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Tomasz Szanciło
European University of Law and Administration in Warsaw, Poland
e-mail: tszancilo@ewspa.edu.pl
ORCID: 0000-0001-6015-6769

ARTIFICIAL INTELLIGENCE AND CASE CATEGORIES IN CIVIL PROCEEDINGS

Abstract

Under the Polish Constitution, administration of justice cannot be performed by someone (something) other than a human being. Therefore, the introduction of AI into civil proceedings may not take place in violation of the right to a court. This does not mean, however, that one should not consider possibly allowing AI to adjudicate civil cases and thus replace the judge, but it should rather apply to simple, uncomplicated and repetitive cases. Certainly, AI would not be affected by external factors, except for one – the introduction of appropriate assumptions into the algorithm. It must be remembered that AI is not human, so if it were to act as a judge, it would have to 'learn to think', be able to react to non-standard behaviour of witnesses and parties, analyse their behaviour, etc. It is worth considering piloting the introduction of AI at first instance in certain categories of cases, especially those that do not require extensive evidentiary proceedings based on evidence other than documents. Examples of such cases are 'franking' cases involving loans linked to a foreign currency. This would provide an opportunity to verify in practice the use of AI in justice for activities other than technical, opinion and adjudication support.

KEYWORDS

artificial intelligence, judge, 'franc' case, right to a court

SŁOWA KLUCZOWE

sztuczna inteligencja, sędzia, „sprawa frankowa", prawo do sądu

I. INTRODUCTION

The application of AI in civil proceedings must meet two conditions: it must not diminish the rights of citizens in the context of the right to a court (Article 45 of the Polish Constitution and Article 6 ECHR)[1] and should result in a reduction of the length of court proceedings, which is a problem not only in Poland but also in other countries.[2] Indeed, the long duration of court proceedings undermines confidence in the justice system. Moreover, the introduction of AI should not be an end in itself but should bring tangible benefits, exactly such as accelerating of judicial proceedings without diminishing the rights of citizens.

New technological tools, which in this area are referred to as LegalTech (Legal Technology),[3] in the provision of legal aid and justice are being introduced in various legal systems, although often not yet on a large scale. In Poland, such most popular tools are: software for the management of law firms, time recording software for lawyers, legal information systems, software for the creation of contracts and pleadings, as well as software supporting debt collection processes. These tools are, therefore, used primarily by law firms and not by the courts.

As far as the judiciary is concerned, a distinction should be made between the tools that improve the work of the court as an institution and the tools that improve the recognition of cases.[4] The former tools are known to Polish legis-

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, as amended and supplemented by protocols (Official Journal of the Republic of Poland 1993, No 61, item 284, as amended).

[2] See Joanna Klimczak, *Szybkość postępowań sądowych w Polsce i w innych państwach Europy* (Warsaw 2020) 7ff.

[3] See, e.g., Laura Kontiainen, *Legal Tech Con 2018 – How will AI shape the future of law* in Riika Koulu, Laura Kontiainen (ed), *How will AI shape the future of law*, Helsinki 2019, 17ff; Dariusz Szostek, in Dariusz Szostek (ed), *Prawo nowych technologii. LegalTech. Czyli jak bezpiecznie korzystać z narzędzi informatycznych organizacji, w tym w kancelarii oraz dziale prawnym* (Warsaw 2021) 3.

[4] It has been pointed out in the doctrine that the applications of AI in the judiciary should be distinguished from the process of automating proceedings – see Arkadiusz Bieliński, *Potencjalne*

lation in relation to civil proceedings, the latter are basically not used in Poland. Therefore, it can be hypothesised that the use of AI in the judiciary in Poland is basically non-existent, and this is not peculiar to Poland alone but to European legislation in general. However, it seems that in certain categories of cases, the use of AI would be beneficial, leaving aside, of course, aspects of a constitutional nature.

The application of tools streamlining the work of courts as institutions is primarily aimed at improving the exchange of pleadings so that the work of court clerks doesn't have to be involved and the circulation of letters between the court and the parties (their attorneys) is faster. In fact, this mainly concerns cases where the parties are represented by professional attorneys (attorneys-at-law, advocates, etc.),[5] with regard to, for example, the possibility of filing pleadings via an ICT system, the problem is the computerisation of the courts, which causes the deadline for the introduction of such a solution to be postponed. Moreover, implementation of some solutions has been forced by the Covid-19 epidemic, e.g. remote hearings.

II. AI IN VARIOUS ROLES IN COURT

1. GENERAL ASPECTS

As indicated, the introduction of AI into civil proceedings would have to solve the problem of protracted proceedings without adversely affecting the substantive adjudication of cases and depleting the rights of the parties (litigants). The key question is whether AI would need to be applied to the substantive adjudication of cases or only to ancillary issues in the administration of justice. Indeed, the scope of the potential use of AI in the judiciary is not analogous to that of other legal professions, since it is not about providing legal assistance to citizens but about adjudicating cases and issuing judgments on behalf of the Republic of Poland in procedural proceedings and decisions on the merits in non-procedural proceedings. It is, therefore, about resolving human disputes, i.e., a judgment must be given in a particular case which is in accordance with the law and at the same time corresponds to the sense of social justice.

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obszary zastosowania sztucznej inteligencji w postępowaniu cywilnym – czy obecnie ma to rację bytu i czy jesteśmy na takie rozwiązania gotowi? in Kinga Flaga-Gieruszyńska, Jacek Gołaczyński, Dariusz Szostek (eds), *Sztuczna inteligencja*, *blockchain, cyberbezpieczeństwo oraz dane osobowe* (Warsaw 2019) 62–64.

[5] See further Tomasz Szanciło, Beata Stępień-Załucka, *Sędzia robotem a robot sędzią w postępowaniu cywilnym w ujęciu konstytucyjnym i procesowym* (Prawo i Więź 2023) No 4, 230-231.

Therefore, in procedural terms, three possibilities must be kept in mind: 1) AI as an assistant judge; 2) AI as a court registrar; 3) AI as a judge. These are different roles performed by specific individuals in the administration of justice, with obviously different roles and powers. If AI were to perform the role of a judge, the question of the appeal procedure appears to be extremely important, and this applies both to ordinary appeals and extraordinary appeals. Indeed, it is possible to imagine (at this point only theoretically) a situation in which the court would be composed of robots in both instances, as well as in the Supreme Court. The question is whether such a solution is possible and, if so, whether it is advisable and necessary. In other words, is it conceivable that the case will be decided from start to finish without the involvement of the human factor, and would such a hearing of the case be acceptable not only from a substantive point of view but also socially acceptable.

2. THE ROLE OF A JUDGE IN THE ADMINISTRATION OF JUSTICE

The administration of justice in the Republic of Poland is exercised by the Supreme Court, common courts, administrative courts and military courts, with judicial proceedings being at least two-instance (Articles 175(1) and 176(1) of the Polish Constitution).

A judge performs tasks in the field of justice and legal protection, other than the administration of justice (Article 2 § 1 and 2a of the Act of 27 July 2001 – Law on the system of common courts[6]), except that in district courts (i.e. the lowest level courts) these tasks are also performed by court assessors,[7] with the exclusion of certain categories of decisions and cases, with the latter exclusion being relevant to civil cases, relating to cases heard in the family and juvenile division (Article 2 § 1a and 2a u.s.p.).[8] Judges, in the exercise of their office, are

[6] Consolidated text Official Journal of the Republic of Poland 2023, item 217, as amended; hereinafter: u.s.p.

[7] Before the expiry of 36 months of performing the duties of a judge, a judicial assessor may submit to the president of the competent regional court a request for appointment to the position of a judge of a district court; the assessment of the qualifications of the judicial assessor is carried out by a visiting judge appointed by way of a draw of lots by the president of the competent appellate court, and then the college of the district court assesses the candidature of the assessor for the vacant position of a judge of a district court (Article 106xa § 1–5 u.s.p.). The application for the appointment of an assessor to the position of a judge is presented to the President of the Republic of Poland by the National Council of the Judiciary.

[8] Pursuant to Article 2 § 1a(3) u.s.p., court assessors are not allowed to resolve cases in the area of family and guardianship law, cases concerning demoralisation and criminal acts of minors, treatment of persons addicted to alcohol and narcotic and psychotropic drugs, as well as cases belonging to the guardianship court under separate acts, with the exception of cases for permission to perform an act exceeding the scope of ordinary management of the property of a child or a person

independent and subject only to the Constitution and laws.[9] Judges shall be provided with working conditions and remuneration commensurate with the dignity of their office and the scope of their duties. A judge may not belong to a political party nor a trade union, nor engage in public activities incompatible with the principles of independence of the courts and independence of judges (Articles 178(1)-(3) of the Constitution of the Republic of Poland). Judges are irremovable, and a judge's removal from office, suspension from office, transfer to another seat or to another position against his or her will may take place only by virtue of a court decision and only in cases specified by law. A judge may not, without the prior consent of the court, be held criminally responsible or deprived of liberty. A judge may also not be detained or arrested, except in the case of being apprehended in the commission of an offence, if his or her detention is necessary to ensure the proper course of proceedings; the president of the locally competent court shall be immediately notified of the detention and may order the immediate release of the detainee (Articles 180(1)-(2) and 181 of the Constitution of the Republic of Poland).

As can be seen, the constitutional guarantees of judges' independence and autonomy from external factors are extensive. This is obvious, as the role of judges (assessors) in the administration of justice is the most important one; it is they who decide how it is exercised, what the content of judgments is, and how specific cases with which civil law subjects apply to the courts are decided. It is the manner in which the judges (assessors) handle the case, including the time taken to conclude them, and the procedural decisions (in particular judgments) they issue that determine the public's perception of the justice system. In other words, it is a combination of two aspects: the completion of the case within a reasonable time and the issuance of a correct and just decision on the merits (judgment or order on the merits). They should be guided solely by the law, their own convictions, principles of logical thinking, life experience, etc., in making their judgements, and, therefore, should not be exposed to any factors that could influence the content of their judgements.

3. AI AS A JUDGE

It is relatively easy to imagine the use of AI in the role of an assistant judge, whose tasks (in general) include taking actions that allow the judge to make a substantive ruling on the case, possibly concluding it in a different way. In practice, this comes down to the assistant judge drafting orders aimed at preparing court cases for hearing, collecting the necessary literature and case law, as well as

under guardianship in the form of simple acceptance or rejection of an inheritance, resolved in the course of proceedings for the statement of inheritance acquisition.

[9] With regard to court assessors, this principle is expressed in Article 106j(1) u.s.p.

drafting judgments and their justifications. The use of AI could particularly concern the preparation of a case for the judge to decide, i.e. the collection of relevant literature and case law (primarily available on the internet and in legal information systems) and the analysis of evidence. AI would certainly be able to determine much more quickly, for example, whether there are rulings on a particular matter or even a line of case law that should be taken into account when deciding a case,[10] reviewing available studies in this respect, etc. Correctly framing the task in this way would make it possible to limit the results to those desirable from the point of view of the substantive decision.

Similarly, AI would be useful in performing the tasks of a court registrar. Court registrars perform a very important range of tasks in the courts, but apart from (at least to some extent) the substantive adjudication of the case as a result of the issuance of an order for payment, all their other activities are ancillary and incidental to the proceedings aimed at resolving the case (issuing a judgment or order on the merits). It does not require the court registrar to perform thought processes in the context of resolving the entire case. The introduction of AI in this matter would, therefore, not affect the essence of the right to a court, while at the same time, it could significantly improve the performance of these activities. The biggest doubt when it comes to the application of AI in the administration of justice concerns its replacement of judges. This concerns the issuing of decisions on the merits. Of course, it is technically possible for a robot to make such rulings, as evidenced by the experience of other countries.[11] There are no such solutions in Poland, and no attempts have even been made to apply them, with the exception of assisting judges with tools such as access to legal information systems, without which (given the wealth of case law and doctrine) it is difficult to imagine the work of a judge. As indicated above, this includes streamlining the proceedings as such and assisting the judge in concluding (especially on the merits of) the case but not about replacing him or her with AI. Even leaving aside the constitutional concerns, the question is whether AI is capable of replacing the human mind, given the various nuances that differentiate cases which appear to be analogous. It is precisely these nuances, small differences, that may affect the content of the adjudication. For it must not be forgotten that AI is merely a certain algorithm.

[10] See Maria Dymitruk, *Sztuczna inteligencja w wymiarze sprawiedliwości?* in Luigi Lai, Marek Świerczyński (eds), *Prawo sztucznej inteligencji* (Warsaw 2020) 275ff.

[11] See further, e.g., Mariusz Załucki, *Nowe technologie a sprawność i przyszłość sądownictwa w Polsce* (Przegląd Sądowy 2021) No 11–12, 11–15.

4. POTENTIAL USE OF AI IN DIFFERENT CATEGORIES OF CIVIL CASES

In general, with a view to the rights and obligations of the parties to a civil law relationship, and thus the type of legal protection sought, three types of actions are traditionally distinguished:

(1) for the award of a benefit, the content of which is the demand to oblige the defendant to a specific behaviour: to give (*dare*), to do (*facere*), not to do (*non facere*), to stop (*omittere*) or to put up with (*pati*);

(2) to establish the existence or non-existence of a legal relationship or right;

(3) for shaping a legal relationship or a right.

The most common action is an action for an order, in particular, for the payment of a specific sum of money. However, it may also consist in a demand for non-pecuniary performance, e.g. for the delivery of an item of property, for an order or prohibition of a specific behaviour. In all cases, however, the demand must be clearly formulated and capable of being performed,[12] as, in principle, judgments in this type of case are enforceable. An action for the surrender of an object should, therefore, be specified by individualising the object – in the case of movable property, identifying marks should be given if possible (e.g. in the case of a car, a machine), while in the case of immovable property, not only the number of the land register which is kept for it (possibly a collection of documents) should be given, but also the town in which it is located, the precinct, the address, the registration number, the surface area, etc.

If an order for payment was to be issued (usually in the case of an action for payment, exceptionally for the delivery of variable items), AI could be applied (there is an appeal against such an order, which is heard by the court that issued the order for payment). An order for payment is issued on the basis of the allegations and evidence presented by the plaintiff if they are not in doubt and the action is not manifestly unfounded. The AI's analysis of the documents should give a proper assessment. After an appeal has been lodged against the order for payment, further evidence may come to light, including personal evidence (testimony of witnesses, parties) or expert witness evidence. It will, thus, be necessary to ask the right questions. Before the evidence can be analysed, it must be collected in accordance with the provisions of the Code of Civil Procedure. Therefore, if AI was to replace a human being, it would have to be able to carry out evidentiary proceedings. Of course, it is possible to introduce algorithms that comply with the code in this matter.

A different type of case is conducted in proceedings where no order for payment is issued and a copy of the statement of claim is served on the defendant,

[12] On the concept of 'benefit', see the resolution of 7 judges of the Supreme Court of Poland of 2 October 1997, III CZP 27/97, OSNC 1998, No 1, item 1; Piotr Osowy, *Powództwo o zasądzenie świadczenia w sądowym postępowaniu cywilnym* (Państwo i Prawo 2002) No 6, 51ff.

who can file for defence. This also applies to an action for benefits, such as an action to compel the defendant to behave in a certain way. For example, in cases for the protection of infringed or lost possession of a road, it is necessary to define the limits of the protection granted with an indication of how the lost possession is to be restored. It is not sufficient to declare the substance of the dispute in general terms by using the formula 'restores the infringed possession', but it is necessary to specify what it should consist in, depending on the nature of the infringement.[13] In actions for determination of a right or legal relationship (Article 189 of the Code of Civil Procedure), it is necessary to specify very precisely the right or legal relationship which the action is supposed to concern, as well as to indicate whether this is a question of determining the existence or non-existence of a specific right or legal relationship. This is because a claim of this type may be both positive (establishing the existence) and negative (establishing the non-existence), e.g. establishing the non-existence of a legal relationship due to the invalidity of a contract (in short: an action for a declaration of the invalidity of a contract). In actions for the modification of a right or legal relationship, on the other hand, the plaintiff should precisely specify the demand for the modification of the indicated right or legal relationship, i.e. the establishment,[14] dissolution,[15] or the transformation of it.[16] Thus, not only the legal relationship or right should be precisely indicated but also the direction of its modification, as this is the primary purpose of this type of action.[17]

The claimant is obliged not only to formulate the demand precisely (the petitum of the statement of claim; the applicant – the petitum of the application), but also to cite the facts justifying the demand and, therefore, relevant to the petition (*causa petendi*). The facts stated by the claimant to justify the demand make it possible to determine the legal basis on which the claimant's claim is based and the defendant's liability regime, and thus to delimit the framework of the dispute and the court's cognition. Indeed, the circumstances indicated constitute the factual basis justifying the application of an abstract legal norm, and the process of

[13] The judgment of the Supreme Court of Poland of 24 January 1985, III CRN 297/84.

[14] For example: for an obligation to make a declaration of intent – when the preliminary agreement meets the requirements on which the validity of the final agreement depends, in particular, the requirements as to form, the entitled party may enforce the conclusion of the final agreement (Article 390 § 2 in connection with Article 64 of the Civil Code); for the establishment of paternity (Article 84 of the Family and Guardianship Code).

[15] For example: dissolution of marriage by divorce (Article 56 of the Family and Guardianship Code), dissolution of a limited liability company (Article 271 of the Commercial Companies Code).

[16] For example: a claim for a reduction in the claimant's benefit or an increase in the benefit due to the claimant, or the invalidity of the contract in the case of exploitation (Article 388 of the Civil Code); a claim for the valorisation (change in the amount or manner of fulfilment) of a monetary benefit in the event of a significant change in the purchasing power of money after the obligation has arisen (Article 358^1 § 3 of the Civil Code).

[17] See further Kazimierz Korzan, *Orzeczenie konstytutywne w postępowaniu cywilnym* (Warsaw 1972) 19.

application of the law by the court consists in comparing the established state of facts with the state of facts stated in the hypothesis of a specific legal norm, i.e. in subsuming the facts of the case under a specific legal provision. The state of facts indicated by the plaintiff and subsequently established by the court, therefore, determines the application of the legal norm and is extremely important in determining the scope of the case being submitted to the court's judgment.[18] There is no basis for calling on the claimant (in the context of a formal review) to supplement the facts when the claimant has set out in the application the facts which make it possible to sufficiently determine the basis of its claim.[19] The determination (indication) of the facts to form the basis of the claim is the sole responsibility of the claimant, and neither the defendant nor the court may adjust these facts, especially in a direction that brings adverse procedural consequences for the claimant.[20] An award of a sum of money which, although within the quantum limits of the claim, is based on a different factual basis constitutes an award in excess of the claim. In other words, a judgment upholding a claim on a factual basis on which the plaintiff neither in the statement of the claim nor in the proceedings before the court of first instance based the claim constitutes an award in excess of the demand. Indeed, the court may not grant the claim on a factual basis other than that indicated in the application.[21] Pursuant to Article 321 § 1 of the Code of Civil Procedure, the court may not adjudicate as to the subject matter which was not covered by the demand, nor may it adjudicate in excess of the demand.

As regards, however, the legal basis of the claim, i.e. – in a nutshell – quotation of numbers of provisions (their content) which, in the plaintiff's opinion, are applicable to the action formulated by the plaintiff, it is uniformly accepted in the doctrine and judicature that it is not required to indicate the legal basis in the statement of claim or in further pleadings (as well as opinions of jurisprudence or representatives of science), and the quoted legal basis is not binding upon the court. This is the result of the applicable rules: *da mihi factum dabo tibi ius* ('state the facts, you get legal protection'), *iura novit curia* ('the court knows the law'). If it follows from the facts stated in the application that the claim is justified in whole or in part, it should be accepted to that extent, even if the claimant does not indicate the legal basis or if the legal basis indicated by him turned out to be incorrect.[22] Moreover, the plaintiff's establishment of a factual basis for the claim,

[18] See the judgment of the Supreme Court of Poland of 11 December 2009, V CSK 180/09.

[19] See, e.g. the decision of the Supreme Court of Poland of 14 December 2001, V CKN 1713/00; decision of the Court of Appeal in Katowice of 10 September 2012, V ACz 667/12.

[20] See the decision of the Supreme Court of Poland of 19 December 2000, V CKN 1790/00.

[21] See, e.g. judgments of the Supreme Court of Poland: of 29 October 1993, I CRN 156/93; of 18 March 2005, II CK 556/04, OSNC 2006, No 2, item 38.

[22] See, e.g. judgments of the Supreme Court of Poland: of 23 February 1999, I CKN 252/98, OSNC 1999, No 9, item 152; of 6 December 2006, IV CSK 269/06; Andrzej Struzik, *Da mihi factum dabo tibi ius* in Jacek Gudowski, Karol Weitz (eds), *Aurea praxis, aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego*, Vol I (Warsaw 2011) 599ff.

which may be qualified according to different legal grounds, justifies the court's consideration of each of them when hearing the case, and the application of one of them, even if different from that stated by the plaintiff, doesn't justify the allegation of a violation of Article 321 § 1 of the Civil Procedure Code.[23]

However, the indication by the claimant of the substantive law provisions intended to constitute the legal basis for the judgment, although not required, is not irrelevant to the course and outcome of the case, since it also indirectly determines the facts justifying the claimant's demand for judgment.[24] It may be the case that the plaintiff, in choosing a legal basis, not only sets out the boundaries of the facts relevant to the outcome of the case, but also sets out the boundaries of the defendant's defence, since the defendant undertakes that defence to the extent that it arises not only from the facts but also from the provision referred to; the defendant is not obliged to structure his defence in such a way as to rebut all the possible objections that may arise from all possible grounds for judgment.[25] This orientation cannot, however, imply that the court is formally bound by the stated legal basis of the claim, in particular, where the facts may support a different, adequate legal basis.[26]

In summary, the claimant in the statement of claim should indicate what he is claiming (petitum) and why (*causa petendi*), i.e. on what grounds he has a designated claim and seeks protection. He is not obliged to state the law, but he must specify whether this is a contract, tort, damage, etc., without necessarily using strictly legal language. AI is able to analyse documents as well as apply the law if the right algorithms are used. The biggest concern is the handling of personal evidence and the evaluation of testimony, including taking into account the testifying persons' behaviour, facial expressions, etc., and on this basis assessing the veracity of the testimony given. It should not be forgotten that AI is an algorithm that is adapted to schematic behaviour. Therefore, if AI was to play the role of a judge, it would have to 'learn to think', be able to react to non-standard behaviour of witnesses and parties, and analyse such behaviour, etc.

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[23] See the judgment of the Supreme Court of Poland of 25 June 2015, V CSK 528/14, OSNC-Additional Collection (OSNC-ZD) 2016, No D, item 73.

[24] See, e.g. judgments of the Supreme Court of Poland: of 23 February 1999, I CKN 252/98, OSNC 1999, No 9, item 152; of 11 December 2009, V CSK 180/09; of 11 March 2011, II CSK 402/10, OSNC-ZD 2012, No A, item 16; Karol Weitz, *Związanie sądu granicami żądania w procesie cywilnym* in Jacek Gudowski, Karol Weitz (eds), *Aurea praxis, aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego*, Vol I (Warsaw 2011) 695–697.

[25] See, e.g. the judgment of the Court of Appeal in Szczecin of 17 April 2015, I ACa 573/14; the judgment of the Court of Appeal in Warsaw of 12 September 2017, I ACa 519/15.

[26] See the judgment of the Supreme Court of Poland of 30 September 2016, I CSK 644/15; Tadeusz Żyznowski, *Uwagi o obligatoryjnych składnikach pozwu i obowiązkach stron stąd wynikających* (Rzecznik Patentowy 2006) No 1–2, 5ff.

5. 'FRANC' CASES

It seems that the cases in which AI could be used on a wider scale, also as a judge, could be the so-called 'franking' cases, concerning loans linked to a foreign currency – indexed and denominated. Such contracts contain prohibited contractual provisions, or the so-called abusive clauses, regulated by Articles 385^1-385^3 of the Civil Code and Article 3 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.[27] The definition of such a provision is contained in Article 385^1 § 1 of the Civil Code, according to which it constitutes a provision of a contract concluded with a consumer that has not been individually negotiated, if it shapes his or her rights and obligations in a manner contrary to good practice, grossly infringing his or her interests, with the proviso that this does not apply to provisions defining the main benefits of the parties, including the price or remuneration, if they have been formulated in an unambiguous manner. It is, therefore, possible to distinguish four prerequisites, the cumulative fulfilment of which determines whether a given term of a standard agreement may be deemed abusive:

(1) the provision has not been individually negotiated with the consumer, and, therefore, has not been subject to negotiation;

(2) the rights and obligations of the consumer shaped in this way are contrary to good practice;

(3) the rights and obligations thus formed grossly infringe the interests of the consumer;

(4) the provision of the agreement does not relate to the unambiguously formulated main benefits of the parties, including the price or remuneration.

The agreements in question contain provisions setting out the rules for converting the amount of the loan granted into the domestic currency at the time of the disbursement of the loan, the instalments to be paid in foreign currency (indexation clause), as well as the provisions related to exchange rate fluctuations (exchange rate risk clause). The former were found to be abusive, as they allow the bank to freely shape the foreign currency exchange rate, based on the bank's exchange rate tables. The amount of the bank's benefit and the amount of the consumer's benefit depend on the bank's free decision. Both the conversion of the amount of the loan into the domestic currency at the time of its disbursement and the reverse conversion at the time of the maturity of individual repayment instalments serve to determine the amount of the consumer's benefit. Such provisions, which empower the bank to unilaterally fix exchange rates, are non-transparent and leave room for arbitrary action by the bank. They thus burden the borrower with unpredictable risks and violate the equality of the parties. Moreover, the vague and unverifiable determination of the determination of exchange rates con-

[27] OJ EU L 95, 29; hereinafter: Directive 93/13.

stitutes an additional, hidden remuneration for the bank, which may be of considerable importance for the counterparty, the amount of which is freely determined by the bank.[28]

The exchange rate risk clause relates to a change (in this case of the amount of the benefit) due to fluctuations in the exchange rate of one currency against another. This may result in a worsening of the financial situation of one party and an improvement of the financial situation of the other party. However, the source of the risk is primarily the inability to accurately predict the direction of fluctuations in the currency exchange rate (increase or decrease in value) and the magnitude of these fluctuations. The borrower must be clearly informed that by signing a loan agreement linked to a foreign currency, he bears a certain exchange rate risk which, from an economic point of view, may prove difficult for him to bear in the event of a fall in the value of the currency in which he is paid in relation to the foreign currency in which the loan was granted. To this end, the trader must outline the possible exchange rate fluctuations and risks involved in taking out a loan in foreign currency.[29] Article 4(2) of Directive 93/13 must, therefore, be interpreted as meaning that the requirement, which states that the terms of the contract must be expressed in plain and intelligible language, obliges financial institutions to provide borrowers with sufficient information to enable them to make informed and prudent decisions. This requirement implies that the condition relating to exchange rate risk must be understood by the consumer both formally and grammatically, as well as with regard to its concrete scope so that a reasonably well-informed and sufficiently attentive and prudent average consumer is able not only to become aware of the possibility of a decrease in the value of the domestic currency in relation to the foreign currency in which the loan was denominated (or indexed), but also to assess the – potentially significant – economic consequences of such a condition on his financial obligations.[30] If, therefore, the consumer has not been duly informed of the exchange rate risk, i.e. the possibility of a fall in the value of the domestic currency against the foreign currency, so that he can assess the economic consequences of such a condition for his financial obligations in the event of fluctuations in the exchange rate, this means that, within the meaning of Article 4(2) of Directive 93/13, the terms of the contract have not been expressed in plain and intelligible language.[31] In practice,

[28] See, e.g. the judgments of the Supreme Court: of 22 January 2016, I CSK 1049/14, OSNC 2016, No 11, item 134; of 4 April 2019, III CSK 159/17, OSP 2019, No 12, item 115; of 7 November 2019, IV CSK 13/19; of 2 June 2021, I CSKP 55/21; of 27 July 2021, V CSKP 49/21.

[29] The judgment of the CJEU of 20 September 2018, C-51/17, OTP Bank and OTP Factoring, para 75; similarly, the judgment of the CJEU of 20 September 2017, C-186/16, Andriciuc and others, para 50.

[30] The judgment of the CJEU of 20 September 2018, C-51/17, para 78.

[31] The judgments of the Supreme Court of 3 February 2022, II CSKP 415/22.

this risk was almost entirely passed on to the consumer.[32] Undoubtedly, therefore, the contractual provisions shaped in this way fulfilled the prerequisites for declaring them abusive as outlined above. CJEU case law also emphasises that there is a significant contractual imbalance to the detriment of the consumer if unlimited exchange rate risk is imposed on the consumer.[33]

In this type of case, borrowers are (usually) seeking to establish the invalidity of the loan agreement and payment of a certain amount due to this invalidity. Such cases are primarily based on documents and, in addition (but not always), the borrowers are questioned on the circumstances surrounding the conclusion of the contract, particularly, whether they had been informed of the exchange rate risk. In fact, the problem concerns the analysis of contractual provisions that are standard (they can be sorted into several groups). The cases are repetitive, so in the vast majority, AI would be a sufficient tool to resolve them.

III. SUMMARY

The electronic (online) court Ultima Ratio at the Association of Notaries of Poland has already appeared in arbitration in Poland, using AI to a greater or lesser extent.[34] However, as far as the ordinary judiciary is concerned, there are no such solutions. Indeed, the first doubt concerns constitutional standards, as it is not possible under the Polish Constitution for the administration of justice to be carried out by someone (something) other than a human being. On the other hand, it is possible as regards technical acts,[35] opinions and supporting the judicial process; this issue does not require constitutional amendments, legislative changes would suffice. The situation is different with regard to AI's ability to administer justice, as this would require an amendment to the Polish Constitution.

The possible acceleration of court proceedings must not take place at the expense of the citizens' right to a fair trial. It seems that, even if the use of AI to

[32] See further Tomasz Szanciło, *Ustalenie nieważności umowy o kredyt frankowy a niedozwolony mechanizm klauzul przeliczeniowych i ryzyko kursowe* in Anna Hrycaj, Tomasz Szanciło (eds), *Upadłość i restrukturyzacja kredytobiorcy lub banku przy umowach o kredyt frankowy* (Warsaw 2024) 75–76.

[33] See the judgment of the CJEU of 10 June 2021, C-776/19 – C-782/19, BNP Paribas Personal Finance SA and BNP Paribas Personal Finance SA i Procureur de la République, para 103.

[34] See also Kinga Flaga-Gieruszyńska, *Zastosowanie sztucznej inteligencji w pozasądowym rozwiązywaniu sporów cywilnych* (Studia Prawnicze KUL 2019) No 3, 9ff.

[35] See Ewa Aleksandra Płocha, *O pojęciu sztucznej inteligencji i możliwościach jej zastosowania w postępowaniu cywilnym* (Prawo w Działaniu 2020) No 44, 286–287, who emphasizes the legitimacy of using AI as a tool to support work of translators, and in some cases even replace them.

adjudicate cases is allowed, the last word should still belong to a human being and, therefore, the remedy should lie with a 'human' court. As it is pointed out, while the very possibility of using AI to support court proceedings should be assessed positively, moderation must be exercised and human participation must be ensured, even if only at the final stage of the proceedings, which would provide a kind of safety buffer and guarantee that the right to a court and to have a case heard and treated as an individual problem is fairly realised.[36]

Possible admission of AI to adjudicate cases should rather concern simple, uncomplicated cases,[37] as well as repetitive ones. Particular reference is made to the European order for payment procedure and the EPU.[38] As far as the other categories of cases mentioned above are concerned, the application of AI should not be widespread, if at all possible. And even if the standardisation of cases for AI was applied, the legal system cannot be subject to constant change. If the legal system is clear and consistent, it is easier to carry out operations using AI, which are mainly mathematical and logical operations.[39]

Moreover, the widespread use of AI to resolve cases may lead to a deadlock in the law, in the sense that it is the 'human factor' that allows it to develop. The judgements made by AI could be standard and identical and the law would become rigid, without providing the necessary flexibility.[40] Standardisation is not always desirable.

Although the European Ethical Charter on the use of artificial intelligence in and around judicial systems was adopted in Strasbourg on 3-4 December 2018,[41] which sets out fundamental principles in this area (including respect for fundamental rights and the operation of AI under user control), introducing AI to adjudication (rather than just advice) in civil cases will not be easy. No special solutions for the judiciary are provided for in the annex to the Resolution of the Council of Ministers No 196 of 28 December 2020 'Policy for the Development

[36] Berenika Kaczmarek-Templin, *Sztuczna inteligencja (AI) i perspektywy jej wykorzystania w postępowaniu przed sądem cywilnym* (Studia Prawnicze. Rozprawy i Materiały 2022) No 2, 74–75.

[37] See, e.g. Mariusz Załucki, *Wykorzystanie sztucznej inteligencji do rozstrzygania praw spadkowych* in Luigi Lai, Marek Świerczyński (eds), *Prawo sztucznej inteligencji* (Warsaw 2020) 145ff; Maria Dymitruk, *Sztuczna inteligencja…*, 275ff; Aleksander Chłopecki, *Sztuczna inteligencja – szkice prawnicze i futurologiczne*, Warsaw 2021, 61ff.

[38] See Arkadiusz Bieliński, *Potencjalne obszary…*, 63–64; Anna Kościółek, *Wykorzystanie sztucznej inteligencji w sądowym postępowaniu cywilnym – zagadnienia wybrane* in Kinga Flaga-Gieruszyńska, Jacek Gołaczyński, Dariusz Szostek (eds), *Sztuczna inteligencja*, *blockchain, cyberbezpieczeństwo oraz dane osobowe* (Warsaw 2019) 69–71.

[39] Łukasz Goździaszek, *Perspektywy wykorzystania sztucznej inteligencji w postępowaniu sądowym*, Przegląd Sądowy 2015, No 10, 47, 55.

[40] See Beata Stępień-Załucka, *Sędziowski stan spoczynku. Studium konstytucyjnoprawne* (Warsaw 2019) 65.

[41] <https://rm.coe.int/ethical-charteren-for-publication-4-december-2018/16808f699c> accessed 1 October 2023.

of Artificial Intelligence in Poland from 2020'.[42] On the other hand, the doctrine postulates that the medium-term goal for the development of the judiciary was the complete digitalization of court records, including sending documents to and from the courts only in electronic form.[43]

This issue needs to be approached very carefully. Certainly, AI would not be exposed to external factors, with the exception of the introduction of appropriate assumptions to the algorithm. Pilot introduction of AI at first instance appears to be worth considering in some categories of cases, particularly those that do not require extensive non-document evidence-based proceedings. The 'franc' cases are an example of such cases.

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[42] <https://www.gov.pl/attachment/fc404068-7a75-4404-8167-a66fb73c067f> accessed 1 October 2023.

[43] Michał Kotalczyk, *Sztuczna inteligencja w służbie polskiego sądu – propozycje rozwiązań*, Iustitia 2021, No 21, 62–64.

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Marcin Baryń
European Commission
e-mail: mbaryn.research@gmail.com
ORCID: 0009-0003-5796-7423

Paweł Kowalski
SWPS University, Poland
e-mail: pkowalski@swps.edu.pl
ORCID: 0000-0003-2078-7712

CORRECTION OF ERRORS IN LEGAL ACTS OF THE EUROPEAN UNION

Abstract

The European Union (EU), epitomizing a composite political and economic entity, holds the responsibility for formulating legislation that synergizes the interests and mandates of its Member States. Situated within this expansive bureaucratic architecture, the authentic representation and articulation of overarching policy objectives and legislative aspirations remains an imperative challenge. The metamorphosis from these high-level objectives to the meticulous translation of legislative intent into codified legal documents situates itself at the nexus of theoretical jurisprudence and pragmatic implementation. This analysis seeks to delineate the complexities and procedural methodologies that characterize this pivotal legal metamorphosis.

KEYWORDS

European Union, legislation, corrigenda, correcting acts

SŁOWA KLUCZOWE

Unia Europejska, legislacja, sprostowanie, obwieszczenia o sprostowaniu aktów prawnych

I. INTRODUCTION TO EU LEGISLATIVE PROCESSES

The European Union (EU), epitomizing a composite political and economic entity, holds the responsibility for formulating legislation that synergizes the interests and mandates of its Member States. Situated within this expansive bureaucratic architecture, the authentic representation and articulation of overarching policy objectives and legislative aspirations remains an imperative challenge. The metamorphosis from these high-level objectives to the meticulous translation of legislative intent into codified legal documents situates itself at the nexus of theoretical jurisprudence and pragmatic implementation. This analysis seeks to delineate the complexities and procedural methodologies that characterize this pivotal legal metamorphosis.

II. CHALLENGES IN MAINTAINING LEGAL PRECISION

Within such a framework, even the most rigorous administrative apparatuses are not immune to inadvertent errors, which might manifest themselves as typographical aberrations and incongruences in formatting, translation errors in multilingual jurisdictions or wrong formulation of the original intent.

While ostensibly minor, these discrepancies underscore the profound challenges intrinsic to maintaining legal precision within extensive institutional configurations. This endeavour is further accentuated within the EU, attributed to its operations spanning 24 distinct languages. This linguistic heterogeneity, indicative of the EU's vast cultural tapestry, might occasionally culminate in translational deviations or drafting oversights, inadvertently straying from the quintessential legislative intent. Beyond merely linguistic hurdles, there exists the potential for incongruities during the drafting process, where the foundational intent might not be assiduously mirrored.

In manoeuvring through this complex juridical landscape, the legal institutions of the EU, instrumental to the legislative framework, are persistently confronted with the monumental challenge of achieving both linguistic and legal coherence. Acknowledging the plethora of challenges inherent at both the supra-national

and individual member state echelons, entrenched legal mechanisms have been devised to redress any such discrepancies and assure alignment with the original intent. These mechanisms are diverse, encompassing those addressing elementary administrative oversights to those probing the more profound nuances of legal substance. While certain of these rectificatory approaches are anchored in established legal statutes, others have materialized through progressive jurisprudential traditions, enshrined within procedural guidelines and institutional directives. It is imperative to note that errors can arise not just from translation but also from the intricate process of drafting legal documents. Such drafting errors, while less frequent, can have profound implications on the legal interpretation of the acts.

In light of this context, this article embarks upon a bifurcated investigative trajectory. Primarily, it endeavours to demystify the array of corrective avenues extant within the EU's legislative ambit subsequent to its publication, traversing both established statutory avenues and emergent jurisprudential practices. Following this, the treatise shifts its focus to an assessment of these mechanisms, gauging them against foundational legal tenets, with a pronounced emphasis on ensuring clarity and comprehensibility. At the heart of this scholarly discourse lies the inviolable doctrine that legal instruments, whether in their nascent or amended form, must epitomize transparency and eschew ambiguity, thereby upholding the venerable principle of legal certainty for all implicated parties.[1]

It should be noted, as Fernand Ramos astutely observes,[2] that the number of detected errors in EU documents is substantial. However, this is not necessarily a negative revelation. The high number of detected errors signifies that there is a robust mechanism in place to identify these errors. This is a testament to the efficiency and meticulousness of the system. If such errors were undetected, it would indeed be a matter of greater concern. Drafting errors, in particular, can lead to ambiguities or unintended legal consequences, emphasizing the importance of rigorous quality control during the drafting phase.

Moreover, the fact that these errors are being identified and rectified post-publication indicates the EU's unwavering commitment to maintaining the integrity of its documents. This method of correcting mistakes before they lead to more significant issues underscores a proactive approach to problem-solving.

Considering the massive volume of EU translations since the mid-2000s, assuring quality becomes a daunting task. Given this immense scale, the number of corrections, as Ramos points out, is indeed acceptable. It's a testament to the

[1] Łukasz Prus, 'Zasada pewności prawa i ochrony uzasadnionych oczekiwań' in Robert Grzeszczak and Aleksandra Szczerba-Zawada (eds), Prawo administracyjne Unii Europejskiej (Instytut Wydawniczy Euro Prawo 2016).

[2] Fernando Prieto Ramos, 'Facing translation errors at international organizations: what corrigenda reveal about correction processes and their implications for translation quality' (2020) 41 Comparative Legilinguistics 97.

system's resilience that, despite such volume and inherent challenges, the process remains largely effective.

Furthermore, while striving for perfection is paramount, it is important to acknowledge that no system, especially one that handles such an extensive volume of translations, can be entirely devoid of errors. The essence lies in how these errors are addressed and managed. The EU's approach to correcting mistakes after their publication showcases its unwavering dedication to quality and precision.

The act of making these corrections also serves as a tangible reminder of the significance of quality assurance. This is especially relevant when the language services are grappling with productivity pressures. It emphasizes that even though speed is crucial, the quality of translations should never be compromised. So rather than pointing towards a flawed system, the detected errors underscore the EU's dedication to quality, transparency, and the ethos of continuous improvement. It highlights the system's adeptness in managing vast volumes of translations and underscores the pivotal role of both legal and linguistic considerations.

III. MECHANISMS FOR ERROR CORRECTION IN EU LEGAL ACTS

Correction of different types of errors in legal acts jointly adopted by the European Parliament and the Council, or only by the Council or only by the Commission require different procedures and are done via different means. Depending on whether an error affects the substance or not and depending on the rules applicable in a given EU institution it will be corrected via another legal act or a corrigendum.

In most of the cases, errors in legal acts adopted by the European Parliament and the Council or solely by the Council would be corrected via **corrigenda**. However, in some cases, where the corrected text would have to depart too far away from the original text and at the same time from the point of view of readability and clarity, it would be difficult to correct it via a corrigendum,[3] then such a correction would be published in an **amending act**.

