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Wydawnictwa Uniwersytetu Warszawskiego
02-678 Warszawa, ul. Smyczkowa 5/7
www.wuw.pl; e-mail: wuw@uw.edu.pl
Dział Handlowy WUW: tel. (48 22) 55 31 333; e-mail: dz.handlowy@uw.edu.pl
Księgarnia internetowa: www.wuw.pl/ksiegarnia

Skład i łamanie
Barbara Obrębska

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Rafał Baum
Poznan University of Life Sciences, Poland
e-mail: rafal.baum@up.poznan.pl
ORCID: 0000-0001-5415-0555

Katarzyna Leśkiewicz
Adam Mickiewicz University in Poznan, Poland
e-mail: katarzyna.leskiewicz@amu.edu.pl
ORCID: 0000-0001-5261-2752

SUSTAINABLE FOOD SYSTEMS IN THE LIGHT OF THE LEGAL AND ECONOMIC CONDITIONS OF THE COMMON AGRICULTURAL POLICY

Abstract

The purpose of this paper is to formulate a preliminary assessment of the selected solutions of the Common Agricultural Policy as to whether they are adequate from the perspective of the objectives of the SFS. Sustainability of food systems has become a complex process, dependent on a number of environmental, economic, and social factors. The authors assess that the instruments for supporting Sustainable Food Systems included in the national strategic plan are adequate to the goals of these systems, but some reservations can be raised about them. In particular, in addition to measures that are certainly beneficial and consolidating (e.g., supporting the reduction of antibiotic use in livestock production and pesticide use in crop production), the national strategic plan lacks larger-scale instruments (important from the point of view of the big picture) to support, for example, the introduction of resource-efficient and climate-resilient production, the promotion of a healthy and sustainable diet, the wider introduction of quality food (not only organic), the reduction and combating of food waste, the proper storage of food, or the reduction and management of waste generated in the food chain. The relative nature of the conditionality mechanism remains a shortcoming.

KEYWORDS

agricultural law, sustainable food systems, common agricultural policy, agricultural activity

SŁOWA KLUCZOWE

prawo rolne, zrównoważone systemy żywnościowe, wspólna polityka rolna, działalność rolnicza

1. INTRODUCTION

The subject of consideration is Sustainable Food Systems (SFS) in light of the legal and economic conditions of the Common Agricultural Policy (CAP). The expression "sustainable food systems" encompasses systems that ensure food safety and food security for all in a way that does not threaten the economic, social, and environmental foundations of this security for future generations.[1] The determinants of the Common Agricultural Policy are defined by various legal acts, in particular Regulations 2021/2115,[2] 2021/2116,[3] 2021/2117,[4] as well

[1] HLPE, Food losses and waste in the context of sustainable food systems, Roma 2014; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Farm-to-Fork Strategy for a Fair, Healthy and Environmentally Friendly Food System, COM/2020/381 final, https://www.europarl.europa.eu/news/pl/headlines/society/20200519STO79425/stworzenie-zrownowazonego-systemu-zywnosciowego-strategia-ue (accessed 15 June 2023), hereinafter referred to as "Farm-to-Fork Strategy".

[2] Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 laying down the rules on support for strategic plans drawn up by Member States under the common agricultural policy (CAP strategic plans) and financed by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No. 1305/2013 and (EU) No. 1307/2013 *PE/64/2021/REV/1*, OJ L 435, 6 December 2021, pp. 1-186, hereinafter referred to as Regulation 2021/2115.

[3] Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management, and monitoring of the common agricultural policy and repealing Regulation (EU) No. 1306/2013, PE/65/2021/INIT, OJ L 435, 6.12.2021, pp. 187-261, hereinafter referred to as Regulation 2021/2116.

[4] 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 organization 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, labeling and protection of geographical indications of aromatized wine products and (EU) No. 228/2013 laying down specific measures in the field of agriculture for the outermost regions of the European Union

as the National Strategic Plan for the Common Agricultural Policy. In principle, all "interventions" should be part of this strategic plan and have an impact on the sectors that are defined in Regulation 1308/2013.[5] Sustainable food systems are referred to in various documents of a strategic nature, in particular, the European Green Deal,[6] and including the Farm to Table strategy.[7] Sustainable food systems in the EU are based on the goals formulated in the United Nations (UN) Agenda for Sustainable Development.[8]

The issue specified in the title has been considered by representatives of various sciences in the literature,[9] including foreign studies,[10] for example, in the field of agricultural economics.[11] However, it has not been elaborated in an exhaustive

PE/66/2021/REV/1, OJ L 435, 6 December 2021, pp. 262-314, hereinafter referred to as Regulation 2021/2117.

[5] Regulation (EU) No. 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organization of the markets in agricultural products and repealing Council Regulations (EEC) No. 922/72, (EEC) No. 234/79, (EC) No. 1037/2001 and (EC) No. 1234/2007, OJ L 347, 20 December 2013, p. 671.

[6] Communication from the Commission to the European Parliament, the European Council, the Council, the Economic and Social Committee and the Committee of the Regions, European Green Deal, COM/2019/640 final, hereinafter referred to as the European Green Deal.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Farm-to-Fork Strategy for a Fair, Healthy and Environmentally Friendly Food System, COM/2020/381 final, https://www.europarl.europa.eu/news/pl/headlines/society/20200519STO79425/stworzenie-zrownowazonego-systemu-zywnosciowego-strategia-ue (accessed 15 September 2020), hereinafter referred to as "Farm-to-Fork Strategy".

[8] Resolution adopted by the General Assembly on 25 September 2015 [without reference to the Core Committee (A/70/L.1)] 70/1 Transforming Our World: 2030 Agenda for Sustainable Development, http://www.unic.un.org.pl/files/164/Agenda%202030_pl_2016_ostateczna.pdf (accessed 29 June 2023).

[9] T. Srogosz, *Food systems in the context of the Sustainable Development Goals – some remarks in a time of pandemonium*, Public Law Review 2020, No. 6, pp. 24-37; K, Leśkiewicz, *Sustainable food systems in the context of the reform of the Common Agricultural Policy – legal aspects*, Przegląd Prawa Rolnego 2020 No. 2, pp. 75-85, B. Włodarczyk, *Prawne instrumenty ochrony środowiska i przeciwdziałania zmianom klimatu we Wspólnej Polityce Rolnej na lata 2023–2027*, Przegląd Prawa Rolnego 2022, No. 2, pp 11-26; A. Niewiadomska, *Key challenges related to smart village*, Przegląd Prawa Rolnego 2023 No. 1, pp. 11-23; A. Kapała, *The role of short supply chains and local food systems in the concept of food sovereignty and food democracy*, Przegląd Prawa Rolnego 2023 No. 1, pp. 117-138.

[10] See, i.e. *Healthy and Sustainable Food Systems,* Mark Lawrence, Sharon Friel (eds.), London 2019.

[11] Cf. M. Kwasek (ed.) *Z badań nad rolnictwem społecznie zrównoważonym*, Warsaw 2018; R. Grochowska (ed.) *Kierunki rozwoju rolnictwa i polityki rolnych – wyzwania przyszłości* (Synteza), Warsaw 2014; A. Kołodziejczak, *Modele rolnictwa a zróżnicowanie przestrzenne sposobów gospodarowania w rolnictwie polskim*, Poznań 2010. The issue of food systems and their sustainability was addressed, among others, in studies: B. Kneen (1993). *From Land to Mouth. Understanding the Food System*. Toronto: NC Press Limited, p. 144; M.C.. Heller, G.A. Keoleian (2003). *Assessing the sustainability of the US food system: a life cycle perspective. Agricultural Systems*, 76(3); P. Ericksen (2008). *Conceptualizing food systems for global environmental change*

way, as food systems are transforming, and their objectives, structure, organization as well as scope of implemented activities are changing.

The choice of the research topic is justified by socio-economic considerations. In a broader context, sustainable food systems are one of the major challenges of the European Green Deal (hereinafter: European Green Deal), the EU's strategy for inclusive and sustainable growth. The European Green Deal aims to stimulate the economy, improve people's health, quality of life and care for nature. Issues of well-being and health of citizens and future generations are closely linked to access to healthy and affordable food. The European agri-food system sets global standards for food safety, security of supply, nutritional value, and quality.[12]

In order to achieve the goals of the European Green Deal and to secure the future of agriculture, support from the EU's agricultural policy is crucial. The new arrangements for the Common Agricultural Policy from 2023 to 2027 focus on ten specific objectives for social, environmental, and economic sustainability in agriculture and rural areas. A special role is to be played by strategic plans – at the national level, member states implement the CAP with their own plan, which combines a wide range of targeted interventions in response to specific needs and is designed to produce tangible results in terms of EU goals.

The Polish Strategic Plan for the Common Agricultural Policy 2023-2027 (PS CAP) addresses all major EU climate and environmental issues.[13] The new programming period will feature the so-called system of new "green architecture" consisting of mutually complementary mandatory requirements and additional voluntary incentives for environmentally and climate-friendly agricultural practices. The elements of the green architecture will be:

1) mandatory conditionality system,
2) voluntary climate and environmental schemes for farmers, the so-called ecoschemes,

research. Global Environmental Change, 18(1), pp. 234-245; J. Ingram (2011). A food systems approach to researching food security and its interactions with global environmental change. Food Security, 3(4), pp. 417-431; S. Kowalczyk (2010). Globalization of agribusiness: specifics, dimensions, consequences. Issues in Agricultural Economics, (2), pp. 6-26; R. Capone, H. El Bilali, P. Debs, G. Cardone, N. Driouech (2014) *Food system sustainability and food security: connecting the dots. Journal of Food Security*, 2(1), 13-22; J. Golebiewski (2019): *Food systems under circular economy. A comparative study of European Union countries*. SGGW Publishing House Warsaw, p. 271.

[12] Cf. Agriculture and the Green Deal https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/agriculture-and-green-deal_pl (accessed 1 August 2023).

[13] Strategic Plan for the Common Agricultural Policy 2023-2027 – short version. European Commission-approved Strategic Plan for the Common Agricultural Policy 2023-2027 – Common Agricultural Policy after 2020 – Gov.pl Portal (www.gov.pl), accessed 18 July 2023, hereinafter referred to as the National Strategic Plan.

3) pro-environmental support instruments – multi-year commitments and investments made under Pillar II.[14]

It is worth bearing in mind that in addition to the continuation of solutions already known,[15] the new CAP introduces solutions that increase the emphasis on investments for the environment and climate, animal welfare, or production based on the highest standards. An important addition to the catalog of farm support is the possibility of using support based on various forms of cooperation.

When it comes to economic considerations, it should be pointed out that the total amount of commitments under the CAP for 2021-2027 is EUR 386,602.8 million, of which 76.8% is allocated to spending in Pillar I, and 23,2% in Pillar II (rural development policy). Currently, agricultural spending in the European Union budget in 2021-2027 will account for 31%. The budget cost of the CAP as a percentage of gross national income (GNI) in the EU has therefore decreased from 0.54% in 1990 to 0.32% in the 2021-2027 projections.[16]

The purpose of the paper is to formulate a preliminary assessment of the selected solutions of the Common Agricultural Policy, whether they are adequate from the perspective of the objectives of the SFS. The structure of the considerations was subordinated to such a goal. First, it was necessary to establish the objectives of the SFS, then to identify the legal solutions for their implementation, showing their economic background.

2. SELECTED ASPECTS OF BUILDING SUSTAINABLE FOOD SYSTEMS (SFS)

Sustainable food systems are included in the European Union's major strategies. The EU food policy has been oriented towards achieving the UN Sustainable Development Goals.[17] In particular, it is expected to contribute to climate change mitigation. On the one hand, the Common Agricultural Policy should ensure affordable, safe and tasty food, an adequate standard of living for farmers and

[14] J. Gierulska (2022): *"Green Deal" in agriculture - what is the Polish plan?* Pomorski Thinkletter No. 3/2022: *The green transformation of Polish agriculture - meaning, philosophy and paths to the goal*, pp. 94-98.

[15] Among them: young farmers' bonuses, the LEADER initiative, and farm modernization support.

[16] CAP funding | Topical notes on the European Union | European Parliament (europa.eu) (accessed 18 July 2023).

[17] Resolution adopted by the General Assembly on 25 September 2015 [without reference to the Core Committee (A/70/L.1)] 70/1 Transforming Our World: 2030 Agenda for Sustainable Development, http://www.unic.un.org.pl/files/164/Agenda%202030_pl_2016_ostateczna. pdf (accessed 19 July 2023).

protect natural resources. On the other hand, it is about ensuring food security, responding to global market fluctuations and price volatility, as well as maintaining rural development in the EU.

Climate protection related to reducing atmospheric emissions of greenhouse gases poses ambitious challenges for current food systems to link agricultural production with a greater commitment to resource conservation and biodiversity. It is assumed that "In doing so, the characteristic of sustainability can be applied to all aspects of production, resource use, production techniques and methods, substances used, waste generation and management, atmospheric emissions, or consumption. The result of such a composition should be a product – food, allowing to meet food security needs".[18] As indicated by the National Strategic Plan for the Common Agricultural Policy 2023-2027, in the section "Strategic Declaration", a total of about 1.4 million farms are identified in Poland, with the main sectors being dairy, cereals, pig breeding, poultry and horticulture. In particular, agriculture is characterized by a diversity of production and economic potential, with a large share of farms of small economic size. There are significant income disparities. It was also pointed out that water shortages and surface water pollution are observed. Despite upward trends, the use of plant protection products remains below the EU average. Rural areas still lack access to modern social and technical infrastructure. A progressive aging of the population is evident. The majority of businesses are associated with the agricultural and forestry services, in the processing and tourism sectors. The strategic plan is intended to support the sustainable development of Polish farms, the processing sector, and the improvement of living and working conditions in small rural towns. In addition, the CAP is intended to serve sustainable farming methods, friendly to the climate and the environment; protecting water, soil and air, and biodiversity.[19]

First of all, bearing in mind the definition of food systems mentioned at the beginning of the discussion, it is crucial to determine which of the actions adopted in the National Strategic Plan directly serve to ensure food security and nutrition, taking into account the economic, social and environmental aspects of sustainable and balanced food chains. The objectives identified in the National Strategic Plan can be divided by the object of impact – into the economy, society and the environment, as follows:

1) Economy – supporting decent farm incomes and resilience across the Union to enhance food security, increasing market orientation and competitiveness, including a greater focus on research, technology and digitization, improving farmers' position in the value chain,

[18] K. Leskiewicz, *Sustainable systems*..., p. 80.

[19] Strategic Plan for the Common Agricultural Policy 2023-2027 – short version, p. 5. (European Commission-approved Strategic Plan for the Common Agricultural Policy 2023-2027 – Common Agricultural Policy after 2020 – gov.pl Portal (www.gov.pl) (accessed 18 July 2023), hereinafter referred to as the National Strategic Plan.

2) Environment – contributing to climate change mitigation and adaptation, as well as sustainable energy production, promoting sustainable development and efficient management of natural resources such as water, soil, and air, contributing to biodiversity conservation, enhancing ecosystem services, and protecting habitats and landscapes,
3) Society – attracting young farmers and facilitating rural business development, promoting employment, growth, social inclusion, and local development in rural areas, including bioeconomy and sustainable forestry, improving the response of EU agriculture to societal needs for food and health, including safe, nutrient-rich and sustainable food, as well as animal welfare.

Due to the framework of the study, selected aspects of the indicated areas of CAP support will be the subject of comments. It is worth noting that at the stage of formulating strategic plans, the need for a more ambitious approach to the specific objectives of the Common Agricultural Policy related to the environment and climate[20] was emphasized. Indeed, the areas mentioned are to constitute specific "areas" of impact, while maintaining the productive function of agriculture closely linked to the elementary *right to food* and *access to food*. Reference to this function can be seen in the delineation of the conceptual framework of agricultural activity in Article 4(2) of Regulation 2021/2115. The EU legislator indicates that in the concept of agricultural activity, Member States should include contributing to the provision of public and private goods by means of at least animal husbandry or cultivation, or maintaining agricultural land in a condition that makes it suitable for grazing or cultivation, without taking preparatory measures beyond the use of ordinary agricultural methods and ordinary agricultural equipment. Thus, agricultural activities should contribute to the provision of public or private goods, which presumably include agricultural products produced under the SFS. For years, in the solutions of the Common Agricultural Policy, the production function has not been fundamental and exclusive. On the one hand, this is a shortcoming of the solutions that distorts the essence of the productive nature of the agricultural system, while on the other hand, it opens up opportunities for other functions of agriculture related precisely to the environment. Therefore, it is important that agriculture should retain the feature of productivity and not be reduced to merely maintaining agricultural land. This issue has been repeatedly addressed by various authors.[21] Already at this point, it is necessary to point out some inconsistencies in the formation of an approach to sustainable agricultural production. One should point out, for example, the mechanism of conditionality. The essence of conditionality for direct payments is the requirement for

[20] Paragraph 123 of the preamble of Regulation 2021/2115.

[21] See i.e. L. Costato, *Mulitifunzionalità dell'impresa agricola ed equivoci sull'agroalimentare: la PAC snaturata*, I Georgofili: Atti dell'Academia dei Georgofili, serie VIII, Vol. 11, Tomo II 2014, pp. 556-570.

cross-compliance and greening, and currently includes Good Agricultural and Environmental Condition of Land (GAEC) standards and Statutory Management Requrements (SMRs). Failure to comply with conditionality does not result in the loss of support but in a 3% reduction in support for various instruments. This solution, at first glance, may not be conducive to the efficiency of the entire support system and does not serve the consistent transformation of agriculture.

Summarizing the above considerations, the transition to a sustainable food system can bring environmental, health, and social benefits, as long as its requirements are fully implemented. The EU's goals in this regard are:[22]

1) reducing the environmental and climate footprint associated with the operation of the food system,
2) guaranteeing food security in the face of climate change and biodiversity loss,
3) strengthening the resilience of the EU food system,
4) ensuring that the EU leads the global transformation toward competitive "farm-to-table" sustainability,
5) enabling more fair economic returns (fair distribution among the various players along the food chain).

3. IMPLEMENTATION OF SUSTAINABLE FOOD SYSTEMS INSTRUMENTS IN THE NEW CAP FUNDING PERSPECTIVE

The 2023-2027 CAP is based on the approach of fulfilling ten specific objectives, which are also the framework for EU countries' CAP strategic plans. They combine targeted "interventions" that address specific needs and achieve EU-level goals. During the approval process, the European Commission assessed how each EU country's CAP strategic plan affects and complies with EU climate and environmental legislation and commitments.[23] As already mentioned, in Poland, financial support under the EU CAP for 2023-2027 will be allocated on the basis of the document entitled: Strategic Plan for the Common Agricultural Policy for 2023-2027.[24] The budget of the CAP SP is 25,125 billion euros. The

[22] Cf. Agriculture and the Green Deal, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/agriculture-and-green-deal_pl (accessed 1 August 2023).

[23] Cf. CAP Strategic Plans https://agriculture.ec.europa.eu/cap-my-country/cap-strategic-plans_pl (accessed 1 August 2023).

[24] Strategic Plan for the Common Agricultural Policy 2023-2027, https://www.gov.pl/web/rolnictwo/plan-strategiczny-dla-wspolnej-polityki-rolnej-na-lata-2023-27 (accessed 1 August 2023).

funding of Pillar I, after the transfer of 30% from Pillar II, is 17,326 million euros, while the Pillar II allocation is 7,799 million euros.[25]

An analysis of this voluminous (1,257 pages) document allows us to conclude that among the objectives of the CAP there were two related to the creation of sustainable food chains:

1) improving the position of farmers in the value chain (specific objective SO3),
2) improving the responsiveness of EU agriculture to societal needs for food and health, (specific objective SO9).

In terms of the SO3 objective, the European Commission noted that "agriculture is characterized by a constant and low share of value added in the value chain due to high input costs, fluctuations in production, and the inclusion of new services".[26] The effect of the goal is to empower farmers through measures such as strengthening cooperation among farmers, increasing market transparency, and providing effective mechanisms to combat unfair trade practices.[27]

The CAP SP needs assessment and intervention strategies include the following needs:[28]

- stimulating joint activities among farmers in various forms of collaboration and cooperation (CS3.P1),
- supporting short/alternative value chains including those related to high quality manufacturing (CS3.P2),
- developing cooperation, improving competitiveness and innovation along the value chain (CS3.P3),
- supporting the development of organized forms of trade (CS3.P4),
- consulting, coaching, cooperation with leaders of the scientific and business communities (CS3.P5),
- promoting solutions to support supply contracts between farmers and the processing industry (CS3.P6),
- the use of digitization in access to financial services, information and improving the supply chain (CS3.P7).

