Faculty of Law and Administration
University of Szczecin

Court of Appeal in Szczecin
Voivodeship Administrative Court in Szczecin

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29)

Wydawnictwo Naukowe Uniwersytetu Szczecińskiego

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Ministry of Science and Higher Education
Republic of Poland

Enhancing the academic level and internationalization of the journal Acta Iuris Stetinensis – a task financed under agreement 638/P-DUN/2019 from the funds of the Minister of Science and Higher Education allocated for activity popularizing science.

Publication of the journal co-financed from the funds of the Ministry of Science and Higher Education under agreement no. 384/WCN/2019/1 of 16 July 2019 which constitute aid granted under the programme "Support for academic journals".

The journal was published thanks to the financial support of the Court of Appeal in Szczecin and the Voivodeship Administrative Court in Szczecin

The paper version is the original version

Full version of the publication available at: https://wnus.edu.pl/ais/en/

Summaries of published papers are available online in the international database: Central European Journal of Social Sciences and Humanities, cejsh.icm.edu.pl | Central and Eastern European Online Library (CEEOL), www.ceeol.com | BazHum, bazhum.muzhp.pl | Directory of Open Access Journals (DOAJ), doaj.org | European Reference Index for the Humanities and Social Sciences (ERIH PLUS)

ISSN 2083-4373 | e-ISSN 2545-3181

WYDAWNICTWO NAUKOWE UNIWERSYTETU SZCZECIŃSKIEGO
Wydanie I. Ark. wyd. 11,5. Ark. druk. 12,0. Format B5. Nakład 172 egz.

Contents

ARTICLES

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29), 5–16
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-01

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The issue of taxation with value added tax concerning medical care services provided by speech therapists in light of the interdisciplinary nature of the profession of a speech therapist

Abstract

Due to the lack of a statutory definition and due to the interdisciplinary nature of the profession of a speech therapist, there have been doubts regarding its classification as a medical or paramedical profession. The above is, in fact, of crucial significance from the point of view of tax provisions, since medical care services provided by medical or paramedical facilities, on the condition of fulfilling specific requirements, can enjoy VAT exemption. Unfortunately, there is no definition of medical care in the EU and domestic law, and the requirements necessary to exempt a given service from the discussed tax have not been sufficiently specified. This publication, using a dogmatic method, by hitherto not conducted in literature analysis, was aimed at answering the question of whether medical care services provided by speech therapists are exempt from value added tax. Having achieved the aforementioned objective, the paper explicitly indicates that a speech therapist is a medical profession pursuant to the tax law provisions. The paper also leads to the conclusion that, in principle, medical care services provided by speech therapists are subject to exemption from VAT.

Keywords: value added tax, speech therapist, tax law, medical care

Introduction

Speech therapy is a young scientific discipline in Poland, the origin of which can be traced back to 1969, the year in which, due to the measures undertaken by Professor Leon Kaczmarek, the Department of Speech Therapy was established at the Maria Curie-Skłodowska University in Lublin. It is the oldest centre of education for speech therapists in Poland, which is currently operating as the Institute of Speech Therapy and Applied Linguistics, managed by Professor Tomasz Woźniak.[1]

In recent years, due to the more frequent developmental problems of children, the aging society and the necessity to provide speech therapy for patients, interest in both education in the scope of speech therapy and speech therapy services has been significantly growing. With regard to the above, the correlation between results in education and speech disorders has been underlined, which also increases the demand for speech therapy services in the scope of preventative measures.[2]

Despite the intensive development of speech therapy and efforts made by the environment, Polish legislation does not at present provide a definition of this profession. The Ministry of Health has made numerous attempts to regulate this profession, and thus, in 2007, a bill on certain medical professions was submitted to the fifth term of the Sejm of the Republic of Poland; however, due to the shortening of this term, this bill did not become the subject of any sessions.[3] Nevertheless, the aforementioned bill did not define the profession of a speech therapist, but only specified the requirements necessary for performance thereof and omitted the issue of defining speech therapy services. However, it is worth noting that certain regulations stipulating the terms and conditions of employment of a speech therapist at healthcare facilities and educational facilities are included in relevant ordinances of the Minister of Health and the Minister of Education.

The lack of an explicit theoretical and legal definition of the profession of a speech therapist is also significant for determining whether medical care services provided by speech therapists do or do not enjoy value added tax exemption. The aforementioned exemption does cover medical care services provided for preventative

1 Woźniak, T., *Edukacja Logopedów w UMCS. Historia–teraźniejszość–przyszłość*, "Annales Universitatis Mariae Curie-Sklodowska, sectio N – Educatio Nova" 2016, No. 1, pp. 97–98.

2 Mistal, P., *Zależność zaburzeń mowy i osiągnięć szkolnych uczniów klas III szkoły podstawowej*, "Logopedia" 2018, Vol. 47–2, pp. 437–450.

3 Sejm Paper no. 1553 of 14 March 2007, www.orka.sejm.gov.pl (accessed 8.02.2020).

reasons, as well as in order to maintain, save, restore and improve health within the performance of medical professions.[4]

Considering the aforementioned legal status, the aim of the considerations presented herein is to indicate whether services in the scope of medical care provided by speech therapists are subject to value added tax exemption.

The issue discussed herein and achievement of the set objective are of great theoretical and practical importance, in particular, due to the fact that the issue in question is not discussed in the literature.

Sources of exempting medical care services from value added tax

Considerations regarding taxation of medical care services provided by speech therapists with value added tax should begin with an indication of legal sources providing for an exemption in this scope.

A higher-ranking text including the discussed provisions is Directive 2006/112/EC,[5] the provisions of which regulate the possibility of the discussed tax exemption with regard to medical services provided by medical or paramedical entities. Regulations of the aforementioned Directive do not specify the concept of a medical or paramedical profession and use numerous terms of an open character, e.g. the concept of medical care.

It is worth underlining that using this type of vague phrasing is characteristic throughout EU law, which purposefully includes many undefined phrases left to be specified by Member States in compliance with the principle of dualism of the application of Community law.[6]

The above is explicitly confirmed by the CJEU in its judgement of 6 November 2003, which indicated that each Member State is responsible for stipulating the character of medical and paramedical professions under relevant domestic provisions. However, the Court underlined that the aforementioned legislative freedom

4 See Article 43 section 1 point 19 of the Act of 11 March 2004 on value added tax, Dz.U. (Journal of Laws) 2020, item 106, hereinafter: the VAT Act.

5 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L, No. 347, p. 1), hereinafter: Directive 2006/112/EC.

6 Münnich, M., *Problems in interpreting tax exemption of medical services as regulated by the EU VAT Directive and the Polish VAT Act*, in: Smoleń, P. (ed.), *Selected issues in taxation and tax authorities in Central Europe*, Lublin 2016, pp. 113–128.

of EU States is limited by the teleological interpretation of Directive 2006/112/EC,[7] conducted by the CJEU.

Therefore, apart from the interpretation of the EU provisions conducted by the CJEU, domestic provisions based on the implementation of Directive 2006/112/EC, i.e. the Act on value added tax and the Act on medical activity,[8] will be the most important herein.

Nonetheless, it should be underlined that domestic provisions are also not sufficiently specific to dismiss doubts concerning definitions of medical care and the medical or paramedical profession; therefore, specification thereof, apart from the aforementioned judicial decisions of the CJEU, will be provided in judicial decisions of Polish administrative courts and the interpretations of tax authorities.

Speech therapy as a medical or paramedical profession

As has already been mentioned, the Act on medical activity does not accurately specify who is considered to be a person performing a medical or paramedical profession. In compliance with the provisions thereof, a person performing the said profession is considered to be a person authorised on the grounds of separate provisions to provide healthcare services and a person who acquired professional qualifications to provide healthcare services in a specific scope or in a specific field of medicine.[9]

Considering the fact that legal acts of the statutory rank do not include a legal definition of the profession of a speech therapist, in order to determine whether a specialist in this field can be qualified as a person performing a medical or paramedical profession, one should refer to the regulations included in relevant regulations stipulating, among others, the rules of employing speech therapists at healthcare facilities and educational facilities, as well as conditioning the acquisition of a specialist title in a given field. The analysis of the above provisions leads to the conclusion that among services guaranteed in the scope of outpatient specialist care,[10] and among services guaranteed in the scope of psychiatric care and

7 Case C-45/01 *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Gießen*, ECLI:EU:C:2003:595.

8 Act of 15 April 2011 on medical activity, Dz.U. (Journal of Laws) 2018, item 2190, hereinafter: the Act on medical activity.

9 Article 2 section 1 point 2 of the Act on medical activity.

10 Appendix no. 1 to the Ordinance of the Ministry of Health of 6 November 2013 on services guaranteed in the scope of outpatient specialist care and addiction treatment, Dz.U (Journal of Laws) 2016, item 357.

addiction treatment,[11] the Minister of Health enumerated services performed by speech therapists. Simultaneously, in the aforementioned ordinances, the Minister specified the qualifications necessary to hold the position of a speech therapist in facilities providing the services listed above.[12] It should also be indicated that the specialisation in neuro-speech therapy and speech therapy for the hearing impaired has been placed among healthcare fields in which one can obtain a specialisation.[13]

Taking into account the above regulations, it should be stated that speech therapists have professional qualifications to provide healthcare services in a specific scope or specific field of medicine, which leads to the conclusion that a speech therapist is a medical profession. Nevertheless, doubts can arise as to the fact of employing speech therapists at educational facilities, where they hold the position of speech therapist-teachers.[14]. However, it should be pointed out that speech therapy is a science bordering on various disciplines and combining, among others, educational and medical activities;[15] thus, the employment of speech therapists at educational facilities as teachers does not exclude qualifying this profession as a medical profession.

The validity of these considerations, despite the lack of a legal act of the statutory rank regulating the profession of a speech therapist, is prejudged by the judgement of the Voivodeship Administrative Court in Szczecin of 8 October 2013, which underlined that the definition of a person performing a medical profession implies that it covers both a person authorised to provide healthcare services on the grounds of separate legal provisions, as well as a person with professional qualifications to provide the aforementioned services, and the legislator's rationalism requires the assumption that while defining the concept of a medical profession, he was aware of the existence of medical professions for which there are no separate statutory provisions.[16]

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11 Appendix no. 4 and Appendix no. 6 to the Ordinance of the Ministry of Health of 19 June 2019 on services guaranteed in the scope of psychiatric care and addiction treatment, Dz.U. (Journal of Laws) 2019, item 1285.

12 Appendix no. 1 to the Ordinance of the Ministry of Health of 6 November 2013, op. cit. and § 2 point 4 of the Ordinance of the Ministry of Health of 19 June 2019, op. cit..

13 § 2 of the Ordinance of the Ministry of Health of 13 June 2017 on specialisation in areas applied in the healthcare, Dz.U. (Journal of Laws) 2017, item 1217.

14 § 20 of the Ordinance of the Ministry of National Education of 1 August 2017 on specific qualifications required from teachers, Dz.U. (Journal of Laws) 2017, item 1575.

15 Jastrzębowska, G., in: Gałkowski, T. and Jastrzębowska, G. (eds.), *Logopedia – pytania i odpowiedzi: T. 1, Interdyscyplinarne podstawy*, Opole 2003, p. 321.

16 Judgement of the Voivodeship Administrative Court in Szczecin of 8 October 2013, I SA/Sz 464/13, Legalis no. 790057.

The above position of the judicature is also confirmed through numerous individual interpretations of tax provisions, in particular, the Individual Interpretation of the Director of the National Revenue Information of 26 October 2018, indicating that the concept of a person performing a medical profession covers persons performing professions the status of which is statutorily stipulated, as well as professions that do not have such a regulation on the grounds of the binding law.[17]

Among interpretations of tax provisions, from the point of view of qualifying speech therapy as a medical profession, the most important is the Individual Interpretation of the Director of the Treasury Office in Łódź of 21 August 2013, in which the tax authority unequivocally stated that a speech therapist is a person performing a medical profession pursuant to the Act on medical activity.[18] Furthermore, the tax authority conducted a short analysis of the above issue by stating that a speech therapist has professional qualifications to provide healthcare services and the profession of a speech therapist has been enumerated along with other medical professions in a number of healthcare-related provisions, by reference to provisions concerning acquiring the title of a specialist in the area of neuro-speech therapy or speech therapy for the hearing impaired. Nevertheless, it is worth noting that in the interpretation in question, the authority made a fundamental mistake by stating that the title of a speech therapist can only be used by a person who graduated from higher education or postgraduate education in this scope, since this title, due to the lack of statutory regulation of the profession of a speech therapist, is not legally protected; however, this mistake has no real impact on the legibility of solutions adopted by the authority.

It should be underlined that even before the aforementioned position, tax authorities considered the profession of a speech therapist as a medical profession; however, the analysis conducted by them was not exhaustive and left certain doubts. The Individual Interpretation of the Director of the Treasury Office in Poznań of 13 July 2012 should be indicated as an example in which the authority considered speech therapy as a medical profession; however, it wrongly indicates only what is involved in the performance of the profession of a speech therapist and does not elaborate on the most important issue, namely, having professional qualifications.[19]

Currently, the position of tax authorities is unequivocal. Tax authorities consider the profession of a speech therapist as a medical profession. This is also confirmed

17 Individual Interpretation of the Director of the National Revenue Information of 26 October 2018, 0114-KDIP1-3.4012.535.2018.1.MK, Legalis.

18 Individual Interpretation of the Director of the Treasury Office in Łódź of 21 August 2013, IPTPP1/443-413/13-4/MH, Legalis.

19 Individual Interpretation of the Director of the Treasury Office in Poznań of 13 July 2012, ILPP2/443-609/12-3/AK, Legalis.

by the newest interpretations within this scope, i.e. the Individual Interpretation of the Director of the National Revenue Information of 8 January 2020,[20] and the Individual Interpretation of the Director of the National Revenue Information of 17 January 2020.[21]

Domestic judicial and administrative decisions concerning qualification of the profession of a speech therapist as a medical or paramedical profession are confirmed by the judgements of the CJEU concerning value added tax.

In the first place, one should refer to the judgement of the CJEU of 6 November 2003, in which the Court considered services performed by non-doctors, such as psychotherapeutic services performed by psychologists, as providing medical care services within the performance of medical and paramedical services.[22] Therefore, the Court of Justice indicated that a psychologist is one of the medical or paramedical professions and, taking into account numerous similarities in the scope of education, the field of science and methodology of the work of psychologists and speech therapists, it should be stated that a speech therapist should also be considered as one of such professions.

With reference to the above, it is worth underlining that in the currently binding Act on value added tax, in the context of tax exemption concerning medical care services, the profession of a psychologist was directly enumerated,[23] which is not the case for the profession of a speech therapist. It is worth noting that the amendment implementing the exemption of medical care services was introduced with the Act of 29 October 2010, which was already after the announcement of the aforementioned judicial decision of the CJEU.

To summarise the analysis of legal provisions and judicial and administrative decisions conducted in this part, it can be concluded that due to significant problems concerning identification of entities subject to the discussed exemption of value added tax, the act regulating this levy requires an amendment consisting in the extension of the catalogue of professions considered as medical or paramedical. For taxpayers, the above amendment would undoubtedly fundamentally facilitate the qualification of services they offer, of course, with a preservation of the currently justly applied open catalogue of entities that can be considered as medical or paramedical professions.

20 Individual Interpretation of the Director of the National Revenue Information of 8 January 2020, 0112-KDIL4.4012.535.2019.2.MB, Legalis.

21 Individual Interpretation of the Director of the National Revenue Information of 17 January 2020, 0112-KDIL2-2.4012.574.2019.4.MŁ, Legalis.

22 Case C-45/01, op. cit.

23 See Article 43 section 1 point 19d of the VAT Act.

Medical care services provided by speech therapists subject to the exemption of value added tax

Taking into account the aforementioned reflections, the conclusion of which consists in the statement that a speech therapist is a medical profession pursuant to tax provisions and provisions of the Act on medical activity, it should be stated that the vast majority of services offered by speech therapists will comprise medical care services. At this point, it is worth underlining that both the EU and domestic provisions do not provide a definition of legal medical care, i.e. the key concept in the analysis of the discussed issue.

Decoding the semantic scope of medical care on the grounds of the VAT Directive was specified by the CJEU in the judgement of 8 June 2006, in which it indicated that the concept of medical care refers to services that are provided for the purposes of diagnosis, care and, if possible, treatment of illnesses and health disorders.[24] The above definition, despite being quite broad, is undoubtedly correct, as it allows qualifying services provided both for the benefit of ill persons and those with health disorders, as well as healthy persons requiring specialist care or diagnosis, as medical care, which is especially important in the case of speech therapy services, often provided for the benefit of healthy children and adults; whereas, the aforementioned services in the scope of diagnosis or specialist care are considered as being aimed at prevention. Moreover, the fact that in order to deem a service as medical care, the service does not have to be aimed at treating illnesses or health disorders is significant in the above definition, since services provided for ill persons or those with disorders, in the case of whom speech therapy cannot result in improvement of their health and is only aimed at the maintenance of a given condition or facilitating communication of those persons with the environment, can also be qualified as medical care.

The Polish Act on value added tax, in compliance with the judicial decisions of the CJEU, indicates that the premise for exempting a medical care service constitutes the fact that it is aimed at prevention, as well as maintaining, saving, restoring and improving health.[25] Thus, *a contrario* medical care services provided by a medical or paramedical entity which do not serve the above objectives will not be covered by tax exemption. Therefore, not all services provided by a speech therapist, even if they constitute services in the scope of medical care, will be covered by the value added tax exemption.

24 Case C-106/05 *L.u.P. GmbH v Finanzamt Bochum-Mitte*, ECLI:EU:C:2006:380.

25 Article 43 section 1 point 19 of the VAT Act.

Once again, judicial decisions of the CJEU, as well as judicial decisions of administrative courts and interpretations of tax authorities, will be extremely helpful to specify objectives that should be served by medical care services in order to be covered by the discussed exemption.

In the first place, the judgement of the CJEU of 20 November 2003 should be quoted, in which it was stated that the aim of a given service determines whether the given service should be exempt from value added tax. The aim of the medical care service provided by speech therapists, which comprises the discussed tax exemption, should be, in fact, prevention, as well as maintaining, saving, restoring and improving health. However, it should be stated that this aim does not have to be achieved. Therefore, it is sufficient when activities undertaken within such a service serve the activities enumerated in the tax law and do not lead to a specific result.[26]

The above position was adopted in judicial decisions of Polish administrative courts, where, as an example, the judgement of the Voivodeship Administrative Court in Kraków of 6 October 2016[27] and the judgement of the Voivodeship Administrative Court in Warszawa of 24 May 2016[28] can be enumerated, and thus, these judicial decisions should be considered as grounded direction of jurisdiction.

Nevertheless, with regard to the above, the most important is the judgement of the Voivodeship Administrative Court in Poznań of 18 January 2012, in which minimal conditions that must be met by a medical care service in order to enjoy tthe discussed exemption were specified. In the above judicial decision, the court notices that medical care services are required to at least ensure the possibility of assessing a patient's health in order to make a correct diagnosis and propose a proper therapeutic procedure adjusted to the requirements of the specific person.[29]

The referred judicial decisions correspond with the position of tax authorities expressed in, among others, the Individual Interpretation of the Director of the National Revenue Information of 8 January 2020,[30] and the Individual Interpretation

26 Case C-212/01 *Margarande Unterpertinger v Pensionsversicherungsanstalt der Arbeiter*, ECLI:EU:C:2003:625.

27 Judgement of the Voivodeship Administrative Court in Kraków of 6 October 2016, I SA/Kr 965/16, Legalis no. 1543086.

28 Judgement of the Voivodeship Administrative Court in Warszawa of 24 May 2016, III SA/Wa 1595/15, Legalis no. 1555618.

29 Judgement of the Voivodeship Administrative Court in Poznań of 18 January 2012, I SA/Po 767/11, Legalis no. 486648.

30 Individual Interpretation of the Director of the National Revenue Information of 8 January 2020, op. cit.

of the Director of the National Revenue Information of 17 January 2020.[31] In the former, with reference to previous positions, the tax authority extends the catalogue of entities exempt from tax to medical care services offered by speech therapists with services related to hearing tests performed by a speech therapist. Furthermore, the tax authority indicates that the exemption also covers diagnosis and speech therapy, since, as in the case of a hearing test, they are aimed at prevention, as well as maintaining, saving, restoring and improving health. In the latter, the authority states that the turnover tax exemption covers therapy and consultation in the scope of clinical speech therapy.

The above interpretations confirm the hitherto position of tax authorities, including that included in the Interpretation of the Treasury Office in Warszawa of 10 March 2011, in which the authority, for the first time, stated that the services provided by a speech therapist in the scope of diagnosis and therapy of communication disorders at various development stages and various spheres of educational, social and professional activity are subject to value added tax exemption.[32]

Finally, it is worth underlining that in order for medical care services to be able to enjoy the discussed exemption, such services can also be provided remotely via communication means, which is confirmed through numerous judicial decisions, including the judgement of the Voivodeship Administrative Court in Poznań of 18 January 2012, in which the court indicated that medical care services provided via the Internet cannot be excluded.[33]

The above position expressed by the Voivodeship Administrative Court is confirmed and extended by the Individual Interpretation of the Director of the National Revenue Information of 21 January 2020, referring to the services provided by a psychologist via the Internet. In the above interpretation, the authority explicitly indicated that application of the tax exemption with regard to the provided services cannot be decided by the type of communication means through which the given service is provided, since the communication means constitute the sole tool for providing services.[34]

31 Individual Interpretation of the Director of the National Revenue Information of 17 January 2020, op. cit.

32 Individual Interpretation of the Treasury Office in Warszawa of 10 March 2011, IPPP1-443-138/11-2/PR, Legalis.

33 Judgement of the Voivodeship Administrative Court in Poznań of 18 January 2012, op. cit.

34 Individual Interpretation of the Director of the National Revenue Information of 21 January 2020, 0114-KDIP4-2.4012.16.2019.1.WH, Legalis.

Medical care services provided by speech therapists not subject to the value added tax exemption

As has already been mentioned, not all medical care services are subject to value added tax exemption. The above exemption does not cover services not aimed at prevention, as well as maintaining, saving, restoring and improving health, and not fulfilling the conditions stipulated in the aforementioned judicial decisions and interpretations.

The CJEU, in the judgement of 20 November 2003, stated that if the context in which a given medical service is provided is aimed at giving advice before making a decision related to legal consequences, the exemption does not apply to this service, unless such a service is mainly aimed at patients' healthcare, e.g. certificates concerning the ability to travel. As an example of services not covered by the exemption, the Court indicated issuing certificates on one's health necessary for purposes such as receiving a social security pension and medical tests aimed at drawing up a report on the responsibility and size of the damage for persons intending to claim injury to the individual or to file a lawsuit. Thus, the above services provided by speech therapists will not enjoy the value added tax exemption.[35]

With reference to the above, it is worth quoting the judgement of the Supreme Administrative Court of 7 February 2018, where a thesis was presented that treatments and examinations executed for a purpose other than human healthcare cannot enjoy the discussed exemption, and as an example, activities related to providing an opinion of legal significance were indicated.[36] Therefore, the judgment fully confirms the position of the CJEU.

Conclusion

To conclude the presented considerations, it should be stated that, putting any doubts of representatives of the science of speech therapy aside, a speech therapist is a medical profession from the point of view of the Act on value added tax and the Act on medical activity. This position is unequivocally confirmed by the judicial decisions of the CJEU and domestic courts, as well as the interpretations of tax authorities.

35 Case C-307/01 *Peter d'Ambrumenil and Dispute Resolution Services Ltd v Commissioners of Customs & Excise*, ECLI:EU:C:2003:627.

36 Judgement of the Supreme Administrative Court of 7 February 2018, I FSK 866/16, Legalis no. 1740480.

Another significant issue constitutes qualification of a given service provided by a speech therapist as medical care. In compliance with the judicial decisions of the Court of Justice, medical care means activities that are aimed at a diagnosis, care and, as far as possible, treatment of illnesses or health disorders. Thus, if the services provided by a speech therapist meet the above criterion, they are considered as medical care.

However, it should be indicated that a given service can be qualified as exempt from tax provided that it is aimed at prevention, as well as maintaining, saving, restoring and improving health. The above criteria have been specified by the judicial decisions and interpretations; thus, it is worth taking into account the position of the judicature established in this scope.

In compliance with the above, not all services provided by speech therapists, even when they constitute medical care, will be subject to the turnover tax exemption. Therefore, to conclude, it should be stated that qualifying a given service provided by speech therapists as exempt from taxation with the aforementioned tax requires an analysis each time.

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CITATION

DREZNO, K., *The issue of taxation with value added tax concerning medical care services provided by speech therapists in light of the interdisciplinary nature of the profession of a speech therapist*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 5–16, DOI: 10.18276/ais.2020.29-01.

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29), 17–31
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-02

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Convicted Nazi lawyer. The case of Gerhard Pchalek in the Gera District Court in 1960[1]

Abstract

This study is devoted to a criminal case brought before a court in the German Democratic Republic against Gerhard Pchalek in connection with his service as a prosecutor in the Third Reich. Pchalek served in the Polish territories incorporated into the Reich, in Bielsko and Katowice. He was a prosecutor in proceedings before special courts in Bielsko and Katowice, as well as before the Higher National Court in Katowice, in which he filed motions to sentence defendants to the death penalty. In 20 cases – as was determined by the District Court in Gera – Pchalek demanded the death penalty, which was then imposed and enforced. His act was classified as aiding in murder under the provisions of the German Criminal Code, and Pchalek was sentenced to 4 years in strict regime prison. The paper discusses the biography of Pchalek, the issue of post-war criminal liability of Nazi lawyers and the criminal trial before the District Court in Gera. The study uses a historical, formal and dogmatic method. The criminal trial in question is one of the few cases in which a Nazi lawyer was convicted.

Keywords: Third Reich, criminal liability, crimes against humanity, judiciary, prosecutor

1 The paper was prepared under the research project financed by the National Science Centre in Poland (2017/27/N/HS5/00423).

Introduction

The purpose of this study is to analyse the case of Gerhard Pchalek who was tried before the District Court in Gera. Pchalek served as a prosecutor during World War II in Polish lands incorporated into the Third Reich. As a prosecutor before special courts, he led to imposing the death penalty in a number of cases. Then, in the early 1960s, he himself was sentenced to 4 years in strict regime prison. Pchalek's case is a rare example of prosecuting a Nazi lawyer. The deliberations are based on Pchalek's personal files kept at the Federal Archives in Berlin (Bundesarchiv Berlin), in unit R 3001 Reichsjustizministerium and the criminal case files of 1959–1960 kept at the office of the Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic, the Gera Branch (Bundesbeauftragte für die Unterlagen der Staatssicherheit der ehem. DDR Außenstelle Gera). Peter Riegel's study[2] of Pchalek and Witold Kulesza's monograph on the crimes committed by judges and prosecutors were also used.[3] It should be noted that the case of prosecutor Pchalek was omitted in the latter, important publication.

In order to better understand that nature of the criminal case before the court in the German Democratic Republic, it is worth describing who Gerhard Pchalek was and discussing the issue of the criminal liability of Nazi-era judges and prosecutors.

Gerhard Pchalek – biographical sketch

Gerhard Pchalek was born on 20 May 1910, in Załęże (currently a district of Katowice) in Upper Silesia, in a working-class family. His father had been a locksmith but had to change his job after an accident. During the Weimar Republic, he became a Commissioner of the criminal police and his family moved to Racibórz. In 1930, Gerhard Pchalek passed his secondary school graduation exam and enrolled to study law at the University in Graz. In 1934, he moved to the University in Wrocław, where he passed the first state examination in law with "satisfactory" grade (*ausreichend*).[4] He got married in early 1936.[5] From 25 October 1937 to 18

2 Riegel, P., *Der Tiefe Fall des Professors Pchalek – Diener dreier Unrechtssysteme. Ein Thüringer Jurist zwischen NS-Justiz, Besatzungsmacht, Rechtsprofessur und Spitzeldienst*, Erfurt 2007.

3 Kulesza, W., *Crimen laesae iustitiae. Odpowiedzialność karna sędziów i prokuratorów za zbrodnie sądowe według prawa norymberskiego, niemieckiego, austriackiego i polskiego*, Łódź 2013.

4 Bundesarchiv Berlin (hereinafter: BA), R 3001 Reichsjustizministerium/70439, p. 5, *Schreiben betr. Zulassung des Referendars Gerhard Pchalek vom 20. September 1938* [Letter on the admission of referendary Gerhard Pchalek of 20 September 1938].

5 Bundesbeauftragte für die Unterlagen der Staatssicherheit der ehem. DDR [Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic,

December 1937, he attended the Hanns Kerrl's camp (*Gemeinschaftslager Hanns Kerrl)*, where trainee lawyers from different regions of the Reich could establish friendly relations with one another. At the end of the two-month camp, each participant received an opinion describing the traits of their character.[6] Pchalek was evaluated as ambitious, diligent, hardworking and polite, though of excessive need for recognition and self-confidence and too fatherly towards his colleagues.[7] Until 1938, he served his legal training in the courts of the region of the Higher National Court in Wrocław, e.g. in Głogów and Zielona Góra.[8]

In early 1939 in Berlin, he passed the grand national legal exam with satisfactory grade (*befriedigend*),[9] which qualified him to serve as an assessor. The summary of his achievements contained contradictory recommendations of the General Prosecutor in Wrocław, Reinhold Sturm, PhD and the President of the Higher National Court in Wrocław, Walther Freiherr von Steinaecker, respectively. It was noted that two of his legal training supervisors were of a very positive opinion of him, although the camp commander's opinion was only average. Pchalek was regarded as a person of impeccable conduct and unquestionable political attitude. This was associated with his membership in the National Socialist Flyers Corps (*NS-Fliegerkorps*), the intention to admit him to the party through that organisation and completion of two eight-week military drills. The general prosecutor stated that Pchalek did not make a positive impression on him in any aspect of his presentation, that he was very self-confident, even to the point of being uncritical of himself, and, accordingly, he recommended not admitting him to service. The President of the Higher National Court in Wrocław assessed the candidate's qualifications as definitely above average and, despite certain doubts concerning his character, he

hereinafter: BStU] Außenstelle Gera [Gera branch], Ministerium für Staatssicherheit [Ministry for State Security; hereinafter: MfS]/Bezirksverwaltung [Regional Board] Gera, Archivierter Untersuchungsvorgang [Archived investigation case; hereinafter: AUV] 38/59, HA [Hauptakten – Main files] Bd. II, p. 177, *Schlussbericht vom 23. Juli 1959* [Final report of 23 July 1959]. The cited archival sources were analyzed by the author, they are not referred to in the publication of Peter Riegel.

6 Gruchmann, L., *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München 2001, p. 303.

7 BA, R 3001/70439, p. 8, *Zeugnis des Kommandanten des Gemeinschaftslagers Hanns Kerrl vom 18. Dezember 1937* [Testimony of camp commander Hanns Kerrl of 18 December 1937].

8 Riegel, P., op. cit., pp. 8–9, 11.

9 BA, R 3001/70439, pp. 10–11, *Prüfungsprotokoll vom 9. Januar 1939* [Exam protocol of 9 January 1939].

recommended his admission. He expressed his hope that, during the preparatory service, the flaws of his character would be polished.[10]

By the end of June 1939, according to the recommendation of the President of the Higher National Court, Pchalek was admitted as a candidate to the judge and prosecutor office, and he obtained the title of a court assessor (*Gerichtsassessor*).[11] He worked as an assessor in the prosecutor's office in Głogów, Gliwice and Wrocław and in the Circuit Court in Nowa Sól, Kowary, Ząbkowice Śląskie and Zabrze.[12]

Pchalek attended the abovementioned military drill from July to September 1935 and from March to May 1937. Because of military operations, he was drafted to Wermacht as a non-commissioned officer from 15 December 1939 to 8 September 1940 and from 7 February 1941.[13] In May, he was discharged due to a heart disease.[14]

In the meantime, from September 1940 to February 1941, he worked in prosecutor's offices in Racibórz and Bielsk. In July 1941, he was appointed by the Führer as prosecutor in the prosecutor's office at the National Court in Bielsk.[15] Letters concerning reclaiming Pchalek's from military service suggest that he was very needed in Bielsko as a specialist in economic crime. It was also noted that the prosecutor's office in Bielsko played an important role in combatting Polish resistance and, in particular, active Polish offenders. Pchalek's superiors considered it necessary to release Pchalek from military service.[16] The military authorities consented to temporary reclaiming, e.g. until 31 August 1941, until 31 December 1941, until 31 March 1942, until 30 June 1942, which means that each time, Pchalek's superiors

10 BA, R 3001/70439, pp. 13–14, *Schreiben des Oberlandesgerichtspräsidenten an den Reichsminister der Justiz betr. Übernahme des Assessors Gerhard Pchalek als Anwärter für das Amt des Richters oder des Staatsanwalts vom 28. Juni 1939* [Letter from the President of the Higher National Court in Wrocław to the Reich Minister of Justice on accepting assessor Gerhard Pchalek as a candidate for the office of a judge or prosecutor of 28 June 1939].

11 BA, R 3001/70439, p. 18, *Schreiben des Reichsministers der Justiz vom 25. August 1939* [Communication of the Reich Minister of Justice of 25 August 1939].

12 BA, R 3001/70439, pp. 24–25, *Personal- und Befähigungsnachweisung* [Personal and qualifications evidence].

13 Ibidem, p. 25.

14 BStU Außenstelle Gera, MfS/Bezirksverwaltung Gera, AUV 38/59, HA Bd. II, p. 179, *Schlussbericht vom 23. Juli 1959* [Final report of 23 July 1959].

15 BA, R 3001/70439, p. 29, *Schreiben des Reichsministers der Justiz betr. Ernennungsurkunde vom 15. Juli 1941* [Communication from the Reich Minister of Justice concerning the appointment letter of 15 July 1941].

16 BA, R 3001/70439, p. 36, *Schreiben des Generalstaatsanwalts in Kattowitz an das Wehrbezirkskommando in Bielitz vom 10. Dezember 1941* [Communication from the Attorney General in Katowice to the military district command in Bielsko of 10 December 1941].

had to apply for extension of the release from military service. Apart from the previous reasons for release, there was also a growing number of cases brought against the military economy and the establishment of Sondergericht Bielitz on 1 September 1942. The prosecuting authority was the prosecutor's office at the National Court in Bielsko and Pchalek, who specialised in economic matters, supported indictments before the Sondergericht. In December 1942, the General Prosecutor in Katowice made it clear that Pchalek was indispensable in the prosecutor's office in Bielsko and that he should be considered as the key person in that office.[17]

Pchalek represented the prosecution before the special courts in Bielsko and Katowice.[18] He substituted for Bielsko and Katowice prosecutors who were on leave and in March 1944, he was delegated to the General Prosecutor's Office in Katowice. His job was to supervise the subsidiary units of the prosecution and handle political criminal cases. In 1945, in order to avoid being drafted to Wehrmacht, he applied to Volkssturm. He went to Dresden and later to Gera.[19] Gera was designated as the liquidation site for the Higher National Court in Katowice and the General Prosecutor's Office in Katowice. The tasks of the liquidation sites for the criminal justice authorities evacuated from the East were to transfer pending cases to courts in the Reich, to settle appeal cases and to solve the issue of the location of prisoners and personnel.[20] In Gera, Pchalek was engaged in the criminal cases of the General Prosecutor's Office in Katowice until the end of the war.[21]

In mid-May 1945, Pchalek was appointed by the Mayor of Gera as the chief prosecutor in Gera. In September 1945, he joined the Social Democratic Party of Germany and after it merged with the Communist Party of Germany, he became a member of the new Socialist Unity Party of Germany. In November 1945, he was appointed the superintendent prosecutor. From 1946, he was the Deputy General Prosecutor of Thuringia, and from the turn of 1948, he was the chief of the General Prosecutor's Office. In 1950, he became the chair of the Criminal Senate at the Higher National Court in Erfurt. In 1952, he became the head of the Department

17 BA, R 3001/70439, p. 44, *Schreiben des Generalstaatsanwalts in Kattowitz an das Wehrbezirkskommando in Bielitz vom 1. Dezember 1942* [Communication from the Attorney General in Katowice to the military district command in Bielsko of 1 December 1942].

18 BStU Außenstelle Gera, MfS/Bezirksverwaltung Gera, AUV 38/59, Haftsache II, p. 222, *Anklageschrift gegen Gerhard Pchalek vom 16. Dezember 1959* [Indictment against Gerhard Pchalek of 16 December 1959].

19 BStU Außenstelle Gera, MfS/Bezirksverwaltung Gera, AUV 38/59, HA Bd. II, pp. 179–180, *Schlussbericht vom 23. Juli 1959* [Final report of 23 July 1959].

20 Graczyk, K., *Ewakuacja Sądu Specjalnego w Bielsku (Sondergericht Bielitz) w świetle raportów urzędnika bielskiej prokuratury z 1945 roku*, "Szkice Archiwalno-Historyczne" 2017, No. 14, p. 151.

21 BStU Außenstelle Gera, MfS/Bezirksverwaltung Gera, AUV 38/59, HA Bd. II, p. 180, op. cit.

of Criminal Law at the Friedrich Schiller University of Jena. He remained in that office until his arrest.[22]

After being convicted in criminal proceedings (discussed hereinabove) and serving a part of his sentence, Pchalek was released in 1962. He started working in the legal department of the state-owned enterprise VEB Zeiss, which specialised in the manufacture of high precision devices. At that time, he secretly collaborated with the Ministry of National Security of the German Democratic Republic. In 1978, he retired. He died in 1980 in Gera.[23]

Criminal liability of Nazi judges and prosecutors

The surviving memories suggest that for a number of years after the end of the war, judges and prosecutors who had worked in special courts experienced social condemnation. Their service was considered as a stain on state honour.[24] In terms of their criminal liability for the judgments they had passed, a total of 22 trials against judges and prosecutors of the Third Reich were conducted before the courts of the German Federal Republic. However, no final judgment convicting a judge adjudicating in a special court or a prosecutor appearing before such court was passed.[25]

This happened even despite the conviction of high officials of the Third Reich justice system in the Nuremberg Trials: judges (including three special court judges)[26] and prosecutors. Nazi jurists were accused of war crimes and even crimes against humanity. What was important in those trials was that the American Mili-

22 BStU Außenstelle Gera, MfS/Bezirksverwaltung Gera, AUV 38/59, HA Bd. II, p. 180, op. cit. Riegel, P., op. cit., pp. 13–15.

23 Riegel, P., op. cit., pp. 55–59, 71.

24 Bundesarchiv Bayreuth, OSTDOK 8/211, p. 6, *Bericht von Kurt Bode vom 1. Dezember 1953* [Kurt Bode's report of 1 December 1953]. In September 1939, Dr. Kurt Bode presided over two court trials against defenders of the Polish post office in Gdańsk, as a result of which 38 Poles were sentenced to death. These sentences were carried out. Both proceedings were a court crime. In the years 1942–1945, Bode was the Prosecutor General in Gdańsk. After the war, he was employed in the justice system of the Federal Republic of Germany. Schenk, D., *Poczta polska w Gdańsku. Dzieje pewnego niemieckiego zabójstwa sądowego*, Gdańsk 1999, pp. 93, 99–100, 169, 191, 228–229.

25 Kulesza, W., op. cit., pp. 132–133. Kulesza determined that final convictions were passed in cases against individuals accused of judicial crimes, who had sentenced to death persons prosecuted before summary courts. Accordingly, participation in issuing the death penalty by a summary court was qualified as complicity (participation) in homicide.

26 Diestelkamp, B., *Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit*, in: Diestelkamp, B. and Stolleis, M. (eds.), *Justizalltag im Dritten Reich*, Frankfurt am Main 1988, p. 134.

tary Tribunal adjudicated solely on the basis of the Allied Control Council Law on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945.[27] This Law being the legal and substantive basis for convictions, made it possible to dismiss the claims of the defense attorneys that defendants could not be considered guilty since they had acted in compliance with the law that was in force at the time of their service. According to the Allied Control Council Law, crimes against humanity were recognised as crimes whether or not they were in violation of the domestic laws of the country where perpetrated. The Tribunal ruled that a Nazi judge who convicted defendants to the death penalty on the grounds of their being a Pole or a Jew committed murder and that the law that enabled it constituted a crime against humanity and a war crime.[28]

Meanwhile, according to the approach adopted by the West German judiciary with respect to Nazi lawyers who had issued the death penalty during the Third Reich, "what had been legal back then could not be considered illegal now." The judges and prosecutors of special courts were not convicted, even despite the principles of the criminal liability of Third Reich judges dogmatically defined by Gustav Radbruch on the grounds of the German criminal law, and specifically § 336 of the StGB (Strafgesetzbuch – the German Criminal Code)[29] on bending the law. According to the Radbruch formula:

> The conflict between justice and the reliability of the law should be solved in favour of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered erroneous law. It is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their improper content; however, another line of demarcation can be drawn with rigidity: Where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation; there a statute is not just 'erroneous law', it is in fact not of a legal nature at all.[30]

27 *Kontrollratsgesetz Nr. 10 – Bestrafung von Personen, die sich Kriegsverbrechen, Verbrechen gegen den Frieden oder gegen die Menschlichkeit schuldig gemacht haben vom 20. Dezember 1945* [Control Council Act no. 10 – punishment of persons guilty of war crimes, crimes against peace and against humanity of 20 December 1945]. Amtsblatt des Kontrollrats in Deutschland 1945, p. 50.

28 Cyprian, T. and Sawicki, J., *Nieznana Norymberga. Dwanaście procesów norymberskich*, Warszawa 1965, pp. 87–132; Kulesza, W., op. cit., p. 41, 503.

29 Strafgesetzbuch für das Deutsche Reich [Criminal Code for the German Reich of 15 May 1871].

30 Zajadło, J., *Radbruch*, Sopot 2016, p. 24; Zajadło, J., *Formuła Radbrucha. Filozofia prawa na granicy pozytywizmu prawniczego i prawa natury*, Gdańsk 2001, passim.

However, the case law, despite Radbruch's intention, limited the scope of application of the crime of bending the law. The Federal Court of Justice determined in its ruling of 1956 that bending the law was a crime only if it was committed with direct intention and not with possible intention. This meant the need to verify whether Nazi jurists intentionally bended the law that was in force in the Third Reich when issuing their judgements. The designatum of the concept of bending the law was falsification of the core of the matter being adjudicated, legally unjustified subsumption of facts and abuse of the judge's freedom of discretion when issuing the death penalty. Nonetheless, the accused lawyers successfully defended themselves claiming that they had issued the death penalty being convinced that their judgments were in compliance with the law and that their intention was to serve the German nation in a situation of danger caused by the ongoing war.

It is claimed that the reason for the failure to serve justice to Nazi judges and prosecutors in the German Federal Republic were the high requirements established in the case law concerning the subjective traits of the crime of bending the law (the requirement to prove direct intention), which were very hard to satisfy due to lack of sufficient evidence. Another factor, not connected with the law, was the reluctance of post-war lawyers in Western Germany to prosecute and punish their Nazi colleagues. After all, they represented the same profession and the same social class and often had similar "brown" pasts.[31]

While no Nazi lawyer was convicted in the criminal trials conducted in the German Federal Republic, there was at least one such case involving a prosecutor in a special court in the German Democratic Republic.

Criminal trial against Gerhard Pchalek

In February 1959, there was an exhibition in Erfurt devoted to "bloody courts" and "bloody judges", i.e. judges and prosecutors of special courts from the period of the Nazi regime. The purpose was to stigmatise them for the judgments they

31 Kulesza, W., op. cit., pp. 77–78, 85, 134–135, 503–505. It should be noted that on 8 of May 1960, the 15-year limitation period of homicide, bodily injury leading to death, illegal deprivation of liberty leading to death and robbery had ended. There was a risk that the limitation period of crimes punished by life in prison, including murder, would expire on 8 May 1965. The Act of 25 March 1965 on Calculating Criminal Periods of Prescription excluded the time between 8 May 1945 to 31 December 1949 from those periods, meaning that Nazi crimes would prescribe on 31 December 1969. The amendment of 26 May 1969 extended the period of prescription for crimes punished by life imprisonment from twenty to thirty years, which delayed the prescription of murders committed by the Nazi to the end of 1979. Finally, the amendment of 16 July 1979 determined that Nazi murders would not have a prescription period. Kulesza, W., op. cit., pp. 95–96.

had passed during the Third Reich, the more so that at the time of the exhibition, they held public offices in the German Federal Republic, also in the judiciary. In that exhibition, one student noticed a facimile of a judgment passed by the Higher National Court in Katowice on 27 June 1944 against a 62-year-old farmer Ignacy Kaczmarek.[32] He had been sentenced to death for undermining the military forces (*Wehrkraftzersetzung*). The judgement bore the name of Prosecutor Pchalek. The student associated the name with Gerhard Pchalek, the lecturer on criminal law, and she informed the District Prosecutor in Erfurt of her discovery.[33]

On 18 and 19 February 1959, the facimile was discussed at a meeting of party and prosecution members, which was also attended by a representative of the Ministry on National Defence of the German Democratic Republic. They wondered what to do next. One of the suggestions was to arrest Pchalek immediately, which, however, was problematic because the consent of the security department was needed. Still, it was important not to let Pchalek flee the country. It was therefore decided that two prosecutors, at the instruction of the district prosecutor, would go to Pchalek and bring him back to Gera for a "conversation". Eventually, the conversation ended in an interrogation at the district prosecutor's office.[34]

The object of the interrogation was Pchalek's activity at the General Prosecutor's Office in Katowice during the war. Initially, he claimed that he had only been involved in economic crimes, but he later added that, at the order of his superiors, he had also worked on cases against treason, undermining military force and so-called radio crimes.[35] He also admitted that in five to ten cases he had requested the death penalty at the order of his superiors, and the court had ruled accordingly. He claimed that if he had not done so, he would have suffered serious personal consequences.[36]

Pchalek was detained on 19 February 1959. On 20 February 1959, the County Court (*Kreisgericht*) in Gera issued an arrest warrant for him. At a hearing in his case, Pchalek maintained what he had said before and as a mitigating circumstance, he claimed that he had requested the death penalty only at the order of his superiors

32 The case was presented by Wolfgang Koppel in his study on death penalties issued by special courts. Koppel, W., *Ungesühnte Nazijustiz. Hundert Urteile klagen ihre Richter an*, Karslruhe 1960, p. 20.