If errors present in the original language version[4] of a Commission act were substantive, they would normally be corrected via a **correcting act**. Similarly,

[3] Such difficulties occur, e.g. when an amending act introduces bulk changes, i.e. modifies a term across the whole original act and then after its publication the legislator realises that in some provisions the changes did not make sense and they introduced interpretative doubts or even made the provisions impossible to apply.

[4] In most cases, EU legal acts are drafted in English (the other procedural languages not as frequently used are French and German) and they are subsequently translated.

substantive errors, which occurred as a result of translation would also be rectified in a form of a **correcting act**.

This article will first focus on corrective legal acts. Then, it will discuss corrigenda related to the substance. Thirdly, it will examine corrigenda rectifying non-substantive or obvious errors. As there are no legal acts directly regulating correction of errors in EU law and publicly available guidelines and instructions are limited, the analyses will be primarily based on examples.

IV. UNDERSTANDING CORRECTIVE LEGAL ACTS IN THE EU FRAMEWORK

Neither the Treaties nor the secondary legislation of the Union define what a legal act correcting another legal act is. There is no description or recommendation on when and how to draft such acts in the EU guide for drafters of legislation.[5] Correcting acts are not specifically mentioned in the Interinstitutional Style Guide[6] either.

However, from the legal point of view acts correcting other acts are no different from amending acts, which are simply legal acts, as defined in Article 288 of the Treaty on the Functioning of the European Union.

Correcting acts have a sole purpose to rectify errors in the act they correct. Nevertheless, there are also legal acts which both correct and at the same time modify the initial act. The intentions are usually clearly marked in the titles of correcting acts. There are, however, also rare cases where corrections are not mentioned in the titles themselves, but they are included in the content of amending acts.

Legal acts of the EU are generally published in the Official Journal of the European Union[7] in all the official languages.[8] One of the biggest differences between standard legal acts and correcting acts is that the latter might concern only several languages and not all. They contain a preamble explaining the reasons why

[5] Publications Office of the European Union, 'Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation' (2015).

[6] Publications Office of the European Union, 'Interinstitutional Style Guide' (2022). This document describes uniform stylistic rules and conventions which must be used by EU entities involved in creating the content of, inter alia, the Official Journal of the European Union.

[7] For more information on the Official Journal of the European Union see Council Regulation (EU) No 216/2013 of 7 March 2013 on the electronic publication of the Official Journal of the European Union [2013] OJ L69/1.

[8] Official languages of the European Union are governed by Regulation No 1 determining the languages to be used by the European Economic Community [1958] OJ 17/385.

this correcting act is needed, which languages are concerned and mention errors made in the original act. This part would be followed by enacting terms describing modifications brought by this act, its entry into force and, in some cases, an applicability date, if it is distinct from the entry into force date. Naturally, in the language versions in which errors have not been made, the enacting terms will not contain provisions on modification. Instead, there will be a statement that these articles, paragraphs or annexes do not concern this particular language.

V. EXAMPLES AND THEIR IMPLICATIONS

In order to get a better understanding of the nature and specificities of the correcting acts, in the lack of openly available guidelines or instructions, they need to be analysed. Those presented below picture different types of errors rectified by several types of legal acts adopted in the recent years.

One such example is Commission Regulation (EU) 2023/1199.[9] It corrects errors introduced by Commission Regulation (EU) 2017/1505[10] replacing annexes to Regulation (EC) No 1221/2009 of the European Parliament and of the Council.[11] Different mistakes were discovered in Danish, Hungarian, Italian, Lithuanian and Polish language versions. Other languages were not affected. The preamble of the correcting act explains that the errors changed the substance of certain provisions. The entry into force of this act was twenty days after its publication, being a standard period for regular legal acts of the EU.

Another interesting example is Commission Implementing Decision (EU) 2022/2521.[12] It corrects an error made in the Romanian language of a decision adopted nearly twenty years before, therefore, much earlier than Romania joined the European Union. The corrected act published in this language by mistake

[9] Commission Regulation (EU) 2023/1199 of 21 June 2023 correcting certain language versions of Regulation (EC) No 1221/2009 of the European Parliament and of the Council on the voluntary participation by organisations in a Community eco-management and audit scheme [2023] OJ L159/1.

[10] Commission Regulation (EU) 2017/1505 of 28 August 2017 amending Annexes I, II and III to Regulation (EC) No 1221/2009 of the European Parliament and of the Council on the voluntary participation by organisations in a Community eco-management and audit scheme [2017] OJ L222/1.

[11] Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC [2009] OJ L342/1.

[12] Commission Implementing Decision (EU) 2022/2521 of 20 December 2022 correcting the Romanian language version of Council Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity [2022] OJ L326/57.

excluded certain products.[13] The entry into force of the correcting act again took place twenty days after its publication.

Commission Implementing Regulation (EU) 2018/353[14] rectifies several serious errors made in all language versions of an act adopted and published the year before. Among the corrected mistakes were repealing the wrong acts, not repealing the correct ones and non-deletion of certain entries which should have been deleted. As it is stated in the preamble of the correcting act, the errors have resulted in some market disturbance.[15] It entered into force on the day of its publication, however, it is applicable retroactively from the day on which the act it corrected entered into force.

The sole reason to adopt Commission Implementing Regulation (EU) 2020/2198[16] was to introduce a missing code related to ethyl alcohol, which was forgotten in all language versions of the corrected legal act. Even though the Commission considered that the error did not raise any concerns,[17] it still decided to rectify it via a correcting act. It entered into force the day after its publication.

Commission Delegated Regulation (EU) 2020/1759[18] introduces an additional type of a trawl, which due to an error, was excluded in all language versions of the initial legal act. The Commission explains that its delegated regulation has a direct impact on the planning of the fishing season of Union vessels and on related economic activities.[19] The entry into force of the correcting act was the day after its publication. However, even though the corrected act applied from January 2018, the Commission decided that its Delegated Regulation (EU) 2020/1759 should apply retroactively only from January 2020.

An example of bulk corrections is Commission Regulation (EU) 2017/1347,[20] which rectifies all language versions of a directive of the European Parliament

[13] ibid recital 1.

[14] Commission Implementing Regulation (EU) 2018/353 of 9 March 2018 correcting Implementing Regulation (EU) 2017/1145 on the withdrawal from the market of certain feed additives authorised pursuant to Council Directives 70/524/EEC and 82/471/EEC and repealing the obsolete provisions authorising those feed additives [2018] OJ L68/3.

[15] ibid recital 7.

[16] Commission Implementing Regulation (EU) 2020/2198 of 22 December 2020 correcting Implementing Regulation (EU) 2020/1628 introducing retrospective Union surveillance of imports of renewable ethanol for fuel [2020] OJ L434/52.

[17] ibid recital 3.

[18] Commission Delegated Regulation (EU) 2020/1759 of 28 August 2020 correcting Delegated Regulation (EU) No 1394/2014 establishing a discard plan for certain pelagic fisheries in South-Western waters [2020] OJ L397/4.

[19] ibid recital 7.

[20] Commission Regulation (EU) 2017/1347 of 13 July 2017 correcting Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EU) No 582/2011 and Commission Regulation (EU) 2017/1151 supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to

and of the Council as well as three Commission regulations, all of them related to approval of motor vehicles. Most of the corrections concern technical errors. According to the Commission, it was necessary in order to ensure proper application of the affected legal provisions.[21] Additionally, one of the corrections introduces the date of application of amendments, which seemed to be forgotten in the original act. This Regulation entered into force three days after its publication.

In Commission Regulation (EU) 2020/1181,[22] errors in three languages (Danish, French and Slovak) present in three legal acts were corrected. The initial legal act contains inconsistences in translations, including translating two very different terms into one and the same term. The problem came from the fact that these words were related to a very significant aspect of the corrected pieces of legislation: fuels. The Commission explains that it rectified three legal acts via a single correcting act, as they form part of a framework, therefore, some of the errors affecting wording of one of the acts automatically affect the others.[23] This legal act entered into force twenty days after its publication.

It seems that the only time the European Parliament and the Council explicitly corrected their legal act via a correcting act is Directive 2005/75/EC.[24] The preamble of the latter specifies that a clerical error prevented the directive being corrected to fully achieve its aim, as certain alignments were not possible to be made. The correcting directive entered into force on the day of its publication with the obligation of transposition on the same future date as the initial act.

Sometimes the Commission decides to correct its earlier act and at the same time to amend it. An example of such a case could be Commission Regulation

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vehicle repair and maintenance information, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Regulation (EC) No 692/2008 [2017] OJ L192/1.

[21] ibid recitals 3, 6, 8 and 9.

[22] Commission Regulation (EU) 2020/1181 of 7 August 2020 correcting certain language versions of Directive 2007/46/EC of the European Parliament and of the Council establishing a framework for the approval of motor vehicles and their trailers, as well as of systems, components and separate technical units intended for such vehicles (Framework Directive), correcting certain language versions of Commission Regulation (EU) No 582/2011 implementing and amending Regulation (EC) No 595/2009 of the European Parliament and of the Council with respect to emissions from heavy duty vehicles (Euro VI) and amending Annexes I and III to Directive 2007/46/EC of the European Parliament and of the Council, and correcting the Danish language version of Commission Regulation (EU) 2017/2400 implementing Regulation (EC) No 595/2009 of the European Parliament and of the Council as regards the determination of the CO2 emissions and fuel consumption of heavy-duty vehicles and amending Directive 2007/46/EC of the European Parliament and of the Council and Commission Regulation (EU) No 582/2011 [2020] OJ L263/1.

[23] ibid recital 4.

[24] Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005 correcting Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2005] OJ L323/55.

(EU) 2020/1245,[25] which in all language versions corrects the description of the tests to be carried out on plastic materials and articles intended to come into contact with food. It also clarifies the points, which – as the preamble to this act says – could be erroneously interpreted.[26] Additionally, it amends the earlier regulation in order to reflect the newest scientific opinions directly related to the matters of this legal act. The Commission decided to give operators that comply with the corrected regulation the possibility to continue placing the concerned items on the market for some time in the future.

In several examples presented above, mistakes appear in all language versions, which means they were introduced already in the original language in which they were drafted and subsequently reproduced in translations. For this reason, corrections were made in all official languages of the EU. Also looking at responsible departments,[27] one could see they are the same ones which were responsible for the initial (corrected) act. In other words, it is a responsible policy department, and not a translation service, who is in charge of drafting the text.

However, in scenarios where only specific language versions of an initial (corrected) act are riddled with errors, it strongly alludes to missteps during the translation process. Corroborating this hypothesis, as reflected on the EUR-Lex information pages, the Directorate-General for Translation assumes responsibility for the corrective act's drafting.

VI. DEFINING SUBSTANTIVE ERRORS IN LEGAL ACTS

As already mentioned, correcting acts are adopted only if there are substantive errors in the initial legal acts. But what is a substantive error? Looking at the examples presented above, a very general conclusion can be drawn: it can be any error that affects the substance of the act. The gravity of mistakes can be very different: from erroneous provisions, which did not raise any concern, however for the sake of clarity the Commission decided to rectify them, through possible misinterpretations to those resulting in disturbance of the market. Further clarity as to the meaning of a substantive error can bring the analysis as to what a non-substantive error is, which will be developed in the next part.

[25] Commission Regulation (EU) 2020/1245 of 2 September 2020 amending and correcting Regulation (EU) No 10/2011 on plastic materials and articles intended to come into contact with food [2020] OJ L288/1.

[26] ibid recital 36.

[27] Departments responsible for drafting Commission's legal acts them are mentioned on EUR-Lex (https://eur-lex.europa.eu) under Document information/Miscellaneous information.

The practice of the Commission shows that errors present in the original language version directly touching the substance of a Commission act are rectified by the Commission generally following the same procedure which was used for adopting the initial act.[28] To be more precise, if an act has been adopted by an oral or written procedure,[29] the corrections are approved using the written procedure. In case an act has been adopted by an empowerment procedure,[30] the same procedure is used for approving the corrections, provided that the empowerment mandate includes such possibility. If it does not, the written procedure would be used in that case too. If an act has been adopted using the delegation procedure,[31] the same procedure is used for correcting substantive errors present in this act.

In 2022, there were 73 correcting acts published (it includes legal acts which are at the same time correcting and amending). All of them were Commission acts. Looking at the statistics for last years, one can notice that, in general, there is an increasing tendency for using this instrument.[32]

VII. RECTIFICATIONS THROUGH AMENDING ACTS

As highlighted above, sometimes rectifications are introduced via amending acts without mentioning neither in the title, nor in the text that some provisions correct errors which were introduced in the previous amending act. An example can be found in Regulation (EU, Euratom) No 1023/2013 amending the Staff Regulations of Officials of the European Union.[33] It introduced a new text of article 18(1) of the Staff Regulations correcting erroneous formulation brought by one of the previous amending acts – Regulation (EU, Euratom) No 1080/2010.[34] The latter one included, among others, changes related to the so-called 'lisbonisation', i.e. shifting of legal personality from the European Communities to the

[28] The authors verified numerous documents referred to in the Register of Commission documents: <https://ec.europa.eu/transparency/documents-register/ accessed> 3 September 2023.

[29] Rules of Procedure of the Commission [2000] OJ L308/28, arts 8 and 12.

[30] ibid art 13.

[31] ibid art 14.

[32] For instance, in 2000, the Commission published 8 correcting acts. In 2010, there were 11, while 4 years later it was 19 and, in 2018, already 27. Source: EUR-Lex, search performed on 3 September 2023.

[33] Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union [2013] OJ L287/15.

[34] Regulation (EU, Euratom) No 1080/2010 of the European Parliament and of the Council of 24 November 2010 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities [2010] OJ L311/1.

European Union. It stipulates that the words 'European Communities' shall be replaced by 'European Union', the words 'Community' and 'Communities' shall be replaced by 'Union' and 'any necessary grammatical changes shall be made'. As a consequence, Article 18(1) of the basic act would have to have the following wording: 'All rights in any writings or other work done by any official in the performance of his duties shall be the property of the Union [replacing the word 'Community'] to whose activities such writings or work relate'. Such a formulation would suggest that there is more than one Union. Moreover, it would not cover the rights relating to officials employed in the service of the European Atomic Energy Community. As this passage had to be completely re-written, a simple corrigendum would have not been a solution and the problem was solved with the next amending act.

The above method of combining amendments and corrections without explicitly mentioning the latter might be challenging for those who do not closely follow developments of a given piece of legislation. They will not be able to easily distinguish them. On the other hand, the purpose of an amending act is to provide for changes to another legal act and corrections can also be seen as changes, therefore, one could argue that this method is equally good to publishing a legal act amending and explicitly correcting errors, even if it is less informative.

VIII. THE ROLE OF CORRIGENDA IN EU LEGAL CORRECTIONS

In EU law, the term 'corrigenda' holds special significance. Derived from the Latin verb *corrigere*, meaning 'to correct', a corrigendum (singular of corrigenda) is an official way used by EU institutions to address and rectify errors, oversights, or inconsistencies in previously published legal texts. These errors can range from minor typographical mistakes to more substantial inaccuracies that might affect the interpretation or application of the law.

While the essence of a legal act remains unchanged, corrigenda ensure that the texts maintain their intended clarity, precision, and consistency across all official EU languages. Given the EU's commitment to multilingualism and the importance of ensuring that its legal acts are coherent and uniformly understood by its diverse citizenry, the role of corrigenda is paramount.

From the formal and strictly legal point of view, corrigenda are not legal acts. Article 288 TFEU does not list them in the closed catalogue of the legal acts of the European Union. There are no acts of secondary legislation which would set out rules concerning the publication of corrigenda, or would refer to their status. Therefore, issuing corrigenda should be considered rather as a convention. This convention is, however, strongly rooted in international law and more precisely in

the Vienna Convention on the Law of Treaties,[35] which in its Article 79 regulates correction of errors in texts or in certified copies of treaties.

Corrigenda are very different from legal acts both in its structure and content. They do not have their own individual title, as they always start with the words 'corrigendum to' followed by the name of the legal act they rectify. They do not have their own number, nor any preamble. Their wording is also very peculiar, as usually either they quote a concrete erroneous provision and then say 'read' putting the correct text underneath or state that the legal act being corrected 'should read as follows'. They do not contain a signature and do not have their own date of entry into force. In fact, corrigenda, unlike correcting acts, replace erroneous texts *ab initio*, which is again in line with the Vienna Convention on the Law of Treaties.[36]

Therefore, corrigenda can be viewed as not more or less than information on how a legal act subject to corrections should be read. As rightly pointed out by Michal Bobek,[37] a corrigendum derives its authority, including its legal force, the provisions concerning its temporal application, and also its legitimacy, from the text it rectifies.

The already mentioned Vienna Convention on the Law of Treaties[38] stipulates that the rectification can generally be done via three means: by using an instrument or instruments setting out the correction, by having the correction made in the text or by executing a corrected text by the same procedure as in the case of the original text. Rectification of errors in legal acts of the European Union via corrigenda seems to use quite much the first two ideas: punctually correcting the erroneous texts or republishing the full text of a legal act with corrections included in the text.

Corrigenda are published in the same series of the Official Journal of the European Union as the act they rectify.[39] Those rectifying the same errors can be published in one, multiple or all language versions. The latter case would suggest that the origin of mistakes was already in the language in which the text was drafted and subsequently repeated in translations. When a corrigendum covers less than all the official languages, the mistakes will rather be a result of erroneous translations. There are also corrigenda published at the same time in several languages, however covering different corrections in each language version.

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[35] The Vienna Convention on the Law of Treaties [1969] United Nations Treaty Series 1155/331. It entered into force on 27 January 1980.

[36] ibid, art 79.4. stipulates: The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.

[37] Michal Bobek, 'Corrigenda in the Official Journal of the European Union: Community law at quicksand' (2009) 34 European Law Review 950.

[38] The Vienna Convention on the Law of Treaties, art 79.1.

[39] For more information on the Official Journal of the European Union, see the EUR-Lex page 'Access to the Official Journal' <https://eur-lex.europa.eu/oj/direct-access.html> accessed 3 September 2023.

IX. ERRORS CORRECTED BY CORRIGENDA

In order to get a better understanding of the content covered by corrigenda and try to classify types of errors they correct, these corrigenda need to be analysed. Several examples of corrigenda to various types of legal acts adopted by different EU institutions in recent years are presented below.

1. CORRIGENDA PERTAINING TO THE GDPR REGULATION

Three corrigenda have been issued concerning the GDPR regulation.[40] The regulation itself was published in the Official Journal of the European Union on 4 May 2016 with the entry into force on 24 May 2016 and the applicability as from 25 May 2018.

The first corrigendum to this act was published on 22 November 2016 and concerns four languages (Estonian, German, Hungarian and Italian).[41] Corrections ranged from one to four per language, primarily addressing incorrect article references or grammatical mistakes.

The second corrigendum was published in all 24 official languages on 23 May 2018,[42] so only two days before this legal act started applying. It brought between 15 corrections on four pages in English to close to 80 corrections on 18 pages in Slovenian. Similarly to the first corrigendum, this one brought many corrections of obvious mistakes, like spelling, missing words, meaningless phrases and, in several cases, it modified imprecise vocabulary. However, in several language versions, among them English, French and Polish, it also slightly changed the conditions on when a data protection officer (DPO) should be appointed. According to the original version of Article 37(1)(c) of GDPR, 'the core activities of the controller or the processor consist of processing on a large scale of special categories of data pursuant to Article 9 and personal data relating to criminal convictions and offences'. The corrigendum corrected the text, so that 'and' became 'or'.

[40] 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) [2016] OJ L119/1.

[41] Corrigendum to 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) [2016] OJ L314/72.

[42] Corrigendum to 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) [2018] OJ L127/2.

The third corrigendum was published in 15 language versions, including German, Italian and Polish, on 4 March 2021.[43] It contained between one correction, in Polish and Slovak, to 181 corrections spread across 55 pages in Finnish. Generally speaking, the corrigendum corrected grammar mistakes, removed unnecessary words and corrected the wording in order to make the text internally more coherent and comprehensible. It is pivotal to note that such corrections, while seemingly minor linguistic adjustments, can have profound ramifications for the interpretation and application of the regulations. Precision in language is paramount, especially in a document as critical as the GDPR, which impacts the data protection rights of millions of citizens.

2. EXAMPLES OF OTHER CORRIGENDA

A recent example of a corrigendum rectifying – in favour of individuals – conditions for operating on the market is Corrigendum to Regulation (EU) 2021/2117.[44] In the original wording of this legislative act of the European Parliament and the Council it said that wine and wine products which meet certain labelling requirements applicable before December 2023 and which were produced and labelled before that date may continue to be placed on the market until stocks are exhausted.[45] The corrigendum, published in July 2023, in all language versions deleted the words 'and labelled', limiting this way the necessary requirements. Such rectifications that operate to the benefit of individuals underscore the flexibility and responsiveness of the EU's legislative system to current needs and challenges. The altered phrasing can significantly affect producers and suppliers, facilitating a more efficient distribution of products in the market.

Numerous corrigenda to other legal acts of the European Parliament and the Council or to those adopted solely by the Council simply rectify wrong references, codes, dates and numbers. An example can be Corrigendum to Council

[43] Corrigendum to 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) [2021] OJ L74/35.

[44] Corrigendum to Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union [2023] OJ L192/34.

[45] Reg 2021/2117, art 5(8).

Decision (CFSP) 2023/193,[46] whose sole purpose was to correct a wrong number of an entity in all languages. Another example can be Corrigendum to Council Directive (EU) 2020/262,[47] where again in all language versions a correction to a wrong paragraph was made.[48]

Other corrigenda correct or delete words which are unnecessary. An example can be Corrigendum to Regulation (EU, Euratom) 2022/2434,[49] which in all languages deletes the full erroneous title of a legal act it refers to in the text and replaces it with a short version. Another interesting example is Corrigendum to Regulation (EU) 2020/1784,[50] which inverses the order of certain expressions used in all the language versions of the corrected act.

As already mentioned and pictured in the context of some corrigenda to GDPR, there are also corrigenda only rectifying translation mistakes, in other words, errors which do not appear in the original version. The mistakes were made while translating and appear in particular language versions. An example can be Corrigendum to Regulation (EU) 2018/848,[51] which was published only in Polish and which corrects a reference to a wrong provision: instead of the word

[46] Corrigendum to Council Decision (CFSP) 2023/193 of 30 January 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ L142/42.

[47] Corrigendum to Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty, OJ L188/60.

[48] Other similar examples published in the same period are: Corrigendum to Council Regulation (EU) 2021/1173 of 13 July 2021 on establishing the European High Performance Computing Joint Undertaking and repealing Regulation (EU) 2018/1488 [2023] OJ L116/29, which in all languages introduced corrections of several mistakes concerning references to different legal provisions, Corrigendum to Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2023] OJ L137/71, which in all languages corrected an erroneous reference to a paragraph, Corrigendum to Council Regulation (EU) 2023/195 of 30 January 2023 fixing for 2023 the fishing opportunities for certain stocks and groups of fish stocks applicable in the Mediterranean and Black Seas and amending Regulation (EU) 2022/110 as regards the fishing opportunities for 2022 applicable in the Mediterranean and the Black Seas [2023] OJ L137/68, which was published in all EU languages and introduced different corrections in different language versions concerning various codes or Corrigendum to Regulation (EU) 2023/1230 of the European Parliament and of the Council of 14 June 2023 on machinery and repealing Directive 2006/42/EC of the European Parliament and of the Council and Council Directive 73/361/EEC) [2023] OJ L169/35, which corrected in all language versions a series of dates.

[49] Corrigendum to Regulation (EU, Euratom) 2022/2434 of the European Parliament and of the Council of 6 December 2022 amending Regulation (EU, Euratom) 2018/1046 as regards the establishment of a diversified funding strategy as a general borrowing method [2023] OJ L84/26.

[50] Corrigendum to Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) [2023] OJ L188/61.

[51] Corrigendum to Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 [2023] OJ L204/66 (Polish language version).

'paragraph' in the original version it said 'article'. Another interesting example is Corrigendum to Council Regulation (EU) 2023/1214,[52] which corrects in Danish, German and Polish languages mistakes introduced to this important legal act tightening restrictive measures against Russia in the context of its war against Ukraine. In Polish, the correction concerns a missing text in one of the entries in an annex, which changed a description of certain exclusions. In German, a reference to a wrong annex was rectified. The Danish version of this corrigendum introduces a bulk rectification of a wrongly translated term. It means that this term needs to be corrected across the whole legal act and necessary grammatical adaptations must be made.

When it comes to rectifications made by the Commission, they are very similar to those coming from the co-legislators or from the Council, with the significant exception that the corrigenda correcting Commission legal acts do not affect the substance. An example of rectifications made by the Commission is Corrigendum to Commission Implementing Regulation (EU) 2023/583.[53] It introduces in all language versions a missing address of an entity as well as a missing code. Another recent example is Corrigendum to Commission Implementing Directive 2014/98/EU,[54] which across all languages corrects the name of a species of pests. Corrigendum to Commission Delegated Regulation (EU) 2023/444[55] corrects a date until which the Member States have to produce a report for the Commission. The modification is in favour of the countries, as it changes November into December. These examples show that corrections made by the Commission are generally fairly simple and rectify obvious mistakes.

Similarly to rectifications of errors present in all the languages of Commission legal acts, also correction of translation errors in such acts – according to the

[52] Corrigendum to Council Regulation (EU) 2023/1214 of 23 June 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2023] OJ L204/65 (Polish, Danish and German language versions).

[53] Corrigendum to Commission Implementing Regulation (EU) 2023/583 of 15 March 2023 amending Implementing Regulation (EU) 2021/607 imposing a definitive anti-dumping duty on imports of citric acid originating in the People's Republic of China as extended to imports of citric acid consigned from Malaysia, whether declared as originating in Malaysia or not, following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council [2023] OJ L183/58.

[54] Corrigendum to Commission Implementing Directive 2014/98/EU of 15 October 2014 implementing Council Directive 2008/90/EC as regards specific requirements for the genus and species of fruit plants referred to in Annex I thereto, specific requirements to be met by suppliers and detailed rules concerning official inspections [2023] OJ L92/28.

[55] Corrigendum to Commission Delegated Regulation (EU) 2023/444 of 16 December 2022 supplementing Directive (EU) 2018/1972 of the European Parliament and of the Council with measures to ensure effective access to emergency services through emergency communications to the single European emergency number '112' [2023] OJ L68/182.

rules of this institution – cannot affect the substance.[56] An example can be Corrigendum to Commission Implementing Regulation (EU) 2022/195,[57] which was published only in the Polish language version. The rectification corrects a meaningless sentence and a missing phrase, mistakes which were repeated several times in the regulation, therefore, several passages had to be corrected. Another interesting example is Corrigendum to Commission Delegated Regulation (EU) 2020/1794,[58] which also was published only in Polish. It corrects a mistranslation and gives the proper term in different grammatical forms. Additionally, it rewrites one of the recitals correcting a similar term.

Naturally, errors do not only originate from the decision makers and translation services. As pointed out by Michal Bobek,[59] they can also come from the publisher of the Official Journal of the European Union, including its contracting companies. Mistakes can be introduced, e.g. during proofreading, preparing layout, formatting or assigning a sequential number to a legal act. Often for a reader it is difficult to say where the origin of errors is. A mistake which seems like one that could come from a publisher can be found in Council Implementing Regulation (EU) 2023/1298.[60] The original title of this legal act, as published in the Official Journal of the European Union, was 'Council Implementing Regulation (EU) 2023/…', so the sequential number normally assigned to each legal act seems to be forgotten. Corrigendum to this implementing regulation was published in all the official languages three days later and corrected solely the title in its part related to the missing number.[61]

[56] Commission, 'Empowerment to correct errors, including minor errors, in translation of acts adopted by the Commission' SEC(2008)2397.

[57] Corrigendum to Commission Implementing Regulation (EU) 2022/195 of 11 February 2022 amending and correcting Implementing Regulation (EU) 2020/683 as regards the information document, the vehicle approval certificates, the test result sheet and the certificates of conformity in paper format [2023] OJ L65/59 (Polish language version).

[58] Corrigendum to Commission Delegated Regulation (EU) 2020/1794 of 16 September 2020 amending Part I of Annex II to Regulation (EU) 2018/848 of the European Parliament and of the Council as regards the use of in-conversion and non-organic plant reproductive material [2023] OJ L214/234 (Polish language version).

[59] Michal Bobek, 'Corrigenda in the Official Journal of the European Union: Community law at quicksand' (2009) 34 European Law Review 950.

[60] Council Implementing Regulation (EU) 2023/1298 of 26 June 2023 implementing Regulation (EU) No 359/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran [2023] OJ L160I/1.

[61] Corrigendum to Council Implementing Regulation (EU) 2023/1298 of 26 June 2023 implementing Regulation (EU) No 359/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran [2023] OJ L163/105.

X. FORMS OF CORRIGENDA

Before delving into the rectification processes within the European Union institutions, it is pertinent to categorize the different forms of corrigenda. For the purposes of this analysis, we propose three primary forms:

- **listed corrections**, where errors and their corrections are enumerated
- **full republication**, where the entire legal act is republished with corrections integrated
- **annulment**, where the publication of a legal act is declared null and void

It is essential to note that this categorization is an authorial interpretation, stemming from the observed practices and in the absence of strict formal regulations on the matter.

When examining the rectification processes within European Union institutions, it is important to highlight the adaptable nature of corrigenda. While there are common practices and formats, the primary goal of corrigenda is clear and accurate correction of content. Given this, EU institutions have the discretion to tailor corrigenda based on the specific error being addressed. This flexibility ensures that legal clarity and precision are maintained, regardless of the specific format chosen. The most typical form of corrigenda is the one used in the above examples, whereby they contain a list of errors and their corrections. Each entry would refer to the legal provision which is being corrected. This would usually be followed by the word 'for:', after which the erroneous provision would be quoted. Subsequently, in the next line the word 'read:' would be placed and followed by the correct text or, in some cases, table or graph. There are some deviations from it, one of the examples can be found in Corrigendum to Commission Delegated Regulation (EU) 2023/1149,[62] published only in the Polish language version. It simply states that one of the legal provisions is to be replaced by the text, which is quoted below. It does not mention the erroneous provision.

In some cases corrigenda are published in the form of **full republication** of a legal act. It often takes place when there are too many corrections to be made, which would touch upon nearly the whole text, so rectifying them individually point by point could be confusing. On the one hand, it makes the text much more readable, as it does not require consolidating the corrections within the original text. On the other hand, as the corrections are not marked, it is more difficult to notice straight away what exactly has been rectified. In order to see it, a compar-

[62] Corrigendum to Commission Delegated Regulation (EU) 2023/1149 of 5 April 2023 correcting the Polish language version of Delegated Regulation (EU) 2022/2292 supplementing Regulation (EU) 2017/625 of the European Parliament and of the Council with regard to requirements for the entry into the Union of consignments of food-producing animals and certain goods intended for human consumption [2023] OJ L163/108 (Polish language version).

ison of the corrected text with the initial one has to be made. An ideal solution would be to present the text in a way that the consolidation service of the Publications Office of the European Union does in case of producing consolidated texts of EU legal acts.[63] Whenever a change is introduced by an amending act or a corrigendum with listed corrections, they would insert such a modification and mark it in the text.

An example of such rectification can be Corrigendum to Council Decision (EU) 2023/992,[64] which republishes the full text of the decision in all language versions. When comparing the corrected version with the original, it can be noticed that mistakes were made practically in every line of the enacting terms, where next to the names of the appointed members of the European Chemicals Agency's management board, nationalities instead of Member States were mentioned. The corrigendum also deleted unnecessary symbols, which were present in each line.

At certain moments of time, corrigenda in the form of full republication were commonly used. William Robinson[65] describes that in 2004 the European Union institutions rushed to publish a large number of legal acts before the accession of ten new Member States. As the time was not sufficient to prepare them according to the usual detailed procedures, they were published in a simplified manner on 30 April 2004. After the accession, 20 issues of the Official Journal containing 2 897 pages had to be republished in their entirety in all the official languages.[66] This was repeated following accession of Bulgaria and Romania in 2007, when republishing as corrigenda was needed to be done in all languages. This time the legal acts contained in 14 Official Journals amounted to 3 225 pages.[67]

Another form of rectification could be called a **corrigendum annulling publication**. Apart from the title, it contains a reference to the Official Journal of the European Union where the legal act it concerns was published as well as a statement that the publication of this act should be considered null and void. This form seems to be used when the whole publication of a legal act was by done by mistake. An example can be Corrigendum to Council Decision (EU) 2023/670[68]

[63] Consolidation in the EU institutional context means combining the provisions of a basic legal act and all subsequent amendments and corrections it underwent in a single text. Consolidation is a purely declaratory and unofficial simplification of the legislation. Consolidated texts are displayed on EUR-Lex.

[64] Corrigendum to Council Decision (EU) 2023/992 of 16 May 2023 appointing 16 members of the Management Board of the European Chemicals Agency (ECHA) [2023] OJ L141/67.

[65] European Parliament's Legal Affairs Committee, *Drafting European Union legislation* (2012) PE 462.442 (William Robinson's report).

[66] See the detailed list of Official Journals [2024] inside the back cover of OJ L244.

[67] See the detailed list of Official Journals [2007] inside the back cover of OJ L190.

[68] Corrigendum to Council Decision (EU) 2023/670 of 21 March 2023 amending Decision 1999/70/EC concerning the external auditors of the national central banks, as regards the external auditors of Banc Ceannais na hÉireann/the Central Bank of Ireland [2023] OJ L 89/6.

published on the 27 March 2023. The decision, which was the subject of this corrigendum, was published only four days before and it was supposed to take effect on the date of its notification.[69] This publication was pronounced null and void by the corrigendum. Subsequently, one day after the latter was published in the Official Journal of the European Union, a new version of the decision was promulgated in the same official gazette.[70] Another example could be Corrigendum to Commission Implementing Regulation (EU) No 793/2012,[71] which was published on 7 September 2012. It stated: 'the publication of Commission Implementing Regulation (EU) No 793/2012[72] is to be considered null and void'. The latter legal act was published the day before. A new version of this legal act was promulgated on 2 October 2012.[73]

In 2022, there were 137 corrigenda published in English, while in Polish there were 166 of them and in French 174. Across the years, there have been differences, however not significant ones.[74]

[69] Council Decision (EU) 2023/670 of 21 March 2023 amending Decision 1999/70/EC concerning the external auditors of the national central banks, as regards the external auditors of Banc Ceannais na hÉireann/the Central Bank of Ireland [2023] OJ L84/14.

[70] Council Decision (EU) 2023/714 of 28 March 2023 amending Decision 1999/70/EC concerning the external auditors of the national central banks, as regards the external auditors of Banc Ceannais na hÉireann/the Central Bank of Ireland [2023] OJ L93/96.

[71] Corrigendum to Commission Implementing Regulation (EU) No 793/2012 of 5 September 2012 adopting the list of flavouring substances provided for by Regulation (EC) No 2232/96 of the European Parliament and of the Council, introducing it in Annex I to Regulation (EC) No 1334/2008 of the European Parliament and of the Council and repealing Commission Regulation (EC) No 1565/2000 and Commission Decision 1999/217/EC [2012] OJ L244/30.

[72] Commission Implementing Regulation (EU) No 793/2012 of 5 September 2012 adopting the list of flavouring substances provided for by Regulation (EC) No 2232/96 of the European Parliament and of the Council, introducing it in Annex I to Regulation (EC) No 1334/2008 of the European Parliament and of the Council and repealing Commission Regulation (EC) No 1565/2000 and Commission Decision 1999/217/EC [2012] OJ L243/1.

[73] Commission Implementing Regulation (EU) No 872/2012 of 1 October 2012 adopting the list of flavouring substances provided for by Regulation (EC) No 2232/96 of the European Parliament and of the Council, introducing it in Annex I to Regulation (EC) No 1334/2008 of the European Parliament and of the Council and repealing Commission Regulation (EC) No 1565/2000 and Commission Decision 1999/217/EC [2012] OJ L267/1.

[74] For instance, in 2010, there were 74 corrigenda published in English, 101 in French and 125 in Polish. In 2014, there were 112 in English, 175 in French and 161 in Polish. Four years later, there were 103 in English, 119 in French and 139 in Polish. Source: EUR-Lex, accessed 3 September 2023.

XI. ADOPTION PROCEDURES IN DIFFERENT EU INSTITUTIONS

1. ADOPTION PROCEDURE AT THE EUROPEAN PARLIAMENT

Rectification of legal acts adopted by co-legislators at the European Parliament are regulated by the Rules of Procedure of the European Parliament.[75] Its rule no 241 requires the President of this institution to, where appropriate, refer a draft corrigendum to the responsible committee. This document – prepared by a lawyer-linguist of the European Parliament on the basis of a document received from the Council – is then examined by the committee. If the latter agrees with the proposal, it submits it to the Parliament. It is then announced at the next session and it is tacitly approved if within 24 hours a political group or 35 members do not request a vote. In case the corrigendum is not approved, it is sent back to the responsible committee which either presents its amended version or closes the procedure.

2. ADOPTION PROCEDURES WITHIN THE COUNCIL OF THE EUROPEAN UNION

The rules concerning adoption of corrigenda by the other co-legislator are included in the Manual of precedents for acts established within the Council of the European Union[76].

– First Procedure: This concerns cases when an error was introduced after the signature of a legal act. In such a case, the Council's lawyer-linguists prepare a corrigendum which is sent to their counterparts in the European Parliament. As soon as the latter agree to the text, it is published in the Official Journal of the European Union.

– Second Procedure: This concerns situations when an error was introduced at earlier stages. The Council's lawyer-linguists prepare a corrigendum, however this time the text is submitted not only to their counterparts at the European Parliament but also to the delegations of Member States. Once the time limit elapses and there are no objections from either the Parliament or the delegations, with the agreement of the Presidency, the corrigendum is published in the Official Journal of the European Union.

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[75] Rules of Procedure of the European Parliament (9th parliamentary term) <https://www.europarl.europa.eu/doceo/document/RULES-9-2019-07-02_EN.pdf> accessed December 2019.

[76] Council of the European Union, Manual of precedents for acts established within the Council of the European Union SN 1250/6/10 (REV 6) 176.

– Formal Procedure: There is also a third, the so-called formal procedure, which can be requested. If it is done, the Council on the ministerial level formally adopts the corrigendum, which is subsequently published the same way as in the previous cases.

For the acts adopted solely by the Council, the first two procedures are applicable.

3. COMMISSION'S AUTHORITY TO CORRECT LEGAL ACTS

The Commission, as an institution which also adopts legal acts, naturally has the competence to correct them. Corrigenda of Commission legal acts are generally done using the same procedure which was used to adopt the original act.[77] The College of Commissioners, according to its Rules of Procedure,[78] can delegate the adoption of management or administrative measures to the Directors-General and Heads of Department. This possibility was used in a decision adopted in 2017, whereby the Commission decided on delegating the power to correct obvious errors in its acts to its Secretary-General.[79] The decision replaced the previous authorization of 1977,[80] which became outdated. Delegating the power of correcting obvious errors to the Secretary General of the Commission is in line with Article 20(2) of the Rules of Procedure. The decision limits the power of the Secretary-General to correct obvious errors which do not affect the substance of corrected provisions of legal acts and which are not politically sensitive or important.

According to the decision,[81] obvious errors are those that are easily recognizable in the text. It provides examples like spelling, typing or printing errors, mathematical errors or the omission of one or more words or of part of the text. If errors appear as a result of translation from the original text, the Commission's Directorate-General for Translation (DGT) will be in charge of preparing a corrigendum. According to the Empowerment Decision[82] – three cumulative conditions must be met so that DGT can correct a mistake in the text: the error must appear in a translation; it must be evident in itself or when comparing the translation with the original; and it must not affect the substance of the text in its integrity. The empowerment was given to the Commissioner in charge of multilingualism, who,

[77] According to art 4 of the Rules of Procedure of the Commission, this institution takes decision via oral, written, empowerment or delegation procedure. The practice shows that for corrigenda the oral procedure is not used and replaced by the written one.

[78] Rules of Procedure of the Commission [2000] OJ L308/26 as amended, art 14.

[79] Commission, 'Commission decision of 12 July 2017 on delegation of the power to correct obvious errors in Commission acts' C(2017) 4898 final.

[80] SEC(1977) 2532/1

[81] Commission decision of 12 July 2017, recital 5. Even though recitals are not legally binding provisions of the text, they bring authentic interpretation.

[82] Commission, Empowerment to correct errors, including minor errors, in translation of acts adopted by the Commission SEC(2008)2397.

in May 2010, sub-delegated the power to correct errors to the Director-General of DGT.[83] DGT, through the services of its corrigenda team, prepares the text of the corrigendum, then consults the Legal Service of the Commission and the originating DGT to obtain their approval for correcting the act, following which DGT, after the approval of its own Director-General, can adopt the instrument.[84]

Independently from the decision-making procedure used by the Commission and irrespective of who is responsible for the adoption of the corrections, the service responsible for initiating the corrections is the one who was the author of the act to be corrected. If errors originate in translation, it will be the Directorate-General for Translation who will start the procedure. In all cases, the Legal Service has to be consulted to confirm the nature of the error (substantive, obvious) and the correct form of the correction.[85]

4. CORRECTIONS BY THE PUBLISHER

As mentioned before, corrigenda can also originate in mistakes made by the publisher of the Official Journal of the European Union or its contractors. When a published legal act deviates in its text from the one adopted and signed by the responsible EU institution(s) and the error is noticed only after publication, a procedure which results in publishing of a corrigendum can be launched. These corrigenda usually correct simple and fairly obvious mistakes.

