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Application of Article 316 of the Polish Code of Civil Procedure in the appeals against decisions of the President of the Office of Electronic Communications

Abstract

In cases specified in Article 206 par. 2 of the Act on the Telecommunications Law, telecommunications entrepreneurs have the right to appeal to the Court of Competition and Consumer Protection in Warszawa. All provisions of the Code of Civil Procedure, including Article 316 of the CCP, apply to the CCCP procedure. Article 316 of the CCP concerns one of the basic issues of civil procedure, i.e. basis for judgement. However, the application thereof in telecommunications cases provokes certain reflections which lead to the conclusion in compliance with which Article 316 of the CCP is applicable in telecommunications cases when the specificity of these cases is taken into account, especially the fact that the CCCP procedure is supervisory in nature and checks the regulatory activities of the President of the Office of Electronic Communications. The paper analyses judicial decisions of ordinary courts and the Supreme Court in telecommunications cases, as well as social security and energy regulation cases, which due to the major similarities of appeals against decisions issued by ZUS and the President of ERO, and appeals against decisions issued by the President of the OEC, may be per analogiam applied to telecommunication cases.

Keywords: Office of Electronic Communications, civil procedure, Telecommunications Law, court's cognition

Introductory notes

The telecommunications services market, on the grounds of the provisions of the Act of 16 July 2004 – the Telecommunications Law[1] (hereinafter: 'the TL'), is subject to regulation by the President of the Office of Electronic Communications (hereinafter: the President of the OEC). Depending on the circumstances established in a given procedure, the President of the OEC can, by an administrative decision, stipulate the rights and obligations of telecommunications entrepreneurs.[2] Article 206 of the TL provides for the possibility of appealing against administrative decisions issued by the President of the OEC. In compliance with Article 206 par. 1 of the TL, procedure before the President of the OEC runs on the basis of provisions of the Act of 14 June 1960 – the Code of Administrative Procedure[3] (hereinafter: the CAP), as amended due to the Act on the Telecommunications Law and the Act of 7 May 2010[4] on supporting development of telecommunications services and networks.[5] Decisions of the President of the OEC, with the exception of decisions enumerated in par. 2 of Article 206 of the TL, are subject to review in administrative procedure in compliance with the rules stipulated in the CAP that is by submitting a motion for re-examination of the case by the President of the OEC.[6] These decisions are then verified in the judicial-administrative procedure (a complaint to the Voivodeship Administrative Court, a cassation appeal to the Supreme Administrative Court). A special appeal mode has been provided for in par. 2 of Article 206 of the TL in compliance with which a decision can be appealed to the District Court in Warszawa – the Court of Competition and Consumer Protection (hereinafter: 'CCCP').[7] Article 206 par. 2 of the TL specifies decisions subject to this mode by indicating the object and/or type of decision, or Article of the TL providing for

1 Act of 16 July 2004 – Telecommunications Law, Dz.U. (Journal of Laws) of 2004, no. 171 item 1088 as amended.

2 Kledzik, P., *Postępowanie przed Prezesem Urzędu Komunikacji Elektronicznej*, in: Babis, H. and Flaga-Gieruszyńska, K. (eds.), *Rynek usług telekomunikacyjnych*, Warszawa 2011, p. 267.

3 Act of 14 June 1960 – Code of Administrative Procedure, consolidated text: Dz.U. (Journal of Laws) of 2013, item 267.

4 Act of 7 May 2010 on supporting development of telecommunications services and networks, consolidated text: Dz.U. (Journal of Laws) of 2010, no. 106 item 675.

5 Dąbrowski, Ł.D., *Odmowa wydania decyzji przez Prezesa Urzędu Komunikacji Elektronicznej w świetle art. 28 ustawy prawo telekomunikacyjne*, "Ius Novum" 2016, No. 3, p. 315.

6 Piątek, S., *Prawo telekomunikacyjne*. Komentarz, Warszawa 2013, p. 1222.

7 Dąbrowski, Ł.D., *Zastosowanie art. 321 k.p.c. w sprawach z odwołań od decyzji Prezesa Urzędu Komunikacji Elektronicznej*, "Ius Novum" 2016, No. 4, p. 158.

issuance thereof.[8] Provisions concerning the mode of procedure in telecommunications cases evolved in the direction of meeting requirements included in Article 4 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002,[9] and respectively, Article 31 of the European Electronic Communications Code,[10] which is to be implemented in domestic legal systems until 21 December 2020.[11] Procedure before the CCCP is pending in compliance with the provisions of the Act of 17 November 1974 – the Code of Civil Procedure.[12] This is a substantive, first instance procedure subject to general rules of examining cases,[13] which results from adjusting legal regulations to regulatory requirements of the European Union.[14]

Decisions issued by the President of the OEC impose on telecommunications entrepreneurs' obligations concerning,[15] among others, telecommunications access, non-discrimination, and costs. These are also decisions related to imposing penalties or giving rights e.g. related to the reservation of frequency[16] or allocation of

8 In compliance with Article 206 par. 2 of the TL, a decision: 1) on determining a significant market position, 2) on imposing, waiving, changing or revoking regulatory obligations, 3) on imposition of a fine, 4) referred to in Article 43a and in Article 201 par. 3, 5) issued in disputes, with the exception of decisions on booking frequency after carrying out a tender, auction or contest and on decision on recognising the tender, auction or contest as unsolved, 6) referred to in Article 7 par. 1, Article 13 par. 2, Article 20, Article 21 par. 2, Article 22 and Article 30 of the Act of 7 May 2010 on supporting development of telecommunications services and networks – may be appealed to the District Court in Warszawa – the Court of Competition and Consumer Protection.

9 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.04.2002, pp. 33 – 50.

10 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321, 17.12.2018, pp. 36–214.

11 Dąbrowski, Ł.D., *Wpływ decyzji Prezesa Urzędu Komunikacji Elektronicznej na handel między państwami członkowskimi Unii Europejskiej*, in: Cała-Wacinkiewicz, E. (ed.), *W jakiej Unii Europejskiej Polska – jaka Polska w Unii Europejskiej*, Warszawa 2019, pp. 333 – 347.

12 Act of 17 November 1964 – the Code of Civil Procedure, Dz.U. (Journal of Laws) of 1964, no. 43 item 296, as amended.

13 Płoski, J. and Pacler, W., *Administracja łączności i postępowanie kontrolne*, in: Rogalski, M. (ed.), *Prawo telekomunikacyjne*, Warszawa 2011, p. 803.

14 Dąbrowski, Ł.D., *Budowa wspólnego rynku usług telekomunikacyjnych w Unii Europejskiej – wybrane zagadnienia prawne*, in: Barcik, J. and Półtorak, M. (eds.), *Unia Europejska w przededniu Brexitu*, Warszawa 2018, p. 247.

15 Dąbrowski, Ł.D., *Obowiązki przedsiębiorców telekomunikacyjnych na rzecz obronności i bezpieczeństwa państwa*, in: Gruszczak, A. (ed.), *Meandry współczesnego bezpieczeństwa. Między regionalizacją a globalizacją*, Kraków 2019, pp. 259 – 269.

16 See: Dąbrowski, Ł.D., *Postępowanie rezerwacyjne a postępowanie przetargowe – specyfika gospodarowania częstotliwościami w prawie telekomunikacyjnym*, in: Wójcicka, E. (ed.), *Gwarancje*

numeration (these decisions can be appealed in the judicial-administrative mode); they may also replace an agreement between parties.[17] Decisions verified by the CCCP, in principle, impose on entrepreneurs only obligations. In the case of decisions: regarding access, specifying rates for ending connections in the network of a given operator or issued in litigations, imposing obligations on one operator is related to granting rights to the other.[18] Judicial trials regarding appeals against decisions issued by the President of the OEC are usually long-lasting and the nature of cases is complex. Often many years pass between appealing the decision of the President of the OEC and the judicial decision issued by the CCCP or a legally binding conclusion of the appeal procedure. A change can be introduced both in factual and legal status of the heard (administrative) case in the course of the judicial procedure. It means the necessity to specify a moment proper for assessment of a given act issued by the President of the OEC for the purposes of resolving a legal case ultimately. The subject matter discussed herein concerns application of Article 316 of the CCP in a special procedure in telecommunications and mail regulation cases initiated as a result of the appeal against a decision issued by the President of the OEC. The problem of applying Article 316 of the CCP in telecommunications cases is not only an academic problem and continues to raise doubts in practice (the number of cases in which it is claimed that Article 316 of the CCP is infringed, is very high),[19] and it concerns the fundamental issue of the civil procedure being the basis for judgement. The aim of the paper is to indicate that Article 316 of the CCP applies in telecommunications cases only in the scope in which without consideration thereof it would not be possible to issue a relevant judgement.[20] However, in certain specific cases direct application thereof will not be appropriate. The source materials for the paper includes judicial decisions issued by the CCCP, appellate courts and the Supreme Court regarding telecommunications cases, as well as social security and energy regulation cases. Judicial decisions in social security and energy regulation cases, due to the major similarities of appeals against decisions issued by the Social Insurance Institution (ZUS) and the President of

praw jednostek w postępowaniu administracyjnym i sądowoadministracyjnym, Częstochowa 2020, pp. 25 – 38.

17 Dąbrowski, Ł.D., *Wygaśnięcie decyzji Prezesa UKE zastępującej umowę stron w postępowaniu odwoławczym przed sądem cywilnym*, "Palestra" 2018, No. 3, pp. 81–85.

18 Dąbrowski Ł.D., *Zastosowanie*…., p. 158.

19 From 2013 to 2019 the allegation of infringing Article 316 of the Code of Civil Procedure in telecommunications cases constituted the grounds of appeals brought both by the President of the Office of Electronic Communications and telecommunications operators in hundreds of cases, and in the same number, constituted the grounds of cassations brought in.

20 See: Dąbrowski, Ł.D., *Zastosowanie*…., pp. 157-158.

the Energy Regulatory Office (hereinafter: the President of the ERO), and appeals against decisions issued by the President of the OEC, may be per analogiam applied to telecommunication cases.

Characteristics of a special procedure

Due to its specific nature, a judicial procedure in telecommunications cases required detailed regulation in a form of a special procedure.[21] Telecommunications cases, the hearing of which was attributed to ordinary courts, due to their essence are of public-legal character. Nevertheless, pursuant to legal regulations (Article 479[57] of the CCP in conjunction with Article 206 of the TL), they have been included in the category of civil cases in the formal sense.[22] In these cases, as civil cases, all procedural provisions apply, including Article 316 of the CCP while also considering regulations resulting from special procedures.[23] In compliance with Article 316 par. 1 of the CCP in principio after closing the hearing, a court issues a judgement on the grounds of the facts existing at the moment of closing the hearing. The rule of adjudicating pursuant to Article 316 of the CCP is sometimes described as the rule of validity of a judicial decision.[24] The facts taken into account by the court in issuing a judgement includes the factual and legal grounds of the judgement.[25] Thus, the moment of adjudication is significant in and determines both scopes.[26] On the grounds of telecommunications cases, due to their special character, it is, however, a theoretical possibility.[27]

While analysing the issue of applying Article 316 of the CCP in telecommunications cases, judicial decisions issued on the grounds of social security cases should be referred to in an auxiliary role. Such possibility is noticed by the Supreme

21 Ibidem, p. 160.

22 See more: Jakubecki, A. (ed.), *Komentarz aktualizowany do ustawy z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*, LEX 2014.

23 See: Dąbrowski, Ł.D., *Zastosowanie*…, pp. 157–170.

24 Judgement of the Appellate Court in Łódź of 14 November 2013, I ACa 629/13, LEX No. 1396870; Judgment of the Supreme Court of 8 February 2006, II CSK 153/05, LEX No. 192012; Uliasz, M., Kodeks postępowania cywilnego. Komentarz, Warszawa 2008, p. 417.

25 Judgment of the Supreme Court of 8 February 2006, II CSK 153/05, LEX No. 192012.

26 Jakubecki, A., *Komentarz do art. 316 Kodeksu postępowania cywilnego*, in: Dolecki, H. and Wiśniewski, T. (eds.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1-366*, LEX 2013.

27 Dolecki, H. and Wiśniewski, T. (eds.), *Kodeks postępowania cywilnego. Komentarz. Tom II*. Artykuły 367-505(37), LEX 2013.

Court in judicial decisions issued in telecommunications cases.[28] These are cases in which ordinary courts hear appeals against decisions issued by social security pension authorities; therefore, the characteristics of these cases are similar to appeals against decisions issued by regulatory authorities. A judicial procedure in social security cases is of an appeal character, since it is initiated as a result of an appeal brought by the insured against the decision issued by the Social Insurance Institution. The object of the procedure comprises assessment of compliance with the law of the decision issued by the social security pension authority. Verification of legality of the decision and issuance of a judicial decision thereof is possible only when considering the factual and legal status existing at the moment of issuance thereof, whereas the hearing of evidence before a court is a procedure verifying findings made by the social security pension authority.[29]

Furthermore, the specific character of a procedure before the CCCP initiated due to the appeal against a decision issued by the President of the OEC or the ERO, is undisputed. It is also initiated as a result of an appeal against an administrative decision, which replaces a suit; thus, it is also of an appellate character. The object thereof comprises assessment of compliance with the law, in both formal and substantive aspect, of a decision issued by a regulatory authority upon a motion of an entrepreneur or *ex officio*. Therefore, it is a procedure in the course of which the court is to strive for, if possible (if there are no special circumstances, e.g. impossible to be validated procedural irregularities of the authority), not only verifying findings made by the President of the OEC or the ERO, but also of the subjective hearing of the case as the first instance court in a contradictory procedure.

Two phases occur in such procedures: the first one being the special administrative procedure ending with issuance of a decision, whereas the second one, pending before an ordinary court according to the provisions of the CCP, ends with an issuance of a judgement. It is commonly believed in the judicial decisions and literature that these procedures are of a hybrid character. It means that these procedures combine elements of judicial first instance procedure with certain elements of second instance control of an administrative decision. This, in turn, means certain restrictions in invoking evidence other than evidence collected in the administrative procedure. These restrictions stem from, first of all, the scope of the decision and, second of all, the scope of the submitted appeal.[30]

28 Ruling of the Supreme Court of 4 March 2014, III SK 35/13, LEX No. 1463898; Decision of the Supreme Court of 20 February 2014, III SK 60/13, LEX No.1455740.

29 Judgement of the Supreme Court of 25 January 2005, I UK 152/04, LEX No. 154236.

30 Judgement of the Appellate Court in Warszawa of 8 March 2012, VI ACa 1150/11, LEX No. 1131091.

Verification of legality of decisions

Specification of the role of an ordinary court in appeals against decisions issued by regulatory authorities constitutes a necessary condition preceding specification of a relevant scope of application of Article 316 of the CCP in telecommunications cases.[31] The court 'reviews legality, as well as validity and advisability of the decision'.[32] Furthermore, it strives to determine factual circumstances of the case and then conducts legal assessment thereof in the scope of the validity of the appeal.[33] The court adjudicates in the first instance, however, due to the validity of undertaking further measures by the court, it cannot omit verification of legality of an administrative act. Nevertheless, the court verifies legality of the decision in a limited scope, since the control of the public administration authority's activities in the view of the regulations of the CAP is restricted to the administrative court (Article 184 of the Constitution).

The judicial procedure is of an appellate character and the object thereof comprises assessment of compliance with the law of the issued decision. Therefore, in principle, the control role of the judicial procedure before a court concerns the facts on the day of issuing a decision by a regulatory authority.[34] Since the court reviews legality of administrative acts, it applies the law binding on the day of issuance thereof and a divergence from a principle of verifying legality of decisions on the day of issuance thereof should be especially justified with circumstances of a given case.[35] Judicial decisions of the Supreme Court of 15 January 2019[36] or of 9 May 2019[37], in social security cases, confirm the possibility of departing from application of Article 316 par. 1 of the CCP, however, only in an exceptional case. It concerns

31 Dąbrowski, Ł.D, *Zastosowanie*…, p. 165.

32 Judgment of the Supreme Court of 29 May 1991, III CRN 120/91, LEX No. 3724.

33 See: Judgment of the Supreme Court of 20 September 2005, III SZP 2/05, LEX No. 195802.

34 Dąbrowski, Ł.D., *Ciężar dowodu w postępowaniu cywilnym i sądowoadministracyjnym w sprawach z odwołań i skarg od decyzji Prezesa Urzędu Komunikacji Elektronicznej*, in: Gil, D. (ed.), *Dowodzenie w postępowaniach sądowych w perspektywie porównawczej*, Lublin 2016, p. 65.

35 See: Judgment of the Appellate Court in Poznań of 5 September 2013, III AUa 310/13, LEX No. 1363318; Judgment of the Appellate Court in Katowice of 9 July 2013, III AUa 1188/13, LEX No. 1349891; Judgment of the Appellate Court in Łodź of 11 September 2013, III AUa 1884/12, LEX No. 1372304; Judgment of the Appellate Court in Szczecin of 27 June 2013, III AUa 134/13, LEX No. 1369375; Judgment of the Appellate Court in Szczecin of 16 May 2013, III AUa 10/13, LEX No. 1369371; Judgment of the Appellate Court in Lublin of 17 April 2013, III AUa 215/13, LEX No. 1312060; Judgment of the Appellate Court in Kraków of 6 March 2013, III AUa 1249/12, LEX No. 1294803; Judgment of the Appellate Court in Kraków of 7 February 2013, III AUa 1079/12, LEX No. 1282647.

36 Decision of the Supreme Court of 15 January 2019, II UK 570/17, LEX No. 2605575.

37 Judgement of the Supreme Court of 9 May 2019, I UK 60/18, LEX No. 2692710.

a situation when application of this provision would lead to a complete deprivation of significance of the administrative procedure. Despite the fact that a court hears a case in subjective terms as the first instance court, it reviews the administrative decision issued in an administrative procedure that preceded the judicial procedure. Thus, the ordinary court is obliged to refer to the facts existing on the day of issuing the decision. Therefore, the rule binding in the 'classic' civil procedure expressed in Article 316 par. 1 of the CCP, in compliance with which the court takes into consideration the facts as on closing the hearing, experiences an exception in a special procedure due to its specific appeal character. It concerns circumstances when the change to the factual and legal status after issuance of the decision is so significant that without consideration thereof it would not be possible to issue a relevant judgement, whereas in the CCCP judgement of 9 November 2017[38] it was stated that premises that can be taken into consideration are not numerous and are treated exceptionally. These circumstances include e.g. the judgement of the Constitutional Tribunal stating that the provision constituting grounds for issuing a decision or amendment to the act constituting substantive-legal grounds in administrative procedure are not compliant with the Constitution. However, these are only exemplary circumstances. While taking into consideration the indicated arguments, circumstances of a specific case should be verified and there will only exceptionally be grounds for departing from the rule that the CCCP should focus on the date of issuing the decision while assessing how the premises that condition legality of the decision are met.

Substantive law provisions regulating a given legal relationship stipulate which provisions, hitherto binding or new, should be applied by the court to decide on the facts of the case pending before it. In principle, new or amended statutory regulations apply only to the future and are not binding with regard to the events occurring before the day of entering into force thereof. A departure from this rule must be explicitly provided for in the act itself. Therefore, the retroactive force of the provision cannot solely result from the purposes of the act, but primarily from its wording.[39] In the judicial decisions issued by administrative courts it is also underlined that, in principle, the binding force of the administrative decision is not affected by an amendment or a revocation of a provision constituting legal grounds for issuance thereof. Nonetheless, slightly differently to the above judicial decision of the Supreme Court, it was decided that a departure from this rule is possible not only when new regulations influencing the hitherto contents of the legal grounds

38 Judgement of the Court of Competition and Consumer Protection of 9 November 2017, XVII AmE 77/14, LEX No. 2433392.

39 Ruling of the Supreme Court of 2 July 2004, II CK 421/03, LEX No. 174137.

stipulate so, but also when it results from the entirety of regulations of a given subject matter.[40] In case of changing legal provisions in the course of the judicial procedure, it should be considered whether amended substantive-legal provisions have retroactive force, since only then can this amendment have impact on the contents of the administrative decision.[41]

Duration of procedure

Due to the autonomy of the administrative procedure, a benchmark for the court should consist in the time when the decision establishing the rights and obligations of a telecommunications entrepreneur was issued. Judicial decisions of the Supreme Court taking into consideration this correlation adopted, that 'Article 316 par. 1 of the CCP should be applied with a consideration of characteristics of these cases determined by proper specification of the object of dispute between an entrepreneur and a regulator.'[42] The dispute between an entrepreneur and a regulator initiated with an appeal concerns legality and advisability (validity) of a decision issued by the President of the OEC. The court assesses the correctness of obligations imposed on telecommunications entrepreneurs in formal and substantive terms,[43] in the scope indicated in the appeal[44] whereas the grounds for the decision are provided for by specific factual findings and legal status. The characteristic feature of civil law procedures in cases concerning appeals against administrative decisions is the possibility to supplement factual findings made in the administrative procedure. On the one hand, these activities depend on the evidence initiative of the parties,[45] and on the other hand are limited with the scope of the decision itself and appeal against it.[46] In compliance with the judicial decisions of the Supreme Court, the date of issuing the decision constitutes a caesura for determining facts of the case. However, the matter in question constitutes the situation in the market

40 Judgement of the Supreme Administrative Court of 19 December 2008, II OSK 1691/07, LEX No. 516054.

41 Siedlecko, W., Postępowanie cywilne, Warszawa 1972, p. 371.

42 Judgement of the Supreme Court of 12 April 2013, III SK 47/12, LEX No. 1375434.

43 Judgement of the Supreme Court of 13 August 2013, III SK 64/12, LEX No. 1380978.

44 Judgement of the Supreme Court of 3 October 2013, III SK 9/13, LEX No. 1391296; Judgement of the Supreme Court of 21 June 2013, III SK 36/12, LEX No. 1353231 and of 18 May 2012, III SK 37/11, LEX No. 1211167.

45 Judgement of the Supreme Court of 7 July 2011, III SK 52/10, LEX No. 1001322; Judgement of the Supreme Court of 13 August 2013, III SK 64/12, LEX No. 1380978.

46 Judgement of the Appellate Court in Warszawa of 8 March 2012, VI ACa 1150/11, LEX No. 1131091.

covered with regulation and issues in operation thereof that require intervention that were identified by the President of the OEC. In the judicial decisions of the Supreme Court,[47] the necessity of cautious application of Article 316 of the CCP was underlined in a situation when a dispute between telecommunications entrepreneurs and the President of the OEC, initiated with an appeal, concerns obligations shaped by the decision issued by the President of the OEC, which are imposed in a specific market situation and legal status. In fact, contrary to regular civil cases in which only a judgement issued by the court resolves rights and obligations of the parties to the procedure, in cases concerning appeals against decisions issued by the President of the OEC legal relationships between telecommunications entrepreneurs have already been established in a regulatory decision.[48] In its judgement, the CCCP adjudicates on the legal personality of the appealed decision by dismissing the appeal or allowing the appeal in full or in part. In the first case, the court upholds the decision in the legal transactions and in the second case, the court eliminates the appealed decision from the legal transactions or upholds it in the legal transactions in an amended form. Therefore, the previous administrative procedure constitutes a necessary condition to initiate a contradictory judicial procedure. Therefore, the judicial possibilities of the CCCP are limited to the object of the appealed decision. This, in turn, means that the judicial procedure does not cover events that occurred after the decision had been issued and which were not covered with the administrative procedure.[49]

Administrative penalties

The confirmation of the thesis that each telecommunications regulation case should be heard considering special circumstances of each case can be found in judicial decisions on cases concerning appeals against administrative decisions under which penalties were imposed on telecommunications entrepreneurs. In compliance with the judicial decisions of the Supreme Court in judicial cases examining appeals against decisions of the President of OEC imposing monetary penalties, Article 316 of the CCP should be applied with special caution; any amendment to the legal status cannot, in fact, lead to deterioration of the legal situation of

47 Ibidem.

48 See: Dąbrowski, Ł.D., *Regulowanie rynku telekomunikacyjnego przez Prezesa UKE – wybrane zagadnienia prawne*, in: Bielecki, L. et al. (eds.), *Szanse i bariery rozwoju przedsiębiorczości w Polsce – w ujęciu prawa publicznego oraz prawa prywatnego*, Lublin 2017, pp. 169–181.

49 Judgement of the Appellate Court in Warszawa of 8 March 2012, VI ACa 1150/11, LEX No. 1131091.

the appealing entrepreneur.[50] In the light of the hitherto judicial decisions of the European Court of Human Rights,[51] severe monetary penalties imposed on entrepreneurs by administrative authorities have a character of penal sanctions pursuant to the provisions of the European Convention on Human Rights.[52] Considering that the procedure regarding administrative penalties imposed on the entrepreneur concerns penal sanctions, which is related to specific procedural guarantees for the punished entity, it is obvious that it is impossible to worsen the situation of such an entity on the grounds of regulations that entered into force after the event which the penalty concerns took place. It is an obvious conclusion also on the grounds of the Act of 6 June 1997 –Penal Code[53] (Article 4 of the PC). Therefore, while considering the specific character of penal sanctions, the Supreme Court took a position against the possibility of applying subsequent wordings of provisions with regard to enterprises which committed an administrative offence before the provisions entered into force. However, it applies to amendments to the detriment of the entrepreneur. This thesis is confirmed with the judgement of the CCCP of 23 September 2019,[54] in which it was stated that due to the amendment of provisions lowering the financial penalty for infringing the rules included in the Act of 20 February 2015 on renewable energy sources,[55] pursuant to Article 316 of the CCP, the facts binding on the date of the CCCP adjudication, which was changed with regard to the facts binding on the date of examining the case by the President of the ERO, should have been taken into account in the scope of specifying the amount of the imposed monetary penalty. Therefore, the court in the said case applied milder conditions and applied more lenient provisions related to the monetary penalty with regard to the entrepreneur.

50 See also: Judgement of the Supreme Court of 21 September 2010, III SK 8/10, LEX No. 1113035; Judgement of the Supreme Court of 7 July 2011, III SK 52/10, LEX No. 1001322; Judgement of the Supreme Court of 9 March 2011, III SK 38/10, LEX No. 818606; Judgment of the Appellate Court in Warszawa of 4 June 2013, VI ACa 1493/12, LEX No. 1345576.

51 ECtHR, *Garyfallou AEBE v Greece*, Application no. 18996/91, 24.09.1997; ECtHR, *Ioannis Haralambidis*, Y. Haralambidis-Liberpa Ltd. v Greece, Application no. 36706/97, Second Section, 23.03.2000.

52 Dąbrowski, Ł.D., *Cywilnoprawna kontrola decyzji administracyjnych Prezesa UKE nakładających kary finansowe na przedsiębiorców telekomunikacyjnych*, in: Bieś-Srokosz, P. et al. (eds.), *Wzajemne oddziaływanie gałęzi prawa publicznego i prywatnego*, Częstochowa 2017, pp. 143 – 156.

53 Act of 6 June 1997 – Penal Code, Dz.U. (Journal of Laws) of 2014, item 538, as amended.

54 Judgement of the Court of Competition and Consumer Protection of 23 September 2019, XVII AmE 186/17, LEX No. 2747781.

55 Act of 20 February 2015 on renewable energy sources, Dz.U. (Journal of Laws) of 2015, item 478, as amended.

Relative decisions

The general administrative decision (prior decision) constitutes the basis for an administrative decision subsequently issued in a special procedure (a derivative, relative, subsequent decision). This type of decisions usually issued in the case of specifying the rate for ending connections in mobile or landline networks. Under a general decision, the rate for a given operator is determined, whereas under consecutive bilateral (implementing) decisions it is implemented in relations between two entrepreneurs in their mutual settlements.[56] The general decision 'constitutes a significant legislative fact in another, different administrative case in a situation, in which an administrative decision could not have been issued at all or an administrative decision of a specific wording without a legal or factual status established or stated under a previous administrative settlement of a different/separate case, could not have been issued'.[57] In other words, the general decision constitutes the basis of the bilateral decision. In the course of lawsuits concerning appeals against bilateral decisions, a general decision can be revoked due to the reasons affecting admissibility and correctness of establishing regulatory obligations. Thus, consecutive decisions based on the primary decision cannot remain in force. Since with regard to the effects of stating invalidity of the decision on which another relative decision is based, the Supreme Administrative Courts assumes that stating invalidity of the basic decision can constitute grounds for stating invalidity of the relative decision as issued with gross infringement of the law,[58] it is admissible to adopt the interpretation in compliance with which revocation of the basic decision in telecommunications cases can justify revocation of the relative decision issued on the grounds of the basic decision.[59]

It does not in any manner prevent from taking into consideration in the judicial procedure revocation of the decision of the President of OEC on the grounds of which telecommunications entrepreneur's obligations are established in consecutive decisions, when the decision was revoked due to reasons affecting admissibility or validity of establishing regulatory obligations in the primary decision on which consecutive decisions are based.[60] From the point of view of the judicial proce-

56 It happens in the case of a dispute among operators and a lack of agreement regarding the implementation of a given rate under an annex to the interconnection agreement.

57 Resolution adopted by a panel of 5 Supreme Administrative Court judges of 9 November 1998, OPK 4/98, "Orzecznictwo Naczelnego Sądu Administracyjnego" 1999, No. 1, item 13.

58 Resolution of the Supreme Administrative Court of 13 November 2012, I OPS 2/12, LEX No. 1225395.

59 See e.g. Ruling of the Supreme Court of 8 May 2014, III SK 72/13, LEX No. 1482420.

60 Judgement of the Supreme Court of 3 October 2013, III SK 9/13, LEX No. 1391296.

dure initiated by the appeal against the decision of the President of OEC, revoking the previous (prior) decision in the course of a special appeal procedure, on the grounds of which the consecutive decision has been issued, which is the subject of a different appeal procedure, is of great importance. It concerns the case when the previous (prior) decision had been revoked due to fundamental structural defects and it simultaneously constituted the primary source of obligations which were specified in the consecutive decision implementing obligations established in the previous decision to the bilateral interconnection cooperation. The basic premise for issuing the subsequent (consecutive) decision constituting (legal) grounds for issuance thereof did, in fact, disappear. Consecutive decisions implementing obligations specified in the revoked (prior) decision cannot be based on the decision which is affected by serious procedural defects.[61]

Additionally, revocation of a general decision leads to the disappearance not only of the legal grounds for issuing the relative decision, but also the disappearance of the factual grounds of issuing this decision and the possibility to verify the level of rates introduced by the President of the OEC on the grounds of the revoked decision. While issuing the consecutive decision, in principle, the President of the OEC bases on the findings made in the issuance of the general decision, and in case this decision has been validly revoked, related findings also cease to be binding. The relative decision does not, in principle, include calculations or analyses which would justify the amount of financial obligations specified therein, whereas both decisions are closely correlated.

Therefore, it is admissible to apply Article 316 par. 1 of the CCP when in the course of the judicial procedure initiated by the appeal against the subsequent (consecutive) decision, the previous (prior) decision was revoked on the grounds of which the telecommunications entrepreneur's obligations had been established in the subsequent (consecutive) decision. It concerns a situation when the previous (prior) decision was revoked due to structural defects resulting from not following legal procedures preceding issuance thereof, challenging its admissibility or validity of regulatory obligations provided for in the decision.[62] This position was confirmed in numerous judicial decisions issued by district courts, appellate courts[63]

61 Judgement of the Supreme Court of 13 August 2013, III SK 64/12, LEX No. 1380978; Judgement of the Supreme Court of 24 September 2013, III SK 8/13, LEX No. 1380981.

62 Rulings of the Supreme Court of 20 February 2014, III SK 60/13, LEX No. 1455740; of 13 August 2013, III SK 64/12, LEX No. 1380978.