33 Riegel, P., op. cit., p. 40.

34 Ibidem, pp. 40–41.

35 For radio crimes, see: Konieczny, A., *Problem przestępstw radiowych w rejencji katowickiej w latach 1939–1945*, "Studia Historycznoprawne", vol. CCXXIII, pp. 195–215.

36 Riegel, P., op. cit., p. 41.

and that, in a few cases, he had not requested the death penalty even despite being ordered to do so.[37]

The indictment was made on 16 December 1959. Pchalek was accused of "destroying human life in appr. 20 cases by aiding murder in the period from 1941 to 1944". According to the prosecution, in that period of time, Pchalek requested the death penalty before special courts in Katowice and Bielsko for German and Polish patriots and, in most cases, "bloody Fascist judges" consented to those requests. The judgments were then executed and Pchalek supervised several of the executions. Moreover, as an assistant of the General Prosecutor in Katowice, he ordered his subordinate prosecutors to request the death penalty. He also reviewed prison sentences and recommended appealing against them using the special legal measure – complaint of invalidity (*Nichtigkeitsbeschwerde*). If, in his opinion, the convicted deserved the death penalty, those sentences were repealed, the trial was repeated and the death penalty was adjudicated. The alleged act was qualified pursuant to § 211 of the StGB (concerning murder), in association with § 49 of the StGB (concerning power of attorney).[38]

The indictment listed specific cases in which Pchalek as the prosecutor had demanded the death penalty and in which it had been adjudicated, e.g. against a woman who had helped her friend acquire weapons in order to fight the German fascism, or against a resistance group whose members included a chaplain and the farmer Ignacy Kaczmarek.[39] Pchalek's supervisory activity at the prosecutor's office in Katowice was elaborated on. Many times, despite the proposals of his subordinate prosecutors to petition for a penalty of strict prison, he had demanded the death penalty. In two cases from the case law of the Sondergericht Kattowitz, Pchalek had demanded the capital punishment, but the court had adjudicated much milder sentences: six and four years of severe prison, respectively. It was refuted that Pchalek had requested the death penalty only at the order of his superiors, presenting as evidence the case of Julian Szynder sentenced to the capital punishment on 20 June 1944 by the Higher National Court in Katowice. It was also noted that Pchalek had applied the Regulation on the criminal law for Poles and Jews in the incorporated

37 BStU Außenstelle Gera, MfS/Bezirksverwaltung Gera, AUV 38/59, Haftsache GA Bd. I, p. 7, *Einlieferungsanzeige vom 19. Februar 1959* [Notice of compulsory appearance of 20 February 1959]; p. 12, *Haftbefehl vom 20. Februar 1959* [Indictment of 20 February 1959]; p. 13, *Verhandlungsprotokoll vom 20. Feberuar 1959* [Minutes of the hearing of 20 February 1959].

38 BStU Außenstelle Gera, MfS/Bezirksverwaltung Gera, AUV 38/59, Haftsache GA Bd. II, pp. 1–2, *Anklageschrift vom 16. Dezember 1959* [Indictment of 16 December 1959].

39 Ibidem, pp. 5–6.

Eastern areas of 4 December 1941.[40] This meant that Pchalek had consistently supported the fascist criminal policy, which could not be reconciled either with the principles of the international law or humanitarianism. In the opinion of the author of the indictment, Pchalek, even though not the perpetrator himself, had assisted the immediate murderers, i.e. the fascist state, by the motions he had filed as the prosecutor. The evidence supplied by the prosecutor included, in particular, documentation (case files and sentences) and testimony of three witnesses, including former officials of the prosecutor's office in Bielsk.[41]

Gerhard Pchalek's act was qualified as aiding in murder pursuant to § 211 of the StGB, in association with § 49 of the StGB. The crime of murder was defined in § 211 section 2 of the StGB. According to that provision, a murderer was one who killed a person: a) out of bloodlust, sexual desire, greed or other low motives; b) insidiously or cruelly, or by using means posing general danger; c) or to enable or conceal another crime. A different provision – § 212 of the StGB – established a milder punishment for murder, understood as intentionally killing a person without premeditation (*Überlegung*). Meanwhile, according to § 49 section 1 of the StGB, a punishment could be served on one who knowingly helped the perpetrator commit a crime or offence through act or advice. In addition, as stated in § 49 section 2 of the StGB, the punishment for the helper was to be determined according to the relevant regulation governing a specific action that one knowingly helped, however, reduced according to the principles governing punishment for 'attempt'.

On 2 February 1960, a decision was issued to open the main proceedings against Pchalek before the Criminal Senate of the District Court in Gera. The main trial was held on 5 April 1960 before a mixed adjudicating panel consisting of one professional judge and two jurors. The defendant Pchalek was brought from custody. He was defended by two hired lawyers. At the prosecutor's request, the proceedings were held in camera. Following the taking of evidence, the prosecutor requested the penalty of 4 years of strict regime prison, minus the time already served in detention, while the two lawyers petitioned for a milder sentence, taking into account the defendant's merits after 1945. The judgement was announced on 8 April 1960.

40 *Verordnung über die Strafrechtspflege gegen Polen und Juden in den eingegliederten Ostgebieten vom 4. Dezember 1941* [Regulation on the criminal law for Poles and Jews in the incorporated Eastern areas of 4 December 1941] RGBl. 1941, p. 759. The International Military Tribunal at Nuremberg declared the Regulation on the criminal law for Poles and Jews in the incorporated Eastern areas to have been illegal and against the Hague Conventions, as its adoption and implementation involved racial persecution and extermination in areas annexed in the course of a criminal and aggressive war. Kulesza, W., op. cit., p. 44.

41 BStU Außenstelle Gera, MfS/Bezirksverwaltung Gera, AUV 38/59, Haftsache GA Bd. II, pp. 6–8, op. cit.

Gerhard Pchalek was sentenced for aiding the murder in 20 cases pursuant to § 211 of the StGB, in association with § 49 of the StGB to 4 years of strict regime prison, minus the time already served in detention.[42]

The 16-page-long judgment with a statement of justification confirmed the findings of the prosecutor presented in the indictment and even intensified many of their aspects. Pchalek was assessed as a social climber who, despite not being a formal member of the NSDAP, enjoyed huge trust of his superiors. Thanks to that trust, in 1942, he was appointed as the permanent representative of the prosecutor's office at Sondergericht Bielitz and moved to the second division of the prosecutor's office for political cases. When serving in that division, he filed motions for the death penalty for five persons, even though he was aware that the punishment was grossly disproportionate to the acts committed by them. He requested the death penalty for 15 other persons when he was delegated to the General Prosecutor's Office, where he controlled all the economic cases in the region. He filed the last motion for the death penalty for three Polish patriots in December 1944, when it was already evident that Hitler's regime was bound to collapse soon. Based on this, the court determined that Pchalek actively promoted the fascist policy of destruction until its last moments.[43]

A lot of attention was devoted to the takeover of power in Germany by national socialists, the unleashing of World War II and fascist crimes. Those fragments of the judgment bear the political imprint of the period when they were written. This is proven both by the language used and references to the activity of the Communist Party of Germany, and the national ideology of the German Democratic Republic. Meanwhile, the statement of justification fails to elaborate on the legal qualification. The legal qualification proposed by the prosecutor was approved in its entire extent. The penalty was affected, on the one hand, by the high social harmfulness of Pchalek's actions and, on the other hand, by his work for the society after 1945.[44]

P. Riegel noted that the judgement in Pchalek's case involved consultation not only with the Central Committee of the Socialist Unity Party of Germany but, most likely, also with the defendant himself. This would explain to some extent the fact

42 BStU Außenstelle Gera, MfS/Bezirksverwaltung Gera, AUV 38/59, Haftsache GA Bd. II, pp. 15–18, *Eröffnungsbeschluss vom 2. Februar 1960* [Decision on opening the main proceedings of 2 February 1960]; pp. 37–43, *Hauptverhandlungsprotokoll vom 5. April 1960* [Minutes of the main hearing of 5 April 1960].

43 BStU Außenstelle Gera, MfS/Bezirksverwaltung Gera, AUV 38/59, Haftsache GA Bd. II, pp. 55–56, 62, *Urteil in der Strafsache gegen Gerhard Pchalek vom 8. April 1960* [Judgement in the criminal case against Gerhard Pchalek of 8 April 1960].

44 Ibidem, pp. 56–61.

that Pchalek did not appeal against the judgement of the court of the first instance.[45] In June 1962, the convict was released on parole after two years on the grounds of good behaviour.[46]

Conclusion

It is common knowledge that a vast majority of lawyers from the Third Reich found employment in the judiciary of the German Federal Republic. Unfortunately, none of them were prosecuted by the German criminal justice system. This was notwithstanding the dogmatic definition of the grounds for such liability determined by Gustav Radbruch as a result of the high standard of proof established by the case law of the Federal Court of Justice. This required proving the judge's or prosecutor's intention of direct deprivation of defendant's life regardless of the substantive conditions of a given case. So this was about a situation in which a Nazi judge a priori intended to convict the defendant to the death penalty, regardless of evidence, e.g. on the grounds of their nationality, political views, etc. Consequently, even though Radbruch's formula laid foundations for invoking the crime against humanity and initiating proceedings against Nazi criminals, and it actually functioned in proceedings before the International Military Tribunal in Nuremberg,[47] it proved useless in confrontation with Nazi lawyers.

The problem of the criminal liability of Nazi lawyers was settled differently in the German Democratic Republic. In the Soviet occupation zone of Germany, the first judgement convicting judges of the Higher National Court in Dresden who had imposed draconian penalties pursuant to regulations on the treason and betrayal of the country, mainly against forced labourers who had tried to escape from places of slave labour, and prosecutors who had filed final motions in those proceedings, was already passed in 1947. The Nazi lawyers were mildly sentenced to imprisonment ranging between one year and two months and six years. The legal basis for the judgement was the abovementioned Act of the Allied Control Council Law on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945 and § 336 of the StGB. In the German Democratic Republic, Nazi lawyers received "flat-rate" (W. Kulesza) sentences in

45 Riegel, P., op. cit., p. 55.

46 BStU Außenstelle Gera, MfS/Bezirksverwaltung Gera, AUV 38/59, Haftsache GA Bd. II, p. 84, *Beschluss vom 14. Juni 1962*. [Decision of 14 June 1962].

47 Lubertowicz, M., *Lex iniustissima non est lex: formuła Gustava Radbrucha jako alternatywa dla międzynarodowego systemu ochrony praw człowieka*, "Studia Erasmiana Wratislaviensia" 2010, No. 4, pp. 364–366.

trials held in Waldheim between April and July 1950, which resulted in 3,324 convictions of imprisonment for 10 to 25 years. In those cases, the only legal basis for the convictions was the Act of the Allied Control Council Law on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945, but accusations extended to membership in the NSDAP or civil service in the Third Reich, which was associated with responsibility for implementing the goals of the Nazi state, as well as participation in war crimes and crimes against humanity. However, those trials were in violation of the substantive and procedural law and in themselves, they were an example of bending the law by judges in criminal proceedings.[48]

Gerhard Pchalek's case discussed in this paper differs from previous attempts to prosecute Nazi lawyers. Pchalek himself was specific, because, after the end of World War II, he managed to conceal the details of his work at the prosecutor's office in Upper Silesia from 1941 to 1944 and, since he had never been a member of the NSDAP, he could perform managerial functions in the reconstructed judiciary of East Germany. The criminal case against him started by accident, though, there was a political factor involved, because Pchalek was a member of the Socialist Unity Party of Germany and held certain functions in it. The legal evaluation in the criminal trial before the District Court in Gera was different than in the Nuremberg trial or the Waldheim trials of lawyers. Instead of the extraordinary regulations passed after the end of World War II, concerning war crimes and crimes against humanity or § 336 of the StGB governing the crime of bending the law, it was based on § 211 of the StGB concerning murder, in association with § 49 of the StGB concerning aiding in murder. The District Court in Gera determined that Pchalek, filing motions for the death penalty for twenty persons in trials before the Special Court in Bielsk, the Special Court in Katowice and the Higher National Court in Katowice, had committed the crime of aiding in murder, because the defendants had been convicted accordingly and the sentences had been executed. The penalty of 4 years of strict regime prison was low, the more so that Pchalek was released on parole, most probably due to political factors. However, his case has a symbolic dimension in the first place. It proves that it was possible to prosecute a Nazi lawyer.

48 Kulesza, W., op. cit., pp. 47–54.

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CITATION

GRACZYK, K., *Convicted Nazi lawyer. The case of Gerhard Pchalek in the Gera District Court in 1960*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 17–31, DOI: 10.18276/ais.2020.29-02.

Acta Iuris Stetinensis
2020, No. 1 (Vol. 29), 33–47
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-03

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Body check or extrajudicial search – chaos in the Police Act

Abstract

A body check is a measure that is usually carried out in the event of a reasonable suspicion of a crime, i.e. when there are grounds to institute criminal proceedings. Moreover, the Police Act has never determined the limits of Police interference with the constitutional rights and freedoms of an individual, nor did it identify any adequate measures to protect the checked persons. These limits were determined by the provisions of the Regulation,[1] according to which the Police could not uncover the parts of body covered with clothes.

The Constitutional Tribunal recognised these provisions as inconsistent with the Constitution of the Republic of Poland[2] and ordered that the definition of a body check, determining the limits of Police interference with the rights and freedoms of an individual and authorising the person subject to a body check to appeal to the court against the decision of the Police, be included in the Police Act.

1 Regulation of the Council of Ministers of 29 September 2015 on the procedure for exercising certain competencies of Police officers, Dz.U. (Journal of Laws) 2015, item 1565.

2 Judgement of the Constitutional Tribunal of 14 December 2017, K 17/14, OTK ZU A/2018, item 4.

The amendment to the Police Act and other acts,[3] which implemented the judgment of the Constitutional Tribunal, authorised the person subject to a body check to have the actions of the Police verified by an independent court, but at the same time, it expanded the scope of Police interference with the rights and freedoms of an individual. The legislator of the Police Act and other acts did not remove the one prerequisite that simultaneously triggered a body check and the search of a person, but instead added other prerequisites that broadened the scope of Police measures in this respect. The limits of Police interference with the rights and freedoms of an individual were also expanded to include a check of the oral cavity, nose, ears and hair of the person subject to a body check and, in special cases, also their private body parts, which the Police officer may check visually or manually.

The purpose of this paper is to show that the provisions of the amended Police Act and other acts, to a large extent, failed to meet the provisions of the Judgment of the Constitutional Tribunal of 14 December 2017. Its extensive, non-transparent provisions broadened the authority of the Police to arbitrarily determine the limits of interference with the rights and freedoms of an individual, thereby eradicating them. The analysis of the amended Act and its implementing acts, as well as the statement of reasons for the draft Act, confirm the thesis that the amended provisions transformed a body check into an extrajudicial search.

Keywords: body check, search of a person, the Police Act, rights and freedoms of an individual, judgment of the Constitutional Tribunal

Introduction

A body check, the same as the search of a person, interferes with the constitutionally protected rights and freedoms of an individual and has triggered controversy for many years. It has been the object of numerous complaints addressed to the Ombudsman, who, on the basis of those complaints, submitted in 2014 a request to the Constitutional Tribunal[4] to verify the constitutionality of the provisions authorising the performance of a body check, luggage and cargo check and search of a person and vehicles by such institutions as the Police, Border Guard, Customs Service, Internal Security Agency, Military Police, fiscal control, municipal guard or State Hunting Guard.

The Ombudsman's first objection, supported by the judgment of the Constitutional Tribunal,[5] concerned the lack of a definition of a body check and search of

3 Act on amending the Police Act and certain other acts of 14 December 2018, Dz.U. (Journal of Laws) 2018, item 2399.

4 Ombudsman's petition no. II.519.344.2014.ST of 29 August 2014 to the CT; http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2017/14 (accessed 12.1.2018).

5 Judgement of the Constitutional Tribunal of 14 December 2017, op. cit.

a person, as well as the limits of the interference of the above institutions with the rights and freedoms of an individual. The Ombudsman was very critical of the fact that the legislator failed to include any provisions that would justify limiting the integrity of the person and the right to privacy, and he left it to executive authorities to determine the extent to which the individual can enjoy their constitutional rights and freedoms. Moreover, he strongly emphasised the fact that those measures and the way they were conducted should be strictly and comprehensively governed by a legal act in the form of a statute, which was also emphasised in the judgment of the CT of 29 October 2013.[6] "(…) a body check (…) constitutes interference with the integrity of a person, protected pursuant to Article 41 section 1 of the Constitution, and the right to privacy, protected pursuant to Article 47 of the Constitution. In light of the requirements imposed on the legislator both by Article 31 section 1 and by Article 41 section 1 of the Constitution, in the event of interference with the two personal freedoms, only the legislator's intervention is admissible. The legislator must intervene in an exhaustive and exact manner. A legal instrument of a lower ranking than an act of law may only govern, subject to explicit authorisation granted by the legislator, practical issues associated with body check procedures."

The Ombudsman's second objection concerned the lack of provisions enabling the person subject to a body check to appeal against the decision of the institution conducting the body check to an independent court. The Ombudsman emphasised the fact that "(…) the legislator either did not provide for any appeal (including an appeal to the court), or he only provided for one possible appeal, namely an appeal to the prosecutor," by which he deprived any persons whose constitutional rights and freedoms were violated by public authorities of their right to trial.

Although the amended Act on the Police includes in its provisions (Article 15 section 5 and section 7), previously included in the Regulation, guarantees that the inspected person and the inspecting person are of the same sex, ensuring that the place is not accessible to bystanders and they have the right to have an additional person with them during such activities, it does not change the fact that this type of intervention should take place only and exclusively within the framework of conducting a criminal trial.

The Constitutional Tribunal agreed with the vast majority of the objections made by the Ombudsman, and on 14 December 2017, the CT concluded that Article 219 § 2 of the Code of Criminal Procedure[7] and Article 44 § 2 of the Code of

6 Judgement of the Constitutional Tribunal of 29 October 2013, U 7/12, OTK 2013, No. 7/A, item 102.

7 Code of Criminal Procedure Act of 6 June 1997, consolidated text: Dz.U. (Journal of Laws) 2017, item 1904.

Procedure for Cases of Petty Offences,[8] to the extent that they provided for the search of a person without specifying the limits of that search, were not compliant with Articles 41 section 1 and 47 in association with Article 31 section 3 of the Constitution of the Republic of Poland.[9] The Tribunal also determined that the provisions of the acts governing the activity of the Police, the Border Guard, the Municipal Guard, the Government Protection Bureau, the Military Police and Military Law Enforcement Units, the Internal Security Agency and Intelligence Agency, the Military Counterintelligence Service and Military Intelligence Service and the Central Anti-Corruption Bureau[10], to the extent they authorised their respective officers to perform a body check without establishing the limits of that check, as well as provisions devoid of judicial review over a body check, were not compliant with Article 45 section 1 and Article 77 section 2 of the Constitution.

The provisions of implementing acts, with respect to performing a body check, were also considered to be non-compliant with Article 41 section 1 and Article 47 in association with Article 31 section 3 of the Constitution.[11]

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8 Code of procedure for cases of petty offences Act of 24 August 2001, consolidated text: Dz.U. (Journal of Laws) 2016, item 1713, as amended.

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

10 Police Act of 6 April 1990, Dz.U. (Journal of Laws) 2017, item 2067 – art. 15 section 1 point 5 and art. 15 section 7; Border Guard Act of 12 October 1990, Dz.U. (Journal of Laws) 2016, item 1643, 1643, 1948 and 1955 and of 2017, item 60 – art. 11 section 1 point 2 and art. 11 section 1 point 2a.a; Municipal Guard Act of 29 August 1997, Dz.U. (Journal of Laws) 2016, item 706 and of 2017, item 60 – art. 12 section 1 point 3a and art. 20; Government Protection Bureau Act of 16 March 2001, Dz.U. (Journal of Laws) 2017, item 985 – art. 13 section 1 point 4; Military Police and Military Law Enforcement Units Act of 24 August 2001, Dz.U. (Journal of Laws) 2016, item 1483 and 1948 and of 2017, item 244, 768 and 1086 – art. 17 section 1 point 10 and art. 24 section 1; Internal Security Agency and Intelligence Agency Act of 24 May 2002, Dz.U. (Journal of Laws) 2017, item 1920 – art. 23 section 1 point 5 and art. 23 section 7 point 1; Military Counterintelligence Service and Military Intelligence Service Act of 9 June 2006, Dz.U. (Journal of Laws) 2017, item 1978 – art. 44 section 2 point 5; Central Anti-Corruption Bureau Act of 9 June 2006, Dz.U. (Journal of Laws) 2017, item 1993 – art. 14 section 1 point 5 and art. 14 section 7 point 1.

11 Regulation of the Minister of Home Affairs and Administration of 15 December 2006 on border control performed by Border Guard Officers, Dz.U. (Journal of Laws), No. 238, item 1729, of 2008, No. 223, item 1474 and of 2017, item 287 – § 5 section 1–4, 6 and 7; Regulation of the Council of Ministers of 18 December 2009 on the scope and means of certain measures performed by municipal (city) guard officers, Dz.U. (Journal of Laws), No. 220, item 1722 and of 2011, No. 222, item 1329 – § 10 section 1 point 2, § 10 section 3–6; Regulation of the Council of Ministers of 9 April 2002 on the specific procedures of the Government Protection Bureau Officers and the assistance of other institutions, Dz.U. (Journal of Laws), No. 57, item 519 – § 9 and § 10; Regulation of the Minister of National Defence of 14 December 2001 on specific procedures for exercising certain competencies of Military Police officers, Dz.U. (Journal of Laws), No. 157, item 1851 and of 2008, No. 182, item 1129 – § 19–21; Regulation of the Council of Ministers of 26 April 2005 on ordering

The judgment of the CT was executed by the Act amending the Police Act and certain other acts of 14 December 2018.[12] However, this Act not only amended the provisions questioned by the CT, but it also introduced regulations that deviated from the constitutional standards much more than those that had been considered non-compliant with the provisions of the Constitution, making a body check an extrajudicial search of a person.

However, considering the fact that analysis of the regulations governing the issue of a body check by the respective institutions would significantly exceed the predetermined framework of the publication, these deliberations will focus on the right of the Police to perform a body check, as referred to in Article 15 section 1 point 5 of the Police Act of 6 April 1990,[13] hereinafter referred to as the Police Act.

persons to behave in a specific way, asking for ID, detention, search, body check, luggage and cargo check and registering events by Internal Security Agency officers, Dz.U. (Journal of Laws), No. 86, item 733 – § 29 section 1–3; Regulation of the Council of Ministers of 25 July 2006 on ordering persons to behave in a specific way, asking for ID, detention, search, body check, luggage and cargo check and registering events by Central Anti-Corruption Bureau officers, Dz.U. (Journal of Laws), No. 142, item 1014 – § 29 section 1–3.

12 This Act amended the following legal instruments: Border Guard Act of 12 October 1990, Dz.U. (Journal of Laws) 2017, item 2365, as amended; Act on protecting the state borders of 12 October 1990, Dz.U. (Journal of Laws) 2018, item 1869; Code of Criminal Procedure Act of 6 June 1997, Dz.U. (Journal of Laws) 2017, item 2365; Municipal Guard Act of 29 August 1997, Dz.U. (Journal of Laws) 2016, item 706 and of 2018, item 60 – art. 12 section 1 point 3a and art. 928; Military Police and Military Law Enforcement Units Act of 24 August 2001, Dz.U. (Journal of Laws) 2018, item 430, 650, 1544; Internal Security Agency and Intelligence Agency Act of 24 May 2002, Dz.U. (Journal of Laws) 2018, item 2387 and 2245; Act on granting protection to foreign nationals on the territory of the Republic of Poland of 13 June 2003, Dz.U. (Journal of Laws) 2018, item 1109 and 1669; Military Counterintelligence Service and Military Intelligence Service Act of 9 June 2006, Dz.U. (Journal of Laws) 2017, item 1978 and of 2018, item 650, 1544 and 1669; Central Anti-Corruption Bureau Act of 9 June 2006, Dz.U. (Journal of Laws) 2018, item 2104; Prison Service Act of 9 April 2010, Dz.U. (Journal of Laws) 2018, item 1542, 1669 and 2245; Foreign Nationals Act of 12 December 2013, Dz.U. (Journal of Laws) 2018, item 2094; State Protection Service Act of 8 December 2017, Dz.U. (Journal of Laws) 2018, item 138, as amended; and Marshal's Guard Act 26 January 2018, Dz.U. (Journal of Laws), item 729 and 1669.

13 Police Act of 6 April 1990, consolidated text: Dz.U. (Journal of Laws) 2019, item 161, as amended.

A body check after execution of the judgment of the CT[14]

Despite numerous objections of the Ombudsman, the Constitutional Tribunal, as well as legal academics,[15] the legislator did not amend the uniform prerequisite for a body check and the search of a person, simultaneously triggering Police measures pursuant to the Police Act and the criminal procedure. Unfortunately, pursuant to the provisions of Article 15 section 1 point 5 of the Police Act, a body check is still performed if there is a reasonable suspicion of a criminal offence, which coincides with the moment that constitutes the basis to institute an investigation.[16] Moreover, the catalogue of prerequisites to perform a body check was extended, further aggravating the problem. Currently, a body check may also be performed to find weapons or other hazardous items that can serve to commit a criminal offence or the possession of which is prohibited or items that can constitute evidence in a procedure conducted in association with the performance of Police tasks or in order to find items that are subject to confiscation in the event of reasonable suspicion that a person has weapons or such items or reasonable suspicion that they were used to commit a criminal offence.

Apart from the main prerequisite triggering a body check, the other prerequisites are, in fact, the purposes of a body check, which were previously included in the executive Regulation concerning the procedure for executing certain powers of Police officers,[17] repealed as a result of execution of the judgment of the CT of 14 December 2017. The artificially identified purposes serving as additional grounds to perform a body check not only are not in any way justified, but they also cause chaos in legal regulations. The CT is of the opinion that regulations that directly affect the constitutional rights and freedoms of a person should be strictly compliant with the requirements concerning their clarity.[18] Unfortunately, in this case, the amendments cause much chaos, not only for persons who may be subject to this procedure, but also for the institution that exercises this law. It

14 Judgement of the Constitutional Tribunal of 14 December 2017, op. cit.

15 Szumiło-Kulczycka, D., *Kontrola osobista, przeglądanie zawartości bagaży, przeszukanie (przyczynek do kwestii racjonalności legislacji)*, "Państwo i Prawo" 2012, No. 3, p. 36 ff. Karaźniewicz, J., *Przeszukanie i czynności zbliżone do przeszukania w teorii i praktyce organów ścigania*, in: Hofmański, P. (ed.), *Węzłowe problemy procesu karnego. Materiały konferencyjne – Kraków, 25–28.9.2008*, Warszawa 2010, pp. 276–278; Kaznowski, A., *Karnoprocesowe aspekty przeszukania osoby w polskiej procedurze karnej*, "Wojskowy Przegląd Prawniczy" 2008, No. 3, pp. 71–72.

16 Cf.: Grochowski, J., *Milicyjne przeszukanie pozaprocesowe a konstytucyjne prawa osobiste w PRL*, "Problemy Prawa Karnego" 1989, No. 15, pp. 26–27; Karaźniewicz, J., op. cit., p. 280.

17 Regulation of the Council of Ministers of 29 September 2015, op. cit.

18 Judgement of the Constitutional Tribunal of 14 December 2017, op. cit.

should be firmly emphasised that "the legislator cannot, by formulating ambiguous legal provisions, leave too much freedom to the institutions that are to apply those provisions in terms of limiting the constitutional rights and freedoms of an individual. Exceeding a certain level of ambiguity of legal provisions may be in itself a prerequisite to conclude that they are non-compliant with the principle of the rule of law."[19]

However, the most worrying are the provisions of Article 15d of the Police Act,[20] which, determining the scope of actual body check measures, deeply interfere with the constitutional rights of an individual and obliterate the distinction between a body check and the search of a person.

Pursuant to the wording of Article 15d section 1 of the Police Act, a body check involves checking the following:

1. Clothes, footwear and objects that a person is wearing on their body, without uncovering the parts of the body covered by clothes.
2. Luggage and other items that a person is carrying with them.
3. Clothes, footwear and objects that a person is wearing on their body, uncovering parts of the body covered by clothes insofar as may be necessary to remove weapons or items referred to in Article 15 section 1 point 5 in the event they were discovered during the check referred to in point 1 or 2 and if the measures referred to in points 1 and 2 are not sufficient to remove them.
4. The oral cavity, nose, ears and hair.
5. In duly justified cases, private body parts.[21]

Accordingly, the amended act[22] expanded the scope of a body check to include checking the oral cavity, nose, ears and hair and, in duly justified cases, private body parts. Before the entry into force of the judgment of the CT,[23] the repealed provisions of the Regulation concerning the procedure for executing certain powers of Police officers of 2015[24] determined the line between the search of a person and a body check, namely the prohibition to uncover the body parts covered by clothes. Given the existing state of the law, this difference is only apparent. The solution provided for in Article 15 section 1 point 3 of the Police Act was justified in the following way: "To ensure compliance of the regulation with the principle of

19 Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, p. 31.

20 Police Act of 6 April 1990, op. cit.

21 Art. 15d section 1 of the Police Act of 6 April 1990, op. cit.

22 Act on Amending the Police Act and certain other acts of 14 December 2018, op. cit.

23 Judgement of the Constitutional Tribunal of 14 December 2017, op. cit.

24 Regulation of the Council of Ministers on the procedure for exercising certain competencies of Police officers of 29 September 2015, op. cit.

proportionality of the interference of a public authority with constitutionally protected rights and freedoms, the measure referred to in Article 15 section 1 point 3 (…) is subsidiary to the measures referred to in Article 15 section 1 point 1 and Article 15 section 1 point 2 and applies only if, in the course of those measures, weapons or other hazardous objects are discovered and if those measures are not sufficient to remove them."[25] Unfortunately, nothing whatsoever is said about the reasons for introducing the provisions on checking the oral cavity, nose, ears, hair and, in duly justified cases, private body parts. Leaving this without a word of comment, despite such deep interference of public authorities, is astonishing, considering the fact that these kinds of measures were previously reserved only for law enforcement authorities searching a person in association with a criminal offence.

Concerning the principle of proportionality claimed in the statement of reasons by members of the committee proposing the draft act amending the Police Act, it should be noted, after L. Garlicki, that the principle of proportionality expresses the conviction that the intensity of interference with the legal situation of the individual must by justified by the rank of public interest that is thereby promoted[26]. Thus, this principle assumes weighing the interests leading to the choice of certain values, which means favouring some at the expense of others.[27] These conditions must be satisfied both at the stage of law-making and applying the law to such sensitive measures as a body check or the search of a person.

The existing provisions of Article 15d of the Police Act identify two situations. The first, discussed in Article 15d section 1 point 1 of the Police Act, concerns checking the clothes, footwear and items that a person is wearing on their body without uncovering the parts of the body covered by clothes. The other situation, discussed in Article 15d section 1 point 3 of the Police Act, takes place if, during the check without uncovering the parts of the body covered by clothes, weapons or other items referred to in Article 15 section 1 point 5 of the Police Act were discovered and, that check being insufficient, it was necessary to uncover the body. In this case, the purpose of the measure is to remove those items. The question is then: what is the purpose of a body check in the other cases referred to in Article 15d section 1 point 1, 2, 4 and 5 of the Police Act? Undoubtedly, the purpose of a body check in every case is to find weapons or items referred in Article 15

25 Statement of reasons for the commission of the draft Act on amending the Police Act and certain other acts – print no. 3088 of 6.12.2018.

26 Garlicki, L., *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, "Państwo i Prawo" 2001, vol. 10, p. 18.

27 Łabno, A., *Istota zasady proporcjonalności*, in: Dukiet-Nagórska, T. (ed.), *Zasada proporcjonalności w prawie karnym*, Warszawa 2010, p. 22.

section 1 point 5 of the Police Act, which makes the provision incomprehensible and groundless.

Another curious provision is Article 15d section 2 of the Police Act. According to this provision, "(…) during the check referred to in paragraph 1.3 and 1.5, the person who is being checked should be partly dressed (…)." In this case, it cannot be disregarded that the legislator transferred elements of the tactics of the search of a person to the tactics of a body check. By quoting the clause of minimising interference with the personal rights of the checked person and of using interference measures adequate to the circumstances in the statement of reasons for the act, the legislator noted that it was the duty of a Police officer to allow a person to put on an item of clothing already checked before checking another item.[28] Of course, in the case of the search of a person, this is appropriate and desired, because it involves removing clothes from a person rather than uncovering the parts of the body covered by clothes. However, in association with the provisions governing a body check, such provisions should be criticised. It is hard to identify the concept of "uncovering the parts of the body covered by clothes" referred to in Article 15d section 1 point 1 and 3 of the Police Act with the "undressing of a person" referred to in Article 15d section 2 of the Police Act. So far, in practice, the prohibition "to uncover the parts of the body covered by clothes" meant so-called palpation without removing the last layer of clothes covering the body, whereas uncovering meant pulling up a top or trouser leg without taking them off, i.e. without undressing a person. Meanwhile, undressing was solely linked with the search of a person in association with a criminal offence, and this involved removing the clothes a person was wearing. Accordingly, such formulation of the provisions not only exposes the legislator to the accusation of inconsistency, but also puts into question the validity of the existence of a body check alongside the search of a person.

Another change that obliterates the difference between a body check and the search of a person is contained in Article 15d section 3 of the Police Act. According to this provision, the oral cavity, nose, ears and hair and, in duly justified cases, private body parts may be checked visually or manually. It should be noted here that the legislator, who, given the degree of interference with the rights and freedoms of an individual, should be expected to be particularly precise, did not make any effort to explain what "duly justified cases" meant. By this, the legislator allowed a visual or manual check of the oral cavity, nose, ears, hair and the private parts of a person to be performed both if the items referred to in Article 15 section 1 point 5 of the

28 Statement of reasons, op. cit.

Police Act are discovered during a body check and if no such items are discovered, regardless of the result of the search, and he left it to the discretion of the Police officer to decide whether a given case is duly justified. According to the CT, correct legislation means that legal provisions are formulated in a precise, correct and clear manner, especially if they concern the rights and freedoms of an individual.[29] "The requirement of clarity means that legal provisions should be clear and understandable for their addressees, who expect a rational legislator to establish regulations that do not raise any doubts as to the wording of the obligations imposed on them and the rights granted to them."[30] "An unclear and imprecise provision makes its addressees uncertain about the scope of their rights and obligations, and it gives too much freedom to the institutions that apply that provision and enables them, instead of the legislator, to decide on issues that the legislator failed to govern in a clear and precise manner."[31]

Even though the provision deeply interferes with the constitutional rights and freedoms of an individual, the legislator did not specify the procedure of a manual private body parts check. The provision is limited to one sentence, according to which the person authorised to perform the check is a Police officer and that the Police officer may request the checked person to take a body position that will enable the checking of their private body parts.

Before the changes introduced in the execution of the judgment of the CT,[32] in our legal system based on the principles of a democratic rule of law, private body parts could be checked solely in the procedure of the search of a person in association with a criminal offence. Another precaution was that this measure could be conducted by an authorised person, namely a physician or authorised health worker, and never by a Police officer. Obviously, a visual check could always take place, and this visual method never raised any objections. However, a manual check was always subject to penal procedure regulations, which were exceptionally restrictive. Unfortunately, the provisions of the amended Police Act make it possible to substitute not only the legislator but also a physician or qualified health worker with a Police officer.

29 Cf. Judgement of the Constitutional Tribunal of 11 January 2000, K 7/99, OTK ZU 1/2000, item 2; Judgement of the Constitutional Tribunal of 21 March 2001, K 24/00, OTK ZU 3/2001, item 51. Judgement of the Constitutional Tribunal of 10 December 2002, K 6/02, OTK ZU 7A/2002, item 91; Judgement of the Constitutional Tribunal of 14 December 2017, op. cit.

30 Judgement of the Constitutional Tribunal of 21 March 2001, op. cit.

31 Tuleja, P., op. cit., p. 31.

32 Judgement of the Constitutional Tribunal of 14 December 2017, op. cit.

The structure of the provisions of Article 15d section 1 point 3 of the Police Act is also surprising, since, although it enables uncovering the body parts covered by clothes, it does not provide for checking private body parts, which is instead governed separately by point 5. Moreover, the statement of reasons for the draft act concerning this part of the provision entirely disregards the issue of checking private body parts: "The scope of procedures covered by a body check was extended to include checking the oral cavity, nose, ears and hair of the checked person and, in duly justified cases, also checking other body parts, including the parts covered by clothes."[33] It should be noted here, by way of comparison, that the statement of reasons for the provisions of the Border Guard Act[34] has two pages of commentary on checking private body parts, and even though it may seem controversial, the arguments of international security related to aviation law and European civil aviation security regulations may have some supporters.[35] Unfortunately, no arguments are provided concerning the corresponding provisions of the Police Act, which suggests that none exist.

In a democratic State governed by the rule of law, an important principle is civic trust in the State and the laws made by the State, as well as the principle of social justice.[36] The former is a guarantee of the decency of legislation[37] and the principle of proportionality,[38] and the latter is supposed to ensure balance in social relations and prevent certain groups from acquiring unjust privileges not supported by objective criteria or requirements.[39] The principle of proportionality guarantees that any limitations imposed by the legislator are proportional to the potential threats and are not arbitrary and that the application of proportionality in actual procedures is effectively monitored. In the event of a conflict between the constitu-

33 Statement of reasons, op. cit.

34 Art. 2 point 1 of the Act on Amending the Police Act and certain other acts, op. cit.

35 Statement of reasons, op. cit.

36 Judgement of the Constitutional Tribunal of 12 April 2000, K 8/98, OTK 2000, No. 3, item 87.

37 Cf. Judgement of the Constitutional Tribunal of 3 November 2004, K 18/03, OTK A/2004, No. 10, item 103; Cf. Wiliński, P., *Proces karny w świetle konstytucji*, Warszawa 2011, pp. 84–85; Zalasiński, T., *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego*, Warszawa 2008, pp. 26–227; Garlicki, L., *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2009, pp. 60–61; Koksanowicz, G., *Zasada określoności przepisów w procesie stanowienia prawa*, "Studia Iuridica Lublinensia" 2014, No. 22, pp. 471–478; Bułajewski, S., *Zasady prawidłowej legislacji podczas tworzenia aktów prawa miejscowego w Polsce*, "Studia Prawnoustrojowe" 2015, No. 29, pp. 31–42.

38 Cf. Wójtowicz, K., *Zasada proporcjonalności jako wyznacznik konstytucyjności norm*, in: Zubik, M. (ed.), *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, Warszawa 2006, p. 265 ff.

39 Wiliński, P., op. cit., p. 87; Cf.: Judgement of the Constitutional Tribunal of 12 April 2000, op. cit.; Judgement of the Constitutional Tribunal of 14 June 2000, P 3/00, OTK 2000, No. 5, item 138; Judgement of the Constitutional Tribunal of 25 April 2001, K 13/01, OTK 2001, No. 4, item 81.

tional right to personal integrity, privacy or inviolability of private premises and the interests of public security and order, it settles disputable issues in compliance with the requirements determined in the Constitution of the RP.[40]

The amended Act also contains provisions that are worthy of approval and have long been awaited. They concern a guarantee of judicial review over the legality of Police operations.

With the existing legislation, the fact that a decision to perform a body check is arbitrarily made by a Police officer is no longer as objectionable as it used to be. This is not about the subjective belief of a Police officer that there are reasonable grounds to suspect that a crime was committed, based on which the officer decides to perform a body check. What is important is that such measures may be reviewed by an independent institution, namely the court. The provisions of Article 15d section 11 of the Police Act grant the person subject to a body check the right to verify the legality, validity and accuracy of the body check performed by a Police officer by filing, within 7 days of the date of the check, a complaint with the district court with jurisdiction over the place where the check was performed. If any irregularities are identified in any of these areas, the court is obliged to communicate this fact to the public prosecutor and the chief of a Police unit superior to the unit of the Police officer in question.

The provisions of the Police Act that were repealed by the judgment of the CT[41] only granted the person subject to a body check the right to complain against the method of performing the body check to the public prosecutor of venue rather than to the court. Thus, this meant that one law enforcement authority was supposed to review another law enforcement authority, the two authorities usually having converging interests.[42] In 2008, the CT, in its judgment K 38/07 evaluating the constitutionality of the provisions of Article 236 § 2 of the Code of Criminal Procedure concerning a search, which, due to the personal nature of this measure, are also relevant to a body check, emphasised that "(…) a complaint and the ensuing review do not constitute protection against the arbitrary interference of law enforcement authorities. Its purpose is to minimise the effects, as it is of a consequent nature. The search and confiscation of belongings should be subject to the review of an independent court. Considering the above, due to lack of judicial review over the

40 Skorupka, J., *Konstytucyjne i konwencyjne granice przeszukania w postępowaniu karnym (cz.1)*, "Palestra" 2007, No. 9–10, p. 94.

41 Judgement of the Constitutional Tribunal of 14 December 2017, op. cit.

42 Cf.: Kamińska-Nawrot, A., *Kontrola osobista – racjonalność ustawodawcy*, "Studia nad Bezpieczeństwem" 2017, No. 2; Kamińska-Nawrot, A., *Przeszukanie osoby a kontrola osobista – w kontekście zasady informacji prawnej*, "Security, Economy & Law" 2017, No. 4.

public prosecutor's decision to search and confiscate belongings and other measures related to the search and confiscation of belongings, this regulation violates the right to trial, because it blocks the judicial manner of protecting constitutional rights and freedoms."[43]

Conclusions

It is beyond any doubt that the amendments obliterated the differences between a body check and the search of a person and significantly extended the authority of Police officers to interfere with the rights and freedoms of an individual.

These provisions are not only disappointing because of their defective structure, the legislator's inconsistency and the lack of regulations governing the conduct of a Police officer during a body check, but, more importantly, they pose a number of threats to an individual and allow for a shocking degree of interference with the constitutional rights and freedoms of an individual. A reasonable suspicion that one is in the possession of items that may be used to commit a criminal offence, even if there is no reasonable suspicion that a criminal offence was actually committed, may be enough for a Police officer to decide that it is duly justified to check private body parts. Moreover, the Police officer may perform the check in any given manner which is not specified by the regulations. This endangers the constitutional rights and freedoms of every individual and is inconsistent with the principles of a democratic state governed by the rule of law.

The above examples show but a few of the problems generated by a body check. The purpose of the expected amendment was mainly to introduce provisions governing the performance of a body check and the search of a person and to specify the limits of public interference with the rights and freedoms of an individual and their rights adequate to the extent to which their personal rights were violated. Unfortunately, the legislator of the Police Act did not satisfy the requirements imposed by the Tribunal and, by removing the line between a body check and the search of a person, transformed the former into an extrajudicial search.

It is indisputable that the Police, whose role is to ensure the safety of people and to maintain public security and order,[44] should have relevant instruments to deal with those who commit criminal offences. However, the entitlement to perform a body check that interferes with the constitutional rights of an individual as deeply

43 Judgement of the Constitutional Tribunal of 3 July 2008, K 38/07, OTK-A 2008, No. 6, item 102; Starzyński, P., *Skutki uznania niekonstytucyjności art. 236 § 2 k.p.k.*, "Przegląd Policyjny" 2010, No. 3, pp. 122–131.

44 Cf.: Pieprzny, S., *Policja – organizacja i funkcjonowanie*, Kraków 2011.

as the search of a person contradicts all constitutional standards. There is no doubt that further intervention from the Ombudsman and a subsequent decision of the Constitutional Tribunal are necessary.

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CITATION

KAMIŃSKA-NAWROT, A., *Body check or extrajudicial search – chaos in the Police Act*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 33–47, DOI: 10.18276/ais.2020.29-03.

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29), 49–60
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-04

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Evolution of the suicides' right to funeral and burial in Canon Law and Polish Law

Abstract

For centuries, funeral law was not too favourable to suicides. Admittedly, at the dawn of Christianity this group of the deceased was not refused religious funeral celebrations or a burial, yet, the situation changed along with the Catholic religion gaining significance. At the beginning of the Middle Ages, suicides were deprived of the right to a religious funeral. Furthermore, in the 11th century the ecclesiastical legislator forbade burial for suicides in "holy places." Until modern times, therefore, suicides were buried at a distance from graveyards. This in practice often indicated a burial insulting human dignity. The monopoly on religious funeral regulations only ended in Europe at the end of the 18th century, when state authorities took an interest in funeral law. On Polish soil, the more enlightened regulations of the Partitioners were enforced in the 19th century. In addition, the Act on burying the deceased passed in 1932 led to the necessary standardization of provisions of national funeral law, while the binding provisions of the Act on cemeteries of 1959 provided equality of rights for the deceased in the access to a place of burial at a cemetery. Finally, in the second half of the 20th century, the ecclesiastical legislator introduced amendments to the Canon Law allowing (in certain instances) a Catholic funeral for a suicide. The liberalization of the Canon Law provisions, therefore, exemplifies wider transformations in the spirit of the conciliar *aggiornamento*.

Keywords: suicides, right to a burial, ecclesiastical funeral, Polish funeral law, Canon law

Introduction

The aim of the paper is to present the evolution of funeral law provisions with regard to suicides that took place in Canon law and in Polish law in the last century. Due to the scarce number of municipal cemeteries and to historical cultural conditions in Polish lands until the 2nd half of the 20th century, Canon law regulations had had a significant impact on the legal situation of suicides in the scope of their right to a burial and right to a funeral.[1, 2] The religion-related diversification of the right of the suicide to a dignified place of burial in a denominational cemetery and unconditional deprivation of a Catholic funeral started to gradually give way to liberalisation of the canon funeral law provisions, especially under the influence of state legislation and under evolutionary changes in the Catholic Church itself. The latter was contributed to primarily by the development of science and by sessions of the Second Vatican Council.