XII. CONCLUSIONS

The European Union, representing a sophisticated amalgamation of political and economic objectives, grapples with the multifaceted task of developing legislation that integrates the varied interests of its Member States. Within this comprehensive bureaucratic structure, the translation of broad objectives into detailed legal directives exemplifies the intricate balance between theoretical legal principles and their practical application.

The breadth of the EU's legislative framework, while extensive, displays discernible gaps, particularly concerning corrigenda. The notable absence of explicit definitions in the Union's primary and secondary legal documents underscores an imperative for enhanced clarity and comprehensive guidelines.

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[83] Commission, Subdelegation of 5 May 2010, C(2010) 3031.

[84] Commission, Empowerment to correct errors, including minor errors, in translation of acts adopted by the Commission SEC(2008)2397, point 6.

[85] Commission, Commission decision of 12 July 2017 on delegation of the power to correct obvious errors in Commission acts, C(2017) 4898 final, art 2.

Correcting acts and corrigenda within the EU's legislative context serve roles beyond mere error rectification. Their significance, while ostensibly clear, is layered with subtleties that demand thorough understanding. The EU's commitment to multilingualism introduces additional challenges. Correcting acts and corrigenda may pertain exclusively to specific linguistic versions, emphasizing the paramount importance of precise translation and the inherent challenges of ensuring linguistic consistency.

A significant advantage of correcting acts is that, unlike corrigenda, they apply prospectively, unless there is a justifiable need for retroactivity. Their preamble provides for the opportunity to list errors and elucidate the reasons for correction. Their disadvantage is that as legal acts, they have to comply with a lengthy decision-making procedure, while mistakes should be rectified promptly. This might be one of the main reasons why it is widely used by the Commission, who as an executive body works permanently and can proceed fast in comparison to the European Parliament and the Council. As practice shows the co-legislators use corrigenda to correct all types of errors, including substantive mistakes. That simplifies and accelerates the procedure, although their retroactive application might at some instances be problematic for individuals, economic operators or administrations. Therefore, it would be recommendable that the European Parliament and the Council considers using corrective acts for rectifying substantive errors.

Another pivotal consideration is the delineation of substantive errors. Such errors, with potential implications ranging from textual discrepancies to considerable market disruptions, necessitate a structured and meticulous approach for identification and rectification.

The practice of the Commission in addressing such errors emphasizes the necessity of upholding legislative consistency and integrity. Recent observations, including data from 2022, suggest a discernible shift in dealing with errors with a heightened emphasis on correcting acts. Such trends warrant meticulous scrutiny to understand underlying motivations and potential implications.

The number of detected errors in EU documents is substantial. However, it also signifies that there is a robust mechanism in place to identify these errors.

In summary, as the EU continues its endeavours towards creating robust and unambiguous legislative frameworks, the intricacies and evolution of correction of errors in EU law remain central to these efforts, reflecting the dynamic and evolving nature of the Union's legislative processes.

Disclaimer

The information and views set out in this article are those of the co-author (Marcin Baryń) and should not be linked with the official opinion of the European Commission.

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Jakub J. Czepek
Cardinal Stefan Wyszyński University in Warsaw, Poland
e-mail: j.czepek@uksw.edu.pl
ORCID: 0000-0001-7741-7806

PROHIBITION OF COLLECTIVE EXPULSION OF ALIENS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

The European Court of Human Rights (ECtHR) refers to the issues regarding aliens and migration on numerous occasions. These cases concern, inter alia: illegal migration, deprivation of liberty of illegal migrants, conditions of their detention, illegal migrant minors, unaccompanied migrant minors, etc. The analysis of these issues involves numerous rights and freedoms enshrined in the Convention. However, there are only three provisions of the European Convention on Human Rights (ECHR) that do focus explicitly on aliens. Those guarantees include Article 16 (prohibition of restricting the public activity of aliens) and Article 4 of Protocol No 4 to the ECHR (prohibition of collective expulsion of aliens) and Article 1 of Protocol No 7 to the ECHR (procedural guarantees regarding the expulsion of aliens).

Despite very few explicit references to 'aliens' in the Convention, the judicial achievements of the ECtHR in this area are extremely extensive, actually incomparable to other international mechanisms for the protection of individual rights and freedoms. ECtHR has wide jurisprudence concerning Articles 2, 3, 5, 6, 8, 13 in this regard. Most of the issues concerning alleged violations of those provisions were subjected to analysis.

However, the very provision which clearly focuses on the prohibition of collective expulsion of aliens is often omitted or treated as 'secondary' provision in this regard. The main aim of this article is to focus solely on Article 4 of Protocol No 4 to the ECHR

and its role in the process of protecting the rights of aliens within the European Paradigm of their protection. The article will also seek to examine the current application of this provision.

KEYWORDS

collective expulsion, European Convention on Human Rights, European paradigm of the protection of aliens, migrants

SŁOWA KLUCZOWE

zbiorowe wydalanie, europejska konwencja praw człowieka, europejski paradygmat ochrony cudzoziemców, migranci

I. INTRODUCTION

In many aspects of its jurisprudence, the European Court of Human Rights (ECtHR) examines the issues regarding aliens[1] and migration[2]. These cases concern, inter alia: illegal migration, deprivation of liberty of illegal migrants, conditions of their detention, illegal migrant minors, unaccompanied migrant minors, etc. The analysis of these issues involves numerous rights and freedoms enshrined in the Convention.[3] However, the provisions of the European Convention on Human Rights (ECHR) do not focus explicitly on aliens. In fact, the only provisions of the ECHR mentioning *expressis verbis* aliens are: Article 16 (prohibition of restricting the public activity of aliens),[4] Article 4 of Protocol No 4 to the ECHR (prohibition of collective expulsion of aliens)[5] and Article 1 of Protocol No 7 to the ECHR (procedural guarantees regarding the expulsion of aliens)[6].

[1] Michał Balcerzak and others, *Prawo międzynarodowe publiczne* (Warszawa: Wolters Kluwer, 2023) 344-345; Wojciech Góralczyk, Karol Karski and Stefan Sawicki, *Prawo międzynarodowe publiczne w zarysie* (Warszawa: Wolters Kluwer, 19th edn, 2024), 293, 300-302.

[2] See, e.g. Karol Karski, 'Migration' in *International Law from a Central European Perspective* in Anikó Raisz (ed) (Miskolc-Budapest: CEA Publishing, 2022), DOI: 10.54171/2022.ar.ilfcec_10.

[3] Elżbieta Karska, 'Kilka uwag o uchodźstwie jako zagadnieniu prawnym' in Elżbieta Karska (ed) *Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego* (Warszawa, Cardinal Stefan Wyszyński University, 2020), 14-16, 19, 21.

[4] European Convention on Human Rights [04 November 1950] Article 16.

[5] ibid, Article 4 of Protocol No 4.

[6] ibid, Article 1 of Protocol No 7.

Despite very few explicit references to 'aliens' in the Convention, the judicial achievements of the ECtHR in this area are extremely extensive, actually incomparable to other international mechanisms for the protection of individual rights and freedoms. This follows from a broad interpretation of the provisions of the ECHR. Article 1 of the Convention guarantees the rights and freedoms provided for in the ECHR to 'everyone' under the jurisdiction of Contracting Parties,[7] and is, therefore, not limited to providing protection to nationals of Contracting Parties[8].

The Court's jurisprudence has been subjected to wide analysis in regard of aliens. Most of the issues concern alleged violations of Articles 2, 3 and 8 and those are subjected to analysis.[9] However, the very provision which clearly focuses on the prohibition of collective expulsion of aliens is often omitted or treated as 'secondary' provision in this regard. The main aim of this article is to focus on Article 4 of Protocol No 4 to the ECHR and its role in the process of protecting the rights of aliens within the European Paradigm of their protection.

II. THE SCOPE OF ARTICLE 4 OF PROTOCOL NO 4

Protocol No 4 was adopted on 16 September 1963. Apart from the prohibition of collective expulsion of aliens (Article 4), it also guarantees the prohibition of imprisonment for debt (Article 1), freedom of movement (Article 2) and prohibition of expulsion of nationals (Article 3).

As the ECtHR stated in *Hirsi Jamaa and Others v Italy*, the *travaux préparatoires* were not explicit as regards the scope of application and ambit of Article 4 of Protocol No 4.[10] According to *travaux préparatoires* on Article 4 of AP No 4, the provision initially was projected to provide for the possibility of individual expulsion of an alien 'only if he endangers national security or offends against *ordre public* or morality'.[11] Such expulsion would be possible, provided an effective remedy would be guaranteed to an alien 'who has been lawfully residing for more than two years in the territory of a Contracting Party'. An alien who has

[7] ibid, Article 1.

[8] Elżbieta Karska and others, *Human Rights in the European Paradigm of the Protection of Aliens* (Warszawa: Cardinal Stefan Wyszyński University, 2023) 24-25, DOI: 10.13166/hrQHLC7301.

[9] ibid.

[10] *Hirsi Jamaa and Others v Italy* [23.02.2012] app. no 27765/09 (ECtHR), § 174.

[11] Council of Europe, 'Collected Edition of the „Travaux Préparatoires" of Protocol No 4 to the Convention, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto', Strasbourg 1976, 200; <https://www.echr.coe.int/documents/d/echr/library_tp_p4_bil> accessed 25 March 2024.

been lawfully residing for more than ten years could be expelled 'for reasons of national security'.[12] The Committee decided that Article 4 should focus on the prohibition of collective expulsion and adopted the text 'Collective expulsion of aliens is prohibited'. The Explanatory Report clearly stresses that this provision refers also to stateless persons. It was also agreed that this provision could not be interpreted as in any way justifying measures of collective expulsion which may have been taken in the past.[13]

The final wording of Article 4 AP No 4 is very simple: 'Collective expulsion of aliens is prohibited'. This provision is of absolute character. It cannot be subjected to any limitations, because it does not provide any limitation clause.[14] It does not provide any restriction of the reasons for expulsion. According to the Explanatory Report, the Committee could not have accepted such a provision.[15] The text does not explicitly mention any particular procedures for lawful expulsion, as proposed in the original draft.[16] However, such procedures are required according to the ECtHR case law.

According to *travaux préparatoires* on Article 4 AP No 4, the term 'aliens' refers not only to those lawfully residing in the territory but 'all those who have no actual right to nationality in a State, whether they are passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality'.[17] In *Hirsi Jamaa and Others v Italy*, The Court stressed that according to the drafters of Protocol No 4, the word 'expulsion' should be interpreted 'in the

[12] ibid.

[13] Council of Europe, 'Explanatory Report to Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto', Strasbourg 16 September 1963, 11; <https://rm.coe.int/16800c92c0> accessed 25 March 2024.

[14] Andrzej Wróbel, 'Protokół 4' in Leszek Garlicki (ed), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 19-59 oraz do Protokołów dodatkowych*, Vol 2 (Warszawa: C.H. Beck, 2010), 610.

[15] Council of Europe, 'Explanatory Report to Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto' (n 13) 11.

[16] ibid; also 'Collected Edition of the „Travaux Préparatoires" of Protocol No 4 to the Convention' (n 11) 200ff.

[17] ibid, § 34. See also Góralczyk, Karski, Sawicki (n 1) 293; Marcin Wiącek, 'Prawo cudzoziemca do uzyskania statusu uchodźcy w świetle Konstytucji RP' in Elżbieta Karska (ed), *Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego,* Warszawa: Cardinal Stefan Wyszyński University, 2020), 159–174. See also Elżbieta Karska, Łukasz Dawid Dąbrowski, 'Qualifying for international and national protection under the Polish legal order: Some remarks in the context of the war in Ukraine', (2024) Stosunki Międzynarodowe | International Relations, DOI: 10.12688/stomiedintrelat.17794.1; Elżbieta Karska and Bartłomiej Oręziak, 'European Paradigm of the Protection of Aliens Categorisation of Foreigners Seeking International Protection in the European Union' (2024) 26(3) *International Community Law Review* 211–226, DOI: 10.1163/18719732-bja10123.

generic meaning, in current use (to drive away from a place)'. This definition is contained in the section relating to Article 3 of the Protocol, but according to the ECtHR, it can also be applied to Article 4 AP No 4. It should be understood that the *travaux préparatoires* do not preclude extraterritorial application of Article 4 of Protocol No 4.[18]

The prohibition of collective expulsion of aliens could not be properly examined without due reference to the Court's case law, the analysis of which is crucial to the proper examination of ECtHR standards regarding domestic practices and proceedings in this regard.

III. ECTHR JURISPRUDENCE REGARDING PROHIBITION OF COLLECTIVE EXPULSION OF ALIENS

For a number of years, the provision of Article 4 of Protocol No 4 was not raised very often. However, recurring migration crises that European countries have been facing over the recent decade, require certain developments of the ECtHR jurisprudence in this regard.

The Court perceives 'collective expulsion' under Article 4 AP No 4 as 'any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'.[19] The Court further clarified in *Čonka* that it did not mean that meeting the requirement of the reasonable and objective examination of the particular case of each individual would mean that 'the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No 4'.[20]

Article 4 AP No 4 prohibits 'collective' expulsions. In this regard, the emphasis should be placed on the amount of individuals affected by expulsion. In this regard, aliens, as a group, are compelled to leave a country, 'except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'.[21] The Court does not voice any requirements concerning a minimum number of individuals below which the collective nature of the expulsion would be called into question. In this regard, for determining whether there has been a violation of Article 4 of AP No 4, the

[18] *Hirsi Jamaa and Others v Italy*, § 174.

[19] *Čonka v Belgium* [5 February 2002] app. no 51564/99 (ECtHR) § 59; see also *Andric v Sweden* [23 February 1999] app. no 45917/99 (ECtHR) § 1.

[20] ibid.

[21] *N.D. and N.T. v Spain* [13 February 2020] app. no 8675/15, 8697/15 (ECtHR) § 193.

number of aliens affected by particular measure is irrelevant.[22] The 'collective' character of the expulsion does not need to be based on a special characteristic or a factor defining a group. The decisive criterion in this regard is the absence of 'a reasonable and objective examination of the particular case of each individual alien of the group'.[23]

The Court stresses the fundamental importance of procedure in relation to all alleged collective expulsions. The expulsion could not be perceived as 'collective' if it was preceded by the 'reasonable and objective examination of the particular case of each individual alien of the group'.[24] ECtHR also specifies that 'the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis'.[25]

The diligent procedural examination of each individual expulsion case is crucial for ensuring safeguards provided under Article 4 AP No 4. The ECtHR clearly stressed that the purpose of Article 4 AP No 4 is to prevent States from being able to remove a certain number of aliens without examining their personal circumstances and, therefore, without enabling them to put forward their arguments against the measure taken by the relevant authority.[26] In order to determine whether there has been a sufficiently individualised examination, it is necessary to consider the circumstances of the case and to verify whether the removal decisions had taken into consideration the specific situation of the individuals concerned.[27]

The Court requires sufficiently individualized examination of each case to determine the lack of 'collective' character of expulsions. The ECtHR clarified its approach in *Khlaifia and Others v Italy*. The Court referred to its previous case law and drew the line between 4 previous violations of Article 4 AP No 4 and the *Khlaifia and Others* case. In *Čonka*, the order to leave the country made no reference to the applicants' asylum request, whereas the asylum procedure had not yet been completed. Additionally, a number of people had been simultaneously summoned to the police station, in conditions that made it very difficult for them to contact a lawyer. In *Hirsi Jamaa and Others*, the applicants had not undergone any identity checks and the authorities had merely put the migrants onto military vessels to take them back to the Libyan coast. In *Georgia v Rus-*

[22] ibid, § 194.

[23] ibid, § 195; see also *Khlaifia and Others v Italy* [15 December 2016] app. no 16483/12 (ECtHR) § 237ff.

[24] *Khlaifia and Others v Italy*, § 237.

[25] *Georgia v Russia* (I) [3 July 2014] app. no 13255/07 (ECtHR) § 167.

[26] *Sharifi and Others v Italy and Greece* [21 October 2014] app. no 16643/09 (ECtHR) § 210; *Hirsi Jamaa and Others v Italy*, § 177; *Khlaifia and Others v Italy*, § 238.

[27] *Hirsi Jamaa and Others v Italy*, § 183; *Khlaifia and Others v Italy*, § 238.

sia (I), ECtHR noticed a coordinated policy of arrest, detention and expulsion of Georgians, who had been arrested under the pretext of examination of their documents and expelled after courts entered into preliminary agreements to endorse such decisions, without any legal representation or examination of the particular circumstances of each case. In *Sharifi and Others*, the migrants intercepted in Adriatic ports were subjected to 'automatic returns' to Greece and were deprived of any effective possibility of seeking asylum.[28]

In *Khlaifia and Others v Italy,* the Court decided that the expulsion of the applicants was not 'collective' within the meaning of Article 4 AP No 4. The ECtHR stated that events in question could be explained as the outcome of a series of individual refusal-of-entry orders and should be distinguished from the cases *Čonka*, *Hirsi Jamaa and Others*, *Georgia v. Russia (I)* and *Sharifi and Others.*[29] Contrary to these cases, the applicants in *Khlaifia and Others* underwent identification on two occasions, their nationality was established, and they were afforded a genuine and effective possibility of submitting arguments against their expulsion. The ECtHR noted that the applicants' representatives were unable to indicate the slightest factual or legal ground which, under international or national law, could have justified their clients' presence on Italian territory and preclude their removal.[30]

The Court's approach in *Khlaifia and Others* clearly shows the procedural minimum that should be satisfied in order for the expulsions not to be deemed 'collective'. The decision should be preceded by 'a reasonable and objective examination of the particular case of each individual alien of the group'.[31] This means providing access to a procedure enabling analysis of individual case in order to exclude automatism or arbitrary character of the procedure. However, this element should be analyzed individually, after the examination of particular circumstances and scope of the procedure in question.

The requirement of individual examination of cases is not the only measure countering 'collective' expulsions. The ECtHR also analyzed the possibility of accessing the territory of a State in a legal manner. The case *N.D. and N.T. v Spain* concerned two migrants, who attempted to enter Spain by scaling the fences surrounding the city of Melilla, a Spanish enclave on the North African Coast. Immediately after crossing the fence, they were apprehended by members of the Guardia Civil who took them back to the other side of the border, without any identification procedure or opportunity to explain their personal circumstances.[32]

The Court introduced the exception absolving the responsibility of a State under Article 4 AP No 4 in situations in which the conduct of persons who crossed

[28] *Khlaifia and Others v Italy*, § 242.
[29] ibid, § 252.
[30] ibid, § 253-254.
[31] *Čonka v Belgium*, § 59; *Andric v Sweden*, § 1.
[32] *N.D. and N.T. v Spain* [13 February 2020] app. no 8675/15 8697/15 (ECtHR) § 15-26.

a land border in an unauthorised manner, deliberately took advantage of their large numbers and used force, was such as to create a clearly disruptive situation which was difficult to control and endangered public safety.[33] The ECtHR introduced a test to examine compliance with Article 4 AP No 4 in relation to individuals crossing a land border illegally and subsequently being expelled. Firstly, the Court examines whether in the circumstances of the particular case, the respondent State provided genuine and effective access to means of legal entry, in particular border procedures. Secondly, if the respondent State provided such access, but an applicant did not make use of it, the Court will consider, in the context in issue and without prejudice to the application of Article 2 and 3, whether there were cogent reasons not to do so, which were based on objective facts for which the respondent State was responsible.[34] Lack of such cogent reasons might lead to being regarded as the consequence of the applicants' own conduct. This test was also applied later in similar cases.[35]

The key issue in this two-tier test is the determination whether the individual had genuine and effective access to procedures for legal entry. In *N.D. and N.T.*, the Court stated that Spain did provide genuine and effective access to procedures for legal entry.[36] The ECtHR reached similar conclusions in *A.A. and Others v North Macedonia*.[37] In *M.H. and Others v Croatia*, the Government did not provide any specific information regarding the asylum procedures at the border with Serbia, such as the location of the border crossing points, the modalities for lodging applications there, the availability of interpreters and legal assistance enabling asylum-seekers to be informed of their rights, and information showing that applications had actually been made at those border points. Due to lack of such information, the Court was unable to examine whether the legal avenue referred to was genuinely and effectively accessible to the applicants at the time.[38] In *Shahzad v Hungary*, the ECtHR noted that there were only two transit zones which enabled the applicant to legally enter Hungary. They were located approximately 40 km and 84 km respectively from the location to which the applicant was returned. In this regard, the Court considered that Hungary failed to secure the applicant effective means of legal entry.[39]

The above proves that the existing domestic regulations and measures play a key role in assessing whether the 'genuine and effective access to procedures for legal entry' was provided. The existing ECtHR case law in this regard clearly

[33] ibid, § 201.

[34] ibid.

[35] *Shahzad v Hungary* [8 July 2021] app. no 12625/17 (ECtHR) § 59ff; *M.H. and Others v Croatia* [18 November 2021] app. no 15670/18, 43115/18 (ECtHR) § 294ff.

[36] *N.D. and N.T. v Spain*, § 229.

[37] *A.A. and Others v North Macedonia* [5 April 2022] app. no 55798/16, 55808/16, 55817/16, 55820/16, 55823/16 (ECtHR) § 122.

[38] *M.H. and Others v Croatia*, § 300-301.

[39] *Shahzad v Hungary*, § 62-65.

shows that the analysis of the existing possibilities of legal access and procedures for entry requires separate examination of each individual case.

IV. PROHIBITION OF COLLECTIVE EXPULSION OF ALIENS: EUROPEAN PARADIGM AND CONTEMPORARY CHALLENGES

The concept of the 'European paradigm of the protection of aliens' is not limited only to the legal or institutional guarantees present in the European systems. Naturally, this paradigm consists of institutions and standards functioning within the structures of the Council of Europe and the European Union. This does not mean, however, that the European paradigm of the protection of aliens is shaped solely on the basis of the achievements of these two international organizations. The UN system should be seen as complementary to this paradigm.[40] In this regard, the 'European paradigm' should be understood as the overall sum of legal provisions, procedures and measures relating to the protection of aliens. This concerns both the international and domestic legal orders.

ECtHR focused on the prohibition of collective expulsion of aliens in the context of recent developments concerning migration crises in southern Europe and abuse of illegal migrants during the Polish-Belarusian border crisis. The migration crises concerning allegations of violation of Article 4 AP No 4 already were partly subjected to ECtHR analysis.[41] The Court also examined the issue of push-backs at the Polish-Belarusian border, however, prior to the events taking place in 2021-2022.

In *M.K. and Others v Poland,* the Court examined the existence of a systemic practice of misrepresenting the statements given by asylum-seekers in the official notes drafted by the officers of the Border Guard serving at the border checkpoints between Poland and Belarus. The irregularities in the procedure concerned the questioning of foreigners arriving at the Polish-Belarusian border at the relevant time, including lack of proper investigation into the reasons for which they sought entry into Poland,[42] which was also confirmed by the judgments of the Supreme Administrative Court.[43]

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[40] Elżbieta Karska and others (n 8) 69-70. See also Elżbieta Karska, 'Słowo wstępne | Introduction'in Elżbieta Karska, Uchodźcy. Aktualne zagadnienia prawa i praktyki (Warszawa: Cardinal Stefan Wyszyński University, 2017), 9.

[41] E.g. *Hirsi Jamaa and Others v Italy*; *Khlaifia and Others v Italy.*

[42] *M.K. and Others v Poland* [23 July 2020] app. no 40503/17, 42902/17, 43643/17 (ECtHR) § 174.

[43] ibid; Case II OSK 1752/18 26 July 2018 Supreme Administrative Court (Naczelny Sąd Administracyjny), LEX no 2529020P; Case II OSK 2766/17 17 May 2018 Supreme Administrative Court (Naczelny Sąd Administracyjny).

In respect of Article 4 AP No 4, the ECtHR stressed that even though individual decisions were issued with respect to each applicant, they did not properly reflect the reasons given by the applicants to justify their fear of persecution. The applicants were not allowed to consult lawyers and were denied access to them, even when their lawyers turned up at the border checkpoint and demanded that they be allowed to meet their clients.[44]

The independent reports in this regard constituted an exemplification of a wider State policy. The reports noted a consistent practice of: holding very brief interviews, during which the foreigners' statements concerning the justification for their seeking international protection were disregarded; emphasis being placed on the arguments that allowed them to be categorised as economic migrants; and misrepresenting the statements made by the foreigners in very brief official notes, which constituted the sole basis for issuing refusal-of-entry decisions and returning them to Belarus, even in the event that the foreigners in question had made it clear that they wished to apply for international protection in Poland.[45] The applicants attempted to cross the border legally and tried to make use of the procedure for lodging applications for international protection that should have been available to them under domestic law,[46] which was different from the situation in *N.D. and N.T. v Spain*.[47]

The subsequent Polish-Belarusian border crisis up to now had two phases: in 2021-2022 and in 2024. It started from an incident concerning the forced landing of a Ryanair passenger plane[48] in 2021 and following sanctions imposed by EU. At that time, the Belarusian President Alexander Lukashenko threatened EU that he would allow 'migrants and drugs' to flood into western Europe if sanctions were imposed on his country.[49] In August 2021 and subsequent months, thousands of illegal migrants attempted to cross Belarusian borders and get to Poland, Lithuania, and Latvia. Belarusian authorities aided illegal migrants in getting to their territory by air and then accompanied them to the border. A. Lukashenko admitted that the involvement of Belarusian border troops in the process is 'absolutely possible'.[50]

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[44] ibid, § 206.

[45] ibid, § 206–208.

[46] ibid, § 207.

[47] *N.D. and N.T. v Spain*, § 231.

[48] E.g. 'Guterres deeply concerned over 'forced landing' and arrest of Belarus opposition journalist, as condemnation grows' UN News (24 May 2021) <https://news.un.org/en/story/2021/05/1092642> accessed 25 March 2024.

[49] 'Belarus dictator threatens to 'flood EU with drugs and migrants'' The Week (28 May 2021) <https://www.theweek.co.uk/news/world-news/europe/952979/belarus-dictator-threatens-flood-eu-with-drugs-migrants-avoid-sanctions> accessed 25 March 2024.

[50] Steve Rosenberg, 'Belarus's Lukashenko tells BBC: We may have helped migrants into EU' BBC News (19 November 2021) <https://www.bbc.com/news/world-europe-59343815 accessed 25 March 2024; Elżbieta Kużelewska and Agnieszka Piekutowska, 'Belarus' Violation of Inter-

The ECtHR referred to the 2021-2022 Polish-Belarusian border situation. It communicated cases and decided to indicate interim measures in *R.A. and Others v Poland*[51] and *H.M.M. and Others v Latvia*.[52] The applicants in both cases wanted to enter Latvia or Poland, allegedly to seek international protection. However, they were unable to enter these states or return to Belarus. The applications concerned 73 individuals who, inter alia, raised violation of Article 4 of Protocols No 4[53] to the ECHR.[54] Recently (in June and July 2024), the Chamber of the ECtHR relinquished its jurisdiction both in *R.A. and Others v Poland* and *H.M.M. and Others v Latvia* in favour of the Grand Chamber. This means that both cases will be examined by the Grand Chamber.

In 2024, the Court also examined the case *Sherov and Others v Poland,*[55] which touched upon the issue of migrants returning from Tajikistan to Ukraine. The Court referred to its prior judgment in *M.K. and Others v Poland*[56] and similarly decided that a decision issued at border checkpoints to refuse applicants entry into Poland constituted an 'expulsion' within the meaning of Article 4 AP No 4.[57]

The ECtHR also noted that the applicants were trying to make use of the procedure for accepting applications for international protection that should have been available to them under domestic law. They attempted to cross a border in a legal manner, using an official checkpoint and subjecting themselves to border checks as required by the relevant law. In this regard, the situation was completely different from *N.D. and N.T. v Spain*.[58] The Court stressed that the decisions refusing the applicants entry were not taken with proper regard to the individual situation of each of them and were part of a wider policy of not receiving applications for international protection from persons arriving at the Polish-Ukrainian border and of returning those persons to Ukraine, in violation of domestic and international law.[59] In this regard, the Court found violation of Article 4 AP No 4.

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national Obligations in Connection with Artificial Migration Pressure on the Belarus–European Union Border' (2023) 28(1) Bialystok Legal Studies | Białostockie Studia Prawnicze 39–52, DOI: 10.15290/bsp.2023.28.01.03; Mieczysława Zdanowicz, 'The Migration Crisis on the Polish–Belarusian Border' (2023) 28(1) Bialystok Legal Studies | Białostockie Studia Prawnicze 103–115, DOI: 10.15290/bsp.2023.28.01.06.

[51] *R.A. and Others v Poland*, app. no 42120/21 (ECtHR).

[52] *H.M.M. and Others v Latvia*, app. no 42165/21 (ECtHR).

[53] ibid.

[54] ibid, see also Krzysztof Sobczak 'ETPC nakazuje pomóc migrantom, ale nie wymaga ich wpuszczenia', Prawo.pl (26 August 2021) <https://www.prawo.pl/prawo/migranci-koczujacy-na-granicy-etpc-nakazuje-pomoc,510239.html> accessed 25 March 2024.

[55] *Sherov and Others v Poland* [4 April 2024] app. no 54029/17, 54117/17 and others (ECtHR).

[56] *M.K. and Others v Poland*, § 197-205.

[57] ibid, *Sherov and Others v Poland*, § 58.

[58] *Sherov and Others v Poland*, § 60; *N.D. and N.T. v Spain*, § 231.

[59] *Sherov and Others v Poland*, § 61-62.

V. CONCLUSIONS

In comparison to other rights guaranteed in the ECHR, The Court does not refer to Article 4 AP No 4 too often. However, in recent years a change in this regard could be noticed. Prohibition of collective expulsion of aliens has been raised in a substantial number of judgements. The Court also developed its case law in this regard. The importance of this provision cannot be overestimated, especially in the context of the European paradigm of the protection of aliens.

The original wording of Article 4 AP No 4 (‘*Collective expulsion of aliens is prohibited’*) seems to be leaving very little room for any exceptions. However, Court’s jurisprudence, e.g. *Khlaifia and Others v Italy*, clearly proves that this provision may not be interpreted in absolute terms. ECtHR case law focuses on individual approach to every illegal migrant’s case and existence of effective procedural framework within the domestic legal system.

The Court will soon be facing the issue of ‘weaponization’ of illegal migrants by the Belarusian regime. The forthcoming Grand Chamber judgments in *R.A. and Others v Poland* and *H.M.M. and Others v Latvia*, have the potential to be important stance, both in the course of development of ECtHR jurisprudence on Article 4 AP No 4 and the European paradigm of protection of aliens. It is possible that *R.A. and Others v Poland* and *H.M.M. and Others v Latvia* will follow the Court’s line of jurisprudence in *Khlaifia and Others*. However, as the Grand Chamber judgments in both cases are still yet to come, the Court will most probably seek to balance both the interest concerning protection of rights of migrants and the necessity of protection of national borders.

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Agnieszka Szpak
Nicolaus Copernicus University, Toruń, Poland
e-mail: aszpak@umk.pl
ORCID: 0000-0001-7601-1230

THE USE OF WATER AS A WEAPON UNDER INTERNATIONAL HUMANITARIAN LAW WITH SPECIAL EMPHASIS ON THE DESTRUCTION OF THE NOVA KAKHOVKA DAM

Abstract

The research aim of this article is to identify the international humanitarian law regulations applicable to water resources and water infrastructure as well as to define their character. The connected research questions are: Are such regulations rather protective or allowing the use of water resources and infrastructure as a means of warfare?, Can such objects be attacked or destroyed in any circumstances?, How to legally classify the destruction of the Nova Kakhovka dam? This article in a comprehensive way examines the legal framework on water resources and infrastructure in international armed conflicts, taking into account the ongoing Russian aggression against Ukraine.

KEYWORDS

weaponization, water infrastructure, international humanitarian law, Russia-Ukraine war, Nova Kakhovka dam

SŁOWA KLUCZOWE

weponizacja, infrastruktura wodna, międzynarodowe prawo humanitarne, wojna rosyjsko-ukraińska, tama w Nowej Kachowce

I. INTRODUCTION

Water is extremely important for humans. Without water there is no life. Unfortunately, during armed conflicts water may become a victim as part of destroyed natural environment, but it may also be used as a means of warfare. Another term used to describe the latter process is 'weaponization' which signifies that water is used as 'a means of gaining advantage or defending oneself in a conflict or contest […,] an item, action, offensive capability, or mechanism used or intended to kill, injure, or coerce'.[1] There are two main ways water can be employed in land warfare: as an area-denial weapon and as a means of besieging and disrupting food and shelter supplies. One of the methods involves blowing up a dam to flood the lower area, aiming to prevent the enemy from fortifying or inhabiting the terrain. Alternatively, the purpose of targeting a dam might be to disable a hydroelectric plant or reservoir, thereby undermining the enemy's war economy. However, despite these possibilities, the success of flooding enemy territories or employing water as a siege engine is limited due to the constraints imposed by the terrain.[2] Tobias von Lossow indicates that there are 'three main ways to use water as a weapon, namely by making sure that there is either too little, or alternatively too much water – both of which involve manipulating quantity – or that water is unusable, by reducing its quality'.[3]

History knows many examples of destruction of water structures such as dams or dikes. Cyrus the Great allegedly captured Babylon in the 6th century B.C. in a remarkable manner. He is said to have accomplished this feat in just one night by redirecting an old artificial lake protecting the city back into the Euphrates River. This strategic move allowed his army to approach the city walls under the cover of darkness and surprise the defenders.[4] The earliest confirmed cases of intentional damage to dams and dykes for military purposes can be traced to the Eighty Years' War in the 16th and 17th century, when Dutch rebel groups fighting

[1] Marcus DuBois King, 'The Weaponization of Water in Syria and Iraq' (2015) 38 (4) Washington Quarterly 153, 155.

[2] Dam warfare (2014) <https://medium.com/war-is-boring/dam-warfare-3da6ee24518a> accessed 15 July 2024.

[3] Tobias von Lossow, 'The Rebirth of Water as a Weapon: IS in Syria and Iraq' (2016) 51 (3) The International Spectator, 82, 87.

[4] Dam warfare (n2).

against the Spanish army in the then Spanish Netherlands flooded some of the agricultural areas that had been painstakingly reclaimed from marshes and the sea in order to hinder the advance of Spanish troops, forcing them to go through new marshlands. With the development of river damming and drainage techniques, such practices (which paradoxically fall under the 'scorched earth' tactics) could and have been used in warfare with increasing impact. In World War II, the destruction of dams as a means of warfare became widely known through the Dambusters raid in May 1943, when British forces targeted three German dams (Gillespie 2023).[5] The operation Chastise involved breaching multiple dams to disable power plants, but its long-term impact was minimal due to its one-time nature, as the Germans swiftly repaired the damage. However, the flooding resulting from the breaches caused significant loss of life, with over a thousand German civilians and numerous Allied prisoners in downstream camps losing their lives (Dam warfare 2014; Schmitt 2022a).[6]

In terms of the sheer loss of life, another area-denial tactic far exceeded the Chastise operation. In June 1938, during the Second Sino-Japanese War, hundreds of thousands of Chinese civilians died when the Nationalist Chinese breached the Yellow River dykes.[7] The Nationalists' estimates indicated that approximately 800,000 people lost their lives due to the flooding, which resulted in the destruction of shelter, food scarcity, and drinking water pollution. Later, the Communists provided a higher estimate, suggesting that up to 900,000 civilians died. Additionally, the disastrous event resulted in between three and 12 million people being displaced from their homes.[8]

Similarly, during the Korean War, the United States military, operating under the United Nations, launched a bombing campaign against North Korean hydroelectric facilities. For example, the Hwachon hydroelectric dam complex became a focal point of military action, illustrating a strategic target during an international armed conflict. U.S. Navy aircraft executed a strike on the dam in 1951, as it was identified that North Korea could exploit it to obstruct the advancement of U.N. forces by causing flooding downstream. Moreover, the dam's gates could be manipulated to lower the water level, creating opportunities for river crossings to attack the flanks of the U.N. forces.[9]

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[5] Alexander Gillespie, 'Why blowing up Ukraine's Nova Kakhovka dam is a war crime' (2023) <https://www.aljazeera.com/opinions/2023/6/8/blowing-up-ukraines-nova-kakhovka-dam-is-a-war-crime> accessed 15 July 2024.

[6] Dam warfare (n2); Michael N. Schmitt, 'Attacking dams – part I: customary international law' (2022), <https://lieber.westpoint.edu/attacking-dams-part-i-customary-international-law/> accessed 15 July 2024.

[7] Dam warfare (n2).

[8] ibid.

[9] Schmitt (6); for more examples see also Marwa Daoudy, 'Water weaponization in the Syrian conflict: strategies of domination and occupation' (2020) 96 (5) International Affairs 1347; L. J. del Giacco, Renato Drusiani, Luca Lucentini and Susanna Murtas, 'Water as a weapon in

In April 2014, Islamic State fighters in Iraq and Syria successfully captured the Nuaimiyah Dam in western Iraq, despite previous attempts to protect the site. Following the takeover, they deliberately overflowed the dam to force Iraqi soldiers out of their positions upstream and to deprive civilians downstream of access to drinking water.[10] In another recent example of 2017, the US in its war against ISIS reportedly conducted airstrikes on Syria's Tabqa Dam despite warnings that the attack could potentially result in tens of thousands of deaths.[11] Luckily, the attack caused only equipment failure, leading to a perilous increase in the water level of the reservoir. This prompted warnings to individuals living downstream about the potential risks. As a consequence of the attack, Turkey also took measures to reduce the flow of water into the reservoir from upstream sources.[12] Most recently, on 6 June 2023, Russia destroyed the Nova Kakhovka dam on the Dnipro river, which will be analyzed in more detail below. For those who seek more extensive information, the Pacific Institute, a think tank based in the United States, manages a database called the *Water Conflict Chronology* (https://www.worldwater.org/conflict/map/), which encompasses historical incidents worldwide from 2500 BC to 2010 AD.

Against this historical background, the research aim of this article is to identify the international humanitarian law (IHL) regulations applicable to water resources and water infrastructure as well as to define their character. The connected research questions are: Are such regulations rather protective or allowing the use of water resources and infrastructure as a means of warfare?, Can such objects be attacked or destroyed in any circumstances?, How to legally classify the destruction of the Nova Kakhovka dam? The research methods include institutional-legal analysis, case study and, supplementarily, critical analysis of the literature. The institutional-legal analysis focuses on the examination of international treaties such as the Geneva Conventions of 1949 and the Additional Protocol I to the Geneva Conventions, which constitute the main legal reference points in this paper, as well as on other documents which may not be binding (such as the Geneva List of Principles on the Protection of Water Infrastructure of 2019[13]). The case study method is used to examine the mentioned case of water weaponization during the Russian aggression against Ukraine.

The structure of the paper is as follows: after this historical and factual introduction and methodological considerations, section 2 will outline the relevant

ancient times: considerations of technical and ethical aspects' (2017) 17 (5) Water Science and Technology: Water Supply, 490–98; King (n1) 155.

[10] Dam warfare (n2).

[11] Gillespie (n5).

[12] Schmitt (n6).

[13] Geneva Water Hub, 'Geneva Principles on the Protection of Water Infrastructure' (2019) <https://www.genevawaterhub.org/sites/default/files/atoms/files/gva_list_of_principles_protection_water_infra_www.pdf> accessed 15 July 2024.

IHL provisions applicable to water resources and infrastructure, while section 3 will concentrate on the case study of war in Ukraine. Finally, in the conclusions, the author will attempt to answer the research questions. In a comprehensive way, this article examines the legal framework on water resources and infrastructure in international armed conflicts, taking into account the ongoing Russian aggression against Ukraine. Its novelty consists, on the one hand, of the fact that it combines hard and soft law instruments and applies them to the evaluation of, in particular, the destruction of the Nova Kakhovka dam. On the other hand, to the author's knowledge, this is the first article systematically examining the case of the destruction of the Nova Kakhovka dam and applicable international humanitarian legal regulations protecting critical water infrastructure. The only available analyses are legal blog examinations to which this paper refers. Still, this paper is the first scientific, legal article to systematically and comprehensively analyze the destruction of the Nova Kakhovka dam and identify applicable IHL norms.

II. INTERNATIONAL HUMANITARIAN LAW AND WATER INFRASTRUCTURE

While international humanitarian law does not specifically address the use of water resources and water infrastructure as a tactic or tool of warfare, certain rules within IHL have potential relevance in prohibiting such practices. These rules may apply to safeguarding civilian populations, ensuring access to essential resources, and preventing unnecessary harm to the environment during armed conflicts. Although not directly addressing water-related tactics, IHL aims to protect civilians and minimize the destructive impact of warfare on vital resources and infrastructure.

Express provisions on water and water infrastructure may be found in Articles 26 and 89 of the Geneva Conventions III and IV respectively (both on sufficient drinking water that has to be accessible for prisoners of war and civilian internees respectively), Articles 54 and 14 of Additional Protocols I and II respectively (on prohibition of starvation and destruction of drinking water installations, supplies and irrigation works), Articles 56 and 15 of Additional Protocols I and II respectively (on the protection of dams) and Articles 35 and 55 of Additional Protocol I referring to the environment. There are also soft law instruments such as the Geneva Principles on the Protection of Water Infrastructure of 2019. The considerations below will be limited only to international armed conflicts as such is the nature of the conflict between Russia and Ukraine.