In terms of priorities at the level of the CAP strategic plan, the first two needs received the status "critical (+++)", the next two "required (++)", CS3.P5 was "beyond prioritization" and the last two needs received the status "desirable (+)". In determining whether a need was included in the CAP strategic plan, the first

[25] Strategic Plan for the Common Agricultural Policy 2023-2027 – p. 42, https://www.gov.pl/web/rolnictwo/plan-strategiczny-dla-wspolnej-polityki-rolnej-na-lata-2023-27 (accessed 1 August 2023).

[26] Cf. Key Policy Goals of the CAP for 2023-2027, https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-2023-27/key-policy-objectives-cap-2023-27_pl (accessed 2 August 2023).

[27] Cf. cap-specific-objectives-brief-3-farmer-position-in-value-chains_en_0.pdf (europa.eu) (accessed 2 August 2023).

[28] Cf. Strategic Plan for the Common Agricultural Policy 2023-2027, pp. 45-46.

five needs were annotated "partially", CS3.P6 was annotated "yes" and CS3.P7 was annotated "no".

Objective SO9, on responding to societal needs for food and health, focused on the challenges of producing high-quality, safe, nutrient-rich, and sustainably produced food and on reducing food waste. It also emphasized the need to increase animal welfare and combat antimicrobial resistance in animal husbandry and highlighted the relationship between animal welfare, animal health, and foodborne diseases.[29]

The CAP PS, in assessing needs and intervention strategies, detailed:[30]

- supporting the reduction of antibiotic use in livestock production (CS9.P1),
- sustainable use of inputs and improved farm biosecurity (CS9.P2),
- animal food production with higher levels of animal welfare (CS9.P3),
- ensuring the availability of organic food produced in food quality systems (CS9.P4),
- raising consumer awareness of food production systems and product labeling (CS9.P5),
- support for the construction of producer groups within the framework of food quality systems and horizontal relations (CS9.P6),
- raising awareness among market participants to counter food waste (CS9. P7),
- raising farmers' knowledge of sustainable use of inputs and bioassurance (CS9.P8).

At the national CAP PS level, in terms of prioritization, needs CS9.P1-P3 and CS9.P6 were given the status "critical (+++)", CS9.P4 and CS9.P5 were given the status "required (++)", and the last two were placed "outside prioritization". Need CS9.P3 was included in the plan in its entirety (annotated "yes") and the remaining needs were included "partially".

Further analysis of the Polish PS of the CAP allows us to conclude that a variety of activities, or the so-called interventions, have been identified to support the implementation of the needs identified earlier, based on the results of the SWOT analysis. Thus, for Objective 3, on improving the position of farmers in the value chain, 20 specific interventions were envisaged, under 6 types of interventions classified into two forms of intervention.[31] For Objective 9, on responding to social needs for food and health, 21 interventions were envisaged to be implemented (3 of which are the so-called ecoschemes), under 7 types and 3 forms of intervention.[32]

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[29] Cf. https://agriculture.ec.europa.eu/system/files/2018-12/cap_briefs_9_final_0.pdf (accessed 2 August 2023).

[30] Cf. Strategic Plan for the Common Agricultural Policy 2023-2027, p. 49.

[31] Cf. Strategic Plan for the Common Agricultural Policy 2023-2027 – pp. 131-132.

[32] *Ibid*, pp. 275-277.

Due to the limited scope of the article, the evaluation of the solutions contained in the CAP SP focuses on the most important aspects from the perspective of sustainable food systems.

In the case of Objective SO3, there is an apparent emphasis on efforts to strengthen the vertical integration of small and medium-sized farms into the food industry and to improve the position of farmers in the food chain, or to promote cooperation between farmers (including joint ventures). This is in line with the farm-to-table strategy's priority of shortening food supply chains. Several interventions are dedicated to these needs, including perhaps the most interesting under "COOP(77) – Cooperation" (and well in line with the idea of ICZM):

- creation and development of producer organizations and agricultural producer groups (I13.2),
- promotion, information, and marketing regarding food produced under food quality systems (I13.3),
- development of producer cooperation within the framework of food quality systems (I13.4),
- cooperation of EPI Operational Groups (I13.5).

Three interventions to support the development of value chain cooperation should also be mentioned (I10.6.2, I10.7.1, and I10.7.1).

A smaller representation of interventions relates to increasing the scale of small-scale processing in the quality-food production sector, which is based on farms' own resources. It seems that stronger support for this segment of the agri-food market should facilitate faster development of local markets and farmers' direct outreach to consumers (including through the establishment of processing businesses by farmers, or agricultural retailing). There is also doubt that small and medium-sized processing plants will receive sufficient support for modernization that will bring them in line with the requirements of a greener and digital economy and strengthen their competitiveness in the market. It is not entirely clear what will be the share of the support (what financial instruments envisaged) for large processing companies for their modernization related to increasing environmental requirements ("Green Deal", "From Farm to Table", or GMO-free feed production). As you know, subsidizing these largest companies requires a lot of money, but at the same time can be crucial for the entire processing sector, or the economy more broadly, due to the large scale of production (and the volume of emissions generated).

It should be noted that for Objective SO9, the main challenge diagnosed in the SWOT analysis is to reduce the use of antibiotics and pesticides, especially in intensive agricultural production. This is, of course, in line with the European Commission's recommendations on the need to ensure animal welfare and reduce the use of antibiotics and pesticides. However, there seems to have been too much emphasis on this aspect in Goal 9 (or - too little attention to other issues). Several interventions correspond to these issues (including ecoschemes: I4.3, I4.4 and

I4.6). The issue of the need to provide adequate information to food consumers (also advocated by the EC) in the CAP SP is already less well represented in principle only through intervention I13.3. Promotion, information and marketing of food produced under food-quality systems (intervention I.7.3 applies only to fruit and vegetable producers). Support related to the implementation of the farm-to-table strategy is evident – activities and investments contributing to environmental and climate protection are represented by three interventions (I.7.5, I 10.2, I 10.4), as well as support for increasing the area of agricultural land covered by the organic farming system (I 8.11).

In both cases, support for fruit and vegetable producers and markets is strongly noted (in SO3 – 6 interventions and in SO9 – 4 interventions in the form of "Sectoral-fruits and vegetables").

In the opinion of the authors, a debatable issue that, unfortunately, cannot be developed further in this study is the number and adequacy of result indicators for evaluating the implementation of individual measures. Why, for example, only three indicators were proposed for the SO3 objective (R 10 R11 R39)? Why indicator R39 (Development of the rural economy. Number of rural enterprises, including bio-economy enterprises developed through CAP support) is also linked to Objective 8? Such a solution "blurs" the actual results obtained for Objective 3. The situation is similar for the result indicators for Objective 9 (R4, R6, R7 R29, R43, R44) – according to the authors, they do not allow to fully measure the effects of the implementation of all interventions under SO9. There is also the phenomenon of using a given indicator to assess the implementation of several objectives, while on the implementation of indicator R29 (Development of organic agriculture. Percentage of utilized agricultural area under CAP support for organic farming, broken down by maintenance and conversion) is influenced by only one intervention I.8.11 – Organic farming. However, it is worth noting that under this intervention, it is imposed on farmers to produce organically and appropriately allocate the harvest, at least 30% of which must be destined for sale or processing.[33] Already at this point, it can be pointed out that this solution is directed at supporting the supply of organic products both primary and processed and subsequently the share of these products in the food market. For years, organic farming has been one of the important instruments for the transformation of EU agriculture, but not sufficiently developed in Poland.

[33] Ordinance of the Minister of Agriculture and Rural Development of 17 April 2023 on the detailed conditions and detailed procedure for granting and paying organic payments under the Strategic Plan for the Common Agricultural Policy for 2023-2027, Journal of Laws of 2023, item 791.

4. CONCLUSION

The Common Agricultural Policy accounts for 1/3 of the total EU budget. Although this share has been steadily declining (in the 1980s it was 70%), it remains a key element of the financing of EU agriculture and as a result, the challenges it faces. Implementation of the new CAP has been taking place at national levels since 2023 with the help of strategic plans.

The considerations carried out allow us to formulate the conclusion that a comprehensive assessment of the sustainability of food systems is associated with the analysis of numerous phenomena – in economic, social, and environmental dimensions, at different scales (e.g., geographical and temporal).[34] Sustainability of food systems has thus become a complex process, dependent on a number of environmental, economic and social factors, which can be viewed from different perspectives. Many of them appear inside food systems (e.g., farmer relations, short supply chains, organic farming), and some exist outside of them (e.g., the issue of health care, or energy security). It should be remembered that the construction of these systems, however, is mainly based on the close link between agricultural production and instruments for combating climate change, restoring and protecting biodiversity from the impact of agriculture. Therefore, the current reform of the Common Agricultural Policy implies a greater focus on the results achieved in terms of climate and environmental protection, as well as the strengthening of efforts for organic farming, or the preservation of biodiversity. These measures – which are part of the pan-European EZ³ strategy – are particularly evident in the Polish CAP SP. Many interventions relate to more environmentally friendly agricultural production (ecoschemes). Further down the list, and consequently with less financial support, are the activities related to sustainable food systems (a total of 41 interventions under CAP objectives SO3 and SO9).

A detailed analysis of these support instruments makes it possible to conclude that the support is primarily aimed at agriculture, and less concerned with food processing (especially large-scale processing), storage, distribution, or consumption. Meanwhile, as defined by the UN Food and Agriculture Organization (FAO), "food systems comprise the entire range of actors and their interrelated value-added activities involved in the production, collection, processing, distribution, consumption, and disposal of food products from agriculture, forestry or fisheries and parts of the broader economic, social and natural environment in which they are embedded".[35] Policies to support and develop sustainable food systems should be comprehensive, not focused on selected subsystems (mainly agri-

[34] Cf. M. Adamowicz, A. Smarzewska *Model and measures of sustainable and balanced development of rural areas locally*, Zeszyty Naukowe SGGW w Warszawie, European Politics, Finance and Marketing No.1 (50), 2009, pp. 251-269.

[35] Cf. https://www.usda.gov/oce/sustainability/definitions (accessed 3 August 2023).

culture). With the recognition that the food system consists of the environment, people, institutions, and processes through which food products are produced, processed, and delivered to people, a holistic approach is needed in creating more sustainable food systems.

Another reflection is that the solutions suggested by the CAP SP are local in nature. On the one hand, it is important for the new CAP to be more flexible and pragmatic, on the other hand, the effects of implementing the solutions may further differentiate the situation of agriculture in individual member countries. Seeing the solution in local food and shortening marketing chains (food bought close to home, in small markets) is a familiar trend. Local systems can be effective, but it should be remembered that their essence is not exclusively to consume food only within a specific area. LGS needs efficiency, and efficiency is about maximizing the use of the resources at hand. To ensure food security (in the context of the growing global hunger problem), local systems are only part of the combined efforts necessary for us to produce nutrient-rich food in the future.[36]

In summary, the instruments for supporting SFS contained in the CAP SP are adequate to the objectives of SFS, but some reservations can be raised about them. The food system is a complex chain: from production, through processing, distribution and trade, to consumption and waste, which has a major impact on the environment, health, and food safety. The chain is made up of relationships between numerous actors.[37] In addition to measures that are certainly beneficial and consolidating (e.g., support for reducing the use of antibiotics in livestock production and pesticides in crop production to increase the resilience of the food system, or interventions under "COOP(77) – Cooperation"), the document lacks larger-scale instruments (important from the perspective of the big picture) to support, for example the introduction of resource-efficient and climate-resilient production, promotion of healthy and sustainable diets, wider introduction of quality food (not only organic), reducing and combating food waste, proper food storage, or reducing and managing waste generated in the food chain.

The discussion undertaken does not exhaust all the important aspects of SFM and its place in the CAP SP (for example, the amount and structure of financial outlays for interventions are not addressed). The EU's sustainable food economy strategy aims to protect the environment and provide healthy food for all while guaranteeing farmers' livelihoods. A final assessment of whether implementing

[36] Cf. https://www.wrp.pl/zrownowazony-system-zywnosci-co-to-jest/ (accessed 3 August 2023).

[37] Within the food system, a special role is played by the so-called food operators – a concept that took shape in the 1990s, as part of the concept of "From farm to table" assuming the influence of each entity – a link in the chain – on the safety of the final consumer (cf. Czarnecki J. (2022): *On the need for sustainable food systems,* https://www.kongresobywatelski.pl/pomorski-thinkletter/wszystkie-teksty/o-potrzebie-zrownowazonych-systemow-zywnosciowych/ (accessed 3 August 2023).

the CAP's tasks in the EU and a sustainable food system in Poland will make it more robust and resilient to future crises, such as pandemics or increasingly frequent natural disasters, will be possible after a certain period of implementation of the presented new CAP instruments.

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Mateusz Boczyło
University of Warsaw, Poland
e-mail: m.boczylo@student.uw.edu.pl
ORCID: 0000-0001-5009-2204

THE ECONOMIC NEEDS OF THE MUNICIPALITY IN THE PROCESS OF CHANGE IN LAND USE FROM AGRICULTURAL TO NON-AGRICULTURAL PURPOSES

Abstract

The aim of this study is to answer the question of whether the economic needs of a municipality can serve as a basis for change in land use from agricultural to non-agricultural purposes. In order to address the research question, the Author conducted an analysis of the provisions of the Act on the protection of agricultural and forest land and the Act on spatial planning and development, relating to the change of agricultural land designation for non-agricultural purposes and also examined key administrative court judgments in cases concerning the consent of the minister responsible for rural development to change the designation of agricultural land of classes I-III. The hypothesis put forward in the article, assuming that the economic needs of the municipality can serve as a basis for changing the designation of agricultural land for non-agricultural purposes has been confirmed. However, the extent of the possibility to invoke them primarily depends on the soil quality classification of the land in question, as well as the specific circumstances of an individual case.

KEYWORDS

spatial planning, agricultural land, change in land use, economic needs of the municipality

SŁOWA KLUCZOWE

planowanie przestrzenne, grunty rolne, zmiana przeznaczenia gruntu, potrzeby ekonomiczne gminy

I. INTRODUCTION

Agricultural land is exceptionally valuable from the point of view of, *inter alia*, food security or environmental protection. Due to the functions of agricultural land, the legislator, by virtue of the provisions of the Act of 3 February 1995 on the protection of agricultural and forest land,[1] restricts the possibility of changing their use, introducing the principles of quantitative and qualitative protection of such land.[2]

The principle of quantitative protection, as expressed in Article 3(1)(1) of the u.o.g.r.l., constitutes the restriction of the designation of agricultural land for non-agricultural or non-forest purposes. This constitutes one of the forms of interference in the municipality's planning sovereignty,[3] which is vested in the municipality under Article 3(1) of the Act of 27 March 2003 on spatial planning and development.[4]

One of the phenomena threatening the existence of agricultural land is progressive urbanisation.[5] With more and more people living in urban areas, over time, housing needs increase and urban development becomes inevitable.[6] Consequently, the willingness of municipalities to use agricultural land for housing or

[1] Journal of Laws 2022, item 2409, as amended; hereinafter: u.o.g.r.l.

[2] D. Danecka, W. Radecki, *Komentarz do art. 3* (in:) D. Danecka, W. Radecki, *Ochrona gruntów rolnych i leśnych. Komentarz*, Warszawa 2021, p. 72.

[3] B. Wierzbowski, *7. Zmiana przeznaczenia gruntów* (in:) *Gospodarka nieruchomościami. Podstawy prawne*, Warszawa 2014, LEX/el.

[4] Journal of Laws 2023, item 977, as amended; hereinafter: u.p.z.p.

[5] K. Marciniuk, *Inwestycje budowlane na gruntach rolnych położonych w granicach administracyjnych miast*, 'Studia Iuridica Agraria' 2011, No. 9, p. 368.; A. Zieliński, *Orzecznictwo sądowoadministracyjne w sprawach odrolnienia gruntów*, 'Zeszyty Naukowe Sądownictwa Administracyjnego' 2010, No. 5-6, p. 497.

[6] B. Chmielewska, *Obszary wiejskie a presja urbanizacyjna w powiatach sąsiadujących z Warszawą*, 'MAZOWSZE Studia Regionalne' 2015, No. 16, p. 53.

commercial and retail purposes is also on the rise. This results in gradual suburbanization which is the process of moving the population from cities to the surrounding rural areas.[7] Another negative phenomenon affecting the existence of agricultural land is 'exurbanization', which is the process of uncontrolled 'urban sprawl'.[8] Furthermore, municipalities may plan construction projects on properties outside the urban area that include agricultural lands, often for economic reasons (under pressure from investors).

The aim of this study is to answer the question of whether the economic needs of a municipality can form a basis for change in land use from agricultural to non-agricultural purposes. The hypothesis put forward in the article assumes that the economic needs of the municipality can serve as a basis for changing the designation of agricultural land for non-agricultural purposes. However, the extent of the possibility to invoke them primarily depends on the soil quality classification of the land in question, as well as the specific circumstances of the individual case.

The Author used the formal-dogmatic approach. In order to address the research question, the Author conducted an analysis of legislation relating to the change of agricultural land designation for non-agricultural purposes and also examined key administrative court judgments in cases concerning the consent of the minister responsible for rural development to change the designation of agricultural land of classes I-III. The article also presents the views of the legal doctrine on the issue of changing the land use designation from agricultural to non-agricultural purposes.

II. THE PROCESS OF CHANGING THE USE OF AGRICULTURAL LAND FOR NON-AGRICULTURAL PURPOSES

The definition of agricultural land for the purpose of the u.o.g.r.l. is provided in Article 2(1) of this act.[9] Agricultural land in the meaning of the u.o.g.r.l. is, among others, land defined in the land register as agricultural land (Article 2(1)(1)).[10] By

[7] I. Markuszewska, A. Delebis, *Urbanizacja terenów wiejskich w percepcji lokalnych mieszkańców na przykładzie Wolicy koło Kalisza*, 'Badania Fizjograficzne nad Polską Zachodnią: Seria A - Geografia Fizyczna' 2016, Vol. 67, p. 146.

[8] E. Kacprzak, B. Głębocki, *Urban sprawl a zmiany zasobów użytków rolnych na obszarach wiejskich aglomeracji poznańskiej w latach 1990-2016*, 'Rozwój Regionalny i Polityka Regionalna' 2016, No. 34, p. 101.

[9] Considering the length limitations of the article, there is no point in quoting the full definition of agricultural land.

[10] As pointed out in the literature: 'the notion of agricultural land is registration (formal) in nature. Land is agricultural land when it has been identified as agricultural land in the land regis-

virtue of Article 2(3) of the u.o.g.r.l., land under parks and gardens entered in the register of historical monuments is not considered agricultural land.

From the text of Article 4(6) of the u.o.g.r.l., it can be inferred that the designation of land for non-agricultural purposes is understood as establishing other than agricultural or forestry use of agricultural land. However, such change in use is limited by the already described principle of quantitative protection of such land.[11] Pursuant to Article 6(1) of the u.o.g.r.l, lands identified in land records as wasteland should be primarily designated for non-agricultural and non-forestry purposes. In their absence, other land with the lowest production suitability may be designated for these purposes. Such wording of the regulation allows the adjudicating authorities the discretion to assess whether, in a given state of affairs, it is justified to consent to a change of land use.[12] The addressees of this norm are the authorities that decide on the change in the use of agricultural land for other purposes.[13] The principle in question states that only in the absence of wasteland may other land with the lowest production suitability be used for non-agricultural or non-forestry purposes. In the event of the presence of a wasteland, the allocation of other agricultural land for non-agricultural or non-forestry purposes is precluded.[14] Production suitability is determined according to soil quality classes, which are described in the Regulation of the Council of Ministers of 12 September 2012 on soil classification.[15] The Regulation introduces a hierarchical classification of land, listing classes: I (the best arable soils), II (very good arable soils), IIIa (good arable soils), IIIb (medium good arable soils), IVa (medium quality arable soils, better), IVb (medium quality arable soils, worse), V (poor arable soils), VI (the weakest arable soils), VIz (the weakest arable soils, permanently too arid or too moist). Where there is no wasteland in a particular area, the designation of agricultural land for non-agricultural or non-forestry purposes should begin with classes VIz and VI and, in the absence of a given class, include hierarchically upper classes.[16] According to J. Bieluk and D. Łobos-Kotowska: "in the absence of wasteland and land of the lowest production suitability, it is possible to change the use, even for land of classes I-III".[17] However, this requires the consent of a competent authority, described further on.