For the purposes of the following reflections, the issue related to determining the meaning of the terms "a burial" and "a funeral" should be underlined. As aptly pointed out by Jan Gołąb, in Poland, there is no statutory definition of a funeral[3]. This situation is additionally complicated by different, often synonymous use of the above terms with reference to commonly binding legal provisions and the Canon law.[4] Thus, "a burial" is understood herein as burying a human corpse or incinerated remains (human ashes) in any legally permitted form, whereas the term "a funeral" refers to the total of religious or secular rituals accompanying the burial.[5] While it should be underlined in accordance with Anna Tunia that "the term »an ecclesiastical funeral« is not used in the Polish law," for the purposes of this paper, it will refer to the Catholic funeral ceremony pursuant to the Canon law provisions.[6] Such

1 The number of municipal cemeteries even in the years 2014–2015 amounted to approx. 1,880 of the total number of over 10 thous. cemeteries functioning in Poland. See the Supreme Audit Office, *Informacja o wynikach kontroli: Zarządzanie cmentarzami komunalnymi*, Poznań 2016, p. 5.

2 According to the official declarations, 87.7 percent of all Poles are members of the Roman Catholic Church. See: *Narodowy Spis Powszechny Ludności i Mieszkań. Struktura narodowo-etniczna, językowa i wyznaniowa ludności Polski*, Warszawa 2015, p. 92.

3 Gołąb, J., *Prawo do pogrzebu i jego wykonanie w prawie kanonicznym i prawie polskim*, Rzeszów 2004, p. 203.

4 See: Walencik, D., *Prawo do pogrzebu katolickiego a prawo do pochówku na cmentarzu wyznaniowym*, in: Zubert, B.W. and Sztyk, W.J. (eds.), *Munus sanctificandi: gaudium vel onus? Zadanie uświęcenia: radość czy ciężar?*, Panewniki 2009, pp. 97–116.

5 In the case of a lack of a corpse, a so-called ritual funeral is possible, which is not performed with the burial. As specified by the canon law, see: Majer, P., *Pogrzeb symboliczny po donacji zwłok na cele naukowe – aspekty prawnokanoniczne*, "Annales Canonici" 2016, No. 12, pp. 91–114.

6 See: Tunia, A., *Recepcja prawa wewnętrznego związków wyznaniowych w prawie polskim*, Lublin 2015, p. 234.

a terminological practice is analogical to the reference to the internal law of religious associations and in this case – the Catholic Church.[7]

The historical background of funeral regulations in the Polish lands until 1795

It would be difficult to consider the Catholic Church's position regarding suicide as uniform from the perspective of the past two thousand years. In the first centuries of existence, Christianity did not unequivocally condemn suicidal acts.[8] This situation changed fundamentally in subsequent times, and is best exemplified by the explicit condemnation of suicide during the Synod in Arles in 452. Over time, the negative approach of Christian and particularly Catholic clerical hierarchy to suicide was manifested in the dimension of funeral regulations, the ban on conducting ecclesiastical funerals for suicides being stipulated as early as at the Synod in Braga in 563.[9] At the end of the 11th century, the restrictions increased, as the ecclesiastical legislator deprived suicides of the right to a burial in "consecrated ground."[10] Thus, the strict provisions of the canon law prevented suicides from having an ecclesiastical funeral and deprived them of the possibility of having a dignified burial, which was understood as burial in the Church itself and over time, also in the churchyard.[11] At this point, it is worth underlining that in the Middle Ages, the religious element was dominant. This meant the lack of the possibility to conduct any funeral ceremony for the deceased.[12] Corpses of suicides were buried in places commonly considered as undignified: outside the churchyard and often also as far from the Church as possible. A burial in the latter was disdainfully called a donkey's (*Eselbegräbnis*) or dog's (*Hundbegräbnis*)[13] burial. In modern times, suicides began to be buried in denominational cemeteries; however, it took place in distant parts thereof – corners or places by the cemetery's wall, often the same place where

7 Ibidem.

8 Hołyst, B., *Stosunek religii do samobójstwa*, in: Hołtys, B., *Suicydologia*, Warszawa 2012, p. 112.

9 Insadowski, H., *Kościelne prawo pogrzebowe*, Włocławek 1930, p. 6.

10 Such restrictions were introduced during the Synod in Nimes, in 1096.

11 Sobczak, A., *Poradnik cmentarny. Kościelne i cywilne normy prawne o cmentarzach i chowaniu zmarłych, wraz z orzecznictwem*, Gniezno 2003, pp. 11–15.

12 For the first time secular funerals were organised in Poland only in the post-war period. See: Kubiak, A.E., *Pogrzeby to nasze życie*, Warszawa 2009, pp. 221–239.

13 See: Duma, P., *Grób alienata. Pochówki dzieci nieochrzczonych, samobójców i skazańców w późnym średniowieczu i dobie wczesnonowożytnej*, Kraków 2010, pp. 58–81. The author enumerates in the publication in detail all possible types of places in which suicides could be buried.

unbaptised children were buried.[14] In towns and cities in the South of Poland, until the early years of the 20th century, there were still cases of burying suicides at the crossroads or in forest wastelands.[15] At these times, there were even instances of drowning the corpses of suicides.[16] The aforementioned funeral practices with regard to suicides were not as much a reminiscence of the Middle Ages' inclination to dispatching corpses of sinners far away from "holy places," but rather cultivating old folk rituals which regarded suicides with fear and manifested the faith in the possibility of their return in a form of ghouls.[17]

What is interesting, references to the old fear of the return of the dead can even be found in the contemporary culture of burial in Poland, especially in smaller local communities.[18] It should be underlined that due to the denominational character of cemeteries in the period from the Middle Ages until the dawn of modern times, it is impossible to distinguish national law provisions that would regulate cemetery issues. Simultaneously, with regard to the contemporary sanitary reality, it was impossible to build private cemeteries in pre-partitioned Republic of Poland.[19] Therefore, the practical monopoly of the canon law in the sphere of funeral regulations resulted not only from the principal position of the Catholic Church that governed the First Polish Republic until the end thereof.[20] Still, pre-partitioned Poland was, nonetheless, positively enlightened, in comparison with other European states, in the scope of the lack of penalisation of a suicide in criminal law. Both, the land law, as well as the German law binding at that time in Polish cities and towns did not impose any criminal penalties for a suicidal act.[21] This situation did not significantly change even in the later period of Polish lands during the Partitions.[22]

14 Ibidem, pp. 64–65.

15 Numerous examples of such local customs can be found in the ethnographic work of Adam Fischer. See: Fischer, A., *Zwyczaje pogrzebowe ludu polskiego*, Lwów 1921, pp. 354–361.

16 Bojko, J., *Okruszyny z Gremboszowa*, Lwów 1911, p. 108.

17 Fischer, op. cit., p. 361.

18 See: Kubiak, A.E., op. cit., pp. 323–343.

19 See: Kolbuszewski, J., *Cmentarze*, Wrocław 1996, p. 54.

20 Even the Governance Act (the Constitution of 3 May) enacted in 1791 included provisions calling the Catholic religion "national" or banning apostasy.

21 Wrzyszcz, A., *Samobójstwo w prawie obowiązującym na ziemiach polskich do 1932 roku*, in: Mozgawa, M. (ed.), *Samobójstwo*, Warszawa 2017, pp. 43–63.

22 For instance, *Theresiana*, penalising suicides and binding as of 1764 in the Habsburg Monarchy, was not introduced in the lands of the Austrian Partition, whereas, its "fundamental difference from the Polish law" was referred to. See: ibidem, pp. 48–49.

Unification of the district funeral law of 1932 and codification of the Canon law in the Code of Canon Law of 1917

Independence in 1918 meant the necessity of dealing with the collision of the Partitioner's contradictory legal orders in the territory of reborn Poland. As aptly stated by Stanisław Płaza, legislation constituting the normative legacy of the partition legislation "was treated not as foreign law, but as Polish district law."[23] By nature, it was impossible, although initially considered, to restore the old law from the times of the First Polish Republic.[24] Therefore, the laws of the Partitioners were maintained solely in order to preserve the principle of the continuity of law.[25] Being aware of the temporary character of these regulations, the necessity to develop new uniform Polish regulations for the whole territory of the reborn Republic of Poland, was commonly accepted.[26]

In the period when Polish lands remained under partition, the role of the state in regulating sanitary issues related to the burial of corpses, commonly growing in Europe and initiated at the turn of the 18th and 19th centuries, constituted a significant funeral *novum*. Thus, the period of the monopoly of the internal law of religious associations in this regard ended.[27] At this point, it is worth referring to the basic legal acts regulating funeral issues in the transitional period of binding district law. In the territory of the former Prussian partition, the pertinent regulations of the Kingdom of Prussia that were binding in the first years of the Second Polish Republic, in total, comprised 4 ministerial regulations: of 19 February 1823, 28 January 1830, 12 November 1835 and 20 January 1890.[28] In Galicia, the provisions of the former Austria-Hungary Monarchy that were binding were pursuant to the court decree issued on 12 August 1788 on the joint burial of various religious denominations.[29] In the territory of the former Russian partition, provisions of the cemetery law were included in the provisions of the Administrative Council of the Kingdom of Poland and provisions regarding burying corpses of 31 May 1846 (12 June 1846 according to the Gregorian calendar).[30]

23 Płaza, S., *Historia prawa w Polsce na tle porównawczym. Część 3. Okres międzywojenny*, Kraków 2001, p. 34.

24 Tunia, A., op. cit., p. 100.

25 Płaza, S., op. cit., p. 33.

26 Ibidem, p. 35.

27 Borecki, P. and Winiarczyk-Kossakowska, M., *Prawo pogrzebowe*, Warszawa 2013, p. 7.

28 Insadowski, H., op. cit, p. 33.

29 Ibidem, p. 30.

30 Ibidem, pp. 28–29.

In particular districts, funeral law provisions were, therefore, often not only anachronic, but also differed among themselves, which resulted in many problems with application thereof, especially with regard to the transport of corpses between various district areas.[31] Problems in applying partition provisions were supposed to be prevented by the especially issued "acts on conflicts of the law": international private law and inter-district private law.[32] Thus, the basic task of the administration of the young Polish state consisted in the necessary unification of the funeral law in the whole territory of the Second Polish Republic.

The first Polish normative act standardising the contradictory regulations of partition states with regard to the funeral matter was the Act of 17 March 1932 on burying the deceased and declaring the cause of death.[33] The Act consisted in total of 18 Articles which regulated basic administrative issues related to burial, declaration of the cause of death and administration of cemeteries by referral, in the case of managing Catholic cemeteries, to Article XVII of the Concordat with the Holy See.[34] At this point, it should be explicitly underlined that the law of the Second Polish Republic was generally characterised with taking into consideration the provisions of the internal law of religious associations in a form of reception thereof or a blanket referral.[35] It is also important to stress the fact of the personal connection of certain Catholic clergymen with holding high positions in the state denominational administration.[36]

The Act on burying the deceased included specific sanitary provisions regarding the location of cemeteries and the transporting of corpses. Moreover, it imposed on municipalities the obligation to bury corpses "unless nobody else takes this obligation."[37] With regard to the deceased worshipping in a denomination that does not have its own denominational cemetery, the Act on burying the deceased ensured burial of the corpse at the nearest municipal cemetery in the case of a lack of a proper cemetery in the municipality where the death was declared.[38] At the

31 Ibidem, p. 35.

32 Tunia, A., op. cit., p. 102

33 Dz.U. (Journal of Laws) 1932, No. 35, item 359, hereinafter: the Act on burying the deceased.

34 The Concordat between the Holy See and the Republic of Poland signed in Rome on 10 February 1925, Dz.U. (Journal of Laws) 1925, No. 72, item 501.

35 Tunia, A., op. cit., p. 125.

36 The best known example was Rev. Bronisław Żongołłowicz, who was for many years employed as the undersecretary of state at the Ministry of Religious Affairs and Public Education. See: Leszczyński, P., *Centralna administracja wyznaniowa II RP. Ministerstwo Wyznań i Oświecenia Publicznego*, Warszawa 2006, pp. 246–260.

37 Article 2 § 2 *in fine* of the Act on burying the deceased.

38 Ibidem, Article 8 § 2 *in fine*.

same time, the provisions of the Act obliged "relevant authorities of religious and denominational associations of legal persons" to accept for a specific period of 5 years, corpses of persons not belonging to a given denomination.[39] It seems that the above provision was aimed at enabling establishing in the meantime municipal cemeteries in Poland that would not be managed by specific religious associations. This task was not completed in the interwar period. Thus, the legal situation related to the burial of suicides continued to exemplify the overwhelming impact of canon law. A significant breakthrough in this issue was brought only by another Act on cemeteries and burying of the deceased of 31 January 1959, passed in the times of the People's Republic of Poland.[40]

The twenty-year interwar period in Poland coincided with the first year of the enforcement of the Code of Canon Law promulgated on 27 May 1917, referred to as the Pio-Benedictine Code.[41] CIC/1917 entered into force on 19 May 1918 and thus, as underlined by Rev. Tadeusz Pawluk: "all of the hitherto official collections became invalid."[42] With reference to the ecclesiastical funeral law provisions, the Code of Canon Law of 1917 decreased the number of persons authorised to be buried inside churches. These changes were to some extent compelled by the growing role of sanitary provisions of the state law initiated at the turn of the 18th and 19th centuries. However, the possibility of burying senior ecclesiastical hierarchs or royal families inside temples was maintained in CIC/1917 to a limited extent.[43]

The Pio-Benedictine Code did not bring significant improvement in the scope of the legal-canon situation of suicides. Worshipers who conscientiously committed a suicide were still deprived of the right to an ecclesiastical funeral. Nonetheless, it is worth noticing the evolution in the approach to suicide. A prominent interwar canonist, Henryk Insadowski, underlined that in order to deprive a worshiper ecclesiastical funeral two crucial premises should be met. The suicide should be "complete" (death only as a result of the suicidal act) and "intentional" (the act intended at committing a suicide).[44] It is worth mentioning that apart from suicides,

39 Ibidem, Article 15 § 1.

40 Consolidated text: Dz.U. (Journal of Laws) 2019, item 1473; hereinafter: the Act on cemeteries.

41 *Codex Iuris Canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus*, AAS 9 (1917), hereinafter: CIC/1917.

42 It should be underlined that CIC/1917 primarily constituted work providing a codification of canon law. In case of any doubts regarding the interpretation of provisions thereof, priority should have been given to the former canon law. See: Pawluk, T., *Prawo kanoniczne według Kodeksu Jana Pawła II. Tom 1. Zagadnienia wstępne i normy ogólne*, Olsztyn 2015, pp. 102–103.

43 The code allowed burial in the premises of the Church of, among others: the Pope, cardinals, resident bishops or representatives of royal families; Sobczak, A., op. cit., p. 15.

44 Insadowski, H., op. cit., p. 168.

CIC/1917 also deprived the deceased of the right to an ecclesiastical funeral as a result of a duel.[45]

The Pio-Benedictine Code did not allow conducting ecclesiastical funerals for numerous categories of worshipers, including persons who were cremated. It took several dozens of years for an in-depth reform of the ecclesiastical funeral law. This came only with the teachings of *Vaticanum Secundum*.

Evolution of Polish and Canon funeral law in the 2nd half of the 20th century

The interwar period brought numerous normative changes to the Polish legal system. These, however, had to catch up with the axiological values of the new political reality of Poland after the end of the Second World War. In the first years of the People's Republic of Poland many areas of the law experienced major transformations as compared to the whole twenty-year interwar period.[46] As aptly stated by Anna Tunia, Soviet law influenced Polish law by way of "infiltration."[47] In the first post-war years, the Act on burying the deceased of 1932 remained in force in the scope of the funeral law. In contrast to many legal acts from the period of the Second Polish Republic it could not be criticised, despite best efforts, for having a "bourgeois-landed" character. Establishing municipal cemeteries and initiating secular funerals formed a crucial *novum* in the scope of the funeral practice that was basically unknown in the burial culture in the period of the Second Polish Republic.[48] The need to replace religious funeral ceremonies with secular ceremonies led to the establishment of a profession previously unknown in Poland – a Master of Ceremony. Nonetheless, secular funerals still constituted a substantial minority with regard to confessional ceremonies, despite the state authorities promoting the ideology related to non-religious axiological values.

On 31 January 1959, a new Act on cemeteries was passed, which, in fact, to a large extent copied the hitherto provisions of the Act on burying the deceased of 1932. Article 8 section 3 of the Act on cemeteries of 1959 provided for the right to equal treatment of all with regard to the "set place of burial," which constituted *novum* with regard to the previously binding provisions. The new Act also guaranteed burial of all deceased in a denominational cemetery, however, on the condition

45 See: Gołąb, J., op. cit, p. 160; Insadowski, H., op. cit., pp. 168–169.

46 For instance, the matrimonial personal law, which in the interwar period was based solely on district regulations and was unified only in 1945.

47 Tunia, A., op. cit., p. 110.

48 Kubiak, A.E., op. cit., p. 221 ff.

that there is no municipal cemetery in a given city or town and (initially) only until establishment thereof.[49] Therefore, with regard to suicides, it was no longer legal to deny burial in a graveyard despite denying the worshipper the ecclesiastical funeral pursuant to CIC/1917.

Nevertheless, only as a result of the amendment to the Act on cemeteries and burying the deceased of 26 June 1997, an unequivocal obligation to bury the deceased "without discrimination" in denominational cemeteries in towns and cities without municipal cemeteries was introduced.[50] A cemetery manager, hence, was no longer authorised to deny burial of a deceased who bought a specific place in a given cemetery.[51] As aptly underlined by Artur Mezglewski, despite the principle of inviolability of cemeteries guaranteed in the Concordat,[52] there is no question of excluding Catholic cemeteries "from the jurisdiction of state authorities."[53]

It is assumed that the meaning of the so-called right to a grave also covers the right to funeral celebrations.[54] Therefore, this should be understood as the right to a burial compliant with the beliefs pursuant to the Act of 17 May 1989 on guarantees of the freedom of conscience and religion.[55] Therefore, the Polish state is a guarantor of the right to a burial.[56] In the scope of a specific place of burial in a cemetery, in Polish civil law, the so-called right to a grave is distinguished, which is the right of a substantive character, however, only until the deceased's burial in a given place.[57] In the case of multi-family graves, the right to a specific grave which acquires (together with a burial of the first deceased) the characteristics of a non-substantive right, may constitute a significant source of judicial conflicts *pro futuro*.[58]

49 Article 8 § 2 of the Act on cemeteries in its original wording.

50 Pietrzak, M., *Prawo wyznaniowe*, Warszawa 2013, p. 291.

51 Ibidem, pp. 290–291.

52 The Concordat between the Holy See and the Republic of Poland signed in Warsaw on 28 July 1993, Dz.U. (Journal of Laws) 1998, No. 51, item 318.

53 Mezglewski, A., *Posiadanie cmentarzy*, in: Mezglewski, A. et al., *Prawo wyznaniowe*, Warszawa 2011, pp. 215–218.

54 Ibidem, p. 217.

55 Consolidated text: Dz.U. (Journal of Laws) 2017, item 1153.

56 Mezglewski, A., op. cit., p. 218.

57 See: Rudnicki, S., *Prawo do grobu. Zagadnienia cywilistyczne*, Kraków 1999.

58 It is not difficult to imagine litigation concerning violation of personal interests in a form of worshipping the memory of the deceased of a family member of the deceased, when in a given grave other deceased, promoting decidedly different axiological values (including calling to commit suicidal acts), were buried.

Any discriminatory practices of denominational cemetery managers in the scope of the right to a grave should be considered in the binding legal status as illegal. The illegal discrimination in the scope of the purchased place of burial can result in civil law liability with regard to the relatives of the deceased pursuant to Article 23 and Article 24 of the Civil Code.[59] It is, in fact, commonly accepted by civil law scholars and commentators and in judicial decisions that the protection of personal interests of the deceased is vested in their relatives.[60]

Illegal disruption of the burial of the deceased who wished to have their secular funeral organised can also constitute possible grounds for prosecuting the denominational cemetery's administrator pursuant to Article 195 section 2 of the Criminal Code.[61] Unfortunately, incidents infringing the above provisions continue to happen in Poland (e.g. closing the pre-burial house in the cemetery, "refusal" to bury the deceased in the denominational cemetery wrongly identified with the refusal to conduct an ecclesiastical funeral).

Despite explicit indications of the legislator and judicial decisions, there are also cases of illegal secular burials or burials of clergymen outside the premises of cemeteries.[62]

It should be underlined that while the Canon law provisions in the scope of the cemetery law had to be adjusted to the requirements of the Polish law on an on-going basis, the regulations regarding the Catholic funeral remained under the exclusive jurisdiction of the ecclesiastical legislator. The binding Code of Canon Law promulgated by John Paul II no longer includes *expressis verbis* the ban on conducting a funeral for suicides[63] however in canon 1184 section 3 of CIC/1983 it refers to the general clause of "manifest sinners." The issue of allocation to a category of the persons deprived of the Catholic funeral occurs in canon provisions of the particular law (e.g. statues of diocesan synods). The general particular law allows conducting an ecclesiastical funeral for a suicide on the condition that they did not promote ostentatiously the idea of suicide during their lifetime. Therefore, the deceased as a result of an assisted suicide and expressing voluntary consent to undergo euthanasia remain deprived of a funeral. It is worth underlining that in the case of a refusal of an ecclesiastical funeral, the issue of possibly causing

59 Consolidated text: Dz.U. (Journal of Laws) 2019, item 1145, as amended.

60 See: Judgement of the Supreme Court of 12 July 1968, I CR 252/68, OSNCP 1970, item 18. See: Bosek, L., *Cywilnoprawny status zwłok ludzkich*, in: Bosek, L. (ed.), *System prawa medycznego. Tom 1. Instytucje prawa medycznego*, Warszawa 2018, pp. 603–626.

61 Consolidated text: Dz.U. (Journal of Laws) 2019, item 1950.

62 Judgement of the Supreme Administrative Court of 19 May 1997, SA/Ka 1717/95, LEX No. 31331.

63 *Codex Iuris Canonici auctoritate Ioannis Pauli pp. II promulgatus*, AAS 75 (1983), entered into force on 27 November 1983.

outrage among the worshipers in the case of a public nature of the suicide is given a significant importance.[64] However, contemporary Canon law no longer denies ecclesiastical funerals to persons who were cremated if they did not undergo cremation against Christian notions.

Thus, the thesis on the significant evolution of ecclesiastical funeral law towards liberalisation of the old, strict canons of the previous Code can be assumed.

Conlusion

The evolution of Polish law and Canon law with regard to the right of suicides in the scope of the right to burial and funeral exemplifies two meaningful phenomena that occurred in two legal systems. On the one hand, the gradually growing role of state legislation is underlined, which only as of the turn of the 18th and 19th centuries started expanding towards regulating the issues regarding the cemetery law that for ages had remained almost the exclusive domain of the internal law of religious associations. On the other hand, the significant evolution of the provisions of the ecclesiastical legislation in the scope of liberalisation of the funeral law of the Catholic Church is invaluable. Not incidentally, apart from suicides (although with significant reservations), the right to the Catholic funeral was also granted pursuant to the modernised Canon law to such categories of the deceased as children dead before baptism or persons who decided to be cremated after death. This indicates the post-Synod changes to the Canon law that were confirmed in the Code of Canon Law promulgated by John Paul II in 1983 that does not include many strict regulations of its predecessor of 1917. Thus, the aforementioned changes should be assessed positively and the hope *pro futuro* should be expressed that despite the cases of not adhering to the binding legal regulations, they will constitute fundamental standards in practice preventing from funeral, "discrimination" of suicides in Poland.

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CITATION

KAŹMIERSKI, P., *Evolution of the suicides' right to funeral and burial in Canon Law and Polish Law*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 49–60, DOI: 10.18276/ais.2020.29-04.

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29), 61–71
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-05

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Constructivism as a chance to break deadlock in interdisciplinary research combining international law and international relations

Abstract

The purpose of this work is to prove that the theory of constructivism can be an escape from the trap of the constant struggle for influence, which now includes interdisciplinary research combining international law and international relations. For this purpose, the work is divided into three sections. In the first one, the author briefly presents the genesis of interdisciplinary research on international law and international relations. In the second part, the sceptical approach of international law researchers towards combined interdisciplinary research is presented. Also in this section, the theory of constructivism is characterised as a potential area for mutual cooperation between international law and international relations. In the final part, based on the relationship between international humanitarian law and the features of modern weapons, the author tries to prove that the theory of constructivism is perfectly suited to the analysis of contemporary relations between international law and the policies of nations on the international stage.

Keywords: constructivism, interdisciplinary research, international humanitarian law, international relations, modern weapons

Introduction

In Jan Klabbers' opinion, interdisciplinary research boils down to a dispute between international law (IL) and international relations (IR):

interdisciplinary scholarship is always, and inevitably, about subjection. Interdisciplinary scholarship is, more often than not, about imposing the vocabulary, methods, theories, and idiosyncrasies of discipline A on the work of discipline B. Interdisciplinary scholarship, in a word, is about power, and when it comes to links between international legal scholarship and international relations scholarship, the power balance tilts strongly in favour of the latter.[1]

This article is an attempt to prove that Klabbers' designation of the interdisciplinarity debate does not undermine the sense of interdisciplinary research at all, but rather identifies an obstacle which hindered the development of mutual cooperation between these two scientific disciplines. In the author's opinion, constructivism is the only effective way to break this stagnation. To this end, the author analyses theories of constructivism in terms of its usefulness in interdisciplinary research.

Interdisciplinarity of IL and IR: genesis of cooperation between these disciplines

The first interaction between the disciplines of IL and IR took place after the First World War, when IR was first recognised as a separate academic discipline. At the beginning, representatives of these two disciplines cooperated closely, not only in a purely academic context, but also practically, in the field of international politics (which resulted in the creation of the League of Nations, for example).[2] As a result of World War II, the scholarship of realism gained significance. It rejected the idealistic assumptions of IL's and IR's cooperation by emphasising that the norms of IL have no real significance for IR, which in reality are shaped only by the principled interests of states.[3]

The so-called "New Haven School" undermined the assumptions of realists by emphasising the important role of IL as a carrier of certain ideas. In the studies of

1 Klabbers, J., *The bridge crack'd: a critical look at interdisciplinary relations*, "International Relations" 2009, No. 23(1), p. 120, DOI: 10.1177/004711780810061 (accessed 15.11.2019).

2 Dunoff, J. and Pollack, M., *International law and international relations: introducing an interdisciplinary dialogue*, New York 2012, pp. 4–6.

3 Slaughter, A., *International law and international relations theory: a dual agenda*, "American Journal of International Law" 1993, No. 87(2). For more on the role of IL in the scholarship of realism see the second part of the article.

Myres McDougal and Harold Lasswell, although IL is politicised by nature, it plays a vital role in promoting human dignity. In turn, one of McDougal's students, Richard Falk, pointed out that IL should not promote higher values, but rather the needs and interests of the global society. Falk believed that in the era of a permanent threat of nuclear annihilation, it is in the interest of humanity to maintain stability of the global security system, and thus IL should be subordinated to this goal.[4]

IR scholars have also tried to create a theoretical framework for interdisciplinary research which would link IL with IR. For example, Anne-Marie Slaughter, in her work *International law and international relations theory: a dual agenda*, comprehensively analyses the issue of interdisciplinarity, and emphasises that cooperation between IR and IL should be natural because both disciplines occupy the same conceptual space. She also pointed to two theories of IR which in her opinion ought to be the starting point for the future cooperation of the two disciplines: liberal theory and institutional theory. Nevertheless, Slaughter ultimately emphasises that the theory which can best be used to build interdisciplinary research is a liberal theory. In her opinion, the liberal theory appreciates the role of IL as a factor which harmonises relations between states.[5] In turn, another concept developed by the IR scholarship – constructivism, which perceives IL as the normative backbone of IR – is in the author's opinion the only effective way to avoid the fight for influence between IL and IR. A detailed description of constructivism, as well as an explanation of its key importance for the potential development of interdisciplinary research, will be presented in the second part of the article.

Constructivism as an opportunity to overcome the deadlock in interdisciplinary research

In this section, the interdisciplinary nature of IR and IL research as a dispute over influences will be outlined. Then, the theory of constructivism will be presented as the most sensible way out of this dispute and as proof that interdisciplinary cooperation between IL and IR is possible.

Marginalisation of the role of IL according to IR scholarship

As the basis of the dispute between IL and IR, Klabbers considers the perception of interdisciplinarity from the perspective of cooperation between IL and the realism

4 Dunoff, J. and Pollack M., op. cit., pp. 5–10.

5 Slaughter, A., op. cit.

theory of IR.[6] The realism theory of IR assumes that IL does not play any significant role in international relations. The realists believe in the existence of an anarchic system in relations between states, in which there are constant clashes caused by their different interests. This theory emphasises that states refer to IL only when it coincides with their particular political interests.[7] In Klabbers' opinion, the juxtaposition of IL with realism results from the need for lawyers to prove the usefulness and importance of IL: "If a lawyer can overcome a realist objection, she can overcome any objection."[8] He also emphasises that interdisciplinary cooperation of IL with the theory of realism increases its importance in the eyes of the international leaders who perceive IL only as a tool for implementing their policy: "Law will only be taken seriously if statesmen take it seriously, and they won't do so unless the law is made attractive to them, as something they can use as they see fit."[9]

Klabbers discusses Slaughter's concept of "the same conceptual space" which IR and IL share. In his text, *The bridge crack'd: a critical look at interdisciplinary relations*, he emphasised that sharing the same conceptual space not only means describing the same phenomena, but also "ask[ing] a similar question and employ[ing] similar methodologies."[10] He pointed out that using the conceptual tools of IR in IL research would be pointless because IR and IL have nothing in common: "the two disciplines have as much in common as the musicologist studying Mozart's string quartets, and the gentleman at the ticket-counter trying to sell tickets to next month's performance of Die Zauberflöte: both somehow have to do with Mozart, but that is about it."[11] Klabbers also briefly presented his opinion about interdisciplinary teaching by pointing out that although academics ought to have some general knowledge about neighbouring scientific disciplines, they should specialise in only one academic field.[12]

The need to fight for the preservation of the subjectivity of IL in relation to the realism theory, in which states are guided solely by their own interests, is also stressed by M. Koskenniemi: "The fight for an international Rule of Law is a fight against politics, understood as a matter of furthering subjective desires and leading

6 Klabbers, J., *The relative autonomy of international law or the forgotten politics of interdisciplinarity*, "Journal of International Law & International Relations" 2004, No. 1(35), p. 38.

7 Klabbers, J., *International law*, Cambridge 2017, p. 16.

8 Klabbers, J., *The relative autonomy…*, p. 38.

9 Ibidem, pp. 37–38.

10 Klabbers, J., *The bridge crack'd…*, p. 120.

11 Ibidem, p. 120.

12 Klabbers, J., *The relative autonomy…*, p. 36.

into an international anarchy."[13] According to Koskenniemi, other theories of IR, such as institutionalism and liberalism, which could hypothetically be a foundation for interdisciplinary research, also violate the autonomy of IL by calling for it to be made informal. In his opinion, modern IR perceives the formal requirements of IL as an "obstacle to effective action." The call to deformalise both substantive and procedural IL aims to increase its practical utility, even at the expense of its credibility, "in other words, if the «dual agenda» were only about what works, it would achieve a thoroughly function-dependent, non-autonomous law, an ingenious justification for a world Leviathan."[14] Concerns about the loss of autonomy by IL due to close cooperation with IR have also been raised by other researchers of IL.[15]

Constructivism as an opportunity to break the deadlock

Despite the strong criticism of the interdisciplinary cooperation between IL and IR by international lawyers, in the author's opinion there is a field of mutual cooperation and it is constituted by the constructive theory of IR. It is constructivism that "one of the most ardent critics of interdisciplinarity research"[16] – Klabbers – points out as the only acceptable one in combined research on IL and IR, which in itself prompts a closer look at this concept as the basis for interdisciplinary research.[17]

Constructivism was born as a theory in opposition to the theories of neorealism and neoliberalism in IR, and by some scholars it is sometimes considered to be the third "great theory" of contemporary international relations.[18] At the root of neorealism and neoliberalism is the joint assumption that both the actions of states and the rationality of their decisions are uniform. Both neorealism and neoliberalism assume that the attitudes of states can be examined in advance, and a certain pattern of potential behaviour can be created. Constructivism, in turn, holds that

13 Koskenniemi, M., *The politics of international law*, "European Journal of International Law" 1990, No. 20(1), p. 5.

14 Koskenniemi M., *The gentle civilizer of nations: the rise and fall of international law 1870–1960*, Cambridge 2009, pp. 486–490.

15 See e.g.: Byers, M., *Taking the law out of international law: a critique of the iterative perspective*, "Harvard International Law Journal" 1997, No. 38(1).

16 Aalberts, T. and Venzke, I., *Moving beyond interdisciplinary turf wars*, in: d'Aspremont, J., et al. (eds.), *International law as a profession*, Cambridge 2017, p. 287.

17 "That is not to say that there is no common ground whatsoever: constructivist work in international relations (…) makes that some common ground exists" – Klabbers, J., *The bridge crack'd…*, p. 121.

18 Klabbers, J., Review of *The status of law in world society: meditations on the role and rule of law* by Friedrich Kratochwil, "European Journal of International Law" 2015, No. 25(4).

the social world is not just a set of certain permanent factors, but that it is created by the attitudes and actions of its participants.[19] Constructivism is sometimes considered an idealistic concept because it assumes that in a particular social reality (in this case in the area of international politics) the behaviour of entities is shaped by values and ideas.[20]

As part of the theory of constructivism, we can distinguish its specific subtypes. Jeffrey Checkel, in his article *Constructivist approaches to European integration*, points to three main currents in the research on the theory of constructivism. "Interpretative constructivism," which is particularly popular in Europe, focusses on the impact of various types of language techniques, on the identity of societies and, consequently, on the attitudes of states. As part of the research methodology, this subtype of constructivism focusses on written sources that allow us to reconstruct the identities of a given society and the attitude of the state in a given period. Also, researchers of "critical/radical constructivism" attach great importance to language, which forms the basis of their analysis, as in the case of interpretative constructivism. However, they add the impact of norms on the attitudes of individual countries.[21] In the context of radical constructivism, an interesting supplement to research on linguistic techniques and the impact of norms on society is the position of Siegfried Schmidt, who extends the field of interest of radical constructivism to include the mass media.[22] Relationships between norms and the attitudes of states in the international arena are the foundation of "conventional constructivism," the most common research methodology within the framework of constructivism. In this article, the possibility of interdisciplinary rapprochement will be studied based on conventional constructivism.[23]

Nicholas Onuf and Friedrich Kratochwil should be included among the creators of the theory of constructivism; they highlighted the key role of IL in creating "normative structures."[24] Normative structures, by interacting with material factors (e.g. the geopolitical situation or changing economic conditions) and ideological factors

19 Widłak, T., *Prawo a konstruktywizm w teorii stosunków międzynarodowych – możliwości interdyscyplinarnego zbliżenia*, in: Bekrycht, T. et al. (eds.), *Integracja zewnętrzna i wewnętrzna nauk prawnych*, Łódź 2014, pp. 55–56.

20 Czaputowicz, J., *Teorie stosunków międzynarodowych*, Warszawa 2008, p. 294.

21 Checkel, J., *Constructivist approaches to European integration*, Oslo 2005, pp. 4–7.

22 Hug, T., *Constructivism and media socialization concepts and perspectives in German-speaking countries*, "Constructivist Foundations" 2009, No. 2(4), p. 76.

23 Checkel, J., *Constructivist approaches*…, pp. 5–6.

24 See: Onuf, N., *World of our making: rules and rule in social theory and international relations*, London 2012; Kratochwil, F., *Rules, norms and decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs*, Cambridge 2011.

(the interests and identity of a given state), shape international policy.[25] Jutta Brunnee and Stephen Toope, in their book *Legitimacy and legality in international law: an international account*, which is based on the theory of constructivism, pointed out that the validity of these norms depend on reciprocity in their observance, and not, as in the case of national law, on the institution of coercion. Drawing attention to "reciprocity" as key to the functioning of IL highlights the element of interaction between states within IL.[26] At the root of the theory of constructivism is also a new look at the institution of anarchy in interstate relations presented by Alexander Wendt in the article *Anarchy is what states make of it: the social construction of power politics*. Wendt undermined the current concept of anarchy seen only as a system of competition between states, stating that the original relationship between them can be based not solely on aggression, but instead on cooperation or indifference.[27]

In the constructive theory of IR, two characteristic aspects allow us to believe that this particular concept can overcome the reluctance of international lawyers to carry out interdisciplinary research combining IL and IR. The first and at the same time key issue is the fact that the theory of constructivism properly appreciates the vital role of norms in shaping the attitude of states in the international arena. The state in the theory of constructivism is both the addressee and the creator of the norm. At the same time, by creating such norms it builds its own identity and shapes its interests, which affects its attitude in the international arena. This theory, in contrast to the liberal theory, allows us to see the role of the norm not only under conditions of peace and mutual cooperation, but also in the case of a conflict between states.[28] An illustration of the impact of international norms on the attitude of states in an armed conflict is the desire of the intervening states to legalise the act of aggression. One example would be the attempt by American diplomats to legitimise the United States' military intervention in Iraq in 2003. Despite the fact that the intervention did not obtain the mandate of the UN Security Council, and that the United States ultimately committed an unlawful act of aggression, a number of attempts to legalise the intervention itself are proof of recognition, even by the strongest states, of the important role of norms in global politics.[29]

25 Widłak, T., op. cit, pp. 56–57.

26 Brunnee, J. and Toope, S., *Legitimacy and legality in international law: an international account*, Cambridge 2010, pp. 132–137.

27 Curanović, A., *Konstruktywizm*, in: Zięba, R. et al. (eds.), *Teorie i podejścia badawcze w nauce o stosunkach międzynarodowych*, Warszawa 2015, pp. 107–108.

28 Widłak, T., op. cit., pp. 64–65.

29 Czaputowicz, J., op. cit., p. 317.

The second issue is the recognition by constructivism that the structures of IL have a normative dimension and are not determined by coercion. The IL system and its participants interact with each other.[30] An example of this interaction is international humanitarian law (IHL), which initially reflected the political will of the states that had created it. However, it currently affects the specific attitudes of states in the international arena. For example, over the past few decades the way weapons are constructed has changed significantly. Weapons are created with the aim of being as precise as possible, thereby reducing the amount of collateral damage when used.[31]

The relationship between humanitarian law and the development of new weapons as a practical example of the constructivist theory

In this final part of the paper, the author, by using the relationship between IHL and the development of new weapons as an example, will try to prove that the constructivist theory of IR describes the interaction of state policy and IL in a very apt way.

As presented above, a characteristic feature of constructivism is to emphasise that the state as a subject of IR creates a certain legal norm through a political decision. However, such a legal norm in the long run also begins to affect the policy and the identity or behaviour of the country on the international stage. An example of such a "feedback loop" could be IHL in relation to the arms policy of states. A characteristic feature of IHL is the fact that its observance almost fully depends on the goodwill of states. Thus, from the point of view of, for example, the theory of realism, IHL should not have any impact on actual state policy.[32]

However, by using the example of modern weapons development, it can be seen that specific IHL norms aimed at removing from the battlefield types of weapons that cause unnecessary suffering or additional casualties among civilians actually affect the attitudes of states. The key provisions for restricting the use of and research on weapons that can "cause superfluous injury or unnecessary suffering"[33]

30 Armstrong, D. et al., *International law and international relations*, Cambridge 2007, pp. 100–105.

31 The relationship between humanitarian law and the characteristics of modern weapons is presented in the last part of the paper.

32 Kolb, R., *Advanced introduction to international humanitarian law*, Cheltenham 2014, p. 187.

33 Article 35: "1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited. 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Article 35 of the

were included in Part III, "Methods and means of warfare combatant and prisoner-of-war status" of the Additional Protocol I to the Geneva Conventions signed in 1977.[34] Behind the creation of this regulation was a political decision of the states based on the Vietnam War, among others. During this conflict, the USA used weapons characterised by a lack of precision which resulted in a large number of civilian casualties and unnecessary suffering (i.e. napalm).[35] In hindsight, it can be assessed that the impact of legal norms resulting from specific articles (e.g. Articles 35 and 36[36]) of the Additional Protocol I on research and then the use of weapons in the modern battlefield is indisputable. One illustration is the development of weapons focussed on the surgical impact of "Weapons of Precise Destruction," which reduce the number of casualties by reducing the area of attack.[37]

The policy of states, as well as the awareness of the need to create as precise weapons as possible, was changed by a norm of IL. Thus, the assumption of constructivism theory that the states create certain norms which in the long run shape the states' policy has been given practical reflection. Of course, the impact of this particular legal norm on the policy of states participating in various armed conflicts in recent decades has not been the same. Nevertheless, the theory of constructivism also takes this into account, emphasising that ideological factors, such as a political regime or economic situation, also influence the application of some norms.[38]

Conclusions

Interdisciplinarity in combined studies of IL and IR has never been as straightforward as it might seem at first glance. In the author's opinion, the main obstacle to establishing close, interdisciplinary cooperation was the marginalisation of IL by the theory of realism. Despite many attempts by researchers representing other

Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf (accessed 24.11.2019).

34 Ibidem.

35 Kolb, R., op. cit., p. 16.

36 Article 36: "In the study, the development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party". Article 36 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf (accessed 24.11.2019).

37 For more on the specific technical solutions that reduce the number of bystanders, see Schmitt, M., *Precision attack and international humanitarian law*, "International Review of the Red Cross" 2005, No. 87, p. 859.

38 Checkel, J., *The constructivist turn in international relations theory*, Cambridge 1998, pp. 416–418.

trends in IR, it has not been possible to create a concept of interdisciplinary research that would inspire the trust of many prominent researchers of IL. The relatively new IR theory, constructivism, which has appreciated the impact of IL on actors of the international system, represents a hope for change. On the one hand, constructivism emphasises the impact of politics on IL, which manifests itself in its establishment, and on the other hand it recognises that legal norms affect the behaviour of states on the international stage. One example of this relationship is the development of modern military systems and weapons in a manner compatible with IHL, i.e. those that enable a precise strike and thus reduce the amount of collateral damage. The establishment of IHL regulations was a political act, while its compliance, despite the lack of top-down constraint, shows that legal norms have an elementary impact on the tradition, attitude, and policy of states.

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CITATION

KOŁODZIEJ, T., *Constructivism as a chance to break deadlock in interdisciplinary research combining international law and international relations*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 61–71, DOI: 10.18276/ais.2020.29-05.

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29), 73–85
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-06

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The influence of the Act of 22 March 2018 on bailiffs on amendments to the Code of Civil Procedure regarding execution from remuneration for work

Abstract

The aim of this paper is to present the general issue of execution from remuneration for work and, in particular, the impact that the Act of 22 March 2018 on bailiffs had on changes in the Code of Civil Procedure. The paper uses the methods of critical analysis of sources and systematic review. So far, there has been no doubt that individuals employed under civil-law contracts are in a much worse situation than those employed under employment contracts. For this reason, the legislature wanted to protect them from execution, hence the introduction of a means to make their situation equal in Article 833 § 2^1 of the Code of Civil Procedure. Despite the good intentions of the legislature, this provision still raises doubts over the wording: 'ensuring livelihood'. For this reason, the application of new provisions that limit the execution of recurring benefits aimed at ensuring subsistence – other than remuneration for work – requires appropriate action.

Keywords: execution, remuneration, labour, civil procedure code, bailiff

Introduction

A frequently used method of executing a judgement is to withhold remuneration for work that has been done. This method ensures the effective satisfaction of the creditor, as remuneration for work is paid to debtors regularly. Execution from a claim for remuneration for work has, however, been abstracted by the legislature and designated as an independent method of execution. The provisions on execution from remuneration for work contained in the Code of Civil Procedure thus apply accordingly to other methods of execution, and can therefore be considered exemplary. Pursuant to Article 893 of the Code of Civil Procedure, Articles 885, 887, and 888 apply to the effects of an attachment of a bank account. The same applies to Article 899 of the Code of Civil Procedure, because according to it, when seizing a receivable secured by a surety, pledge, or registered pledge, a judicial officer, at the request of the creditor, also notifies the guarantor or the owner of the asset encumbered by the pledge that the benefit of the secured receivable cannot be paid to the debtor. Article 882 § 1.2 of the Code of Civil Procedure – which enacts the obligation to notify the judicial officer of any changes in the state of the debt – applies to this execution. Article 900 § 2 of the Code of Civil Procedure also refers to the appropriate application of Article 883 § 2 in the case of execution from sums payable periodically, including future payments. In turn, Article 902 provides that the provisions on execution from remuneration for work under Articles 885, 887, and 888 apply correspondingly to the consequences of attachment of a receivable debt. Article 886 applies *mutatis mutandis* to the consequences of failure to comply with a judicial officer's summons and obligations resulting from the seizure.

The title of Part Three, Title II, Chapter II of the Code of Civil Procedure – 'remuneration for work' – and the provisions of that Chapter indicate that it refers to a specific type of debt. In the Code of Civil Procedure of 1930, execution of remuneration for work was not provided for as a separate method of execution at all. Execution proceedings were then carried out in accordance with the provisions on executing monetary claims and other property rights. The remuneration for work was therefore regulated on a par with the debtor's other claims. It was only in the Civil Procedure Code of 1964 that remuneration for work was described as an independent method of execution.