1. GENERAL PRINCIPLES OF IHL

Before delving into the details of specific provisions on water resources and water infrastructure, it is necessary to outline the basic IHL regulations. One fundamental principle in IHL is that of distinction, mandating that all parties in a conflict must consistently differentiate between civilians and civilian objects, and combatants and military objectives. Consequently, any attacks should exclusively target military objectives and combatants, while ensuring the protection of civilians and civilian objects (Article 48 of Additional Protocol I). Military objectives, in turn, are defined in Article 52 (2) of Additional Protocol I in the following way: 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.[14]

Adhering to another principle, that of proportionality, requires that those responsible for planning an attack must exercise caution to avoid launching an offensive against a legitimate military target if it could result in unintended loss of civilian lives, injuries to civilians, damage to civilian property, or overall harm that exceeds the expected direct military advantage. This concept, often referred to as 'collateral damage', requires a careful assessment of the potential consequences to ensure that the expected military gains do not disproportionately outweigh the potential harm to civilians and civilian assets (Article 57 of Additional Protocol I).[15]

In every attack, precautionary measures should be taken, such as verification of the military character of the objective to be attacked as well as selection of the methods and weapons that will avoid or, if not possible, minimize incidental civilian losses (Article 57 (2)).[16] These basic principles apply to attacks against water resources and water infrastructure, including dams. Generally, a dam is not a military objective by nature, but it may turn into such by its use or purpose (Milanovic 2023).[17] Tom Dannenbaum argues that the road crossing the Nova Kakhovka dam might be classified as a military objective based on its strategic position because it serves as a crucial route for Ukrainian troops to advance into Russian-controlled territory and plays a vital role in the Ukrainian counter-offensive. In regular circumstances, objects that meet this criterion can be considered legitimate targets, provided that reasonable efforts are made to minimize civilian

[14] 'Additional Protocol I on the Protection of Victims of International Law' (1977) <https://ihl-databases.icrc.org/ihl/INTRO/470> accessed 15 July 2024.

[15] ibid.

[16] ibid.

[17] Milanovic M. (2023) *The Destruction of the Nova Kakhovka Dam and International Humanitarian Law: Some Preliminary Thoughts*, https://www.ejiltalk.org/the-destruction-of-the-nova-kakhovka-dam-and-international-humanitarian-law-some-preliminary-thoughts/.

casualties, and the expected impact on civilians does not outweigh the military advantage expected[18] (in other words, in accordance with the principle of proportionality).

2. PROHIBITION OF ATTACKING OBJECTS CONTAINING DANGEROUS FORCES

These provisions should be read together with Article 56 of Additional Protocol I, which actually takes precedence over provisions on precautions and proportionality in attack. It is important to note that Article 56 is placed in Chapter III entitled *Civilian objects*, which suggests that, as a rule, dams (also dykes and nuclear power plants enumerated in the provision) are regarded as such. The ICRC Commentary to Additional Protocol I (1987, 669) affirms that and elaborates it further, stating that dams are not permissible targets for attacks. When dams are deemed military objectives (in the meaning of Article 52) in exceptional circumstances, they are granted special protection, as outlined in Article 56 of the Protocol. This special protection is designed to ensure that such critical infrastructure is not unnecessarily targeted and that the potential consequences of attacking dams are carefully considered in line with the principle of proportionality to safeguard civilians and civilian properties.[19]

Article 56 in its relevant paragraphs states:

> 1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population. 2. The special protection against attack provided by paragraph 1 shall cease: (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support; […] (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support. 3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided

[18] Tom Dannenbaum, 'What International Humanitarian Law Says About the Nova Kakhovka Dam' (2023) <https://www.lawfaremedia.org/article/the-destruction-of-the-nova-kakhovka-dam-and-the-heightened-protections-of-additional-protocol-i> accessed 15 July 2024.

[19] 'ICRC Commentary to Additional Protocol I' (1987) <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-56/commentary/1987?activeTab=default> accessed 15 July 2024.

> for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces. 4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals. 5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations. 6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.[20]

The first paragraph establishes a rule that prohibits attacks on various targets, including dams. In the second paragraph, a limited exception is outlined to this prohibition. Initially, the ICRC introduced an absolute prohibition without exceptions, but after lengthy debates, the provision was modified to its current form.[21] The general prohibition against attacks applies even when the dam is considered a military objective, as previously defined. However, this basic prohibition is qualified by the use of the term 'if' – meaning an attack is prohibited 'if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population'. This exception can be referred to as the 'if not' exception – indicating that if there is no such risk, the attack would be considered legal. Similar regulations are applicable to military objectives located in the vicinity of a dam.

According to Dannenbaum,

> [i]n both respects the rule deviates from the ordinary law of armed conflict framework, pursuant to which military objectives may be targeted, with civilians and civilian objects protected from the effects of such targeting by the cumulative requirements of discrimination, proportionality, and precautions in attack.[22]

Consequently, the regulations outlined in Article 56 can be seen as specifying the fundamental principles of distinction, proportionality, and precautions in attack. Thus, the provisions in Article 56 take precedence; however, when an attack against a dam is legally permissible, the general principles of IHL still apply. In other words, dams receive specific protection in addition to the general rules of IHL. In the context of this topic, Dannenbaum (2022) indicates that '[b]y

[20] Additional Protocol I (n14).

[21] ICRC Commentary (n19) 668.

[22] Tom Dannenbaum, 'The attack at the Zaporizhzhia nuclear plant and Additional Protocol I' (2022) <https://Lieber.Westpoint.Edu/Attack-Zaporizhzhia-Nuclear-Plant/> accessed 15 July 2024.

prohibiting the targeting of what would otherwise qualify as clear military objectives, Article 56 alters the rule of distinction'. Likewise, Yoram Dinstein (2004, 93) emphasizes that 'the military character of an object is not always conclusive in justifying an attack against it'.[23]

As to the risk of 'release of the dangerous forces' and its consequences, what matters is the mere risk of such release evaluated *ex ante*. ICRC Commentary (1987, 669) interprets this provision in the following way: an attack against works and installations containing dangerous forces, including dams, would be legal if 'such an attack cannot cause severe losses', which means that those that decide upon the attack must be certain that no such losses will occur. ICRC Commentary clarifies that evaluation of the severity of the losses among the civilian population requires common sense and good faith when taking into account such factors as vicinity to populated areas and density of the population.[24] Hence, it is the duty of the attacking forces to prove that there is no risk of release of the dangerous forces. If the parties involved in the conflict lack full information during the planning of an attack, the law requires them to adopt a cautious approach, taking into account the potential grave danger to civilians and the environment. In such cases, the parties must abandon the attack unless they can ensure that any release of dangerous forces is impossible (e.g., by restricting the planned attack to non-essential elements of the systems) or that civilian residents in the area are not exposed to the risk of severe losses or injuries.[25] Michael N. Schmitt clarifies that the prohibition specifically applies to scenarios where the release of the dam's water leads to losses among the civilian population. In situations where civilians are injured or killed at or near the dam during the attack, not as a result of the water's release, the standard targeting rules (distinction and proportionality) govern the situation. For instance, if an attacker chooses to use anti-personnel or other weapons that are not likely to cause a breach of the dam, Article 56 would not be applicable, even if there is a likelihood of significant civilian casualties.[26]

The second express exception to attacking dams envisioned in Article 56 (2) (a) is a very narrow one. It requires meeting 'three substantive criteria and one procedural criterion'[27] or 'triple qualification'[28] plus being used 'for other than normal function'. Once again, and as is often the case in IHL, common sense and

[23] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004) 93.

[24] ICRC Commentary (n19) 669.

[25] Abby Zeith and Eirini Giorgou, 'Dangerous forces: the protection of nuclear power plants in armed conflict' (2022) <https://blogs.icrc.org/law-and-policy/2022/10/18/protection-nuclear-power-plants-armed-conflict/> accessed 15 July 2024.

[26] Michael N. Schmitt, 'Attacking dams – part II: the 1977 Additional Protocols' (2022) <https://lieber.westpoint.edu/attacking-dams-part-ii-1977-additional-protocols/> accessed 15 July 2024.

[27] Dannenbaum (n22).

[28] ICRC Commentary (n19) 671.

good faith play a vital role in interpreting these criteria. Considering the grave implications of a potential attack against dams, the decision to exempt such structures from protection can only be authorized at the highest level of command. Due to the significant risks and potential harm involved, any such decision must be approached with the utmost care and consideration, reflecting the principles of IHL and the protection of civilians and vital infrastructure.[29]

First of all, the term 'other than its normal function' must be clarified. According to the ICRC Commentary to Additional Protocol I it means 'that the dam or dyke is used for a purpose other than containing an actual or potential mass of water, which is the normal function of such a structure; if the dam or dyke is not used for any other purpose, it must not be attacked under any circumstances'.[30] We can envision a case in which a dyke is an integral part of a fortification system, or a road on the top of a dam is an essential route for armed forces' movement. However, for the protection to cease, such a dyke or dam must be a 'regular, significant and direct support of military operation', and there is no other feasible way to stop this support.[31] This scenario is an example of significant and direct support to enemy military operations, but even in this case the attacking party must do everything in its power to avoid the release of the waters.

As to the triple qualification, the dam must be used in 'regular' support of military operations which relates to time. This condition is not met if the armed forces draw occasionally on this source or use it as a backup. The ICRC Commentary clarifies that 'accidental or sporadic use is not sufficient; there must be some continuity in the use, or at least some rhythm'.[32] Secondly, the dam must be used in 'direct' support of military operations. According to the ICRC Commentary, the term 'direct' means 'not in an intermediate or a roundabout way,' so the 'relation between the act and its effect must be close and immediate'.[33]

The final substantial criterion pertains to the requirement of 'significant' support. The ICRC Commentary provides valuable guidance in understanding this aspect. It clarifies that 'significant' denotes a range of degrees of importance that must be determined. The support should not be negligible or merely an incidental factor; rather, it must be substantial, possessing a genuine and effective impact.[34] This interpretation emphasizes the need to assess the level of support provided, considering its tangible and meaningful influence on the military operation in question. Nevertheless, even if all these three substantive criteria are fulfilled,

[29] ibid 670; ICRC, *Customary International Humanitarian Law. Volume I: Rules* (Cambridge University Press 2005) 141.

[30] ICRC Commentary (n19) 670-671.

[31] ibid.

[32] ibid.

[33] ibid.

[34] ibid.

any alternative offering a feasible way of stopping such support would preclude an attack (Article 56 (2)).

Similar criteria also apply to 'other military objectives located at or in the vicinity of' a dam, as specified in Article 56 (2) (c). Moreover, if installations attached to a dam serve solely defensive purposes (for example against saboteurs) and are utilized accordingly, they cannot be categorized as military objectives providing direct, regular, and significant support to military operations.[35] This aligns with the passive precautions outlined in paragraph 5 of Article 56, which pertain to the positioning of military objects near works or installations containing dangerous forces, particularly relevant to dams in this context. Both the defender and attacker hold an equal obligation to take all feasible precautions against attacks, with the defender ensuring the preservation or enhancement of protection for facilities and installations containing dangerous forces. Such facilities must not directly support military operations and military objectives should be located at an adequate distance from these installations, avoiding the use of these installations as shields for military operations.[36] Consequently, both parties in the conflict should strive to avoid positioning any military objectives, except for purely defensive ones, in close proximity to such works and installations. Nonetheless, the failure to comply with this provision would not, by itself, justify the removal of protection for military objectives located near the power station. As stated, the exclusive conditions that must be met before targeting such objectives are outlined in paragraph 2 (c) of Article 56. Purely defensive installations used solely in a defensive capacity are not legitimate targets in any scenario. Furthermore, even non-defensive military objectives (though not located near the dam) must not be attacked unless the conditions specified in Article 56 (2) (c) are met.[37]

Paragraph 4 of Article 56 explicitly specifies the prohibition 'to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals', thus affirming further the above considerations. A breach of paragraph 5 by one party to the conflict does not imply that paragraph 2 (c) may be breached as a mechanism of law enforcement.[38]

Lastly, the Protocol urges state-parties engaged in the conflict to establish agreements that would provide enhanced protection for objects containing dangerous forces. Such measures may involve neutralization of these objects or the establishment of demilitarized zones.[39]

[35] Dannenbaum (n22).

[36] ICRC Study (n29) 141.

[37] Dannenbaum (n22).

[38] Additional Protocol I (n14).

[39] ICRC Commentary (n19) 674; for more in-depth information on demilitarized zones, refer to Schmitt (n6) (n26); Zeith and Giorgou (25).

3. PROHIBITION OF STARVATION AND OBJECTS INDISPENSABLE TO THE SURVIVAL OF THE CIVILIAN POPULATION

Another important provision that must be kept in mind is Article 54 of Additional Protocol I prohibiting starvation of civilians as a method of warfare. Paragraph 2 adds that:

> It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, **drinking water installations and supplies and irrigation works**, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive [emphasis added].[40]

Hence, in the light of Article 54, some dams and dykes can be considered as irrigation works, and there are irrigation structures that are used at the same time as power generators. Therefore, if such works are to be attacked, an additional condition must be met: as Article 54 para 3 specifies, the objective of such an attack must be to subsist the opposing military units or to provide other direct support for military actions. Even if this condition is met, such an attack is prohibited if damaging such objects may cause starvation among the local population or force them to move away from their homes.[41]

It is worth mentioning that according to paragraph 5 of Article 54 in the context of defending its national territory against invasion, a party to the conflict may temporarily set aside the prohibitions stated in paragraph 2 if it is deemed necessary due to imperative military necessity. This recognition allows for derogation from the stated prohibitions within the territory under the party's control to address critical military requirements during the conflict.[42] This would hypothetically allow Ukraine – but not Russia, an occupying power – to destroy such objects on its territory.

4. PROTECTION OF THE ENVIRONMENT

Additional Protocol I also protects the environment (needless to say, water is part of the environment) in the following terms:

> Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such

[40] Additional Protocol I (n14).
[41] ICRC Commentary (n19) 671.
[42] Additional Protocol I (n14).

damage to the natural environment and thereby to prejudice the health or survival of the population (paragraph 1).[43]

Similar provisions may be found in Article 35 (3). What both Articles focus on is prohibiting the use of means of warfare leading to 'widespread, long-term and severe damage to the natural environment', and their scope seems to be extensive, at least at first perusal (The Environment and International Humanitarian Law, nd).[44] Article 55 perceives the protection of the environment or the need to protect it through the anthropocentric lens of population's health and survival, while Article 35 (3) operates without any anthropocentric connections.[45]

5. SOFT LAW INSTRUMENTS – THE GENEVA PRINCIPLES ON THE PROTECTION OF WATER INFRASTRUCTURE

As to the soft law instruments, the Geneva Principles on the Protection of Water Infrastructure is the first text that gathers the primary rules governing the protection of water infrastructure in the context of armed conflicts. It encompasses guidelines not only pertaining to the conduct of hostilities but also for post-conflict situations, providing comprehensive recommendations that extend beyond the current legal framework.[46] The Principles reaffirm that parties involved in a conflict should abstain from utilizing water infrastructure and related facilities as tools of warfare. Whenever attacking water infrastructure and related facilities is employed as a tactic of warfare during hostilities, it is imperative to uphold the principles of distinction, proportionality and precautions (Principle 4).[47] The Principles explain that the primary roles of water infrastructure, apart from managing wastewater, can be broadly classified into four categories that benefit the population: supplying drinking water, facilitating domestic needs, supporting irrigation, and generating energy. Therefore, the term 'water infrastructure' encompasses all structures, installations, and facilities involved in these functions, which directly or indirectly impact the health and survival of the population.[48] Principle 5 restates customary international law rule that 'the use of poison or poisoned weapons against water and water infrastructure is prohibited'.[49]

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[43] ibid.

[44] 'The Environment and International Humanitarian Law' (nd) <https://casebook.icrc.org/case-study/environment-and-international-humanitarian-law> accessed 15 July 2024.

[45] Additional Protocol I (n14).

[46] Geneva Principles (n13) v.

[47] ibid.

[48] ibid v.

[49] ibid; see also Article 23 (a) of the Regulations annexed to IV Hague Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1907 <https://ihl-databases.icrc.org/assets/treaties/195-IHL-19-EN.pdf> accessed 15 July 2024.

6. CRIMINAL RESPONSIBILITY FOR VIOLATIONS OF IHL

Finally, a few comments should be made on the issue of criminal responsibility for violations of IHL with reference to water resources and water infrastructure. It is essential to note that launching an attack against a dam (or other objects containing dangerous forces) with the knowledge that such an attack will result in unacceptable collateral damage (in other words, an attack that violates the principle of proportionality) constitutes a war crime under Article 85 (3) (c) of Additional Protocol I.[50] To qualify as such, the attack must also have been 'committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health'. This underscores the gravity of ensuring compliance with IHL principles and the need for responsible decision-making in armed conflicts involving vital infrastructure and objects that may pose risks to civilian populations and the environment. It is worth adding that Article 8 (2) (b) (xxv) of the ICC Statute (1998) envisages a war crime of depriving civilians of the objects indispensable to their survival, without specifying any particular form that the deprivation may take.[51] Consequently, debates concerning whether the destruction of a dam would qualify as an 'attack' under IHL – as will be discussed in section 3 below – do not matter in this context as they do with reference to the special protections granted to dams under Article 56 as this provision mentions an 'attack'. The focus of this war crime is on the act of depriving civilians of access to the protected objects, regardless of the method or means used to achieve that deprivation, so not only on attacks against such objects but also destroying them, removing them or rendering them useless. And importantly, it is necessary to prove the intent to starve ('intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival').

Moreover, according to Article 8 (2) (b) (iv), it is a war crime to 'intentionally launch […] an attack in the knowledge that such attack will cause […] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' (in other words in violation of the principle of proportionality).[52] Dannenbaum claims that considering the significant expected harm to civilians and the environment at present, the military advantage foreseen must be extraordinary for the attack to be considered proportionate. Although there is limited legal precedent explicitly defining disproportionate attacks as war crimes, even

[50] Additional Protocol I (n14).

[51] ICC (International Criminal Court) Statute (1998) <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> accessed 15 July 2024.

[52] ibid.

under a highly stringent criminal standard, it is very probable that any intentional, destructive attack on the dam would be deemed excessively harmful to civilians.[53]

III. CASE STUDY OF WATER WEAPONIZATION DURING RUSSIAN AGGRESSION AGAINST UKRAINE

The utilization of water resources and infrastructure as a tactic of warfare has grown more prominent in the ongoing armed conflict between Russia and Ukraine. Since 2014, both countries have employed water as a weapon. Incidents include three kinds of activities: 1. targeted attacks on water infrastructure, 2. intentional water contamination, and 3. flooding with the purpose of hindering enemy movements or advances. Moreover, water was utilized to instill fear among civilians, as witnessed in events like the case of Mariupol.[54] For example, in February 2022, Russian forces targeted and destroyed a dam in Ukraine's Kherson region that had been blocking water access to Russian-annexed Crimea. The destruction of the dam further escalated tensions between the two countries. In the city of Mariupol, located in southeastern Ukraine, Russian soldiers implemented a brutal siege and deliberately shut off the local water supply. As a result, the trapped population in the city was left without access to safe drinking water and proper sanitation. Mariupol fell under Russian control earlier in the week, exacerbating the dire situation for civilians in the city.[55] This could be treated as part of psychological war aimed at terrorizing the civilian population.[56] On the other hand, in February 2022, the Ukrainian army took a strategic measure and detonated a dam on the river Irpin. The explosion resulted in a surge of water inundating the nearby village and thousands of acres of surrounding land, causing the flooding of houses and fields. However, this action successfully prevented Russian tanks from advancing and reaching the capital city. The decision to blow up the dam was a calculated move aimed at thwarting the enemy's advance and

[53] Dannenbaum (n18); on an interesting concept of treating the destruction of the Nova Kakhovka dam as a means of committing the crime against humanity of 'forcible transfer of population' (Article 7 (d) ICC Statute) see Aaron Dumont, 'A 'Clear' War Crime Against the Environment? The Destruction of the Nova Kakhovka Dam' (2023) <https://voelkerrechtsblog.org/a-clear-war-crime-against-the-environment/> accessed 15 July 2024.

[54] Mara Tignino, Tadesse Kebebew and Caroline Pellaton, 'International law and accountability for the Nova Kakhovka dam disaster' (2023) <https://lieber.westpoint.edu/international-law-accountability-nova-kakhovka-dam-disaster/> accessed 15 July 2024.

[55] Antonia Zimmermann, 'Russia's war on water in Ukraine' (2023) <https://www.politico.eu/article/russias-war-on-water-in-ukraine/> accessed 15 July 2024.

[56] King (n1) 158.

protecting the capital (Reuters 2022).[57] As mentioned in section 2, Ukraine was legally entitled to do so according to paragraph 5 of Article 54. In the context of defending its national territory against invasion, Ukraine could destroy objects indispensable to the survival of the civilian population if it was deemed necessary due to imperative military necessity.

The UN General Assembly also expressed its alarm at attacks against water infrastructure in Ukraine. For example, in its resolution No ES-11/2 Humanitarian Consequences of the Aggression against Ukraine, it demanded 'full respect for and protection of objects indispensable to the survival of the civilian population and civilian infrastructure that is critical to the delivery of essential services in armed conflict', such objects clearly encompassing drinking water or irrigation systems.[58] The UN Security Council could not react as it is blocked by the Russian veto.

The most serious water infrastructure incident during the Russian aggression against Ukraine was the Russian destruction of the Nova Kakhovka dam on the Dnipro river on 6 June 2023. The destruction of this critical infrastructure, which played a vital role in the hydroelectric generation and water supply capacities of southern Ukraine and cooling the Zaporizhzhia nuclear power plant, is irreversible. The consequences will be immense, impacting humanitarian, ecological, agricultural, and economic aspects. The destruction of the Nova Kakhovka dam appears to be a significant humanitarian and ecological disaster (President Zelensky even called it 'ecocide'[59]), although further investigation is required for a comprehensive understanding of the circumstances. The incident led to direct and immediate consequences such as catastrophic flooding, resulting in the devastation of multiple villages and thousands of hectares of agricultural land. The destruction of the dam severely disrupted the water supply in the region and introduced heavy pollutants, leading to tens of thousands of people losing access to safe drinking water. But the flooding caused by the destruction will also have lasting environmental effects, with chemical and pyrotechnic pollution from fuel oil tanks, mines, and unexploded ordnance washing away, leaving a lasting impact for decades to come. The region's flora, fauna and fertile land, along with the ecosystems of its rivers, lakes, and the marine environment of the Black Sea, will suffer severe damage. The quality of groundwater in aquifers and surface

[57] Reuters, 'Ukraine blew up a dam to stop the Russian advance on Kyiv, some homes remain flooded' (2022) <https://www.reuters.com/world/europe/months-after-dam-destroyed-stop-russian-advance-parts-village-still-flooded-2022-05-29/> accessed 15 July 2024.

[58] UN General Assembly, 'Resolution no ES-11/2. Humanitarian consequences of the aggression against Ukraine' (2022), para 5 <https://research.un.org/en/docs/ga/quick/emergency> accessed 15 July 2024.

[59] Ken Silverstein, 'President Zelensky: The Destruction Of Hydroelectric Dam Is 'Ecocide'' (2023) <https://www.forbes.com/sites/kensilverstein/2023/06/08/president-zelensky-the-destruction-of-hydroelectric-dam-is-ecocide/> accessed 15 July 2024.

water will also be significantly degraded, making it extremely challenging to provide water to the population for an extended period.[60]

Both Russia and Ukraine are parties to the four Geneva Conventions (which reflect customary international law) and to Additional Protocol I, the latter containing the provisions dedicated to the protection of dams. These provisions clearly apply to the Nova Kakhovka Dam.

Assuming that Russia attacked the Nova Kakhovka dam,[61] first of all, it must be clarified whether the dam was identified as a military objective. If yes, those involved in planning and carrying out military operations must initially assess whether the object in question is granted special protection under IHL. Dams are such objects as they contain dangerous forces and as a consequence they must not be attacked, 'even when they become military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population'.[62] The exceptions to this general rule are very narrow. In this context, the basic question is whether the Nova Kakhovka dam was used 'for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support'. Neither Russia nor Ukraine have claimed that any military use of the dam had occurred.[63] Even if it was confirmed that the dam was a military objective, it would still be prohibited to attack it if the attack could 'cause the release of dangerous forces and consequent severe losses among the civilian population'. In this context, it is necessary to determine whether losses among the civilian population were severe, and whether the dam's destruction might have caused such losses. The severity threshold is somewhat ambiguous, but in a situation involving a risk to many thousands of people in areas that have not undergone prior evacuation, it is likely to be exceeded. The potential impact on civilians in the case of Nova Kakhovka dam is immense (as pointed out above), and if this situation is not considered severe in terms of the risk to civilian life, it becomes challenging to envision what circumstances would meet the severity criteria.[64] As to the question whether such an attack 'may cause the release of dangerous forces and consequent severe losses among the civilian population', the likelihood threshold is relatively low as the mere risk suffices (as discussed in section 2).

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[60] Franck Galland, 'War in Ukraine: 'The destruction of the Kakhovka dam marks a turning point in 21st century wars'' (2023) <https://www.lemonde.fr/en/opinion/article/2023/06/08/war-in-ukraine-the-destruction-of-the-kakhovka-dam-marks-a-turning-point-in-21st-century-wars_6030458_23.html#> accessed 15 July 2024; Tignino, Kebebew and Pellaton (n54).

[61] For confirmation of these allegations, see James Glanz and others, 'Why the Evidence Suggests Russia Blew Up the Kakhovka Dam' (2023). <https://www.nytimes.com/interactive/2023/06/16/world/europe/ukraine-kakhovka-dam-collapse.html> accessed 15 July 2024.

[62] Article 56 of Additional Protocol I (n14).

[63] Tignino, Kebebew and Pellaton (n54).

[64] Milanovic (n17); Dannenbaum (n18).

Due to the essential importance of the Nova Kakhovka dam as a vital source of irrigation and drinking water in the area, the destruction of the dam and the subsequent draining of its waters also raises concerns about the prohibition of destroying objects indispensable for the survival of the civilian population. Hence, the Nova Kakhovka dam incident also involves another IHL prohibition examined above, which pertains to the protection of objects essential for the survival of the civilian population. This prohibition is not limited to 'attacks' but also extends to the destruction, removal, or rendering such objects useless.[65] Here, remarkably, regardless of any suggestions that Russia blew up the dam from within the controlled territory, such actions would still constitute violation of the special protection granted to dams. As to those suggestions, there are some doubts as to whether the Nova Kakhovka incident constituted an attack within the meaning of IHL, in particular, relevant for this paper Article 56 of Additional Protocol I. For example, Marko Milanovic argues that the sabotage of a dam within a state's own territory, with the aim of flooding the downstream area to impede the advancement of enemy troops, might not fall explicitly under the category of an 'attack' as defined by IHL, and Russia could indeed assert that the situation regarding the Nova Kakhovka dam falls under the circumstances described, arguing that the dam is located within territory under their control, irrespective of the fact that the installation is objectively situated in the territory under Ukrainian sovereignty.[66] Milanovic states that:

> […]if the initial damage to the dam was caused by Russia, e.g. by damaging a sluice gate which then in a catastrophic chain of events led to the collapse of the whole dam, it is somewhat less clear whether this event would qualify as an 'attack'. Generally IHL does NOT regard as attacks the sabotage of a party's own dam […]. If, for example, Ukraine sabotaged a dam under its control in order to flood an area and prevent Russian troops from advancing, this would not be an attack on the dam in the sense of IHL, even if civilians died as a result. From Russia's perspective the Nova Kakhovka dam is precisely in such a situation, especially because it was under its control – even if as an objective matter the dam and the whole territory is under Ukrainian sovereignty.[67]

Still, despite the fact of the dam being under the Russian control, Russia was not the sovereign but the occupying state. Hence, one may question the application by analogy of this provision to Russia.

Going back to Article 54 of Additional Protocol I, Dannenbaum envisages two scenarios based on the interpretation of these provisions: 1) according to Article 54 (2)-(3)(a), certain objects indispensable for survival cannot be targeted for their sustenance value, even if they also benefit adversary forces. In other words, dual-use sustenance items (e.g., food or water for civilians and combatants) are

[65] Article 54 of Additional Protocol I (n14).

[66] Milanovic (n17); see also Tignino, Kebebew and Pellaton (54); Dannenbaum (n18).

[67] Milanovic (n17).

protected from attack. This prohibition applies regardless of intent or outcome and is solely based on the purpose of sustenance denial and its impact on civilians; 2) Article 54 (3)(b) allows the targeting of objects indispensable to civilian survival for non-sustenance reasons, but only if two conditions are met. First, the objects must provide direct support for military action, similar to the exception for attacking dams. Second, even if direct support is established, targeting is still prohibited if it is expected to lead to civilian starvation or forced displacement due to insufficient food or water. It is currently challenging to determine whether the Russian operation's purpose was sustenance denial; however, the destruction has created a significant risk of starvation or displacement due to inadequate food or water, which may have been anticipated at the time of the incident.[68]

The explosion of the dam could potentially also violate the protection accorded to the natural environment envisaged in Articles 35 (3) and 55 of the Additional Protocol I examined in section 2. Article 55 (1) expressly mentions a damage to the natural environment endangering the health or survival of the population.[69] At the beginning of this section, the severe consequences to the environment, reaching the level of ecological catastrophe, were indicated. These prohibitions mandate parties involved in the conflict to safeguard the natural environment from such detrimental effects. The extremely stringent criteria established in these provisions have faced consistent criticism. Nonetheless, those responsible for planning and conducting such an action against the dam must have been fully aware of the inevitable ecological catastrophe that would follow.[70]

Regarding the requirement in Article 55 (1) that the damage should 'prejudice the health or survival of the population', two important points should be highlighted. Firstly, Article 35 (3) does not include such a specific, anthropocentric requirement. Secondly, considering the impacts discussed earlier, it is highly likely that the destruction of the dam could be seen as prejudicing the health or survival of the population in the affected area. The consequences of water contamination in armed conflicts are frequently severe, further underscoring the potential harm inflicted on civilian well-being and survival.[71]

As to the criminal responsibility for the Nova Kakhovka dam's breach, Russia is a party to Additional Protocol I, so provisions of Article 85 (3) (c) are applicable. Even though Russia (and Ukraine as well) have not ratified the ICC Statute, the ICC has jurisdiction in this case on the basis of Ukrainian acceptance of its jurisdiction. On two occasions, Ukraine expressed its consent to the ICC's jurisdiction concerning potential crimes under the ICC Statute that may have occurred within its borders. The initial declaration pertained to alleged crimes on Ukrainian territory between 21 November 2013 and 22 February 2014, while the sub-

[68] Dannenbaum (n18).
[69] Additional Protocol I (n14).
[70] Tignino, Kebebew and Pellaton (n54).
[71] Dannenbaum (n18).

sequent declaration expansively extended the previous one to encompass crimes purportedly committed across the entire Ukrainian territory from 20 February 2014 onwards (Statement of the ICC Prosecutor 2022).[72]

IV. CONCLUSIONS

Safeguarding water resources and installations is a critical aspect of protecting civilians during armed conflicts. 'Contemporary armed conflicts have seen an increase in attacks against and the weaponization of water infrastructure. These acts have severe consequences on the environment and most importantly on the civilian population, especially on the most vulnerable groups, such as children'.[73] The destruction of the Nova Kakhovka dam is an illustration of this trend and, at the same time, an example of a breach of various IHL obligations identified in this article. Answering the first research question, these IHL obligations or provisions are definitely protective of water resources and infrastructure and generally do not allow attacking or destroying them. The exceptions to the prohibition of attacks against dams are very narrow and not applicable to the Nova Kakhovka dam. Furthermore, the destruction of the dam reached the level of a war crime codified in Article 85 (3) (c) of Additional Protocol and potentially of other war crimes discussed in the article.

The destruction of the Nova Kakhovka dam was aimed at delaying and/or disturbing the Ukrainian counter-offensive. It significantly disrupted the strategic situation in southern Ukraine, compelling both parties to make significant adjustments. As a result, especially the Ukrainians needed to reassess the situation and its implications. The repercussions of the dam's breach have introduced uncertainties and complexities into the conflict dynamics, impacting the strategic calculations of both sides.[74] Taking all this into account, one may conclude that water resources and water infrastructure incidents in the Russian aggression against Ukraine illustrate the disturbing phenomenon of weaponizing water (treating water and water infrastructure as a means of warfare) in order to further the belligerent's political and military aims. The above analysis showed that water resources and infrastructure may be weaponized as a military target (when they are damaged or destroyed so that they unleash destructive capabilities that

[72] 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (2022) <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine> accessed 15 July 2024.

[73] Geneva Principles (n13) v.

[74] For more details see Frank Gardner, 'Nova Kakhovka: Who benefits from breaching the dam?' (2022) BBC <https://www.bbc.com/news/world-europe-65821052> accessed 5 July 2024.

enable forces to cause harm to populations beyond the scope of their traditional capacities) but also as a military tool when water infrastructure under the control of a party to the conflict is used to terrorize populations or directly aid tactical objectives during military operations.[75] Ukrainian acts may be understandable as the state is defending itself against the aggressor, but Russia's actions clearly reach not only the level of IHL violations but also of war crimes.

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Ewa Dawidziuk
SWPS University, Poland
e-mail: edawidziuk@swps.edu.pl
ORCID: 0000-0003-1262-5617

HAPPY ANNIVERSARY? 10 YEARS SINCE THE ESTABLISHMENT OF PREVENTIVE DETENTION IN POLAND

Abstract

The 10th anniversary of the National Center for the Prevention of Dissocial Behaviour prompts reflections on its functioning. Unfortunately, in addition to an increasing population of patients isolated from society and rising expenditures, we have not seen fundamental changes. These are necessary in the law of 22 November 2013, which is the legal basis for the creation of the Center, as well as in the philosophy of the operation of this type of detention facilities. The article presents the CPT's recommendations and observations included in a report that was published in 2024, following a visit to the Center in 2022. The article presents the latest statistics, information on cases communicated to the Polish government before the ECtHR. It provides an assessment of the current status of the National Center after a decade since its establishment, and at a time when it is possible to believe that the Ministry of Justice, together with the Ministry of Health, will proceed with legislative and conceptual changes.

KEYWORDS

preventive detention, human rights, National Center for the Prevention of Dissocial Behaviour, society protection

SŁOWA KLUCZOWE

detencja prewencyjna, prawa człowieka, Krajowy Ośrodek Zapobiegania Zachowaniom Dyssocialnym, ochrona społeczeństwa

I. INTRODUCTION

The '2013 Act', enacted on 22 November 2013, addresses the treatment of mentally disturbed individuals who pose a danger to the life, health, or sexual freedom of others.[1] This legislation established the framework for the creation of isolation facilities designed for individuals who persist in posing a threat to society even after completing their sentences. However, over the past decade, this law has inadvertently led to the violation of human rights within the facility called the National Center for the Prevention of Dissocial Behaviour (hereinafter: Center or NCPDB).[2] It can be argued that the application of these provisions is unconstitutional.[3] Therefore, the article relates to the systemic problems of the Center over the past decade. First and foremost, I pay attention to several aspects of its reality, which also became the subject of interest for the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter: CPT) during its visits to Poland in 2017 and 2022. Secondly, this article aims to explore the principles of preventive detention in Poland, shedding light on several issues that arise in the context of ten cases against Poland. These were communicated to the Polish government by the Strasbourg Court in 2022 and 2023.

Lastly, I want to emphasize that the text reflects my insights gathered from the visits to the NCPDB as a representative of the Commissioner for Human Rights. Visiting the facility almost every year, talking to patients, employees, and judges deciding the cases of the Center, I have formed the conviction that legislative changes are particularly urgent, just as it is necessary to change the organization of the Center and the rules of its operation.

[1] Journal of Laws (Dziennik Ustaw), consolidated text: 2022, item 1689.

[2] In the period 2014-2022, the only such place of detention was located in Gostynin, in central Poland (Masovian Voivodeship). A second building in Czersk in the northern part of the country (Pomeranian Voivodeship), which is a branch of the NCPDB, was opened in February 2022.

[3] The Constitutional Tribunal of the Republic of Poland ruled the constitutionality of the challenged provisions of the 2013 Act, with the exception of the provision relating to expert witnesses giving opinions at the stage of the determination of release from the Center. The judgment of 23 November 2016, ref. act K 6/14.

II. DEPRIVATION OF LIBERTY TO PROTECT SOCIETY

As noted by Christopher Slobogin, we should carefully analyze how we deprive people with mental disorders of freedom.[4] This is undoubtedly a valid claim, also in the context of Poland's experience of using preventive detention after serving the sentence as it is used towards people who have mental disorders such as personality disorder, sexual disorders, or mental impairment.

Indeed, increasing punitiveness is being noted in the politics of countries around the world, pointing to the changes in the laws of many states in order to protect the public from them.[5] An example of the growing trend toward deprivation of liberty in Poland is represented not only by enactment of the legal basis for isolating from society those who have already served their whole prison sentences. The amendment to the Polish Penal Code[6] in July 2022 is an even more drastic example of tightening penal policy by providing absolute life imprisonment even if it is inconsistent with international standards highlighted repeatedly in ECtHR rulings.

The definition of 'preventive detention' was created many years ago[7] and remains the state's response to addressing dangerous offenders. There are numerous scientific studies[8] on the subject of the criminal legal response of states to individuals who are highly likely to re-offend with significant social harm, especially focusing on sex offenders. The topic arguably requires constant monitoring and review of how legislation in this area evolves as well as an examination of the factors leading to the introduction of new legal solutions allowing for the deprivation of liberty of those considered a threat to society – sometimes arguably up to the point of their death. It also raises the question how should a state respond to public pressure to protect society from those people who appear to present a continuing danger of violence.[9]

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[4] Christopher Slobogin, *Minding Justice. Laws that deprive people with mental disability of life and liberty*, Harvard University Press (2006) ix.

[5] Monika Płatek, 'Kreowanie „groźnych, niebezpiecznych i złych"', Archiwum Kryminologii 41 No 1 (2019) 125, 128.

[6] Parliamentary Paper No 2024, Act on Amendments to the Criminal Code and Certain Other Acts, enacted on 7 July 2022.

[7] Tamara Tulich, 'Critical reflections on preventive justice' in Tamara Tulich, Rebecca Ananian-Welsh, Simon Bronitt, Sarah Murray (eds) Regulating Preventive Justice. Principle, Policy and Paradox (Routledge 2017).

[8] Jörg-Martin Jehle and others, 'Dealing with Dangerous Offenders in Europe. A Comparative Study of Provisions in England and Wales, Germany, the Netherlands, Poland and Sweden', Criminal Law Forum 32 (2001) 181.

[9] Andrew Hammel, 'Preventive Detention in Comparative Perspective', Annual of German & European Law 2 (2006), 85.

Preventive detention in Poland was created in the course of a rapid legislative process.[10] As it turned out in subsequent years, the law is full of legislative errors and loopholes, leading to the operation of the Center based on internal regulations, the issuance of which is not even supported by the law.[11] Moreover, internal regulations cannot form a basis for restricting the constitutional and conventional rights of persons deprived of their liberty in this place.

The first patient was deprived of liberty in Gostynin Center in early 2014 and his criminal history prompted the Polish legislator to swiftly draft a bill.[12] All this, amid the creation of fear, use of dehumanizing terms against those to be covered by the act from the media and politicians.[13]

In the context of the single and dual-track system concept presented within the literature regarding post-conviction detention,[14] the preventive detention established in Poland under the 2013 Act leans towards the single-track approach. Within this framework, a criminal court can impose only punishment, and the necessity for additional isolation (which is not a punishment but is connected with therapy) within the NCPDB transitions to civil proceedings at the end of serving the sentence. It can be suspended upon the request of the prison director and this procedure is applicable only to individuals who committed a crime before 1 July 2015. Conversely, in the case of a conviction for an offense committed after that date, the legislator implemented a dual-track system. This is because the criminal court, while convicting and imposing a sentence of imprisonment, simultaneously decides on isolation within a psychiatric hospital to safeguard society upon release of such a person from prison. Both legal solutions operate concurrently. While developing a new concept of protecting the public from people who pose a serious threat,[15] we should, in my opinion, concentrate both on isolation security measures and the NCPDB.

[10] See more details in Ewa Dawidziuk, 'Human rights in the context of post-conviction preventive detention in Poland' in Czarnecki Łukasz (ed), Human Rights Protection and Ius Puniendi. Perspectives from Central Europe and Latin American countries (Springer Nature 2023) 19.

[11] The law does not contain a provision authorizing the director of the Center to issue rules of procedure.

[12] For more see in Marcin Szwed, 'The Polish Model of civil post-conviction preventive detention in the light of the European Convention on Human Rights', The International Journal of Human Rights (2021) 1.

[13] Maciej Bocheński, 'Populizm penalny w polskim wydaniu - rzecz o kryminologicznej problematyce ustawy o postępowaniu wobec osób stwarzających zagrożenie', Czasopismo Prawa Karnego i Nauk Penalnych (2015) 127.

[14] Dirk van Zyl Smith, Catherine Appleton, 'Life Imprisonment a Global Human Rights Analysis' (Harvard University Press 2019) 76.

[15] In April 2024, the Minister of Justice established a Criminal Law Codification Commission to address it, among other issues.