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ter', cf. D. Danecka, W. Radecki, *Komentarz do art. 2* (in:) D. Danecka, W. Radecki, *op. cit*., p. 54. The same view was presented in K. Małysa, *Ustalanie warunków zabudowy i zagospodarowania terenu dla gruntów rolnych*, Samorząd Terytorialny 2003, No. 11, p. 25.

[11] J. Bieluk, D. Łobos-Kotowska*, Komentarz do art. 3* (in:) *J. Bieluk, D. Łobos-Kotowska*, *Ustawa o ochronie gruntów rolnych i leśnych. Komentarz*, Warszawa 2015, LEX/el., Section No. 1.

[12] A. Zieliński, *op. cit*., p. 506.

[13] D. Danecka, W. Radecki, *Komentarz do art. 6* (in:) D. Danecka, W. Radecki, *op. cit*, p. 86.

[14] *Ibidem,* p. 87.

[15] Journal of Laws 2012, item 1246, as amended, hereinafter: the Regulation.

[16] D. Danecka, W. Radecki, *Komentarz do art. 6* (in:) D. Danecka, W. Radecki, *op. cit*., p. 88.

[17] J. Bieluk, D. Łobos-Kotowska*, Komentarz do art. 6* (in:) *op. cit.,* Section No. 1.

Pursuant to the regulation of Article 7(2)(1) of the u.o.g.r.l., the designation for non-agricultural and non-forest purposes of agricultural land of classes I-III (i.e. I, II, IIIa and IIIb) requires the consent of the minister responsible for rural development,[18] unless the conditions of Article 7(2a)[19] of the u.o.g.r.l. are jointly met, or if the land is located within the administrative boundaries of towns and cities.[20] Pursuant to Article 7(1) of the u.o.g.r.l., the change in land use from agricultural to non-agricultural purposes, which requires the consent of the Minister, is, in principle, done in a local zoning plan.[21] As an exception, such designation may occur without MPZP, but only in areas where MPZPs are not adopted (Article 7(1a) of the u.o.g.r.l.).[22] The procedure for obtaining the required consent is part of the procedure for adopting MPZP.[23] It cannot be initiated independently of the spatial planning procedure.[24] As noticed in the doctrine, this solution, due to

[18] Currently, Minister of Agriculture and Rural Development, https://www.gov.pl/web/rolnictwo/podstawowe-informacje (accessed 10 September 2023); hereinafter: 'the Minister'.

[19] It should be indicated at this point that, by virtue of the Act of 7 July 2023 on the Amendment of the Act on Spatial Planning and Development and some other acts (Journal of Laws 2023, item 1688), hereinafter: Amendment to the u.p.z.p. of July 2023), the wording of Article 7(2a) of the u.o.g.r.l. changed as of 24 September 2023. From 10 October 2015, the lack of need to obtain consent for the change of use applied to agricultural land of classes I-III, if the land cumulatively fulfilled the following conditions: 1) at least half of the area of each compact piece of land was contained in a compact development area; 2) they were located at a distance of no more than 50 m from the border of the nearest building plot within the meaning of the provisions of the Act of 21 August 1997 on Property Management (Journal of Laws 2015, item 782, as amended); 3) they were located at a distance of no more than 50 metres from a public road within the meaning of the provisions of the Act of 21 March 1985 on Public Roads (Journal of Laws 2015, item 460, 774 and 870); 4) their area did not exceed 0.5 ha, regardless of whether they constituted a single whole or several separate parts. Following the amendment to the wording of this provision, as of 24 September 2023, the absence of the need to obtain consent for the change of designation shall apply to agricultural land located in the building extension area within the meaning of the provisions on planning and spatial development.

[20] Pursuant to the Article 10a of the u.o.g.r.l., introduced into this act on 5 September 2014, by virtue of the Act of 11 July 2014 on the Amendment of the Environmental Protection Law and some other acts (Journal of Laws 2014, item 1101), the provisions of Chapter 2 of u.o.g.r.l. shall not apply to agricultural land located within the administrative boundaries of towns and cities.

[21] A local zoning plan (hereinafter: MPZP) is a spatial planning instrument, by virtue of which, in principle, the use of land is established, the location of public purpose investments is determined and the conditions for development of the land are specified (Article 4(1) of the u.p.z.p.).

[22] It should also be noted at this point that "for land requiring the consent referred to in Article 7(2) of the u.o.g.r.l., it is possible to issue a decision on land development for projects that are compatible with the agricultural or forestry use of the land, and therefore do not lead to a change of use of the land, but only serve to continue the purpose for which the land is intended, in order to deepen the function it has"., cf. K. Małysa-Sulińska, *Klimat a ochrona gruntów rolnych i leśnych przy ustalaniu lokalizacji inwestycji w oparciu o przepisy ogólne na obszarach nieobjętych miejscowym planem zagospodarowania przestrzennego*, 'Gdańskie Studia Prawnicze' 2021, No. 3, p. 137.

[23] D. Danecka, W. Radecki, *Komentarz do art. 7* (in:) D. Danecka, W. Radecki, *op. cit.,* p. 98.

[24] A. Zieliński, *op. cit.,* p. 502.

the necessity of enacting or amending the MPZP, allows for a reasonable possible change in the use of agricultural land for non-agricultural purposes.[25] The mayor is a party to the consent proceedings pursuant to Article 7(3a) of the u.o.g.r.l. The consent proceedings are initiated precisely at the mayor's request[26] (Article 7(3) of the u.o.g.r.l.). As D. Danecka and W. Radecki indicate: "No other person may file a legally effective application for consent to change of use, in particular not an investor".[27] The Marshall of the Voivodeship attaches his opinion to the application. It is he who forwards the application to the Minister within 30 days of the submission of the application by the mayor (Article 7(4) of the u.o.g.r.l.).

In the aforementioned scenario, pursuant to Article 10(1) of the u.o.g.r.l., the aforementioned application should contain:

1) justification of the need to change the designation of agricultural land of classes I-III;
2) a list of areas of such land, taking into account soil quality classes;
3) economic justification of the proposed use, taking into account in particular:
   (a) the sum of dues and annual fees for the land proposed to be used for non-agricultural and non-forest purposes,
   (b) the anticipated extent of the losses to be suffered by agriculture as a result of the negative impact of the investments located on land proposed for non-agricultural and non-forest use;
4) a map of the municipality or town made to a scale equal to that of the map of the municipality's or town's MPZP, taking into account the requirements described in Article 10(2) of the u.o.g.r.l.

The competent authority, while granting the consent provided for in Article 7(2) of the u.o.g.r.l., does so in the form of an administrative decision,[28] which must meet the requirements set out in Article 107 of the Administrative Procedure Code.[29] As J. Bieluk and D. Łobos-Kotowska pointed out: "A decision issued on the basis of the provision of Article 7(2) of the u.o.g.r.l. is of a discretionary nature".[30] According to J. Zimmermann, "administrative discretion" can be understood as "a flexibility defined by law concerning the behaviour of the public adminis-

[25] S. Prutis, *Instrumenty planowania przestrzennego w rolnictwie (założenia modelowe a rzeczywistość)*, 'Studia Iuridica Agraria' 2012, No. 10, p. 36.

[26] By virtue of the Amendment to the u.p.z.p. of July 2023, as of 1 January 2026, the competent authority will have 60 days from the date of receipt of the application to grant its consent. The new regulations also provide for the so-called 'administrative silence'. The absence of consent or refusal to grant consent within this period will be deemed to be equivalent to consent.

[27] D. Danecka, W. Radecki, *Komentarz do art. 7* (in:) D. Danecka, W. Radecki, *op. cit.,* p. 98.

[28] *Ibidem*, p. 102.

[29] Act of 14 June 1960 - Administrative Procedure Code (Journal of Laws of 2023, item 775, as amended).

[30] J. Bieluk, D. Łobos-Kotowska*, Komentarz do art. 7* (in:) *op. cit.,* Section No. 12.

tration authority issuing an administrative decision".[31] However, when issuing a decision based on discretion, the authority cannot act in a completely arbitrary and unrestrained manner, as it is constrained by the legislator within the norm that introduces discretion. Consequently, the authority cannot arbitrarily make different decisions in identical circumstances, but it does have the opportunity to arrive at the correct decision, not only on the basis of the law but also by applying unwritten principles of purpose and justice, as well as considering the specific circumstances of the case.[32] The jurisprudence emphasises that "the authority, when examining an application for a change in land use, should first and foremost consider the principles of land protection indicated by the legislator".[33]

According to the rulings of the administrative courts, it is the applicant (i.e. the municipality's executive body) who, in order to obtain a consent, must structure the application in such a way and present all relevant circumstances supporting its legitimacy so as to convince the adjudicating authority that the application may be accepted (within the scope of administrative discretion).[34] Furthermore, case law indicates that: "The municipality, when exercising its authority in the context of spatial policy development, is obligated to take comprehensive measures. This implies that when making decisions regarding the municipality's development, it cannot do so in isolation from the current status of the entire municipal land. Whenever a municipality intends to alter land use, it must not only provide justifications for the proposed changes based on prior changes but also demonstrate that it was objectively unfeasible to utilise the land for which a previous change of use decision had been granted".[35]

The question that also needs to be addressed pertains to the status of agricultural land for which the aforementioned consent is not required (so, *inter alia*, agricultural land of classes IV-VIz). Firstly, the municipality, as the governing body with planning authority over its territory, has the autonomy to decide with regard to the utilisation of such land.[36] The municipal council, as its governing body responsible for decision-making, decides on the designation of particular properties in the MPZP. It is reasonable to assert that such actions cannot be carried out arbitrarily. The municipal council must adhere to the principle of quantitative protection of agricultural land and try to first allocate wasteland for non-agricultural or non-forest purposes. Secondly, if the land in question is not

[31] J. Zimmermann, *Uznanie administracyjne* (in:) *Alfabet prawa administracyjnego*, Warszawa 2022, p. 271.

[32] *Ibidem*, p. 271.

[33] Judgement of the Supreme Administrative Court (NSA) of 9 May 2023, I OSK 956/22, LEX No. 3559970.

[34] Judgement of the NSA of 17 February 2010, II OSK 329/09, LEX No. 592060.; Judgement of the NSA of 5 December 2012, II OSK 1425/11, LEX No. 1233709.

[35] Judgement of the Voivodeship Administrative Court (WSA) in Warsaw of 18 February 2020, IV SA/Wa 2635/19, LEX No. 3031009.

[36] J. Bieluk, D. Łobos-Kotowska*, Komentarz do art. 7* (in:) *op. cit.,* Section No. 2.

governed by the provisions of an MPZP, a competent authority[37] may modify the land use by issuing a decision[38] on land development.[39] It should also be noted that, in accordance with Article 61(1)(4) of the u.p.z.p., the absence of the need to obtain consent for changing the use of agricultural land to non-agricultural and non-forest purposes is one of the prerequisites that must be met in order for a WZ to be issued for a specific property. When issuing the discussed decision, it also appears necessary to adhere to the principle of quantitative protection of agricultural land.[40]

III. THE ECONOMIC NEEDS OF THE MUNICIPALITY AS A RATIONALE FOR CHANGING THE USE OF AGRICULTURAL LAND TO NON-AGRICULTURAL PURPOSES

As emphasised by the NSA in its ruling of 18 December 2020,[41] "the exclusion of agricultural and forestry land from production[42] should also consider the guidelines derived from the u.p.z.p. These include the fundamental principles of creating spatial order and sustainable development, which serve as the cornerstone for all spatial management activities. They also stand as the primary yardstick for gauging the correctness and legality of executing the provisions laid out within the u.p.z.p.".

In view of the diversity of values that must be considered in the planning and spatial development process – ranging from environmental protection[43] to fostering opportunities for municipal economic growth by leveraging the economic

[37] Pursuant to Article 60(1) of the u.p.z.p., a decision on land development is issued, in principle, by the mayor.

[38] A decision on land development (hereinafter: WZ) is a planning instrument that serves as the foundation for establishing planning and spatial development conditions in areas without an MPZP (Article 4(2) of the u.p.z.p.).

[39] D. R. Kijowski, *Zabudowa nieruchomości na terenach nie objętych miejscowym planem zagospodarowania przestrzennego*, 'CASUS' 2005, No. 3, p. 11.

[40] In practice, however, this may be ineffective, due to the fact that the WZ is not a discretionary decision but a constrained one. This means that if the investor fulfils the prerequisites of Article 61(1) of the u.p.z.p., the authority issuing the WZ cannot refuse to grant it, cf. K. Małysa-Sulińska, *op. cit.*, p. 137.

[41] Judgement of the NSA of 18 December 2020, II OSK 1993/18, LEX No. 3095638.

[42] The exclusion of agricultural land from agricultural production is the second stage, after the change of use for non-agricultural purposes, of the so-called 'de-agriculturalisation' procedure. The quoted judgement, however, refers in its substance to the procedure of change in land use.

[43] In line with Article 1(2)(3) of the u.p.z.p., environmental protection requirements, including water management and protection of agricultural and forestry land, should be particularly taken into account in the process of planning and spatial development.

potentials of land[44] – the research question whether a municipality's economic needs can serve as a basis for change in land use from agricultural to non-agricultural purposes emerges as a significant concern.

Answering the research question requires considering two distinct situations. The potential recognition of economic motives as a basis for changing the designation of agricultural land for non-agricultural purposes primarily depends on determining whether obtaining the Minister's consent is required for the change in question.

On the basis of an analysis of the provisions of the u.o.g.r.l., it should be concluded that obtaining consent for the change of the use of agricultural land for non-agricultural purposes by the municipality is not necessary in relation to:

1. agricultural land of classes I-III, if they fulfil the requirements set out in Article 7(2a) of the u.o.g.r.l.;[45]
2. agricultural land of classes IV-VIz (*a contrario* to Article 7(2)(1) of the u.o.g.r.l.);
3. lands other than those defined in the land register as agricultural land, as defined in Article 2(1) in conjunction with Article 2(3) of the u.o.g.r.l.;
4. agricultural land identified as a wasteland in the land register (Article 6(1) of the u.o.g.r.l.);
5. agricultural land located within the administrative boundaries of cities (Article 10a of the u.o.g.r.l.).

It is worth noting that changing the use of agricultural land to non-agricultural purposes, which does not require consent from the competent authority, does not need to be carried out in the MPZP. In such cases, issuing a WZ is sufficient.[46] In my opinion, the economic needs of the municipality can serve as the basis for changing the designation of these lands. Especially agricultural lands located within the administrative boundaries of cities (to which the provisions of Chapter 2 of the u.o.g.r.l., as stipulated in Article 10a of this act, do not apply) may be deprived of their agricultural designation. This does not seem to be controversial, given their location within urbanised areas and limited potential for agricultural production. However, it is important to consider the issue of the inadequate technical readiness of such lands for construction projects.[47] The case of agricultural lands of classes I-III, fulfilling the requirements specified in Article 7(2a) of the u.o.g.r.l. is also indisputable.[48] With regard to wastelands and

[44] Judgement of the NSA of 18 December 2020, II OSK 1993/18, LEX No. 3095638; Pursuant to Article 1(6) of the u.p.z.p. the economic advantages of land are also a value to be taken into account in spatial planning.

[45] As has already been pointed out, the text of Article 7(2a) of the u.o.g.r.l. was modified by the Amendment to the u.p.z.p. of July 2023.

[46] D. R. Kijowski, *op. cit.*, p. 11.; Obviously, this is only permitted if the area in question is not covered by a MPZP.

[47] K. Marciniuk, *op. cit.*, p. 372.

[48] Both as of 24 September 2023 and before the Amendment to the u.p.z.p. of July 2023.

agricultural lands of classes IV-VIz, it is necessary to adhere to the previously mentioned principle stemming from Article 6(1) of the u.o.g.r.l. In the absence of the necessity to obtain consent from the competent authority, the municipality, in its actions related to the management of agricultural land, should be bound by the principle arising from Article 6(1) of the u.o.g.r.l. and the values essential to be considered in spatial planning and development as defined in Article 1(2) of the u.p.z.p. Among these values, the economic advantages of land are particularly significant. The municipality (and indirectly, private investors) can leverage the advantageous location of the property for the planned construction projects on the discussed lands, which, due to their quality (low suitability class of soil) or location, will not have a negative impact on environmental aspects. Through decisions concerning the intended use of a specific property, the municipality exercises its planning authority.[49] However, the situation of changing the designation of lands other than those specified in the land registry as agricultural lands, within the meaning of the definition in Article 2(1) in conjunction with Article 2(3) of the u.o.g.r.l., requires a thorough analysis. Finally, it should be emphasised that when designating the aforementioned agricultural lands for other purposes, municipalities should not abuse their planning authority by excessively issuing decisions on land development. Due to its limited spatial scope, this instrument may not be well-suited for effecting substantial, long-term changes in land use, particularly from production to investment purposes.[50] Furthermore, due to difficulties in meeting the so-called 'good neighbourhood principle'[51] when applying this decision in agricultural areas, it most often does not lead to the creation of spatial order.[52]

Obtaining the Minister's consent is required for lands of classes I-III, located outside the administrative boundaries of towns and cities.[53] As already pointed out, granting or refusing consent for changing the designation of agricultural lands for a different purpose is based on administrative discretion.[54] The Minister is obliged to consider two values. On the one hand, it is the value stemming from the objectives of the u.o.g.r.l., i.e., the protection of agricultural lands by restricting their use for non-agricultural purposes. On the other hand, it is the value arising from the socio-economic development needs of the given area.[55] Furthermore,

[49] J. Bieluk, D. Łobos-Kotowska*, Komentarz do art. 7* (in:) *op. cit.,* Section No. 2.

[50] K. Marciniuk, *op. cit*., p. 373.

[51] "The good neighbour principle constitutes the necessity of adjusting new development to the urban and architectural features and parameters determined by the existing state of development in a particular place", cf. Judgement of the NSA of 17 April 2018, II OSK 2627/17, LEX No. 2505289.

[52] K. Marciniuk, *op. cit.,* p. 371.

[53] J. Bieluk, D. Łobos-Kotowska*, Komentarz do art. 7* (in:) *op. cit.,* Section No. 4.

[54] Judgement of the NSA of 17 January 2019, II OSK 775/18, LEX No. 2628730.

[55] Judgement of the NSA of 6 December 2016, II OSK 613/15, LEX No. 2205999.; As noted by the WSA in Warsaw in its judgement of 16 April 2019, IV SA/Wa 185/19, LEX No. 3074076:

"If the public interest allows and the administrative body has the authority to do so, it must rule in favour of the party in matters left to administrative discretion".[56] However, it should be noted that Article 7(2) of the u.o.g.r.l. does not impose an obligation on the Minister to grant a consent that could be issued in the case of a specific factual situation.[57] Hence, the analysis of case law presented below serves solely as an illustration and aims to categorise specific judgments related to the change in the use of agricultural lands of classes I-III for non-agricultural purposes.

At the very beginning of the analysis of the case law concerning the discussed consent, it is worth quoting the views of the NSA, which will serve as the starting point for further analysis. In the judgement of 11 January 2011,[58] the court emphasised that the provisions of Article 6(1) and Article 7(1) and (2) of the u.o.g.r.l. are merely guidelines for the Minister, which he should consider when granting consent for a designation of agricultural land for non-agricultural purposes. These provisions do not preclude the possibility of changing the use of agricultural lands of classes I-III for non-agricultural purposes. The NSA pointed out that the sole circumstance that the law provides special protection for these lands cannot constitute the only argument for refusing consent to change the designation of these lands. The judgement stated that the protection of agricultural lands cannot be extended to the extent that it would result in a lack or significant limitation of the municipality's development possibilities. This is because the potential for this development, just like the right to property, are values subject to legal protection and must also be taken into account when arriving at a decision based on Article 7(2) of the u.o.g.r.l. Furthermore, in another judgement,[59] the NSA stated that when making a decision regarding granting consent for a change of the designation of agricultural land for non-agricultural purposes, the Minister is obligated to conduct a thorough and specific analysis of whether and to what extent allocating a specific area of agricultural land for non-agricultural purposes may have a negative impact on the achievement of the goals and values specified in the u.o.g.r.l.