63 Decisions of the Appellate Court in Warszawa: of 11 January 2011, VI ACa 784/10, LEX No. 1369431; of 29 November 2011, VI ACa 553/11, LEX No. 1369428; of 14 December 2011, VI ACa 639/11, LEX No. 1238451; of 16 December 2011, VI ACa 916/11, LEX No. 1369434; of 14 February 2012, VI ACa 911/11, LEX No. 1369433; of 13 March 2012, VI ACa 1213/11, LEX

and the Supreme Court[64] on the grounds of cases concerning specification of rates for terminating connections in mobile networks.

Conclusion

The analysis of the Code of Civil Procedure's provisions does not give an unequivocal answer with regard to the date on which the meeting of the premises that condition legality of the administrative decision should be examined. As results from the hitherto judicial decisions of the Supreme Court, none of the CCP's provisions excludes application of Article 316 par. 1 of the CCP in these types of cases.[65] However, it does not mean applying this provision without consideration of the characteristics thereof.[66] While examining the case regarding an appeal against an administrative decision, the ordinary court reviews the legality, validity and advisability of the decision. Furthermore, it strives to determine the facts of the case and then conducts legal assessment thereof in the scope of the validity of the appeal. Thus, the court verifies correctness of the decision in substantive and formal terms. Therefore, it has the possibility to remedy certain defaults of the President of the OEC made before issuing the administrative decision. Nevertheless, this possibility is limited. The court should especially control, if on the date of issuance of the appealed decision the President of the OEC had the capacity to issue it, whether he or she properly specified the addressee (addressees) and met legal procedural requirements (in particular, consultation and consolidation procedures). In the case of stating defaults in this scope, it is necessary to revoke the appealed decision. These are defects of such gravity which cannot be corrected by the court in the civil procedure. Simultaneously, they prevent issuance of a relevant judicial decision.[67]

No. 1369404; of 27 March 2012, VI ACa 1219/11, LEX No. 1369406; of 22 February 2013, VI ACa 929/12, LEX No. 1369436; of 21 March 2013, VI ACa 1229/12, LEX No. 1314926; of 10 April 2013, VI ACa 1318/12, LEX No. 1369409; of 19 April 2013, VI ACa 379/12, LEX No. 1362977; of 23 April 2013, VI ACa 1499/12, LEX No. 1331151; of 25 April 2013, VI ACa 1317/12, LEX No. 1369442; of 18 July 2013, VI ACa 1590/12, LEX No. 1400503.

64 Rulings of the Supreme Court: of 20 March 2013, III SK 35/12, LEX No. 1318420; of 6 March 2013, III SK 32/12, LEX No. 1331341; of 13 December 2012, III SK 24/12, LEX No. 1238117; of 11 April 2012, III SK 41/11, LEX No. 1238126; of 12 April 2013, III SK 47/12, LEX No. 1375434; of 5 June 2013, III SK 54/12, LEX No. 1391292; of 27 March 2014, III SK 68/13, LEX No. 1463903; of 27 March 2014, III SK 69/13, LEX No. 1463904; of 27 March 2014, III SK 67/13, LEX No. 1463902; of 8 May 2014, III SK 72/13, LEX No. 1482420.

65 See, among others: Judgement of the Supreme Court of 17 March 2010, III SK 40/09, LEX No. 987815.

66 Ruling of the Supreme Court of 20 February 2014, III SK 60/13, LEX No. 1455740.

67 Among others, Judgement of the Supreme Court of 5 January 2011, III SK 34/10, LEX No. 1130869.

However, contrary to the administrative court, the civil court does not examine the administrative decision as the act of application of the law. Therefore, it does not control the activity of the President of the OEC as the public administration authority in the light of the CAP's provisions. It is aimed at substantive verification of the decision issued by the President of the OEC in the scope of the dispute arising as a result of issuing the decision questioned by the telecommunications entrepreneur.

In telecommunications cases, on the one hand, the principle specified in Article 316 par. 1 of the CCP regarding adjudicating according to the state of affairs as on the closing of the hearing, is binding; however, on the other hand, the correctness and legality of the decision is assessed according to the state of affairs as on the moment of issuance thereof. Application of Article 316 of the CCP should be considered ad casum so that its application does not lead to distortion of the nature of proceedings in telecommunications cases. There cannot be a situation when the administrative procedure preceding the judicial procedure is rid of significance.[68] Therefore, Article 316 par. 1 of the CCP is infringed only when the change in the factual and legal status after issuance of the decision of the President of the OEC is so significant that without consideration thereof it would not be possible to issue a proper judgement. In other cases, the principle of assessing the correctness of decision according to the status existing on the day of issuance thereof, is binding. Despite the fact that the CCCP examines the case substantively as the first instance court and thus, re-examines the case, as a control authority towards the regulatory authority, it is obliged to refer to the legal and factual status existing on the day of issuance of the decision. Thus, the rule binding in the lawsuit stipulated in Article 316 par. 1 of the CCP is an exception in the special procedure in telecommunications regulation cases due to its special appeal nature.

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68 See: Judgement of the Appellate Court in Łódź of 14 September 2018, III AUa 1249/17, LEX No. 2578776.

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Porta semper aperta est

Suicide from the joint perspective of canon law and Polish law

Abstract

The purpose of this paper was to show how the ecclesiastical and secular societies protect human life against a specific danger posed by one's own hand. The authors, basing on the formal-dogmatic approach, researching literature and analysing appropriate norms of canon and Polish law, demonstrate that both canon and Polish criminal law provisions on suicide protect human life only circumstantially. In the first part, we present the issue of suicide from the point of view of moral teachings of the Catholic Church, which are a fundamental law-making factor for the ecclesiastical community. Reception of the ethical doctrine by canon law was reflected in two Codes of Canon Law, those of 1917 and 1983. In these codifications, we traced gradual reduction of prohibitions or sanctions for suicides (especially regarding right to Christian burial), which however does not refer to all self-killers, because of the need for protecting other spiritual goods (suicide attempt as irregularity in the case of receiving or exercising holy orders). In the second part, we presented the problem of suicide

in the context of Polish law, with special emphasis on the significance of human life as a legal interest subject to strong protection and as a conflict between life and dignity. We also analysed the question of the unlawfulness of suicide attempts. In the end, we point to legal measures intended to prevent this phenomenon, which is unfavourable to the society.

Keywords: suicide, moral teaching of the Church, canon law, criminal law, right to life and human dignity

Introduction

The thought of the Second Vatican Council concerning the coexistence of the Church and the State, which has found its deepest expression in the Constitution *Gaudium et spes*, represents a completely new opening in the field of these relations[1] – quite different from that which was still promoted as being right during the first decades of the 20th century[2]. It seems that it is precisely because of their concern for human beings – in spite of their separate aims – that both communities, ecclesial and secular, have a vital interest in suicidal issues and are making concrete legislative efforts to ensure the protection of these both fundamental values, that is, human existence as well as other intangible goods[3].

In our presentation we will show the ways in which the mentioned communities protect the life of an individual in the Republic of Poland against a specific kind of danger – coming from its own side. We will highlight the norms that have a preventative function, deterring an individual from suicide attempts; we will as well describe the norms which protect human freedom from being influenced by others when making such a tragic decision and which are aimed at the safeguarding of spiritual goods in the form of the sacraments and sacramentals. We hypothesise that *de lege lata* both norms of canon law and Polish criminal law that concern suicide only circumstantially protect human life. Their closer subject of protection is other goods.

1 'The political community and the Church are, in their respective fields, independent and autonomous from each other. But both communities, though by different titles, serve the individual and social vocation of the same people', Vatican Council II, *Pastoral Constitution on the Church in the Modern World Gaudium et spes, 7.12.1965*, in: Groblicki, J. and Florkowski, E. (eds.), *Vatican Council II. Constitutions, edicts, declarations. Polish text*, Poznań 1968, No. 76.

2 See: Gasparri, P., *Catholic Catechism*, translated by Korzonkiewicz, J., Warszawa 2015, p. 83. The mutual relations of *societates perfectae* are characterised as follows: 'there is no separation between the Church and the state, nor can the state be rightly governed on the principle of separation from the Church'.

3 These intangible goods will often be differently understood in the church's and secular legal order.

The size of this paper does not allow for a more comprehensive approach to this issue[4]. Therefore, the authors do not exclude the possibility of conducting further research, which may result in the publication of a more extensive study on this highly emotional and deeply problematic practical issue.

Suicide in the moral teaching of the Church

Ancient Jewish culture, like the other civilisations of the Mediterranean basin, was not characterised by a negative approach to the phenomenon of suicide[5]. This is also reflected in the pages of the Old Testament. Examples of effective suicide attempts by Abimelech (see Judg 9:54)[6], Samson (see Judg 16:30), Saul (see 1 Sam 31:4), Saul's armour bearer (see 1 Sam 31:5), Achitofel (see 2 Sam 17:23), Zimri (see 1 Kgs 16:18) and Razis (see 2 Macc, 14:43-46) not only weren't stigmatised by the inspired editors, but are sometimes even justified or praised as honourable or noble (especially in the face of imminent defeat in battle). The biblical descriptions in the indicated stories emphasise the tragedy of the situation in which – the characters often find themselves forced to choose between two solutions abounding in terrible consequences, or caused by the fear of a shameful or cruel death from the hands of a merciless enemy, which undoubtedly reflects the emotions that accompany a person on the threshold of deciding whether to end his/her own life.

The radically opposed opinion on this issue, which the Church will consider as its own, is represented by St. Augustine of Hippo, an early Christian philosopher and theologian. The treatise *De civitate Dei*, considered by experts as the most prominent elucidation of its author's views, is essentially based on the confrontation of customs, attitudes, or patterns of pagan civilisation with its Christian antithesis, i.e. the said new People of God. There, *Doctor Gratiae* takes up a clear criticism of the practice of voluntary death accepted in the Roman Empire,[7] claiming: 'he who takes his own life the killer is, and is so much more guilty of killing himself than he was less guilty of in the matter for which he takes his own life'.[8] He cites as justification for this claim the case of Judas' suicide after betraying the Lord Jesus

4 K. Burdziak points out very aptly that: '(...) suicide is an extremely complex phenomenon, characterised by an extremely complicated structure, and at the same time – going beyond unambiguous solutions'. See: Burdziak, K., *Samobójstwo w prawie polskim,* Warszawa 2019, p. 175.

5 See: Walton, J.H. et al., in: Chrostowski, W. (ed.), *The IVP Bible background commentary: Old Testament,* Warszawa 2014, p. 382.

6 *Biblia Tysiąclecia – Pismo Święte Starego i Nowego Testamentu, Wyd. 5*, Poznań 2012.

7 More on this topic: Hołówka, J., *Etyka w działaniu*, Warszawa 2001, pp. 99-102.

8 Augustine of Hippo, *The City of God*, Kęty 2002, p. 41 (De civ. I, 17).

(see Matt 27:5)[9]. The thinker also gives a broad interpretation of the 5th commandment of the Decalogue, making it clear that it refers primarily to the one to whom it was entrusted to obey,[10] which can be seen as a kind of *novum* – a break with the neutral evaluation of the suicidal act yet inherited from Israeli tradition.

The position of Augustinian thought has been absorbed by St. Thomas Aquinas, who in *Summa theologiae* – the most profound work of the scholastic era – gives arguments for the wickedness of the suicide attempt. Aquinas points out: firstly, every being *ex sua natura* loves itself, striving to preserve its existence; secondly, man as a social being does everything towards others, which implies that every moral misconduct also hits others; thirdly, the power over human existence is exercised by God alone, who sovereignly decides on birth or death[11].

The post-conciliar teaching of the Church, as expressed in the Encyclical *Evangelium vitae* of John Paul II, maintains – to the fullest extent – the negative qualification of suicide, calling it 'deeply immoral'[12] and also unacceptable in any situation. Although the objective evaluation of the suicidal act remains unchanged, the Magisterium, taking into account the achievements of the humanities – especially in the field of the study of the human mind – allows the subjective responsibility of the person to be mitigated or even removed[13] if certain circumstances accompanying the deed will materialise, such as 'severe mental disorders, fear or serious concern of attempt, suffering or torture'.[14]

1917 Code of Canon Law

The first orderly compilation of canon law[15] in the form of a modern code, characteristic for secular systems, was promulgated by Benedict XV by the Apostolic Constitution *Providentissima Mater Ecclesia* of 27 May 1917. The novelty of the Work is the abandonment of the casuistic method since individual canons are given in the form of short and concise commanding or forbidding sentences. Specific

9 'Since we rightly condemn Judas' deed, and such a verdict we proclaim, by hanging himself he not only did not atone for ... treason, but rather increased his guilt; ibidem [De civ. I, 17].

10 Ibidem, p. 45. (De civ. I, 20).

11 See: St. Thomas Aquinas, *Summa theologiae*, vol. 18 (Justice), translated by Bednarski, F., London 1970, p. 114 (Part II-II, Question 64, Art. 5). The motifs shown were also referred to in the book: Gasparri, P., op. cit., p. 106.

12 John Paul II, *Encyclical Evangelium vitae*, Poznań 1995, No. 66.

13 Ibidem.

14 *Katechizm Kościoła Katolickiego, wyd. II,* Poznań 2012, No. 2282.

15 *Codex Iuris Canonici auctoritate Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*, 27.05.1917, Vaticanae 1961.

regulations covering the taking one's own life have been included in various codification books, because they referred to various intangible goods protected by the Church community. These norms – copied directly from the doctrine – were at that time a practical reflection of the negative assessment of the suicidal act from a moral point of view, which was expressed in the attribution of specific legal inconveniences to the suicide, which have been described below.

Deprivation of a church burial

Canon 1239 § 3 of the Pio-Benedictine Code *expressis verbis* statutes the right of all baptised[16] to receive a Catholic burial. This specific entitlement – as E. Sztafrowski emphasises – stems from visible belonging to the Church, which gives it the value of inalienability.[17] However, the same provision adds *in fine* a clause indicating the possibility of being deprived of this right (this stems from the use of the Latin verb *privare*) if someone has not shown a sign of remorse before his death. An enumerative catalogue[18] of entities to be denied *sepultura ecclesiastica* can be found in can. 1240 § 1, and among them are also those who have deliberately tried to kill themselves (see can. 1240 § 1, 3°).

The burial ban is an ecclesial *sui generis* sanction with a dual punitive and educational character, since on the one hand it is intended to punish a person who has committed a crime or at least a grave sin, and on the other hand to warn the living.[19] The norms, in addition to *privatio sepulturae* itself, impose additional burdens, such as the impossibility of celebrating Mass, even an anniversary Mass, or any other canonic service for the deceased without a burial (see can. 1241) or the inclusion on the priest who was aware of the ban and yet celebrated the burial, an excommunication *latae sententiae* (see can. 2339).

Commenting on the refusal to bury suicides, the canonists of that time stressed the need to prove the certainty[20] of a suicidal act in full consciousness of mind, as

16 The term *omnes baptizati* should be understood in coincidence with the then Canon 1203 expressing the Church's obligation to bury *fideles defuncti*.

17 See: Sztafrowski, E., *Miejsca i czasy święte*, Warszawa 1970, p. 131.

18 By the way, it is worth mentioning that the practice of creating such lists dates back to the First Council of Braga of 561. See: Wolczko, M., *Odmowa pogrzebu kościelnego. Zarys ewolucji historycznej i obowiązujące normy*, in: Kruk, E. (ed.), *Pochówek w prawie kanonicznym i świeckim*, Kraków 2019, p. 12.

19 See: Sztafrowski, E., op. cit., p. 132.

20 See: Szwagrzyk, T., *Samobójstwo i pogrzeb kościelny,* "Ruch Biblijny i Liturgiczny" 1961, No. 5, p. 236. As an example of the absolute necessity of establishing the certainty of the fact of suicide, the author gave the following case study: 'if, for example, a drowned man has been found, he

well as with complete freedom of action.[21] Since the ban on a funeral is a provision limiting the inherent right of the baptised it should be interpreted strictly (see can. 19), and thus the priest, in doubtful cases – when it does not threaten to be a scandal – should decide *pro reo* (see can. 1240 § 2). Moreover, it was emphasised that taking one's own life is to be direct, intentional[22] and complete, it means, as T. Szwagrzyk explains, 'death should come from a suicidal act and not from some other reason'.[23] If the above premises do not occur, that is, self-destruction does not occur, or if a permanent (mental illness) or existing limitation in logical reasoning (desperation or exultation)[24] is proved, the burial cannot be refused.

The code regulations in this matter, although they may have been regarded as strict, were often tempered by the Church. The priests had to refer to each case individually, deciding each time according to the principle of equity (*aequitas canonica*) and taking into account the circumstances accompanying the act and reducing its *gravitas*.

Irregularities of ordination

The concept of *irregularitas* on canonical grounds remains inextricably linked to the sacrament of Holy Orders, and thus is one of the fundamental spiritual goods of the Church community. Canon 949 of the Pio-Benedictine Code distinguishes two types of ordination – higher (*maiores*), which included presbyterate, diaconate, subdiaconate, as well as lower (*minores*), i.e. acolytes, exorcists, lectors and porters.[25] The candidate, due to the specificity of his ministry and the exceptional character of his clerical condition, should be legally capable to receive ordination by fulfilling a number of requirements – including being free from irregularity, defined by F. Bączkowicz as 'a permanent obstacle (...) which forbids one from receiving ordination directly and first of all, and subsequently also forbids use of ordination already received'.[26]

cannot be deprived of a church burial unless it will be proved with complete certainty that we are dealing with a real suicide'.

21 See: Sztafrowski, E., op. cit., p. 137.

22 See: Insadowski, H., *Kościelne prawo pogrzebowe*, Włocławek 1930, p. 168.

23 Szwagrzyk, T., op. cit., p. 237.

24 See: Insadowski, H., op. cit., p. 168.

25 In 1972, Paul VI, through his Apostolic Letter *motu proprio Ministeria quaedam*, reduced the number of degrees of ordination, leaving only three *maiores*: the episcopate, the presbyterate, and the diaconate.

26 Bączkowicz, F., *Prawo kanoniczne. Podręcznik dla duchowieństwa*, vol. II, Opole 1958, p. 104.

The codification in force at that time divided *irregularitates* according to their origin – *ex defectu* (resulting from some objective lack, even without fault, of certain physical qualities) and *ex delicto* (resulting from a crime). Scholars and commentators agree that the irregularities are not punishments[27] but guarantees securing the sacrament of Holy Orders, which statute the direct prohibition of receiving the ordination by a clergyman bounded by them (see can. 968), as well as indirectly prohibiting the bishop from consecration of such a candidate (see can. 973 § 3).

Suicide attempt is indicated as *irregularitas ex delicto* (see can. 985, 5°) equally the mutilation of yourself or someone else. Due to the criminal origins of this permanent obstacle, the construction of the so-called '*delictum frustratum*' from can. 2212 § 2 should be used to describe it, characterised by the fact that the perpetrator, against his/her will, did not achieve an effect, which in the context of an assassination attempt on his/her own life means that 'someone has performed acts which by their nature lead to suicide and are sufficient in themselves, but death did not occur for reasons independent of (...) those acting'.[28]

Moreover, the Code's legislature in another provision stipulates that if the victim of failed suicide belongs to a clergyman's state, then he should be suspended for the time prescribed by the Ordinary, as well as deprived of his benefits and removed from offices related to the spiritual care of the faithful (see can. 2350 § 2).

Present Canonical Regulations

The idea of renewing ecclesiastical law in the spirit of *aggiornamento* was born under the pontificate of John XXIII, who in his Encyclical *Ad Petri Cathedram* of 1959 announced the adaptation of the *Codex Iuris Canonici* to today's needs.[29] This work, after many years of preparation, culminated in the promulgation by John Paul II on 25 January 1983, with the help of the Apostolic Constitution *Sacrae disciplinae leges*, of a new codification[30] – understood by the Pope himself – as a translation of the doctrine of the Second Vatican Council into the language of canons.[31]

The former can. 1240 – containing a catalogue of persons deprived of the right to a church burial – has been significantly modified, as in the 1977 version this

27 Ibidem, p. 105.

28 Ibidem, p. 120.

29 See: John XXIII, *Encyclical Ad Petri Cathedram,* "News of the Archdiocese of Warszawa" 1960, No. 1, pp. 4-5.

30 Pontificia Commissio Codici Iuris Canonici Authentice Interpretando, *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus. Fontium annotatione et indice analytico-alphabetico auctus*, 25.01.1983, Vaticanae 1989. Polish text in*: Kodeks Prawa Kanonicznego*, Poznań 2008.

31 See: introduction to *Kodeks Prawa*, p. 13.

list was completely removed (deprivation was limited to those who had not shown signs of repentance before their death).[32] However, in the 1980 overall project (and then in the final version), this list reappeared again, but in a heavily reduced form.[33] This provision finally constituted as can. 1184, no longer prohibits *in genere* the Catholic burial of suicides (especially those who are committed to the faith and the Church[34]), which the Polish Bishops' Conference (Episcopal Conference of Poland) explains by the fact that, according to the opinion of psychiatrists, they are not fully responsible for their deeds,[35] so it is difficult to speak of meeting the criterion of intentionality. At the same time, the 'native shepherds' strongly emphasise that a suicide who 'before suicide attempt gave a sin, should be treated as an outright sinner'[36] and therefore, in case of a scandal among the faithful, there are grounds for refusing the funeral under can. 1184 § 1, 3°.

The John Paul II Code departs from material division of irregularities in favour of the subjective criterion.[37] From that moment on, permanent obstacles preventing the acceptance of ordination, as well as their execution, are distinguished. The first ones, concerning the candidates, are included in can. 1041, and among them there is also an attempt to commit deliberate suicide (see can. 1041, 5°), which, according to M. Pastuszko, 'should be treated as a grave sin and not, for example, as committed by a mentally ill person, drunk or being a result of an unfortunate event'.[38]

Interestingly, can. 1044 § 1, which provides for *irregularitates ad exercendos ordines*, mentions, in the context of an unsuccessful suicide attempt, that it has to be a criminal act, so it seems that in order for a clergyman to be able to ascertain an irregularity prohibiting him from carrying out the ordinations, the general signs of

32 See: Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Schema canonum libri IV De Ecclesiae munere sanctificandi, pars II De locis et temporibus sacris deque culto divino*, Vaticanae 1977, p. 16.

33 See: Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Schema Codicis Iuris Canonici*, Vaticanae 1980, p. 257.

34 See: Episcopal Conference of Poland, *Instrukcja liturgiczno-duszpasterska o pogrzebie i modlitwach za zmarłych, 05.05.1978,* in: *Obrzędy pogrzebu dostosowane do zwyczajów diecezji polskich*, Katowice 2011.

35 Ibidem.

36 Ibidem.

37 Such a change may result from the redefinition of the perpetrator of a canonical crime – presently it can be done by a faithful person of the Catholic Church, that is, a person baptised in it or accepted after baptism, while the previous codification referred to all the baptised (also belonging to other confessions).

38 Pastuszko, M., *Nieprawidłowości i przeszkody do święceń (kanony 1040-1049*), "Prawo Kanoniczne" 2007, No. 3/4, p. 152.

a canonical offence *implicite* contained in can. 1321 § 1, 1399 and 1401, 2° should exist.[39] It is worth adding that in further regulations the legislator introduces the provision that ignorance of permanent obstacles does not free from them (see can. 1045), and the repetition of a given deed causes the multiplication of *irregularitas*, which is not without significance when making a request for dispensation (see can. 1049 § 1).

Suicide in Canon Law – conclusions

Code provisions on suicide remain firmly rooted in the Church's moral doctrine which negatively addresses this issue, but taking into account – in accordance with the motto aggiornamento – the achievements of the humanities which allow for a deeper understanding of human beings and their mental condition in the modern world. Suicidal issues are perceived in canon law primarily functionally, from the perspective of specific spiritual goods, such as the sacraments (ordination) or sacramentals (funeral), which the suicidal attempt significantly affects, often causing scandal.

The ecclesiastical legislature is therefore making concrete legislative efforts to ensure that these values, which are fundamental to the church community, will be properly protected. It should also be noted that there is now an emphasis on the need, influenced by a person's personalist vision, to understand the difficult situation that led a suicidal man to make a decision that radically contradicts the self-preserving nature of people, which is clearly expressed in the abolition of the Catholic burial ban.

Life and dignity of the human being as legal goods of the highest value in the Republic of Poland

Protection of human life as a unique value and its limitations

Human life is one of the most valuable legal goods to be protected in every corner of the world.[40] The uniqueness of human life lies in the fact that it offers the possibility of realising all other values that are precious to the individual, and thus

39 See: Syryjczyk, J., *Sankcje w Kościele*, Warszawa 2008, pp. 97-100.

40 In the Polish legal order, the source of the norm ordering public authorities to ensure the protection of human life is Article 38 of the Constitution of the Republic of Poland of 2 April 1997, Dz.U. (Journal of Laws) of 1997, no. 78 item 483 as amended.

constitutes a great value in itself – a fundamental good of each of us.[41] However, life is not only an individual value, closely related to its owners, i.e. individual persons. For it is worth emphasising that a person never lives alone, and as a social being he/she has to take into account at least a small degree of other people's requirements concerning his/her own person.[42] As A. Gubiński points out, the general public has an interest in keeping people alive because of '(...) the uniqueness of every human being, his/her family, social and friendship ties, as well as the value of each person as a creator of material or spiritual goods'.[43] Suicide is therefore not only an individual's tragedy, but also affects the society in which this individual is functioning.[44]

The protection of this good, which is at the top of the hierarchy of legal goods, may vary in intensity, as life is not an absolute value.[45] It is impossible to give it such a status because, like any legal good in everyday life, it comes into conflict with other goods, for example, when an attacker is deprived of his/her life for self-defence purpose or in case of legal abortion.

Suicide as a manifestation of the autonomy of the individual based on human dignity

Article 30 of the Constitution of the Republic of Poland confirms that the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.[46] As M. Chmaj notes, '(...) human dignity is revealed in the consciousness of man by showing the fact that man is different from animals, and that his/her actions by which he/she achieves existential

41 Noll, P., *Übergesetzliche Rechtfertigungsgründe im besonders die Einwilligung des Verletzten,* Basel 1955, p. 36, 76; Kaczmarek, T., *Wolność dysponowania życiem a prawo do godnej śmierci*, in: Kaczmarek, T., *Rozważania o przestępstwie i karze. Wybór prac z okresu 40-lecia naukowej twórczości*, Warszawa 2006, p. 405.

42 Klamut, R., *Aktywność obywatelska jako rodzaj aktywności społecznej – perspektywa psychologiczna*, "Studia Socjologiczne" 2013, No. 1, p. 187; Kakareko, K., *Samobójstwo w różnych kulturach prawnych*, in: Mozgawa, M. (ed.), *Samobójstwo*, Warszawa 2017, p. 325.

43 Gubiński, A., *Wyłączenie bezprawności czynu*, Warszawa 1961, p. 80.

44 Stefaniuk, M., *Samobójstwo jako zjawisko społeczne – pojęcie i rodzaje*, in: Mozgawa, M. (ed.), op. cit., p. 40.

45 As T. Kaczmarek notes: '(...) the level of this protection is usually considered to be a measure of the culture or spiritual condition of a given community', see: Kaczmarek, T., op. cit., p. 405.

46 Granat, M., *Godność człowieka z art. 30 Konstytucji jako wartość i norma prawna*, "Państwo i Prawo" 2014, No. 8, p. 15.

goals are not the work of instincts, but of mind and free decisions'[47]. Dignity is an indicator of humanity. Its essence is autonomy – the right to self-determination[48].

The need to respect human dignity as an absolute value, which neither the public authorities nor a third party can violate,[49] requires that people be given the opportunity to decide to end their lives so that they can do so freely, consciously and in accordance with their free will. Although the decision about suicide can be judged in different ways, it should be remembered that '(...) suicide is a manifestation of the greatest human freedom – thus it is an arch-human event, humanistic act, not existing in the animal world'.[50] Enabling voluntary death involves respect for human dignity, and especially its manifestation in the use of the human gift of free will and autonomy of decision.[51] Establishing by the public authorities an obligation to exist against the will of an individual would be grossly contrary to this necessity.[52]

Therefore, in a democratic state governed by the rule of law, it is inconceivable to lay down norms prohibiting suicide attempts, let alone sanctioning linked to them. The criminalisation of attempted suicide would constitute a restriction of human dignity due to the pursuit of the absolute protection of life, which would be unacceptable since, as the Constitutional Tribunal points out, 'according to the generally accepted view, this is the only right (of course we are talking about human dignity – MG's note) to which the principle of proportionality would not be applicable'.[53]

47 Chmaj, M., *Godność człowieka jako źródło jego wolności i praw*, in: Chmaj, M. (ed.), *Konstytucyjne wolności i prawa w Polsce. Tom I. Zasady ogólne*, Kraków 2002, p. 74.

48 Burdziak, K., op. cit., p. 87.

49 See: Zoll, A., *Wymiar kary w aspekcie godności człowieka*, in: *Godność człowieka a prawa ekonomiczne i socjalne. Księga jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich,* Warszawa 2003, p. 183.

50 Grudecki, M., *Wybrane prawnokarne aspekty prób samobójczych, nakłaniania do samobójstwa oraz pomocy w samobójstwie*, "Wojskowy Przegląd Prawniczy" 2019, No. 2, p. 78. K. Kakareko suggests that for some people suicide '(...) is an expression of real human freedom, allows for its realization', see: Kakareko, K., op. cit., p. 322. See also: Stefaniuk, M., op. cit., p. 13.

51 See: Kijaczko, S., *Konstruktywny i niekonstruktywny potencjał samobójstwa*, in: Mozgawa, M. (ed.), op. cit., p. 366; Szeroczyńska, M., *Eutanazja i wspomagane samobójstwo na świecie. Studium prawnoporównawcze*, Kraków 2004, p. 117.

52 Glaser, S., *Zabójstwo na żądanie*, Warszawa 1936, p. 47. It is worth recalling at this point the reflections of M. Płatek: 'The life of an individual has therefore a utilitarian meaning. Human life – to whom does it belong then? This question opens up a dialogue, a dilemma and the tragedy of an individual's own will towards the requirement of obedience to the authorities', see: Płatek, M., *Prawna natura samobójstwa. Od anomii po autonomię*, in: Mozgawa, M. (ed.), op. cit., p. 228.

53 Judgment of the Constitutional Tribunal of 5 March 2003, K 7/01, Legalis No. 56028. As M. Płatek points out, 'releasing a suicide from criminal responsibility may have been associated with an increase in social sensitivity, and over time also with the development of human rights. This, by changing the power of authority over the individual, has brought to the forefront the dignity of

Suicide as an attack on human dignity

Of course, we can also distinguish an opinion different than the one presented above, according to which suicide violates human dignity without being an expression of the autonomy of the person deriving from that dignity. On the basis of this theory, self-destruction is considered a degradation of humanity, a destruction of one's own personality, which is the unity of body and spirit.[54] Dignity is inalienable, and by depriving oneself of life, a person prevents the realisation of this dignity. In this way the person destroys his/her own individuality, makes it impossible to achieve the goal he/she has set.[55] Dignity, as K. Complak points out, has a defensive character and protects '(...) human beings from violating what is most human in them'.[56] What can be more human in a human being than his/her right to life – the uniqueness and exceptionality of the existence of each of us, which is an opportunity to realise all other values?

Should suicide in this sense of dignity constitute a forbidden act? Perhaps the conclusion will be the same as when accepting the opposite judgement, which sees the possibility of a suicide attempt as an expression of respect for human autonomy.

For a person who decides to shorten his/her life, not a sanction for breaking the ban but the need to continue to exist is the worst that can happen to him/her.[57] A suicidal person feels a mental pain that cannot be solved and finds himself/herself in a state of hopelessness and helplessness, from which he/she sees the only way to escape is in death.[58] As S. Kijaczko points out, 'if a person does not consider his/her life as valuable, if he/she is not convinced that 'the most important aspects of life are appropriate for him/her', nothing can contribute to improving its quality'[59]. It is therefore inhuman to punish this one who is experiencing a personal tragedy, sometimes resulting from the disintegration of the social groups in which he/she

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the human being freed from the relationship with external sovereignty (...)', see: Płatek, M., op. cit., p. 235.

