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ARTICLES

Małgorzata Balwicka-Szczyrba*

**SEPARATE REGULATIONS ON DEFECTS IN A DECLARATION
OF INTENT TO ENTER INTO MARRIAGE, AS DISTINCT FROM
GENERAL PROVISIONS OF THE POLISH CIVIL CODE**

Abstract

The aim of this paper is to present regulations on defects in a declaration of intent to enter into marriage and compare them with regulations set out in Articles 82-88 PCC with respect to the scope of the individual defects in a declaration of intent and the ways in which the resulting inconsistencies can be justified.

The paper uses a method of research based on legal doctrine, involving an analysis of legal provisions, especially those set out in the Polish Family and Guardianship Code, the Polish Civil Code, case law and the literature. Methods based on comparative law and the history of law are used as a secondary measure.

The research has shown that a limitation of the catalogue of defects in a declaration of intent as set out in Article 15¹ PFGC and the definition of the scope of the individual defects is justified by the nature of marriage as a lasting relationship. The inconsistencies between these regulations are therefore a deliberate step to implement the principle of permanence of marriage. However, the opinion expressed in this paper is that some of the defects in a declaration of intent to enter into marriage are regulated too narrowly, which is why the debate over amendments to Article 15¹ § 1 PFGC is well worth continuing. Especially relevant here is the *de lege ferenda* postulate to extend the scope of a defect in a declaration of intent set out in Article 15¹ § 1(1) PFGC

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with the defect of no freedom to declare intent to enter into marriage, as well as the postulate to extend the scope of error set out in Article 15¹ § 1(2) PFGC to include error as to civil identity. However, no reasons could be found to extend the catalogue of defects in a declaration of intent set out in 15¹ § 1 PFGC to include ‘ostensible nature’.

Keywords: entry into marriage, defects in a declaration of intent, marriage

Introduction

Defects in a declaration of intent are set out in a statute and classified into specific types of irregularities that arise when making a decision (expressing intent) or accompany demonstration (declaration) of intent, thereby making such a declaration of intent, as defective, possibly legally ineffective.¹ The provisions of the Polish Civil Code (hereinafter ‘PCC’) governing defects in a declaration of intent are set out in Articles 82–86 and applicable to all legal acts under civil law, with the exception of those legal acts whose effects are regulated by special provisions. This *lex specialis*, whereby it is possible to annul a marriage due to a defect in a declaration of intent, is embodied in Article 15¹ of the Polish Family and Guardianship Code (hereinafter ‘PFGC’).² This covers a civil marriage (Article 1 § 1 PFGC) and marriage entered into under canon law or the internal law of any other religious order, and effective under civil law (Article 1 § 2 PFGC). However, the declaration of intent to conclude simultaneously a civil marriage may be defective, not a declaration about concluding a religious marriage.³

The catalogue of defects in a declaration of intent under Article 15¹ PFGC, as well as the manner of their regulation, including the scope of individual defects, deviates from the civil code regulation under Articles 82–88 PCC. Under Article 15¹ § 1 PFGC, a marriage may be annulled if the marriage declaration was submitted a) by a person who, for whatever reason, was unable to consciously

¹ Wolter, A., Ignatowicz, J., Stefaniuk, K., *Prawo cywilne. Zarys części ogólnej*. Warszawa 2018, p. 385.

² Separate regulation of defects in a declaration of intent set out in Article 15¹ PFGC is indicative of the belief that entry into marriage constitutes a legal act, though of a special kind. This is questionable, however, as some authors do not classify acts under family law as legal acts – see Zielonacki, A., *Zawarcie małżeństwa*. Wrocław 1982, pp. 175–188 and literature quoted there.

³ See Domański, M. in: Osajda, K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające KRO*. Warszawa 2015, p. 151.

express his/her intention, b) under an error as to the other party's identity, c) under an unlawful threat from other party or a third party if the circumstances indicate that the person submitting the declaration could fear serious personal danger to himself or another person. In the absence of a specific reference to Articles 82–88 PCC, general provisions cannot be applied, even by analogy.⁴

This paper analyses the issues of the regulation of defects in a declaration of intent to enter into marriage which is different to general provisions set out in Articles 82–88 PCC in the aspect of individual defects as well as reasons for the existing divergences.⁵

Separate regulation of defects in a declaration of intent in Article 15¹ § 1 PFGC – general discussion

At the outset, it is a good idea to try to explain the model applied by the legislator, in which the definition of a defect in a declaration of intent, as set out in Article 15¹ § 1 PFGC, is considerably more narrow than its general regulation known from Articles 82–88 PCC. The rationale for the existing discrepancy should be sought in the nature of the institution of marriage.

Among the fundamental principles at the core of Article 18 of the Polish Constitution⁶ and provisions set out in the family and guardianship code is the principle of protection of marriage as a lasting union.⁷ Marriage is legally designed to be a stable institution due to its role in society. The reason for this is that marriage involves one of the most private spheres of human life, and entry into a marital union determines the person's legal situation, for example, by creating a new marital status of a husband and a wife, and also because marriage is the nucleus of the basic building block of society – the family.⁸ Special protections applied to marriage call for a detailed definition of protected conditions.

⁴ Gajda, J., in: Smoczyński, T. (ed.), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*. Warszawa 2014, p. 184.

⁵ This article omits questions relating to discrepancies as to sanctions, which – though interesting as research subjects – would go far beyond the scope of this paper.

⁶ Thus in Kalus, S., *Konstytucyjne źródła zasad polskiego prawa rodzinnego*, in: *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego*. Kraków 2003, p. 107.

⁷ The principle of permanence of marriage is singled out by numerous authors, such as Ignatowicz, J. and Nazar, M., *Prawo rodzinne*. Warszawa 2016, p. 102.

⁸ Cf. Piasecki, K., *Prawo małżeńskie*. Warszawa 2011, p. 148.

Without that, these protections would often be pointless. Therefore, if the principle of permanence of marriage can be derived from legal provisions, then it must be given extraordinary axiological, functional and hierarchical importance against other legal regulations.⁹ As a consequence, due to the principle of permanence of marriage's expressing essential values which underlay the legislator's introduction of given regulations, their interpretation should be carried out with taking it into account.

The presented reasoning for the legislative framework governing defects in a declaration of intent in the PFGC is additionally supported by a historical analysis. The institution of defects in a declaration of intent when entering into marriage was only introduced to the family and guardianship code by an amendment of 24 July 1998¹⁰ (over 20 years ago).¹¹ Since the entry into force of the PFGC, in the absence of possibilities to apply a general code regulation, the only way to dissolve a defective marriage has been by divorce, as the possibility of applying analogy with Article 82–88 PCC has been rejected.¹² This clearly shows that the legislator's intention there was for marriage to be dissoluble only in extraordinary circumstances. With respect to marriage as a lasting union, it should be stressed that the legal instruments capable of contesting a marriage's right to exist should be carefully limited by the legislator and availed of under valid circumstances.

At the same time, we cannot ignore the fact that, as there was a lack of regulations of defects in a declaration of intent, legal scholars have been involved in a debate over the need to take them into consideration.¹³ It has been rightly pointed out that the absence of regulations on defects in a declaration of intent in PFGC is somehow detrimental to the principle of marital permanence, because

⁹ Cf. Leszczyński, L. and Maroń, G., *Pojęcie i treść zasad prawnych oraz generalnych klauzul odsyłających. Uwagi porównawcze*, "Annales Universitatis Mariae Curie-Skłodowska" 2013, No. LX(1), p. 83.

¹⁰ Dz. U. (Journal of Laws) of 1998, No. 117 item 757.

¹¹ Defects in a declaration of intent were covered under previous regulations; for example, Article 5 of the Decree of 25 September 1945 stipulates marriage is validly concluded if the spouses' declarations of intent to enter into marital relations are free from defects and made in a manner provided for in the law. The Family Code of 1950 made no mention of defects in a declaration of intent.

¹² See Supreme Court judgment of 8 October 1952, C 1809/51, NP 1953, No. 6, p. 56.

¹³ See more on the subject in Pietrzykowski, K., *Wpływ wad oświadczenia woli nupturientów na ważność małżeństwa*, "Studia Prawnicze" 1980, No. 2, pp. 132–136 and literature quoted there. The author makes *de lege ferenda* postulates for introducing such regulations – p. 153.

a larger number of marriages are then dissolved by divorce.¹⁴ However, the introduction of the proposed legislation had to harmonize with the essence of marriage and fundamental principles of marital law, hence the departure from the model provisions set out in Article 82-88 PCC was justified.

Considering this, it should be assumed that, firstly, the regulation of defects in a declaration of intent, as laid down in PFGC, is justified by its preventive function.¹⁵ Secondly, the essence of marriage and its role in society accounts for the limitation of the scope of defects in a declaration of intent, as compared with general regulations laid down in PCC. However, this does exclude the validity of an in-depth analysis of defects in a declaration of intent set out in Article 15¹ § 1 PFGC as compared to PCC provisions, including through an assessment of detailed arrangements presented below.

Inability to consciously express intent

The first defect in a declaration of intent set out in Article 15¹ § 1(1) PFGC is inability to consciously express intent.¹⁶ A declaration of intent to enter into marital relations is deemed to be defective if made by a person who, for whatever reason, was unable to consciously express his/her intention. Within the meaning of this provision, the inability to consciously express one's intention refers to the declaration of intent to enter into marriage and therefore not to formalities preceding entry into marriage, including the grant of a power of attorney to enter into marriage. In the second case, however, the principal may assert nullity of the power of attorney on general terms set out in PCC. What should be noted with respect to Article 82 PCC is the different construal of the discussed declaration of intent whereby 'defect' extends to cover not only a condition precluding conscious and free decision-making but also expression of intention.

¹⁴ See Ignatowicz J., in: Piąkowski, J. (ed.), *System prawa rodzinnego i opiekuńczego*. Warszawa–Łódź 1985, p. 140.

¹⁵ *Ibidem*, p. 166.

¹⁶ The sanction prescribed in the event of defects set out in Article 15¹ PFGC is the possibility of invalidating the marriage, which is in support of the Supreme Court's opinion that no valid claim can be made to establish the non-existence of a marriage so concluded by asserting failure to make a declaration of intent to enter into marriage due to being in a state precluding a conscious expression of will (Article 151 § 1(1) of PFGC) – Supreme Court judgment of 22 February 2012, IV CSK 240/11, LEX no. 1217052.

An investigation of the decision-making stage suggests that the PFGC model, whereby decision-making done not consciously or freely is legally irrelevant, is sensible. This is because the law provides for effective and arguably sufficient measures to prevent decisions to enter into marriage in such a condition. These measures are set out particularly in Article 4 PFGC where a 1-month waiting period must expire before marriage can be effected, and Article 12 PFGC listing mental illness and mental retardation as impediments to marriage.¹⁷ Additionally, it should be appreciated that the plea of lack of consciousness or lack of freedom could be abused by parties wishing to release themselves from the legal effects of marriage. The subsequent stage of expressing intent certainly verifies the validity of the first, decision-making stage.

In the light of Article 15¹ § 1 PFGC lack of consciousness is legally relevant for making a declaration of intent to enter into marriage, i.e. making a declaration to the registrar of vital records or an officiating clergyman. The legislator is silent on the causes of lack of consciousness, meaning that it could be any circumstance e.g. arising out of the declaring party's old-age dementia or abuse of psychoactive substances, such as medications, alcohol or drugs. Fault or complicity in bringing about the absence of consciousness of the person making a declaration of intent is immaterial, as is also the question whether the cause of lack of consciousness is of permanent or temporary duration.¹⁸ Satisfaction of conditions set out in Article 12 PFGC bars Article 15¹ § 1 (1) PFGC and so the grounds for nullifying marriage are provided by the impediment of mental illness or mental retardation. As a consequence, it is not necessary to determine whether the declaring party made the declaration in a condition precluding conscious expression of will.¹⁹

A doubt appears with respect to Article 15¹ § 1 PFGC whether failure to qualify a condition in which one is not free to express one's will as defective is a purposeful step. The quality of 'consciousness' is substantially different from 'freedom' as confirmed by the use of both these terms in Article 82 PCC. PFGC's omission of the defect of lack of freedom is noteworthy, for the inability to act freely does not always mean the inability to consciously express one's

¹⁷ See Smoczyński, T., *Nowelizacja prawa małżeńskiego*, "Państwo i Prawo" 1999, No. 1, p. 30.

¹⁸ See Domański, M., op. cit, p. 152.

¹⁹ Thus in Borysiak, W., in: Wierciński, J. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*. Warszawa 2014, p. 167.

intentions.²⁰ Consciousness understood as the ‘the ability to perceive’²¹ presupposes making a declaration of intent with full cognizance of its legal effects. Freedom in turn assures making unrestricted declarations of intent without being bound by any constraints.²² It is rightly pointed out that in the light of Article 15¹ § 1(1) PFGC making a declaration of intent to enter into marriage, made in a state of drug hunger (a condition excluding free declaration of intent) would not necessarily constitute grounds for nullifying the marriage (for it does not always exclude conscious declaration of intent). However, Article 82 PCC would allow invalidating a declaration of intent so made.²³

After examining this issue, we cannot help but agree that it is rather questionable to narrow down this defect in a declaration of intent to refer only to a lack of consciousness when making a declaration of intent to enter into marriage.²⁴ Controversies arise as to its compatibility with the New York Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962, to which Poland is a party.²⁵ Under the Convention’s Article 1, consent to marriage should be full and free. Therefore, extending the scope of a defect by the quality of ‘lack of freedom’ is justified in the context of model general provisions in Article 82 PCC, as well as obligations under international law. It would be difficult to find legitimate reasons to omit the defect of ‘lack of freedom’ when performing this particular legal act, that is entering into marriage. In this case, marriage is established by a declaration of intent made by a person limited in his actions, whose conduct is restrained by internal or external factors, and as such results in a defective declaration of intent. The principle of permanence of marriage should not allow the existence of relationships established under such conditions.

²⁰ See Balwicka-Szczyrba, M., *Wady oświadczenia woli przy zawarciu małżeństwa oraz zawarcie małżeństwa przez pełnomocnika na tle problematyki migracji zarobkowej* in: Stądniczeńko, S., Gołowkin-Hudała, M., Wilk, A. (eds.), *Prawnorożdzinne i społeczne konsekwencje migracji zarobkowej. Wybrane zagadnienia*. Opole 2009, p. 91.

²¹ Szymczak, M. (ed.), *Słownik Języka Polskiego PWN, R–Z*. Warszawa 1999, p. 426.

²² Cf. the definition of ‘freedom’ – *ibidem*, p. 350.

²³ Ignatowicz, J. and Nazar, M. *Prawo rodzinne*. Warszawa 2004, p. 104.

²⁴ Thus *ibidem*, p. 104.

²⁵ Dz. U. (Journal of Laws) of 1965, No. 9, item 53. Poland ratified the Convention in 1964.

Error

Under Article 15¹ § 1(2) PFGC, marriage can be invalidated if the declaration of entry into marriage was made under an error as to the other party's identity. At the same time, PFGC does not provide for deceit as a separate category of error.

In the context of general principles, the idea of 'error' may be understood in multiple ways. This being said, not every error is material under the applicable law. Article 84 PCC makes a distinction of errors in legal acts between material errors of fact and immaterial errors, the latter type being legally irrelevant.²⁶ The error in a legal act performed against payment should be asserted by the disadvantaged party even where he was not at fault for the error, or conscious or able to easily notice the error. The law also requires the error to be objectively substantial in such a way that no reasonable person would make a declaration of intent if he knew the true state of affairs.²⁷

The concept of error in entry into marriage raises doubts as to its scope. Error as to person can be understood as error about the person's civil and physical identity.²⁸ Error about physical identity occurs where marriage is concluded with either the would-be spouse's twin sibling or attorney-in-fact acting on behalf of someone with exactly the same name.²⁹ Error about civil identity relates to the future spouse's marital and personal status. In addition to these, an error about quality may also be asserted whereby one of the spouses is mistaken as to the other spouse's personal characteristics, such as sexual orientation, ability to have sex or dependence on intoxicating substances.

Jurisprudence sways in favour of the view that the legislator in Article 15¹ § 1 (2) PFGC refers only to the error as to the other person's identity.³⁰ If 'iden-

²⁶ The legislator takes this into account in matters of succession (Article 945 § 1 PCC) and in the case of deceit (Article 86 PCC).

²⁷ Wolter, A., Ignatowicz, J., Stefaniuk, K, op. cit., pp. 309–310.

²⁸ An extensive discussion of errors in entry into marriage is found in Pietrzykowski, K., in: *Kodeks rodzinny i opiekuńczy. Komentarz*. Warszawa 2018, pp. 224–226.

²⁹ See Preussner-Zamorska, J., *Wady oświadczenia woli na gruncie prawa rodzinnego (ocena aktualnego stanu prawnego i wnioski de lege ferenda)*, in: Sołtysiński, S. (ed.), *Problemy kodyfikacji prawa cywilnego (studia i rozprawy)*. Księga pamiątkowa ku czci profesora Zbigniewa Radwańskiego. Poznań 1990, pp. 543–544.

³⁰ Thus in Strzebińczyk, J., *Prawo rodzinne*. Kraków 2003, p. 112; Balwicka-Szczyrba, M., op. cit., p. 93.

tity' means being the same, or identical³¹, the error is construed very narrowly. In this line of argument, error under Article 15¹ PFGC does not include a misconception about the other person's marital or personal status³², not to mention the ability to have sex, homosexuality or pathological genetic heritage³³, which can only be cited as a cause of cessation of marital relations and therefore a ground for divorce. The predominating view is that the provision cannot be explained in more detail, although there are minority opinions to the contrary.³⁴

In view of the provisions of Article 1 of the New York Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962 which mention full and free consent to marriage, it is clear that PFGC does not exhaustively transpose these provisions. A survey of foreign legislation also suggests a significantly broader understanding of error as a defect in a declaration of intent.³⁵ For example, in the French legal system, defects in a declaration of intent to enter into marriage include error as to person or personal characteristic (Article 180.2 of BGB). Similarly, Swiss law also includes error as to person or material characteristics of the person as defects. This is also the case for marriages entered into without intention.³⁶

A broad interpretation of error also follows from a survey of canon law.³⁷ For the purpose of comparison, it is good to point out that assertion of nullity of marriage under canon law as a result of error is one of the most frequently invoked premises for decisions of ecclesiastical courts.³⁸ Canon law specifies three types of error: error about a person (canon 1097 § 1); error about a quality of the person (canon 1097 § 2); error about a quality of the person as a result of

³¹ Szymczak, M. (ed.), op. cit., p. 481.

³² See in Haak, H., *Nowelizacja prawa rodzinnego*, "Monitor Prawniczy" 1999, No. 33, p. 158.

³³ See in Smoczyński, T., op. cit., p. 31.

³⁴ See in Gajda, where error as to physical identity includes error as to marital status – Gajda, J., op. cit., p. 186.

³⁵ Arguments in comparative law are extensively analysed by Nesterowicz, M., *Błąd co do osoby jako przyczyna unieważnienia małżeństwa (uwagi de lege ferenda)*, "Państwo i Prawo" 2009, No. 4, pp. 20ff.

³⁶ Ibidem, pp. 22, 26.

³⁷ More on error in canon law in Pawluk, T., *Prawo kanoniczne według kodeksu Jana Pawła II. Volume III. Prawo małżeńskie*. Olsztyn 1996, p. 160.

³⁸ Ibidem, p. 160.

deceit (canon 1099); legal error about the unity, inseparability and sacramental dignity of marriage (canon 1098). Marriage made in error about the person is invalid, but the error should be objective, substantial and related to the person taken in matrimony.³⁹ On the other hand, entry into marriage in error about the person's quality (nationality, marital status, profession) does not affect its validity unless such a quality is explicitly required or essential (canon 1097 § 2).⁴⁰ A third type of error recognized in canon law is deceit, which results in the nullity of marriage if it relates to a quality of the party, which by its nature may seriously disrupt marital relations (e.g. infertility). The purpose of deceit is to inveigle the other party into marriage.⁴¹ The last type of error, one relating to the unity, inseparability and dignity of the marital relation, nullifies the marriage if it was relied upon by the declaring party in expressing his/her intent.⁴²

With respect to the above reservations relating to the interpretation of provisions in Article 15¹ § 1(2) PFGC as well as arguments in comparative law, calls have been raised in the judiciary community to extend the scope of error as a nullifying premise.⁴³ This stance should be shared but only in so far as the proposed legislative amendments remain within a strictly designated spectrum. In order to serve the interests of entrants into marriage, an error in making a declaration of intent to enter into marriage as a defect in a declaration of intent should relate to physical and civil identity, including the entrant's physical qualities making up his marital or personal status. In my opinion, it remains doubtful whether the extension of the scope of error should go so far as to cover errors about a quality, for these could be abused by persons unsatisfied with their marriage.⁴⁴ Quality is a characteristic feature of a person or of a thing.⁴⁵ Such an interpretation of this concept would lead to undesirable effects, espe-

³⁹ Ibidem, p. 160.

⁴⁰ See Góralski, W., *Błąd co do przymiotu osoby (kan. 1097 § 2 k.p.kan.)*, "Ius matrimoniale" 1994, No. 4, pp. 48–49.

⁴¹ Góralski, W., *Kanoniczne prawo małżeńskie*. Warszawa 2000, p. 98.

⁴² Ibidem, p. 98.

⁴³ Thus in Sokołowski, T., *Zawarcie małżeństwa przez chorego na ciężką chorobę zakaźną*, "Gdańskie Studia Prawnicze" 2003, No. X., p. 16; Nesterowicz, M., op. cit., p. 30.

⁴⁴ This problem has been pointed out by Jerzy Strzebińczyk, arguing that if invocations of error as to a quality of a person are allowed, the semantic scope of 'a quality' could be extended to include 'state of health' – Strzebińczyk, J., op. cit., p. 115.

⁴⁵ Szymczak, M., op. cit., p. 682.

cially attempts to nullify the marriage by claiming error as to essential personal qualities required by one party but absent from the other despite assurances.

Threat

Under Article 15¹ § 1 (3) PFGC, marriage may be nullified if entered into under unlawful threat by the other party or a third party if it follows from the circumstances that the declaring party had reason to fear that he or another party is in serious danger with regard to person or property. Threat mentioned in Article 15¹ § 1(3) is present when the threat and its execution is determined by the threatening party. A threat is considered to be unlawful if it violates the applicable laws and principles of community life.⁴⁶ Such a threat should be serious and rational. It is rightly maintained that any assessment of whether a threat is serious should look at both the subjective and objective side of the situation, in particular the perpetrator's age and mental condition and the kind of impending danger.⁴⁷ It is not necessary that the person making a threat directly demand a declaration of intent for such a declaration to be considered to have been made under an unlawful threat; it is sufficient that the declaration was necessary to avoid the effects of the threat.⁴⁸

When comparing a defect in a declaration of intent made under threat as set out in Article 15¹ § 1(3) PFGC with that discussed in Article 87 PCC, it can be observed that these regulations share a great number of similarities. Therefore, the opinion holds true that where detailed issues are concerned it is acceptable to draw upon legal scholarship formed around Article 87 PCC.⁴⁹ In PCC, a threat is present when a person, in order to force another person to make a declaration of intent, announces the use of measures that will result in negative consequences for their intended recipient or a third party. The threat mentioned in Article 87 PCC is premised on unlawfulness and the recipient's reasonable fear that he or another person is in danger. In other words, the threat must be serious. The difference between a threat on general terms and threat under Article 15¹ PFGC is that

⁴⁶ Cf. Supreme Court judgment I CKN 1134/99, LEX no. 53282 in which it was pointed out that a threat involves unlawful action or exercising formally lawful actions for a purpose for which they cannot be exercised legally.

⁴⁷ Domański, M., op. cit., p. 157.

⁴⁸ See Supreme Court decision of 15 October 1946, C III 597/46, OSN 1947, No. 3, item 48.

⁴⁹ Thus in Smoczyński, T., op. cit., p. 53.

– pursuant to Article 87 PCC – danger to both the person and property is legally significant, while Article 15¹ § 1(3) PFGC mentions only danger to the person.

Threat defined as including only danger to the person may be a little controversial. Cases exist where a marital union was entered into for fear, sometimes even serious fear, arising from economic motives. In the case of a special legal act, such as entering into marriage, this kind of fear is legally immaterial due to the nature of marriage as establishing personal relations that far outweigh relations of a financial nature. The PFGC treatment of threat as a defect in a declaration of intent should therefore be considered correct.

The problem of omission of the defect of ‘ostensible nature’

Article 15¹ PFGC omits ‘ostensible nature’ as a defect in a declaration of intent and so entry into marriage on false pretences does not allow a *de lege lata* avenue for its invalidation. No grounds exist to justify reference by analogy to Article 83 PCC, for it is difficult to claim a legal loophole in this case.⁵⁰ Some scholars are of the opinion that ‘ostensible nature’ should be made a defect in a declaration of intent to enter into marriage, but these are rightly criticized⁵¹ minority views.⁵² The view cannot be supported by invoking the Foreigners Act of 12 December 2013⁵³ due to the different purpose of the act as a whole, and also due to the function of the act’s Article 169 introduced to counteract abuses of law in obtaining residency permits.⁵⁴

It should be noted that ‘ostensible nature’ as defined in Article 83 PCC is in fact at variance with marriage as a specific legal act. This is – firstly – because the model construction of ‘ostensible nature’ relates to bilateral acts, while entry into marriage involves making declarations of intent to the registrar of vital records or an officiating clergyman. Therefore, the participation of an official component

⁵⁰ See Pietrzykowski, K., in: Pietrzykowski, K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*. Warszawa 2018, p. 229.

⁵¹ See Pietrzykowski, K., *Wpływ*, p. 149 and the literature quoted there.

⁵² Thus in Kozaczka, A., *Wady oświadczenia konsensu z art. 1 kodeksu rodzinnego a nieważność małżeństwa*, “Nowe Prawo” 1957, No. 9, p. 53.

⁵³ Dz. U. (Journal of Laws of 2018), item 2094, consolidated text.

⁵⁴ See judgment of the Supreme Administrative Court in Warszawa 19 October 2016, II OSK 2628/15, LEX no. 2169082. A discussion of this issue was taken up by Lewandowska, E., *Pozorność oświadczenia woli. Studium cywilnoprawne*, Olsztyn 2018, pp. 202ff.

precludes such a defect, for entry into marriage is not a purely bilateral construct. Secondly, entering into marriage produces legal effects not only for the parties but for the country and society as a whole. As the nature of marital bonds is not entirely the spouses' private matter, the implicit contract existing between them should be of no legal consequence.⁵⁵ Thirdly, it should be assumed that where a will to make a declaration of intent to enter into marriage is absent, it results in making declarations not seriously which then means that no marriage has been formed and there are reasons to regard it as non-existent (*matrimonium non existens*). To resolve this problem, we need to view it on a different level by considering the question of whether or not the marriage exists rather than whether it should be nullified as defective.

With the above arguments in mind, the omission of 'ostensible nature' in Article 15¹ PFGC as a defect in a declaration of intent seems to have been intended by the legislator. The general provisions in Article 83 PCC cannot be applied here, not even by analogy.⁵⁶ Legislating on 'ostensible nature' would lead to numerous practical problems where a lot of discontented spouses would attempt to claim that their marriage was concluded as a result of ostensible declarations⁵⁷. Its omission is justified by the principle of permanence of marriage.

Conclusions

The amendment to the PFGC of 24 July 1998 introduced the possibility of invalidating a marriage in the event of defects in a declaration of intent. Despite the 20-year period that has passed since then, the provisions of Article 15¹ § 1 PFGC continue to give rise to doubts as to their interpretation, in particular due to the different scope of regulation of such defects, compared with general regulations in Articles 82–88 PCC.

The considerations contained in this article suffice to conclude that a limitation of the catalogue of defects in a declaration of intent, and a different definition of the scope of individual defects, is justified by the nature of marriage as

⁵⁵ Pietrzykowski, K., *Wpływ*, p. 149.

⁵⁶ See Gajda, J., *op. cit.*, p. 184.

⁵⁷ It was noticed as early as in the 1924 Marriage Law bill that 'it is common that reasons based on defects are fictitious' quoted in Kozaczka, A., *op. cit.*, p. 53. The problem of abuse of this legal provision is also pointed out by Strzebińczyk, J., *op. cit.*, p. 112.

a lasting institution. The nature of marriage and its function within society justify the inconsistency in the analysed legal regulations.

This thesis does not, however, prejudice the opinion expressed in this paper, that the regulation of some defects in a declaration of intent to enter into marriage is too narrow and so the debate over amendments to Article 15¹ § 1 PFGC is well worth continuing. Especially relevant here is the *de lege ferenda* postulate for extending the scope of a defect in a declaration of intent as set out in Article 15¹ § 1(1) PFGC by a defect of no freedom of a declaration about entering into marriage, as well as the postulate to extend the scope of error within the meaning of Article 15¹ § 1 (2) PFGC by error as to civil identity. Such a modification of defects would provide entrants into marriage with better protection against the effects of declarations of intent made in a defective manner.

No grounds could be found for extending the catalogue of defects in a declaration of intent set out in Article 15¹ § 1 PFGC to include ‘ostensible nature’. The defect of ostensible nature within the meaning of Article 83 PCC is incompatible as to its substance with the special legal act of entry into marriage if only because of the involvement of the authorities excludes the model construction of a bilateral act. It should be understood that no will to make a declaration of intent to enter into marriage results in making declarations not seriously and therefore marriage never materializes (*matrimonium non existens*).

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OWNERSHIP AND PROPERTY IN COMMUNIST CIVIL CODES OF CZECHOSLOVAKIA

Abstract

The distribution of property in society is a fundament of communist ideology, which in Czechoslovakia was regulated by two Civil Codes. In the process of reforming the entire legal system, the purpose of both codes was, besides property regulation, also to transform the perception of the importance of ownership in society and to change the way people think about the role of property. In order to achieve this, the communist legislation introduced brand new property-rights institutions, which were supposed to replace ownership – in particular, the so-called ‘use’ (*užívání*) of property. The ultimate goal of the communist property reform, however, became so-called socialist ownership, which corresponded to the requirements of communist ideology and which existed in public and individual form.

This article presents the various types of ownership regulated in the Czechoslovak Civil Codes in the years 1948–1989. It also draws attention to some of the pitfalls of applying different forms of property in legal practice, particularly as regards land. It also points out the difference between the political demands placed on property law legislation and the economic reality of the day, which, among other things, contributed to the gradual weakening of the confidence in the Communist Party of Czechoslovakia and eventually led to the fall of the whole regime.

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Ownership of the means of production as well as consumer goods is one of the key issues of communist ideology, which aims to build a centralised economic system that would enable a new model of the social and economic order. The social role of property and ownership was seen by Marxist-Leninist ideology as one of the main elements in the process of transforming the capitalist society into a socialist and subsequently a communist society. The role of law has been reduced to a mere tool to achieve these ideologically motivated political-economic goals.

The new legal concept of property law and particularly ownership was, therefore, one of the main characteristics of the law during the communist era in Czechoslovakia. The new understanding of ownership was based on the objectives of the communist movement and the Soviet political and economic model.¹

The traditional civil law concept of ownership based on Roman law was repeatedly criticised by the communist ideologists due to its individualistic character as well as its close connection to the free-market economy. This was against the collectivistic objective aiming to build a perfectly equal society. Private ownership was seen as a result of a broader concept of private law that was introduced by Roman law. Lenin, therefore, stated: ‘We do not accept anything which is private. For us is everything which regards the economy always public, never private’² This is why also the Czechoslovak Civil Codes of 1950 and 1964 were not considered codes of private law, on the contrary, one of the main objectives of these civil codes was to eliminate the traditional distinction between private and public law since all communist law was officially regarded as public law.³

The new socialist society was, therefore, to be built on the new principles by limiting individual ownership and reshaping the society according to the communist doctrine. As for property, this meant, among other things, that the

¹ Knapp, V., *Vlastnictví v lidové demokracii*, Praha 1952, p. 9.

² Lenin, V. I., *On the Responsibilities of the People's Commissariat of Justice in Conditions of the New Economic Policy – a letter to the People's Commissariat of Justice*. See: Bosiacki, A., *Roman Law in Totalitarian Systems: Soviet Union, Italy and Germany – Case Study*, in: *Au delà frontières, melanges de droit Romain offert à Witold Wolodkiewicz*, Warszawa 2000, vol. 1, 131–138.

³ Bělovský, P., *Občanské právo*, in: Bobek, M., Molek, P., and Šimíček, V. *Komunistické právo v Československu: Kapitoly z dějin bezpráví*, Brno 2009, pp. 425–462.

people were to be discouraged from accumulating property and motivated into changing their ‘property habits’, as it was described by various legal scholars of that time.⁴ This is why in the later period of development of socialist law, especially in the 1960s, the opinion of Soviet specialists, according to which the temporary use of property (in the form of lending or lease) is economically and politically more efficient than ownership, prevailed. Officially, the so-called ‘personal use’ (*osobní užívání*) was declared to be a higher economic form of the disposal of property. The General Secretary of the Communist Party of the Soviet Union N. Khrushchev expressed the thought during his meeting with representatives of French syndicates that in order to meet the demand of the people for automobiles, the industry could produce ten times fewer automobiles when lending to people than selling them directly to them.⁵ As a paradox, new free-market economic models of the 21st century follow a similar idea, as seen by the growing demand for property-sharing (cars, bicycles, etc). However, in contrast to the communist ideology, this trend is spontaneous and based on real demand from consumers.

Two Civil Codes

Shortly after the communist takeover in February 1948, a new Czechoslovak constitution was adopted (already in May 1948), which openly expressed the ‘decision to build a people’s democracy’ and proclaimed the determination to take the path to socialism. As part of the initiated reform of the entire legal order, a new Civil Code was adopted in 1950, based on the recently adopted constitution. The Civil Code of 1950 (‘CC1950’) was an ideologically influenced statute that, among other things, was supposed to contribute to the process of changing the property habits of the people in order to prepare the ground for socialism. CC1950 was officially proclaimed as ‘the people’s code’, a code for the modern era, while at the same time the Austrian Civil Code (ABGB) that it was to replace was depicted as a symbol of the past.

The subsequent development of the society in the 1950s could be characterised as the conservative period of the communist regime. Inspired by

⁴ Dvonč, F. and Štěpina, J., *Návrh nového občanského zákoníka – zákoníka socialistické společnosti*, “Právní obzor” 1963, No. 3, p. 161.

⁵ Khrushchev, N. S., *Moskovskaia Pravda*, April 2, 1960; Dvonč, F. and Štěpina, J., *Návrh...*, p. 162.

the Soviet Union, many people opposing the communist regime were imprisoned or even executed. Most private property was confiscated. As a result, the enthusiasm of the Communist Party supporters for building a state providing equal opportunities for all, typical of the beginning of the 1950s, slowly cooled down with the end of the decade. The improving post-war economy began to stagnate and this resulted in a crisis in the beginning of the 1960s. As a paradox, this happened at a time when, according to the predictions of the communist ideologists, the productivity of industry should have increased five times compared to the beginning of the 1950s and socialism should have been achieved.⁶

Instead of openly facing the economic crisis, the Communist Party decided to proclaim that all the objectives of the socialist economy had been reached, the foundations of socialism constructed and that the next generation of Czechoslovak citizens would live in communism.⁷ Further steps were made in socialist legislation to intensify the ideological contents of the key statutes. Considerable amendments were made to the criminal code and new statutes enforcing the socialist regime were promulgated, namely the statute on the state prosecution and a new statute on the state police. All these changes were based on the new constitution of 1960, which changed the name of the Czechoslovak Republic to the Czechoslovak Socialist Republic and proclaimed the leading role of the Communist Party in state affairs.

Based on the provisions of the new constitution, a new Civil Code was introduced in 1964 ('CC1964'). It was aimed at continuing the transformation process initiated by CC1950 and to make the next step – it was to 'prepare society for a life in communism', which was regarded as the final stage of the transformation process by the communist ideologists. This is why compared to the previous code CC1964 was considerably more radical. With the intention to eliminate what was left of the ABGB in the CC1950, the authors of the new code invented new legal institutes that were to replace the traditional ones. Some of the fundamental civil law institutes derived from the Roman law tradition, such as possession, prescription, servitudes, and to some extent also contracts

⁶ Barnovský, M., *K niektorým otázkam spoločenského vývoja Československa v šesťdesiatych rokoch*, in: "Dějiny socialistického Československa" 1989, No. 10, p. 16.

⁷ This was officially declared by Czechoslovak President Antonín Novotný at the meeting of the Soviet Communist Party in 1961. A similar declaration had been expressed already at the meeting of the Czechoslovak Communist Party in 1958.

(!) were abolished. They were replaced by the ideologically acceptable new institutions named 'personal use' (*osobní užívání* – to replace possession and servitudes) and 'services' (*služby* – to replace contracts). The traditional legal entities were replaced by socialist organisations (*socialistické organizace*).

The primary task of the new code was to transform the common way of life and to change the way people think about property. Its purpose, therefore, remained the same as with CC1950, only the process achieving it was intensified, regardless of the fact that the social analysis of the effects of CC1950 on the Czechoslovak population had shown that it had failed in this role. CC1964 contained a preamble openly declaring the main objective to 'lead the society into communism'. Apart from that, it proclaimed the close connection between the law and the state-planned economy and the principal role of the socialist organisations (*socialistické organizace*) that were established in order to 'meet all the demands of the citizens', but in fact were to strengthen the centralisation of the economy. Officially, every person could enjoy the services provided by the socialist organisations to the extent he or she 'contributed to the process of constructing communism'.

In general, all the contents of CC1964 were built on a utopian vision, ignoring the real situation in society. The mistake of this approach was proven by the freedom movement in 1968, suppressed by an invasion by military troops of the Warszawa pact in August of the same year. This is why CC1964 was significantly amended in 1982. Most of the traditional institutions were reintroduced, namely possession and servitudes. Services, however, remained dominant over contracts. Regardless of these partial changes, the character of the whole law remained the same.

At the time of the fall of the communist regime in 1989, this code was still in effect. One of the main tasks of the democratic legislation was to prepare a new code that would suit the democratic society and the market economy. The intensive need for a new code, however, resulted in 1991 in a temporary solution that brought only an amendment of CC1964. At the same time, the preparation of a whole new code, which was expected to take more time, was initiated in the beginning of the 1990s. However, only in 2012, some 23 years after the fall of the communist regime in Czechoslovakia, was the amended CC1964 replaced by a new civil code that returned to the traditional civil law.

Types of property ownership in the socialist Civil Codes

Under the influence of the state ideology, the traditional institutions of property law also obtained new contents. The socialist law treated ownership as a collective institution, emphasizing its economic character: ‘Ownership becomes social, it becomes a productive relationship of the people determined by the new economic and social structure on the socialist basis’.⁸

The socialist understanding of ownership was derived from the Czechoslovak constitution of 1948 and subsequently from CC1950, which introduced the primary division of ownership into three specific forms: socialist ownership, personal ownership, and private ownership.

Socialist ownership

Socialist ownership (*socialistické vlastnictví*) was a collective form of ownership established as an institution by the intensive process of nationalisation and supported by the centrally planned economy. Socialist ownership became a part of the newly introduced concept of civil law and at the same time a counter-balance to the traditional concept of ownership.⁹ It was proclaimed to be a progressive form of ownership since the traditional Roman law-based type of ownership was not suitable for the socialist society and was also considered obsolete. The legislative commentary to CC1950 presented socialist ownership as the shield against the exploitation of workers and it was to provide ‘constant growth of wealth of the workers’.

Socialist ownership should not be, however, understood as equivalent to state ownership.¹⁰ Apart from state property, the object of socialist ownership was also the property of cooperatives and property in personal ownership that had also a socialist character.

According to the official ideology, property in socialist ownership did not belong to the state but to the workers. In practice, however, it was the state that disposed of so-called socialist state property and this is why the state had pro-

⁸ The Legislative Commentary to CC1950, intro., art. 7.

⁹ Venědiktov, A. V., *Státní socialistické vlastnictví*, Praha 1950, p. 357.

¹⁰ Bělovský, P., *Instituty občanského práva 1950–1982*, in: Kuklík, J. (ed.), *Dějiny československého práva 1945–1989*, Praha 2011, pp. 352–354; Karass, A. V. *Obsah práva státního socialistického vlastnictví*, “Sovětskoje gosudarstvo i pravo” 1949, No. 7.

claimed itself the representative of the working class. The ownership of state property, so-called national property (*národní majetek*), was exercised by the state either directly (this was state socialist ownership – *státní socialistické vlastnictví*) or indirectly using the authorities assigned for the administration of the national and community companies (i.e., the socialist legal persons – *socialistické právnické osoby*) later called the socialist organisations.¹¹ These subjects were entitled to obtain socialist property in order to provide services to the public through so-called ‘permanent use’ (*trvalé užívání*).

In order to ensure that socialist property (i.e., national property) was not used for individual benefit, CC1950 restricted the transfer of socialist ownership. This was to prevent the transfer of socialist property to individuals. The products of socialist industry could be transferred to personal ownership (*osobní vlastnictví*) only if they were part of the socialist production designated for personal consumption.

CC1964 continued to distinguish the types of ownership introduced by the constitution of 1948 and CC1950. Unlike CC1950, the 1964 code does not define socialist ownership (it does, however, give a general definition of ownership, see above). It is, however, mentioned by the enacting clause of the code: ‘the constantly developing social production based on the property in socialist ownership is the source of meeting the demands of the citizens; every person is obliged to develop, strengthen and protect this property’. Socialist ownership remained part of the Civil Code until the democratic reform of the law after the revolution of 1989.

Technically, the treatment of socialist ownership by both Civil Codes was very poor. There are many unclear provisions that cause considerable confusion about which property may be in socialist ownership and which would be in personal or private ownership. One of the most significant problems was the question of ownership of land.

Socialist ownership of the cooperatives

A specific form of socialist ownership was the ownership of ‘people’s cooperatives’, or cooperative ownership (*družstevní vlastnictví*).¹² The constitution of

¹¹ Knapp, V. *Operativní správa národního majetku národními podniky*, in: Knapp, V., Isakovič Škundin, Z., and Petržalka, K., *K otázkám nového občanského práva*, Praha 1950, p. 15 ssq.

¹² Bělovský, P., *Instituty...*, pp. 354–356.

1948 presented a definition of these cooperatives: ‘the people’s cooperatives are the unions of the workers associated for the purpose of a common activity aimed to increase the living standard of its members and all the working people, but not to achieve the highest possible profit from the invested capital’.¹³ The ownership of land other than ‘people’s cooperatives’ was not considered socialist ownership. This regarded particularly the so-called ‘private-capital cooperatives’ that had operated on the territory of Czechoslovakia since the 1920s. However, in the beginning of the process of the socialist transformation, even the people’s cooperatives did not meet the standards required by the Communist Party and the socialist jurisprudence. The proper socialist cooperatives as defined by the constitution were to be established later with the achievement of a higher level of nationalisation and collectivisation.¹⁴

Cooperative ownership was thus regarded as a form of collective ownership, in the same way as state ownership (unlike personal and private ownership). Cooperative ownership was nevertheless considered to be a kind of ownership inferior to state ownership. On the scale of the ownership hierarchy, it was therefore placed between state and private ownership and it was this position that determined its limits. In practice, this meant that property capable of being exclusively the object of state ownership was excluded from cooperative ownership, while property capable of being in private ownership was also capable of being in the ownership of the cooperatives.

CC1964 followed the concept of CC1950 regarding cooperative ownership. However, at the time when CC1964 came into effect, the process of collectivisation had made considerable progress and thus the role of the cooperatives was accentuated in the new code. Formally, they were placed among the newly introduced socialist organisations. Apart from the agriculture sector, they played a major role, especially in housing.

CC1964 contained very detailed regulation of the use of apartments and land and at the same time introduced a new institution of cooperative apartments (*družstevní byty*). The very detailed treatment of the legal relationships among the members of apartment cooperatives reflected the newly emerging phenomena of collective use of apartment buildings. The legal regulation of the use of apartments and apartment cooperatives exceeded the measure of detail of any

¹³ The Czechoslovak Constitution of 1948, art. 157.

¹⁴ Knapp, V., *Vlastnictví v naší společnosti*, “Právník” 1949, No. 7–8, p. 308.

other institution contained in CC1964. While the traditional institutions of possession or prescription, reintroduced after the amendment of 1982, were treated in one single article, housing was treated in 69 articles in the code. Likewise, after the amendment of CC1964 in 1982, servitudes were treated in two articles and the regulation of housing became even more detailed. One of the first things that can be observed in CC1964 is, therefore, the significant disproportion in the regulation of various civil law institutions. This, however, demonstrated the level of importance considered by the authors of the communist Civil Code regarding various social topics. The priorities in treating civil law institutions were expressed in accordance with the legislative strategy of the Communist Party.

Personal ownership

Personal ownership (*osobní vlastnictví*) under CC1950 does not pertain directly to the category of socialist ownership.¹⁵ Also, CC1964 does not explicitly mention personal ownership as a socialist type of ownership. Nevertheless, both codes recognised the socialist character of personal ownership and placed it in contrast to private ownership (*soukromé vlastnictví*, see below).

Personal ownership was, along with non-socialist private ownership, a form of individual ownership recognised by the communist legislation and jurisprudence. Both forms of individual ownership were tolerated side by side with socialist ownership, which was the only form of ownership to really meet the ideological standards set by the communist regime. Although personal ownership was in substance contrary to communist principles refusing the individualistic character of the law, it was accepted by the communist legislation. The incorporation of personal ownership into civil law was, therefore, accompanied by a strict limitation of the property capable of becoming an object of this form of ownership.

The new legal concept of ownership constructed by the communist ideologists never went so far as to limit the ownership of consumer goods. Consumer products along with personal things were the only possible objects of personal ownership. All other things (except for some immovables) were allowed to be only in the socialist ownership belonging to all the citizens.¹⁶

¹⁵ Bělovský, P. *Instituty...*, pp. 356–360.

¹⁶ Plank, K. *Osobné vlastnictvo*, “Právny obzor” 1952, p. 418.

In the beginning of the 1950s, personal ownership, just as with socialist ownership, was only starting to function in terms of the constitution of 1948 as well as in terms of the plans of the Communist Party. Accordingly, CC1950 presented only a brief description of personal ownership.¹⁷ The further text of the code does not explicitly distinguish between personal ownership and private ownership. This flaw, which made it difficult to determine the exact limits of personal ownership, was, however, subject to severe criticism in the official law journals of that time.

The group of things that could become an object of personal ownership and thus personal property was strictly limited. Personal ownership was primarily restricted to personal things, consumer products, and personal savings. It was thus the character of the thing that determined the character of ownership. This meant that if the consumer product turned into a means of production, the character of ownership of the thing changed accordingly.

In comparison to the later development of civil law in the 1960s, the regulation of personal ownership established by CC1950 was considerably more liberal. Unlike CC1964, the first socialist Civil Code allowed the personal ownership of land. The personal ownership of land was in CC1964 replaced with 'the personal use of land'. Both codes, however, allowed also the personal ownership of 'family houses'.