I recommend taking into consideration the Dutch concept in which facilities are divided into TBS[16] where intensive therapy is provided for 9-10 years to enable people to integrate into society again without reoffending and Long-Stay Forensic Care (LFPC) for people who are not likely to make a recovery and whose functioning during they stay in TBS is not improving.[17]

III. STATISTICS

Currently,[18] 103 people (77 patients in Gostynin, 26 in Czersk),[19] including two women,[20] are deprived of liberty within the NCPDB and are isolated from society. In fact, current legislation does not require separate placement of women and men in treatment entities (forensic psychiatry wards, centers where preventive detention is implemented).[21] The number of people deemed to pose a threat to society is steadily increasing. In 2014-2018, 205 cases were pending under the 2013 Act.[22] Subsequent research data from 2020 already account for 275 cases under this Act.[23] File surveys conducted on a sample of 106 cases under the 2013 Act revealed a predominance of individuals who had previously committed acts against sexual freedom and morality, property, as well as life and health.[24]

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[16] It means treatment on behalf of the state, oryg. *Terbeschikkinstelling*, and it is regulated in Article 237 of the Dutch Penal Code. It was created in 1920s.

[17] Marjam Veerle Smeekens, Peter Braun, 'Long-Term Forensic Care: The Duch Perspective' in Birgit Völlm, Peter Braun (eds), Long-Term Forensic Psychiatric Care (Springer Nature Switzerland AG 2019).

[18] Since statistics are volatile, it must be indicated that this data is as of 1 April 2024.

[19] By comparison, as of 15 June 2020, there were 86 patients in the NCPDB. Throughout the Covid-19 pandemic, more people were admitted, even when there were outbreaks of coronavirus in the Center. For the courts, this was not an obstacle for referral under preventive detention: <https://bip.brpo.gov.pl/pl/content/zla-sytuacja-epidemiologiczna-w-kozzd> accessed 16 August 2022.

[20] The first woman's stay since 2016 has been widely reported in the media: <https://wiadomosci.onet.pl/tylko-w-onecie/dobra-i-zla-janinka-dlaczego-panstwo-zawiodlo-obie/hl7nc5c> accessed 30 July 2022. The second woman was admitted to the NCPDB in 2022. Both patients stayed in the same room at the beginning. Now they are separated in two different buildings.

[21] The rules are shaped differently in penitentiary units, where it is obligatory to place women separately from men. All over the world there are disputes about which is better: coeducation or separate gender divisions.

[22] Agnieszka Gutkowska and others (eds), 'Gdy kara nie wystarcza… O praktyce stosowania wybranych rozwiązań prawnych wobec sprawców z zaburzeniami psychicznymi stwarzających zagrożenie dla społeczeństwa' (Instytut Wymiaru Sprawiedliwości 2020).

[23] Ewa Dawidziuk, Jolanta Nowakowska (eds), 'Izolacja sprawców przestępstw uznanych za niebezpiecznych dla społeczeństwa' (Biuro Rzecznika Praw Obywatelskich 2020).

[24] Detailed file survey data are available in the 2020 Institute of Justice publication: Agnieszka Gutkowska and others, 'Gdy kara nie wystarcza… O praktyce stosowania wybranych

As reported by the Center's director on 12 April 2024, at the conference organized by the University of Warsaw, over the years 154 people have been admitted to it, 18 left the NCPDB on different grounds, and 5 died with patient status – one in the Center, the others in external institutions like hospitals or hospices. The Center has 490 employees as of the date of this information, of which just over 200 are security personnel. This figure includes those employed in both Gostynin and Czersk.

IV. CONDITIONS OF PREVENTIVE DETENTION IN THE NCPDB

Persons considered dangerous for society are no longer kept in prisons.[25] Such individuals undergo treatment within a medical care center with the primary goal of providing an extended therapeutic intervention.[26] Another challenge lies in the perceived efficacy of this therapy, as highlighted by Płatek[27] or the reluctance of many patients to participate in it (only 50% want to attend it).[28] The duration of stay in the preventive detention center is not predetermined, and the civil court[29] reviews the necessity for further stay every six months.

In addition, it is important to highlight that the subjective scope of the 2013 Act specifically encompasses only a limited set of mental disorders, namely personality disorders, sexual preference disorders, and mental retardation. The legislation explicitly excludes coverage for any disorders other than those stipulated in Article 1 of the 2013 Act. Specifically, it does not apply to individuals diagnosed with mental illness, as determined by the Supreme Court when addressing legal questions on the matter.[30] Nevertheless, in practice, there are instances of indi-

rozwiązań prawnych wobec sprawców z zaburzeniami psychicznymi stwarzających zagrożenie dla społeczeństwa' (Instytut Wymiaru Sprawiedliwości 2020).

[25] In cases against Germany, including *M v Germany*, the ECtHR took the position that the conditions under which detention is carried out after a prison sentence has been served must be different from those in prison, given the different purpose of detention.

[26] Wojciech Zalewski describes rules regarding therapy within the German system of preventive detention in 'Detencja "terapeutyczna" – wątpliwości konstytucyjne i polityczno-kryminalne w kontekście ustawy o "bestiach"' Gdańskie Studia Prawnicze 4 (2018), 371. It might be a comparison for the Polish Center.

[27] Monika Płatek, 'Negatywne skutki iluzji terapii. Uwagi o stosowaniu ustawy o postępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób' Państwo i Prawo 11 (2020), 93.

[28] The NPM report of the visit to Czersk on 16-19 October 2023, KMP.574.2.2022.RK, 15, available at the website of the Commissioner for Human Rights.

[29] In other countries, such as Germany and the Netherlands, the criminal court decides on preventive detention both initially and on a regular basis to prolong the deprivation of liberty.

[30] Supreme Court decision of 16 April 2015, Case No I CSK 825/14: <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/i%20csk%20825-14-1.docx.html> accessed 29 July 2022.

viduals being placed in the NCPDB, where psychiatrists at the Center, along with forensic experts, identify mental illness.[31] This poses challenges both in terms of regulatory compliance and, more significantly, from a psychiatric therapy standpoint. Conducting treatment of mentally ill people, under the conditions that prevail in the NCPDB and among people with mental disorders, especially those presenting abnormal personality traits of a dissocial nature, creates many therapeutic difficulties for the staff.

In addition to the mentioned mental disorders, eligibility for referral to the NCPDB requires a prior history of serving a sentence, of any duration, in a therapeutic unit, coupled with the diagnosed mental disorders of such a nature or severity that there is at least a high probability of committing a criminal act with violence or the threat of violence against life, health or sexual freedom, punishable by imprisonment, the upper limit of which is at least 10 years. This content of the provision raises questions of interpretation and difficulties in expert opinion.[32]

Królikowski and Sakowicz emphasize that the use of preventive isolation is not a punishment.[33] The Constitutional Court in Poland affirmed that the regulations of the 2013 Act align with the provisions of the Polish Constitution.[34] This judgment faced widespread criticism[35] because, at the time when individuals affected by the 2013 Act were sentenced to imprisonment by a criminal court, legislation did not permit preventive detention after they had completed their prison terms. Despite this, the Constitutional Court concluded that there was no violation of the principles of *lex retro non agit* and *ne bis in idem*. As we anticipate the inaugural historic judgments from the ECtHR regarding complaints filed by patients of the post-penal detention center, it is likely that the identification of Article 5 violations of the ECHR will play a crucial role in shaping the assessment of the legality of deprivation of liberty in the NCPDB.

[31] The information was provided by the Polish Ombudsman within its report, inter alia: NPM in Poland report 2019, KMP.574.1.2019.JZ, 4, available at www.rpo.gov.pl.

[32] Agnieszka Gutkowska and others, 'Gdy kara nie wystarcza… O praktyce stosowania wybranych rozwiązań prawnych wobec sprawców z zaburzeniami psychicznymi stwarzających zagrożenie dla społeczeństwa' (Instytut Wymiaru Sprawiedliwości 2020).

[33] Michał Królikowski, Andrzej Sakowicz, 'Granice legalności postpenalnej detencji sprawców niebezpiecznych', Forum Prawnicze 5 (2013).

[34] Case K 6/14 23 November 2016 Polish Constitutional Tribunal (Trybunał Konstytucyjny).

[35] Jan Kluza, 'O granicach zasad *ne bis in idem* i *lex retro non agit*. Uwagi na tle wyroku Trybunału Konstytucyjnego w sprawie tzw. „ustawy o bestiach"' Krytyka Prawa, vol 10, no 3 (2018), 41; Maciej Bocheński, 'Practical aspects of assessment of risk of re-offending by "especially dangerous" offenders in the context of the judgment of the Constitutional Tribunal of 23 November 2016 (K 6/14)' Problems of Forensic Sciences 108 (2016) 632.

V. VISITING BODIES IN THE NCPDB

The Centers in Gostynin and Czersk have been visited multiple times by various human rights protection institutions – the Commissioner for Human Rights,[36] National Preventive Mechanism,[37] and the European Committee for the Prevention of Torture (CPT). The CPT visited the NCPDB twice – first in 2017[38] and then for the second time in 2022.[39] The Subcommittee on Prevention of Torture (SPT) has never conducted visits in the Center, despite inspecting places of detention in Poland in July 2018.[40]

The CPT noted the lack of visits to the facility by the Minister of Health who supervises the NCPDB. The Director of the Center held weekly online or telephone consultations with relevant higher-level officials of the Ministry of Health, but there was no practice for Ministry representatives to physically visit the facility. As a result, in CPT's opinion, they were not sufficiently aware of the current situation and challenges faced by the NCPDB.[41]

The fact that the new government created in 2023 is taking an interest in the Center, and that the Deputy Minister of Health and Justice finally visited the

[36] The Criminal Executive Law Department and Civil Law Department deal with complaints from the patients of the NCPDB. The representative of the first mentioned Department visited the center in the past to check systematic issues as well as to examine complaints. Detailed information and reports can be found at website: <https://bip.brpo.gov.pl/pl/kategoria-tematyczna/kozzd-gostynin> accessed 10 January 2024. Over the past 10 years, the Ombudsman, having no legislative initiative, has addressed nearly 70 general letters to state bodies (mainly the Minister of Health and the Minister of Justice), indicating specific demands for legislative changes.

[37] The NPM calls the NCPDB as post-penal detention facilities: <https://bip.brpo.gov.pl/pl/content/wizytacje-kraochejowego-mechanizmu-prewencji> accessed 2 February 2024

[38] Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 March to 1 April 2022, Strasbourg, 22 February 2024, CPT/Inf (2024) 10, <https://rm.coe.int/1680ae9529> accessed 1 April 2024.

[39] Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 22 May 2017, Strasbourg, 25 July 2018, CPT/Inf (2018) 39, <https://rm.coe.int/16808c7a91> accessed 1 April 2024.

[40] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Comments of Poland on the recommendations and observations addressed to it in connection with the Subcommittee visit undertaken from 9 to 18 July 2018; <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2FPOL%2FCSPRO%2F1&Lang=en> accessed 2 May 2024.

[41] CPT's report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 March to 1 April 2022, paragraph 85.

NCPDB in April 2024, gives hope that this time the problem of the functioning of the preventive detention will not be neglected.[42]

VI. CPT'S ASSESSMENT OF THE PREVENTIVE DETENTION CENTER IN POLAND

CPT pointed out that both NCPDB buildings had a satisfactory number of care staff who seemed adequately trained and highly motivated. Patients were offered (on a voluntary basis) a range of medical and psychosocial treatments.[43]

When CPT visited the Center in 2017, it noted that living conditions were characterized by overcrowding in all quarters, even though the population density was much lower at that time than in subsequent years. In 2022, CPT described the living conditions as acceptable, however heavily overcrowded.[44] During the CPT visit to Gostynin in 2022, there were 94 patients in a facility with a capacity of 60, while 180 cases were pending under the 2013 Act at that time. In Czersk, the capacity was set at 40 people. During the CPT's visit in 2022, this branch was not yet populated. It was put into use at the beginning of 2022 as a temporary solution, with the building being leased for a period of 3 years, considering plans for the construction of a dedicated facility for preventive detention.

As presented above, population density has been fluctuating over the years. However, the number of patients is increasing year by year, despite some patients leaving the center due to death or being transferred to a penitentiary unit to serve their sentences. After nearly 30 people were transferred to Czersk, living conditions in Gostynin improved, but still there are rooms for 6-8 people. This improvement occurred at a time when some patients were seriously ill and required care. The director decided to purchase a few hospital beds instead of bunk beds, commonly used in prisons. Seriously ill patients were placed in single rooms (e.g. a patient with cancer staying in bed permanently). My personal reflection from the last visit to Gostynin in October 2023 was that the NCPDB is transforming into a facility similar to a social welfare home. From this perspective, the reality of the Center has changed – the number of patients in rooms has decreased, thanks to the possibility of transferring some patients to Czersk. At the same time, patients are increasingly older, more infirm, after a stroke, with a diagnosed

[42] Deputy Minister of Justice Maria Ejchart reported on this visit during a conference regarding NCPDB, held at the Faculty of Law of the University of Warsaw on 12 April 2024. Prof. Janusz Heitzman also participated in this visit.

[43] CPT's report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 March to 1 April 2022, paragraph 74.

[44] ibid, paragraph 71.

cancer, requiring care and frequent consultations with specialist doctors outside the NCPDB.

The director of the Center adopted principles[45] that patients who were previously in Gostynin and do not show somatic illnesses, can be transferred to the unit in Czersk. Individuals requiring special care – such as patients with cancer, post-strokes, wheelchair users – are housed in Gostynin. Construction of a dedicated NCPDB building has not yet begun, despite plans that the Center's management has been talking about for a decade, which the CPT inquired about after their visit in 2017. The director states that the current task facing the Center is updating the existing project documentation to comply with current legal requirements, energy standards, as well as the key aspect of increasing the number of available beds and room layouts. Following this update, further progress in the investment project will be possible.

Undoubtedly, the establishment of living conditions different from the current ones – such as the creation of single rooms with sanitary facilities, therapy rooms, workshops, a space equipped with physical exercise equipment, and a designated area for meal preparation or outside recreational area – will facilitate better preparation for leaving the NCPDB or ensure that individuals can live there with dignity until the end of their lives. Unfortunately, I have no doubt that not everyone will have the opportunity to leave this facility.

VII. CASES BEFORE THE ECTHR

Ten cases communicated to the Polish government regarding the preventive detention in Poland have not yet been resolved by the ECtHR, and none of the judgments have been issued. These are: *W v Poland*,[46] *J.R. v Poland*,[47] *A.W. v Poland* and *W v Poland*,[48] *J.T. v Poland*,[49] *Ł.K. v Poland*,[50] *P.W. v Poland* and 2 other applications,[51] *A.S. v Poland*,[52] *T.S. v Poland*,[53] *J.C. v Poland*,[54] *H.A. v*

[45] The information was presented by the director of the NCPDB in the correspondence with the author in April 2024.

[46] Ap. No 43562/17.

[47] Ap. No 49560/17.

[48] Ap. Nos. 43691/18 and 9173/21.

[49] Ap. No 74254/17.

[50] Ap. No 20228/19.

[51] Ap. Nos 78366/17, 83161/17, 38717/19. The applicant died in 2023 within the NCPDB but the case is crucial so the Polish Ombudsman decided to lodge the *amicus curiae*.

[52] Ap. No 28295/21.

[53] Ap. No 47406/21.

[54] Ap. No 15624/20.

Poland.[55] It will not be an exaggeration to say that these will be historic cases, and the Court's rulings will likely have a significant impact on the shape of preventive detention in Poland. The cases relate to violations of Articles 3, 5 and 8 of the ECHR in the following contexts: the conditions of detainees' stay and therapy, the preventive use of handcuffs during transportation or medical examinations outside the Center (Article 3 of the ECHR); the legality of the deprivation of liberty, the procedure for release or prolongation of the detainees' stay in the NCPDB, the therapeutic interventions (Article 5 of the ECHR); the authorization of temporary release to attend the funeral of one of the parents, as well as the constant presence of a guard in the visiting room during meetings with the family, as well as body searches to which the patients were subjected each time they had a visit (Article 8 of the ECHR).

It is important to notice that the ECtHR struck off three cases from the list of cases to be considered due to the lack of response by the patients from the NCPDB. One of them removed from the list was previously taken up by the Commissioner for Human Rights, considering that the case raises systemic issues worthy of support by the Commissioner's *amicus curiae* opinion.

In my opinion, it might show that the involvement of lawyers representing patients from the Center should be greater. In one case, the patient is represented by the HFHR. However in the other cases, patients sent their complaints on their own. There is a possibility that they will not understand letters received from the Tribunal in Strasburg. Removing the cases from the list is alarming especially as I am aware of the infringements of human rights in the Center.

1. LIVING CONDITIONS

Alleging violations of Article 3 of the ECHR, NCPDB's patients specifically highlight their living conditions before the ECtHR. From January 2014 to February 2022, the patients were housed in a single building located in Gostynin. At first, the rooms were single, then double, and over time bunk beds were added to the larger rooms placing as many as 8-10 people. The constant accessibility of the room doors did not enhance the comfort of the stay. The Center's rules stipulated that patients could only talk on the phone in the living rooms or outdoors while walking. At the same time, the rooms were overcrowded with insufficient space for personal belongings and that resulted in conflicts among patients.[56] After the director of the NCPDB refused to accept 3 people referred to the Center[57] under

[55] Ap. No 24676/18.

[56] Description prepared by the author, who visited NCPDB.

[57] See more: Patryk Kukliński, 'Pandemia w instytucji totalnej na przykładzie Krajowego Ośrodka Zapobiegania Zachowaniom Dyssocjalnym w Gostyninie' Studia Iuridica vol 91 (2022) 164.

court orders, having nowhere to put them, the legislator began work on changing the regulations.[58] These allowed the lending of buildings from the Prison Service. As a result, the second NCPDB[59] building was opened on the site of the former prison in Czersk. It helped to introduce improvements in living conditions.[60] The rooms at the Czersk facility hold a maximum of four people, with bathrooms located outside the living quarters, with the exception of a room adapted for people with physical disabilities, which is equipped with a built-in sanitary facility. Still, the infrastructure of the two buildings does not allow for the organization of individual rooms for those deemed dangerous to society, a solution which is commonly used in other European countries.

2. THERAPY

Patients complain before ECtHR that the Center does not resemble a therapeutic facility due to poor living conditions, understaffing, overcrowding and lack of space. They also complain about the intimidating atmosphere caused by the possibility of using direct coercive measures such as batons, handcuffs and pepper spray, as well as lack of an individualized therapy plan.[61] In the literature, there are opinions that effective therapy is one of the biggest problems.[62] The CPT report from the visit indicated that about 75% of patients were not interested in therapy. In this case, the delegation could not resist the impression that there was a general problem with the concept of therapy and, in particular, there was no clear vision of what to do with patients who refuse treatment and participation in rehabilitation activities. The Committee recommended considering the concept and philosophy of treatment at the NCPDB.[63]

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[58] The legislative process went quickly - the draft was submitted to the Sejm on 9 April 2021, Parliamentary Print No 1071, and the act was already passed on 15 April 2021.

[59] However, the local community protested against the organisation of a preventive detention center in their city https://wiadomosci.onet.pl/trojmiasto/gostynin-niebezpieczni-przestepcy-trafia-do-czerska-mieszkancy-protestuja/pgby5ek> accessed 16 August 2022; <https://wiadomosci.dziennik.pl/wydarzenia/artykuly/8339854,osrodek-pedofile-czersk.html> accessed 16 August 2022.

[60] For more on this topic, see the NPM report on the 2022 visit to the NCPDB branch in Czersk: <https://bip.brpo.gov.pl/index.php/pl/content/rpo-w-oddziale-zamiejscowym-kozzd-w-czersku-kmpt> accessed 29 July 2022.

[61] Among others, case *T.S. v Poland*, Ap. No 47406/21.

[62] Patryk Kukliński, 'Terapia, readaptacja czy mrzonka? Porównanie polskich i niemieckich doświadczeń w terapii zaburzonych psychicznie sprawców niebezpiecznych izolowanych od społeczeństwa' in Diana Dajnowicz-Piesiecka, Emilia Jurgielewicz-Delegacz, Emil Pływaczewski (eds), *Badania kryminologiczne a praktyka. Perspektywa krajowa i międzynarodowa* (Wolters Kluwer 2021).

[63] Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 22 May 2017, Strasbourg, 25 July 2018, CPT/Inf (2018) 39, paragraph 121.

Unfortunately, nothing has been done in this matter to this day. The previous Minister of Justice did not want to deal with the law and the problem of the Center, and the Ministry of Health began to prepare an amendment[64] without including opinions presented during social consultations on the website of the government legislative center. The NCPDB's staff themselves have not been able to draw from the experiences of other countries. This is primarily, of course, the responsibility of the legislator.

3. SECURITY MEASURES

Patients have raised complaints to the ECHR that they are under constant surveillance of closed-circuit television cameras in the premises of the Center, including bathrooms.[65] CPT also observed a very high level of security that did not seem individualized and adapted to the level of risk posed by specific patients within the facility. This related to privacy during therapeutic consultations (always within sight, though not within hearing, of security personnel), handcuffing during external medical consultations (including dental and gynecological), but primarily to cameras covering absolutely every area where patients were present, including toilets and showers. Additionally, large screens on which security guards watched CCTV recordings were placed in such a way that other passersby (including unauthorized personnel and even patients) could see what was transmitted on the screen. Security personnel wore special equipment (batons, handcuffs, and pepper spray) at all times, including inside living quarters and in the presence of patients. As CPT highlighted in the 2017 report, this is an intimidating and unjustified practice.[66] These reservations were reiterated in 2022. According to the CPT, steps should be taken to ensure that all security measures (CCTV monitoring, presence of guards within sight during consultations and therapeutic interventions, use of handcuffs, etc.) are based on duly justified and documented individual assessments and adjusted to the level of risk posed by each specific patient.[67] Relevant legal provisions should be appropriately amended.

4. BASIS OF PLACEMENT AND LENGTH OF STAY IN THE CENTER

Some patients have pointed to violations of Article 5 §1(e) of the ECHR when referring a complaint to the ECtHR.[68] CPT noted during interviews with patients

[64] Draft amendment, number UD350, < https://legislacja.gov.pl/projekt/12358362> accessed 3 May 2024.

[65] Inter alia in case *Ł.K. v Poland*, Ap. No 20228/19.

[66] CPT report from 2017 visit to Poland, paragraph 128.

[67] CPT report from 2022 visit to Poland, paragraph 69.

[68] Among others *W v Poland*, Ap. No 43562/17.

that they did not understand the reason for their placement in the NCPDB and were unable to predict how long they would have to stay there. This has a negative impact on their mood, attitude, and motivation to cooperate with staff.[69] As I mentioned at the outset, five patients died – in the hospital, hospice, or within the Center. The procedure for releasing individuals in poor health is so lengthy that patients die while still being the patients of the NCPDB. I also know a case where consent was given by the court for temporary stay outside the center in a hospice. However, a person in a terminal state of health was still on its roster and was not released. This is because the court would have to appoint forensic experts, and this process takes a long time.

VIII. FINANCIAL ASPECTS

The provision of Article 56 of the 2013 Act clarifies the limits on state spending on the NCPDB's operation. While it was 5 million zlotys in 2014 when the Center began operating, from 2015 to 2022, expenditures were planned at 7 million zlotys, but with the condition that they are estimated up to a limit of 10 patients. This number was exceeded not long after it was opened. The 60-patient limit set by the Health Ministry's regulation[70] was exceeded in 2018.

Since the number of 10 patients was exceeded in 2016, the expenses for the operation of the NCPDB increased drastically, amounting to 15 million zlotys in 2017, 35 million zlotys in 2018, and in the following years, respectively, 2019 – 30,600 million zlotys, 2020 – 59,370 million zlotys, 2021 – 65,375 million zlotys, 2022 – 56,886 million zlotys, 2023 – 94,925 million zlotys. As was publicly announced in April 2024,[71] currently the costs are more than 135 million zlotys. Therefore, the question should be raised as to whether, at such high expenses from the state budget, the Center effectively achieves all its goals, and whether the effectiveness of its therapy is evaluated in the form of scientific research. According to my knowledge, the latter is not the case. Huge funds allocated for the functioning of the NCPDB may constitute another argument for an in-depth analysis of the direction of changes in the functioning of preventive detention in our country.

[69] CPT report from 2022 visit to Poland, paragraph 86.

[70] Regulation of the Minister of Health dated 16 January 2014 on the National Center for the Prevention of Dissocial Behavior, in § 2 stipulates that the number of beds at the Center is 60. The capacity of the Gostynin center has never been increased, even though the regulation was amended in 2015, 2018 and 2022.

[71] The information presented by Monika Platek, during the conference: <https://www.youtube.com/watch?v=RVq4HdJoH1M> accessed 28 April 2024.

CONCLUSIONS

The anniversary of the preventive detention center cannot be treated as a moment to celebrate. On the contrary, it must be a moment to say stop to postponing legislative changes, turning a blind eye to violations of national and international law, and disrespecting standards of treatment of persons deprived of their liberty. New philosophy of post-penal isolation needs to be created. In my opinion, it should rather lead us towards the solutions used in the Netherlands than Germany.

Over the years changes have occurred, however in the direction of increasing overcrowding. Against this backdrop, CPT emphasized that it is aware that not only living conditions are a problem, and many more systemic issues need to be addressed regarding the future operation of the NCPDB and creating effective alternatives to that.[72] Over the past decade, the leadership of the Center has changed, following the death of the previous director, the atmosphere between patients and staff has evolved from crisis situations manifested in hunger strikes to a certain stability recently. However, the number of patients continues to increase and the concept of preventive detention requires new legal solutions that will take into account: past experience of its implementation in Poland as well as other countries within the framework of legal comparative analysis, and voices of experts from various fields – not only lawyers but also psychologists, psychiatrists, and sexologists.[73]

It is crucial to have a debate on security measures among those dealing with this issue, remembering that since 2015, the legal status has changed, and individuals 'posing a threat' may be isolated after serving their sentence in psychiatric institutions. It should be a fundamental change. CPT gives an indication that it refers to a change from the safety-based to rehabilitation-based one, involving appropriate preparation for release, in cooperation with society.[74] The current overcrowding in the National Center in Gostynin can be addressed not only by expanding the facilities but also by assisting more patients in reintegrating into society (under appropriate supervision when required). Additionally, amended law should contribute to increased use of alternative measures such as preven-

[72] Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 March to 1 April 2022, CPT/Inf (2024) 10, Strasbourg 2024, paragraph 86.

[73] Józef K. Gierowski, 'Uwagi psychologa sądowego o możliwościach opiniowania o stopniu zagrożenia u osób objętych ustawą z 22 listopada 2013 r.' Przegląd Więziennictwa Polskiego 82/2014, 15; Filip Szumski, Krzysztof Kasparek & Józef Gierowski, (2020) 'Wysokie czy bardzo wysokie ryzyko recydywy?: możliwości oceny kategorii ryzyka recydywy sprawców na potrzeby Ustawy z 22.11.2013' Psychiatria Polska 54.6, 1181.

[74] ibid, paragraph 86.

tive supervision to reduce the number of patients referred to preventive detention centers.

Therefore, the 10th anniversary of the Center cannot be considered a celebration of a well-functioning system of law, it is rather an occasion for a sad reflection that, despite the numerous scientific conferences highlighting the poorly functioning system of preventive detention, the institutions responsible for legislation and protection of society have not yet addressed this issue.

Last but not least, in my opinion, the CPT should also develop general recommendations on the standards of operation of places of preventive detention, just as it recently did regarding transgender persons in prisons.[75]

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[75] CoE, Prison Standard. Extract from the 33rd General Report CPT/Inf (2024) 16 – part (2024).

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Michał Mariański
University of Warmia and Mazury in Olsztyn, Poland
e-mail: michal.marianski@uwm.edu.pl
ORCID: 0000-0001-6212-914X

INSTITUTIONAL CHANGES IN THE FRENCH FINANCIAL JUDICIARY

Abstract

This publication is a part of the study of the French *Code des juridictions financières* in the field of the institutional aspects of the control of public finances. The main purpose of this publication is not only to describe the specificity of the French legal system in this field but also to focus on the recent changes that were introduced in 2023 by the French legislator. The general control is still exercised by the Court of Auditors *(Cour des comptes)* and Regional and territorial chambers of audit *(Chambres régionales et territoriales des comptes).* What is important is the fact that the new financial jurisdiction *(Cour d'appel financière)* appeared and took his first judgement in January 2024. This new Financial Appeals Court has not yet been analyzed in the doctrine.

The methodology used by the author is related to the functional approach of the comparative method, the historical-descriptive and dogmatic method, with particular emphasis on the regulations of French law.

This study analyzes the provisions of the French *Code des juridictions financières* related to the above mentioned new financial jurisdiction *(Cour d'appel financière)* and presents its place in the whole system – especially in relation to the Court of Auditors *(Cour des comptes)* and highest Administrative Court *(Conseil d'Etat).* The analysis of the very important role of the latter court is carried out in relation to its counterparts in Polish law, where the author's use of a functional approach to the comparative method plays a key role.The present article may also be considered as the first step towards a further in-depth analysis and research, and thus the verification of the thesis on possible application

of structures and solutions that were introduced in France by the Polish legislator or any other European country.

KEYWORDS

French law, financial law, control, Court of Auditors, public finance discipline

SŁOWA KLUCZOWE

prawo francuskie, prawo finansowe, kontrola, Trybunał Obrachunkowy, dyscyplina finansów publicznych

I. INTRODUCTION

The peculiarities of the French financial law and fiscal system are evinced, among other things, in the rather elaborate tax framework and in the significant role of case law,[1] by virtue of which, in certain aspects, the system closely resembles the solutions characteristic of the common law system.

The French financial judiciary was shaped concurrently with the decentralization processes initiated by the Act of 2 March 1982 on the rights and freedoms of communes, departments and regions.[2] Thus, from the outset, judicial control of public finances relied not only on the key role of the Court of Accounts (*Cour des comptes*) but also on the supplementary control exercised by the Regional and Territorial Chambers of Accounts (*chambres régionales et territoriales des comptes*) and the so-called supporting institutions of the Court of Accounts.[3]

Due to its limited scope, this article will not attempt to analyze all aspects of the financial judiciary in France, but it will outline the current framework of controlling public finances under French law, which saw a change following the establishment of the new Financial Court of Appeal (*Cour d'appel financière*) in 2023. In this regard, it is a distinguishing feature of the French financial system that all audit bodies are included in a single piece of legislation, the Code of Financial Jurisdictions (*Code des juridictions financières*), whose current content results from the latest reform that entered into force in 2023.[4]

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[1] Michel Bouvier, Les Finances locales (19th edn LGDJ Paris 2022) 7.

[2] Law of 2 March 1982 no 82-213 – *Loi relative aux droits et libertes des communes, des departements et des regions.*

[3] Michał Mariański, 'Kontrola finansów publicznych w prawie francuskim. Wybrane aspekty instytucjonalne' (2023) 28 Białostockie Studia Prawnicze 215.

[4] Fr. Ordonnance n° 2022-408 du 23 mars 2022 relative au régime de responsabilité financière des gestionnaires publics, JORF n°0070 du 24 mars 2022.

The methodology employed by this author is informed by the historical-descriptive as well as the dogmatic method, though it also adopts the functional approach of the comparative method with a particular focus on the provisions of French law. It should also be underlined that although the legal-comparative law method used in this study has a theoretical dimension – as an ex post guideline for the legislator – it may, above all, serve a practical purpose as a tool for improving the application of the law. Comparative law constitutes a science, a research method as well as the findings obtained by means of the comparative method.[5] It is further noted in Polish scholarship that comparative law is, in principle, a certain methodology for conducting research whose outcomes may be relevant for regulation at a level higher than merely national.[6]

Therefore, as part of this study, the author will briefly discuss where the Court of Accounts (*Cour des comptes*) and the Regional and Territorial Chambers of Accounts (*chambres régionales et territoriales des comptes*) stand within the French legal system, only to focus subsequently on the competences of the new Financial Court of Appeal (*Cour d'appel financière*). In the course of these deliberations, necessary references will be made to the competences and role of the supreme administrative court in France – the *Conseil d'Etat*.

In the new system of financial jurisdiction in France, the Court of Accounts is the court of first instance, while the new Financial Court of Appeal is a second-instance tribunal. The *Cour d'appel financière* is composed equally of representatives of the Court of Accounts itself and the supreme administrative court in France (*Conseil d'Etat*). In the system of financial jurisdiction, the latter is a court of cassation to which parties are able to appeal against the decisions of the Financial Court of Appeal through extraordinary appeal.

Furthermore, the inquiry and analysis presented in this study do have their practical significance, given that the Financial Court of Appeal, presided over by Mr. Pierre Moscovici, already delivered its first judgment on 12 January 2024 on the appeal filed by the General Prosecutor against the ruling of a chamber of the Court of Accounts.[7]

Consequently, the analysis presented here is relevant insofar as French law is characterized by the significant role of case law in formulating legislation and fine-tuning its provisions. In view of the above, a delineation of the nature and competences of the new institution – the Financial Court of Appeal (*Cour d'appel financière*) – may offer an incentive for further research and comparative investigations in this respect as well as assessments of the structures and solutions intro-

[5] Iwona Szymczak, 'Metoda nauki o porównywaniu systemów prawnych' (2014) 3 Ruch Prawniczy, Ekonomiczny i Socjologiczny 37.

[6] Roman Tokarczyk, Komparatystyka prawnicza (1st edn, Wolters Kluwer, 2008) 25.

[7] Case 2024-01 12 January 2024 The French Financial Court of Appeal - Alpexpo Company *(fr. Arrêt n° 2024-01 „Alpexpo Company").*

duced in France in terms of potential application by the Polish or other European lawmaker.

II. COURT OF ACCOUNTS AND CHAMBERS OF ACCOUNTS IN FRANCE

Both prior to and after the 2023 reform, the Court of Accounts (*Cour des comptes*) remains a key institution for public finance control in France. Detailed regulations pertaining to the court are contained in the Code of Financial Jurisdictions (*Code des juridictions financières*, hereinafter the CJF), Article L.111-1 to Article L.143-9.

The Court's primary tasks are to audit public accounts of the state and the main public institutions as well as verify whether the implementation of the financial plans was correct in budgetary and legal terms. The Court issues two types of rulings: discharge rulings when the accounting officer has fulfilled their duties and obligations[8] as well as rulings on debit when the said officer has incurred irregular expenditure or collected irregular revenue.[9]

It is also worth stressing that the Court carries out a very broad range of informative and scientific activities, for instance, by publishing annual reports concerned with public and local finances. The reports in question often identify key challenges in public finance and its control, providing a starting point for many subsequent analyses.[10] The latest report of the Court of Accounts, dated March 2023, delivers observations on the 40th anniversary of the decentralization process in France.[11] Spanning more than 500 pages, the document examines the chief challenges facing local government units in France.

Historically, the Court of Accounts was established by Napoleon under the law of 16 September 1807. It may also be noted that this body is also underpinned in the Constitution of the Fifth Republic of 1958.[12] Moreover, to ensure that it

[8] Fr. *des arrêts de décharge si le comptable public a respecté ses obligations*.

[9] Fr. *des arrêts de débet lorsque celui-ci a payé des dépenses ou encaissé des recettes irrégulières*.

[10] Michał Mariański, 'Wyzwania stojące przed organizacją i funkcjonowaniem JST we Francji świetle raportu francuskiego Cour des comptes z 2023 roku' (2024) 2 Dyskurs Prawniczy i Administracyjny 41.

[11] Raport Cour des comptes. *Rapport public annuel 2023 La décentralisation 40 ans après*, mars 2023, pdf. <www.ccomptes.fr> accessed 30 June 2024.

[12] Stanisław Bożyk, 'Wspomaganie parlamentu przez Trybunał Obrachunkowy we Francji. Aktualne problemy reform konstytucyjnych' (1st edn Temida 2, 2013) 337.

fulfils its mission in a completely independent way, the Court is composed of irremovable judges and has been granted a high degree of operational autonomy.[13]

In addition to its purely jurisdictional powers, the Court of Accounts assists the Parliament and the Government in monitoring compliance with financial statutes. Hence, internal audits assess whether the public funds of the state and other public institutions are properly used.[14]

In a general description of the French financial control model, one cannot fail to mention that besides their respective judicial functions, the Court and the Chambers of Accounts conduct extensive administrative audits of management on the part of administrators of public funds.

The Chambers of Accounts, as the second pillar of public financial control in France, are divided into regional chambers (*chambres régionales des comptes*) provided for in Article L.211 – L.245 CJF, and territorial chambers (*chambres territoriales des comptes*) referred to in Article L.250 – L.274 CJF.[15] In addition, due to the revised regional division in France under the law of 16 January 2015, the number of regional chambers in mainland France has been reduced by the relevant decree to thirteen, while the five territorial chambers competent for overseas territories have been retained.[16] It is also worth noting that the regional and the territorial chambers are a homogeneous group in terms of their institutional organization and scope of competence. In this way, they support the Court of Account (*Cour des comptes*) in that they jointly make up a system of overall assessment of the financial records maintained by public accounting officers as well as administrators of public funds.[17]

III. THE SITUATION BEFORE THE REFORM AND THE ROLE OF THE *CONSEIL D'ETAT*

Originally, the Court of Accounts was an institution which heard appeals against rulings of both types of chambers of accounts. As a body that issued var-

[13] Jacques Magnet, La Cour des comptes (2nd edn Berger Levrault, collection Administration nouvelle 1972) 31.

[14] Michel Bouvier, 'Nowe zarządzanie finansami publicznymi i strategie reform administracji we Francji' in Jacek Czaputowicz (ed), 'Zarządzanie zmianą w administracji publicznej' (Kontrast Warszawa 2012) 40-61.

[15] Adam Błaszko, 'Organizacja samorządu terytorialnego oraz nadzoru nad samorządem we Francji' (2019) 6 Finanse Komunalne 63.

[16] Fr. décret 2015-1199 du 30 septembre 2015.

[17] Michał Mariański, Luiza Budner-Iwanicka, 'Podstawy prawne funkcjonowania Izb obrachunkowych w Polsce i we Francji. Wybrane aspekty prawnoporównawcze' (2024) 1 Studia Prawnoustrojowe 243.

ious types of rulings, it was also a first-instance court whose decisions could be contested at the *Conseil d'Etat*, the Supreme Administrative Court, as the appellate institution. It should be emphasized at this point that the author has deliberately chosen not to use a literal translation of the latter's name in order not to mislead as to its role; instead, it is described in terms of its actual function and the position that it occupies within the French judicial system.[18]

In the current framework, the Court of Accounts remains a court of first instance – within the extent discussed above; however, its rulings cannot be appealed against with the Supreme Administrative Court (*Conseil d'Etat*) as previously, but have to be filed with the new Financial Court of Appeal.

Even so, the *Conseil d'Etat* still has a substantial role to play as, by virtue of decrees with the legal force of statutes, it determines the number of chambers of the Financial Court of Appeal, their composition, the rules of presidency and the conditions under which the Financial Court of Appeal decides in plenary or in chambers. It may be noted that the French legal order distinguishes three categories of regulatory decrees (*décrets réglementaires*): ordinary decrees (*les décrets simples*), decrees of the supreme administrative court (*les décrets en Conseil d'État*) and decrees of the Council of Ministers (*décrets en conseil des ministres*).[19] The decrees issued by the *Conseil d'État* are regulatory texts issued within the limits of the law and drafted according to a procedure different from ordinary decrees; also, they are provided with the closing formula "*Le Conseil d'État entendu*". There are four grounds on which such decrees are issued: the provision in Article 37 of the Constitution,[20] a specific statute, another decree, or the will of the Government expressed in view of the importance of the subject matter of the decree. Thus, the principal basis for the *Conseil d'Etat* to issue decrees with the force of law derives from Article 37 of the French Constitution.

In the opinion of this author, it is a highly interesting and, at the same time, controversial matter that the aforementioned reform establishes very strong organizational dependence between the new Financial Court of Appeal and the Court of Accounts as well as the Supreme Administrative Court (*Conseil d'Etat*). That dependence is evinced in the fact that the new Court of Appeals operates under the chairmanship of the first President of the Court of Accounts, while the bench is further composed of four representatives of the *Conseil d'Etat*, four

[18] Anna Klimaszewska and others, 'Spółka z ograniczoną odpowiedzialnością (société à responsabilité limitée) we francuskim kodeksie handlowym' (1st edition Wydawnictwo UWM 2017) 42.

[19] Muriel Fabre-Magnan, François Brunet, Introduction générale au droit (1st eds PUF 2017) 49.

[20] Fr. *Les matières autres que celles qui sont du domaine de la loi ont un caractère réglementaire. Les textes de forme législative intervenus en ces matières peuvent être modifiés par décrets pris après avis du Conseil d'État. Ceux de ces textes qui interviendraient après l'entrée en vigueur de la présente Constitution ne pourront être modifiés par décret que si le Conseil Constitutionnel a déclaré qu'ils ont un caractère réglementaire en vertu de l'alinéa précédent.*

representatives of the *Cour des comptes*, and two qualified persons with more than ten years' experience in the field of public management. Such composition of the new court makes it a de facto intermediate institution between the court of first instance and the court of cassation, as their representatives account for as much as eighty per cent of its members. In theory, this could raise doubts about the impartiality of appellate rulings which, after all, concern the judgments of the Court of Accounts. Similar reservations may also be expressed with respect to the cassation rulings of the *Conseil d'Etat*.