Remuneration for commissioned work

The provision in the second sentence of Article 881 § 2 of the Code of Civil Procedure, which lists the exemplary components of pay for work, indicates pay for work to be performed. The linguistic interpretation and the phrase 'remuneration for

commissioned work' allow us to assume that the Code of Civil Procedure in this part of the provision refers to civil-law relationships, and above all to the notion of commission. However, applying the interpretation by analogy, the 'commissioned work' should also refer to other civil-law contracts, e.g. contracts for specific work. Andrzej Marciniak, following the views of Michał Seweryński, assumes that recurring payments which – although they go beyond remuneration understood in this way, and are subject to execution from remuneration for work (e.g. remuneration for commissioned work) under the Code of Civil Procedure Article 881 § 2 – in light of the provisions restricting execution, are another type of recurring payments whose purpose is to ensure maintenance (payments referred to in Code of Civil Procedure Article 833 § 2).

It should be pointed out that, until the end of 2018, the situation of employees regarding deductions had been better than that of contractors, although some protection against deductions had also been available to contractors. In Poland, more than 1.5 million people are employed under contracts of mandate. Indeed, for a large part of them the remuneration they receive under contracts of mandate is their only source of income. On 1 January 2019, protection against deductions of remuneration received by persons employed under civil-law contracts came into effect. Therefore, in accordance with the applicable regulations, the enforcement of the remuneration is limited both in the case of individuals employed under employment contracts and those performing work on the basis of civil-law contracts. Currently, contractors benefit from the protection of remuneration against excessive deductions on similar terms as employees. It should be noted, however, that the scope of this protection is not the same as in the case of employees, because the remuneration of contractors and other natural persons who are debtors is subject to protection as long as these are periodic payments that provide them with a livelihood or are their only source of income. Moreover, it should be pointed out that Article 833 § 1 of the Code of Civil Procedure does not regulate on its own the issue of excluding remuneration for work from enforcement, but refers in this respect to the Labour Code. Therefore, reference to the concept of remuneration for work as accepted under labour law is justified.

In labour law, the notion of 'remuneration for work' is understood as a financial and claim-like payment originating from the employment relationship, paid by an employer to an employee in return for work performed by him/her according to its type, quantity, and quality.[1] However, in the provisions of the Code of Civil Procedure, the notion of 'remuneration for work' is defined separately in order

1 Szubert, W., *Zarys prawa pracy*, Warszawa 1976, p. 236; Seweryński, M., *Wynagrodzenie za pracę. Pojęcie, regulacja i ustalanie*, Warszawa 1981, p. 100.

to determine the subject matter of enforcement from this remuneration. Pursuant to Article 881 § 2, the subject of enforcement of remuneration for work is, in particular, periodic remuneration for work, remuneration for commissioned work, awards and bonuses to which the debtor (employee) is entitled for the period of employment, profit relating to the employment relationship, participation in the company fund, and any other funds relating to the employment relationship. The content of this provision engenders two general remarks.

First of all, it should be noted that the components of employee income listed therein are exemplary, as explicitly indicated by the phrase 'in particular'. Furthermore, the provision refers to the concept of remuneration for work not only as income from work performed in the context of the employment relationship, but also to income which an employee receives from his/her employer in connection with the employment relationship.

Therefore, it may be argued that the object of enforcement of remuneration within the meaning of Article 881 § 2 is any income that an employee receives from his/her employer in connection with their employment relationship. This applies both to remuneration for work within the meaning of the labour law[2] (Articles 78–98 of the Labour Code) and other benefits owed to the debtor by the employer, in connection with both the employment relationship (e.g. awards) and other legal relationships (e.g. remuneration for work commissioned on the basis of a contract of mandate or contract for work).[3]

Amendments to the Act of 22 March 2018 on bailiffs[4]

On 1 January 2019, the amended Act of 29 August 1997 on bailiffs and judicial execution came into effect. In the current legal status there are two separate acts: the Act of 22 March 2018 on bailiffs and the Act of 28 February 2018 on bailiff costs.[5] The new laws introduced many changes to the system, as well as to the rules of service for judicial officers.

The content of Article 1(1) of the Act on bailiffs indicates that judicial enforcement is a task of the state and defines how this task should be performed. It also lays down the basis for further systemic solutions, redefining the purpose and scope of administrative supervision of bailiffs, the link with judicial supervision,

2 Act of 26 June 1974 – Labour Code, Dz.U. (Journal of Laws) of 1974 no. 24, item 141, as amended.

3 Marciniak, A., *Wprowadzenie do działu II*, in: Marciniak, A. et al. (eds.), *Kodeks postępowania cywilnego. Tom III. Komentarz. Art. 730–1088*, Warszawa 2015, pp. 565–567.

4 Act of 22 March 2018 on bailiffs, Dz.U. (Journal of Laws) of 2018, item 771, as amended.

5 Act of 28 February 2018 on bailiff costs, Dz.U. (Journal of Laws) of 2018, item 770.

the functions and tasks of bailiffs' self-governing bodies, and the training of future bailiffs. The new Act does not cover enforcement fees (bailiff costs), which are dealt with in the separate Act on bailiff costs.[6]

The Act on bailiffs also introduced changes to the Code of Civil Procedure, which are covered by Article 833, among others. Currently, §§1[1] and 2 read as follows:

§ 1[1]. The provisions of Article 87 and Article 87[1] of the Labour Code apply respectively to unemployment benefits, activation allowances, scholarships, and training allowances paid under the Act of 20 April 2004 on employment promotion and labour market institutions.[7]

§ 2. The provisions of Article 87 and Article 87[1] of the Labour Code shall apply respectively to the salaries of MPs and senators, the dues of members of agricultural production cooperatives and their household members for work in a cooperative, and the salaries of members of labour cooperatives.'

In addition, the following §2[1] has been added: The provisions of Article 87 and Article 87[1] of the Labour Code shall apply respectively to all recurring benefits whose purpose is to provide a livelihood or which constitute the sole source of income for a debtor who is a natural person'. Likewise, § 3 has the following wording: 'The restrictions provided for in paragraphs 2 and 2[1] shall not apply to the claims of members of agricultural production cooperatives on account of their share of the cooperative's revenue accruing to them from contributions to the cooperative.'

The provisions of Article 833 §§ 2 and 2[1] of the Code of Civil Procedure contain a limitation on enforcement related to recurring payments whose purpose is to ensure subsistence, other than remuneration for work. They are subject to enforcement to the extent specified in the provisions of Articles 87 and 87[1] of the Code of Civil Procedure, as respectively applied.[8]

The previous Article 833 § 2 of the Code of Civil Procedure raised doubts as to the interpretation of whether the remuneration received by a debtor employed under a civil-law contract may be considered a recurring payment aimed at ensuring maintenance. There is no doubt that people employed under civil-law contracts, although they constitute a considerable percentage of the workforce, are still in a much worse situation than people employed under employment contracts. Thus,

6 Reiwer, R., *Ustawa o komornikach sądowych. Komentarz*, in: Reiwer, R. (ed.), *Ustawa o komornikach sądowych. Ustawa o kosztach komorniczych. Komentarz*, Warszawa 2019, p. 4; Reiwer, R., *O potrzebie uchwalenia nowej ustawy o komornikach sądowych*, in: Marciniak, A. (ed.), *Założenia projektu nowej ustawy*, Sopot 2014, pp. 9–11.

7 Act of 20 April 2004 on employment promotion and labour market institutions, Dz.U. (Journal of Laws) of 2017, item 1065.

8 Wiśniewski, A., *Komentarz do art. 833 k.p.c*, in: Jankowski, J. (ed.), *Kodeks postępowania cywilnego. Tom II. Komentarz. Art. 730–1217*, Warszawa 2019, pp. 554–556.

in terms of ensuring their minimum subsistence and protection against enforcement, the legislature introduced § 2^1 in order to equate them unequivocally with individuals with the status of employees within the meaning of the Labour Code.[9] Despite the good intentions of the legislature, this provision still raises doubts about the phrase 'ensuring livelihood'. The editors of 'Rzeczpospolita' asked the Ministry of Justice to elucidate the meaning of the phrase 'ensuring livelihood'. Consequently, on 19 December 2018, the Ministry explained that:

'– the term should be understood in the same way as in the legislation in force until the end of 2018, with the proviso that this legislation expressly covers contractors as well;

– as regards the very concept of "assurance of livelihood," it should be pointed out that the position expressed in judicial case law is that this concept should be given a broad meaning and that the inclusion of a given payment in the group of payments in question depends solely on the determination of whether the payment is of a periodic (recurring) nature and fulfils the above-mentioned objective;

– recurring payments are entitlements paid to the debtor periodically at recurring intervals.'[10]

As regards the interpretation of the notion of 'ensuring maintenance', the judgment of the Appellate Court in Łódź – according to which 'there is no doubt that the recurring payments which are intended to ensure maintenance also include remuneration paid under civil-law contracts (such as lease agreements). Legal scholars and commentators emphasize that the concept of recurring payments whose purpose is to provide for maintenance should be given a broad meaning. The inclusion of a given payment in the group of payments depends solely on determining whether the payment is of a periodic (recurring) nature and whether it meets the purpose indicated above. Recurring payments are payments paid periodically to the debtor at recurring intervals.'[11]

It follows from the above that those cash payments which are recurring and which provide a livelihood or are the debtor's only source of income are eligible for deduction.

Therefore, the upper limit on deductions for income from civil-law contracts is as follows:

9 Justification of 24 May 2017 to the government act on bailiffs, http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1582 (accessed 22.06.2020).

10 Pigulski, M., *Zarobki zleceniobiorców silniej chronione od 2019 r.*, "Rzeczpospolita" 3.01.2019,, https://www.rp.pl/Kadry/301039989-Zarobki-zleceniobiorcow-silniej-chronione-od-2019-r.html (accessed 28.01.2020).

11 Judgement of the Appellate Court in Łódź of 13 February 2014, I ACa 1057/13, LEX no. 1438078.

– in the case of execution for maintenance, 3/5 of the salary,

– in the case of execution for other claims or deduction of cash advances, 1/2 of the salary, and

– when the deductions from various titles related to execution under the enforcement order for payment of claims other than maintenance and cash advances are combined, up to 1/2 of the salary, and up to 3/5 of the salary, including the deduction of maintenance claims.

As 'Rzeczpospolita' rightly pointed out,[12] the amended provisions do not result from the amended legislation:

'– whether, in order to determine the free amount, when the contractor's remuneration is of a recurring nature and constitutes his/her only source of subsistence, the amount of the minimum remuneration for work applicable to employees (PLN 2,250 for full-time employment) or the minimum hourly rate for contractors (PLN 14.70) multiplied by the number of hours spent executing the order in a given month should be adopted;

– how to determine the free amount in the case of a merger with an order'.

In its explanations of 19 December 2018 submitted to the editorial office of 'Rzeczpospolita', the Ministry of Justice took the position that

'– in relation to persons performing work on the basis of a contract of mandate, a free amount must be applied in the amount of the statutory minimum wage currently payable to employees (provided, of course, that in the given circumstances the conditions of Article 833 § 2^1 of the Code of Civil Procedure are met);

– on the basis of the legal status in force until the end of 2018, opinions are expressed that by analogy, it should be assumed that in the case of a contractor, the free amounts are reduced as in the case of part-time employment – in accordance with Article 87^1 § 2 of the Labour Code;[13]

– in the case of working for one employer at the same time on the basis of an employment contract and a contract of mandate, the bailiff's determination of the amount exempt from deductions should take into account the total income obtained from both sources (this issue, in the absence of an explicit regulation, will be clarified only by the court's jurisprudence); the department has confirmed by telephone that a similar principle applies to merging jobs and orders from different entities.'

12 Ibidem.

13 The Ministry, however, reserved the opinion that the development of judicial practice in this respect against the background of the amended provisions can only take place in connection with the examination of complaints against the action of a judicial bailiff.

An employer of contractors should know, if necessary, when the limit of deduction can be applied and the amount exempt from deduction, equal to the minimum wage for a given year. Therefore, it is possible to take this decision if the employer, having obtained from the bailiff the seizure of the contractor's claims, has knowledge that the remuneration transferred to the employee due to the contract of employment

– is of the nature of a payment paid periodically at recurring intervals, and
– its purpose is to provide a livelihood or it constitutes the sole source of income for the debtor, who is a natural person.

Undoubtedly, the application of the new rules limiting the enforcement of recurring payments intended to ensure subsistence, other than remuneration for work, requires appropriate retrospection.

First of all, it should be determined whether the contractor's claim enjoys protection against deduction, as the employing entity deducts from the claim of a debtor who is a natural person on the basis of a notification from a bailiff or administrative enforcement authority. As a rule, the notice does not explicitly mention the application or non-application of the provisions on protection against execution to a given claim. If a given claim meets the conditions for such protection, the debtor should file a request at the enforcement authority, as the enforcement authority considers each case individually. The basis for the application by an employer of contractors, of the limit of deduction and the amount exempt from deductions will be a letter from the enforcement authority in this case. It should then be determined whether the debtor is entitled to protection against deductions. If so, the limit of deduction and the amount exempt from deduction must be determined.

If a limit of deduction and a non-deductible amount should be applied to the debtor's claim according to the letter of the enforcement authority, the determination of these amounts depends on the type of relationship between the parties. The subject to social insurance contributions or taxation of, for example, the contract on which the work is based may vary. While a deduction should be made from the net amount of the remuneration actually due to the debtor, the determination of a non-deductible amount will, as in the case of employees, be independent of the remuneration to be paid.

Moreover, it should be remembered that in the event of an unjustified transfer of the entire remuneration due to the contractor by the principal to the bailiff, the debtor has the right to submit a request to limit the enforcement (Article 833 § 2^1 of the Code of Civil Procedure) in order to prove that the conditions justifying the proper application of the provisions of the Labour Code to the payment received by him under the contract of mandate are met.

Restrictions on judicial enforcement in selected EU countries

As it has already been described above, people employed under civil-law contracts are in a much worse situation than those employed under employment contracts. In order to protect them from enforcement, the legislature introduced § 2^1 into Article 833, containing a limitation of enforcement relating to recurring payments whose purpose is to ensure subsistence, other than remuneration for work. Similar solutions can also be found under the provisions of the civil procedure codes in force in Germany, France, Sweden, and Spain.

Compulsory enforcement in Germany[14] is regulated mainly by § 704 et seq. of the Code of Civil Procedure (*Zivilprozessordnung* [ZPO]) and by the Act on forced sales and receivership (*Gesetzüber die Zwangsversteigerung und Zwangsverwaltung* [ZVG]). 'The debtor's movable assets, claims, and other property rights and real property can be subject to enforcement. § 811 ZPO specifies the movable assets that cannot be attached; the aim is to allow the debtor and his/her household to retain the minimum that is essential for personal or professional use. Restrictions on attachment also apply to the debtor's earned income. § 850 et seq. ZPO provide for certain amounts that cannot be attached, as the debtor needs them to provide for his subsistence. Credit balances can be protected in an "account exempted from attachment" (*Pfändungsschutzkonto*, § 850k ZPO). Certain amounts exempt from attachment are held in these accounts irrespective of the origin of the credit balance.'[15] Thus, it is easy to see a similarity between the German 'minimum of subsistence' and the Polish 'ensuring maintenance.'

Further similarities can be seen in French law,[16] according to which a creditor can pursue a claim against all the debtor's assets; therefore, 'in principle, all assets belonging to the debtor' can be seized. There are specific rules depending on the type of such assets: claims (rent, remuneration, or funds accrued in a bank account), movable property of all kinds, immovable property and rights in rem, securities and rights attached to shares, vehicles (land vehicles, vessels, boats, or aircraft), copyright rights, sums of money deposited in a safe, etc. 'However, by way of exception, the law states that certain assets may not be attached. This is the case, in particular, for sums needed for maintenance; thus, for example, it is not possible to attach all of a person's earned income because that person has to keep a sum sufficient to meet his or her everyday needs. The amount of that sum is set

14 Official website of the European Union, https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-de-pl.do?member=1 (accessed 22.06.2020).

15 Ibidem.

16 Official website of the European Union, https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-fr-pl.do?member=1 (accessed 22.06.2020).

each year and takes into account the amount of earned income and the number of dependants [sic].'[17]

Swedish law,[18] like Polish law, uses the term 'amount necessary to maintain.' In order for property to be attached, certain conditions must be met. 'The property must belong to the debtor, be transferable, and have some monetary value. Attachment may be used to claim property of any kind. (…) Earnings, pensions, etc. may also be subject to attachment. Some property cannot be attached. This is the case with beneficial property. The rules on beneficial property generally apply only to natural persons. (…) Attachment of earnings may only apply over and above the amount that the debtor needs to maintain him/herself and his/her family.'[19]

While the Spanish Code of Civil Procedure[20] does not introduce terms such as 'minimum of subsistence' or 'ensuring maintenance', it does detail the extent of the restrictions on enforcement of remuneration for work and, moreover, 'salaries, wages, pensions, remuneration, or their equivalent not exceeding the amount of the minimum wage', which, in the author's view, can be considered recurring payments, which are explicitly referred to in the Polish Code of Civil Procedure. Interestingly, the regulations limiting enforcement apply to revenue from professional and commercial activities carried out on the basis of self-employment. With regard to the attachment of wages and pensions, the Code of Civil Procedure lays down, in Article 607, the following preclusions:

1. Salaries, wages, pensions, remuneration or their equivalent not exceeding the amount of the minimum wage (set annually by the government) are exempt from attachment.
2. Salaries, wages, remuneration or pensions above the minimum wage may be attached according to the scale below:

a) for the first additional amount up to the amount equivalent to twice the minimum wage, 30%;
b) for the additional amount up to the amount equivalent to three times the minimum wage, 50%;
c) for the additional amount up to the amount equivalent to four times the minimum wage, 60%;

17 Ibidem.

18 Official website of the European Union, https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-se-pl.do?member=1(accessed 22.06.2020).

19 Ibidem.

20 Official website of the European Union, https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-es-pl.do?member=1, (accessed 22.06.2020).

d) for the additional amount up to the amount equivalent to five times the minimum wage, 75%.
e) For any amount that exceeds the above amount, 90%.
3. If the party against whom enforcement is sought receives more than one salary or wage, all of them will be added together and the unattachable part deducted once only [sic!]. Unless separate estates are in place for the spouses, and proof of this is provided to the Clerk of Court, the spouses' salaries, wages and pensions, emoluments, or equivalent shall be combined.

If the party against whom enforcement is sought has dependants, the Clerk of Court may reduce percentage points laid down in points 1–4 of this Article by between 10 and 15 per cent. 5. If the salaries, wages, pensions, or remuneration were encumbered with permanent or temporary deductions of a public nature pursuant to tax or social security legislation, the net amount received by the judgment debtor after those deductions will be the amount used as the basis for determining the amount to be seized.

4. The previous paragraphs of this Article shall apply to revenue from professional and commercial activities carried out on a self-employed basis.
5. The amounts seized in accordance with this provision may be transferred directly to the party seeking enforcement, into an account previously designated by said party, if approval is granted by the Clerk of Court responsible for enforcing the seizure.'[21]

In the author's opinion, the examples presented above demonstrate a certain similarity among the European Union member states in terms of regulations concerning enforcement from remuneration for work, and in particular leaving debtors with the means necessary to support themselves and their families.

Conclusion

Execution from remuneration for work is one of the most common ways of enforcing a judgement. The correct application of the regulations governing it provides the creditor with an opportunity to obtain his or her claim, often in a relatively short time. The biggest problem can be simply discovering where the debtor is employed. The measure of the disclosure of assets (Article 913 et seq. of the Code of Civil Procedure), as well as the procedure introduced into the Code of Civil Procedure of ordering a bailiff to search for the debtor's assets for remuneration

21 Ibidem.

(Article 7971 of the Code of Civil Procedure) may be helpful in determining the place of a debtor's employment.

Furthermore, it should also be stated that not all of the payments included in the enforcement from remuneration for work will be subject to enforcement on the basis of the provisions relating to remuneration for work. It must also be underlined that the literal interpretation of Article 833 § 1 of the Code of Civil Procedure discusses the remuneration referred to in the Labour Code. In the phrase 'remuneration from the employment relationship', this provision narrows down the payments referred to in the remuneration for work that is enforceable, under Article 881 § 2 sentence 2 of the Code of Civil Procedure, to the remuneration for work in the strict sense of the Labour Code. Andrzej Marciniak presented a similar position in the literature on enforcement proceedings.[22] The jurisprudence of the Supreme Court also speaks in favour of adopting such a stance. First of all, it should be emphasised that the Supreme Court has protected under Article 87 of the Labour Code payments other than remuneration, by analogy, taking into account the similarity of the function and nature of these payments to remuneration (payments resulting from the employment relationship, being monetary in nature, and providing funds for the maintenance of the employee, calculated on the basis of remuneration for work, the size of the payments depending on the length of service). It can therefore be argued that the case-law has developed criteria which allow the payment to be characterised as remuneration, whereas payments which do not meet those criteria are not characterised as remuneration.

Until the end of 2018, a bailiff had been unable to seize the entire remuneration of a person working on the basis of an employment contract, whereas in the case of contractors and persons performing work, it was possible. The increase in the number of civil-law forms of employment meant that debtors increasingly often lacked the means to live. The newly added Article 833 § 2^1 of the Code of Civil Procedure was meant to change the prevailing situation. However, likely contrary to the legislature's intentions, the new regulations will not protect contractors or employees. Bailiffs still have the possibility to seize one's entire payment, and they will release part of it only when the debtor shows that part of the seized funds is necessary for his or her life.

22 Marciniak, A., *Komentarz do art. 881*, in: Marciniak, A. et al. (eds.), *Kodeks postępowania cywilnego. Tom III. Komentarz. Art. 730–1088*, Warszawa 2015, pp. 570–572.

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CITATION

KUCHTA, D., *The influence of the act of 22 March 2018 on bailiffs on amendments to the Code of Civil Procedure regarding execution from remuneration for work*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 73–85, DOI: 10.18276/ais.2020.29-06.

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29), 87–99
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-07

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RAM devices in the light of selected provisions of the Act on weapons and ammunition[1]

Abstract

The modern market for personal protection devices has brought about such challenges as the need to phrase legal regulations regarding possession and use of such devices. The aim of the study is to answer the questions whether RAM devices are firearms and whether they are weapons at all within the meaning of the Act of 21 May 1999 on weapons and ammunition. On the way to achieve this goal, a thorough analysis of the translation of the detailed characterisation of RAM devices into specific definitions of the Act in question is used. The result of the author's research is the conclusion that RAM devices are neither weapons nor firearms within the meaning of Polish legislation. Furthermore, the article provides a number of legal consequences resulting from such research conclusions, e.g. no obligation to undergo medical or psychological examinations by a potential RAM device owner.

Keywords: weapon, RAM, real action marker, firearms, ammunition

1 Act of 21 May 1999 on weapons and ammunition, consolidated text: Dz.U. (Journal of Laws) 2019, item 284, hereinafter: A.W.A

Introduction

In recent years, the Polish market for broadly understood self-defence products has seen the emergence of real action markers, or devices which, at first sight, resemble firearms. Those RAM devices which accurately imitate, even if by their external appearance, specific firearm models can safely be termed as replicas[2]. The term *device*[3] is used herein deliberately, for it is the most general and substantively cautious denomination for these types of objects, although their manufacturers and dealers refer to them as, among others, markers (thus suggesting a certain analogy with paintball markers), replicas (impliedly – firearm replicas) or even weapons (although this is surely an oversimplification). However, it would be wrong to define all RAM devices as replicas (indeed, not every such device is a replica of a specific firearm, which is best demonstrated by the example of the HDR 50 T4E), or to define RAM devices as:

– markers (RAM devices are not designed solely to mark targets, e.g. with paint, as is the case of paintball markers);
– or, the more so, weapons (as this term must be approached with particular caution).

The purpose of this paper is to answer the following two fundamental questions:

1. Are RAM devices firearms within the meaning of the Act of 21 May 1999 on weapons and ammunition?
2. Are RAM devices weapons at all within the meaning of the aforementioned Act?

The layout of the paper may be puzzling, as the first of its goals is to answer the question of whether RAM devices are firearms and, only then, to answer the question of whether RAM devices are weapons at all. A negative answer to the

2 *Replica* meaning something which accurately imitates something else; a true copy – as in: Dubisz, S. (ed.), *Uniwersalny słownik języka polskiego PWN*, Warszawa 2006, p. 930.

3 Lexicographers state that *a device* is a mechanism or a set of mechanisms […] designed to carry out specific activities, playing a certain function; an appliance – as in Dunaj, B. (ed.), *Współczesny słownik języka polskiego*. O–Ż, Warszawa 2007, p. 1926, and also a mechanism or a set of mechanisms designed to carry out specific activities to facilitate work; an instrument, a machine – as in Dubisz, S. (ed.), *Wielki…*, O–Ż, p. 102. It also seems that it would be advisable to use the term *tool*, which, according to the authors of dictionaries, means e.g. a simple or complex device which makes it possible to carry out a certain activity or work; an appliance, an instrument – as in Dubisz, S. (ed.), *Wielki…*, H–N, p. 1086, or an object which enables or facilitates execution of a certain piece of work, an appliance, an instrument – as in Dunaj, B., *Współczesny…*, pp. 928–929. One should note that lexicography most often highlights the work-related purpose of *tools*. Furthermore, the term *device* is purely intuitively associated with a broader scope of application than the term *tool*, which is normally understood as a means to carry out a certain work/a certain duty. Additionally, the term *device* was already used by the legislator in the Act on weapons and ammunition and was subsequently replaced by the term *portable barrelled weapon*.

question of whether RAM devices are weapons at all would also, *a maiori ad minus*,[4] be a negative answer to the question of whether RAM devices are firearms. Even a positive answer to the question of whether RAM devices are weapons at all would justify the layout of the article in which the question of whether RAM devices are weapons at all would be first. However, the layout of this study is not accidental. The justification for such a structure of the study is threefold. First of all – one should seek this justification in the specificity of social associations (the average person, unfamiliar with the subject of firearms, will especially associate RAM devices that are replicas of firearms from the outside with firearms). Secondly – belonging to the class of firearms is associated with much more significant legal consequences than it is in the case of the given item belonging to the class of weapons at all (a negative answer to the question about the belonging of RAM devices to the class of firearms could reassure readers who are potential buyers of RAM devices). Finally, the lay-out of the article, according to which the first is the question about whether RAM devices belong to the class of firearms is basically analogous in its consequences to the reverse structure of the study. A positive answer to the question about whether RAM devices belong to the class of firearms ends the discussion on whether RAM devices are weapons at all. A negative answer to the question about whether RAM devices belong to the class of firearms does not close the discussion on whether RAM devices are weapons at all.

Answering these questions will allow one to draw conclusions regarding the legal consequences of using such devices depending on whether or not they are weapons (and if yes, then what type of weapon). The necessary starting point for further reflections (including answering the above questions) will be a detailed characterisation of RAM devices, explaining the assumptions behind designing these devices, their mechanism of action and the materials which these devices can expel. This clarification is necessary, as it will constitute the basis for examining whether RAM devices can be categorised as weapons in the context of specific definition components included such provisions of the A.W.A as Article 4 and Article 7.

Characteristics of RAM devices

Definition and purpose of RAM devices

In Polish literature, finding attempts to define a RAM is a very difficult challenge. Therefore, one must rely on other sources in this respect. A real action marker

4 Argumentum *a maiori ad minus* (inference from larger to smaller) is a kind of so-called inference *a fortiori*. Inference *a maiori ad minus* can be presented using the example: *Whoever is allowed more, all the more is allowed less* – See: Morawski, L., *Wstęp do prawoznawstwa*, Toruń 2008, p. 162.

(RAM) is a paintball weapon powered by CO_2 or compressed air, firing 0.43 caliber (0.43 inch or 10.9 mm) paint-filled or rubber balls.[5] According to another definition attempt, RAMs are simply advanced replicas (of firearms) which expel rubber, pepper, paint or powder bullets.[6] Due to their concise character, among others, these specific definitions fail to clarify exactly how RAMs would differ from e.g. pneumatic weapons or firearms (if one assumes that RAMs are neither of the two). However, RAMs do share certain technical similarities with the aforementioned weapon types, as well as with the so-called paintball markers.

RAM devices which have been available on the Polish market in recent years have often been designated as *T4E*. The acronym stands for training for engagement, which is translated into Polish as *trening nawiązywania walki*[7] or *trening przez walkę*.[8] Such devices were originally manufactured for the training purposes of US uniformed services. The Americans needed devices which could be used in CQB (close quarters battle) drills, i.e. when firing shots at short distances in enclosed spaces. They needed a device which was safe to use and, at the same time, could expel projectiles with sufficient force to cause clear discomfort in counterpart trainees. These requirements were met by RAM T4E devices, which expelled safe, non-penetrating projectiles with kinetic energy sufficient to cause pain in humans and, at the same time, were accurate replicas of lethal firearms (also in terms of weight and use – bolt/slide operation, magazine loading, use of weapon sights, etc.).[9] It is pointed out that RAM devices can be used, depending on the type of projectiles expelled, for such purposes as e.g. shooting practice, paintball or ASG recreation or personal protection.[10] The latter clearly involves the possibility to use a RAM device in a situation of a threat to a legally protected asset – where it becomes necessary to use the benefits of such criminal law measures as the right of self-defence or the state of necessity. The intended purpose of the device in question defined in this manner seems to be most reliable and exhaustive.

5 AirsoftPRESS, *The guide to maintaining and tuning a Real Action Marker (RAM) M4 Gearbox*, Scotts Valley, p. 9.

6 *Zastosowanie markerów RAM*, Militaria.pl blog, https://militaria-blog.pl/samoobrona/zastosowanie-markerow-ram/ (accessed 5.03.2020).

7 Lewandowski, J., *Walther PPQ na gumowe kule*, 6.09.2017. strzał.pl pro liberate, https://strzal.pl/2017/09/06/walther-ppq-na-gumowe-kule/ (accessed 5.03.2020).

8 Ibidem.

9 Ibidem.

10 Ibidem.

Mechanism of action and the construction of RAM devices

In RAM devices, the expelling mechanism itself is principally the same as that used in airguns. Indeed, RAM devices and airguns expel projectiles with the use of compressed air or carbon dioxide, which is subjected to mechanical pressure generated by internal mechanical components without any chemical reactions. It is therefore a completely different mechanism than that used in firearms, where a bullet is discharged as a result of exothermic oxidation of combustible propellants (discharge gases/propulsive gases) in a process that generates propulsive energy for the bullet.[11] Obviously, both these processes are initiated by the action of the device's internal mechanical components operated by the user.

Although RAM devices which are manufactured and sold at present cannot be stripped in the same way as e.g. lethal firearms or popular airguns (i.e. pneumatic pistols and rifles which discharge pellets with kinetic energy up to 17 J), one can say that their internal assembly corresponds to that of airguns. The internal design of airguns powered by 12-gram CO_2 capsules and that of RAM devices are very similar, as RAM devices are powered by 12-gram CO_2 capsules. The differences in the internal design of the two device types lie principally in the size of specific components, which is due to the different calibres of bullets which they expel. Naturally, the bolt section will be larger and the barrel wider in RAM devices, which expel 0.43 inch or 0.50 inch calibre bullets (ca. 10.9 mm and 11 mm, respectively), than in airguns, which expel pellets of e.g. 4.5 mm calibre. However, one can say that in functional terms, both designs are principally analogous.

Projectile expelled in RAM devices

In the aforementioned cases of airguns and RAM devices, the kinetic energy of the bullet expelled is much lower than 17 J. Importantly, RAM devices have been designed to expel only non-penetrating projectiles. Simply put, the shape of bullets expelled by a RAM device makes them unable to penetrate the target, e.g. a human body (unlike pointed and elongated bullets used in lethal firearms, whose penetrating properties are enhanced by the characteristics of the bullet discharge process itself). RAM devices expel only spherically-shaped bullets made of rubber, rubber with an admixture of steel or another soft material (in the case of bullets filled with paint, powder or capsaicin).

Although no empirical studies with RAM devices have been conducted yet to determine the consequences of firing a bullet from such a device at a human and the subsequent contact of the bullet with the human body, one must assume that

11 Campbell, R., *Strzelanie z broni palnej. Ilustrowany podręcznik*, Warszawa 2014, p. 13.

the consequences for the potential target would not be severe. RAM devices expel spherically-shaped bullets made of relatively soft material, with low kinetic energy of 4–5 J. Furthermore, it seems that RAM devices are also much safer to use than airguns, which is mentioned on numerous occasions in this paper. Indeed, the latter, available on the Polish market, expel pellets – smelted metal products, normally with sharp edges. In addition, the pellets used in airguns are expelled with much greater kinetic energy (even up to ca. 11 J) than in the case of bullets expelled by RAM devices (4–5 J). Due to the aforementioned factors, shooting airguns at live targets, e.g. humans, may cause various health-related consequences to the latter. The potential hazards related with shooting pneumatic weapons (including airguns, which in fact are such weapons) at live targets have also been highlighted by experts.[12] However, one should not draw hasty conclusions from the above observations, such as a claim that airguns may not be used as a balanced means of defending legally protected assets in emergency situations.

RAM devices in the light of definitions provided in the A.W.A.

Are RAM devices firearms?

These deliberations, bearing critical importance for the subject matter of this paper, must be started by quoting a legal definition of the firearm *in extenso.*[13] Article 7 section 1 of the A.W.A. stipulates that: Within the meaning of the Act, the term firearm shall mean every portable barrelled weapon which expels, is designed to expel or can be converted to expel one or more bullets or substances by the action of a propellant. In order to resolve whether RAM devices are firearms, one needs to closely examine whether they meet all the essential requirements set out in the aforementioned definition of what makes an object a firearm.

Firstly, one must state that in their efforts to resolve the meaning of the term *firearm*, the legislators explain that it is a […] portable barrelled weapon without providing any prior concise explanation of what a weapon is in their opinion. It is not yet known whether RAM devices are weapons at all, but it is known that they are certainly portable barrelled devices. Hence, when analysing RAM devices or firearms, knowing that they are barrelled devices, one must make a preliminary assumption that they are also barrelled weapons. Adopting the opposite hypothesis

12 See: Bratton, S.L. et. al, *Serious and fatal air gun injuries: more than meets the eye*, "Pediatrics" 1997, No. 100(4), pp. 609–612; Shaw, M.D.M. and Galbraith, S., *Penetrating airgun injuries of the head*, "British Journal of Surgery" 1977, No. 64(3), pp. 221–224; Bowen, D.I. and Magauran, D.M., *Ocular injuries caused by airgun pellets: an analysis of 105 cases*, "Br Med J" 1973, No. 1(5849), pp. 333–337.

13 Eng. *as a whole.*

would eliminate the necessity to analyse subsequent features of RAM devices on the grounds of further components of the definition of firearms in the meaning of Article 7 section 1 of the A.W.A.

Furthermore, it must be clearly stated that not only are RAM devices capable of expelling one or more bullets, they are simply designed to do so. It must be noted here that the multitude of expressions with the verb *expel* used by the legislator indicates that the legislator's probable intention was to assign a different meaning to each of them. Therefore, it seems that the word *expels* simply means that one of its functions is to expel, but it is not its sole purpose, the phrase *is designed to expel* means that it has been made with the sole purpose to expel, and the phrase *can be converted to expel* simply means that it can be altered in order to expel (the latter meaning is supported by the content of Article 7 section 1a of the A.W.A.). The aforementioned diversification of meaning is substantiated by the prohibition of the *per non est* interpretation.[14] Indeed, if one assumes that e.g. *expels* means the same as *is designed to expel*, one would have to conclude that the legislator acted unreasonably by constructing a definition containing redundant terms. Furthermore, it must be noted that by phrasing the above differentiation in that exact manner, the legislator wrongly used inclusive disjunction (expressed in Polish by the conjunction *lub*) for all the terms provided, instead of exclusive disjunction (expressed in Polish by the conjunction *albo*).[15]

A matter that may raise significant doubts, and therefore requires slightly more thorough consideration, is whether RAM devices expel bullets by the action of a propellant. If one examines the phrase *by the action of a propellant*, then one may conclude that the said *action of the propellant* can be both combustion of a propellant and pressure of gasses – e.g. CO_2 – as the two processes generate the propulsive force for the bullet. Consequently, one would have to consider, also based on other analyses made earlier in this paper, that RAM devices are not only barrelled weapons designed to expel one or more bullets, but also that the process of expelling is triggered by the action of a propellant, *ergo*[16] RAM devices are firearms. However, it is doubtful whether gas, e.g. carbon dioxide, can be deemed as *a propellant* within the meaning of the regulation in question, and whether mechanical com-

14 The prohibition of interpretation *per non est* is a directive of the linguistic interpretation of law, according to which it is not allowed to interpret legal provisions so that certain parts of these provisions turn out to be redundant – See: Morawski, L., op. cit., p. 146.

15 The alternative is one type of sentence in a logical sense. The cumulative alternative is marked in Polish with the conjunction *lub*; a disjunctive alternative is marked in Polish with the conjunction *albo*. The cumulative alternative can be represented by the sentence: *A lub B*, which means: A, B, A + B. The disjunctive alternative can be represented by the sentence: *A albo B*, which means: A, B. – See: Ziembiński, Z., *Logika praktyczna*, Warszawa 2019, p. 87.

16 Eng. *thus*.

pression can be deemed as *the action*. It must be remembered that the regulation does apply to firearms. The prefix *fire-* suggests a specific process – oxidation of, importantly, a specific substance. Such reasoning is intensified by an analysis of the term *ammunition* in light of the A.W.A. The said Act stipulates in Article 4 section 2 that all references to ammunition shall mean references to firearm ammunition. An important feature of ammunition, indicated in Article 5 section 3 of the A.W.A., is that it has a primer which initiates combustion of the propellant, which is very aptly pointed out by R. Rejmaniak,[17] who, equally aptly, suggests that the content of Article 7 section 1 of the A.W.A. lacks the word *explosive* preceding the term *propellant*.[18] Had it defined firearms in this manner, the legislator would have saved the addressees of the Act any reasonable doubts regarding what is and what is not legally deemed a firearm.

In conclusion, it must be clearly said that RAM devices are not firearms. It is true that it has been assumed that they are barrelled weapons, and, furthermore, they are designed to expel one or more bullets. However, the process of expelling involves the purely mechanical process of gas compression (e.g. CO_2), not a chemical reaction of oxidation of a combustible propellant triggered by the impact of a firing pin on a cartridge's primer with a propellant charge[19]. Thus, RAM devices do not meet the third requirement of all the requirements necessary to deem them as firearms within the meaning of the A.W.A. RAM devices are neither *a maiori ad minus* signal firearms (Article 7 section 2 of the A.W.A.) nor alarm firearms (Article 7 section 3 of the A.W.A.).

Are RAM devices weapons at all?

It can be said that Article 4 section 1 of the A.W.A., by continuing the catalogue of objects that are weapons under the A.W.A., also creates an extensional legal definition of the term *weapon*. Furthermore, based on the position taken by the Supreme Court, one could consider it to be an extensional definition with a closed catalogue. Indeed, the Supreme Court concluded that an authentic baseball bat is not the tool defined in the last sentence of Article 4 section 1 point 4a of the A.W.A. (i.e. a replica of a baseball bat).[20] Thus, only objects listed in the catalogue in Article 4 section 1 of the A.W.A. may be deemed as weapons (in the legal meaning of the word).

17 Rejmaniak, R., *Pojęcie broni palnej*, "Prokuratura i Prawo" 2018, No. 4, pp. 78–103.

18 Ibidem.

19 Ciepliński, A., *Encyklopedia współczesnej broni palnej (od połowy XIX wieku)*, Warszawa 1994, p. 89.

20 Resolution of the Supreme Court of 24 July 2001, I KZP 10/01, OSNKW 2001, No. 9–10, item 76.

The Polish Language Dictionary defines *weap*on as inter alia a tool of combat and a means or a method of fighting against somebody or something.[21] In accordance with this very general definition, items deemed as weapons can be not only the objects listed by the legislator in Article 4 section 1 of the A.W.A., e.g. incapacitating gas sprays and knuckle dusters, or objects which are intuitively associated with the term *weapon*, e.g. firearms, but also all other objects suitable for combat in any way whatsoever[22]. Such reasoning would be wrong, however, for then e.g. a toothpick, a ballpoint pen or footwear could also be deemed as weapons. The Court of Appeals in Łódź concluded that since the term *weapon* in Polish means, among others, arms or a tool of combat, then this explication can lead to the requirement of a certain abstract minimal level of threat to one's health or life which an object should meet to be deemed as a weapon.[23] One must admit that this is a questionable conclusion. Following this reasoning, one could deem as a weapon everything which bears even a minimal threat potential – e.g. a nearly empty handbag used by a woman in defense against an attacker which, when used skilfully, can give the attacker several very superficial bruises. R. Rejmaniak[24] seems to take a similar position to that taken by the Court concerned.

The suggestion that such, and not other, objects are covered by the definition of a weapon provided in Article 4 section 1 of the A.W.A. because firstly – they can serve as a tool of combat, and secondly – they are characterised by a certain generally understood minimal level of threat to health and life, is inconsistent and therefore could be wrong. Had such reasoning been rooted in logic, why then did the legislator not enumerate such objects in Article 4 section 1 of the A.W.A. as e.g. the aforementioned toothpick or scissors or an axe? Indeed, they all meet both of the presumed characteristics of a weapon. Secondly, the reasoning is also wrong, because in its definition of a weapon (Article 4 section 1 of the A.W.A.), the legislator indicates e.g. pneumatic weapons as weapons which expel bullets with kinetic energy greater than 17 J. Returning to the earlier deliberations, it must be remembered that even an airgun expelling pellets with kinetic energy of 7.5 J can penetrate the human skull (and therefore cause a threat to life and health that is much greater

21 "Broń", *Słownik Języka Polskiego*, SJP PWN, https://sjp.pwn.pl/slowniki/broń.html (accessed 7.03.2020).

22 The term *combat* is construed very extensively and vaguely – as *inter alia a struggle between opponents* – as in "walka", *Słownik Języka Polskiego*, SJP PWN, https://sjp.pl/walka (accessed 8.03.2020).

23 Judgement of the Court of Appeals in Łódź of 14 June 2018, II AKa 111/18, OSAŁ 2018, No. 2, item 87.

24 Rejmaniak, R., op. cit., p. 98.

than just minimal)[25]. This could indicate an intention, which the legislator relied upon when creating the catalogue in Article 4 section 1 of the A.W.A., to be guided rather by the criterion of abstractly average rather than abstractly minimum risk to life and health. Therefore, it seems that Z. Wardak and P. Grzegorczyk are closer to the truth, for they point out that weapons deemed as firearms should be those which, while keeping firearm-specific characteristics (such as firing a bullet by the force of gases from oxidation of a propellant), are also characterised by the capability to cause death or severe injuries.[26] The phrase *could indicate an intention* not *indicates an intention* was used intentionally, because the legislator is inconsistent in putting together, in its definition, such objects as signal firearms (not intended as a tool of combat at all) with pneumatic weapons which discharge bullets with kinetic energy greater than 17 J (and are therefore capable of causing severe injuries to the target, or even capable of causing any minor injuries). Thus, it remains unknown what guided the legislator when creating Article 4 section 1 of the A.W.A. Nevertheless, it was certainly not the criterion of an object's abstractly minimal threat level to life and health.

RAM devices, as not being firearms (which has been resolved above in this paper), do not classify as any of the weapon types listed by the legislator in Article 4 section 1 of the A.W.A. Or do they? Article 8 of the A.W.A., which enacts the legal definition of pneumatic weapon, actually enumerates three constitutive characteristics of this weapon type, namely:

- threat to life or health;
- capability to discharge a bullet from a barrel or its substitute by the action of compressed gas, and thus the ability to engage targets at a distance;
- capability to discharge a bullet with kinetic energy greater than 17 J.

Although RAM devices do in fact generally have the pneumatic mechanism referred to by the legislator in Article 8 of the A.W.A., only devices capable of discharging bullets with kinetic energy greater the 17 J may be categorised as pneumatic weapons[27]. As highlighted throughout this paper, RAM devices discharge bullets with kinetic energy of ca. 4–5 J. Therefore, they do not meet the energy criterion. Furthermore, since even an airgun, which discharges a bullet with kinetic energy of 7.5 J, capable of penetrating the human skull, is not deemed by the legislator as dangerous to life or health, then *a maiori ad minus* a RAM device cannot be deemed

25 Laudański, R., *Czy Polacy chcą mieć dostęp do broni? [sonda]*, 12.08.2015, "Gazeta Pomorska", https://pomorska.pl/czy-polacy-chca-miec-dostep-do-broni-sonda/ar/7774449 (accessed 8.03.2020).

26 Grzegorczyk, P. and Wardak, Z., *Pojęcie broni palnej w prawie karnym*, "Prokuratura i Prawo" 2017, No. 10, pp. 85–99.

27 See: Kurzępa, B., *Ustawa o broni i amunicji. Komentarz*, Warszawa 2010, Legalis.

as such. This argument is intensified by the view taken by the Court of Appeal in Wrocław that an A3000 pneumatic pistol is not as dangerous as a firearm or a knife[28] (assuming *implicite*[29] that no object with a threat potential lower than a firearm or a knife should be deemed as a weapon). Apart from the above legislative and juristic deliberations, one must say that, objectively, RAM devices carry a negligible potential of threat to health and life, even if only due to the fact that they expel non-penetrating bullets with low kinetic energy. Simply put, RAM devices meet just one of the three requirements necessary to deem them as pneumatic weapons.

Conclusions

Answering the questions asked at the introduction of this paper, and thus meeting the purpose of the publication, one must say that RAM devices are not firearms, pneumatic weapons or can be legally understood weapons at all. This is so for two reasons:

- they do not meet all the requirements which they would have to meet to be categorised as firearms, pneumatic weapons or any other weapon type under Article 4 section 1 of the A.W.A.;
- they do not have a level of threat to life or health that would be sufficient to deem them as weapons (although they can be used in combat – e.g. in self defence against an attacker).