A family house in the socialist civil law became a technical term. CC1950 introduced it as one of the possible objects of personal property. The economic character of this kind of object and its placement among the things excluded from socialist property raised many legal questions. This resulted later in the significantly more detailed treatment of the family house as an object of personal ownership in the Civil Code of 1964. The individual ownership of things whose price would exceed the value of consumer products was seen as something that could threaten the socialist environment. Yet, since it was absurd even for communist jurisprudence to consider a family house property belonging to the whole society, it was therefore accepted to consider it again personal property.

In contrast to the previous Code of 1950, however, the authors of CC1964 decided to present a definition of a family house: 'The family house is a residential building in which at least two-thirds of the floor surface is used for living space. The number of rooms in the family house cannot exceed five, not includ-

¹⁷ CC1950, art. 105.

ing the kitchen. This number can be greater only if the total area of the floor surface of the building does not exceed 120 square metres'.¹⁸

The personal ownership of family houses was limited not only by the area of the building but by quantity. Art. 129 of CC1964 fixed the number of family houses allowed to be owned by a person to one single house.

The personal ownership of land was allowed only by CC1950. This fact, however, was not explicitly stated by the text of the code but had to be traced by legal interpretation. CC1964, which was to provide a transition to communism, excluded land from personal ownership and made it an object of socialist property only. The persons were nevertheless even under CC1964 allowed to use land for their personal benefit. From the legal point of view, however, the persons were entitled to do this not by ownership of land but by a newly introduced instrument named 'the personal use of land' (*osobní užívání pozemku*).¹⁹

Although personal use was introduced as an innovation of CC1964, it had its roots already in CC1950, which came up with an instrument called 'the permanent use' (*trvalé užívání*).²⁰ The permanent use of land was to be constituted in favour of socialist legal persons. The lack of any further treatment of this institution by CC1950 made it, however, unclear in its contents. Only art. 158 of CC1950 states that socialist legal persons do not need any consent to construct a building on land in permanent use.

CC1964 followed the treatment of personal ownership in the sense of the communist constitution of 1960, which was supposed to provide the legal basis for life in the new communist society. As a consequence, the treatment of personal ownership by CC1964 became more detailed, on the one hand, and more restrictive as to the objects capable of being in personal ownership, on the other. While CC1950 treats personal ownership (and personal property) in one single article, CC1964 devoted to this type of ownership one whole chapter containing ten articles. In CC1964, personal ownership was mentioned already in the preamble to the code as an important means of meeting the demands of the citizens. The same characteristic is given once again further in the text of the code, which demonstrates the ideological purpose of the statement. The legislative commentary to CC1964 defines personal ownership by three main attributes: 1. the indi-

¹⁸ CC1964, art. 128.

¹⁹ Fábry, V., *Osobní užívání půdy*, "Právnícké štúdie" 1964, No. 2.

²⁰ CC1950, art. 103.

visible connection to socialist ownership, 2. the honesty of the source of personal ownership, 3. the consumer character.²¹

Concerning immovables, CC1964 introduced a radically new perspective towards the disposal of land. If CC1950 implicitly allowed the personal ownership of land (i.e., construction and agricultural land), then CC1964 completely restricted the ownership of any land. This was in accordance with the officially proclaimed ideological statements of the Communist Party because land was considered a means of production. Although CC1964 did not again exclude land from personal ownership explicitly, the text regarding the disposal of land implies that land can be an object exclusively of socialist ownership. Just as with family houses, personal ownership of land was replaced with the newly introduced institution of 'the personal use of land' (derived from the already mentioned 'permanent use of land'). The word 'land' in this case regarded only construction land; the personal use of agricultural land was not possible and could be, therefore, an object of socialist ownership only.

The ban on the personal ownership of land was related to the main ideological proclamation in the preamble to CC1964: 'the land belongs to those who work on it', mentioned already in the constitution of 1948. In practice, this meant that the land belongs to the working class as a whole and cannot be an object of individual ownership.²²

The objective of the ban on the personal ownership of land and its replacement with the more restrictive 'personal use' was to provide control over the disposal of land. According to the new legal concept of ownership introduced by CC1964, socialist property formally belonged to all people. In practice, however, the administration of it was carried out by state officials. This provided an easier position in the realisation of state-directed construction projects (roads, parking lots, etc.). The state authorities did not have to communicate with the owners of the relevant land in order to expropriate the property.

Personal use was not provided to individuals free of charge and the fee was determined by state legislation. The distribution of land for personal use was performed by the state administration. The land ascribed for personal use remained in socialist ownership (administered again by the state) and, therefore, could not be transferred by the person entitled to it for personal use. On the other hand, the

²¹ Knapp, V. and Plank, K. et al., *Učebnice československého občanského práva*, Praha 1965, vol. II., p. 26.

²² Eliáš, K., *Právo osobního užívání pozemku*, "Socialistická zákonnost" 1983, p. 242.

institution of personal use bore certain signs of the *iura in rem* which brought it very close to regular ownership. The duration of personal use was not limited by the life of the entitled person but succeeded to his/her heirs. Also, the protection of personal use was very similar to the protection of personal ownership.

CC1964 proclaimed that the protection of personal ownership is provided only to those owners who acquired it from an honest source.²³ This meant that the acquirer's knowledge of the quality of the source was irrelevant. In case a person acquired it in good faith yet from a thief, possession acquired this way was not entitled to protection since the source was not honest. The socialist organisations were assumed to be always an honest source.

Private ownership

Private ownership (*soukromé vlastnictví*) was regarded by the communist doctrine as a relic of capitalism that was to be temporarily tolerated and accepted within the communist legal system.²⁴ This is why unlike personal ownership, private ownership was not seen as an institution of the socialist law system. On the other hand, just as with personal ownership, private ownership was also a form of individual ownership, which was recognised by the law as a regulated alternative to the socialist common ownership.

In 1950, when CC1950 was promulgated, the process of collectivisation and nationalisation had only commenced. Even though the war had inflicted severe damage to the property of most of the people, still many of them owned a significant amount of property (land, cattle, buildings, personal savings, etc.). This was considered by the growing Communist Party as a remnant of the bourgeois society.

The contents of the Civil Code, therefore, had to reflect this situation despite the political or ideological objectives. Private property was declared a temporary phenomenon, tolerated by the communist legislation until the transformation process was finished.²⁵ The socialist environment and society were expected to spontaneously eliminate the needs of the citizens for private ownership since all their demands were to be furnished by the socialist property and by the socialist organisations. The Communist Party had to face the fact that in the beginning of the 1950s, the citizens were not yet prepared to reject the traditional individual

²³ CC1964, art. 125.

²⁴ Bělovský, P., *Instituty...*, pp. 360–362.

²⁵ Knapp, V., *Hlavní zásady československého socialistického občanského práva*, Praha 1958, p. 358.

forms of ownership. The transformation into socialism and subsequently into communism had to be regarded as a gradual process. Personal ownership was to slowly replace private ownership, which would consequently be followed by the elimination of all individual property in the communist society.²⁶

The contents of CC1950 reflects the situation faced by the Communist Party. Private ownership was, therefore, not made inferior to the socialist personal ownership. It was quite the contrary. Many of the civil law principles regarding personal ownership were equally applicable to private ownership (as the acquisition of ownership, the common ownership, the protection of ownership). The distinction between the various types of ownership established by the constitution of 1948 was nevertheless subsequently not treated clearly and accurately by CC1950. This resulted, on the one hand, in much legal confusion and many conflicts. On the other hand, this proved that the motivation for drawing a strict line between socialist and non-socialist ownership was not as strong as could be expected.

The process of nationalisation was an inseparable part of the communist planned transformation of Czechoslovak society. It was, however, started even before the constitution of the communist government in 1948. Based on decrees by the president, n.100-103/1945, some companies in light and heavy industry were nationalised already in 1945. These were followed in the same year by insurance companies and banks. In 1948, general nationalisation had hit all companies with a number of employees exceeding 50. The process subsequently affected all construction companies, travel agencies, and spa companies. The gradual process of nationalisation of the Czechoslovak industry was in 1947 and 1948 finalised by large-scale land reform.

Business undertakings were allowed by the constitution of 1948, which declared in its art. 151 that: 'a business undertaking is either public (performed by the state), cooperative or private'. As for a private business undertaking, the constitution explicitly tolerates the existence of companies and enterprises with a number of employees not exceeding 50. Accordingly, the declaration of the constitution in 1948 was reflected by CC1950. The legislative commentary nevertheless states that exploitation is still a common phenomenon represented by 'rural rich men' (the so-called 'kulaks'). It is, therefore, only a matter of time and agricultural strategy before they are eliminated, adds the legislative commentary.

²⁶ Kratochvíl, Z., *Předmět a systém socialistického práva občanského*, "Právník" 1962, No. 1, p. 32; Čížková, V. *Osobní vlastnictví a jeho úprava v evropských socialistických právních řádech*, "Acta Universitatis Carolinae – Iuridica" 1974, No. 3, p. 178.

For the purpose of farming and private agricultural activities, CC1950 allowed the private ownership of agricultural land. This was nevertheless allowed only in the limits set by the constitution of 1948, which restricted the private ownership of agricultural land to 50 acres. The recognition of minor farming was in its roots inspired by the same source, which affected the whole concept of the Czechoslovak Civil Code of 1950, from the Soviet civil law. In practice, however, all private business or farming activities were unwelcome, and, therefore, rather tolerated than supported.

With the introduction of CC1964, the approach of the state legislator towards private property, as well as towards all private activities of people, drifted and became more conservative. Still, even in the beginning of 1960, neither state legislation nor the official ideology managed to eliminate all undertakings. For this reason, CC1964 had to again contain the treatment of private ownership. This is, however, understood as the result of a political compromise. Despite the economic crisis at the end of 1950, President Novotný officially declared in 1958 that the construction of a socialist society had finished and that all the preconditions necessary for the process that would lead the society into communism were fulfilled. Communism was officially expected to be reached in the beginning of the 1980s. Instead of liberalising the society, which would prevent the further deterioration of the economy, the state legislator decided to reinforce the mechanisms securing the socialist regime. The consequence of this approach can be seen in the contents of CC1964, as described above.

The proclamation of President Novotný, which ignored all economic indicators and blindly followed the ideological plans of the Communist Party, resulted in the slow deterioration of the economy and consequently, the living standards of the people. From the present perspective, this proclamation can be viewed as one of the elements that contributed to the formation of the dissident movement and later to the democratic revolution in 1989.

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Natalya Andreevna Chudinovskaya

**THE INSTITUTE OF REPRESENTATION IN THE CIVIL
PROCESS OF RUSSIA: TRENDS AND DEVELOPMENT
PROSPECTS**

Abstract

Art. 48 of the Constitution of the Russian Federation guarantees everyone the right to qualified legal assistance. The question of the means and methods it should be provided with has been debated between lawyers for a long time. A number of scientists talk about the need for legislative consolidation of the ‘advocate monopoly’. Others consider it appropriate to license the legal services market. These disputes remain relevant today.

However, in 2019, Russia has undergone a reform of procedural law, which lawyers have called a ‘process revolution.’ Many rules of procedural codes have undergone major changes.

In particular, as a result of the reform, the requirements for persons who may act as representatives in civil matters have been substantially changed.

In the framework of this article, an attempt is made to analyse the reform of the institution of representation. Based on a systematic analysis of procedural legislation and law enforcement practice, the author comes to the conclusion that legislative consolidation of the need for higher legal education for representatives can be called one of the positive aspects of the reform.

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This article provides an analysis of the development trends of the institution of representation in the historical aspect. The author concludes that it is maintaining logical and consistent movement along the path of becoming an 'advocate monopoly' in Russia. It seems that subject to its competent and phased introduction, as well as the reform of the corps of the bar itself, not only by increasing its number but above all by increasing the professionalism of its members, it can and should become an effective tool in the civil process.

Keywords: civil procedure, representation, professional legal assistance, higher legal education

Current trends in the development of the institution of representation in the civil process of Russia

The discussion on the feasibility of establishing professional representation has been conducted in Russia for many years. The need for a professional qualification in relation to procedural representatives in the arbitration process was also discussed by V.F. Yakovlev and A.A. Ivanov. The comprehensive concept of professional representation in the Russian civil process was developed in 2004 in the doctoral dissertation by E.V. Tarlo.¹

If we analyse the ways of reforming the legislation in relation to the issue under consideration, it should be remembered that the first attempt to establish an 'advocate monopoly' in the arbitration process was made in the Arbitration Procedure Code of the Russian Federation in 2002. The legislator limited the list of possible representatives of the organisation: such could be its head and employees, or advocates. Interestingly, such restrictions concerned organisations, while the right to choose a representative in relation to individual entrepreneurs was not limited in any way.

However, already in 2004 this rule was declared unconstitutional. In the literature, the legal position of the Constitutional Court is assessed differently. Many scientists believe that, within the framework of this decision, the court recognised as unacceptable the existence of restrictions on subjects of representation in general. Such an interpretation does not seem completely objective. An

¹ See more: Tarlo, E.G., *Problemy professional'nogo predstavitel'stva v sudoproizvodstve Rossii* / avtoref.dis. ... d-ra jurid.nauk. M., 2004. (Tarlo, E.G., *Problems of professional representation in the legal proceedings of Russia*).

analysis of the judgment allows us to conclude that the Constitutional Court does not speak about the ‘unconstitutionality’ of the ‘advocate monopoly’ as such but only about a violation of Art. 19 of the Constitution of the Russian Federation in connection with discrimination of subjects depending on the method of organising entrepreneurial activity: restrictions apply only to organisations and only to the arbitration process.

Thus, the legislative consolidation of the complex restrictions on the right to choose a representative for all participants in the civil process is unlikely to be in any conflict with the Constitution of the Russian Federation.

In recent years, the discussion about the need for an ‘advocate monopoly’ in Russia has become more visible. After approval of the state ‘Justice’ programme,² taking into account the consolidation of the provisions on the need for a twofold increase in the lawyer corps, the prospect of introducing a single lawyer’s status for all players in the legal services market seemed quite real. However, the further development of events went in a slightly different direction. The deadlines for submitting to the Government of the Russian Federation the Federal Law on Professional Legal Aid, aimed at optimising the procedure for admission to the lawyer profession and standardising the market for professional legal assistance, have been repeatedly postponed.

On October 24, 2017, the Ministry of Justice published the Concept of Regulation of the Legal Services Market (Professional Legal Aid Market)³ for general discussion. This Concept suggested the following stages of reforming the institution of representation: 1. 2018 – the introduction of access to the institution by lawyers of commercial legal forms; 2. 2019 – adoption of regulations on a simplified procedure for joining the bar; 3. 2020–2022 – admission to the legal profession of persons interested in this; from January 1, 2023, judicial representation in all instances and in all types of cases can only be carried out by lawyers.

The proposed reform method has been actively criticised by the legal community. In particular, the possibility of obtaining the status of a lawyer in

² See more: Postanovlenie Pravitel'stva RF ot 15.04. 2014 № 312 ‘Ob utverzhdenii gosudarstvennoj programmy Rossijskoj Federacii “Yusticiya”’ (Decree of the Government of the Russian Federation of April 15, 2014. No. 312 ‘On approval of the state programme of the Russian Federation “Justice”’).

³ Proekt Rasporyazheniya Pravitel'stva RF ‘Konceptiya regulirovaniya rynka professional'noj yuridicheskoy pomoshchi’, podgotovlen Minyustom Rossii (The draft Government Order of the Russian Federation ‘The Concept of Regulation of the Professional Legal Aid Market’, prepared by the Ministry of Justice of Russia).

a simplified manner was assessed extremely negatively, since such an approach nullifies the proclaimed goal of the reform – ensuring the right to qualified legal assistance.

The adoption of the Federal Law of November 28, 2018, No. 451, suspended the active discussion that unfolded around the ways of reforming the institution of representation, establishing not professional, but educational qualifications in relation to the subjects of representation.

It seems that the legislative consolidation of the need for higher legal education for representatives can be called one of the positive aspects of the reform. A similar approach has already been tested under the Code of Administrative Procedure of the Russian Federation and demonstrated its viability and effectiveness. In the context of the discussion about reform of the legal services market and the advisability of the ‘advocate monopoly’ in the civil process, the establishment of an educational qualification seems to be a less radical measure. This approach obviously does not entail restrictions on the principles of dispositiveness and accessibility of judicial protection, or mean the need for a sharp increase in the body of lawyers, nor is it likely to lead to a significant increase in the cost of legal services. At the same time, it seems that the requirement for higher legal education among representatives will contribute to the realisation of the right to qualified legal assistance guaranteed by Art. 48 of the Constitution of the Russian Federation.

It seems logical and reasonable that the norms on an academic degree in a legal speciality appear as an alternative to higher legal education.

It should be noted that if in the arbitration and administrative process the requirement for a legal education extends to all levels of the judicial system, then according to the new version of Art. 49 of the Civil Procedure Code of the Russian Federation, the requirement of higher legal education or degree in a legal speciality does not apply to cases considered by district courts. Thus, in accordance with the new provisions of the procedural legislation of the Russian Federation, a representative who does not have higher legal education will no longer be able to be a representative in courts above the district level, in particular in courts of appeal and cassation. If we apply these rules to the average case relating to the jurisdiction of the district court, then we get a rather strange situation. A representative who does not have higher legal education in a civil case that was examined at the first instance in a district court will no longer be able to be a representative in the same case when considering an appeal. Taking into account the

old Russian proverb ‘they don’t change horses at the crossing’, it is not clear why the principal who chose the representative and thanks to this representative won the case in the court of the first instance should suddenly be required to change this representative in case of an appeal against the decision.

So, the final version of Art. 49 Code of Civil Procedure of the Russian Federation raises a number of quite logical questions:

- why does the educational qualification impede the exercise of the right to judicial protection at the level of access to the court of first instance but does not prevent it at the level of the court of appeal and cassation?
- why does the educational qualification impede the exercise of the right to judicial protection in the framework of the civil process but not interfere in the framework of the arbitration process, as well as in the consideration of administrative cases under the rules of the CAS of the Russian Federation?
- what is the ratio of these restrictions in the civil process with the idea of unification of the civil and arbitration process?
- finally, an equally important issue is the need to guarantee not only the right to judicial protection but also the right to qualified legal assistance. Obviously one of the standards for the provision of qualified legal assistance is that a representative has a legal education. So, why does this standard begin to be respected only from the appeal court?

Based on the foregoing, the approach chosen by the legislator cannot be considered successful. Moreover, returning to the decision of the Constitutional Court, an analysis of which was given at the beginning of the article, it seems that such selective restrictions on a representative in the civil process can again be recognised as certain discrimination, which is in contradiction with the constitutional provisions of the Russian Federation.

The new edition of the procedural law contains a number of well-founded exceptions to the requirement that a representative has higher legal education. In particular, the need to comply with educational qualifications does not apply to:

- patent attorneys for disputes related to the legal protection of the results of intellectual activity and means of individualisation,
- arbitration managers in the performance of their duties in a bankruptcy case,

- trade unions, their organisations, associations representing in court the interests of persons who are members of trade unions in disputes related to the violation or contest of rights, freedoms and legitimate interests in the field of labour (service) relations and other relations directly related to them.

The specified list is not exhaustive, other cases may be provided for by federal law.

It should be noted that the new version of the law leaves unresolved the issue of the possibility of technical actions (for example, submitting and receiving documents in court) by persons who do not have a legal education. A literal interpretation of the law suggests that this is not possible. However, it is obvious that such an approach will create many unnecessary difficulties in practice.

In the original version of the bill for such purposes, it was supposed to introduce a new figure into the civil process – the ‘attorney’. It can be assumed that the idea has roots in the French doctrine where the division of legal aid providers into lawyers and attorneys existed until December 31, 1971. The expediency of the emergence of the status of ‘attorney’ in the Russian civil process was subjected to extensive criticism from the legal community. As rightly noted by V.P. Kudryavtseva, ‘it is not clear what material legal relations serve as the content of the attorney’s introduced procedural status and why the existing procedural figures are not suitable.’⁴ In addition, a number of questions were also raised by the normative regulation of the new procedural figure. In particular, having empowered the attorney with the authority to receive judicial notices and calls, the legislator did not make corresponding changes to the relevant articles on the proper notification of persons involved in the case. Subject to extensive discussion and amendments to the second reading, these provisions were deleted.

Summing up, we note that the proposed way of reforming the institution of representation as a whole can be a good basis for the establishment of the ‘advocate monopoly’ in Russian Federation. It seems that subject to its competent and phased introduction, as well as the reform of the corps of the bar itself, not only by increasing its number but above all by increasing the professionalism of its members, it can become an effective tool in the civil process.

⁴ Kudryavtseva V.P., *Status poverennogo v grazhdanskom i administrativnom sudoproizvodstve* “Arbitrazhnyj i grazhdanskij process” 2017. № 12, p. 23. (Kudryavtseva, V. P., *Attorney status in civil and administrative proceedings*, “Arbitration and civil procedure” 2017, No. 12, p. 23).

The expenses of representative services in the civil process in Russia

As already noted, the introduction of the ‘advocate monopoly’ in the Russian civil process can lead to a significant increase in the cost of paying for the services of a representative. In this regard, it seems necessary to analyse the mechanism of formation of these costs and methods for their compensation.

A lawyer’s fee is one of the essential conditions of a legal aid agreement. Today, most common in the Russian Federation is the system of fixed tariffs for the provision of legal services, as well as a mixed-fee payment system: fixed-fee rates for each authority plus the total fee in the form of a percentage of the collected funds (‘success fee’).

The practice of including the conditions of the ‘success fee’ has been widespread in Russia for a long time. However, in 1999, the Supreme Arbitration Court of the Russian Federation spoke out negatively about the possibility of classifying the ‘success fee’ as legal costs.⁵ At the same time, the Supreme Arbitration Court did not indicate that the condition of the contract for the provision of legal services, making the amount of the payment for services dependent on the court decision to be taken in the future, should it be recognised as invalid (void), contrary to the requirement of the law. The information letter only notes that the contractor’s claim for remuneration is not subject to satisfaction if the plaintiff substantiates this claim by the condition of the contract, making the amount of payment for services dependent on the decision of the court or state body that will be adopted in the future.

Accordingly, if the obligation to pay the ‘success fee’ is fulfilled voluntarily, then it is valid. If it is not voluntarily executed, then it cannot be claimed through the court. Later, when considering the admissibility of such practice in Russia, the Constitutional Court came to the conclusion that lawyers are forbidden to conclude agreements containing a condition about a fee, the size of which depends

⁵ See more: Informacionnoe pis’mo Prezidiuma Vysshego Arbitrazhnogo Suda RF ot 29.09.1999 № 48 ‘O nekotoryh voprosah sudebnoj praktiki, vznikayushchih pri rassmotrenii sporov, svyazannyh s dogovorami na okazanie pravovyh uslug’. (See: Information Letter No. 48 of the Presidium of the Supreme Arbitration Court of the Russian Federation dated September 29, 1999 ‘On Certain Issues of Judicial Practice Arising in the Consideration of Disputes Relating to Legal Services Agreements’).

on a future court decision.⁶ The court found that in this case, not only are the actions of the performer subject to payment but also the specific result for the achievement of which the corresponding contract is concluded, namely, the court ruling in favour of the applicant. Meanwhile, a court decision cannot be the object of anyone's civil rights (Article 128 of the Civil Code of the Russian Federation) or the subject of any civil law agreement (Article 432 of the Civil Code of the Russian Federation).

At present, an approach that can be considered relatively established in judicial practice is one in which, when a customer refuses to pay a fee, the courts do not recognise the right to enforce the contract.

The 'success fee' paid in most cases is not recoverable from the losing party in order to reimburse legal expenses since this contingent consideration does not imply that the representatives take any additional actions, provide additional services, or otherwise provide another consideration within the framework of the legal aid contract, so it is essentially that this reward is a kind of bonus for representatives. The amount of the specified premium depends on the agreement reached by the parties to the legal services agreement. The result of such an agreement between the client and the representative ('success fee') cannot be recovered as legal costs from the procedural opponent of the client, which is not a party to this agreement.

Moreover, in a number of precedents, if the amount was paid by the customer voluntarily, the courts satisfy the demand for its return as unjust enrichment.

However, in some judicial acts, the opposite approach is also encountered. So, in 2012, the Moscow Arbitration Court recovered from a defendant expenses for the services of the representative of the plaintiff in the amount of USD 121,264.09 and RUB 28,880,657.79. It is interesting that the remuneration for the lawyers in this case consisted of two parts: a fixed fee for representing the interests of the client in the relevant instance and a percentage of the amount recovered in favour of the plaintiff. To justify the admissibility and reasonableness of

⁶ Postanovlenie Konstitucionnogo Suda RF ot 23.01.2007 № 1-P 'Po delu o proverke konstitucionnosti polozhenij punkta 1 stat'i 779 i punkta 1 stat'i 781 Grazhdanskogo kodeksa Rossijskoj Federacii v svyazi s zhalobami obshchestva s ogranichennoj otvetstvennost'yu 'Agentstvo korporativnoj bezopasnosti' i grazhdanina V.V. Makeeva' (Decree of the Constitutional Court of the Russian Federation of January 23, 2007 No. 1-P 'On the case on the verification of the constitutionality of the provisions of paragraph 1 of Article 779 and paragraph 1 of Article 781 of the Civil Code of the Russian Federation in connection with complaints of the limited liability company' Corporate Security Agency and V.V. Makeev).

such a 'success fee' the court made the following calculation. It established the total number of hours spent by lawyers to provide services to their client in the framework of the case. The court multiplied the resulting figure by the hourly wage rates set by the relevant law office. At the same time, the amount of 'mixed' remuneration only slightly exceeded the amount of the fee that lawyers would have received if fixed hourly rates were applied.

The above arguments allowed the arbitral tribunal to recover the claimed 'success fee' in full. It should be noted that in a subsequent court of appeal, the amount recovered was reduced to USD 46,264.09 and RUB 28,880,657.79. However, the fact of the possibility of collecting a 'success fee' by the courts of higher instances was not refuted.

The possibility of collecting a certain percentage of the principal's economic effect as a lawyer's fee is also seen in a number of other judicial acts of arbitration practice. In accordance with art. 100 Code of Civil Procedure of the Russian Federation, part 2 of art. 110 Code of Arbitration Procedure of the Russian Federation, art. 112 of the Code of Administrative Procedure of the Russian Federation, the costs of paying for the services of a representative incurred by a person in whose favour the judicial act was passed are recovered by the court from another person participating in the case, within reasonable limits.

Procedural law provides two ways of reimbursing the costs of representative services:

- 1) Simplified procedure, when the issue of recovering such expenses is resolved simultaneously with the court decision and the corresponding conclusion is included in the final court decision.

- 2) General procedure, when this issue is decided in a separate court session, the results are documented in a separate judicial act.

After the adoption of the final judicial act in the case, the person participating in the case is entitled to apply to the court with a statement on the issue of legal costs incurred in connection with consideration of the case, the reimbursement of which was not announced during its consideration. The term for handling such a statement is three months.

When considering the application on the issue of legal costs, the court also resolves the distribution of legal costs associated with the consideration of this application. With this in mind, the relevant application filed after a ruling on the

issue of legal costs is not subject to acceptance for production and consideration by the court. The procedural legislation does not provide for payment by the state duty of an application for reimbursement of expenses for the services of a representative since it is not an independent claim.

In order to recover costs for the representative's services from the opposite side, the court must establish a set of legal facts.

The first comprises the presence and amount of real costs for the payment of representative services. To confirm the existence of expenses incurred to pay for services and their amounts, the winning party may submit:

- a contract for the provision of legal services or a contract of commission,
- acts on the provision of legal services (performance of work),
- invoices for payment of legal services rendered (work performed),
- payment orders with a note from the bank on the transfer of funds to pay for the representative's services (work), an extract from the bank confirming the write-off or crediting of the payment amount under the contract and other duly executed documents confirming the payment of funds.

Controversial in judicial practice is the question of the possibility of confirming the costs of paying for a representative's services with a handwritten receipt. Obviously, in relation to a lawyer, this method of fixing the receipt of funds is not permissible, since in accordance with part 6 of art. 25 of the Federal Law On Lawyers' Activity and Advocacy in the Russian Federation 'the remuneration paid to the advocate by the principal is subject to obligatory payment to the cashier of the lawyer's workplace'. However, in the case of the provision of legal services by persons who do not have the status of a lawyer, a handwritten receipt from a representative may be recognised by the court as an appropriate document confirming the transfer of money.

The requirement of cash for court expenses is well-established both in procedural science and in judicial practice. However, there is an alternative point of view, according to which the reality of court costs is determined through the inevitability and the onset of all conditions for their payment. Moreover, the fact of spending money does not matter. This approach is followed, in particular, by the European Court of Human Rights (ECtHR). So, in one of the decisions, the arguments of the Russian Federation that the legal costs of the representative do not meet the reality criterion and are probabilistic in the future were rejected because

all the conditions for the payment of the representative's remuneration provided for in the agreement have come about. According to the ECtHR, a respectable and law-abiding citizen will necessarily pay remuneration to his representative, as required by the contract, and accordingly, to discuss the likelihood of paying remuneration means to question the integrity of the citizen, which is unacceptable.

The second one comprises the objections of the losing party against the amount claimed for reimbursement of the services of a representative, or the apparent excessiveness of such expenses.

The Constitutional Court of the Russian Federation has repeatedly spoken out on the inadmissibility of arbitrary reduction of reimbursement of expenses for the services of a representative. The issuance of a reasoned decision to change the amount recovered in reimbursement of the relevant costs is permissible only if the other party raises objections and presents evidence of the excessiveness of the costs recovered from it. However, in accordance with para. 11 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of June 21, 2016, if the amount of the legal costs claimed for compensation is clearly unreasonable (excessive), the court has the right to reduce the amount of compensated legal costs on its own initiative. The literature notes that the court's right to discretion to reduce the cost of legal expenses at its discretion is an exception to the general principle of adversarial and equal rights, in fact, entrusting the court with the role of investigator and attorney of the losing party. It seems that the exercise of this authority should not be generally accepted. Essentially, we should only talk about cases where the person from whom the compensation of legal costs is recovered cannot present his objections for physical or intellectual reasons.⁷

The third comprises the reasonableness of the cost of paying for the services of a representative. Obviously the category of 'rationality' is a value concept. In resolving this issue, the court should consider a number of criteria. The main ones are indicated in para. 3 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated January 21, 2016, No. 1, 'On some issues of the application of legislation on reimbursement of costs associated with the consideration of the case', as well as the information letter of the Presidium of

⁷ See more: Razd'yakov E.S., Tarasov I.N., Halatov S.A. *Aktual'nye voprosy vozmeshcheniya sudebnyh izderzhek: kommentarij k Postanovleniyu Plenuma Verhovnogo Suda RF* "Vestnik ekonomicheskogo pravosudiya Rossijskoj Federacii" 2016. № 4. (See: Razdyakov E.S., Tarasov I.N., Khalatov S.A., *Actual issues of reimbursement of legal costs: commentary on the Resolution of the Plenum of the Supreme Court of the Russian Federation*, "Bulletin of Economic Justice of the Russian Federation" 2016, No. 4).

the Supreme Arbitration Court of the Russian Federation of August 13, 2004, No. 82, 'On some issues of the application of the Arbitration Procedure Code of the Russian Federation'. In particular, they should include the number of claims, the amounts of the claims, the complexity of the case, the total services provided by the representative, the time required to prepare the procedural documents, the duration of the case, and other circumstances.

The reasonableness of the legal costs of paying for the services of a representative cannot be justified by the fame of the representative of the person participating in the case.

It should be noted that the representative's expenses necessary for the fulfilment of his obligation to provide legal services, for example, expenses for acquaintance with the case materials, for the use of the internet, for mobile communications, for sending documents, are not subject to additional compensation by the other party to the dispute, since according to rule 309.2 of the Civil Code of the Russian Federation, such expenses, as a general rule, are included in the price of the services provided.

So, the analysis has shown that the consistent development of the institution of representation in the Russian civil process is on the path to becoming an 'advocate monopoly'. Of course, this may cause an increase in the cost of representative services. However, the professionalism of the representative is a prerequisite for victory in court. And in this case, all expenses incurred can be recovered from the losing side.

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IMPACT OF CHANGES INTRODUCED TO THE POLISH ELECTION LAW IN 2018 ON THE PROCESS OF PREPARING AND CONDUCTING ELECTIONS

Abstract

The aim of the paper was to explain the essence of the reform of the Polish election law, which took place in 2018. The changes were studied from the perspective of their impact on the process of organisation and preparation of elections. Therefore, four key elements of the reform were selected for analysis: institutional changes concerning commissioners and election officials, change in the position of local government units in the preparation and conduct of elections, live streaming of the work of district electoral Commissions (*Obwodowa Komisja Wyborcza*) and their appointing their members. The basic research method was the analysis of legal acts and expert interviews.

The text highlights a number of problems and shortcomings related to the implementation of the reform. It was found that there are currently no institutions in Poland that have the resources to take over from local government units the tasks related to the preparation and organisation of elections. It was shown that many of the intended objectives of the reform were not achieved, either as a result of the amendments in the

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pre-election period or as a result of the interpretation aimed at maintaining the actual status quo despite legal changes. The latter phenomenon is the most visible in the institution of the electoral officer.

Keywords: local elections, election law, code of election laws, election official

Introduction

The purpose of this text is to study changes to the Polish election law that were passed before local elections in 2018 during the 8th term of the Sejm (lower house of the Polish Parliament). The key assumptions of the amended Code of Election Laws (CEL) were contained in the Act on amending certain acts in order to increase the involvement of citizens in the processes of electing, functioning and controlling certain political authorities of 11 January 2018.¹ The process of preparing and conducting elections referred to in the title of this paper is understood here as a number of organisational and technical measures performed by state and local government institutions. The basic goal of this paper, apart from describing and explaining selected aspects of those changes, is to show that adaptation to legal changes may not always be a unilateral relation, but that it is to a some extent based on the feedback mechanism. Here, the authors mean subsequent amendments of legal acts, both on the legislative level and of implementation acts, caused by problems with implementing former legal amendments, and – what is particularly interesting – to some extent, also changes in the interpretation of legal provisions. The study focused on such elements of the reform as: institutional changes affecting commissioners and election officials, new competencies of local government units in preparing and conducting elections, the issue of live streaming of the work of district electoral commissions and appointing their members.

The process of preparing and conducting elections, whose framework is defined in the CEL is a huge project and challenge for the election administration, in the broad meaning of the term. In a city the size of Szczecin, it required engagement, given the dual structure of district electoral commissions, of appr. 4,000 members of personnel, plus at least hundreds of persons supporting the elec-

¹ Act on amending certain acts in order to increase the involvement of citizens in the processes of electing, functioning and controlling certain political authorities of 11 January 2018, Journal of Laws (Dz.U.) 2018, item 130. The Act, apart from amending the election law, also contained solutions that were supposed to increase citizen involvement in administering a certain local government unit by increasing their participatory rights. For more information, see Pszczyński, M., Sobczyk, P., *Nowelizacja przepisów samorządowych i wyborczych – aspekty prawne i praktyczne istotne dla jednostek samorządu gminnego*, “Ekspertyzy i opracowania NIST” 2018, No. 38.

tion process in various roles: IT services, preparing the polling station, transporting the ballot papers or ensuring security, etc. The total number of persons engaged in the organisation of elections across the country could reach as many as 500,000.

Origin of the election law reform

The election law reform discourse intensified in Poland after the 2014 local elections. Two main reasons should be highlighted here. The first is an exceptionally high number of votes cast for the Polish People's party (*PSL – Polskie Stronnictwo Ludowe*) in those elections compared to pre-election polls and a high number of invalid votes. It was commonly believed, and later confirmed by researchers², that the reason was the ballot paper, which, by resolution of the National Electoral Commission³, had the form of a stitched brochure with each page listing the candidates of another election committee. The brochure had no covers, title page or table of contents. Since the PSL party got itself number 1 in a draw, the first page of the brochure contained the list of that particular party. The number of invalid votes by type of elections was: in the scale of the entire country, in all local elections – 9.76%, in municipal (*gmina* – municipality) and urban (*miasto na prawach powiatu* – city with county status) council elections – 5.16%, in county (*powiat*) council elections – 16.67% and in regional assembly (*sejmik województwa*) elections – as much as 17.47%.⁴ The high percentage of invalid votes combined with the fact that the voting reports of the district electoral commissions (*OKW – obwodowa komisja wyborcza*) did not specify why the votes were invalid resulted in the citizens losing their trust in election institutions.⁵ 22% of Poles declared that the results of elec-

² Flis, J., *Efekt książeczki*, in: Flis J., et al. (ed.), *Co się stało 15 listopada? Wybory samorządowe 2014*, Warszawa 2015, p. 41–52.

³ Resolution of the National Electoral Commission of 11.08.2014 on ballot paper templates and ballot paper and Braille overlays for ballot papers in *gmina* council, *powiat* council, voivodeship *sejmik* and Warszawa district council elections and *gmina*, town and city mayor elections, M.P. 2014, item 734.

⁴ Interestingly, correct information on the actual percentage of invalid votes in regional assembly elections was only published in March of the following year. Before that, PKW reported at a conference a different value – 17.93%.

⁵ However, the problem of invalid votes should not be demonised or treated as an objective indicator of the scale of electoral irregularities, which has been done in Poland in recent years. According to research, the reasons for this phenomenon should rather be associated with the form of ballot papers, qualifications of the constituents or possibly protest votes. In the Polish case, as is suggested by a very high percentage of empty ballot papers (no boxes ticked) among invalid votes, the nature of local elections should be taken into consideration, where a voter gets 3 or 4 ballot papers even though they may be interested only in 1 or 2 most local elections. The percentage of invalid votes has always been the highest in regional assembly elections, of all the popular elections in Poland. For more information, see Gendźwiłł, A., et al., *Nieważne głosy, ważny problem. Wyniki badania kart do głosowania z wyborów do sejmików województw*, Warszawa 2016.

tions announced in 2014 by the National Electoral Commission (*PKW – Państwowa Komisja Wyborcza*) were unreliable.⁶

Another aspect of electoral controversies was associated with the operation of the National Electoral Office (*Krajowe Biuro Wyborcze – KBW*), which has developed a new electronic system to support local elections. The system was supposed to serve a number of functions, including functions vital for determining the results of elections, i.e. entering voting results data, printing draft breakdowns and reports (which also requires indicating the results of elections) or sending approved reports to the central system.⁷ The computer program that was crucial for conducting elections, as was determined in a post-audit statement of the Supreme Audit Office (*NIK – Najwyższa Izba Kontroli*),⁸ contained so many critical errors that it was impossible to conduct elections in an efficient way.⁹ The chaos and organisational paralysis that followed everywhere from district electoral commissions up to the National Electoral Commission, the delay in announcing the results of the votes, inconsistencies in reports, later confirmed during court audits, and substantial criticism from the public opinion resulted in the resignation of the entire National Electoral Commission and the Head of the National Electoral Office. Another effect was the amendment of the CEL initiated by the then President of the Republic of Poland, Bronisław Komorowski.¹⁰ Most of the changes introduced at that time were technical and without much significance for the efficiency of the election process in the opinion of the authors, while the most visible change for the constituents was the introduction of large, transparent ballot boxes, of the same design across Poland.¹¹

⁶ Roguska, B., *Zaufanie do procedur wyborczych. Komunikat z badań No. 174/2014*, Warszawa 2014.

⁷ Resolution of the National Electoral Commission of 22.09.2014 on the conditions and means of using electronic technology in in gmina council, powiat council, voivodeship sejmik and Warszawa district council elections and gmina, town and city mayor elections, M.P. 2014, item 903.

⁸ Post-audit statement of the Supreme Audit Office President no. KBF 4114-004-01/201, I/14/006.

⁹ *NIK o kontroli Krajowego Biura Wyborczego*, <https://www.nik.gov.pl/aktualnosci/nik-o-kontroli-krajowego-biura-wyborczego.html>. Accessed on: 30.10.2019.

¹⁰ The Act on Amending the Code of Elections Act of 25.06.2015, Journal of Laws (Dz.U.) 2015, item 1043.

¹¹ Resolution of the National Electoral Commission of 21.03.2016 on ballot box design, M.P. 2016, item 312. Since the ballot box is made of transparent material and a ballot paper with a box ticked could land there in a way that would reveal the electoral decision to other persons, doubts were raised as to preserving the secrecy of the act of voting. An initial draft amendment to the CEL proposed in 2017 stipulated that a district electoral should hand a constituent an envelope to put their votes in before injecting them into the ballot box. During a discussion on the amendment this idea was finally rejected and the constituent was made partly responsible for ensuring the secrecy of vote by a new provision added in Article 52 §6: “A constituent injects the ballot paper into the ballot box positioned in an accessible and visible spot in the polling station in such a way that the printed side is not visible”.

Having won the parliamentary elections, with a majority in both houses of the Parliament, the Law and Justice Party (*Prawo i Sprawiedliwość* – PiS, undertook the goal of introducing a number of institutional reforms. Amending the election law was not surprise,¹² as the leaders of the party previously highlighted a number of irregularities in the organisation of elections and even requested repeating the 2014 local elections.¹³ The Bill on amending certain acts in order to increase the involvement of citizens in the processes of electing, functioning and controlling certain political authorities was submitted in the Sejm on 10 November

¹² However, neither the Law and Justice Party's 2014 program "Health. Family. Labour" nor its program materials, such as, for example "Thinking Poland" from the Law and Justice and United Right Wing (*Zjednoczona Prawica*) Parties Program Convention, which was held in Katowice on 3–5 July 2015, mentioned amending the election law, nor did they contain a negative diagnosis of the existing legal status in this area, which comes as a surprise, especially given the large volume and detailed nature of both documents. Accessed on: 30.10.2019. <http://pis.org.pl/dokumenty>.

¹³ The statement of justification for the draft Act on amending certain acts in order to increase the involvement of citizens in the processes of electing, functioning and controlling certain political authorities contained the following fragment (pp. 5–6): "The unprecedented character of the 2014 local elections may be described as a scandal that shocked the public opinion. In the 21st century, in a large country in Central Europe, because of an IT system breakdown, we had to wait for almost two weeks after the elections for the official results. Once the results were announced, it turned out that almost one in five votes in regional assembly and county council elections were invalid and in some constituencies, the number of invalid votes reached 40%. There may be two explanations for this state of affairs. First it is due to the failure of the central election authority, i.e. the then National Electoral Commission to perform its duties properly. Selection of the supplier of the IT system and no lessons learned from the 2010 local elections in the Mazowsze region concerning the form of ballot papers prove it beyond any doubt. That every fifth constituent should cast an invalid vote is absolutely wrong and it proves that the National Electoral Commission chose the wrong form of ballot papers. Such errors could have a significant impact on the results of elections and it is likely that the officially announced results do not reflect the will of the constituents. Secondly, an analysis of the procedures used in the elections conducted in the autumn of 2014 does not exclude the likelihood of conscious attempts to promote some election committees to the disadvantage of other committees, which was possible because of imprecise provisions of the Code of Election Laws. The question of the scale of such measures remains an open issue, however, it was documented in a number of cases and a number of protests against the results of elections were filed on this basis. The total amount of such forgeries could actually have a significant impact on the result of the elections. Regardless of whether the election scandal in the 2014 local elections was the result of how the elections had been prepared or of conscious efforts, there is one conclusion: The election law should be amended in such a way as to eliminate as much as possible the risk of irregularities and forgery in election procedures. The attitude of the previous Sejm majority, which voted against the proposals of the then opposition that aimed in this direction, justifies this present initiative". Accessed on: 30.10.2019. <http://orka.sejm.gov.pl/Druki7ka.nsf/0/5D147A5D7E-8FEE04C1257E0C00434FD6/%24File/3248-uzasadnienie.docx>.

2017 and its first reading took place on 24 November 2017.¹⁴ On the same meeting, the Sejm appointed an Extraordinary Commission to review the bills on election law. The Commission met eight times within three weeks only, by 13 December 2017, and the act was finally passed on 11 January 2018. It is worth noting that the Senat (Higher House of the Polish Parliament) actively participated in the legislative procedure and contributed a number of vital modifications to some of the controversial solutions, which – importantly – were adopted by Sejm. In the first place, it should be noted that voting by mail was introduced, or rather partly reintroduced. In the amended Act, it was limited to disabled persons or, more precisely – to persons with a severe or moderate level of disability within the meaning of the Act on Professional and Social Rehabilitation and Employment of the Disabled of 27 August 1997.¹⁵ The motivation behind the original liquidation of voting by mail was, according to the statement of justification for the bill, that voting by mail significantly increased the risk of irregularities and that persons who for reasons beyond their control were unable to go to the polling station could vote via an

¹⁴ With respect to the Code of Election Laws, according to the statement of justification, changes concerned the following issues: abolishment of two-day elections, abolishment of voting by mail, security measures with respect to changing election districts and making the polling stations more accessible to constituents, the form of ballot papers, presence of the members of the commissions during voting and counting the votes, amending the provisions governing the registration of the activities of district electoral commissions on the day of the vote by a person of trust, lack of confirmation of receiving a ballot paper by a voter, live streaming from or audio video recording in a polling station on the day of the vote, of the method of counting the votes, bulk packaging to secure the ballot papers, introducing a report “on paper” as the basis for entering data to the computer system, access to copies of voting reports, transport of a report to a higher level commission, establishing new election authorities – region (*województwo*) and county-level election commissioner, persons of trust, changes concerning the legal authority of members of district electoral commissions, additional technical facilities in a polling station, verifying ballot papers and other election documents, composition of the National Electoral Commission, informing about the method of voting, security of the IT system, quorum to pass resolutions of the National Electoral Commission, objecting against resolutions of the National Electoral Commission, identifying within district electoral commissions a district electoral commission for conducting the voting in the district and a district electoral commission for determining the results of voting in the district, changes concerning territorial and district electoral commissions, announcing the date of elections to local government authorities, changes concerning the election of mayors of municipalities, towns and cities. Changes in the system of municipal council elections, changed number of the elected municipal council, county council or regional assembly councilors, number (*sic!*) of candidates on a list in municipal council and county council elections, requirements concerning support lists and number of signatures on a support list in municipal council elections, election officials.

¹⁵ Act on Professional and Social Rehabilitation and Employment of the Disabled of 27.08.1997, i.e. Journal of Laws (Dz. U.) 2016, item 2046, as amended.

attorney.¹⁶ However, the Senat, according to the statement of justification for the Act – determined that “the sake of the reliability of elections must give way to ensuring that the disabled are able to vote”.¹⁷ The Senat also authorized the National Electoral Commission to notify the minister in charge of home affairs of its reasonable objections against certain candidates for election officials, which obliges the minister to propose new candidates.