54 See Burdziak, K., op. cit., pp. 94-95.

55 Complak, K., *O prawidłowe pojmowanie godności osoby ludzkiej w porządku RP*, in: Banaszak, B. and Preisner, A. (eds.), *Prawa i wolności obywatelskie w Konstytucji RP,* Warszawa 2002, p. 66.

56 Ibidem, p. 68.

57 Grudecki, M., op. cit., p. 63.

58 Stefaniuk, M., op. cit., p. 29.

59 Kijaczko, S., op. cit., p. 368. As K. Burdziak points out, 'given the mental state of an individual before a suicide attempt, it is impossible to expect that a possible legal norm prohibiting suicide could directly influence the behaviour of a suicide man in any way', see: Burdziak, K., op. cit., p. 104.

functions (family, work, friends) or the entire society, a serious illness or the transformation of the value system.[60]

In view of the above, it is worth emphasising that an effort to subject the postulate of introducing a ban on suicide attempts to the proportionality test under Article 31 section 3 of the Constitution of the Republic of Poland would have a negative effect already when checking the usefulness of establishing such a standard. A ban on suicide attempts, even if combined with a criminal law, cannot be an effective tool in combating this unfavourable social phenomenon. Such a sanctioned standard could not effectively influence the subject's behaviour and motivate him/her to the desired behaviour. In fact, the opposite would be true, since, as A. Wąsek suggests, '(...) the punishment of attempted suicide could mobilise desperate people to seek more effective methods of depriving themselves of their lives'.[61] In some cases, these could be dangerous methods for other people (for example, subjecting oneself to carbon monoxide gas poisoning or throwing oneself under a car). We may also wonder whether criminalising suicide attempts would not increase interest in this type of behaviour according to the reactance theory[62]. To put it simply, 'forbidden fruit' tastes the best.

Moreover, it seems that other, less intrusive methods of preventing suicide, such as preventive measures, can also be found.[63] The criminalisation of suicide attempts therefore does not meet the requirement of necessity, violating the *ultima ratio* principle of criminal law. Its introduction would be, as K. Burdziak aptly stresses, unconstitutional and therefore unacceptable.[64]

The freedom of a human being to decide to end his/her own existence

The inherent and inalienable dignity of the human being requires respect for the right to end one's existence. This right is linked to the limitation of the protection

60 Malczewski, J., *Problemy z prawną kwalifikacją lekarskiej pomocy do samobójstwa,* "Prokuratura i Prawo" 2008, No. 11, p. 23; Wąsek, A., *Prawnokarna problematyka samobójstwa*, Warszawa 1981, p. 48. As M. Płatek adds, '(...) more often a suicide can count on understanding and compassion than on condemnation'. See also: Stefaniuk, M., op. cit., pp. 19, 21-22, 33-34.

61 Wąsek, A., op. cit., p. 48.

62 Pasikowski, S., *Opór indywidualny. Teorie, klasyfikacje i diagnozowanie w ujęciu psychologicznym*, "Teraźniejszość – Człowiek – Edukacja" 2014, No. 68, p. 43.

63 See: Burdziak, K. op. cit., p. 105. An example of such actions is the publication of a guide for employees of educational institutions, see: Szymańska, J., *Zapobieganie samobójstwom dzieci i młodzieży. Poradnik dla pracowników szkół i placówek oświatowych oraz rodziców*, Warszawa 2016, pp. 37.

64 See: Burdziak, K., op. cit., p. 175.

of human life, which is an extremely precious value for society and the State. Therefore, it cannot be taken too broadly. A person who is considering a suicide attempt is always in an abnormal motivational situation because he/she wants to behave in a way that contradicts the natural self-preservation instinct.[65] Therefore, such a decision must be made solely by oneself, without any influence from third parties. But, the need to respect the decision to commit suicide does not mean that it is possible to offer the suicidal person help in the attempt at suicide.[66]

Taking into account the above thesis, it should be pointed out that the Polish legislator when criminalising the forcing of and help with suicide attempts (Article 151 of the Criminal Code),[67] stalking crimes[68] (Article 190a § 3 of the Criminal Code), abuse of a close or dependent person (Article 207 § 3 of the Criminal Code), as well as the soldier's abuse on his/her subordinates (Article 352 § 3 of the Criminal Code), protects first of all the freedom of a person to decide to end his/her own existence, and only then his/her life.

The above thesis is confirmed by the criminalisation of the so-called euthanasia murder (Article 150 of the Criminal Code). Although the state does not oblige a person to live, prohibiting the possibility of committing suicide, it has the right to oblige others to respect the life of another person, as its destruction is irreversible.[69] The admissibility of euthanasia or helping in suicide is always at risk, to some extent, of the undesirable influence of third parties in such a unique, particularly important, and even intimate situation, which is the decision to end his/her own life. The same remark can, however, be made regarding the possibility of refusing

65 Grudecki, M., op. cit., pp. 63-64, 79; Stefaniuk, M., op. cit., p. 13.

66 As S. Kijaczko points out, 'the possibility of choice is the basic context explaining the nature of the phenomenon of suicide, included in the formula of an unforced and deliberate action, whose perpetrator, aware of its result, alone determines the circumstances, conditions and factors causing his/her death', see: Kijaczko, S., op. cit., p. 365. See also: Konieczniak, P., *W sprawie eutanatycznej pomocy do samobójstwa*, "Państwo i Prawo" 1999, No. 5, p. 75.

67 Act of 6 June 1998 – Criminal Code, Dz.U. (Journal of Laws) of 2019, item 1950 as amended.

68 Patrycja Kozłowska-Kalisz writes in detail about the symptom of the effect of a suicide attempt under Polish criminal law, see: Kozłowska-Kalisz, P., *Targnięcie się na własne życie – wybrane zagadnienia dogmatyczne*, in: Mozgawa, M. (ed.), op. cit., pp. 89-110.

69 See: Noll, P., op. cit., p. 67, 79.

the consent for therapeutic treatments in a situation where this leads to death[70]. In this case, the inconsistency of the legislator is surprising and difficult to justify.[71]

Conclusion

Suicide is a highly negative issue, since its effects not only harm the individual who acts against his/her own life contrary to his/her natural self-preservation instinct, but also people in general. Despite this, given its nature, and above all the state of the person making such a desperate decision, it is not possible to forbid suicide attempts or to condemn suicides in an exceptional (all the more legal) way.

Therefore, both the canonical and secular legislators, when implementing legal norms for suicides, only marginally protect human life from destruction by its owner. An argument confirming this thesis is the *de lege lata* abandonment of the regulations of the Pio-Benedictine Code, which *in genere* prohibits the burial of people who deliberately took their own lives. In the case of secular law, the argument in this respect is an unquestionable ban on criminalising suicide attempts, as well as excluding them from the standard of sanction derived from Article 148 of the Criminal Code.

The main aim of the activity of church and secular legislators is therefore the protection of other goods connected with the phenomenon of suicide. As has already been mentioned, suicidal issues are currently seen in canon law mainly in the perspective of the protection of specific spiritual goods, such as the sacraments (ordination) or sacramentals (funeral), which are significantly threatened by suicide attempts. In Polish criminal law, the main object of protection is the freedom of a person to decide to end his/her existence. The legislator protects an individual from any interference by third parties in this respect.

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70 As T. Kaczmarek points out, 'axiological rigor would suggest that the law should consistently either allow or prohibit a person from freely making decisions relating to his/her private life, both if it were to concern the demand for his/her own death as well as the lack of consent for the medical treatment the initiation or continuation of which would be necessary to save his/her life', see: Kaczmarek, T., op. cit., p. 423.

71 And, as S. Kijaczko rightly points out, 'the regulations that uphold freedom cannot be inconsistent or contradictory', see: Kijaczko, S., op. cit., p. 365.

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Intercountry adoption in Polish family law

Abstract

The objective of this article is to present the intercountry adoption institutions in Polish family law. The objective is achieved by analysing the term 'adoption' by tracing it back to its origins in *Imperium Romanum*. Particular attention was paid to the recent amendment to the Penal Code, based on which the legal definition of the term 'adoption' was introduced (which is not the case of the Family and Guardianship Code) and to the differences between the terms 'intercountry adoption' and 'foreign adoption'. The article includes the analysis of Article 114^2 of the Family and Guardianship Code and the essence of the intercountry adoption principle of subsidiarity. The purpose of the study was to show technical and organisational issues related to the concept of intercountry adoption, such as pre-adoption period or 'eligibility' of potential adopters. One of the conclusions was that the citizenship of the adopter does not determine the international type of adoption, but his/her place of residence outside Poland. Certain international legal documents were reviewed to see how the adoptee's welfare is protected under international law and to outline the genesis of the regulations in Article 114^2 of the Family and Guardianship Code. The author's aim is to show the circumstances favourable to the adoption of a child by a foreign couple. At this point, it should be stated that the child's best interest should always remain the most important condition. Furthermore, when ruling in an adoption case, the court should protect the child's interests, but also pay attention to the regulations concerning the continuity of the child's upbringing as well as its ethnic, religious, cultural and linguistic identity. The above is related to the

contemporary issue of adoption by homosexual couples. Countries, such as Poland, which do not allow adoption by homosexual couples may challenge the eligibility of candidates on the grounds of infringement of fundamental rules of the Polish legal order. Furthermore, the article includes statistical data concerning intercountry adoption. Currently, the number of intercountry adoptions decreases not only in Poland, but worldwide. In Poland, it may be caused by the tightening of the eligibility criteria for adopters and adoptees with respect to intercountry adoptions and reduction in the number of centres authorised to effect such adoptions. In the last part of the study, the author developed the argument that the issues of intercountry adoption are part of the global problems related to poverty and inequality.

Keywords: intercountry adoption, child's welfare, adoptee, principle of subsidiarity, adopter

Introduction

The term 'obligation of maintenance' is used in the Family and Guardianship Code,[1] but its equivalent – -'adoption'- – derived from the Latin word *adoptio* is more popular. In Roman law, adoption was one of the methods for introducing a stranger into the family and under the paternal power (*patria potestas*).[2] *Adoptio* meant adoption of a child that was supposed to 'imitate the nature',[3] therefore, the requirement was that the adopter had to be older than the adoptee by at least 'full maturity'.[4] According to the law of Justinian, the established age limit was 18.[5]

Adoption is by its very nature a measure of personal family law, but it was not always the case. In different historical periods, adoption was used to derive economic profits, going far beyond the area of civil law.[6] In light of the provisions of the Family and Guardianship Code, adoption has legal and family character. The existence of the legal adoption relationship is a formal act that occurs as a result of

1 Act of 25 February 1964 – Family and Guardianship Code, consolidated text: Dz.U. (Journal of Laws) of 2019, item 2086.

2 The adoption was effected as a legal act between the present 'male head of a family' (*pater familias*) and the adopter, causing the breaking of family bonds between the adoptee and his/her present family as well as gaining independence from the current father's power. More information: Kuryłowicz, M., *Rozwój historyczny rzymskiej adopcji,* "Studia Iuridica Lublinensia" 2011, No. 16, pp. 35-53.

3 In compliance with the Roman principle *adoptio naturam imitatur*.

4 However, it is worth noting that it was not always the case. For some period of time, according to the Roman law, an older person could be adopted by a younger one [author's note: the author would like to thank an anonymous reviewer for pointing this out].

5 Kolańczyk, K., *Prawo rzymskie*, Warszawa 2007, p. 245.

6 The procedure of adoption is used for dynastic purposes or to give the 'nobility status'. The issues are discussed in more detail in: Ignatowicz, J. and Nazar, M., *Prawo rodzinne,* Warszawa 2016, pp. 466-467.

the decision of the Guardianship Court and not the will of the parties. On the other hand, it must be stressed that the court does not work *ex officio*, but upon request; therefore, it may be assumed that the will of the adopters is reflected by submitting such request.

Adoption is defined in modern law as the establishment of a legal and family relationship between the adopter and adoptee similar to the relationship that occurs between a parent and a child.[7] Referring to the views of M. Andrzejewski, it is a way to formally ensure social fiction by officially establishing legal bonds similar to the relationship of parents and children.[8] Therefore, a thought comes that the basic social function of adoption is to replace the missing family environment.[9] Such a need occurs especially when the child becomes a natural or social orphan. The latter refers to the situation when at least one of the parents is alive but does not fulfil their parental duties.[10]

Terminology

The term 'adoption' has so far not been defined in the Family and Guardianship Code; the definition is included in the Penal Code.[11] In compliance with the present wording of Article 115 § 22(a) of the Penal Code, adoption means acquisition of parental authority over the child by a person other than the one from whom the child comes.[12] The authors of the amendments to the Penal Code in 2019 wanted to bring order to the terminology, as the term 'adoption' was used, but not defined

7 Adoption should be aimed at creating the conditions for the child identical to those in natural families. In particular, it is possible in the event when two married people jointly adopt the child and become the new parents therefor. However, joint adoption is not possible if two people are not married. See: Partyk, A., *Specyfika przysposobienia wspólnego*, LEX 2020.

8 Andrzejewski, M., *Przysposobienie – podstawowe informacje i najważniejsze płaszczyzny sporów prawnych*, in: Andrzejewski, M. and Łączkowska, M. (eds.), *Prawne i pozaprawne aspekty adopcji*, Poznań 2008, p. 8. See: resolution of the Supreme Court of 9 June 1976, III CZP 46/75, LEX No. 1966.

9 The Supreme Court explained that adoption is entirely aimed at ensuring the child's welfare. An important element – from the point of view of the child's welfare, apart from satisfying its needs in terms of maintenance and upbringing – is to create a family bond in the child's psyche by establishing the child-parent relationship between the child and the adoptive parents, having significant impact on its proper psychological and emotional development. See: judgement of the Supreme Court of 8 August 1967, I CR 120/67, LEX No. 762.

10 Strzebinczyk, J.F., *Prawo rodzinne,* Warszawa 2016, p. 331.

11 Act of 6 June 1997 – Penal Code, consolidated text: Dz.U. (Journal of Laws) of 2020, item 1086.

12 The provision was added by Article 1 point 1 of the Act of 16 October 2019 amending the act – Penal Code and act – Code of Civil Procedure, consolidated text: Dz.U. (Journal of Laws) of 2019, item 2128.

in the legislation. On the other hand, in legal jargon, the term 'adoption' is used interchangeably with the 'obligation of maintenance'. The aforementioned amendment introduced penalty for giving the child up for adoption by holders of parental responsibility (Article 211a § 1 of the Penal Code) and adopting the child from a person who is not its biological parent (211a § 3 of the Penal Code).[13] In the grounds for the draft Act, it is stated that the concept of 'adoption' (...) should be considered (...) too [narrow] for the purposes of criminal law and criminalisation of behaviours stipulated in Article 211(a) of the Penal Code. The essence of wrongdoing is the willingness to acquire parental authority over the child and, from the point of view of such intention of the offender, it is irrelevant which legal and family measure he/she may use. The planned legal effect may be obtained through the adoption proceedings or, for instance, fictitious recognition of the child by a person pretending to be its biological parent.[14] On the other hand, it should be noted that in other provisions of the Penal Code, the legislator consistently uses the term 'adoption'. For instance, pursuant to Article 115 § 11 of the Penal Code, 'next of kin' is 'the person remaining in adoption-like relationship or their spouse'.

Adoption is not a uniform legal instrument, as it may create the legal and family relationship between the adopter and the adoptee, with effects on other family members, but also the legal and family relationship between the adopter and the adoptee themselves, without any effects on other family members. The following types of adoption are identified in the Family and Guardianship Code: simple adoption (*adoptio minus plena*), plenary adoption (*adoptio plena*) and full adoption (*adoptio plenissima*).[15] On the other hand, the adoption resulting in the adoptee changing his/her place of residence in the Republic of Poland to reside in another state is referred to as 'foreign adoption'. In this context, it is more appropriate to use the term of 'intercountry adoption', as it relates to the terminology of international law. The provision in Article 114^2 of the Family and Guardianship Code is usually applied by the Polish court, but it could be also used by a foreign court if the governing law is the Polish law. According to R. Zegadło, 'the term would potentially match the adoption ruled by a foreign court, for the acknowledgement of which it was applied in Poland'.[16] The above should be supplemented with the statement that the provision in Article 114^2 of the Family and Guardianship Code does not

13 Mozgawa, M., *Komentarz do art. 211a k.k.*, in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz aktualizowany*, LEX 2020.

14 Government draft act amending the act – Penal Code, print No. 3665.

15 Smyczyński, T., *Prawo rodzinne i opiekuńcze*, Warszawa 2018, p. 310.

16 Zegadło, R., *Komentarz do art. 114^2 k.r.o.*, in: Wierciński, J. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, LexisNexis 2014.

concern cases of intercountry adoption to be potentially examined by the Polish court. An example could be the adoption of a child from another country by the applicants in Poland. Furthermore, the statutory definition of such adoption is the 'intercountry adoption'. The term is present in the provisions of the Act of 9 June 2011 on support for families and the foster care system, which govern the pre-adoption procedure.[17]

Historical background and assumptions of the provision in Article 114[2] of the Family and Guardianship Code

On the one hand, it may be claimed that by 19 October 1995, i.e. till the Act of 26 May 1995 amending the Act – Family and Guardianship Code and some other acts came into force[18], the Polish law had not recognised the concept of the 'intercountry adoption'.[19] Nonetheless, it must be remembered that foreign adoptions could be ruled pursuant to Article 21 of the ratified Convention on the Rights of the Child.[20] The scarcity of regulations on the intercountry adoptions, both in the Family and Guardianship Code from 1964 and earlier normative acts governing the institution of adoption after the Second World War, resulted from a small number of such adoptions. Legal scholars and commentators have observed that by the 1980s, the share of intercountry adoptions in the total number of adoptions ruled annually had not exceeded 2%.[21] The development of the human rights protection system led to the situation that it eventually covered the institution of adoption. Together with the subsequent international initiatives more and more attention was paid to the need to protect the adopter.[22] The first document aimed at protecting the child's welfare was the Declaration of the Rights of the Child, also referred to as the

17 Act of 9 June 2011 on support for families and the foster care system, consolidated text: Dz.U. (Journal of Laws) of 2020, item 821.

18 Act of 26 May 1995 amending the act – Family and Guardianship Code and certain other acts, consolidated text: Dz.U. (Journal of Laws) of 1995, no. 83 item 417.

19 Kalus, S. and Habdas, M., *Family and succession law in Poland*, Alphen aan den Rijn 2020, pp. 135-136.

20 Convention on the Rights of the Child, 7 March 1990, E/CN.4/RES/1990/74.

21 The assessment whether the intended adoption was in compliance with the child's welfare was the decisive factor in accepting the application for adoption. See: Holewińska-Łapińska, E., *Adopcje zagraniczne w praktyce polskich sądów,* Warszawa 1998, pp. 70-75.

22 Łukasiewicz, R., *Dobro dziecka a interesy innych podmiotów w polskiej regulacji prawnej przysposobienia*, Warszawa 2019, p. 42.

Declaration of Geneva, adopted on 23 February 1923.[23] However, the Declaration was of a general nature; it was composed of five points concerning the issues that have a detrimental impact on the child's development.[24] It served as a starting point for further and more intense protection of the welfare of the child deprived of its family environment. On 10 December 1948, the UN General Assembly adopted the Universal Declaration on Human Rights[25]; however, it was also general and the child's welfare was just one of the elements of its subject. The guarantee of human rights protection did not provide sufficient protection of the child's welfare; therefore, it was decided to pass a separate declaration, focusing on the interests of minors.

On 20 November 1959, the UN General Assembly adopted the Declaration of the Rights of the Child.[26] In the context of the discussed issues, the sixth principle of the Declaration seems important, as it puts emphasis on the upbringing of the child in the family without being separated from its mother, and with the provision of particular care to children without a family. On the other hand, the protection of the welfare of the adoptee is noticeable within the following areas: possible separation of the child from its family, if necessary, and provision of care for children without the family. Another stage was to prepare the binding international agreement aimed at introducing the standard protection of the child's welfare. Therefore, on 20 November 1989, the Convention on the Rights of the Child, at times referred to as the 'world constitution of children's rights' was passed. It included framework solutions concerning the most important aspects of the adoptee's welfare protection. It should be recognised that pursuant to Article 20 sec. 2 of the Convention on the Rights of the Child, the States Parties are obliged to provide custody to children without the family environment. It may be in the form of placing the child in foster care, *Kafali* in Islamic law, adoption or, if necessary, in an appropriate institution established to provide custody to children.[27]

The aforementioned Article 114^2 of the Family and Guardianship Code was introduced by amendment in 1995 to implement the provisions of Article 2(b) of the Convention on the Rights of the Child, in compliance with which the States

23 Geneva Declaration of the Rights of the Child adopted on 26 September 1924, League of Nations Official Journal, Special Supplement 21, p. 43.

24 Famine, disease, disability, social orphanhood, crime. See: Truszkowska-Wojtkowiak, M., *Prawa dziecka a czas wolny*, "Studia Gdańskie. Wizje i Rzeczywistość" 2013, Vol. 10, p. 401.

25 Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

26 Declaration of the Rights of the Child, 20 November 1959, A/RES/1386(XIV).

27 Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. See: Article 20 sec. 3. The enumeration is purely illustrative.

Parties should treat the adoption related to the relocation of the child into another country as the substitute means where the child may not be placed in foster care or adoptive home or if it is impossible to provide care for the child in the country of its origin.[28] The above refers to the principle of subsidiarity of intercountry adoption. First of all, it should be considered whether custody or adoption would be the best for the child's welfare. Only then, when adoption proves the most convenient solution for the child, it is possible to assess which type of adoption would be better, in-country or intercountry. It means that not only the in-country adoption has the priority over the intercountry adoption, as it might seem, but also custody if it is the right solution for a given child. Furthermore, the Convention on the Rights of the Child provides for special requirements related to the intercountry adoption. In compliance with Article 21(c) of the Convention on the Rights of the Child, the child adopted from another country should be provided with a warranty bond and standard of living adequate to those that would be ensured in the case of the in-country adoption.

At this point, we should refer to the general condition of adoption. The requirement that the adoption should be for the child's welfare (Article 114 § 1 of the Family and Guardianship Code) is determinative on whether the adoption could be effected. The child's welfare is of utmost importance and should be taken into account each time the child's custody is at stake[29], thus also in the case of in-country and intercountry adoption. The child's welfare principle permeates adoption in all phases of its existence. The court – guided by the principle of the child's welfare – decides whether the adoption relationship occurs, since the adoption is permissible only to ensure the child's welfare (Article 114 § 1 of the Family and Guardianship Code). The court considers the child's interests also when ruling in cases related to adoption in the course of a legal relationship. The parental authority must be exerted by the adoptive parents as required to protect the child's welfare and social interests (Article 95 § 3 of the Family and Guardianship Code). The above principle is also of key importance in the case of terminating the adoption. It is unacceptable

28 Bridge, C. and Swindells, H.Q.C., *The modern law*, Bristol 2003, pp. 294-295.

29 There is no legal definition of the term 'child's welfare'. In its decision of 13 December 2013, the Supreme Court stated that '(...) the meaning should be given in specific circumstances, especially if they indicate to the existence of a situation, in which the child lives, requiring interference on the part of other entities, including the court. It is important to mention the right to protect life and health and all actions undertaken by other entities, who are obliged to provide appropriate conditions for peace, proper and undisturbed development, respect of dignity and participation in the process of deciding about the child's situation, and state that it is an inexhaustible set', see: decision of the Supreme Court of 13 December 2013, III CZP 89/13, LEX No. 2216088.

that the child's welfare should suffer due to such termination (Article 125 § 1 of the Family and Guardianship Code).[30]

Family law scholars believe that a decision on adoption must be in line with the child's welfare if there is a possibility of establishing a close emotional bond between the parties to the adoption relationship typical of the biological parents and children, when the adopter is capable of providing the appropriate upbringing and maintenance conditions for the child.[31] At this point, it should be added that the evaluation of the adoptee's welfare may not be directed at the child's present situation only, but must also include its future.[32]

If there appears to be no chance of the child being adopted nationally, its adoption by persons living abroad may be considered. In such proceedings, the child's interests are of utmost importance. It is shown that the preservation of the national identity of the minor constitutes just one of the elements of the 'child's welfare'. The court adjudicating in adoption cases should cooperate with the institutions specialised in the organisation of family foster care environments for children lacking the opportunity to live in natural families. When choosing appropriate solutions, the continuity of the child's upbringing and its ethical, religious, cultural and language continuity should be taken into consideration (Article 20 sec. 3 of the Convention on the Rights of the Child).[33]

Appropriate condition of a family foster care environment and the pre-adoption period

One of the conditions determining the eligibility of the intercountry adoption is to establish that it is the only method for providing the child with the appropriate family foster care environment.[34] At this point, the content of the term 'family foster care environment' used in Article 114^2 § 1 of the Family and Guardianship Code and the criteria allowing the evaluation of 'appropriateness' of such environment for the child should be determined. The adoption that entails the child's relocation to another country refers to the 'substitute means of child custody', which are discussed further in the article. The courts adjudicating in cases of adoption of the Polish child by foreigners are obliged to determine whether a given child may

30 Ignatowicz, J. and Nazar, M., op. cit., p. 467.

31 See: Stojanowska, W., *Rozwód a dobro dziecka,* Warszawa 1979, p. 35.

32 Decision of the Supreme Court of 22 June 2012, V CSK 283/11, LEX No. 1232479.

33 Ignaczewski, J., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2010, p. 666.

34 See: Article 20 sec. 3 of the Convention on the Rights of the Child.

be adopted by an appropriate Polish family or placed in Polish foster care. Only if there appears to be no chance of the child being adopted nationally, its adoption by persons living abroad may be considered.[35]

The 'foster care environment' is created by an adoptive family and foster care family. What caused doubts among legal commentators was the fact that foster homes were treated as a family foster care environment. The custody exercised by the foster home is more institutionalised, hence it was proposed to exclude it from the scope of the discussed term.[36] It is agreed that to ensure the child's welfare, family foster care environments have priority over institutions providing care for children. However, it is impossible not to agree with the opinion that no facility, even the best one, is able to ensure a family foster care environment.

At this point, it should be noted that the adoption proceedings are governed by the Act of 9 June 2011 on support for families and the foster care system. The implementation of adoption procedures and preparation of persons ready to adopt the child, known as the candidates for adopters, constitute an exclusive competence of the adoption centre. The exclusive competence of the adoption centre to implement the adoption procedures and training sessions means that none of the parties to such procedures may implement such procedures or train future adoptive parents.[37]

Pursuant to Article 167 of the said Act, the child may be eligible for adoption involving a change of its current place of residence in the Republic of Poland to reside in another state after exhausting all possibilities of finding the candidate for an adopter in the country, unless there is a relationship of consanguinity or affinity between the adopter and the adoptee, or the adopter has already adopted a brother or sister of the adoptee. It should be stressed that the adoption procedures related to the change of the child's current place of residence in the Republic of Poland to reside in another state may be implemented solely by the adoption centre authorised to cooperate with foreign central authorities or organisations or adoption centres licensed by foreign state authorities.[38]

The legal consequences of the choice of one of the aforesaid forms of a family foster care environment are different. The placement of a child in a foster family does not change its family status, hence, it is assumed that the child will maintain contact with its biological family. In such case, it is possible that the child will come

35 Ignaczewski, J., op. cit., p. 666.

36 The systemic interpretation would support such a solution. See: Holewińska-Łapińska, E., op. cit., pp. 70-75.

37 Tryniszewska, K., *Komentarz do art. 154 u.w.r.*, in: Tryniszewska, K. (ed.), *Ustawa o wspieraniu rodziny i systemie pieczy zastępczej. Komentarz,* LEX 2015.

38 Wilk, A., *Komentarz do art. 168 u.w.r.*, in: Nitecki, S. (ed.), *Ustawa o wspieraniu rodziny i systemie pieczy zastępczej. Komentarz*, LEX 2018.

back to its family. If it turns out that such return is impossible or would be harmful to the child and the child reached the age indicating development of strong bonds with the new family, the adoptive family would be the appropriate upbringing environment.[39]

The 1995 amendment introduced an additional condition in the form of a trial period, i.e. a mandatory period of personal contact between the potential adopters and the child at the child's current place of residence. In light of the judicial decisions of the Supreme Court, such a solution (…) has effect in the form of granting custody of the child for the duration of the adoption proceedings as collateral, which – if executed – will be equal to the placement of the child for upbringing.[40] The point of this period is to verify whether the adopters were selected appropriately, to allow the parties to get to know each other and develop emotional bonds, and – above all – to ensure that the prerequisite to protect the child's welfare will be satisfied.[41]

The regulation in Article 120^1 § 3 of the Family and Guardianship Code stipulates that special care should be taken while selecting parties to the adoption relationship, as a result of which the adoptee will permanently leave the their home country.[42] The literature shows that the last reservation concerning the place of the trial period is aimed at preventing the transfer of children abroad under the pretext that the trial period should take place in a foreign country, whereas in reality the objective is to avoid adoption proceedings before the Polish courts.[43]

Therefore, the view of J. Gajda should be shared, in accordance with which (…) a negative aspect of the solution adopted by the legislator may be the fact that not in every case, the adopter, sometimes having high personal and moral qualities, will be able to leave his/her place of residence, and abandon professional work for some period of time. It may cause that the potential adopter decides to give up the intention to adopt the child. However, the child's welfare requirement must be the priority, therefore, such a solution should be considered correct despite the fact that, for example, it may become the reason for limiting the number of foreign

39 Holewińska-Łapińska, E., op. cit., pp. 559-560. See: Gajda, J., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2000, p. 441.

40 Decision of the Supreme Court of 18 November 2014, II UK 52/14, "Orzecznictwo Sądu Najwyższego. Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych" 2016, No. 5, item 64.

41 Andrzejewska, M., *Osobista styczność z dzieckiem w przypadku spraw o przysposobienie międzynarodowe jako narzędzie chroniące dobro dziecka*, "Białostockie Studia Prawnicze" 2017, No. 3, pp. 33-42.

42 Smyczyński, T., op. cit., p. 275.

43 Strzebinczyk, J.F., op. cit., p. 348.

adoptions.[44] It should be noted that the duration of the pre-adoption period has not been defined anywhere. Research has shown that in 75% of the examined cases, in which the period of contact was precisely defined, it was usually around two weeks but not longer than three weeks.[45] The period seems short, especially when considering that in the case of intercountry adoption, the child and adoptive parents experience language and cultural barriers, apart from the ordinary barrier of strangeness.[46] In this context, the *de lege ferenda* demand is to precisely determine the minimum period of personal contact so as to increase safety of the adoptees by not allowing the so-called 'quick adoptions' and to provide the court with appropriate time to predict personal bonds between the parties.

Principle of subsidiarity of intercountry adoption

In compliance with the principle of subsidiarity of intercountry adoption, the adoption that entails the child's relocation to another country refers to the substitute means of child custody if the child may not be placed in foster care or an adoptive home or if it is impossible to provide care for the child in the country of its origin. It should be stressed that according to the Polish law, the principle of priority of adoption of Polish minors residing in Poland by Poles residing in Poland is effective. The adoption that causes the change of the adoptee's current place of residence in the Republic of Poland to reside in another state is allowable in the event when it is the only method for providing the adoptee with an appropriate family foster care environment.

The change of the place of residence may not be equal to the actual change of the child's whereabouts.[47] *Domicilium* of a natural person is defined in Article 25 of the Civil Code.[48] The child's *domicilium* is described in Article 26 of the Civil Code, in compliance with which it is the place of residence of the parents or the parent who has been vested with parental authority or entrusted with the exercise of such parental authority.[49] If the parental authority is vested in both parents, who

44 Gajda, J., *Przysposobienie dziecka w prawie polskim,* in: Kasprzyk, P. (ed.), *Prawo rodzinne w Polsce i w Europie,* Lublin 2005, p. 253.