"The authority deciding within the administrative discretion on the change of use of agricultural land should consider the public interest consisting in the necessity of improving the economic and development conditions of the inhabitants of the municipality in the area of which the land covered by the application is located". As A. Zieliński points out, "The protection of agricultural and forest land cannot [...] be reduced solely to strict limitations, disregarding other responsibilities of the state or local authorities. The protection aspect cannot dominate over the needs for ordering investment space and infrastructure", cf. A. Zieliński, *op. cit.,* p. 497.

[56] Judgement of the NSA of 11 January 2012, II OSK 2031/10, LEX No. 1138046.

[57] M. Karpiuk, *Normatywne aspekty ograniczenia przeznaczenia gruntów rolnych i leśnych na cele nierolnicze i nieleśne*, 'Studia Iuridica Lublinensia' 2013, Vol. 20, p. 77.

[58] Judgement of the NSA of 11 January 2012, II OSK 2031/10, LEX No. 1138046. This view was also referred to by the WSA in Warsaw in its judgement of 16 April 2019, IV SA/Wa 185/19, LEX No. 3074076, and in its judgement of 26 April 2018, IV SA/Wa 3391/17, LEX No. 3005251.

[59] Judgement of the NSA of 8 May 2018, II OSK 1506/16, LEX No. 2527637.

The court pointed out that the Minister must assess the significance of changing the designation of the proposed area of agricultural land with a specific soil suitability class for non-agricultural purposes in the context of the current needs of the national agricultural economy, taking into account the impact of this change on agricultural production and the legal significance of the reasons supporting the change of designation. The judgement emphasised that abstract and unspecified references to general concepts such as 'food economy needs', 'food security', and 'the need to protect high-quality agricultural land' are not sufficient in this regard. The cited judgments indicate the significance of the 'economic needs' of municipalities and the absence of primacy of the necessity to protect agricultural land in every case. On the other hand, it should be noted that in the case of a collision between the public interest and the interest of the entity applying for a change in land use to non-agricultural purposes, the Minister should primarily consider the specific public interest stipulated by law, which is the protection of land as a public good. The outcome of balancing the public interest and the interest of the entity applying for a change in land use depends on the specific factual circumstances in each case.[60]

The circumstances that argue against the Minister granting consent for a change in land use from agricultural land to non-agricultural purposes will be discussed first. Based on the analysis of case law and the factual situations presented in administrative court judgments, these circumstances can be categorised into three groups:

A. Lack of continuity with existing land use in neighbouring areas or disruption of the compact agricultural production area

From the analysed judgments, it can be inferred that a factor justifying the Minister's refusal to grant consent is the absence of a linkage between the proposed land use change and the current development of neighbouring areas or the disruption of a contiguous agricultural production area. In the judgement of the NSA of 9 May 2023,[61] dismissing the mayor's cassation complaint against the Minister's refusal, one of the court's arguments was that the areas covered by the application were situated in the vicinity of agricultural lands. Changing their designation to non-agricultural purposes would result in non-agricultural construction intruding into agricultural areas, thus disrupting the continuity of the agricultural production area. Reference to the necessity of protecting the contiguous agricultural production area has been made in several other analysed judgments.[62] Furthermore, in the aforementioned NSA ruling, it was noted that

[60] Judgement of the NSA of 24 May 2016, II OSK 2263/14, LEX No. 2108471.

[61] Judgement of the NSA of 9 May 2023, I OSK 956/22, LEX No. 3559970.

[62] Judgement of the NSA of 2 September 2014, II OSK 436/13, LEX No. 1572729; Judgement of the NSA of 23 April 2014, II OSK 2898/12, LEX No. 1481939; Judgement of the WSA in Warsaw of 13 October 2021, IV SA/Wa 577/21, LEX No. 3309633; Judgement of the WSA in Warsaw of 14 December 2020, IV SA/Wa 1571/20, LEX No. 3146455; Judgement of the WSA in Warsaw

the Minister does not evaluate a request submitted by the municipality's executive body on the basis of economic needs and urban planning intentions of the municipality. Instead, the evaluation is made from the perspective of protecting agriculturally utilised areas, considering the adverse effects of such changes and adhering to the public interest and the principles of land protection expressed in the u.o.g.r.l. A similar perspective was expressed by the NSA in a judgement of 21 December 2016:[63] "The Minister evaluates the proposed change in land use not in the context of the compactness of built-up areas, but gives priority to preserving the uniformity of the agricultural area". In addition, it is worth noting that the intersection of areas with different uses might lead to spatial and social conflicts (e.g., due to the use of natural fertilisers on agricultural land or the need for access to fields), thus hindering the proper functioning of farms.[64] Therefore, if specific agricultural lands are part of a compact agricultural complex with a considerable surface area and high production potential, the Minister should not grant consent for their conversion to non-agricultural purposes, especially when the construction project can be realised in another location.

B. The municipality's possession of an investment reserve or wasteland/ lower-class land

Another reason for not granting consent by the Minister may be the municipality's possession of an investment reserve or lands of lower classes.[65] The term 'investment reserve' refers to previously unused lands designated for non-agricultural purposes in prior planning procedures. Administrative courts have repeatedly emphasised that a municipality's policy of changing the land use from agricultural to non-agricultural must be rational and the fact of having a significant investment reserve makes it unnecessary to exclude more lands from agricul-

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of 20 January 2016, IV SA/Wa 2830/15, LEX No. 2141954; Judgement of the WSA in Warsaw of 18 February 2020, IV SA/Wa 2635/19, LEX No. 3031009; Judgement of the WSA in Warsaw of 27 September 2019, IV SA/Wa 606/19, https://orzeczenia.nsa.gov.pl/doc/F854729628 (accessed 14 September 2023); Judgement of the WSA of 9 September 2015, IV SA/Wa 1503/15, https://orzeczenia.nsa.gov.pl/doc/D307B2F939 (accessed 13 September 2023).

[63] Judgement of the NSA of 21 December 2016, II OSK 1234/16, LEX No. 2279427.

[64] Judgement of the NSA of 14 October 2020, II OSK 2327/18, LEX No. 3296186; Judgement of the WSA in Warsaw of 28 May 2021, IV SA/Wa 229/21, LEX No. 3313242; cf. W. Jabłoński, K. Mazurkiewicz., *Konflikty przestrzenne na terenach wiejskich - ignorancja czy niewiedza? Studium przypadku*, 'Infrastruktura i ekologia terenów wiejskich', No. IV/2/2014, POLISH ACADEMY OF SCIENCES, Branch in Kraków, p. 1170.

[65] This conclusion can be inferred, *inter alia*, from the justifications of the following judgments: Judgement of the WSA in Warsaw of 28 May 2014, IV SA/Wa 671/14, LEX No. 1562863; Judgement of the WSA in Warsaw of 18 February 2019, IV SA/Wa 2574/18, LEX No. 3018673; Judgement of the WSA in Warsaw of 9 March 2017, IV SA/Wa 3207/16, LEX No. 2776708; Judgement of the WSA in Warsaw of 18 March 2016, IV SA/Wa 3798/15, LEX No. 2459469; Judgement of the WSA in Warsaw of 15 July 2020, IV SA/Wa 138/20, https://orzeczenia.nsa.gov.pl/doc/D9D577D7DD (accessed 15 September 2023); Judgement of the NSA of 5 October 2016, II OSK 2739/14, https://orzeczenia.nsa.gov.pl/doc/9C5A2B6ED2 (accessed 15 September 2023).

tural production.[66] In cases where there are wastelands or lands of lower classes in a particular area, they should be prioritised for construction purposes. It is also worth noting another view of the NSA, which states: "There may be several cases where reasons other than the lack of alternative lands advocate designating higher-class agricultural lands for non-agricultural purposes (see the phrase 'primarily' used in Article 6(1) of the u.o.g.r.l.)".[67]

C. Lack of specific circumstances supporting the granting of consent

Pursuant to Article 10(1), points 1 and 3 of the u.o.g.r.l., an application for consent to change the use of agricultural land for non-agricultural purposes should include a rationale for the need to change the land use, as well as an economic justification for the proposed use. Based on the interpretation of Article 6(1) of the u.o.g.r.l., performed by administrative courts, the change of land use from agricultural should primarily concern wasteland and lands with the lowest production suitability, and exceptionally, lands of the highest classes.[68] Therefore, when applying for Ministerial consent, the applicant should adequately justify their request by invoking specific circumstances that necessitate changing the land use of high-class agricultural lands for other purposes. The absence of such special circumstances may support the refusal to grant consent.[69] Furthermore, it is noteworthy that in several court rulings, it has been emphasised that changes in land use from agricultural to non-agricultural purposes should not be solely justified by economic factors.[70] In my opinion, this standpoint does not exclude the possibility of generally referring to 'economic needs' or 'development needs' in the applications,[71] as there are situations in which prioritising the protection of

[66] Judgement of the NSA of 6 May 2022, I OSK 1733/21, LEX No. 3347541; Judgement of the NSA of 5 November 2020, II OSK 1570/20,https://orzeczenia.nsa.gov.pl/doc/ED3CDC010A (accessed 16 September 2023); Judgement of the NSA of 26 May 2020, II OSK 2397/19, https://orzeczenia.nsa.gov.pl/doc/BF19BA2F7D (accessed 16 September 2023; Judgement of the NSA of 26 May 2020, II OSK 2969/19, [https://orzeczenia.nsa.gov.pl/doc/0468F6E01A, accessed 16 September 2023].

[67] Judgement of the NSA of 11 January 2012, II OSK 2031/10, LEX No. 1138046.

[68] Judgement of the NSA of 6 May 2022, I OSK 1733/21, LEX No. 3347541; Judgement of the NSA of 27 May 2021, I OSK 148/21, LEX No. 3265534; Judgement of the NSA of 17 January 2019, II OSK 775/18, LEX No. 2628730.

[69] Judgement of the NSA of 18 May 2022, I OSK 1757/21, LEX No. 3401257; Judgement of the NSA of 6 May 2022, I OSK 1733/21, LEX No. 3347541; Judgement of the NSA of 27 May 2021, I OSK 148/21, LEX No. 3265534;

[70] Judgement of the NSA of 9 May 2023, I OSK 956/22, LEX No. 3559970; A similar view was expressed by the NSA in a thesis of judgement of 21 December 2016, II OSK 1234/16, LEX No. 2279427, assuming that: "Arguments of an economic nature are not sufficient to be taken into account when considering an application for consent to change the use of agricultural land for non-agricultural purposes".

[71] In the judgement of 13 October 2021, IV SA/Wa 569/21, LEX No. 3309679, the WSA in Warsaw remarked that "Economic reasons may justify the proposal from the point of view of the municipality's interest". This court presented a similar view in the judgement of 26 April 2018, IV SA/Wa 3391/17, LEX No. 3005251.

agricultural lands becomes irrational and economic reasons are the pivotal factor for the change in land use, as further detailed.

Furthermore, it seems reasonable to acknowledge that the higher the soil suitability class of the land, the lower the chances of the municipality obtaining a positive decision from the Minister. A low percentage of high-class agricultural lands in the spatial structure of a particular municipality argues for the need to protect them.

The circumstances that favour the Minister's consent to changing the designation of agricultural lands for non-agricultural purposes, as determined through the analysis of case law, can be categorised into four distinct categories:

A. Continuation of existing development and the absence of interference in compact agricultural production area

In the examined judgments, administrative courts emphasised, when overturning the Minister's decision of refusal, that the Minister, in not granting consent, did not take into account the circumstances that the planned development on the land constitutes a continuation of the existing built-up area. This bolsters organised and harmonious municipal development.[72] In a judgement of 16 April 2019,[73] the WSA in Warsaw, when adjudicating a case related to the Minister's decision to refuse consent, also noted that: "It is necessary to thoroughly consider the consequences of the decision, with particular regard to the fact that the lands proposed for a change of use are of a small area and are located in the vicinity of lands designated for residential or public road construction, thus not forming a larger soil complex of class IIIb". Therefore, it can be considered that if changing the land use from classes I-III to non-agricultural purposes enables the continuation of existing development while not disturbing the cohesive agricultural production area, the Minister should grant consent for the change of use.

B. Lack of the possibility or willingness to continue using a particular parcel of agricultural land

Another circumstance that may serve as a basis for the Minister to grant consent is when the applicant demonstrates the lack of possibility or willingness to continue using the land for agricultural purposes. The lack of possibility can result from factors such as restricted access for agricultural equipment. In a judgement of 8 May 2018,[74] the NSA noted that, "In the case of agricultural lands, even those of a high class, forming a kind of enclave in an area predominantly non-agricultural, the issue of providing realistic access for agricultural equipment to these lands has legal significance".[75] The inability to continue agricultural activities on a particular

[72] Judgement of the WSA in Warsaw of 27 October 2021, IV SA/Wa 930/21, LEX No. 3309608; Judgement of the WSA in Warsaw of 26 April 2018, IV SA/Wa 3391/17, LEX No. 3005251.

[73] Judgement of the WSA in Warsaw of 16 April 2019, IV SA/Wa 185/19, LEX No. 3074076.

[74] Judgement of the NSA of 8 May 2018, II OSK 1506/16, LEX No. 2527637.

[75] The lack of accessibility and the need to consider the real possibility of cultivating the land was also referred to by the WSA in Warsaw, stating that: "Indeed, when recognising the necessity

land can also be due to its location. In a judgement of 16 April 2019,[76] the WSA in Warsaw pointed out that: "In a situation where agricultural lands, even if they are of a high class, constitute a small area (...) and are located in the vicinity of lands designated for residential development and road investment, the impact of pollution caused by future development of the adjacent lands cannot be overlooked. Consequently, the impact of this environment and the pollution created by it on the quality of crops from the soil and its influence on the quality of life of society should not be without significance. The decision-making body, within the framework of administrative discretion regarding the change of land use, should, in the Court's opinion, consider the interest manifested in ensuring the country's food security not only in terms of the potential food production but also the quality of the produced food". While the lack of 'possibility' is an objective condition and, when properly demonstrated and justified, should support the Minister's consent, the lack of 'willingness' is purely subjective. Demonstrating the sole lack of willingness to continue using agricultural land in accordance with its designated purpose does not appear to be a sufficient basis for obtaining Ministerial consent.[77] It stems from the fact that it is economically reasonable for landowners to strive for a change in land use from agricultural to non-agricultural purposes. Building lands reach higher prices on the market and they are subject to fewer regulations juxtaposed to agricultural lands.[78] Meanwhile, the Minister is the authority charged with the task of protecting agricultural lands. The case law in this matter is not uniform. As the NSA pointed out in the judgement of 5 May 2015:[79] "The issue of the owner's intentions and the lack of willingness on their part to engage in agricultural cultivation on highly fertile lands cannot justify the abandonment of the rational use of agricultural space". However, in the judgement of 11 January 2012,[80] the NSA stated that: "Lack of interest in

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of preserving the agricultural character of land of the highest quality class, the authority should assess the real possibility of cultivating this land, including, *inter alia*, whether there is access to this land by equipment allowing for its cultivation. If no such access is provided, doubts as to the existence of the possibility of agricultural use of the land are justified. In the Court's view, maintaining the agricultural character of the land solely on the basis of its high quality, in the event that, in view of the changed reality, the land cannot be used agriculturally, while at the same time there is a declared increasing interest in the land in question by investors (residential development), constitutes an unjustified restriction on the development of the municipality", cf. Judgement of the WSA in Warsaw of 16 April 2019, IV SA/Wa 185/19, LEX No. 3074076.

[76] Judgement of the WSA in Warsaw of 16 April 2019, IV SA/Wa 185/19, LEX No. 3074076.

[77] Judgement of the WSA in Warsaw of 23 March 2018, IV SA/Wa 3179/17, https://orzeczenia.nsa.gov.pl/doc/8E65C0E869 (accessed 17 September 2023).

[78] Pursuant to Article 2a(1) of the Act of 11 April 2003 on the Formation of the Agricultural System (Journal of Laws 2022, item 2569, as amended), in principle, only an individual farmer may be a purchaser of agricultural property.

[79] Judgement of the NSA of 5 May 2015, II OSK 897/14, LEX No. 1796299.

[80] Judgement of the NSA of 11 January 2012, II OSK 2031/10, LEX No. 1138046; This standpoint was also referred to by WSA in Warsaw in the judgement of 10 June 2015, IV SA/Wa 359/15, LEX No. 2325653.

continuing agricultural production on the lands may, in some cases, be an indication that these lands are not suitable for rational further use". Nevertheless, this requires the applicant to provide appropriate justification, and in itself, it does not appear to be a sufficient basis for the Minister to grant consent.

C. Lack of an investment reserve and wasteland/lower-class lands

The Minister should also take into account the absence of both investment reserves and wasteland/weaker class lands within the municipality's territory as a reason to grant approval. Urban development in municipal areas is often unavoidable and adhering to the principle in Article 6(1) of the u.o.g.r.l., which dictates that non-arable lands and lands of the lowest class should be primarily designated for non-agricultural purposes, does not always fully enable the municipality's continued development.

D. Special circumstances (related to the specific conditions of the particular case)

Analysing the case law, it can be noted that ministerial consent may also be influenced by the specific circumstances of the case. Examples of such special circumstances could include the location of the lands in a special economic zone,[81] the inability for the city's territorial development in other directions due to the marshy terrain,[82] or the convenient location of the land near an expressway.[83]

IV. CONCLUSIONS

On balance, the hypothesis put forward in the article, assuming that the economic needs of the municipality can serve as a basis for changing the designation of agricultural land for non-agricultural purposes has been confirmed. However, the extent of the possibility to invoke them primarily depends on the soil quality classification of the land in question, as well as the specific circumstances of the

[81] cf. Judgement of the NSA of 6 December 2016, II OSK 613/15, LEX No. 2205999, in which the court stated that: "The adoption in Article 7(2) of the u.o.g.r.l. the admissibility of the use of agricultural land of class III for non-agricultural purposes implies that, since there is no absolute prohibition, but only the consent of the minister of agriculture and rural development is needed, when examining the case, the authority is obliged to take into account not only the regulation adopted in the u.o.g.r.l., but also in the legislation setting other values, including the Act of 20 October 1994 on Special Economic Zones".

[82] Judgement of the NSA of 11 January 2012, II OSK 2031/10, LEX No. 1138046.

[83] Judgement of the NSA of 19 January 2018, II OSK 830/16, LEX No. 2449049, in which the court indicated that 'the fact that the land in question is located close to the S8 trunk road may have a significant impact on the outcome of the case. Indeed, such an additional factor has, on the one hand, an impact in general on the possibility of using the land for agricultural purposes; and, on the other hand, it is a factor which, if properly utilised, may have an impact on issues relating to the development of the Municipality'.

individual case. It is essential to differentiate between situations where obtaining ministerial consent is a prerequisite for altering land use and those where it is not. According to the current law, it depends on the soil quality classification. When Ministerial consent is not mandatory, economic needs can provide a valid rationale for land use modification. The legislator adequately protects only the land with the highest suitability class. In other situations, municipalities should follow the guidelines outlined in Article 6(1) of the u.o.g.r.l., which prioritise the conversion of wasteland before other land types. At the same time, the municipalities should have the possibility to take advantage of the location of a particular agriculture land of lower quality. In cases requiring ministerial consent, the feasibility of invoking economic needs as a basis for change depends on the specific circumstances of each case due to the discretionary nature of the Minister's decision.

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Lavinia Brancusi
Polish Academy of Sciences, Warsaw
e-mail: l.brancusi@inp.pan.pl
ORCID 0000-0002-7042-1084

PROTECTING AND UNDERSTANDING DIGITAL DESIGNS – THE SHAPE OF THINGS TO COME

Abstract

This study looks into aspects of the new EU design legislation that relate to the subject-matter of digital designs and the extent to which Polish law should adapt for full harmonization. The first part examines the new open-ended definitions of a 'design' and 'product' with a focus on dematerialized items that exist solely through appearance. The second part touches upon several legal parameters serving the identification of the object of design protection. It discusses the visibility requirement embedded by the filing requirements, the eye-perception of design features, and the disconnection of the scope of protection from the designated product category. The last part takes an interdisciplinary approach based on the rules of psychology and design engineering in order to explain the issues that underline human vision, with a focus on the appearance of user interfaces. The understanding of sensory and cognitive determinants of human perception is a useful guide for a judge or examiner in the assessment of the overall impression of two designs. Because of the challenges resulting from the specificity of digital designs, this article argues that Polish law should comprehensively implement the new EU design provisions in order to prevent further difficulties in enforcement.