In the course of developing the Act, the provision that triggered the most discussion was the one according to which a person who was previously twice elected the mayor (*wójt*) of a municipality, has no right to stand for election in mayor (*wójt* in a municipality, or *burmistrz* in a town, or *prezydent* in a city, respectively) elections. Finally, the limitation was introduced, but in a significantly modified form, because the provision did not apply to municipality, town or city mayor elections from before the entry into force of the Act.

The changes introduced by the amended CEL may, in general terms, be defined as twofold: either associated with increasing the transparency of the election process, in particular in terms of the work of district electoral commissions, or changes in the institutional structure responsible for conducting elections, which will be discussed in more detail further on in this paper. The judicial model of election administration was gradually abandoned. It should be noted, however, problems with implementing the amended provisions of the CEL resulted in another amendment introduced even before local elections by the Act on amending the Act – Code of Election Laws and certain other acts of 15 June 2018¹⁸, hereinafter referred to as the June Act.

Reform of the election law

Reform of the institutional structure responsible for preparing and conducting elections significantly modified the position of the already existing elections commissioners, defined by Article 152 §1 as permanent election authorities. Initially, it

¹⁶ Statement of Justification for MP’s draft Act on amending certain acts in order to increase the involvement of citizens in the processes of electing, functioning and controlling certain political authorities. Accessed on: 30.10.2019, <http://orka.sejm.gov.pl/Druki7ka.nsf/0/5D147A5D7E-8FEE04C1257E0C00434FD6/%24File/3248-uzasadnienie.docx>.

¹⁷ Resolution of the Senat of the Republic of Poland of 21.12.2017 on the Act on amending certain acts in order to increase the involvement of citizens in the processes of electing, functioning and controlling certain political authorities. Accessed on: 30.10.2019, www.senat.gov.pl/download/gfx/senat/pl/senatuchwaly/3496/plik/696uch.pdf.

¹⁸ The Act on Amending the Code of Elections Act of 15.06.2018, Journal of Laws (Dz.U.) 2018, item 1349.

was even planned to introduce a two-level structure of election commissioners, also on the county level, which would require appointing almost 400 commissioners. Finally, only regional or supra-county commissioners were left, but their number was increased from 51 to 100. They were to be appointed by the National Electoral Commission at the request of the Ministry of Home Affairs and Administration (*MSWiA*). It was required of commissioners to have a university degree in law; also commissioners had to be trusted to perform their function diligently. The term of office of former commissioners ended prematurely. 700 candidates applied in the recruitment procedure, including commissioners, judges, legal counsels and attorneys-at-law. The Ministry of Home Affairs and Administration organised a two-day training in election law and the history of elections in Poland, which ended with a test in the knowledge of election law. Finally, the National Electoral Commission elected commissioners in one meeting, on the basis of surveys sent by the Minister, without interviewing the candidates. The election commissioners appointed in Szczecin were Jacek Szreder (the former election commissioner in Szczecin) and a 31-year-old attorney-at law. It was raised that many new election commissioners had no experience in election law.¹⁹ The method of electing commissioners and expanding their competencies with respect to the division into constituencies and wards was criticised by some researchers as a sign of politicisation of the election administration²⁰, although it is worth noting that in the former model, the National Electoral Commission also appointed commissioners at the request of the Minister, but in that case, it was the Minister of Justice.²¹

The distribution of territorial authority of commissioners, both on the national and regional level could be confusing. For example, an election commissioner seated in Słupsk, rather than in Gdańsk, was to be responsible for the city of Gdynia. In the Zachodniopomorskie region, 5 commissioners were appointed: 2 in Szczecin and 3 in Koszalin. In Szczecin, tasks were unequally divided between the two commissioners. Commissioner identified as Szczecin I was responsible for 5 counties and 2 cities with county status: Świnoujście and

¹⁹ Frydrych-Depka, A., *Instytucja komisarza wyborczego i urzędników wyborczych po nowelizacji kodeksu wyborczego*, "Studia Iuridica Toruniensia" 2018, No. 23, pp. 63, 70.

²⁰ Rakowska-Trela, A., *Current Amendments to Polish Electoral Law in the Light of European Standards*, "Polish Political Science Yearbook" 2018, No. 47, pp.464-465; Sokala, A., *Zmiany w systemie polskiej administracji wyborczej*, "Studia Wyborcze" 2018, No. 25, pp. 48-49.

²¹ The most important change was that, after the amendment, election commissioners no longer had to be judges. However, in the previous model, it was not clear whether the National Electoral Commission could refuse to appoint as commissioner a candidate proposed by the Minister.

Szczecin, with 749,000 residents, and performed tasks of regional significance. Commissioner Szczecin II was responsible for 4 counties with 310,000 residents.

This division is also the consequence of modifications introduced by the Senat, which made it impossible to happen that the territorial authority of election commissioners would overlap with the area of Senat constituencies, the purpose of which was to enable the National Electoral Commission to flexibly adjust the territorial authority of commissioners to the number of their district and territorial election commissions and the number of single-member constituencies to municipal councils and – consequently – the number of by-elections during a term of office.²²

One of the basic changes concerning the institutional structure of elections was the introduction of the *de facto* new institution of the election official.²³ Establishing a body of election officials was to be a sign of professionalization of election administration.²⁴ Moreover, as one of the authors of the Bill and rapporteur of the Extraordinary Commission Łukasz Schreiber claimed: “It should not happen that a municipality, town or city mayor who usually stands for another term of office at the same time organises elections”²⁵ and that “elections in a municipality will not be organised by a municipality, town or city mayor, but by state officials”.²⁶ A statement of justification for the bill stated explicitly that the reason “for the changes is the fact that a person who performs the functions of the local executive authority and is a ‘part’ of the legislative authority, is at the same time an active politician interested in the results of elections, not only on the level that directly concerns them. Such situation increases the risk of malpractice and irregularities”.²⁷

²² Resolution of the Senat of the Republic of Poland of 21.12.2017.

²³ We can read in the literature that, before the 2018 changes, the term election official was used to refer to an election attorney within the area of a territorial government unit appointed by a municipality, town or city mayor. It was usually a municipal official, often in the rank of a director or secretary. For more information, see Sokala, A., Michalak, B., Uziębło, P., *Leksykon prawa wyborczego*, Warszawa 2013, ebook version, entry: urzędnik wyborczy (election official).

²⁴ Ibidem.

²⁵ PAP, *Kodeks do zmiany. PiS zaproponował nowelizację Kodeksu wyborczego*, 10.11.2017. Accessed on: 30.10.2019, <https://samorzad.pap.pl/kategoria/wybory/kodeks-do-zmiany-pis-zaproponowal-nowelizacje-kodeksu-wyborczego>.

²⁶ Schreiber o zmianach w Kodeksie wyborczym: wychodzą naprzeciw oczekiwaniom strony społecznej, “Gazeta Prawna” 15.12.2017.

²⁷ Statement of Justification for a draft Act on amending certain acts in order to increase citizen participation in the process of electing, functioning and controlling certain public institutions. Accessed on: 30.10.2019, <http://orka.sejm.gov.pl/Druki7ka.nsf/0/5D147A5D7E8FEE04C1257E-0C00434FD6/%24File/3248-uzasadnienie.docx>.

An election official could be a person holding a university degree and an employee of an office providing services to: state or local government authorities or of units subordinate to or supervised by them, or other persons with at least 5 years of employment in those offices or units. Election officials were appointed by the Head of the National Electoral Office. According to Article 191b of the CEL, an election official could not be a person running for elections in the constituency that included a municipality in the area of operation of an election official, election commissioner, election attorney, financial attorney, person of trust or member of the election commission. An election official could not be a member of a political party or be engaged in political activity that could not be reconciled with this function, or a person sentenced with a final and binding judgment for an indictable offence or fiscal offence. One of the main criteria was the place of residence – a candidate for an election official could not live in the municipality where they wanted to perform that function (except for cities with county status). No other requirements were made of the candidates, e.g. there was no knowledge test, as was the case with candidates for election commissioners, and training, if any, was held only after appointment. As a result, persons with no experience either in the field of election law or in management and organisations applied to participate in the organisation of elections. Lack of knowledge about the actual process of preparing elections triggered major problems, also in the course of elections. The fact that this function was performed by persons from outside a municipality, who were unfamiliar even with the topography of the place, was an additional hindrance on the day of elections. The officials were not prepared, and the training they conducted for members of district electoral commissions were of poor quality, which translated to a large number of errors in reports, problems encountered by the district electoral members of the voting day and difficulties with transferring documentation between commissions in one election district. Officials who conducted the training were not fully aware of their responsibility, and some claimed, for example, that one could resign at any time from membership in a district electoral commission. Although this could be true (even though some election commissioners propose a different interpretation²⁸), the time and place is not right and as it could lead to problems with staffing the district electoral commission, compromising the quality of the election

²⁸ This concerns application of Article 231 of the Criminal Code: Abuse of power by civil officers: §1. A civil officer who, by abusing their power or failing to perform their duties, compromises public or private interest, is punishable by imprisonment of up to 3 years. The Criminal Code Act of 6.06.1997, i.e. Journal of Laws (Dz.U) 2018, item 1600, as amended.

process. It seems indisputable that election officials who train members of district electoral commissions should themselves be properly selected and trained, both in terms of knowledge and communication skills, so that training for members of district electoral commissions is not limited to reading aloud presentations prepared by the National Electoral Office.

The National Electoral Office had huge problems with appointing election officials.²⁹ The final date of election official recruitment was postponed and there was a large-scale advertisement campaign (e.g. in social media, like Facebook) – without much success. There were not enough appointed officials, especially in medium and large cities, where there were the election officials had the most work to do. The problem remained valid by the time of the 2019 parliamentary elections. The workload of an election official in a large municipality is incomparably higher than in a town with only a couple of district electorals, and the salaries are comparable.

The dynamic changes of legal regulations showed that finding election officials was indeed problematic. First, the National Electoral Commission passed the Resolution of 19 February 2018 on determining the number of election officials the and procedure and conditions of their appointment, which raised the need for appr. 5,500 officials, and the deadline for submitting candidate applications was 21 days of the day of publication. Since there were not enough candidates (less than 20% of the vacant posts), the National Electoral Commission was forced to pass the Resolution of 22 March 2018 amending the Resolution on determining the number of election officials the and procedure and conditions of their appointment, based on which the deadline for submitting applications was postponed by 6 April 2018. Another Resolution amending the Resolution on determining the number of election officials the and procedure and conditions of their appointment, passed by the National Electoral Commission on 26 March 2018, drastically reduced the minimum and target number of officials and once again postponed the deadline for submitting applications.

The basic task of the election officials was to ensure efficient functioning of district electoral commissions, which they did by performing the following procedures:

- 1) Preparing and monitoring, under the supervision of the election commissioner, the election process in district electoral commissions.

²⁹ Notably, one of the changes introduced before the local elections was the new Article 191ca, which authorised the Head of the National Electoral Office to appoint, in the case of a threat, a person who did not fulfil the criteria to perform the task for no longer than the duration of given elections.

- 2) Developing and updating a training system for members of district electoral commissions.
- 3) Organising and conducting training for members of district electoral commissions.
- 4) Delivering ballot papers to relevant district electoral commissions.
- 5) Supervising the proper working conditions of district electoral commissions.

The above information shows that the role of officials focused on two areas: members of district electoral commissions and ballot papers. In a debate on the role and significance of an election official in local government circles it was argued that, since the scope of their duties included “preparing” the elections procedure in district electoral committees, a broad range of tasks should be delegated to them. The National Electoral Commission joined the debate, highlighting that an election official was appointed to collaborate with municipalities rather than to perform for them the procedures associated with handling and ensuring technical and physical conditions for district electoral commissions, which, according to Article 156 of the CEL, remain to be the duty of the municipality mayor, on the municipal level.³⁰ Finally, at the time of the 2018 local elections, the catalogue of the specific duties of election officials included enabling voting by mail, training members of district electoral commissions, being on duty on the election day and collecting election documentation from the district electoral commission after determining the voting results. It seems that the function and tasks of the election official evolved – from an organiser, according the declarations of Members of Sejm to election observer in practice. It is worth noting that election officials were only determined on the municipal level, and their tasks in supra-municipal elections were not defined. Because of the loophole in legal provisions³¹, in

³⁰ Statement of the National Electoral Commission of 21.05.2018 on the role of the territorial government in organising elections. Accessed on: 30.10.2019, http://pkw.gov.pl/345_Wyjasnienia_stanowiska_komunikaty/1/25465_Stanowisko_Panstwowej_Komisji_Wyborczej_z_dnia_21_maja_2018_r_w_sprawie_rol_samorzadu_terytorialnego_przy_organizacji_wyborow.

³¹ There was no such provision as the one that applied, for example, to election commissioners, according to which in the case there were more than one commissioners in a given capital city of a region, one commissioner was made responsible for handling regional matters. This problem concerning election officials was unsuccessfully highlighted during the Senat procedure by the expert for legislative matters in the Legislation Office at the Senat Chancellery, Marek Jarentowski. Cf. Shorthand record. Joint meeting of the Human Rights, Rule of Law and Petitions Commission (193.), Territorial Local Government and State Administration Commission (129.) and Legislative Commission (207.) on 18.12.2017, pp. 10–11.

regional assembly elections, for example, election officials usually did not participate in any procedures, not even symbolically.

The Opinion of the Local Government Party of the Joint State and Local Government Commission of 28 March 2018, i.e. less than one quarter after amending the election law, highlighted problems associated with the organisation of elections: “It is likely that at least some of the abovementioned issues will not be satisfactorily solved before the elections. The main problem may be not the amount of time left for organisation, but unsolved problems arising directly from the new provisions of the code of election law. Accordingly, we demand urgent steps to be taken in order to successfully resolve the abovementioned issues, including urgent amendments to the provisions of the code of election law”.³²

Expecting that territorial government units might not be willing to collaborate, the June amendment also changed the wording of Article 191g, which originally provided for an agreement between the Head of the National Electoral Office and the mayor of a gmina in order to ensure suitable services for election authorities and working conditions for election officials. Such agreement was supposed to determine in particular, organisational, administrative and technical conditions and payment of the related costs. Originally, the agreement had been mandatory, but after the June amendment, it was optional.

The dispute between representatives of local government units and the National Electoral Office and National Electoral Commission was mainly associated with the wording of the abovementioned Article 156 §, according to which services as well as technical and physical working conditions for district and territorial electoral commissions and tasks associated with organising and conducting elections in a municipality, county or region were to be secured by the mayor of a municipality, county or region (*marszałek województwa*), respectively, with the exception of a number of important issues (mainly concerning designing, printing and transporting ballot papers). These tasks are delegated to territorial government units. The expression used in the act: “with the exception of” was interpreted in the Opinion of the National Electoral Commission on the role of

³² Statement of the Local Government Party of the Joint Commission of the Government and Territorial Government on preparedness for local government elections in 2018. Accessed on: 30.10.2019, https://pkw.gov.pl/345_Wyjasnienia_stanowiska_komunikaty/1/25465_Stalowisko_Panstwowej_Komisji_Wyborczej_z_dnia_21_maja_2018_r_w_sprawie_rol_i_samorzadu_terytoralnego_przy_organizacji_wyborow.

territorial governments in the organisation of the elections of 21 May 2018.³³ The Opinion stated that the exception did not mean that these tasks were excluded from the catalogue of territorial government's tasks, but instead, it suggested that they should be performed in collaboration with election officials. Also, the institutional changes associated with the organisation of elections were evaluated. In its Opinion, the National Electoral Commission stated that "... in association with comments made in the media that the role of territorial governments in organising elections was significantly limited by the amendment to the Code of Election Laws introduced by the Act of 11 January 2018 (...), the Commission would like to note that Article 156§1 of the Code of Election Law, which governs these issues in a general way, was only slightly modified by the abovementioned amendment. It still assumes an important role of territorial governments among the organisers of elections".³⁴

One could see that as the elections approached, the attitude of local government representatives changed. Initially, they criticised the legislator and election authorities for making errors and not preparing the reform diligently. Importantly, local government circles remembered critical comments made about the role of local governments in organising elections, and even allegations of fraud at the time when the Bill was developed³⁵. Later, however, local governments made a great organisational effort to ensure that the elections were conducted smoothly, regardless of any doubts they might have about the respective provisions of the amended Code. A major role in reconciling the opinions was played by the Head of the National Electoral Office, Magdalena Pietrzak.

Live streaming from polling stations

The most important element of the June amendment, in the public opinion, was the waiver of Article 52§7–8, which required live streaming from a polling station via a publicly available electronic data transmission network from the moment of checking and sealing the ballot box by the District Electoral Commission until signing the voting report. If live streaming was not possible

³³ Ibidem.

³⁴ Statement of the National Electoral Commission on the role of the territorial government in organising elections of 21.05.2018.

³⁵ Miernik, R., *Charakterystyka wyborów samorządowych w Polsce*, "Studia Politicae Universitatis Silesiensis" 2019, No. 24, p. 100.

for technical reasons, the work done by the commission was to be recorded on audio video recording devices and later uploaded on the National Electoral Commission's website. It was one of the most disputable issues in the debate on the implementation of the amended CEL.³⁶ The scale of a project associated with constructing and operating a system that would ensure live streaming of the work of election commissions was a major challenge for institutions that organised elections. Doubts concerned the ability to ensure audio video streaming devices and a broadband connection, to maintain their continued operation throughout the work of the District Electoral Commission and on-line availability of the transmission, and later uploading long hours of recordings on websites. In the 2014 local elections in Poland, there were 27,435 district electoral commissions, and each was supposed to have at least two cameras. Discussion on the technical limitations of such project also involved the issue of personal data protection. A solution to the problem was proposed in the opinion published by the Inspector General for the Protection of Personal Data (*GIODO – Generalny Inspektor Ochrony Danych Osobowych*). He noted the need to adapt to data protection provisions, in particular to the Regulation (EU) 2016/679 of the European Parliament and of the Council 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), which have been directly applicable in Poland since 25 May 2018. In his final conclusion, the Inspector claimed that “the scope of adaptations and the number and gravity of risks may, in practice, make it impossible to broadcast elections in accordance with the data protection law”.³⁷ It was claimed that broadcasting would involve revealing faces, behaviours or information about the place or residence or stay of the voters.³⁸ This opinion contributed to closing the debate on installing cameras in polling stations within just a few months after the new regulations had been passed, even though similar doubts had been raised at the

³⁶ Frydrych-Depka, A., *Prawo do informacji o wyborach*, “Studia Wyborcze” 2018, No. 25, p. 65.

³⁷ Information of the National Electoral Commission of 12.04.2018. Accessed on: 30.10.2019, https://pkw.gov.pl/337_Informacje/1/24969_Informacja_Panstwowej_Komisji_Wyborczej_z_dnia_12_kwietnia_2018_r_o_stanowisku_Generalnego_Inspektora_Danych_Osobowych_w_sprawie_przepisow_Kodeksu_wyborczego.

³⁸ GIODO letter from Edyta Bielak-Jomaa dated 11.04.2018 addressed to Magdalena Pietrzak, head of KBW, case no. DOLIS.027.437.18. Accessed on: 30.10.2019, <https://archiwum.giodo.gov.pl/pl/1520341/10462>.

time of their development.³⁹ It is disputable whether it would be possible for the National Electoral Commission could, before the June amendment, to effectively determine a method of broadcasting in such a way as to ensure compliance with standards arising from the EU law.⁴⁰ Such resolution, however, would not solve the problem of actual preparation of polling stations for broadcasting.

District electoral commissions

One of the key changes in the election law was the abovementioned introduction of the double structure of the district electoral commission, which, after the reform, would consist of two separate commissions: one for conducting the elections in the district (so-called daily commission) and the other for determining the results of voting in the district (so-called night commission). The originators of the idea believed that, after working for the whole day, members of the commission were tired and could make mistakes in the complicated vote counting procedure.

Moreover, the day commission was supposed to perform all its tasks on the election day in the presence of as many of its members as possible, in any case no less than 2/3 of the statutory members⁴¹, including the chair or deputy chair of the commission. The required presence of 2/3 of the commission members meant their constant presence in the room with the ballot box. One of the commission members should stay near the ballot box, to secure its integrity and voters' compliance with the secrecy of the vote, i.e. to make sure that voters put ballot papers in the ballot box with the printed side of the paper not visible. In the case of commissions with

³⁹ E.g. Expert in the Constitutional, International and European Law Team in the Commissioner for Human Rights Office, Zbieranek J., or in: Uziębło, P., *Analiza zagrożeń związanych z wprowadzeniem rejestrowania przebiegu głosowania w wyborach w Rzeczypospolitej Polskiej*. Accessed on: 30.10.2019, http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/ObserwujemyWybory/14_03_2018%20Opinia%20prof_Uziebly%20nt%20nagrywania%20wyborow.pdf. Different opinion in: Pytel, A., *Problematyka rejestrowania oraz rozpowszechniania wizerunku i głosu wyborców oraz członków obwodowych komisji wyborczych – postulat de lege ferenda*, "Studia Wyborcze" 2019, No. 27, p. 46 ff. The author states, for example, that "the legislator's decision seems unfortunate, as democracy is founded, apart from the procedure of electing representative public authorities, on the idea of public life transparency. Thus, no measure that does not disturb the election process or limit its transparency should be prohibited or needs to be governed by a legal norm".

⁴⁰ Uziębło, P., *Opinia w sprawie dopuszczalności przełożenia wyborów do organów stanowiących samorządu terytorialnego oraz organu wykonawczego na poziomie gminy*. Accessed on: 30.10.2019, <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/ObserwujemyWybory/Opinia%20w%20sprawie%20dopuszczalnosc%20przełożenia%20wyborow%20.pdf>

⁴¹ Before the Code of Election Laws reform, constant presence of at least 1/2 of the commission members was required.

the minimum number of members, this meant that three persons handed out the ballot papers and one secured the ballot box. Since the turnout was much higher than in the 2014 elections, in some polling stations, voters had to queue to collect their ballot papers.⁴² The work of the day commission ended the moment they handed over the documents and materials to the night commission, which was documented by a handover report. The night commission was obliged to count the votes and make a district voting report in the presence of all its members. It was no longer possible to create subgroups or sub-commissions to perform the respective tasks separately (although it was reported that some commissions worked in the same way as they used to before the reform, which was against the intentions of the legislator and the wording of the Act). However, the fear that the procedure could be used by some members to obstruct the commission's work did not come true.⁴³

There were also problems caused by the fact that some members left district electoral commissions without any sound reasons, only because, for example, the working hours were too long, the work started too early or ended too late or the remuneration was too low, or sometimes without even explaining why they left. In the case of commissions that consisted of the minimum number of members, this could paralyse the work of the commission. The problem was intensified by the amended provisions of the CEL concerning the appointment of substitute members. According to the principles of appointing district electoral commissions, election committees were supposed to propose enough candidates for a commission to be able to operate. However, after replacing a single commission with two separate commissions, the number of the required commission members doubled. Election committee attorneys were not able to propose enough candidates⁴⁴

⁴² Turnout in the 1st round of the 2018 local elections was 52.01%, while in the 1st round of the 2014 local elections it was 35.39%.

⁴³ Rulka, M., *Opinia na temat zgodności projektu ustawy o zmianie niektórych ustaw w celu zwiększenia udziału obywateli w procesie wybierania, funkcjonowania i kontrolowania niektórych organów publicznych (druk No. 2001) — w części zmieniającej przepisy kodeksu wyborczego — z europejskimi standardami wyborczymi*, "Przegląd Sejmowy" 2018, No. 144, p. 171.

⁴⁴ This problems were predicted at the stage of legislative work. See Uziębło, P., *Opinia prawna w sprawie zmian w kodeksie wyborczym wprowadzanych ustawą z dnia 14 grudnia 2017 r.* Accessed on: 30.10.2019, <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/Opinia%20prawna%20w%20sprawie%20zmian%20w%20kodeksie%20wyborczym%20wprowadzanych%20ustawa%20z%20dnia%2014%20grudnia%202017r.pdf> r., p. 6; Szymanek, J., *Opinia w sprawie poselskiego projektu ustawy o zmianie niektórych ustaw w celu zwiększenia udziału obywateli w procesie wybierania, funkcjonowania i kontrolowania niektórych organów publicznych (druk No. 2001) — w części dotyczącej proponowanych zmian w ustawie z dnia 5 stycznia 2011 r. Kodeks wyborczy*. Accessed on: 30.10.2019, <http://orka.sejm.gov.pl/rexdomk8.nsf/0/7A63D69811565C59C12581E-90034AA30/%24File/i2493-17.rtf>, pp. 10–11.

to appoint commissions with a sufficient number of members.⁴⁵ Serious problems were also associated with the limitations imposed on appointing substitute commission members – the limit was the minimum number (five) of commission members, even though there were enough candidates to replace all the missing commission members up to their maximum number. Consequently, if one more member resigned, the commission lost its minimum number of members and the procedure of electing a substitute member had to be repeated. If it was not for this limitation, the risk of having to replace a missing candidate would be much lower, and this is not an easy task, especially the day before or even on the election day. This was in contrast to the norms concerning composition of commissions in so-called separate voting districts, where both the maximum and minimum limit was 6 members. In practice, this meant that a commission consisting of 6 members worked in a district with several dozen voters (e.g. in a hospital), while a commission consisting of five members worked in a district with two thousand voters. Inability to replace more than the minimum number of commission members resulted in a dissonance: on the one hand, commission members knew from the media that there were candidates willing to work in the commission, but on the other hand, it turned out that they had to work with the minimum number of members. It would not be possible to replace commission members on the election day without the support of local administration. It is worth noting that the amendment delegated this authority to the election commissioner. Before the amendment, substitute district electoral commission members were elected by a mayor (of municipality, town or city, respectively), which, according to some researchers could raise doubts as to the impartiality of such members.⁴⁶

There are a number of technical issues that caused organisational challenges and increased the risk of errors. For example, election commissioners instructed elections officials to note down the numbers of seals (used, not used and broken), which significantly delayed collection of documents from the commission

⁴⁵ In this situation, the former stipulations of unequal treatment of parties in appointing members of district electoral commissions introduced by the amendment were of no practical significance. See Niżnik-Mucha, A., *Wybrane zmiany kodeksu wyborczego w świetle konstytucyjnych zasad prawa wyborczego*, "Casus. Kwartalnik Krajowej Reprezentacji Samorządowych Kolegiów Odwoławczych" 2018, No. 91, pp. 12–13.

⁴⁶ Rulka, M., Wróblewski, B., *Rozwiązania Kodeksu Wyborczego wpływające na zaufanie wyborców do procedury wyborczej. Uwagi de lege ferenda*, "Przegląd Sejmowy" 2018, No. 154, p. 54.

calculating the voting results (and it took place late at night, usually between 2 and 7 a.m.) There were also major problems with transferring documentation between commissions. Handover reports were hastily written and were not duly accounted for or explained to the commission calculating the voting results. Consequently, when summarising the voting report, errors made as a result of the work of the day commission were reported by the night commission. Since the night commission did not know what happened during voting, it reported erroneous information, causing further problems upon report approval.⁴⁷ Many district commission members raised the problem of the inefficiency of respective commission members, especially due to their advanced age or problems with basic arithmetical calculations. Also, it was claimed that the remuneration of district electoral commission members in the 2nd round of elections was too low. Having to work for long hours and with limited personnel, many commission members resigned before the 2nd round of mayor elections. District electoral commission members received 1/2 of their original remuneration in the 2nd round of elections.⁴⁸ The main reason to resign from membership in district electoral commissions, claimed by the resigning members, was the disproportion between the workload and the reduced remuneration. Consequently, in some cases, substitute members appointed to district electoral commissions had no relevant training.

Election law amendments after the local elections

After conducting local elections in the new conditions, the crucial institutions of the election system summarised and evaluated the new regulations. In information dated 21 January 2019, the National Electoral Commission proposed more than 22 specific changes to the CEL, which in many cases coincide with the problems associated with organising elections presented in this paper.⁴⁹ The Law and Justice Parliamentary Club submitted to the Speaker (Marszałek) of Sejm on 23 January

⁴⁷ The problem was perceived by researchers even before the elections, e.g. Michalak, B., *Zmiana przepisów Kodeksu wyborczego przed wyborami samorządowymi 2018*, "Athenaeum. Polskie Studia Politologiczne" 2018, No. 58, pp. 92–93.

⁴⁸ In 2018, the remuneration of the chair of a district electoral commission was 380 PLN, of deputy chair – 330 PLN and of commission member – 300 PLN. In the case of the second round of mayor elections, each would receive 1/2 of the respective amounts.

⁴⁹ PKW, *Informacja o realizacji przepisów Kodeksu wyborczego oraz propozycje ich zmiany*. Accessed on: 30.10.2019, https://pkw.gov.pl/pliki/1549013020_Informacja_o_realizacji_przepisow_Kodeksu_wyborczego_oraz_propozycje_ich_zmiany.pdf.

2019 a bill amending the Act – Code of Election Laws,⁵⁰ to some extent accepting the recommendations of the National Electoral Commission. The main goal of the amendment, according to its initiators, was to streamline the election process. The amendment increased the possibilities to appoint district electoral commissions in their full composition, also in the event if less than the required minimum of five members were proposed.⁵¹ Also, the size of district electoral commissions differed, depending on the number of voters in a given district.⁵² Another important change was that the dual structure of district electoral commissions was abolished. A single commission to conduct the voting and calculate the votes after closing the polling station was reintroduced. Even though, according to the current wording of the Act, the dual structure of district electoral commissions is to be reinstated for the next local elections, the relatively positive experiences with both European Parliament elections and Sejm and Senate elections show that one but bigger electoral commission may be more effective than two separate commissions.⁵³ Since in October 2018, election committees were not very active in proposing candidate members to district electoral commissions, interested citizens were allowed to apply for commission membership without the agency of those committees. Limitations associated with the function of the election officials were also reduced: now, the official may be employed in the municipality concerned (except for persons directly employed in the municipal office). Also, the deadline for reviewing requests to enter in the permanent election register was extended from three to five

⁵⁰ Sejm print No. 3163. Accessed on: 30.10.2019. <http://orka.sejm.gov.pl/Druki8ka.nsf/0/1A9F6DC1DE719813C125838B0049200B/%24File/3163.pdf>.

⁵¹ The Act on Amending the Code of Elections Act of 31.01.2019, Journal of Laws (Dz.U.) 2019, item 273.

⁵² Each district electoral commission shall consist of: 1) 7 members in voting districts with up to 1,000 residents; 2) 9 members in voting districts with 1,000 to 2,000 residents; 3) 11 members in voting districts with 2,001 to 3,000 residents; 4) 13 members in voting districts with more than 3,000 residents.

⁵³ It should also be noted that the National Electoral Commission, following the wave of resignations of district electoral commission members, slightly increased their remuneration, in particular the remuneration of commission chairs, who had the most duties. See Resolution No. 6/2019 of the National Electoral Commission of 27.02.2019 on the money due to members of election commissions in the elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland, and to the European Parliament and on documenting the days of leave from work.

working days.⁵⁴ Municipalities were given extra time to diligently review both traditional requests and requests submitted via the online voting services platform. At the same time, voters requesting to be entered in a given register of electors were obliged to provide, apart from other information, also their temporary address of residence on the election day. The abovementioned Article 156 §1 received the following new wording that made the role of territorial government units more unequivocal: “Services as well as technical and physical working conditions for district and territorial electoral commissions and tasks associated with organising and conducting elections in a municipality, county or region shall be secured by the mayor of a municipality, county or region”.

These changes were requested not only by the National Electoral Commission, but also by the Association of Polish Cities (Związek Miast Polskich).⁵⁵ The January amendment was not the only amendment to the Code of Election Laws in 2019, but the subsequent amendments did not directly affect the process of preparing and conducting elections.

Conclusions

The 2014 local elections triggered a common belief that organisation of the election process in Poland required changes, and the reform was supposed to be based on major amendments to the election laws. The first modifications were introduced already during the 2011–2015 term of office, but more radical steps were taken in 2017 and 2018. This paper discusses a number of changes vital for the process of preparing and conducting elections, and it presents the main problems arising from the new solutions. This diagnosis was to some extent confirmed by the legislator, who made new amendments, both before and, specifically after the local elections. The subsequent changes may be interpreted as withdrawal from the original intentions.

⁵⁴ According to 18§1 of the Code of Election Laws, a permanent register of constituents includes persons who are permanent residents of a municipality and are entitled to vote. A request to be entered in the register must be substantiated by submitting a proof of permanent residence, e.g. employment agreement, bills, etc. to the municipal office.

⁵⁵ Statement of the Polish Cities Association on organising and conducting local government elections in 2018. This document requested not only changes in the new solutions, but also, in many cases, reintroducing the legal status from before the December 2017 reform. These requests, apart from the request to prolong the deadline to be added to the election register, were not satisfied. For more information, see: *Nowy Kodeks wyborczy*, “Samorząd miejski. Miesięcznik Związku Miast Polskich” 2019, No. 257.

It is worth noting the disproportion between the goals declared by Sejm Members proposing the Bill and interpretation of legal provisions applied by election authorities in the course of preparing local elections. The unilateral evaluation of the limited position of local authorities in the institutional structure responsible for preparing and conducting elections, formulated at the stage of legislative work, was taken no notice of in the months before the elections. The “risk of malpractice and irregularities” that had been mentioned was finally reduced to a “minor change”. The first conclusion is that there is currently no institution in Poland with sufficient resources to overtake from territorial government units the tasks associated with preparing and conducting elections. In the end, the role of the new structures was limited to supervision, and it is doubtful whether the actual process of appointing election officials enabled professional performance of those tasks. Moreover, neither the legislator nor the election authorities found an answer to the challenges associated with the need to improve the quality of operation of district commissions.

This paper does not discuss a number of specific changes introduced by the amended election laws or the issue of IT systems supporting the work of electoral bodies, which have undoubtedly improved, especially compared to the 2014 elections. It should also be noted that one of the key changes to the Polish election laws, concerning the appointment of the National Electoral Commission members according to the new regulations, which may affect all the elements of the election system, has not been completed by the time this paper was written.⁵⁶

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⁵⁶ The National Electoral Commission shall consist of one judge of the Constitutional Tribunal, appointed by the President of the Constitutional Tribunal, one judge of the Supreme Administrative Court, appointed by the President of the Supreme Administrative Court and seven members qualified to hold the position of a judge, appointed by Sejm. National Electoral Commission members appointed by Sejm shall be proposed by Sejm clubs, proportionally to the size of a club. For more information, see Rakowska-Trela, A., *Zasada demokratycznego państwa prawnego a zmiany w prawie wyborczym*, “*Studia Wyborcze*” 2018, No. 25, pp. 18–28.

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Michał Kasiński

RELIGIOUS INSTRUCTION IN POLISH PUBLIC SCHOOLS IN LIGHT OF UNIVERSAL AND EUROPEAN STANDARDS

Abstract

The study is devoted to the analysis of legal regulations at a national level (Poland), the jurisprudence (case-law) of the Constitutional Tribunal and the practices of central and local government in matters related to public education, as perceived from the point of view of universal and European standards protecting freedom of conscience and religion.

The author justifies the claim that the standards set by the Polish Constitutional Tribunal in this field are fundamentally different from the standards established in the case-law of the UN Human Rights Committee and the European Court of Human Rights.

This leads to tolerance of repeated violation of the principle of ideological impartiality of public authorities. The principle, declared in Article 25 (2) of the Constitution of the Republic of Poland¹, is violated both by state-level legislation pertaining to the sphere of religion, and by biased practices of educational administration.

What is particularly abnormal is the inertia of public authorities that are obliged to supervise religious education and/or instruction, and their indifference to the unlawful activities of the entity interested in ideological domination over the education sector.

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¹ Act of 2 April 1997 Constitution of the Republic of Poland, Dz. U. (Journal of Laws) of 1997 No. 78, item 483, as amended.

The author expresses the conviction that a fundamental change of the approach of the Polish legislator should take place, especially as regards the role and tasks of state entities in protecting freedom of conscience and religion in the educational activities of public schools. This would guarantee the philosophical and religious neutrality of education in state schools.

Keywords: religious education, public education, freedom of conscience and religion, ideological neutrality of public authorities, UN Human Rights Committee, European Court of Human Rights

1. International and European acts which proclaim protection of freedom of conscience and belief, neither forbid nor include obligation of providing Religious Education (in a broad sense: teaching about religion in general; in a narrow sense: teaching of a particular religion; the Polish context tends to employ the narrow sense in a vast majority of cases; that is why “religious education” and “religious instruction” are used interchangeably) in public, or state schools. Their provisions oblige countries to recognize the right of parents to bring their children up and teach them in accordance with their own religious and philosophical beliefs.² In particular, provisions of two fundamental documents of the United Nations of 1966: Article 18(4) of the International Covenant on Civil and Political Rights³ and Article 13(3) of the International Covenant on Economic, Social and Cultural Rights⁴ include obligation of State-Parties to each covenant, to respect the freedom of parents in providing their children with religious and moral education in accordance with their own beliefs. Report No. 1 to European Convention on Human Rights of 1950, indicates in Article 2 the parents’ right to have their own rights to provide their children with education in accordance with their personal religious and philosophical beliefs respected by the State which performs its obligations in education.⁵ A similar provision is included in Principle VII of the Final Act of the Conference on Security and Co-operation in

² Sobczak, W., *Wolność myśli, sumienia i religii. Poszukiwanie standardu europejskiego*, Toruń 2013, pp. 440–458.

³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

⁵ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

Europe of 1975⁶. In accordance with Article 14(3) of the Charter of Fundamental Rights of the European Union of 2007 the right of parents to provide children with education in accordance with their own religious, philosophical and pedagogical beliefs, is respected, in accordance with state acts governing the exercise of this right.⁷

In light of the mentioned acts, the right in question is of neutral nature and is firstly executed in a family entitled to organize their religious or irreligious life freely at home under the parents' direction. Parents are entitled to decide whether their children should receive religious education and what form it should take, in accordance with their own religious beliefs and even with their general outlook on life. What is more, Article 14 of the UN Convention on the Rights of the Child of 1989 includes an obligation for Party States to respect children's right to freedom of thought, conscience and belief, and to respect the rights and obligations of parents (legal guardians) concerning directing their child in terms of exercising its rights in a manner consistent with developing abilities of the child.⁸ All these regulations should function to protect the family (which is the subject of freedom of conscience and belief) against arbitrary inference of government authorities, hence it is difficult to find there any indications concerning e.g. methods of resolving disputes between parents of different beliefs in terms of the religious direction of bringing up their children.

2. Real problems of protection of child's freedom of conscience and belief in the education process occur not only in the area of relations inside the family, but mainly in relations between children/students and their parents and the authorities of the school that the particular students attend. In this regard, two kinds of solutions may be identified, stated in acts of international and European law which should guarantee parents' influence on the direction of religious education at schools. Firstly, ensuring the freedom of establishing private schools whose curriculums include (or do not include) religious education and providing the

⁶ Organization for Security and Co-operation in Europe (OSCE), *Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki*, 1 August 1975.

⁷ European Union, Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

⁸ The document ratifying this convention by the Republic of Poland was supplemented with a declaration on the basis of which a child should execute (inter alia) the right in question with respect of parental authority, and in accordance with Polish customs and traditions concerning the position of the child in the family and outside it. Act of 20 November 1989 on ratifying the UN Convention on the Rights of the Child, Dz.U. (Journal of Laws) of 1991 No.120, item 526, as amended).

child with freedom of choice of such a school which is run e.g. by a particular religious or non-religious association. Secondly, acceptance of admissibility of introduction of religious contents in public school curriculum and delivering them in a didactic process to all students or only to those students whose parents (or the students alone) expressed such a will by attending separate classes devoted to a given religion. In this way, the original right of parents to bring their children up in accordance with their own beliefs, takes the form of the right to teach children a particular religion in a private school (first option) or in a public school as well (option two). It is clear that the classes are to be conducted only by a duly qualified teacher who is also accepted by a relevant religious association. The second option which introduces religious education also in public schools is definitely more significant in European states because of the principle of the universal right to education and compulsoriness (and gratuitousness) of education at least at the basic level which is respected there (Article 26(1) of the Universal Declaration of Human Rights, Article 13 of the International Covenant on Economic, Social and Cultural Rights, Article 14 of the Charter of Fundamental Rights of the European Union, Article 28 of the Convention on the Rights of the Child).

It is the public school system that is directed and supervised by governmental or local authorities where the principles of universality and compulsoriness of education are implemented. Activity of such schools, in the area of interest of this paper, is subject to legal and political principles which govern relations between religious associations and the state. In confessional states there are reasons for including religious content in school curriculum which is consistent with the doctrine of the governing church, and even for introducing obligation of teaching the faith of a particular church. In states that represent separation of church and state or, in a less radical option, a neutral outlook on governmental authorities, there are reasons for providing secular schools.

In Europe, there is a constant tendency of shifting from the model of a confessional state towards various options of democratic secular state of law, or a lay state.⁹ In some of the states certain legal solutions are still preserved, which guarantees preference for religious associations (especially for the dominant confession) in various spheres of public life, also in public education. This preference faces more or less justified claims of its inconsistency with the prin-

⁹ Pietrzak, M., *Państwo laickie*, "Przegląd Humanistyczny" 1990, No. 8–9, reprint: Pietrzak, M., *Demokratyczne, świeckie państwo prawne*, Warszawa 1999, see especially pp. 140–143.

ciple of protection of freedom of conscience and belief. On the other hand, too strict an understanding of secular education is also subject of criticism. It may be argued that a total exclusion of religious instruction from public school curriculum would, in fact, mean opening a way for atheist indoctrination, which would be inconsistent with the rights of students (and their parents) to have an influence on the direction of education consistent with their religious beliefs and, in consequence, it would mean weakening of freedom of conscience and belief. Having started at this point, a conclusion may be formed that religious instruction is “a remarkable achievement of the European legal culture in terms of respecting freedom of conscience and religion, as this means protection of the parent’s religious freedom, in the scope of raising children according to the parents’ views within public education”¹⁰.

An attempt to form a compromise between the two contradictory tendencies is visible in acts of international law. Following Article 2 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”. As both the academic writing and judicial decisions pointed out, this provision does not guarantee the absolute right to education of children in accordance with the beliefs of parents, but merely “respect” towards them. This “respect towards parent’s beliefs” can be understood in a number of ways, but it certainly assumes the existence of negative obligations on the part of the State, as well as certain positive obligations.¹¹

The controversial nature of state law regulations in the area in question is the reason for numerous complaints against Party States to the conventions mentioned above, chiefly addressed to the United Nations Human Rights Committee (hereinafter referred to as: HRC) and European Court of Human Rights (hereinafter referred to as: ECtHR). The case-law of these bodies includes more or less conservative attempts to define transnational (universal, European) standards in teaching religion as part of public education. It would be valuable to determine

¹⁰ *Nauczanie religii w polskiej szkole*, 10.01.2019, <https://ekai.pl/nauczanie-religii-w-polskiej-szkole-2/>, accessed on: 28.11.2019; especially quote of Father Józef Krukowski.

¹¹ Nowicki, M.A., *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2017, p. 882; ECtHR, *Lautsi and others v. Italy*, Application No. 30814/06, Grand Chamber, 18 March 2011, par. 61.

the degree to which these standards have influenced the making and application of provisions of Polish law with regard to teaching religion in public schools.

Special attention should be paid to the standard of ensuring freedom of conscience and belief which was shaped by the judicial decisions of the United Nations Human Rights Committee and the European Court of Human Rights, under which the parents are granted the right to decide about religious education of their children with respect to their education in a public school. According to the established practice of the Human Rights Committee, teaching religion at public schools is acceptable if the parents are granted the right to exempt, fully and freely, their children from such classes. Alternative classes in ethics or in history of religion are to be held in a neutral manner.¹²

The European Court of Human Rights has taken the view that, while religious education at school is not contrary to the Convention, it is required to check in detail whether it involves the obligation to involve students in some form of religious practice or to expose them in any form to religious indoctrination. What is important at this stage is the possibility of exempting a student from such lessons. Parents may not send their children to be instructed in a religion that they do not like. Religious education should be held in a way allowing a real possibility of making such a choice.¹³

4. Religious education in Poland is currently regulated by provisions of the Constitution of 2 April 1997, the already mentioned conventions to which the Republic of Poland is a party, the Concordat between the Holy See and Poland of 28 July 1993¹⁴, the Act on guarantees of freedom of conscience and belief of 17 May 1989¹⁵ and other acts on confessions¹⁶, the Act on the education system

¹² Wieruszewski, R., *Nauczanie religii w szkołach publicznych oraz finansowanie szkół religijnych w świetle orzecznictwa Komitetu Praw Człowieka ONZ*, in: Wieruszewski, R., Wyrzykowski, M., Kondratiewa-Bryzik, L. (eds.), *Prawne granice wolności sumienia i wyznania*, Warszawa 2012, pp. 170–173.

¹³ M. A. Nowicki, op. cit., p. 886; ECtHR, *Angeleni v. Sweden*, Application no. 1049/83, 3 December 1986, p. 41; ECtHR, *Bernard v. Luxembourg*, Application no. 17187/90, 8 September 1993, p. 57; ECtHR, *C.J., J.J., E.J. v. Poland*, Application no. 23380/94, 16 January 1996, p. 46.

¹⁴ Dz. U. (Journal of Laws) of 1998, No. 51, item 318.

¹⁵ Dz. U. (Journal of Laws) of 2017, item 1153.

¹⁶ It especially concerns the so-called individual acts regulating the attitude of the State to certain religious associations, among others the Act of 17 May 1989 on the relations of the State and the Catholic Church in the Republic of Poland, Dz. U. (Journal of Laws) of 2018, item 380, as amended) and several acts regulating the legal situation of 14 other religious associations.

of 7 September 1991,¹⁷ Regulation of the Ministry of Education on conditions and ways of organizing religious education in public pre-schools and schools of 14 April 1992,¹⁸ and the Act on specific conditions and grading, classifying and promotion schemes for students and course participants at public schools of 10 June 2015¹⁹ and agreements of this ministry with leaderships of specific religious associations.

The first impression is that the Polish law contains regulations in line with the above-mentioned standards for religious education in public schools. In accordance with Article 53(4) of the Constitution, the religion of a church or other legally recognized religious organization may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed thereby. The Constitution does not impose an obligation on public schools to conduct religious instruction yet it does not provide for restriction of such instruction if citizens express such a wish.²⁰ However, what remains doubtful is the constitutionality of Article 12 of the Concordat which states that "by recognizing the right of parents to the religious education of children and the principle of tolerance, the state guarantees that public primary and post-primary schools as well as kindergartens maintained by bodies of state administration and local government, provide religious education under the school and pre-school curriculum, according to the will of those interested". The phrase "the state guarantees..." may be understood literally as the state's commitment to the general introduction of religious instruction in public schools and kindergartens. It would be, however, a *contra legem fundamentalem* mistake. The interpretation of the provision in question, taking into account the content of the parent norm, expressed in two provisions of the Polish Constitution: "Parents have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions" (Article 53(3) of the Constitution) seems convincing. Upbringing should take into account the degree of maturity of a child, as well as his freedom of conscience and belief and also his convictions" (Article 48(1) of the Constitution). Moreover, the Concordat refers to the principle of tolerance and "the wishes of those involved". One

¹⁷ Dz. U. (Journal of Laws) of 2019, item 1481, as amended.