45 Ciepła, H. et al., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2011, p. 882.

46 Andrzejewska, M., op. cit., p. 39.

47 Decision of the Supreme Court of 27 September 1990, III SA 688/90, LEX No. 10153.

48 Act of 23 April 1964 – Civil Code, consolidated text: Dz.U. (Journal of Laws) of 2020, item 875.

49 If the child remains under parental authority of both parents residing in the same city/town, the place of residence of all these persons will be this city/town. See: Nazaruk, P., *Komentarz do art. 26 k.c.*, in: Ciszewski, J. and Nazaruk, P. (eds.), *Kodeks cywilny. Komentarz*, LEX 2019.

live separately, the child's place of residence must be with the parent with whom the child stays permanently.[50] The will of the Polish legislator was the principle of one place of residence (Article 28 of the Civil Code). Therefore, if the child's place of residence during the adoption proceedings is in a Polish city/town, Article 114^2 § 1 of the Family and Guardianship Code applies even if the child has stayed abroad for a longer period of time. In such case, despite the fact that the decision on adoption by a person living abroad does not cause the change of the country or even a city/town where the child actually stays (having formal place of residence in Poland), the persons residing in Poland will have priority in adopting him or her.[51]

However, the priority principle of in-country adoption may not be automatically interpreted in a 'zero-one' manner. Other premises, such as the family situation of the child, its physical and psychological features, stage of development, and relationship with the adopters may also come into play.[52] At this point, it should be determined that the child's welfare is a decisive factor. It was also the ruling of the Supreme Court, which stated in the decision of 5 July 2006 that *(…)* although in light of Article 114^2 § 1 of the Family and Guardianship Code, the foreign adoption should be actually treated as ultima ratio, the child's interest and welfare as well as the possibility of its full and harmonious development may require, in a given case, rejection of the priority principle of in-country adoption.[53]

On 29 May 1993, the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption was passed in Hague.[54] The Convention confirmed the principle of subsidiarity with respect to intercountry adoptions, in compliance with which this kind of adoption should be treated as the *ultima ratio* measure. Furthermore, Article 4 of the said Convention also includes the conditions for intercountry adoptions. First of all, competent authorities in the country of origin must determine that the child is eligible for adoption.[55] After examining the possibilities of placing the child in the country of its origin, the state authorities

50 If the child does not stay permanently with either of parents, its place of residence is determined by the Guardianship Court (Article 26 § 2 of the Civil Code).

51 The literature contains a view that the purpose of such regulation was to prevent the situations when the child, whose place of residence is Poland, will be taken abroad to facilitate the adoption procedure for foreigners. More information: Holewińska-Łapińska, E., in: Smyczyński, T. (ed.), *System prawa prywatnego. Prawo rodzinne i opiekuńcze. Tom 12,* Warszawa 2011, p. 558.

52 Adoption by a person residing abroad, who is the child's relative and is emotionally involved with the child may serve as an example.

53 Decision of the Supreme Court of 5 July 2006, IV CSK 127/06, LEX No. 232819.

54 Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, 33.

55 It means that it is first necessary to state that it is the adoptive family, and not, for example custody, that will be the appropriate environment for the child.

must determine whether the intercountry adoption would best match the child's interests.

The child's welfare is also protected by way of appropriate control of the candidates for adopters. The host state must conclude that the 'future adopters [parents] are eligible', which is provided for by Article 5(a) of the aforementioned Convention. It is important to note in this regard that the collaboration between the authorities of the country of origin and the host state does not aim only at the determination that the adopters are eligible for the child's adoption in general, but that they are appropriate for this particular child.

The discussed Convention is an attempt to establish a minimum standard for protecting the child's welfare in this area. Even though its general values are unquestionable, legal commentary shows certain disputes that arise in the practice of intercountry adoptions between the State Party to the Convention and the state not participating in the Convention. This often leads to the differentiation of standards of the child's welfare protection.[56]

As already mentioned, Article 114^2 of the Family and Guardianship Code introduced the priority principle, according to which the in-country adoptions prevail over the intercountry adoptions, yet with certain exceptions mentioned in § 2, which stipulates that the aforesaid principle does not apply if the adopter is the child's relative or affinity; or if the adopter has already adopted a brother or sister of the child. Apparently, certain limitations regarding intercountry adoptions do not refer to inter-family adoptions or adoptions aimed at the maintenance of family bonds. It seems that in the case of joint adoption by spouses, the discussed condition is fulfilled if one of the spouses is the child's relative or affinity. What is interesting, neither the degree or line of kinship or affinity are defined in the Family and Guardianship Code, which means that the kinship or affinity may be direct or secondary and the degree of kinship or affinity remote.

It must be agreed that the child's relative or affinity does not privilege the foreign applicant. The foreign applicant's request is not each time granted priority. In the case of a conflict between the request for a decision on adoption submitted by the entities mentioned in 114^2 § 2 of the Family and Guardianship Code and the request of the Polish candidate, the Guardianship Court, guided by the child's interests, should choose the adopter who may best guarantee the due performance of the obligations resulting from the adoption.[57]

56 Zieliński, A., *Nowa konwencja haska w sprawie przysposobienia międzynarodowego*, "Państwo i Prawo" 1993, No. 9, pp. 3-13.

57 Strzebinczyk, J.F., op. cit., p. 346.

Adoption by homosexual couples

The issue of admissibility of intercountry adoption by homosexual couples was one of the controversial aspects that emerged during the debate on the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. However, it must be stressed that, in this context, same-sex adoptions only concern such cases when both the country where the adopters reside and the child's country of origin allow such adoptions. Therefore, it might be concluded that the country (its courts), whose legislation does not allow adoptions by homosexual couples, may invoke fundamental principles of its own legal framework (public policy clause).

Adoptions by homosexual couples have been legalised in 15 countries, including Belgium (2006), Denmark (2010), France (2013), Iceland (2006), the Netherlands (2001), Norway (2009), Spain (2005), Sweden (2003) and in some parts of the United Kingdom (2005).[58] In Poland, the legal and social situation of LGBT people[59] is evaluated differently. The social situation concerns such issues as the tolerance level towards LGBT individuals, extent of violence against LGBT individuals in society as well as the LGBT culture and media. On the other hand, the legal situation includes such issues as a possibility of formal recognition by the legislator of a same-sex relationship (marriage or partnership) or adoption of a child under the care of the state facility or stepson/stepdaughter by a LGBT person or couple.[60]

The advocates of adoption, including intercountry adoption, by same-sex couples use the argument of equal rights, i.e. they claim that there is no place in civilised societies for ethnic, gender or sexual orientation discrimination. The refusal to grant equal rights to homosexual partners may be a manifestation of discrimination.[61] Furthermore, there is considerable evidence that same-sex couples have equally good competence as parents as heterosexual couples.[62] Another issue is that a child needs a family. It should be also remembered that adopted children,

58 The provisions allowing the adoption by homosexual couples have been effective in England and Wales since 2005, in Scotland since 2009 and in Ireland since 2013.

59 The abbreviation that stands for Lesbian, Gay, Bisexual, Transgender. See: American Psychological Association, https://www.apa.org/topics/lgbt (accessed 28.07.2020).

60 For the legal and social situation of LGBT people in Poland see Wikipedia, *Sytuacja prawna i społeczna osób LGBT w Polsce,* https://pl.wikipedia.org/wiki/Sytuacja_prawna_i_społeczna_osób_LGBT_w_Polsce (accessed 28.07.2020).

61 In other words, both homosexual and heterosexual couples deserve the same right to adopt children. See: judgement of the Constitutional Tribunal of 21 March 2005, P 5/04 and judgement of the Supreme Administrative Court of 19 February 2020, II OSK 932/18, LEX No. 3022271 (in particular, the manner of understanding the principle of equality).

62 Averett, P. et al., *An evaluation of gay/lesbian and heterosexual adoption*, "Adoption Quarterly" 2009, Vol. 12, pp. 129-151.

including children adopted by same-sex partners, do not come from full and happy families. Majority of them come from orphanages or foster care families, or remain under the custody of single mothers who are unable to provide care for children. A (traditional) family or homosexual couple may prove the best possible solution.[63] What is interesting is the fact that thanks to the American legislation allowing adoption by same-sex couples, 65,000 children have already found their homes.

The literature also includes arguments against adoption by same-sex couples. One of them is that homosexual relationships are not as lasting as heterosexual relationships. A characteristic feature of such relationships is also promiscuity, which is not so typical of heterosexual relationships. Another thing is frequent identity changes during the relationships. The key argument against adoption by same-sex couples is still the welfare of the child that – as proven by science and life experience – needs a mother and father for its proper development.[64]

On the other hand, one of the main principles of the EU is the principle of subsidiarity. It refers to the issues, which – due to their nature – will be resolved or achieved more efficiently at the EU level. Adoption by same-sex couples is the issue that should be resolved at the national level, without any pressure on citizens coming from more traditional societies. It is also worth mentioning that parenthood by homosexual couples is sometimes contradictory to the religious views of many people. Legalisation of adoption by LGBT people could offend professed values and the role of religion, which is the moral foundation of society. Another issue is democracy, which not always produces the expected results. We should respect the choice of the majority, even if they are against adoption by same-sex couples.[65]

Currently, it is rather unlikely that Poland will introduce any changes related to the situation of LGBT individuals in this regard. It is also worth mentioning that in July 2020, President Andrzej Duda signed draft constitutional amendments prohibiting adoption by same-sex couples. The provisions of family law will be incorporated into the Constitution: a minor may be adopted solely for the purpose of ensuring his/her welfare; the minor may be adopted solely by a married couple pursuant to the definition included in Article 18 of the Constitution, i.e. a man and a woman only. The Parliament is planning to add one more provision, which is not

63 Shapiro, L.M., *Inferring a right to permanent family care from the United Nations Convention on the Rights of the Child, the Hague Convention on Intercountry Adoption, and selected scientific literature*, "Washington and Lee Journal of Civil Rights and Social Justice" 2008, Vol. 15, No. 1, pp. 191-226.

64 *To krzywda dla dzieci*, "Niedziela Ogólnopolska" 2011, No. 49, p. 33.

65 *Arguments for and against gay adoption*, Debating Europe, https://www.debatingeurope.eu/focus/arguments-gay-adoption/#.XyEffy0lD7m (accessed 29.07.2020).

currently in family law, i.e. the minor may not be adopted by any person who is in cohabitation with another person of the same sex.[66]

Intercountry adoption in numbers

The number of adoptions in Poland remains at the same level and includes around 3,000 children per year.[67] On the other hand, the number of Polish children adopted by foreign couples is decreasing, which is shown in the following table.

Table 1: Statistics of intercountry adoptions in Poland in 2012-2018.[68]

Country of adoptive parents	2012	2013	2014	2015	2016	2017	2018
Austria	0	0	5	0	0	0	0
Belgium	10	0	17	10	6	3	0
France	13	21	24	6	4	2	1
Spain	9	21	13	17	12	4	1
The Netherlands	13	6	5	8	1	1	1
Ireland	0	0	0	0	1	0	0
Canada	2	0	1	1	0	1	0
Germany	2	5	2	10	2	2	0
Sweden	12	17	13	11	12	3	0
USA	38	44	54	85	55	26	14
Great Britain	0	0	1	1	0	0	0
Italy	156	209	176	177	124	56	11
TOTAL	255	323	311	326	217	98	28

Since 2003, over 4,000 children were adopted by foreign families. The largest number of children from Polish orphanages went to Italy (25,000) and the USA

66 Ambroziak, A., *Dudy gra wyborcza zakazem adopcji. "To okrutne. Prezydent odbiera dzieciom prawo do rodziny"*, 06.07.2020, OKO.press, https://oko.press/dudy-gra-wyborcza-zakazem-adopcji/ (accessed 28.07.2020).

67 Statistical data from the Ministry of Labour, Family and Social Affairs, in the period 2006-2015.

68 Source: statistical data of the Ministry of Labour, Family and Social Affairs, elaboration by the Department of Policy of the Ministry of Labour, Family and Social Affairs, based on statistical data from the reports of adoption centres responsible for intercountry adoptions), https://www.gov.pl/web/rodzina/667informacje-statystyczne (accessed 09.07.2019).

(700).[69] In 2013, the number of intercountry adoptions worldwide decreased threefold in comparison with 2003, which is illustrated in the following figure.

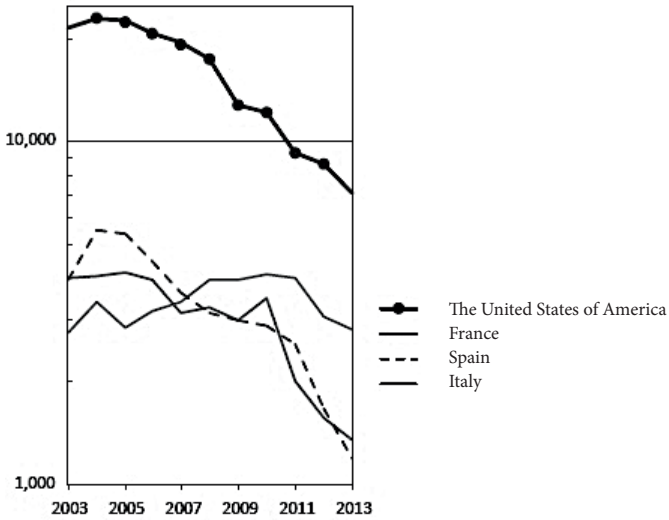

Figure 1: Statistics on intercountry adoptions worldwide, in major host states in the period 2003-2013.[70]

To compare, the Western European countries and Scandinavia are rather conservative when it comes to adoption of their citizens abroad.[71] Between 1999 and 2015, 1,254 Polish children were adopted by adopters in the USA, whereas only 2 were adopted by adopters in Finland, 7 in France, and 2 in Italy in the same period.[72] Foreign families usually adopt children in the 7 to 10 age group .[73]

69 More information about the reasons for this phenomenon may be found in: Knuiman, S. et al., *Children without parental care in Poland: foster care, institutionalization and adoption*, "International Social Work" 2015, Vol. 58 (1), pp. 142-152.

70 Source: Selman, P., *Key tables for intercountry adoption: receiving states 2003-2013 and states of origin 2003-2013*, Newcastle University 2014.

71 More information: Mignot, J., *Why is intercountry adoption declining worldwide?*, "Population & Societies" 2015, No. 519, p. 3.

72 Krawczak, A., *Adopcje zagraniczne – gdzie tkwi problem*, 25.01.2017, Krytyka Polityczna, http://krytykapolityczna.pl/kraj/adopcje-zagraniczne-gdzie-tkwi-problem/ (accessed 09.07.2020).

73 Pawłowska, D., *Droga do domu. Adopcje w Polsce i na świecie*, 06.02.2017, wyborcza.pl, http://biqdata.wyborcza.pl/biqdata/7,159116,22156657,droga-do-domu-adopcje-w-polsce-i-na-swiecie.html (accessed 09.07.2020).

As the practice shows, the number of countries where citizens apply for adoption of Polish children has been decreasing recently. According to the Ministry's data, it is evident that in the first half of 2017, 41 intercountry adoptions were performed in total. To compare, in the similar period one year before, 109 children who could not find their permanent homes in Poland were adopted by foreign families.[74] Such a significant decline is caused by the tightening of the eligibility criteria for adopters and adoptees with respect to intercountry adoptions and the reduction in the number of centres authorised to effect such adoptions.

Generally speaking, it may be stated that the issues of intercountry adoption are part of global problems related to poverty and inequality. The children who are included in the international adoption system usually come from developing countries, whereas the adoptive parents usually live in developed countries. The meaning of intercountry adoptions is the subject of many disputes, where the opinions differ depending on the adopted perspective, including the context of origin or the context of adoption.[75] The decreasing number of intercountry adoptions worldwide and the increasing criticism, together with accusations of child trafficking, led to the change of the mass adoption system to a more elitist arrangement, where childless couples and people from rich countries who are single may embody their conviction that they have the right to have a child and build a family. What is interesting, some countries give their consent to intercountry adoption, whereas others, with similar social, political and economic conditions, disagree.[76] Additionally, the analysis of this phenomenon shows that it is caused by the division of the world into the centre and peripheries as well as by the system of global inequalities that trigger international migrations. Such global inequalities include, in particular, social and cultural gender inequalities. The literature confirms that privileged women who are aware of their rights and are domiciled in developed countries adopt children from countries where the cultural position of women is generally low and their weak bargaining position is further weakened by the pressure resulting from the hardship of a biological mother.[77] Nonetheless, far too little is said about adoption in the context of the welfare of the child, which this measure should serve.

74 Świętochowska, E., *Trudniej o adopcje zagraniczne*, 29.01.2018, Gazeta Prawna, https://prawo.gazetaprawna.pl/artykuly/1100746,adopcje-zagraniczne-prawo.html (accessed 04.07.2020).

75 See: Lind, J. and Johansson, S., *Preservation of the child's background in in – and intercountry adoption*, "The International Journal of Children's Rights" 2009, Vol. 17, No. 2, pp. 235-260.

76 Albański, Ł. and Krywult-Albańska, M., *Adopcje międzynarodowe jako zaniedbany obszar badań nad migracjami*, "Studia Migracyjne – Przegląd Polonijny" 2016, Vol. 3 (161), pp. 369-390.

77 McCreery Bunkers, K. et al., *International adoption and child protection in Guatemala. A case of the tail wagging the dog*, "International Social Work" 2009, Vol. 52 (5), pp. 649-660.

Conclusion

Adoption of a child is a form of foster parenthood, within the framework of which the child become a full member of the adopters' family. Obviously, it is the type of adoption that determines whether the child will 'enter' the family of the adopter and become its part just like a biological child. In the case of half-adoption, its effects concern both the adopter and the adoptee (and its descendants). The child may be eligible for adoption connected with the changing of its current place of residence in the Republic of Poland to reside in another state after exhausting all possibilities of finding the candidate for adopter of the child in the country, unless there is a relationship of consanguinity or affinity between the adopter and the adoptee, or the adopter has already adopted a brother or sister of the adoptee.

Intercountry adoption is not an alternative to in-country adoption. The child's welfare principle permeates adoption at all stages of its existence. All emerging problems and dilemmas related to intercountry adoption should be mainly resolved by specifying the provisions governing such intercountry adoption,[78] for the purpose of protecting the child's interests in the most efficient way.

In recent years, the number of intercountry adoptions of Polish minors has been decreasing. This is the result of, among other things, the tightening of the eligibility criteria for both parents and children subject to intercountry adoption. The issues of intercountry adoptions are more and more often present in social, legal and political discourse regarding intercountry adoption. They are also part of the poverty and inequality context. However, what remains unchanged is the fact that all adoption decisions must be taken to safeguard the child's welfare.

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78 More information: request of the Polish Commissioner for Human Rights and the Ombudsman for Children submitted with the Minister of Justice to specify the provisions on intercountry adoptions dated 08.11.2017, IV.7023.8.2017.

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Suicide as an insurance accident

Abstract

This paper constitutes an attempt at the analysis of provisions of the Civil Code regarding suicide in an insurance contract. The aim of the paper is to analyse the economic aspect of a suicidal death. Regardless of this analysis, a few aspects related to death by suicide in the insurance industry have been indicated. In this paper, the author also analysed the German legal system conception. Therefore, the method of examining applicable laws and the legal-comparative methods have been used herein. The main conclusion drawn up on the grounds of the conducted research is that strict legal regulations are not compatible with suicide as a complex psychological and social process.

Keywords: suicide, insured, insurance accident, insurance contract, insurance benefit

Introduction

Suicide, being voluntary resignation from life, has a social dimension, usually considered on a psychological and mental level. Furthermore, a suicidal act constitutes

an indicator of the state and level of social and personality integration.[1] This issue covers three elements: the first is the desire to kill oneself (a component of masochism), the second is the will to kill somebody from one's own environment as a result of one's own death (a component of sadism) and the third is the longing for death.[2] These elements allow an observation that a complexity of motives constitutes the grounds of the decision to commit suicide.

In the present period of strong and turbulent political, social and economic transformations (so-called: big change syndrome), the number of suicidal deaths is growing. In years of stability and a sense of security as well as integration to protect common values, the number of suicides drops. Although in Poland the number of suicides is relatively small, it is growing continuously. [3]

Therefore, in the face of dynamic economic changes, the issue of suicide deserves an in-depth analysis not only from the psychological, mental or formal-criminal but also the economic perspective. Usually, a person's death activates the insurer's obligation to pay a personal insurance benefit, whereas suicide is a special situation and depends on the will of the insured person.

Herein, the suicidal death will be analysed from the perspective of the insurance contract and its random character. Consideration thereof against an insurance event, the existence of which activates the insurer's obligation to pay insurance, is equally important. A detailed assessment will cover the issue of paying the benefit by the insurer in the case of the insured person's death and depression, which is an illness that often precedes suicide and is of significance on the grounds of an insurance contract and the policyholder's information obligations.

1 Czabański, A. and Mariański, J., *Samobójstwo w ujęciu Marii Janosz,* "Teologia i Moralność" 2018, No. 2(24), p. 225. See more: Durkheim, E., *Samobójstwo. Studium z socjologii*, translated by Wakar K., Warszawa 2006.

2 Manninger, K.A., *Man against himself*, New York, 1938, op. cit.: Hołyst, B., *Wiktymologia*, Warszawa 2000, p. 192.

3 Czabański, A. and Mariański, J., op. cit., p. 238. The act of self-annihilation is one of ten most frequent reasons of death in each country, and also one of three most often declared causes of death among young people (aged between 15 and 35 years old). See: Lebiedowicz, A., *Samobójstwo w ujęciu wielopłaszczyznowym*, "Wojskowy Przegląd Prawniczy" 2013, No. 3, http://www.npw.internetdsl.pl/Dokumenty/2013-3/2013-3-5.pdf, p. 2 (accessed 18.02.2020). The Report of Statistics Poland implies that in 2016 the Polish Police Headquarters noted 9,861 suicide attempts, of which 5,405, thus, almost 55% of cases ended with death. Men committed 4,638 suicides (85.8% cases), and women – 767. Suicides were more often committed in cities and towns (56.1%) than in the countryside (43.9%), https://stat.goVol.pl/obszary-tematyczne/ludnosc/statystyka-przyczyn-zgonow/zamachy-samobojcze-w-2016-r-,5,1.html (accessed 1.02.2020).

Insurance event

To begin with, a few comments should be made concerning the essence of the insurance contract with which the insurer undertakes to fulfil a specific benefit in the case of an accident provided for in the contract, whereas the policyholder undertakes to pay a premium (Article 805 par. 1 of the Civil Code).[4] At this point, the legislator distinguishes two types of insurance performances: compensation for a damage caused as a result of the accident provided for in the contract (in the case of a property insurance) and an amount of money, annuity or other performance in case the accident provided for in the contract happens in the insured person's life (in the case of personal insurance). Herein, one should focus on the latter.

The essence of insurance consists in persons who want to ensure compensation for damage resulting from a fortuitous event paying premiums to a fund from which in the case of such an event they later receive the performance.[5] The aim of insurance is to provide the policyholder with insurance protection.[6] The insurance contract is a consensual,[7] paid, bilaterally binding and mutual agreement that also allows an insurance contract to be concluded with a reservation of a condition[8] or a period of time.

In the literature there is an opinion, in compliance with which parties can agree that the contract is concluded only upon the policyholder's payment of a premium or at a time after this fact, at which point the consensual contract (*solo consensu*) becomes a real contract. Supporters of this opinion argue that such a transformation is possible only on the grounds of the principle of freedom of contracts (Article 353^1 of the Civil Code) and is quite often used within the General Insurance

4 Act of 23 April 1964 – the Civil Code, Dz.U. (Journal of Laws) of 1964, no. 16 item 93 as amended.

5 Dubis, W., in: Gniewek, E. and Machnikowski, P. (eds.), *Kodeks cywilny. Komentarz*, Legalis 2019, par. No. 1.

6 Judgement of the Administrative Court in Krakow of 12 July 2018, I ACa 1595/17, Legalis No. 1865480.

7 An agreement is, in principle, concluded by submitting a unanimous declaration of will by the parties, effectiveness thereof does not require drawing up an agreement in writing. See: Judgement of the District Court in Wrocław of 29 June 2015, II Ca 800/15, Portal Orzeczeń Sądów Powszechnych, http://orzeczenia.wroclaw.so.goVol.pl/content/$N/155025000001003_II_Ca_000800_2015_Uz_2015-07-30_001 (accessed 20.02.2020).

8 A condition can be resolutive or precedent. In the factual circumstances of the case in which judgement of the Regional Court for Łódź-Widzew of 10 August 2016 was given, the defendant did not pay the insurance contribution and thus, the condition precedent, which obliged the insurer to provide the defendant with insurance cover, was not fulfilled (Article 89 of the Civil Code). See: judgement of the Regional Court for Łódź-Widzew of 10 August 2016, VIII C 3261/15, Legalis No. 2083866.

Conditions.[9] This position has been criticised due to the fact that the provisions of the Civil Code do not condition the effectiveness of an insurance contract's conclusion on premises other than the submission of parties' consistent declarations of will. Moreover, payment of the premium is important in the context of establishing the insurer's liability, but it does not constitute the condition of this contract's conclusion.[10]

The payment character of the contract is demonstrated in the policyholder's obligation to pay a premium to the insurer. The premium is the main payment paid by the policyholder to the insurer in exchange for insurance protection provided by the latter.[11] Upon payment of the premium, the policyholder expects the insurer to pay a specific amount in the case of an insurance event resulting in the insurer's liability.[12] It is calculated for the whole period of time for which the insurance contract has been concluded and the amount thereof is defined by the insurer, who leaves the decision on concluding the insurance contract to the policyholder (Article 813 of the Civil Code).[13] The amount of the life insurance premium depends on a series of insurance risk factors, such as: age, gender, height and weight, alcohol or nicotine consumption, blood pressure, organ diseases, family circumstances, profession,

9 Kasprzyk, R., *Glosa do wyroku SA w Łodzi z 14 marca 1996 r., I ACr 62/96*, "Palestra" 1997, No. 3-4, p. 264.

10 Tadla, A., *Umowa ubezpieczenia na życie,* Warszawa 2000, p. 55; Szczepańska, M., *Ubezpieczenie na życie z ubezpieczeniowym funduszem kapitałowym*, Warszawa 2011, p. 80.

11 Fras, M., in: Habdas, M. and Fras, M. (eds.), *Kodeks cywilny. Komentarz. Tom V. Zobowiązania. Część szczególna (art. 765 – 92116),* Warszawa 2019, p. 191.

12 Judgement of the Supreme Court of 7 February 2001, V CKN 199/00, Legalis No. 291992. The subject matter of the amount of the premiums subject to reimbursement in case of terminating the insurance relationship was discussed in judicial decisions numerous times. The Supreme Court in Warszawa, in its judgement of 16 December 2011 adjudicated a general principle that stipulates that, if a legislator provides for the obligation to reimburse the premiums for the period of unused insurance cover, even if the insurance contract is terminated due to reasons not attributable to the parties' will, it cannot be stated that the legislator simultaneously allows contractual exclusion of such an obligation in case such a relationship's termination is a result of a decision made by one of the parties. See: judgment of the Administrative Court in Warszawa of 16 December 2011, VI ACa 1269/11, Legalis No. 532605. Whereas, the Supreme Court in its judgement of 9 September 2015, while analysing the amount of the premiums subject to reimbursement, adopted that it should be calculated according to a proportion, in which the period of unused insurance cover remains with regard to the whole period, in which the insurer's liability was originally to last. See: judgment of the Supreme Court of 9 September 2015, III SK 40/14, Legalis No. 1352544.

13 The premiums should ensure performance of all obligations under the insurance contract and cover costs of performing insurance activity by the insurer. See: Gawlik, Z., in: Kidyba, A. (ed.), *Kodeks cywilny. Komentarz, Tom III,* Warszawa 2014, p. 1035.

and the way of spending leisure time.[14] Risk is a component of several factors such as peril, uncertainty, probability and possibility, whereas the risk assessment system has been based on the field of clinical medicine, insurance medicine and insurance statistics.[15] In such cases, the premium may increase by an additional coefficient. It will be a substandard insurance for risk higher than average. These circumstances are of great importance in chronic diseases including depression, which has been discussed more in the further part of the paper.

The insurance contract has a character of a bilateral obligation, since each party is obliged to provide a specific performance to the other party. The insurer is obliged to provide the insurance protection whereas the policyholder is to pay the premiums. However, from the perspective of the issue discussed herein, the randomness of the insurance contract is of key significance.

The obligation to provide the insurance performance is activated with the existence of the insurance event, therefore of an uncertain event. This, in turn, indicates the random character of the contract.

In the contents of Article 3 par. 1 point 57 of the Act on insurance and reinsurance activity (hereinafter: the Act on insurance and reinsurance activity)[16] the legislator proposed a legal definition of a random event, in compliance with which it is a future and uncertain event, independent of the policyholder's or insured person's will, existence of which results in a detriment to the personal or property sphere, or an increase in property needs of a person covered with insurance. An insurance accident, provided that it is an uncertain event,[17] does not always take the form of a future event. An insurance accident can be defined in a causal form, by indicating specific consequences of certain events, or in a non-causal form.

This accident should be specified in the contents of the contract. However, only the interpretation of the insurance contract together with its integral part, that is, the General Insurance Conditions, with the consideration of the rules stipulated in Article 65 par. 2 of the Civil Code, will allow proper identification of the event covered with the insurance contract.

14 Guzel-Szczepiórkowska, Z. and Visan, J., *Ocena ryzyka w ubezpieczeniach życiowych*, in: Doan, O. (ed.), *Ubezpieczenia życiowe*, Warszawa 1995, p. 121.

15 Puto, M., *Wykluczenie z ubezpieczenia na życie osób dotkniętych określonymi chorobami przewlekłymi,* "Wiadomości Ubezpieczeniowe" 2014, No. 2, p. 16.

16 Act of 11 September 2015 on insurance and reinsurance activity, Dz.U. (Journal of Laws) of 2015, item 1844 as amended.

17 In the literature it is indicated that an insurance accident, which has already happened, should not lose the characteristics of uncertainty. See: Kondek, J.M., in: Osajda, K. (ed.), *Kodeks cywilny. Komentarz,* Legalis 2020.

While referring to the definition of an insurance event in any life insurance contract, in compliance with the established line of judicial decisions it is assumed that it can be freely stipulated pursuant to Article 353[1] of the Civil Code.[18] Provisions of Article 65 par. 1 and 2 of the Civil Code applied in the interpretation of the insurance contract imply that while translating declarations of will, not only the wording of the contract, but also the circumstances of making such declarations, the rules of social interaction and established customs should be taken into account, and the common intention of the parties and the objective of the agreement should also be examined (the combined interpretation). The content of the insurance contractual relationship is also determined by the provisions of the contractual template in the form of the General Insurance Conditions. Furthermore, since the insurer defined the contents of the General Insurance Conditions and the disputable provision excludes the insurer's liability, any ambiguities should be interpreted in a narrowing manner so that the insured person is covered.[19]

The estimates allowing assessment of the probability of existence of the specific event are of no importance with regard to the random character of the contract. Currently, in fact, the activity of insurers comes down to the diligent, possibly detailed estimation of the risk of the existence of the event with the use of scientific methods and mathematical rules. This activity allows assessment of the level of the insured risk. Thus, one may have an impression that the insurance contract loses its random character, since the existence of the insurance event does not constitute an uncertain event (macro scale); however, from the perspective of a specific legal relationship, it is never certain whether the insurance accident happens (micro scale). In fact, randomness constitutes the criterion of the contractual relationship's assessment and not the insurer's activity.[20]

It should be noted that the fundamental performance from the insurer in the form of providing insurance cover is executed irrespective of the existence of the insurance accident. Only the performance of this cover by payment of the performance depends on the existence of the insurance accident. Therefore, the insurance accident does not constitute a condition as an element of the contents of the legal

18 Judgement of the Administrative Court in Warszawa of 25 April 2019, I ACa 629/18, Legalis No. 2121870. Since the insurer phrased the contents of the General Insurance Conditions, and the questionable provision excludes the insurer's liability, any ambiguities should be construed in a narrowing manner in order to protect the insured. See: judgement of the Administrative Court in Warszawa of 3 April 2019, I ACa 53/18, Legalis No. 2122440.