KEYWORDS

digital designs, intangibles, perception, design engineering, metaverse

SŁOWA KLUCZOWE

wzory cyfrowe, wytwory niematerialne, percepcja, projektowanie, metaverse

1. INTRODUCTION

The EU design law is currently under major revision.[1] On 28 November 2022, the Commission advanced two Proposals for an amended Directive (hereinafter PDD)[2] and amended Regulation (hereinafter PRD).[3] These acts are waiting to be adopted in the nearest future, as the European Parliament will vote on the Directive, whilst the Council on the Regulation. The purposes of the new design package are, among others, to follow the technological advance and encourage innovation, specifically in relation to the creation of 'new product design in the digital age'.[4] Significant amendments pertain to facilitating the registration, use, and enforcement of digital designs. These changes do not surprise, as digital media have started to pervade everyday life, most of activities have shifted online via dedicated apps, e-commerce is flourishing, and the number of those looking for entertainment in the virtual world is increasing. Users moving around in digital and/or virtual environments need to rely on the appearance of digital products, such as the layout of apps, websites, and icons. And it is the appearance of things that constitutes the very object of design protection. However, as a digital design lacks material substance, it is difficult to ascertain whether users/consumers experience it similarly to a regular, tangible product.

The present study addresses several aspects of the new EU design legislation that relate to the subject-matter of digital designs and the extent to which national

[1] This piece is based on my contribution to the panel concerning 'Industrial Designs' at the conference 'Wyzwania dla systemu własności intelektualnej w Polsce' organized by Polish Patent Office and Jagiellonian University in Cracow, 18 May 2023.

[2] See the proposal for Directive with Explanatory memorandum COM(2022) 667 final https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0667 (accessed 11 January 2024).

[3] See the proposal for Regulation COM(2022) 666 final https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0666 (accessed 11 January 2024).

[4] Explanatory Memorandum to PDD, *ibidem*, 8, more A. Tischner, *Reforma prawa wzorów w Europie – o reżimie wzorniczym perspektywicznie i (nieco) krytycznie*, "ZNUJ PPWI" 2/ 2023, p. 103.

legislations – such as Polish law – need to adapt for full harmonization. Sections 2 and 3 below discuss the basic parameters of the notion and scope of protection of digital designs, with an emphasis on Polish changes to come. However, the challenges concerning designs used digitally are not confined to the mere adapting the law. In the author's opinion, significant challenges address the perception of digital designs and the understanding of the reasons for which a certain look is conferred on digital designs to raise intended actions from users that communicate with a device. To this end, section 4 contains interdisciplinary remarks about human perception and design engineering rules resulting therefrom. A clarification is necessary at this point. By referring to 'digital designs' this piece does not deal with digital versions (files) of tangible products; it focuses on designs created exclusively for digital use.

2. DIGITAL DESIGNS UNDER THE NEW DEFINITIONS OF A 'DESIGN' AND A 'PRODUCT'

One of the purposes of the new design package is to update and clarify the subject-matter of a design right in order to keep pace with technological development. Although the previous notions of a 'design' and a 'product' were based on open-ended catalogues, the amended versions introduce more detailed definitions. The aim is to confirm the design eligibility of certain items which otherwise have raised doubts due to their immaterial or complex appearance.

2.1. WHAT IS A 'DESIGN'?

Pursuant to Article 3(a) PDD and Article 4(a) PRD, a design still means the 'appearance' of a 'product' or part(s) of it resulting from various features, such as lines, contours, colours, shape, texture, materials, decoration.[5] The last addition indicates 'movement, transition or any other sort of animation of those features'. The latter terms apply especially to digital designs, as the EUIPO has already registered animated icons in the Locarno-class 14.04.[6] The redundancy of words is noticeable – any animation seems to encompass both movement and transition. In the author's opinion, the purpose of the new provisions is to include any kind of dynamic change within the subject-matter of a design, irrespective of

[5] G. Hasselblatt, *Art. 3*, in: G. Hasselblatt (ed.), *Community Design Regulation. Article-by--Article Commentary,* 2nd ed. 2018, pp. 40-46; A. Wojciechowska, *Pojęcie wzoru przemysłowego* in: R. Skubisz (ed.), *System Prawa Prywatnego. Prawo własności przemysłowej. Tom 14B,* 2nd ed. 2017, pp. 64-65.

[6] The author could not find features of a motion registered in another category than 14.04.

whether it relates to the features of shape, words, graphics, colours, etc. According to the EUIPO Convergence Guidelines 'CP7' (i.e. 'Convergence on graphic representations of designs', 2018) an 'animated design' is defined as a sequence of snapshots, that is a short sequence of views showing a 'single animated design at different specific moments in time, in a clearly understandable progression'.[7] It may be stated, that 'animation' may include movement(s) of a complex combination of design features, and not only of a single design element, such as parts/sequences of videogames. This interpretation would enable some conceptual distinction between 'animation' and 'movement', the latter indicating a simple change in position, or between 'animation' and 'transition', the latter implying passing through several identifiable stages.

It seems useful that the future definition of a design (*wzór przemysłowy*) under Polish law (PWP[8]) would include animation – and perhaps the adjacent categories of 'movement' and 'transition' – within an open-ended catalogue of relevant design features. Considering the scarce practice to date, such a step will remove uncertainty over their design eligibility.

2.2. WHAT IS A 'PRODUCT'?

The new definition of a 'product' explicitly departs from any kind of material connotation. It refers to any industrial or handicraft item, 'regardless of whether it is embodied in a physical object or materialises in a digital form' (cf. Article 2(4) PDD and Article 3(2) PRD). Again, this definition is based on an open-ended catalogue, which includes new categories of products.

Already under the old law, the relevant product covered 'graphic symbols' and 'typographic typefaces', which effectively meant that a product could take on a two-dimensional nature.[9] The new law adds 'graphic works or symbols', 'logos' and 'surface patterns'. The consequence is that, ontologically, the subject-matter of a design may easily overlap with that of a trademark or copyright. Design registers are full of figurative signs, colour combinations, logos, and textile patterns.[10] Important CJEU rulings touched upon the issue of the cumulation of rights, and consequently held that one form of protection did not exclude another one, yet acquiring protection under each regime followed the distinct conditions set forth

[7] EUIPO CP 7, pp. 37 at: https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/who_we_are/common_communication/common_communication_7/common_communication7_en.pdf (accessed 11 January 2024).

[8] Polish Act of 30 June 2000 'Prawo własności przemysłowej' (consolidated version, Journal of Laws of 2023, item 1170).

[9] L. Brancusi, *Wzór wspólnotowy i jego zakres ochrony*, Warszawa 2012, pp. 71-78; Hasselblatt, *ibidem*, pp. 49-52.

[10] https://www.tmdn.org/tmdsview-web/welcome#/dsview (accessed 11 January 2024).

in those particular laws.[11] The possibility to claim several types of protection for identical/similar subject-matter will certainly be maintained also under the new design provisions.

Furthermore, the old law indicated 'get-up' as a product category. Under the EUIPO's practice 'get-up' has easily accommodated the appearance of a line of products, hotel rooms, layout of web-pages or video-games, and various arrangements of features. The current amendments explicitly add 'sets of articles', 'spatial arrangement of items intended to form, in particular, an interior environment', and 'graphical user interfaces' (cf. Article 2(4)(a)-(b) PDD and Article 3(2)(a)-(b) PRD). MPI recent study notes that the consequence is that "the product is indiscernible from its appearance. There is nothing beyond appearance".[12] If a 'product' consists of a spatial arrangement or a graphical user interface, this means that the corresponding 'design' represents that particular appearance of the arrangement/combination of features. However, in the case of a complex arrangement with some variation amongst its elements/design features – such as individual pages of a website, or individual snapshots of an interior design – it will be difficult to assess whether there is one design under multiple views, or several designs linked one to another. Certainly, the filing requirements will play an essential role in clarifying such issues, especially because PDD also aims to harmonize procedural rules over representation of designs and multiple application (cf. Articles 26-27 PDD).

The emphasis on de-materialized types of products clearly seeks to match the increased activities in the digital environment. From the perspective of the above product categories, the notion of a 'digital design' relates to two kinds of 'items'.[13] On the one hand, it may encompass digital designs which are linked to material products, such as the features of apps appearance (screen display, icons) or of video-games uploaded into a smartphone. On the other hand, there may be designs of products mimicking reality, which are created to exist exclusively in the virtual space, such as the appearance of a digital car or bag in the Metaverse.[14]

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[11] C-237/19 *Gömböc*, ECLI:EU:C:2020:296, paras 49, 52–53 (overlap between design and trade mark protection); C-833/18 *Brompton*, ECLI:EU:C:2020:46, paras 30–36 (overlapping between patent and copyright protection); more Estelle Derclaye, *Overlapping Rights* in: Rochelle Dreyfuss, Justine Pila (eds.), *The Oxford Handbook of Intellectual Property* (OUP 2018), 618, A. Tischner, *Kumulatywna ochrona wzornictwa przemysłowego w prawie własności intelektualnej*, Warszawa 2015, pp. 12-26, 32-40.

[12] A. Kur, T. Endrich-Laimböck, M. Huckschlag, *Position Statement of the Max Planck Institute for Innovation and Competition of 23 January 2023 on the 'Design Package' (Amendment of the Design Regulation and Recast of the Design Directive)*, hereinafter 'MPI Study', p. 4, at: https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI_Position_Statement_on_the_Design_Package_01-25.pdf (accessed 11 January 2024).

[13] M. Antikainen, *Differences in Immaterial Details: Dimensional Conversion and Its Implications for Protecting Digital Designs in EU Design law*, (2021) 52 IIC 137, pp. 140-141.

[14] For an introduction A. Ramos, *The metaverse, NFTs and IP rights: to regulate or not to regulate*, WIPO Magazine 2/2022 at: https://www.wipo.int/wipo_magazine/en/2022/02/article_0002.

As to the Metaverse, in a communication note of September 2022, the EUIPO recommended that applicants interested in registering three-dimensional designs intended for use in a virtual environment, or in both real and virtual environments, should, nevertheless, include a physical product indication.[15] The reason given is that it would facilitate searches. However, this shows that at the perception level, even a virtual design of a bag still needs to relate to a precise appearance of a bag, even though such a bag would not be used in real life. The EUIPO's requirements reveal the need for clarity in identifying the subject-matter of a (digital) design – a significant determinant of the current amendments.

From the Polish perspective, it seems useful to extend the definition of the 'product' to include the additions brought by the PDD. Already under the old law, 'get-up' was not mentioned by Article 102(2) PWP, which gave rise to queries about the extent to which a loose arrangement of features may enjoy design protection.[16] In order to eliminate any possible doubts concerning their design eligibility, the specification of GUIs, get-up, spatial arrangement and set of articles should be explicitly mentioned by the Polish act.

2.3. THE EXCLUSION OF 'COMPUTER PROGRAMS'

The proposals reiterate the exclusion of computer programs from the definition of a product. Researchers understood it as excluding the protection of the computer code as such, but not the 'look (and feel)' of the software, even before the protection of GUIs was permitted.[17] The MPI Study argues that the exclusion of computer programs sounds a bit passé and should be deleted. One argument reads that it is unlikely for a text, being the visual appearance of a computer code, to fulfil the criteria of novelty and individual character vis-à-vis prior art.[18] Whilst this sounds true in general terms, the issue of protecting written texts may resurface in the case of designs of websites, such as comprising various tabs or 'cookies'. These are examples of eligible designs, as relating to the appearance of the interface, although they may contain large parts of written text. In order to differentiate between the possibility of protecting parts comprising the written text

html (accessed 11 January 2024). The connection of a design to actual goods seems an important parameter to rule on the jurisdictional issue of the choice of law to be applied in an infringement in the online environment, more E. Rosati, *The localization of IP infringements in the online environment: from Web 2.0 to Web 3.0 and the Metaverse*, „JIPL&P" 10/2023, pp. 726-727.

[15] https://euipo.europa.eu/ohimportal/en/web/guest/news-newsflash/-/asset_publisher/JLOyNNwVxGDF/content/id/9999412?pk_campaign=keyuser-newsflash-September-2022&pk_kwd=en (accessed 11 January 2024).

[16] L. Brancusi, *Graficzny interfejs użytkownika (GUI) jako wzór przemysłowy*, "PPH" 8/2018, pp. 30-31.

[17] O. Ruhl, *Gemeinschaftsgeschmacksmuster. Kommentar*, 2nd ed. 2010, p. 56.

[18] MPI Study, *ibidem*, p. 5.

of a GUI vis-à-vis the text of a computer code, the author sees the usefulness of a normative exclusion of 'computer programs'. For these reasons, a similar exclusion should be also present in the Polish act.

3. THE PARAMETERS OF DEFINING THE SCOPE OF PROTECTION OF A DIGITAL DESIGN

The following part discusses the rules concerning the identification of the object of design protection, the type of relevant design features and the link to the product category. By means of exemplification, the analysis focuses on digital designs. Each of these issues is put in the perspective of the necessary amendments to the Polish law.

3.1. IDENTIFYING THE OBJECT OF PROTECTION

An important addition in the new law is the provision pertaining to the 'object of protection' of a registered design. Pursuant to Article 15 PDD and Article 18 PRD, protection is conferred only to the features of appearance which are shown 'visibly' in the application for registration. The provisions of Recital 18 DD and Recital 10 RCD explain that design features "do not need to be visible at any particular time or in any particular situation of use in order to attract protection". However, the specific requirement of visibility 'during normal use' of a product will still apply to designs of 'component parts of a complex product'. It results that, apart from the latter category, even internal features of a product, which become visible during consumption (e.g. motifs of the inner part of a cake or an ice-cream), or features visible when the device is turned on (e.g. the GUI of a computer program), may enjoy design protection under the condition of being clearly displayed in the application for registration.[19] This requirement is strengthened under the new Directive by the addition of Articles 25 and 26 PDD which contain procedural details of the application, such as the compulsory content based on the representation of design which governs the application. The new law still allows the Member States to include word description, as a non-compulsory part of an application for registration under national law. However, sole representation of the design will determine the scope of protection of the design.

The new visibility requirement needs explicit implementation into the Polish act. Under the old law, the protection of designs of the inner parts of a product

[19] Tischner, *Reforma*, *ibidem*, pp. 106-108; MPI Study, *ibidem*, p. 2.

raised reluctance in the Polish practice.[20] Furthermore, the introduction into the PDD of explicit rules concerning the content of applications, the means of representing a design and the conditions of multiple applications will also require proper implementation via modification of the current Article 108 PWP. Due to the on-going legislative process, a detailed discussion of these rules seems to be premature.

At this point, it is worth noting that the representation of a design is set to meet the criteria of being "clear, precise, consistent and of a quality allowing for all the details of the matter for which protection is sought to be clearly distinguished and published" (Article 26(1) PDD). These terms recall *Sieckmann* criteria which have served to assess the eligibility of signs as trademarks with regard to their capability to denote 'clear and precise-subject matter'.[21] The requirement of consistency between different parts of a design application may raise similar issues of interpretation as it has occurred in the EUTM practice.[22] The complex appearance of digital/multimedia designs is particularly challenging. Already under current EUIPO guidelines, the sequence of views of an animated icon or GUI ought to be visually related. It was the applicant's responsibility to show how the views connect to one another, whilst giving a clear perception of the movement/progression.[23] Despite many registered GUIs, invalidity or enforcement practice has been scarce, especially as concerns issues of coherence and clarity of the subject-matter. Taking the example of several views of an animated website, should the appearance of every page contain a certain amount of common elements in order to ensure the necessary visual link between all pages? Or would it suffice to have a link between every two subsequent pages, yet, not necessarily throughout the whole webpage, in a way that the first and last page may not even share common elements? This kind of queries seem pertinent, bearing in mind that the identification of the subject-matter of a design consisting of a combination of features is a pre-requisite of comparing it to the appearance of similar designs for invalidity or enforcement purposes. The author argues in Part 4 why registers and courts may face difficulties in understanding the real nature and the reasons why digital designs of interfaces look like they do, if visual perception is not supported by in-depth knowledge about design engineering rules.

[20] J. Sieńczyło-Chlabicz, *Unieważnienie i wygaśnięcie prawa z rejestracji wzoru przemysłowego*, Warszawa 2013, pp. 69-72; cf. K. Szczepanowska-Kozłowska, *Pojęcie wzoru przemysłowego – między funkcjonalnością a estetyką*, "PPH" 3/2010, pp. 13-14.

[21] C-273/00 *Ralf Sieckmann v. DPMA*, ECLI:EU:C:2002:748.

[22] A. Kur, *Acquisition of Rights*, in: A. Kur, M. Senftleben (eds.), *European Trade Mark Law. A Commentary*, OUP 2017, pp. 92-103.

[23] EUIPO CP 7, *ibidem*, p. 37.

3.2. THE SPECTRUM OF RELEVANT DESIGN FEATURES

The legislative developments on the visibility requirement support the view that the subject-matter of an EU design remains restricted to design features that are perceived solely by the eye. This means that audio, touch and features perceived by other senses cannot enjoy EU design protection.[24] Amongst such items, the audio-layer of digital products seems the most discriminated. However, it should be kept in mind that items perceived by various senses may be eligible to trade mark protection. Although the EUIPO practice currently refuses trade mark registration of perfume, haptic, and tactile marks – until future technology would ensure clear and objective subject-matter – audio, motion (including gesture) and multi-media marks have already been successfully registered.[25] Trade mark protection may be indefinitely renewed as long as the sign is put at trade and registration is conferred after substantive examination of applications. By contrast, design protection, limited in time up to 25 years, is granted only under a formalities check.[26] If a design right is sought to be an easily granted tool to capture fast-moving innovation, then the design system needs certainty anchored into some objective frames. Requiring eye-perception from a design's subject-matter is a way of ensuring the legal certainty needed by all market actors. Certainly, these issues remain subject to further scrutiny, as technological advances may foster the registrability of new types of designs.

3.3. FAREWELL TO THE PRINCIPLE OF SPECIALIZATION UNDER NATIONAL LEGISLATIONS

Under the old Directive 98/71/WE, national legislations were allowed to register designs in specific classes of products. In such a case, the scope of a design right was correlated with the product category(ies) chosen by the applicant. An example was Polish law that applied to designs the principle of specialization known from the trade mark law. Pursuant to Article 105(5) PWP, the extent of a design right is confined to the category(ies) of product for which the application was filed.[27] By contrast, the provision of new Article 25(3) PDD stipulates that neither the indication of the products or a description (if permitted by the national law), shall affect the scope of protection of a design. These rules are modelled

[24] Ruhl, *ibidem*, pp. 59-62; Hasselblatt, *ibidem*, p. 38.

[25] S. Geiregat, *Trade Marks in Sound and Gestures: A Critical Analysis of Two Non-Traditional Signs in the EU*, GRUR Int (2022) 71(8) 702, pp. 706-713.

[26] J. Sieńczyło-Chlabicz, *Rejestracja jako warunek ochrony przewidzianej dla wzorów wspólnotowych zarejestrowanych*, (in:) M. Poźniak-Niedzielska, J. Sieńczyło-Chlabicz, *Europejskie prawo wzorów przemysłowych,* Warszawa 2015, pp. 61-78.

[27] Critically, K. Wernicka, *Art. 105*, in: Ł. Żelechowski (ed.) *Prawo własności przemysłowej. Komentarz*, Vol. VIIIA, Warszawa 2022, pp. 976-977.

upon the current Reg. no 6/2002 which lays down that product indication serves only administrative purposes, without affecting the scope of protection of the conferred design (Article 36(6) Reg.).

These amendments will require explicit modification of national laws, such as Polish PWP. The consequence will be that the scope of protection of a design and related validity or enforcement issues will be disconnected from the designated product category. In practice, two-dimensional designs may be enforced against, or challenged by, three-dimensional designs, and vice-versa.[28] For instance, a graphic symbol displaying a doll may extend its scope of protection also towards the use of the same or similar design in a real doll. Furthermore, even a three-dimensional design registered for one type of a product may raise claims vis-à-vis the use of an identical/similar design for a different kind of product, such as the model of a real car versus a toy-car, or the design of a laundry ball versus a ball used as a massage tool.[29]

By the same token, similar rules should apply when a digital design is used alternatively, once as a virtual design, and once in relation to a real product. In the author's opinion, the use of a digital design in the virtual environment, such as the Metaverse, even though it is meant to be a parallel world, does not allow to simply copy that which exists in the real world. In other words, if the state of art of virtual environment comprises designs identical or similar to those used in real life by other parties, this gives grounds to infringement/invalidity claims. And vice-versa, a virtual design may constitute a relevant antecedent towards a subsequent design embodied in a real product.