¹⁸ Dz. U. (Journal of Laws) of 1992, No. 36, item 155.

¹⁹ Dz. U. (Journal of Laws) of 2019, item 372.

²⁰ Florczak-Wątor, M., *Art. 53 [Wolność sumienia i wyznania]*, in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej Komentarz*, Warszawa 2019, pp. 184–185.

may agree with the opinion that, in this sense, the provision of Article 12(1) of the Concordat does not contradict the principle of voluntary use of religious classes, but rather supports this principle by allowing its full understanding: instruction in religious education in public schools is dependent on a positive declaration of intent to participate in religion classes.²¹

This statement may be made by the students' parents, their guardians or the students themselves. According to the Act on the Education System, the right to choose religious instruction in pre-schools and primary schools belongs to the parents; while in secondary schools it belongs to the parents or the students themselves. An adult student submits the statement on his/her own.

Religious instruction is optional in public pre-schools and schools.²² Polish law does not provide for the requirement of submitting a clear declaration of intent of a student's parent or the student himself/herself not to participate in religion classes, because such a practice could mean not only illegal pressure, but an outright breach of the constitutional ban of obliging anyone by the public authorities to disclose their religious convictions or belief (Article 53(7) of the Constitution). The phenomenon of violating this ban – which was widespread until recently – caused the 2013 Commissioner for Human Rights' appeal to the Minister of National Education, who undertook to provide the superintendents and school principals with information about the illegality of the practice in question.²³

The statement concerning the decision on choosing instruction in religious education should be submitted to the authorities of the school, and not to the church authorities. The school authorities are not allowed to reveal to a religious educator or the leadership of the church or any third party the identity of students who (or whose parents) have submitted an opt-out decision or who have not expressed any will. Practice in this respect often varies. It frequently occurs that the school authorities inform the religious educator or the authorities of the church about the full list of pupils – thus enabling the identification of students

²¹ Góralski, W., Pieńdyk, A., *Zasada niezależności i autonomii państwa i Kościoła w konkordacie polskim z 1993 r.*, Warszawa 2007, pp. 38–39.

²² Kasiński, M., *Ochrona wolności sumienia i wyznania*, in: Duniewska, Z. (ed.) et al., *Prawo administracyjne materialne*, Warszawa 2019, pp. 226–228.

²³ Polish Commissioner for Human Rights, Statement of 15 November 2013, reference number RPO / 601727/08/1/104122. <http://www.sprawy-generalne.brpo.gov.pl>, (downloaded 4.07.2014). This view seems to be shared by the spokesman of the Polish Bishops' Conference, cf. *Statement of the EPC: Religious education not is an optional subject. Classes can take place in the middle of the school day*, 18.03.2019. *Gazeta.pl*, accessed on: 28.11.2019.

whose parents have not opted in or have opted out. Another dysfunctional phenomenon in this area is that fact of not submitting a statement for the child's participation in religious education classes is identified as a specified denominational or worldview option of his/her parents (e.g. incidental cases of proclamation by some ecclesiastical authorities or catechists, that the resignation from the child's attending religious instruction is, de facto, equivalent to the apostasy of his/her parents).²⁴ Even more dangerous is the passivity of the school and public authorities towards the described negative behaviour, even if its scope seems statistically narrow. One of the reasons for this inaction may be the extremely limited legal possibilities of the application of the measures of pedagogical supervision over this behaviour. Another one involves the fear of disturbances in the relations with the ecclesiastical authorities, which often tend to view the critique of the methods and results of catechetical activities as an attack on the Church itself.

5. Ethics classes in Poland, in contrast to the solutions adopted in other countries, as well as those suggested by the jurisprudence of international courts, are not an alternative to religious instruction for two reasons. First, parents or students, have the right to choose one of these subjects or the resignation from both; it is also acceptable to take part in both the religious instruction and ethics classes. Secondly, so far the overwhelming majority of public schools do not hold classes in ethics.²⁵ In this situation, fulfilling the requirement of the ideological neutrality of teaching ethics in Poland is not a subject of major controversy. The situation may, however, change if, for example, under pressure from European authorities, ethics classes will be organized in a greater number of schools. Then, probably the words from the preamble of the Act on the education system stating that "Teaching and upbringing-respecting the Christian value system is based on the universal principles of ethics" will take on a new tone.

6. The material taught during the religious education classes and the principles of assessing (grading) the students are of crucial importance. The judicature

²⁴ Suhecka, J., *Kuria straszy rodziców. Wypisałę dziecko z religii? "To pisemna apostazja"*, 9.09.2014. Wyborcza.pl, accessed on: 26.11.2019. Later, the Curia withdrew from the statement in brackets.

²⁵ The availability of ethics classes has changed significantly over the last dozen years. In the 2006/2007 school year, only 285 schools organized ethics lessons. In 2014 (as of September 30), ethics was already taught in 2,471 schools. Rzecznik Praw Obywatelskich, *Dostępność lekcji religii wyznań mniejszościowych i lekcji etyki w ramach systemu edukacji szkolnej – analiza i zalecenia*, Warszawa 2015, p. 35. In the 2017/2018 school year, ethics classes were held by ca. 3300 schools. Suhecka, J., *Rodzice wciąż muszą walczyć o lekcje etyki "Zajęcia zaczynają się o 7.15"*, 2.04.2018. Wyborcza.pl, accessed on: 28.11.2019.

of the ECtHR highlighted that it was inappropriate for the religious education program to include the rites pertaining only to a single religion and/or be reduced to learning the prayers, psalms, memorizing religious texts, rituals of a single religious group.²⁶ Also, the Polish literature expresses the view that the basis of assessment of religion education should be the student's knowledge as well as his/her diligence and activity, though it should not include the student's participation in religious practices.²⁷

The reality is different: the basis for the assessment of "religion classes" very often involves the quantity and quality of the student's religious practices, such as participation in certain religious services. Religious education classes are not comparable with the lessons of other subjects – they are not primarily concerned with the transfer of scientific knowledge, such as mathematics, chemistry or history classes. They do not resemble religious studies but are of catechetical nature.²⁸ They are used for shaping the student's religious training and social attitudes in accordance with the doctrinal principles of a given religious organization, leading to the assimilation of "the truths of faith" and the formation of the habit of participating in ceremonial activities. It is doubtful whether, from this viewpoint, the instruction at a public school should be more effective than one held outside school, that is, at an education facility of a religious association. It is unacceptable for the grade in religious education to be seen as equal with the assessment of the success in the field of religious indoctrination of the students. Above all, it should by no means be treated as a means of assessment of the success in shaping the student's negative attitude towards "infidels", atheists, agnostics, or any students not participating in the instruction of the dominant religion. To protect the latter students against religiously motivated harassment from some teachers and some of the "majority" part of the peer environment is an inalienable responsibility of public school authorities, as well as government and local authorities.

²⁶ ECtHR, *Folgero and Others v. Norway*, Application no.15472/02, the Grand Chamber, 29 June 2007, par. 94; ECtHR, *Hasan and Eylem Zengin v. Turkey*, Application no. 1448, 9 January 2008, par. 60 and 62; Sobczak, W., op. cit., p. 446.

²⁷ Mezglewski, A., *Nauczanie religii w publicznych przedszkolach i szkołach*, in: Mezglewski, A., Misztal, H., Stanisław, P., *Prawo wyznaniowe*, Warszawa 2011, p. 176.

²⁸ Brzozowski, W., *Bezstronność światopoglądowa władz publicznych w Konstytucji RP*, Warszawa 2011, p. 37.

Thus, it is crucial to ask the following question: can the government interfere with the content of the curriculum and the method of religious instruction at a public school? In the light of the judicature of the ECtHR, a positive response does not raise any doubt. According to the Court, school education should take into account the cultural and religious diversity of societies of Europe, and because teaching is a holistic process – religious issues cannot be excluded from its framework. Religious elements are also present in the overall teaching content in public schools, which means that parents, regardless of their religious or philosophical beliefs, are not entitled to demand that their children were deprived of contact with any of them, or specifically with some of the philosophical or religious views, for example during the lessons of history, literature, or art history. The content of school programs must, however, be presented in an objective, critical and pluralist manner, allowing students to shape the “critical approach in the matters of religion,” and “in a peaceful atmosphere, free from improper proselytism”. Any indoctrination without any regard to the parents’ convictions is prohibited. The right of parents to the education and teaching of their children in conformity with their religious and philosophical convictions (Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms) is related to the fundamental right to education and should be read in conjunction with Articles 8, 9 and 10 of that Convention, and, therefore, with the right of every person “to respect for private and family life”, to “freedom of thought, conscience and religion” as well as to “freedom of receiving and imparting information and ideas”. According to the ECtHR, there are no obstacles for the public school curriculum to include separate classes in religion or about religion. However, they must respect the prohibition of indoctrination, which applies to both the content taught, and the organizational location of the subject.²⁹ In several rulings, the Tribunal expressed the view that whenever the state introduces religious education to the school program, regardless of the possibility of obtaining exemption from such lessons, parents of attendees may expect this subject to be taught in a way that meets the criteria of objectivity and pluralism, respecting their religious and philosophical views.³⁰

²⁹ ECtHR, *Kjeldsen, Busk Madsen and Petersen v. Denmark*, Application no. 5095/71; 5920/72; 5926/72, 7 December 1976.

³⁰ ECtHR, *Hasan and Eylem Zengin v. Turkey*, Application no. 1448/04; ECtHR, *Mansur Yalcin and Others v. Turkey*, Application no. 21163/11, 16 September 2014, par. 77; ECtHR, *Izzettin Dogan and Others v. Turkey*, Application no. 62649/10, 26 April 2016, par. 129.

Binding regulations and actions undertaken by education authorities in Poland are markedly inconsistent with the ECtHR jurisprudence mentioned above. Public authorities and school management have not been awarded sufficient legal means and, most probably, are not quite willing to respond accordingly to the situation when indoctrination during religion classes is common rather than exceptional. The primary reason for this situation is the Concordat. Article 12 Part 2 thereof reads: “Catholic religion education curriculum, as well as appropriate textbooks shall be designed by church authorities and shall be presented to competent state authorities for informational purposes”. The authors of the commentary to the Concordat (the issue of which was agreed upon by the Metropolitan Curia for Warsaw) are of the opinion that the statement quoted above gives church authorities the sole right to design the Catholic religion education curricula and textbooks and, at the same time, it repeals the statement included in the act on the education system which states that the Minister of National Education selects curricula and school textbooks which shall be certified for use in public schools. They also claim that such a procedure results from the fact that the state respects the church autonomy in designing and selecting curricula and textbooks used for teaching the Catholic religion. Due to the fact that religion is taught in public schools and kindergartens, curricula and textbooks should be familiar to the competent state authorities. However, any state interference in teaching truths of the faith would clearly contradict the rule of independence and autonomy of the state and the Church within their respective spheres of activity, referred to in Article 1 of the Concordat.

The Authors of the abovementioned commentary also claim that it is guaranteed that “the Church cares about the content of faith testimony”. The regulations referred to in Article 12(3) and (4) of the Concordat assure that the teachers of religion are dependent on the church regulations and orders, in all matters which refer to “teaching religion” (religious instruction). Moreover, they have to obtain a certificate (*missio canonica*) awarded by a diocesan bishop, which confirms their allegiance to the Catholic doctrine and allows them to teach religion. Thereby, the Church has the possibility to decide on particular catechists (religious instructors) to be employed in public schools. This is supposed to protect the Church-bound identity within the scope of truths of the faith which are passed on, as well as a Catholic morality. According to the Authors: “The Church does not interfere in teaching other subjects or in any other issues which belong to the sphere of competence of

the public education system, whereas the state does not teach the rules and truths of the faith. The autonomy of these two spheres is so strongly adhered to that it is also coherent with the rule of separating the state from the Church”.³¹ However, I would not agree with this statement. Public authorities are not able to act effectively in situations where the Church interferes in teaching school subjects other than religion. On the other hand, they are not able to influence religious education curricula, even if religion classes included elements of indoctrination, promoted aversion to other denominations or conveyed messages which were strongly contradictory to information presented during classes in other school subjects (for example to the current research results in biology, medicine or history).³² They are, however, to finance religious education from public funds.³³

7. The special privileges of the Catholic Church (visible in common religious instruction in public schools), which mainly result from the Concordat, are usually not granted to the representatives of other religions whose relations with the state are regulated by individual acts, and the Act on the freedom of conscience and religion. Breaking the constitutional rule concerning equal rights for different religious associations, referred to in Article 25 (1) of the Constitution, cannot be justified in this case. Nevertheless, the Constitutional Tribunal justifies it either by the wrong law interpretation, i.e. it claims that Article 25 (4) of the Constitution which legitimises the concordat shall be deemed *lex specialis* and, therefore, shall exclude the equal rights obligation – or by emphasizing the dominant position of the Catholic Church in society in terms of the number of followers.³⁴

Teaching religious education in public schools provided by other religious associations which represent any “minority” would face significant legal and organizational obstacles, mostly because schools have the right and are obliged

³¹ Góralski, W., Pieńdyk, A., op. cit., pp. 39–41.

³² Polish Bishops’ Conference, *Core curriculum for the catechesis of the Catholic Church in Poland, Document adopted during the 379 Plenary Meeting of the Polish Bishops’ Conference on June 8, 2018*. This document was criticized by liberal circles, including Piotr Pacewicz in: *Kościół na terenie świeckiej szkoły*, 22.04.2019. OKO.press, accessed on: 28.11.2019.

³³ Cf. Pacewicz, P., *MEN: nauczanie religii kosztowało w 2018 roku 1,48 mld. OKO.press: katecheta zarabia średnio 4960 zł*, 22.04.2019. oko.press, <https://oko.press/men-nauczanie-religii-kosztowalo-w-2018-r-148-mld-oko-press-katecheta-zarabia-srednio-4960-zl/>, accessed on: 24.04.2019. According to the Catholic Upbringing Commission of the Polish Bishops’ Conference for the 2017/2018 school year, a total of 31,353 catechists (religious instructors) conveyed classes at Polish schools.

³⁴ Brzozowski, W., *Glosa do wyroku Trybunału Konstytucyjnego z dnia 2 grudnia 2009 r., U 10/07, “Przegląd Sejmowy” 2010, No.4; Brzozowski, W., Bezstronność...*, p. 219.

to provide lessons of religion for a given denomination only if there are at least seven students of this denomination in a single class or group of students. For smaller groups, religion classes in school should be organised in a mixed class group, or in a group comprised of students from different schools or in a facility outside school, which in fact means outside the public school. The aforementioned quantity limits have been set illegally.³⁵ They are not aligned with constitutional rules on equal treatment of all students by public authorities since they create special privileges for the followers of the dominant religion in terms of quantity, who can be taught religion in schools. They also provoke harassment towards students who are either members of other religious groups or who are confessionless. Furthermore, the limits provoke monopolization of the Catholic Church in teaching religion in public schools.

Problems related to restrictions of access to instruction in minority religions (as well as ethics classes), and detailed recommendations for actions that would allow these restrictions to be eliminated were presented in the report of the Commissioner for Human Rights to the Minister of National Education in 2015, titled “Availability of minority religious education and ethics lessons as part of the school education system. Analysis and recommendations”, as well as in subsequent speeches from 2016 and 2018. In the last of these speeches, the Commissioner expressed a view that “any barriers to access to minority religious education or ethics classes, or unequal treatment of students not attending religion classes organized by the school, are symptoms of discrimination on the grounds of religion and worldview in the area of education.” Among the remedies indicated in his speech was the postulate to amend the Regulation on the conditions and method of organizing religious education in public pre-schools and schools of 14 April 1992, imposing an obligation on school heads to inform parents and students about the possibilities and principles of organizing religious education or ethics classes. This can lead to increased awareness of the existence of such entitlement in children and families from minority religious groups (ones with a minor number of followers in a given area). The Commissioner pointed out the need to remove organizational restrictions, including the ones associated with difficult commuting, long waiting times for classes, or the need to choose between religion or ethics classes and other extracurricular activities, as well as the need to inform parents and students that it

³⁵ Directive of the Minister of National Education of 14 April 1992 on the conditions and ways of organizing religious education lessons in public schools and pre-school, *Dz. U. (Journal of Laws)* of 1992, No. 36, item 155, as amended) was issued without statutory authorization.

is possible to attend religious education and ethics concurrently.³⁶

8. In Poland, the right to be taught religion in public schools is no longer (to such a large extent) associated with the right to be taught in general, which is due to the fact that religious instruction has become, to a large extent, an indoctrination tool. It also ceased to bear a clear relation to the core principle of the freedom of conscience and religion since all too often religion is taught in a way which clearly contradicts this freedom. However, undoubtedly, the legal regulations concerning religious education in public schools provide organizational and financial support to the public authorities for implementing religious missions of religious associations, with the special influence of strengthening the social impact of the Catholic Church. However, this support is not fully effective, since the tendency of students (parents of students) to resign from religion lessons has been increasing for several years.

In this situation, more and more doubts are raised by legal solutions according to which religious education should be treated as one of several optional subjects, equal to other subjects in the school curriculum, with general grading principles applied.³⁷ It is, however, an utter misunderstanding to assume (*de lege lata*) religious education to be a compulsory subject.³⁸ It is neither legally applicable, nor legitimate to include grades from a religion/ethics class in an end-of-year school certificate, as this incorrectly suggests the joint responsibility of public school authorities for the correctness of these grades and the correctness of the content and methods of teaching religious education classes, which, in fact, could not be influenced by the school authorities by any way. Moreover, the lack of a grade in the space provided for religion class grade (i.e. a hyphen instead of a numeric mark) stigmatizes a student who does not attend religion classes, because ethics classes are not held in the vast majority of Polish schools. In the *Grzelak v. Poland* case, the ECtHR decided that the lack of a mark in the space called “religion/ethics” in subsequent school certificates signifies a breach of Article 14 in connection with Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.³⁹ Obviously, this also

³⁶ Speech of the Commissioner for Human Rights to the Minister of National Education of 20.09.2018. Letter No. XI.5601.4.2016.JS.

³⁷ Act of 7 September 1991 on the education system, Dz. U. (Journal of Laws) of 2019, item 1481, as amended.

³⁸ The Catholic Upbringing Commission of the Polish Bishops' Conference has expressed a view that religious education is an elective class, which becomes compulsory if declared by the parents or major students.

³⁹ ECtHR, *Grzelak v. Poland*, Application no. 7710/02, 22 November 2010; Cf. Brzozowski, W., *Bezstronność...*, p. 220, Sobczak, W., op. cit., p. 447.

entails a breach of Article 32 and Article 53(7) of the Constitution (unequal treatment by public authorities and breaking the confidentiality of one's religious convictions).

Therefore, it is not possible to agree with the opinion of the Constitutional Tribunal which claims that the regulations that justify awarding end-of-year grades in religion classes and including them in the so-called grade average are consistent with the Constitution and are not contradictory to the act on the guarantees of the freedom of conscience and religion.⁴⁰ These regulations allow for legal privileges for students who attend religion classes. These classes help in student's efforts to be accepted into certain post-primary level schools, where admission (and scholarships) is granted on the basis of a grade average. Usually, it is fairly easy to be awarded a high grade in religion classes – and such a grade is not always granted for educational excellence, but for example for the account of systematic taking of Holy Communion or attending morning Advent masses. The students who are awarded such high grades have better chances to be admitted to prestigious post-primary level schools or be awarded a scholarship. This proves that the abovementioned regulations contravene constitutional regulations concerning equality within the legal system and the right to equal treatment by the public authorities (Article 32(1) of the Constitution). They are also inconsistent with the rules of good, rational educational system.

9. The standards shaping the freedom of conscience and religion across education established by the Constitutional Tribunal of Poland differ significantly from the standards established in the case-law of the HRC and the ECtHR. Furthermore, these standards are only seemingly consistent with the rule of impartiality of public authorities. They lead to a situation of tolerance for violating this principle repeatedly in cases related to religious education in public schools, either openly or secretly. Such a situation is favoured by the legislation which is marked by significant defects, as well as the biased practice of educational administration in religious matters. What is glaringly visible in this context is the inability of state and local government institutions (who are obliged to supervise these matters) to take a proper course of action.

The neutrality of public authorities (Article 25(2) of the Constitution) is understood, as mentioned by T.J. Zieliński, as indifference to the actions under-

⁴⁰ Directive of the Minister of National Education of 13 July 2007 amending the directive on the conditions and the ways of assessment, classifying and promoting students and conducting tests and examinations in Public schools, *Dz. U. (Journal of Laws)* of 2007, No. 130, item 906; Constitutional Tribunal ruling of 2 December 2009, U 10/07, OTK-A 2009, No. 11, item 1630.

taken by the entity who intends to assume domination over the sphere which should be governed by the state and which should not be claimed by any particular group. The public educational system, from which the state withdrew to a significant extent, is such a vulnerable sphere.⁴¹ This situation should change. In particular, there is a need for a new legislative vision of a role and tasks of the state in terms of protecting the freedom of conscience and religion in the educational activity of public schools. This vision should be strongly coherent with general and European standards and it should assure philosophical neutrality of public schools, even if religious education is continued in them.

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⁴¹ Zieliński, T., *Zakaz indoktrynacji światopoglądowej w szkolnictwie według wyroku Lautsi przeciwko Włochom*, in: Wieruszewski, R., Wyrzykowski, M., Kondratiewa-Bryzik, L. (eds.), *Prawne granice wolności sumienia i wyznania*, Warszawa 2012, pp. 73–74.

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CITIZENS' RESOLUTION-PASSING INITIATIVE

Abstract

Amendment to local government political acts, introduced in January 2018, expanded the catalogue of legal instruments for participation of residents of local government units in solving the actual problems of their self-governing communities. The catalogue included a citizens' resolution-passing initiative, which may be classified as a means of integrating members of a given community and involving them in the process of law making. Until the entry into force of legal solutions, introduced by the amending act, the issues of the resolution-passing initiative were subject to statutory regulations. The scope of these regulations was diverse, which is why the legislator decided to harmonise them.

The study includes an analysis of applicable legal solutions that shape the institution of the citizens' resolution-passing initiative as well as their assessment and an attempt to formulate *de lege lata* conclusions.

Keywords: participation, resolution-passing initiative, resolution-passing procedure

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Introduction

The catalogue of legal instruments for participation of residents of local government units in identifying and solving the actual problems of their self-governing communities covers different forms of participation, which were not normatively determined in the same way. One of the forms of social participation and means of integrating members of a given community is the citizens' resolution-passing initiative. The term of "resolution-passing initiative" was not defined by the legislator. The source literature suggests the possibility of its definition in a comparable manner to the definition of the term of "legislative initiative"¹ due to significant similarities between those two concepts.² The legislative initiative is treated as the right to submit with the body authorised to pass resolutions the bills with a specific legal effect in the form of an obligation to put such bills for voting.³ In the literature, it is also stressed that such initiative may be either direct or indirect. In the first case, the bill is subject to voting, during which the citizens may decide whether it should be adopted or rejected. The indirect initiative means that once the competent body receives the bill submitted for voting, the citizens have no direct impact on the adoption of the act, as the final decision in that respect is made by the representative body⁴. The right to implement the citizens' legislative initiative was guaranteed by the Constitution. By virtue of Article 118 sec. 2 of the Constitution of the Republic of Poland⁵, the aforesaid right is granted to a group of at least 100 000 citizens entitled to vote for the Sejm. The procedure related to the implementation of the legislative initiative by the citizens is described in the Act of 24 June 1999.⁶

¹ Szewc, A. and Szewc, T., *Uchwalodawcza działalność organów samorządu terytorialnego*, Warszawa 1999, s. 58.

² Dolnicki, B., *Obywatelska inicjatywa uchwalodawcza jako forma partycypacji obywateli w podejmowaniu rozstrzygnięć na poziomie lokalnym*, in: M. Stec, M., Mączyński, M., (ed.), *Partycypacja obywateli i podmiotów obywatelskich w podejmowaniu rozstrzygnięć publicznych na poziomie lokalnym*, Warszawa 2012, p. 114.

³ Uziębło, P., *Inicjatywa ustawodawcza obywateli. Act of 24 June 1999 with commentary*, Warszawa 2008, p. 45–46.

⁴ Borski, M., *Inicjatywa ludowa instrumentem presji na ustawodawcę?*, "Przegląd Prawa Publicznego" 2016, No. 7–8, 56–65, p. 56.

⁵ Constitution of the Republic of Poland of 2 April 1997, Dz.U. (Journal of Laws) of 2003, No. 78, item 483, as amended).

⁶ Act of 24 June 1999 on the Exercise of the Citizens' Legislative Initiative, consolidated text: Dz.U. (Journal of Laws) of 2018, item 2120.

Therefore, while referring the term of the “legislative initiative” to local and regional structures and conditions, it must be assumed that the resolution-passing initiative means the right of a specific entity to submit the bill with the decision-making, controlling and executive body.⁷ The resolution-passing initiative may be treated as a factor initiating the resolution-passing procedure before the decision-making and controlling body of the local government unit. At the preliminary stage of the procedure, the entitled (and sometimes obliged) entities submit with the decision-making body a proposition to regulate certain standard elements by way of issuing draft normative acts, including financial simulation of the effects of their adoption, while obliging the decision-making body to examine such draft laws.⁸ In the literature it is recognised that the resolution-passing initiative may be seen as the institution restricting access to the law-making process. Nonetheless, the restriction of the circle of entities that may put forward the bill is not aimed at limiting the rights of individual members of a given community, but at ensuring appropriate substantive and legislative level of the established laws.⁹

Attention should be drawn to the need of differentiating the following terms: “resolution-passing initiative” and “preparation of the bill”. The preparation of the bill is understood as a set of activities aimed at developing a written document expressing the content of the intended resolution, appropriate in terms of both the text and form, in order to become the subject of the meeting of the local-government body and take the form of its resolution.¹⁰ Therefore, its semantic scope should cover all activities aimed at satisfying formal requirements before putting the bill to the decision-making body. For example, the above-mentioned activities may refer to: appropriate form and contents of the bill, including all the opinions required by law.¹¹

⁷ Szewc, A. and Szewc, T., *Uchwalodawcza...*, p. 58.

⁸ Wierzbica, A., *Referendum i wybory oraz zarządzenia i uchwały jednostek samorządu terytorialnego*, Warszawa 2014, p. 358.

⁹ Czerw, J., *Procedury podejmowania uchwał przez radę gminy i powiatu. Poradnik dla praktyków*, Warszawa 2010, p. 65.

¹⁰ Szewc, A. and Szewc, T., *Uchwalodawcza...*, p. 67.

¹¹ Dąbek, D., *Prawo miejscowe*, Warszawa 2007, p. 210.

Objective and subjective scope of the citizens' resolution-passing initiative

The legal bases for the citizens' resolution-passing initiative were shaped at the statutory level by way of provisions of the Act of 11 January 2018 Amending Certain Laws to Increase Citizens' Participation in the Process of Election, Operation and Control of Some Public Bodies.¹² The aforesaid legal act amended local government organisational laws¹³ by introducing regulations aimed at increasing citizens' participation in the process of election, operation and control of some local government authorities. The adopted legal solutions established new institution, which include, among other things, the citizens' resolution-passing initiative. Until the entry into force of the amending act, the issues of the resolution-passing initiative were subject to statutory regulations. However, the act was included in the statutes in a relatively rare and differentiated manner.¹⁴ Under the current legal environment, every local government organisational law includes regulations, which unify the institution of the citizens' resolution-passing initiative at the level of local and regional self-governing communities.

In conformity to will of the legislator, a group of inhabitants in a given local government unit, who have active voting rights, may submit the citizens' resolution-passing initiative with the decision-making body.¹⁵ Therefore, the whole individuals residing within the area of a specific self-governing community is covered by the subjective scope of the regulation.¹⁶ By virtue of Article 25 of

¹² Act of 11 January 2018 Amending Certain Laws to Increase Citizens' Participation in the Process of Election, Operation and Control of Some Public Bodies, Dz.U. (Journal of Laws) of 2018, item 130.

¹³ Act of 8 March 1990 on Local Self-Government, consolidated text: Dz.U. (Journal of Laws) of 2019, item 506, as amended, hereinafter referred to as the "Local Self-Government Act"; Act of 5 June 1998 on District Self-Government, consolidated text: Dz.U. (Journal of Laws) of 2019, item 511, as amended, hereinafter referred to as the "District Self-Government Act"; Act of 5 June 1998 on Voivodeship Self-Government, consolidated text: Dz.U. (Journal of Laws) of 2019, item 512, as amended, hereinafter referred to as the "Voivodeship Self-Government Act".

¹⁴ The resolution-passing initiative was mainly addressed to a group of inhabitants, whose size depended on the number of inhabitants in a given self-governing community, whereas the right to the resolution-passing initiative was correlated with the requirement to enter an inhabitant into the election register; Koniuszewska, E., *Inicjatywa uchwałodawcza członków wspólnoty samorządowej jako narzędzie partycypacji społecznej*, in: Dolnicki, B., (eds.), *Partycypacja społeczna w samorządzie terytorialnym*, Warszawa 2014, p. 418–430.

¹⁵ Article 41a sec. 1 of the Local Self-Government Act, Article 42a sec. 1 of the District Self-Government Act, Article 89a sec. 1 of the Voivodeship Self-Government Act.

¹⁶ Szewc, A. *Commentary to Article 1*, in: Szewc, A. (eds.), *Ustawa o samorządzie gminnym. Komentarz*, Warszawa 2012, s. 34.

the Civil Code,¹⁷ the place of residence of an individual is the place where such individual stays with an intention of permanent stay. The permanent place of residence of the individual at a specific location is not determined solely on the basis of the permanent residence registration, but also on the facts confirming the individual's permanent stay at such place. Therefore, the permanent residence registration should be treated as only one of the elements showing that the individual stays within the area of the commune with the intention of permanent stay.¹⁸

To exercise their rights, the inhabitants of the local government unit must prove active voting rights before the decision-making body. Pursuant to Article 10 § 1 point 3 of the Election Code,¹⁹ a Polish citizen and EU citizen, who is not Polish citizen, being at least 18 years old at the time of elections and permanently residing in the commune has the right to elect representatives to the commune council. On the other hand, a Polish citizen, being at least 18 years old at the time of elections and permanently residing the area of such district and voivodeship, respectively, has the right to elect representatives to the district council and regional council. Additionally, pursuant to 10 § 2 of the Election Code, no voting rights are vested in a person who: has been deprived of civil rights based on court's decision, has been deprived of voting rights based on final decision of the State Tribunal, legally incapacitated based on court's decision. In the literature, any limitation of the citizens' resolution-passing initiative to only those community members who have active voting rights in the decision-making body is subject to criticism. It is shown that failure to involve underage inhabitants in public affairs, while they are still able to file complaints, motions and petitions seems inexplicable.²⁰ A possibility of granting underage inhabitants of the self-governing community the right to put forward the resolution-passing initiative should be examined also in the context of the operations at the commune level of the youth commune council. In compliance with the provisions of Article 5b sec. 2 of the Local Self-Government Act, the commune council

¹⁷ Act of 23 April 1964, Civil Code, consolidated text: Dz.U. (Journal of Laws) of 2019, item 1145.

¹⁸ Dolnicki, B., *Commentary to Article 1*, in: Dolnicki, B. (eds.), *Ustawa o samorządzie gminnym. Komentarz*, Warszawa 2016, p. 25–26.

¹⁹ Act of 5 January 2011, Election Code, consolidation text: Dz.U. (Journal of Laws) of 2019, item 684, as amended.

²⁰ Kłucińska, P., Sześciło, D., Wilk, B., *Nowy model demokracji samorządowej – uwagi na tle zmian w ustawach samorządowych wprowadzonych ustawą z 11 stycznia 2018 r.*, "Samorząd Terytorialny" 2018, No. 10, p. 34.

may – upon request of the interested circles – give their consent to establish the consultative youth council of the commune. Such body has impact on public life of the local community, among other things, by: representing youth interests before the commune self-government authorities, education authorities, non-government organizations, taking actions to promote integration and collaboration within youth communities, starting undertakings for the youth, especially in the field of science, culture and sports. The responsibilities of the youth commune council include evaluation of certain bills, in particular those referring to acts that influence conditions for the development of young people today,²¹ and submission of applications to the chairperson of the council, councillors and executive bodies with respect to the implementation of the resolution-passing initiative.²² Since the youth commune council is allowed to undertake actions directly related to the resolution-passing procedure, it would be reasonable to include underage inhabitants of the commune in the group of entities entitled to put forward resolution-passing initiatives. However, it should be assumed that the legislator, while establishing the law of the citizens' resolution-passing initiative, used legal solutions included in the Act on the Exercise of the Citizens' Legislative Initiative. According to the aforesaid Act, the exercise of the right of legislative initiative depends on the right to vote in elections to the Sejm.

The prerequisite for the exercise of the right of resolution-passing initiative by members of the self-governing communities is to act in an organised manner. To that end, such members form a group of persons supporting the initiative, whose size depends on the number of inhabitants in a given local government unit. At the commune level, the group must consist of: at least 100 persons – where the commune contains up to 5 000 inhabitants, at least 200 persons – where the commune contains up to 20 000 inhabitants, at least 300 persons – where the commune contains more than 20 000 inhabitants. In the district, the group comprises: at least 300 persons – in the district up to 100 000 inhabitants, at least 500 persons – in the district with more than 100 000 inhabitants. In the self-governing voivodeship, the group of inhabitants that propose the resolution-passing initiative must consist of at least 1 000 persons. Thresholds for supporting the bill in the smallest self-governing communities adopted by the legislator are too high

²¹ Mączyński, M., *Commentary to Article 5b*, in: Chmielnicki, P. (ed.), *Ustawa o samorządzie gminnym. Komentarz*, Warszawa 2013, p. 141.

²² Bylaws of the Youth Council of the City in Łódź, https://uml.lodz.pl/files/public/dla_mieszkanca/Statut_ujednoczony_MRM_pdf.pdf, accessed on: 25.10.1019.

while considering a relatively low level of social involvement in local affairs.²³ It should be noted that already at the stage of works on the bill introducing the citizens' resolution-passing initiative, the representatives of sciences informed about the risk associated with setting an unnecessarily high limit for the number of persons required to support the bill. It was shown that the limit for the required signatures should be based on objective criteria. It was also suggested to use the desired number of signatures for the implementation of the legislative initiatives as a frame of reference.²⁴ Furthermore, the professionals stressed that the support threshold should be determined in a manner, which – in the view of a given community – promotes the submission of further projects. On the other hand, the aforementioned threshold should constitute an actual barrier to making hasty decisions about the resolution-passing initiatives.²⁵

While formulating the requirement of supporting the resolution-passing initiative, the legislator used the term “group of inhabitants”. Therefore, it should be considered whether the support should be given by the group of inhabitants distinguished from among all inhabitants of a given local government unit or the group comprising only persons with active rights to elect representatives to the decision-making bodies. A reference in sec. 2 Article 41a of the Local Self-Government Act (sec. 2 Article 42a of the District Self-Government Act, sec. 2 Article 89a of the Voivodeship Self-Government Act) to sec. 1, which defines the powers of the group of inhabitants with active voting rights, justifies the thesis that only a group of inhabitants having the right of action may efficiently support the resolution-passing initiative. Furthermore, it must be stressed that while determining in Article 28aa sec. 7 of the Local Self-Government Act (Article 30a sec. 7 of the District Self-Government Act and Article 89a sec. 7 of the Voivodeship Self-Government Act) the conditions of participation of the inhabitants of the local government unit in a debate on the report on its situation, the legislator did not require to affix signatures of the inhabitants with active voting rights on the written applications for participation. The requirement to prove active voting rights was not formulated with respect to the inhabitants supporting the bill

²³ Marchaj, R., *Commentary to Article 41*, in: Dolnicki, B. (ed.), *Ustawa o samorządzie gminnym. Komentarz*, publ. II, WKP 2018, LEX/el.

²⁴ Dolnicki, B., *Obywatelska...*, p. 128.

²⁵ Augustyniak, M., *Inicjatywa uchwałodawcza mieszkańców jako forma partycypacji społecznej w jednostkach samorządu terytorialnego – wnioski de lege lata i postulaty de lege ferenda*, in: Dolnicki, B. (ed.), *Partycypacja społeczna w samorządzie terytorialnym*, Warszawa 2014, p. 368.

implemented in the framework of the participatory budget either. The aforementioned legal regulations highlight the use of diverse criteria, which determine involvement of the members of the self-governing community in the undertakings that refer to such community.

The regulations shaping the requirement for supporting the resolution-passing initiative do not contain any provisions that would exclude a possibility of withdrawing the support given.²⁶ The legislator did not decide to adopt the solution that constitutes equivalent of Article 9 sec. 3 of the Act on the Exercise of the Citizens' Legislative Initiative, in compliance with which any withdrawal of support for the bill is ineffective. Lack of equivalent regulation on the resolution-passing initiative creates a risk that it may be necessary to supplement such support immediately before submitting the bill with the decision-making body.

The objective scope of the citizens' resolution-passing initiative covers all matters referring to tasks and competencies of the decision-making bodies and controlling local government units. Nonetheless, it is essential to exclude from the aforesaid scope all matters, in which the resolution-passing initiative has been reserved for specific entities pursuant to special provisions of law. In some areas, the legislator entrusted the resolution-passing initiative with: commune administrator, interested circles, review panel, specific number of councillors.²⁷ In the absence of other restrictions, it may be assumed that the subject matter of the resolution-passing initiative may be bills that will become local acts of law and other not universally applicable laws.

Procedure in case of citizens' initiative

By virtue of Article 41a sec. 3 of the Local Self-Government Act (Article 42a sec. 3 of the District Self-Government Act and Article 89a sec. 3 of the Voivodeship Self-Government Act, respectively), the bill proposed as part of the citizens' resolution-passing initiative becomes the subject of the meeting of the commune council at its next session after the submission of the bill, however, not later than after 3 months from the date of filing such bill. On the basis of the

²⁶ Marchaj, R., *Commentary to Article 41a*, in: Dolnicki, B. (ed.), *Ustawa o samorządzie gminnym. Komentarz*, publ. II, WKP 2018, LEX/el.

²⁷ See Czerw, J., *Stanowienie uchwał przez radę gminy*, "Samorząd Terytorialny" 2015, No. 12, p. 35, Czerw, J., *Procedury...*, pp. 65–67.

text of the invoked legal solution, the responsibilities of the party that initiated the resolution-passing proceedings and the body competent to conduct such proceedings may be determined. The group of inhabitants in the local government unit, which initiates the resolution-passing proceedings, is obliged to submit the bill by exercising their rights. As emphasised in the jurisprudence, within the framework of the resolution-passing initiative, the members of the self-governing communities are entitled to develop and submit the bill, which by operation of law and upon fulfilment of formal conditions should become the subject of the meeting and then submitted for a vote of the decision-making body.²⁸ Therefore, the subject matter of the resolution-passing initiative is the bill in the form which allows it to be included in the agenda of the meeting by the chairperson of the decision-making body. With the above in mind, the submission of assumptions to the bill may not be treated as the implementation of the resolution-passing initiative. The demands to settle the issue or the direction of desired actions as shown by the initiators must be included in the bill prepared by the executive body.²⁹ By invoking the regulations on the citizens' legislative initiative, which shaped it as the so-called "formulated" initiative³⁰, it may be stated that based on the applicable legal solutions, the citizens' resolution-passing initiative took an analogous form. The "formulated" initiative means that it is necessary to put forward proposals in compliance with the legislative technique. The initiative is also opposed to the "non-formulated" initiative, whose essence consists in treating the legislative initiative as the requirement.³¹

Bearing in mind the previously made arrangements with regard to the terminology and the need to delimit the following terms: "resolution-passing initiative" and "preparation of the bill", it must be assumed that the right of the inhabitants of the local government unit to submit the resolution-passing initiative is correlated with an obligation to draft the bill. The necessity to draft the bill by the initiator is actually justified by practical reasons. To put the bill on the agenda for the meeting of the decision-making body, it is essential to first obtain

²⁸ Supervising authority's resolution no. NPII.4131.1.656.2018 of the Śląskie Voivodeship Governor of 14 December 2018, Official Journal of Śląskie Voivodeship of 2018, item 8074.

²⁹ Decision of the Voivodeship Administrative Court of 25 June 2019, III SA/GI 435/19, LEX no. 2706767.

³⁰ Article 118 sec. 3 of the Constitution of the Republic of Poland.

³¹ Szmyt, A., *Obywatelska inicjatywa ustawodawcza*, "Gdańskie Studia Prawnicze" 1998, volume III, pp. 151–152.

the support of a specific group of inhabitants, who should familiarise themselves with the contents of such bill. Otherwise, the bill prepared once the required number of signatures of the members of the self-governing community have been collected could not meet the expectations of persons opposing the initiative or even be against their intentions.³²

The bill drafted as part of the citizens' resolution-passing initiative should be in line with the requirements for bills submitted by other entities entitled to the resolution-passing initiative. The literature shows that the requirements specified in "The principles of legislative technique"³³ must apply to resolutions of the decision-making bodies of the local government units, which constitute local acts of law. Nonetheless, it is recommended that the uniform structure and form were used in case of all resolutions passed by the decision-making bodies in the self-government bodies. The resolutions should be structured according to the pattern that includes the following: title, legal basis, substantive provisions – general and special, when necessary, interim and adjustment provisions, final provisions, signature of the resolution.³⁴ It must be stressed that the provisions of Article 58 sec. 1 of the Local Self-Government Act with reference to the resolutions of the commune authorities concerning the financial commitments establish the obligation to indicate sources, from which such commitments will be covered. The aforementioned legal regulation causes certain interpretation doubts and is subject to criticism by the doctrine representatives.³⁵ It must be noted that the legal regulation does not correspond to other regulations of the Act on Public Finance³⁶ and the requirement to indicate the source, from which the commitments will be covered is illogical and unenforceable.³⁷ Despite negative assessment of the provisions of the Article 58 sec. 1 of the Local Self-Government Act, they may

³² Decision of the Voivodeship Administrative Court of 25 June 2019, III SA/GI 435/19, LEX no. 2706767.

³³ § 143 of the Appendix to the Resolution of the Prime Minister of 20 June 2002 on "The Principles of Legislative Technique", consolidated text: Dz.U. (Journal of Laws) of 2016, item 283.

³⁴ Czerw, J. and Krześnicki, I., *Działalność uchwalodawcza rady gminy ze wzorami uchwał, procedur i pism*. Warszawa 2007, pp. 161–162.

³⁵ Kryczko P., *Commentary to Article 58*, in: Chmielnicki, P. (ed.), *Ustawa o samorządzie gminnym. Komentarz*, Warszawa 2013, pp. 756–760.

³⁶ Act of 27 August 2009 on Public Finance, consolidated text: Dz.U. (Journal of Laws) of 2019, item 869.

³⁷ Glumińska-Pawlic, J., *Commentary to Article 58*, in: Dolnicki, B., *Ustawa o samorządzie gminnym. Komentarz*, Warszawa 2016, pp. 1012–1014.

be treated as the source of the obligation addressed to the inhabitants of the commune which exercises the right to the resolution-passing initiative. Therefore, a question arises regarding an actual possibility of specifying the sources of funds for covering the financial commitments by the initiators of the resolution-passing proceedings. It may be expected that strict compliance with the above-mentioned obligation will weaken the willingness of the inhabitants to initiate the resolution-passing procedure and hence limit their activities.

The obligations resulting from the essence of the citizens' resolution-passing initiative are not only for the inhabitants of the local government units, but also for the decision-making bodies in the self-governing communities. The council and regional council are obliged to examine the bill submitted as part of the resolution-passing procedure. In compliance with the regulations of the local government organisational acts, the bill becomes the subject of the meeting of the decision-making body at the upcoming session, after its submission, yet not later than upon expiry of 3 months from date of filing such bill. The adopted legal solution eliminates the risk that the decision-making body will amend the bill before the meeting of such body. The bill should be immediately put on the agenda for the meeting of the decision-making body. On the other hand, at the subsequent stages of the resolution-passing procedure, the council or regional council may interfere with the text of the submitted bill. The implementation of the bill proposed by the inhabitants will depend on its substance and elements of local policy, which determine acceptance or rejection of specific solutions, including legal solutions.³⁸ The deadline for commencing the bill procedure by the decision-making body of the self-governing community was outlined in general terms. The time limit starts to run at the time of the first session commenced upon submission of the bill and ends upon expiry of the third month, counting from the date of filing such bill. The legislator failed to specify the consequences of failure to meet deadline and to act by the decision-making body. One of the deficiencies of the analysed legal solution is the fact that the inhabitants who proposed the citizens' resolution-passing initiative were deprived of legal remedies in the discussed situation. Even though the representatives of science stressed the fact that the initiators of the bill put forward by the inhabitants should be provided with a possibility of filing a complaint with the administrative court on the

³⁸ Uziębło, P., *Inicjatywa uchwałodawcza mieszkańców gminy. Glosa do wyroku WSA z dnia 28 października 2008 r., II SA/Ol 737/08*, "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" 2011, No. 2, 53–62, p. 58.

grounds that the decision-making body failed to act, the argument was not taken into consideration.³⁹

The initiation of the resolution-passing proceedings as part of the citizens' initiative and its continuation requires a number of activities, in case of which members of the self-governing communities must organise themselves. The resolution-passing initiative committee is established to ensure appropriateness of the undertaken activities and improve their efficiency. The rules of creating such committees should be specified in the resolution of the decision-making body. To specify such rules, it might be helpful to use the solutions included in the Act on the Exercise of the Citizens' Legislative Initiative, subject to the consideration of differences between the legislative initiative and resolution-passing initiative. The literature shows that the rules for creating, acting and financing the committee of the citizens' resolution-passing initiative should not limit the possibilities of its establishment or significantly hinder its operations in practice.⁴⁰ In accordance with the will of the legislator, the aforesaid committee is entitled to appoint persons authorised to represent the committee during the activities of the decision-making body. Generally, a specific member of the committee should be appointed to represent the committee based on a resolution passed thereby.⁴¹ The court and administrative case law show that the decision-making body is not competent to determine the rules of representing the committee, since such powers are outside the scope of authorisation to "establish specific rules for proposing citizens' initiatives".⁴²

By regulating the institution of the citizens' resolution-passing initiative in the organisational acts, the legislator set out its general framework. In addition, the legislator obliged the decision-making bodies of the self-governing communities to specify the following issues by way of a resolution: detailed rules of proposing citizens' legislative initiatives, rules of creating committees of citizens' resolution-passing initiatives, rules of promoting citizens' resolution-passing initiatives,

³⁹ Kisiel, W., *Udział jednostki w procedurze uchwalodawczej rady gminy (pytania de lege ferenda)*, in: Stec, M., et al. (eds.), *Partycypacja obywateli i podmiotów obywatelskich w podejmowaniu rozstrzygnięć publicznych na poziomie lokalnym*, Warszawa 2012, p. 105; Augustyniak, M., *Inicjatywa...*, p. 378.