19 Judgement of the Administrative Court in Warszawa of 3 April 2019, I ACa 53/18, Legalis No. 2122440.

20 Krajewski, M., *Umowa ubezpieczenia. Art. 805 – 834 KC. Komentarz*, Legalis 2016, par. 11.

activity, since it has no impact on the existence of the insurance contract. Nevertheless, due to its meaning in the insurance contract, the assessment of suicide as the insurance event requires a diligent analysis.

Suicide

Suicide constitutes a special situation dependent on the will of the person who decides to die. With regard to the conscious decision aimed at committing suicide, this event loses the element of randomness. Therefore, the suicidal death of the insured person (the policyholder, in the case of contracts on a third party's account – the insured) cannot be deemed as a random event and thus, the insurance accident. This particular reason of death, with fulfilment of relevant conditions, constitutes a negative premise for a monetary payment.

In compliance with the content of Article 833 of the Civil Code, if the insured person commits suicide 2 years after the day of concluding the insurance contract, the insurer will be obliged to perform to their benefit. It means that the criterion for determining payment of the performance is the period of time that passed between the date of the insurance contract's conclusion and the suicidal death, whereas the 2 year period of time can be shortened under a contract or the General Insurance Conditions to the period not shorter than 6 months (Article 833 of the Civil Code *in fine*).[21]

At this point, it is worth underlining that the German legislator excludes the insurer's performance obligation where suicide is committed within 3 years as of conclusion of the insurance contract, whereas, this period can be modified by the parties to the contract.[22]

While attempting to define the concept of suicide from the perspective of the disposition of Article 833 of the Civil Code, it happens when the insured dies as a result of a premeditated and intentional action taken in order to end one's life. Therefore, death resulting from risky or even reckless activities of the insured that were not aimed at taking their own life, even if the person was aware of the threat to their life when they took such actions, is not a suicidal death.[23] As indicated in

21 Before the amendment of Article 833 of the Civil Code by the Act of 13 April 2007, shortening the 3-year term was common practice adopted by insurers. See: Fras, M., in: Habdas, M. and Fras, M., (eds.), op. cit., p. 391.

22 Section 161, Insurance Contract Act, Federal Law Gazette I page 2631, as amended, https://germanlawarchive.iuscomp.org/?p=861#164 (accessed 1.02.2020).

23 Judgement of the District Court in Warszawa of 21 December 2016, IV C 508/14, LEX No. 2300638.

the literature, a suicidal activity requires the existence of a direct intention.[24] Otherwise, the insurer will be obliged to provide the performance, even if the event takes place in the period when the insurer's liability for suicide is excluded. It should be underlined, not without doubts, that the directionality of activity and not the directionality of fault is referred to.[25] Moreover, it seems that not only sanity, but also the health, both physical and emotional, of the insured person, as well as the reason of the suicide are insignificant.

The same results from the insured person's death caused upon their consent, which happens especially in the case of euthanasia.[26] It is irrelevant whether euthanasia was legal in the place where it was executed.[27] Since suicide that does not constitute a prohibited act can release the insurer from the obligation to provide the payment to the insured person, legal euthanasia can exclude the insurer's liability. The German legal system excludes the insurer's payment obligation if the insured person's death resulted from illegal behaviour of the person entitled to the performance. The case is similar with a performance payable to a third party who indicated the insured person and then led to the death of the latter as a result of illegal activity. Then, the insurer's liability is excluded.[28]

What is important, the provision of Article 833 of the Civil Code refers to the effective suicidal attempt ending with the death of the insured. It does not stipulate the rules and conditions of the insurer's liability in the situation of attempting suicide that resulted only in bodily injury or health disturbance. Since upon a lapse of not more than 2 years suicide of the insured does not release from the obligation of providing the performance, the more so, upon a lapse of this period of time, other behaviour of the insured, such as a failed suicidal attempt or self-harm, should not release the insurer from the obligation of providing the performance. However, insurance companies often provide in the contents of the General Insurance Conditions for the exclusion of the insurer's liability not only in the case of the insured person's death as a result of suicide, an attempt to commit suicide or self-harm or

24 Ciepła, H., in: Bieniek, G. (ed.), *Komentarz. Zobowiązania*, *Tom II,* Legalis 2011, Article 833, par. No. 1.

25 It means that suicide also includes an attempt to take one's life by a mentally ill person, who cannot be blamed. As in: Orlicki, M., in: Gutowski, M. (ed.), *Komentarz, Tom II,* Legalis 2019, Article 833, par. No. 4. Otherwise: Krajewski, M., op. cit., par. No. 2. In his opinion, suicide only applies to persons of sound mind.

26 Kondek, J.M., in: Osajda, K., (ed.), op. cit., Legalis.

27 Orlicki, M., in: Gutowski, M. (ed.), op. cit., par. 4.

28 Section 162, Insurance Contract Act, op. cit. (accessed 1.02.2020).

harming the insured upon their own request committed within 2 years of the date of concluding the agreement.

Considering the fact that between the activity and death of the insured person a certain period of time can pass, it should be asked which moment determines and is taken into consideration while calculating the 2-year period of time. It seems, however, that the 2-year period of time should be calculated from the insurance contract's conclusion until the day of the suicidal death, thus, the actual loss of life.

Irrespective of the above, provisions of the insurance contract or contents of the General Insurance Conditions (hereinafter: the General Insurance Conditions) can provide for the exclusion of the insurer's liability due to the character of the activity, among others, especially risky activity. Moreover, despite the explicit regulation under Article 833 of the Civil Code, insurers usually include in the General Insurance Conditions provisions stipulating for exclusion of liability in the case of the insured person's suicide.

The solution adopted by the national legislator was also expressed in the law binding in the territory of Canada. The Uniform Life Insurance Act provides for the claims of persons entitled to compensation with regard to the insured person taking their own life, whereas Quebec's legal system provides for a possibility of refusing to accept the liability for suicide if it is committed within 2 years as of the date of contract conclusion.[29]

Where it is deemed that the death did not result from a suicidal act, it can be considered as the insurance accident in the life insurance, which in turn obliges the insurer to pay. It has to be remembered that pursuant to Article 6 of the Civil Code, the insurer is obliged to prove that the insured committed suicide, that is, took deliberate actions in order to take their own life. Only by proving this premise would the insurer be released from the payment obligation and thus would construe legal consequences beneficial for him.[30]

As has already been mentioned, the insurer is not obliged to provide the insurance performance in case the insured commits suicide, unless the suicide is committed upon a lapse of the period of time after the insurance contract's conclusion specified by the legislator. Usually, this period is 2 years, but, it can be shortened in the contract or in the General Insurance Conditions, but not more than to 6 months. This period should be calculated as of the day of covering the insured with protection, which, as a rule, will correspond with the day of concluding the

29 Hołyst, B., *Suicydologia*, Warszawa 2012, p. 180.

30 Judgement of the District Court in Bydgoszcz of 5 November 2015, II Ca 268/15, http://orzeczenia.bydgoszcz.so.goVol.pl/content/$N/151005000001003_II_Ca_000268_2015_Uz_2015-11-05_002 (accessed 15.02.2020).

contract, yet, in the case of contracts concluded to the benefit of a third party, it can happen only upon the insured person's submission of the declaration of consent to coverage if the consent has been submitted upon conclusion of the insurance contract. In the case of contracts concluded to the benefit of a third party, changing the insurer does not interrupt the running of this 2-year period of time, which is justified with regard to the teleological interpretation. The lapse of this period of time causes that it is impossible to assume that the motive of concluding the insurance contract was the planned suicide and a possible change of the insurer, on which the insured person has no impact, does not change it.[31]

Although the provisions of the Civil Code regulating the insurance contract do not provide for, in isolation from the General Insurance Conditions, any specific premises of the insurer's liability in the scope of particular types,[32] the provision of Article 833 of the Civil Code covers with its scope only the suicide of the person with life insurance. It does not apply in the case of a suicidal death of a person with personal accident insurance, since it cannot be considered as a personal accident.[33] Therefore, the insurer is free from the liability under personal accident insurance also in the case the suicidal death of the insured which happened upon a lapse of two years from concluding the insurance contract.

Application of this provision is also excluded if the insurance event in the life insurance is an accident in the insured person's life consisting in changing their family situation as a result of death of their family member specified in the insurance contract (e.g. death of a child, a spouse, a parent, a sibling). For the existence and scope of the insurer's liability it is unimportant whether this death results from suicide, since in such a case the person who committed the suicide is not the insured. Nonetheless, the Act does not prohibit contractual exclusion of the insurer's liability, also when the suicidal death of the family member took place upon a lapse of 2 years from the insurance contract's conclusion.

However, one should remember that grace can also concern other events such as a serious disease, a surgery or a diagnosed tumour. Furthermore, the contents of

31 See: judgment of the Appellate Court in Poznań of 5 December 2017, I ACa 649/17, Legalis No. 1717466.

32 Judgement of the Supreme Court of 29 November 1982, I CR 407/82, Legalis No. 23458. However, it is underlined that the concept of damage in the insurance contract is the same as the concept of damage in other sections of the insurance law, yet, the characteristics of the insurance law causes modification of the principles of liability for damages, including, sometimes exclusion thereof. See: judgment of the Supreme Court of 19 May 2016, IV CSK 552/15, Legalis No. 1508609.

33 Kęszycka, B., in: Glicz, M. and Serwach, M. (eds.), *Prawo ubezpieczeń gospodarczych. Komentarz. Tom II. Prawo o kontraktach w ubezpieczeniach. Komentarz do przepisów i wybranych wzorców umów*, Warszawa 2010, p. 395.

the General Insurance Conditions provide for the exclusion of the insurer's liability in the situation of driving a car under the influence of alcohol or other narcotic drugs, or staying in the territory of a country where acts of war take place.

Information obligation

Depression is a chronic disease[34] and may constitute a reason for excluding persons suffering from it from the subjective scope of the life insurance contract. Surely this health condition will not remain unnoticed by the insurer. In the insurers' opinion, the mental condition of persons suffering from depression entails an increased risk of damage to health. Thus, it is necessary to verify the stability of the potential insured person's health condition, the number and type of medications they take and also the treatment stage.[35] Due to the role of diseases in the insurance contract's conclusion, it remains necessary to consider the impact of depression on the amount of the insurance premium and payment of the benefit, the relation between depression and suicidal death and finally, fulfilment of the information obligation by the policyholder.

Firstly, it should be noticed that the policyholder is obliged to inform the insurer of any known circumstances about which the insurer asked in the offer form or in other letters before concluding the contract (*vide*: Article 815 of the Civil Code). Thus, it should be considered whether the policyholder's hiding important information on their health, that is, the information on depression treatment, excludes the insurer's liability.

First of all, it should be underlined that using by the insurer the statutory sanction of releasing themselves from the provision of a performance is only possible when the insurer makes an enquiry referred to in Article 815 par. 1 first sentence of the Civil Code. It is impossible to state that it is sufficient for the insurer to solely have the information on the circumstances important from the point of view of the insurance risk, coming from, among others, their own findings, universally known information or the information given by the policyholder with regard to the conclusion of other insurance contracts or with regard to negotiations undertaken

34 See: the International Classification of Diseases ICD-10. https://www.cdc.gov/nchs/icd/icd10.htm (accessed 1.08.2020).

35 Insurers often refuse concluding a contract in the preliminary period of the treatment process due to the increased risk of, among others, suicide. See: Puto, M. op. cit., p. 21.

by the parties.[36] This obligation is, in fact, of directional and purposeful character, aimed at obtaining specific information and only then does it condition the sanction of releasing the insurer from providing the performance.[37] Above all, the policyholder's obligation is limited to the circumstances known to them. Importantly, between the hidden circumstance and a specific insurance event there should be an adequate causal link, whereas the burden of proof that the circumstances given by the policyholder were not compliant with their knowledge is put on the insurer.[38]

Thus, the policyholder is not obliged to inform the insurer of all circumstances known to them, but only of the circumstances the insurer asked about before concluding the insurance contract. Not having asked about mental illnesses before concluding the contract, the insurer cannot refer to the nondisclosure of important circumstances and demand application of Article 815 par. 3 of the Civil Code.

It should be noted that in the case of personal insurance the legislator limits the possibility to refer to untrue information, especially nondisclosure of the insured person's disease if the accident happened three years after the life insurance contract's conclusion, whereas, the contract or the General Insurance Conditions can shorten this period of time (*vide:* Article 834 of the Civil Code).

While returning to the information obligation, the manner of formulating questions, which should not be imprecise, ambiguous, compound-complex and additionally, should not be misleading as a result of the improper use of conjunctions or alternatives, should be underlined.[39] Negative consequences of improper formulation of a question should, however, lie with the insurer and not with the policyholder.

Secondly, undoubtedly, depression is among the aforementioned risk factors. It should be added that the so-called underwriting is necessary for the risk assessment. Estimation of the risk related to health is usually related to obtaining relevant information, including in the scope of the performed profession, or to undergoing

36 Judgement of the Administrative Court in Białystok of 18 March 2019, I ACa 696/18, Legalis No. 1978561.

37 Judgement of the Appellate Court in Rzeszów of 7 March 2017, I ACa 278/16, LEX No. 2630497; Rogowski, S., *Granice zwolnienia ubezpieczyciela od odpowiedzialności. Naruszenie zasady obowiązku informowania przez ubezpieczającego*, "Przegląd Ubezpieczeń Społecznych i Gospodarczych" 1999 No. 10, p. 34 ff.; see: Tadla, A., *Umowa ubezpieczenia na życie: zawieranie umowy, dochodzenie roszczeń, wzory,* Warszawa 2000, p. 65.

38 Judgment of the Administrative Court in Białystok of 21 April 2015, I ACa 1039/14, Legalis No. 1249495.

39 Kamieński, W., *Deklaracja ryzyka w umowie ubezpieczenia na życie,* in: Szumlicz, T. (ed.), *Problemy ochrony konsumenta na rynku ubezpieczeń,* Warszawa 2006, p. 105; Puto, M., op. cit., pp. 15 – 16.

relevant examinations. Underwriting should, in principle, precede any insurance contract. On the one hand, it protects the insurer by allowing objective risk assessment; and on the other hand, it allows protection of the insured.

Conclusions

The ban on the insurer's referral to the suicidal death of the insured, if it happened 2 years after concluding the insurance contract, is justified with humanitarian reasons. The aim of the regulation is to prevent situations when the insured intending to take their own life abuses the legal relationship, that is, the contract of the highest trust. Therefore, the introduction of this term was aimed at not as much the protection of the insurer's interest, as the public interest.[40]

The compilation of regulations of the insurance contract on the one hand, and the dynamics of mental processes on the other, leads to the conclusion that suicidal thoughts that can lead to a suicidal death appear many times in minds of persons, who at the moment of concluding the insurance contract do not even allow the possibility of committing suicide or, the more so, do not show such symptoms. Such sudden change in opinion or the appearance and intensification of disease symptoms should not lead to excluding the insurer's liability.

The issue presented above has been noticed in the judicature. The Administrative Court in Warsaw stated that the insured person's depression was not the cause of the suicide with a reservation that it could have increased probability of committing it. A suicidal death does not, in fact, result from the circumstances not disclosed to the insurer, since it is a result of a conscious decision. At the moment of concluding the insurance contract it is difficult to expect from the insured that they foresee their future condition and the more so, their decision.[41]

Thus, while this regulation should not raise any doubts, indicating by the legislator such a rigid boundary (term) does not correlate with suicide, which is most often the last stage of an illness (among others, depression) and as a phenomenon is not made only of one act, a single activity of taking one's own life, but of many events and behaviours that in final result, lead thereto.

From the point of view of the potential insured suffering from a chronic disease, in the process of obtaining a desired insurance cover one can come across obstacles.

40 Fras, M., in: Habdas, M. and Fras, M. (eds.), op. cit., p. 391.

41 Judgment of the Administrative Court in Warszawa of 23 June 2015, VI ACa 859/14, http://orzeczenia.waw.sa.goVol.pl/content/$N/154500000003003_VI_ACa_000859_2014_Uz_2015-06-24_002 (accessed 1.02.2020).

However, it seems that refusal to cover with insurance should happen only in exceptional situations, each time preceded with a detailed and diligent review of a given person's situation.

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Internet of Things and biometric data versus employee privacy in the Polish case

Abstract

The Internet of Things is a modern technology that affects every area of human life, including employment relationships. IoT enables the processing of specific personal data categories, including biometric data, and entails the risk of employers interfering with employee privacy. Due to the use of intelligent solutions, the issue of employee privacy, which is, in principle, a personal right subject to protection, becomes significant. The relationship between an employee and an employer includes two subjects of legal protection, the meeting of which may lead to internal contradiction. There is the employee's dignity and privacy, on the one hand, and protection of reasonable interests of an employer, on the other. A definition of the concept of the Internet of Things and its applications was introduced. Moreover, the author proposed setting a specific legal framework for this and discussed the issue of biometric data. It was also shown how far IoT solutions, which make it possible to analyse and describe the personality of an individual, may interfere with the information autonomy of a person. As a consequence, the employer's interference with employee privacy cannot be unrestricted, because it should be limited by purpose and lawfulness. This is the purpose of the current legislation.

Keywords: Internet of Things, biometric data, employee privacy

Introduction

The purpose of this study is to outline the subject matter of utilisation of IoT technology in employment relations and its consequences related to the employees' situation in the process of work performance. An analysis of various areas of IoT applications and the resulting possibilities allows for the assumption that IoT permits far-reaching interference in the employees' private sphere, and thus it may affect (or even violate) their fundamental rights. Of course, in this case, there is a visible clash between the rights and interests of both parties to the employment relationship. Taking into account the fact that IoT allows for autonomous collection and processing of specific types of personal data, namely biometric data, it appears necessary to include IoT in a specific legal framework.

During the performance of their work, employees generate vast amounts of data around them. This data can be received by smart devices. In this way, the employer can obtain extremely sensitive information allowing for the identification of employees, assessment of their suitability for work and to gain knowledge about their internal reactions, e.g. stress levels and behavioural data. The reason why this issue is vital is that the real-time transfer of this data takes place entirely beyond the employees' conscious control. The possibilities of interfering with the employees' information autonomy offered by IoT may give rise to concerns from the perspective of both legal protection and ethical assessment.

The main research objective is to determine whether the current law sufficiently regulates the use of IoT in employment relations, and in particular, whether it provides a sufficient level of employee privacy protection. On that account, the aspects of desirability, adequacy and legality of data processing remain extremely important.

This is important, because it is assumed that IoT will lead to a perceptibly greater revolution than the Internet or mobile communications.[1] Due to the use of intelligent solutions, the issue of employee privacy, which is, in principle, a personal right subject to protection, becomes significant. The right is held by every natural person, and therefore an employee as well. The relationship between an employee and an employer includes two subjects of legal protection, the meeting of which may lead to an internal contradiction. There is an employee's dignity and privacy, on the one hand, and the protection of the reasonable material and non-material interests of

1 Kwiatkowska, E.M., *Rozwój Internetu rzeczy – szanse i zagrożenia*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2014, No. 8, p. 60.

an employer, on the other.[2] This subject is important, because IoT-based solutions are increasingly becoming an integral part of a job and can change the situation of employees.

The concept of the Internet of Things

The concept refers to the transfer of information between objects or between objects and people.[3] The Internet serves as a communication platform used for the transmission of data with the use of a computer network. It makes it possible to collect, process and exchange data by objects without human interference, which is referred to as M2M.[4] The concept of IoT appeared when the number of devices connected to the web exceeded the number of people on Earth.[5] The term was first used by K. Ashton in the title of a presentation for Procter & Gamble in 1999.[6]

Kevin Ashton[7] observed that the problem of computerisation and data exchange on the web lies in the total dependence on the human factor, as materials and information have been collected and created by people. Human participation in the process of entering data onto the web involves certain drawbacks. The main problem is that there is limited time available to an individual. Moreover, his or her work bears the risk of negligence and inattentiveness in the process of its creation. This proves that people are neither the best elements of the system nor optimum subjects of the mechanism of processing data with the use of the web. Technological development should therefore be oriented towards a broader use of the possibilities offered by computers. It is necessary to equip them with the ability to independently receive stimuli from the outer world and thus gather and process external information. To

2 Knade, A., *Czy pracodawca ma prawo inwigilować pracownika? Prawo do prywatności pracownika a interesy pracodawcy*, in: Chrzczonowicz, P. et al. (eds.), *Społeczeństwo inwigilowane w państwie prawa*. Toruń 2003, p. 59.

3 It should be clarified that the Internet is only a transfer point, but its substance and aim is to collect as much as data as possible.

4 Machine to Machine.

5 Such a position was taken by Cisco Internet Business Solutions Group (Cisco IBSG) – in 2000, the world population was ca. 6 billion people, and only 500 million devices were connected to the web. The number of smart devices exceeded the world population for the first time at the turn of 2008 and 2009. In 2010, we faced a dynamic growth in the number of smartphones and tablets, as a result of which the number of devices included in the network increased to 12.5 billion. – in: Kwiatkowska, E.M., op. cit., p. 61.

6 Maj, I., *Internet rzeczy i zagrożenia z nim związane*, "Bezpieczeństwo. Teoria i Praktyka" 2015, No. 3, p. 51.

7 Ashton, K., *That "Internet of things" Thing*, 22.06.2009, RFID Journal, http://www.itrco.jp/libraries/RFIDjournal-That%20Internet%20of%20Things%20Thing.pdf (accessed 17.09.2020).

put it in simple terms, K. Ashton argued that modern data transfer should be based on making it possible for computers to "see, hear and smell the world". This could be possible with the use of various kinds of sensors and identification systems.[8]

IoT is a term directly related to the technological revolution in IT and telecommunications,[9] which affects both business organisations and the public sector, as well as the private lives of community members. The pace at which this phenomenon is developing is illustrated by the dynamics of searching the phrase "*Internet of Things*" in web browsers, which has shown huge growth of interest in recent years.[10]

It is difficult to develop a single, detailed definition of the concept of IoT. It may describe a situation in which the number of smart products grows and points out new possibilities provided by connected devices.[11] Others depict it as sensors and actuators placed in machines and other physical objects for the purposes of data collection, remote activity monitoring, decision-making and, most of all, applying optimisation processes in all areas of manufacture, including infrastructure and healthcare.[12] According to the author, IoT is more than just devices and sensors; it is a kind of autonomous data exchange environment.

To put it in simple terms, IoT may therefore be defined as an ecosystem within which objects equipped with appropriate sensors may communicate with computers. One should note that such an interaction may occur both with and without human participation.[13]

Literature indicates that IoT is based on three fundamental pillars referring to the features of smart objects. *Smart* objects may identify themselves, ensure communication and cooperate. In other words, the concept of the Internet of Things

8 Kwiatkowska, E.M., op. cit., p. 61.

9 Changes in the area of data technology and transmission that are related to the development of the Internet of Things are often referred to as the fourth industrial revolution. See Rot, A. and Blaicke, A.B., *Zagrożenia wynikające z implementacji koncepcji Internetu rzeczy w wybranych obszarach zastosowań*, "Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach" 2017, No. 341. p. 317.

10 Senkus, P. et al., *Internet of Things: przeszłość – teraźniejszość – przyszłość*, "Zeszyty Naukowe Uniwersytetu Przyrodniczo-Humanistycznego w Siedlcach. Seria: Administracja i Zarządzanie" 2014, No. 103, pp. 164-165.

11 Heppelmann, J. and Porter, M., *How smart, connected products are transforming competition*, "Harvard Business Review" 2014, pp. 64-88, as cited in: Wielki, J., *Internet Rzeczy i jego wpływ na modele biznesowe współczesnych organizacji gospodarczych*, "Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach" 2016, No. 281, p. 209.

12 Dobbs, R. et al., *No ordinary disruption*, New York 2015, p. 38, as cited in: ibidem, p. 209.

13 Malucha, M., *Internet rzeczy – kontekst technologiczny i obszary zastosowań*, "Studia i Prace WNEiZ US" 2018, No. 54, p. 55.

covers objects working with the use of various sensors and mechanisms based on the following assumptions: everything can introduce itself; everything can communicate; and everything can influence each other.[14]

IoT represents a global infrastructure of an information society, the purpose of which is to combine material and virtual things. The difference between these categories comes down to the environment in which they exist and operate. However, both material and virtual things can be identified and included in the web.[15]

Looking at it from the point of view of employment, one can conclude that the organisation of a working environment based on the application of IoT is beneficial in various respects, which include improvement of productivity, acceleration of the innovative cycle in the organisation, expansion of the product and service range, as well as reduction of costs and increase of profitability.[16] It seems that IoT will completely change the interactions between employers and employees, as the employer is given the opportunity to better control and verify a person's suitability for a particular job. In the author's opinion, no other technology has such an impact on the situation of workers, especially with regard to their sensitive data and information autonomy.

The interest of business organisations and enterprises in IoT technology is determined by social and economic market changes. One can undoubtedly assume that the environment in which companies operate is currently subject to rapid changes, as the requirements of customers and employees are growing, with market competition being more and more fierce. It is therefore necessary to undertake steps to increase the effectiveness. At the same time, the management needs fast and continuous access to reliable and comprehensive information concerning the internal situation regarding company operations. IoT can be perceived as a specific technological revolution in this respect.[17]

IoT application areas

IoT may have numerous applications and impacts on employment relations. In the context of the discussed issues, it is important for IoT to make it possible to improve generally defined work performance processes, which should translate into a significant increase of production effectiveness, cost optimisation and employee

14 Krysiński, M., *Internet rzeczy – innowacyjne narzędzie dla firm*, "Ekonomiczne Problemy Usług" 2016, No. 122, p. 280.

15 Kwiatkowska, E.M., op. cit., p. 62.

16 Wielki, J., op. cit., p. 210.

17 Krysiński, M., op. cit., p. 281.

efficiency. IoT allows for an optimal organisation of the work environment, taking into account the data collected in the course of work, the predisposition of employees and their reactions. IoT enables unlimited analysis of the work process, both in relation to the equipment used and the employees themselves.

The scope of IoT makes it possible to analyse it in terms of employment relationships and the situation of people performing work. Its development is favoured by the popularisation of the *System on a Chip* (SOC). This solution consists in the placement of a processor, RAM, radio communication systems and analogue systems in a single integrated circuit. As a consequence, a virtually complete actuator of a small size and high functionality is obtained.[18] Such technological development makes it possible to equip employees with devices having sensors gathering and processing specific data, of which biometric data is the most significant. The question of the scope and purpose of gathering such data remains open. A further step will involve microchipping employees by placing special devices under their skin.

IoT technology may be applied in every dimension of the working environment. The components of IoT technology may serve different purposes and, most of all, be of different sizes. Solutions available on the market include simple interactive devices, such as microprocessors (beacons) and sensors, as well as complex devices performing complicated functions: industrial robots, autonomous transport devices, smart measuring devices or mobile devices. Integrated circuits are often assembled with the use of hi-tech electronics including, for example, flexible PCBs (printed circuit boards).[19] As a result of the progress in this area, IoT solutions may be getting closer to the employee. They can be found not only in production and office devices, as well as buildings, but also in clothes, watches and ID cards.

Legal aspects of using the Internet of Things

The social and economic significance of IoT makes it necessary to specify the legal framework for this phenomenon in the future. In my opinion, it will be very difficult to regulate all aspects of this technology, mainly due to the abundance of applications and areas of use, which will probably continuously evolve and progress. However, using IoT is linked to the issue of the security of collecting data, its processing and the protection of privacy.

18 *Raport Grupy Roboczej ds. Internetu rzeczy przy Ministrze Cyfryzacji, IoT w polskiej gospodarce,* Ministerstwo Cyfryzacji 2019, https://www.gov.pl/attachment/82ad18f8-2ac1-4433-a1ea-f887b5-22e46b, p. 10 (accessed 04.04.2020).

19 Ibidem, pp. 9 and 12.

The above issue is crucial both for employees and employers. One can assume without any major reservations that the use of smart devices involves the risk of data theft and enables deep intrusion into privacy. Given the fact that we currently face hacker attacks on computers, tablets and smartphones connected to a network, such activities will obviously be possible with respect to all devices based on the IoT concept. Due to the wide range of the potential application of this technology, the problem of protection against such attacks and ensuring data security is particularly important. This requires special attention from the legislator, as the Internet of Things makes it possible to use biometric data, including behavioural data. Appropriate legal norms should provide some kind of support for entities using IoT to take relevant steps. Legal regulations should be adjusted to the new reality before IoT becomes widespread in everyday life. In the author's opinion, it is currently possible to predict certain directions of progress in the use of IoT in labour relations, which should be borne in mind by the legislator. However, it should be noted that, due to the pace at which modern technologies develop, the legislator may fall behind when enacting relevant regulations. The range of legal provisions is also debatable, since the creation of domestic law can hardly be regarded as sufficient in the face of such a global phenomenon, because IoT devices are solutions that appear everywhere and affect the work situation regardless of the location.

Potential actions are necessary, as the functioning of IoT is inextricably related to data management. A system that consists of objects permanently connected to the web and constantly exchanging information leads to a critical amount of generated data and the number of processes used for its processing. It is said that IoT involves the creation of more than 2.5 trillion bytes per day, most of which have come into existence in recent years. It is not data collection itself that poses the greatest challenge, but its processing and analysis. In other words, Big Data will require the use of technology enabling the effective processing of unstructured data.[20]

The widespread use of the Internet of Things requires trust in the new technologies and a guarantee to individuals that the information generated on the web will not be used inappropriately. There are no doubts as to the fact that the respect for privacy and data protection are fundamental human rights in the European Union.

As mentioned above, the ability to connect physical objects and establish communication between them is the essence of the Internet of Things. This technology makes it possible for devices to act or react autonomously. It is the exclusion of the human factor from active data processing that makes it so unique. There is currently no law that would regulate IoT in general. Nevertheless, there are vertical regulations that appear in the world concerning the selected areas in which it

20 Kwiatkowska, E.M., op. cit., p. 69.

occurs, e.g. the USA.[21] However, it seems that a comprehensive regulation covering at least cybersecurity, personal data, liability for damages and intellectual property would be advisable. Ethical issues and delimitation of boundaries within which IoT devices could be installed could be important. An example would be a ban on the use of subcutaneous chips as they involve interference with human physical integrity and lack of control of whether the chips also operate outside working hours.

IoT technology, due to its global character and generally unlimited range, as well as the exclusion of the human factor from the process of data analysis and collection, makes it necessary to look at biometric data processing in a different way. Its scope is expanding as a result of technological progress. After all, IoT devices allow all types of data to be collected and processed autonomously and independently of human will. From the point of view of the issue, the sensitive data of the employees – retina, shape of the auricle or motor and reactions – is important. IoT and the connection of all kinds of devices which transmit any data onto the web is opening new fields for computational social research. Big Data[22] can make it possible to discover interesting relationships and acquire knowledge about employees concerning highly intimate matters.[23]

It is also noteworthy that physical objects included in the ecosystem of IoT enable acquisition of knowledge in a way that is virtually impossible to be controlled by the entity providing such information, especially behavioural data, as well as unlimited profiling of individuals. The scope of potential interference with an employee's private life is too far reaching, whereas the collected data may be transferred anytime, anywhere.[24] This process may be difficult to control; therefore, it requires special attention from legislators. In labour relations, IoT requires special attention, because its essence presupposes the inequality of the parties to the relationship, and as a consequence, some enhanced protection is required by employees.

21 The American California Consumer Privacy Act of 2018 (1798.100 – 1798.199, *Title 1.81.5 added by Stats. 2018, Ch. 55, Sec. 3.* Civil Code), the so-called California IoT Act, is an example of such legislation.