In this respect, one must not overlook the fairly specific role that the Supreme Administrative Court plays within the French judiciary. In other legal systems, such as Poland, the competences of the Supreme Administrative Court are not as extensive, although it is emphasized in the doctrine that the scope of cognizance of the Polish *Najwyższy Sąd Administracyjny* has gradually expanded since the early 1990s.[21] In the legal order of the Fifth French Republic, the *Conseil d'Etat* functions as an advisory body to the government and as the highest organ of the administrative judiciary. France's experience of the formation of the administrative judiciary during the Napoleonic period, which originated with the *Conseil d'Etat*, had a major impact on the French model, though it has rarely been adopted by other countries. From the outset, the distinctive feature of that model was that the adjudication of administrative disputes was separated from the court system; moreover, the bodies hearing such disputes were recognized as an integral part of the executive. In consequence, even the contemporary *Conseil d'Etat* is a body with a special systemic position and mixed judicial-administrative tasks.[22]

That exceptional role of the *Conseil d'Etat*, which may sometimes be difficult to understand in other legal orders, should be attributed to both historical developments and conceptual considerations.

The historical aspect should primarily be associated with the fact that the shape and the rules which govern the functioning of the administrative courts in France are rooted primarily in case law. This concerns such key issues as the liability of the state for the loss caused by its functionaries or the concept of the so-called public service (*service public*), which was identified and defined in the 1873 ruling in the *Blanco* case.[23] Other crucial judgments for the administrative judiciary include those issued in the *Terrier* case of 1903,[24] the *Feutry* case of 1908[25] and the *Thérond* case of 1910.[26]

[21] Maciej Dębski, 'Zmiany w polskim sądownictwie administracyjnym (zagadnienia wybrane)' (2022) 98 Acta Universitatis Lodziensis. Folia Iuridica 265.

[22] Lech Garlicki, 'Wprowadzenie' in Leszek Garlicki (eds) Sądownictwo administracyjne w Europie Zachodniej (1st ed Państwowe Wydawnictwo Naukowe Warszawa 1990) 9.

[23] Judgement of French Court *Tribunal des conflits* of 8 February 1873.

[24] Judgement of French Court *Conseil d'Etat* of 6 February 1903.

[25] Judgement of French Court *Tribunal des conflits* of 29 February 1908.

[26] Judgement of French Court *Conseil d'Etat* of 4 March 1910.

As for the conceptual considerations, although they situate France among the countries with two independent jurisdictions involving common and administrative courts, the nature of the latter is quite unique. The administrative judiciary, despite its well-established jurisprudential origin, was constitutionally and legally constituted only following the rulings issued by the French Constitutional Court (*Conseil Constitutionnel*) in the 1980s, which asserted that the control of administration by means of administrative courts headed by the *Conseil d'Etat* is among the foremost principles of the system of the Fifth Republic.[27] The decision of the Constitutional Court (*Conseil Constitutionnel*) of 22 July 1980 is particularly noteworthy,[28] as it expressly recognized that the principle of independent judiciary applied to the administrative courts as well. Furthermore, it is observed in the French doctrine that conceptually, the administrative judiciary on the Seine is structured like a planetary system, whose pivotal element and the center around which the other elements are organized is the *Conseil d'Etat*.[29] Other studies compare the understanding of the role and importance of the *Conseil d'Etat* to finding a key and essential element to the order of administrative judiciary in France.[30]

IV. COMPETENCES OF THE NEW FINANCIAL COURT

The competences of the Financial Court of Appeal in France are set out in detail in the (*Code des juridictions financières*; hereinafter the CJF), specifically in Article L.311-1 – L.311-7.

The very first provisions of that legislation, i.e. Article L.311-1, specify that the Financial Court of Appeal shall hear appeals against rulings by the chamber of litigation of the Court of Accounts referred to in Article L.131-21, with the exception of the judgments referred to in the second section of Article L.111-1. Pursuant to the cited article, these exceptions concern cases in which the Court of Accounts rules at first instance, including appeals against decisions of the territorial chambers of accounts.

It may be important to note that one of the elements of the reform which introduced the Financial Court of Appeal was the establishment of a new chamber dedicated to disputes – the so-called *chambre du contentieux* – within the structure of the Court of Accounts.

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[27] Michał Mariański, 'Specyfika organizacji samorządu terytorialnego we Francji' (2010) 12 Studia Ełckie 284.

[28] Decision of the Constitutional Court (*Conseil Constitutionnel*) of 22 July 1980 no 80-119 regarding the act validating administrative acts.

[29] René Chapus, 'Droit du contentieux administratif' (1999) 51 Revue internationale de droit compare 1164.

[30] Georges Vedel, Pierre Delvolvé, *Droit administratif* (1st edn PUF Paris 1992) 74.

Regarding the organization of the new Financial Court of Appeal, Article L.311-2 CJF indicates that it is chaired by the first President of the Court of Accounts, while the bench is further composed of four representatives of the *Conseil d'Etat*, four representatives of the *Cour des comptes*, and two qualified persons with more than ten years of experience in public management. Moreover, the members of the Financial Court of Appeal are appointed under a decree of the Prime Minister for a period of five years. Pursuant to Article L.311-3, all members are to submit to the President of the Financial Court of Appeal an exhaustive, accurate and sincere declaration of potential conflicts of interest, stating the connections and interests that the applicant has had in the five years preceding the appointment and which may have or appear to have an impact on the independent, impartial and objective performance of their duties.[31]

Further concerning the working mode and organization of the Financial Court of Appeal, Article L.311-4 provides that it adjudicates sitting on a full bench or in chambers. In chambers, it is presided over by one of the persons mentioned in 1° or 2° of Article L. 311-2, i.e. either a representative of the Court of Accounts or a representative of the *Conseil d'Etat*. In addition, it is the decree of the latter court that determines the number of chambers, their composition, the rules of the presidency, and the conditions under which the Financial Court of Appeal rules in plenary or in chambers.

As for the procedural aspects of the court's functioning, Article L.311-5 CJF specifies that the rules set out for the Court of Accounts in Chapter II, Title IV, Book I apply. In addition, Article L.311-6 makes it clear that the deadline for appeal and its filing suspends the execution of judgments of the chamber of litigation (*chambre du contentieux*) of the Court of Accounts. The final article of that part of pertinent legislation – L.311-7 – provides that a decree of the supreme administrative court of France (*Conseil d'Etat*) determines the conditions for the application of that particular book of the Code.

The aforementioned decrees have been collected in the regulatory part of the Code of Financial Jurisdictions – where the successive articles are marked with the letter R – specifically in R.311-1 to R.341-1. Thus, under one of the first decrees,[32] which supplied details to complement the statutory provisions (indicated by the letter 'L'), Article R.311-1 was introduced, which specifies that the Financial Court of Appeal operates within the Court of Accounts, having its seat there. In addition, according to Article R.311-2, the secretariat of the Financial Court of Appeal is provided by the services of the Court of Accounts.[33]

[31] This article specifies that any material change in the connections and interests held requires an additional declaration in the same form.

[32] Fr. décret n°2022-1604 du 22 décembre 2022 - art 7.

[33] The composition of each chamber shall ensure a balanced representation of the different categories of members provided for in points 1 to 3 of Article L. 311-2. The president of each chamber is appointed for the duration of his term of office by the president of the Financial Appeal

Furthermore, the decree clarifies that the composition of the Financial Court of Appeal includes ten alternate members who are appointed on the same terms as full members (Article L.311-3 CJF).

Regarding the procedural aspects, Article R.311-4 states that when adjudicating in plenary session, the Financial Court of Appeal is chaired by its president, who may also preside over this body when it rules in chambers. Here, Article R.311-5 adds that the Financial Court of Appeal has two chambers, each of which consists of five full members and five alternate members appointed by the president of the Financial Court of Appeal.

Pursuant to Article R.311-7, cases brought before the Financial Court of Appeal are heard in chambers and the President of the Financial Court or the president of the chamber hearing the case may refer the case to a plenary session. However, the President of the Financial Court of Appeal may decide that the case be registered directly in plenary. By virtue of a decree, Article R.311-8 and Article R.311-9 further specify that in the event of the absence or incapacity of the president of the court during a plenary or chamber sitting, the second president of the chamber or, in the absence of the latter, a judge with seniority presides.

A vital elaboration of the statutory regulations is found in Article R.311-10, which sets out that in the event of vacancy, absence or incapacity of a member of a chamber, an alternate deputy member takes their place; should the latter be absent, the President of the Court of Accounts will delegate an ordinary or alternate member of the other chamber. The members thus designated are selected in order of seniority of appointment to the Financial Court of Appeal. In the cases of equal seniority of several members, the most senior member is selected.

It is worth noting that the Financial Court of Appeal can only validly deliberate in plenary sessions or in chambers if at least six or three members of the panel are present, respectively, including, pursuant to Article R.311-11, at least one representative of the Court of Accounts and at least one representative of the *Conseil d'Etat*. Crowning the above, Article R.311-13 provides that the President of the Financial Court of Appeal appoints one or more senior judicial officers (*greffier*) chosen from among the representatives of the Court of Accounts, who take the oath before the president. Those senior judicial officers (*greffiers*), who have their Polish equivalent in the well-known institution of the court referenda, are responsible for the proper conduct of court proceedings and assist the member of the Financial Court of Appeal in charge of the investigation.[34]

Another set of provisions introduced by the decrees of the French Supreme Administrative Court (*Conseil d'Etat*) elaborate on the statutory regulations with respect to procedure. Thus, Article R.321-1 provides that, in principle, the pro-

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Court from among the ordinary members referred to in 1° and 2° of Article L.311-2 (thus among the representatives of the *Cour des Comptes and Conseil d'Etat*).

[34] In addition, the *greffier* prepares and organizes hearings, keeps books and registers, announces judgments and publishes them in accordance with the law.

visions of the code of financial jurisdictions (*Code des juridictions financières*), which pertain to the Court of Accounts, apply to the Financial Court of Appeal as well. In addition, the Secretariat of the Financial Court of Appeal, in accordance with Article R.321-1, is required to promptly communicate requests for appeal and supplementary submissions, if any, to other persons entitled to file an appeal.

If the appeal is duly lodged within one month of the communication referred to in Article R.321-2, the party with the status of the respondent may become acquainted with all the documents attached to the appeal application at the Secretariat of the Financial Court of Appeal and file a response to the appeal. The Secretariat serves a copy of the first response to the appeal on the appellant, who, within one month from being served, may submit a response, which in turn will be conveyed to the respondent. On the basis of the latter, the respondent has fifteen days to submit a second response to the appeal, which is transmitted to the appellant. The appellant may submit yet another reply within fifteen days of the transmission. This procedure, described in Article R.321-3, is, in fact, a measure enabling an extended dialogue between the parties, as the double reply to the appeal and the double counter-reply are elements that are extremely rarely explicitly included in procedural acts.

In addition, pursuant to Article R.321-4, if the appeal application is not accompanied by a copy of the ruling issued by the chamber of litigation of the Court of Accounts, the appellant is requested to supplement the application. The request states that failure to do so will result in the appeal being rejected as inadmissible after the expiry of the prescribed time limit, which, except in extraordinary circumstances, may not be less than fifteen days. The decree also clarifies that when a case is brought before the Financial Court of Appeal, its president appoints one or more full or alternate members, state councilors or chief councilors of the Court of Accounts to provide additional information on the case.

Furthermore, Article R.321-6 indicates that if a member of the Financial Court of Appeal in charge of supplementary information finds that there are reasons for them to be excluded from the case, they should abstain from voting, immediately advising the Chairman of the Adjudicating Panel. The latter appoints another judge to replace the former. Likewise, a party wishing to challenge the impartiality of a member of the Financial Court of Appeal in charge of supplementary information files a request with the president of the Court within one month from the date of appointment of the member or the occurrence of an event which gives rise to the request, as the case may be.[35] It may be noted that the actions of the recused member prior to their becoming aware of the request for exclusion may not be challenged. Furthermore, the President of the Financial Court of Appeal rules on the recusal by way of a decision without stating reasons thereto, which

[35] The application should indicate precisely the reasons for filing the complaint and include in an annex documents confirming the content contained therein.

may only be appealed against before the *Conseil d'Etat* along with the ruling issued subsequently.

As far as the member responsible for supplementary information is concerned, pursuant to Article R.321-7, they are required to issue a closing order in which they present the results of their work. This order is not appealable (*pas susceptible de recours*).

The issuance of the ruling by the Financial Court of Appeal is subject to the requirements and procedures applicable to the Court of Accounts. In particular, pursuant to Article R.322-2, it is the presiding judge who exercises control over a hearing and decides the direction of the hearings at which the member of the Financial Court of Appeal in charge of supplementary information presents the outcome of their investigation. The person who is a party to the appeal or their attorney may make oral submissions while the members of the panel and the prosecutor may direct questions to the person who is a party to the appeal or the witnesses, asking the President to speak. The person who is a party to the appeal may, under the same conditions, ask questions of witnesses and, where appropriate, other persons who are party to the appeal. Additionally, the prosecutor or the person who is a party to the appeal may request a suspension of the hearing at any time. The last of the articles relating to hearings, which were introduced by virtue of a decree, is Article R.322-3 – provides that after the public hearing, the panel deliberates without the member of the Financial Court of Appeal in charge of supplementary information or the prosecution in attendance. If a vote has to be taken, the Chairman collects the opinion of each member of the panel successively, in reverse order of seniority, while decisions are taken by majority vote.[36]

The final aspect of the regulatory part – namely, the issues pertaining to appeal – are detailed in Article R.331-1 to R.331-3. The first of these specifies that the decisions of the Financial Court of Appeal may be the subject of an appeal in cassation to the Supreme Administrative Court (*Conseil d'Etat*). This measure may be applied by the prosecutor or a person who is a party to the proceedings. In addition, pursuant to Article R.331-2, a party to the appeal may request, after the expiry of the deadline for filing it with the *Conseil d'Etat*, a review of the ruling when a new fact or circumstance comes to light that, having been unknown to the panel at the date of the ruling, is likely to prove a party not liable. The request for review is addressed to the President of the Financial Court of Appeal. If submitted on paper, it is to be sent by registered mail with acknowledgement of receipt. It must set out the facts and arguments invoked by the applicant and must include a copy of the judgment under appeal, along with its rationale. Finally, ending this part of the Code of Financial Jurisdictions, Article R.331-3 sets out that, in the case of an appeal filed with the Financial Court of Appeal (as a court of second

[36] Only members of the adjudicating panel who participated in the public hearing take part in voting on the Court's position.

instance), its president appoints a member responsible for examining the request for review, of which the parties to the appeal are to be notified. The proposals of the member in charge of the investigation are forwarded to the prosecutor, who presents the conclusions. Following a public hearing, the Financial Court of Appeal rules on the review of the judgment, deciding on the admissibility of the appeal and, if applicable, on the merits of the case.

V. CONCLUSIONS

The analysis of the reform of the French financial judiciary, whose key element was establishing a new Financial Court of Appeal, has revealed a number of aspects that may prompt further research and contribute to reflection on the concept of decent legislation[37] and validity of French solutions. A system in which the Court of Accounts (*Cour des comptes*) and the Supreme French Administrative Court (*Conseil d'Etat*) play crucial roles has been left in place. At the same time, provisions pertaining to the new Financial Court of Appeal have been included in the legislation which governs the two aforementioned courts, i.e. the Code of Financial Jurisdictions (*Code des juridictions financières*), as a result of which the regulations are consistent and complementary. In other words, numerous earlier provisions of the aforementioned Code, especially with respect to procedure, apply to the new financial court.

Moreover, the provisions relating to the new Financial Court of Appeal introduce several interesting and specific procedural solutions, notably the possibility of an extended dialogue between the parties contained in Article R.321-3, enabling a double reply to the appeal and a double counter-reply.

Moreover, the decrees of the French Supreme Administrative Court (*Conseil d'Etat*) carry great significance in this arrangement, as they define, e.g. the number of chambers, their composition, the rules of the presidency and the terms under which the Financial Court of Appeal rules in plenary or in chambers.

In the opinion of this author, it was a highly interesting, though at the same time controversial fact that the new Financial Court of Appeal is very strongly dependent – in terms of organization – on both the Court of Accounts and the Supreme Administrative Court (*Conseil d'Etat*). This is evinced in the fact that the new Court of Appeals operates under the chairmanship of the first President of the Court of Accounts, while the bench is further composed of four representatives of the *Conseil d'Etat*, four representatives of the *Cour des comptes*, and two qualified persons with more than ten years' experience in public management.

[37] Dawid Ziółkowski, 'Importance of the principle of decent legislation for Polish administrative law' (2024) 102 Studia Iuridica 242.

Such a composition of the new court may raise doubts about the impartiality of its rulings, which, after all, concern the judgments of the Court of Accounts. Much the same is the case with cassation appeals against the judgments of the new Financial Court of Appeal, which are heard by the Supreme Administrative Court (*Conseil d'Etat),* whose members sit on the former.

Undoubtedly, such an organization of the court of appeals has the advantage of being specialized and, therefore, efficient, though simultaneously, the actual two-instance nature of the appeal procedure and the impartiality of the rulings may be considered debatable. Obviously, the above will be verified in the course of judicial practice, which has only just been inaugurated with the first ruling that the new Financial Court of Appeal issued in January 2024. Nevertheless, bearing in mind the observations in this publication, a very interesting element for further analysis may be the potential complaints to the European Court of Human Rights, in which one would, e.g. challenge the independence of the court in view of its composition, as forty per cent of the judges are associated with the court of first instance and another forty per cent with the court of cassation.

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Łukasz Dubiński
University of Szczecin, Poland
e-mail: lukasz.dubinski@usz.edu.pl
ORCID: 0000-0002-9360-3892

ADMINISTRATIVE AGREEMENT (OUTLINE OF THE ISSUE IN THE POLISH LEGAL SYSTEM)

Abstract

There is no general regulation in the Polish legal system that would specify the rules for executing administrative contracts. What is more, a number of legal acts offer solutions that do not fit the formula of 'traditional' forms of contracts under administrative law and civil law. When it comes to activities that require cooperation of a public administration body with entities outside the administration, the above-mentioned forms of action are often referred to as administrative agreements. Therefore, this study attempts to determine the basic properties of an administrative agreement, with a particular emphasis on the juxtaposition of its features with its civil law counterpart.

KEYWORDS

administrative agreement, administrative authority, civil law

SŁOWA KLUCZOWE

umowa administracyjna, organ administracji publicznej, prawo cywilne

I. INTRODUCTION

The aim of this study is a critical analysis of the features of administrative agreement that are presented in the Polish literature. The Polish legal scholars and commentators have published an array of studies, also including monographs[1] that address the subject matter of administrative agreement.[2] Moreover, this question has been discussed multiple times when presenting legal forms of operation of administration[3] and when commenting on a project that was ultimately not implemented and that was intended, inter alia, to outline general rules of the Polish variant of the administrative agreement.[4] At that point, we need to note that almost all authors specify their own catalogue of features of an administrative agreement.

It needs to be emphasized in this context that numerous publications feature discussions on foreign solutions (e.g. German,[5] French[6] or Italian[7]). However, the administrative agreement is often subject of a separate and general regulation in other countries. Given that as well as the objective differences between individual legal systems, the discussion in this study will be limited to Polish determinants of the administrative agreement.

The aim of this study is also to prepare proposals of a definition of the administrative agreement. The pretext for this initiative came in the words of Bieś-Srokosz who says that:

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[1] See, e.g. Ziemowit Cieślik, *Umowa administracyjna w państwie prawa* (Kantor Wydawniczy Zakamycze 2004).

[2] See, e.g. Andrzej Panasiuk, 'Umowa publicznoprawna (próba definicji)' [2008] 2 Państwo i Prawo 18, 18ff; Lucyna Staniszewska, 'Zagadnienia konstrukcyjne umów publicznoprawnych' [2019] 3(27) Studia Prawa Publicznego 139, 139ff.

[3] See, e.g. Jerzy Starościak, *Prawne formy działania administracji* (Wydawnictwo Prawnicze 1957) 250-272; Eugeniusz Ochendowski, *Prawo administracyjne. Część ogólna* (Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora" w Toruniu 1998) 186.

[4] See, e.g. Agnieszka Krawczyk, 'Umowa administracyjna w kodeksie postępowania administracyjnego (propozycja regulacji)' [2015] 2 *Państwo i Prawo* 100, 100ff; Dariusz Ryszard Kijowski, 'Umowa administracyjna w części ogólnej polskiego prawa administracyjnego' in Jan Boć and Andrzej Chajbowicz (eds), *Nowe problemy badawcze w teorii prawa administracyjnego* (Kolonia Limited 2009) 283-292.

[5] See, e.g. Marcin Miemiec, 'Umowa administracyjna według prawa niemieckiego' in Jerzy Korczak and Jan Szreniawski (eds), *Cywilizacja administracji publicznej: księga jubileuszowa z okazji 80-lecia urodzin prof. nadzw. UWr dra hab. Jana Jeżewskiego* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego 2018) 311-324.

[6] See, e.g. Michał Kania, *Umowa o partnerstwie publiczno-prywatnym. Studium administracyjno-prawne* (Oficyna Wydawnicza Wacław Walasek 2013) 127-136.

[7] See, e.g. Marek Szewczyk, 'Umowa ekspropriacyjna' in Marek Szewczyk and Maciej Kruś and Zbigniew Leoński, *Prawo zagospodarowania przestrzeni* (Wolters Kluwer Polska 2022) <https://sip.lex.pl/#/monograph/369519344/8?tocHit=1> accessed 2 May 2023.

> [u]nfortunately, an agreement under civil law is often mistaken for an administrative agreement, which de facto does not have a legal definition or a definition developed by the scholarly circles. Naturally, there have been numerous attempts to define it, though without the desired effect of its further acceptance.[8]

Given the limitation of the volume of the text and the research purpose, this study adopts the following initial assumptions. First of all, the administrative agreement is a legal form of activity of administration,[9] and to be more precise, a legal act of administrative authorities.[10] Secondly, the administrative contract is a non-authority imposing form of activity of public entities.[11] Thirdly, it is assumed that the administrative agreement is not simply an agreement under civil law executed by public administration authorities.[12] Therefore, it seems necessary to refer the features of the administrative contract to the foundation of contracts under civil law, that is the principle of freedom of contract.[13]

Some other information must be added to the above. There is no general regulation in the Polish legal system that would set rules for executing administrative agreements.[14] Nevertheless, legal scholars and commentators assume that selected contracts executed by public authorities should be indeed treated as administrative agreements.[15]

The lack of administrative regulation indicated above means that the features of the administrative agreement will be outlined in this study on the basis of three sources. In the first instance, the achievements of legal scholars and commenta-

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[8] Paulina Bieś-Srokosz, 'Kierunek działań prawodawczych ustawodawcy w stosowaniu prywatnej i hybrydowej formy działania w administracji publicznej' [2018] 2(244) Zeszyty Naukowe KUL 65, 70.

[9] See Krystian Ziemski, *Indywidualny akt administracyjny jako forma prawna działania administracji publicznej* (Wydawnictwo Naukowe UAM 2005) 138ff.

[10] The point is that it is undertaken directly for the purpose of producing a legal effect… ibid, 143.

[11] Bartłomiej Jaworski, 'Niewładcze formy działania administracji – potrzeba redefinicji?' [2018] XVI/1 (2) Opolskie Studia Administracyjno-Prawne 133, 134ff.

[12] See Paweł Sancewicz, 'Umowa jako prawna forma działania administracji publicznej w polskiej i niemieckiej doktrynie prawa publicznego' [2019] 1 (25) Studia Prawa Publicznego 55, 57-63.

[13] See Piotr Machnikowski, *Swoboda umów według art. 353[1] KC. Konstrukcja prawna* (C.H. Beck 2005).

[14] Sławomir Pawłowski, 'Umowa publicznoprawna – niewykorzystana szansa' [2021] 35/117 Acta Iuridica Resoviensia 320.

[15] What is meant here is the so-called expropriation agreement and social contact. See respectively, Sławomir Pawłowski, 'Pojęcie, przedmiot i charakter prawny umowy wywłaszczeniowej (ekspropriacyjnej)' [2018] 4(244) Zeszyty Naukowe KUL 2018 155, 155ff; Alina Miruć, 'O roli i specyfice umów w działaniach administracji pomocy społecznej' Jerzy Korczak and Jan Szreniawski (eds), *Cywilizacja administracji publicznej: księga jubileuszowa z okazji 80-lecia urodzin prof. nadzw. UWr dra hab. Jana Jeżewskiego* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego 2018) 325-338.

tors on this form of activity of public administration will be presented. Secondly, the previously mentioned reference to the civil law regulation concerning freedom of contract will be referred to. Thirdly, the discussion will be complemented by individual solutions relating to regulations concerning contracts recognized in the literature as examples of administrative agreements. To be more precise, what we mean here is the so-called expropriation agreement[16] and the so-called social contract.[17] It is highlighted at the same time that a detailed discussion of both these contracts and an analysis of foreign models of administrative agreements go beyond the framework of this study.[18]

II. LEGAL BASIS FOR EXECUTING AN ADMINISTRATIVE AGREEMENT

Most studies emphasize that the execution of an administrative agreement hinges on the existence of an appropriate legal basis.[19] It is, undeniably, the appropriate approach. As is rightly noted in the literature, 'the specific characteristics of actions taken by administration require each time a legal basis to execute a given action. This principle is expressed in the Constitution, which provides that

[16] See Sławomir Pawłowski, 'Pojęcie, przedmiot i charakter prawny umowy wywłaszczeniowej (ekspropriacyjnej)' [2018] 4(244) Zeszyty Naukowe KUL 2018 155, 155ff.

[17] See Iwona Sierpowska, *Pomoc społeczna jako administracja świadcząca. Studium administracyjnoprawne* (Wolters Kluwer Polska 2012) <https://sip.lex.pl/#/monograph/369255273/166010> accessed 2 May 2023.

[18] It needs to be pointed out that apart from the expropriation agreement and the social contract referred to above, legal writings also identify other examples of presence of administrative agreements in the Polish legal system. For example, we must note a subsidy agreement in the light of Polish and foreign regulations and an agreement on the execution of an individual programme of overcoming homelessness. See respectively, Anna Ostrowska, 'Koncepcja umowy administracyjnej na przykładzie umowy o dotację w świetle polskich i zagranicznych regulacji' [2018] 6/3 *Prawo Budżetowe Państwa i Samorządu* 9, 9ff. Dominika Cendrowicz, 'Koncepcja umowy administracyjnej na przykładzie umowy w sprawie realizacji indywidualnego programu wychodzenia z bezdomności' in Maciej Kruś and Lucyna Staniszewska and Marek Szewczyk (eds), *Kierunki rozwoju jurysdykcji administracyjnej* (Wolters Kluwer Polska 2022).

[19] Piotr Szreniawski, *Administracyjnoprawne zagadnienia przeciwdziałania nikotynizmowi* (Wydawnictwo piotrszreniawski 2005) 69. Starościak's position needs to be noted in this context, according to whom the administrative agreement does not usually feature: 'as a fully independent form, but as a form bound by an administrative act. This is the case when admissibility to execute an agreement depends on the existence of an administrative act, whose provisions the agreement develops or where there is an obligation to have the agreement confirmed or registered by another public authority'. Quotation from: Jerzy Starościak, *Prawo Administracyjne* (Państwowe Wydawnictwo Naukowe 1969) 251.

all government and administrative authorities act under the law'.[20] In this context, however, it must be raised that the sole fact of binding authorities with law does not provide a basis to differentiate the administrative agreement from other forms of activity of public administration.[21]

Taking the above into consideration, it is also worth emphasizing that the execution of an agreement under civil law[22] by a public entity should also be based on the provisions of the law.[23] Therefore, the principle of the freedom of contract does not apply in the sense that the assessment of the correctness of a public authority becoming a party to a private law relationship does not come down to verifying whether establishing a given legal relationship has not been in violation of the law. It is thus necessary to verify whether there is a legal basis that justifies the conclusion of a given contract by a public entity.

It must also be noted that binding the authority that enters into a civil law agreement by law also matters for the counterparty from outside public administration. The issue lies in the fact that if a public entity does not have a legal basis while entering into a private law agreement the legal effect of such a contract may be undermined. It is worth pointing out in this context that the presented relation

[20] Joanna Lemańska, 'Umowa administracyjna a umowa cywilnoprawna' in Iwona Niżnik-Dobosz and others (eds), *Instytucje współczesnego prawa administracyjnego: księga jubileuszowa profesora zw. dra hab. Józefa Filipka* (Wydawnictwo Uniwersytetu Jagiellońskiego 2011) 421.

[21] What is meant here is that due to Article 7 of the basic law, de facto any activity of an authority must be based on provisions of the law. See Jan Olszanowski, 'Treść zasady' in Grzegorz Łaszczyca and Andrzej Matan and Wojciech Piątek and Jan Tarno (eds), *System Prawa Administracyjnego Procesowego. Vol. II. Część 2. Zasady ogólne postępowania administracyjnego* (Wydawnictwo Uniwersytetu Jagiellońskiego 2018) <https://sip.lex.pl/#/monograph/369442027/387170> accessed 2 May 2023.

[22] 'Agreements under civil law in administration will include, inter alia, agreements in cases of public contracts, public-private partnership agreements, agreements for the provision of health care services, or agreements executed on the basis of provisions on financing science or provisions of the law on higher education'. Quotation from: Anna Fermus-Bobowiec, 'Wybrane zagadnienia dotyczące wykorzystania umowy cywilnoprawnej jako instrumentu działania administracji' [2018] 4(244) Zeszyty Naukowe KUL 125, 126. It must be noted on the side that the issue of the use of agreements under civil law was examined even in the period of the Polish People's Republic. See Zbigniew Kmieciak, 'Umowa cywilnoprawna i porozumienie administracyjne jako formy działania organów administracji w sferze zarządzania gospodarką państwową' [1987] 3 Ruch Prawniczy, Ekonomiczny i Socjologiczny 159, 159ff.

[23] Kijowski points in this context to the diversity of positions presented by legal scholars and commentators: 'On the one hand, it was being proven that the possibilities of the use of civil-law forms of operation of administration are very broad, agreements must be executed on the basis of task-based norms (...). On the other hand, the need of existence of a detailed legal basis to execute each agreement was being proven'. Quotation from: Dariusz Ryszard Kijowski, *Czy cywilnoprawne formy działania administracji cywilizują jej podejście do spraw obywateli?* in Jerzy Korczak and Jan Szreniawski (eds), *Cywilizacja administracji publicznej: księga jubileuszowa z okazji 80-lecia urodzin prof. nadzw. UWr dra hab. Jana Jeżewskiego* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego 2018) 195.

between the meaning of the legal basis for authorities' entering into agreements under civil law is analogous to a situation where public entities enter into administrative contracts.

III. THE SUBJECT OF AN ADMINISTRATIVE AGREEMENT

The special objects of the administrative agreement are the second feature most frequently mentioned when discussing it. The literature points out that the purpose of the execution of such a contract is either to satisfy society's needs[24] (also public needs)[25] or to implement public tasks.[26] There is also talk about the fact that 'an agreement executed by an administrative authority is related to the implementation of its planned obligations'.[27] Analysing these views, it needs to be noticed that despite the different specification of objectives of an administrative agreement, each of the positions presented has a visible reference to the essence of the operation of public sector entities. Thus, it means proceedings that are intended to satisfy public needs in the sphere in which the legislator outlines the scope of operation of a specific public entity. However, it needs to be noted that these assumptions that refer to the objects of an administrative agreement may in certain cases be realized also by the public authority entering into a relationship under civil law. The private-public partnership[28] may serve as an example here. Its objective may be to realise a specific public task.[29] Bearing this in mind, Lemańska's position needs to be rejected. She claims that 'in the case of administrative agreements, the objects of the contract are usually so strongly related to admi-

[24] Paulina Bieś-Srokosz, 'Kierunek działań prawodawczych ustawodawcy w stosowaniu prywatnej i hybrydowej formy działania w administracji publicznej' [2018] 4(244) Zeszyty Naukowe KUL 65, 71.

[25] Lucyna Staniszewska, 'Zagadnienia konstrukcyjne umów publicznoprawnych' [2019] 3(27) Studia Prawa Publicznego 139, 149.

[26] Andrzej Panasiuk, 'Umowa publicznoprawna (próba definicji)' [2008] 2 Państwo i Prawo 18, 27.

[27] Jerzy Starościak, *Prawne formy działania administracji* (Wydawnictwo Prawnicze 1957) 270.

[28] 'The literature predominantly presents a belief that the legislator rightly held that a private-public partnership agreement has a civil law nature, which in practice has undoubtedly helped avoid possible different opinions on the legal nature of these agreements' - quotation from: Katarzyna Płonka-Bielenin, 'Kwalifikacja prawna umowy o partnerstwie publiczno-prywatnym' in Marek Mączyński and Mirosław Stec (eds), *Działalność gospodarcza jednostek samorządu terytorialnego* (Wolters Kluwer Polska 2016) <https://sip.lex.pl/#/monograph/369394630/311760> accessed 2 May 2023.

[29] Katarzyna Płonka-Bielenin, 'Realizacja zadań publicznych w formie partnerstwa publiczno-prywatnego' in Bogdan Dolnicki (ed), *Sposoby realizacji zadań publicznych* (Wolters Kluwer Polska 2017) <https://sip.lex.pl/#/monograph/369405745/332801> accessed 2 May 2023.

nistration that they could not function outside of it'.[30] On the other hand, it needs to be said that naturally there will be administrative agreements whose objects will be impossible to recreate in relationships under civil law. Nevertheless, such cases must not be treated as a rule, or more strictly speaking, such an assumption cannot be made before the legislator creates general rules on executing administrative agreements.

IV. ADMINISTRATIVE AGREEMENT AND ADMINISTRATIVE RELATIONSHIP

Issuing an administrative decision, and thus taking this particular legal act by a public entity, results in the emergence of an administrative relationship. Thus it becomes necessary in this place to emphasize the fact that so far no consensus has been made as to how to understand the administrative agreement itself.[31] This absence of a joint position of legal scholars and commentators is all the more troublesome as it concerns one of the key institutions of administrative law. However, we may notice that it is assumed as a rule that the essence of a relationship under administrative law is the fact that its participants are not equal.[32] At the same time, the dominant role is attributed to the public side of administrative relations because it is this party that has 'the right to rule on and decide in a binding manner about the situation of the other party to this relationship'.[33]

Given the above, it is worth quoting Ochendowski, according to whom 'an administrative agreement may cause the establishment, change or cancellation of administrative relations'.[34] Unfortunately, he fails to develop his view. At the

[30] Joanna Lemańska, 'Umowa administracyjna a umowa cywilnoprawna' in Iwona Niżnik-Dobosz and others (eds), *Instytucje współczesnego prawa administracyjnego: księga jubileuszowa profesora zw. dra hab. Józefa Filipka* (Wydawnictwo Uniwersytetu Jagiellońskiego 2011) 424.

[31] See Roman Hauser, 'Stosunek administracyjnoprawny' in Roman Hauser and Zygmunt Niewiadomski and Andrzej Wróbel (eds), *Instytucje prawa administracyjnego. System Prawa Administracyjnego* (C.H. Beck 2015) <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zoge4tkmbwgq3dambogqxde#id=mjxw62zoge4tkmbwgq3dambogq> accessed 2 May 2023).

[32] See Jan Zimmermann, *Aksjomaty prawa administracyjnego* (Wolters Kluwer Polska 2013) 131.

[33] Roman Hauser, 'Stosunek administracyjnoprawny' in Roman Hauser and Zygmunt Niewiadomski and Andrzej Wróbel (eds), *Instytucje prawa administracyjnego. System Prawa Administracyjnego* (C.H. Beck 2015) <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zoge4tkmbwgq3dambogqxde#id=mjxw62zoge4tkmbwgq3dambogq> accessed 2 May 2023). The Author refers to Jerzy Starościak, 'Stosunek administracyjnoprawny' in Teresa Rabska and Janusz Łętowski (eds) *System Prawa Administracyjnego* (Ossolineum 1978) 21.

[34] Eugeniusz Ochendowski, *Prawo administracyjne. Część ogólna* (Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora" w Toruniu 1998) 186. Also, the concepts that

same time, we cannot rely on this statement only. Thus, given the non-authority imposing nature of an administrative agreement, we need to hold that a relationship modelled on the basis of the execution of a contract does not correspond to the 'classic' administrative relationship. An obvious question appears here about how to qualify this relation. Undeniably, execution of an administrative agreement results in the emergence of a legal relationship between its parties. Besides, we may say with certainty that it is not a relationship under civil law as it effects in the execution of a private law agreement. Given this, it is worth remembering other features, apart from the above-mentioned inequalities of parties that legal scholars attribute to the administrative relationship. It is assumed in the literature that the emergence of the analysed relation means that a public authority must be one of the parties to it[35] (personal feature), and its objects remain related to the implementation of the responsibilities of this entity[36] (material feature). It may easily be noticed that both these attributes are also characteristic of relations that emerge as a result of the execution of an administrative agreement. Therefore, it is proposed that the understanding of an administrative agreement be modified in such a way that its formula includes both, relations that emerge as a result of issuing an administrative decision and those that will be constituted after the execution of an administrative agreement. Therefore, it seems that such a general administrative relationship should have the features mentioned above (that is, personal and material). Naturally, such an approach may be undermined by a belief that individual civil law relations may also fit within such a framework. The previously-mentioned public-private partnership agreement may serve as an example here. However, it is worth noting that even a simultaneous occurrence in a civil-law relationship of both of the said features of an administrative law relationship does not constitute a private law relationship. This is because a relationship under civil law has other features.[37] Therefore, it must be said that a given relation may be of a private law character despite having features of an administrative relationship (that is personal and material). Moreover, the said modelling of a specific relationship under civil law is only one of the variants of a private law relationship. On the other hand, rela-

assume the creation of regulations of an administrative agreement emphasize that such contracts should result in the creation of an administrative-private relationship – Piotr Ruczkowski, 'O potrzebie wprowadzenia procesowej i materialnoprawnej umowy publicznej (administracyjnej) do systemu prawnych form działania administracji' in Emil Kruk and Grzegorz Lubeńczuk and Marian Zdyb (eds), *Dysfunkcje publicznego prawa gospodarczego* (C.H. Beck 2018) 84.

[35] Jan Zimmermann, *Alfabet prawa administracyjnego* (Wolters Kluwer Polska 2022) 239.

[36] Jerzy Starościak, *Prawo Administracyjne* (Państwowe Wydawnictwo Naukowe 1969) 15.

[37] What is meant here is that we can talk about a civil law relationship only in the case of a financial and non-financial relationship of two equal and at the same time any given entities that have rights and obligations towards each other. The basis of their emergence lies in civil law regulations. Thus, it is not that one of those entities must be a public administration authority and that the relationship of the participants of the relationship must refer to administrative law. See Agnieszka Kawałko, Hanna Witczak, *Prawo cywilne część ogólna* (C.H. Beck 2020) 35-36.

tions that emerge as a result of issuing an administrative decision or the execution of an administrative agreement cannot be devoid of any of the features mentioned, that is a public entity must be one of the parties and the objects of the contract must be related to the execution of tasks of the administering entity.

Referring to the quoted view by Ochendowski, one could also come to the conclusion that the execution of an administrative contract may impact another legal relationship, that is the relation that emerged under a given agreement. In this context, it needs to be noted that the execution of a social contract has the same effects.[38] In turn, the signing of the so-called expropriation agreement allows 'avoidance' of an administrative relationship *sensu stricto* that would have to emerge as a result of issuing a decision that takes away ownership of given real estate.[39] It also needs to be emphasized that the given examples of consequences of the execution of administrative agreements cannot be seen as representative of the entire legal system. This conclusion is founded on the fact that the relations of these agreements with administrative relationships result from the specific characteristics of both contracts, not from any general assumptions.[40] Therefore, it needs to be assumed that the possible impact on 'external' administrative relations towards a specific administrative agreement is not a feature that would distinguish this type of contract.

V. FREEDOM OF CHOICE OF THE FORM OF AN ADMINISTRATIVE AGREEMENT

The foundations of private law relations include the option to add instruments that serve the implementation of a given goal. For example, transfer of ownership may well proceed under the contract of sale and a donation agreement. Therefore, it is worth looking at this issue from the perspective of contracts under admi-

[38] 'For example - the aim of the contract may envisage its implementation in the form of a decision of a social assistance authority on granting an earmarked benefit'. Wojciech Maciejko, Monika Lew, 'Jurysdykcyjna rola kontraktu socjalnego' [2014] 73 Casus 8, 9.

[39] See Marek Szewczyk, 'Umowa ekspropriacyjna' in Marek Szewczyk and Maciej Kruś and Zbigniew Leoński, Prawo zagospodarowania przestrzeni (Wolters Kluwer Polska 2019) <https://sip.lex.pl/#/monograph/369451743/476?keyword=marek%20szewczyk&tocHit=1&cm=SREST> accessed 2 May 2023. What is meant here is Case SK 39/15, 12 December 2017 Polish Constitutional Tribunal (Trybunał Konstytucyjny) OTK-A 2017. See Sławomir Pawłowski, 'Glosa (aprobująca) do wyroku Trybunału Konstytucyjnego z dnia 12 grudnia 2017 r., sygn. SK 39/15' [2018] 21 Studia Prawa Publicznego 2018, 175, 175ff.