⁴⁰ Ziółkowski, D., *Commentary to Article 41a*, in: Gajewski, S. and Jakubowski, A., *Ustawa o samorządzie gminnym. Komentarz*, Legalis, accessed on: 25.10.2019.

⁴¹ *Ibidem*.

⁴² Decision of the Supreme Court of 04 July 2019 III SA/Gd 333/19, LEX no. 2698392.

formal requirements which the submitted bills must satisfy. The decision-making body is obliged to exhaust the scope of its statutory authority by regulating all issues considered material by the legislator. Failure to fulfil this obligation will constitute flagrant breach of the law and hence make the act null and void.⁴³

Summary

The citizens' resolution-passing initiative supplemented the catalogue of legal instruments for participation of residents of the local government units in solving issues that are material for a given community. Moving the regulation on the resolution-passing initiative from basic level to the statutory level should be considered positive. Thanks to such legislative treatment, the inhabitants of all local government units were granted the right to implement the resolution-passing initiative and the present legal solutions related thereto were harmonised. The regulations introduced by the legislator allowed to distinguish main elements of the analysed institution, such as: subjective scope, objective scope and mode of procedure.

While shaping the citizens' resolution-passing initiative, the legislator used certain legal solutions that standardise the citizens' legislative initiative. To invoke such solutions, it was crucial to consider both the conditions and specificity of the functioning of the self-governing communities, hence, only some of them could be applied.

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⁴³ Decision of the Voivodeship Administrative Court of 25 June 2019, III SA/GI 435/19, LEX no. 2706767.

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Paweł Lewandowski*

**DELEGATING MEMBERS OF THE SUPERVISORY BOARD
OF A LIMITED LIABILITY COMPANY TO ACT IN THE
MANAGEMENT BOARD**

Abstract

So far, it has not been decided whether a limited liability company may delegate a member of the supervisory board to temporarily perform the duties of a member of the management board. Practice is in favour of this possibility, while the doctrine expresses diverse views. The purpose of this paper is to analyze the subject matter in question. The principle of freedom of contract under company law and differences in the regulation of partnerships and capital companies, including the method of appointing the management board, are pointed out. It discusses the consequences of the assessment of delegation in the absence of explicit regulation, as well as the absence of a referral to use Article 383 of the Commercial Companies Code analogically. It demonstrates a number of doubts which are caused by delegation (when the thesis about its admissibility is approved), in particular the status of the delegate (the question of the continued existence of a legal relationship in the supervisory board). The paper employs the dogmatic method.

The conclusion is that delegating a member of the supervisory board in a limited liability company *de lege lata* is not acceptable. However, it is desirable, which is why it should have a regulation modelled on Article 383 § 1 CCC.

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Introduction

A limited liability company operates in trading using the legal personality conferred upon it (Article 12 of the Commercial Companies Code¹). Therefore, it has the structure of bodies equipped with specific competences and authorized to perform acts prescribed for them (Article 38 of the Civil Code²). The management board in a limited liability company is an obligatory body³, while the supervisory board⁴ is optional⁵ as a rule.

The management board is a single or multi-person body. In both cases, it may occur that none of the management board members will be able to serve the term of office, and at the same time it will not be possible to appoint a new management board member immediately. Meanwhile, a limited liability company cannot operate and participate in the market without an appropriately staffed management board. In such circumstances, with regard to the company in question, the legislator, apart from the option of appointing a new management board member, does not provide for any other specific form of supplementing the composition of this body. First of all, it does not indicate the possibility of delegating a member of the SB to perform temporarily duties in the management board which was implicitly expressed for a joint-stock company. The absence of a provision in the regulation of a limited liability company which would correspond to Article 383 CCC is the axis of the dispute and makes it possible to have different directions of interpretation of the applicable legal status.

¹ Act of 15 September 2000, the Commercial Companies Code, consolidated text, Dz. U. (Journal of Laws) of 2017, item 1577, as amended, hereinafter CCC.

² Act of 23 April 1964, the Civil Code, consolidated text: Dz. U. (Journal of Laws) of 2018, item 1025, as amended, hereinafter CC.

³ The management board is an “executive” body with the authorization to run the company’s affairs and represent it. It uses the presumption of competence, which means that affairs that are not explicitly reserved to the competences of other bodies, belong to the management board, cf. Rachwał, A., in: Włodyka S. (ed.), *System Prawa handlowego*, v. 2A *Prawo spółek handlowych*, Warszawa 2007, p. 962 et seq.

⁴ Hereinafter the SB.

⁵ The cases of obligatory occurrence of the SB are based on Article 213 § 2 of the Commercial Companies Code.

Doubts in delegating a member of the SB to perform management board duties have permeated into current reflections of the Commercial Code.⁶ As early as then, some authors believed that the articles of association could authorize the SB to delegate its members to temporarily perform management board duties⁷, while others thought that the transfer of institutions regulated for a joint-stock company onto a limited liability company was not admissible.⁸ One may also ask why, despite the existing discrepancies, the legislator did not regulate the delegation issue in a limited liability company in the current Commercial Companies Code.

The presented position aims to show that delegating a member of the SB in a limited liability company is not acceptable under current law. Therefore, it opposes the practical approach to the issue⁹, but finds a juridical basis in the legal order.

Position of the doctrine on admissibility of delegating

Principle of freedom of contract

The subject matter in question entails looking at the principle of freedom of contract under company law. It is either an argument for accepting the view on admissibility of delegating a member of the SB to act in the management board or a specific obstacle to it.

Representatives of the doctrine, according to whom it is allowed in a limited liability company to delegate a member of the SB to act as a management board member, point as their main argument to the principle of freedom of contract. The

⁶ Ordinance of the President of the Republic of Poland of 27 June 1934, the Commercial Code, Dz. U. (Journal of Laws) of 1934, no. 57, item 502, as amended, hereinafter the Commercial Code.

⁷ Dziurzyński, T., in: Dziurzyński, T., Fenichel, Z., Honzatko, M. (eds.), *Kodeks handlowy. Komentarz*, Łódź 1990, p. 241.

⁸ Namitkiewicz, J., *Kodeks handlowy. Komentarz v. III*. Warszawa 1937, p. 155; Allerhandt, M., *Kodeks handlowy. Księga pierwsza Kupiec. Komentarz*, Lviv 1935 (reprint Warszawa, 1991), p. 345. Ambiguous statements by Julian Tomkiewicz and Józef Bloch, pointing out that the supervisory board, in the event of the incomplete composition of the management board due to suspension of management board members, should take steps to complete the management board, referring to Article 383 § 1 of the Commercial Code, in: Tomkiewicz, J., Bloch, J., *Spółki z ograniczoną odpowiedzialnością. Kodeks handlowy art. 158–306 i 491–497 Komentarz*, Warszawa 1934, p. 119.

⁹ Cf. the facts of the case pending at the Supreme Court, judgement of the Supreme Court of 6 June 2013, II UK 329/12, LEX No. 1331292.

basis for the application of the provision of Article 353¹ CC to the commercial law is a reference to the Civil Code made in Article 2 CCC (commercial law is part of the civil law).¹⁰ While for a joint-stock company the freedom of contract following Articles 304 § 3 and 4 CCC was clearly limited, there is no corresponding provision for a limited liability company. On this basis, it is concluded that the principle of the autonomy of the will is applicable to shaping the content of the articles of association of a limited liability company.¹¹ Some commentators claim that regulating the issue of delegating by way of relevant provisions of the articles of association does not preclude restrictions under Article 353¹ CC, in particular the nature of a limited liability company.¹² Therefore, the absence of an equivalent of Article 383 CCC does not indicate inadmissibility of delegating because the legislator did not prohibit it on the basis of a general clause.

Some authors condition the application of Article 353¹ CC on the number of shareholders, allowing for this principle to be invoked only with regard to companies other than single-shareholder companies,¹³ because in such a situation it is not possible to speak strictly about the company's articles of association. This view, due to the wording of the provision of Article 4 § 2 CCC, which introduces equality between the founding act and the articles of association, is rightly questioned. It is recognized that the indicated documents have the same juridical character, and their distinction is justified only in the name.¹⁴ It should be agreed that the position referred to is an interpretation *contra legem*, which additionally leads to the emergence of inequality of limited liability companies. The legislator does not introduce a distinction in this matter, using it explicitly in situations requiring it (for example, Article 210 § 2 CCC). *A contrario*, in other situations the possibility of transferring regulations between the companies is wrong.

¹⁰ Kopaczyńska-Pieczniak, K., in: Kidyba, A. (ed.), *Kodeks spółek handlowych v. I. Komentarz do art. 1–150*, Warszawa 2017, p. 54.

¹¹ Kwaśnicki, R. L., *Autonomia woli w kształtowaniu postanowień umowy (aktu założycielskiego) spółki z o.o.*, "Prawo Spółek" 2003, No. 7-8, pp. 20, 36.

¹² Strzelczyk, K., in: Siemiątkowski, T., Potrzebszcz R. (eds.), *Kodeks spółek handlowych. Komentarz v. 2*, Warszawa 2011, p. 402; Rodzynkiewicz, M., *Kodeks spółek handlowych komentarz*, Warszawa 2012, p. 406–407.

¹³ Litwińska, M., *Glosa do wyroku Sądu Najwyższego z 5 maja 1996, sygn. akt: II CRN 29/96*, "Przegląd Prawa Handlowego" 1997, No. 1, p. 28.

¹⁴ Cf. Kwaśnicki, R. L., *Autonomia*, p. 20; Siemiątkowski, T., Potrzebszcz R., in: Siemiątkowski, T., Potrzebszcz R. (eds.), *Kodeks spółek handlowych. Komentarz. Tytuł I. Przepisy ogólne. Tytuł II. Spółki osobowe, v. 1*, Warszawa 2011, p. 48.

Representatives of the doctrine, according to whom the principle of freedom of contract is limited in company law, indicate that company law is not based on the principle of sovereignty and self-government. Relying on the security of trading and the creative nature of the articles of association of a commercial company (creating an independent and self-operating organizational unit equipped with personality), the legislator reserves broad powers to interfere in the content of the articles of association, providing shareholders with a narrow scope of freedom to create a company's relationship.¹⁵ This leads to the assertion that the legislator does not think that the shareholders know best how to shape the content of the articles of association.¹⁶ In capital companies it is argued that the separation of competences between the company's bodies constitutes a rule which indicates their nature. Therefore, any deviations in this matter should be treated as precisely as possible. Each company body has its own competence reserved statutorily, which may be modified if there is a legal norm in this regard. Therefore, it is recognized that even the exemplary (open) nature of listing additional competences of the SB (Article 220 CCC), shows that delegating (which is not listed in the catalogue of Article 220 CCC) is outside the contractual freedom of the parties¹⁷ as going beyond the nature of a limited liability company. Therefore, delegating members of the SB to act temporarily in the management board is not admissible, because the competences of the supervisory body may not be expanded against the statutory model under the articles of association.¹⁸ It results from the perception of the separation of competences of the managing and supervisory bodies as a regulation that constitutes the essence of a limited liability company¹⁹, in which wider powers and a stronger position are attributed to shareholders.²⁰

¹⁵ Romanowski, M., in: Szajkowski, A. (ed.), *System Prawa Prywatnego v. 16. Prawo spółek osobowych*, Warszawa 2008, p. 176–177.

¹⁶ *Ibidem*, 177.

¹⁷ Nowacki, A., *Komentarz do art. 220 KSH*, in: *Spółka z ograniczoną odpowiedzialnością. Volume I. Komentarz do art. 151–226 KSH*, available in Legalis 2018 database, accessed on: 24.01.2019.

¹⁸ Tarska, M., *Zakres swobody umów w spółkach handlowych*, Warszawa 2012, p. 404.

¹⁹ Szumański, A., *Ograniczona wolność umów w prawie spółek handlowych*, "Gdańskie Studia Prawnicze" 1999, No. II, p. 417; Tarska, M., *Zakres*, p. 404.

²⁰ Cf. Article 212 of the CCC, the counterpart is missing in the case of a joint-stock company.

Method of regulating companies in the CCC

When interpreting the admissibility of delegating a member of the SB of a limited liability company to act in the management board, the method of regulating partnerships and capital companies should be considered. It should be emphasized that all partnerships, except for a registered partnership, are governed in a non-quorum manner by referring to relevant application of provisions on the registered partnership.²¹ The Code only regulates their *differentia specifica*. In turn, in relation to capital companies, the legislator uses a different legislative technique because each company type is governed comprehensively, without the use of a reference (the provisions of the act constitute a functional whole). In this context, reaching for models of a joint-stock company for the needs of a limited liability company is doubtful.²² Since the legislator does not apply provisions referring to another capital company, it should be assumed that it is not possible to draw on this regulation. Admitting such a possibility would mean that provisions referring to other rules in the case of a professional partnership, limited partnership and limited joint-stock partnership are unnecessary, since “referring” still occurs without them.

One should agree with the view that the natures of a limited liability company and a joint-stock company are different, even though both are capital companies.²³ In the case of a joint-stock company, the legislator expressly provided for and regulated delegating, which was not performed for a limited liability company. Considering the legislator’s rationality, this proves the expediency of the legislative measure and thus the acceptance that the legislator did not intend to legalize delegating in a limited liability company.²⁴ It is worth noting that Arti-

²¹ Article 89 CCC, Article 103 § 1 CCC, Art. 126 § 1(1) CCC refer to the proper application of the provisions on registered partnership.

²² On the contrary, Andrzej Szajkowski, Monika Tarska, Andrzej Szumański argue that some issues (including delegating a member of the SB to perform duties of the management board) deliberately found themselves outside the text of the act, because a limited liability company is less “governed” than a joint-stock company. Therefore, it is possible to apply forms of a joint-stock company, with the absence of possibility to apply it in the opposite direction, because regulations of a limited liability company are not tailored to the essence of a joint-stock company, in: Sołtysiński, S., Szajkowski, A., Szumański, A., Szwaja, J. (eds.), *Kodeks spółek handlowych, v. II. Spółka z ograniczoną odpowiedzialnością. Komentarz do art. 151–300*, Warszawa 2014, pp. 575–576.

²³ Szumański, A., *Ograniczona*, p. 416.

²⁴ Strzępka, J. A., Zielińska, E., in: Strzępka, J. A. (ed.), *Kodeks spółek handlowych. Komentarz*, Warszawa 2015, p. 556; Strzępka, W., *Rozszerzenie uprawnień rady nadzorczej w spółce z o.o.*, “Prawo Spółek” 2001, No. 5, p. 26.

cle 220 CCC and Article 383 CCC show some similarity, which may confirm that the aforementioned difference is not accidental.²⁵ According to some authors, the fact that the list included in Article 220 CCC serves as an example does not allow for accepting the position that delegating is prohibited.²⁶ However, it is pointed out that exhaustive and precise regulation of powers of the SB leads to the conclusion that this list is the maximum catalogue of competencies affecting the operation and shape of the management board.²⁷ In addition, the division of competences between bodies and their statutory specification (including in relation to the supervisory body) are an element constituting the essence of a limited liability company, therefore they may not be contractually expanded.²⁸ The arguments about a closed catalogue of commercial companies which state that one may not freely select items and transfer them onto other legal forms, unless the legislator allows it, are convincing. The circumstance of the creative nature of a contract cannot have no impact on the freedom of contract. Furthermore, one needs to agree with the statement that “the risk for the company, shareholders and third parties associated with the use of the discussed institution speaks against acknowledging the admissibility of delegating members of the supervisory board to act temporarily as management board members in a limited liability company under the articles of association”.²⁹

It is worth mentioning here the recommendation of the Team for developing recommendations regarding draft regulations governing a simple joint-stock company (proposal of amendments to the Commercial Companies Code).³⁰ This document provides for a new model of a capital company, i.e. a simple joint-stock company.³¹ The recommendation expressly states the possibility of delegating in a SJSC (Article 300⁶⁶ of the Recommendation is equivalent to Article CCC), leaving no freedom of interpretation, and even solving some existing doubts regarding delegating. The planned regulation confirms that the legislator, with

²⁵ Nowacki, A., *Komentarz*, available in Legalis 2018 database, accessed on: 24.01.2019.

²⁶ Rodzyńkiewicz, M., *Kodeks spółek handlowych komentarz*, Warszawa 2012, p. 406.

²⁷ Kopaczyńska-Pieczniak, K., in: Kidyba, A. (ed.), *Kodeks spółek handlowych v. II. Komentarz do art. 151-300*, Warszawa 2018, p. 497.

²⁸ Tarska, M., *Zakres*, p. 404.

²⁹ *Ibidem*, 405.

³⁰ The recommendation introduces amendments to other parts of the Code, related to a SJCC; it does not interfere with the content of Article 220 CCC, unpublished.

³¹ Hereinafter, a SJCC.

the intention of allowing the delegation of a member of the SB to act temporarily in the management board, does so clearly. Therefore, it allows one to conclude that the absence of regulation regarding delegating in a limited liability company is not accidental, but it is a deliberate intention of the legislator.

The historical interpretation proves the absence of accidentality of the current regulation. The Commercial Code did not regulate delegating for a limited liability company, while doing so in the case of a joint-stock company.³² The discrepancies existing in this matter did not prompt the legislator to regulate the analysed issue. It seems that the legislator employed negative regulation.³³ Namely, not wanting delegating in a limited liability company to be applied, it simply neither explicitly indicated it nor allowed it in the form of a provision referring to another rule. Therefore, it may not be argued against the legislator that in the absence of a provision it is possible to create a contractual standard, as if there was a legal gap in this area which should be filled somehow.

Argument of the competence to appoint the management board

The provision of Article 383 CCC and the lack of its equivalent in Division I of Title III of the CCC should also be considered taking into account the provisions of Article 368 § 4 CCC and Article 201 § 4 CCC, indicating entities authorized by law to appoint and dismiss management board members. While in the case of a joint-stock company the power (but also an obligation, cf. Article 383 § 2 CCC³⁴), to appoint management board members was vested in the supervisory board, in a limited liability company, as a general rule, it is the shareholders who have such a power (Article 201 § 4 of the CCC is dispositive³⁵ and the articles of association may authorize another entity, including the SB, to appoint manage-

³² Cf. Strzępka, W., *Rozszerzenie*, p. 28.

³³ Cf. Morawski, L., *Zasady wykładni prawa*. Toruń 2010, p. 150.

³⁴ The authors state that the SB has an obligation to make changes in the composition of the management board (the need for the SB to work for the good of the company), the conceptual scope of which includes delegating, cf. Szwaja, J., Mika, I. B., in: Sołtysiński, S., Szajkowski, A., Szumański, A., Szwaja, J. (eds.), *Kodeks spółek handlowych v. III Spółka akcyjna. Komentarz do art. 301–490*, Warszawa 2013, p. 733.

³⁵ An exception to this rule involves municipal limited liability companies, in which management board members are appointed by the supervisory board, Article 10a (6) of the Act of 20 December 1996 on Municipal Management, consolidated text, Dz. U. (Journal of Laws) of 2017, item 827, as amended.

ment board members). In a limited liability company, it is as a rule the general meeting of shareholders that should have influence over the composition of the management board, and thus over the shape and image of the company. In this context, a positive interpretation, i.e. allowing a member of the supervisory board to be delegated to act temporarily in the management board in a limited liability company, appears to be in contradiction with the intention of the legislator. Granting the above competence to the SB introduces a breach in the systemic recognition of powers of the bodies appointing management board members, making the body that has no *ex lege* powers to appoint this body to have the competence to supplement it in an emergency. Such an interpretation appears to be accidental and violates the coherence of the Code in this matter, because the role of the SB in a joint-stock company was, pursuant to Article 368 § 4 CCC, clearly strengthened with respect to a limited liability company with significant personal powers.³⁶ The appointment also involves dismissing them, and these competencies systematically include the right to a temporary delegation in connection with the incompleteness of composition of the executive body.

Doubts associated with delegating in practice

No explicit regulation of delegating a member of the SB to act in the management board in a limited liability company, as well as no indication as to the application of Article 383 CCC *per analogiam* raise a number of ambiguities not only as to the admissibility of this institution in a limited liability company, but also as to the premises for delegating and assessing its legal consequences should the thesis about its admissibility be approved. The literature presents different theories as to the status of the delegated member (although valid for a joint-stock company, also relevant for a limited liability company). The existing doubts do not support the admissibility of delegating in a limited liability company.

Delegating as an exceptional institution

It needs to be emphasized that delegation regulated on the basis of a joint-stock company is perceived as an exceptional institution, allowed if the manage-

³⁶ Szajkowski, A., Tarska, M., Szumański, A., in: Sołtysiński, S., Szajkowski, A., Szumański, A., Szwaja, J. (eds.), *Kodeks spółek handlowych v. III Spółka akcyjna. Komentarz do art. 301–490*, Warszawa 2013, p. 570.

ment board cannot function properly.³⁷ Specifically, it involves only a temporary obstacle to acting as a management board member, not a definitive impossibility (this does not fall within the statutory premise of delegating).³⁸ Therefore, when the management board is duly-staffed, delegation may not take place, for example, to support the management board with personnel.³⁹ Delegation is possible when a management board member cannot currently hold a seat but there is a chance to restore it within a predictable and short period of time.⁴⁰ Delegation should not be allowed if the time period for reinstating a management board member in the office is possible to be defined (predictable) but long.⁴¹

It should be pointed out that despite its uniqueness, delegating to the temporary performance of activities in the management board is an independent institution and does not require co-occurrence of another activity, e.g. suspension of a management board member.⁴² The circumstance introducing the need for delegating is therefore irrelevant and not subject to research.

The institution of delegation should be perceived as an exception to the general rules of appointing management board members in a procedure ensuring stability of its composition. Therefore, it may not be applied in a scope wider than the legislator provides for (*exceptiones non sunt extendendae*). Perceiving delegation as an exception, in the absence of explicit regulation in relation to a limited liability company, makes one believe that the legislator prefers the use of “ordinary” procedures for the appointment of a new member.

³⁷ Naworski, J. P., *Delegowanie członków organów nadzoru spółki kapitałowej do zarządu*, “Prawo Spółek” 2002, No. 2, p. 3.

³⁸ The option of delegation is excluded, e.g. if the mandate expires due to death (there is no doubt that the person holding the office of a management board member will not return to perform the mandate), see Szumański, A., in: Pyziół, W., Szumański, A., Weiss, I. (eds.), *Prawo spółek*, Warszawa 2014, p. 998.

³⁹ Opalski, A., in: Opalski, A. (ed.), *Kodeks spółek handlowych, v. IIIA. Spółka akcyjna. Komentarz do art. 301–392*, Warszawa 2016, p. 1490.

⁴⁰ Cf. Naworski, J. P., *Delegowanie*, p. 6 et seq.

⁴¹ Ibidem, p. 4.

⁴² Kwaśnicki, R. L., Korniluk, M., *Delegowanie członka rady nadzorczej spółki akcyjnej do czasowego wykonywania funkcji członka zarządu*, Monitor Prawniczy 2009, No. 1, available in Legalis database, accessed on: 3.02.2019; similar: Bieniak, J., in: Bieniak, J., Bieniak, M. (eds.), *Spółka akcyjna. Komentarz*, Warszawa 2005, p. 308.

Obligation to enter delegating in the register of entrepreneurs

With regard to a limited liability company,⁴³ the register does not provide an appropriate heading for the data of persons delegated to perform management board duties (it has no physically separate place to make an appropriate entry). In the case of delegating, the relevant information is included in section 2, subheading 1 of heading 1, in the field specifying the function in the representing body. Such a practice appears to be wrong, because the term “member of the supervisory board delegated to perform the function of president” does not specify the function but the status of the person. On the other hand, accepting the correctness of this practice would dispel doubts about the status of this person, because it should be recognized that they become a management board member, since they are given an entry in heading 1 referring to the body authorized to represent. However, one may see the cascading nature and the possibility of assumptions guiding the above arguments.

Considering the certainty of trading and protection of the interests of third parties (company’s counterparties), the statute should provide for the obligation to enter delegation of a member of the SB to temporarily perform duties in the management board of a limited liability company. The entry should be obligatory, although declarative, and delegating itself should be effective upon the supervisory board passing a resolution. It should be assumed that the adoption of a resolution by the SB should have the effect of delegating.

Time frames of delegating

The current state of (not)regulating delegation in a limited liability company, in particular in view of admissibility of delegating on the basis of the freedom of contract, results i.a. in the freedom of shaping the time frames of the institution in question. While the provision of Article 383 CCC expressly indicates the temporary nature of delegation, allowing its application for a maximum period of three months, in the case of a limited liability company there are no legal indications regarding the period of admissibility of delegating. This makes it seem possible to indicate a time frame for a period exceeding the time limit specified for a joint-

⁴³ Article 39 of the Act of 20 August 1997 on the National Court Register Dz. U. (Journal of Laws) of 2018, item 986, as amended) does not differentiate between capital companies in this respect, thus also with reference to a joint-stock company there is no relevant legal norm requiring an entry or a field in the register itself.

stock company or, for example, by reference to an indefinite future event, such as the phrase “the date of convening the next meeting of shareholders”.

The institution of delegating, as an exceptional institution, must have a temporary, strictly-defined nature. Its statutory regulation is desirable, as it may be seen that it creates the risk of freedom and arbitrariness of casuistic solutions.

Status of a member of the SB delegated to perform management board duties

Part of the doctrine indicates that a delegated member of the SB assumes the rights and obligations of a management board member, which, however, does not determine the acquisition of the status of a management board member.⁴⁴ This is supported by the literal interpretation of the provision of Article 383 CCC, in which it refers to “delegating to perform duties of a management board member” and not delegating to the management board.⁴⁵ There are opinions that if the intention of the legislator was to make the delegated person a management board member, it would be simply pointed out in the text of the act, instead of using a longer linguistic form referring directly to the performance of duties of a management board member.⁴⁶ At the same time, the current absence of regulation (provision) makes it impossible to accept a delegated person’s suspension of acting in the SB while they are delegated to the management board and while there are views confirming the non-acquisition of a management board member status.⁴⁷

In turn, the second position recognizes the delegated person as a management board member, claiming that the performance of duties of a management board member makes them a management board member.⁴⁸ It is assumed that the delegated member of the SB becomes a manager with all related consequences, and thus, upon the adoption of a relevant resolution they become a management board member.⁴⁹

⁴⁴ Opalski A., in: *Kodeks*, p. 1486; Chomiuk, M., in: Jara, Z. (ed.), *Kodeks spółek handlowych. Komentarz*, Warszawa 2014, p. 874; similarly on the basis of a joint-stock company: Szwaja, J., Mika, I., in: *Kodeks*, p. 729.

⁴⁵ Nowacki, A., *Delegowanie członków rady nadzorczej do czasowego wykonywania czynności członków zarządu*, “Przegląd Prawa Handlowego” 2010, No. 10, p. 13.

⁴⁶ Ibidem, 13.

⁴⁷ Strzępka, J., *Rozszerzenie*, p. 27.

⁴⁸ Naworski, J.P., *Delegowanie*, p. 9.

⁴⁹ Judgment of the Supreme Administrative Court in Warszawa of 12 April 2013 I GSK 1263/11, LEX No. 1336162.

The delegated person assumes the general rights and obligations of a management board member.⁵⁰ In addition, jurisprudence considers a delegated person to be a management board member within the meaning of Article 116 § 1 of the Tax Ordinance Act⁵¹, which in terms of content is an equivalent of Article 299 CCC.

Approving of one of the two aforementioned positions regarding the status of a delegated person is not a purely doctrinal question, but affects the functioning of a company, in particular the responsibility of the delegated person for the company's obligations and the possibility of applying a non-competition clause for them.

A consequence of the approval of the concept that the delegated member of the SB does not acquire the status of a management board member, would involve an exemption from the application of certain regulations with regard to such a person, such as remuneration, non-competition, disputes with the company or liability.⁵² Therefore, in a situation where a non-competition rule has not been imposed on a member of the SB, this prohibition will not be binding on them in the case of being delegated (Article 390 § 3 sentence 3 of the CCC). *A contrario*, even if an appropriate contractual prohibition has not been introduced and we believe that the delegated member of the SB becomes a management board member, the non-competition rule will be binding on them during the delegation period and will cease after that time (Article 211 § 1 CCC; temporary nature of the non-competition rule).⁵³ Therefore, the acknowledgement that the delegated person becomes a management board member eliminates legislative imperfections in this matter.

It is worth recalling here the amendment of the CCC⁵⁴ adding Article 299¹ CCC, by virtue of which liability of management board members under Article 299 CCC was expanded to apply also to the company's liquidators. This amendment proves that the circle of liable entities pursuant to Article 299 CCC must be strictly interpreted, all the more that Article 276 § 1 CCC establishes the principle that management board members shall act as the liquidators, unless other regu-

⁵⁰ Ibidem.

⁵¹ Judgment of the Supreme Court of 12 May 2011, II UK 308/10, LEX No. 1165771.

⁵² Cf. Nowacki, A., *Delegowanie*, p. 13.

⁵³ Naworski, J.P., *Delegowanie*, p. 15.

⁵⁴ Act of 15 May 2015 Restructuring Law Dz. U. (Journal of Laws) of 2015, item 978, there is a later consolidated text of the act, however, it is not relevant for incidental amendment of the CCC, etc.

lations are included in the articles of association of a limited liability company or a shareholders' resolution. Therefore, following the approval of the position according to which a member of the SB delegated to perform duties in the management board is not a member, a situation arises where they are not liable under Article 299 CCC. The delegated person will not be held liable, even though they perform the same duties as a management board member appointed in a traditional procedure who will be held liable. Such an interpretation seems unfair and is a manifestation of unequal treatment of entities in the same situation.⁵⁵ Currently, there is no legal norm imposing liability on persons delegated to perform management board duties.

It should be assumed that it is the scope of performed activities (duties), not the manner (procedure) of appointment that should be the circumstance indicating the same position (the status of the delegated person). The thesis that delegation is a source of establishing a membership relationship in the management board seems to be correct, which is why the delegated person has a status (temporary membership) of being part of the management board.⁵⁶ In other words, authorization to act on behalf of the company in a specific scope of matters and not the source of authorization (decision-making body) to act as a manager should be key.⁵⁷

It should be noticed that specifying the status of a member of the SB delegated to perform duties of the management board is important from the point of view of proper functioning of both the management board and the supervisory board, in particular where compositions of both bodies were settled in the articles of association in a rigid manner (not involving a range). A decrease in the number of members below a certain number means that the body is not properly staffed (non-quorum body) and is therefore unable to act on behalf of the company.

Finally, it should be noted that as a result of delegating, a member of the SB acquires the right to perform the activities of the management board, i.e. they may manage the company's affairs and represent it. Performing management

⁵⁵ Nowacki, A., *Delegowanie*, p. 15, in the opinion of whom, a person delegated to perform functions of the management board may not be liable under the provisions on liability of management board members, because he or she is not a member. The author refers his own view to criminal responsibility, which may not be based on a provision used in a corresponding way, but this view also applies to civil law liability, including Article 291 CCC or Article 299 CCC.

⁵⁶ Judgment of the Supreme Administrative Court in Warszawa of 12 April 2013 I GSK 1263/11, LEX No. 1336162.

⁵⁷ Judgment of the Supreme Court of 12 May 2011, II UK 308/10, LEX No. 1165771.

duties affects many areas of the company's activity, at the same time excluding impartiality of the delegated person. The simultaneous performance of management and audit activities is contrary to the rule of Article 214 § 1 CCC, which prohibits combining membership in these bodies (the prohibition applies to all audit activities and is absolute). For this reason, a member of the SB delegated to perform tasks of the management board while holding a position in the management board, should not have the competence to perform duties in the supervisory board.⁵⁸ In this situation it is important that the mandate of a member of the SB carries on, and therefore it is not possible to appoint a new one. Due to these difficulties, delegating appears as a troublesome institution, not very simple in everyday use for the company. *De lege ferenda*, it is worth considering in the CCC a suspension of *ex lege* membership in the SB for the time of delegation.

Incidentally, it is worth noting that as a result of delegating, a member of the SB may *de facto* control his or her activities, although such a situation may arise in the ordinary course of proceedings and filling mandates in the bodies of the company, as the CCC does not prohibit the performance of duties in the SB immediately after fulfilling the mandate of a management board member. *De lege lata* there is no legal norm ordering one to refrain from evaluating previous actions, which seems desirable *de lege ferenda*.⁵⁹

In connection with the aforementioned observations, it should be pointed out that Article 214 CCC introduces a prohibition of combining positions in the management board and the supervisory board on the basis of a limited liability company. The possibility of delegating a member of the supervisory board, assuming the belief that the mandate in the supervisory does not expire, is against this regulation. Opponents of this view indicate that it has its counterpart in a joint stock company – i.e. Article 387 CCC,⁶⁰ without noticing a seemingly important difference that on the ground of a limited liability company there is a *lex specialis* in the form of 383 §1 CCC, which explicitly allows delegating.⁶¹

⁵⁸ Chomiuk, A., in: *Kodeks*, p. 874; similarly on the basis of a joint-stock company: Szwaja, J., Mika, I., in: *Kodeks*, p. 729.

⁵⁹ A model to work on this regulation could involve Articles 209 or 244 CCC.

⁶⁰ Opalski, A., *Komentarz do art. 220 k.s.h.*, in: Opalski, A. (ed.), *Kodeks spółek handlowych. Volume II A. Spółka z ograniczoną odpowiedzialnością. Komentarz do art. 151–226*, available in Legalis 2018 database, accessed on: 4.02.2019.

⁶¹ Nowacki, A., *Komentarz do art. 220 KSH*.

Summary and conclusions

Delegating a member of the SB to temporarily perform management board duties in a limited liability company is an ambiguous measure. This feature is demonstrated not only by the possibility of delegating but also by its legal consequences. It is fully justified to raise the argument about the impossibility of its occurrence in a limited liability company due to the absence of a standard allowing the possibility of delegating members of the SB to perform management board functions. The existing cases should be treated as an interpretation creating an institution that does not have a clear normative basis.

Although the position is contrary to the practical approach to the issue, it finds a juridical basis in the legal order (negative regulation). First of all, the legislator regulates capital companies in a comprehensive manner, which makes reaching for forms of a joint-stock company for the needs of a limited liability company doubtful. I do not think that a limited liability company is “unregulated” and that it is necessary to apply the standards governing a joint-stock company. The legislator does not use a provision referring to another rule, without which it seems not possible to fall back on the regulation of another company. Within their characteristics, capital companies divide competences between their bodies. Any deviations in this matter should be treated as precisely as possible. Each company body has its own statutorily reserved competence which may be modified if there is an explicit legal norm in this regard. The provision of Article 383 CCC allows the adoption of the uniqueness of the regulation, which may not be freely transferred onto a limited liability company, in particular by referring to the principle of the freedom of contract. The example involves the Recommendation in the scope of draft laws regulating a simple joint-stock company, which, for a SJSC, which is a category of a joint-stock company, explicitly provide for self-regulation in the matter of delegating, not for referring to Article 383 CCC.

It is puzzling how far the creative interpretation of shareholders of a limited liability company that creates institutions that are not explicitly indicated in the act can go. The freedom of shareholders *in casu* in this respect weakens the argument of the legislator’s rationality and the resulting conclusion that the absence of regulation is not accidental, but fully intended. It should be added that one may conclude from the provisions of the CCC that the composition of the management board, and thus the shape and image of a limited liability company, should be influenced by the company’s shareholders. All in all, despite the discrepancies

already existing on the grounds of the CC regarding the admissibility of delegating in a limited liability company, the legislator did not comment in the CCC in this regard. A specific complement to the above arguments involves ambiguities arising in relation to the assessment of delegating, the legal consequences of its application, as well as specifying the status of a delegated member of the supervisory board.

Numerous doubts regarding delegation to perform temporarily duties in the management board, being a consequence of creative legal interpretation processes, make their definitive removal possible only through the legislator's interference in the text of the CCC. Delegation in practice raises a number of ambiguities. Despite the position taken and the comments made, in my opinion, the amendment to Section II of the CCC "Supervision", more precisely its Article 220, should aim at allowing the possibility of delegating a member of the SB to temporarily perform duties in the management board (similar to Article 383 § 1 CCC), with a precise determination of the limits and premises of delegating and a settlement of the status of the delegated person. Although the proposed amendment could be accused of "statutory overregulation", it must be remembered that legal certainty is a value in itself, which requires firmness and precision.

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Dominika Mróz-Krysta*

**REIMBURSEMENT OF THE EXPENDITURES FROM THE
JOINT PROPERTY OF THE SPOUSES ON THE REAL ESTATE
CONSTITUTING PERSONAL PROPERTY OF ONE OF THEM
– IS IT POSSIBLE TO EXTEND THE EXCEPTIONS TO THE
RETENTION RIGHT**

Abstract

Pursuant to Article 461§1 of Polish Civil Code (hereinafter referred to as: “CC”) related to Article 461§2 CC, a person obliged to release the property belonging to somebody else may retain such property until their claims for the reimbursement of expenditures on the thing of claims to redress the damage inflicted by the thing are satisfied or secured (retention rights). The aforementioned provision shall not apply when the duty to release the property results from tort or in the case of returning the property which have been leased, rented or loaned for use.¹

Hence the question about the possibility of applying an analogy to the exclusions to retention right listed in Article 461§2 CC in a situation where after the termination of the marriage (for example: by divorce) the former spouse resides on the property constituting the personal property of the other spouse, against their will, invoking the duty of

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¹ Polish regulation, contrary to the French one (see: Article 2286 *Code Civil*), exemplifies exceptions to the retention right, not to cases where this right is granted to the party.

reimbursement of the expenditures from the common property to the personal property of the other spouse. The author has applied a dogmatic method to the issue outlined above, analysing the current legal situation and concluding that it is permissible to extend exceptions to the right of detention. There are the following premises for application of analogy in the civil law: similarity due to important features and loophole in the law. The use of the real estate property of the ex-spouse, contrary to the will of the other spouse, fulfils all the premises for application of analogy.

The ex-spouse residence on the real estate belonging to another spouse, contrary to the other spouse's will, is reprehensible enough to be qualified as tort and cessation of the family law title to the apartment, referred to in Article 28¹ FGC – similarity to the cessation of continuous legal relationships, such as lending.

As proved, in accordance with applicable law it is admissible to create the analogy to Article 461§2 CC, so that the ex-spouse using the real property of another spouse upon termination of marriage could not invoke the retention right. As for the future, the statutory extension of the scope of the exceptions to the retention right should be suggested.

Keywords: retention right, analogy, expenditures, personal property, joint property

Introduction

Pursuant to Article 461§1 of Polish Civil Code (hereinafter referred to as: “CC”) related to Article 461§2 CC, a person obliged to release the thing belonging to somebody else may retain such thing until their claims for the reimbursement of expenditures on the thing or claims to redress the damage inflicted by the thing are satisfied or secured (retention rights). The aforementioned provision shall not apply when the duty to release the property results from a tort or where it concerns the return of the thing which have been leased, rented or loaned for use.

It may occur in practice of law that the ex-spouse refuses to release the thing constituting the personal property of another spouse and profits from the retention right, provided for in Article 461§1 CC (*ius retentionis*; retention rights), claiming the reimbursement of the expenditures from the joint property of the spouses. If the expenditures were effectuated on the real estate property which satisfied the housing needs of the family (for example: the land built up with the residential building or the premises constituting a separate apartment), exercising the retention rights means refusal to quit the immovable property by the ex-spouse and cohabitation, most frequently, contrary to the will of another spouse.

Moreover, reimbursement of the expenditures from the joint property of the spouses on the personal propriety of another spouse are claimed in the proceedings concerning the division of the assets of joint property (often, reimbursement of the expenditures is the only issue to be considered during the proceedings),² the courts make the eviction of the responding divorced spouse conditional from the real estate on the other spouse executing the decision on the division of property, which lay down an obligation to account for expenditure on joint property to the personal property of the other spouse. In other words – the retention objection raised by the ex-spouse, who is the respondent in the eviction proceedings, is upheld. This means that the actual eviction of the ex-spouse who uses the real estate property of another spouse depends on the reimbursement of the expenditures from the joint property of the spouses on the personal propriety of the other spouse.³

Such practice, although consistent with the literal meaning of Article 461§1 and §2 CC, is questionable, as in fact it renders null and void the proceedings for the divisions of joint assets which – as secondary to the cessation of the marriage – is aimed at “separation of the ex-spouses definitely, in the financial sense.” Making reimbursement of the expenditures claimed in the proceedings concerning the division of the assets of joint property a condition for eviction of the ex-spouse leads to the artificial “prolongation” of property relations between ex-spouses and gives rise to a conflict. Thus, it is against the purpose and essence of the proceedings for the division of assets and leads to granting unjustified protection against eviction to the divorced spouse, in a situation, when the subject of personal property, to which expenditures have been made from joint property, is the real estate used for housing purposes. In this context, a question arises, whether it is admissible to extend the scope of the exceptions to the retention rights, regulated in Article 461§2 CC. In other words – is it possible and justified to include in the catalogue of exceptions from the retention rights a divorced spouse who refuses to release the thing constituting personal property of another spouse, especially in the case of real estate which was used to meet the housing needs of the family.

² See Article 567§1 of the Polish Code of Civil Procedure (hereinafter referred to as: CCP).

³ It is stated in the jurisprudence that “the use of the retention right does not lead to the dismissal of the claim, but to adjudicating the return of the real estate under the obligation of reimbursement of expenditures.” [judgment of the Court of Appeal in Kraków – Civil Section I of 17 November 2016, I ACa 789/16, Legalis no. 1564467).

The issue in question is consistent with the theme of the conference, i.e.: “The principle of the unity of civil law and the cohesion of the regulations of civil, commercial and family law” (“Zasada jedności prawa cywilnego a spójność regulacji prawnohandlowych i prawnorodzinnych”) – as it concerns the specific incoherence of the family law regulation,⁴ regarding cessation of the marriage, division of joint property and reimbursement of the expenditures from the joint property of the spouses and civil law regulations regarding the retention right. In accordance with applicable law, a question arises whether it is admissible to remove the aforementioned incoherence by means of analogy to article 461§2 CC, and, consequently – whether it is possible to invoke the retention rights of the ex-spouse who refuses to release the property constituting personal property of another spouse.

In view of the social role of the immovable properties and the satisfaction of the housing needs of the family, taking into consideration the fact that the use of the real estate property of the ex-spouse contrary to their will is so reprehensible, the analysis concerning the obligation to “release the thing” will be conducted with reference to the real estate property.

The legal situation of the ex-spouse residing at the real estate property of another spouse and the legal exceptions to the retention rights

There is no doubt that the spouse holds the legal title to use the real estate property of another one during the marriage, within the context of family law regulations, i.e. Article 28¹ of Polish Family and Guardianship Code (hereinafter referred to as: “FGC”). The literature states without any reservation that “the entitlement to use the premises (by the other spouse – author’s explanation) is limited to a purpose, which consists in satisfying the needs of the family.”⁵, and the aforementioned right of the spouse is qualified as subjective right.⁶ On the other hand, the interpretation of the word “apartment” is very broad. On the grounds

⁴ Both on the grounds of substantive law and the proceedings; Article 28¹ FGC, Article 567§1 CCP.

⁵ Michałowska, K., *Niemajątkowe wartości życia rodzinnego w polskim prawie cywilnym*, Warszawa 2017, p. 436.

⁶ “It has been indicated that in this manner, the legislator has constructed a certain legal title for such spouse, as the entitlement in question is undoubtedly a subjective right.”: Pietrzykowski, K., in: Pietrzykowski, K. (ed.), *Kodeks rodzinny i opiekuńczy, Komentarz*, Warszawa 2018, p. 286.

of Article 28¹ FGC, an apartment is: “premises where living can be organised”.⁷

Moreover, it is obvious that termination of marriage (e.g. by divorce) results in an automatic termination of the right to premises, in view of the family law regulations.⁸ This means that the ex-spouse, who lives on the real estate intended for family residence which constitutes the personal property of another one upon cessation of marriage, uses the premises without a legal title. Thus, he or she is “obliged to release the thing” within the meaning of Article 461§1 CC. The literal interpretation of the exceptions to the retention right (Article 461§1 CC) means that the ex-spouse using the real estate of another one is entitled to enjoy this right. This means that the divorced spouse may live with the ex-spouse on the premises of the latter – even against their will.

A question arises, whether it is admissible to extend the scope of the exceptions thereto in order to include in such catalogue the ex-spouse who exercises this right with reference to the obligation to leave the real estate belonging to the other spouse (which, in fact, is an obligation to return it). This is an issue of the possibility to deprive the ex-spouse of the retention rights in the conditions specified. A question arises whether it is admissible to deprive them of this right by the extension of the scope of the exceptions thereto. It is assumed that the retention right is not absolute in nature and is subject to exceptions; moreover, it does not create the unconditional protection of the debtor.⁹

In this context, two issues must be taken into account: whether the ex-spouse owning the real estate has a stronger interest in receiving the thing back than the

⁷ Bieranowski, A., *Prawa małżonków do mieszkania*, in: *Małżeńskie prawo majątkowe*, Warszawa 2014, p. 278, Jadczyk-Żebrowska, M., *Prawa i obowiązki małżonków*, Warszawa 2017, p. 293.

⁸ In relation to the spouse's right to premises pursuant to the provisions of family law and its derivative nature: Olczyk, M., *Komentarz do art. 28(1) Kodeksu Rodzinnego i Opiekuńczego*, LEX – el., Thesis 1.

⁹ It is assumed as follows: “The term «not applicable» used in Article 461(2) CC does not mean that the provision is a peremptory norm, but merely that the person concerned cannot invoke their retention right on the basis of their unilateral declaration of will, unless the parties have agreed otherwise in this regard. **The parties may also, by means of an agreement, expand the catalogue of cases where retention right is invalid.**” (Expression in bold by the author): Rzetecka-Gil, A., *Komentarz do art. 461 Kodeksu Cywilnego*, Lex – el., Thesis 49). As is: Rapała, A., in: Habdas, M. and Frasz, M. (eds.), *Kodeks cywilny. Komentarz. Volume III. Zobowiązania. Część ogólna (art. 353–534)*, Warszawa 2018, p. 808; Wiśniewski, T., in: Gudowski, J. (ed.), *Kodeks cywilny. Komentarz. Volume III. Zobowiązania. Część ogólna*, Warszawa 2018, p. 1186; Zagrobelny, K., in: Gniewek, E. (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2016, p. 946; Janiak, A., in: Gutowski, M. (ed.), *Kodeks cywilny. Komentarz. Volume II, Art. 353–26*, Warszawa 2019, p. 1029.

ex-spouse who exercises the right to retention and whether the premises to use analogy from Article 461 §2 CC have been fulfilled. There is also a question whether the charge of abusing the right (Article 5 CC) could constitute effective and sufficient protection of the interests of the ex-spouse who is the owner of the real estate.