22 The term means large, variable and diverse datasets that are of high value.

23 Jemielniak, D., *Socjologia internetu*, Warszawa 2019, p. 45.

24 Due to the extensive possibilities of identifying individuals and collecting data that is not related to work.

Biometric data

The concept of biometric data is defined in Regulation (EC) 2016/679 of the European Parliament and of the Council[25] (hereinafter GDPR). Pursuant to Article 4(14) of the GDPR, personal data are resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of an individual, which allows or confirms the unique identification of that person, such as facial images or fingerprint data.

The development of IoT leads to the progress of biometric methods that enable the use of the unique physical, physiological or behavioural characteristics of an individual for the purposes of identification and identity verification. They include fingerprints, palm, ear or face geometry, the iris, the fundus, the palm or the blood vessel arrangement of the palm or finger, voice, deportment or even the way one hits the keyboard.[26]

The EU legislator decided to include biometric data in the category of special personal data (Article 9(1) of the GDPR). It does not matter whether new, e.g. health-related, information is generated as a result of its processing. The point is that technologies involving iris or fundus scanning may make health problems to surface.[27]

Biometric data makes it possible to identify a person or explicitly confirm their identity. It is particularly valuable due to its uniqueness. As a consequence, its collection and processing are specific, as it involves greater interference with the information independence of an individual, which is related to the physical or physiological structure or physical characteristics of an individual.[28] What is more, it cannot exist independently, as it depends on various carriers – saliva, blood, fundus image or fingerprints.[29]

However, it should be pointed out that according to the definition of biometric data introduced by the EU legislator, it includes only data that enables the

25 Regulation 2016/679 of the European Parliament and of the Council (EU) of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC – General Data Protection Regulation, OJ L 119, 4.5.2016, pp. 1–88.

26 Pyka, A., *Przetwarzanie danych biometrycznych. Aspekty prawne*, "Studia Prawa Publicznego" 2018, No. 3, p. 133.

27 Ibidem, p. 138.

28 Ibidem, p. 138.

29 Bąba, M., *Próba wyznaczenia zakresu pojęcia danych biometrycznych*, "Prawo Mediów Elektronicznych" 2016, No. 2, p. 26.

identification and verification of a given person. Not every biometric method allows one to achieve such a goal with the use of specific carriers.

In the context of the discussed issues, it can be noted that the aspect of collecting and processing special categories of data started to appear in the rulings together with the spread of modern technologies. A view was expressed that digitally processed information on characteristic points of employees' fingerprints is their personal data. It should be mentioned that the collection and gathering, i.e. processing, of employees' data, such as fingerprints or the iris pattern, is generally allowed, but it must be done in compliance with the provisions of the Polish data protection act.[30] The above view should obviously be extended with the provisions of the GDPR and the Polish labour code[31] (hereinafter "LC"). These pieces of legislation now complement the protection of personal data in labour relations.

The Internet of Things versus employee privacy

The processing of data is the essence of IoT. In labour relations, it is important that this process is registered by relevant algorithms, which work continuously and, to some extent, arrange the collected data strings by making sense out of them, which, as a consequence, leads to the creation of information about an employee. It enables the development of knowledge that makes it possible to identify and describe one's personality, as the Internet of Things offers limitless possibilities for analysis.[32] That is why it is possible to study the behaviour and characteristics of individuals, including sensitive data, thoroughly, based on automatic algorithms.

According to M. Bąba, IoT involves elimination of separateness of individuals and unlimited access to them through the observation of spontaneously revealed personal states. Privacy may be examined from different angles, as it is an area in which individuals attach specific value to a certain range of information about themselves. That is why they tend to protect and share it. This kind of data and information remains private irrespective of its disclosure. This is an explicit expression of the information autonomy of an individual.[33]

30 Judgement of the Voivodeship Administrative Court in Warszawa of 27 November 2008, II SA/Wa 903/08, LEX No. 521934.

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

32 Bąba, M., *Refleksje wokół prywatności i autonomii informacyjnej w świecie Internetu (wszech) rzeczy*, "Zeszyty Naukowe Wydziału Informatycznych Technik Zarządzania Wyższej Szkoły Informatyki Stosowanej i Zarządzania pod Auspicjami Polskiej Akademii Nauk. Współczesne Problemy Zarządzania" 2018, No. 2, p. 34.

33 Ibidem, p. 34.

In this context, there is no reason for depriving employees of their privacy and the possibility to freely dispose of it. People spontaneously manifest their behaviours and personal states in the process of work. The conclusion that the work performance process may merge with an employee's private life is therefore legitimate. The process of biometric data processing is related to the possibility of far-reaching encroachment into an employee's private sphere. As a consequence, we are facing interference with the information autonomy of an individual. Such a problem may also appear in the relationship between an employer and an employee. For obvious reasons, in this case, the economic and organisational advantage of an employer can be observed. In this context, the principle of data processing legalism is particularly important. This is expressed in Article 5(1) of the GDPR, which sets out that it must be processed lawfully.

The EU legislator assumed that biometric data processing involves the necessity of the controller proving that there are any of the legal bases for data processing mentioned in Article 9(2) of the GDPR. In principle, it is not allowed to process personal data that can be defined as sensitive data, including data revealing racial or ethnic origin, political opinion, religion or beliefs or trade union membership, as well as genetic, biometric data for the purposes of identifying a natural person or data concerning the health or sexual orientation of an individual.

Legal bases for the processing of biometric data are particularly important. Circumstances precluding the general ban on using this kind of data are set out in Article 9(2). The express consent of the data subject is one of the conditions for the lawfulness of data processing. It is hard to imagine that consent for the processing of biometric data in a relationship between an employee and an employer could be given upon the initiative of the former. Such a position is justified by the nature of the relationship between parties to an employment relationship and the specific dependence of an employee on an employer. In the employment relationship, the subordination of the employees to the employer is a basic characteristic, so the possibility of expressing one's will completely freely may be doubtful. In such a situation, the employee's consent will, in a sense, be based on an organisational and economic compulsion. Such a rule is also provided for in the LC. Without discussing the nature of such consent, one can conclude that the currently applicable Article 22^{1b} of the LC regulates this matter. The said provision expressly refers to Article 9(1) of the GDPR; therefore, it also applies to biometric data processing by an employer. This is related to both the employee and the employer. However, pursuant to Article 22^{1b}(1) of the LC, its lawfulness depends on consent, though the legislator does not specify that it should be expressed. It is nevertheless important that such data must be provided on the initiative of the person being an employer or a candidate for employment. Moreover, as provided by Article 22^{1b}(2), biometric

data processing is also permissible in a situation where it has to be provided due to the control of access to particularly important information, the disclosure of which may cause damage to the employer, or access to rooms that require special protection.

The opinion of the District Court in Giżycko stating that "pursuant to the new wording of Article 22^{1b} of the LC, so-called special category data may be processed on the basis of an employee's consent only if it is provided upon the initiative of an employee. As a consequence, the legislator precludes the application of consent if an employee is not the initiator of the provision of information on his sobriety" seems reasonable.[34] The above-mentioned opinion should be interpreted as referring not only to an employee's sobriety, but to all kinds of data, in particular biometric (including behavioural) data under Article 22^{1b} of the LB. It seems that such a position reflects the main assumptions made concerning personal data protection in the Polish legal system.

Given the above, the question arises as to whether the currently applicable GDPR and LC regulations are sufficient and relevant for the current extent of technological progress in the field of biometric data. It is hard to provide an explicit answer, as the issue involves the interests of both, employees and employers. Moreover, as provided by Article 22^{1b}(2), biometric data processing is permissible if it has to be provided due to the control of access to particularly important information, the disclosure of which may cause damage to the employer, or access to rooms that require special protection. These circumstances rightly make the use of such data lawful. Nevertheless, as far as the employer's interests are concerned, it does not cover issues related to the streamlining of production processes or increasing effectiveness. Article 9(2)(b) of the GDPR precludes a general ban on using biometric data if it is not necessary for the fulfilment of duties and the exercise of special rights by a data controller or a data subject in the area of labour law, social security and social protection, provided that it is allowed under EU law or the law of a member state or a collective agreement under the law of a member state providing for the appropriate protection of the fundamental rights and interests of a data subject.

In the context of the cited provision of the GDPR, the specific flexibility of the bases for the lawfulness of biometric data processing is noteworthy. Its use may be permitted under EU law and the domestic law of a member state or even under a collective agreement made under the law of a member state.

According to legal academics, "legal provisions under which a collective agreement may be established must provide for appropriate protection of the fundamental rights and interests of the data subject. However, the question of whether such

34 Judgement of the District Court in Giżycko of 10 September 2019, IV P 49/19, LEX No. 2747635.

a solution, despite providing greater flexibility, will not lower the level of protection of the personal data subject (employees in particular) raises concerns. However, there are generally no doubts as to the fact that the processing of sensitive data must be allowed if it is necessary for the purposes of employment or social security".[35]

The discussed regulation authorises the creation of grounds for such activities under relevant provisions, including secondary legislation passed by virtue of a delegation of legislative powers or under collective agreements. Biometric data processing in employment relationships cannot be associated exclusively with actions having negative consequences for employees. There should be no obstacles for the parties to reach a collective agreement to agree upon the given manner and scope of using sensitive data, in particular social and economic relationships, provided that the dominant party (the employer) is responsible for the proper protection of and respect for employees' fundamental rights. This is important due to the fact that IoT is much more than just a tendency in recent years. It has the potential to revolutionise numerous areas of life, including employee relationships.

The regulation on the issue of biometric data protection at the EU level is undoubtedly a positive thing. The introduction of Article 22^{1b} of the LC, which could be extended in line with the provisions of Article 9(2)(b) of the GDPR, is also noteworthy. IoT is a constantly developing technology that finds new applications in more and more areas. As a consequence, it may be necessary to introduce legal changes corresponding to emerging needs. According to the author, it will be necessary to regulate the use of IoT comprehensively in the long term. It should be added that distinguishing between a data controller and a data processor already poses a problem.[36] IoT undoubtedly increases the possibilities for employers to collect and process employees' personal data. Therefore, the legislator should introduce into labour law solutions aimed at a certain limit on the actions taken by the employer. Nevertheless, this is difficult, because this field is – in a certain sense – very hectic and rapidly changing.

One should also remember that IoT involves totally automated data processing, including profiling. The consequences may be twofold. On the one hand, they may offer more individual solutions for employees, but on the other hand, they can lead to unfair discrimination. Some restrictions are necessary even though the establishment of grounds for biometric data protection under collective agreements is authorised. The purpose and appropriateness of the manner in which biometric

35 Kuba, M., *Komentarz do art. 9*, in: Bielak-Jomaa, E. and Lubasz, D. (eds.), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, LEX 2018.

36 This issue has been discussed by Deloitte in: *Internet Rzeczy, ochrona prywatności a bezpieczeństwo danych,* https://www2.deloitte.com/pl/pl/pages/doradztwo-prawne/articles/Internet-Rzeczy-ochrona-prywatnosci-a-bezpieczenstwo-danych.html (accessed 07.07.2020).

data is collected and processed should therefore be taken into account. For example, the use of biometric data for the purpose of controlling employees' working time is disproportionate to the intended purpose of its processing.[37]

The opinion of the Judgement of the Court of Appeal in Gdańsk is correct in that an employer's interference with an employee's private sphere through the use of IoT solutions at the workplace may not be unlimited. An employer should observe the general provisions of the labour law, including Article 11^1 of the LC, which stipulates that they are obliged to respect the dignity and personal rights of an employee. Thus, the cited provision should set limits for any interference with an employee's privacy. As established in judicial decisions, respect for an employee's dignity and privacy as their personal rights is one of the fundamental duties of an employer.[38]

Conclusions

Modern technologies, including IoT, have great influence on every aspect of people's daily life. They undoubtedly affect the relationship between an employer and an employee, in particular the conditions of the work performed. Due to their specific nature, IoT solutions may be applied in virtually every industry, and they will probably become widespread in the near future. Although there are numerous advantages of their application, there are also certain risks related to information autonomy. That is why IoT will require an international legal framework. The specificity of IoT is based on the broad possibility of generating information, including employee data, the collection and processing of which is a key element of computerised reality. As a result, IoT makes it necessary to examine the issue of using sensitive data in greater detail.

The application of IoT in the working environment may involve biometric data, including behavioural data processing, which makes it possible to unambiguously identify an employee. Naturally, the use of modern technologies at a workplace does not have to involve only surveillance. Ubiquitous sensors, cameras, remote video surveillance of an employee at the workplace – all these factors may cause a person employed at a modern company to feel trapped. Currently applicable regulations set out grounds on which such data may be lawfully used by an employer quite precisely. The processing of personal and biometric data itself has been regulated by virtue of the provisions of the GDPR, which deserves credit. The authorisation

37 Judgement of the Supreme Administrative Court of 1 December 2009, I OSK 249/09, "Orzecznictwo Naczelnego Sądu Administracyjnego i wojewódzkich sądów administracyjnych" 2011/2/39.

38 Judgement of the Court of Appeal in Gdańsk of 12 June 2013, III APa 16/13, LEX No. 1339302.

of the establishment of legal bases for such activities under collective agreements is certainly an interesting solution.

There are no doubts as to the fact that an employer is able to use IoT technological solutions that make it possible to collect precise information on employees. Moreover, it seems that such solutions will be continuously developed. The risk of violating information autonomy, as well as far-reaching interference with employee privacy, should also be taken into account. It has long been pointed out in rulings that express consent for collecting and processing employees' data given at the request of an employer violates their rights and freedom of will.[39] Due to such risks, the processing of data collected with the use of IoT devices should be subject to specific restrictions regarding the purpose, adequacy and lawfulness. This is all the more important as IoT solutions enabling extensive interference with the information autonomy of an employee will become widespread in the era of Industry 4.0.

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39 Judgement of the Court of Appeal of 17 October 2018, II PK 178/18, LEX No. 2562148.

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Arbitration in employment disputes – de lege ferenda comments 15 years after arbitration clauses in employment relations were introduced in the civil procedure

Abstract

The purpose of this paper is to analyse the existing model of employment arbitration in Poland in force since 2005. According to Article 1164 of the Code of Civil Procedure, arbitration clauses in employment disputes can only be established once a dispute has already arisen. In reality, this post-dispute voluntary regulation has no practical value and employment arbitration is an instrument used extremely rarely in Poland.

On the basis of examination of applicable laws, the author shows that in given factual and legal circumstances a reasonable employee and a reasonable employer shall seldom have a cause to simultaneously agree to arbitrate an already existing dispute. By applying the comparative method at the same time, the paper examines possible criteria of distinguishing categories of disputes, agreements, persons and other conditions that would permit a valid arbitration clause in employment agreements.

In conclusion, the author demonstrates that, firstly, the existing voluntary post-dispute employment arbitration model in Poland is a fictitious one and requires reform and, secondly, that both a full elimination of arbitration clauses in employment agreements and a full arbitration clause for all future disputes are too blunt a tool not taking into account the real

needs and requirements of today's employees and employers. The author calls for a more nuanced regulation of employment arbitration in Poland.

Keywords: employment dispute, arbitration clause, employment arbitration

Introduction

Arbitration clauses in labour law matters may only be introduced after a dispute has arisen. This rule, introduced in Article 1164 of the Code of Civil Procedure, precludes the imposition of arbitration clauses in employment agreements and in other agreements establishing an employment relationship.[1] It is the purpose of such regulation to protect a weaker party to an employment relationship by affording it the right to co-decide in matters related to referring a dispute to arbitration proceedings only after a dispute has arisen and claims have been determined.[2] This purpose is a consequence of the assumption that an employment agreement is often in the nature of an adhesion contract, where an employee is unable to make decisions concerning individual contractual solutions and may only accept the agreement in its entirety.[3]

In Poland, it has only been possible to submit an employment dispute to arbitration since 2005. Up until then this mode of dispute resolution was not available to employees and employers. The literature has pointed out that the instrument provided for in Article 1164 of the Code of Civil Procedure is a dead letter,[4] only to be used on very rare occasions.[5] In the Court of Arbitration at the Confederation of Lewiatan, a dispute in the field of labour law has never been considered, while

1 Bąba, M., *Zapis na sąd polubowny w sporach z zakresu prawa pracy*, "ADR. Arbitraż i Mediacja" 2009, No. 4(8), pp. 5-13; Golat, R., *Specyfika polubownego rozstrzygania sporów w stosunkach pracowniczych*, "Służba Pracownicza" 2006, No. 9, pp. 9-14.

2 Flejszar, R., *Ugodowe rozwiązywanie sporów z zakresu prawa pracy*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2010, No. 1, pp. 315-328.

3 Skąpski, M., *Ochronna funkcja prawa pracy w gospodarce rynkowej*, Kraków 2006, pp. 106-161.

4 Szlęzak, A. and Pałubicki, R., *Pozasądowe sposoby rozwiązywania sporów pracowniczych. Uwagi ogólne,* in: Góra-Błaszczykowska, A. and Antolak-Szymański, K. (eds.), *Pozasądowe sposoby rozwiązywania sporów pracowniczych*, Warszawa 2015, p. 25. The statistics referred to by the authors specify that the number of employment disputes in Poland resolved by arbitration clause is limited to several per year.

5 Flaga-Gieruszyńska, K., *Sądownictwo polubowne w sprawach z zakresu prawa pracy*, in: Góra-Błaszczykowska, A. and Antolak-Szymański, K. (eds.), *Pozasądowe sposoby rozwiązywania sporów pracowniczych*, Warszawa 2015, pp. 73-82.

the Court of Arbitration at the Polish Chamber of Commerce refuses to provide any statistics.[6]

As a result, in light of only marginal use of arbitration clauses in Poland in labour law matters, it seems that precluding the option to refer disputes arising in connection with employment agreement to arbitration is not really a solution, and at best it is a solution that is not sufficiently nuanced in currently evolving economic and technological conditions. Some authors emphasise the need of legislative changes in the field of employment arbitration.[7] Suggestions that have been presented include making arbitration operate more efficiently by establishing specialised courts devoted to such disputes[8] or singling out employment agreements executed by management board members of companies as fit for employment arbitration.[9] However, what is lacking in literature from the field of labour law and civil proceedings is a critical analysis of the rule adopted in the Code of Civil Procedure, stating that only already existing disputes in connection with employment agreements may be the object of arbitration clauses.

In respect of arbitration in employment matters, it seems that a division of solutions concerning arbitration in employment agreements into mandatory pre-dispute clauses and voluntary post-dispute clauses[10] is of vital importance. In this paper, the model that is in force in Poland is referred to as voluntary. However, this voluntary nature means that both parties are permitted to make a decision to refer a dispute to arbitration only after such dispute has arisen. A mandatory model, in turn, is one where both parties make such a decision prior to the dispute having arisen – "mandatory" in this case does not mean that arbitration as such is mandatory.

Proponents of the voluntary model are of the opinion that all benefits and characteristics of arbitration still apply after the dispute has arisen. There is no point, therefore, in tying our hands by arbitration and precluding common courts from resolving a dispute before such dispute has even come to be. However, this reasoning seems faulty, as it completely disregards actually existing legal, economic and social conditions in which employees and employers operate. Further, it seems correct and justified to propose that after a dispute has arisen rational parties to an

6 Electronic correspondence with registries of both aforementioned courts in February 2020.

7 A. Węgrzyn, *Sądownictwo polubowne w sporach z zakresu prawa pracy*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2007, No. 1, pp. 399-410.

8 Flaga-Gieruszyńska, K., op. cit., p. 77.

9 Szlęzak, A. and Pałubicki, R., op. cit., p. 26.

10 Estreicher, S., *Saturns for rickshaws: the stakes in the debate over predispute employment arbitration agreements*, "Ohio State Journal on Dispute Resolution" 2001, Vol. 16, No. 3, pp. 559-570; Eisenberg, T. and Hill, E., *Arbitration and litigation of employment claims: an empirical comparison*, "Dispute Resolution Journal" 2003/2004, Vol. 58, No. 4, pp. 44-55.

employment relationship only rarely will decide to refer such conflict to an arbitration court since at any point either party will be more interested in either common courts or arbitration courts. The consent of both parties is needed for an arbitration clause to take effect. The current regulation, however, imposes certain restrictions concerning the time when an arbitration clause with respect to employee and employer claims may be introduced.[11]

This paper presents a critical analysis of the post-dispute model that is in force in Poland and revisits the conditions that should be fulfilled in order to introduce pre-dispute clauses as well. This evaluation has been conducted accounting for the prevailing conviction in labour law studies about benefits to be incurred by reducing tensions in the work environment thanks to entities from outside the common court system.[12] This paper shows possible criteria for identification of specific categories of disputes, agreements, entities and other conditions, whereby an arbitration clause would be permitted in an employment agreement.

Defects of the voluntary model

The applicable post-dispute model for labour law conflicts does not offer employees and employers a real option to refer the dispute to arbitration – it is only nominal and on the surface. After the dispute has arisen, i.e. after claims of the parties have been specified and their positions have become known, the legislator assumes that those parties will reach an arrangement regarding the forum which will be tasked with resolving the conflict. Meanwhile, for both the employee and the employer – and often and especially for lawyers who represent them in the event a dispute arises – the strategic decision on whether to introduce an arbitration clause will depend mainly, if not exclusively, on whether this will increase their chances of obtaining a favourable outcome in a particular case in specific factual and legal circumstances. Assuming both parties act rationally, most frequently only one party will arrive at the conclusion that such a clause is beneficial to it. Only in extraordinary situations will this conclusion be reached by both the employee and the employer. This is the main reason why the voluntary post-dispute arbitration clause model is so unpopular.

Firstly, the parties and their professional advisers in particular will scrutinise each and every advantage and disadvantage of arbitration in terms of already specified claims – for example, whether experts competent for a given dispute or persons

11 Mędrala, M., *Zapis na sąd polubowny w sprawach z zakresu prawa pracy*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2007, No. 1, pp. 411-419.

12 Baran, K.W. (ed.), *System prawa pracy. Tom I. Część ogólna*, Warszawa 2017, pp. 1207-1210.

familiar with the industry make rulings in a given court or whether a no-jury trial has any significance, whether a trial conducted in camera will be beneficial for one of the parties, whether a ruling will be appealable, whether full proceedings on evidence will be conducted or whether the proceedings will be speedier than in common courts. Only the sum of answers to each and every of those questions will allow each party to decide if arbitration will be a good solution in specific circumstances – and only for this party, not for anyone else. It is difficult to imagine a dispute in which both parties and often their lawyers would, as a result of the respective conducted analysis, make the same decision as regards the arbitration clause. What is a benefit of proceedings before arbitration courts for one party will be a drawback and risk for the other. For instance, long duration of proceedings before common courts could be deemed an asset for a party that intends to 'exhaust' its opponent and delay an unfavourable ruling. On the other hand, the openness of proceedings could be seen as an advantage for an employee who wants the affairs of a business to be examined in public, but may also be beneficial for an employer who would like a given person's salary to be known to the media. For this reason, while it is possible for both parties to be interested in referring a dispute to arbitration, only on very rare occasions will both of them be willing to have a specific conflict resolved before such a forum.

Secondly, at the moment when a dispute has come into being, relations between parties are already affected by negative emotions and a certain tension. Also then for psychological reasons it is difficult to expect conflicted parties to come to an arrangement in any matter and forget about their clash in order to reach an agreement on a neutral or fresh ground in an additional matter.

Thirdly, parties and in particular the lawyers representing them are not willing to take any steps that the other party may interpret as weakness. Meanwhile, considering the aforementioned circumstances, consent to arbitration may be regarded by one party as admission of vulnerabilities with which the proposed legal and factual narration is afflicted.

In other words, if both parties are competent, only in extraordinary situations will they make a simultaneous decision to refer an existing dispute to arbitration. On the other hand, a rational risk and benefit analysis related to arbitration as well as relationship dynamics between the parties upon executing an employment agreement are a different matter altogether. At such point, the parties are unable to specify any particular dispute that might arise between them in specific legal and factual circumstances. They are thus incapable of determining whether the common court or the arbitration court is in general more beneficial to them. If for any reason both parties are willing to be bound by an arbitration clause, this joint willingness will most likely disappear at the very moment a conflict is established,

since in the assessment of one party proceeding to resolve the issue by way of conventional courts might be more worthwhile. In other words, the benefits that the parties collectively see according to a mandatory model (i.e. in being bound by an arbitration clause when executing an employment agreement) are missing in the voluntary model, since one of the parties is unlikely to consider them as such.

In the voluntary system provided for in Article 1164 of the Code of Civil Procedure the parties have to bear all the problems related to dispute resolution by common courts plus all negative aspects of arbitration. For this reason, it is not surprising that in the Polish reality employees and employers vote against arbitration clauses. After the dispute has arisen, none of the parties, thinking it has a better chance in common courts, will agree to any other solution. Imagine poker players who are encouraged to swap their position after cards have been dealt – they will never agree to it at the same time. However, before card dealing no one should have any problem whatsoever with this.

One of the consequences of precluding arbitration clauses from being included in employment agreements are long waiting times before cases are heard before labour courts, whereas a substantial number of such cases could be efficiently resolved in arbitration. Of course, there are several arguments against the inclusion of arbitration clauses in employment agreements, but analysis thereof leads to an opposite conclusion.

Firstly, supporters of the voluntary model can maintain that arbitration proceedings are not open and therefore some rulings on labour law matters would not be part of the public domain. However, this objection against arbitration proceedings may pertain to all types of conflicts resolved by arbitration courts. The private nature of arbitration proceedings may be a value in itself – even of elementary importance – for the parties. If we agree that it is a value of this sort – it will remain a value both when the dispute has already arisen and at the stage of executing an employment agreement. All those benefits to arbitration proceedings that exist the moment the fact of a conflict has been established, likewise existed at the stage of executing an employment agreement. The argument concerning openness may also be reversed – openness of proceedings is sometimes used in labour law disputes for the promotion of dubious or risky suits so as to force, by means of public exposure of the case, the other party to specific concessions. The issue of openness or lack thereof is not a matter of advantages or disadvantages of employment arbitration, but constitutes a generally acceptable characteristic of arbitration proceedings which is of various importance for various parties, irrespective of whether it is assessed in light of an already existing dispute or a conflict that might come to be in the future.

Secondly, proponents of the voluntary model may state that in labour law cases arbitration is of limited use due to evidentiary restrictions often applicable before

such courts (such as written witness statements). As with lack of openness, this objection against arbitration proceedings may concern all types of cases resolved by arbitration courts. Meanwhile, limited and speedy proceedings on evidence may be deemed a benefit for each party to a conflict, and if we consider such streamlined rules of proceedings on evidence as a general advantage of arbitration, our assessment will not differ regardless the time it is made. Otherwise, we would be forced to admit that limited proceedings on evidence of this sort may never be permitted in labour law matters at all, even if an arbitration clause was to be introduced after a dispute has arisen.

Thirdly, supporters of the voluntary model may claim that arbiters in arbitration courts will, as a rule, favour employers (due to the economic nature of arbitration as such). Such criticism may also boil down to the assessment that conventional labour courts with jurors would be more forgiving towards employees or that in such courts employees may expect higher compensation. Such attitude may also be manifested in an accusation that if a given enterprise is a frequent client of a given arbitration court it will enjoy a privileged position.[13] These arguments contain contradictory prejudices that are not supported by any statistical research but are rather based on "hunches" and legal measures. If they are indeed a reflection of particular methods of dispute resolution, they are not favourable to any one model, but rather speak against both of them. Considering moreover that arbitration in labour law matters in Poland is used only marginally, attributing favouritism towards employers to those courts seems out of touch with reality – arguments of this type state first of all that common courts should not favour employees at the expense of employers, and secondly that some labour law cases should be actually submitted to arbitration.

Finally, proponents of the voluntary model may purport that an employment agreement, being an adhesion contract, is not negotiated by an employee and therefore it should not feature an arbitration clause as sometimes the employee may even be unaware of the consequences of such contractual provision. However, when executing an employment agreement, an employee (managerial staff or high-level specialists notwithstanding) usually has little influence on any particular contractual provision, and despite this, for some reason, the legislator decided against specifying in detail what solutions should be included in an employment agreement and afforded the parties certain freedom in their arrangements regarding

13 Bingham, L., *Employment arbitration: the repeat player effect*, "Employee Rights and Employment Policy Journal" 1997, No. 1, pp. 189-199. The author notes that perhaps the privilege concerns not employers whose disputes found their way into arbitration courts but professional representatives using a given forum.

the employment relationship. It is commonplace and accepted that an employee executes an employment agreement as an adhesion contract of sorts – and for this reason this is not an argument against such arbitration clause to be a part of the agreement. Either this practice should be permitted in full or we should oppose it altogether. The voluntary model is characterised by a dual personality of sorts – on one hand it assumes that an employee upon executing an employment agreement may be unaware of what he is signing and on the other hand it presumes that when a dispute arises the employee will most certainly make a rational decision regarding the type of court.

It is impossible to criticise arbitration for lack of openness, limited proceedings on evidence or favouring employers and other characteristics and at the same time support referrals to arbitration courts by parties to an employment relationship after a dispute has arisen.

Recapitulating – if we agree that arbitration in Poland has any benefits, those benefits will exist both when a dispute has arisen and at an earlier date, when an employment agreement is being executed. Taking into account the aforementioned arguments proving that rational parties will only on rare occasions and only in extraordinary circumstances refer a dispute that has already been established to arbitration, one cannot as a result logically proclaim advantages of arbitration and simultaneously declare that such advantages are non-existent when an employment agreement is being executed.

Therefore, it is worth considering in relation to what kind of disputes, entities and agreements and under what conditions arbitration clause could be included in employment agreements at the moment they are executed.

Conditions for the mandatory model

In light of the comments presented above and the only marginal use of post-dispute arbitration clauses in Poland, it seems justified to consider the conditions the fulfilment of which would allow parties to an employment relationship to submit a dispute to arbitration as soon as such relationship has been established.

Firstly, such clauses could be used in employment agreements executed with management board members or more broadly with company officials by defining such persons similarly to Article 128 §2(2) and Article 1514 § 1 of the Labour Code as 'employees managing the workplace on behalf of the employer' and 'directors of separate organisational units'. In all those cases, an employee is not a weaker party to an employment relationship and therefore the need of enhanced protection is not as valid as in the case of ordinary employees. Most commonly, employment

agreements with such persons are not in the nature of adhesion contracts. In this context, it is worth remembering about different negotiating positions afforded to promoted intra-corporate managers on one hand and to managers brought from outside on the other hand, but this division is impossible to be reflected in provisions of law. As a rule, one can notice a correlation that the longer a given employee works with a given employer, the more willing he will be to be bound by an arbitration clause[14] (this most likely indicates that parties bound by a long-term contract would seek more creative ways to resolve a dispute). Further, conflicts between such persons and employers often resemble economic disputes, involving experts in the field of management and evaluations of enterprises. One should also not forget that arbiters may be better prepared to tackle such quasi-corporate or quasi-economic disputes than labour judges and jurors.

Research results from the United States point to certain interesting correlations in this scope.[15] Namely, referrals to arbitration can be most often found in three situations involving the management staff (it is worth remembering that in the United States as many as nearly 60% of employment agreements contain arbitration clauses),[16] in particular in employment agreements with management staff, where a part of the compensation depends on long-term business results of the managed enterprise. In those situations, employees usually want to ensure that the dispute is submitted to experts in the field of management and remuneration and to complicated mathematical models, that information about their salary is kept confidential and most of all that the high salary does not put them at a disadvantage in the eyes of common court judges (moreover, some employees may be anxious that the industry they work in, e.g. e-gaming tech start-ups, will be met in common courts with scepticism or lack of understanding). Further, arbitration clauses can be found in employment agreements executed mainly in industries susceptible to volatile economic changes, such as mergers, acquisitions or bankruptcies. In those circumstances, employees usually want to have the dispute resolved quickly. Finally, referral to arbitration is also frequently added to employment agreements in low-income industries where employees are often more interested in lower costs

14 Schmitz, A., *Untangling the privacy paradox in arbitration*, "University of Kansas Law Review" 2006, Vol. 54, pp. 1215-1217.