Naturally, the above state of affairs gives rise to specific legal consequences (not only under the A.W.A.). For a start, one needs to conclude that since RAM devices are not weapons, then their purchase, possession and sales are not forbidden (*a contrario*[30] Article 2 of the A.W.A.). Although conversions of RAM devices which alter their intended purpose cannot be deemed as weapon manufacturing in the light of Article 6 of the A.W.A., such a conversion should in fact be deemed as weapon manufacturing if it is meant to e.g. convert a RAM device into a device expelling bullets with kinetic energy greater than 17 J (and thus making it a pneumatic weapon within the meaning of the A.W.A.). Not deeming RAM devices as firearms, pneumatic weapons or any weapons at all also brings a natural effect of the lack of the requirement to obtain a licence for and to register such a device (*a contrario* Article 9 of the A.W.A.). In addition, purchasing projectiles for RAM

28 Judgement of the Court of Appeals in Wrocław of 23 November 2005, II AKa 290/05, Legalis No. 77470.

29 Eng. *implicitly.*

30 Inference *a contrario* is the so-called inference from the opposite. This means that if the given legal consequences of X are related to the facts of Z, then the legal consequences of X cannot be associated with the facts of Y, even if the facts of Y are substantially similar to the facts of Z – see: Morawski, L., op. cit., p. 161.

devices in the form of spherical bullets is not subject to any specific requirements – such requirements have been established only for purchasing firearms ammunition (Article 14 in connection with Article 4 section 2 of the A.W.A.). Naturally, a person who intends to purchase a RAM device is not subject to an obligatory medical or mental examination, contrary to persons who apply for a firearms licence (Article 15 ff of the A.W.A.). Neither is a potential owner of a RAM device obliged to take any exams in the knowledge of regulations regarding possession and use of RAM devices or in skills associated with the operation of RAM devices (*a contrario* Article 16 of the A.W.A.). This is, however, relatively general knowledge that exists in the public awareness somewhat intuitively. Therefore, it is necessary to proceed to slightly less obvious regulations.

In the event of losing a RAM device, its owner is not obliged to report it to the Police or Military Police (*a contrario* Article 25 of the A.W.A.). The same applies if the owner of a RAM device changes his or her place of permanent residence. Importantly, RAM device owners are not subject to a number of obligations regarding storage, carrying and transport of weapons (Articles 32 and 33, Chapter III of the A.W.A.). Therefore, a RAM device owner is allowed to travel by e.g. tram, bus or train with a loaded RAM device, even if it is ready to be discharged only by a simple pull on the trigger.[31] Perhaps the most interesting consequence of not deeming RAM devices as weapons is that they do not have to be used for sports or training purposes at firing ranges only. As rightly pointed by S. Maj, the use of airguns – which are not deemed as weapons within the meaning of the A.W.A. either – is not restricted solely to firing ranges.[32] However, it does not exclude the general liability for causing damage to other persons as a result of such devices.[33] The same type of liability will emerge in the case of RAM devices. As a result, a RAM user is not subject to any specific liability for a crime or an offence under Chapter V (Articles 50 and 51) of the A.W.A. It also seems that RAM devices will not constitute another similarly dangerous object or a means of incapacitation within the meaning of Article 280 § 2 of the Criminal Code,[34] for their normal use (or any abnormal use, however understood) does not result in the threat of causing death or serious injury.[35]

31 S. Maj points out that the minimum secure condition for a weapon, as specified in Article 35 of the A.W.A., means carrying it without a cartridge in the chamber and with the safety lever on – see: Maj, S., *Ustawa o broni i amunicji. Komentarz*, Warszawa 2010, LEX.

32 Ibidem.

33 Ibidem.

34 Act of 6 June 1997 on the Criminal Code, consolidated text: Dz.U. (Journal of Laws) 2019, item 1950.

35 See: Decision of the Supreme Court of 29 May 2003, I KZP 13/03, OSNKW 2003, No. 7–8, item 69; Judgement of the Court of Appeals in Katowice of 12 April 2018, II AKa 56/18, LEX No. 2612788.

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CITATION

KWASIŃSKI, O., *RAM devices in the light of selected provisions of the Act on weapons and ammunition*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 87–99,
DOI: 10.18276/ais.2020.29-07.

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29), 101–126
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-08

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The lifting of "pontifical secrecy" and the relationship between the state and Church systems of justice in the subject matter of sex offences against minors[1]

Abstract

The article describes the issue of the relationship between the Catholic Church's judicial system and the national law enforcement authorities and judiciary powers after 6 December 2019, when Pope Francis lifted the so-called "pontifical secrecy" concerning canon criminal cases of clerics accused of sexually abusing minors. After a brief outline of the regulations referring to the institution of secrecy in the canonical legal order and arguments justifying the need to keep it, the author presents certain provisions on pontifical secrecy and the consequences of lifting it for the relationship between the state and the Church's system of justice.

Keywords: canon law, Catholic Church, canonical procedure, sexual abuse of minors, secrecy, pontifical secrecy, collaboration with civil authorities

1 The article was written as part of the research project No. 2019/33/B/HS5/02465, financed by the National Science Centre, Poland.

Introduction

According to the *rescriptum ex audientia pontificia* of 6 December 2019,[2] Pope Francis lifted the 'pontifical secrecy' (*secretum pontificium*) for sexual abuse cases against minors, which are prosecuted under canon law (regardless of the activities of secular law enforcement and judicial authorities). The fact that the pontifical secrecy rule remained in force with respect to such offences was subject to criticism. Being bound by the pontifical secrecy rule, the authorities that conducted canonical criminal proceedings could not provide any information obtained in such proceedings to the law enforcement authorities without breaching the law of the Catholic Church. Such refusal was often treated as placing the Church above the law, or worse – an attempt to hide the offenders.

The function of 'secrecy' in canon law

It is not always mandatory to disclose, either verbally or in writing, one's own thoughts, actions, or knowledge. Both moral principles and laws stipulate that in justified cases, it is fair and even obligatory to stay silent, keep discrete, i.e. keep secrecy – either with respect to all or only to some unauthorised people. Secrecy as an object refers to the information that should remain hidden, while secrecy in a subjective sense refers to the obligation to refrain from disclosing any content subject to secrecy.[3]

The obligation to keep secrecy in the religious and Church context is particularly significant due to the relationship of trust between the people responsible for clerical and moral matters, who are often the subject of mutual contact within the Church community. Undoubtedly, the spiritual realm, human conscience, faith, prayers, and religious experiences are areas of intimacy and privacy, which deserve discretion and protection.

At this point, the moral teachings of the Church regarding the issue of discretion and the obligation to keep secrecy and the classification introduced thereby shall be omitted[4] from this article so that the main focus is on secrecy as a legal category.

2 Secretary of State, *Rescriptum ex audientia Ss.mi*, 6.12.2019, "L'Osservatore Romano", 18.12.2019, p. 5.

3 See: Palazzini, P., *Secretum*, in: Palazzini, P. (ed.), *Dictionarium morale et canonicum*, Vol. IV, Roma 1968, p. 246.

4 The dictionary definition can be found in: Padovese, L., *Segreto*, in: Compagnoni, F. et al. (eds.), *Nuovo dizionario di teologia morale*, Cinisello Balsamo 1990, pp. 1205–1212.

The Code of Canon Law[5] – the fundamental Act of the Catholic Church, together with the Code of Canons of the Eastern Churches[6] – including provisions which, together with other acts of laws from outside the Code, constitute one legal regulation of secrecy in the canonical legal order. Therefore, it is essential to first outline such provisions that create a catalogue of secrets protected under canon law.[7]

The most recognised and widely discussed rule is the secret of confession, i.e. *sacramentale sigillum* – which literally means the "seal of confession." In compliance with can. 983 § 1 of the 1983 Code of Canon Law (CIC) and its corresponding can. 733 § 1 of the 1990 Code of Canons of the Eastern Churches (CCEO), "the sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason." Other provisions included in the canon law (both Latin and Oriental Codes) also refer to the seal of confession: can. 983 § 2 CIC and can. 733 § 2 CCEO stipulate that "the interpreter, if there is one, and all others who in any way have knowledge of sins from confession are also obliged to observe secrecy." Furthermore, according to can. 984 § 1 of CIC and can. 734 § 1, "a confessor is prohibited completely from using knowledge acquired from confession to the detriment of the penitent even when any danger of revelation is excluded."

Nevertheless, the obligation of secrecy and discretion in the Catholic Church is much broader than the seal of confession. In terms of the sacraments, the obligation of secrecy is imposed on secret marriages (can. 1131, 2º and can. 1132 CIC as well as can. 840 § 1–3 CCEO). As far as administrative canon law is concerned, the obligation of secrecy is part of the procedure for appointing bishops (can. 377 § 2 and 3 CIC as well as can. 184 § 1 and can. 185 § 2 CCEO), part of preparing lists of people who are suitable for episcopal office in case of an obstacle to the governance of the bishop's see (can. 413 § 1 CIC), and – as a requirement regarding secrecy of office – one of the duties of the members of the diocesan curia (can. 471, 2º CIC and can. 244 § 2, 2º CCEO). The obligation of secrecy entails the need to maintain a secret archive in every diocesan curia, where only the bishop is to have the key (can. 489 § 1–2 and can. 490 § 1–3 CIC as well as can. 259 § 1–2 and can. 260 § 1–3

5 Codex Iuris Canonici auctoritate Joannis Pauli pp. II promulgatus of 25 January 1983, Acta Apostolicae Sedis [AAS] 1983, pars II, pp. 1–317.

6 Codex Canonum Ecclesiarum Orientalium auctoritate Joannis Pauli pp. II promulgatus of 18 October 1990, AAS 1990, No. 11, pp. 1045–1363.

7 More information may be found in Martens, K., *Le secret dans la religion catholique*, "Revue de Droit Canonique" 2002, No. 2, pp. 259–274; Coronelli, R., *Significato ecclesiale del segreto*, "Quaderni di Diritto Ecclesiale" 2013, No. 1, pp. 16–49; Waters, I., *The law of secrecy in the Latin church*, "The Canonist" 2016, No. 1, pp. 78–84; Rhode, U., *Trasparenza e segreto nel diritto canonico*, "Periodica de Re Canonica" 2018, No. 3, pp. 476–479.

CCEO). At the central level, strict secrecy of the conclave,[8] and the secrecy of office in force in the Roman Curia should also be mentioned.[9]

The area, where – according to canon law – secrecy must be strictly observed is the regulation of the Church's system of justice. Judges and tribunal personnel are always bound to observe secrecy of office in a penal trial, as well as in a contentious trial if the revelation of some procedural act could bring disadvantage to the parties (can. 1455 § 1 CIC and can. 1113 § 1 CCEO). They are also always bound to observe secrecy concerning the discussion among the judges in a collegiate tribunal (can. 1455 § 2 CIC and can. 1113 § 2 CCEO). Failure to observe secrecy is subject to canonical sanctions, including privation from office (can. 1457 § 1 and 2 CIC as well as can. 1115 § 1 and 2 CCEO). If disclosure of the acts or evidence could endanger the reputation of others, provide opportunity for discord, or give rise to scandal or some other disadvantage, the judge can bind the witnesses, the experts, the parties, and their advocates or procurators by an oath to observe secrecy (can. 1455 § 3 CIC and can. 1113 § 3 CCEO). Individuals bound to observe secrecy are exempted from the obligation to submit documents (can. 1546 § 1 CIC and can. 1227 § 1 CCEO) and to respond with respect to the information covered by the secrecy rule (can. 1548 § 2, 1º CIC and can. 1229 § 2, 1º CCEO). Interestingly, canon law does not provide for the possibility for exemption from the obligation to observe secrecy of office by the court, as in the case of the national legal orders. The seal of confession is subject to special protection – a priest cannot be a witness with respect to any matters which they have come to know from sacramental confession, even if the penitent wishes them to be disclosed. Moreover, matters heard by anyone and in any way on the occasion of confession cannot be accepted even as an indication of the truth (can. 1550 § 2, 2º CIC and can. 1231 § 2, 2º CCEO). Nonetheless, the protection of secrecy goes beyond *sacramentale sigillum*, as clerics are exempted from the obligation to respond "to what has been made known to them by reason of sacred ministry" (can. 1548 § 2, 1º CIC and can. 1229 § 2, 1º CCEO). Furthermore, can. 1548 § 2, 2º CIC and can. 1229 § 2, 2º CCEO also stipulate that

8 John Paul II, Apostolic Constitution *Universi Dominici gregis* of 22 February 1996, AAS 1996, No. 4, pp. 305–343, in particular No. 55–61. See also: Trevisan, G., *Osservare il segreto secondo la costituzione «Universi Dominici Gregis»*, "Quaderni di Diritto Ecclesiale" 2009, No. 3, pp. 283–291; Majer, P., *Secreto en la elección del Romano Pontífice*, in: Otaduy, J. et al. (eds.), *Diccionario General de Derecho Canónico*, Vol. VII, Pamplona 2012, pp. 183–185.

9 In compliance with the General Regulations of the Roman Curia of 30 April 1999, all members of the Roman Curia shall observe secrecy of office, which is also supported by an oath taken to that effect. Violation of this oath shall result in suspension from office. See: Secretary of State, *Regolamento Generale della Curia Romana*, 30 April 1999, AAS 1999, No. 7, 629–699, Articles 18 § 2, 36 § 1, 72, 5º.

all "those who fear that from their own testimony ill repute, dangerous hardships, or other grave evils will befall them, their spouses, or persons related to them by consanguinity or affinity" shall also be exempted from the obligation to respond.

In some cases, the obligation of secrecy entails an oath or promise, which, in canon law, has religious significance and constitutes open invocation of the divine name to solidify the promise to keep secret (can. 1199 § 1 CIC and can. 895 CCEO).[10]

According to Ulrich Rhode, the classification of the canon law provisions on the observance of secrecy may be presented as follows:

a) the provisions on the obligation to observe secrecy;
b) the provisions on the obligation to take an oath of secrecy;
c) the provisions on canonical sanctions for failure to observe secrecy;
d) the provisions governing storing, accessing, and deleting confidential documents;
e) the provisions that constitute the right to silence with respect to confidential information;
f) the provisions agreed with the state provisions as regards the observance of Church secrecy and the integrity of Church archives, also in compliance with secular legal norms.[11]

In the era of transparency, which involves technological development, the willingness to keep certain matters confidential raises suspicion. Even the very word "secret" is not widely accepted – it often evokes negative emotions and suggests ambiguous, clandestine activities which are supposedly dishonest. On the other hand, such terms as "openness" or "transparency" raise more positive feelings. If there is any part of life that must remain hidden from the public, the category of "privacy" seems more acceptable than "secret", as it shows that certain areas of human life shall be inaccessible, because people wish to keep them private.[12] Despite tensions between the proposed transparency of actions and the need to keep some matters confidential, the Church stands for the protection of secrecy, mainly justifying this position with the dignity of the human being. The obligation of secrecy is firmly rooted in the need to protect the most intimate area of life. Every person has the right not to reveal those aspects of their life which they consider the most personal, intimate, and private. Every person also has the right to disclose

10 The aforementioned oath is required, for example, from people who hold Church offices (the Roman Curia and diocesan curia) and those who are to assume special functions or tasks (cardinal electors and others with access to the conclave or witnesses and parties testifying in Church procedures).

11 Rhode, U., op. cit., pp. 476–477.

12 See Montini, G.P., *La Chiesa tra l'impegno per la trasparenza e la tutela del segreto*, "Periodica de Re Canonica" 2018, No. 3, p. 538.

such matters in a confidential manner – to open their souls and confess, to confide personal issues to other people, selected according to their own needs and in an absolutely free manner, being confident that the secrets will not be revealed. Both Church and secular laws safeguard such rights by specifying them and imposing administrative or penal sanctions in case of any infringement thereof, depending on the seriousness of each case for a single entity or community.

The right to secrecy and the protection of secrets are not limited to private welfare only, but also relate to the common good. The right is aimed at creating the chance to freely approach some people – not only private individuals, but also those selected on the basis of their public or social functions (doctors, lawyers, journalists, or priests) – with trust and confidence that one's privacy is duly protected. Therefore, by protecting the rights of individual entities, the Church or the state safeguard the so-called trust mechanism, which constitutes part of the common welfare.[13] Moreover, *ratio legis* justifying the canonical regulation on the obligation of secrecy consists not only in the protection of the private good (the right to protection of reputation and integrity and the right to privacy[14]), but also to the common good – the freedom of authorities to make decisions (e.g. the election of the Pope, the appointment of bishops, or the resolution of court cases). Private interests are at times aligned with public interests (e.g. the purpose of secrecy in the procedure of appointing bishops is to protect both the freedom of exercising ecclesiastical powers and the personal good of the potential candidates – particularly those who shall not be eventually elected to the office of bishop).[15] What is particularly significant is the obligation of secrecy in criminal proceedings, which shall be discussed in more detail in subsequent sections. It must be also remembered that, in some cases, the arguments justifying the obligation of secrecy may be in conflict with other rights and values – e.g. classifying evidence that may cause negative repercussions is against the right to defence, and closing the hearing to the public due to morality or security reasons is against the principle of transparency, which is one of the most fundamental guarantees of a fair trial. Therefore, the ecclesiastic significance of secrecy must include various factors and values, which are subject to protection and which coordinate the requirement of secrecy with other rights and interests.[16]

Therefore, the Church postulates that the right of secrecy established in the canonical legal order is also recognised and observed in the secular legal systems,

13 See: Martens, K., op. cit., p. 274.

14 See: can. 220 CIC and can. 23 CCEO.

15 See: Rhode, U., op. cit., pp. 479–481.

16 See: Coronelli, R., op. cit., pp. 52–53.

mainly on the basis of non-admissibility as evidence, i.e. the prohibition against examining clerics as witnesses at court in the matter of their sacred ministry, the exemption from the obligation to report crimes, or the right to refuse to respond to any facts obtained by priests during confession. It is not uncommon to acknowledge and protect the seal of confession in secular law.[17] However, faced with the scandal of priests sexually abusing minors, some state authorities have suggested or even officially put forward legislative initiatives – instituted in some countries – aiming to revise the provisions in force so that sacramental secrecy is not protected in cases of sexual crimes against minors and a priest who obtains any information about such offences during confession is not exempted from the obligation to inform appropriate law enforcement authorities.[18] The response to these demands was the Note on the importance of the internal forum and the inviolability of the

17 The laws applicable in that area within the European Union are described in: Robbers, G. (ed.), *Państwo i Kościół w krajach Unii Europejskiej*, Wrocław 2007, passim (original publication: *State and Church in the European Union*, Baden-Baden 2005). For Polish law, see: Rakoczy, B., *Tajemnica spowiedzi w polskim postępowaniu cywilnym, karnym i administracyjnym*, "Przegląd Sądowy" 2003, No. 11–12, pp. 126–138; Rutecki, M., *Tajemnica spowiedzi a prawo człowieka do prywatności*, in: Jasudowicz, T. et al. (eds.), *Z problemów bezpieczeństwa. Prawa człowieka*, Chojnice 2012, pp. 180–199; Pieron, B., *Ochrona tajemnicy spowiedzi w prawie polskim*, "Kieleckie Studia Teologiczne" 2012, No. 11, pp. 321–334; Adamczewski, K.K., *Godność sakramentu pokuty a jego ochrona w prawie kanonicznym oraz w systemie prawa polskiego*, "Łódzkie Studia Teologiczne" 2016, No. 2, pp. 16–21; Król, M., *Niemożność bycia świadkiem w postępowaniu administracyjnym przez duchownego katolickiego w świetle Kodeksu postępowania administracyjnego i Kodeksu prawa kanonicznego z 1983 roku*, "Acta Iuris Stetinensis" 2018, No. 3, pp. 129–142, DOI:10.18276/ais.2018.23.07 (accessed 23.07.2020); Szymański, M., *Tajemnica spowiedzi w prawie polskim – stan aktualny i propozycje zmian*, "Internetowy Przegląd Prawniczy TBSP UJ" 2017, No. 4, pp. 73–85, http://www.tbsp.wpia.uj.edu.pl/documents/4137545/137185925/IPP_2017_4/acde991d-c387-4e04-a9ee-e173bdd46bf#page=73 (accessed 14.03.2020). For American and Canadian law, see: Jurzyk, M., *Prawna ochrona tajemnicy spowiedzi w Stanach Zjednoczonych*, "Studia z Prawa Wyznaniowego" 2001, No. 3, pp. 3–50; Zubacz, G.J., *The sacramental seal of confession from the Canadian civil law perspective*, doctoral dissertation, Saint Paul University, Ottawa 2008, https://ruor.uottawa.ca/bitstream/10393/29803/1/NR52340.PDF (accessed 14.03.2020). To read more about the seal of confession according to Portugal law, see Lopes Almeida, J.J., *O delito canonico e civil de violaçao do sigilo sacramental*, "Revista Española de Derecho Canónico" 2006, No. 160, pp. 73–123. For Italian law, see: Boni, G., *Sigillo sacramentale e segreto ministeriale. La tutela tra diritto canonico e diritto secolare*, "Stato, Chiese e Pluralismo Confessionale. Rivista Telematica" 2019, No. 34, https://www.statoechiese.it/contributi/sigillo-sacramentale-e-segreto-ministeriale.-la-tutela-ra-diritto-canonico (accessed 14.03.2020).

18 See: Mbwadiwe Osuala, T., *Sigilo sacramental y denuncia obligatoria del abuso de menores. Una mirada global*, "Revista Española de Derecho Canónico" 2019, No. 186, pp. 215–139; Palomino Lozano, R., *Sigilo de confesión y abuso de menores*, "Ius Canonicum" 2019, No. 118, pp. 778–804; Carní, M., *Segreto confessionale e derive giurisdizionaliste nel rapporto della Royal Commission australiana*, "Diritto e Religioni" 2019, No. 1, pp. 46–63.

sacramental seal, dated 29 June 2019, from the Apostolic Penitentiary.[19] In this document, the Holy See reiterated the absolute integrity of the sacramental seal, which is based on the Law of God, without any exceptions.

The Church not only postulates the recognition and protection of the seal of confession in secular law, but also the acknowledgement of pastoral secrecy in the secular community, which is a type of professional secrecy of clerics, modelled on other professional groups. In some countries – sometimes as a result of the Concordat Agreement – the right of a priest to refuse to testify with information obtained while performing activities other than confession (e.g. spiritual direction or other spiritual advice subject to confidentiality, preparations for the sacrament of marriage, etc.).[20] In other countries – e.g. in Poland – this right is not explicitly accepted and reference to a general professional secret is not always sufficient. Therefore, the legal scholars and commentators present well-founded postulates for changing this state of affairs. It is also worth mentioning that the postulates are not limited to only the Catholic Church, but refer to other churches and religious associations as well – even those that do not have a formal ritual of confession.[21]

19 http://www.vatican.va/roman_curia/tribunals/apost_penit/documents/rc_trib_appen_pro_20190629_forointerno_en.html (accessed 14.03.2020).

20 Examples of such guarantees in binding international agreements between the Holy See and states may be found in the concordats and arrangements made with Austria on 5.06.1933 (Article 18), Germany on 20.02.1933 (Article 9), Portugal on 7.05.1949 (Article 12), the Dominican Republic on 16.06.1954 (Article 11, sec. 2), Spain on 28.07.1976 (Article 2, sec. 2), Italy on 18.02.1984 (Article 4, sec. 4), Thuringia on 11.06.1997 (Article 2), Mecklenburg–West Pomerania on 15.09.1997 (Article 9), Saxony-Anhalt on 15.01.1998 (Article 1, sec. 3), and Slovakia on 24.11.2000 (Article 8, sec. 2). The texts of these international agreements are in: Lora, E. (ed.), *Enchiridion dei concordati. Due secoli di storia dei rapporti Chiesa-Stato*, Bologna 2003, pp. 854–855, 868–869, 974–975, 1144–1145, 1492–1493, 1583, 1968–1969, 2014–2015, 2086–2087, 2216–2217. Furthermore, the rules on protecting information obtained while providing pastoral care services are included in the agreements signed with the following entities: the Free Hanseatic City of Bremen on 21.11.2003 (Article 9), Brazil on 13.11.2008 (Article 13), the Land of Schleswig-Holstein on 9.12.2009 (Article 9), the Free and Hanseatic City of Hamburg on 6.07.2011 (Article 9), Equatorial Guinea on 13.10.2012 (Article 9, sec. 3), the Republic of Cape Verde on 10.06.2013 (Article 9, sec. 1), and the Democratic Republic of the Congo on 3.02.2017 (Article 9, sec. 2). The texts of the agreements published in AAS are also available online: https://www.iuscangreg.it/accordi_santa_sede.php (accessed 14.03.2020).

21 See: Tomkiewicz, M., *"Tajemnica spowiedzi" i "tajemnica duszpasterska" w procesie karnym*, "Prokuratura i Prawo" 2012, No. 2, pp. 50–64; Pieron, B., *Tajemnica zawodowa (duszpasterska) duchownego*, "Annales Canonici" 2016, Vol. 12, pp. 131–153; Tomkiewicz, M., *Czynności przeszukania w pomieszczeniach kościołów i innych związków wyznaniowych. Zatrzymanie dokumentów i innych rzeczy*, "Annales Canonici" 2018, No. 1, pp. 137–139; Hucał, M., *Tajemnica rozmowy duszpasterskiej na przykładzie Kościoła Ewangelicko-Augsburskiego – stan obecny i wnioski de lege ferenda*, in: Zieliński, T. and Hucał, M. (eds.), *Prawo do prywatności w Kościołach i innych związkach wyznaniowych. Od tajemnicy duszpasterskiej do ochrony danych osobowych*, Warszawa 2019, pp. 250–259; Zamirski, K., *Prawna ochrona tajemnicy duszpasterskiej a informacja o przestępstwie*

Pontifical Secrecy

Secretum pontificium constitutes a special type of secret in the canonical legal order. Even though it is not derived from the Law of God – unlike the seal of confession – but from the Church's law, due to the fact that it refers to the Church's matters of greater significance, pontifical secrecy is considered a higher-ranking secret than the official secret binding all officials of the Roman Curia.[22]

The effective canonical regulation of the pontifical secrecy rule is included in the instruction *Secreta continere* of 4 February 1974.[23] The institution stems from the former "Secret of the Holy Office," governed by the pontifical acts as of the 18th century.[24] Such a name was used to designate the present *secretum pontificium* until 1974. All members of the Congregation of the Holy Office (later also members of other dicasteries of the Roman Curia) were obliged to observe secrecy under oath; otherwise they risked excommunication *latae sententiae* (i.e. the punishment was implemented solely based on the illegal act itself, without the need to additionally impose it during the penal procedure), which – except for the risk of death – could only be lifted by the Pope. The Pope was also empowered to release someone from the obligation of secrecy.

The present name, *secretum pontificium*, explicitly indicates the Pope's responsibilities with respect to defining the obligation of secrecy and matters covered thereby. The secret is "pontifical," as it is regulated in a special manner by the Roman Bishop. First and foremost, it is binding upon their co-workers (inside or outside the Roman Curia) and refers to matters which concern the Pope or the Holy See or is directly related to the tasks performed upon the request of the Pope or for the

w percepcji wybranych polskich Kościołów mniejszościowych, in: Zieliński, T. and Hucał, M. (eds.), Warszawa 2019, pp. 269–282.

22 The differentiation between an "official secret" and a "pontifical secret" can be found in the General Regulations of the Roman Curia, where, according to Article 36 § 1, an official secret should be duly observed, and according to Article 36 § 2, the pontifical secrecy rule should be applied "with particular care". The consequences for violating official secrecy is disciplinary sanction in the form of temporary suspension from office (Article 72, 5º) and the violation of the pontifical secret is privation from office (Article 76 § 1, 3º).

23 AAS, 1974, No. 2, 89–92. More information on pontifical secrecy can be found in: Arias, J., *Las normas sobre el secreto pontificio. Sistema de defensa*, "Ius Canonicum" 1974, No. 28, pp. 332–352; Perlasca, A., *Il segreto pontificio*, "Quaderni di Diritto Ecclesiale" 2013, No. 1, pp. 91–104; Laucirica, J.M., *Secreto pontificio*, in: Otaduy, J. et al. (eds.), *Diccionario General de Derecho Canónico*, Vol. VII, Pamplona 2012, pp. 186–189; de Paolis, V., *El secreto pontificio: fundamento moral y jurídico*, "Ius Communionis" 2018, No. 2, pp. 259–283.

24 The first legal regulation of the *Secretum Sancti Officii* was the decree of Pope Clement XI of 1 December 1709. For more on the history of pontifical secrecy see: Perlasca, A., op. cit., pp. 91–99; Rhode, U., op. cit., pp. 467–473; de Paolis, V., op. cit., pp. 271–273.

benefit of the Pope. The instruction *Secreta continere* does not define or specify the pontifical secrecy rule,[25] but indicates the scope of matters covered thereby as well as the categories of people to whom this rule applies.

In the decree from 1974 (Article 1), it is indicated that all Church matters of greater importance – the preparation of pontifical documents, some issues which are the responsibility of the Secretary of State, reports and proceedings in doctrinal cases and cases regarding crimes against faith, morality, and the sacrament of penance, reports drafted by papal legates, information obtained due to the office held about the appointment of important Church offices and positions (e.g. cardinals, bishops, papal legates, or officials of the Roman Curia), ciphers and ciphertext, or information and documents concerning legal or financial matters with respect to the Pope or the Secretary of State – are subject to the pontifical secrecy rule.[26]

As far as the subjective scope is concerned, Article 2 of the instruction *Secreta continere* includes the following categories of people obliged to observe the pontifical secrecy rule: cardinals, bishops, superiors, higher and lower ranking officials, advisers, and experts who deal with matters covered by pontifical secrecy; legates of the Holy See and diplomatic representatives, as well as all those who are contacted to express their opinion on matters covered by pontifical secrecy; people responsible for keeping pontifical secrecy while handling certain matters; as well as people who obtained some information that is subject to pontifical secrecy by chance or illegally.

The documents subject to the pontifical secrecy rule usually include the annotation *sub secreto pontificio*, therefore, everyone who – legally or illegally – comes into possession of such a document has a moral and legal obligation to observe secrecy, even if the person has not held any of the above-mentioned Church offices. The instruction *Secreta continere* includes canonical sanctions for breaching the *secretum pontificium* rule (Article 3 sec. 2) – indeterminate penalties were provided for depending on the seriousness of the breach and losses caused, to be determined and imposed by a special committee of the dicasteries of the Roman Curia – yet, due to the fact that pursuant to can. 6 CIC all criminal laws in effect prior to the Code of Canon Law coming into force in 1983 were repealed, the instructions of the criminal provisions may not be applied. As mentioned above,[27] the General Regulations

25 Apart from the general statement that 'those bound by papal secrecy have a serious obligation to observe it' (Article 3 sec. 1).

26 In the case of the last matter, the scope of the pontifical secret stipulated in the 1974 instruction was extended pursuant to rescriptum of the Secretary of State, *De Regulis, quae ad Secretum Pontificium spectant* of 5 December 2016, AAS 2017, No. 2, 72.

27 See: footnote 22.

of the Roman Curia of 30 April 1999 include disciplinary sanctions for violating the pontifical secrecy rule. Furthermore, according to can. 1389 § 1 CIC and can. 1464 § 1 CCEO, a person who abuses ecclesiastical power or an office, which applies to *secretum pontificium* and every official secret provided for under canon law, is to be punished with an indeterminate penalty. However, penal sanctions would be applicable on such grounds only when the infringer held any Church office or was commissioned with a particular task.

Secretum pontificium is not only a special type of official secret, but a separate category of secret.[28] While the scope and manner of observing official secrecy are determined by the diocesan bishop (in the diocesan curia)[29] and the doctrine states that a given person may, in certain serious and extraordinary circumstances, be released from the order of silence,[30] in the case of pontifical secrecy, no possibility of exemption or dispensation thereof is explicitly provided for.[31] Nonetheless, according to the text of the oath, which shall be taken by every person who, due to their function, handles matters covered by pontifical secrecy, it is apparent that the exemption from the obligation to observe secrecy may not be easily justified, since the pontifical secret may not be violated "in any manner, under any circumstances, either for greater good or to settle an urgent and serious matter," even after the issue subject to the pontifical secrecy rule has been handled (Article 4).

Pontifical secrecy with respect to cases of sexual abuse of minors

The instruction *Secreta continere* sets out an obligation to observe the pontifical secrecy rule with respect to any reports, proceedings, or decisions in moral cases. Such cases include sexual crimes committed by priests against minors. In compliance with can. 1395 § 2 CIC, a cleric who has committed an offence against the Sixth Commandment, if the delict was perpetrated against a minor under the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants. The provisions of 21 May 2010 implemented by the Congregation for the Doctrine of the Faith with respect to more serious crimes,

28 See: de Paolis, V., op. cit., pp. 280–281; Laucirica, J.M., op. cit., p. 186. The opinion is justified by the fact that the official secret and pontifical secret are treated differently in Article 36 of the General Regulations of the Roman Curia.

29 See: can. 471, 2º CIC and can. 244 § 2, 2º CCEO.

30 See: de Paolis, V., op. cit., pp. 268–270.

31 However, in compliance with the general legal principles, such as the 1st *Regula iuris* by Pope Gregory IX ("Omnis res, per quascumque causas nascitur, per easdem dissolvitur" ["Everything that it is brought into being is dissolved again in the same way"]), the Holy See or, more precisely, the Secretary of State, may exempt someone from the obligation to observe secrecy.

in which the recognition and punishment of an offender is under the jurisdiction of the Congregation, raised the minimum age of a passive victim to eighteen years, and made all minors equivalent to people who are incapable by reason of mental disorder.[32] Moreover, the 'acquisition, possession, or distribution by a cleric of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology' also constitutes a classified crime according to the Congregation for the Doctrine of the Faith.[33] In fact, Article 30 § 1 *Normae de gravioribus delictis* stipulates that "such matters are subject to pontifical secrecy."[34]

However, on the basis of the text of Article 1 sec. 4 of the 1974 instruction *Secreta continere*, it is not evident that the obligation of pontifical secrecy (*secretum pontificium*) in moral criminal cases is limited only to such cases that refer to classified crimes of the Congregation for the Doctrine of the Faith. The pontifical secrecy rule used to refer to every criminal procedure – from reports of a potential crime, through initial investigations and criminal proceedings (court or administrative), to the issuance of a judgement or decree closing the case[35] – conducted in moral cases, i.e. a concubinage offence or other violation against the Sixth Commandment, committed by a priest with an adult, if the offence was public or violent.[36] It meant that the suspect, the accused, the victim, and any witnesses, attorneys and, obviously, representatives of the Church's legal system – judges, delegates of the bishop, notaries public, promoters of justice (prosecutors), interpreters, experts, etc. – were bound by strict confidentiality rules.[37] All individuals admitted to the proceedings due to their functions were obliged to take an oath to respect pontifi-

32 Congregation for the Doctrine of the Faith, *Normae de gravioribus delictis*, AAS 2010, No. 7, p. 424, Article 6 § 1, 1°.

33 Ibidem, Article 6 § 1, 2°. According to the subsequent provisions promulgated by Pope Francis, the age of individuals shown in pornographic materials was raised to eighteen. See: the motu proprio *Vos estis lux mundi* of 7 May 2019, "L'Osservatore Romano" 10.5.2019, p. 10, Article 1 § 2.c.

34 The same was stated in the previous – now repealed – provisions regulating the classified crimes of the Congregation for the Doctrine of the Faith included in the motu proprio of John Paul II, *Sacramentorum sanctitatis tutela* of 30 April 2001 along with the accompanying substantive legal provisions and procedural rules, *Normae de gravioribus delictis*. This motu proprio was the only official act promulgated at that time in AAS 2001, No. 11, pp. 737–739. The *Normae* were published unofficially in "Archiv für katholisches Kirchenrecht" 2002, No. 2, pp. 458–466.

35 See: Cito, D., *Trasparenza e segreto nel diritto penale canonico*, "Periodica de Re Canonica" 2018, No. 3, p. 520.

36 See: can. 1395 § 1 and 2 CIC.

37 "All persons who acquired knowledge of the case in a legitimate manner shall be bound by the secrecy rule." Cito, D., *Norme «De gravioribus delictis». Commentario*, in: del Pozzo, M. et al. (eds.), *Norme procedurali canoniche commentate*, Roma 2013, p. 654.

cal secrecy, according to the text in the instruction *Secreta continere*, which reads as follows: "I am also aware that one who violates the secret commits a grave sin."

An order of confidentiality in this kind of criminal case does not seem to be ill-founded. It is justified by the need to respect the reputation of a person who claims to have been harmed, i.e. the alleged injured party (the disclosure of whose identity and circumstances of a delict would cause more harm and entail further stigma) and the alleged offender (who shall enjoy the presumption of innocence until proven guilty), as well as any other people involved in the case (e.g. witnesses).[38] The purpose of the secrecy is also to ensure smooth progress of the procedure – freedom of testimony for the witnesses, protection against corruption and attempts of exerting undue influence and external pressure (society, media, politics, etc.), and avoidance of prejudice and premature judgements. Another important function of the secret is that it protects against scandal.[39]

The same arguments justify closing the hearing to the public in common (secular) courts. Even though transparency is a constitutional principle according to Polish law (Article 45 sec. 1 of the Polish Constitution), some categories of cases may be, by virtue of law or upon the request of the parties, closed to the public – e.g. the court may close the hearing to the public completely or partially if it could violate good morals or private interests by being open[40] – e.g. in the event the case concerns details of the parties' intimate sphere of life or drastic circumstances of events are the subject matter of the hearing.

Despite the above-mentioned arguments, applying the pontifical secrecy rule to canonical criminal proceedings against priests who commit sexual transgressions has provoked critical responses from both outside and inside the Church community. The most far-reaching accusations were those concerning the willingness to hide offenders despite certain regulations being in effect in some countries, according to which it is obligatory to inform law enforcement authorities that

38 According to can. 1717 § 1 CIC and can. 1468 § 1 CCEO, an ordinary should "carefully" inquire a delict, and according to can. 1717 § 2 CIC and can. 1468 § 2 CCEO "care must be taken so that the good name of anyone is not endangered from this investigation". For the same reasons, in compliance with can. 489 § 2 CIC and can. 259 § 2 CCEO, the documents of criminal cases concerning moral matters are to be kept safe in the archive of the curia and destroyed whenever the guilty parties die or ten years have elapsed since a condemnatory sentence concluded the affair. A short summary of the facts is to be kept, together with the text of the definitive judgement.

39 A scandal shall not be deemed to mean violation of somebody's sense of decency and willingness to maintain a good reputation of the institution of the Church externally despite the crimes committed by priests, but it shall be treated as a threat to the faith and morality of Christians. Therefore, the protection against scandal understood this way is one of the missions of the Church.

40 See: Article 360 § 1 of the Polish Code of Criminal Procedure, Act of 6 June 1997, consolidated text: Dz.U. (Journal of Laws) 2020, item 30.

a punishable offence has been committed.[41] Pontifical secrecy makes impossible or significantly hinders practical cooperation between the Church, secular law enforcement authorities, and the justice system. This cooperation in prosecuting offenders of sexual crimes against minors was recommended in the circular letter of the Congregation for the Doctrine of the Faith of 3 May 2011 to assist episcopal conferences in developing guidelines for dealing with cases of clerics sexually abusing minors.[42] Even though, according to the literature, pontifical secrecy does not limit the state's authority or release anyone from their obligation to reliably collaborate with secular bodies – since both the Church and the state are communities that stand in service of the good of entities and societies[43] – in practice, it is difficult to reconcile the postulated "spirit of cooperation" with the formal observance of secrecy, especially when the law enforcement authorities ask the Church to disclose their documents of canonical proceedings that are subject to *secretum pontificium*; in the case of such discrepancies between the obligations resulting from the provisions of canon law and the orders of state law, commentators have recommended compliance with Church law.[44]

The obligation of secrecy entailed another inconvenience: the difficulty of providing information to Church authorities about a person who reports a suspected crime and/or alleged victim (not necessarily the same person), the course of the proceedings, decisions taken, and the final judgement in the case. It should be remembered that an injured party has no special rights in canonical proceedings – victims

41 Such obligation results, for example, from Article 240 § 1 of the Criminal Code and Act of 6 June 1997, consolidated text: Dz.U. (Journal of Laws) 2019, item 2128. The position of the Church on the aforesaid obligation (also in other countries) is described in: Majer, P., *Problem wykorzystywania seksualnego małoletnich w Kościele. Perspektywa prawnokanoniczna*, in: Żak, A. and Kusz, E. (eds.), *Seksualne wykorzystywanie małoletnich w Kościele. Problem – odpowiedź Kościoła – doświadczenie polskie*, Kraków 2018, pp. 229–233.

42 AAS, 2011, No. 6, p. 408: "Sexual abuse of minors is not just a canonical delict but also a crime prosecuted by civil law. Although relations with civil authorities will differ in various countries, nevertheless it is important to cooperate with such an authority within their responsibilities. Specifically, without prejudice to the sacramental internal forum, the prescriptions of civil law regarding the reporting of such crimes to the designated authority should always be followed."

43 See e.g.: Cito, D., *Trasparenza…*, p. 521; Mosconi, M., *I principali doveri del vescovo davanti alla notizia di un delitto «più grave» commesso contro la morale o nella celebrazione dei sacramenti*, "Quaderni di Diritto Ecclesiale" 2012, No. 3, p. 307.

44 See: Bartone N., *Il conflitto d'obbligo tra autorità ecclesiastica e autorità statale e il crimine di sesso del presbitero con il minore nella normativa comparata e interordinamentale*, in: *Questioni attuali di diritto penale canonico*, Vaticano 2012, pp. 152–153; Nuñez, G., *Abusos sexuales de menores. Consideraciones sobre el derecho de defensa y la colaboración con la autoridad civil*, "Scripta Theologica" 2014, p. 756.

are not treated as a party to the proceedings, but as a witness.[45] Furthermore, in compliance with canon law, such a person is obliged – also under oath[46] – to keep all contents of the investigation (questions and answers) confidential. The confidentiality obligation, even though justified by the above arguments, could indeed be construed as an attempt to disguise the truth. As a result, neither the person reporting the crime nor the alleged victim is given an opportunity to familiarise themselves with the course of the proceedings or the final decision in a legitimate manner. The same applies to the community of faith, in which a priest is accused of committing a crime and which should be informed about the punishment or acquittal of the accused priest.[47]

As a result of the critical comments and real obstacles created by the requirement to observe strict pontifical secrecy, it was proposed during the meeting of the chairpersons of the episcopal conference in Rome in February 2019 to relax the secrecy regulations so that –without prejudice to the protection of the values for the protection of which the secrecy rule was established (the dignity and reputation of people and the best interests of the Church) – it would be possible to create an environment of transparency and trust, while avoiding an impression that pontifical secrecy is used to hide problems.[48]

Effects of lifting pontifical secrecy

Even prior to the announcement of the decision to lift the pontifical secrecy rule in cases of sexual abuse of minors, Pope Francis introduced certain provisions on the protection of persons reporting a suspected criminal offence in his motu proprio

45 Only if the injured party brought a contentious action to repair damages incurred personally from the delict in a penal trial – not an administrative trial – pursuant to can. 1729 § 1 CIC and can. 1483 § 1 CCEO, would such injured party enjoy the rights of being a party to the proceedings.

46 The oath is not directly required under the instruction *Secreta continere*, but pursuant to can. 1455 § 3 CIC and can. 1113 § 3 CCEO, "whenever the nature of the case or the evidence is such that disclosure of the acts or evidence will endanger the reputation of others, provide opportunity for discord, or give rise to scandal or some other disadvantage, the judge can bind the witnesses, the experts, the parties, and their advocates or procurators by oath to observe secrecy." Although according to the text of the above provision, it does not follow that the obligation to take the oath is absolute ("the judge can"), the nature of criminal cases of child sexual abuse turns such a possibility into an actual obligation.

47 See: Scicluna, C. and Tornelli, A., *Scelta epocale che toglie ostacoli e impedimenti. Intervista con l'arcivescovo Scicluna, segretario aggiunto della Congregazione per la dottrina della fede*, "L'Osservatore Romano" 18.12.2019, p. 4.

48 See *Consapevolezza e purificazione. Atti dell'Incontro per la Tutela dei minori nella Chiesa (Città del Vaticano 21–24 febbraio 2019)*, Vaticano 2019, pp. 81, 94.

Vos estis lux mundi of 7 May 2019. First of all, it should be stressed that the above-mentioned reports do not constitute any infringement of official secrecy (Article 4 § 3). Any form of harming, repression, or discrimination due to filing such reports – excluding false reports[49] – shall be prohibited and considered an obstruction of the procedure, which is an illegal act (Article 4 § 2). It is also prohibited to impose on the whistle-blower an obligation of silence with respect to the information included in the report of a suspected crime (Article 4 § 3).

Similar regulations are included in the *Instruction on the confidentiality of legal proceedings* of 6 December 2019, enclosed with the *Rescriptum ex audientia pontificia* published on the same date:[50] "The person who files the report, the person who alleges to have been harmed, and the witnesses shall not be bound by any obligation of silence with regard to matters involving the case" (Article 5).

It should be mentioned that in the first document, the prohibition to impose the obligation of silence refers to the "contents of the report" and in the second one to "matters involving the case". Such expressions may be understood that it is prohibited to demand the observance of secrecy with respect to the events experienced by an alleged victim. The pontifical secrecy rule was often construed in a very strict manner and the victim was forbidden from speaking about being harmed. On the other hand it seems these expressions do not discount the possibility of imposing an obligation to keep secret the questions asked during criminal proceedings – or the initial investigation or hearing – and other circumstances about which an interviewee has already learnt in connection with the proceedings. It would not impose an obligation of secrecy with respect to an illegal act, but to circumstances whose disclosure could potentially disrupt or preclude cognisance of the case and the issuance of a fair decision.[51]

It seems that despite some doubts as to the effectiveness of can. 1455 § 3 CIC and can. 1113 § 3 CCEO (given the publication of the instructions), according to which the judge can bind the witnesses, the experts, the parties, and their advocates or procurators by oath to observe secrecy whenever the nature of the case or the evidence is such that disclosing the acts or evidence would endanger the reputation of others, provide opportunity for discord, or give rise to scandal or some other disadvantage, this canon cannot be invoked. Even though the instructions, as

49 By virtue of can. 1390 § 2 CIC and can. 1454 CCEO, a person who calumniously denounces an offence commits a canonical crime.