Irrespective of any dimensional shift and way of use, what bears significance is the appearance of the designs at issue. The comparison of two designs applied to two different kinds of products or to the same product category, yet used in the real versus virtual world, will depend on assessing the scope of protection of the designs. The latter outcome depends on the perception of the informed user and the scope of the designer's freedom of creation. These are two normative, fictional criteria, which any decision-taker, patent office or court, has to define and use them as 'the lens' to compare the designs at issue.[30] Because of their normative character, reference to expert opinions is limited, even with regard to the

[28] Antikainen, *ibidem*, pp. 159-162; Brancusi, *Wzór…*, *ibidem*, pp. 289-293; K. Szczepanowska-Kozłowska, *Naruszenie prawa z rejestracji wzoru przemysłowego*, (in:) Skubisz (ed.), *System…, ibidem*, pp. 309-310.

[29] Decision of BoA EUIPO in case R 84/2007-3, *Ferrari v. Dansk*, at https://euipo.europa.eu/eSearchCLW/#basic/*///number/84%2F2007-3 or UK judgment in *Green Lane...v PMS International Group* ...[2008] EWCA Civ 358 (England and Wales Court of Appeal, Civil Division), 23 April 2008 at https://www.casemine.com/judgement/uk/5b46f1f62c94e0775e7ef1b2, extensively D. Stone, *European Union Design Law: A Practitioners' Guide*, 2nd ed. Oxford 2016, pp. 170-175.

[30] Sieńczyło-Chlabicz, *ibidem*, pp. 101-103, Szczepanowska-Kozłowska, *ibidem*, pp. 300 and 311; J. Brückner-Hofmann, *Art. 6* (in:) Haselblatt, *ibidem*, pp. 91-93, 131.

designer's freedom. The decision is taken by the judge/examiner upon the body of evidence and guided by his/her reason and experience. However, the latter depends on the understanding of what lies before the eyes. The core issue of any design assessment relies on perception. The following section is an invitation to broaden the perspective.

4. SEEING THROUGH AND UNDERSTANDING DIGITAL DESIGNS

Do we perceive exactly what is in front of our eyes? If two persons look simultaneously at the same surroundings from the same place, do they see the same thing? What influences the perception of a digital design being a combination of various design features, for instance an intangible digital design represented by means of two-dimensional graphics versus a snapshot of a video film? As noted above, these queries sound relevant each time an examiner or judge must identify the overall impression of a design through the eyes of an informed user and consider the determinants of a designer's freedom. However, answering such questions should go beyond legal reasoning based on assumptions and common knowledge. An interdisciplinary insight from the field of psychology and design engineering seems particularly useful.

The following remarks from the work 'Teoria widzenia' (*Theory of vision*) of Władysław Strzemiński, Polish theoretician of art and avant-garde painter, serve as a useful introduction to what perception means:

"There is a reciprocal influence of thought on vision and vision on thought".

"Seeing is not a passive reception of visual sensations. The experiences we receive are subject to mental analysis; we confront them with the corresponding sections of reality, and we explain the resulting interrelationships and causes: what are the sensations and what they say about the objectively existing world around us. Thus, there is not only a passive physiological perception of visual sensations, but alongside it: the active cognitive work of our intellect".[31]

These words tell us that we see only what our mind enables us to see. What we see depends on what we have been taught to see from our previous experience, on what current circumstances enable us to see, and on what we intend to see. Neuroscientist David Eagleman emphasizes that all sensory experience is not a 'direct

[31] Władysław Strzemiński, *Teoria widzenia*, post mortem 1958 (reprint 2016 Warszawa), 51, translation by LB of the text: "Istnieje wzajemny wpływ myśl na widzenie i widzenia na myśl. Widzenie to nie tylko bierny odbiór doznań wzrokowych. Otrzymane doznania poddajemy analizie myślowej, konfrontujemy z odpowiadającymi im odcinkami rzeczywistości, wyjaśniamy sens powstałych stąd wzajemnych związków i przyczyn: jakie doznania i co mówią o obiektywnie istniejącym świecie. Istnieje więc nie tylko bierny fizjologiczny odbiór doznań wzrokowych, lecz obok niego – czynna poznawcza praca naszego intelektu".

experience', but 'an electrochemical rendition' of the brain which "compar[es] the signals it receives from the different sensory inputs, detecting patterns that allows it to make the best guesses about what's 'out there'".[32]

Psychology confirms that the way of seeing things depends on how our mind constructs images of the perceived objects by inferring and interpreting the sensory stimulation upon the knowledge acquired through learning and memory.[33] Falkowski explains it through the term of 'plasticity' of the human mind which may generate different pictures based on the same stimuli – for example two persons looking at the image depicting the word 'liar' written in white against black background may see it as a word or as a male profile.[34] This corresponds to the rule of selective perception. In the field of vision, we see what we are looking for: two persons looking at a crowded street from the same place will certainly notice different things.[35] The rule that looking for the content that an addressee expects to receive dominates her vision and eliminates the possibility of seeing other details, was verified by art theoreticians through experiments. Participants were shown several versions of a branded name (logo) written in various fonts, bolding style and composition – some people did not notice any differences between the graphic variants because the semantic layer (the word) was the same.[36] Wróblewski also argues that the contours of a perceived item may take different meanings, depending on the proximity with other objects, on the setting and sequence of images and words, on the overall composition.[37]

In the case of a composition consisting of the layout of a digital design (a webpage or app), users may perceive the meaning and significance of displayed elements differently. What and the order in which a user perceives the design features of an interface determines the quality of the communication with the device and the performance of tasks. There are specific rules of designing the look (and feel) of software applications for them to appear intuitive and easy to handle. Users should not think too much about an interface which should facilitate the use of a device. Because human psychology determines perception, and per consequence the appearance of designs, the following findings refer to a well-known design manual of user interfaces 'Designing with the Mind in Mind' authored

[32] D. Eagleman, *The Brain. The Story of You*, Canongate 2016, pp. 41-42.

[33] A. Falkowski, *Podobieństwo oznaczeń a niebezpieczeństwo wprowadzenia w błąd: perspektywa psychologiczna*, (in:) R. Skubisz (ed.), *Znaki towarowe i ich ochrona*, Warszawa 2019, p. 98.

[34] Falkowski, *ibidem*, 100 referring to an example of visual illusion created by the New York artist Paul Agule in 1987.

[35] A. J. Wróblewski, *Sztuka widzenia*, ASP Warszawa 2012, p. 96.

[36] Wróblewski, *ibidem*, p. 98.

[37] Wróblewski, *ibidem*, p. 79. Changing the order of the same photos may change the meaning of the message: a happy or a tragic picture, pp. 109-111.

by Jeff Johnson[38] which explain the elements that underline the appearance of user interfaces. The topics were chosen in consideration of their relevance for the understanding of the similarities shared by such designs and their impact on the overall impression.

The first and most important are the *Gestalt* principles originating from the pioneering works of German psychologists at the beginning of the 20th century, who advanced the thesis that human perception was holistic – looking at any complex image brain creates unconscious shortcuts (forms, patterns, structure) to convey meaning to what results from the sensory stimuli.[39] The following *Gestalt* rules apply to user interfaces:[40]

- Proximity – objects, even dissimilar, placed near to one another appear grouped
- Similarity – objects looking similar appear grouped
- Continuity – in case of visual ambiguity or missing information, our visual system fills in the gaps so that to perceive whole objects
- Closure – visual system closes open or incomplete figures so that to see whole objects
- Symmetry – the complexity of a whole is reduced by searching for symmetry via organizing and interpreting data accordingly
- Figure versus Ground – the visual field is separated into foreground/figure and background (for example, if two items overlap, the smaller one will be seen as a 'figure')
- Common Fate – objects moving together (e.g. animation), are perceived as 'grouped', sharing the common fate of movement
- Combination – *Gestalt* principles are interrelated and work in combination

Other important pieces of guidance relate to eye-capabilities, colour perception and eye-synchronization with movement.

All humans see better in the centre of our visual field, called the fovea, than on sides.[41] For this reason, important things should always be placed in the middle of the layout. However, certain things can be captured by the peripheral vision, that is colour, movement, and font. The shape of letters, though, is not well seen peripherally. Also, peripheral vision works better in the dark.[42]

Colour vision is limited. Retinal cone cells structure the signals into three colour-opponent channels, that is red-green, yellow-blue and black-white. These

[38] J. Johnson, *Designing with the Mind in Mind. Simple Guide to Understanding User Interface Design Guidelines*, 3rd ed., Morgan Kaufmann Elsevier 2021.

[39] Those were Max Wertheimer, Wolfgang Köhler, Kurt Koffka, see K. Koffka, *Principles of Gestalt Psychology*, Routledge 1935 (reprint 2013). Examples of *Gestalt* rules at work: https://www.superside.com/blog/gestalt-principles-of-design (accessed 11 January 2024).

[40] Koffka, pp. 106-210; Johnson, *ibidem*, pp. 15-29.

[41] Johnson, *ibidem*, pp. 57-61.

[42] Johnson, *ibidem*, pp. 61-3, 77.

are the most distinctive colours.[43] Vision is much more sensitive to contrasting colours, edges and quick changes, than brightness level – pale colours are hard to distinguish. Many factors influence colour vision. The presentation, size and mutual proximity of patches of colour determine the way we perceive differences in colours. Also, a greyscale background makes different colours look similar.[44] These findings explain how wording, graphics and features of colours (in terms of hues and intensity) should be placed within the overall layout of a digital interface so as to ensure the optimal perception of all details.

However, apart from sight determinants, there are laws related to the optimal eye-hand coordination (Fitts' law), which enhances the usability of a device. Fitts' law reads that the time necessary to hit a target depends on the size of the target and its distance with the pointer's starting position.[45] It follows the design rules to make important targets bigger and placed near the edge of the screen, to leave enough space between targets, and also to design menus in such way as to be easily activated with a thumb.[46]

Circling back to cognitive parameters, the way our attention works when perceiving things is connected to how human brain operates within two interrelated systems of unconscious mind and conscious awareness.[47] Psychology confirms that there is 'system 1' of the intuition self, which operates automatically, effortlessly and involuntarily, and 'system 2' of the conscious reasoning self, that conducts effortful mental activities and controls the input of impulses and associations of system 1.[48] Some mental activities are completed involuntarily by system 1, such as detecting that one object is more distant than another, reading words on billboards, recognizing known faces, whilst other activities require specific attention of system 2, such as looking out for one detail, comparing two items for overall value, or focusing attention on an item in a crowded space.[49] However, our brain optimizes effort. This means that system 2 is 'lazy' and restricts energy to necessary activities, whilst choosing to 'run on automatic pilot', that is leaving many tasks to be guided by system 1.[50] These findings serve to understand several design strategies that optimize the amount of data which human brain may capture and process to achieve pre-defined design goals.

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[43] Johnson, *ibidem*, pp. 43-51.

[44] Johnson, *ibidem*, pp. 53, 56.

[45] https://www.interaction-design.org/literature/topics/fitts-law (accessed 11 January 2024), Johnson, *ibidem*, pp. 225-30.

[46] Johnson, *ibidem*, p. 233.

[47] Eagleman, *ibidem*, pp. 77-105.

[48] Nobel-prize winner Daniel Kahneman has named these systems as 'System 1' which thinks fast, and 'System 2' which thinks slow, more D. Kahneman, *Thinking, Fast and Slow*, Penguin 2011, pp. 20-21.

[49] Kahneman, *ibidem*, pp. 21-22.

[50] Kahneman, *ibidem*, 31, Eagleman, *ibidem*, pp. 89-92.

The first rule relates to the content and structure of complex compositions. Experiments have shown that the number of ideas/concepts that can be retained simultaneously by the working memory is 'five plus or minus one'.[51] 'Working memory' represents a short-term memory – as compared to the other type of 'long-term memory' – which has limited capacity, meaning that attention selectively chooses certain items/events to remember, whilst neglecting others. Putting this into the perspective of design interfaces, a complex combination of design features may capture the attention/working memory of a user only to the limited extent – defined by the number 'five plus or minus one'.[52]

In connection with the above findings, there is a difference between the capability of recognition and recall. Recognition is based on perceptual input (visual, acoustic, etc.), which occurs automatically – we recognize certain things instantly. A recall occurs with more difficulty, because it stems from long-term memory which requires reactivating old neural patterns formed on the basis of the same/similar perceptions.[53] It follows the design rule that using pictures is optimal to inform fast about the function and commands of a device. For this reason, designers use icons that depict physical objects or tasks in order to convey information about function, based on recognition.[54] Last, but not least, design rules are formulated to ensure and increase the 'responsiveness' of a system/device, defined upon users' expectations in terms of time performance and general user satisfaction.[55] However, the latter depends on brain's reaction to any sensory input. Neurophysiology teaches about the speed needed by the human brain to process different sensory input, such as the time to visually identify an object (0,25 sec), to see the number of four/five items in a visual field (0,2 sec), the maximum interval for visual fusion in case of successive images (0,05 sec).[56] Such measurements specifically apply to designs used interactively. For instance, considering the time-limits of the human brain, animation and/or movement should be displayed smoothly, with a frame rate of 10-20 frames per second.[57]

5. CONCLUSIONS

The last section shows that there are many sensory and cognitive determinants of human perception. Various neuro-physiological and psychological stud-

[51] Johnson, *ibidem*, pp. 107-109.
[52] Johnson, *ibidem*, p. 123.
[53] Johnson, *ibidem*, pp. 143-147.
[54] Johnson, *ibidem*, p. 149.
[55] Johnson, *ibidem*, p. 236.
[56] Johnson, *ibidem*, pp. 238-39 with further references.
[57] Johnson, *ibidem*, p. 257.

ies explain what we see at a given time. As applied to the digital interface designs, additional constraints flow from their basic functional purpose. Any interface should enable proper and fast communication with the device and its smooth operation. Depending on the purpose of the interface and the actions needed from users, the layout of a digital design will comprise 'specific' elements of a 'specific' appearance that affect human perception in a 'specific' way and trigger relevant reactions. In the author's opinion, the above findings give ground for a more thorough legal discussion about the constraints faced by designers engaged in creating digital designs. In the light of the previous findings, user interfaces do not appear designed 'at random'. Certain design choices are necessary so that a user 'sees' the composition of design features in a way that smoothly guides him/her through the operation of the device.

Going back to the legal steps, the EU design amendments certainly pave the way to registering anything that may be perceived by the eye, regardless of its tangible or intangible nature, provided that it may be framed by the requirements of a clear and precise subject-matter and visible representation. Specifically, arrangements of items, be it the layout of an interface, an interior design, or a graphic composition, will benefit from explicit normative provisions. The door is wide open for protecting digital products. However, Polish law should comprehensively implement all amendments concerning the definition and representation of the subject-matter to prevent subsequent difficulties in enforcement. Future amendments concerning the disconnection of the scope of protection from the product category will certainly give rise to practical difficulties, by challenging the usual comparison of designs when applied to different products. For these reasons Polish law should minimalize the risks of misinterpreting the basics of design protection by avoiding faulty implementation.

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Bartłomiej Chludziński
Nicolaus Copernicus University in Toruń, Poland
e-mail: bartekch@umk.pl
ORCID: 0000-0001-9483-7976

Karolina Rokicka-Murszewska
Nicolaus Copernicus University in Toruń, Poland
e-mail: krm@umk.pl
ORCID: 0000-0001-5402-4137

ENVIRONMENTAL ASPECTS OF LOCATING INVESTMENTS RELATED TO RENEWABLE ENERGY SOURCES IN POLAND

Abstract

Global warming is, besides the COVID-19 pandemic, the greatest challenge for international society nowadays. Further reduction of greenhouse gas emissions is a crucial issue for the European Union and member states. In accordance with European Commission's long-term strategy, by 2050 United Europe's economy will have been neutral for the climate. In Poland, the main source of energy is still coal therefore the need to spread and accelerate the use of renewable energy sources is urgent. However, the pace of work in this area is determined by the law procedure for obtaining legal permits for investments in renewable energy sources. This article is a scientific analysis of the Polish legal provisions related to obtaining a decision on environmental conditions. The authors have used formal-dogmatic and theoretical methods supplemented with an analysis of the judgments of Polish administrative courts. In light of Polish regulations, investments in renewable energy are investments that have a significant impact on the environment and as such require a complex environmental assessment in an administrative procedure.

KEYWORDS

renewable energy, environmental aspects, assessment of environmental impact

SŁOWA KLUCZOWE

energia odnawialna, aspekty środowiskowe, ocena wpływu na środowisko

1. INTRODUCTION

Taking into account the environmental aspects of the gradual shift away from coal-based power generation towards low-emission solutions, the Polish legislator is imposing obligations on public authorities in the process of planning and implementing investments consisting in the construction of renewable energy sources (hereinafter also referred to as RES) systems and the assessment of the environmental impact of such investments. The Polish legislator is well aware of the fact that sustainable development is associated with an increased share of RES that "ensure energy security, diversification of energy supply, and improve the quality of the environment and the life of local communities".[1] Among the legal acts that regulate the issues raised, one should mention the Act of 3 October 2008 on access to information on the environment and its protection, public participation in environmental protection and environmental impact assessment,[2] and the Act of 27 March 2003 on spatial planning and development.[3]

At the beginning of this analysis, it is necessary to indicate the necessity of applying particular legal regulations in relation to the very investment, which is the main subject of this study. This is because, depending on whether the location of RES-energy-generating equipment will be determined by planning acts[4] or individual acts – such as decisions on land development conditions or building permits – the environmental tools are shaped differently.

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[1] W. Sobczyk, E.J. Sobczyk, *Varying the Energy Mix in the EU-28 and in Poland as a Step towards Sustainable Development*, "Energies" 2021, No. 14, p. 1502.

[2] Journal of Laws of 2021, item 247, as amended, hereinafter referred to as: AIEP.

[3] Journal of Laws of 2020, item 293, as amended, hereinafter referred to as: SPDA.

[4] The term "planning acts" means the acts adopted as a result of the planning procedure; cf. the judgment of the Provincial Administrative Court in Gdańsk of 5 October 2016, II SA/Gd 232/16, LEX No. 2141775.

2. TOOLS PROTECTING THE ENVIRONMENT VS METHODS OF LOCALIZATION OF RES INVESTMENTS RELATED TO RENEWABLE ENERGY SOURCES

When the RES location takes place on the basis of a study of conditions and directions of the spatial development of the commune (hereinafter also referred to as the study of conditions) and a local spatial development plan (hereinafter also referred to as the local plan), it is necessary to conduct a strategic environmental impact assessment (hereinafter referred to as the SEIA) as one of the requirements of environmental protection, which should be met while preparing planning acts. The SEIA is to be carried out for projects of documents that determine the framework for the later implementation of projects that may significantly affect the environment, in accordance with the wording of Article 46(1), item 1 *in fine* AIEP.

The legal situation of entities planning to locate investments based on the decisions on land development conditions is slightly different.[5] Pursuant to Article 72(1), item 3 of AIEP, before obtaining one of the location decisions, a decision on environmental conditions (hereinafter also referred to as the environmental approval) must be issued. The environmental approval, which is also important, precedes the decisions issued at a later stage of the RES investment: the decision on the building permit, the decision on the approval of the building project, and the decision on the permit to resume construction works – issued on the basis of the Act of 7 July 1994 – Construction Law[6] (Article 71(1), item 1 of AIEP), as well as the construction notification or execution of construction works and notification of a change in the way the building or its part is used based on the Construction Law.

All the above-mentioned situations generate the necessity to decide whether our project falls into the category that may 'always' or 'potentially' significantly affect the environment or not.[7] Failure to confirm a significant impact means that there is no need to carry out an environmental impact assessment. However, in the case of projects that may 'always' have a significant impact, it will be necessary to conduct an environmental impact assessment as part of the procedure for

[5] Pursuant to Article 4(2) of SPDA, in the absence of a local plan, the methods of land development and the conditions of development shall be determined by way of a decision on land development and the conditions of development, whereby the location of a public purpose investment shall be determined by way of a decision on the location of a public purpose investment, and the manner of land development and the conditions of development for other investments shall be determined by way of a decision on land development conditions; hereinafter also referred to jointly as location decisions or separately as a location decision.