15 Schwab, S. and Thomas, R., *An empirical analysis of CEO employment contracts: what do top executives bargain for?*, "Washington and Lee Law Review" 2006, Vol. 63, pp. 236-240; Thomas, R. et al., *Arbitration clauses in CEO employment contracts: an empirical and theoretical analysis*, "Vanderbilt Law Review" 2008, Vol. 63, No. 4, pp. 960-974.

16 Colvin, A., *The growing use of mandatory arbitration. Access to the courts is now barred for more than 60 million American workers,* 27.09.2017, Economic Policy Institute, https://www.epi.org/files/pdf/135056.pdf (accessed 31.01.2019).

of proceedings (in Poland, however, the cost argument works the other way), and by granting consent to arbitration clauses they wish to emphasise their loyalty and willingness to compromise.

In the United States, we can also see another correlation. Namely, the bigger the share of a given employer in gross product of a given state, the bigger the willingness of management staff to avoid state courts in disputes with this employer.[17] In other words, managers fear bias of judges (referred to as hometown bias) in the event of a dispute with an employer who has a big impact on the local economy. This might be a valuable guideline for employees of Polish State Treasury companies or municipal companies.

Secondly, an arbitration clause in labour law matters could be permitted upon employment agreement execution by correlating it with a certain threshold number, such as salary per year or month or claim value in a given case. These numbers are usually dependent on the position, nature of employee's duties and qualifications and may thus be treated as an indication of whether in a specific situation a given employee must be subject to protection by national labour courts or can be afforded the leeway to decide for himself. Research shows that the higher the employee's salary, the more interested he is in having the dispute resolved by arbitration courts.[18]

Thirdly, it is easy to imagine a model in which, at the stage of executing an employment agreement, an arbitration clause would be permissible in every matter save for cases involving equal treatment in employment. This way, ordinary disputes related to termination of employment and payment of items of salary could be subjected to arbitration, while conflicts concerning rights and freedoms protected by the Constitution would have to always be considered by common courts. Also disputes regarding the protection of business secrets or non-competition could enjoy a different treatment.

Fourthly, considering the aforementioned research showing the correlation between an employee's willingness to resort to arbitration and the volatility of a given industry, one possible criterion is the character of the conducted business activity. For example, arbitration clauses in labour law disputes could find their way to agreements executed by employees working for companies listed on the NewConnect stock exchange operated by Giełda Papierów Wartościowych w Warszawie (Warsaw Stock Exchange) in the case of new-tech and intangible assets companies.

Finally, referring to the aforementioned analyses presenting a correlation between career length with a given employer and employee's willingness to be bound by an

17 Sherwyn, D. et al., *Assessing the case for employment arbitration: a new path for empirical research*, "Stanford Law Review" 2005, Vol. 57, No. 4, pp. 1557-1590.

18 Thomas, R. et al., op. cit., p. 983.

arbitration clause, it might be a good idea to specify in an employment agreement that only disputes that arise after the lapse of certain time that such an agreement has been in force will be referred to arbitration. On the one hand, this would allow conflicted, albeit familiar parties to look to arbitration courts for more creative solutions than those available in labour courts, and on the other hand to show a tendency to some kind of mutual loyalty and willingness to compromise, which will have an impact on how comfortable both parties will be to perform the agreement.

Conclusions

The option to refer labour law disputes of parties in an employment relationship to arbitration courts that was introduced in Poland in 2005 has proven to be a fiction. The analysis we have conducted above shows that in specific actual and legal circumstances a rational employee and a rational employer will only rarely find reasons to agree to refer an already existing dispute to an arbitration court.

As a result, it seems that an amendment to Article 1164 of the Code of Civil Procedure is desirable in order to permit more extensive and genuine application of arbitration clauses by parties to an employment agreement. Both complete elimination of arbitration clauses, as it is today, as well as the opposite situation – full submission of all future labour law disputes to arbitration courts do not take into consideration the actual needs and expectations of the parties to an employment relationship.

The statutory regulation of arbitration clauses in labour law disputes should be more nuanced and should respect the willingness of certain groups of employees and employers to be bound by arbitration clauses in specific employment agreements. This will allow parties to an employment relationship to have the provisions concerning arbitration clauses formulated in a flexible manner at the stage of negotiating an employment agreement and to refer particular types of cases to common courts and other conflicts to arbitration courts.

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Protection of the rights of persons with disabilities under the European Social Charter

Abstract

The aim of the study is to discuss the protection of the rights of persons with disabilities under the system of law of the Council of Europe. In particular, the focus is on the rights of persons with disabilities to independence, social integration, and participation in the life of the community under the European Social Charter (ESC). This paper covers both an analysis of the Charter, with special attention paid to Article 15, and an examination of the decisions of the European Committee of Social Rights (ECSR) with respect to this provision. Besides the regulation of these rights at the European level, this paper also discusses different examples of state regulations' conformity or non-conformity with Article 15 ESC.

Keywords: rights of people with disabilities, social rights, human rights, European Social Charter, protection of social rights

Introduction

The Council of Europe is the leading human rights organisation in Europe whose stated aim is to uphold human rights, democracy, and the rule of law in Europe. It

includes 47 member states[1] and covers about 820 million people.[2] The European Social Charter (ESC) is a Council of Europe treaty that guarantees fundamental social and economic rights related to employment, housing, health, education, social protection, and welfare.[3] The Charter is intended to be the counterpart[4] in the field of economic and social rights to the 1950 European Convention on Human Rights (ECHR), the major achievement of the Council of Europe in the field of human rights.[5]

The ESC has two versions, the first signed in 1961 and the second signed in 1996. The 1996 Charter is an extended revision of the 1961 one. The 1961 Charter[6] first recognised a list of social rights related to work, social protection, and vulnerable groups of people, as well as a reporting system as a mandatory monitoring mechanism.[7] Later, the Charter of 1961 was expanded and amended to include a series of instruments. The final result of the process was the adoption in 1996 of the European Social Charter (Revised),[8] which entered into force on 1 July 1999. This Revised Charter was basically intended to update and adapt the substantive content of the original Charter and supplement its provisions in light of the social changes and developments since the adoption of the original text. Today, the Charter treaty system is one of the most widely accepted sets of human rights standards

1 Members of the Council of Europe are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom.

2 https://www.coe.int/en/web/about-us/budget (accessed 15.02.2020).

3 For an excellent if by now outdated overview of the ESC, see: Harris, D. and D'Arcy, J., *The European Social Charter, 2nd edition*, Ardsley 2001. See also the collected essays in: De Schutter, O. (ed.), *The European Social Charter: A social constitution for Europe*, Bruylant 2010.

4 See more: O'Cinneide, C., *The European Social Charter and the UK: why it matters,* "King's Law Journal" 2018, Vol. 29, No. 2, pp. 275-296.

5 Stein, E., *The European Social Charter—instruments and procedures*, "Nordic Journal of Human Rights", Vol. 25, No. 1, 2007, pp. 58–64.

6 CoE, *European Social Charter*, ETS No. 35, opened for signature in Turin on 18 October 1961, in force since 26 February 1965.

7 For early comments, see : Harris, D., *The European Social Charter*, "International and Comparative Law Quarterly" 1964, Vol. 13, pp. 1076-1087; Valticos, N., *La Charte sociale européenne: sa structure, son contenu, le contrôle de son application*, "Droit Social" 1963, Vol. 26, pp. 466-482; Wiebringhaus, H., *La Charte sociale européenne,* "Annuaire Français de Droit International" 1963, Vol. 9, pp. 709-721.

8 CoE, *European Social Charter (Revised),* CETS No. 163, opened for signature in Strasbourg on 3 May 1996, in force since 1 July 1999.

within the Council of Europe. The widespread support for social rights is ensured by the fact that 43 out of the 47 member states of the Council of Europe are parties to either the 1961 Charter or the 1996 Revised Charter.[9] Poland is a party to the 1961 Charter. It signed, but has not yet ratified, the 1996 Revised Charter.

In terms of structure, the 1961 Charter and the 1996 Revised Charter are similar. The rights protected are listed in general terms in Part I, which contains a policy commitment that is not legally binding. In Part II, the rights are specified and made the subject of legal obligations. Part III sets out the undertakings that a state must accept to become a contracting party, and Part IV lays down the rules for the regular supervisory machinery that is based on the submission by states parties of periodic reports that are assessed from the point of view of compliance with the standards of the Charter by the European Committee of Social Rights.[10] Parts V and VI (VI only in the Revised ESC) contain ancillary provisions of various kinds. Finally, each instrument has an Appendix, which forms 'an integral part', containing a series of clauses interpreting or adding to different provisions of the 1961 Charter and the 1996 Revised Charter.[11]

The rights of persons with disabilities are protected under numerous provisions of both the 1961 and 1996 European Social Charter. All the articles guarantee different social rights to all nationals of the contracting parties and foreigners 'in so far as they are nationals of other Parties' and 'are lawfully resident or regularly working within the territory of the Party concerned'.[12] These include both fully-abled and disabled persons. Articles 1-4 of both Charters (hereinafter also referred to as ESCs) guarantee the rights of employees to work, to just conditions of work, to safe and healthy working conditions, and to fair remuneration. ESC Articles 5-6 guarantee the collective rights of employees: the right to organise and the right to bargain collectively. Subsequent provisions of the Charters (Articles 7-31) regulate other rights, such as the right to vocational guidance, the right to social security, or the right to benefit from social welfare services.

Apart from all the provisions of Part II of the ESC that are applicable to everyone, meaning both fully-abled and disabled persons, there are two provisions that must be especially considered while addressing the issue of the protection of rights of people with disabilities under the 1961 and 1996 Charters—these are Article 15

9 Only Liechtenstein, Monaco, San Marino and Switzerland have not ratified either of these treaties.

10 For more information on the system of supervision of the European Social Charter see: Brillat, R., *The supervisory machinery of the European Social Charter: recent developments and their impact*, in: De Búrca, G. and De Witte, B. (eds.), *Social rights in Europe*, Oxford Scholarship Online 2012.

11 See more: Stein E., op. cit, pp. 55-64.

12 ESC/RevESC, Appendix, item 1.

ESC and Article E of the Revised ESC. Article 15 ESC guarantees people with disabilities the right to independence, social integration, and participation in the life of the community, and Article E Revised ESC expresses the right to equal enjoyment of the rights set forth in the Charter without discrimination on any grounds, such as disability. The prohibition of discrimination (Article E) covers direct and indirect discrimination. Prohibition of indirect discrimination 'calls for contextual intervention to correct the situation'.[13] Inequality is reduced by equalling opportunities by means of positive action favouring disadvantaged persons. The measures may include quotas, priority status in access to goods and services, and the obligation to introduce facilities supporting people with disabilities with independent living.

The right to independence, social integration, and participation in the life of the community

The content of Article 15 Revised European Social Charter

The right of persons with disabilities to independence, social integration, and participation in the life of the community is listed in Part I, point 15 of the Revised European Social Charter, and regulated in detail in Part II, Article 15.[14]

Pursuant to Article 15 ESC, 'with a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration, and participation in the life of the community, the Parties undertake, in particular:

- to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private (par. 1);
- to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services (par. 2);

13 Mikkola, M., *Social human rights of Europe*, Karelactio 2010, p. 554.

14 For the interpretation of Article 15 ESC 1961 see: Samuel, L., *Fundamental social rights. Case law of the European Social Charter*, *second edition,* Strasbourg 2002.

– to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility, and enabling access to transport, housing, cultural activities, and leisure (par. 3)'.

The protection afforded by Article 15 of the Revised ESC has been extended compared to that afforded by Article 15 of the 1961 Charter, as it no longer applies only to vocational training, rehabilitation, and social resettlement[15] but also to independent social integration, personal autonomy, and participation in the life of the community in general. The words 'effective exercise of the right to independence' contained in the introductory sentence to the provision imply, *inter alia*, that disabled persons should have the right to an independent life.[16]

Article 15 ESC reflects and advances the change in disability policy away from segregation and treating disabled persons as objects of pity and towards inclusion, choice, and respecting people with disabilities 'as equal citizens—an approach that the Council of Europe contributed to promote, with the adoption by the Committee of Ministers of Recommendation (92)6 of 1992 on a coherent policy for people with disabilities. The underlying vision of Article 15 ESC is one of equal citizenship for persons with disabilities and, fittingly, the primary rights are those of independence, social integration, and participation in the life of the community'.[17] In light of this, the non-discrimination norm has a very important role in the disability context and forms an integral part of Article 15 of the Charter.[18]

Under Article 15 ESC, states must aim to develop a coherent policy for people with disabilities. The provision takes a modern approach to how the protection of the disabled should be carried out, for example, by stipulating that guidance, education, and vocational training be provided whenever possible in the framework of general schemes rather than in specialised institutions, an approach that corresponds to that of Recommendation No. R (92) 6 of the Committee of Ministers of the Council of Europe. It not only provides the possibility, but to a large extent

15 On the protection afforded by the 1961 European Social Charter see more: Schömann, I., *Article 15 The Right of Disabled Persons to Vocational Training, rehabilitation and Resettlement*, in: Bruun, N. et al. (eds), *The European Social Charter and the employment relation*, Oxford and Portland 2017.

16 CoE, *Explanatory Report to the European Social Charter (Revised),* Strasbourg, 3.05.1996, ETS No. 163, p. 63.

17 ECSR, *Association internationale Autisme-Europe (AIAE) v. France*, Complaint No. 13/2002, Decision on the merits of 4 November 2003 (hereinafter Complaint No. 13/2002), § 48; Conclusions 2003, Statement on Interpretation on Article 15; CoE, *The digest of the case law of the European Committee of Social Rights,* December 2018, (hereinafter referred to as: *Digest 2018*), p. 157, https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80 (accessed 15.02.2020).

18 ECSR, Conclusions 2003, Statement of Interpretation on Article 15; *Digest 2018,* p. 157.

obliges the parties to adopt positive measures for the disabled.[19] Equality of treatment is required to exist not only in law but also in practice.[20]

The right to independence, social integration, and participation in the life of the community guaranteed under Article 15 ESC consists of three main components supporting people with disabilities in three main areas of life, these being: the right to guidance, education, and vocational training (par. 1); the right to equal access to employment (par. 2), and the right to full social integration and participation in the life of the community (par. 3). Combined with the definition of disability, these three components determine the scope of support provided to people with disability under the Charter in practice.

Definition of disability

Article 15 ESC applies to all persons with disabilities regardless of the nature and origin of their disability and irrespective of age. In the regulations of the Council of Europe, there is no legal definition of 'disability'; 'person/people with a disability' or 'discrimination on the basis of disability'. In its decisions and conclusions,[21] the European Committee of Social Rights[22] turns directly to the definition of 'disability' and 'person/people with a disability' endorsed by the WHO in its International Classification of Functioning, Disability, and Health[23] ('ICF') and to the definition of 'discrimination on the basis of disability' used in the United Nations Convention on the Rights of Persons with Disabilities ('CRPD')[24] based on the ICF model.[25]

The first document, known more commonly as the ICF, is a classification of health and health-related domains and is the WHO framework for measuring health and disability at both the individual and population levels. The ICF was officially endorsed by all 191 WHO Member States in the 54th World Health Assembly

19 CoE, *Explanatory Report …*, p. 64.

20 CoE, ESC/RevESC Appendix, item 1; Complaint No. 13/2002, § 48; Conclusions XIV-2 (1998), Statement of Interpretation on Article 15; *Digest 2018*, p. 157.

21 ECSR, Conclusions 2016, Hungary, Article 15.1.

22 On the impact of the jurisprudence of the ECSR see: Akandji-Kombé, J.F., *The material impact of the jurisprudence of the European Committee of Social Rights,* in: de Búrca, G. et al. (eds), *Social rights in Europe*, Oxford Scholarship Online 2012.

23 WHO, *International Classification of Functioning, Disability and Health (ICF),* 22.05.2011, WHA54.21, https://www.who.int/classifications/icf/en/ (accessed 26.02.2020).

24 ECSR, *Mental Disability Advocacy Centre (MDAC) v. Belgium*, Complaint No. 109/2014 (hereinafter Complaint No. 109/2014), Decision on the merits of 16 October 2017, §§ 22 – 24.

25 See more: Cera, R., *Article 2 [Definitions]*, in: Della Fina, V. et al. (eds), *The United Nations Convention on the Rights of Persons with Disabilities*, New York 2017, pp. 107-118.

on 22 May 2001[26] as the international standard to describe and measure health and disability.

Before the ICF, two major conceptual models of disability had been proposed. The medical model views disability as a feature of a person directly caused by disease, trauma, or other health condition that requires medical care provided in the form of individual treatment by professionals. Disability, in this model, calls for medical or other treatment or intervention, to 'correct' the problem with the individual.

The social model of disability, on the other hand, sees disability as a socially created problem and not at all an attribute of an individual. In the social model, disability demands a political response, since the problem is created by an unaccommodating physical environment brought about by attitudes and other features of the social environment.

The idea of the ICF is that on their own, neither model is adequate, although both are partially valid. Disability is a complex phenomenon that is at one and the same time a problem at the level of a person's body and a complex and primarily social phenomena. Disability is always an interaction between features of the person and features of the overall context in which the person lives. Some aspects of disability are almost entirely internal to the person, while others are almost entirely external. In other words, both medical and social responses are appropriate to the problems associated with disability; we cannot wholly reject either kind of intervention. A better model of disability, in short, is one that synthesises what is true in the medical and social models, without making the mistakes inherent in each one in reducing the whole, complex notion of disability to one of its aspects. This more useful model of disability might be called the 'biopsychosocial model' or 'the human rights model'.[27] The ICF is based on this model and provides a coherent view of different perspectives of health-biological, individual, and social.[28]

Pursuant to Article 2 CRPD, 'discrimination on the basis of disability' means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms

26 WHO, op. cit.

27 Degener, T.A., *A new human rights model of disability*, in: Della Fina, V. et al. (eds), *The United Nations Convention on the Rights of Persons with Disabilities*, New York 2017, pp. 41-59 and Degener, T., *Disability in a human rights context*, "Laws" 2016, Vol. 5, Issue 3, https://www.mdpi.com/2075-471X/5/3/35/htm (accessed 27.10.2020).

28 WHO, *Towards a common language for functioning, disability and health: ICF,* Geneva 2002, WHO/EIP/GPE/CAS/01.3, pp. 8-9, https://www.who.int/classifications/icf/icfbeginnersguide.pdf?ua=1 (accessed 28.02.2020).

of discrimination, including denial of reasonable accommodation. 'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

While assessing state legislation under Article 15 ESC, the European Committee on Social Rights finds incompatibility in the definitions of disability with the ESC where the definitions of disability and persons with disabilities focus on impairments of an individual rather than on the barriers that he/she faces, as such definitions fail to encompass all persons with disabilities, including those with psychosocial disabilities.[29]

The right to guidance, education, and vocational training

Securing the right to education for children, adolescents, and adults with disabilities plays an important role in advancing their citizenship rights and guaranteeing their fundamental rights,[30] as education and training are essential foundations to obtain a position in the open labour market and to be able to lead a self-determined life.[31] The rights to vocational guidance and training are generally laid down in Articles 1.4, 9 and 10 ESC, and Article 15.1 ESC refers specifically to persons with disabilities, aiming at offering increased protection in the areas where people with disabilities are one of the most vulnerable groups.

Pursuant to Article 15.1 ESC, all persons with disabilities—children, adolescents, and adults who face particular disadvantages in education, including persons with intellectual disabilities—have the right to education and training. This right encompasses all levels of education, starting with primary education, through general and vocational secondary education, as well as other forms of vocational training, and finishing with all types of higher education, including at the university level.[32]

Education provided to people with disabilities must be inclusive. Inclusiveness requires free and unlimited accessibility of educational premises both in legal and practical terms. Pursuant to Article 15.1 ESC, education must be ensured within the framework of general schemes wherever possible or, where this is not possible,

29 ECSR, Conclusions 2016, Hungary, Article 15.1.

30 Complaint No. 13/2002, § 48; *Digest 2018*, p. 157.

31 ECSR, Conclusions XX-1 (2012), Austria; *Digest 2018*, p. 158.

32 ECSR, Conclusions 2012, Ireland; *Digest 2018*, p. 157.

through specialised bodies, public or private. This formulation of Article 15.1 of the Charter does not leave states a wide margin of options when it comes to choosing the type of school in which they will promote the independence, integration, and participation of persons with disabilities, as the priority is given to education in mainstream establishments whenever possible.[33] Specialised institutions should be education providers only in those situations where the type of disability, its severity or a variety of individual circumstances make mainstream education impossible or especially ineffective, which must be examined on a case-by-case basis[34]. In such cases, specialised institutions must ensure through their internal organisation and working methods the predominance of guidance, education, and vocational training over the other functions and duties that they may be required to perform under domestic law[35].

Both types of schools must guarantee equal and non-discriminatory treatment to persons with disabilities, which means they must ensure physical accessibility of buildings and classes,[36] adequate lessons,[37] adapted teaching,[38] and human assistance for the person's school career where needed (e.g., for children and adolescents with autism in mainstream schools).[39] The room to manoeuvre in these matters applies only to the means that states deem most appropriate, bearing in mind the cultural, political, or financial circumstances in which their education systems operate. However, the choices made and the means adopted cannot be of a nature or applied in a way that deprives the established right of its effectiveness and turns it into a purely theoretical right.[40]

Under Article 15.1 ESC, the existence of non-discrimination legislation is considered necessary as an important tool for the advancement of the inclusion of children with disabilities into general or mainstream educational schemes. Such legislation should, at a minimum, require a compelling justification for special or segregated educational systems and confer an effective remedy on those who are found to have been unlawfully excluded or segregated or otherwise denied an

33 ECSR, *European Action of the Disabled (AEH) v. France*, Complaint No. 81/2012 (hereinafter Complaint No. 81/2012), Decision on the merits of 11 September 2013, § 78; *Digest 2018*, p. 158.

34 *Digest 2018,* p. 158.

35 Complaint No. 81/2012, Decision on the merits of 11 September 2013, § 111; *Digest 2018,* p. 158.

36 ECSR, Conclusions 2005, Cyprus.

37 Complaint No. 13/2002, § 48.

38 Complaint No. 81/2012, Decision on the merits of 11 September 2013, § 85.

39 Ibidem, § 85.

40 Ibidem, §§ 80-81; *Digest 2018*, p. 158.

effective right to education. Legislation may consist of general anti-discrimination legislation, specific legislation concerning education, or a combination of the two.[41]

The European Committee of Social Rights found violations of Article 15.1 ESC in cases where there existed a lack of effective integration of children and youth with disabilities into mainstream education and into mainstream vocational training facilities, and so special and separate facilities remained the norm,[42] or where the minority[43] or almost half of pupils with special educational needs attended special schools.[44] Non-compliance with Article 15.1 ESC[45] was also declared by the ECSR in cases where there was found to be a lack of equal access of children with disabilities to education, where many children with disabilities were placed in institutions, particularly those with mental disabilities (who accounted for about 80% of all children living in institutions), and did not therefore have equal access to education.[46]

The right to equal access to employment

Securing the right to equal access to employment for people with disabilities plays an important role in advancing their citizenship rights and guaranteeing their fundamental rights by obtaining a position in the open or specialised labour market, which enables them to lead a self-determined life. The rights to work, just conditions of work, and safe and healthy conditions at work, are generally laid down in Articles 1, 2, and 3 ESC, and Article 15.2 ESC refers specifically to persons with disabilities, aiming at offering increased protection in the area of employment where people with disabilities are more vulnerable than other employees.

Pursuant to Article 15.2 ESC, all persons with disabilities, both physically and intellectually disabled,[47] have the right to equal access to employment. Under this article, states are required to promote their access to employment through all

41 ECSR, Conclusions 2007, Statement of interpretation on Article 15.1.

42 ECSR, Conclusions XVI-2 (2004), Malta, Article 15.1.

43 ECSR, Conclusions 2016, Ukraine, Article 15.1.

44 ECSR, Conclusions 2016, Austria, Article 15.1, Conclusions 2016, Romania, Article 15.1.

45 For assessment of Ukrainian legislation see: Smusz-Kulesza, M., *Report on the needs assessment in respect of social rights in Ukraine conducted within the framework of the Council of Europe project "Framing cooperation for social rights development in Ukraine"*, Council of Europe 2019, available at: https://rm.coe.int/report-on-the-needs-assessment-in-respect-of-social-rights-in-ukraine-/168093d9a2 (accessed 19.10.2020).

46 ECSR, Conclusions 2016, Serbia, Article 15.1.

47 ECSR, Conclusions XX-1 (2012), Czech Republic; Conclusions I (1969), Statement of Interpretation on Article 15.2.

measures, to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services.

In accordance with Article 15.2 ESC, access to employment must be ensured within the framework of the open labour market wherever possible or, where this is not possible, through sheltered employment, public or private. Such formulation of Article 15.2 of the Charter does not leave states a wide margin of options when it comes to choosing the type of employment in which they will promote the equality of persons with disabilities, as the priority is given to the open labour market whenever possible. Sheltered employment, understood as covering also working co-operatives,[48] should be provided only in situations where the type of disability, its severity, or a variety of individual circumstances make integration into the open labour market impossible or especially ineffective, which must be examined on a case-by-case basis. In such cases, persons working in sheltered employment facilities must be entitled to the basic provisions of labour law and in particular the right to fair remuneration and trade union rights.[49] Sheltered employment facilities, apart from providing work, should aim to assist their beneficiaries to enter the open labour market.[50]

Access to employment provided to people with disabilities must be equal. To this aim, discrimination on the basis of disability in employment (including the conditions of dismissal) must be prohibited.[51] In addition, regarding work conditions, 'there must be obligations on the employer to take steps in accordance with the requirement of reasonable accommodation to ensure effective access to employment and to keep in employment persons with disabilities, in particular persons who have become disabled while in their employment as a result of an industrial accident or occupational disease'.[52] Apart from that, regulations must 'confer an effective remedy on those who are found to have been unlawfully discriminated'.[53] Apart from the abovementioned obligations, states enjoy a margin of discretion concerning other measures they take in order to promote access to employment of

48 CoE, *Explanatory Report …*, p. 65.

49 ECSR, Conclusions XVII-2 (2005), Czech Republic.

50 ECSR, *Digest 2018*, p. 158.

51 ECSR, Conclusions 2003, Slovenia; Conclusions 2012, Russian Federation.

52 ECSR, Conclusions 2007, Statement of Interpretation on Article 15.2.

53 ECSR, Conclusions XIX-1 (2008), Czech Republic.

persons with disabilities—in particular, Article 15.2 ESC does not require the introduction of a system of quotas.[54] Under the approach adopted in Article 15.2 ESC, the state is responsible for adopting measures to help disabled persons participate fully and actively in the labour market. Those measures, if needed, may take the form of positive action designed to improve the 'employability' of disabled persons and their access and ability to remain in employment. Particular emphasis must be put on the protection of persons who are disabled as a result of an occupational accident or illness.[55]

The European Committee of Social Rights found violations of Article 15.2 ESC in cases of a lack of legislation prohibiting discrimination on the grounds of disability in the field of employment[56] or lack of adequate protection against discrimination on the grounds of disability—a lack of measures protecting employees with disabilities from dismissal and lack of an obligation for employers to continue to employ a person who becomes disabled following an occupational injury or disease.[57] Apart from that, non-compliance with Article 15.2 ESC was established in cases of excessively low wage levels in sheltered employment facilities where persons employed performing production-orientated work were not subject to the usual terms and conditions of employment and their pay was much lower than that in the open working environment (varying between 5% and 30%).[58]

The right to full social integration and participation in the life of the community

Securing the right to full social integration and participation in the life of the community for people with disabilities is the essence of guaranteeing their fundamental rights. The rights to protection of health, social and medical assistance, social welfare services, and housing are generally laid down in Arts. 11, 13, 14, 31 ESC, and Article 15.3 ESC refers specifically to persons with disabilities, aiming at offering increased protection in the area of community life where people with disabilities are more vulnerable than other members of the society.

Pursuant to Article 15.3 ESC, all persons with disabilities have the right to full social integration and participation in the life of the community, which should

54 ECSR, Conclusions XIV-2 (1998), Belgium.

55 ECSR, Conclusions XIV-2, Statement of interpretation on Article 15.

56 ECSR, Conclusions XVI-2 (2004), Belgium, Article 15.2; Conclusions XVI-2 (2004), Spain, Article 15.2.

57 ECSR, Conclusions XVI-2 (2004), Denmark, Article 15.2.

58 Ibidem.

be promoted in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and 'enable access to transport (land, rail, sea and air), housing (public, social and private), cultural activities and leisure (social and sporting activities)'.[59] To this end, Article 15.3 ESC 'requires the existence of comprehensive non-discrimination legislation covering both the public and private sphere in fields such as housing, transport, telecommunications and cultural and leisure activities and effective remedies for those who have been unlawfully treated'.[60] Such legislation may consist of general anti-discrimination legislation, specific legislation, or a combination of the two.[61]

Article 15.3 ESC requires the 'adoption of a coherent policy in the disability context: positive action measures to achieve the goals of social integration and full participation of persons with disabilities. Such measures should have a clear legal basis and be coordinated'.[62] People with disabilities should have a voice in the design, implementation, and review of policies concerning them.[63] To achieve the aim of Article 15.3 ESC, mechanisms must be established to assess the barriers to communication and mobility faced by persons with disabilities and identify the support measures that are required to assist them in overcoming these barriers.[64]

Furthermore, technical aids must be available, either for free or subject to a contribution towards their cost and taking into account the beneficiary's means. Such aids may, for example, take the form of prostheses, walkers, wheelchairs, guide dogs, appropriate housing support arrangements, or support services such as personal assistance and auxiliary aids.[65]

To achieve full social integration and participation of people with disabilities in the life of the community, 'telecommunications and new information technology must be accessible and sign language must have an official status'.[66] 'Public transports (land, rail, sea and air), all newly constructed or renovated public buildings, facilities and buildings open to the public, and cultural and leisure activities should be physically accessible'.[67]

59 ECSR, Conclusions 2005, Norway.

60 ECSR, Conclusions 2007, Slovenia.

61 ECSR, Conclusions 2012, Estonia.

62 *Digest 2018*, p. 161.

63 ECSR, Conclusions 2003, Italy.

64 ECSR, Conclusions 2008, Statement of interpretation on Article 15 § 3; *Digest 2018,* pp. 161-162.

65 *Digest 2018*, pp. 161-162.

66 ECSR, Conclusions 2005, Estonia; Conclusions 2003, Slovenia.

67 ECSR, Conclusions 2003, Italy; *Digest 2018*, pp. 161-162.

'The needs of persons with disabilities must be taken into account in housing policies, including the construction of an adequate supply of suitable, public, social or private, housing. Further, financial assistance should be provided for the adaptation of existing housing'.[68]

The European Committee of Social Rights found violations of Article 15.3 ESC in cases where there was a lack of anti-discrimination legislation for persons with disabilities that specifically cover the areas of housing, transport, communications, culture, and leisure.[69]

Conclusions

The rights of persons with disabilities are protected under numerous provisions of the 1961 and 1996 European Social Charter. Protection conferred by the 1996 ESC is wider than that conferred by the earlier version as the latter is a revised and extended version. All the articles of both the 1961 and 1996 Charter guarantee different social rights to all—fully-abled and disabled persons. Additionally, the 1996 European Social Charter in Article E directly states that the enjoyment of the rights set forth in the Charter shall be secured without discrimination on any grounds, such as e.g. disability.

Apart from these, Article 15 of the 1961 and 1996 ESC guarantee people with disabilities special protection. Article 15 1996 ESC establishes the right to independence, social integration, and participation in the life of the community. The aim of Article 15 ESC is to offer increased protection in areas of life where people with disabilities are most vulnerable—education, guidance, vocational training, employment, and community life. While assessing the compliance of state regulations with Article 15 ESC, the European Committee of Social Rights highlights the importance of inclusiveness as an essential characteristic of all the above-mentioned areas. 'Integration' and 'inclusion' are two different notions and one does not necessarily lead to the other. The right to inclusive education, guidance, vocational training, employment, and community life is about the person's right to participate in the mainstream institutions of these fields and the institutions' obligation to accept the person, taking into account the best interests of the person as well as their abilities and needs as the primary consideration.[70]

68 *Digest 2018*, pp. 161-162.