[40] When it comes to the social contract, the 'additional' administrative relations are to become a platform for providing social assistance. On the other hand, when it comes to the expropriation agreement, its execution allows one to avoid a situation where taking away real estate would proceed on terms imposed by a public authority.

nistrative law. One may first look at the scope of discretion of the operation of entities from outside public administration. If specific proceedings may be closed only by the conclusion of an administrative agreement, then entering into this agreement by an entity from outside administration becomes obligatory in the sense that a certain issue may not be handled otherwise. For example, as a rule,[41] granting 24-hour temporary shelter to homeless persons depends on their execution of an administrative agreement,[42] which means a social contract.[43]

It also seems that a similar outlook may be taken on all those cases where the conclusion of an administrative agreement was to be an alternative to issuing an administrative act. It means that if wishing to handle a certain administrative matter, its participant must become a party to this contract 'under the pain' of becoming an addressee of the alternative form of activity of administration (e.g. administrative decision). The said regulations on the expropriation agreement are an example of such a state of affairs. Indeed, if the competent body or disposer of the real estate does not execute the said contract, then expropriation proceeds through issuing an administrative decision.

Given the above, however, the described structure of 'compulsory' execution of an administrative agreement does not apply to the obligations *sensu stricto*. It means that one could talk about an absolute obligation to enter into an administrative agreement only for proceedings initiated *ex officio*, which could close only by the conclusion of an administrative contract and the relevant authority would not be allowed e.g. to discontinue the proceedings if the administered body was not willing to enter into the agreement. Naturally, we cannot rule out that the legislator may adopt such a solution. It needs to be noted though that the competent authority would be then, and in any other case, obliged to close the case it is examining. This fact would not change due to 'unwillingness' of the administered entity. Therefore, it is easy to identify a threat where the essence of operation of

[41] It needs to be emphasized that it is a rule we are talking about here. On the other hand, the content of provisions Act of 12 March 2004: The Social Assistance (Ustawa z dnia 12 marca 2004 r. o pomocy społecznej; consolidated text [2021] JoL 2268 as amended; hereinafter: SAA) accommodates exceptions from this rule.

[42] The rule quoted in the text results from Article 48a(2) SAA.

[43] As Iwona Sierpowska explains: 'A social contract demonstrates features of an administrative agreement, rare in Polish law. First of all, this contract is wholly regulated by provisions of administrative law, including its definition; they do not even stipulate supplementary application of the Civil Code. Secondly, despite the lack of full freedom and equality of parties, the activity discussed is bilateral and is executed by way of negotiation. Even though the entity that represents administration has a stronger position, it may not impose the obligation to conclude the agreement or establish its content unilaterally; these features clearly distinguish the social contract from an administrative decision. Thirdly, conclusion of a contract models the administrative law relationship and the related conflicts are not subject to examination by a common court of law'. Quotation from*:* I. Sierpowska, 'Commentary art. 108' in Iwona Sierpowska, *Pomoc społeczna. Komentarz*, (Wolters Kluwer Polska 2021) <https://sip.lex.pl/#/commentary/587230021/660204/sierpowska-iwona-pomoc-spoleczna-komentarz-wyd-vi?cm=URELATIONS> accessed 2 May 2023.

a public entity in the described case would be to impose provisions of the administrative agreement and the very 'expression of consent' for its conclusion. As a consequence, entering into such a *de facto* obligatory contract would not differ *sensu stricto* much from having to abide by an administrative decision.

It needs to be highlighted that the question of freedom of administrative contract looks considerably different in the case of public administration, which is a result of a mechanism that *de facto* refers to each form of activity of public administration. Thus, public entities undertaking individual activities is a consequence of such an obligation inscribed in the provisions of the law. There are two scenarios here. We must first describe those cases where the legislator directly orders that a certain action be performed. For example, this will apply where the entity entitled will request permission for construction. In this case, the legislator obliges the relevant authority to respond in a particular way, that is issue an administrative decision.[44] An analogous example may be found in regulations concerning administrative agreements. Legal scholars and commentators point out that 'in the case of a homeless person who requests admission to a homeless shelter, the social worker does not have the right to refuse the signing of this contract'.[45] In other words, the competent public entity is obliged to perform a particular action (that is to conclude an administrative agreement).

Cases where the legislator does not order directly that a certain action be taken need to be mentioned. On the other hand, such a necessity is associated with the realization of a specific task that rests on a given public entity. It needs to be emphasized at that point that it is about actions that may not necessarily be attributed to a specific obligation of a public administration entity, thus they may have a 'universal' character. To illustrate such a situation, Article 7(2) of the Act of 8 August 1990 of Commune Self-Government Law may be invoked,[46] pursuant to which meeting collective needs of the community falls under the commune's own tasks. These tasks include, for example, matters of communal roads, streets, bridges, squares, and traffic organization. Given this, a commune is obliged to 'construct such facilities and the accompanying infrastructure and to maintain them in a condition adequate to the satisfaction of the community's transport needs'.[47] Implementation of this task may require the introduction of division of

[44] See Justyna Goździewicz-Biechońska, *Wadliwość decyzji administracyjnych w procesie inwestycyjno-budowlanym* (Wolters Kluwer Polska 2011) <https://sip.lex.pl/#/monograph/369233535/162248> accessed 2 May 2023.

[45] Magdalena Małecka-Łyszczek, Radosław Mędrzycki, 'Kontrakt socjalny' in Magdalena Małecka-Łyszczek and Radosław Mędrzycki, *Osoby ubogie, niepełnosprawne i bezdomne w systemie pomocy społecznej* (Wolters Kluwer Polska 2021) <https://sip.lex.pl/#/monograph/369490747/424938> accessed 2 May 2023.

[46] (Ustawa z dnia 08 marca 1990 r. o samorządzie gminnym) consolidated text [2023] JoL 40 as amended (PL).

[47] Marta Romańska, 'Obowiązki gminy dotyczące dróg' in Katarzyna Małysa-Sulińska and Mirosław Stec (eds), *Prawo do dobrego samorządu w kontekście realizacji zadań publicznych*

real estate or even taking ownership of it. Therefore, it needs to be pointed out that the relevant authority does not have discretion under civil law in how these actions are performed and it is obliged to take such actions that are stipulated in the law. It needs to be assumed that the legislator too points to the administrative agreement (e.g. as is the case of expropriation) as a form of handling a particular matter related to the authority's obligations and this public entity has no other choice but to take action to execute a specific contract.[48]

VI. THE CONTENT OF AN ADMINISTRATIVE AGREEMENT

Freedom in composing the content of agreements is undoubtedly one of the pillars of the freedom of contract.[49] It needs to be emphasized that what is obvious in this case cannot be said about absolute freedom. The fundamental relevant provision here (that is Article 353^1 of the Civil Code[50]) provides that parties executing a contract may arrange their legal relationship at their discretion as long as the content or purpose of the contract is not contrary to (the nature of) the relationship, the law or the principles of community life. In addition, it needs to be pointed out that we may talk about the correct execution of individual categories of the so-called nominate contracts only when their parties bind themselves with an agreement that includes provisions specified by law.[51]

Given the above, it may be concluded that administrative agreements are similar to the said nominate contracts in a certain scope. The essence of it lies in the fact that the correctness of entering into an administrative law relationship is assessed from the perspective of whether the basis for creating it (such as e.g. administrative agreement) is not only contrary to the provisions of the law (that is like a 'regular' agreement under civil law), but, moreover, whether its content corresponds to individual requirements that are stipulated for a given form of operation (like in the case of a nominate contract).

(Wolters Kluwer Polska 2021) <https://sip.lex.pl/#/monograph/369494572/425550> accessed 2 May 2023.

[48] See Sławomir Pawłowski, 'Pojęcie, przedmiot i charakter prawny umowy wywłaszczeniowej (ekspropriacyjnej)' [2018] 4(244) Zeszyty Naukowe KUL 2018 155, 155ff.

[49] Piotr Nazaruk, 'Com. art. 353^1' in Jerzy Ciszewski, *Kodeks cywilny. Komentarz* (LEX/el. 2023) <https://sip.lex.pl/#/commentary/587858110/714351/ciszewski-jerzy-red-nazaruk-piotr-red-kodeks-cywilny-komentarz-aktualizowany?cm=URELATIONS> accessed 2 May 2023.

[50] It is naturally Act of 23 April 1964 Civil Code (Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny) consolidated text [2023] JoL 1610 as amended (PL).

[51] See Michał Niedośpiał, *Pojęcie umowy nazwanej, mieszanej i nienazwanej oraz systematyka i związek umów: Słowa Boga* (ERIDA 2014) 75ff.

When comparing nominate contracts with administrative contracts, one needs to mention an essential difference between them. As a matter of fact, violation of principles of executing a specific type of a nominate contract does not mean that there will be no relation under civil law established between the parties. Such a legal relationship may arise as long as the clauses of a given contract are not contrary to Article 353^1 CC referred to above. Undoubtedly, it needs to be reserved that in such a case we are no longer talking about a nominate contract. On the other hand, if the parties to a specific relation do not meet the requirements specified by provisions of administrative law, in the best case we will be able to say that an erroneous relationship under public law has been established.

Given the above, it needs to be noticed that an administrative agreement may be differentiated from a civil law agreement in the context of freedom of modelling their content from two perspectives. We must first say that the total of clauses of a contract under administrative law should correspond only to the goal behind legal provisions that provide a basis for executing it. As results from the principle of legalism,[52] a public authority that enters into an administrative agreement may only act on the basis and within the limits of the law, that is a regulation that specifies conditions for concluding a particular contract. As a result, a public entity may not arbitrarily 'enrich' the content of a specific contract with clauses not stipulated in the law, even if they believed it would 'pay off' from the perspective of the public interest. In comparison, parties to individual civil law contracts may freely decide about the scope and purpose of their agreements and, for example, create hybrid contracts that include clauses that regulate different legal events (e.g. sale and lease) at the same time. It needs to be added here that how the content of a given administrative agreement is modelled may also largely depend on its parties. Such an option, still depends on a specific decision of the legislator, not a general rule, as is the case of relations under civil law.

The above also entails the fact that in the case of the conclusion of administrative contracts, one must talk not so much about establishing their content by their parties but about their acceptance of the legislator's assumptions. The activity of the party to an administrative agreement *de facto* comes down to two new questions. The first one refers to expressing consent for being bound by an administrative contract. The second one regards establishing data that may be defined more as technical rather than *sensu stricto* legal. What we mean here is, for example, specifying identification of data of a party to an agreement and identifying information specific to a particular type of administrative agreement. For example, in the case of an expropriation agreement, it will be about the price of the real estate being taken over, and in the case of a social contract – the fact

[52] See Bartosz Rakoczy, 'Commentary art. 7' in 'Komentarz do Konstytucji Rzeczypospolitej Polskiej' in *Prawo ochrony środowiska. Komentarz* (LexisNexis 2013) <https://sip.lex.pl/#/commentary/587387560/185000/rakoczy-bartosz-komentarz-do-konstytucji-rzeczypospolitej-polskiej-w-prawo-ochrony-srodowiska...?cm=URELATIONS> accessed 2 May 2023.

of giving homeless persons a place in a shelter. In other words, it would have to be concluded that the achievement of a specific effect in administrative law is not possible in any other way but by adhering to a model specified by the legislator. In comparison, creating a relationship under civil law requires not so much pursuing a path outlined by the legislator, but moving within the boundaries delineated by the lawmaker. The same approach then must be taken when it comes to freedom in shaping the content of an administrative agreement (that is proceeding pursuant to the legislator's order) and an agreement under civil law (that is acting within the boundaries set out by law).

VII. THE PARTIES OF AN ADMINISTRATIVE AGREEMENT

Legal scholars and commentators assume that the execution of an administrative agreement requires cooperation of at least two entities, where at least one of them must be a representative of a public entity and the second one should come from external administration.[53] It would seem then that this rule makes a breakthrough in one of the pillars of the principle of freedom of contract, that is freedom to choose one's counterparty.[54] Therefore, it needs to be remembered that under civil law we cannot say that it is absolute freedom either. The fact is that the very possibility of entering into a civil law contract depends, for example, on having the capacity to perform legal acts.[55] Therefore, rules that restrict the freedom of choosing the counterparty are considered general. Moreover, certain relationships under civil law may be made between parties that meet certain special requirements laid down by the law. In this case, the life annuity agreement is an example where only a natural person may become one of the parties (the so-called annuitant) to this agreement.[56] Thus, we may say that under private law, freedom in the choice of the counterparty must be understood as freedom in choosing the party to the agreement among entities that meet requirements for any given contract and at the same time requirements set for the specific contract the parties wish to execute. It needs to be concluded that this rule may be freely applied to

[53] See Kacper Rożek, *Umowa o partnerstwie publiczno-prywatnym a umowa administracyjna* (Wyższa Szkoła Humanitas 2018) 40ff.

[54] Agnieszka Goliszewicz, *Treść i charakter prawny umowy deweloperskiej* (Wolters Kluwer Polska 2013) <https://sip.lex.pl/#/monograph/369270865/187616> accessed 20 March 2023.

[55] Marek Watrakiewicz, 'Wiek a zdolność do czynności prawnych' [2003] 3 Kwartalnik Prawa Publicznego 497, 497 ff.

[56] Adam Bieranowski, 'Commentary art. 908' in Jerzy Ciszewski and Piotr Nazaruk (eds), *Kodeks cywilny. Komentarz aktualizowany*, (LEX/el. 2023) <https://sip.lex.pl/#/commentary/587858803/715043/ciszewski-jerzy-red-nazaruk-piotr-red-kodeks-cywilny-komentarz-aktualizowany?cm=URELATIONS> accessed 20 March 2023.

agreements under administrative law. Thus, the general rule would be that, as mentioned earlier, at least one of the parties of the contract must be a competent authority, and only entities that do not belong to public administration may act as the other party. On the other hand, detailed rules should result from solutions that refer to a specific kind of administrative agreement.

The above means that agreements under civil law and administrative agreements are subject to the same analogical rules that apply to restrictions in choosing counterparties. Now, departing from these rules will not automatically mean that one cannot establish a relationship under civil law. This results from the fact that if a given relationship is not contrary to the aforementioned Article 353^1 CC, we can talk about a correct execution of the so-called innominate contract. Therefore, the situation here is the same as in the case of effects (discussed before) of departing in private law contracts from statutory assumptions on the content of a specific nominate contract. On the other hand, when it comes to contracts under administrative law, it may be assumed that like in the case of other legal forms of operation of administration, violations of law in the area of selection of counterparties will result in a given contract being defective. A situation where a given contract is not concluded by a public authority is an exception to this principle. It may be assumed that such a situation will be the case of a non-act.[57] However, it is only the sphere of administrative law that is concerned here. Such defective contracts may have effects in case of civil law too. For example, the said expropriation agreement may simply be recognized as a contract of sale.

VIII. CONCLUSIONS

Based on this discussion, the following definition of the concept of an administrative agreement may be proposed. The essence here lies in a legal administrative act that does not carry authority, which may be performed only by entities listed in the act, where one of them must be a public entity and the content and objective of such a contract relate to the obligations of its administrative side and depend on the legislator's decision. At the same time, the mandatory content of a contract may be specified by listing directly the required clauses (e.g. as in the case of the social contract) or by specifying the objects of the contract (e.g. as in the case of the expropriation agreement). What is essential here though is the fact that irrespective of the adopted model of specifying the content of an administrative agreement, its parties are deprived of the possibility to cross beyond the subject matter outlined by the law.

[57] See Laura Münkler, *Der Nichtakt. Eine dogmatische Rekonstruktion* (Duncker & Humblot 2015).

When looking at the institution of an administrative agreement from the perspective of its civil law counterpart, two obvious differences come to the fore. They are the place of regulation and the extent of freedom of counterparties' conduct. The second aspect naturally means that the parties to a relationship under civil law act more within the boundaries of law, while participants of an administrative law relationship may only take such actions that the legislator allows them to perform (that is operate more on the basis of the law). The juxtaposition of effects of violations of methods of modelling both kinds of contracts seems especially interesting. What is meant here is, naturally, a comparison of the so-called nominate contracts with administrative agreements. And what follows, modelling a civil law relationship that is contrary to detailed rules does not entail its defectiveness as is the case of the relationship under administrative law. The core of the case is that a contract executed contrary to provisions on a specific nominate contract 'transforms' into the so-called innominate contract, whose possible defectiveness is evaluated from the perspective of Article 353[1] CC. Naturally, in the case of administrative contracts such a 'two-stage' evaluation of correctness of their execution is not possible.

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Marta J. Kuklo
University of Bialystok, Poland
e-mail: m.kuklo@uwb.edu.pl
ORCID: 0000-0001-5995-1394

AN ASSESSMENT OF THE EFFECTS OF THE FUNCTIONING OF ARTICLE 54A OF THE PUBLIC FINANCE ACT SIX YEARS AFTER ITS ENTRY INTO FORCE (MEDIATOR'S PRACTICAL REMARKS ON MEDIATION WITH PARTICIPATION OF PUBLIC FINANCE SECTOR UNITS IN DISPUTED CASES OF CIVIL LAW RECEIVABLES)

Abstract

The six-year period of validity of the amended provisions of the Public Finance Act (hereinafter PFA) and the Act on Liability for Violation of Public Finance Discipline (hereinafter ALVPDF), in which the legislator explicitly provided for the possibility of concluding settlements in disputed civil law receivables by public finance sector entities; the constant increase in the number of mediation proceedings in disputes involving public finance sector entities carried by the author; as well as conducted scientific research related to the issue of participation of indicated entities in mediation proceedings in disputes over civil law liabilities, prompted the author to analyze the effectiveness of the above-mentioned provisions. Therefore, the aim of this article is to present a fragment of the conducted research and provide a preliminary assessment of the functioning of article 54a of PFA by presenting the reasons and intentions of the statutory regulation, providing an analysis of its functioning as well as conclusions drawn therefrom.

KEYWORDS

Alternative Dispute Resolution (ADR), mediation, public finance sector unit, civil law receivables, Public Finance Act

SŁOWA KLUCZOWE

alternatywne metody rozwiązywania sporów, mediacja, jednostka sektora finansów publicznych, sporne należności cywilnoprawne, ustawa o finansach publicznych

I. INTRODUCTION

Public finance sector units (hereinafter PFSU) entering into civil law obligation relations with other entities, including entrepreneurs, e.g. by concluding a construction contract under the provisions of the Public Procurement Law,[1] are obliged (despite the private law nature of the contracted obligation) to operate in the legal regime specified in the provisions of the PFA,[2] the ALVPDF,[3] and other acts,[4] in accordance with the principles of operation of the financial economy, including the collection and expenditure of public funds, among others in: legal, purposeful and economical, planned, sustainable, open (transparent), rational and economically effective manner,[5] taking into account the fact that in public law, unlike private law,[6] what is not permitted by law is prohibited.[7]

[1] Public Procurement Law Act of 11 September 2019 [2022] JoL 1710 as amended, hereinafter referred to as 'PPL'.

[2] Public Finances Act of 27 August 2009 [2023] JoL 1270 as amended, hereinafter referred to as 'PFA'.

[3] Liability for Violations of Public Finance Discipline Act of 17 December 2004 [2021] JoL 289 as amended, hereinafter referred to as 'ALVPDF'.

[4] For example, Accounting Act of 29 September 1994 [2023] JoL 120 as amended.

[5] See Cezary Kosikowski, Eugeniusz Ruśkowski (eds), *Finanse publiczne i prawo finansowe* (1st edn, ABC Publishing House 2003), 261-262; Piotr Sołtyk in Piotr Walczak (ed), *Ustawa o finansach publicznych. Komentarz dla jednostek samorządowych* (2nd edn, C.H. Beck 2021) 13-14.

[6] The principle 'what is not prohibited by law is permitted' is expressed, for example, in Article 8 of the Entrepreneurs' Law Act of 6 March 6 2018 [2023] JoL 221 as amended; or Art 353[1] of the Civil Code of 23 April 1964 [2023] JoL 1610 as amended, hereinafter referred to as the 'CC'; see also Decision II OSK 3297/18 5 December 2018 Supreme Administrative Court, LEX no 2590171.

[7] See, i.e., Article 7 of the Constitution of the Republic of Poland of 2 April 2 1997; Judgment II GSK 427/07 19 March 2008 Supreme Administrative Court, LEX no 466154; Judgment BDF1/4900/92/92/12/ 29 October 2012 Main Adjudicating Committee, Legalis no 2423.

The validity of the above-mentioned principle of legalism, the lack of direct consideration by the legislator of the possibility of concluding a settlement in the above-mentioned legal provisions and the established strict disciplinary liability similar to the criminal liability of PFSU managers, for years, have determined the manner of conduct of these entities in situations of arising and pursuing disputed civil law receivables, leading to their avoidance of participating in mediation proceedings (even court annexed)[8] aimed at trying to reach an agreement and resolve an existing dispute. Compliance with the above-mentioned rules dominated the application of other rules, often leading to ineffective use of public funds.[9]

Recognizing the need to introduce regulations that would directly enable PFSU to conclude settlements in cases of disputed civil law receivables, which would change the approach of the indicated entities to the principles of managing public funds, the legislator decided to introduce Article 54a PFA and changes to certain provisions of the ALVPDF, which have been in force since 1 June 2017.[10]

Over 6 years of the provisions in question being in force, a constant increase in the number of mediation proceedings conducted in disputes involving PFSU (I have been a mediator since 2009), as well as my own observations and conversations with PFSU representatives participating in mediations, prompted me to undertake research related to the issues of PFSU's participation in mediation proceedings in disputes over civil law liabilities. One of the elements of the conducted scientific activities is the explication of the effectiveness of Article 54a PFA based, among others, on: the above-mentioned observations, case studies or analysis of legal provisions, statistical studies and other information available to the public.

Therefore, the aim of this article is to present a fragment of the conducted research and provide a preliminary assessment of the functioning of Article 54 a PFA. Consequently, first of all, I will explain in more detail the reasons and intentions of the statutory regulation of article 54a PFA, then I will describe and analyze how the above-mentioned provisions fulfill their role leading to the participation of PFSU in mediation proceedings in disputes over civil law receivables. I will also present the first preliminary conclusions resulting from the analyses. At the same time, I would like to point out that due to the stage of the research and the volume of this study, detailed analyzes including the impact of statutory

[8] There are various types of mediation proceedings, including: mediation court-annexed (conducted on the basis of a decision issued by the court referring the case to mediation) and private (conducted in connection with the mediation clause included in the contract from which the dispute arises or the consent of the conflicting parties expressed in the contract concluded with the mediator to conduct the proceedings mediation).

[9] See Justification for the Government's Draft Act Amending Certain Acts to Facilitate Debt Recovery Along with Justification 28 December 2016, Parliament form no 1185, 2-3.

[10] ibid, see Act on Amending Certain Acts to Facilitate Debt Recovery of 7 April 2017 [2017] JoL 933.

conditions on concluding a possible settlement, as well as final conclusions in this respect, will be included in the habilitation thesis on which I am working.

II. PARTICIPATION OF PFSU IN MEDIATION PROCEEDINGS IN DISPUTES OVER CIVIL LAW RECEIVABLES BEFORE 1 JUNE 2017

Disputed civil receivables are recovered by the conflicting parties, including PFSU, as a rule, through court proceedings before common courts. This means that despite the 'public' nature of the entity such as PFSU and the specific legal regime applicable to it, due to the civil law nature of the obligation, the basis for conducting proceedings and recovering the receivables in question are private law regulations. PFSUs are, therefore, obliged to comply with both public legal regulations relating to the disposal and management of public funds, as well as private law regulations regarding the recovery or transfer of disputed receivables, which may lead to difficulties in applying certain regulations or principles in practice, especially in the context of a conflict or legal loophole.

Problems in the interpretation of the provisions allowing the PFSU's participation in mediation proceedings and concluding a settlement regarding a disputed civil law receivable were noticeable until 31 May 2017. Both the provisions of the PFA and the ALVPDF did not directly specify the possibility of concluding settlements by PFSU in the above-mentioned disputes. Although the provisions in force at that time contained in Articles 55–59 PFA referred to the general principles of granting relief in the repayment of liabilities arising from civil law receivables and the limits of freedom of the bodies representing the State Treasury in the disposal of its receivables, they did not make it possible to apply them directly to receivables arising from civil law relationships of a contentious nature, and only to previously determined receivables for which there were grounds for applying the relief. Moreover, the above-mentioned provisions did not contain sufficient positive premises justifying the conclusion of the settlement, but only the requirement of important public interest relating to the granting of relief. Moreover, the strict provisions contained in ALVPDF did not include a direct reference to the lack of liability for violating public finance discipline due to the conclusion and implementation of the settlement by PFSU. The possibility of participating in the amicable resolution of this type of disputes and concluding settlements therein existed (and still exists) under the provisions of private law – civil law, i.e. based on the provisions of Article 917 – 918 CC (referring to the essence of the settlement and the grounds for avoiding the legal consequences of its conclusion) and the provisions of Articles 183^{1-15} CCP (which introduced mediation into civil pro-

ceedings).[11] However, from the provisions of Article 917 CC, it follows that reaching an agreement that will be acceptable to both parties to the dispute requires concessions from both conflicting parties,[12] which, in relation to PFSU, may lead to an allegation of groundless waiver of the recovery of receivables that are part of public funds. That is why PFSUs did not use this option, pointing out – as mentioned earlier – the lack of direct provisions under public law and the related fear of being accused of inappropriate care of public finances and, consequently, exposure to liability in this respect.

Confirmation of the problem with the vagueness of the provisions of the PFA in connection with the wide scope of ALVPDF and the need to apply such a specific legal regime, despite the existence of private law provisions enabling the participation of PFSUs in mediation proceedings and concluding a settlement while they were in progress, are the author's direct experiences related to the participation of these entities in the mediation proceedings conducted by the author. In the years 2011-2016, the author received several decisions from courts in the Bialystok appeals area to refer cases involving PFSU to mediation. During the indicated period, the said entities agreed to participate in and conduct mediation proceedings in only four cases, and in two of them the parties managed to reach a settlement. In conversations with the mediator, PFSU, justifying their refusal to participate in mediation, pointed primarily to the too-high risk associated with incurring liability for violating public finance discipline in connection with reaching a possible settlement and the possibility of eliminating such risk (despite the financial loss) by participating in court proceedings and the issuance of even the most unfavorable judgment by a common court. Moreover, in the case of the four mediation proceedings indicated above, in two of them, despite finding a common solution and reaching an agreement, the PFSU managers did not decide to finally sign it, citing the need to return to court for the same reasons. The author's explanations pointing out the benefits of participating in mediation through the possibility of actually recovering even a smaller amount from the debtor than not receiving payment in any part; spreading the financial obligation into installments adapted to the financial capabilities of PFSU (if it is the debtor of the other party to the dispute); savings, not only financial ones, related to abandoning court proceedings in favor of mediation were not a convincing argument to use the mediation procedure. Also, the explanation that the legislator's intention with regard to Polish procedural law in civil matters was, among others, enabling the parties to civil law relations to facilitate the pursuit of claims, providing legal

[11] Code of Civil Procedure of 17 November 1964 [2023] JoL 1550 as amended, hereinafter referred to as the 'CCP'. Mediation proceedings have been introduced into the provisions of the CCP by the Act on Amending the Act – CCP and Certain Other Acts of 28 July 2005 [2005] JoL number 172, item 1438.

[12] See, e.g. Maciej Dulęba, *Ugoda w polskim prawie cywilnym* (1st edn, Lexis Nexis 2012) 73-78; Judgment I ACa 86/14 16 May 2014 Court of Appeal in Katowice.

protection to entities that choose this method of pursuing claims, by approving any settlement reached by the court and thus giving it legal force, did not encourage PFSU managers to participate in mediation proceedings. Moreover, even the amendment to the provisions of the CCP of 2015,[13] which significantly changed the institution of mediation and increased interest in this institution among other participants in contractual relations, did not affect the participation of PFSU in the mediation proceedings.

The author's experiences are confirmed by statistical data (from the same period) of the General Counsel of the State Treasury – currently the General Counsel of the Republic of Poland, which, being a state organizational unit, was established to ensure legal protection of the rights and interests of the State Treasury, including through legal representation of the State Treasury and participation in court proceedings, also before common courts. Statistical data included in the annual reports on the activities of the General Counsel of the State Treasury show that in 2013, it concluded a total of 3,982 cases, of which only 22 resulted in a settlement; 2014 – 3,698 concluded cases, including 18 as a result of concluding a settlement; 2015 – 4,024 concluded cases, including 26 as a result of concluding a settlement; and in 2016, it concluded 3,829 cases, including 39 in connection with concluding a settlement.[14]

Recognizing the problem related to the lack of direct provisions allowing for the conclusion of a settlement in disputed civil law receivables by PFSUs and their concerns related to liability for violation of public finance discipline in the event of concluding a possible settlement, the legislator decided to amend the provisions of the PFA mentioned in the introduction and ALVPDF, among others, by introducing Article 54a to the PFA, based on which the PFSU has had the opportunity, since 1 June 2017, to conclude (subject to certain conditions) a settlement that does not constitute a violation of public finance discipline. As indicated in the justification to the draft act, the purpose of the formulated change was to create a clear (and separate from Articles 55-59 of the PFA) legal basis that

[13] The Act on Amending the CCP and Certain Other Acts in Connection with Supporting Amicable Methods of Resolving Disputes of 10 September 2015 [2015] JoL item 1595, entered into force on 1 January 2016.

[14] See the following: The Report on the Activities of the General Counsel of the State Treasury in the Period from 1 January 2013 to 31 December 2013 <https://www.gov.pl/web/prokuratoria/sprawozdania-z-dzialalnosci> accessed 29 July 2023, 9; The Report on the Activities of the General Counsel of the State Treasury in the Period from 1 January 2014 to 31 December 2014 <https://www.gov.pl/web/prokuratoria/sprawozdania-z-dzialalnosci> accessed 29 July 2023, 11; The Report on the Activities of the General Counsel of the State Treasury in the Period from 1 January 2015 to 31 December 2015 <https://www.gov.pl/web/prokuratoria/sprawozdania-z-dzialalnosci> accessed 29 July 2023, 12; The Report on the Activities of the General Counsel of the State Treasury in the Period from 1 January 2016 to 31 December 2016 <https://www.gov.pl/web/prokuratoria/sprawozdania-z-dzialalnosci> accessed 29 July 2023, 17. The statistical data presented in previous reports, i.e. before 2013, do not include the number of cases completed as a result of concluding a settlement, therefore, they are not referred to by the author in this study.

would primarily allow for the rationalization of the activities of public entities, following the example of private entities that have the actual possibility of choosing how to end the dispute after considering all the possible consequences, both legal and economic.[15] Moreover, the purpose of the amended regulations was to remove the state of uncertainty as to whether, from a formal point of view, public entities have the possibility of amicably ending a dispute over receivables arising from civil law relations and to create the possibility for public entities to act more flexibly and adequately to the circumstances of a given case.[16] Finally, it also allowed – in the intention of the drafter – to avoid situations in which the analysis of the case shows that a settlement is more advantageous – and the only argument against concluding it concerns doubts of the formal nature of the PFSU.[17]

The introduction of the above-mentioned changes means that the PFSU may conclude a settlement regarding a disputed civil law receivable if it assesses that the effects of the settlement are more favorable for this entity or, respectively, the State Treasury or the budget of a local government unit, than the probable outcome of court or arbitration proceedings (Article 54a, section 1 PFA). The assessment of the effects of the settlement will be made in writing, considering the circumstances of the case, in particular, the validity of the disputed demands, the possibility of satisfying them and the expected duration and costs of court or arbitration proceedings (Article 54a, section 2 PFA). Moreover, the correct conclusion and implementation of the settlement, including the execution of expenditure from public funds, or the incurring or change of an obligation on the basis of the concluded settlement, does not constitute a violation of public finance discipline (Article 5, section 4; Article 11, section 2; Article 15 ALVPDF).

III. MEDIATIONS WITH THE PARTICIPATION OF PFSU AFTER 1 JUNE 2017

The amendment in question to the provisions of the PFA and the ALVPDF resulted in PFSUs receiving a specific legal basis to participate in mediation proceedings and conclude settlements with private entities in disputes over civil receivables. It also introduced certain general guidelines conditioning the conclusion of the settlement itself. Moreover, it gave hope to private entities entering into civil law relations with public entities that, in addition to the principle of legalism,

[15] See Justification for the Government's Bill on Amending Certain Acts to Facilitate Debt Recovery, the work cited, 51-55.

[16] ibid.

[17] ibid.

the latter, when resolving disputes, will also be guided by other rules, including those typical of professional economic transactions (e.g. profit and loss account).

Observation of the behavior and actions taken by PFSU in situations of disputes over civil law receivables over the six years of operation of the amended regulations allows us to conclude that there is an increase in interest in mediation proceedings among these entities. Moreover, PFSUs more often and willingly decide to try to reach an agreement with the entrepreneur in this type of disputes by participating in mediation.

In the years 2018-2020, the author, as a mediator, again received several decisions from courts in the Bialystok appeals area to refer cases involving PFSU to mediation. This time, however, only in every fourth case did the PFSU not agree to participate in mediation proceedings. In the years 2021-2023, there were over 20 court decisions referring cases involving PFSU to mediation. Additionally, there were also requests to the mediator to conduct mediation at the pre-trial stage, as part of out-of-court (private) mediation.[18] In approximately 70% of the cases in which the parties decided to participate in mediation, they concluded a settlement, which was submitted to the court along with an application for approval, and then approved by the court (both in the case of court annexed and out-of-court mediation). During conversations with representatives of the PFSU at the stage of deciding on their participation in the proceedings in question, the author received information in more than half of the cases that the people representing them were aware of the introduction of changes to the provisions of the PFA and the ALVPDF and despite concerns[19] about how the above-mentioned provisions would be implemented, for example by the financial supervision and control authorities, they decided to participate in mediation. In the remaining conversations, after the mediator provided information about the amendment to the regulations and then internal legal consultations, PFSUs also decided, in principle, to participate in the mediation proceedings. The refusal to participate in mediation in the remaining cases was related primarily to personnel changes in decision-making positions and the transition period indicated in the interviews related to the introduction of new people who could make an informed decision to participate in the proceedings in question or certainty about the validity and effectiveness of the claims pursued before common court.

Over the years, not only the number of PFSUs deciding to participate in judicial or out-of-court mediations has increased, but also the way in which the

[18] Regarding the types of mediations conducted, see footnote 8.

[19] These concerns appeared in conversations conducted by the author in the first years after the entry into force of the amended regulations, i.e. in the period from 2018 to 2020/2021. Currently, it is extremely rare (if at all) for a mediator to hear from an attorney or other person representing JSFP about concerns related to participation in mediation, which result from the consequences related to the subsequent, possible control of the settlements reached during the mediation proceedings.

indicated entities participated in reaching an agreement. Each year, the author observed the increasing awareness (not only legal) of people representing PFSU of the benefits of the agreement jointly developed by the parties and the growing involvement of these entities in finding a solution acceptable to both the PFSU itself and the entrepreneur. Conversations conducted by the mediator after the end of the mediation proceedings allow for the general conclusion that public entities are slowly becoming convinced of the benefits of participating in mediation.

Once again, the author's conclusions regarding the increased interest in mediation proceedings and the participation of PFSU in them seem to be confirmed by the statistical data presented by the General Counsel of the Republic of Poland, which shows that: in 2018, out of 2,669 completed cases, in case of 84 of them settlements were concluded,[20] in 2019, out of 3,078 completed cases, 96 of them were settled,[21] and in 2020, despite the completion of a smaller number of cases (2,249), the number of those finalized based on an agreement increased (136).[22] A similar upward trend can be observed in the following years, when in 2021, out of 2,698 completed cases, 111 cases were concluded with a settlement, and in 2022, 108 cases out of 2,983 were concluded with an agreement.[23]

Moreover, in 2018, the Court of Arbitration at the General Counsel of the Republic of Poland was established[24] and in 2019 its jurisdiction was extended, which resulted in a significant increase in mediation proceedings conducted within the indicated Court, from two in 2018[25] to 9 mediations conducted in 2019,[26] by 38 in 2020,[27] after 68 mediations in 2021,[28] and 96 in 2022.[29]

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[20] The Report on the Activities of the General Counsel of the Republic of Poland for 2018 <https://www.gov.pl/web/prokuratoria/sprawozdania-z-dzialalnosci> accessed 29 July 2023, 18-19.

[21] The Report on the Activities of the General Counsel of the Republic of Poland for 2019 <https://www.gov.pl/web/prokuratoria/sprawozdania-z-dzialalnosci> accessed 29 July 2023, 22.

[22] The Report on the Activities of the General Counsel of the Republic of Poland for 2020 <https://www.gov.pl/web/prokuratoria/sprawozdania-z-dzialalnosci> accessed 29 July 2023, 26.

[23] See consecutively: The Report on the Activities of the General Counsel of the Republic of Poland for 2021 <https://www.gov.pl/web/prokuratoria/sprawozdania-z-dzialalnosci> accessed 29 July 2023, 23; The Report on the Activities of the General Counsel of the Republic of Poland for 2022 <https://www.gov.pl/web/prokuratoria/sprawozdania-z-dzialalnosci> accessed 29 July 2023, 15. Statistical data on the activities of the General Counsel of the Republic of Poland for 2023 are not available yet.

[24] The Arbitration Court at the General Counsel of the Republic of Poland conducts mediation or other amicable resolution of the dispute pursuant to the provisions of the General Counsel of the Republic of Poland Act of 15 December 2016 [2023] JoL item 1109, as amended.

[25] The Report on the Activities of the General … for 2018, the work cited, 18-19.

[26] The Report on the Activities of the General … for 2019, the work cited, 13-14.

[27] The Report on the Activities of the General … for 2020, the work cited, 17.

[28] The Report on the Activities of the General … for 2021, the work cited, 13-14.

[29] The Report on the Activities of the General … for 2022, the work cited, 32-33.

IV. SUMMARY

If, in the analyzed case, the criterion for the effectiveness of specific legal provisions was solely the increase in the number of cases (or, as in the case of the General Counsel of the Republic of Poland, also the increase in the value of cases in which a settlement was reached),[30] in which authorized entities took advantage of the privilege granted to them by these provisions (mediation and concluding settlements), one could come to the conclusion that six years after the amendment of the provisions of the PFA on and the ALVPDF, the goal set by the legislator when designing the changes, has been achieved. However, formulating such a statement based solely on one criterion is a mistake. A number of other factors (legal and extra-legal) should be considered, which could also contribute to the increased interest in and use of mediation proceedings by the PFSU.

Other legal impulses that could have had a positive impact on the PFSU's approach to participating in mediation and increased their interest in concluding a settlement include the already mentioned changes introduced in private law by the Act on supporting amicable dispute resolution methods, which has been in force since 1 January 2006.[31] The purpose of these regulations was primarily to increase the number of commercial cases referred to mediation and to raise entrepreneurs' awareness that mediation can be an alternative to court proceedings. Another legal incentive encouraging PFSUs to participate in mediation proceedings was certainly the introduction of the new Public Procurement Act, which for the first time clearly introduced into public procurement the possibility of concluding settlements through various out-of-court methods of resolving disputes, including mediation, conducted both by a mediator of the Arbitration Court of the General Counsel of the Republic of Poland or another selected mediator.

In addition to legal factors, there are also a number of other activities undertaken over the last six years (at the national and regional levels), including the popularization of mediation, both by public institutions and private entities, including professional self-governments, addressed to various social and professional groups, certainly had an impact on the increase in knowledge about mediation, also in PFSU. The most important activities promoting the idea of amicable resolution of disputes, undertaken at the national level, include at least two projects co-financed by the European Union under the Knowledge Education Development Operational Program (action: effective justice). The first one, implemented in 2018-2020, involved the creation of 16 arbitration and mediation centers and

[30] Data on the increase in the value of cases in which a settlement was concluded are presented in the Reports on the Activities of the General Counsel of the Republic of Poland for individual years, but due to the framework of this study, they are no longer quoted by the author.

[31] See footnote 13.

was addressed to entrepreneurs, judges and prosecutors.[32] Its aim was to popularize the method of conducting mediation (primarily economic) and basing it on standards developed in all mediation centers in Poland on a voluntary basis; as well as improving the quality of issued judgments and increasing the effectiveness of their enforcement. The second project, implemented in 2020-2023, was the 'National Register of Mediators' project, the aim of which was to once again popularize alternative methods of resolving disputes (primarily mediation – civil, including economic) by improving the competences of mediators, creating the National Register of Mediators and information activities.[33] The activities were addressed to both citizens interested in using mediation proceedings and judicial authorities as those who referred cases to mediation, mediators or people who wanted to obtain mediation rights.

In addition to the steps indicated, a direct incentive for PFSU to participate in mediation was the development and publication in May 2021 of recommendations of the General Counsel of the Republic of Poland regarding amicable dispute resolution proceedings, addressed to *stationes fisci* and replaced persons.[34] The purpose of the issued recommendations was to facilitate the PFSU in choosing the most advantageous solution to a civil law dispute.

Other activities popularizing the development of settlements in controversial cases (as already indicated) were also undertaken by various professional groups, including courts (appointment of mediation coordinators),[35] bar councils, and chambers of attorneys-at-law (creating mediation centers conducting training for lawyers, attorneys-at-law, trainees) or mediators (organizing conferences, seminars, training and undertaking a number of various initiatives – e.g. organizing lessons in primary schools and secondary schools on mediation).