[6] Journal of Laws of 2020, item 1333, as amended.

[7] This results directly from the Regulation of the Council of Ministers of 10 September 2019 on projects that may significantly affect the environment (Journal of Laws No. 1839), hereinafter: RPMSAE.

issuing a decision on environmental conditions. However, if the project has only a 'potential' impact, the obligation to carry out the environmental impact assessment results from the decision of the body conducting the proceedings. In such a case, the decision on environmental conditions may be issued also without the environmental impact assessment. In such a situation, the decision in this respect is made by the body conducting the proceedings on the case.[8] The term 'project' should be understood as "a construction project or other interference in the environment consisting in the transformation or change of the land use method, including the extraction of minerals; technologically related projects are classified as a single project, also if they are carried out by different entities" (Article 3(1), item 13 of AIEP).

RES projects that may always have a significant impact on the environment are systems using wind energy with a total nominal capacity of not less than 100 MW and located in the maritime areas of the Republic of Poland (§ 2, section 1, item 5 of the Regulation on projects which may significantly affect the environment – RPMSAE). On the other hand, the RES investments which potentially have a significant impact on the environment include:

- hydroelectric power plants (§ 3, section 1, item 5 of RPMSAE),
- systems using wind energy other than those listed in § 2, section 1, item 5: located in the areas covered by forms of nature protection referred to in Article 6(1), items 1-5, 8 and 9 of 16 April 2004 on nature protection, excluding systems intended exclusively for supplying road and railway signs, road and railway traffic control and monitoring equipment, navigation signs, lighting equipment, billboards and advertising boards; with a total height of not less than 30 m (§ 3, section 1, item 6 of RPMSAE),
- systems for the production of fuels from plant products, excluding systems for the production of agricultural biogas within the meaning of Article 2(2) of the Act of 20 February 2015 on renewable energy sources,[9] with an installed electrical capacity of 0.5 MW or less or with an equivalent amount of agricultural biogas used for purposes other than the production of electricity (§ 3(1)(47) of RPMSAE),
- photovoltaic power plants (§ 3, section 1, item 54 of RPMSAE).

2.1. STRATEGIC ASSESSMENT OF ENVIRONMENTAL IMPACT

In accordance with Article 3(1), item 14 of AIEP, strategic environmental impact assessment is the procedure for assessing the environmental impact of the implementation of a policy, strategy, plan, or programme, including in particular:

[8] See: A. Siwkowska, *Proces inwestycyjno-budowlany dla instalacji OZE*, Warszawa 2019, p. 12.

[9] Journal of Laws of 2020, item 261 as amended.

a) agreeing on the level of detail of information contained in the environmental impact assessment,
b) drawing up a forecast of the environmental impact,
c) obtaining the opinions required by law,
d) ensuring public participation in the proceedings.

The SEIA is required, e.g. by the draft of the local plan and the study of conditions (Article 46(1), item 1 of AIEP). Pursuant to Article 46(2) in conjunction with Article 46(1), item 1 of AIEP, it should be performed, not only in the case of new documents but also when amending those already accepted.[10] Such a regulation corresponds to Article 27 of SPDA, according to which a change of a study of conditions or a local plan takes place in the manner in which they are adopted.

As A. Fogel points out, the most important element of the strategic environmental impact assessment is the forecast of the impact on the environment.[11] The forecast is a non-normative evaluation document and its purpose is to verify the intended use and the manner of land development.[12]

The environmental impact assessment is prepared by the body developing the project of the study of conditions or the local plan, i.e. in both cases the head of the commune, mayor, or president of the city. However, the execution itself may be entrusted to another entity. It is also permissible to separate the scope of works with regard to environmental monitoring and analyses included in the forecast.[13] As indicated by A. Barczak, M. Łazor, and A. Ogonowska, the forecast must include "numerous pieces of information about the impacts caused by the implementation of the document, the methods of preventing such impacts and/or reducing their effects, as well as alternative solutions".[14] The information to be included in the forecast in detail and an enumerative manner is mentioned by the legislator in Article 51(2) of AIEP. However, both the scope and degree of detail of the information required for the environmental impact assessment must be agreed upon by the head of the commune, mayor, or president of the city (as the body preparing the local plan or study of conditions project) with the competent authorities referred to in Article 57 and Article 58 of AIEP.

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[10] K. Buliński, T. Filipowicz, W. Jacyno, J. Rewkowska, (in:) T. Filipowicz, A. Plucińska-Filipowicz. M. Wierzbowski (eds.), *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz*, Warszawa 2017, Legalis, commentary on Article 3, section no. 15.

[11] A. Fogel, *Strategiczna ocena oddziaływania na środowisko gminnych aktów planowania przestrzennego*, "Samorząd Terytorialny" 2014, No. 9, p. 16.

[12] *Ibidem*.

[13] A. Fogel, (in:) W. Federczyk, A. Fogel, A. Kosieradzka-Federczyk, *Prawo ochrony środowiska w procesie inwestycyjno-budowlanym*, Warszawa 2015, p. 107.

[14] A. Barczak, M. Łazor, A. Ogonowska, *Oceny oddziaływania na środowisko w prawie polskim ze wzorami dokumentów i schematami*, Warszawa 2018, p. 65.

Further stages of the SEIA procedure, i.e. the course of cooperation between authorities and public participation, depend on the forecast.[15] Public participation in the SEIA procedure has been analysed in one of the subsequent chapters. It should be pointed out only that in accordance with Article 29 of AIEP, everyone has the right to submit comments and motions in proceedings requiring public participation. However, as has already been pointed out, according to Article 54(3) of the AIEP, the rules for submitting comments and motions as well as issuing opinions on drafts of local spatial development plans and studies of conditions and directions of spatial development of communes are specified by the provisions of SPDA.

The bodies competent for issuing opinions and arrangements within the SEIA for local plans and studies, pursuant to Article 57(1), item 1 and 58(1), item 3 of AIEP, are (respectively) the regional director for environmental protection and the state district sanitary inspector. These bodies provide opinions on the draft planning acts they receive from the head of the commune, mayor, or president of the city together with the environmental impact assessment (this results from the wording of Article 25(1) of SPDA). They issue their opinion within 30 days from the date of receipt of the request for an opinion. It should be noted that the opinion of the cooperating body, which is a form of taking a position, is not strictly binding for the proceeding body. If a negative opinion is expressed or objections are raised, the cooperating body is not bound by this position.[16]

In accordance with Article 42 of AIEP., a body that prepares a draft document requiring public participation shall consider comments and motions, and attach to the adopted document a justification containing information on the public participation in the procedure and on the manner in which the comments and motions made in relation to public participation have been taken into account and to what extent they have been considered. This provision corresponds to the regulation contained in the provision of Article 55(1) of AIEP, which also requires the body preparing the draft local plan or study of conditions to consider comments and motions submitted in relation to public participation. Moreover, the authority is also obliged to take into account the findings contained in the environmental impact assessment and the opinions of the consultative bodies.

The adopted document is accompanied by a written summary justifying the selection of this document with regard to the alternatives considered, as well as information on how the findings of the environmental impact assessment have been taken into account and to what extent the following have been considered: the findings of the environmental impact assessment forecast, the standpoints of the competent authorities providing opinions and the submitted comments and motions, as well as the results of the cross-border environmental impact assess-

[15] *Ibidem*.

[16] Cf. M. Wincenciak, (in:) T. Filipowicz, A. Plucińska-Filipowicz. M. Wierzbowski (eds.), *Ustawa o udostępnianiu*…, commentary on Article 54, section no. 1.

ment procedure, if any, and the proposals concerning the methods and frequency of monitoring the effects of the implementation of the provisions of the document. Neither the environmental impact assessment itself nor the justification and summary of the SEIA constitute attachments to the resolution on the study of conditions or the local plan. However, they are an appendix to the documentation of planning works, which is a collection of documents developed in the process of preparing and adopting draft planning acts.[17] Thanks to this the voivode can assess the compliance with the requirements concerning the mode of preparation of planning acts.[18]

2.2. ASSESSMENT OF ENVIRONMENTAL IMPACT OF THE PROJECT – PROCEDURE FOR THE ISSUANCE OF A DECISION ON ENVIRONMENTAL CONDITIONS

The procedure of environmental impact assessment (hereinafter also referred to as EIA), the so-called individual assessment,[19] is an extremely important part of the process of issuing decisions for the execution of projects. Thanks to the assessment, the body can gain knowledge about the potential effects of the project on the environment. It is also a guarantee that the environmental conditions will be taken into account on an equal footing with the economic and social conditions.

As mentioned in the introduction to this chapter, the issuance of an environmental decision does not always have to be preceded by an environmental impact assessment. Obligatorily, the EIA must be carried out for RES projects that may always have a significant impact on the environment, whereas, in the case of a potentially significant impact, the decision belongs to the body conducting the proceedings. From the definition of the EIA, contained in Article 3(8) of AIEP, it follows that this is the procedure for the assessment of the planned project's environmental impact, including in particular:

a) verification of the report on the environmental impact of the project (hereinafter also referred to as the report),
b) obtaining the opinions and agreements required by law,
c) ensuring public participation in the proceedings.

The EIA procedure, therefore, consists of a total of three fixed stages. The first one, concerning the determination of the scope of the report and project qualification in relation to the adopted criteria, is referred to as *scoping* and *screening* (respectively). The second stage accompanying the EIA is to obtain the opinions

[17] K. Rokicka, *Udostępnianie dokumentów planistycznych gminy jako przejaw zasady jawności*, (in:) B. Dolnicki (ed.), *Jawność w samorządzie terytorialnym*, Warszawa 2015, p. 614.

[18] A. Fogel, (in:) W. Federczyk, A. Fogel, A. Kosieradzka-Federczyk, *Prawo ochrony…*, p. 111.

[19] A. Barczak, M. Łazor, A. Ogonowska, *Oceny oddziaływania…*, p. 78.

and agreements required by the Act. The last – third one – includes ensuring the possibility of public participation in the proceedings. As in the case of the EIA, the last stage will be omitted in this part, as has been analysed in the chapter on public participation in the decision-making process concerning the location of RES.

It follows from the above that – just as in the forecast of the impact on the environment in the case of SEIA – in the EIA, the decisive element is the report on the environmental impact of the project. This document contains data concerning the whole project – including the characteristics of the project, the description of the anticipated impact on the environment and the location, design, technological, technical, and organizational solutions adopted by the investor, and the description of natural elements of the environment, which may be affected by it.[20]

In accordance with Article 73(1) of AIEP, the proceedings concerning the decision on environmental conditions begin with the submission of an application for environmental approval by an entity planning to undertake the execution of a project. Only in the case of a project for which a decision on the approval of the project of land consolidation or exchange is required, is the procedure for issuing the decision on environmental conditions initiated *ex officio*. There are no limitations in the scope of the catalogue of entities entitled to submit an application. It is not necessary to present a legal title to the property.[21] The application for the issuance of the environmental decision for RES projects is most often submitted to the competent regional director for environmental protection (always competent in matters concerning the issuance of the environmental decision for wind farms – see Article 75 (1) item 1, point AIEP) or to the head of the commune, mayor, or president of the city (in accordance with Article 75 (1), item 4 of AIEP is competent to conduct the proceedings in the scope not reserved for other authorities).[22]

Differences in procedure between particular categories of RES projects are already visible at this stage – in the case of projects that may always have a significant impact on the environment, the application should be accompanied by a report on the environmental impact of the project or a project information sheet together with a request to determine the scope of the report. On the other hand, entities wishing to carry out projects that may potentially have a significant impact on the environment submit a project information sheet. These are the basic annexes, while the remaining ones (maps, excerpts, drawings) are listed by the legislator in Article 74 (1) of AIEP. The elements of the application are not specified by the legislator, so it should be assumed that we apply Article 63 of the Act of 14 June 1960 – The Code of Administrative Procedure,[23] respectively, and the

[20] See: System OOŚ (2013), electronic version: http://katowice.rdos.gov.pl/system-oos (accessed: 11 January 2019).

[21] A. Barczak, M. Łazor, A. Ogonowska, *Oceny oddziaływania*…, p. 82.

[22] Cf. A. Siwkowska, *Proces*…, p. 14.

[23] Journal of Laws of 2020, item 256 as amended, hereinafter referred to as: CAP.

application itself should be precise enough to make it possible to determine the information indicated in Article 63 of AIEP.[24]

In the first of the above situations, the body conducting the proceedings may immediately move on to the environmental impact assessment and issue a decision on environmental conditions. However, in a situation where the report has not been prepared earlier and the party submits an application for determining its scope, the body conducting the proceedings must request the cooperating bodies to determine the scope of the report (scoping). The bodies competent to express opinions are the regional director for environmental protection, the competent authority of the State Sanitary Inspection, the authority competent to issue the integrated permit, as long as it concerns the RES installations, and the competent authority for water law assessments. In addition, if the project is carried out in maritime areas (e.g. an offshore power plant), the scope of the report is also assessed by the competent director of the maritime office. The *scoping* procedure ends with the issuance of an appropriate decision. The authority determining the scope of the report – guided by the location, character, and scale of the environmental impact of the project – may depart from the specific requirements as to the content of the report or indicate the types of alternative variants that require research (Article 68 of AIEP). The cooperating bodies have 14 days from the date of receiving the documents (i.e. the application for the issuance of the decision on environmental conditions and the information sheet for the project) to express their opinion, and the decision should be issued within 30 days from the date of initiating the proceedings (Article 70(3) and (4) of AIEP).

However, in the second of the indicated situations, i.e. concerning the project that may potentially affect the environment, the appropriate qualification of the project, the so-called screening, must take place. It is used by the competent authority to determine whether it is necessary to conduct an environmental impact assessment for the planned project potentially having a significant impact on the environment. The *screening* procedure also ends with the issuance of an appropriate decision. When issuing a decision, the authority is obliged to take into account all the criteria, specified in detail in Article 63 of AIEP. It may be a decision stating the obligation to carry out the EIA and, therefore, determining the scope of the environmental impact report, or a decision on the lack of the necessity to carry out the EIA. Before issuing the decision, the body must consult the cooperating bodies – the same ones that were consulted in the part of the procedure defined as *scoping* (Article 64(1) and (1a) of AIEP).

The legislator defined the content of the report in Article 66 of AIEP, thus determining the maximum scope of this study and at the same time guaranteeing that the document will contain information necessary to complete the impact

[24] See: A. Barczak, M. Łazor, A. Ogonowska, *Oceny oddziaływania*…, p. 82.

assessment procedure.[25] It is assumed that the report is a private investor document which constitutes evidence in administrative proceedings.[26] It may, therefore, be challenged by the parties as well as by representatives of the public.[27] The authority is not bound by the content of the report. The findings contained in the report may be used to issue a decision only if the report contains a set of necessary information allowing for the assessment of the environmental impact of the project and is reliable, coherent, and free from ambiguities and inaccuracies.[28] As indicated in one of the judgments of the Provincial Administrative Court in Poznań, "the first instance authority, as well as the appeal authority, are obliged to check the content of the report in the context of meeting formal and substantive requirements (...). The authorities are also obliged to check the materials constituting the basis for the report".[29] There is no doubt that the effectiveness of charges against a report may vary depending on whether they are supported by appropriate evidence and specific arguments.[30]

In each situation in which an EIA is carried out (in relation to projects that may always significantly affect the environment and in relation to those projects that may potentially significantly affect the environment, for which an EIA obligation has been established), prior to issuing a decision on environmental conditions, the authority competent to issue this decision applies for an agreement or an opinion on the conditions for the execution of the project.[31] As A. Siwkowska points out, in the case of RES projects, the agreeing bodies are: the competent regional director for environmental protection, the competent body for water and legal assessments, the director of maritime office (in maritime areas), and (to a narrow extent concerning national parks) – the minister competent for the environment.[32] However, in accordance with Article 77 (1), item 2 of AIEP, the competent authority of the State Sanitary Inspection shall be the consultative body.

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[25] See: K. Gruszecki, *Udostępnianie informacji o środowisku i jego ochronie, udział społeczeństwa w ochronie środowiska oraz oceny oddziaływania na środowisko. Komentarz*, LEX 2013, commentary on Article 66, section no. 1.

[26] See: the judgment of the Provincial Administrative Court in Lublin of 31 March 2011, II SA/Lu 845/10, LEX No 993489.

[27] Cf. the judgment of the Supreme Administrative Court of 2 October 2008, II OSK 1113/07, Legalis No. 188579; the judgment of the Supreme Administrative Court of 23 February 2007, II OSK 363/06, Legalis No. 83804.

[28] The judgment of the Provincial Administrative Court in Gorzów Wielkopolski of 22 August 2018, II SA/Go 242/18, LEX No. 2540458; the judgment of the Provincial Administrative Court in Poznań of 7 February 2018, IV SA/Po 292/15, LEX No. 2442598.

[29] The judgment of the Provincial Administrative Court in Poznań of 7 February 2018, IV SA/Po 292/15, LEX No. 2442598.

[30] The judgment of the Provincial Administrative Court in Gorzów Wielkopolski of 22 August 2018, II SA/Go 242/18, LEX No. 2540458.

[31] See: P. Otawski, (in:) T. Filipowicz, A. Plucińska-Filipowicz. M. Wierzbowski (eds.), *Ustawa o udostępnianiu…*, commentary on Article 77, section no. 1.

[32] See: A. Siwkowska, *Proces…*, p. 25.

Arrangements and opinions take the form of provisions that are not subject to the complaint (Article 77(7) of AIEP, in conjunction with Article 106 § 5 of CAP). The decision may be challenged only at the stage of appeal against the environmental approval.[33]

The agreement reached by the cooperating body guarantees its influence on the content of the decision as to the merits of the case, but only to the extent covered by the obligation to cooperate.[34] An agreement, in principle, means the consent of the authority to issue a specific content of the decision. It should be noted, however, that the positive opinions of the competent consenting bodies are not binding on the body conducting the proceedings and do not oblige it to issue a positive decision on environmental conditions. In particular, it is important in a situation where the body conducting the proceedings, for justified reasons, does not accept, e.g. any of the significant findings or conditions specified in the decision.[35] However, the reverse situation – i.e. issuing a positive decision in the situation of obtaining a negative agreement from a specialist body – is unacceptable.[36]

The culmination of the entire procedure is the issuance of a decision on environmental conditions, which will determine the environmental conditions for the execution of the project. As D. Trzcińska points out, the environmental decision, constituting a kind of preliminary consent for the execution of the investment, expresses the investor's right to its execution in the form resulting from its content in relation to environmental conditions.[37]

On the other hand, the content of the decision on environmental conditions was specified by the legislator in Article 82 and 84 of AIEP. It follows from Article 82(1) of AIEP that in the environmental approval, the issuance of which was preceded by the EIA, one can distinguish obligatory components (Article 82(1), item 1 of AIEP), which must be included in each decision and optional ones (Article 82(1), items 2-6 of AIEP). As P. Otawski points out, a significant part of the requirements listed in Article 82 is related to the type of project or some particular feature of it, and, therefore, "the number of requirements that the authority must meet regardless of the project for which the environmental decision proceedings

[33] See the judgment of the Supreme Administrative Court of 14 January 2011, II OSK 2365/10, Legalis No. 361309; cf. the judgment of the Provincial Administrative Court in Olsztyn of 9 December 2010, II SA/Ol 755/10, Legalis No. 440778; the judgment of the Provincial Administrative Court in Warsaw of 17 August 2011, VII SA/Wa 1344/11, Legalis No. 381345.

[34] Cf. the judgment of the Provincial Administrative Court in Kraków of 30 December 2008, II SA/Kr 286/07, Legalis No. 167706.

[35] Cf. the judgment of the Provincial Administrative Court in Gorzów Wielkopolski of 22 August 2018, II SA/Go 242/18, LEX No. 2540458.

[36] The judgment of the Provincial Administrative Court in Warsaw of 31 January 2018, VIII SA/Wa 627/17, Legalis No. 1721635.

[37] See: D. Trzcińska, *Charakter prawny decyzji o środowiskowych uwarunkowaniach zgody na realizację przedsięwzięcia*, "Studia Prawnoustrojowe" 2017, No. 37, p. 70.

are conducted is relatively narrow".[38] If the EIA has not been carried out, the competent authority states in the decision on environmental conditions that there is no need to carry out the environmental impact assessment of the project (Article 84(1) of AIEP).