69 ECSR, Conclusions 2016, Estonia, Article 15.3.

70 Complaint No. 109/2014, Decision on the merits of 16 October 2017, § 66; *Digest 2018*, p. 158.

The European Committee of Social Rights found incompatibility of different states' provisions with Article 15 ESC in cases of definitions of disability focusing on impairments of an individual rather than on the barriers that disabled people face; in cases of lack of equal access of children with disabilities to education and in cases of lack of effective integration of children and youth with disabilities into mainstream education vocational training. Non-compliance with Article 15.1-3 ESC was also declared by the ECSR in cases of lack of effective legislation prohibiting discrimination on the grounds of disability in the field of employment, housing, transport, communications, culture and leisure.

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The nature of law and its role in society: reflections on the basis of William Golding's novel 'Lord of the Flies'

Abstract

Literature provides a great deal of material for more general observations regarding the assessment of law and its role in public awareness. Literary works act as a mirror in which we can see the dangers of breaking the link between law and morality. An excellent example is William Golding's novel, 'Lord of the Flies'. His parabolic story about human nature provides a reflection on the role and nature of law in society. The task of defining the essence of law and its role in society has captured the minds of legal theorists, philosophers, and sociologists for centuries. This paper includes a brief analysis of two basic concepts of the nature of law, i.e. natural law and legal positivism. It is an attempt to show that theoretical beliefs about the essence of law have a direct impact on the practice of making and applying laws. The pluralism of values is used by various social groups or the ruling political elite to achieve their own goals. They value individual civil liberties, giving primacy to values that safeguard their interests. This often happens at the expense of other groups whose freedoms are being limited. Importantly, such mechanisms of assigning value are used in both undemocratic and democratic systems.

Keywords: literature, values, morality, natural law, legal positivism, mechanisms of power

Introduction

The main purpose of this paper is to draw attention to the value of literature for the study of the philosophy of law, by using the example of the novel 'Lord of the Flies' by William Golding to demonstrate that literature is a rich and complex source of knowledge about law. It opens the door to many interpretations and provokes contemplation. Unfortunately, it is rare to find references to literature in the papers of Polish jurisprudents. The 'Law and Literature' movement is still treated as irrelevant and extraneous in Poland, while this movement has developed remarkably in other countries.

Literature vividly presents important problems for researchers of law. This literary imagery can be simplified to detect a parallel between the symbolic situations depicted in novels and in reality. Golding's novel provides a reflection on the role and nature of law in society. In my work, I briefly describe two main concepts of law—natural law and legal positivism—also making my own assessment as to which of these concepts Golding refers to. Furthermore, using literature as inspiration I indicate the practical significance of the dispute about the nature of law and its connections with morality. In the context of the concept of the pluralism of values and moral relativism, referring to Golding's novel, I present the valuation of rights as an important element of exercising power. In this respect, literary references help to understand what causes the submission of a given social group to the rules and regulations adopted by the authorities. I also use literature as a starting point to show that the valuing of civil liberties takes place in both democratic and undemocratic systems and leads to a limitation of the rights of individual groups, a feature which is common to both regimes. In this way, literature becomes a tool for learning about the mechanisms of power and patterns of social behaviour that affect legal arrangements.

Literature as a source of knowledge about the law

It is a truism to state that the law is culturally and socially conditioned. Based on this observation, the current research on the essence of the law includes an assessment of law as a cultural phenomenon, which implies an interdisciplinary approach to legal science.[1] For instance, in the early 1970s, the Law and Literature movement

1 See Aleksandrowicz, M., et al., *Demokracja, teoria prawa, sądownictwo konstytucyjne. Księga jubileuszowa dedykowana profesorowi zw. nauk prawnych Adamowi Jamrozowi z okazji pięćdziesięciolecia pracy zawodowej*, Białystok 2018, pp. 55–56.

started and spread throughout the 1980s and 1990s.[2] It was a new course in the theory of law focusing on the connection between law and literature. However, it should be noted that the field of law and literature is not new, as in the nineteenth century English lawyers wrote about depictions of the legal system by Shakespeare, Dickens, and other famous writers.[3] John H. Wigmore, who was an American lawyer and legal scholar, explained literature's practical value to lawyers, saying they should read the great writers to learn about human nature.[4] Nevertheless, only since the publication of James Boyd White's 'The Legal Imagination: Studies in the Nature of Legal Thought and Expression' in 1973 has a distinct, self-aware field of law and literature emerged.[5]

The law and literature movement has grown in the USA since then, as reflected in new courses called 'Law and Literature' offered by law schools, in which students are asked to read literature in order to discover the legal principles embedded in the narratives.[6] In Europe, the movement is promoted by the European Network for Law and Literature Scholarship. Founded by Jeanne Gaakeer, a judge and law professor working in the Netherlands, and Greta Olson, a literary scholar based in Germany, this network aims to increase communication between scholars working on related topics within Europe.[7] Similar networks of Law and Literature scholars exist, for example, in Scandinavian countries[8] and in Italy.[9] In Poland, this new field of interdisciplinary studies is developing mainly at the University of Warsaw thanks to two academic scholars: Marek Wąsowicz and Jarosław Kuisz. Nonetheless, it has not yet gained much popularity in the Polish academic world. One should only trust that this will change, for, as the proponents of the law and literature theory rightly point out, literature offers numerous possibilities.

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2 Hämäläinen, N., *Literature and moral theory*, 2015, p. 5.

3 Posner, R.A., *Law and literature: a relation reargued*, "Virginia Law Review" 1986, Vol. 72, p. 1352.

4 Wigmore, J.H., *Introduction*, in: Gest, J.M. (ed.), *The lawyer in literature*, London 1913, pp. IX–XII.

5 Posner, R.A., op. cit., vol. 72, p. 1352.

6 See Tiefenbrun, S., *Decoding international law: semiotics and the humanities*, New York 2010, p. 137. For example, Law and Literature was introduced as part of interdisciplinary studies at Cardozo School of Law in New York, Yale University School of Law, and the University of Virginia School of Law.

7 The European Network for Law and Literature, https://www.uni-giessen.de/faculties/f05/engl/lit/research/eurnll (accessed 01.06.2020).

8 Nordic Network for Law and Literature, https://researchportal.helsinki.fi/en/activities/nordic-network-for-law-and-literature-external-organisation (accessed 01.06.2020). In 2009, the Nordic Network for Law and Literature ended the cooperation between scholars of law and literature in the Nordic countries.

9 AIDEL (Italian Association of Law and Literature), https://aidel.it (accessed 01.06.2020).

Literature can be a tool not only for interpreting legal norms for a better understanding of the essence of a specific legal dispute, but it can also be helpful when considering philosophical and ethical topics such as freedom and its limits, equality before the law, or the relationship between law and morality. Literature has significant potential in constructing wider cultural and social contexts, which can provide new insights into the assumptions of legal systems. Therefore, literature can play a special role as a source of knowledge about the law and as a record of the culture and legal awareness of society. A literary work can constitute an expression of views and ideas about the law that exists in a given society and in a specific period.[10] This is what makes literature an attractive tool for a law researcher. Literature sheds light on legal loopholes, legal rhetoric, and moral attitudes expressed by the law.[11] Through the use of symbols, literary texts illustrate the problems associated with adopting a given concept of law. On the other hand, stories read from an early age shape our personality and value system, but they also affect how we perceive the law. They build our view of what the law is and what lawlessness is. Literature shows the complexity of human nature, which has an impact on the application of the law. There are many novels that show the mechanisms leading to savagery and crime. Well-known examples would be Fyodor Dostoevsky's novel 'Crime and Punishment' and Albert Camus's 'The Stranger'. However, this paper is based on references to another widely known novel, 'Lord of the Flies', by British author William Golding.

The story takes place in the midst of atomic warfare. After an aeroplane crash a group of schoolboys find themselves marooned on a deserted island. Within the first few days, the boys establish a rough and ready form of government and order. Their democratically elected leader, Ralph, urges the rest of the children to enjoy their freedom whilst respecting the agreed rules, as the only way to survive is to work together. Initially, with no adult supervision, their unrestricted freedom is a reason to celebrate. However, their unfettered fun leads to chaos, and when order collapses terror begins to reign. The beginning of oppression is associated with the fear of a beast that does not actually exist. The boys divide themselves into opposing groups. One faction, with Ralph and Piggy in charge, consists of boys who insist monsters do not exist and who are in favour of maintaining the rules and democratic order; the second group, led by Jack and Roger, consists of hunters who want to hunt wild pigs living on the island and claim they will find and kill the monster.

10 Kuisz, J. and Wąsowicz, M., (eds.), *Prawo i literatura. Antologia,* Warszawa 2019, pp. 10–14.

11 Baron, J.B., *Law, literature, and the problems of interdisciplinarity*, in: Kuisz, J. and Wąsowicz, J., (eds.), *Prawo i literatura. Antologia*, Warszawa 2019, p. 39.

They are not interested in adapting to the rules. Over time, the group of hunters inverts the process of hunting for the sake of survival to that of hunting to murder one of their own kind.[12] Joyful, innocent children turn into dangerous beasts, into murderers.

By placing children on a paradisiacal island, isolated from European civilization, the writer shows the mechanisms that govern people. As a moralist, the author examines the sources of evil in human beings. In an illustrative manner, he tries to present factors that drive people to commit crime and lead them to choose authoritarian leaders. Using symbols, Golding describes how people turn away from the rule of law and incline towards moral chaos. His parabolic story about human nature also provides a reflection on the nature and role of law in society. Golding perceives law as something undoubtedly good in itself. The law protects democracy and the values that seem to be objective, which corresponds to the concepts of natural law.

William Golding and the idea of law: two concepts of law

Specific yet universal, 'Lord of the Flies' by William Golding has become a classic listed on The Guardian's index of the 100 best novels written in English. The tale provides numerous interpretative possibilities and many themes, including ideas about the importance of law and its role in society. Golding uses the concept of law as the opposite of disorder. It determines the code of conduct and moral standards. The significance of law is illustrated by symbols, of which the conch shell is the main one. Found by Piggy, the shell becomes a symbol of parliamentary order, as only the one holding it during the boys' meetings had the right to speak. This rule shows that the conch stands for law and order, a key feature of a democracy.[13] The symbolic end of democracy on the island comes with the destruction of the conch shell. The rules that protected the democratic system of government on the island and guaranteed the children's freedom from violence would cease to apply. The term 'rules' is used by Golding only in a positive sense. Breaking the rules opens the way to tyranny. Ralph realises that risk and his words bear witness to the fact: 'the rules are the only thing we've got!'[14] He is trying to stop the schoolboys from

12 Woodward, K., *The case for strict law and order*, in: Swisher, C. (ed.), *Readings on Lord of the Flies*, San Diego 1997, p. 91.

13 Bruns, B., *The symbolism of power in William Golding's Lord of the Flies*, Karlstad 2008, p. 1, https://www.diva-portal.org/smash/get/diva2:132457/fulltext01(accessed 05.06.2020).

14 Golding, W., *Lord of the Flies*, New York 1988, p. 92.

following their primal instincts, since that would mean losing their entire sense of humanity and morality. Therefore, Ralph is portrayed as a defender of principles and objective morals, while the actions of Jack's tribe are a denial of the law because they move away from the established rules and morality.

The idea of law presented by Golding is a part of the theories of natural law, which date back to antiquity and were further developed by mediaeval Christian scholarship. Proponents of natural law believe that the law is closely related to morality and that a norm 'cannot become legally valid unless it passes a certain threshold of morality'.[15] The law must conform in its content to the universal morality in order to become binding law. That is to say, natural law advocates maintain that the moral content of norms forms part of the conditions of legal validity; therefore, an applicable law is, by necessity, morally good.[16] Consequently, the law is implied to be objective and universal. According to proponents of natural law, the character of the law is expressed by the maxim originating with St Augustine and repeated by Thomas Aquinas: 'A law that is not just seems to be no law at all.'[17] St Thomas perceived natural law as 'something appointed by reason'.[18] He further explains that the first principle of practical reason is founded on the precept that 'good is to be done and pursued, and evil is to be avoided'.[19] Accordingly, law is understood as an instrument of great good, but at the same time it could become an instrument of great evil. In such circumstances, it loses its meaning as a law, but it actually becomes a source of 'normative lawlessness'. Thus, law is used to cloak inherently lawless decisions.

After the catastrophe of Nazism and the victory of communism in so many countries, the international community and legal scholars wondered about the importance of the rule of law when the law violates the fundamental freedoms of the individual. That is why the ideas that the legal validity of a norm is at least partly conditional on its moral content and that there is no strict separation of law from morality have been revived in post-war philosophy of law. Gustav Radbruch was one of legal theorists deeply affected by the evil done during the Second World War, often under the rubric of law.[20] He argued, as did medieval theologians, that

15 Marmor, A., *Law in the age of pluralism*, New York 2007, p. 37.

16 Ibidem.

17 Aquinas, T., *Summa Theologica*, translated by Fathers of the English Dominican Province, 1947, Parts I–II, q. 96, art. 4, https://www.ccel.org/a/aquinas/summa/home.html (accessed 06.06.20200).

18 Ibidem, Parts I–II, q. 94, art. 1.

19 Ibidem, Parts I–II, q. 94, art. 2.

20 Bix, B.H., *Radbruch's formula and conceptual analysis,* "American Journal of Jurisprudence" 2011, Vol. 56, p. 45, https://ssrn.com/abstract=2017942 (accessed 25.10.2020).

an unjust rule loses its status as a valid legal norm (the Radbruch Formula).[21] The modern version of natural law theory has been also articulated, in different ways, by John Finnis,[22] Jacques Maritain,[23] and Lon Fuller.[24] All of these scholars differ in their theoretical concepts, but they share the idea of a connection between the law and morality. They maintain that settling what the law is depends on moral reflections about what it ought to be, and that the justification of the modern rule of law requires recourse to the theory of human nature, moral goods, and values.[25]

These natural law concepts were in line with the ideological atmosphere of the post-war period, noticeable in the literature of that period. Besides Golding, other twentieth-century novelists and poets also drew attention to the ethical component of the law, criticizing legal systems based on ethical nihilism.[26] By appealing to the imagination of the reader, the writers created catastrophic visions of the collapse of Western civilization by destroying freedom and trampling people's dignity in the name of a new order. The novelists show the enslavement of a man by ideologies which are trying to redefine the concept of morality. Setting aside objective morality and the negation of the existing values brought misfortune on literary characters and, by implication, to humanity. That way, literary fiction supported theories postulating the inseparability of law and morality, illustrating the negative consequences of breaking this relationship.

Such an approach was in opposition to legal positivism, which developed during the 18th and 19th centuries and dominated Western philosophy of law until the outbreak of World War II. Legal positivists claim that the conditions of legal validity cannot depend on the moral merits of the norms. They believe that the question of what the law is must be kept separate from the question of what the law ought to be.[27] World War II was a sort of litmus test for legal positivism. The Third Reich's institutions constituted law in accordance with the positivist criteria of legality, but in violation of fundamental ethical principles. Thus, after World War II, legal

21 Ibidem.

22 See Finnis, J., *Fundamentals of ethics*, Oxford 1983 and Finnis, J. et al., *Nuclear deterrence, morality, and realism*, Oxford 1987.

23 See Maritain, J., *The Rights of man and natural law*, translated by Anson, D.C., New York 1943.

24 See Fuller, L., *The morality of law: revised edition*, London 1969.

25 Cf. Covell, C., *The defence of natural law: a study of the ideas of law and justice in the writings of Lon L. Fuller, Michael Oakeshot, F.A. Hayek, Ronald Dworkin, and John Finnis*, London 1992.

26 See Koestler, A., *Darkness at noon*, New York 1941; Orwell, G., *Nineteen eighty-four*; translated by Mirkowicz, T., Kraków 2004; Jastrun, M., *Z pamiętnika byłego więźnia obozów koncentracyjnych*, in: Jastrun, M., *Wiersze zebrane*, Warszawa 1956, pp. 470-471; Miłosz, Cz., *Zniewolony umysł,* Kraków 2011; Wojnowicz, W., *Moskwa 2042,* translated by Broniatowska, H., Warszawa 1992.

27 Bix, B., *Jurisprudence: theory and concept*, London 1999, p. 31.

scholarship and commentary shifted from unpopular positivist theories of law to natural law concepts.[28] The crisis of legal positivism has led to a profound transformation. One of the most important creators of contemporary legal positivism is Hans Kelsen. The idea that a legal order is a compound of norms and the strict separation of law and morals were the essence of his presentation of the 'Pure Theory of Law'. Kelsen indicated that his theory is an attempt 'to answer the question of what and how the law is, not how it ought to be.'[29] According to Kelsen, the latter is no longer the subject of jurisprudence, but of legal politics. Next, he explains why it is called a 'pure' theory of law, declaring that it only describes the law and attempts to eliminate from the science of law everything that is not strictly law (alien elements). Under the Kelsen's theory, the law should exclude all non-legal elements such as psychology, ethics, the social aspects, and so on. The pure theory of law leaves as the subject matter of legal science only positive law, excluding all external factors.[30] Kelsen also rejects the theory 'that a coercive order, to be regarded as law, must fulfil a minimum moral postulate', emphasizing the relativity of moral values.[31] The validity of legal norms does not depend on whether they comply with moral norms or not.[32] He argued in favour of the relativistic theory of values and postulated that the law should not be analysed in terms of morality.

The problem of the relationship between law and morality is not only a problem that remains in the realm of philosophy and the theory of law, but it has a direct impact on the practice of creating, interpreting, and applying the law. The dispute between legal positivists and natural law theorists is very current. The opponents of combining law and morality see a threat in natural law concepts, being afraid that in reference to morality various social groups will be deprived of their important freedoms, such as the right to euthanasia, the right of sexual minorities to marry and adopt children, or the right of women to contraception and abortion. They try to show that these freedoms also express values, denying the objectivity of values and referring—like Kelsen—to the pluralism of values, which is in fact moral relativism. This is reflected in contemporary literature dealing with the problem

28 Potrzeszcz, J., *Pozytywistyczna a niepozytywistyczna koncepcja prawa*, "Roczniki Nauk Prawnych" 2005, Vol. XV, No. 2, p. 15, http://czasopisma.tnkul.pl/index.php/rnp/article/ viewFile/2153/2261 (accessed 11.02.2020).

29 Kelsen, H., *Pure theory of law*, translated by Knight, M., Berkeley–Los Angeles 1967, p. 1.

30 Ibidem.

31 Ibidem, pp. 63–65.

32 Ibidem, p. 66.

of minority rights or access to abortion and euthanasia.[33] Contemporary values are being re-evaluated as a response to the suppression of the rights and needs of minorities. The novels of this movement take place in democratic societies. What they reveal is that the cultural and legal norms of these societies need to be changed.

Advocates of such controversial subjects argue that we live in a multicultural and pluralistic society with a wide spectrum of opinions regarding what is moral. This situation requires tolerance of different opinions and attitudes, denying the validity of absolute truths and unchanging moral norms.[34] Such a point of view was also shared by the Supreme Court of the United States, which in 1973 legalised abortion in the USA, justifying its position with the 'right to privacy' that protects a pregnant woman's right to choose whether or not to have an abortion.[35] In this way, by relativizing basic concepts, e.g. the concept of a person, various social groups have an effect on legal regulations and the application of the law. Consequently, the mechanism of devaluating fundamental ideas is not only characteristic of authoritarian and totalitarian systems, but is also used in democratic systems. In the next section of the paper, I discuss some other mechanisms of power and influence on laws, referring to the legal order of both democratic and undemocratic countries.

'Lord of the Flies' as an allegory of society: valuation of liberties and mechanisms of power in democratic and undemocratic countries

The community created by Golding's characters can be seen as an allegory of society. When the boys arrive on the island, they immediately elect a leader to restrain the chaos. They believe that the only way to remain civilised is to create a specific structure that all the children must follow. However, at the same time, rivalry ensues when the boys set about electing a leader. Jack, who loses the democratic vote for leader, initiates the terror on the island. After losing a democratic vote, he is no longer interested in democracy. He chooses to follow another path to gain power,

33 See Atwood, M., *The handmaid's tale,* New York 2006; Zumas, L., *Red clocks*, New York 2018; Vidal, G., *The city and the pillar*; London 1997; Genet, J., *Our Lady of the Flowers,* London 2019*;* Genet, J., *The thief's journal,* New York 2018; Baldwin, J., *Another country*, London 2001; Isherwood, Ch., *A single man,* New York 2013*;* Picoult, J., *Mercy,* London 2013; McDaniel, L.*, Breathless*, New York 2009; Amsterdam, S.*, The easy way out,* Hachette 2016.

34 Kalpakgian, M., *The Right to life and the natural law*, in: Koterski, J.W. (ed.), *Life and learning IX: Proceedings of the ninth University Faculty for Life Conference,* June 1999, at Trinity International University, Deerfield, III, Washington 2000, p. 1.

35 See Judgement of the Supreme Court, *Jane Roe et al. v. Henry Wade, District Attorney of Dallas County*, 410 U.S. 113 (1973), https://cdn.loc.gov/service/ll/usrep/usrep410/usrep410113/usrep410113.pdf (accessed 09.06.2020).

i.e. violence. This resembles situations known from history, when frustration with democracy led to a coup and the introduction of an authoritarian political system. In Western legal orders, with a theoretically stable democracy, anger at democratic political elites and economic dissatisfaction are fuel for political parties that express extreme views.

'Lord of the Flies' provokes discussion and critical thought about the mechanisms of gaining power and control over the others. It is noteworthy that what leads to the erosion of those initial attempts to assert law and order on the island is fear of an imaginary monster. The position of Ralph and Piggy, the boys who support democratic principles, is eroded as fear of the beast quickly grows. Jack's opposition wins popularity among the boys, who see Jack as a defender against the threat of the mysterious beast. Some boys join Jack's tribe to find safety, which he promises: 'If there's a beast, we'll hunt it down!'.[36] Therefore, Jack uses this fear to gain power and then to strengthen his dictatorship. Fear is the source of totalitarian power. Because of their fear, people give up their rights and freedoms. It was also the reason why the characters of Golding's story gave up their liberty and equality. They chose safety over freedom and friendship, considering them less important. Significantly, Jack and Roger—who are supposed to guarantee safety—are more of a threat to the boys than the beast, which did not even exist.

It is not difficult to see an analogy to history. In dictatorial regimes, many people have supported non-democratic regimes or joined the ruling party to gain security. In the late 1970s, the authoritarian ruling party, the Polish United Workers' Party, reached its peak at over 3 million members, i.e. around 15 per cent of the adult inhabitants of Poland. The communist authorities aroused fear, which kept the majority of the public from actively resisting or criticising, and forced them to obey the guidelines and decisions issued by the party leaders.[37] The role of the Polish United Workers' Party was explicitly defined in the Constitution of the Polish People's Republic, amended in 1976, by inserting a clause on the leading role of the Polish United Workers' Party in the task of building socialism, which was the political system of Poland at the time.[38] The Constitution sanctioned the monopoly of power of a particular social group, i.e. members of the Polish United Workers' Party. It might be surprising, but even in contemporary Poland, security seems to be a priority, rather than democracy. Such conclusions are derived by Polish politi-

36 Golding, W., op. cit., p. 92.

37 Wrona, J., *Rola PZPR w państwie i społeczeństwie polskim*, "Pamięć i Sprawiedliwość" 2018, No. 2(32), pp. 61–64.

38 Art. 3(1) of the Constitution of the Polish People's Republic of 22 July 1952, Dz.U. (Journal of Laws) 1976.7.36, consolidated text 1976.02.21.

cal scientist and sociologist Radosław Marzęcki, from a study he conducted among students from Poland and Ukraine. He asked them which value is the most important to them: security, prosperity, or democracy. The last one received the fewest votes.[39] This is the cause for the expansion of control and supervision systems in modern democracies, in which the rights to privacy and freedom of movement are shrinking.

This remark is particularly relevant nowadays, when the world is struggling with a coronavirus epidemic. The COVID-19 crisis is already dictating a compromise between the need to protect public health and the limitation of privacy and other civil liberties. Democratically elected governments are introducing solutions to enable surveillance. One example is Art. 73(13) of the Polish Act of 16 April 2020 on special instruments of support in relation to the spread of the SARS-CoV-2 virus, under which—during an epidemic threat—telecommunications operators are required to provide the Minister of Digital Affairs with the location data of the mobile phones of individuals infected with the coronavirus or under quarantine on order of the Minister and in a manner determined by the Minister.[40] This provision did not meet social resistance, which shows that the fear of an invisible beast—the virus—is stronger than the need to protect privacy.

In Golding's tale, not only is the beast a threat, but Jack also perceives the boys from Ralph's group as a threat. The way he gets rid of his opponents is quite instructive. When he realises that one of the boys cannot be convinced to join his tribe under any circumstance whatsoever, he decides to use torture or murder against his rival. This reflects Golding's own 'experience of the war, … the use of the atomic bombs on Japan, … the Holocaust, and the horrors of Stalinist Russia'.[41] The writer described the methods used in totalitarian systems for fighting political opponents. It should be also noted that the book was published in the 1950s, as the Cold War was intensifying. The Western democratic world was treated as an enemy of the totalitarian systems of communist countries. Fearful of the influx of Western, imperialist ideology the communist states closed their borders. Traveling to Western countries was extremely difficult. During the communist period in Poland, passports were subject to strict regulations and were granted depending on the

39 Marzęcki, R., *Młodzi Polacy myślą przede wszystkim o swoim bezpieczeństwie*, 7.02.2018, Wszystko co najważniejsze, https://wszystkoconajwazniejsze.pl/radoslaw-marzecki-mlodzi-polacy-mysla-przede-wszystkim-o-swoim-bezpieczenstwie (accessed 09.06.2020).

40 Art. 73(13) of the Act of 16 April 2020 on special instruments of support in relation to the spread of the SARS-CoV-2 virus, Dz.U. (Journal of Laws) of 2020 item 695.

41 Baker, J.R., *Golding and Huxley: the fables of demonic possession*, "Twentieth Century Literature" 2000, Vol. 46(3), p. 315.

will of officers of the territorial units of the Ministry of the Interior. Although the Passport Act of 1959 granted every citizen the right to a passport, the 'relevant authority' could derogate from this principle and refuse to issue the document in several cases that were described in general terms which conferred discretionary powers on officers in interpreting the legal provisions. In addition, the refusal to issue a passport did not have to be justified.[42] Today's freedom of movement is an important good. It should be mentioned, however, that in democratic systems there are also limitations of fundamental freedoms justified by the fight against hostile forces. One example is the restrictions introduced in the USA, which were justified by the war against terror. The Patriot Act, signed on 26 October 2001 by President George Bush, allowed, for example, indefinite detention of immigrants suspected of terrorism, searches of electronic devices and business records without a court order, and the use of greater surveillance in the prevention of crime.[43] Therefore, the Patriot Act codified the violation of a number of civil liberties. However, the atmosphere of the threat of terrorism and the widely expressed will to fight Islamic terrorists led to the swift adoption of the controversial act.

Food and other vital resources are often associated with power. Access to food is the central point of many countries' policies. Authoritarian governments use the threat of hunger to maintain power. Food was also a reason why more and more of the boys joined Jack's tribe. Since the boys were bored with eating crabs and fruit, they wanted to get some pork. This decreased Ralph's authority and contributed to the downfall of democracy.[44] Satisfying basic needs was more important than protecting basic freedoms. The rationing of goods used in the Polish People's Republic comes immediately to mind. Basic necessities were strictly rationed for over twenty years of the existence of the People's Republic. Importantly, the rationing had a legal basis, as it was introduced by the resolutions of the Council of Ministers.[45] At the same time, membership in the ruling party came with privileges.[46] This was perfectly illustrated by Stanisław Bareja's films, portraying the disproportions between

42 Passport Act of 17 June 1959, Arts. 4(1), (2), (4a) – consolidated text: Dz.U. (Journal of Laws), of 1967, No. 17 item 81, as amended.

43 The Uniting and Strengthening America by Providing Appropriate Tools to Restrict, Intercept, and Obstruct Terrorism Act of 2001, Sections 215, 216, 412, 505, 115 STAT. 272, PUBLIC LAW 107–56, 26 October 2001.

44 Bruns, B., op. cit., p. 5.

45 See for example, Resolution No. 183 of the Council of Ministers of 27 December 1983 regarding the regulated sale of goods, Monitor Polski (Polish Monitor) 1983.43.250.

46 See Leszczyński, A., *Przywileje partyjnej elity PRL: mieszkania, jachty, wczasy*, 23.02.2015, Gazeta Wyborcza, https://wyborcza.pl/alehistoria/1,121681,17462415,Przywileje_partyjnej_elity_PRL__mieszkania__jachty_.html (accessed 09.06.2020).

the standard of living of party dignitaries and that of ordinary citizens struggling with a shortage of goods. Therefore, the rationing of goods can be perceived as a method for managing the society. Access to basic goods is not a problem in modern, Western, capitalist economies. This does not mean that democratic societies do not experience a conflict of values. Against the background of the current anti-crisis solutions being implemented by countries to limit the consequences of the pandemic, there is a conflict between two values: economic stability and workers' rights. One example is the regulation of another anti-crisis law, the Polish Act of 2 March 2020 on specific solutions related to the prevention, counteraction, and eradication of COVID-19, other infectious diseases, and crisis situations caused by them. Under the provisions of this bill, employers were given the opportunity to limit employees' rights, such as the right to take leave, as well as to reduce employees' remuneration.[47] Consequently, business stability has been recognised as a value that should be protected more than employees' rights.

Conclusions

William Golding's iconic novel, 'Lord of the Flies', provides a rich source of reflection on human nature, society, and the role of law. In this moral parable, the author presents the mechanisms of influencing, subordinating, and taking control over people that are used by humans to achieve their own goals. These mechanisms, described in my work, show that the valuation of civil liberties takes place in both undemocratic and democratic systems. In undemocratic systems, the limitation or even violation of some freedoms is excused by the need to protect another value (usually security) which is presented as being more important. Consequently, the relativization of values is part of a policy that is intended to reinforce the power of the ruling political elite. The law is a tool which confirms this power. An example given in this paper is a provision in the Constitution of the Polish People's Republic on the leading role of one party. In turn, in democratic systems, referring to the pluralism of values, various social groups and their political leaders assert their own interests, often at the expense of another social group, such as Polish regulations on counteracting the effects of a pandemic, which supports the interests of employers at the expense of employees' rights. Legal provisions are only a tangible result of the preceding valuation process, which is part of the legislative process.

47 Act of 2 March 2020 on specific solutions related to the prevention, counteraction, and eradication of COVID-19, other infectious diseases, and crisis situations caused by them, Arts. 15zzzzzr, 15zzzzzu – consolidated text of 16 October 2020, Dz.U. (Journal of Laws) of 2020 item 1842.

Importantly, Golding does not use the notion of law to define the principles and commands given by Jack. The hunters' behaviour is a negation of the law and of civilisation. Only the democratic and peaceful rules introduced by Ralph are the law, as they fulfil the moral requirements. The mechanisms used by Jack are not moral, although he promises his followers security and provides entertainment and food. The adoption of relativistic theories in modern science of law and the rejection of the idea of a relationship between law and morality means that the law ceases to be a barrier against human nature, which is capable of evil, and becomes its tool. While moral chaos is measurable in undemocratic systems, the rules in democratic systems may overshadow this moral incoherence of the adopted legal solutions. Therefore, particular vigilance should be exercised. Limitation of the rights to freedom, privacy, free movement, rest, and adequate wages turns democracy into a façade. Consequently, literature acts as a mirror in which such façade becomes visible.

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