One could not ignore the essence of the right to retention, which “is characterized by the fact that the holder of this right is **entitled to continuation of the possession of the thing** (expression in bold by the author) which already is at disposal – justified by law – of the holder of the right”.¹⁰ The reasons for the exceptions to the retention rights, in turn, result from “the fact that the legislator has noticed priority of the interests of the person claiming release of the thing comparing with the interests of the person obliged to release it”.¹¹

The priority of the interests of the owner claiming to recover the thing comparing with the interest of the person who profits from the retention right

The retention right is not absolute by nature. It is assumed in the literature that “the retention rights granted to the debtor might be somehow limited”. The exceptions thereto refer to the cases where the legislator decided that the interest of the creditor in having the thing returned has to be treated with priority over the interest of the debtor in obtaining reimbursement.”¹² It has been pointed out that in the events specified in Article 461 §2 CC, “(...) the interest of the creditor in having the thing released has to be treated with priority over the interest of the debtor in obtaining reimbursement or securing the claims related to the thing”.¹³

¹⁰ Popiołek W., in: Pietrzykowski K (ed.), *Kodeks cywilny. Volume II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, Warszawa 2018, p. 31.

¹¹ Rapała, A., *Ibidem*, Janiak, A., in: Gutowski, M. (ed.), *Kodeks cywilny. Komentarz. Volume II, Art. 353–626*, Warszawa 2019, p. 1029. As of the legal nature of the retention right – there is no agreement in the literature regarding the relationship between this right and the right to withhold performance of the benefit, provided for in Article 488 §2 CC: see: Zoll, F., in: Olejniczak, A. (ed.), *System Prawa Prywatnego. Volume 6. Prawo zobowiązań – część ogólna. Suplement* (series editor – Radwański, Z.), Warszawa 2010, p. 71; Wiśniewski, T., *Prawo zatrzymania w Kodeksie Cywilnym, part 1*, PS 1999, No. 1, pp. 36–37. On the ground of the Code of Obligations – Longchamps de Berier, R., *Uzasadnienie projektu kodeksu zobowiązań. Komisja Kodyfikacyjna. Podkomisja prawa o zobowiązaniach*, book 4, Warszawa 1934, p. 313; Czachórski, W. at el., *Zobowiązania. Zarys wykładu*, Warszawa 2009, pp. 325, 755.

¹² Wiśniewski, T., *Glosa do uchwały SN z dnia 29 listopada 1991 r., III CZP 124/91*, “Orzecznictwo Sądów Polskich” 1992, No. 9 (207).

¹³ Kocot, W., *Prawo zatrzymania w prawie cywilnym i handlowym*, “Państwo i Prawo” 1994, No. 5, p. 57.

As a consequence, the interest of the owner who reclaims the real estate property has to be treated with priority over the interest of the debtor, being the ex-spouse. The situation when the ex-spouse resides at the real property of another one spouse following the divorce and the division of the joint assets is justified neither by virtue of law, nor the social circumstances.¹⁴ Such a situation only artificially *prolongs* the personal and financial relationships between ex-spouses. The real estate constituting personal property is to serve primarily to satisfy housing needs of the ex-spouse who is the owner of this property. It should also be noted that upon cessation of marriage by divorce, the duty of mutual assistance between the spouses, specified in Article 23 FGC, ceases as well. Moreover, it is not uncommon that the ex-spouse residing at the real property of another one spouse only hinders the fulfilment of obligation to reimburse the expenditures. The sale of the disputed real estate is often the only way for an ex-spouse, obliged to reimburse the expenditure, to obtain the funds to pay the dues. The ex-spouse residing at the real property of another one spouse is an obstacle in selling the property and obtaining funds to repay the value of expenditures made on the joint property.

To sum up, it is admissible to conclude, that the owner of the real property constituting personal property of the spouse during marriage has a further-reaching and more justified interest in eviction of ex-spouse than the latter in retention of the thing and settlement of the expenditures.

The retention right and the charge of abuse of the subjective right

There is also a question whether the charge of abusing the right (Article 5 CC), when the ex-spouse exercises their retention right, could constitute effective and sufficient protection of the interests of the ex-spouse who is the owner of the real estate. The general clause regulated in Article 5 CC leaves the court with a wide scope of discretion and makes it possible to take into consideration the

¹⁴ An opinion which may lead to a different conclusion is presented by Wiśniewski, who argues: "As it concerns the exceptions to the retention right such as tort, one ought to state that refusal to release the thing does not constitute tort as such, under the condition that the possession of the thing involved a legal title or good faith. Even possession in bad faith does not have to be automatically qualified as tort, although these situations may appear simultaneously." Wiśniewski, T., in: Gudowski, J. (ed.), *Kodeks cywilny. Komentarz. Vol. III. Zobowiązania. Część ogólna*, Warszawa 2018, p. 1186. In the course of the marriage, the spouse used the real estate of the other spouse on the basis of Article 28¹ FGC.

interests of various subjects in a specific situation.¹⁵ Therefore, it is not possible to define strict criteria of its application¹⁶ and the charge of abuse of the retention right could never guarantee effective protection for the owner of the real estate. Due to the purpose of the proceedings: divorce and liquidation of the joint property (termination of marriage) – the protection of the owner of the property should be generalized and within this sense – independent of the circumstances of the given case.

The premises of the reason by analogy to the exceptions to the retention right

Admissibility of the reason by analogy to Article 461§2 CC for such legal and factual situations, which have not been listed in the aforementioned provision and exhibit essential similarity to lease, rent or loan for use, as well as the tort and the interest of the owner of the thing has to be treated with priority over the interest of the person obliged to returning the thing, should also be taken into consideration.

The issue in question cannot be discussed without taking into consideration the analogy in the civil law. It is assumed in the literature and the case law that “*the precondition to apply reason by analogy is the loophole in law*”.¹⁷ The loophole in the law is usually understood as “such a state of affairs, when a specific social relationship is neither legally indifferent nor considered by the legislator to be unregulated, there is no legal norm, either explicit or implicit, in the interpretation of the law”.¹⁸ It should also be taken into consideration that: “the interpretation of the provisions of law has to respect the assumption of the reasonability of the legislator, as well as the cohesion of the legal system”.¹⁹

Apart from the loophole, the premise for admissibility of the application of analogy is the similarity of the facts subject to legal assessment. As it has been

¹⁵ Judgement of the Supreme Court – Civil Chamber of 28 May 2019, II CSK 587/18, Legalis no. 1942530.

¹⁶ Judgement of the Supreme Court – Civil Chamber of 31 May 2019, II CSK 618/18, Legalis no. 1950389.

¹⁷ Kabza, E., *Problem stosowania analogii w prawie cywilnym*, “Forum Prawnicze” 2010, No. 1, p. 56; Mróz-Krysta, D., *Obligacyjne skutki ustawowego prawa odstąpienia od umowy*, Warszawa 2014, p. 203.

¹⁸ Kabza, E., *Ibidem.*, p. 57; Mróz-Krysta, D., *Ibidem.*

¹⁹ Kabza, E., *Ibidem.*, p. 56; Mróz-Krysta, D., *Ibidem.*

emphasised in the literature, this context refers to “a provision regulating the closest cases, the most similar and the most relevant, the closest to the case in question due to their most characteristic features”.²⁰

Both premises of reason by analogy are met.

Legal loophole

The protection of a debtor resulting from the possibility to exercise retention right is not absolute in nature. This leads to a conclusion that the catalogue of exceptions specified in Article 461 §2 CC does not need to be closed.

In the light of the above, as well as in view of Article 28¹ FGC, a question arises, whether it is admissible to exercise retention right by the divorced spouse who is to be evicted from the residential premises constituting personal property of the other spouse. This question is justified by specificity of the situation of the ex-spouses when one of them owns the property and the other resides at the premises, despite cessation of the marriage by divorce and therefore does so despite cessation of the family law title to the apartment, specified in Article 28¹ FGC. The literature emphasise that the rights provided for therein are situated within the content of the marriage relation, and cease as the elements of its content upon cessation or invalidation of marriage.²¹

If the seemingly exceptional²² nature of the provision of Article 461 §2 CC may be “exceeded” by the principle of freedom of contract,²³ then it may be “exceeded” even more so in a situation where there are so many reasons for granting stronger protection to the owner of the property entitled to its recovery, including in particular the reprehensible conduct of the divorced spouse who, without any justification in an objectively assessed property situation, resides with their ex-spouse.

²⁰ Kabza, E., Ibidem, p. 56; Mróz-Krysta, D., Ibidem.

²¹ Nazar, M., in: T. Smoczyński (ed.), *System Prawa Prywatnego. Volume 11. Prawo Rodzinne i Opiekuńcze*, Warszawa 2014, pp. 446–447.

²² The literature stresses the exceptional nature of the exclusions of retention right: “On the other hand, the retention right of a thing belonging to another person, provided for in Article 461 §2 CC **exceptionally shall not arise** («exceptionally» author’s emphasis, «shall not arise» – original emphasis), when the duty to release the property results from a tort or where it concerns the return of the property which have been leased, rented or loaned for use”, Doliwa, A., in: Załucki, M. (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019, p. 1066, No 1.

²³ Rzetecka-Gil, A., *Komentarz do art. 461 Kodeksu Cywilnego*, Lex – el., Thesis 49.

Failure to mention the obligation to return the thing resulting from the cessation of the derivative family civil law right to the thing in question in Article 461§2 CC and the temporal relationship between Article 461§1 and §2 and Article 281 FGC (the latter provision has come into force later) allow to conclude that there is a loophole in the regulation of the exceptions to the right of retention. Moreover, it is necessary to look for a general mode of protection of the owner of the real estate, which is not granted *de lege lata*.

Similarities concerning the characteristic features

The legal situation of the ex-spouse who uses the real estate of the other spouse is similar to all situations exemplified as exceptions to the retention right.

One of the arguments in favour of exclusion of retention right in the event when the divorced spouse wants to exercise it, is similarity of the family law title to the apartment referred to in Article 28¹ FGC to a lending relationship, especially due to the similarity of the purpose of both institutions (assisting the spouse and the lending party). The derivative family law title held by the spouse who is not the owner of the apartment (understood in any form) indicates numerous similarities to the loan agreement, especially in terms of the aim of both institutions (assistance). The aim of the regulation is undoubtedly a “significant issue” and an important criterion of similarity in terms of premises for the application of analogy. The legal academics emphasise the gratuitous and relief nature of the loan agreement.²⁴ It can be assumed in this context that in light of Article 23 FGC spouses are obliged to assist each other and regulation of Article 28¹ which protects housing needs of the spouse who is not the owner of the property is a certain manifestation and expression of this obligation.²⁵ It is emphasised that

²⁴ As of loan, the views of the legal scholars are as follows: “*As it results from the provision of Article 710 of the Civil Code, the lender commits, by a lending for use contract, to permit the borrower, for a fixed or a non-fixed term, to use a thing free of charge for the stated purpose. In fact, it is the lender gratuitously depriving themselves of the use of a particular item for the convenience of the borrower. A lending agreement, usually motivated by the willingness to help relatives, is intended to benefit the lender to the benefit of the borrower, who may use the lender’s property free of charge*” (author’s emphasis), Gawlik Z., et al., in: Kidyba, A. (ed.), *Komentarz do art. 710 Kodeksu Cywilnego*, LEX – el., Thesis 3.

²⁵ On the basis of the previously binding legal status, it was claimed that “*the obligation of mutual assistance* (original emphasis – author’s explanation) *may, in specific circumstances, constitute a basis for providing the spouse with legal protection by allowing them to use the premises constituting a separate (currently personal) property of the other spouse.*”, Pietrzykowski, K., in: Pietrzykowski, K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2018, p. 286.

termination of the contract of loan of use which is linked with the voluntary aid, justifies the weaker protection of the debtor obliged to release the thing; it is more justified to eliminate the retention right in the case when the aid connected with the terminated legal relationship was a duty of the owner of the thing (between the spouses, by the virtue of Article 23 CFG).

Another important feature, due to which residence on the property by the divorced spouse on the property of the former spouse justifies the analogy with the exclusions of the retention right, is the similarity between cessation of the marriage and termination of the continuous legal relationships referred to in Article 461§2 CC. The continuous nature of the compared legal relationships and the consequences of their termination are undoubtedly similar in view of the “essential features” of the conditions for the application of the analogy. The fact not to be overlooked is that the legislator provided for exceptions to the retention right upon termination of the legal relationships of a continuous nature (lending, renting, leasing) and, in such situations, considered the interest of the owner of the property in receiving it back to be a priority. The literature states that: “The parties of the contracts of the continuous character, as for example: the contract of lease of the labour contract, dissolution of which are effective *ex nunc* are not entitled to the retention right”.²⁶ The presented examples, including the employment contract not listed in Article 461§2 CC, suggest that a certain general rule is being created according to which for legal relationships of a continuous nature, whose termination results exclusively with future effect, the interest of the owner in receiving the thing back – due to this continuance of a legal relationship – is more justified than the protection of the debtor resulting from the need to secure or satisfy his claims related to the thing. In this context, it should also be noted that the marriage – which is the initial factor as well as the reason of the regulation of Article 28¹ CFG, but is not a contract – is similar to the legal relations of continuous nature. It should be added that under the assumption of the provisions of the Family and Guardianship Code, marriage is a relationship of permanent nature, whose annulment, determination of non-existence or dissolution requires court intervention on the basis of strictly defined rules and premises. What is more, termination of the marriage as a result of the proclamation of the divorce effective *ex nunc*, i.e. for the future, constitutes the new legal state not

²⁶ Kocot, W., *Prawo zatrzymania w prawie cywilnym i handlowym*, “Państwo i Prawo” 1994, No. 5, p. 57.

only between the ex-spouses, but towards the third parties as well. In this context, the legal nature of cessation of marriage, and, consequently, the cessation of a derivative family law title of a spouse to the premises – justifies its similarity to cease the continuous legal relationships, and thus further reaching protection of the owner of the real estate than the protection of the debtor obliged to release it.

Another exclusion from retention right is the obligation to release the thing resulting from tort. The continuous and constant residence by the ex-spouse on the real estate belonging to another spouse, contrary to the other spouse's will and following the divorce, is reprehensible enough to be qualified as tort, thus another exclusion of retention right.²⁷ Reprehensible conduct is another feature constituting a significant similarity criterion which is a premise to apply analogy. The above statement is justified, as the literature adopts a wide definition of tort based on Article 461§2 CC.²⁸

It should be concluded that the use of the real estate property of the ex-spouse, contrary to the will of the other spouse and without any support in the legal status, following the divorce and the division of property is a situation constituting a broadly understood conflict with the law, and therefore may be classified as tort within the meaning of Article 461§2 CC. It should also be noted that the Authors quoted do not use the notion: "conflict with the statutory act", but "conflict with the law". The latter notion has obviously broader meaning, comprising also the contradiction to the principles of community life, as well as the conflict with the legal order.

It may also be argued that the ex-spouse using the real estate belonging to the other spouse contrary to their will and after the divorce may be qualified as tort – and the retention right is just excluded. In such a case, there would be no need to apply analogy. However, in such a case the generalized protection of the owner of the real estate will not be granted, because the judgement on whether tort has occurred will be dependent on the circumstances of the specific case.

²⁷ It is important to bear in mind that different conclusions may be reached through the approval of view expressed by T. Wiśniewski: "As regards the exclusion of the retention right due to tort, it should be noted that such an act is not a mere refusal by the holder to return the thing, if the thing had been acquired due to holding a legal title or in good faith. Also, possession in bad faith cannot be equated with tort, although sometimes there will be overlaps." Wiśniewski, T., in: Gudowski, J. (ed.), *Kodeks cywilny. Komentarz. Volume III. Zobowiązania. Część ogólna*, Warszawa 2018, p. 1186.

²⁸ It was stated that: "The term 'tort' cannot be understood only as civil delict referred to in the Civil Code (Article 415 et seq. of the Civil Code), but all unlawful situations.", Koziński, M. H., *Glosa do wyroku SN z dnia 31 stycznia 2002 r., IV CKN 651/00*, PS 2003, No. 10, p. 127; Rzetecka-Gil, A., *Komentarz do art. 461 Kodeksu Cywilnego*, Lex – el., Thesis 50.

Conclusions

Proceedings for divorce and for the division of property are intended to separate the spouses from each other, both in a personal and financial sense. Possible security of housing needs or claims for maintenance of the divorced spouse are regulated by separate legal institutions provided for in the FGC, which are of a strict nature. Article 461 CC cannot constitute a basis for legitimizing the fact of residing with a divorced spouse without the consent of the other former spouse and outside the framework provided by the provisions of the Family and Guardianship Code. The limits of the protection of the housing needs of the ex-spouse are regulated by the judgement of use the real estate property until the division of common assets by divorce decree.²⁹ Moreover, the mechanisms allowing for execution are the sufficient guarantee of the reimbursement of the expenditures from the common property to the benefit of the ex-spouse, who is entitled to such reimbursement.

It should also be noted that upon cessation of marriage by divorce, the duty of mutual assistance between the spouses, specified in Article 23 FGC, ceases as well. The limits of the protection of the housing needs of the ex-spouse are regulated by the judgement on use of the real estate property until the division of common assets by a divorce decree. Moreover, the mechanisms allowing for execution are the sufficient guarantee of the reimbursement of the expenditures from the common property to the benefit of the ex-spouse, who is entitled to such reimbursement.

What is more, the rejection of the claim of the retention right does not deprive the ex-spouse of the right to claim reimbursement of expenditures in separate proceedings.³⁰

It is also emphasised that: “Legal scholars have recently held the view that the relationship between FGC and CC is similar to the one existing between *lex specialis* and *lex generalis*”.³¹ The approval of such view leads to a conclusion that if the interests of the divorced spouse are understood as: housing needs or assistance regarding maintenance obligation are protected – in strictly specified

²⁹ See: Pietrzykowski, K., *Ibidem*.

³⁰ Judgement of the Court of Appeal in Warszawa – VI Civil Section of 24 March 2016, VI ACa 67/07, *Legalis* no. 1460551.

³¹ Smoczyński, T., in: Smoczyński T. (ed.), *System Prawa Prywatnego. Volume II. Prawo Rodzinne i Opiekuncze*, Warszawa 2014, p. 35.

cases – the provisions of FGC, there is no ground for extending such protection by granting retention right to the ex-spouse. The specific nature of family and legal relationships and the similarity of the spouse's derived right to housing to the legal relationships justifying the exclusion of the retention right cannot be ignored in this respect.

The aforementioned reasons and arguments raise serious doubts as to the scope of application of Article 461§1 CC in the context of Article 28¹ CC with regard to a divorced spouse who resides with their former spouse on their property, and with regard to the legal and social significance of marriage and its dissolution, it is necessary to interpret the aforementioned provisions. All the premises for application of analogy to Article 461§2 CC have been fulfilled – i.e. the loophole in the law and similarity concerning the characteristic features. The use of the real estate property of the ex-spouse, contrary to the will of the other spouse, fulfils all the premises for application of analogy to Article 461§2 CC and the fact that the nature of this provision is not absolute, constitutes authorisation to use this analogy.

In the context of the considerations set out above, and in view of the fact that the right of retention is not absolute and therefore there are no grounds for assuming the absolute nature of the debtor's protection resulting therefrom, it must be assumed that the divorced spouse does not have retention right in the event of his or her eviction from the property of the other spouse.

In accordance with applicable law, it is admissible to create the analogy to Article 461§2 CC. As for the future, the extension of the scope of the exceptions to the retention right by the ex-spouse obliged to leave the real property of another one, should be suggested.

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**THE LEGAL NATURE OF RESOLUTIONS OF THE GOVERNING
BODIES OF COMPANIES AND THEIR CHALLENGEABILITY
IN THE LIGHT OF THE PROVISIONS OF POLISH LAW**

Abstract

The subject of this article is an analysis of the functioning models of the claimability of the resolutions of the bodies of companies in terms of the connection of these models with the legal nature of these resolutions. In the case of resolutions of shareholders meetings of companies, the provisions of the Code of Commercial Companies and Partnerships provide for a judicial review of each resolution adopted by that body. A different situation occurs in the case of resolutions of supervisory boards of companies, for which no procedure for pursuing legal actions against them is provided for in the CCC&P. The doctrine and the case law assume that, as a consequence of the application of the principle of unity of civil law, these resolutions can be challenged in court, as can invalid legal transactions. In this case, therefore, the legal nature of the resolution, and thus the determination that it is a legal transaction is crucial for the possibility of its challenging in court.

Keywords: resolution, claimability, resolutions of the bodies of companies

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Introduction

Regulations regarding Polish company law do not contain a definition of a resolution, just as there is no such definition in the provisions of the Civil Code.¹ For these reasons, the legal nature of resolutions adopted by the bodies of companies has been an object of interest of the commercial law doctrine for many years.² The deliberations are conducted in particular with reference to the resolutions of the assemblies of companies, permitting the performance of a legal transaction, in connection with the regulation of Article 17 of the Code of Companies and Partnerships.³ The legal nature of resolutions of bodies other than shareholders' meetings has been the subject of research in the context of seeking a legal basis to challenge resolutions of these bodies.⁴

The legal nature of the resolution of the corporate body

Most representatives of the Polish legal doctrine agree that the resolutions should be included in legal transactions in a broad sense. A resolution is an expression of the collective will of the body of a legal person (or a statutory person), and it is referred to as a "collective legal transaction" or a "collective declaration of will".⁵ Resolutions may be included in a separate category of corporate activities as a specific category of legal transactions.⁶ It is emphasized that the resolution

¹ The Act of 23 April 1964 the Civil Code, Journal of Laws of 2018, item 1025, as amended; the Act of 15 September 2000 Code of Companies and Partnerships, Journal of Laws of 2019, item 505, as amended.

² Antoszek, P., *Cywilnoprawny charakter uchwał wspólników spółek kapitałowych*, Warszawa 2009, p. 144; Sołtysiński, S., *Charakter prawny uchwał rady nadzorczej*, in: Modrzejewska, M. (ed.), *Prawo handlowe XXI wieku. Czas stabilizacji, ewolucji czy rewolucji. Księga pamiątkowa ku czci Profesora Józefa Okolskiego*, Warszawa 2010, p. 952; Frąckowiak, J., *Charakter prawny uchwał organów spółek kapitałowych a ich zaskarżalność*, "Przegląd Prawa Handlowego" 2014, No. 9; Popiołek, W., *Charakter prawny uchwał wspólników i organów spółek kapitałowych*, "Przegląd Prawa Handlowego" 2014, No. 9; Ziemianin, B., *Charakter prawny uchwał kolegialnych organów osób prawnych*, "Przegląd Prawa Handlowego" 2014, No. 9.

³ Antoszek, P., *Charakter prawny uchwał zgromadzeń spółek kapitałowych zezwalających na dokonanie czynności prawnych przez spółkę*, "Przegląd Prawa Handlowego" 2006, No. 7, pp. 28–35.

⁴ Sikorska-Lewandowska, A., *Sanckje wadliwych uchwał rad nadzorczych spółek kapitałowych i spółdzielni*, Toruń 2013, p. 71.

⁵ Pazdan, M., *Niektóre konsekwencje teorii organów osoby prawnej*, in: *Prace Naukowe Uniwersytetu Śląskiego* 5, "Prace prawnicze" I., Katowice 1969, p. 205.

⁶ Radwański, Z., *System prawa prywatnego. Prawo Cywilne – część ogólna*, v. 2, Warszawa 2008, p. 181.

may bring about an internal or external effect, depending on whether the subject of its regulation is intra-corporate relations, or whether it is a declaration of will made to a third party by the company. In particular, in relation to internal resolutions, their civil nature was questioned, indicating a number of specific features that distinguish them from classical civil law transactions.⁷ Among these differences one should mention the effective adoption of resolutions by a majority of votes, and the consequent lack of a requirement to submit consistent declarations of will, including omitting those voted through, specific requirements for convening, and holding a meeting of the body.⁸ For these reasons, a proposal has been made to distinguish a separate type of legal transactions, the so-called intra-corporate legal transactions.⁹

There is no doubt that not all resolutions adopted by collective bodies of legal persons can be treated as civil law transactions, but only those that contain a body's declaration of will in their content, and which aim to produce a legal effect in the form of creating, changing, or terminating a civil-law relationship.¹⁰ The literature assumes that only such resolutions may be adopted as will not have the effect of creating, changing or terminating the legal relationship, and thus will not have a civil law nature, i.e. those in which congratulations or acknowledgements are included.¹¹ The adopting of these resolutions cannot be ruled out, however, but, since their content will not bring about a legal effect, no need to challenge them will arise.

The doctrine proposed a division of resolutions adopted by legal entities and being legal transactions, into three types:¹² (1) resolutions that bring about an external effect directly and without the participation of other bodies, (2) resolutions constituting a component of a legal transaction performed by another body, and (3) resolutions that produce only internal effects, affecting the structure and operation of the legal entity itself.

⁷ Frąckowiak, J., *Handlowe czynności kreujące*, "Przegląd Prawa Handlowego" 2008, No. 12, p. 12.

⁸ Frąckowiak, J., *Handlowe*, p. 11.

⁹ Frąckowiak, J., *Charakter prawny*, p. 26.

¹⁰ Radwański, Z., *System*, p. 183; Antoszek, P., *Cywilnoprawny*, p. 279; Ziemianin, B., *Charakter*, p. 49.

¹¹ Radwański, *System*, 183.

¹² Ibidem, pp. 183–184, Ganobis, M., *Uchwały zgromadzeń spółek kapitałowych a pojęcie czynności prawnej*, "Monitor Prawniczy" 2007, No. 23, p. 1296.

In particular, with respect to resolutions of bodies with only internal effects, and thus not bringing about direct effects in relations with third parties, but directed to another body, it was assumed that they are “internal transactions” that do not have the features of civil law transactions.¹³ However, the doctrine emphasized that each of the types of resolutions distinguished has civil law effects, including those related to the internal sphere.¹⁴ This is a result of the fact that intra-corporate relations belong to civil law relations, and therefore the adopted resolutions, concerning them, relate to the civil law sphere.¹⁵

The lack of an external effect of this resolution does not nullify the civil law nature of the resolution, for it is necessary to opt for a view according to which the corporate relationship is a civil law relationship.¹⁶ Relations between bodies, as well as between members of bodies and those bodies, and finally between bodies and the company, are of a civil law nature. The structures of company law, as is apparent from the provision of Article 2 of the Code of Commercial Companies and Partnerships, were based on the basic institutions of the Civil Code, and not on separate structures relevant only to the commercial companies law.¹⁷ Each resolution consists of declarations of will of the members of that body, jointly expressing the will of the body. Resolutions are, therefore, a specific type of legal transactions, they express the collective will of the body, which is assigned, by means of the theory of the body, to a legal person. The doctrine proposes to distinguish the category of intra-corporate legal transactions, which include the resolutions.¹⁸

Challengeability of the resolution of a shareholders’ meeting

In the light of the provisions of the Code of Commercial Companies and Partnerships, the grounds for invalidity of a resolution of a shareholders’ meet-

¹³ Judgment of the Court of Appeal in Katowice of 05/11/2009, V ACa 352/09, LEX No. 599725.

¹⁴ Sołtysiński, S., *Charakter*, pp. 957–958.

¹⁵ Sołtysiński, S., Opalski, A., *Zaskarżanie uchwał zarządów i rad nadzorczych spółek kapitałowych*, “Przegląd Prawa Handlowego” 2010, No. 11, p. 10.

¹⁶ Banaszczyk, Z., *System Prawa Prywatnego*, v. 1, Safjan, M., (ed.), Warszawa 2012, p. 977.

¹⁷ Radwański, Z., *System Prawa Prywatnego*, v. 2, Radwański, Z., (ed.), Warszawa 2002, p. 442.

¹⁸ Frąckowiak, J., *Uchwała zgromadzenia wspólników spółki kapitałowej jako czynność prawna wewnątrzkorporacyjna*, “Przegląd Prawa Handlowego” 2018, No. 9, p. 19.

ing, specified in the provisions of Articles 249 and 252 of the Code of Commercial Companies and Partnerships and Articles 422 and 425 of the Code of Commercial Companies and Partnerships completely disregard the legal nature of the resolution. The resolution of a shareholders' meeting that is contrary to the law is invalid, regardless of whether or not it has civil law effects, and possibly to what extent. Similarly, in the case of substantive law prerequisites resulting in the repeal of the resolution, they do not refer to the legal nature of the adopted resolution, although in practice it is difficult to accept that a settlement on a conflict with the company's statutes or articles of association may apply to a resolution that does not bring about non-civil law effects. In principle, the legal regime of challenging the resolutions of the assemblies resulting from the Code of Commercial Companies and Partnerships is complete, and therefore excludes the possibility of invoking grounds for the invalidity of resolutions other than those specified in the provisions of the Code of Commercial Companies and Partnerships.¹⁹

The lack of a possibility of applying the consequence of absolute invalidity provided for in Article 58 of the Code of Commercial Companies and Partnerships to defective resolutions of shareholders' meetings arises directly from the regulation of the Code of Commercial Companies and Partnerships, which provides for separate actions and prerequisites for their inclusion. However, in civil proceedings initiated by a complaint for the repeal or for declaration of invalidity of resolutions of shareholders' meetings, it may be necessary to use the provisions of the Civil Code, especially in such cases as verifying the correctness of the vote cast by a shareholder or assessing the effects of acting by proxy. The principle of unity of civil law, which is applicable to matters not regulated by the Code of Commercial Companies and Partnerships, makes it possible to use the provisions of the Civil Code in such situations.

Undoubtedly, in the case of resolutions of the shareholders' meetings, the regulation of the Code of Commercial Companies and Partnerships indicates that their challengeability does not depend on the legal nature of the resolution. The right to challenge a resolution has been granted *ex lege* to specific entities pos-

¹⁹ Bilewska, K., *Zaskarżanie uchwał zgromadzenia wspólników przez odwołanych członków organów spółki*, "Monitor Prawniczy" 2007, No. 19, p. 1100; Koch, A., *Charakter sankcji wobec sprzecznych z prawem uchwał spółek kapitałowych*, "Przegląd Prawa Handlowego" 2007, No. 2, p. 9; Osajda, K., *Kodeks spółek handlowych w orzecznictwie Sądu Najwyższego w II półroczu 2004 r.*, "Glosa" 2006, No. 1, p. 7.

sessing the right of action, with the effectiveness of the exercise of this right dependent on the occurrence of certain material and legal premises. If an action is brought, the existence of a resolution of the assembly and the occurrence of premises for the defectiveness of the resolution are examined, not its legal nature.

However, the legal nature of a resolution is significant, not only in the context of the admissibility of its challenge, but this does not concern the resolutions of the assemblies, but other aspects. A decision that a resolution belongs to a group of legal transactions results in the possibility of applying to it the provisions on declarations of will, as well as the regulation of the Civil Code on the consequences of defects in legal transactions.²⁰ Then, it is also possible to adopt, with reference to resolutions, the legal structure of a non-existent resolution (legal transaction), which raises numerous controversies in the doctrine.²¹

Searching for legal grounds for challenging resolutions of bodies other than a shareholders' meeting

In the absence of any regulation in the CCC and P regarding the control of resolutions adopted by such bodies as the supervisory board and the management board of a company, the admissibility of challenging them was considered, formulating three theses. It was possible to accept that the resolutions of these bodies are not challengeable,²² since the legislator did not explicitly specify the instruments for challenging them, or on the contrary, accept that they are challengeable, since this was not explicitly excluded. In the Code of Commercial Companies and Partnerships, as in the previous Commercial Code, the legislator passed over in silence the issue of the lawfulness of resolutions of such bodies as the supervisory board, the audit committee, or the management board of a com-

²⁰ Popiołek, W., *Charakter*, p. 11.

²¹ Sołtysiński, S., *Rozważania o nieważnych i "nieistniejących" czynnościach prawnych ze szczególnym uwzględnieniem uchwał zgromadzeń spółek kapitałowych i spółdzielni*, in: Brzozowski, A. et al. (eds.), *W kierunku europeizacji prawa prywatnego, Księga pamiątkowa dedykowana profesorowi Jerzemu Rajskiemu*, Warszawa 2007, p. 316; Szczurowski, T., *Nieistniejące uchwały zgromadzenia spółki kapitałowej*, "Monitor Prawniczy" 2007, No. 6, p. 307; Tofel, M. S., *Uchwały nieistniejące na gruncie kodeksu spółek handlowych*, "Państwo i Prawo" 2007, No. 4, p. 69; Kruśzyński, M., *Uchwały nieistniejące*, "Przegląd Prawa Handlowego" 2008, No. 7, p. 44; Sołtysiński, S., *Czy "istnieją" uchwały "nieistniejące" zgromadzeń spółek kapitałowych i spółdzielni*, "Przegląd Prawa Handlowego" 2006, No. 2, p. 9.

²² Resolution of the Supreme Court of 7 October, 2009, III CZP 114/93, OSNC 1994, No. 4, item 73.

pany. Recognition of the possibility of questioning the validity of resolutions in court led to the search for a way to challenge them. Two competing concepts appeared at that time: according to the first of these, to defective resolutions of supervisory boards the provisions of the Code of Commercial Companies and Partnerships should be applied *per analogiam* in the challenging of resolutions of assemblies,²³ and according to the second, contradictory concept, the provisions of the Civil Code on defective legal transactions are appropriate.²⁴ The decision to choose one of these different ways of judicial control of the correctness of resolutions of collective bodies other than the assembly depended on the adopted assumption as to the legal nature of the resolution.

The decision in this matter was brought by the resolution of the seven judges of the Supreme Court of 18 September 2013,²⁵ which was given the force of a legal principle. The resolution states that resolutions of the management board, supervisory board, and audit committee of a limited liability company, and resolutions of the management board and supervisory board of a joint-stock company are subject to challenge by way of a declaratory action (Article 189 of the Code of Civil Procedure in conjunction with Article 58 of the Civil Code). The resolution met with divergent assessments in the doctrine.²⁶

The legal nature of the resolution became the starting point for the adoption of the provisions of the Civil Code and the Code of Civil Procedure, and thus also Article 58 of the Civil Code establishing the consequence of invalidity of the legal transaction and Article 189 of the Code of Civil Procedure as to the possibility of using the action provided for in relation to resolutions of bodies other than the shareholders' meeting.

²³ Judgment of the Supreme Court of 20 January 2009, II CSK 419/08, LEX No. 49155.

²⁴ Judgment of the Supreme Court of 18 February 2010, II CSK 449/09, Biuletyn SN 2010, No. 4 p. 14.

²⁵ Resolution of the Supreme Court (7) of 18 September 2013, III CZP 13/13, OSNC 2014, No. 3, item 23.

²⁶ Osajda, K., *Trzyście uwag krytycznych do uchwały składu 7 sędziów Sądu Najwyższego z 18.09.2013 r. (III CZP 13/13)* "Przegląd Prawa Handlowego" 2014, No. 10, pp. 40–44; Zięba, M., *Glosa do uchwały SN z dnia 18 września 2013 r., III CZP 13/13, Uchwały zarządów i rad nadzorczych spółek kapitałowych*, "Glosa" 2014, No. 4, pp. 34–43; Moskała, P., *Zaskarżanie uchwał organów spółek kapitałowych, Glosa do uchwały SN z dnia 18 września 2013 r., III CZP 13/13*, "Glosa" 2014, No. 4, pp. 44–57; Maliszewska, J. and Tarkowski, M., *Glosa do uchwały SN z dnia 18 września 2013 r., III CZP 13/13*, "Palestra" 2016, No. 4, pp. 98–105; Kidyba, A. and Dumkiewicz, M., *Konstytutywny charakter wyroku sądu stwierdzającego nieważność sprzecznej z umową uchwały wspólników; zaskarżenie uchwały spółki – glosa – III CZP 13/13*, "Monitor Prawa Handlowego" 2014, No. 1, p. 47.

At the same time, owing to a clearly different regulation of the Code of Commercial Companies and Partnerships establishing two separate actions aimed at initiating judicial control of the regularity of resolutions adopted by the general meeting of shareholders, the provisions of Article 58 of the Civil Code and Article 189 of the Code of Civil Procedure do not apply, despite the fact that the resolutions of shareholders' meetings definitely qualify as legal transactions. On the other hand, the situation in which the resolution of the assembly brings about no civil law effects is not an obstacle to its being challenged, since, as previously mentioned, its challengeability has not been linked to its legal nature. The legislator applied the principle of a limited autonomy of commercial law in the sphere of assessing consequences for defective resolutions of company assemblies, but without extending these autonomous solutions, which should be clearly stressed, to the resolutions of the other bodies of these companies.

A completely different situation will occur in the case of resolutions of supervisory boards and resolutions of management boards, to which no features of civil law transactions may be attributed. It seems that in such cases it should be assumed that they will be simply unchallengeable, because the provisions do not provide for a procedure for challenging resolutions devoid of such a nature.

The mechanism of applying the provisions of the Civil Code to defective resolutions of bodies other than the shareholders' meeting

The provision of Article 2 of the Code of Commercial Companies and Partnerships indicates that in matters referred to in Article 1 § 1 of the Code of Commercial Companies and Partnerships, not regulated in the Act, the provisions of the Civil Code shall apply. This regulation thus formulates two premises – the case must be within the objective scope of the catalogue specified in Article 1 § 1 of the Code of Commercial Companies and Partnerships, and at the same time remain unregulated in the Code of Commercial Companies and Partnerships.

And since the functioning of companies has been included in Article 1 § 1 of the Code of Commercial Companies and Partnerships, and the operation of companies through all bodies is undoubtedly contained in this broad concept, and thus also the adoption of resolutions, it must be assumed that this is an issue covered by this regulation. The entire spectrum of issues is connected with adopting resolutions, in particular the issue of defective resolutions and the mode of their judicial control.

This aspect was regulated *expressis verbis* by the legislator only with respect to the resolutions of the shareholders' meetings, and therefore, remained unregulated with respect to the resolutions of the other bodies of companies. In accordance with the wording of Article 2 of the Code of Commercial Companies and Partnerships, in such a situation, the provisions of the Civil Code should be applied directly, because it is a matter unregulated in the Code of Commercial Companies and Partnerships that belongs to the category of "the functioning of companies".

The application of the Civil Code in this case depends solely on one issue – the recognition of the resolutions of these bodies as legal transactions. The inclusion of resolutions in the category of civil law transactions, or their exclusion from this category is of key importance, determining the application of the legal regime from the Civil Code. If we were to adopt a different thesis, and thus assume that resolutions do not belong to the group of civil law transactions, but constitute a peculiar, different group of corporate activities (the name does not matter, the point is that they are not legal transactions), then the application of the provisions of the Civil Code would be excluded.

The rejection of the possibility of applying, *per analogiam*, of the provisions of the Code of Commercial Companies and Partnerships with regard to the consequences of defective resolutions of shareholders' meetings was justified by the statement that there was no loophole in legal regulation in this matter. Since the resolutions of bodies of companies belong to the category of legal transactions, and in matters concerning the functioning of companies but are not regulated in the Code of Commercial Companies and Partnerships, the provisions of the Civil Code should be directly applied, which means that there is no regulatory gap.

The practical considerations also speak against the application *per analogiam* of the provisions concerning the challenging of resolutions of shareholders' meetings to the defective resolutions of other bodies. This regulation, even to the extent of persons having the right of action, is completely inadequate in the case of complaints against the resolutions of other bodies.²⁷ The circle of people having the right of action would have to be changed; because it is members of the supervisory board, or members of the management board who would be the most often interested in challenging the resolutions of the supervisory board, while the regulation of the Code of Commercial Companies and Partnerships conferring such right of action to shareholders in certain cases cannot be applied here.

²⁷ Sołtyński, S. and Opalski, A., *Zaskarżanie*, p. 6.

The effects of the application of the principle of the unity of civil law in the sphere of challenging the resolutions of corporate bodies

Examination of the legal nature of the resolutions of bodies other than the shareholders' meeting, and recognition of them as legal transactions has resulted in the claim that they may be challenged by an action for their invalidation or, possibly, their non-existence, pursuant to Article 189 of the Code of Civil Procedure. The application of the principle of the unity of civil law, with the exclusion of the possibility of applying analogy, has resulted in the approval of the functioning of two separate, different regimes of challenging the resolutions of corporate bodies. Paradoxically, the principle of unity of civil law, applied in the absence of a regulation in the Code of Commercial Companies and Partnerships of consequences for defective resolutions of other corporate bodies, has not caused harmonization but diversification of the bases and procedure for challenging the resolutions of various bodies of the same legal entity. Such an interpretation is obviously the result of the regulation of the Code of Commercial Companies and Partnerships; should the legislator directly regulate the challenging of resolutions other than the assembly of bodies, there would be no need to look for ways to challenge them.

Under the current legal status, according to a settled interpretation, a resolution regarding the dismissal of a member of the management board will be open to challenge in two separate ways – depending on the question of by which corporate body it has been adopted. It has been noted in the doctrine that it is not advisable to differentiate the rules for challenging because of the nature of the competences in which these resolutions are adopted; the manner of challenging is determined by the body that has passed the resolution.²⁸ Such a solution cannot be considered satisfactory, because the differentiation of modes of challenging the subject-specific identical resolutions does not stabilize the legal system, but introduces a state of uncertainty. In particular, in such situations, the dualism of modes of challenging resolutions appears as an inconsistency of the legal system. In subject-specific identical matters, the reasonable expectation would be that of a single, coherent challenging procedure.

Commercial law is a part of civil law and it should not, or even cannot, break away from its roots. The foundation in the form of civil law regulations is a support for structures appropriate to commercial companies, sometimes undergoing modifications necessary because of their specificity. For these reasons, the

²⁸ Sołtyński, S. and Opalski, A., *Zaskarżanie*, p. 8.

application of Civil Code regulations to the legal relations of commercial companies is not always unambiguous and obvious. In principle, this procedure should lead to the unification of solutions, and thus the application of typical, general rules of conduct, which should be taken into account by the rational – by definition – legislator.

Unfortunately, the fundamental regulation of the Civil Code, concerning bilateral contractual obligations, is in fact not directly applicable to a company's relations because of the non-adjustment of the regulation. The differences characterizing commercial companies have been included in a separate legal regulation, which is the Code of Commercial Companies and Partnerships, however, this does not include a comprehensive regulation regarding the adoption of resolutions by the bodies, and in particular their challenging.

The regulation of the Civil Code is not adapted to complex corporate relations. The solutions provided for classic contractual relationships do not work in the complexity of the relationships and do not suit their nature within commercial companies. The provision of Article 58 of the Civil Code regulates the consequence of the absolute invalidity of a legal transaction, and the premises of invalidity, in addition to the conflict with the law, are in contradiction with the principles of social coexistence, which does not take into account the richness of corporate relations. In particular, the legal qualification of the conflict between the supervisory board's resolution and the company's articles of association or statutes raises doubts. The doctrine presents the view that in such a case the norms specifying consequences of resolutions of the assemblies that are contrary to the articles of association (statute) of a company or cooperative should be applied analogously to the resolutions of supervisory boards.²⁹ According to another view, resolutions of the supervisory board that are contrary to the articles of association or statutes of a commercial company are invalid by virtue of Articles 35 and 38 in conjunction with Article 58 § 1 of the Civil Code in conjunction with Article of the Code of Commercial Companies and Partnerships.³⁰ The regulation of the Civil Code in the area of classic consequences for defective legal actions is either not applicable at all to defective resolutions of corporate bodies, or requires deep modifications. As for the consequence of the suspended ineffectiveness and the

²⁹ Sikorska-Lewandowska, A., *Sprzecznosc uchwały rady nadzorczej ze statutem spółki lub spółdzielni*, "Przegląd Prawa Handlowego" 2013, No. 11, p. 46.

³⁰ Saczywko, M., *Sprzecznosc uchwały rady nadzorczej z umową albo statutem spółki kapitałowej*, "Przegląd Prawa Handlowego" 2014, No. 12, p. 9.

relative ineffectiveness of a legal transaction – in principle, they are not suitable for application to resolutions. Two consequences of invalidity: absolute invalidity and relative invalidity (challengeability) with certain modifications, can be applied to defective resolutions, however, but these are not regulations that take into account the specificity of corporate declarations of will.

Therefore, there is also a lack of general provisions in the Civil Code regarding resolutions of legal entities, more broadly speaking – there is a lack of modern regulations on legal persons and their bodies. Only such a model regulation would be suitable for the defective resolutions of legal entities, in accordance with the principle of the unity of civil law. The current regulation of the Civil Code does not contain satisfactory regulation of the basic rules of operation of legal entities by their bodies, and therefore, through the search for the civil law nature of the resolution, the provisions of the Civil Code on legal acts are applied, even though the Code does not contain any regulations of the specific legal transactions such as resolutions. It seems that it is not even necessary to define a resolution and prejudge its civil law nature. It is much more desirable to set general rules for the functioning of legal entity bodies, as this broad zone of intra-corporate relations has been completely omitted in the Civil Code, and general provisions on legal entities are extremely laconic and therefore insufficient to be used.

The issue of consequences of defective resolutions adopted by corporate bodies perfectly indicates how complicated are the consequences brought about by the application of the principle of the unity of civil law, in the absence of appropriate regulations in the Civil Code. The dualism of procedures for challenging resolutions, even those that are objectively identical, but adopted by various bodies of commercial companies, cannot be assessed positively. In this situation, the proposal to standardize regulations³¹ in the field of judicial review of defective resolutions of all corporate bodies, which was expressed earlier, should be repeated.

The assessment of the current solution is not unambiguous, as each of the actions has specific characteristics determining its nature, which can be assessed in both positive and negative terms. An action for a declaration of invalidity provided for in Article 189 of the Code of Civil Procedure allows for the broad challengeability of the resolution, unlimited in time, delimiting the plaintiff's right of action with his/her legal interest, while the complaints provided for in the Code of Commercial Companies and Partnerships determine in a closed manner the

³¹ Sikorska-Lewandowska, A., *Sankcje*, p. 406.

number of entities entitled to lodge them, along with short limitation periods. The time limits of bringing actions undoubtedly influence the stabilization of the company's relations. Pursuant to the action under Article 189 of the Code of Civil Procedure, it is possible to demand the non-existence of a resolution, but such a possibility is not provided for in the Code of Commercial Companies and Partnerships establishing two available actions for challenging the resolutions of shareholders' meetings.

Conclusions

In view of the concept of applying an action for a declaration of invalidity or non-existence of a resolution based on Article 189 of the Code of Civil Procedure for challenging resolutions, criticism should be formulated. Such an action does not guarantee all the effects that a judgment declaring the invalidity of the resolution or quashing the resolution should cause in modern legal transactions. There is a lack of a regulation to ensure the protection of third parties acting in good faith on the basis of a resolution as to which a judgment declaring the invalidity has been passed, i.e. solutions analogous to those provided for in Article 254 § 2 and Article 427 § 2 of the Code of Commercial Companies and Partnerships. There is also lack of grounds for adopting the extended effectiveness of the judgment declaring invalidity of a resolution on the basis of Article 189 of the Code of Civil Procedure in relations between the company and all shareholders, and in relations between the company and members of the company bodies, which, in turn, were provided for in the Code of Commercial Companies and Partnerships. Again, it should be stated that, just as the regulation of the Civil Code in the scope of the consequence of defectiveness is not adapted to corporate transactions such as resolutions, so the regulation of the Code of Civil Procedure does not provide for modern procedural solutions corresponding to the needs of the judicial regulation of intra-corporate relationships of legal entities.