50 See: footnote 2.

51 Moreover, it is even possible to see a conflict between the provisions in Article 5 of the *Instruction*, where the obligation of secrecy is prohibited, and the provisions in Article 3 of the same legal act, according to which all persons involved in the proceedings shall observe official secrecy.

executive legal acts, may not amend the laws – and if the instructions are contrary to the law (can. 34 § 2 CIC) they are devoid of any legal effect – in this particular case, despite defining the document as "instructions," it is in fact an implementing act and, moreover, it includes a special clause introduced by the Pope which repeals any provisions that are incompatible therewith: *contrariis quibuslibet, etiam speciali mentione dignis, minime obstantibus*.

In compliance with the *Instruction on the confidentiality of legal proceedings*, the pontifical secrecy rule was lifted with respect to all reports, proceedings, and decisions regarding the crimes mentioned in Article 1 of the motu proprio *Vos estis lux mundi* of 7 May 2019 and Article 6 of *Normae de gravioribus delictis*, at the sole discretion of the Congregation for the Doctrine of the Faith, pursuant to the motu proprio *Sacramentorum Sanctitatis Tutela* by Saint John Paul II of 30 April 2001, as amended. Therefore, the above refers to the following crimes committed by clerics: 1) being involved in sexual activities with an under-aged or vulnerable person (i.e. a person who is unable to oppose aggression, even temporarily), 2) forcing someone into sexual activities – either by violence, threat, or abuse of power, 3) acquiring, storing, or distributing pornographic materials portraying minors under the age of eighteen years for obscene purposes, 4) involving a minor in pornographic performances, and 5) obstructing criminal proceedings against persons suspected of the aforementioned crimes by Church hierarchs.

The institution of pontifical secrecy has not been fully lifted and has not disappeared from the canonical legal order. The 1974 instruction *Secreta continere* is the legal act that remains in force, with recent amendments. The Pope's decision means that the Church authorities responsible for criminal proceedings related to the above-mentioned suspected crimes shall no longer be bound by pontifical secrecy. The same applies to individuals who report suspected crimes, injured parties, and witnesses testifying in canonical proceedings.

The decision does not mean that cases of crimes against the Sixth Commandment shall become public. Anyone who has become party to the procedure due to their function (judges, assessors, prosecutors, or notaries public) and anyone who gains knowledge of the subject matter of the proceedings or has been involved in the investigation shall be bound by official secrecy, the scope of which is to be determined by the provisions of law or the decision of the bishop.[52] It is stressed in the

52 See: can. 471, 2º CIC and can. 244 § 2, 2° CCEO invoked in the *Instruction* and can. 1455 § 1 CIC, as well as can. 1113 § 1 CCEO. Even though, according to the text of can. 471, 2º CIC and can. 244 § 2, 2° CCEO, official secrecy must be observed by persons holding office in the diocesan curia, the Secretary of the Pontifical Council for Legislative Texts stated that the regulation applies to all clerics and persons holding office in the Church, as well as to all parties involved in

Instruction that information related to canonical proceedings shall only be used in a manner that guarantees its safety, integrity, and confidentiality so that the reputation, good image, and privacy of the parties to the proceedings are not damaged. The aforementioned principles refer not only to persons holding Church offices, but also to everyone who gains knowledge of the facts of the suspected crime.

The first comments after the new provisions came into force indicated that the Pope's decision constituted a response to the numerous appeals expressed during the summit devoted to the sexual abuse of minors which took place in February 2019. Andrea Tornielli, Editorial Director for the Vatican Dicastery for Communication, boldly referred to this decision as "historical" and defined it as "a sign of openness, readiness, transparency, and cooperation with secular authorities."[53] Due to the ongoing difficulties and accusations that the Church is reluctant to collaborate with secular law enforcement authorities, the decision of Pope Francis means – according to the Italian journalist in the semi-official Vatican body – that the Church's documentation of criminal cases shall be made available to the secular authorities responsible for proceedings already covered by canonical proceedings.

Despite such positive opinions, the difficulties and doubts regarding the application of the Church's new provisions still persist. Such issues – to be discussed in the last section of this article – shall be resolved in the legal scholarship and commentary, practice, and case law.

Questions regarding the new Church regulations

The first potential difficulty in the Church cooperating with states in terms of sexual abuse crimes committed by clerics against minors is the differences in the understanding of such offences in the two legal orders. Canon law recognises an "offence against the Sixth Commandment" (can. 1395 § 2 CIC) and an "external sin against chastity" (can. 1453 § 1 CCEO); thus, the act is prohibited by the law of God. It is rather too much to expect that secular law enforcement authorities become interested in prosecuting people who have transgressed the commandments of God. There are different types of criminal liability and different objective, subjective, and legal features of a criminal offence.[54] Even though, according to Polish criminal

the proceedings in cases mentioned in the *Instruction*. See Arrieta, J.I., *Riservatezza e dovere di denuncia*, "L'Osservatore Romano" 18.12.2019, pp. 4–5.

53 Tornielli, A., *Decisione storica. Frutto del summit di febbraio*, "L'Osservatore Romano" 18.12.2019, p. 1.

54 More information about the differences between the legal regulations regarding sexual abuse crimes against minors in canonical and Polish legal orders may be found in: Skonieczny, P.,

law, every sexual offence involving a minor is also considered a canonical offence, not every such canonical offence is penalised under the Polish Criminal Code. For instance, such crimes prosecuted under canon law refer to individuals under eighteen years of age, whereas according to Articles 200 and 200(a) of the Polish Criminal Code they apply to individuals under fifteen years of age. Last but not least, the penal procedure provided for in each of such legal orders is also different. For example, prior to an interrogation, a witness in Church proceedings is not informed about any criminal liability for giving false testimony. Is it thus possible to invoke in secular proceedings, without any reservations, such witness's statements made before a Church authority? The witnesses in canonical proceedings take a religious oath to tell the truth. This raises the question of the witnesses' attitude towards their faith and religious practices in order to assess their credibility. Is it possible to provide secular law enforcement authorities with such information without any restrictions, while considering Article 53 sec. 7 of the Polish Constitution: "No-one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions, or belief?" Based on which criteria shall the secular prosecutor or court assess the potential differences between the testimony made by the same person in canonical proceedings and secular proceedings?

Therefore, it seems justified that secular law enforcement authorities or courts should demand that Church institutions document canonical proceedings *in extenso*. To respect the rights of people who testify in canonical proceedings, it would be appropriate to request that a given Church office provide certain information specified by the prosecutor's office or court – e.g. the decisions of Church authorities made with respect to the accused priest or a list of people who have already testified in canonical proceedings. In this case, the relevant state authorities could summon the same individuals and interrogate them in compliance with the rules of the criminal procedure under national law.

Article 4 of the *Instruction on the confidentiality of legal proceedings* of 6 December 2019 stipulates that official secrecy, which covers the information obtained during canonical proceedings, shall not prevent the fulfilment of any obligations resulting from secular laws effective in particular countries, including a potential obligation to report suspected crimes or to satisfy the requests of state judiciary

Przestępstwo cięższe przeciwko szóstemu przykazaniu Dekalogu z małoletnim – uwagi de lege lata i de lege ferenda, "Prawo Kanoniczne" 2017, No. 1, 135–175; Skonieczny, P., *Przestępstwo cięższe pornografii dziecięcej. Komentarz do art. 6 § 1 n. 2 Sacramentorum sanctitatis tutela z 2010 r.*, "Prawo Kanoniczne" 2017, No. 2, pp. 119–138.

authorities.[55] The argument behind such a provision is obvious: the official secrecy that must be observed according to canon law does not release someone from the obligation to report a suspected crime if the legislation of a given country imposes such an obligation.[56] A similar situation exists in the case of a law of a given country that provides for the possibility to demand information or necessary documents or an expedient for the purpose of a fair judgement of the alleged offender.[57]

Nevertheless, the question arises whether the same obligation of disclosing the information to state authorities shall be binding upon Church institutions in the case of civil proceedings for damages. While the need for collaboration in criminal cases is justified for the purpose of finding the offender and bringing them to justice (after the accused's guilt has been proven), which is the aim of both the secular

55 The term "judiciary authorities" used in the *Instruction* does not preclude the acknowledgement of the same obligation with respect to a summons sent by law enforcement authorities, which are not judiciary authorities, for example, in the Polish legal system. The authors of the *Instruction* drew inspiration from the inquisitorial legal system existing in the Roman tradition, where the preliminary investigation falls within the competence of the judiciary.

56 For instance, this is the case with Polish legislation (Article 240 of the Criminal Code). Therefore, after the Act of 23 March 2017 on the amendment of the Criminal Code, the Juvenile Justice Act, and the Code of Criminal Procedure, Dz.U. (Journal of Laws) of 2017, item 773, came into force, the Conference of the Bishops of Poland amended, on 7 June 2017, the *Guidelines for the preliminary canonical investigation in the case of accusations against a cleric for the transgression of the Sixth Commandment with a minor under the age of eighteen* (Akta Konferencji Episkopatu Polski, 2017, No. 29, pp. 93–97). The recitals of this document stipulate that while examining the alleged misconduct of priests and adopting penal measures, Church authorities shall act "with respect for the national law of Poland". First, the reporting person shall be reminded about the obligation to notify the appropriate authorities of a prohibited act, and if they fail to do so, the Church authorities should advise the law enforcement authorities, unless those authorities have already been informed thereof.

57 In Article 2.5 of the guidelines *Linee guida per i casi di abuso sessuale nei confronti di minori da parte di chierici* (2012 and 2014 version), issued by the Conference of the Bishops of Italy; https://www.chiesacattolica.it/documenti-segreteria/linee-guida-per-i-casi-di-abuso-sessuale-nei-confronti-dei-minori-da-parte-di-chierici (accessed 14.03.2020), the Conference of the Bishops of Italy stressed that bishops, who are not public officials according to Italian law, should be released from the obligation of denouncing priests and, pursuant to the concordat agreement guaranteeing the integrity of Church archives and the provisions of the Italian penal procedure, priests should be exempted from the obligation to testify with respect to what has been made known to them by reason of sacred ministry. However, after the latest amendment to the guidelines – *Linee guida per la tutela dei minori e delle persone vulnerabili* of 24 June 2019, https://www.chiesacattolica.it/documenti-segreteria/linee-guida-per-la-tutela-dei-minori-e-delle-persone-vulnerabili (accessed 14.03.2020) – the above-mentioned provisions have been replaced by a general declaration of cooperation between the Church and the state authorities "in respect of mutual autonomy and canon, secular, and concordat law". It is also emphasised that reporting a crime does not exclude or hinder the procedure of notification of state authorities, but rather encourages such action. The canonical procedure is independent of the secular procedure, which it does not intend to replace (Article 5.6).

and Church communities, in cases for damages, where the defendant is a Church legal person (e.g. a diocese), it is not so unequivocal. If, upon request of the court, the Church legal person disclosed an unfavourable document, such person would have to act against themselves. Even though the *nemo tenetur se ipsum accusare* principle – according to which there is no obligation to prove one's innocence or to provide evidence against oneself – usually refers to criminal law, it is sometimes used in civil proceedings as well. In such a case, *nemo tenetur* is expressed as *nemo tenetur edere contra se* or *nemo tenetur se detegere* (no-one is bound to arm his adversary against himself). However, even though this principle – according to the new civil procedure model, not only in the Polish legal order[58] – seems to be less and less important than the judicial truth,[59] it must be remembered that the *nemo est* principle is deeply rooted in the Constitution; thus, it is justified to limit knowledge of the truth in civil proceedings due to the need to safeguard other rights and values.[60] It would be difficult to assume that the party to the litigation shall act to their detriment. Yet, on the other hand, to sustain the credibility of the Church – especially in such delicate matters as sexual abuse crimes against minors committed by priests – it is necessary to undertake common actions for the purpose of establishing the truth even at the expense of paying the compensation.

Last but not least, it should be determined whether the principle of reciprocity could be applied in this area and whether the Church judiciary could be provided with access to the materials used in prosecutorial or court proceedings. According to Polish law, third parties may examine the files pertaining to a court case or a preliminary investigation (during the pending proceedings). In the former case, the records may be made accessible to others with the consent of the president of the court (Article 156 § 1 Code of Criminal Procedure) and in the latter case with the consent of the prosecutor (Article 156 § 5 Code of Criminal Procedure). The consent to disclose the materials of a preliminary investigation may be granted optionally, in special circumstances if it is not necessary to safeguard the proper

58 Despite the fact that pursuant to Article 261 § 2 in connection with Article 304, the party may refuse to respond to the questions asked if their testimony could put them at risk of criminal liability, disgrace, or harmful direct material loss, in compliance with Article 3, the parties to the proceedings shall provide explanations with respect to the facts of the case, truthfully and accurately, and in compliance with Article 248 § 2, the party may not refuse to produce a document upon request of the court if it may expose them to the risk of losing a case. See: Drozd, S., *Prawo do żądania od przeciwnika wyjawienia niekorzystnych dla niego dowodów w polskim procesie cywilnym*, http://www.codozasady.pl/prawo-do-zadania-od-przeciwnika-wyjawienia-niekorzystnych-dla-niego-dowodow-w-polskim-procesie-cywilnym (accessed 14.03.2020).

59 See: Gradi, M., *L'obbligo di verità delle parti*, Torino 2018, pp. 621–676.

60 See: Muliński, M., in: Góra-Błaszczykowska, A. (ed.), *Kodeks postępowania cywilnego. Tom I A*, Warszawa 2019, commentary to art. 3, p. 18, index 5.

course of the proceedings or important interests of the state. One of the benefits derived from the information on the subject matter of a preliminary investigation carried out under canonical proceedings would be, for example, the possibility of abandoning the preliminary investigation in the diocese and notifying the Congregation for the Doctrine of the Faith about the allegations made against a priest.[61] Similarly, by obtaining the testimony of a minor who is the alleged victim of a sexual abuse crime the re-interrogation of the same person could be avoided at the stage of the Church proceedings, which would be advantageous for the same reasons, based on which the Polish legislature decided that a person under the age of fifteen years may only be interrogated once (Article 185a § 1 Code of Criminal Procedure). Certainly, such a solution is aimed at mitigating the adverse effects of such situations on the mental well-being of a minor.

The cooperation between the Church and the state in terms of the prosecution, judgement, and fair punishment of priests who commit sexual crimes against minors is desirable and advantageous. Priests are subject to both the Church and secular legal order, so the punishment imposed in one legal system shall not replace the punishment in the other.[62] Church law shall not replace penal legislation in countries where the Church is present, and shall not be used instead of the secular law, but rather next to it. The aforementioned crimes – despite their different legal configuration – shall be considered *delicta mixta*, which both the canonical and secular legal orders are trying to eliminate. To ensure successful collaboration in this area, it is essential to acknowledge the autonomy and independence of both legal systems, the differences in substantive law and procedures, and certain limitations resulting thereof. Whenever the state accepts the Church legal order, the Church jurisdiction referring to its affairs and independent Church judiciary authorities,[63] the col-

61 According to can. 1717 § 1 CIC and can. 1469 § 1 CCEO, an ordinary may completely abandon the idea of carrying out the preliminary investigation if such an inquiry seems entirely superfluous. Bearing in mind that the preliminary investigation is not aimed at proving guilt, but verifying the grounds for the report, if the information about the alleged crime is fully reliable and the facts of the case are evident – e.g. when the case is public and the accused priest has been arrested – the ordinary may immediately notify the Congregation for the Doctrine of the Faith, which shall be thenceforth responsible for the proceedings in the case.

62 However, it is also crucial to remember can. 1344 CIC and can. 1409 § 1 CCEO, according to which the Church judge can, according to his own conscience and prudence, abstain from imposing a penalty, impose a lighter penalty, or employ a penance if the offender has reformed and repaired the scandal or if the offender has been or is foreseen to be punished sufficiently by the civil authority.

63 It might be the case in concordat states, where – pursuant to the international agreement with the Holy See – the state shall acknowledge final decisions of Church courts with respect to matrimonial matters, hence, accept the Church's judiciary power. Italy, Spain, Portugal, Malta, Croatia, Lithuania, and Slovakia are examples of such states. In Poland, even though the decisions of

laboration may be beneficial. On the other hand, if the state continues to treat the Catholic Church only as a private institution or social or non-governmental organisation, and not a public law entity[64] with its own legal system and judiciary power, as a consequence, it shall not acknowledge its autonomous jurisdiction (operating on its own) either, and instead of cooperating, the state will strive to subjugate the Church in a principled way, which – using the legally permitted instruments (property seizure or a call for the release or transfer of the seized property) – may cause the infringement of constitutional and international legal regulations governing the relationship between the Church and the state.

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64 See: Dobkowski, J., *Status administracyjno-prawny Kościoła Katolickiego w Polsce (przyczynek do dyskusji)*, "Civitas et Lex" 2017, No. 1, pp. 21–28.

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CITATION

MAJER, P., *The lifting of "pontifical secrecy" and the relationship between the state and Church systems of justice in the subject matter of sex offences against minors*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 101–126, DOI: 10.18276/ais.2020.29-08.

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29), 127–145
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-09

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Dilemmas of the amendment to the Code of Civil Procedure of 4 July 2019 as seen in the case of Article 186[1] of the Code of Civil Procedure – selected issues

Abstract

The subject of this paper involves issues related to the statics of the lawsuit. Herein, defective legislative technique applied in the contents of Article 186[1] of the Code of Civil Procedure is indicated. The use of indefinite phrases lacking an explicit designation of terminology is pointed out: "the writ (…), the contents of which do not imply the request to recognise a civil-case litigation" or "exceptional circumstances justifying initiation of proceedings". It is stated within that allowing the possibility of returning by the president the writ filed as an action stipulated in Article 186[1] of the Code of Civil Procedure should be *de facto* and *de iure* considered as a potential possibility of depriving the party of any path to assert claims and thus, limits their constitutional right to court. It is also underlined herein that such a situation can lead to too far-reaching and undesirable discrepancies in court practice in the scope of application thereof, since particular judges and judging panels (in recognition of e.g. a complaint) can interpret this norm differently. This may lead to situations where civil proceedings become an unforeseeable and disordered activity, as well as to situations where the loss of a guarantee to a fair trial is of significance for the participants thereof.

Keywords: the Code of Civil Procedure, acts of legal procedure, procedural writ, action, return, complaint

Introduction

The often expressed, especially nowadays, slogan of the need of establishing quick and reliable court-based jurisdiction, according to F. Carnelutti[1], contains a *contradictio in adiecto* error; if, in fact, jurisdiction is reliable, then, in the assumption it shall not be quick, if, on the other hand, it is quick, it shall certainly not be reliable.

Theoretical and legal analysis

In Chapter 2, Section II, Title VI, First Book of the First Part of the Code of Civil Procedure, a situation not previously known to the Polish civil procedure law has been regulated. The added Article 186[1] of the Code of Civil Procedure regulates a situation in which a court receives a writ, which even if it has been called "an action", it shall not *de facto* constitute by the president's will a type of a procedural writ, since, in his or her opinion it does not include a demand for settling a litigation of a civil case character pursuant to Article 1 of the Code of Civil Procedure.

The literal wording of Article 186[1] of the Code of Civil Procedure implies that the president can return such a writ to the petitioner "(…) without undertaking any further activities, unless exceptional circumstances justify initiating proceedings". In compliance with the above regulation, the president of the division shall decide whether the case has a character of a civil case or not, which until now used to constitute a court prerogative. As a result, the president shall not have to undertake any activities to strive to settle the case even if the other party is a citizen deprived of professional aid.

The quoted contents do not completely allow specification of the situation referred to in the provision and, in particular, of how the phrase: "the writ (…), the contents of which do not imply the demand to recognise a civil-case litigation" and the concept: "exceptional circumstances justifying initiation of proceedings" should be understood.

A doubt arises whether by increasing the formality of proceedings, this provision does not, at the same time, disclose the attempt to improve the proceedings understood as a lack of interferences in the course thereof, of simultaneous burdening parties with consequences for undertaking activities divergent from the model course of a lawsuit.[2]

It should be remembered that excessive rigours and formalisation of the proceedings have not worked well in practice and have not achieved the aim thereof.

1 Carnelutti, F., *Diritto e processo*. *Trattato del processo civile*, Napoli, 1958, p. 154.

2 See: Judgement of the Constitutional Tribunal of 20 May 2008, P 18/07, Legalis No. 98265.

Procedural formalism should be perceived as exercising the principle of equality of arms, and not requirements that are onerous for the parties of concern.[3] Therefore, it does not constitute proper means to ensure the efficient course of court proceedings.[4]

At this point, an opinion exists that the quality of the "transparent" law consists in the fact that it ensures reliability, and, in consequence, also predictability. While drawing up legal provisions, one should be aware that they have to be legible so that the persons applying them have not doubts regarding the type of procedural activities they have to undertake and so that parties to proceedings could foresee which activities shall be undertaken by the adjudicating court.[5]

Therefore, there is a fundamental doubt whether this regulation is compliant with the constitutional right to court, since the person requesting legal aid is refused thereof without studying details of the given case and without providing any aid.

It should be reminded that the Constitutional Tribunal in its resolution of 25.01.1995, W 14/94[6] stated that "in the rule of law, the right to court cannot be understood only in formal terms as availability of the recourse to law in general, but also in substantive terms, as the possibility of legally effective protection of rights by the recourse to law."

The justification of the Bill[7] allows realising that "(…) it concerns a return of the writ, the author of which has a negative approach to a phenomenon or a person and does not formulate any demand of providing him or her with legal protection." Furthermore, it has been pointed out that this provision extends the scope of the judge's discretionary authority.

In literature it is indicated that the discretion of the judge's authority in the broad understanding comprises the right to make decisions which cannot be directly deducted from the legal text, whereas, the stage of applying the referred

3 Ereciński, T., *O potrzebie nowego Kodeksu postępowania cywilnego*, "Państwo i Prawo" 2004, No. 4, p. 10.

4 Helwig, K., *Justizreform*, Berlin 1910, p. 10 – as quoted in: Waśkowski, E., *Zasady procesu cywilnego* (*z powodu Projektu Polskiej Procedury Cywilnej*), "Rocznik Prawniczy Wileński" 1930, No. 4, p. 283 – claimed that: "(…) with regard to the interpretation of provisions concerning keeping formality, it should be presumed that they are introduced to regulate the proceeding and not to ambush parties and prevent the court from determining and protecting the law."

5 Jarra, E., *Ogólna teoria prawa*, Warszawa 1922, pp. 271–272; Wróblewski, J., *Pragmatyczna jasność prawa*, "Państwo i Prawo" 1988, No. 4, p. 8 ff.

6 OTK 1995, part I, p. 219 ff.

7 Parliamentary paper No. 3137.

law which those decisions concern, is irrelevant.[8] Moreover, this authority has certain limitations.[9]

Indeed, it is difficult to understand how the contents of Article 186[1] of the Code of Civil Procedure can be associated with reinforcement of the judge's discretionary authority.

It raises no doubts that procedural writs submitted to the court, the contents of which either include a description of certain personal events of the petitioner or have a nature of a complaint. Nevertheless, it does not mean that the petitioner does not intend to initiate civil proceedings, although the writ does not include a demand from the court to settle a litigation that, in the petitioner's opinion, exists between him or her and indicated persons.

It is hard not to get the impression that the legislator relied in this scope on the resolution (7) of the Supreme Court of 20 April 1970, III CZP 4/70[10] in compliance with which: "writs of the discussed type that are not actions cannot constitute grounds for initiating civil proceedings and provisions allowing supplementing formal shortcomings do not apply thereto."

However, for this reason the writs in question were dealt with by the president, but in the non-procedural mode by giving the sender a relevant reply with explanation. He or she did not return such a writ pursuant to Article 130 of the Code of Civil Procedure, since application of this norm was excluded.[11]

Simultaneously, in the quoted resolution, the Supreme Court indicated that it "(…) refers to the first writ submitted in the case on the grounds of which it cannot be determined which claim is asserted by the plaintiff and what he or she requests of the court." In the conclusion, the Supreme Court stated that "(…) the recourse to law shall not be acceptable in case the statements made by the plaintiff or circumstances quoted by him or her clearly imply that there is no legal relationship between the plaintiff and the defendant, which could provide grounds for demanding an action" (Article 199 § 1 point 1 of the Code of Civil Procedure).

8 Czarnik, Z., *Prawotwórcza rola sądu a dyskrecjonalność sędziowska*, in: Dębiński, M. et al. (eds.), *Dyskrecjonalna władza sędziego. Zagadnienia z teorii i praktyki*, Tarnobrzeg 2012, p. 16.

9 Kozak, A., *Granice prawniczej władzy dyskrecjonalnej*, Wrocław 2002, pp. 99–101.

10 OSN 1970, No. 9, item 146.

11 Cagara, J., *Zwrot i odrzucenie pisma procesowego*, Instytut Badania Prawa Sądowego, Warszawa 1988, p. 34.

The position presented in the aforementioned resolution was not at that time approved by legal scholars. Hence, the validity of the aforementioned theses was questioned by W. Siedlecki[12] and E. Wengerek and J. Sobkowski.[13]

W. Siedlecki expressed an opinion that, if the case was given in the action a character of a civil case by reference to the civil-law provisions and in reality no legal relationship occurs, then, the submitted procedural claim should be rather assessed as unjustified,[14] which cannot receive legal protection not only by the recourse to law, but also in general, in no other manner, and, therefore, the action should be dismissed and not rejected. The inadmissibility of the recourse to law can only be discussed when the specific civil-law claim cannot be recognised by an ordinary court, since other non-court authority is authorised to recognition thereof.

According to E. Wengerek and J. Sobkowski, the court can properly assess whether the asserted claim is of a civil-law character only after a hearing and can only express this assessment in the issued judgment. Furthermore, the outcome cannot be prejudged by a court in proceedings dealing with formal preliminaries pursuant to Article 199 of the Code of Civil Procedure, even if, according to the court, this shortage is obvious. The arguments presented herein, thus retain full substantive value.

Provision of Article 186^1 of the Code of Civil Procedure appears to be the legislator's return to the situation when not even the court, but a president shall single-handedly assess the asserted procedural claim from the point of view of a specific civil-law relationship actually existing between the parties.

Meanwhile, currently, it is evident that, which E. Waśkowski has already noticed,[15] in order to institute an action, it is completely not necessary for the subjective right to objectively exist, and it is only necessary to state the existence thereof. In other words, the fact of "having" the right, the protection of which is demanded, is necessary not to initiate, but to possibly win the lawsuit.[16] Indeed,

12 Siedlecki, W., *Przegląd orzecznictwa SN z zakresu procesu cywilnego*, "Państwo i Prawo" 1971, No. 7, p. 130.

13 Wengerek, E. and Sobkowski, J., *Przegląd orzecznictwa SN odnośnie procesu cywilnego*, "Nowe Prawo" 1971, No. 5, pp. 744–745.

14 As in: Kruszelnicki, Ś., *Kodeks postępowania cywilnego z komentarzem, część 1*, Poznań 1938, pp. 168–169, on the grounds of the Code of Civil Procedure of 1930.

15 Waśkowski, E., *Skarga, powództwo i prawo do ochrony sądowej*, "Polski Proces Cywilny" 1937, No. 9–10, p. 261.

16 Korzan, K., *Roszczenie procesowe jako przedmiot postępowania cywilnego w kontekście prawa dostępu do sądu i prawa do powództwa*, in: Marciniak, A. (ed.), *Symbolae Vitoldo Broniewicz dedicatae. Księga pamiątkowa ku czci Witolda Broniewicza*, Łódź 1998, p. 186.

according to J. Lapierre,[17] in contemporary procedural systems, "(…) an action can be initiated by anyone who claims that he or she is vested with a right resulting from a substantive-law relationship."

The trial is, in fact, intended to show whether the statements providing grounds for the plaintiff's demand are justified in substantive-law provisions.[18]

Therefore, in principle, any request with regard to providing legal protection submitted to the court by an entity that may have specific procedural burdens, results in establishing a valid (flawless) civil-procedural legal relationship, and initiating proceedings that are always – at least until a certain stage – objective proceedings.[19] The court has to accept for recognition any procedural claim submitted in compliance with procedural provisions and state its position in the form of a decision made in the case irrespectively of its validity or groundlessness.[20] Hence, there is no direct and necessary connection between the civil case pursuant to Article 1 of the Code of Civil Procedure and the substantive relationship. The civil case cannot exist without any substantive grounds, whereas the substantive relationship can be established and executed while never becoming the subject of a lawsuit.[21]

Admissibility of the recourse to law does not depend on proving the existence of a substantive-law claim or the feature of the legal relationship actually existing between the parties. This admissibility depends only on factual circumstances (statements) stated by the plaintiff as the grounds for the asserted claim.[22]

Only initiation of the proceedings, the course and ending thereof can verify those statements and determine whether they are based on substantive law provisions,

17 Lapierre, J., in: Jodłowski, J. et al., *Postępowanie cywilne*, Warszawa 2003, p. 242.

18 Trammer, H., *Następcza bezprzedmiotowość procesu cywilnego*, Kraków 1950, p. 14; Siedlecki, W., *Prawo procesowe cywilne a prawo cywilne materialne*, "Krakowskie Studia Prawnicze" 1969, No. 3–4, p. 78; Murray, P.L. and Stürner, R., *German Civil Justice*, Durham–North Carolina 2004, p. 190.

19 Osowy, P., *Powództwa o ukształtowanie stosunku prawnego*, Warszawa 2015, p. 75.

20 Siedlecki, W., *Zasady wyrokowania w procesie cywilnym*, Warszawa 1957, p. 37. Also: Resich, Z., *Przesłanki procesowe*, Warszawa 1966, p. 25 ff.) indicates the obligation of the court's acceptance of any claim asserted in a suit for recognition, but from the point of view of the constitutional right to judicature.

21 Siedlecki, W., *Zasady wyrokowania…*, p. 92. In foreign literature e.g. Schwab, K.H., *Noch einmal: Bemerkungen zum Streitgegenstand, Festschrüft für G. Lüke zum 70. Geburstag*, München 1997, p. 793.

22 See: Decision of the Supreme Court of 21 May 2002, III CKN 53/02, OSNC 2003, No. 2, item 31; Judgement of the Supreme Court of 3 July 2003 in the case III CKN 564/01 (not published).

possibly leading to a binding determination of the existence or non-existence of a specific civil-law relationship between parties to the proceedings.[23]

Such understanding hitherto justified with procedural arguments is supported with the contents of Article 177 of the Constitution of the Republic of Poland, in compliance with which: "ordinary courts administer justice in all cases with the exception of cases statutorily reserved for jurisdiction of other courts."[24] Also in judicature,[25] it has been stated that the constitutional presumption stipulated in this provision implies that the ordinary court should recognise the case in substantive terms whenever there is no explicit indication that in the particular case brought by the interested party to the ordinary court, another court is competent.

In the view thereof, it is justified to assume that recourse to law is admissible whenever the petitioner (possible plaintiff – applicant) bases his or her claim on legal events that can result in civil-law consequences, even potentially. Thus, the admissibility of recourse to law is not and should not be conditioned with the existence of the claim.[26]

In consequence, the Supreme Court[27] expressed the opinion that: "(…) in principle, any procedural claim in the form of the stated substantive-law claim formulated as the request to award, determine or shape the legal relationship irrespectively of its substantive validity, is covered by the recourse to law – if it concerns entities whose position within this legal relationship or legal ties established therein, is equivalent.

Therefore, the contents of the submitted writ, which has been filed as an action, should be assessed with particular prudence and rejection thereof due to the inadmissibility of recourse to law and the more so, return thereof due to the subjective assessment of the lack of characteristics of a civil case should be considered as

23 See: Decision of the Supreme Court of 22 April 1998, I CKN 1000/97, OSNC 1999 no. 1, item 6 and of 10 March 1999, II CKN 340/98, OSNC 1999, No. 9, item 161.

24 See: Judgement of the Constitutional Tribunal of 10 July 2000, SK 12/99, OTK-A 2000, No. 5, item 143. In the same judgement, the Constitutional Tribunal stated that: "(…) the right to court is vested irrespectively of the fact, whether parties to the litigation are actually bound with the substantive law relationship or, despite the claim of one party to the contrary, in the specific case, no legal relationship binds such parties" (ibidem, p. 300).

25 As the Supreme Court in the Resolution of 8 June 2010, II PZP 5/10, OSNP 2010, No. 23–24, item 279.

26 See: Resolution of the Supreme Court of 3 December 2014, III CZP 91/14, OSNC 2015, No. 10, item 111 and previous judicial decisions referred to therein.

27 See: Decision of the Supreme Court of 4 November 2011, I CSK 50/11, LEX No. 1133782.

unjustified, if the petitioner presented circumstances and events that can constitute the civil-law source for his or her demands.[28]

At the same time, it should be pointed out in this context that the introduction of Article 186[1] of the Code of Civil Procedure did not result in the simultaneous amendment of Article 199 of the Code of Civil Procedure, which in § 1 point 1 includes the absolute, favourable prerequisite for court proceedings in the form of admissibility of recourse to law.[29]

Therefore, when the contents of stated circumstances can correspond (even hypothetically) with the specific substantive-law right that is subject to recognition under civil proceedings, such a writ should be treated as an action and should be initiated and not "automatically" returned pursuant to Article 186[1] of the Code of Civil Procedure. As a matter of fact, it should be remembered that the function of the right to court is not to provide the litigant party with a favourable result, but to enable effective possibility of requesting from the court issuance of a just decision (*sententia iusta*) according to the hearing of evidence and in compliance with the contents of substantive law.[30] Since, as noticed by L. Garlicki:[31] "(…) the principle of the right to court means that limiting citizens' rights is only possible on the grounds of a judicial settlement issued upon conducting formalised proceedings and in the subjective aspect it formulates the right of the citizen, whose rights have been violated in his or her opinion, to request final determination of his or her legal situation by the judicial authority."[32]

28 See: Decision of the Supreme Court of 24 June 2010, IV CSK 554/09, OSNC 2011, No. 2, item 29 and judicial decisions referred to therein.

29 Jędrejek, G., *Kilka uwag dotyczących planowanych zmian przez MS w cywilnym postępowaniu rozpoznawczym*, in: Jędrejek, G. et al. (eds.), *Postępowanie cywilne – wprowadzone i projektowane zmiany 2019*, Warszawa 2019, p. 19; also the Decision of Supreme Court of 21 May 2002, op. cit.

30 Czeszejko-Sochacki, Z., *Prawo do sądu w* świetle *Konstytucji Rzeczypospolitej Polskiej* (*Ogólna charakterystyka*), "Państwo i Prawo" 1997, No. 11–12, p. 89; Ereciński, T. and Weitz, K., *Prawda i równość w postępowaniu cywilnym a orzecznictwo Trybunału Konstytucyjnego*, in: Ereciński, T. and Weitz, K. (eds.), *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego*, Warszawa 2010, p. 43; Grzegorczyk, P., *Immunitet państwa w postępowaniu cywilnym*, Warszawa 2010, pp. 309–310; Judgement of the Supreme Court of 4 October 2000, III CKN 1006/00, Legalis No. 58088; Resolution of the Supreme Court of 27 June 2007, III CZP 152/06, OSNC 2007, No. 12, item 175; Judgement of the Constitutional Court of 10 June 2003, SK 37/02, OTK-A 2003, No. 6, item 53.

31 Garlicki, L., *Prawo do sądu*, in: Wieruszewski, R. (ed.), *Prawa człowieka. Model prawny*, Wrocław–Warszawa–Kraków 1991, p. 538.

32 As in: Osowy, P., *Problemy dotyczące dostosowania polskiego prawa sądowego cywilnego do prawa europejskiego – ochrona praw i wolności na przykładzie prawa do sądu*, "Rejent" 2000, No. 12, p. 83.

In reinforcement of the above, A. Jakubecki,[33] by indicating the predominant characteristics of the lawsuit, that is, the principle of availability (faculty to dispose), states that: "(…) the substantive availability *sensu stricto* comprises indications of the parties' autonomy of will in the field of procedural law, demonstrated in the monopoly of initiating and continuing the suit."

Therefore, it should not be a problem that a citizen writes a writ (an action-motion) in a manner disclosing ignorance of the law. It is the court that should be bound to find a relevant approach to the issue of a provision that shall provide legal protection. In fact, work on the knowledge of legal provisions constitutes groundwork. However, since the grounds are faulty, it should not be required from the citizen to have full knowledge and be liable for the negative consequences of this ignorance.[34]

Such understanding of the case should result from the fact that the right to court should be, above all, treated as a directive to create it and a hint in the process of interpretation of such a right.[35] With regard to notion of interpretation, the starting point of this consists in the observation that the lawsuit is the most important test of the effectiveness, rationality and accuracy of legislative solutions in the sphere of practical problems encountered by the individual.[36]

Unfortunately, the reality is different. I believe that today in all fields of creativity and thus, also in the field of legislation, novelty is sought at all costs, since this is required by the spirit of the times. Nonetheless, this strive for a new path, greed of originality stemming from the desire to get rid of old forms should remain under logical control. Especially in the legislative field, introducing too risky changes not sufficiently tried or not resulting from domestic experiences can prove not to be as much innovative, but in the long-term a measure raising doubts, which can be multiplied with the clear "impairment" of perceiving rules of the proper legislative technique. This view is confirmed with amendments to the Code of Civil Procedure of the last several years wherein it is clearly visible that consecutive amendments constitute an attempt at repairing what has been destroyed by previous amendments

33 Jakubecki, A., *Naczelne zasady postępowania cywilnego w świetle nowelizacji kodeksu postępowania cywilnego*, in: Ratusińska, I. (ed.), *Czterdziestolecie kodeksu postępowania cywilnego*, Kraków 2006, p. 351.

34 Osowy, P., *Głos w dyskusji*, in: Sawczuk, M. (ed.), *Czterdzieści lat kodeksu cywilnego. Materiały z Ogólnopolskiego Zjazdu Cywilistów w Rzeszowie (8–10 października 2004 r.)*, Kraków 2006, pp. 53–54.

35 Grzegorczyk, P. and Weitz, K., in: Safjan, M. (ed.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016, Legalis, commentary to Article 45.

36 Gutowski, M., *Opinia Komisji Legislacyjnej przy Naczelnej Radzie Adwokackiej do projektu ustawy o zmianie ustawy Kodeks Postępowania Cywilnego oraz niektórych innych ustaw z dnia 27 listopada 2017 r.*, Poznań 2017, p. 8.

and which instead of giving a coherent and logical reply to arising questions (issues), only multiply them (mainly due to the lack of designations introduced to the Code of Civil Procedure).[37]

While drawing up procedural law provisions, the legislator should be aware that they have to be legible so that the persons applying them have no doubts regarding the type of procedural activities they have to undertake and so that parties to the proceedings could foresee which activities shall be undertaken by the adjudicating court.[38] Thus, the principle of moderate formalism shall be preserved,[39] and it shall be possible to assess the proceedings as reliable.[40]

Unfortunately, it seems that it is not like that in the case of the introduction of Article 186[1] of the Code of Civil Procedure which is an example of defective (using an indefinite phrase[41]) and incoherent (used terminology[42]) legislation, application of which can infringe upon the citizen's right to court.[43]

37 Osowy, P., *Prawo procesowe cywilne – tradycja a postęp. Wykład inauguracyjny WSPiA 2014/2015*, Przemyśl 2014, p. 14; idem, *Tradycja a współczesność w nowelizacji kodeksu postępowania cywilnego – (refleksja ogólna)*, in: Marszałkowa-Krześ, E. et al. (eds.), *Kodeks postępowania cywilnego z perspektywy pięćdziesięciolecia jego obowiązywania. Doświadczenia i perspektywy*, Sopot 2016, pp. 216–217.

38 It was already underlined in the Ancient Rome in the legal maxim: "*Ubi ius incertum, ibi ius nullum*" (where the law is uncertain, there is no law); Kuryłowicz, M., *Słownik terminów, zwrotów i sentencji prawniczych łacińskich oraz pochodzenia łacińskiego*, Kraków 1999, p. 124.

39 Osowy, P., *Umiarkowany formalizm procesowy*, in: Flaga-Gieruszyńska, K. and Jędrejek, G. (eds.), *Aequitas Sequitur Legem. Księga jubileuszowa z okazji 75. urodzin profesora Andrzeja Zielińskiego*, Warszawa 2014, p. 437 ff.

40 Góra-Błaszczykowska, A., *Zasada równości stron w procesie cywilnym*, Warszawa 2008, pp. 186–192; idem, *Ekspertyza na temat projektu ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw – druk sejmowy nr 3137*, http://www.sejm.gov.pl/sejm8.nsf/opinieBAS.xsp?nr=3137 (accessed 15.5.2019), p. 15.

41 Indescribability of the used term entails its simultaneous vagueness, which being a logical category concerns the scope thereof. The indescribability consists in the fact that despite learning about the features of the used term, we cannot judge whether it is or it is not the *designation* of the specific name and thus, whether it is included in the current scope thereof, or not.

42 In Article 394 § 1 point 1 of the Code of Civil Procedure including the enumeration of decisions and orders with regard to which a complaint can be filed, the legislator used the phrase: "petition for examination of a case", whereas, in Article 186[1] of the Code of Civil Procedure the following phrase has been used: "petition for examination of a civil case litigation" – which raises justified doubts in determination of the subject of the examination of the complaint.

43 Kościołek, A., in: Gołaczyński, J. and Szostek, D. (eds.), *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.7.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*, Legalis, commentary do Article 186[1], who expressly states that "(…) such a solution may lead to the worsening of the procedural situation and infringement of constitutional guarantees, especially of persons who do not have the possibility of benefiting from aid provided by a professional attorney *ad litem*."

First of all, from the logical point of view, the provision of Article 186[1] of the Code of Civil Procedure includes in the first sentence a rule and in its final part an exception.

In compliance with the provision of Article 186[1] of the Code of Civil Procedure *in fine* the writ filed as an action shall not be returned, if "exceptional circumstances justify initiation thereof."

This regulation appears as *inelegantia verbis*.

The legislator has not explained what exceptional circumstances in case of occurrence thereof would result in not returning a writ that is not an action.

In the justification of the project,[44] it has been indicated that "(…) the possibility of processing such a writ should be foreseen in case it is justified with exceptional circumstances (it does not have to be a procedural initiation – the writ can be e.g. forwarded to the competent authority)."

Such an interpretation raises serious doubts.

It seems that the obligation to return the writ shall apply only to those competences of the president of the division that are not included in the obligation of undertaking procedural activities.[45] It should be recognised that this shall usually result from treating the writ as a complaint on activity (negligence) of a particular judicial authority (e.g. a judge, a division official, a judicial enforcement officer, a secretariat employee) or non-judicial authority (e.g. a public administration authority). Relevant processing of the writ can consist in forwarding the writ by the president of the division to a pertinent authority (the president of the court, the Minister of Justice, the public administration authority). Moreover, the president should also forward the writ to the prosecutor's office (Article 304 of the Code of Criminal Procedure), if it includes a description of a criminal behaviour of a specific entity, including a natural person or a legal person not exercising public power (administration). The obligation to notify the guardianship court in cases stipulated in Article 572 of the Code of Civil Procedure[46] is similar.

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44 Parliamentary Paper no. 3137.

45 In compliance with the definition that today seems to reflect common views, an act of legal procedure constitutes such a formal act (in the form of an action or conscious omission) of a procedural subject, which, according to the Procedural Act, can have consequences for the lawsuit (Waśkowski, E., *Istota czynności procesowych*, "Polski Proces Cywilny" 1937, No. 24, p. 740; Siedlecki, W., *Czynności procesowe*, "Państwo i Prawo" 1951, No. 11, p. 704). In foreign literature e.g. Rosenberg, L. et al., *Zivilprozessrecht*, München 2010, pp. 328–329; Simotta, D.A., in: Rechberger, W.H. and Simotta, D.A. (eds.), *Grundriß des österreichischen Zivilprozeßrechts*, Wien 2010, pp. 306–308.

46 As: Kunicki, I., in: Góra-Błaszczykowska, A. (ed.), *Kodeks postępowania cywilnego. Tom I A. Komentarz do art. 1-42412*, Warszawa 2020, Legalis, commentary to Article 186[1].

Secondly, it is worth studying the analysis conducted by the Supreme Court Research and Analyses Office, which in its opinion of 4 January 2018 expressed its doubts regarding the compliance of this provision with Article 45 § 1 and Article 77 § 2 of the Constitution of the Republic of Poland.[47] since, in essence, it comes down to the rejection of recognising the case.[48] It is underlined that this issue can be socially significant, especially in cases in the scope of social insurance, in which it often happens that the party not satisfied with the administrative decision does not formulate any requests and usually acts without any professional plenipotentiary.

B. Czech[49] seems to underestimate these concerns and he indicates the fact that "(…) provided for in Article 186[1] of the Code of Civil Procedure return of the writ is subject to the instance review and the party can easily obtain legal advice, also free of charge, in the case of the need to file an action or a motion and the amount of the judge's work necessary for the aid automatically deprives other parties engagement in their cases."

It seems that the possibility of instance review itself does not reduce the doubts in case such a party is an individual e.g. less educated, who does not use professional legal aid due to a lack of necessary funds or does not obtain such aid as a result of refusing the motion for appointment of a court-assigned attorney.

Furthermore, unfortunately, today's social realities indicate that obtaining free of charge legal aid is more and more often illusive.[50]

In addition, the contents of the filed writ can include inaccurate phrases. This situation does not release the president from attempting to determine the type of settlement requested by the party – or the aim (intention) of filing such a writ.[51] In such a case, the president of the division or the appointed judge reporter should call on the author to supplement formal shortages of the action (Article 130 of the Code

47 It seems that is shall also concern compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Dz.U. (Journal of Laws) 1993, No. 61, item 284 – Article 6 § 1 and Article 14 § 1.

48 Konarska, E. et al., *Opinia do projektu ustawy o zmianie ustawy – kodeks postępowaniu cywilnego oraz niektórych innych ustaw*, Warszawa 2018, pp. 3–4.

49 Czech, B., in: Marciniak, A. (ed.), *Kodeks postępowania cywilnego. Tom I. Komentarz. Art. 1–205*, Warszawa 2019, pp. 1217–1218.