It is impossible to list here all the activities undertaken in recent years at the national and regional level in the field of mediation. It is worth noting, however, that activities promoting this idea have been intensified, aimed at increasing society's general knowledge in this area. This could also contribute to the dissemination of knowledge about amicable methods of resolving disputes and encourage PFSU to use them.

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[32] Project website: Arbitration and Mediation Centers <https://www.cammediacje.pl/centra-arbitrazu-i-mediacji> accessed 30 July 2023. General information about the project, see Website of the Ministry of Justice <https://www.gov.pl/web/spowiedzedliwosc/centra-arbitrazu-i-mediacji> accessed 30 July 2023.

[33] Project website: National Register of Mediators <https://krm.gov.pl/> accessed 30 July 2023. General information about the project, see Website of the Ministry of Justice <https://www.gov.pl/web/spowiedzedliwosc/projekt-krm2> accessed 30 July 2023.

[34] Website of the General Counsel of the Republic of Poland <https://www.gov.pl/web/prokuratoria/rezdrowie-i-wzory-postańen-umow2> accessed 30 July 2023. Legal basis: Art 16a of the Law on the Organization of Common Courts Act of 27 July 2001 [2023] JoL item 217, as amended.

[35] Legal basis: ibid.

Providing a clear answer to the question about the effectiveness of only the amended provisions of the PFA and the ALVPDF in the context of increased interest in participation in mediation proceedings by PFSU, without considering the above-mentioned factors, is, in my opinion, not possible. Certainly, the introduction of a legal basis that allows PFSU to directly conclude a settlement on a disputed civil law receivable opens up the legal possibility for them to use the indicated path. However, the question remains whether it is the only or main motivator for choosing this type of dispute resolution. It seems that the omission of other (indicated) factors is unjustified when examining the effectiveness of the analyzed provisions and their impact on the choice of dispute resolution method by the PFSU, and a full interpretation of the assessment of the effects of their introduction requires further in-depth analysis and taking into account the relationship between the introduced provisions and other factors that may influence decision-making on how to resolve a dispute over a civil law debt. In-depth research is the subject of current scientific activities undertaken by the author of this study and will soon be presented publicly.

Finally, it is also necessary to point out the need to conduct a critical analysis of the amended provisions of the PFA which have been in force for six years and the ALVPDF, in order to clarify them and finally eliminate further doubts that still appear in the practice of their application by PFSU and which are still related to the fear of violating public finance discipline in connection with their conclusion of the settlement. Even though the author, together with prof. J. M. Salachna,[36] analyzed the provisions in question in the first year of their operation, it is worth re-verifying and updating the previous *de lege ferenda* postulates, considering several years of experience in their application by JSFP. Possible further directions of changes to the provisions of the PFA and the ALVPDF will be examined by the author in her habilitation thesis.

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Sołtyk P, in Walczak P (ed), *Ustawa o finansach publicznych. Komentarz dla jednostek samorządowych* (2nd edn C.H. Beck 2021)

[36] See Joanna M. Salachna, Marta J. Skrodzka, 'Ugoda mediacyjna w sprawie należności cywilnoprawnej w kontekście oceny skutków jej zawarcia – perspektywa prywatnoprawna i publicznoprawna (art. 54a ustawy o finansach publicznych)' (2018) 7 PUG 8-14.

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Aleksandra Szydzik
University of Gdańsk, Poland
e-mail: aleksandra.szydzik@ug.edu.pl
ORCID: 0000-0003-3744-859X

COMMENTARY TO THE JUDGEMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS OF 23 NOVEMBER 2023 IN THE CASE OF *WAŁĘSA V POLAND* (APPLICATION NO 50849/21)

Abstract

In the commented judgment of 23 November 2023, issued in the case of *Wałęsa v Poland* (application no. 50849/21), the European Court of Human Rights stated that the extraordinary complaint, which has been functioning in the Polish legal system since 2018, is incompatible with the standards of a fair trial and the principle of legal certainty under Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. The author, sharing reservations about the extraordinary complaint brought by the European Court of Human Rights, discusses the fundamental defects of this institution with regard to the broader domestic context and formulates *de lege ferenda* conclusions. The commentary also indicates that the defectiveness of the extraordinary complaint also manifests itself in other aspects that were overlooked in the commented judgement. For this reason, it is necessary to undertake a deeper, systemic reflection on this legal institution before its possible reform.

KEYWORDS

extraordinary complaint, extraordinary appeal, legal certainty, Chamber of Extraordinary Review and Public Affairs, European Court of Human Rights, pilot-judgment, independent and impartial court established by law

SŁOWA KLUCZOWE

skarga nadzwyczajna, pewność prawa, Izba Kontroli Nadzwyczajnej i Spraw Publicznych, Europejski Trybunał Praw Człowieka, wyrok pilotażowy, niezawisły i bezstronny sąd ustanowiony ustawą

I. INTRODUCTORY REMARKS

On 23 November 2023, the European Court of Human Rights (hereinafter 'ECHR') issued a judgment in the case of *Wałęsa v Poland,*[1] which has important implications for the functioning of the Polish judicial system. Generally, the case concerns two important legal issues – the status of judges of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court and the role of the extraordinary complaint in the Polish legal system. While the first of these has already been analyzed by the ECHR, for example in the case of *Dolińska-Ficek and Ozimek v Poland,*[2] the ECHR has not yet considered in detail the issue of extraordinary complaint, which has been introduced into the Polish legal system in 2018.

Therefore, the purpose of this commentary is to analyze the commented judgment on the latter legal issue indicated above, i.e. considerations regarding the functioning of the extraordinary complaint in the Polish legal system. Consequently, the status of the judges of the Chamber of Extraordinary Review and Public Affairs Chamber of the Supreme Court and the defective procedure for their appointment will be beyond the scope of the analysis.

As can be concluded from the commented judgement, the functioning of the extraordinary complaint in the Polish legal system is incompatible with the standards of a fair trial and the principle of legal certainty under Article 6(1) of

[1] Judgment of the European Court of Human Rights of 23 November 2023, application no 50849/21, *Wałęsa v Poland*, HUDOC (hereinafter referred to as the 'commented judgment').

[2] Judgement of the European Court of Human Rights of 8 November 2021, application no 49868/19 and no 57511/19, *Dolińska-Ficek and Ozimek v Poland*, HUDOC.

the Convention for the Protection of Human Rights and Fundamental Freedoms.[3] Analysis of the ECHR's considerations leads to a conclusion about the general defectiveness of an extraordinary complaint, which is manifested in the following aspects:

a. general and vague conditions for the admissibility of an extraordinary complaint,
b. possibility of re-examination of the facts of the case by the Supreme Court as a result of lodging an extraordinary complaint, what thus creates a third instance in the course of Polish judicial proceedings,
c. possibility of challenging, through an extraordinary complaint, judgments issued before the introduction of this remedy into the Polish legal system, which undermines the principle of legal certainty,
d. possibility of political instrumentalization of extraordinary complaint as a result of entrusting the right to lodge this remedy to the Prosecutor General, holding the office of Minister of Justice, and entrusting exclusive jurisdiction to examine extraordinary complaint to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court.

This commentary is of an approving nature – the conclusions of ECHR on defects of the extraordinary complaint should be fully shared. Their detailed analysis has been presented in the further part of the paper with regard to the broader, domestic context of the functioning of this institution in the Polish legal system.

II. FACTS OF THE CASE

Lech Wałęsa[4] filed a complaint to the ECHR in connection with the lawsuit for the protection of personal rights brought against Krzysztof Wyszkowski.[5] On 16 November 2005, a television station broadcasted a programme in which Krzysztof Wyszkowski stated that Lech Wałęsa was a secret collaborator of the communist Security Service, operating under a nickname 'Bolek'.[6]

[3] Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, No 61, item 284, as amended and supplemented; hereinafter referred to as the 'Convention').

[4] Lech Wałęsa is a former President of the Republic of Poland from 1990 to 1995, laureate of the Nobel Peace Prize in 1983, leader of the Solidarity Independent Self-Governing Trade Union (pol. *Niezależny Samorządny Związek Zawodowy Solidarność*), as well as a political opposition activist during the Polish People's Republic.

[5] Krzysztof Wyszkowski is a Polish politician and publicist, associated with the right-wing political party – Law and Justice (pol. *Prawo i Sprawiedliwość*).

[6] Krzysztof Wyszkowski made this statement following granting Lech Wałęsa the victim status under Article 6 of the Act of 18 December 1998 in the Institute of National Remembrance

It should be noted that due to historical reasons, cooperation with state security during the People's Republic of Poland was, and invariably still is, associated with social disapproval and judged negatively. Therefore, during the trial, it was generally considered that the allegation made against Lech Wałęsa undermined his reputation and personal dignity. The contentious issue, however, was whether Krzysztof Wyszkowski – as a defendant – had proved the truthfulness of his statement concerning alleged collaboration with the communist security service, which could consequently exclude the unlawfulness of his conduct,[7] and whether he had made this statement on television as a journalist or as an ordinary citizen. The defendant argued that his action was not unlawful as he had made the statement as a journalist, exercising his freedom of expression and the right to seek historical truth. Although he did not have sufficient evidence to support his claims, he maintained that he had displayed the requisite diligence in researching and checking information on which he had relied when formulating the allegation against Lech Wałęsa. Consequently, he stated that his conduct was not unlawful, and he was not required to prove the truth of the allegation.

The trial ended with the judgement of the Court of Appeal in Gdańsk of 24 March 2011, issued in the case ref. no.: I ACa 1520/10[8], based on which Krzysztof Wyszkowski was ordered to publicly apologize to Lech Wałęsa by publishing an appropriate statement in television stations. The Court of Appeal in Gdańsk held that permissible public criticism of politicians cannot violate the dignity and reputation of others unless it is based on true allegations and undertaken to protect a legitimate public interest. In the court's opinion, the defendant failed to prove the accuracy of his claim that Lech Wałęsa had collaborated in the past with the communist Security Service, as well as that he had acted as an active journalist at that time. In the court's view, when formulating the allegation about Lech Wałęsa, Krzysztof Wyszkowski had acted as 'an ordinary citizen asked to comment on the applicant's having been granted victim status by the IPN'.[9] Therefore, contrary

– Commission for the Prosecution of Crimes against the Polish Nation (consolidated text, Journal of Laws 2023, item 102). According to Article 6(1), a victim within the meaning of this act was 'a person in respect of whom organs of the secret service collected information on the basis of purposefully gathered data, including in a secret manner'. According to Article 6(3) of the act, 'a person who subsequently became an officer, employee or collaborator of the secret service' was not a 'victim' for the purposes of the act. By issuing this certificate, the IPN, therefore, confirmed that Lech Wałęsa had not been a collaborator of the communist state security organs.

[7] Article 24 of the Act of 23 June 1964 - Civil Code (consolidated text: Journal of Laws of 2023, item 1610, as amended) provides for the statutory presumption of illegality of the actions of a person violating personal rights. This presumption may be rebutted by circumstances excluding the unlawfulness of the violation of another person's personal rights, which include, among others acting within the legal order, i.e. acting as permitted by law, exercising a subjective right, or acting within the framework of a justified social or private interest.

[8] Judgement of the Court of Appeal in Gdańsk of 24 March 2011, I ACa 1520/10, LEX no 3147749.

[9] See the commented judgement, § 21.

to the defendant's belief, the scope of his freedom of expression was not broader considering the circumstances of the case. The verdict of the Court of Appeal in Gdańsk – as a verdict of the court of second instance – was binding and in force as soon as it was issued, but in the following years it was not enforced by the defendant, i.e. the defendant did not apologize to Lech Wałęsa by publishing an appropriate statement.[10]

After almost nine years, on 31 January 2020, the Prosecutor General lodged an extraordinary complaint to the Supreme Court, challenging the judgement of the Court of Appeal in Gdańsk in the part concerning the defendant's obligation to publish an apology, requesting to revoke it in this regard and to rule on the merits of the case by dismissing the lawsuit. The Supreme Court based on the judgment of 21 April 2021, issued in the case conducted under ref. no.: I NSNc 89/20,[11] accepted the motions of the Prosecutor General, i.e. revoked the appealed judgment in part and dismissed the appeal insofar as the Court of Appeal allowed the claim, stating that the judgement of the Court of Appeal in Gdańsk violated Article 54 of the Constitution of the Republic of Poland[12] (freedom of speech) and flagrantly violated Article 10(1) of the Convention (freedom of expression). In the opinion of the Supreme Court, the severity of these violations prejudged the need to revoke the contested judgement to ensure its compliance with the principle of a democratic state ruled by law and implementing the principles of social justice (Article 2 of the Polish Constitution).

In view of the circumstances of the case described above, Lech Wałęsa, on 5 October 2021, filed a complaint to the European Court of Human Rights, in which he alleged that Poland had violated the provisions of the Convention, in particular:

a. Article 6(1) by examination of his case by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which does not constitute an 'independent and impartial court established by law' within the meaning of this provision, as it is composed entirely of judges appointed with the participation of the National Judicial Council, formed according to the rules introduced in 2017, which does not ensure the independence of this body from the legislative and executive powers, as well as by lodging an extraordinary complaint, a construction of which violates the principle of legal certainty,

[10] It should be noted that Krzysztof Wyszkowski made an unsuccessful attempt to lodge a cassation appeal, as well as a request to reopen the proceedings in this case. See the commented judgment, § 22-25.

[11] Judgement of the Supreme Court of 21 April 2021, I NSNc 89/20, OSNKN 2021, No 3, item 23.

[12] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No 78, item 483, as amended and corrected; hereinafter referred to as the 'Polish Constitution').

b. Article 8 by unlawful interference with his private life and violation of his right to reputation due to revocation of the final judgement of the Court of Appeal in Gdańsk following the extraordinary complaint.

As a result of examining the application of Lech Wałęsa, on 23 November 2023, the ECHR issued a judgment holding that Poland had violated Article 6(1) and Article 8 of the Convention, and awarded Lech Wałęsa the sum of € 30,000.00 in respect of the non-pecuniary damage he had suffered. What is particularly important, in this case the ECHR applied the pilot-judgment procedure, indicating that the identified violations are of a systemic nature, extend the sole interests of the applicant and are related to general dysfunction of the judicial system in Poland, including defective procedure for judicial appointments by the National Council of the Judiciary, the status of the Chamber of Extraordinary Review and Public Affairs, as well as defective construction of the extraordinary complaint, which undermines the principle of legal certainty.

After the judgment was issued, the Ministry of Justice published a press announcement indicating that the judgement of the ECHR is unlawful and has no binding force, as it was issued in violation of the Convention, and groundlessly negates the legitimacy of the National Council of the Judiciary and the Supreme Court, thus also violating the principles of international law.[13] On the one hand, the basis for adopting such a position was changes in the panel of judges that heard the case of *Wałęsa v Poland*. According to Article 26(4) of the Convention, the adjudicating panel should include a judge from the state against which the complaint is directed. In the case under comment, a Polish judge withdrew from adjudication. Due to the fact that in his place a judge from Greece was appointed to the panel, the Ministry of Justice considered a violation of the Convention. It should be noted, however, that according to Rule 29(2)(b) of the Rules of the Court of ECHR, the President of the Chamber may appoint another judge to adjudicate if he considers that fewer than 3 persons indicated on the *ad hoc* list of judges of the state, against which the complaint is directed, meet the required criteria. Therefore, contrary to the position of the Ministry of Justice, there was no violation of the Convention in this regard. On the other hand, the announcement stated that the ECHR, by questioning the legitimacy of national bodies, went beyond the scope of powers granted to it under international law, and the judgment itself is a manifestation of discrimination against the Republic of Poland, since in many European countries the procedure for appointing judges is far more politicized. However, it is only the Republic of Poland that has been criticizing in this regard.

[13] The press announcement of the Ministry of Justice of the Republic of Poland is available in Polish at: <https://www.gov.pl/web/sprawiedliwosc/bezprawny-wyrok-etpc-w-sprawie-lecha-walesy> accessed 26 January 2024, whereas it should be noted that it is archival. It was prepared by the Ministry of Justice under the previous leadership and does not present the position of the current Minister of Justice. Mention in this regard is also made in the body of the announcement.

Shortly thereafter, the position of the Ministry of Justice changed, as the issuance of the judgment under comment coincided with the change of government in Poland. On 13 December 2023, i.e., on the day of its inauguration, the newly appointed Minister of Foreign Affairs sent a letter to the President of ECHR, as well as to the members of the Committee of Ministers, in which he declared that the Republic of Poland would not appeal the judgement issued in the case of *Wałęsa v Poland*, and that its implementation constitutes a priority task for the state.[14]

III. DEFECTS OF THE EXTRAORDINARY COMPLAINT

Analysis of the judgment under comment leads to the conclusion that the institution of the extraordinary complaint is defective in general. It is worth noting that concerns about this institution are raised not only internationally, but primarily in Polish legal science. The fundamental problem of the extraordinary complaint is the conflict of constitutional values – on the one hand, justice, identified with the correctness of court decisions, and, on the other hand, legal certainty, associated with the stability of court decisions.[15] More specifically, the criticism of the extraordinary complaint concerns specific legal solutions regarding the way it is structured in the Polish legal system, in particular: the generally formulated conditions for the admissibility of the extraordinary complaint, the limited catalog of entities entitled to file the extraordinary complaint, including the right to file the extraordinary complaint granted to politically involved entities, as well as the broad substantive and temporal scope of the extraordinary complaint.

In view of the subject of this commentary, special attention should be paid to considerations undertaken by Michał Balcerzak on the compliance of the institution of the extraordinary complaint with the standards of the right to a fair trial, as referred to in Article 6(1) of the Convention.[16] The author points out that although the construction of the extraordinary complaint is not subject to the control of the

[14] The press announcement of the Minister of Foreign Affairs of the Republic of Poland is available in Polish online <https://www.gov.pl/web/dyplomacja/listy-ministra-radoslawa-sikorskiego-do-przewodniczacej-europejskiego-trybunalu-praw-czlowieka-oraz-do-komitetu-ministrow-rady-europy> accessed 26 January 2024.

[15] This is noticed, among others, by Anna Michalak, *Skarga nadzwyczajna – dopełniający czy konkurencyjny wobec skargi konstytucyjnej instrument ochrony konstytucyjnych wolności i praw jednostki*, Przegląd Sejmowy 2019, No 2(151), 93. See also Paweł Bury, *Skarga nadzwyczajna a trwałość orzeczeń w postępowaniu cywilnym* in *Zagadnienia współczesnego prawa publicznego*, Maciej Pisz, Marcin Przychodzki, Mateusz Radajewski (eds) (Poznań 2018) 117.

[16] Michał Balcerzak, *Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka* (Palestra 2018) No 1-2, 17-19.

Convention *in abstracto*, nothing prevents it from being assessed by the ECHR against the background of an individual case.[17]

For the first time, such an assessment has been made in the case of *Wałęsa v Poland*. The judgement confirms the previously expressed view of Michał Balcerzak as to the applicability of Article 6(1) of the Convention in proceedings initiated by an extraordinary complaint.[18] The objections of the ECHR to this institution, expressed in the justification of the judgement, can be divided into three groups, i.e. objections that concern:

a. conditions for the admissibility (grounds) of an extraordinary complaint,
b. time limits for lodging an extraordinary complaint, and
c. possibility of political instrumentalization of an extraordinary complaint.

1. CONDITIONS FOR THE ADMISSIBILITY OF AN EXTRAORDINARY COMPLAINT

In the commented judgment, the ECHR indicated that one of the major defects of the extraordinary complaint is general and vague conditions for the admissibility of this remedy, which give wide discretion in their interpretation. It should be noted that objections to the conditions for admissibility of the extraordinary complaint had already been raised earlier by, among others, the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE/ODIHR),[19] the Venice Commission[20] or the European Commission.[21] The ECHR shared the opinions of these institutions in the commented judgment.[22]

The conditions for the admissibility of the extraordinary complaint can be divided into substantive and formal conditions. The substantive conditions, also

[17] ibid 17.

[18] ibid 19.

[19] See the opinion no JUD-PL/315/2017 of the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, dated 13 November 2017, on certain provisions of the draft act on the Supreme Court of Poland. The opinion is available in English online <https://legislationline.org/sites/default/files/documents/35/FINAL%20ODIHR%20Opinion%20on%20the%20Draft%20Act%20on%20the%20Supreme%20Court%20of%20Poland_13Nov2017_ENGLISH.pdf> accessed 26 January 2024.

[20] See the opinion no 904/2017 of the Venice Commission on the draft act amending the act on the National Council of the Judiciary and on the draft act amending the act on the Supreme Court, proposed by the President of Poland, and on the act on the organization of common courts. The opinion is available in English online <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e> accessed 26 January 2024.

[21] See Commission Recommendation (EU) 2018.103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 (OJ EU L of 23 January 2018.).

[22] See commented judgement, § 235.

referred to as its grounds, are further distinguished. Pursuant to Article 89 § 1 of the Act of 8 December 2017 on the Supreme Court,[23] the substantive conditions for the admissibility of an extraordinary complaint, comprise the general (functional) condition of the need to ensure compliance of the contested decision with the principle of a democratic state ruled by law and implementing the principles of social justice, and three special conditions:

1) infringement by the contested decision of the principles or rights and freedoms of human and citizen, enshrined in the Constitution of the Republic of Poland,
2) gross infringement of law by the contested decision through its misinterpretation or misapplication, and
3) obvious contradiction between the court findings and the evidence collected in the case.

For the extraordinary complaint to be admissible, the general condition and one of the special conditions must be cumulatively met.

The analysis of the commented judgment leads to the conclusion that the ECHR recognized, although only partially, the nature of Article 2 of the Polish Constitution, to which the functional condition of the extraordinary complaint refers, indicating that the concept of 'social justice' is general and unclear, and thus creates the possibility of its broad interpretation in legal proceedings.[24] Beyond the scope of the ECHR's considerations, however, remained the concept of a 'democratic state of law', which is also an ill-defined phrase, as well as the analysis of the special conditions of Article 89 § 1 points 1-2 of the Act on the Supreme Court.

In order to determine the nature of the functional condition of the extraordinary complaint, it is necessary to reconstruct the content scope of the standard of review, the carrier of which is the principle of a democratic state ruled by law and implementing the principles of social justice, formulated in Article 2 of the Polish Constitution. Jurisprudence and doctrine have not yet developed an unambiguous definition or any comprehensive approach to the principle of the democratic state ruled by law due to its wide flexibility and open interpretation formula. Some authors even indicate that it is a principle of a dynamic nature, which at no time obtains a metrified, final shape.[25] This is because both the phrase 'democratic state ruled by law' and the phrase 'social justice' are undefined, while Article 2

[23] Act of 8 December 2017 on the Supreme Court (consolidated text, Journal of Laws of 2023, item 1093, as amended; hereinafter referred to as the: 'Act on the Supreme Court').

[24] See the commented judgement, § 235.

[25] Tatiana Chauvin, Jan Winczorek, Piotr Winczorek, *Wprowadzenie klauzuli państwa prawnego do porządku konstytucyjnego Rzeczypospolitej Polskiej* in *Zasada demokratycznego państwa prawnego w Konstytucji RP*, Sławomira Wronkowska (ed) (Warsaw 2006), 16. Piotr Tuleja, *Zastane pojęcie państwa prawnego* in *Zasada demokratycznego państwa prawnego w Konstytucji RP*, Sławomira Wronkowska (ed) (Warsaw 2006) 63.

of the Polish Constitution has the character of a provision referring to the concept (model) of the state, which the legislator has recognized as a certain type of political standard.[26] At the same time, it is an indefinite reference, as the concept of the state ruled by law is constantly changing due to the political, economic, and social transformations ongoing in the state, which is emphasized in the discussion conducted between representatives of legal studies, politicians, and the judiciary.[27]

Thus, the principle of the democratic state ruled by law is a legal construct of a complex, yet open-ended nature, which has certain consequences for the reconstruction of its content scope. First, this principle remains open to interpretation by the entities applying the Polish Constitution, including the Supreme Court examining extraordinary complaints. Therefore, due to the dynamic nature of this principle, it is not possible to precisely define its content scope, as it is subject to a continuous process of formation. Hence, the content of the principle of the democratic state ruled by law is not unambiguously defined, although it is possible to indicate within its framework certain elements that are constant and form the so-called hard core of this principle. However, still, there remains a large scope of vagueness, which results from the use of undefined phrases in Article 2 of the Polish Constitution. As rightly noted by the ECHR, this opens the way for arbitrary use of extraordinary complaint in the Polish legal system.[28] Therefore, a legal provision formulating a functional condition of extraordinary complaint does not satisfy the requirements of the Convention for the quality of law, since the conditions for the admissibility of extraordinary remedies should be precisely formulated.

It seems that also the special conditions of the extraordinary complaint have not been adequately concretized, which is argued in the Polish legal science[29] but has not been raised by the ECHR in the judgment under comment. Indeed, the ambiguity of the expression 'a principle laid down in the Polish Constitution' as well as the use of an evaluative phrase of an estimative nature, such as 'gross violation of the law' leaves a wide discretion for the interpretation of the special conditions of the extraordinary complaint set forth in Article 89 § 1(1) and (2) of the Act on the Supreme Court.

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[26] Sławomira Wronkowska, *Charakter prawny klauzuli demokratycznego państwa prawnego (art. 2 Konstytucji Rzeczypospolitej Polskiej)* in *Zasada demokratycznego państwa prawnego w Konstytucji RP*, Sławomira Wronkowska (ed) (Warsaw 2006) 103-104. The Constitutional Tribunal in its judgment of 20 November 2022, case no K 41/02, OTK-A 2002, No 6, item 83, pointed out that Article 2 of the Polish Constitution resolves the model of the state, defining it as a 'democratic legal state implementing the principles of social justice'.

[27] Sławomira Wronkowska, *Charakter prawny klauzuli…*, 105.

[28] See the commented judgement, § 235.

[29] See among others, Bartosz Wyżykowski, *Skarga nadzwyczajna w postępowaniu cywilnym – wybrane zagadnienia* (Studia Prawa Publicznego 2018) No 4(24), 114-115; Oktawian Nawrot, Krzysztof Olszak, *Rażące naruszenie prawa jako przesłanka skargi nadzwyczajnej* (Prawo i Więź 2023) No 2, 334; Aldona Domańska, *Czy skarga nadzwyczajna do Sądu Najwyższego spełnia swoje cele? (*Acta Universitatis Lodziensis. Folia Iuridica 2020) No 93, 111-113.

In turn, the ECHR analyzed in detail the special condition of Article 89 § 1(3) of the Act on the Supreme Court, highlighting that it allows to use the extraordinary complaint as an 'ordinary appeal in disguise', as it creates the possibility for the Supreme Court to reconsider the facts of the case. This conclusion should be shared, as *de facto* the extraordinary complaint creates a third instance in the course of proceedings and allows triple determination of the facts, which leads to the prolongation of the proceedings and promotes its protraction, while not guaranteeing a better clarification of the facts.[30] Most of all, it also violates the principle of legal certainty and *res judicata*. According to ECHR case law, the principle of legal certainty is manifested, inter alia, in the requirement that final judicial decisions should not be questioned, which serves to ensure the stability of the judiciary and build the confidence of citizens in the state.[31] Consequently, the extraordinary review of final judicial decisions should be exceptional, it cannot serve solely to reconsider the case but should be justified by serious defects of the judgment.[32] The ECHR did not find such defects in the discussed case and indicated that there were no circumstances justifying a departure from the principle of *res judicata*.[33]

2. TIME LIMITS FOR LODGING THE EXTRAORDINARY COMPLAINT

The institution of the extraordinary complaint was also found by the ECHR to be incompatible with the above-mentioned principles of legal certainty and *res judicata* because of the time limits for lodging this remedy. According to Article 89 § 3 of the Act on the Supreme Court, the general time limit for lodging the extraordinary complaint is five years from the date on which the decision appealed against has become final and, if a cassation appeal has been lodged against that decision, within one year from the date of its examination.[34] At the same time, it should be noted that Article 115 of the Act on the Supreme Court, which is a transitional rule, indicates that within 6 years from the date of entry into force of this Act, the extraordinary complaint may be lodged by the Prose-

[30] Tadeusz Zembrzuski, *Skarga nadzwyczajna w polskim postepowaniu cywilnym* (Państwo i Prawo 2019) No 6, 130.

[31] See the judgement of European Court of Human Rights of 23 January 2001, *Brumărescu v Romania*, application no 28342/95, HUDOC, § 61; and the judgement of European Court of Human Rights of 12 March 2019, *Guðmundur Andri Ástráðsson v Iceland*, application no 26374/18, HUDOC, § 238.

[32] See the judgement of European Court of Human Rights of 6 July 2021, *Tiğrak v Turkey*, application no 70306/10, HUDOC, § 48.

[33] See the commented judgement, § 255.

[34] In criminal proceedings the extraordinary complaint shall be inadmissible to allow an extraordinary complaint to the detriment of the defendant if it is lodged after one year from the date on which the decision has become final and, if a cassation appeal or a cassation has been lodged against that decision, after six months from the date of its examination.

cutor General and the Polish Commissioner for Human Rights against final decisions terminating proceedings in cases that became final after 17 October 1997 – i.e. after the date of entry into force of the Polish Constitution, but before the entry into force of this Act, i.e. before 3 April 2018. This means that through the extraordinary complaint, until 3 April 2024, on the initiative of the Prosecutor General and the Polish Commissioner for Human Rights, any final decision of a common and military court issued within the last 25 years could be challenged, provided that it became final before the entry into force of the Act introducing the extraordinary complaint and after the entry into force of the Polish Constitution.

In the commented judgment, the ECHR held the view that the exception provided for in the transitional provision is incompatible with the requirements of the rule of law, in particular, with the principles of legal certainty, *res judicata,* and foreseeability of the law.[35] In fact, the power provided by this provision was established retrospectively, which created a significant risk of destabilizing legal affairs. Indeed, it should be noted that lodging the extraordinary complaint can lead to far-reaching, adverse, and often irreversible legal consequences for the parties to the proceedings.

Therefore, such a solution should be assessed in an unequivocally critical manner.[36] The institution of the extraordinary complaint implies the need to weigh certain general values of the legal system – on the one hand, the fairness of judicial decisions, and on the other hand, their stability, and the related value of legal security. It should be recognized that by introducing the extraordinary complaint, the legislator assumed the primacy of the principle of justice, understood in this context as the issuance of a judgment free of defects, consistent with the law, as well as based on correctly collected and verified evidence. Thus, the Polish legislator took the position that the stability of final judicial judgments cannot be defended at all costs. However, this position has led to the introduction of a kind of insecurity about the stability of final judicial decisions since the legal protection granted under them is, in fact, temporary.[37]

3. POSSIBILITY OF POLITICAL INSTRUMENTALIZATION OF THE EXTRAORDINARY COMPLAINT

In its considerations, the ECHR also noticed the possibility of political instrumentalization of the extraordinary complaint[38] for two main reasons – firstly, by

[35] See the commented judgement, § 237.

[36] This solution is also criticized in Polish literature. See Tadeusz Zembrzuski, *Skarga nadzwyczajna…*, 132; Tadeusz Eryciński, Karol Weitz, *Skarga nadzwyczajna w sprawach cywilnych* (Przegląd Sądowy 2019) No 2, 12-13; Mateusz Radajewski, *Skarga nadzwyczajna (wybrane zagadnienia)* (Państwo i Prawo 2020) no 3, 76.

[37] Tadeusz Zembrzuski, *Skarga nadzwyczajna…*, 132.

[38] See the commented judgement, § 231.

entrusting the right to lodge this remedy to the Prosecutor General, who holds the office of Minister of Justice in the Polish legal system, and secondly, by entrusting exclusive jurisdiction to examine extraordinary complaints to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which does not constitute an 'independent and impartial court established by law' in the light of ECHR's judicature.

Regarding the first of the stated reasons, it should be emphasized that from 2015 to 2023, the office of the Prosecutor General was continuously held by Zbigniew Ziobro – the president of the party 'Solidary Poland' (pol. *Solidarna Polska*), which formed the ruling government coalition during that period. As a Minister of Justice, he was responsible for the widely criticized reform of the judiciary in Poland, including the reform of the Supreme Court in 2017 and the introduction of the institution of extraordinary complaint into the Polish legal system. According to statistics, which are also presented in the commented judgement of the ECHR,[39] between 2018 and 2023, the Prosecutor General showed the highest activity in challenging judicial decisions with the extraordinary complaint among all entities entitled to lodge it.[40] However, cases in which the Prosecutor General brought the extraordinary complaint during this period often had a political context. Among them, one can generally distinguish cases of an ideological nature (e.g. cases involving the LGBT community, cases concerning marches of nationalist groups), cases of political supporters of the ruling parties, brought in their favor (e.g. the case of journalists of Public Television in Poland – Magdalena Ogórek and Rafał Ziemkiewicz),[41] and cases of political opponents of Zbigniew Ziobro, brought against them (e.g. commented case of Lech Wałęsa or the case of Waldemar Żurek).[42]

Consequently, the possibility of political instrumentalization of the extraordinary complaint is confirmed not only by the case of Lech Wałęsa but in general by the past practice of Zbigniew Ziobro, who served as Prosecutor General until 2023, in the selection of cases in which he lodged the extraordinary complaint. Its analysis leads to the conclusion that the extraordinary complaint can be used as a legal tool of political supervision over judicial decisions, used for the implemen-

[39] See the commented judgement, § 48 and 228.

[40] I have presented statistics in this regard with Magdalena Wrzalik based on information obtained through access to public information. See Aleksandra Szydzik, Magdalena Wrzalik, *Legitymacja Prokuratora Generalnego do wniesienia skargi nadzwyczajnej – rozważania na tle spraw wybranych* (Gubernaculum et Administratio 2024) No 1(29), vol 2, 204 <https://czasopisma.ujd.edu.pl/index.php/GeT/issue/view/185/457> accessed 25 September 2024.

[41] See the decision of the Supreme Court of 18 August 2023, II NSNk 23/23, LEX no 3594066.

[42] Most of the mentioned cases have been discussed in the literature. See Aleksandra Szydzik, Magdalena Wrzalik, *Legitymacja Prokuratora Generalnego do wniesienia skargi nadzwyczajnej – rozważania na tle spraw wybranych* (Gubernaculum et Administratio 2024) No 1(29), vol 2, 207-213 <https://czasopisma.ujd.edu.pl/index.php/GeT/issue/view/185/457> accessed 25 September 2024.

tation of the views of the Minister of Justice. This was accurately stated by the ECHR, which indicated that 'it is one thing to hold strong and hostile opinions on one's political opponents yet another to pursue those opinions through the state judicial mechanism, using one's exceptional statutory powers to challenge the finality of an unfavorable judgment in the case of a person who is closely related politically'.[43]

Consequently, it should be concluded that the Prosecutor General, while holding the office of Minister of Justice, is a politically involved entity, as he represents certain views and pursues an agreed political agenda. Therefore, *de lege ferenda* postulate to deprive the Prosecutor General of the right to lodge the extraordinary complaint – at least as long as the office of the Prosecutor General is combined with the office of the Minister of Justice[44] – should be considered as desired. However, it is worth noting that in January 2024, the current Minister of Justice – Adam Bodnar, presented a draft of the act providing the separation of these offices.[45] This may help to partially resolve this problematic aspect of the functioning of the extraordinary complaint provided that the President of the Republic of Poland, who is politically connected to the previous ruling government, will be willing to sign this act.

Referring to the second of the reasons identified by the ECHR that generates the risk of political instrumentalization of the extraordinary complaint, it should be noted that the status of the Chamber for Extraordinary Review and Public Affairs is questioned by both domestic[46] and international[47] justice. This is because the Chamber is composed entirely of judges appointed with the participation of the National Judicial Council, which does not provide sufficient guarantee

[43] See the commented judgement, § 253.

[44] A similar postulate is also made by Jarosław Stasiak, who indicates that the right of the Prosecutor General to lodge an extraordinary complaint should be left only with the separation of the offices of the Prosecutor General and the Minister of Justice due to the possibility of instrumental use of the extraordinary complaint for political purposes. Jarosław Stasiak, *Skarga nadzwyczajna w postępowaniu cywilnym* (Warsaw 2020) 89.

[45] This commentary considers legal situation as of 31 January 2024.

[46] See the resolution of the formation of the combined Civil Chamber, Criminal Chamber and Labor and Social Insurance Chamber of the Supreme Court of 23 January 2020, case no BSA I-4110-1/20, OSNKW 2020, No 2, item 7. The resolution is available in English on the website of the Polish Supreme Court at <https://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf> accessed 26 January 2024.

[47] In this context, it is worth to mention the judgment of the European Court of Human Rights of 8 November 2021, applications no 49868/19 and no 57511/19, *Dolińska-Ficek and Ozimek v Poland*, HUDOC, in which it was indicated that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court is not an independent and impartial court established by law within the meaning of Article 6 § 1 of the Convention. For the same reason, the Court of Justice of the European Union refused to answer the preliminary ruling made by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. See judgment of the Court of Justice of the European Union of 21 December 2023, *LG v Krajowa Rada Sądownictwa*, C-718/21, ECLI:EU:C:2023:1015.

of independence from the legislative and executive powers. Consequently, all the judges sitting in this Chamber are considered to have been appointed in a defective procedure, which precludes them from being considered as an 'independent and impartial court established by law' within the meaning of Article 6(1) of the Convention.

At the same time, one should note that the Chamber of Extraordinary Review and Public Affairs has the exclusive jurisdiction to examine extraordinary complaints, which in fact leads to a state of affairs in which the consideration of an appeal that is incompatible with the standards of fair trial and the principle of legal certainty under Article 6(1) of the Convention has been entrusted with a body that is not considered as a court within the meaning of this provision.[48] This, among other reasons, determined the application of the pilot-judgment procedure by the ECHR, as the current situation involves a cumulative violation of Article 6(1) of the Convention. The ECHR stated that the described violations are systemic and the functioning of the extraordinary complaint in its current form should be considered a dysfunction that may result in systematic violations of Article 6(1) of the Convention, and consequently cause similar complaints to be lodged in the future.

IV. CONCLUSIONS

The conclusions of the ECHR arising from the judgement under comment should be generally shared. Extraordinary complaint is a flawed institution, and its legal construction as well as the manner in which it has been applied in practice so far should be criticized. Although the Polish legal system needs an instrument that would allow for the control of the constitutionality of judicial decisions, such an instrument should be constructed in accordance with the generally accepted standards of the rule of law and democracy. Therefore, the continued functioning of the extraordinary complaint in the Polish legal system requires comprehensive reform.

Analysis of the ECHR judgment leads to the conclusion that the defectiveness of the extraordinary complaint is multifaceted, and the violation of Article 6(1) of the Convention identified in the judgment under comment should be considered as a result of the sum of the defects of this institution. Indeed, the reservations raised against the extraordinary complaint concern both theoretical and practical aspects. Considering the application of the pilot-judgment procedure in the case of *Wałęsa v Poland,* as well as the indication by the ECHR of the general measures that should be taken with regard to the systemic problem, the analysis allows to formulate the following *de lege ferenda* postulates:

[48] See the commented judgement, § 324.

a. the substantive conditions of the extraordinary complaint, particularly the functional condition of the extraordinary complaint, should be precisely formulated in order to minimize the possibility of their arbitrary interpretation,
b. the special condition of the extraordinary complaint, formulated in Article 89 § 1(3) of the Act on the Supreme Court, should be removed, as it allows for a re-examination of the facts of the case,
c. the Prosecutor General should be deprived of the right to lodge an extraordinary complaint if in the future, the office will continue to be merged with the office of the Minister of Justice.

It should be reserved that the above *de lege ferenda* postulates do not exhaust the issue of the defectiveness of the extraordinary complaint, but only constitute a proposal to amend it in several key aspects. Therefore, before the possible reform of the extraordinary complaint, it is necessary to undertake a deeper, systemic reflection on this legal institution. In any case, however, the reform of the extraordinary complaint should be of a comprehensive nature, since its defectiveness cannot be repealed by introducing amendments to a limited extent. For example, although depriving the Prosecutor General of the right to file an extraordinary complaint would reduce the possibility of political instrumentalization of this institution, it would still be necessary to amend other aspects of the functioning of the extraordinary complaint, regarding, e.g. its substantive and temporal scope or the conditions for its admissibility, to remedy the violation of Article 6(1) of the Convention.

Despite the general defectiveness of the extraordinary complaint, it is worth making the effort to reform this institution to provide fuller protection of the Constitution of the Republic of Poland, in particular, constitutional rights and freedoms. Due to the narrow model of the constitutional complaint, only fragmentary constitutional protection is provided in the Polish legal system, as this institution allows for the control of the constitutionality of the law but not judicial decisions. As Piotr Tuleja points out, this results from the incompatibility of the substantive and procedural dimensions of the protection of rights in the Polish legal order, in which the means of protection have been strictly divided into those that are directed against acts of lawmaking and those that are directed against acts of law application.[49] As a result, effective protection of individual rights is sometimes only possible before the ECHR, and not at the domestic level.

The insufficient scope of constitutional protection, in particular, in the area of application and interpretation of law, is confirmed by the allegations raised in extraordinary complaints. For this reason, keeping the extraordinary complaint in the Polish legal system, subject to its prior reform, should be considered desir-

[49] Piotr Tuleja, *Geneza, rozwój i upadek sądownictwa konstytucyjnego* (Państwo i Prawo 2022) No 10, 267.

able – at least until the political and legal conditions allow for the amendment of the Constitution of the Republic of Poland and the adoption of a broad model of constitutional complaint, based on the solutions existing in Germany, Spain or the Czech Republic.

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