In this situation, the intervention of the legislator seems to be indispensable. A solution would be to extend the regulation of the Code of Civil Procedure by introducing provisions providing for a simple procedure for challenging the invalid resolutions of supervisory boards and resolutions of management boards of commercial companies, subject to the standard currently in force for the resolutions of the assemblies. Another solution could be to introduce a regulation

whereby to resolutions adopted by supervisory boards of commercial companies in cases in which the power to adopt them arises out of the company's articles of association or statutes, the provisions on challenging resolutions of the company's assemblies would apply accordingly.

An alternative to changes in the Code of Commercial Companies and Partnerships is the introduction of general provisions on the operation of legal entities, or, more strictly, the general rules of adopting resolutions by collective bodies of legal persons, which would also include the regulation of challenging resolutions that would apply, unless specific provisions provide otherwise.

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**DIVISION OF THE JOINT PROPERTY OF SPOUSES – PARTNERS
IN A REGISTERED PARTNERSHIP AND SHAREHOLDERS IN
A LIMITED LIABILITY COMPANY**

Abstract

The purpose of the paper is to analyze the issue of the division of the joint property of spouses in the scope of individual components of this joint property – partnership rights due to participation in a registered partnership and shares in a limited liability company. While many studies have been written on the subject of partnership rights belonging to the property of spouses, the issue of the division of the spouses' property including these rights is only beginning to appear in deliberations of few authors.

An independent interpretation of the law as well as an analysis and critical look at the literature were adopted as the basic research method. The subject of the research involves a registered partnership (as a model partnership) and a limited liability company (because in many places regulations concerning a limited liability company and a joint-stock company are similar). Although the issues of the division of the joint property of spouses are regulated by the provisions of the Family and Guardianship Code (Articles 45 and 46 FGC) and the Civil Code, one can find norms concerning the operation of companies and partnerships (Article 1 § 1 CCC) which modify general principles regarding the manner of division of joint property and are applied as a special rule. The civil division of a partnership share in a registered partnership (Article 62 CCC) and the division in kind of a single share in a capital company (Article 333 § 1 CCC) are not possible. It is the my belief – although I am aware that this is a controversial thesis – that it is possible to divide a partnership share in a general partnership. Restrictions on the method of the division are provided for in Articles 10, 183¹, 332¹ CCC, which, in my opinion, apply to the division of the joint property of spouses.

Keywords: division of the property of spouses, joint property, registered partnership, limited liability company

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General comments

a. The issue of married persons' conducting business activity¹ and their participation in civil law partnerships² and commercial companies³ has enjoyed great

¹ E.g. Jędrzejek, G., Pogonowski, P., *Działalność gospodarcza małżonków*, Warszawa 2002; Łączkowska, M., *Stosunki majątkowe między przedsiębiorcą i jego małżonkiem w świetle ustroju wspólności ustawowej*, Warszawa 2006.

² E.g. Policzkiewicz, Z., *Dopuszczalność spółki cywilnej między małżonkami*, in: Sołtysiński, S. (ed.), *Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci Profesora Zbigniewa Radwańskiego*. Poznań 1990, pp. 523–532; Jędrzejek, G., *Spółka cywilna między małżonkami*. Warszawa 2003; Wręczycka, K., *Spółka cywilna między małżonkami*, "Acta Universitatis Wratislaviensis – Przegląd Prawa i Administracji" 2004, No. LXIV, pp. 275–292; Łączkowska, M., *Spółka cywilna jako forma prowadzenia działalności gospodarczej a ustawa o wspólność majątkowa małżeńska*, "Przegląd Prawa Handlowego" 2007, No. 7, pp. 9–12; Klepacka, M. A., *Spółka cywilna między małżonkami w świetle ustawowego ustroju majątkowego – zagadnienia wybrane*, "Monitor Prawniczy" 2007, No. 21, pp. 1183–1189.

³ Dyoniak, A., *Przynależność do majątków małżonków udziału w spółce z ograniczoną odpowiedzialnością i akcji*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1991, No. 3, pp. 25–35; Jędrzejewska, A., *Spółka osobowa a małżeńska majątkowa wspólność ustawowa*, "Kwartalnik Prawa Prywatnego" 1996, No. 3, pp. 511–560; Kondracka, A., *Ustrój małżeński a prawa i obowiązki akcjonariusza*, "Radca Prawny" 1999, No. 4, pp. 55–58; Wręczycka, K., *Udział w spółce z ograniczoną odpowiedzialnością a wspólność majątkowa małżeńska*, "Przegląd Prawa Handlowego" 2001, No. 8, pp. 35–44; Kondracka, A., Mróz, T., *Glosa do wyroku SN z dnia 20.05.1999 r., sygn. akt I CKN 1146/97*, "Monitor Prawniczy" 2001, No. 10, pp. 556–558; Kurnicki, T., *Pozycja współmałżonków udziałowców i akcjonariuszy spółek kapitałowych*, "Prawo Spółek" 2004, No. 12, pp. 24–31; Szajkowski, A., *Wyłączenie wstąpienia do spółki z o.o. współmałżonka wspólnika (uwagi na tle nowelizacji k.s.h. z 2003 r.)*, "Prace z Wynalazczości i Ochrony Własności Intelektualnej" 2004, No. 88, pp. 289–300; Zdanikowski, P., *Prawo udziałowe w spółce kapitałowej jako przedmiot majątku wspólnego małżonków*, "Palestra" 2006, No. 9–10, pp. 103–107; Stepień, A., *Akcje należące do majątku wspólnego małżonków*, "Przegląd Prawa Handlowego" 2006, No. 12, pp. 40–44; Nazar, M., *Komercjalizacja majątkowych stosunków małżeńskich w spółkach kapitałowych*, in: Kidyba, A., Skubisz, R. (eds.), *Współczesne problemy prawa handlowego, Księga jubileuszowa dedykowana prof. dr hab. M. Poźniak-Niedzielskiej*, Kraków 2007, pp. 201–222; Stepień, A., *Glosa do wyroku Sądu Najwyższego z 5 października 2005 r., sygn. akt IV CK 99/05 (Nabycie udziału w spółce z o.o. przez małżonka ze środków z majątku wspólnego)*, "Prawo Spółek" 2007, No. 1, pp. 52–56; Stepień-Sporek, A., *Przynależność udziałów w spółce z o.o. do majątków małżonków*, "Państwo i Prawo" 2007, No. 10, pp. 58–69; Stepień-Sporek, A., *Przynależność do majątków małżonków praw spółkowych w spółkach osobowych*, "Prawo Spółek" 2008, No. 2, pp. 22–30; Kułak, K., *Udział kapitałowy jako przedmiot majątku wspólnego małżonków – uwagi de lege ferenda*, "Rejent" 2008, No. 7–8, pp. 60–72; Chłopecki, A., *Akcje zdematerializowane w małżeńskiej wspólności majątkowej*, "Przegląd Prawa Handlowego" 2008, No. 10, pp. 46–53; Nazar, M., in: Smoczyński T. (ed.), *System Prawa Prywatnego, Tom 11, Prawo rodzinne i opiekuńcze*. Warszawa 2009, pp. 279–289; Sieradzka, M., *Glosa do wyroku SN z dnia 21.01.2009 r., II CSK 446/08, "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa"* 2009, No. 4 101–107; Karczewska-Pacholczyk, M., Kobyłka, N., *Glosa do postanowienia SN z dnia 03.12.2009 r., II CSK 273/09*, "Glosa" 2010, No. 4; Kulgawczuk, D., *Akcje i udziały w majątku wspólnym małżonków*, special issue of "Monitor Prawniczy" – "Prawo spółek w orzecznictwie Sądu Najwyższego" (2009–2010) – okiem praktyków 2010", No. 19, pp. 12–13; Kubas, A., *Udział w spółce handlowej jako składnik majątku wspólnego*, "Przegląd Prawa Handlowego" 2011, No. 4 pp. 18 et seq; Kwaśnicki, R. L., Piskorz, A., Nałazek, A., *Udziały/akcje imienne znajdujące się w majątku wspólnym małżonków, cz. I – w sprawie statusu wspólnika/akcjonariusza zbiorowego*, "Monitor Prawa Handlowego" 2011, No. 1, pp. 60–66; Szymach, A., *Udział w spółce z o.o. a wspólność ustawowa małżeńska*, "Monitor Prawniczy" 2013, No. 20, pp. 1088–1097; Dworek, D., *Udziały/akcje w majątku wspólnym małżonków*, (special issue MoP 1/2014), "Monitor Prawniczy" 2014, No. 1, pp. 11–13; Liber, B., *Status wspólnika spółki z o.o. a uzyskanie udziału ze środków pochodzących z majątku wspólnego małżonków*, "Edukacja Prawna" 2014, No. 6, pp. 36–39; Ślabuszewski, R., *Przynależność praw spółkowych w spółce jawnej do majątków małżonków*, Warszawa 2015; Szumański, A., *Status prawny małżonka wspólnika w spółce kapitałowej w sytuacji, gdy objęcie albo nabycie praw udziałowych w spółce jest finansowane z majątku wspólnego małżonków*, "Monitor Prawniczy" (dodatek) 2015, No. 7, pp. 32–40; Zdanikowski, P., *O niektórych konsekwencjach przynależności udziałów w spółce z o.o. do majątków małżonków*, "Monitor Prawniczy" 2015, No. 7; Kuniewicz, Z., Malinowska-Woźniak, K., *Status prawny małżonków w spółkach cywilnych i handlowych*, Warszawa 2016; Stefanicki, R., *Przynależność i wykonywanie – nabytych z majątku wspólnego – praw udziałowych w spółce z ograniczoną odpowiedzialnością (spójność prawa handlowego i rodzinnego w zakresie statusu małżonka wspólnika)*, "Państwo i Prawo" 2017, No. 10, pp. 65–78; Sieczka, Ł., Szewczyk, J., *Jeśli wkład do spółki z o.o. pochodzi z majątku wspólnego, objęte w zamian udziały również wchodzi w jego skład*, "Monitor Prawniczy" 2017, No. 19, pp. 24–25; Jaszczyk, K., *Skutki wniesienia do spółki z o.o. wkładu należącego do majątku wspólnego wspólnika i jego małżonka – glosa – III CZP 32/16*, "Monitor Prawniczy" 2017, No. 24, pp. 1343–1345.

scholarly interest, if not out of inspiration from practice, certainly with the benefit for it. In terms of participation in partnerships and companies, most of the works concern the ownership of the rights to the property of the spouses or possibly the management of these rights. There are few statements about the division of the joint property of spouses in the scope in which it includes partnership rights.⁴ The following text analyzes the issues of division of joint property of spouses with regard to their partnership rights. The analysis concerns the registered partnership as a model partnership (for other partnerships provisions on the registered partnership apply respectively, unless the provisions of the Commercial Companies Code⁵ (hereinafter: CCC) provide otherwise – Articles 89, 103 and 126 § 1 CCC) and the limited liability company. A considerable share of reflections regarding the limited liability company may also be applied to the joint-stock company, although it is necessary to point out some differences (addressed in the final part of the work).

b. Regulations on the division of the property of spouses are included in family law regulations referring to the inheritance law, where in turn reference is made to the right in rem (Article 46 of the Family and Guardianship Code⁶ (hereinafter: FGC), Article 1035 of the Civil Code⁷ (hereinafter: CC)). The nature of assets subject to division in the form of partnership rights or shares is regulated in the Commercial Companies Code. This makes it necessary to consider the principle of unity of the civil law when searching for solutions to specific problems. After all, civil law structures reconstructed on the basis of provisions contained in the Civil Code (e.g. on the cancellation of co-ownership) apply also to the matters included in non-code provisions (regardless of whether there is any regulation on

⁴ Adamus, R., *Uczestnictwo małżonka w spółce jawnej a podział majątku wspólnego*, “Jurysta” 2015, No. 1, pp. 22–27 (Whereas, this article concerns only the affiliation and distribution of the company’s profit when one of the spouses before the marriage was a shareholder in a civil partnership later transformed into a general partnership, i.e. when the company’s share was not part of the joint property); Okolski, D., Strzelecka, S., *Problematyka legitymacji akcjonariusza wspólmałżonka w świetle podziału majątku wspólnego a zdatność arbitrażowa*, “Przegląd Prawa Handlowego” 2016, No. 1, pp. 25–33; Śledzikowski, M., *Wpływ podziału majątku wspólnego małżonków na status akcjonariusza spółki akcyjnej*, “Przegląd Prawa Handlowego” 2017, No. 8, pp. 42–46.

⁵ Act of 15 September 2000 – Commercial Companies Code, consolidated text: Dz.U. (Journal of Laws) of 2019, item 505.

⁶ Act of 25 February 1964 – Family and Guardianship Code, consolidated text: Dz.U. (Journal of Laws) of 2019, item 2086.

⁷ Act of 23 April 1964 – Civil Code, consolidated text: Dz.U. (Journal of Laws) of 2019, item 1145.

the relationship of a given legal act with the Civil Code or not). With regard to the subject of this article, there are provisions referring to the application of the code regulations (Article 2 CCC and Article 46 FGC). Therefore, the manner of solving specific problems will be affected by the pursuit to maintain the coherence of legal norms that form the subsystem of civil law norms and its unity in terms of the basic civil law concepts and constructions. In the case of doubts concerning the interpretation of provisions on private law institutions included outside the Civil Code, a presumption should be made in favour of the pro-code interpretation. The principles of civil law and the principles of individual divisions of this law (e.g. family and guardianship law and company law) should be weighed in case of collisions.

Discrepancies between the positions of scholars and case-law concerning the issue of partnership rights or shares forming part of the property of spouses, the legal status of the spouse who is a partner in a partnership or a shareholder in a company as well as the heterogeneous terminology used in the legal language, make it necessary to introduce some assumptions at the outset and to clarify terminological issues. At the same time, I point only to the position I have adopted, one of many previously expressed (sometimes even the one that is not dominant), as a starting point for further, detailed reflections, being aware that each of the assumptions could be (and most often already has been) a subject of a separate study. The framework of the article, however, does not allow for a detailed reflection on each side issue.

The legislator⁸ itself as well as the case-law of the Supreme Court⁹ have spoken on the admissibility of including shares in a limited liability company or in a joint-stock company in the joint property of spouses. I assume that shares in a limited liability company and shares in a joint-stock company may belong to the joint property, whereby both spouses or one of them may be shareholders. Having the status of a shareholder and company rights or shares forming the

⁸ Art. 183¹ and 332¹ the Commercial Companies Code.

⁹ Judgment of the Supreme Court of May 20, 1999, I CKN 1146/97, OSNC 1999/12, item 209; decision of 23 November 2000, I CKN 950/98, unpublished; judgment of the Supreme Court of January 21, 2009, II CSK 446/08, OSNC Additional Co. 2010 No. A, item 7, p. 34; the decision of the Supreme Court of December 3, 2009, II CSK 273/09, unpublished; decision of the Supreme Court of January 31, 2013, II CSK 349/12, unpublished; Supreme Court judgment of 7 July 2016, III CZP 32/16, OSNC 2017/5, item 57; the decision of the Supreme Court of 16 March 2018, IV CSK 105/17, Biuletyn SN 2018/10, item 9. In one of the rulings the Supreme Court wrongly made the belonging of a share to the joint property dependent on the will of the spouses (judgment of the Supreme Court of 5 October 2005, IV CK 99/05, OSNC 2006/7-8, item 127).

assets are two different things, which means that where only one of the spouses is a shareholder, shares may belong to the joint property (of course, both spouses may happen to be shareholders). This results not only from the search for analogies with the belonging of dues to the joint property, but also from the approval of the position that if an act is performed (e.g. subscription or acquisition of shares) by one of the spouses – even with the use of joint property – only one of the spouses is the party to this act, i.e. the spouse who joined a company or acquired a share.¹⁰ Above all, such a position takes into account two basic principles of civil law and company law (or corporate law in general), i.e. the principle of autonomy of the will and the principle of voluntary membership, which preserves the unity of civil law in this respect. In addition – as was already pointed out in the case-law¹¹ – a situation in which the composition of the company is unclear only because some shareholders are married and engage financial resources in the company which form in whole or in part the joint property cannot be accepted for purely pragmatic reasons. Special complications could arise in the case of a single-shareholder company.

Definitely more doubts arise from the fact that partnership rights in the registered partnership belong to the property of the spouses, in particular the possibility of including these rights in the joint property.¹² In this article I make the assumption that partnership rights in a registered partnership may belong to the joint property as they have not been excluded from the joint property pursuant to Article 33 FGC (points 3 and 5 in particular) or another special provision, while the law does not provide for other property than the joint property and personal property of the spouses in matrimonial property regimes. This position also begins to appear in

¹⁰ There is also resolution of the Supreme Court of 24 September 1970, III CZP 55/70, OSPiKA 1973/6, item 120, resolution of the Full Civil Chamber of the Supreme Court of September 28, 1979, III CZP 15/79, OSNCP 1980/4, item 63.

¹¹ Reasoning of the judgment of the Supreme Court of May 20, 1999, I CKN 1146/97, OSNC 1999/12, item 209.

¹² As to representations of various concepts of studies, see in particular: Jędrzejewska, A., *Spółka osobowa a małżeńska majątkowa wspólność ustawowa*, "Kwartalnik Prawa Prywatnego" 1996, No. 3, pp. 544–551; Kidyba, A., *Atypowe spółki handlowe*, Kraków 2001, p. 197; Jędrzej, G., *Spółka cywilna między małżonkami*, Warszawa 2003, pp. 145–148; Sołtysiński, S., in: Sołtysiński S., et al., *Kodeks spółek handlowych, Komentarz*, Tom I, Warszawa 2006, p. 382; Bryłowski, P., *Przepisy kodeksu spółek handlowych regulujące odpowiedzialność wspólników spółek osobowych za zobowiązania spółek w świetle norm regulujących małżeńską wspólność ustawową*, in: Frąckowiak, J. (ed.), *Kodeks spółek handlowych po pięciu latach*, Wrocław 2006, pp. 309–311; Nazar, M., in: Smoczyński, T. (ed.), *System Prawa Prywatnego, Tom 11, Prawo rodzinne i opiekuńcze*, Warszawa 2009, pp. 322–325.

the case-law practice.¹³ On the ground of a registered partnership I also distinguish between having the status of a partner and partnership rights belonging to given assets, which means that where only one of the spouses is a partner partnership rights may belong to the joint property (both spouses also may happen to be partners). The content of the articles of partnership¹⁴ or the content of the consent of the remaining partners (in the event of acquiring all rights and obligations pursuant to Article 10 CCC)¹⁵ determine the obtaining of the status of a partner and not the origin of funds for the contribution or acquisition of all rights and obligations. The general rights and obligations of a partner in a registered partnership in a legal language are commonly referred to as a “partnership share” (*Gesellschaftsanteil*). However, when accepting this terminological convention, it should be stressed that the partnership share in a registered partnership as a component of the joint property of the spouses (according to the FGC terminology – “property” belonging to the joint property) is a personal right, thus a situation of the rightholder covering only rights (without related duties only he or she is involved in) of a relative, property, non-hereditary and in principle non-transferable nature.

As a result, I assume that a partnership share in a registered partnership, a share in a limited liability company or a share in a joint-stock company may belong to the joint property. In such a situation the following persons may be partners or shareholders:

- one of the spouses (if one of them entered into a commercial company agreement, or acquired a share in a limited liability company or a joint-stock company or a partnership share in accordance with Article 10 CCC), or
- both spouses (if both of them entered into a commercial company agreement or were acquirers of a partnership share in an already exist-

¹³ For example, District Court for Łódź-Śródmieście in the decision of May 21, 2014, II Ns 1514/07 approved by the Regional Court in Łódź in the judgment of March 3, 2015, III Ca 1484/16; Regional Court in Łomża in the judgment of November 15, 2017, I Ca 332/17 and judgment of the Voivodeship Administrative Court in Szczecin of 25 October 2007, I SA/Sz 59/07.

¹⁴ According to Article 25(2) of the Commercial Companies Code the articles of partnership must include, among others, the description of the contributions made by each partner and their value, therefore it is inadmissible that the articles of partnership do not specify whether both spouses are partners or one of them. Notification of a registered partnership to the register must contain the first and last names of partners or the business name.

¹⁵ Even if the consent itself, granted on the basis of Article 10 § 2 CCC, did not specify whether one spouse or both spouses are to be the acquirers, the act on the basis of which the acquisition takes place (e.g. a sale contract or a gift agreement) must specify the party of this act.

ing registered partnership, a share of an already existing limited liability company or a share in an already existing joint-stock company).

As for the possible ways of division (both contractually and arbitrarily – Articles 211 and 212 CC) of things covered by co-ownership, three solutions are possible,

- physical division,
- granting the thing to one of the spouses where the other spouse is paid off,
- civil division (i.e. sale of goods and division of the amount obtained from the sale).

Next, I will try to answer the question whether and how one can divide such a thing as a partnership share in a registered partnership, a share in a limited liability company or a share in a joint-stock company in accordance with the norms of family law, inheritance law and real rights and company law.

Division of a partnership share in a general partnership

a. The view that allows the division of a partnership share into two or more partnership shares is considered to be disputable.¹⁶ Such a concept would be opposed by the prohibition of splitting partnership rights.¹⁷ However, this prohibition should not be understood as a prohibition of replacing one partner or the so-called joint partner in a partnership with several partners. Each partner who appears in the partnership after the division of the partnership share will have their own rights and obligations of a partner in a partnership, including all rights and obligations covered by the prohibition of splitting. It is possible to make a “mathematical” reference here, which states that the prohibition of splitting the rights and duties of a partner concerns “dividing” individual rights and obligations that are indivisible and not their “multiplication”. Therefore, it is not possible to divide the general rights and obligations in such a way that, for example, one spouse will get the right to profit, to run the partnership’s affairs and to terminate the articles of partnership, and the second one will get the right to interest on the capital share, to represent the partnership and to demand

¹⁶ Grykiel, J., *Zbycie udziałów w ogóle praw i obowiązków współnika spółki osobowej*, Cz. I, “Prawo Spółek” 2009, No. 9, p. 14; Kuropatwiński, J., *Glosa do postanowienia SO w Bydgoszczy z dnia 13.05.2009 r.*, VIII Ga 23/09, “Glosa” 2011, No. 2, pp. 43, 49.

¹⁷ Regional Court in Bydgoszcz in the decision of May 13, 2009, VIII Ga 23/09, unpublished.

that the partnership be dissolved. There is no absolute prohibition that instead of one partner there should be e.g. two, each of whom having his or her own rights and obligations covered by the prohibition of splitting. It should be added that in the context of a share in a limited liability company, the prohibition of splitting company rights is also in force¹⁸ and there is no doubt that a share in this company may be divided into two separate shares, which, moreover – where a shareholder may hold only one share, as in the registered partnership – results from the provisions themselves (Article 181 § 1 and Article 183 § 3 CCC).

As for the manner of the division, it is reasonable to use analogy to the rules for the division of shares worked out in the light of Article 181 § 1 CCC and Article 183 § 3 CCC. The first of the provisions stipulates that in a situation where a shareholder may have only one share, the articles of association may allow the transfer of a part of the share. If the transfer is made to a person who is already a shareholder, their share increases by a part of the acquired share. If the transfer is made to a person who has not been a shareholder, a new share is created. In fact, the share is divided into independent, separate shares¹⁹ (Article 181 § 2 CCC begins, after all, with the words “The division may not result in ...”).

The situation of existing partners may of course change (e.g. they may be voted down, if instead of one spouse-partner whose share belonged to the joint property or the so-called joint partner there will be two separate partners with separate shares and votes). However, this is not an obstacle to the division of shares because this is not the only case where the voting power of partners may change, which is discussed below.

The division “in kind” may mean no change in the composition of partners, if both spouses were partners in the partnership. The spouses will then “become independent” within the partnership (instead of a joint share entailing the status of a joint partner in the partnership, they will acquire separate, independent shares). Such a division does not require the consent of the remaining partners, as the composition of partners does not change.²⁰

¹⁸ As to how to understand it, see in particular Herbet, A., *Obrót udziałami w spółce z o.o.* Warszawa 2004, pp. 163–180; Zdanikowski, P., *Prawo udziałowe w spółce z o.o.*, Warszawa 2011, pp. 158–161.

¹⁹ Szajkowski, A., Tarska, M., in: Sołtyński S. et al. (ed.), *Kodeks spółek handlowych, Komentarz*, Volume II, Warszawa 2014, pp. 295–296; Opalski, A., in: Opalski, A. (ed.), *Kodeks spółek handlowych, Komentarz*, Volume IIA, Warszawa 2018, p. 433.

²⁰ Contrary to this: the decision of the Regional Court in Kraków of August 10, 2017, XII Ga 125/17, unpublished.

The division of the share “in kind” and the granting of one of the resulting shares to a spouse who has not been a partner so far is more problematic (this is a matter of including the partnership share in the joint property, combined with obtaining the status of a partner by only one spouse). The question arises whether it requires the consent of all the remaining partners (based on Article 10 § 2 CCC). It should be assumed that yes, because then such a division will not infringe the interest of the remaining partners. If the transfer of a partnership share requires the consent of the partners (in principle all of them unless otherwise jointly agreed in the articles of partnership), the division “in kind”, which results in the status of a partner being obtained by the spouse who is not a partner, should also require such a consent (because unwanted partners should not be imposed on the company, the more so as we are dealing with – unlike with capital companies – the right in principle inalienable, and an organization in which the characteristics of partners and their mutual trust are important). In the absence of the consent, it will not be possible to grant the share to the spouse who was not a partner.

Regarding the accounting division of rights related to a shared share (e.g. in terms of participation in profits and losses, partners’ capital share.), it should be assumed that spouses acquiring separate partnership shares, in place of the joint share, take over the rights and obligations they enjoyed as a rule in equal parts (Article 43 § 1 FGC), possibly in parts where unequal shares in the joint property have been established (Article 43 § 2 FGC). For example, when the spouses had a capital share in the amount of PLN 800,000 and the share in profits and losses and liquidation assets fixed in the articles of partnership at 30% the division in kind results in each spouse becoming a partner with a capital share in the amount of PLN 400,000 and a share in profits and losses and assets after liquidation in the amount of 15% (Article 48 § 1 CCC, Article 50 § 1 CCC, Article 51 § 1 CCC, Article 82 § 2 CCC, Article 83 CCC, Article 2 CC in conjunction with Article 197 CC). Admitting the possibility of dividing the acquired share between spouses requires, in particular, a division of the capital share.²¹

There is also a category of rights and obligations (voting rights, representation rights, joint and several liability for debts), which will be vested in each

²¹ Such a solution is considered by W. Pyziół against the background of the admissibility of dividing the capital share between heirs becoming members of the partnership pursuant to Article 60 CCC (Pyziół, W., in: Pyziół, W., Szumański, A., Weiss, I., *Prawo spółek*, Warszawa 2016, p. 77).

partner in the scope that was enjoyed by a spouse-partner or spouses-partners jointly before the division of the partnership share. Therefore, it will not be possible that in place of one vote after the split each spouse will be entitled to half a vote. It should be added that the change in the number of votes – which undoubtedly changes the situation of the remaining partners – can also occur in the opposite direction. In principle, therefore, there is no prohibition on performing acts that change the situation of the remaining partners as to the power of their vote. For example, if a person A acquires pursuant to Article 10 CCC partnership shares from persons B, C and D who were partners in the partnership, capital shares are added up, but a partner A will have one vote (not three) and will not be, for example, “three-fold” liable for the partnership’s debts. If the partnership shares of partners B, C and D involved the right to interest on the capital share at 5%, then the partner will also be entitled to 5% of the total capital share (rather than 15%). If, on the basis of individual capital shares (e.g. three shares of PLN 20,000 each), interest is payable to partners in different amounts (e.g. 5, 6 and 7%), it will be the same after the shares are combined (the partner will have one share with the value of PLN 60,000 on which interest will amount to 5% on PLN 20,000, 6% on PLN 20,000 and 7% on PLN 20,000). However, it should be added that the articles of partnership may make the partner’s voting power dependent on the value of the capital share. In such a situation, the division of the partnership share together with the capital share will also lead to the division of the voting power between independent – after the division – partners.²² Partnership rights of a corporate nature according to the statutory construction are not dependent on the size of the capital share, but result from the mere fact of holding the status of a partner (being a partner).

Also in the light of the principle of unity of civil law (Article 2 CCC as a rule orders to apply the provisions of the CC directly, and in exceptional circumstances – accordingly), the above interpretation is justified, arguing for the admissibility of the division of the partnership share “in kind” since the basic right of co-owners is to demand that the co-ownership be cancelled (Article 210 § 1 CC), and the fractional co-ownership itself is, by its very essence, a temporary and undesirable state. This is all the more so because it can be done without violating the prohibition of the splitting of rights and obligations that make up

²² Kuropatwiński, J., *Glosa do postanowienia SO w Bydgoszczy z dnia 13.05.2009 r.*, VIII Ga 23/09, “Glosa” 2011, No. 2, p. 52.

the partnership share and retaining the influence of the remaining partners on the composition of the partnership.

b. Considering the possibility of granting the partnership share belonging to the joint property to one of the spouses, two situations should be identified:

- when both spouses are partners in the partnership,
- when only one of the spouses is a partner in the partnership.

Specifying the manner of cancelling co-ownership of assets one should first of all take into account the will of the spouses themselves – participants of the proceedings for the division of joint property. In the event of a division of an asset such as a partnership share in a commercial partnership, the interest of the partnership and the remaining partners is imposed on the will and the interest of the spouses.

It seems less problematic when both spouses are partners because granting a partnership share to one of them will not cause the appearance of an unwanted partner in the partnership since both spouses are already partners. As a result of the cancellation of the joint share and granting it to one of the spouses, only one of the spouses will remain as a partner in the partnership.

In a situation where the partnership share belongs to the joint property and only one of the spouses is a partner (only one of them concluded the articles of partnership or joined the partnership) it is reasonable to grant the partnership share to the spouse who is the partner in the partnership. Granting the share to the other spouse would be possible subject to the rigors of Article 10 CCC (the possibility of transferring the share provided for in the articles of partnership and the consent of all the remaining partners, unless the articles of partnership provide otherwise).

This allows a statement that whenever the cancellation of co-ownership of a partnership share leads to a change in the composition of partners (transfer of a partnership share onto a spouse who has not been a partner so far), it is necessary to meet the requirements provided for in Article 10 CCC because the regulations of the civil law and the family law overlap with the regulations of the company law, which must be taken into account both in the contractual and judicial division.

c. The law allows, though does not prefer, for the cancellation of co-ownership by sale of an asset and distribution of the sum obtained between spouses (Article 212 (2) CC). This form of cancelling co-ownership of a partnership share

is not possible in the case of a registered partnership. According to Article 212 § 2 CC, the sale should be made in accordance with the provisions of the Code of Civil Procedure.

Since, as a rule, it is not possible for a partner in a register partnership to transfer their share (Article 10 CCC is an exception to the rule), there can also be no enforcement on the partnership share as partner's all rights and obligations. During the term of the partnership, a creditor of a partner may receive an attachment order concerning only the rights enjoyed by the partner in respect of participation in the partnership which the partner may freely dispose of, or an attachment order concerning the claims of the partner arising in the event of the partner's withdrawal or dissolution of the partnership and then terminate the articles of partnership (Article 62 § 1–3 CCC).

An asset that is not subject to enforcement sale (partnership share) cannot be subject to the so-called civil division (sale under the Code of Civil Procedure and distribution of the amount obtained).

d. The partnership share's belonging to the joint property of the spouses subject to division is determined by the moment of termination of the joint property, where the participation must remain joint at the time of the division, and the value of the partnership share should be determined according to the prices at the time of adjudication,²³ using the valuation method according to the balance sheet drawn up in accordance with Article 65 CCC.²⁴

The division of assets including shares in a limited liability company

Cancellation of co-ownership of a share in a limited liability company can take the form of:

- “physical” division,
- granting the share to one of the spouses along with a pay-off for the other spouse,
- the sale of the joint right and division of funds.

a. Regarding the physical division of shares, it is necessary to distinguish between a situation where, according to the articles of association, a shareholder may have only one share and a situation permitting the holding of more than one share.

²³ Resolution of the Supreme Court of 23 February 2018, III CZP 103/17, unpublished.

²⁴ Resolution of the Supreme Court of 13 March 2008, III CZP 9/08, OSNC 2009/4, item 54; Supreme Court decision of 17 April 2013, I CSK 468/12, unpublished.

Pursuant to Article 153 CCC, the articles of association determine whether a shareholder may have one or more shares. If the shareholder may have more than one share, all shares in the share capital shall be equal and indivisible.

According to Article 181 § 1 and 2 CCC, if, according to the articles of association, a shareholder may have only one share, the articles of association may allow for the transfer of a part of the share. As a result of the division, no shares lower than PLN 50 may be created.

In the case of a divided share, the cancellation of co-ownership may therefore consist, if it is provided for in the articles of association, in separating parts from the joint right which will become independent and in awarding them to each spouse.

Where the spouses have more joint shares, they can be divided “physically” between both spouses by allocating a certain number from a larger number of shares held (e.g. instead of 100 joint shares, 50 will be awarded to the wife and 50 to the husband), while it is not possible to divide a single share into parts (Article 153 CCC).

By making such a “physical” division of a share or shares, an issue of the need to take into account the limitations under Article 183¹ CCC results.

The meaning of Article 183¹ CCC and its influence on the division of the property of the spouses have repeatedly been the subject of the positions of the doctrine,²⁵ representatives of which either stated that no legal norm could be interpreted at all from this regulation,²⁶ or they assumed – and this view is correct – that Article 183¹ CCC, where an appropriate clause is included in the articles of association, precludes granting a share belonging to the joint property to a spouse who is not a shareholder, and some even limited the normative content of this provision to such a prohibition (binding both the spouses and the court making the division).²⁷

²⁵ In addition to the comments on Article 183¹ CCC see in particular the items regarding capital companies listed in footnote 3.

²⁶ Zdanikowski, P., *Prawo udziałowe*, p. 188.

²⁷ Kubas, A., *Udział w spółce handlowej jako składnik majątku wspólnego*, “Przegląd Prawa Handlowego” 2011, No. 4, p. 26; Chomiuk, M., in: Jara, Z. (ed.), *Kodeks spółek handlowych, Komentarz*, Warszawa 2017, p. 704; Rodzyńkiewicz, M., *Kodeks spółek handlowych, Komentarz*, Warszawa 2018, pp. 376–377. However, it should be added that few authors express the view that the provision does not exclude the possibility of granting shares following the division of joint property to the spouse whom the limitation under the articles of association concerns pursuant to Article 183¹ CCC (Kuniewicz, Z., *Wybrane problemy dotyczące objęcia małżeńską wspólnością majątkową praw udziałowych w spółkach kapitałowych* in: Kuniewicz, Z., Malinowska-Woźniak, K. (eds.), *Status prawny małżonków w spółkach cywilnych i handlowych*, Warszawa 2016, p. 283; Nowacki, A., *Spółka z ograniczoną odpowiedzialnością, Komentarz*, Warszawa 2018, p. 655.

In the opinion of the Supreme Court, shares in a limited liability company belonging to the joint property cannot be granted to a spouse who is not a shareholder where a reservation pursuant to Article 183¹ CCC is included in the articles of association.²⁸

Where the share forms part of the joint property:

- both spouses may be shareholders (in which case Article 184 CCC will apply),
- one of the spouses may be a shareholder.

Shares subject to division may be awarded to the spouse-shareholder or to the spouse who is not a shareholder, because shares in a limited liability company are, as a rule, transferable. At the same time, when dividing assets that belonged to statutory joint property, the court may award shares of a limited liability company belonging to the joint property to a former spouse who is not a shareholder only with his or her consent.²⁹

b. Both divisible and indivisible shares may be awarded to one of the spouses with a repayment for the other. Then, however, it is necessary (in addition to Article 183¹ CCC) to consider the effect on the permissible way of dividing the possible restrictions in the transfer of shares.

According to Article 182 § 1–3 CCC a transfer of a share, its part or a fractional share and a pledging of the share may be, under the articles of association, subject to the company's consent or otherwise restricted. Unless the articles of association provide otherwise, consent shall be given by the management board in writing. Should the consent be refused, the registry court may allow for the transfer if there are significant reasons.

Transfer within the meaning of Article 182 § 1 CCC means, undoubtedly, acts in law such as a sale, gift, exchange, etc. As a rule, trading a share is unrestricted both in terms of the “transfer” (sale, exchange, gift, etc.) and in terms of forms of trading with a source in a specific event, to which the act assigns a legal effect in the form of universal or singular succession.³⁰ It is problematic to recognize the “transfer” of the conventional cancellation of co-ownership, and there should be no doubt that “transfer” within the meaning of this provision does

²⁸ Order of the Supreme Court of January 31, 2013, II CSK 349/12, unpublished.

²⁹ Reasoning of the decision of the Supreme Court of 16 March 2018, IV CSK 105/17, unpublished.

³⁰ Szajkowski, A., Tarska, M., in: Sołtysiński, S. et al. (eds.), *Kodeks spółek handlowych, Komentarz*, Volume II, Warszawa 2014, p. 297.

not include a judicial division of joint property.³¹ I believe that neither court nor contractual cancellation of co-ownership by granting a share or shares to one of the spouses will fall within the scope of Article 182 CCC.³² The share was, after all, covered by the joint property of the spouses, which is why each of the spouses already had the right to the whole. In such a case, it is difficult to talk about “a transfer” at all. Moreover, if the registry court in the case of existence of valid reasons may allow for the transfer of the share, the more the civil court that cancels the joint property of a share should be able to do so. In light of this regulation, reference should also be made to the principle of unity of civil law, as the provision of Article 182 § 1 CCC must be considered as an exception to the principle set out in Article 57 § 1 CC, and if so, it should be interpreted strictly.³³

c. In the event of a judicial division of shares by their transfer and distribution of obtained funds, Article 185 CCC applies. The Civil Code refers to the provisions of the Code of Civil Procedure (Article 212 § 2 CC). This provision (Article 185 CCC) is intended to maintain the influence of shareholders on the company’s composition (and thus similar to Articles 182, 183 and 183¹ CCC). Since the legislator decided that in the event of compulsory enforcement on the share the provisions of the articles of association referred to in Article 185 CCC need to be considered, the more one need to take into account such restrictions, when the transfer of a share under the Code of Civil Procedure results from the court’s decision to divide the joint property by transferring shares and dividing the obtained funds. The contractual division, consisting in the transfer of shares and the distribution of obtained funds, must take into account the requirements or restrictions introduced in the company in accordance with Article 182 CCC.

d. There is no doubt that the value of the share is determined according to the prices at the time of the division (in the event of a judicial division, at the moment of adjudication).³⁴

³¹ Cf. Kwaśnicki, R. L., *Zakres autonomii woli w kształtowaniu ograniczeń zbywalności praw udziałowych spółek kapitałowych*, “Prawo Spółek 2003”, No. 2, p. 11, which excludes from the concept of “transfer” the transfer of shares due to inheritance, through privatization processes, in the performance of the agreement on separate property regime.

³² The same in: Nowacki, A., *Spółka z ograniczoną odpowiedzialnością, Komentarz*, Warszawa 2018, pp. 585, 655.

³³ Cf. judgment of the Supreme Court of 5 March 1996, I CKN 29/96, OSNC 1996/5, item 75.

³⁴ Rodzyńkiewicz, M., *Kodeks spółek*, p. 381; resolution of the Supreme Court of 13 March 2008, III CZP 9/08, OSNC 2009/4, item 54.

e. The above findings can be largely applied to the division of the spouses' assets including shares, but some specific problems should be flagged up. As to the "physical" division of the shares, it will only be admissible if the spouses have more than one share, because the shares are always indivisible (Article 333 § 1 CCC). As regards the division of shares between spouses, Article 332¹ CCC applicable to the division of joint property is the equivalent of the regulation contained in Article 183¹ CCC for the joint stock company. Attention should be paid to whether the division of shares will not change significantly the subject of the division or decrease the value of shares (which would violate the division rules contained in Article 211 CC) if there is a conflict between the spouses that could be transferred onto the company's field of activity, while spouses exercising share-related rights jointly held a controlling interest that they will no longer hold as separate shareholders.³⁵ The transfer of shares in order to obtain cash and its distribution must take into account the restrictions on the transferability of shares provided for in the statute in the event of a contractual division and it does not have to take into account these limitations in the event of a judicial division resulting directly from Article 337 § 5 CCC, which does not have its equivalent in the provisions for a limited liability company. The court then orders the sale in the course of execution.³⁶ As for the value of the share, the doctrine indicates that one should consider the prices at the time of the ruling.³⁷

Conclusions

As a rule, the issues of the division of joint property of spouses are regulated by the provisions of the Family and Guardianship Code and the Civil Code. However, there are such regulations regarding the operation of companies (Article 1 § 1 CCC), which modify the general rules regarding the manner of dividing joint property. For example, a civil division of a partnership share in a registered partnership will not be possible (Article 62 CCC), neither will the division in kind of a single share (Article 333 § 1 CCC). Restrictions as to the manner of the division will be imposed on the spouses or the court under Articles 10, 183¹ and 332¹ CCC. Modifications included in the Commercial Companies

³⁵ Śledzikowski, M., *Wpływ podziału*, p. 45.

³⁶ Śledzikowski, M., *Wpływ podziału*, pp. 44–45.

³⁷ Okolski, D., Strzelecka, S., *Problematyka legitymacji*, p. 32; Śledzikowski, M., *Wpływ podziału*, p. 45.

Code may also concern other issues, e.g. forms of acts (this will apply, for example, to Article 180 CCC and the need to make a division under the articles of association, including the requirement of a written form with signatures certified by a notary). Regulations of the Commercial Companies Code will then apply as special provisions and must be taken into account by both the court (in the case of a judicial division) and the spouses themselves (former spouses) in the case of a contractual division.

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UNITY OF CIVIL LAW AND THE LEGAL REGULATION OF COMMERCIAL COMPANIES – SELECTED ISSUES

Abstract

The introduction of the principle unity of civil law into the Polish civil law with the entry into force of the Civil Code in 1965 did not involve ensuring internal consistency of normative acts forming the core of civil law, i.e.: the Civil Code, regulations regarding commercial companies contained in the 1934 Commercial Code, the Family and Guardianship Code, and the law on land and mortgage registers. The Code of Commercial Companies of 2000, to some extent, but not completely, pursued the postulate of ensuring the consistency of the provisions of the Civil Code and the law of commercial companies. In the legal literature, attention is paid increasingly to the necessity to complete the process of adjusting the Commercial Companies Code to the Civil Code as well as the introduction of relevant modifications and corrections to the Commercial Companies Code ensuring the necessary coherence of the legal regulations of these codes. In the first place, this is required by the following issues:

Firstly, concerning the nature, manner and scope of applying the freedom of contract principle in the area of legal regulation of commercial companies.

Secondly, the relation between the provisions of the Civil Code concerning acts in law, in particular contracts, and articles of association in commercial companies as well as the so called invalidity of articles of association (Article 21 CCC).

Thirdly, the issues concerning the concept of an act in law and resolutions of a capital company body, invalidity of an act in law and challengeability of a resolution of the general meeting or of the general assembly of a capital company, as well as the explanation of the so called non-existent resolutions.

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Fourthly, the legal and financial status of the spouses where at least one of them is a participant in a commercial company.

Fifthly, synchronization of the provisions of the Act on the National Court Register concerning registration procedure with structural provisions of the Commercial Companies Code concerning the functioning of commercial companies. The application of adequate provisions of the Code of Civil Procedure is to be considered in this respect.

Keywords: unity of civil law, commercial companies

I. Entry into force of the Civil Code in 1965 meant – in accordance with the overwhelming view of the creators of the Civil Code (hereinafter referred to as CC) – the introduction of the principle of unity of civil law.¹ However, there were also opinions of outstanding scholars that it was only a purely formal intervention because the aforementioned unity of civil and commercial law resulting from the declared repeal of the Commercial Code did not involve ensuring internal consistency of legal provisions making up “Civil Law united”, “united” normative acts forming the core of civil law, i.e. the Civil Code, regulations concerning commercial companies contained in the 1934 Commercial Code, still valid, though propaganda-related repealed by article VI of the regulations introducing the Civil Code, the Family and Guardianship Code (hereinafter referred to as FGC) and the law on land and mortgage register. At the time prof. Stefan Grzybowski aptly stated, “From the point of view of the correctness of the legislative technique all provisions of the Commercial Code should rather be repealed and replaced as needed by new ones, more adapted to current needs”.² Nevertheless, “The lawmaker chose (...) the path indicated by legislative tactics, and justified by the expectation that the parts of the Commercial Code maintained in force for the time being would be repealed in the future”.³ The expectation of the communist lawmaker did not come true in the end and, fortunately, the Commercial Code was “truly” repealed only at

¹ Cf. e.g. Czachórski, W., *Prawo zobowiązań w zarysie*, Warszawa 1970, p. 24 and Wasilkowski, J., *Metoda opracowania i założenia kodeksu cywilnego*, “Państwo i Prawo” 1964, No. 5–6.

² Cf. Grzybowski, S., in: Grzybowski, S. (ed.), *System Prawa Cywilnego*, Vol. III part 2, Wrocław 1976, p. 842.

³ Cf. *ibidem*.

the end of 2000.⁴ On 1 January 2001 the Commercial Companies Code (hereinafter referred to as CCC) came into force, which to a certain extent – but not fully – fulfilled the postulate of ensuring cohesion of the provisions of civil law (the Civil Code) and commercial companies law.

When we reach for the literature from 20 years ago the reason for only partial synchronization of the Civil Code and the Commercial Companies Code provisions will become understandable. Well, the worst problem discussed at the time did not consist in ensuring consistency of the provisions of the broadly understood civil law but the question whether to repeal the Commercial Code at all and ultimately liquidate the separation of commercial companies law from civil law; next – whether and in what legal shape to ensure the adaptation of Polish commercial law to the then European law and in what direction the Polish commercial companies law should be modernized.

Recently, prof. Józef Frąckowiak⁵ and prof. Andrzej Szajkowski⁶ have drawn attention to the need to undertake research, and then carry out legislative work in the field of ensuring consistency of provisions of normative acts of broadly understood civil law. I also share the view that it is necessary to complete the adjustment (adaptation) process of the Commercial Companies Code to the Civil Code and to introduce appropriate modifications and corrections ensuring necessary consistency of legal regulations of those codes. The issue is by no means easy and requires further research. It should also be noted that a similar problem occurs with the Family and Guardianship Code. A proper synchronization of the Commercial Companies Code and the Family

⁴ In accordance with Article 630 CCC, until the regulations concerning the business name and commercial power of attorney were issued (i.e. until the date of entry into force of the amendment of the Civil Code of 14 February 2003 (Dz. U. (Journal of Laws) No. 49, item 408). Commercial Code provisions regulating both of these institutions were maintained in force.