50 See: Letter of the Commissioner for Human Rights to the President of the Republic of Poland of 6 July 2017, (IV.510.9.2014.AB, pp. 1–2) regarding free legal assistance and legal education. The contents of the letter imply that, among others: "(…) the system of free legal assistance is inefficient and ineffective, and the number of persons benefiting from free advice within the programme binding as of 1 January 2016 is insignificant."

51 Kunicki, I., op. cit., commentary to Article 187.

of Civil Procedure)[52] by specifying the claim (Article 187 § 1 point 1 of the Code of Civil Procedure) and indicating the facts on which he or she bases their statements (Article 187 § 1 point 2 of the Code of Civil Procedure).[53] The court should return the writ pursuant to Article 186[1] of the Code of Civil Procedure only in the absence of such a supplementation.

It seems that when properly applied, Article 130 of the Code of Civil Procedure does not constitute aid to the potential plaintiff, yet, serves as providing him or her with the right to court resulting from Article 45 § 1 of the Constitution of the Republic of Poland and does not lead to disproportions signalled in the literature, which would entitle, e.g. the defendant, to request analogous aid in formulating the reply to the action or with regard to the doubts in the scope of impartiality of the president (and not the court in this case).[54] The possibility of processing the procedural writ should not be executed at the discretion of the president of the division and without attempting to explain the contents thereof.[55]

Furthermore, a situation wherein the court of the 2nd instance recognising the complaint[56] regarding the ruling[57] on the return (Article 394 § 1 point 1 of the Code of Civil Procedure) shares the opinion of the president and by dismissing thereof shall deprive the person of the possibility to process his or her procedural writ as an action,[58] cannot be excluded. This is significant, since the returned writ shall not result in any legal consequences (neither substantive, nor procedural) even if, in the opinion of the petitioner, the intention was to request recognition of a civil-type of litigation. The second instance court decision dismissing complaints on the return of the writ pursuant to Article 186[1] of the Code of Civil Procedure cannot be complained against to the Supreme Court, since it does not include recognition

52 See: e.g. Decision of the Supreme Court of 22 July 1999, I PZ 33/99, OSNAPiUS 2000, No. 23, item 862.

53 Zieliński, A. and Flaga-Gieruszyńska, K., *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2016, p. 381; see: Decision of the Supreme Court of 18 March 2010, V CZ 10/10, Legalis No. 358181 or Judgement of the Administrative Court in Szczecin of 16 March 2016, I ACa 941/15, Legalis No. 1470191.

54 Czech, B., op. cit., p. 1217.

55 As the Supreme Court in the Decision of 22 July 1999, op. cit.

56 The legislator legitimately did not restrict himself to the horizontal complaint (non-devolutive).

57 Since it concerns the resolution of the president and not the court, it should have the form of an order (Article 47 § 31 of the Code of Civil Procedure).

58 Despite the fact that the contents of Article 394 § 1 point 1 of the Code of Civil Procedure concern the return of the writ submitted as an action, it should be consequently stated that, by the reference included in Article 13 § 2 of the Code of Civil Procedure, this provision shall respectively apply to the president's order on the return of writs initiating proceedings other than the lawsuit.

pursuant to Article 398[1] § 1 sentence 1 of the Code of Civil Procedure[59] as it is neither the decision concluding the proceedings in the case due to the previous lack of the pendency of the litigation (Article 199 § 1 point 2 of the Code of Civil Procedure). However, due to the necessity to protect the constitutional right to court – legitimately in the literature[60] – such an interpretation of Article 398[1] § 1 of the Code of Civil Procedure (if necessary, even with the use of the analogy[61]) is postulated in order to ensure the possibility of the Supreme Court's review over decisions of the second instance courts dismissing complaints on the return of the writ pursuant to Article 186[1] of the Code of Civil Procedure.

As accurately noticed by M. Dziurda:[62] "(…) due to the necessity of guaranteeing the right to court, even if in the course of recognising the complaint on the ruling on return issued pursuant to Article 186[1] of the Code of Civil Procedure, it turns out that the writ can, if fact, be understood as including the request to recognise the civil case pursuant to Article 1 of the Code of Civil Procedure, the court of the second instance should dismiss it in order to ensure recognition of the case in compliance with the provisions of the Code of Civil Procedure."

In the binding classification system of the Code of Civil Procedure, the provision of Article 186[1] shall also apply in non-procedural proceedings (as a result of applying Article 13 § 2 of the Code of Civil Procedure),[63] despite not very precise formulation of the provision "(…) a civil-case litigation,[64]" since litigations can also be recognised in non-procedural proceedings. Therefore, the president should strive to clarify whether the petitioner requests the legal aid that should be provided by the court by issuing a substantive decision.[65] Furthermore, the contents of

59 Dziurda, M., in: Zembrzuski, T. (ed.), *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian. Tom I i II*, Warszawa 2019, Legalis, commentary to Article 186[1], v. 28.

60 Ibidem, v. 29.

61 E.g. the Supreme Court commented in favour of applying prudent iuris analogy in its Resolution of 22 January 1998, III CZP 69/97, OSNC 1998, no. 7–8, item 111.

62 Dziurda, M., op. cit., v. 27.

63 Differently: Klonowski, M., *Kierunki zmian postępowania cywilnego w projekcie Ministra Sprawiedliwości ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw z 27.11.2017 r. – podstawowe założenia, przegląd proponowanych rozwiązań oraz ich ocena*, "Polski Proces Cywilny" 2018, No. 2, p. 188.

64 Two types of being have been differentiated: the ones that are a part of the nature and the ones that have been created by a human. This differentiation was previously introduced by Greeks, who separated what comes from nature (*physei*), and what comes from art, that is, human creation (*nomo, theei*). Therefore, when we are reading and writing about the "character" of a civil case, we intuitively (and thus, nomo) understand its "feature" and therefore, its contents.

65 Szanciło, T., in: Szanciło, T. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2019, pp. 600–601.

such a writ can, e.g. in the enforcement or family proceedings, signal the existence of irregularities.[66]

To sum up, it should be stated that the contents of Article 186[1] of the Code of Civil Procedure can affect obtaining by the party a valid decision on the merits of the case. It also includes indefinite phrases that lack an unequivocal designation of terminology: "the writ (…), the contents of which do not imply the request to recognise a civil-case litigation" or "exceptional circumstances justifying initiation of proceedings."[67] Using indefinite concepts in the procedural act extends the time of work of the judge who should focus on the merits of the case and not on analysing the intention of the drafter and on decoding provisions of the civil proceedings.[68] Such a situation can lead to too far-reaching and undesirable discrepancies in court practice in the scope of application thereof, since particular judges or judging panels (in recognition of a complaint) can interpret this norm differently, which may lead to the situation when civil proceedings become an unforeseeable and disordered activity and it may lose the guarantee significance for participants thereof.[69]

Allowing the possibility[70] of returning the writ filed as an action by the president stipulated in Article 186[1] of the Code of Civil Procedure should be *de facto* and *de iure* considered as a potential possibility of depriving the party of any path to assert claims and thus, limit the constitutional right to court.

66 Marszałkowska-Krześ, E., *Opinia Ośrodka Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych o projekcie ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*, Warszawa 2017, pp. 6–7; Szanciło, T., op. cit., pp. 690–691.

67 Similar position of the "Iustitia" Polish Judges Association on the bill on the amendment to the act – the Code of Civil Procedure and certain other acts (UD 309), Warszawa 2017, p. 7, where the poor linguistic level is underlined.

68 Torbus, A., *Czy projekt nowelizacji Kodeksu postępowania cywilnego pod nazwą „Ustawa o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw" (druk nr 3137) pozwala zwiększyć efektywności postępowania cywilnego?*, Warszawa 2019, p. 31; is of the opinion that Article 186[1] of the Code of Civil Procedure is a vague provision conflicting with the regulation on the rejection of an action (Article 199 § 1 point 1 of the Code of Civil Procedure), and from the point of view of the effectiveness of proceedings, rather completely redundant.

69 Cieślak, S., *Formalizm postępowania cywilnego*, Warszawa 2008, p. 118.

70 It has been stated in the literature that in compliance with Article 186[1] of the Code of Civil Procedure, sanction in the form of returning the writ without undertaking any further activities does not constitute only a possibility the execution of which would be left to the president's discretion, but it is his or her obligation. Therefore, whenever, in the president's opinion a writ is submitted, which does not include any petition for examination of the case, he or she is obliged to return the writ to the petitioner (Kościołek A., op.cit.).

Conlusion

In conclusion, it should be underlined that obviously the paper does not exhaust all issues related to the concept of a writ filed as an action and return thereof pursuant to Article 186[1] of the Code of Civil Procedure. Moreover, the presented opinion does not aspire to be called "the only right." Writing this paper was dictated by the need to address the topic included in the title. I tried to underline doubts that may arise with regard to the possible interpretation thereof. However, I did so in order to, by underlining the complexity of this issue, indicate the necessity of starting a discussion the subject of which was the described matter.

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CITATION

OSOWY, A., *Dilemmas of the amendment to the Code of Civil Procedure of 4 July 2019 as seen in the case of Article 186[1] of the Code of Civil Procedure – selected issues*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 127–145, DOI: 10.18276/ais.2020.29-09.

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29), 147–164
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-10

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Protecting the right to clean air through criminal law: a perspective from economic law analysis and the case of Poland

Abstract

The aim of this paper is to examine whether Polish criminal law efficiently criminalises acts that harm air quality (most notably emissions of toxins to the air through, among others, the improper processing of waste). The relevance of this research stems from the notorious fact that air-quality in Poland is one of the worst in Europe, and it is no secret that this situation is caused largely by private actors infringing on rules concerning the emissions of toxins into the environment. As the author establishes through legal analysis, the collection of empirical data, and on the basis of an economic-law-analysis crime model, Polish criminal law fails thoroughly when it comes to combatting this phenomenon. Relating the current legal regulations and, most importantly, their employment in practice to the prerequisites of effective crime policy (as envisaged by G. Becker), it is doubtless that for the poor air-quality in Poland to change, the state should aim at reaching a better detection rate when it comes to environmental crimes, as well as inflicting more severe penalties on the perpetrators of those crimes. This, coupled with proper educational campaigns directed at citizens and law enforcement authorities at large, should bring about higher levels of deterrence when it comes to these crimes, and by extension, enhance air quality in Poland.

Keywords: air pollution, efficiency of environmental criminal law, right to a clean environment, economic law analysis

Introduction

In a situation when legal goods are not sufficiently protected by civil law, or when their protection is a public matter, it should be regulated through administrative or penal law (or both).[1] That statement perfectly applies to protecting the environment and, among other things, ensuring clean air quality. It is agreed in the legal scholarship and commentary that in cases of a violation of environmental norms, a suitable public law regulation is necessary to scare off potential violators and minimise the negative externalities generated by their acts. The reasons for that are manifold. First, it is quite complicated for private entities to detect those who have violated their rights with respect to a clean environment. Such a private actor does not have the organisational or legal instruments that are at the public authorities' disposal.[2] Moreover, it is not insignificant that the effects of emissions are dispersed, which means that the group of victims may be very difficult to determine.[3] Finally, considering this matter from an economic-law-analysis standpoint, it must be stressed that if a wrongful act is only regulated in civil law, it means no less than that the legislator allows the commission of such an act provided that the perpetrator is ready to pay restitution (an amount equal to the damage caused). On the other hand, criminalisation makes clear that the lawmaker's intent is to fully prohibit a wrongful act due to its destructive and anti-social nature.[4] In that case, it is not necessary, and most often not advisable, to set the legal penalty as equal to the damage, rather the punishment should deter the perpetrator.

This paper will discuss how well criminal law provides for such deterrence. It will analyse whether the criminal code and other acts properly criminalise the actions of citizens that harm air quality at large. The importance of this research cannot be overstated. It is a notorious fact that air quality in Poland is one of the worst in Europe, and it is no secret whatsoever that this situation is caused largely by private actors, namely people and entities emitting toxins into the air through the use of poor-quality fuel to heat their homes. Among the most detrimental practices of

1 Cooter, R. and Ulen, T., *Law and economics, 6th edition*, Berkeley 2016, pp. 460–461.

2 Posner, R., *An economic theory of the criminal law*, "Columbia Law Review" 1985, No. 85, pp. 1193–209; Skogh, G., *A note on Gary Becker's crime and punishment: an economic approach*, "Swedish Journal of Economics" 1973, Vol. 75, pp. 305–311; Skogh, G. and Stuart, C., *An economic analysis of crime rates, punishment and the social consequences of crime*, "Public Choice" 1982, No. 38, pp. 171–179.

3 Faure, M., *Environmental crimes*, in: Garoupa, N. (ed.), *Criminal law and economics*, Cheltenham 2009, pp. 320–345.

4 Cooter, R., *Prices and sanctions*, "Columbia Law Review" 1984, No. 6, p. 1550.

this kind one can name is the illegal incineration of waste, which leads to emitting carcinogenic aromatic hydrocarbons (most notably benzopyrene).

Next to formal legal analysis, this paper draws upon such interpretation methods as comparative analysis, as well as economic law analysis, which provides an invaluable framework to assess the legal regulations from viability and cost-efficiency standpoints.

At this point, it might be asked whether criminal regulation is at all necessary to regulate air-polluting activities. It could be posited that administrative regulation would be more suited to tackle this problem. In economic-law-analysis literature, it is strongly advised that imposing small penalties for 'less significant crimes' within criminal procedure is far more costly and less efficient than doing so through administrative law (which is partly because of the fewer procedural guarantees in the latter type of proceedings[5]).

To counter it, it can be said that because the probability of detection of air pollution is relatively low, the penalties for such acts should be that much higher (more on that later). Quite obviously, administrative law is arguably not the optimal medium for imposing high financial penalties, and surely not punishment consisting of deprivation or limitation of liberty[6]. Moreover, such penalties are not possible to use as substitutes in administrative law, although such a possibility exists within criminal law. Because of that, administrative law might prove fully inefficient towards a person who does not have any means to cover the financial penalty imposed on him. This may very often be the case when it comes to air pollution and the generation of particulate matter since the overarching reason for such behaviour is very often poverty and such people's poor financial circumstances. Taking all of the above into account, it seems reasonable to claim that in order to achieve the desired level of prevention of the described illegal acts, criminal regulation is necessary, even if serving as a complement to existing administrative measures.

Criminalisation of acts against the environment

The Polish Criminal Code[7] provides two types of crimes that can apply to those who emit air-polluting substances. They are regulated, respectively, in Arts. 182 and 183 CC, i.e., in chapter XXII of the Code dedicated to crimes against the environment.

5 Ogus, A. and Abbot, C., *Pollution and penalties*, in: Swanson, T. (ed.), *An introduction to the law and economics of environmental policy*: *issues in institutional design*, Amsterdam 2002, pp. 493–516.

6 Miceli T., *Optimal prosecution of defendants whose guilt is uncertain*, "Journal of Law, Economics and Organisation" 1990, No. 6, pp. 189–201.

7 Act of 6 June 1997 – Criminal Code, Dz.U. (Journal of Laws) 2018, item 1600 (hereinafter: CC).

In order to determine whether the above-mentioned legal provisions can be useful when battling polluting the atmosphere, their components need to be described. Then it will be necessary to ascertain whether actions such as the incineration of waste, use of heating devices of poor quality, or overall excessive emission of pollution can be qualified as one of those crimes. When interpreting those provisions, the question of how they are put into practice by judicial authorities will be taken into account.

Pollution of the environment – Art. 182 § 1 CC

Art. 182 § 1 CC penalises the behaviour of a person who pollutes the air with a substance or radiation in such quantities or form that could pose a danger to the life or health of many people, or cause significant destruction of plant and animal life. The crime may be committed intentionally, in which case it is punishable by imprisonment for three months to five years, or unintentionally (182 § 2 CC), in which case it is punishable with a fine, restriction of liberty, or imprisonment for up to two years.

Moving to the analysis of each component of the crime, it should first be noted that the existence of this crime requires that the criminal has polluted the air. The Criminal Code does not define that act, which is why, by virtue of systemic interpretation, we should turn to its definition under Art. 3, point 49 in conjunction with point 3 EPL.[8] This provision stipulates that air pollution should be understood as introducing substances into the air directly or indirectly, which may deteriorate the aesthetic qualities of the environment or interfere with other justified uses thereof. Given that pollution consists of introducing substances, it follows that it can only be committed by action, and not by omission (unless there is a specific obligation on the offender to prevent such pollution[9]).

In that respect, it is doubtless that actions such as incinerating waste and producing toxic gaseous substances and particulate matter, as well as the use of low-quality heating devices, can be deemed as air pollution within the meaning of Art. 182 § 1 CC, as they generate PM10 and PM2.5 particles as well as benzopyrene, and introduce them into the atmosphere.

The next component necessary to commit the described crime is that the criminal's action should bring about consequences in the form of creating a threat of pollution of a certain degree and intensity. The threatening pollution needs to be

8 Act of 27 April 2001 – Environmental Protection Law (hereinafter: EPL), Dz.U. (Journal of Laws) 2018, pp. 799.

9 Lachowski, J., *Komentarz do art. 182 CC*, in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, 2018, LEX.

high enough for it to compromise human life or health, or the quality of air, or plant and animal life. What is crucial is that these consequences do not actually have to come about. It is just enough that such an occurrence is probable.[10] It is also not necessary for the pollution to compromise the health of more than one person.[11] In other words, the described crime is that of an abstract-concrete exposure to danger.[12] Thus, the crime has a material character, unlike the one indicated by legal scholar and commentators,[13] as it requires an effect to take place.

It also needs to be stressed that the action of one person may already create such a threat, which is required in order for the crime to exist. To argue otherwise would lead to the virtual impossibility of employing the provision in the described way, which would definitely be counterproductive.[14] It is true that such a conclusion departs from the strict obligation typical in cases of criminal law to establish a causal link between the action and the effect. However, sticking to that in the case of Art. 182 § 1 CC would neglect the specific nature of the crime against the environment and the pure impossibility of establishing a strict causal link between a particular emission in question and threat to life. In the author's view, it is fully sufficient that the action of one person consisting of air pollution increases the threat to life in order to ascribe criminal responsibility under Art. 182 § 1 CC. Such a conclusion, it seems, does not contravene the Constitution and its Art. 42, which requires that criminal responsibility be possible to be accurately determined and which prohibits broadening the interpretation of provisions. There is no broadening, since the action of one person who produces pollution, especially when committed continuously throughout the heating season, already creates a risk of deteriorating human health, and thus fulfils the necessary conditions under Art. 182 § 1 CC.[15]

However one may perceive that the above-mentioned problem of the attributability of the effect to the actions of one person should at least be verified through standard criminal procedure. It is obvious since the emission of harmful pollution

10 Radecki, W., *Ochrona środowiska w nowym prawie karnym, cz. II: Prawnokarna ochrona przed zanieczyszczeniami, odpadami i promieniowaniem*, "Monitor Prawniczy" 1998, No. 1, Legalis.

11 Similarly: Gałązka, M., *Komentarz do art. 182*, in: Grześkowiak, A. and Wiak, K. (eds.), *Kodeks karny. Komentarz*, Warszawa 2019; it was different before the revision of March 2011 when it was necessary that the threat concerned multiple people. Cf: Radecki, W., *Komentarz do art. 182 k.k.* in: Górniok, O. (ed.), *Kodeks karny. Komentarz*, Warszawa 2005.

12 In the sense that the pollution has to be real and the danger connected with it potential/abstract.

13 Gruszecka, D., *Komentarz do art. 182*, in: Giezek, J. (ed.) *Kodeks karny. Część szczególna. Komentarz*, Warszawa 2014, p. 425; Zoll, A., *Komentarz do art. 182*, in: Wróbel, W. and Zoll, A. (eds.), *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1–52*, 2016, LEX, paragraph 3.

14 Radecki, W., *Ochrona*…, op. cit., Legalis.

15 Similarly, Judgement of the Appellate Court in Wrocław of 21 September 2017, II AKa 236/17, LEX no. 2381444.

already creates a suspicion of committing a crime under Art. 182 CC, which means that the existence of its elements should be verified through evidentiary proceedings before at least a prosecutor in criminal preparatory proceedings (pursuant to Art. 303 CPC in conjunction with Art. 325a § 2 CPC [16]). In such proceedings, calling upon an expert should be considered in order to establish what threat to human life was generated by the offender's actions. This, however, for unknown reasons, almost never happens. Cases concerning Art. 182 CC are rarely opened, and the conviction rate is remarkably low (see below).

Table 1. Data concerning the number of cases related to Art. 182 § 1 CC

Year	Number of cases opened	Number of convictions	Crimes detected	Detection rate (in %)
2017	111	22	7	31.8
2016	109	19	9	47.4
2015	100	16	6	37.5
2014	91	14	2	14.3
2013	99	24	7	29.2
2012	95	8	4	50.0
2011	60	6	0	0.0
2010	68	12	5	41.7
2009	88	14	5	35.7
2008	107	16	5	31.3

Source: http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-3/63472, Zanieczyszczanie-srodowiska-art-182.html (accessed 15.02.2020).

The final component of *corpus delicti* of the crime in question is intent. As mentioned above, this particular crime may be committed both intentionally and unintentionally. To perceive any criminal act as an intentional one, there are two possible scenarios. Either the perpetrator has to both want (direct intent) to commit a crime along with all of its objective components (in the case of the act described in Art. 182 § 1 CC, the perpetrator has to be willing to engender pollution of such an intense degree that it creates a risk to human life or health, or the quality of air, or plant and animal life).[17] Alternatively, a perpetrator of such an act has to realise and accept that his/her actions may bring about such dangerous pollution, without it being their goal (possible intent). In all other cases, committing a crime described

16 Act of 6 June 1997 – Criminal Proceedings Code, Dz.U. (Journal of Laws) 2018, item 1987.

17 Zoll, A., op.cit.

in Art. 182 § 1 CC would have to be considered as unintentional and thus punishable on the basis of § 3 of this provision.

Naturally, in cases of this criminal act and environmental crimes in general, proving intent is rather a daunting challenge. Given that most people do not want to create pollution for the sake of it, as a rule their possible intent would have to be considered. To prove that, however, it would have to be demonstrated beyond reasonable doubt that a perpetrator of this act had knowledge and awareness that his/her actions, (coupled with other polluters) may in turn give rise to dangerous consequences, notably to human life and health. It seems to the author that, as the social awareness of these issues is increasing, it will be possible to assume that it is general knowledge that unlawful emissions of pollution may be detrimental to public health and the environment. On the other hand, such an assumption could and would undoubtedly be challenged by the perpetrator in the course of criminal proceedings, and there is little doubt it would have to be resolved in his/her favour.[18] Notwithstanding, the legislator provides that a crime fulfilling the objective elements envisaged in Art. 182 § 1 CC may also by committed without intent, that is to say, not in a careful manner required under the circumstances, when the possibility of committing the prohibited act should or could have been foreseen. While in cases of unlawful dangerous emissions existence of possible intent may at times be difficult to prove, there should be no difficulty in establishing that it is common knowledge that emitting substances into the atmosphere requires care concerning such key aspects as the chemical nature of the released toxins and potential hazardous consequences thereof. From that standpoint, it seems that the question of intent of committing the crime envisaged in Art. 183 § 1 CC is not that relevant as regards the attributability of the crime itself, since it is rather improbable that a person accused of committing the crime in question could successfully prove they lacked acting with due care while performing unlawful emissions of toxic substances into the air.

To conclude, it has to be said that even though the above-described provision could technically be an efficient instrument against those who insist on polluting the atmosphere in a continuous fashion, it is regrettably not at all employed in that way. As will be shown below, criminals have to be sufficiently deterred in order for criminal law to work. If the above provision is not used, even though it could be, what is left is prosecuting offenders on the grounds of minor delinquency, which means that the offenders face very limited charges, and in turn, that the rate of deterrence may be too low.

18 Kurowski, M., *Komentarz do art. 5*, in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz*, 2020, LEX.

Improper waste management – Art. 183 § 1 CC and Art. 155 of the Waste Act[19]

Art. 183 § 1 CC penalises behaviour in which the offender, in violation of the law, stores, disposes of, recycles, neutralises or transports waste or substances under conditions or in a manner that could pose a danger to the life or health of human beings, or cause significant destruction to plant or animal life, and is liable to imprisonment for between three months and five years. As can be seen at first glance, this provision may be useful in battling the harmful behaviours to which this article refers. The above-mentioned crime, just like the one from Art. 182 § 1 CC, can be committed intentionally or unintentionally.

Referring first to the object of the criminal act, it is waste, as defined in the Waste Act, i.e., as each substance or object whose possessor disposes of or intends or is obliged to dispose of.[20] For the object to be considered waste, it is unimportant whether after its possessor disposes of it, someone may find it and put it to some use.[21]

As regards the action that the crime may consist of, considering the topic of the article, it is the processing of waste, its recycling and neutralisation. It is doubtless that incineration of waste is one of those actions, and thus falls under the scope of Art. 183 § 1 CC.

A person commits the crime described in that article only when their actions towards waste are 'in violation of the law', that is, they contravene respective administrative provisions regarding waste management. It needs to be indicated that neither of the above provisions allows the incineration of waste at home, and thus such behaviour will always be in violation of the law, and fulfils the described component of Art. 183 § 1 CC.

For the existence of a crime under Art. 183 § 1 CC, it is also necessary – not unlike in the case of Art. 182 § 1 CC – that unlawful management of waste described in the provision should bring about consequences in the form of creating a threat of pollution of a certain degree and intensity. The threatening pollution needs to be high enough for it to compromise human life or health, or the quality of air, or plant and animal life. As this component is identical to the one in Art. 182 § 1 CC, it is sufficient to state that all of the considerations applying to that crime are also valid in the case of Art. 183 § 1 CC.

19 Act of 14 December 2012 on waste, Dz.U. (Journal of Laws) 2018, item 992. (hereinafter: Waste Act).

20 Królikowski, M., *Komentarz do art. 183*, in: Królikowski, M. and Zawłocki, R. (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, 2017, Legalis.

21 Judgement of the Regional Administrative Court in Warsaw of 21 September 2010, IV SA/Wa 868/10, Legalis 279206.

From this short analysis, it follows that the behaviour being the focal point of this section, i.e., the incineration of waste, which produces much of smog's most dangerous chemical components (most notably the cancerogenic benzopyrene), is criminalised by Art. 183 § 1 CC. Just as in the case of Art. 182 § 1 CC, although the judicial organs know about the widespread practice of incinerating waste, offenders are not persecuted, and if they are, it is on the basis of minor offences and not according to Art. 183 § 1 CC. The rarity, and consequently, the fallacy of the employment of this provision is manifest, considering the low number of convictions based on it. By way of example, in 2017 only 51 violations of this provision were legally confirmed. This number remains in stark contrast with simple human experience, which tells us that each day there is at least one person in our neighbourhood who perpetrates such an act. Instead of prosecuting them, law enforcement is content with considering those acts as merely minor offences.

Table 2. Data concerning the number of cases regarding Art. 182 § 1 CC

Year	Number of cases opened	Number of convictions	Crimes detected	Detection rate (in %)
2017	249	51	28	54.9
2016	224	48	32	65.3
2015	175	43	31	72.1
2014	172	56	32	57.1
2013	150	75	53	70.7
2012	172	42	23	53.5
2011	99	35	26	74.3
2010	191	52	36	69.2
2009	162	69	55	79.7
2008	209	80	62	77.5

Source: http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-3/63476,Nieodpowiednie-postepowanie-z-odpadami-art-183.html (accessed 15.02.2020).

A complementary regulation to the one described above is Art. 191 of the Waste Act. This article provides that it is illegal to incinerate waste outside of authorised waste-treatment facilities. Unlike the act criminalised by Art. 183 § 1 CC, this act is not a crime but a minor offence, punishable by a maximum fine of PLN 5,000 or detention for a maximum of 30 days. It can be perpetrated by a physical person, and responsibility for such an act does not depend on the consequences that it

could bring (such as danger to life or health), which marks a radical difference in comparison with the crime of waste mismanagement.

Assessment of this regulation is not an easy task. On one hand, this regulation perfectly complements the more stringent one provided in Art. 183 § 1 CC so that someone who does burn their waste can be held liable, even if it did not bring about the consequences necessary to pursue such a person on the grounds of Art. 183 § 1 CC. In that sense, the regulation has to be praised. On the other hand, it also leads law enforcement authorities to choose to pursue detected perpetrators on the grounds of the Waste Act rather than to tackle the more complicated task of building a convincing case based on Art. 183 § 1 CC, even if it better fits the committed offence. Thus, the existence of less-severe criminal responsibility in the form of Art. 191 of the Waste Act may in fact hinder the proper use of Art. 183 § 1 CC. It has to be noted that if someone constantly commits the described minor offence, they will inevitably in total create enough toxic emissions that will engender a risk to the life and health of people. This, in turn, fulfils the condition necessary to prosecute such a person on the grounds of the Criminal Code (and with far stricter penalties possible).[22] However, this has never been acknowledged or recognized by Polish law-enforcement authorities, which content themselves with simply punishing offenders for the minor offence provided in Art. 191 of the Waste Act, even in cases when these people commit the offence of the illegal incineration of waste on a regular basis.

Such a practice is downright unacceptable. It means that in practice, people guilty of regular emissions – and by that same token, of emitting considerable amounts of toxic gases – may face only a small fine or a short stay in jail. The exact consequences of such a deplorable oversight on the part of law enforcers will be discussed in the next part of the paper.

The adequacy and efficiency of the Polish criminal regulation devised to protect the environment

The next question that needs to be asked is about the character of the penal regulations concerning air pollution, as well as their scope, practice of implementation, severity, and finally, whether they form with other legal norms a cohesive system of protection of the air and its users. In the following sections, I will analyse the methodology of such an assessment and then make an attempt to apply that methodology to the above-described criminal regulations. On the grounds of the

22 Radecki, W., *Komentarz do art. 191*, in: Radecki, W. (ed.), *Ustawa o odpadach. Komentarz*, Warszawa 2020, LEX.

proposed assessment model, those regulations will be critically assessed as regards their functionality, efficiency, and possible ways of improvement.

Becker Model – methodology of assessment

The efficiency of criminal law should, in brief, be considered as its capability to discourage legal entities from committing crimes. This notion has always been a subject of interest among philosophers and legal theorists, primarily of philosopher Jeremy Bentham.[23] The modern methodology of criminal law efficiency was formulated by economist and Nobel Prize winner in economics G. Becker in his article *Crime and punishment: an economic approach*.[24] The Becker model gives the answer to what kinds of punishments should be imposed on criminals for given crimes, how severe those punishments should be, and finally what is the optimal rate of detection of the analysed crimes in order to minimise negative externalities resulting from the commission of crimes of this type (where the externalities comprise damage resulting from crimes, the costs of detection and conviction of offenders, as well as the costs of their punishment). Efficient criminal law minimises such negative externalities. As a matter of fact, the more severe the externalities of certain crimes are, the more it is beneficial to invest in detecting them or to increasing the punishment for perpetrating them.

In his analysis, Becker assumed that a criminal acts rationally, i.e., they want to maximise gain from crimes. Thus, their decision as to whether to commit crimes is a direct result of comparing the pros and cons of that decision. If the negative consequences of potential legal sanctions, considering the probability of detection, are equal to or higher than the expected gains, then they should decide against committing a crime. It needs to be said that the specific decision is dependent on the criminal's attitude to risk.[25] From those considerations, it follows that the function

23 Bentham, J., *Introduction to the principles of morals and legislation*, Kitchener 2000, pp. 135–151, https://socialsciencepp.mcmaster.ca/econ/ugcm/3ll3/bentham/moralpp.pdf, (accessed 7.03.2019); Posner R., *Frontiers of legal theory*, Harvard 2004, p. 52.

24 Becker, G.S., *Crime and punishment: an economic approach*, "Journal of Political Economy", Vol. 76, No. 2, pp. 169–217; Becker, G.S., *Irrational behaviour and economic theory*, "Journal of Political Economy" 1962, Vol. 70, pp. 1–13; Stigler G., *The optimum enforcement of laws*, "Journal of Political Economy" 1970, Vol. 78, No. 3, pp. 526–536.

25 And thus a risk-taking person will commit a crime even if the gain is marginal; on the other hand, a risk-averse person will resign from considerable gain in order to commit themselves to legal activities; Becker, G.S., *Crime*…, p. 176; Jajuga, W., in: Jajuga, W. (ed.), *Zarządzanie ryzykiem*, Warszawa 2007, p. 14.

of criminal law is increasing the costs of committing crimes so that it is no longer beneficial to the criminal.[26]

According to the author, the instruments through which the state aims at achieving that goal is either increasing maximal sanctions for committing crimes or using more resources for detecting and sentencing criminals. Those instruments should interplay, and it is for the lawmaker to decide which is more important in any given situation. The same level of deterrence can be achieved by imposing draconian punishments and ensuring a very low detection rate. Conversely, lawmakers may opt for imposing very lenient penalties while ensuring that that the offenders will almost certainly be apprehended and convicted. The decision about what to do should always consider the costs of each alternative. The above-described conclusions, citing M. Polinsky and S. Shavell,[27] can be approached in a more formal fashion:

$$P_1 > 0 <=> Z_{P1} > p\ (g + d(t))$$

where:

P_1 – supply of a specific crime

Z_{P1} – gain from committing a crime

p – probability of detection

g – usually imposed fines for the crime in question

$d(t)$ – disutility for the criminal arising from limiting or depriving their liberty.

The cost of committing crimes is expressed by the equation $p(g+ d(t))$. That cost is in simple terms, the sum of criminal sanctions relative to the probability of detection and conviction of the criminal. In other words, if for a specific crime the typical punishment imposed is two years of imprisonment and the probability of detection and conviction is 50%, the expected average cost of committing a crime is equal to the value that one year of imprisonment represents to the criminal. This value is naturally subjective and different for everyone. It depends on how much the criminal could earn during that time and also on extra-financial aspects, such as the family situation of the criminal or fear of losing his/her reputation.[28]

Naturally, it is much easier to determine the potential costs of committing a crime if the only possible penalty is a fine. In that case, the cost is the amount of the fine typically imposed times the probability of it being imposed. Because using this penalty, provided that it is successfully executed, generates no costs for

26 Bowles, R., *Law and the economy*, Oxford 1982, pp. 54–105.

27 Polinsky, M. and Shavell, P., *The economic theory of public enforcement of law*, "Journal of Economic Literature" 2000, No. 38, pp. 45–76.

28 Ashraf, N. et al., *Adam Smith. Behavioral economist*, "Journal of Economic Perspective" 2005, Vol. 19, No. 3, pp. 131–145.

the state, it is economically speaking an optimal sanction.[29] It is often an adequate price paid by the offender to the injured society, without making that society pay for executing the punishment (which is quite different in case of deprivation or limitation of liberty).

However, it has to be noted that fines are not always perfect sanctions.[30] First, because of the fact that some offenders are insolvent, which renders financial fines quite ineffective, which finally will either be cancelled or exchanged for a different penalty.

Second, at times the deterrent power of fines may prove insufficient. As results from the Becker model, the state can check the interplay of two factors when deciding criminal policy: the severity of crimes and probability of detection. In some situations it may prove optimal to lower the detection rate and increase penalties. This is the case especially when crime detection is costly and difficult; in order to keep the deterrence unchanged, the state may limit its efforts in detecting crimes while increasing the severity of sanctions[31]. Given a certain low probability of detection, it may happen that even the highest fine possible will not be sufficient to successfully deter criminals from committing crimes, which in turn will mean that it will be necessary to resort to more severe charges.

Irrespective of the above, generally it has to be said that the above-cited authors are correct in saying that fines are usually optimal, especially when it comes to economic crimes (i.e., crimes in which the main motive is financial gain). On the one hand, such a penalty is just because it is directed against the assets of the criminal, who wanted to increase them through criminal means. On the other hand, society will not in such a case suffer the costs arising from executing the penalties (this philosophy is also adopted in the criminal code in Art. 57 CC).

29 Posner, R., *Optimal sentences for white-collar criminals*, "American Criminal Law Review" 1980, Vol. 17, pp. 400–418.

30 Coffee, J.P., *Corporate crime and punishment: a non-Chicago view of the economics of criminal sanctions*, "American Criminal Law Review" 1980, pp. 419–476; Shavell, P., *Criminal law and the optimal use of non-monetary sanctions as a deterrent*, "Columbia Law Review" 1985, No. 85, pp. 1232–1262.

31 See: Becker, S., *Crime*…, p. 183.

The economic model in the case of environmental crimes

The model presented above also applies to environmental crimes directed against the quality of air, as described in the article[32]. It is said in the literature that in the case of such crimes, the penalties for committing them were not set properly in modern legal systems, as the costs of crime are lower than the gains the criminal reaps and the damages those crimes generate. Given that, it is claimed that the current deterrence level in the case of the described crimes is far too low. This conclusion is highly supported by the Becker Model and fully applies to Polish criminal law in that respect.

According to Becker, the more negative externalities a crime generates, the more severe the criminalisation should be. Despite that, environmental crimes, exponentially harmful as they are, do not seem to be prosecuted in Poland as a matter of priority. Quite the contrary – it seems that the fight against environmental crimes is rather lackadaisical.

Some authors do indicate that one of the reasons for it might be the sheer difficulty in detecting such crimes, their perpetrators, and consequences.[33] The reason for this is quite simple. The described crimes are very common and, at the same time, they can happen in the privacy of each perpetrator's home. Once committed, the commission of the act may only be proven by costly and lengthy chemical examinations of the remnants. Finally, the crimes in question very often remain without direct, identifiable victims, who in the case of other crimes very often serve as a source of information about the commission of the crime(s). Finally, specifically concerning Polish criminal practice, the authorities are ill-prepared to fight this particular kind of criminality because of both a lack of adequate training and equipment. As indicated in the statistics, very few crimes against the environment are detected and properly processed, even though the levels of air pollution indicate that committing them is common and prevalent within Polish society. Also, the general public has only started to appreciate the problem and criminality of the above-described actions, which generate a considerable part of air pollution in the country, which is why the reporting rate of these crimes is still low.

In such a case, i.e., when the detection of crimes turns out to be troublesome, as the Becker model suggests, the punishment should be even more severe in order

32 Almer, C., *Extending the economic model of crime to environmental offenses – and vice versa*, https://www.ethz.ch/content/dam/ethz/special-interest/mtec/cer-eth/resource-econ-dam/documents/research/ws-and-conf/nachwuchsworkshop/Almer_Paper.pdf (accessed 15.07.2020); Faure, M., op. cit., pp. 328.

33 No extensive *empirical* research exists on the topic, nevertheless the conclusion is evident despite limited data. Cf: Faure, M., op.cit. pp. 320–345.

to scare off potential perpetrators, even if the chances of getting caught are low. However, Polish environmental criminal law seems to operate according to reverse principles. First, the existing criminal regulations are either rarely employed or employed incorrectly (as is the case of the incomprehensible resignation from instigating criminal prosecution on the grounds of Art. 183 § 1 CC against habitual offenders who regularly commit minor offences such as incineration of waste, even though it would not only be possible but actually desirable). Second, even if a case concerning an act against the quality of air is presented to a judge, the chances are that the final punishment will be very lenient. It has been concluded through a series of studies that judges are not willing to impose severe financial penalties for these particular crimes[34] as they consider them unimportant crimes in comparison with others (such as burglary or mugging). Judges are even less prone to consider even more severe punishment such as deprivation or limitation of liberty.[35]

All of the above shows that all those who violate the law when it comes to polluting the atmosphere may sleep well while under Polish jurisdiction. Not only are the chances of getting caught extremely low but also they are likely to answer only for a minor offence and suffer a minimal penalty for it. Because of the inconsequential value of these crimes, it will in all probability remain financially beneficial for the offender to keep on committing them.

Final remarks and suggestions

The above analysis not only shows that the prosecution of offences against the environment and clean air is faulty but also allows us to pinpoint the reasons why that is the case. Interestingly enough, they do not lie in the poor quality of legislation. Actually, the legal provisions currently in force in Poland regulate all conceivable manners of harmful activities directed against the atmosphere, and so they do not really require a change (maybe only for the sake of clarification of certain issues, which the author has described in his analysis). The problem lies in the way these regulations are put into practice. To rectify the current situation, following the conclusions arising from the Becker model, the Polish state should focus on two aspects related to environmental crimes.

34 Faure, M., op. cit., pp. 320–345; Meinberg V., *Empirische Erkenntnisse zum Vollzug des Umweltstrafrechts*, "Zeitschrift für die Gesamte Strafrechtswissenschaften" 1988, pp. 112–157; Ogus, A. and Abbot, C., op. cit., pp. 493–516.

35 Barrett, J.J., *Sentencing environmental crimes under the United States sentencing guidelines: a sentencing lottery*, "Environmental Law" 1992, No. 22, pp. 1421–1449.

First, more funds should be devoted to increasing the detection rate of these crimes. The way to go about it would be to train law-enforcement agents to be more sensitive to the described issues and to educate them on how to detect, prove, and qualify the commission of such crimes. Also, a higher detection rate may be brought about by increasing general public awareness concerning the issue. If citizens are properly informed about the risks to their health that arise from the seemingly innocent activities of their neighbours, they may be more prone to report them to the authorities. Also, with the general public better informed on the issue, it will be much more difficult for those who commit the crimes described in this article to successfully plead that they were not aware of the consequences of their actions and that they cannot be held responsible for intentional crimes.

Second, assuming that the poor detection of these crimes is unavoidable due to their nature, steps should be taken to ensure that those who are sentenced for acts harming air quality are punished severely enough to deter others and also according to the criminal character of their actions and the level of social consequences. Such a goal can be achieved by increasing the lower limits of punishment possible to impose it again through proper training of prosecutors and judges so that they properly qualify specific criminal acts which they have to legally process (either as a crime or minor offence). Such training could also bring about a better appreciation of the social ramifications of the criminal acts discussed here, which could possibly lead to employing more punishment of a more adequately severe nature.

It is the author's belief that putting the above-mentioned measures into practice should result in a substantial lowering of the rate of the offences in question, as well as reducing air pollution in general. One may just hope that such measures will be adopted by the Polish state in its striving for a greener tomorrow.

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CITATION

PODHALICZ, M., *Protecting the right to clean air through criminal law: a perspective from economic law analysis and the case of Poland*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 147–164, DOI: 10.18276/ais.2020.29-10.

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29), 165–175
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-11

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Tax on revenue from buildings after the latest amendment: characteristics and doubts

Abstract

The aim of the article was to describe the current tax on revenue from buildings and to present the doubts connected with it. The author analysed legal acts, interpretations of the tax authorities, judgments of administrative courts, and views of tax law scholars and commentators for the article. The tax on revenue from buildings (until 2018 also known as the tax on commercial real estate) is a relatively new tax under Polish law. It was introduced in 2018, though it was amended considerably in 2019. Although it is regulated by the Personal Income Tax Act and the Corporate Income Tax Act, in fact it should be recognised as a kind of wealth tax. The taxpayers are the owners of buildings that are wholly or partially used for the purposes of tenancy, lease, and other similar contracts (the total value of the building has to exceed PLN 10 million). The tax rate is 0.035% of the building's value, paid monthly. It can be deducted from advance payments for income tax, and next it can be deducted from the income tax amount indicated in an annual tax return. The tax has created many doubts over interpretation. Some of them could be eliminated through the legislature's amendments to the relevant provisions.

Keywords: tax on revenue from buildings, personal income tax, corporate income tax

Introduction

The income tax on commercial real estate (also known as the minimum income tax) was introduced into the Polish legal order by amendments to the Personal Income Tax Act[1] (the PITA) and the Corporate Income Tax Act[2] (the CITA), which were enacted in 2017. This tax came into force on 1 January 2018. Some of its features, however, raised doubts in the European Commission (in particular, over whether a narrower scope of taxation does not constitute a form of prohibited public aid in relation to entities using real estate of lower value, etc.[3]).

Therefore, the Polish government decided to amend the previous provisions through an amendment which was made under the Act of 15 June 2018, amending the PITA, the CITA, and the Lump Sum Income Tax on certain incomes earned by natural persons.[4] Despite the retention from the previous wording of certain issues (such as the tax base or the level of the tax rate), the Act introduced some fundamental changes. The amendment came into force on 1 January 2019 at the beginning of the new financial year.

Subject of taxation and entities taxed

The tax on commercial real estate (since the amendment of 2018, which the legislature calls a tax on revenue from buildings) is regulated by Article 30g of the PITA, and in a similar way with very minor differences in Article 24b of the CITA. Originally, the object of taxation of this tax was the types of real estate enumerated in the Act, depending on the type of activity they were intended for (mainly related to trade and office space). The amendment of 2018 significantly changed the scope of taxation with this tax, in its new wording covering all buildings owned or co-owned by the a taxpayer that are wholly or partially used for tenancy, lease, or other similar contracts (they must be financial in nature, so this tax does not apply, for example,

1 Personal Income Tax Act, consolidated text: Dz.U. (Journal of Laws) of 2019, item 1387, as amended.

2 Corporate Income Tax Act, consolidated text: Dz.U. (Journal of Laws) of 2019, item 865, as amended.

3 Self-amendment to the governmental bill amending the Personal Income Tax Act, the Corporate Income Tax Act, and the Lump Sum Income Tax on certain incomes earned by natural persons – Statement of reasons (https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=2291-A).

4 Act of 15 June 2018 amending the PITA, the CITA, and the Lump Sum Income Tax on certain incomes earned by natural persons, Dz.U. (Journal of Laws) of 2018, item 1291.

to contracts regarding use[5] or lending free of charge). Thus, the list of items subject to the tax has been narrowed down (at least as regards buildings which were already subject to taxation before the amendment came into force), because if a building or part of it is not leased, etc., it is no longer subject to the tax. On the other hand, in some respects, the scope of the entities has expanded, as there is no longer any limitation on the types of buildings to be taxed. In contrast to the previous version, it includes warehouses and – in certain situations – even residential buildings, among others.[6] Taxation concerns owners and co-owners of buildings located in the Republic of Poland. However, by way of exception, pursuant to Art. 30g(17) of the PITA and Art. 24b(17) of the CITA, if the building in question is the object of a financial leasing agreement and the conditions for its taxation with the tax in question are met, a lessee who claims deductions for depreciation of the building is the taxpayer, instead of the owner.[7] Moreover, in the case of personal income tax, there is an additional premise: the object of taxation must be an asset related to business activity. This means that the obligation to pay tax on revenue from buildings shall not apply to natural persons obtaining revenue from the 'private lease'[8] referred to in Article 1(2) of the Lump Sum Income Tax Act.[9]

In addition, in the latest amendment of 2018 (in effect since 1 January 2019), the legislature in Article 30g(18) of the PITA and in Article 24b(18) of the CITA included a provision preventing avoidance of tax on revenue from buildings by transferring ownership (or co-ownership) of a given building asset to another person, or by putting it into use through a financial leasing agreement (according to tax law). The legislation requires that a taxpayer who has thus disposed of the real estate in question must remain liable to taxation under two conditions: firstly, that the taxpayer, in carrying out the transaction, tried to avoid being subject to the tax in question, and secondly, that the transaction had no legitimate economic reasons. The tax authority then has the power to determine the tax liability of the original owner (co-owner) of the building, which in turn results in no tax liability for

5 Individual interpretation of the Director of the National Revenue Information System of 20.02.2019, ref. no. 0111-KDIB1-3.4010.163.2019.1.MBD (sip.mf.gov.pl).

6 Banasik, P. et al., *Podatek od przychodów z budynków – następca minimalnego podatku dochodowego od wartości budynków komercyjnych – wybrane problemy*, "Przegląd Podatkowy" 2018, No. 2, LEX.

7 Sender, E., *Jak liczyć podatek od przychodów z budynku?*, 29.05.2019, Rzeczpospolita, https://www.rp.pl/Podatek-dochodowy/305299993-Jak-liczyc-podatek-od-przychodow-z-budynku.html (accessed 22.04.2020).

8 Jankowski, J., *Zmiany w minimalnym podatku od nieruchomości komercyjnych w 2019 r.*, "Nieruchomości" 2019, No. 1, Legalis.

9 Lump Sum Income Tax Act, consolidated text: Dz.U. (Journal of Laws) of 2019, item 43, as amended.

the buyer of the property. These regulations constitute a special clause against tax avoidance for the purposes of the tax under study.

The PITA and the CITA do not contain a definition of a building. Therefore, the question arises as to how a building should be interpreted in terms of the tax on revenue from buildings. It seems that the most accurate method would be to refer to the Classification of Fixed Assets (the CFA), which in the case of income tax is also the basis for selecting the depreciation rate of a fixed asset. The scope of entities subject to the tax on revenue from buildings has already been the subject of many tax interpretations. For example, in the individual interpretation of 24 May 2019, ref. no. 0114-KDIP2-1.4010.153.2019.1.JC,[10] the Director of the National Revenue Information System considered that a stadium is not subject to tax on revenue from buildings, because in the CFA stadiums are classified under Group 290 as 'Sport and recreational buildings' and not as buildings. This interpretation confirms the thesis that in order to define whether a given structure is subject to the tax on revenue from buildings, it should be considered how the object is qualified in the CFA.

The question also arises whether the objects of taxation – buildings – are fixed assets, since under the provision of Article 30g(1) of the PITA (and, accordingly, Article 24b(1) of the CITA), such fixed assets include only buildings in which premises have not been separated or buildings in which premises have been separated but with a share in a common area. This issue was also the subject of one of the individual interpretations of the director of the National Revenue Information System. In this interpretation, the director agreed with the taxpayer's position (the owner of a building in which premises have not been separated or of premises in other buildings which share a common area and form a housing community) that

"Although in Article 30g of the PITA the legislature also uses the notion of co-ownership of the building (indicating in Article 30g(5) of the PITA the method for calculating the initial value for the purpose of calculating the tax), it does not in any way refer to the minimum tax for premises separated within a given building. (…) Moreover, the Classification of Fixed Assets, indicating fixed assets that are real estate, treats buildings and premises separately. In addition, the definitions of building and premises contained in the explanatory notes to the above-mentioned Classification are not the same, which clearly demonstrates the need to distinguish between them".[11]

10 Individual interpretation of the Director of the National Revenue Information System of 24 May 2019, ref. no. 0114-KDIP2-1.4010.153.2019.1.JC (sip.mf.gov.pl).

11 Individual interpretation of the director of the National Revenue Information System of 18 February 2019, ref. no. 0115-KDIT3.4011.537.2018.2.WM (sip.mf.gov.pl).

Furthermore, it would therefore follow from the position presented above that if the owner of a building separates premises within it on the basis of the Act on the Ownership of Premises[12] and makes himself the owner of such premises, then he is not liable for the tax on revenue from buildings. A similar situation may occur if a taxpayer decides to separate the premises and transfer ownership of them to another person, e.g., a family member, in order to limit taxation. Interestingly, the special circumvention clause included in Article 30g(18) of the PITA (and, accordingly, Article 24b(18) of the CITA), added as a result of the 2018 amendment, would not apply to such a taxpayer.[13] This is due to the fact that, according to the above-mentioned provisions, this clause applies only to an economically unjustified transfer of all or part of the ownership or co-ownership of a building or making the building available under a financial leasing agreement (according to the tax law). In such a case, the clause may not be effective, because it does not include an economically unjustified separation of the premises. Of course, this does not change the fact that the example of optimisation presented above, provided certain conditions are met, could still be challenged on the basis of the general anti-avoidance clause referred to in Article 119a of the Tax Ordinance.[14] The example was intended to identify certain loopholes in the special clause for the tax on revenue from buildings, which may reduce its effectiveness to some extent.

Importantly, the legislature decided to introduce several exemptions to the taxation of buildings. One of them is provided for in Article 30g(2) of the PITA and Article 24b(2) of the CITA, by exempting from the tax the revenue from a fixed asset which is a residential building put into use due to the implementation of government and self-government social housing programmes if this exemption constitutes compensation that meets the conditions laid down in Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the functioning of the European Union to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

A similar rule also applies when not the entire building, but part of its premises (area) has been put into operation within the implementation of government and self-government programmes for social housing (Article 30g(8) of PITA and Article 24b(8) of CITA). Then, the revenue should be reduced according to the

12 Act on the ownership of premises, consolidated text: Dz.U. (Journal of Laws) of 2020, item 532, as amended.

13 Bauta-Szostak, J. and Kran, R., *Opodatkowanie nieruchomości w działalności gospodarczej. Podatek od nieruchomości. Podatek od przychodów z budynków*, Warszawa 2018, p. 372.

14 Tax Ordinance Act, consolidated text: Dz.U. (Journal of Laws) of 2019, item 900, as amended.

proportion of such premises in the usable area of the building. In addition, in accordance with Article 30g(7) of the PITA (and by analogy, according to Article 24b(7) of the CITA), buildings whose useful floor area has been put into use, i.e. for the purposes of tenancy, lease, etc. does not exceed 5% of the total area of the building are exempted from the tax.

Tax rate and method of payment

The legislature's inclusion of the discussed provisions in the income tax acts is an unprecedented measure in Polish tax law, since the tax on revenue from buildings is in fact a wealth tax (in its original version prior to the amendment as well). A wealth tax is to be understood as 'a tax whose source is the taxpayer's wealth.'[15] The tax base for this tax is the sum of revenues, though the use of the word 'revenue' is only a legal fiction and does not refer to revenue as a monetary or non-monetary benefit, as it is understood in Polish income tax law. This fiction results from the fact that, pursuant to Art. 30g(3) of the PITA and Art. 24b(3) of the CITA, for the purposes of tax on revenue from buildings, the revenue is, by definition, understood as 'the initial value of the taxable fixed asset resulting from records, determined on the first day of each month, and in the month in which the fixed asset was entered in the records, the initial value determined on the day the fixed asset was entered into the evidence.'

It is clear that this is completely different from the understanding of revenue in Polish income tax law. Clearly, the tax base (the so-called revenue) here is the value of a specific asset in the form of the sum of the value of buildings belonging to a given tax entity. Consequently, this tax should be qualified as a wealth tax, despite the misleading term 'revenue' in the regulations in question. It is therefore interesting that the legislature decided to introduce such a tax not in a separate act but using the income tax laws, which by definition do not refer to wealth as such. It is likely that the inclusion of these provisions in income tax law was forced by the fact that they are intended to have a sealing effect, in particular with regard to income taxes. Apart from that, the second reason for this is the fact that the tax on revenue from buildings, if certain conditions are met, may be deducted from advances on income tax (this will be discussed in detail below). In itself, the way the tax is calculated is highly original, which is the result of the purposes for which it was established. Above all, the idea of its introduction was based on the view that many entities from the commercial real estate sector use tax optimization which

15 Gomułowicz, A. and Mączyński, D., *Podatki i prawo podatkowe*, Warszawa 2016, p. 164.

allows them to pay extremely low taxes in Poland.[16] The legislature, guided by this conviction, decided that an entrepreneur should pay some minimal income tax when using wealth of high value. The tax under analysis is correlated to the value of the taxpayer's wealth, and the taxpayer bears a financial burden from it only if the taxpayer does not achieve adequate income subject to income tax.[17]

The monthly tax base is always calculated by deducting an amount of PLN 10 million from the sum of the value of the buildings belonging to a given taxpayer (Article 30g(9) of the PITA and, similarly, Article 24b(9) of the CITA). Thus, we can say that PLN 10 million is an allowance, a tax-free amount (or rather a tax-free value). Therefore, only the excess value above this amount is subject to taxation.[18] As a result, owners of buildings whose value does not exceed PLN 10 million are exempted from the tax. The tax rate has not changed as a result of the amendment and is still 0.035% of the tax base per month.

Looking at the above-mentioned features of the tax on revenue from buildings, the thesis that it is, to some extent, a kind of ad valorem tax (according to value) on real estate seems to be correct, but with a significantly limited scope of the object of taxation. Moreover, unlike the ad valorem tax in its classic version, i.e. the one in force in Germany and Spain,[19] it is not based on the 'real estate cadastre'. As mentioned above, the tax in question is calculated on the basis of the value of the building, resulting from the fixed assets evidence of the taxpayer and it is related to the initial value of the building, i.e. also adopted for depreciation purposes. In accordance with Article 30g(6) of the PITA (and analogously Article 24b(6) of the CITA), if only part of a building is put into use (putting into use means using for the purposes of tenancy, etc.[20]), then the revenue is determined by calculating the proportion of the area put into use to the total area of the building. It is also worth noting that in the CITA (Article 24c) the legislature provided for a regulation concerning the rules of determining the tax on revenue from buildings within a tax capital group. It follows that in the case of commercial real estate tax as well, companies belonging to a tax capital group are treated as one taxpayer.

However, the question arises as to whether it should be the full initial value of the building that is taken into account for the purposes of the tax on revenue from

16 Banasik P., et al., op. cit.

17 Ibidem.

18 Małecki, P. and Mazurkiewicz, M., *Komentarz do art.24(b) ustawy o podatku dochodowym od osób prawnych*, in: Małecki, P. and Mazurkiewicz, M. (eds.), *CIT. Komentarz. Podatki i rachunkowość*, Warszawa 2018 (LEX).

19 Firlej, K.A. and Firlej, C., *Porównanie systemów opodatkowania nieruchomości w Unii Europejskiej*, "Progress in Economic Sciences" 2014, No. 1, p. 295.

20 Banasik, P., et al., op. cit.

buildings or the current value, i.e. taking into account depreciation write-offs made before the first day of a given month or possible improvements within the meaning of Article 22g(13) of the PITA (and Article 16g(13) of the CITA), which seems to be suggested by Article 30g(3) of the PITA (and Article 24b(3) of the CITA) using the following words: "The revenue referred to in Paragraph 1 shall be the initial value calculated on the first day of each month." This problem has become the subject of an individual interpretation issued by the director of the National Revenue Information System,[21] in which it was considered that the initial value should be adopted for tax purposes, without any updates related to the deduction of previous depreciation deductions. The claimant challenged this interpretation to the Voivodship Administrative Court (VAC) in Warsaw (not the final judgment),[22] which accepted the claimant's position and repealed the challenged interpretation. The Court considered that only the undepreciated part of the initial value should be used for tax calculation purposes. In solving the problem, the Court referred to the principle of resolving doubts in favour of the taxpayer[23] (Article 2a of the Tax Ordinance). The judgment appears to be a fair compromise, since the provision which the contested interpretation is about is imperfectly worded and raises fundamental doubts in this respect. The VAC in Warsaw ruled again in a similar spirit on 22 May 2019.[24] This ruling is also not final. Although these judgements were based on provisions which were valid prior to 1 January 2019, they can still be taken as a reference, since both provisions – before and after this date – related to the calculation of the tax base are almost the same (only the wording has been changed, but doubts remained).

In practice, however, many entities still take a cautious approach to this issue, taking the full initial value as the tax base, i.e. without any deductions for depreciation. This is particularly due to the individual interpretations of the tax law made by the director of the National Revenue Information System,[25] despite the existence of judgments challenging this point of view. The unfavourable line of interpretation is

21 Individual interpretation of the Director of the National Revenue Information System of 30 May 2018, ref. no. 0114-KDIP2-1.4010.83.2018.1.JC (sip.mf.gov.pl).

22 Judgment of the Voivodship Administrative Court in Warszawa of 17 April 2019, III SA/Wa 1905/18 (source: jud.nsa.gov.pl).

23 Zalewski, Ł., *Precedensowy wyrok WSA: Podatek od przychodów z budynków można obniżać*, 09.05.2019, Dziennik Gazeta Prawna, https://podatki.gazetaprawna.pl/artykuly/1411365,jak-obnizyc-podatek-od-nieruchomosci.html (accessed 22.04.2020).

24 Judgment of the Voivodship Administrative Court in Warszawa of 22 May 2019, III SA/Wa 1903/18 (jud.nsa.gov.pl).

25 Individual interpretation of the Director of National Revenue Information System of 9 March 2020, ref. no. 0111-KDIB2-1.4010.8.2020.1.EN; Individual interpretation of the Director of National Revenue Information System of 5 February 2020, ref. no. 0114-KDIP2-1.4010.518.2019.1.JF (sip.mf.gov.pl).

probably maintained due to the fact that at the moment of writing this article, these judgments are still non-final, as the director of the National Revenue Information System has lodged a cassation complaint against them. Therefore, a postulate should be made for the legislature itself to solve this problem of interpretation, making the provisions more precise in this respect.

In the case of both the PITA and the CITA, the procedure for paying the tax is remarkably similar. The mechanism adopted in accordance with Article 30g(11) of the PITA (and, similarly, Article 24b(11) of the CITA) sets the deadline for payment of the tax at the twentieth day of each month (however, in the case of payment of the tax for the last month of the tax year, it must be paid by the deadline for submitting the annual tax return). Then, the tax paid on revenue from buildings is deducted from the advance payment for income tax. This applies to both personal income tax and corporate income tax (however, in the case of personal income tax, this applies only to advances on income from business activities). In case the amount of tax on revenue from buildings turns out to be lower than the amount of advance payment of income tax for a given month, the taxpayer is entitled not to pay tax on revenue from buildings for the month. The full amount of tax on revenues from buildings paid during the tax year is deducted by the taxpayer from the tax calculated after the end of the tax year. Article 30g(15) of the PITA and Article 24b(15) of the CITA provide for a special refund procedure. It covers entities which did not have the possibility to fully deduct the amount of the tax on revenue from buildings from the income tax in their annual return (e.g. due to a loss or low income tax to be paid, i.e. lower than the value of the tax on revenue from buildings). This is a different procedure to the refund of an overpayment of a specific nature, as referred to in Article 75 of the Tax Ordinance.[26] In principle, the refund of the tax on revenue from buildings is to 'be granted to these taxpayers whose loss or low income tax does not result from the tax optimisations applied',[27] and is only made at the request of the taxpayer. However, the tax authority will be able to challenge the refund if it considers that other revenues and expenses have been determined on non-market terms. On the other hand, pursuant to Article 30g(16) of the PITA and Article 24b(16) of the CITA, if the tax authority determines the tax liability or loss to be a different amount than that resulting from the tax return, the taxpayer is entitled to a refund of tax on revenue from buildings equivalent to the difference between the amount of paid and non-deducted tax on revenue from

26 Szulc, M., *Podatek galeryjny wycieknie z deklaracji? Pieniądze mogą przeciec fiskusowi przez palce*, 4.02.2019, Gazeta Prawna, https://podatki.gazetaprawna.pl/artykuly/1395809,pieniadze-z-podatku-minimalnego-moga-przeciec-fiskusowi-przez-palce.html (accessed 22.04.2020).

27 Banasik, P. et al., op. cit.

buildings and the amount of tax determined by the tax authority (in the case of calculating tax liability) or equivalent to the paid and non-deducted tax on revenue from buildings (in the case of losses being calculated by the authority). This refund solution model entered into force in 2019.

Conclusion

The tax on revenue from buildings is a new levy, existing since 2018. Although it has been in effect a short time, it has already been thoroughly amended once. Despite having the characteristics of a wealth tax, the legislature decided to qualify it as an income tax. Thus, it was introduced to the income tax laws for natural persons and for corporate entities. In both acts it takes virtually the same form. The entities that are subject to this tax are the owners and co-owners of the buildings. However, it does not cover owners of separated premises, which was confirmed by the director of the National Revenue Information System in one of the individual interpretations. The object of the tax is buildings intended to be used for rental, lease, and other similar agreements. The tax base is the value of the building resulting from the taxpayer's evidence reduced by PLN 10 million. The tax is paid monthly and amounts to 0.035% of the tax base. The tax paid on revenue from buildings is deducted from advances on income tax and then from income tax.

The tax on revenue from buildings was created to a large extent in order to curb tax optimisation[28] and to increase the state budget revenues from economic activity related to large-area trade and renting of office space. However, in view of the European Commission's doubts, it has been decided to change the scope of the tax so that it can now also cover buildings used for other sectors of business. Following the amendment of the acts, certain provisions of the tax law still raise questions relating to the proper interpretation, including fairly important issues (e.g. what value should be used when calculating the tax base). Therefore, a *de lege ferenda* postulate should be made, proposing clarification of the most important doubts by unifying the provisions that cause the greatest problems in interpretation.

28 Draft Act amending the Personal Income Tax Act, the Corporate Income Tax Act, and the Lump Sum Income Tax Act on certain incomes earned by natural persons, Statement of reasons, p. 23 (https://legislacja.rcl.gov.pl/projekt/12300402/katalog/12445416#12445416).

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TEKIELAK, J., *Tax on revenue from buildings after the latest amendment: characteristics and doubts*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 165–175, DOI: 10.18276/ais.2020.29-11.

Acta Iuris Stetinensis

2020, No. 1 (Vol. 29), 177–191
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.29-12

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Corporate social responsibility instruments and their impact on labour rights[1]

Abstract

The aim of this article was to assess to what extent self-regulation within the CSR framework contributes to improving workers' rights worldwide. Transnational company agreements, corporate codes of conduct, NGOs' social accountability standards, ISO standards, the Dow Jones Sustainability Index and the Global Reporting Initiative were critically analysed using logical-linguistic, historical and comparative legal methods. The research showed some evidence of a limited impact of CSR instruments on labour rights and proved that CSR tools can be perceived only as additional value to law.

Keywords: labour rights, corporate social responsibility, private standard-setting

Introduction

In the era of global value chains and turbulent debates on trade policies, we have to consider how to ensure decent work for all. Within the powerful machinery of

1 The project was financed by the National Science Centre in Poland pursuant to decision number DEC-2016/21/D/HS5/03849. The project's registration number is: 2016/21/D/HS5/03849.

world trade, social concerns can be expressed in many ways, e.g. in mega-regional trade agreements, the Generalized System of Preferences or even through the flexible interpretation of WTO exceptions, allowing trade sanctions for reasons related to violations of workers' rights. However, labour standards can also be included in the entire spectrum of private norms. The aim of this article is to assess to what extent self-regulation within the corporate social responsibility (CSR) framework contributes to improving workers' rights worldwide. The study aims at providing an overview of some crucial instruments in the field of CSR: transnational company agreements, corporate codes of conduct, NGOs' social accountability standards, ISO standards, the Dow Jones Sustainability Index and the Global Reporting Initiative.

Before scrutinising this in more detail, one should first define the term CSR, which is understood as "an umbrella term for a variety of theories and practices, all of which recognise the following: (a) that companies have a responsibility for their impact on society and the natural environment, sometimes beyond legal compliance and the liability of individuals; (b) that companies have a responsibility for the behaviour of others with whom they do business (e.g. within supply chains); and (c) that business needs to manage its relationship with the wider society, whether for reasons of commercial viability or to add value to society."[2]

The research method is based on an analysis and criticism of all the above-mentioned instruments, as well as relevant literature. Historical, comparative and logical-linguistic legal methods are also used, and the synthesis is an investigative technique for the development of the accumulated literature.

Transnational company agreements

Transnational Company Agreements (TCAs) can be divided into European Framework Agreements (EFAs) and International/Global Framework Agreements (IFAs/GFAs). As regards the latter, they are negotiated and signed by a multinational company and at least one Global Union Federation (GUF).[3] As Schömann points out, unlike IFAs, which are a global instrument aimed mainly at ensuring international labour standards (especially ILO core labour standards) in all of the target

2 Blowfield, M. and Frynas, J.G., *Editorial. Setting new agendas: Critical perspectives on corporate social responsibility in the developing world*, "International Affairs" 2005, No. 81, p. 503, as quoted in: Lund-Thomsen, P. and Lindgreen, A., *Corporate social responsibility in global value chains: where are we now and where are we going?*, "Journal of Business Ethics" 2014, No. 123, p. 12. DOI: 10.1007/s10551-013-1796-x (accessed 23.11.2019).

3 Ojeda-Avilés, A., *Transnational labour law*, Alphen aan den Rijn 2015, p. 237.

company's locations, EFAs embrace more issues and are regionally limited. The author, however, further adds that this difference is vanishing, as it can be observed that, on the one hand, IFAs are becoming much more detailed, and on the other hand, international aspects appear with increasing frequency in EFAs.[4]

There are considerable advantages of TCAs. As pointed out by Schömann, owing to social dialogue with trade unions, these tools are considered as means of promoting industrial peace. Trade unions and workers are involved in drafting, monitoring and implementing TCAs. Trade unions help solve problems related to the implementation of these agreements and provide an alternative dispute resolution mechanism. From the point of view of trade unions, TCAs contribute to involving MNCs in a private standard-setting process with the aim of increasing the quality of working conditions and strengthening the rights of local unions. On the other hand, from the perspective of MNCs, TCAs – similarly to other private instruments – help build a good reputation and avoid unfavourable public campaigns.[5]

As of November 2019, over 300 TCAs have been signed, including over 100 IFAs.[6] The first IFA was signed in 1988 between the French food company Danone, which could boast of a reputation for social partnership and a progressive attitude to CSR,[7] and the International Union of Food and Allied Workers' Association (IUF).[8] The second was signed with the ACCOR hotel chain in 1995.[9] Despite their growing popularity, questions still arise, for example, as to their legal value, legal nature, as well as legal impact. There is no legal framework under which TCAs are

4 Schömann, I., *Transnational company agreements: towards an internationalisation of industrial relations*, in: Schömann, I. et al. (eds.), *Transnational collective bargaining at company level. A new component of European industrial relations?*, Brussels 2012, pp. 202–203, https://www.etui.org/Publications2/Books/Transnational-collective-bargaining-at-company-level.-A-new-component-of-European-industrial-relations (accessed 23.11.2019).

5 Ibidem, p. 204. See the cited literature.

6 The list of all identified TCAs can be found at: https://ec.europa.eu/social/main.jsp?catId=978&langId=en (accessed 23.11.2019).

7 Cotton, E., *Employment relations, international framework agreements and global unions*, in: Roper, I. et al., (eds.), *Critical issues in human resource management: contemporary perspectives*, London 2020, p. 145.

8 Barrier, D., *National policy regimes: implications for the activism-policy nexus*, in: Utting, P. et al., (eds.), *Global justice activism and policy reform in Europe: understanding when change happens*, New York-London 2012, p. 52.

9 Barreau, J., and Arnal, J., *Effects of financialization on restructuring and sustainable development policy: the ACCOR group case*, in: Sun, W. et al. (eds.), *Finance and sustainability: towards a new paradigm? A post-crisis agenda*, Bingley 2011, p. 268.

created, and thus the legal nature of such a norm as TCAs is conditional upon the powers granted by law to MNCs and trade unions.[10]

Corporate codes of conduct

Self-regulation through TCAs is only one of the pathways of corporate law development. The other is related to corporate codes of conduct, which are defined as "unilateral recommendations through which the main decision-making bodies of companies set up rules of behaviour for managers and employees (sometimes also for suppliers and subcontractors) that reflect the principles and values of corporate social responsibility."[11] They have their roots in the 1970s, when the number of reports concerning unethical or illegal activities of MNCs increased and led to discussions within international organisations.[12] This laid the foundation for, inter alia, the UN Draft Code of Conduct on TNCs, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Furthermore, many codes of conduct were established to provide a stable framework in which MNEs conduct their business[13] (the first generation of codes of conduct).

The second wave of codes appeared in the early 1990s and paid much attention to labour conditions.[14] In 1992, Levi Strauss adopted so-called "Global Sourcing and Operating Guidelines,"[15] which were described as belonging to the second generation of codes.[16] This was the first supplier code of conduct for the apparel industry introduced by an MNC. However, the document omitted any reference to freedom of association and the right to collective bargaining.[17] Since the early

10 See: Schömann, I., op. cit., passim.

11 Marassi, M., *Globalization and transnational collective labour relations. International and European framework agreements at company level*, in: Blanpain, R. (ed.), *Bulletin for comparative labour relations*, Alphen aan den Rijn 2015, p. 21.

12 Kaufmann, C., *Globalisation and labour rights. The conflict between core labour rights and international economic law*, Oxford-Portland 2007, p. 156.

13 Ibidem, p. 156.

14 Jenkins, R. et al., *Introduction*, in: Jenkins, R. et al., (eds.), *Corporate responsibility and labour rights: codes of conduct in the global economy*, London-Sterling, Vancouver 2002, p. 3.

15 Ibidem, p. 156.

16 Stohl C., et al., *A new generation of corporate codes of ethics*, "Journal of Business Ethics" 2009, No. 90, p. 614, DOI 10.1007/s10551-009-0064-6 (accessed 23.11.2019).

17 Egels-Zandén, N. and Merk, J., *Private regulation and trade union rights: why codes of conduct have limited impact on trade union rights*, "Journal of Business Ethics" 2014, No. 123, p. 463, DOI: 10.1007/s10551-013-1840-x (accessed 23.11.2019).

1990s, a considerable number of MNCs have adopted codes, most of which fully or partly address employment standards.[18]

In 1999, the Global Sullivan Principles were launched in the presence of Kofi Annan, the UN Secretary General. On this occasion, he made a reference to the Global Sullivan Principles as important for the UN Global Compact (UN 2000). The Global Compact, named in literature as a "Model Code,"[19] includes references to freedom of association and the right to collective bargaining, and "symbolises the evolution of the «international human rights regime» to incorporate what is described as the «third generation»."[20] In the area of labour, the Global Compact establishes the same principles as the ILO Declaration on Fundamental Principles and Rights at Work. However, the intended effect is to ensure that MNCs – rather than governments – comply with them.[21] Interestingly, it does not address issues of monitoring.[22]

Corporate codes of conduct present both advantages and disadvantages. Some authors prove that they exert a positive impact on the workers' situation. For example, as Toffel, Short and Ouellet point out, private codes of conduct that implement global labour standards reinforce the norms promoted by the ILO and provide enforcement pressure that the ILO lacks.[23] In addition, Harrington writes about the "quite positive results" of codes of conduct, especially in developing countries.[24] Referring to corporate social responsibility policies, the author highlights that they can ensure that progressive labour standards are used even if they are not legally

18 Arthurs, H.W., *Private ordering and workers' rights in the global economy: corporate codes of conduct as a regime of labour market regulation*, in: Conaghan, J. et al., (eds.), *Labour law in an era of globalization: transformative practices and possibilities*, Oxford 2004, p. 474; see the cited literature.

19 Bronstein, A., *International and comparative labour law. Current challenges*, Geneva 2009, p. 112.

20 "Third generation embodies the social and material conditions as well as the reflexivity associated with globalization, and ethical behavior grounded in the larger interconnected environment within which an organization functions", Stohl, C. et al., op. cit., p. 612; "Third generation CSR focuses on the rights of a collective that can only be realized through global participation, cooperation, and agreement. Sections mentioning overall social good, such as peace, healthy environment, and the common heritage of mankind, were coded as third generation", Ibidem, p. 614.

21 Lyutov, N., *Traditional international labour law and the new "global" kind: is there a way to make them work together?*, "Zbornik Pravnog Fakulteta u Zagrebu" 2017, No. 67, p. 33.

22 Bronstein, A., op. cit., p. 114.

23 Toffel, M.W. et al., *Codes in context: how states, markets, and civil society shape adherence to global labor standards*, "Regulation & Governance" 2015, No. 9, p. 208. DOI: 10.1111/rego.12076 (accessed 23.11.2020).

24 Harrington, A.R., *Corporate social responsibility, globalization, the multinational corporation, and labor: an unlikely alliance*, "Albany Law Review" 2011/2012, No. 75, p. 493. See the cited literature.

compulsory. She adds that in this manner, CSR can eventually lead to the future revision of domestic labour law.[25]

However, there are also considerable concerns related to codes of conduct. The first-generation codes differ between companies and across industries, and there is little uniformity in their content. Many of them use vague language (especially as regards the freedom of association and wages), and for some rights, they are limited to asking for compliance with the supplier countries' domestic laws. Their underlying values are perceived as obscure. Codes of conduct mainly address marketing aims and respond to unfavourable publicity produced by the media. They are seen as a measure of propaganda and a means of improvement of an MNC's reputation, corporate legitimacy, trust, image or brand. One of their worst weaknesses is a lack of involvement of social partners in the decision-making process leading to the adoption of codes of conduct. Once adopted, they impose lower standards than public regulatory frameworks. Besides this, they are more selective in their choice of labour rights.[26]

In regard to the second generation, as supplier codes of conduct enjoyed rising popularity in the 1990s, advocates began to focus less on code adoption and more on compliance verification.[27] The Sullivan Principles represent the first effort towards the implementation of codes of conduct with, e.g., monitoring schemes and independent monitoring in a multi-stakeholder forum.[28] Currently, in relation to the third generation, there are always numerous problems with the implementation, monitoring and enforcement of a corporate code of conduct.[29]

NGOs' social accountability standards

Social accountability standards are created by non-governmental organisations (NGOs). In 1997, the NGO Social Accountability International established the Social Accountability Standard (SA8000) with the aim of implementing international

25 Ibidem, pp. 508–509.

26 Arthurs, H.W., op. cit., p. 477; Marassi S., op. cit., p. 22; Däubler, W., *Corporate social responsibility: a way to make deregulation more acceptable?*, in: Blanpain, R. and Hendrickx, F. (eds.), *Bulletin for comparative labour relations. Labour law between change and tradition. Liber Amicorum Antoine Jacobs*, Alphen aan den Rijn 2011, p. 49; Egels-Zandén, N. and Merk, J., op. cit., p. 464; Hepple, B., *Labour laws and global trade*, Oxford 2005, p. 76.

27 Herman, A., *Reassessing the role of supplier codes of conduct: closing the gap between aspirations and reality*, "Virginia Journal of International Law" 2012, No. 52, p. 455.

28 Segerlund, L., *Making corporate social responsibility a global concern. Norm construction in a globalizing world*, Farnham 2010, p. 56.

29 Hepple, B., op. cit., p. 76.

labour standards and national labour laws. More specifically, the Standard mirrors labour provisions laid down in the ILO's conventions and the Universal Declaration of Human Rights. Moreover, it respects, supports and complements national labour laws all over the world. SA8000 is the leading social certification standard for factories and organisations around the globe. Social performance in areas crucial to social accountability in workplaces (child labour, forced or compulsory labour, health and safety, freedom of association and the right to collective bargaining, discrimination, disciplinary practices, working hours and remuneration) is measured through SA8000. It is anchored by a ninth element, i.e. a management system that drives continuous improvement in all of the above-mentioned areas. Given new and emergent social and human rights issues, regular revisions ensure the Standard's continuing applicability[30]. SA8000:2014 – which replaced SA8000:2008 – is the current version of the Standard. The most important updates to the Standard are related to forced or compulsory labour, as well as health and safety areas. All organisations certified to SA8000:2014 must now ensure that their workers are free from employment fees and costs, and they must establish a Health and Safety Committee responsible for monitoring health and safety hazards which is composed of management representatives and workers.[31]

As regards the SA8000 certification process, during the first phase, the applicant organisation undertakes an online management system self-assessment. Subsequently, it selects and works with one of the independent certification bodies (accredited by the Social Accountability Accreditation Services, SAAS) in order to start the full evaluation process. Once the organisation has implemented the necessary actions and improvements to become compliant with the Standard, the certification body grants the SA8000 certificate. Afterwards, the organisation is reviewed through on-site monitoring visits, both announced and unannounced.[32]

As explained by Bronstein, one of the characteristics of standards like the SA8000 is that certification pertains to factories and suppliers of the product and is not directed towards the retailers or the brand itself. Thus, by entering into business only with certified factories, MNCs encourage organisations to obtain certification.[33]

30 http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1689 (accessed 23.11.2019).

31 http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1711 (accessed 23.11.2019).

32 http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1791 (accessed 23.11.2019).

33 Bronstein, A., op. cit., p. 122.

ISO standards

Other private initiatives include the activities of the International Organization for Standardization (ISO). It is an independent, non-governmental international organisation that develops voluntary, consensus-based, market relevant International Standards which provide world-class specifications for products, services and systems to ensure quality, safety and efficiency. They are instrumental in facilitating international trade.[34]

In 2010, the International Organization for Standardization developed the ISO 26000 standard for corporate responsibility. It provides guidance on how businesses and organisations can operate in a socially responsible way, i.e. act in an ethical and transparent manner that contributes to the health and welfare of society. It is noteworthy that ISO 26000 provides only guidance and not requirements, thus it cannot be certified to unlike some other ISO standards. However, it plays an important role in clarifying what social responsibility is. Besides this, it helps businesses and organisations translate principles into effective actions and shares best practices relating to social responsibility globally. Crucially, it is addressed to all types of organisations, irrespective of their activity, size or location. ISO 26000 represents an international consensus, since representatives from labour organisations, NGOs, industry, government and consumer groups from around the world were involved in negotiations for five years and contributed to its development.[35]

In the above context, significant attention should be given to the interrelationship between the UN Sustainable Development Goals (SDGs) and ISO 26000. In other words, how can the ISO 26000 contribute to SDGs? When we think about this question, what first comes to mind is SDG 8: Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. The case of the Algerian drinks producer NCA Rouiba is a good example of ISO 26000 in action. When it started the implementation of ISO 26000, staff welfare was given high priority. A new employee relations framework was developed with the aim of preventing discrimination and promoting well-being. It was established in association with trade unions and worker representatives. NCA Rouiba updated contracts with suppliers and insisted they implement the same standards. Another example that can be found on the ISO website relates to SDG 1: No poverty. For this one goal, Subclause 6.4.4.2 of ISO 26000 under the core subject "Labour practices" states: "An organisation should pay wages at least adequate for the needs of workers and their families. In doing so, it should take into account the general level of

34 https://www.iso.org/about-us.html (accessed 23.11.2019).

35 https://www.iso.org/iso-26000-social-responsibility.html (accessed 23.11.2019).

wages in the country, the cost of living, social security benefits and the relative living standards of other social groups."[36]

ISO has also developed a standard that will help organisations to improve employee safety, reduce workplace risks and create better, safer working conditions all over the world. Here we talk about ISO 45001 Occupational health and safety.[37] Unlike ISO 26000, it was created to be certifiable and to verify the safety and soundness of worker safety procedures. As highlighted by Cooper, organisations have two options: they can accept certification to this standard or adopt it as self-certification in the form of internal practice. Regardless of the choice made, ISO 45001 is aimed at creating a necessary foundation of worker safety and building integrity standards and conformance that can be accepted all over the world. ISO 45001 furnishes all industries, workers, other stakeholders and governmental agencies with operative and useful guidance for improving worker safety.[38]

This all sounds good in theory, but in practice, a dispute arose between the ILO and the ISO, mainly over the ISO 45001 standard on occupational safety and health management systems. The ILO wanted to reserve its exclusive right to create standards protecting workers' safety. It emphasised that its legitimacy results from being a treaty-based organisation, working directly with nation-states.[39] Admittedly, the Agreement between the ILO and the International Organization for Standardization was signed on 6 August 2013, but the ILO formally notified the International Organization for Standardization on 18 December 2017 of its decision to terminate it (going into effect on 8 March 2018). The decision followed a review by the ILO Governing Body of a report on the ILO's pilot implementation of that Agreement (which was in the context of development of an ISO occupational health and safety management systems standard, namely ISO 45001). It was found that the implementation of the said document over four years did not reach the objectives of the Agreement. The conflict between the ISO standards and international labour standards was crucial here. According to paragraph 4 of the Agreement, "Given the broad mandate and action of the ILO to promote social justice and decent work, and ISO's broad mission, ISO standards that relate to issues within the ILO's mandate (ILO issues) should respect and support the provisions of ILS and related ILO action, including by using ILS as the source of reference with respect to ILO issues in case

36 ISO 26000 and the SDGs, https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100401.pdf (accessed 23.11.2019).

37 https://www.iso.org/iso-45001-occupational-health-and-safety.html (accessed 23.11. 2019).

38 Cooper, S., *Global supply chain governance: ILO, ISO & Worker Safety*, "Professional Safety" 2018, pp. 71–72.

39 Ibidem, p. 70.

of conflict." Organisations could not reach a consensus on the question whether development of ISO standards required treating international labour standards "as the source of reference" or whether the ISO only needed to consider but not to refer to international labour standards. As highlighted by the ILO, the private standards involve the risk of leaving workers without protection in a situation where an international labour standard (concluded through tripartite consensus and given effect for decades) does not constitute the basis for private standards on issues related to the work of the ILO. As stated on the ILO website, according to the decision of the Governing Body, the ILO has no intention to seek to renew collaboration with the ISO without adequate safeguards ensuring respect of ILO standards.[40]

The Dow Jones Sustainability Index (DJSI)

The Dow Jones Sustainability Index (DJSI) was launched in 1999 and is considered a significant standard for corporate sustainability. It provides an instrument to track the financial performance of leading companies around the world and to measure their progress in sustainability. Created jointly by S&P Dow Jones Indices and RobecoSAM (Sustainable Asset Management), the DJSI selects the most sustainable companies from across 61 industries.[41] From the point of view of MNEs, being listed on the DJSI translates into getting access to significant investment capital. Additionally, taking into account the DJSI's global renown, companies always try to leverage their position on the DJSI in enhancing their own reputation.[42]

As regards reporting under DJSI, it includes three categories that cover the "triple bottom line"[43]: economic, environmental and social. The latter embraces an important aspect for our research, namely human rights, which contains investment, non-discrimination, freedom of association and collective bargaining, child labour, forced or compulsory labour, security practices, indigenous rights, assessment, supplier human rights assessment and human rights grievance mechanisms. Another reporting aspect is associated with labour practices and decent work. It encompasses: employment, labour-management relations, occupational health and safety, training and education, diversity and equal opportunity, equal remuneration

40 https://www.ilo.org/global/about-the-ilo/newsroom/statements-and-speeches/WCMS_617802/lang--en/index.htm (accessed 23.11.2019).

41 https://www.robecosam.com/csa/indices/djsi-index-family.html (accessed 23.11.2019).

42 D'heur, M., *Shared.Value.Chain: profitable growth through sustainable value creation*, in: D'heur, M. (ed.), *Sustainable value chain management: delivering sustainability through the core business*, Cham 2015, p. 57.

43 Fiksel, J., *Design for environment: a guide to sustainable product development*, New York 2009, p. 40.

for women and men, supplier assessment for labour practices and labour practices grievance management.[44]

However, it is worth stressing that the DJSI keeps itself informed primarily through the SAM questionnaire, which is completed by the companies invited to take part in SAM's Corporate Sustainability Assessment. The second source of information is company and third-party documents, as well as personal contacts between analysts and companies.[45]

In light of these reflections, there is little doubt that a self-reporting method which is not based on observations of a real company's progress in sustainability is not the best. Beside this, the DJSI is favourable towards the world's largest companies and excludes smaller ones. As an example, in 2019, over 3,500 of "the world's largest companies" were invited to participate in SAM's Corporate Sustainability Assessment.[46]

The Global Reporting Initiative (GRI)

The Global Reporting Initiative (GRI) is an independent international organisation based in Amsterdam that has pioneered sustainability reporting since 1997. According to its website, the GRI works with the largest companies in the world and contributes to social well-being, better jobs, less environmental damage, access to clean water, less child and forced labour and gender equality.[47]

The organisation prides itself on the fact that the GRI Sustainability Reporting Standards are the first and the most broadly adopted global standards for sustainability reporting.[48] Developed by the Global Sustainability Standards Board, the GRI Standards give all organisations the possibility of reporting publicly on their economic (the 200 series of the GRI Standards), environmental (the 300 series of the GRI Standards) and social (the 400 series of the GRI Standards) impacts and contributions to sustainable development.[49] For reporting on its material topics, an organisation selects from the set of topic-specific GRI Standards. Interestingly, the

44 Sikdar, S.K. et al., *Measuring progress towards sustainability: a treatise for engineers*, Cham 2017, p. 120.

45 Fiksel, J., op. cit., p. 41.

46 https://www.finchandbeak.com/1451/the-2019-global-dow-jones-sustainability.htm (accessed 23.11.2019).

47 https://www.globalreporting.org/information/about-gri/Pages/default.aspx (accessed 23.11.2019).

48 https://www.globalreporting.org/information/about-gri/Pages/default.aspx (accessed 23.11.2019).

49 https://www.globalreporting.org/information/about-gri/gri-history/Pages/GRI's%20history.aspx (accessed 23.11.2019).

400 series of the GRI Standards can be described as thematically oriented standards used to report information on an organisation's material impacts exerted on social topics. All Standards included in the 400 series have been effective since 1 July 2018 (with the exception of GRI 403, which will be effective from 1 January 2021). The Standards are the following: GRI 401: Employment, GRI 402: Labor/Management Relations, GRI 403: Occupational Health and Safety, GRI 404: Training and Education, GRI 405: Diversity and Equal Opportunity, GRI 406: Non-discrimination, GRI 407: Freedom of Association and Collective Bargaining, GRI 408: Child Labor, GRI 409: Forced or Compulsory Labor, GRI 410: Security Practices, GRI 411: Rights of Indigenous Peoples, GRI 412: Human Rights Assessment, GRI 413: Local Communities, GRI 414: Supplier Social Assessment, GRI 415: Public Policy, GRI 416: Customer Health and Safety, GRI 417: Marketing and Labeling, GRI 418: Customer Privacy and GRI 419: Socioeconomic Compliance.[50]

One can approximate the operation of the Standards using the example comprising human rights. Thus, for the purposes of this research, the focus here is on GRI 406: Non-discrimination, which establishes reporting requirements on the issue of non-discrimination. It can be used by an organisation of any type, size, sector or geographic location that is keen on reporting on its impact in this field (a common feature of all standards). This Standard defines discrimination as "the act and the result of treating people unequally by imposing unequal burdens or denying benefits, instead of treating each person fairly on the basis of individual merit." Discrimination includes harassment, which is defined as "a course of comments or actions that are unwelcome, or should reasonably be known to be unwelcome, to the person towards whom they are addressed". Importantly, an organisation shall avoid discriminating against any person on any grounds, including discriminating against workers. In order to help understand and apply the Standard, it refers back to ILO Conventions Nos. 100 and 111, as well as other instruments of the OECD and the UN. Given this context, it should be highlighted that GRI 406: Non-discrimination includes disclosures on the management approach and topic-specific disclosures. "Disclosure 406-1: Incidents of discrimination and corrective actions taken" establishes reporting requirements. The key point is that in this case, a self-reporting method is also used. The organisation shall report the total number of incidents of discrimination during the reporting period, as well as the status of the incidents and actions taken with reference to: incidents reviewed by the organisation; remediation plans being implemented; remediation plans that have been

50 https://www.globalreporting.org/standards/gri-standards-download-center/ (accessed 23.11.2019).

implemented, with results reviewed through routine internal management review processes; incidents no longer subject to action.[51]

Conclusion

CSR norms are developed beyond the power of the state, cannot be enforced through the court processes and are adopted voluntarily within the private sector, often with the aim of enhancing a company's reputation or getting access to significant investment capital. This may all be perceived as evidence of the limited impact of CSR instruments on labour rights. Within the rich spectrum of CSR instruments that has been discussed, TCAs seem to be attractive mainly because of the benefits of social dialogue and the involvement of trade unions and workers in their drafting, monitoring and implementing. However, as has been raised, their legal nature and impact remain necessary to clarify. Unilateral corporate codes of conduct also present some disadvantages, inter alia, related to their implementation, monitoring and enforcement. Moreover, the self-reporting method inscribed in the nature of CSR instruments (e.g. the DJSI) gives only the illusion of impeccable operation by MNCs. Last but not least, it would be difficult not to mention the dispute that arose between the ILO and the ISO, mainly over the ISO 45001 standard, which is an example of a conflict between public and private organisations. In conclusion, CSR tools can be perceived only as additional value to law and – as such – can be further developed, mainly because they have a potential to encourage MNCs to raise standards (e.g. to obtain certification in the case of SA8000), to exert a positive impact on the workers' situation (e.g. codes of conduct) and to unite different stakeholders in carrying out one purpose, i.e. promoting labour rights.

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CITATION

TYC, A., *Corporate social responsibility instruments and their impact on labour rights*, "Acta Iuris Stetinensis" 2020, No. 1 (Vol. 29), 177–191, DOI: 10.18276/ais.2020.29-12.