⁵ Commenting on the changes introduced by the amendment of the Civil Code in the Act of 14 February 2003 (ibidem), professor Frąckowiak strongly emphasizes the importance of that amendment. “Its entry into force will make the unity of civil law, so far declared only formally to a great extent, acquire clearer shapes. The Civil Code is becoming the basic regulation for all entrepreneurs”, Cf. Frąckowiak, J., *Instytucje prawa handlowego w kodeksie cywilnym*, “Rejent” 2003, No. 6 (146), p. 17.

⁶ Cf. Szajkowski, A., *Postulat spójności Kodeksu spółek handlowych z Kodeksem cywilnym oraz Kodeksem rodzinnym i opiekuńczym*, in: Pisuliński, J. and Zoll, F. (eds.), *Rozprawy z prawa cywilnego, własności intelektualnej i prawa prywatnego międzynarodowego. Księga pamiątkowa dedykowana prof. B. Gawlikowi*, Warszawa 2012; Nita-Jagielski, G., *Dylematy spójności Kodeksu spółek handlowych z Kodeksem cywilnym oraz Kodeksem rodzinnym i opiekuńczym – konferencja naukowa dla uczczenia 40-lecia pracy naukowej Profesora Andrzeja Szajkowskiego w INP PAN*, Warszawa, 23 września 2014, “Monitor Prawniczy” 2015, No. 7, special issue.

and Guardianship Code is necessary due to the fact that matrimonial property relations are primarily regulated by the Family and Guardianship Code, which in the basic range defines the legal status of both partners (shareholders) – spouses, personal and capital participants of commercial companies.⁷ At present there are too many uncertainties as regards the legal status of spouses of whom at least one is a shareholder of or participant in a commercial company, and the 2003 amendment of the Commercial Companies Code in this respect turned out to be a complete misunderstanding.

The analysis of the overlapping areas of the legal regulations of the Commercial Companies Code, the Civil Code and the Family and Guardianship Code has shown that the following groups of issues require a detailed study of purposefulness and of the range of the possible synchronization of the provisions of the aforementioned codes.

Firstly, concerning the nature, manner and scope of applying the freedom of contract principle in the area of legal regulation of commercial companies.

Secondly, the relation between the provisions of the Civil Code concerning acts in law, in particular contracts, and articles of association as well as the so-called invalidity of articles of association (Article 21 CCC).

Thirdly, the issues concerning the concept of an act in law and resolutions of a capital company body, invalidity of an act in law and challengeability of a resolution of the general meeting or of the general assembly of a capital company, as well as the explanation of the so called non-existent resolutions.

Fourthly, legal and financial status of the spouses where at least one of them is a participant in a commercial company.

Fifthly, synchronization of the provisions of the Act on the National Court Register concerning registration procedure with structural provisions of the Commercial Companies Code concerning the functioning of commercial companies. The application of adequate provisions of the Code of Civil Procedure is to be considered in this respect.

II. Three main positions appeared in the literature as for the nature, manner and scope of applying the freedom of contract principle (Article 353¹ CC) in the area of articles of association.

⁷ M. Nazar also strongly emphasizes it in *Komercjalizacja majątkowych stosunków małżeńskich w spółkach kapitałowych*, in: Kidyba, A. and Skubisz, R. (eds.), *Współczesne problemy prawa handlowego, Księga jubileuszowa dedykowana prof. dr hab. Marii Poźniak-Niedzielskiej*, Kraków 2007, pp. 201ff.

Prof. S. Sołtysiński takes a relatively liberal position in this matter.⁸ In his opinion “legislation concerning commercial companies is based on the principle of autonomy of the parties’ will as well as of the freedom of contract”,⁹ and the civil nature of relations in a commercial company, based on the concept of an agreement (Article 3 CCC), makes it possible to apply the freedom of contract principle (Article 353¹ CC).¹⁰

An entirely different position is taken by prof. M. Romanowski, who does not as a matter of fact question applying the freedom of contract principle to articles of association¹¹ but he emphasizes the problem of establishing the manner¹² and scope of its application.¹³ The author aptly states that the “axiology of commercial companies law does not reject the concept of the freedom of contract but requires its friendly adaptation considering the axiology of commercial companies law in general and the nature of particular types of companies as well as within a particular type of companies the nature of a particular company”. At the same time, however, taking the typological features of “classic” contractual relationships indicated by prof. E. Łętowska¹⁴ as a starting point and *lex contractus* measure, he states that articles of association may not be qualified as *lex contractus*. In his opinion, “commercial companies

⁸ A similar position is taken by S. Włodyka (in: Włodyka, S. (ed.), *System Prawa Handlowego*, Vol. 2, 2nd edition, Warszawa 2012, p. 39) who states that “while shaping the company relationship the shareholders are entitled to the freedom of contract. It is in this case, however, strongly limited, from the one side by the characteristics of a company relationship, and from the other – more importantly – by the fact that commercial companies provisions have to a great extent – as it has already been mentioned – *iuris cogentis* nature. There are two consequences of that. The first one is the principle of *numerus clausus* in commercial companies law”. (...) The other consequence is the limited admissibility of contractual modifications of normative types of contracts.

⁹ Sołtysiński, S., in: Sołtysiński, S., Szajkowski, A., Szwaja, J. (eds.), *Komentarz do Kodeksu Handlowego*, Vol. I, 2nd edition, Warszawa 1997, p. 79.

¹⁰ Cf. Sołtysiński, S., in: Sołtysiński, S. (ed.), *System Prawa Prywatnego*, Vol. 17A, 2nd edition, Warszawa 2015, p. 13.

¹¹ Romanowski, M., *Umowa spółki*, in: Sołtysiński, S. (ed.), *System Prawa Prywatnego*, Vol. 16, 2nd edition, Warszawa 2016, p. 178.

¹² Conducive to, i.e. to the benefit of the freedom of contract considering the nature of a particular type of a company as a legal entity and its internal and external relations.

¹³ The author is in favour of using this principle in accordance with the standard of special, not general competence.

¹⁴ Łętowska, E., in: Łętowska, E. (ed.), *System Prawa Prywatnego*, Vol. 5, 2nd edition, Warszawa 2013, pp. 10–11.

law, in contrast to contract law is neither democratic nor “self-serving” nor based on the principle of self-determination; as a result of that, it demonstrates neither the feature of “sovereignty” nor “self-government” which characterize *lex contractus*”.

I take a middle-of-the road (intermediate) position on this matter. In my opinion, “Article 353¹ CC provides a foundation for using the freedom of contract by parties to articles of association – through supplementing or modifying statutory solutions in the area not regulated by the lawmaker by *iuris cogentis* provisions.¹⁵ At the same time, however, in view of the differences in axiology of commercial companies law in comparison with “classic” law of obligations – especially because of the need to provide protection to other market participants, in particular company’s creditors as well as sometimes the shareholders or partners themselves, particularly minority shareholders – this rule is subject to greater restrictions with reference to articles of association resulting primarily from the law.¹⁶ It concerns especially those aspects of the establishment and functioning of the company that may affect the legal sphere of other market participants, that is because of the creative effect of making the articles of association which results in establishing an independent legal entity with legal capacity. In my opinion, these reasons justify to some extent the lawmaker’s interference in internal relations,¹⁷ whereas to a greater extent in those aspects of articles of association which are important in external relations.¹⁸

¹⁵ Tarska, M., *Zakres swobody umów w spółkach handlowych*, Warszawa 2012, p. 552.

¹⁶ Ibidem, p. 5.

¹⁷ It refers especially to a joint-stock company, whose participants, except for majority shareholders, usually have little influence on establishing the internal rules binding for the company or on defining the rights and obligations of particular bodies of a joint-stock company, including division of its competences in connection with the obligation to bear civil and penal liability (See Article 293, Article 299, Articles 480–481, Articles 483–484, Article 586 et seq. CCC).

¹⁸ It refers in particular to defining in each type of a company the rules of liability for its obligations, as well as the rules of efficient performance on behalf of the company. Cf. Tarska, M., op. cit, p. 93. Similarly Litwińska, M., *Typologia prawa spółek*, PUG 2001, No. 2, p. 6.

As it seems, prof. M. Romanowski's very firm position that commercial companies law constitutes the opposite of *lex contractus*¹⁹ may be regarded as too categorical. The view of that Author that "axiology of commercial companies law does not contain a permission to create *legis contractus* by the shareholders or partners themselves"²⁰ may be shared – with the reservation, however, that it is about the scope and manner of making law that is conferred to the parties of a ("classic") obligation relationship. As a matter of fact, except for the regulations "imposed" by the lawmaker, the Commercial Companies Code regulates a lot of issues worded in relatively binding provisions, thus being the lawmaker's "proposal" that the parties to articles of association may accept, modify or even reject. Moreover, as part of a legal relationship of each of six types of companies, a certain sphere of contractual freedom not covered by statutory regulations at all remains, thus left to the free decision of founders (later – shareholders or partners) of a company.

III. In terms of the relation of the Civil Code provisions concerning acts in law, in particular contracts, to articles of association the matter is relatively simple because, as a rule, there are no doubts that the aforementioned provisions of CC apply broadly – and directly – to articles of association. There are, however, some areas of the provisions that concern making, functioning and terminating articles of associations where the application of the general CC provisions on contracts remains limited to some extent. It concerns, *inter alia* the nature of articles of association that has long been emphasized in literature and comes down to creating a new entity. The making of articles of association results in creating not only a legal relationship of a company but also a new civil law entity that, as a rule, enters a lot of legal relationships with other entities, creates permanent legal structures and sometimes has significant assets as well as liabilities (debts). For this reason, a special regulation for dissolving

¹⁹ In view of S. Sołtysiński (in: Sołtysiński, S. (ed.), *System Prawa Handlowego*, Vol. 17A, p. 23), this opinion does not find a normative and functional justification. Article 2 sentence 1 CCC refers to *inter alia* general clauses of the Civil Code, together with Article 353¹ CC, which is perceived by the majority of scholars as a ground of freedom of contract also with reference to commercial companies relationships (Cf. S. Włodyka, in: Szumański, A. (ed.), *System Prawa Handlowego*, Vol. 2A, 3rd. edition, Warszawa 2019, p. 47 and the following ones: Szumański, A., *Ograniczona wolność umów w prawie spółek handlowych*, "Gdańskie Studia Prawnicze" 1999, No. 2, pp. 411, 415, 417; Okolski, J., Modrzejewski, J., Gasiński, Ł., *Natura stosunku korporacyjnego*, "Przegląd Prawa Handlowego" 2000, No 8, p. 6ff).

²⁰ Romanowski, M., op. cit., p. 219.

a company by a registry court included in Article 21 CCC – which in fact in the vast majority of cases *de iure* means the court's dissolving the articles of association – contains so many separate solutions that may indeed seem controversial but are very pragmatic and axiologically fully acceptable.

The question arises, however, about the exact scope of the previously mentioned restrictions adapted in the Commercial Companies Code, restrictions of the application of the Civil Code concerning acts in law and whether they (the restrictions) are justified. Those issues require an in-depth analysis. It is also necessary to find a satisfactory solution to the problem, pointed out by prof. M. Romanowski, that together with specifying the scope of application of the freedom of contract in the area of commercial companies law (Article 353¹ CC) one needs to take in account a directive stipulating that articles of association may not be qualified as *lex contractus*.

IV. In the Civil Code and the Commercial Companies Code the issues of defectiveness, in particular, invalidity of acts in law and challengeability, including invalidity of resolutions of bodies of capital companies were regulated according to different legislative concepts and, as it seems, it is not possible to ensure consistency of both normative acts through appropriate unification of those different regulations. The main reason for this situation consists in the need to ensure the safety of legal transactions. Commercial companies running business activity, as a rule with multiple members, function in certain economic realities in which stabilization of economic relations and the time factor play a special role. And the same reasons which speak for recognizing the legal existence of companies with the highest degree of defectiveness (e.g. absence of articles of association or unlawful company's objects – cf. Article 21 § 1(1) and (3) 3 CCC) decided about the adoption – first in the Commercial Code and next in the Commercial Companies Code – of the concept of depriving defective resolutions of legal effects by challenging them.²¹

Nevertheless, both the Commercial Code concerning the aforementioned issues of challengeability and defectiveness of resolutions, as well as the solutions adopted in this regard in the Commercial Companies Code, raise some doubts and reservations, which is evidenced by abundant literature. As it seems,

²¹ Cf. Frąckowiak, J., *Uchwała zgromadzenia wspólników spółki kapitałowej jako czynność prawna wewnątrzkorporacyjna*, "Przegląd Prawa Handlowego" 2018, No. 9, pp. 19–26.

these issues have been better regulated in Article 42 Cooperative Law,²² which expressly allows (in Article 42(9)) the right to bring an action for declaring non-existence of a resolution of the general assembly.²³

Another issue, especially important for the commercial companies law, involves the so called resolutions *non existens*. Their identification and existence itself is denied by some scholars although in practice there are attempts to qualify different kinds of alleged resolutions – acts that are not resolutions at all in the meaning of the Commercial Companies Code – as challengeable resolutions, as they do not bear the characteristic features²⁴ of a resolution required by law: they are neither a formal statement of company's participants (shareholders) constituting the company's resolution-making body nor a statement made as a result of company's participants voting – they are only some kind of osten-

²² Act of 16 September 1982 Cooperative Law, Dz. U. (Journal of Laws) of 2018, item 1285), Article 42 § 1. Resolutions of the general assembly are binding for all members and bodies of the cooperative. § 2. A resolution contrary to the law is invalid. § 3. A resolution contrary to the provisions of the statute, contrary to fair dealings or compromising the interests of the cooperative as well as aiming to harm its member may be appealed against before a court. § 4. Each member of the cooperative or the management may bring an action to repeal the resolution. However, the right to appeal against the resolution on the exclusion or removal of a member is given only to the excluded or removed member. § 5. If the management board brings an action the cooperative is represented by a representative appointed by the supervisory board, and the cooperative in which the supervisory board is not appointed, the representative appointed by the general assembly. In case of not appointing a representative the court competent to hear the case appoints a guardian for the cooperative. § 6. The action for repealing the resolution of the general assembly shall be brought within 6 weeks from the date of the general assembly being held, if, however, the action is brought by a member absent at the general assembly as a result of its faulty convening – within 6 weeks from the date on which the member learnt about the resolution, no later than a year from the date the general assembly was held. § 7. If the act or statute require notifying the member about the resolution, the 6-week period referred to in par. 6 runs from the date of that notification made in the way indicated in the statute. § 8. The court may not allow the expiry of the time period referred to in par. 6 if maintaining the resolution of the general assembly in force would cause severe effects for a member and the delay in appealing is justified by the very exceptional circumstances and is not excessive. § 9. The court ruling determining non-existence or invalidity of the resolution of the general assembly or repealing the resolution is legally binding for all members of the cooperative and all its bodies.

²³ Cf. Koch, A., *Podważanie uchwał zgromadzeń spółek kapitałowych*, Warszawa 2011, pp. 150–151.

²⁴ Cf. Radwański, Z., in: Radwański, Z. and Olejniczak, A. (eds.), *System Prawa Prywatnego*, Vol. 2, 3rd edition, Warszawa 2019, p. 447 as well as the reasoning to the resolution of the Supreme Court of 2 February 1994, III CZP 181/93: “if the resolution is, as a matter of fact, not a resolution but only has an ostensible nature of a resolution, i.e. if it was passed by unauthorized persons, Article 240 of the Commercial Code may not apply”, OSN 1994, No. 9, p. 15.

sible resolutions.²⁵ In the Commercial Companies Code there is no legal ground for accepting a presumption that every act about which somebody says that it is a resolution of a constituting body of a capital company is a resolution that can be appealed against in the procedure specified in the Commercial Companies Code. As a result, in accordance with Article 6 CC such a person will have to prove *in casu* that a particular act is a resolution at all because the burden of proving a fact lies with the person who derives legal effects from this fact. The fact that we are dealing with a defective resolution must be proved by persons or bodies questioning the legitimacy (validity) of the resolution appealed against, who are moreover authorized, in accordance with an adequate provision of the Commercial Companies Code, to bring an action for repealing this resolution or declaring it invalid.

As for the issue of non-existent and unlawful resolutions, the position taken by the Supreme Court in a decision of 25 August 2016²⁶ seems right and worth quoting: “Non-existent resolutions differ from unlawful resolutions in such a way that because of their drastic, extreme degree of defectiveness they do not cause any legal effects *ab initio*. A resolution affected by such a significant degree of defectiveness does not exist and has never existed. With reference to non-existent resolutions there is no need to obtain a judgment stating the circumstance of their non-existence on the ground of Article 189 of the Code of Civil Procedure.”

V. Synchronization of the provisions of the Commercial Companies Code and the Family and Guardianship Code regulating the legal situation of spouses – participants in commercial companies is a very urgent matter.

Briefness of the provisions of the Commercial Companies Code as for the legal status of spouses in commercial companies as well as the regulation of legal and property relations between spouses resulting from participation and co-participation in a commercial company adopted in Article 31-46 FGC create a lot of significant misunderstandings in practice. There are completely basic doubts as for which of the spouses has the rights of a shareholder if at least one of them joins the company; what is more – are these rights of a shareholder or only rights of a co-shareholder of a commercial company?; also, what is the scope of authority that each spouse may perform independently in such a situation? The last

²⁵ Cf. Szajkowski, A., *O metodzie badania prawa handlowego*, in: Frąckowiak, J. (ed.), *Kodeks spółek handlowych po 15 latach obowiązywania*, Warszawa 2018.

²⁶ V CSK 694/15, Legalis no. 1514858.

issue is of utmost importance. It cannot be assumed – although the unclear provision in Article 31 FGC suggests it to some extent – that at the moment of creation of statutory matrimonial joint property it covers not only items acquired “by both spouses or by one of them” to their joint property but also items acquired by one spouse for the account of private property. The aforementioned issue has not been clearly regulated in the provisions on the statutory system of matrimonial property rights. It is difficult to assume that the lawmaker shares the view that on entering into marriage each spouse loses the ability to act independently: acquiring items for private account, in exchange for certain assets, or as debt. This problem is essential for determining the binding legal status of spouses associated with participation in a commercial company.

Moreover, the provision of Article 183¹ CCC (introduced by the December 2003 amendment), completely defective and containing internal contradictions, needs to be repealed.

VI. Another difficult, though necessary task is to ensure proper synchronization of the provisions of the Act on the National Court Register concerning the registration procedure – most of all with common sense, and then also with structural provisions of the Commercial Companies Code regulating the functioning of commercial companies. The problem concerns i.a. the registry court’s making entries in the register following events which produce specific legal effects according to the provisions of the Commercial Companies Code, e.g. entry into or removal from the register of persons holding the right to represent a company. This issue is essential from the point of view of both the company (and shareholders) and its counterparties (including creditors), as well as members of the company’s management board. The topic has not been duly regulated, thus producing potential threat to the interests of all stakeholders.

Capital companies registration regulations must contain a mistake in the system. There are no effective measures of prevention against “hostile takeovers” of the management board of a limited liability company by persons from outside the company, e.g. persons interested in quick access to company’s bank accounts.

A resolution on changing the company’s management board is like giving a stranger a key to a safe. The new management board gets access to all bank accounts, has them at their disposal, and if, as a result of a defective, previously prepared or non-existent resolution, an entry into the register of new members

of the management board occurs (unauthorized persons *de iure*) – on the basis of a court extract obtained without difficulty, they (new members of the management board) may take hundreds of millions of zlotys out of the company in one day. The current, insufficient regulation in the Commercial Companies Code and the act on the National Court Register seems striking in terms of entering in the register changes in the composition of the management board. It does not contain necessary measures to protect the interests of the company and its shareholders as well as existing management board members and is based on crude formalism.

In accordance with the current regulations the registry court does not verify whether the documents submitted together with the application for an entry in the register by persons claiming to be new management board members are actually documents coming from that company, and whether these persons are duly appointed management board members. The Supreme Court jurisdiction is going in a similar direction. For example, in one of its resolutions the Supreme Court states that a situation where a resolution has not been passed at all and a situation where there is indeed an appearance of passing it but in accordance with the views consolidated in the Supreme Court jurisdiction and in literature it must be considered non-existent should be assessed differently. In the first situation there is a possibility of the registry court acting *ex officio*, in the second one – the only fundamental document for the registry court is a final court judgment stating non-existence of a resolution.²⁷

The abovementioned statements of the Supreme Court may be considered well grounded in case of a real, typical dispute over the legitimacy (validity) of a resolution of the general assembly. They are, however, not acceptable for the so called non-existent resolutions or overt frauds connected with preparation of forged company documents.

These issues require, in my opinion, in-depth analysis and adequate amendments in the applicable commercial companies law and regulations concerning the National Court Register.

VII. The analysis of the subject-matter addressed in this study reveals an issue of the absence of necessary synchronization of the Commercial Companies Code with the Civil Code and the Family and the Guardianship Code, which

²⁷ Resolution of the Supreme Court – Civil Chamber of 4 June 2009, III CZP 30/09.

has been raised by A. Szajkowski,²⁸ J. Frąckowiak,²⁹ and M. Nazar³⁰ from many years. This mostly results from the legislator's failure to ensure the actual unity of civil law,³¹ since the entry into force of the Civil Code, in its different segments from the legislative side. As A. Szajkowski³² accurately concludes, it is undoubtedly urgent and necessary to ensure proper coherence of legal regulations of the CCC with the CC and the FGC, though implementing this task is certainly not an easy thing to do. Therefore, initiating in-depth research and an appropriate scholarly debate on this topic is well-grounded and necessary.

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²⁸ Szajkowski, A., *Postulat spójności*.... See also: Nita-Jagielski, G., op. cit.

²⁹ See Frąckowiak, J., *Kodeks spółek handlowych. Studia i materiały*, Poznań-Kluczbork 2001, pp. 251–271. See also Frąckowiak, J., *Ustawodawstwo dotyczące przedsiębiorców pod rządami jedności prawa cywilnego*, "Przegląd Prawa Handlowego" 2000, No. 11.

³⁰ See also Nazar, M., in: Kidyba, A. and Skubisz, R., (eds.), *Komercjalizacja majątkowych stosunków małżeńskich w spółkach kapitałowych*, w: *Współczesne problemy prawa handlowego, Księga jubileuszowa dedykowana prof. dr hab. Marii Poźniak-Niedzielskiej*, Kraków 2007, p. 201ff.

³¹ Szajkowski, A., *Deklarowana jedność prawa cywilnego*, in: Dańko-Roesler, A. et al. (eds.), *Ius est ars boni et aequi: księga pamiątkowa dedykowana profesorowi Józefowi Frąckowiakowi*, Warszawa 2018.

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Adam Wróbel*

**COMMENTARY TO THE SUPREME COURT RESOLUTION
OF 20 SEPTEMBER 2018, I KZP 5/18**

Abstract

The Supreme Court, in the ruling which is subject to this commentary, addresses the notion of an employee referred to in Article 218 § 1a of the Criminal Code. The court discussed the issue of the designation and limits of the notion of “employee” and the subject-matter of protection of the provision referred to above along with its scope. The commentator – in this context – analyses the Supreme Court’s thinking.

The commentary’s author agrees in most part with the belief that “the scope of Article 218 § 1a CrC covers only persons who are employees within the meaning of Article 2 LC and Article 22 § 1 and § 1¹ LC”, though he deems it incomplete as one also needs to take into account Article 8(2a) of the act on social insurance, where – with regard to social insurance – the notion of an employee is slightly broader than the one included in the provisions of the Labour Code. The commentator believes it legitimate that the subject-matter of protection of Article 218 § 1a CrC includes all employee rights resulting from an employment or social insurance relationship. The commentator shares the *de lege ferenda* postulate for the “protection under Article 218 § 1a CrC to include also persons in employment relationships other than a contract of employment” and, which the Court did not address in the discussed resolution, the civil law relationship referred to in Article 8(2a) of the Social Insurance Act.

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Keywords: employee in criminal law, criminal and legal protection of employee rights, criminal law, employment relationship

The Supreme Court, in a ruling which is subject to this commentary, addresses the issue of an employee referred to in Article 218 § 1a CrC.¹ The court answers the following questions: what is the designation and what are the limits of the notion of “employee”? what is the subject-matter of protection of the provision referred to above and what is its scope? The commentator follows the Supreme Court’s thinking and analyses it.

In the Labour Code perspective, an employee is a person bound with the employer by the bond of an employment relationship. By establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration (Article 22 § 1 LC).² The name of the contract concluded by the parties is entirely irrelevant here, since employment pursuant to Article 22 § 11 LC is employment under the employment relationship. Also, it is inadmissible to replace employment contracts with civil law contracts where the conditions of the performance of work specified in Article 22 § 1 LC remain intact (Article 22 § 12 LC). Also in the perspective of Article 218 § 1a CrC the notion of the employee mostly overlaps with the meaning attributed to it by the Labour Code.³ The legislator narrowed down in this notion the protected person (“employee”) in relation to the persons referred to in the title of the Chapter of the Criminal Code in which this phrase was placed (“people in paid work”). Nevertheless, one cannot forget the slightly broader

¹ Act of 6 June 1997 The Criminal Code, Dz. U. (Journal of Laws) of 2018, item 1600, consolidated text as amended (hereinafter referred to as: CrC).

² Act of 26 June 1974, The Labour Code, Dz. U. (Journal of Laws) of 2018, item 917, consolidated text as amended (hereinafter referred to as: LC).

³ See Daniluk, P., Witoszko, W., *Glosa do uchwały SN z dnia 15 grudnia 2005, I KZP 34/05*, “Orzecznictwo Sądów Polskich” 2006, No. 7–8, item 93, <https://sip.lex.pl/#/publication/385929524>, accessed on: 27.03.2019 and Siwik, Z., in: Filar, M. (ed.), *Kodeks karny. Komentarz*, 5th edition, Warszawa 2016, <https://sip.lex.pl/#/commentary/587611208/503460>, accessed on: 28.03.2019, commentary to Article 218, thesis 4.

understanding of the terms “employee” against the Labour Code regulation – in reference to social insurance.⁴

In view of the above, in the resolution commented on, the quoted content of the resolution of the Supreme Court of 15 December 2005, I KZP 34/05,⁵ saying that offences specified in Article 220 CrC and Article 218 § 1a CrC are placed in the same chapter of the Criminal Code, entitled “Offences against the rights of people in paid work”, whereas the term “employee” (also mentioned in the provisions typifying these offences) “has not been legally defined for the needs of the Criminal Code in its Article 115, but the legislator left it, which is rational and purposeful in all measures, to norms of labour law”. The Supreme Court pointed out that in accordance with Article 2 LC an employee means a person employed on the basis of an employment contract, an appointment, an election, a nomination or a co-operative employment contract, and also that the status of an employee is acquired by forming an employment relationship, by which – in line with Article 22 § 1 LC – an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer while the employer undertakes to employ the employee in return for remuneration. The law study assumes that definitions established under other branches of law should not be as a rule modified in the process of decoding attributes of crimes (see Wiatrowski, P., *Dyrektywy wykładni prawa materialnego w judykaturze Sądu Najwyższego*, Warszawa 2013, pp. 123–134).⁶ Therefore, the Supreme Court continues, “the significance of the terms in question, employed in Article 218 § 1a CrC, should be established by means of norms and definitions deriving from the labour law.

Differentiation of protection of employees *sensu stricto* (Article 218 and 220 CrC) and of other persons in paid work (Article 219 and 221 CrC) is strongly

⁴ More on this subject, see judgment of the Administrative Court in Białystok of 24 September 2013, III AUa 304/13, LEX No. 1369209 and Konarska-Wrzonek, V., et al., in: Konarska-Wrzonek, V. (ed.), *Kodeks karny. Komentarz*, 2nd edition, Warszawa 2018, <https://sip.lex.pl/#/commentary/587715878/571138>, accessed on: 26.03.2019, commentary to Article 218, thesis 5.

⁵ LEX No. 164200.

⁶ Cf. Wiatrowski, P., *Dyrektywy systemowy interpretacyjnej wykładni przepisów prawa karnego w orzecznictwie Sądu Najwyższego*, “Czasopismo Prawa Karnego i Nauk Penalnych” 2009, No. 2, pp. 179–181.

supported in the systemic argumentation, since only in Article 218 and 220 CrC did the legislator use the term »employee« within the meaning of Article 2 LC. Chapter XXVIII CrC also includes Article 218a CrC, added by Article 13 of the act of 10 January 2018 on restricting trade on Sundays and holidays and certain other days (Dz. U. (Journal of Laws) of 2018 item 305) which, by its use of the expressions »employee or an employed person« differentiates clearly between these two terms, which means that it gives than a different meaning (prohibition of applying synonymous interpretation)”.⁷

The confirmations cited above, as mentioned before, may be approved, though it needs to be emphasized that in the context of “social insurance” the notion of an employee becomes slightly broader.⁸ *In genere* it needs to be stated that an employee means a person specified in the regulation of the Labour Code (Article 2 LC, Article 22 § 1 and § 1¹ LC),⁹ and in the perspective of the act of 13 October 1998 on social insurance system¹⁰ an employee means, similarly, an individual under an employment contract (Article 8(1)), as well as an individual specified in Article 8(2a). This provision stipulates, that an employee also means a person who performs work on the basis of an agency agreement, a mandate contract and other another agreement for the provision of services, to which provisions on mandate apply under the Civil Code, or a specific work contract if the individual concluded such a contract with an employer with whom he is bound under an employment relationship, or if he carries out work under such a contract for the benefit of the employer with whom he is bound by an employment rela-

⁷ One can refer here to the content of Article 1¹ of the act of 23 May 1991 on trade unions (Dz. U. (Journal of Laws) of 2019 item 263 consolidated text), according to which a person delivering paid work means an employee or a person performing work in return for remuneration on a basis other than an employment relationship, unless they employ other persons for this type of works, regardless of the basis for employment, and has the same rights and interests related to the performance of work that can be represented and protected by a trade union. However, it needs to be pointed out that this provision came into force on 1 January 2019, that is after the issuance of the ruling subject to this commentary. See Budyn-Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, (System Informacji Prawnej LEX, 2018), <https://sip.lex.pl/#/commentary/587737074/578912>, accessed on: 01.04.2019, commentary to Article 218, thesis 1.

⁸ Judgment of the Administrative Court in Białystok of 24 September 2013, op. cit. and Konarska-Wrzošek, V., op. cit., commentary to Article 218, thesis 5.

⁹ Which is also pointed to in the commented ruling.

¹⁰ Dz. U. (Journal of Laws) of 2019, item 300, consolidated text as amended.

tionship.¹¹ Thus, the scope of Article 218 § 1a CrC also refers to these persons, since in light of the subject matter of Social Insurance Act they are considered employees. This is why, in the context of Article 218 § 1a CrC these persons may be injured by this offence if their rights under a social insurance relationship are maliciously or persistently infringed by an offender performing actions in term of social insurance matters. The Supreme Court rejects the thought that the interpretation of the term “employee” under Article 218 § 1a CrC should be “grossly non-guarantee” in nature, indicating that “it needs to be emphasised that the presented interpretation of the term »employee«, referred to in Article 218 § 1a CrC, cannot be considered as grossly non-guarantee in nature, since the system of law features both criminal and civil measures to protect the contractual relationship. The former involves offender’s liability under Article 160 CrC, which criminalises exposing anyone, not only an employee or another person in paid work, to an immediate danger of loss of life or a serious impairment of health”. It needs to be reminded that Article 160 § 1 CrC is *lex generalis* in relation to the regulation of Article 220 § 1 CrC, similar to Article 160 § 3 CrC in relation to Article 220 § 2 CrC. Also in the perspective of occupational health and safety (referred to in Article 207 § 2 LC) the employer is obliged to ensure such conditions to individuals performing work on a basis other than an employment contract in a work establishment or in a place designated by the employer, as well as to anyone conducting business activity on their own account in the work establishment or in a place designated by the employer (Article 304 § 1 LC); also, anyone who, while responsible for health and safety at work, or otherwise managing employees or other individuals, does not observe the provisions or principles of health and safety at work, is liable to a legal and offence-related sanction (Article 283 § 1 LC).¹² Nevertheless, it seems legitimate to state that the perspective

¹¹ Moreover, the legislator specified in the regulation of the Social Insurance System Act that, as long as an employee meets the criteria for co-operating individuals, described in subsection 11, for the purposes of social insurance they shall be treated as a co-operating individual (Article 8(2)); an individual co-operating with individuals engaged in non-agricultural business activities, contractors and natural persons referred to in Article 18(1) of the act of 6 March 2018 – Entrepreneurs Law, referred to in Article 6(1)(4) and (5), shall mean the spouse, children, the spouse’s children and adopted children, parents, stepmother and stepfather, and adopted parents of the individuals, as long as they share a joint household and co-operate in their business activities or in the execution of an agency agreement or a mandate contract; except for individuals who have concluded an employment contract with a view to preparing for a profession (section 11).

¹² More on the subject Wróbel, A., *Odpowiedzialność karna za niedopełnienie obowiązków z zakresu bezpieczeństwa i higieny pracy*, “Państwo i Prawo” 2012, No. 12, pp. 72–81.

of Article 218 § 1a CrC protects – narrowly – only the right of a person who is an “employee”, but not – broadly – the right of a person “performing work”, which in a perspective postulates for an extending amendment.¹³

The Supreme Court rightly points out in the discussed resolution that the subject of protection of Article 218 § 1a CrC includes all rights of an employee resulting from an employment or social insurance relationship. “All rights of an employee under an employment or social insurance relationship”, that is those whose source in an employment or social insurance relationship. It involves rights afforded to an employee: a) in the course of an employment relationship (for employees and situations specified in Article 8(2a) of the Social Insurance Act – in the course of a civil law relationship) and b) after termination of the employment relationship (for employees and situations specified in Article 8(2a) of the Social Insurance Act – after termination of a civil law relationship), not the rights of persons who are not and have not been the “weaker” party (employee) of a given employment relationship, or a party – in the perspective

¹³ The Supreme Court stresses that “attributing, on the ground of Article 218(1a) CrC, the term »employee« with a meaning that is broader than the one functioning in the labour law would constitute an unlawful interpretation to the detriment of the accused, in collision with the *nullum crimen sine lege* principle. A significant share of commentators opted for a homogenous, that is compliant with the definition under Article 2 CrC in connection with Article 22 CrC, understanding of the word »employee« throughout Chapter XXVIII CrC, pointing out that it is inadmissible to apply an extending interpretation here (see Unterschütz, J., *Glosa do postanowienia SN z 13 kwietnia 2005, III KK 23/05*, “Gdańskie Studia Prawnicze – Przegląd Orzecznictwa” 2006, No.1, pp. 123–134; article in “Gdańskie Studia Prawnicze – Przegląd Orzecznictwa” 2015, No. 4, pp. 164–172). As far as critical opinions on the resolution decoding the sense of Article 220 CrC (see Musiała, A., Jankowiak, J., *Glosa do uchwały SN z 15 grudnia 2005*, “Prokuratura i Prawo” 2007, No.2, pp. 163–167) may raise some doubts among the commentators or those applying the law as regards the existing understanding of the word »employee« used in this provision (the current composition of the Supreme Court does not have such doubts), these critical stands may in no way refer to the content of Article 218 § 1a CrC”. In this case it involves the fact – as pointed out by the Court – “that the aim of protection under Article 220 CrC is the employee’s right to safe and healthy conditions of work and only in this context did the opponents attempt to negate the result of the interpretation done by the ruling of 15 December 2005, by reference to Article 66(2) of the Constitution of the Republic of Poland, Article 3(a) of Directive 89/391/EEC or Article 29(3) of the Atomic Law, which (those regulations) all are solely devoted to the value of health and safety at work. The arguments directed at this issue could not have obvious reasons for application when deciphering the sense of Article 218 § 1a CrC, because the subject of protection of this provision, contrary to Article 220 CrC, does not involve rights to healthy and safe conditions at work, but all rights of an employee resulting from the employment or social insurance relationship”. Cf. Wróbel, A., *Glosa do postanowienia SN z dnia 13 kwietnia 2005, III KK 23/05*, *Studia Iuridica Toruniensia* 2013, No. 1, pp. 265–267. DOI: <http://dx.doi.org/10.12775/SIT.2013.013>, accessed on: 28.03.2019.

of Article 8(2a) of the Social Insurance Act to a civil law relationship.¹⁴ Thus, when an employment relationship (or respectively a civil law relationship) has not been formed yet, the rights resulting from social insurance have not occurred yet, then such a situation is not in any way reflected – in terms of the subject of protection – in the regulation of Article 218 § 1a CrC. The catalogue of employee rights includes: the right to respect for dignity, the right to receive remuneration or their benefits, the right to rest, the right to obtain a certificate of employment, the right to confirm the terms of the employment contract in writing, the right to protect the permanence of the employment relationship, the right to special protection of work in the case of women and youth, the right to safe and healthy conditions of work, the right to be re-admitted to work which was ruled by a competent authority, the rights arising from the social insurance relationship.¹⁵ The Supreme Court rightly points out that there is an indirect legal construct between: a) “a person employed on the basis of an employment contract, an election, a nomination or a co-operative employment contract”, and b) “a person performing work under civil law agreements”. Thus, it does not cover “persons who under the disguise of a civil law agreement in fact perform work under an employment contract”. Such a reasoning of the Court is also supported by Article 22 § 12 LC which specifies that it is inadmissible to replace employment contracts with a civil law contract where the conditions of the performance of work specified in Article 22 § 1 LC remain intact.

This is why it is validly noted in the resolution in question that the motivational part of the resolution of the Supreme Court of 15 December 2005, I KZP 34/05 does not make a direct mention of Article 22 § 11 LC, which specifies that employment under the conditions stipulated for in Article 22 § 1 LC constitutes employment on the basis of an employment contract regardless of the name of the contract concluded by the parties, “though it was expressly highlighted in its reasoning, that the term »employee« can also include a person with whom a civil law agreement, not an employment contract, was formally executed. This entails the need to treat such a defectively named contract as an employment contract,

¹⁴ Cf. Samol, S., *Prawnikarna ochrona praw pracownika w nowym kodeksie karnym*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1998, No. 3–4, p. 77 and Budyn-Kulik, M., op. cit., commentary to Article 218, thesis 1.

¹⁵ More on the subject: Unterschütz, J., *Karnoprawna ochrona praw osób wykonujących pracę zarobkową*, Warszawa 2010, pp. 76–110.

and the person performing work – as a person under an employment contract”. Nonetheless, it should be added, that the regulation of Article 22 § 11 and Article 22 § 12 LC does not entail a prohibition of employing on the basis of a relationship other than an employment relationship.¹⁶ However, if the work met the *de facto* premises specified in Article 22 § 1 LC, then *de iure* it would be work performed under an employment contract;¹⁷ also, irrespective of the name and type of contract executed by the parties, irrespective of whether it would be one of the contracts under civil law (mandate, specific work, agency, “innominate”),¹⁸ “self-employment” (e.g. in the case of the so-called “ostensible entrepreneurs”)¹⁹ or “a management contract”,²⁰ etc.

The scope of Article 218 § 1a CrC, the Supreme Court points out (though, not mentioning the regulation of Article 8 (2a) of the Social Insurance Act), “covers only persons who are employees within the meaning of Article 2 LC and Article 22 § 1 and § 11 LC, thus persons employed on conditions characteristic to the employment relationship, irrespective of the name of the contract concluded by the parties; findings in this regard are determined in a criminal case by the court, according to the principle of jurisdictional independence expressed

¹⁶ As aptly pointed out by Radecki “where a civil law contract was not concluded only to conceal the true employment relationship, that is, it truly is a civil law contract (mandate contract, agency agreement, another service contract), which the parties may indeed execute, then the rights of e.g. the mandatary are not protected under Article 218 § 1 CrC”; Radecki, W., *Przestępstwa przeciwko prawom osób wykonujących pracę zarobkową. Rozdział XXVIII Kodeksu karnego. Komentarz*, Warszawa 2001, p. 30.

¹⁷ Cf. Kowalski, S., *Ochrona praw pracownika w kodeksie karnym. Zagadnienia teoretyczne i praktyczne*, Toruń 2014, p. 40.

¹⁸ Daniluk and Witoszko point out – analysing views expressed by legal scholars – that one should favour the stand that the term “employee” (even though in the context of Article 220 CrC, but also referring to Article 218 § 1a CrC) also refers to “persons which are not formally employed on the basis on an employment contact, an appointment, an election, a nomination or a cooperative employment contract (Article 2 LC), but in fact – performing acts under various, mostly ostensible, civil law agreements (e.g. mandate contract, contract for specific work) – they perform work under an employment contract”; Daniluk, P., Witoszko, W., *op. cit.*

¹⁹ Chobot, A., *Nowe formy zatrudnienia. Kierunki rozwoju i nowelizacji*, Warszawa 1997, pp. 168–169.

²⁰ Unterschütz, J., *Karnoprawna...*, pp. 69–71.

in Article 8 § 1 of the Code of Criminal Procedure”.²¹ This provisions stipulates *expressis verbis*, that the criminal court determines, at its own discretion, the factual and legal matters and is not bound by the determinations of another court or authority. In this context it is rightly taken up in the judicature that the principle of independence of jurisdiction of the adjudicating court specified in Article 8 § 1 CCP is one of the prime principles of criminal procedure; it is a consequence of application on the ground of the Code of Criminal Procedure of the principle of free appraisal of evidence under Article 7 CCP. “It means that for a ruling in a court’s criminal procedure, rulings of other courts or authorities are irrelevant even in factually similar cases. The only exception to this rule is introduced in Article 8 § 2 CCP in reference to valid determinations establishing rights or legal relationships”.²² One needs to agree with the thought expressed in the literature, that court determinations referred to in Article 8 § 1 CCP are “particularly important from the point of view of the notion of employing employees on the basis

²¹ The Supreme Court preceded this conclusion with an analysis, that “judicial decisions in terms of labour law devoted a lot of attention to the analysed subject matter, presenting homogeneous and consistent understanding in this matter, which proved helpful in reading the meaning of terms under this branch of law used in the criminal statute, including the term “employee” under Article 218 § 1a CrC. It is assumed, that the principal importance in the process of judicial examination of whether a given legal relationship is an employment relationship, lies with establishing the facts whether the work performed under the evaluated legal relationship truly has attributes named in Article 22 § 1 LC; for this purposes the circumstances and conditions in which a given person performs acts for the benefit of another entity under the law are examined, and only in the result of such examination is it decided whether these performances are provided in conditions indicating an employment relationship (see judgment of the Supreme Court of 17 October 2017, II UK 451/16). If employee characteristics prevail in the contract, such as reporting to the employer or absence of real possibility of the performance of the agreement by a person other than the employed, then we are dealing with an employment contract even if it was the parties’ will to execute a civil law agreement (see judgment of the Supreme Court of 7 June 2017, I PK 176/16). The literature notes that the character of the relationship and the content of an executed contract, not its name, decide whether a given person stays in an employment relationship or in an obligation relationship with the employing party. The features of an employment relationship – resulting directly from Article 22 § 1 LC – include provision of work in return for remuneration by the employee for the employer and under the supervision of this employer. The views of labour law scholars and commentators add to it features such as personal provision of work by the employee, unsolicited nature of the obligation and charging the employer with an economic, production and personal risk. The legislator, in Article 22 § 1¹ LC, established a specific principle for employment under the employment relationship, which means that any employment bearing the features of an employment relationship is by operation of law treated as employment under an employment relationship, regardless of the name of the contract executed between the parties (see Daniluk, P., Witoszko, W., op. cit., p. 93; Unterschütz, J., *Karnoprawna...*; Rączka, K., *Komentarz do art. 2 Kodeksu pracy*, LEX OMEGA dla Sądów 32/2018)”.

²² Thesis to an order of the Administrative Court in Katowice of 15 March 2017, II AKz 138/17, Lex No. 2333415.

of civil law agreements, referred to as »junk contracts«, which only »conceal« the fact that the employed person performs work under conditions typical to an employment contract”.²³

The commentator shares the *de lege ferenda* postulate, “for the protection under Article 218 § 1a CrC to cover also persons in employment relationships other a contract of employment”²⁴ and – which the Court does not refer to in the resolution in question – other than those specified in Article 8(2a) of the Social Insurance Act. In this case, in the law-making perspective, one needs to take into account not only “persons performing paid work” but also persons “performing work of a non-paid character”, that is *in genre*: persons “performing work”. Such a change should ensure protection not only to an employee in the meaning of the provisions of the labour law and social security law, but also any other person performing work irrespective of the basis of this performance; irrespective of whether it was performed under an employment contract or a civil law relationship. Regardless of whether the person performing work carries it out under an employment contract, an appointment, a nomination, an election, a cooperative employment contract, a volunteering contract, a contract for practical vocation training, an apprenticeship contract, a mandate contract, etc. The reasons of equity and the reasons of fairness require for all these persons to be protected with the possibility of applying a criminal sanction where the illegal practice of violating their right associated with the work performed by them (right resulting from the legal relationship that is the basis of the performed work, regardless of its type) or social insurance, reached the size justifying the application of legal and criminal repression.

The commentary’s author agrees in most part with the belief that “the scope of Article 218 § 1a CrC covers only persons who are employees within the meaning of Article 2 LC and Article 22 § 1 and § 11 LC”, though he deems it incomplete as one also needs to take into account Article 8(2a) of the act on social insurance, where – with regard to social insurance – the notion of an employee is slightly broader than the one included in the provisions of the Labour Code.

²³ Siwik, Z., op. cit., commentary to Article 218, thesis 4.

²⁴ This postulate, which is rightly pointed to in the discussed resolution and reminded of in the legal and constitutional perspective – needs to be addressed to “the law-making authority, as under the Polish legal system only the Parliament, not any court of any type of instance by means of a precedence ruling, is authorised to extend the limits of criminal liability on the basis of a specific provision”.

The commentator believes it legitimate that the subject-matter of protection of Article 218 § 1a CrC includes all employee rights resulting from an employment or social insurance relationship.

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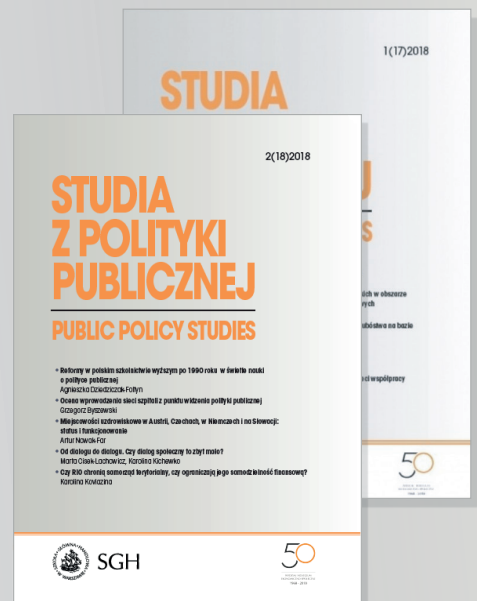
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