The decision on environmental conditions should be attached to the application for the decisions referred to in Article 72(1) of AIEP and the notification referred to in Article 72(1a) of AIEP. In the case of RES projects, this refers primarily to the application for a building permit or location decisions. The application or notification is submitted within 6 years from the date on which the decision on environmental conditions has become final (possibly – 10 years, in specific cases and after fulfilling additional requirements resulting from Article 72(4) of AIEP).

Importantly, environmental approval must always be justified. It must meet both the conditions resulting from Article 107 § 3 of CAP and the detailed requirements resulting from Article 85(2) of AIEP (again – they differ depending on whether the EIA procedure has been carried out or not).

According to Article 86 of AIEP, the environmental approval is binding on the authorities issuing the decisions, the issuance of which is preceded by the necessity to obtain the environmental approval (such as e.g. authorities issuing a building permit) or authorities accepting construction notifications. There are no exceptions to this binding nature of the decision on environmental conditions.[39]

3. CONCLUSION

Polish legal solutions concerning the impact of renewable energy installations are based on the standards of administrative law. The procedure provides for the assessment of the impact of renewable energy on the environment when adopting general planning acts and issuing decisions in individual cases. In the first case, the administrative authorities prepare a strategic environmental impact assessment, while in the second, they prepare an environmental impact assessment and issue a decision on environmental conditions.

The analysis of the presented solutions leads to the conclusion that the Polish legislator has implemented a comprehensive legal regulation allowing for

[38] See: P. Otawski, (in:) T. Filipowicz, A. Plucińska-Filipowicz. M. Wierzbowski (eds.), *Ustawa o udostępnianiu…*, commentary on Article 82, section no. 2.

[39] Cf. the judgment of the Provincial Administrative Court in Gliwice of 27 April 2017, II SA/Gl 53/17, Legalis No. 1633488; see also the judgment of the Provincial Administrative Court in Gdańsk of 20 September 2017, II SA/Gd 498/17, Legalis No. 1673456; the judgment of the Provincial Administrative Court in Poznań of 7 March 2018, IV SA/Po 1194/17, Legalis No. 1742278.

a comprehensive assessment of the environmental impact of renewable energy sources. Such solutions are time-consuming and may affect the pace of investments, but on the other hand, they are an expression of sustainable development and the evolutionary creation of an environmentally neutral economy.

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Antonina Chłopecka
University of Warsaw, Poland
e-mail: a.chlopecka@uw.edu.pl
ORCID: 0000-0003-3042-4747

THE USE OF ARTIFICIAL INTELLIGENCE IN ASSESSING A BANK CUSTOMER'S DEBT CAPACITY

Abstract

The purpose of this article is to discuss the issue of financial institutions, and especially banks, using artificial intelligence algorithms to assess the debt capacity of their potential borrowers. The author presents the view that the regulations currently in place are insufficient. In particular, there are no provisions in place to sufficiently protect the interests of bank customers. Additionally, the author considers what claims bank customers could have in the event that an algorithm made an incorrect assessment of their creditworthiness.

KEYWORDS

artificial intelligence, algorithms, creditworthiness, banking law, banks

SŁOWA KLUCZOWE

sztuczna inteligencja, algorytmy, zdolność kredytowa, prawo bankowe, banki

1. BACKGROUND

The term artificial intelligence (AI) usually conjures up visions of an omnipotent computer whose intelligence is greater than that of human beings. For some of us, such visions inspire the hope that many of the issues humanity is struggling to overcome can be resolved, while for others they raise a shudder of anxiety since the idea of an intelligent machine able to control human beings (and not vice versa) is ubiquitous in mass culture. However, when considering the issue of artificial intelligence, we should not think only about the very distant future. **We should consider the present, and concentrate on solving problems that already affect those involved in legal transactions.** While many people are not fully aware of this, artificial intelligence is already having a significant impact on our lives, and on certain vital aspects in particular.

The banking and finance sector is one such area. Like it or not, we are heavily dependent on the proper functioning of financial institutions, especially banks. The role of a credit institution, which today is one of the basic institutions of banking law, has grown along with the development of money – now the primary means of payment. Deposit and credit activities have already had a long standing of being traditionally recognized as core banking activities that distinguish banks from other financial market players.[1]

Nowadays, in order to finance various types of business ventures, it is necessary to raise funds – sometimes very substantial amounts of cash. Credit institutions make it possible to finance various types of investments. However, the bank **has the right to verify creditworthiness of a potential borrower in order to secure its capital and not entrust it to an unworthy person from whom it would then fail to recover the outstanding amount. The granting of a credit facility by a bank should be contingent on a positive outcome of the assessment of the potential debtor.**

So what do creditworthiness assessments have to do with artificial intelligence algorithms? An analysis of Article 70 of the Banking Law, especially in conjunction with Article 105a(1a)[2] (concerning creditworthiness assessments and analysing credit risk of a borrower) shows that they have very much in common…

[1] B. Bajor (in:) L. Kociucki, J. M. Kondek, K. Królikowska, B. Bajor, *Prawo bankowe. Komentarz do przepisów cywilnoprawnych [Banking Law. Legal commentary to Civil Law provisions]*, Warsaw, 2020, Article 69.

[2] The Banking Law Act of 29 August 1997 (consolidated text in the Official Journal of Law of 2020, Item 1896, as amended). Article 105a(1a) indicates that Banks, other institutions with statutory authorization to grant credit facilities, lending institutions and entities referred to in Article 59d of the Act of 12 May 2011 on consumer credit, as well as institutions established pursuant to Article 105(4) of the Act of 12 May 2011 on consumer credit, may, for the purposes of assessing creditworthiness and analysing credit risk, take decisions based solely on automated personal data processing, including profiling, also with respect to the personal data that constates a banking

2. THE POSSIBLE USE OF AI BY BANKS

As already mentioned above, creditworthiness assessments are regulated in general by Article 70 of the Banking Law, which states that **a bank renders the granting of a credit facility to a person contingent upon that person's creditworthiness.** Pursuant to that provision, creditworthiness is construed as the ability to repay the capital plus interest borrowed on the maturity dates specified in the facility agreement. At the same time, at the bank's request, the borrower is obliged to submit documents and information the bank needs to assess the borrower's debt capacity. Furthermore, pursuant to Article 70 Section 3, the borrower is obliged to allow the bank to take actions related to assessing the borrower's financial and economic position and to inspect the manner in which the borrower utilises and repays the credit facility.

This provision does not define the bank's obligations explicitly. However, legal commentators are pretty well unanimous in arguing that **the bank should not grant a credit facility without first assessing the creditworthiness of the person applying for credit.**[3] Hence, the aforementioned regulation should be considered reasonable and comprehensible. A bank should act in a way that enables it to avoid entering into risky contracts with entities incapable of returning the capital entrusted to them, so that the bank may safeguard its own capital as well as the capital of the bank's customers (in particular, the capital deposited in bank accounts).

Yet one must also consider Article 105a(1a) of the Banking Law, which states that, when assessing creditworthiness and analysing credit risk, banks, as well as other institutions with statutory authorisation to grant credit facilities, may make decisions **based solely on automated personal data processing, including profiling**, as well as with respect to personal data that constitute banking secrets.

The only condition for using such a method of creditworthiness assessment and credit risk analysis is that the person affected by the automated decision has **the right to receive an adequate explanation as to the grounds for the decision taken and, subsequently, to benefit from human intervention to reconsider the decision and to express his or her own position regarding the same.**

The notion of banks' authorisation to carry out automated personal data processing, including profiling, veils the fact that **banks are actually granted the power to use artificial intelligence algorithms. In order for us to better grasp the inherent dangers of banks using self-learning algorithms in their activities aimed at assessing the creditworthiness of borrowers and analysing**

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secret, provided that the person affected by the automated decision making is granted the right to receive adequate explanations as to the grounds for the decision taken, to obtain human intervention in order to have the decision reconsidered and to express his or her own position.

[3] *Ibidem*, Article 70.

credit risk, it is important to clarify at this point what artificial intelligence algorithms, and in particular self-learning AI algorithms, actually are.

The explanations that follow concern banking institutions' operations for assessing creditworthiness of a potential borrower and analysing credit risk.

3. THE NOTION OF SELF-LEARNING ALGORITHMS

In general, one should define an algorithm as a '**mechanical'** way of solving a specific task, and as a certain class of tasks consisting of specific, ordered and predefined steps. The word 'mechanical' is used because the method does not require the problem-solving agent to demonstrate any creative invention. Instead, the agent is expected to strictly follow a predefined and well-described set of instructions detailing the steps to be taken.

Algorithms, therefore, **are used in the process of making calculations**. They contain a strictly ordered set of commands to be executed in accordance with an instruction. The commands must be executed in the prescribed order, except for instances where the instruction itself allows the agent to move to the next command. Algorithms can be created using various methods, such as a more or less precise verbal description, or notations in various programming languages. Importantly, an algorithm may serve as the basis for writing a computer program. One could say that algorithms are blueprints for computer programs, while a computer program constitutes a particular recording of an algorithm.

We need to make a distinction between an ordinary algorithm and a self-learning algorithm. Not every algorithm is self-learning. However, where it is not possible (or desirable) to formulate a fully defined, complete, and correct algorithm, there may be a need to design a self-learning one that can experiment autonomously, make errors, and thus acquire knowledge on its own to become able to learn over time. The need to deploy a self-learning algorithm arises mostly from the volatile nature of the environment in which the computer program operates, or from other circumstances in which the use of an ordinary algorithm would be inefficient, uneconomical, or unreasonable. The need to program self-learning algorithms can also arise from the need to develop **a computer system that can function without human intervention – that can operate on its own.** To create such a system, it is necessary to ensure that it has the ability to adapt to the changing conditions of its environment. **The need to perform operations on sets of data so large and complex that they are unlikely to be aligned in order in a non-automated way is yet another instance of the need for self-learning algorithms.**[4] Nowadays, self-learning

[4] P. Cichosz, *Systemy uczące się [Self-learning systems]*, Warsaw, 2000, pp. 39-40.

algorithms have many practical applications outside of banking, such as in medical diagnostics, to give just one example.[5]

As already noted, self-learning algorithms need to be distinguished from 'plain' ones. While 'plain' algorithms are obviously predictable, when deploying self-learning algorithms we will not always be able to accurately predict what they will do. In the case of a self-learning algorithm, their coder equips the software only with what is known as 'background knowledge'. Despite holding the key input data (i.e. the input knowledge and instructions on how to proceed) necessary to predict the ultimate solution proposed by the computer, developers of self-learning algorithms may not discover until the very last moment that **the information they possessed was insufficient for them to predict what the ultimate output generated by the AI algorithm would be. In other words, when an AI algorithm is up and running, factors that even an expert programmer could not have foreseen may come into play. The number of variables may simply have been too large to be taken into account by the algorithm developer.**

4. PROBLEMS RELATED TO THE USE OF AI IN ASSESSING CREDITWORTHINESS

Self-learning artificial intelligence algorithms can also be used to assess the creditworthiness of a bank customer and evaluate credit risk. From the bank's perspective, this can be very beneficial, for individual bank employees no longer need to analyse huge amounts of data themselves. AI can assist them and, as a matter of fact, is often doing so nowadays.

As to the input data that is made available to the artificial intelligence algorithm analysing a borrower's creditworthiness, Article 105a(1b) of the Banking Law defines the admissible scope of such data. Creditworthiness may be analysed only on the basis of **data indispensable in view of the purpose and type of credit facility** and, in particular, based on the following categories of data: **natural person's data** (such as name and surname, marital status, legal title to occupied premises, place of work, profession, education, form of employment, financial situation, including income and expenditures, dependent household

[5] Examples in this field include diagnostic tests, symptoms under observation, and findings made when interviewing current patients to diagnose new patients and suggest potential therapies. For a discussion of AI applied in medicine cf., *i.a.*, D. Wang, A. Khosla, R. Gargeya, H. Irshad, A. H. Beck, *Deep learning for identifying metastatic breast cancer*, Cornell University Library, 18 June 2016, https://arxiv.org/abs/1606.05718 (accessed 27 January 2021).

members, marital property regime between spouses) **and data concerning liabilities as specifically indicated in the above-mentioned provision.**

That said, pursuant to Article 105(1c) of the Banking Law, it is prohibited to process personal data as referred to in Article 9 of Regulation 2016/679,[6] that is, data on racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership. Additionally, it is prohibited to process any genetic data, biometric data for the purpose of unambiguous identification of a natural person, or data concerning a person's health, sexuality, or sexual orientation. These types of data are collectively known as the so-called **sensitive data** since they pertain to a particular person's private life.

To reiterate, algorithms created by banking institutions to assess borrowers' creditworthiness and analyse credit risk **will most often be in the form of self-learning algorithms – indeed, they have already been taking on that form.** In my opinion, with so much data on borrowers accumulated,[7] one cannot create an algorithm in the form of a 'closed-end' instruction containing all possible paths of available solutions. It seems inevitable to create algorithms for this purpose which can acquire further knowledge on their own and which, by developing the input data given to them, can themselves propose solutions to the problems they are given. At this point, another question arises: What operating principle should govern the functions of an algorithm designed to assess a borrower's creditworthiness and analyse credit risk in order for it to be as useful as possible for the bank's purposes? **One of the more likely solutions is a technique known as 'random forest'.[8]** Here, a computer having the basic data of the borrower available to it generates a numerical creditworthiness forecast for the borrower in question. To do so, it uses data on other borrowers, as well as the answers it has already given in other cases on the extent to which various factors affect a person's creditworthiness or credit risk in a given situation. The algorithm developer must equip the database with different possible types of hypothetical situations and the corresponding responses. Obviously, it is impossible to predict all situations that could potentially arise, so the algorithm should be authorised to solve any unforeseen problems on its own.

[6] 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).

[7] The catalogue comprising Article 105a(1b) contains more than thirty items. However, one should bear in mind that the wording 'in particular' is used in the provision, which indicates that the catalogue is an open-ended one. Hence, there is no obstacle to a creditworthiness analysis also being carried out on the basis of other information, as long as this is necessary, of course, in view of the purpose and type of credit facility involved.

[8] J. Kleinberg, H. Lakkaraju, J. Leskovec, J. Ludwig, S. Mullainathan, *Human Decisions and Machine Predictions,* Cambridge, MA 2017, NBER Working Paper No. 23180, http://www.nber.org/papers/w23180 (accessed 27 January 2021).

Beyond any doubt, such algorithms do have one advantage. Namely, they do not differentiate between individual borrowers whose actual position is identical and for whom they hold identical and indistinguishable information. As a matter of fact, one cannot rule out a situation where a differentiation is made despite the absence of a factual basis when creditworthiness is assessed on a case-by-case basis by a bank employee. **However, there is also one problem here that we cannot forget about.** Explicitly, the creditworthiness analysis made by the algorithm is only **a forecast**, i.e. it could result in a false positive as well as a false negative result, since the creditworthiness assessed on the basis of the information the algorithm possesses is a statistical forecast only. **It is not possible to obtain a result that is one hundred percent certain.**

The provisions of Article 105a(1a) of the Banking Law provide a borrower with specific protection consisting in **the right to obtain relevant explanations as to the basis of the decision made and, ultimately, to seek human intervention in order to have the decision reconsidered, as well as to be heard when voicing one's own opinion.** However, as explained below, the measures stipulated by the provisions of the Banking Law may prove insufficient to provide a borrower with due legal protection.

Moreover, this issue is not the only problem we face when using AI algorithms to analyse borrowers' creditworthiness. Even though the scope of data that may be used when assessing creditworthiness has been limited by law to "data indispensable in view of the purpose and type of credit facility", and even though the Banking Law excludes the use of certain data categories (sensitive data), banks will still have a basically unlimited pool of data at their disposal that they can feed to their algorithms when making decisions about borrowers.

The bank remains free to decide what data is or is not necessary for its purposes. In principle, then, a lending institution can use any kind of data concerning a borrower, provided, of course, that they constitute "data indispensable in view of the purpose and type of the credit facility", and they are not data excluded under Article 105a(1c) of the Banking Law.

An artificial intelligence algorithm may therefore analyse the situation of a given borrower **not only on the basis of such obvious information as credit score, past bank account statements, or contact details, but also on the basis of the borrower's everyday behaviour as established, for example, on the basis of their everyday activity on the Internet, particularly in social media, and the applications they own.** However, what seems to be the most problematic in light of Article 105a of the Banking Act is the fact that the bank is not legally bound to inform the borrower what data will be taken into account by the algorithm when assessing creditworthiness, or how the algorithm will qualify such data, or the actual sources of the data obtained. Article 70(1) of the Banking Law states that a borrower is required to submit, at the bank's request, the documents and information necessary for the bank to assess his or her debt capacity. But this

does not mean that the bank cannot use any data sources other than the documents and information provided by the borrower. Importantly, even seemingly 'benign' data can deprive a borrower of access to a credit facility.

For example, we can imagine a situation where an AI algorithm analyses the creditworthiness of a borrower on the basis of bank statements provided by them. When evaluating the deposits and charges shown on a statement, the algorithm could question the creditworthiness of an individual who spends a considerable part of their income on expensive computer games and does not have any significant amounts accumulated in savings accounts. For the algorithm, such seemingly innocuous information could turn out to be decisive for the borrower's credit score (also with respect to a credit card) and thereby determine the amount of money made available to the borrower under the credit facility.[9]

Of course, an obvious counter-argument may easily be presented. After all, the provisions of Article 105a(1a) of the Banking Law afford the borrower a specific safeguard in the form of **the right to receive a relevant explanation of the grounds for the decision taken and, subsequently, also the right to obtain human intervention in order to have the decision reconsidered, as well as the right to express his or her own position.** There is no doubt that a literal reading of this provision indeed indicates such a right.

However, one key element to be noted is that **the algorithm used by the bank is likely to be considered a business secret.[10]** So there is a question as to whether any bank will be willing (or legally bound, for that matter) to share with the borrower such information as the manner in which its AI algorithm works. In fact, it is doubtful whether a white-collar employee of the bank would even have access to such knowledge at all.

Furthermore, the explanation given by a bank employee in charge of a loan could differ from the actual 'motives' behind the AI algorithm. And the potential borrower will have no way to verify whether or not this is actually the case.

When we entrust self-learning algorithms to search for solutions on their own, we may end up with a situation where the path leading to that solution appears completely irrational to a human being. This is because algorithms do not reason in the same way as humans. How then, can a human justify such a 'thought' process? Even the creator of a given algorithm may not be aware of what is going on 'inside' the algorithm when it is empowered to acquire knowledge on its own and learn independently from the information it has gathered. The best a bank

[9] The manner in which some types of data can shape human creditworthiness is illustrated by the citizen rating system named *Sesame Credit* that was implemented by the Chinese government; cf. Li Xiaoxiao, *Ant financial subsidiary starts offering individual credit scores,* "Caixin", 2 March 2015, https://www.caixinglobal.com/2015-03-02/101012655.html.

[10] A. Michalak, "2. Charakter prawny ochrony tajemnicy przedsiębiorstwa" ["2. Legal nature of the protection of business secrets"] (in:) *Ochrona tajemnicy przedsiębiorstwa. Zagadnienia cywilnoprawne [Protection of Business Secrets. Civil Law Issues]*, Kraków, 2006.

employee can do when explaining why a potential customer's loan application has been rejected is to **make a guesstimate** as to the reasoning involved. In fact, the algorithm's reasoning does not have to be logical – neither for the customer, the bank employee, nor for the bank itself.

We can illustrate how an algorithm's 'reasoning' differs from that of a human being using the example of an algorithm designed to recognise a dog in a photograph.[11] How can one write instructions for a computer to enable the algorithm to recognise any dog in a photo without confusing it with any other kind of animal? It is not enough to indicate that a dog is an animal with four paws, two ears, a nose, a tail, and fur, for the algorithm could easily mistake another animal with those characteristics for a dog. One could give the algorithm instructions describing each type of dog nose or fur, but this would probably overload the computer with too much information, and would not guarantee ultimate success in dog recognition. Besides, what about those cases where the dog is missing a paw, or only part of the dog is visible in the photo, or the dog has its back to the camera?

For those reasons, **self-learning algorithms** are used to handle tasks like photographed object recognition. The algorithm recognises a dog not by the features that seem obvious to humans. **It functions in a more abstract way.** That is, it recognises certain characteristic arrangements of edges, shadows or light in photographs. In this way, it is able to recognise whether there is a dog or another animal in the picture. Additionally, the algorithm will learn how to recognise dogs **independently**. The algorithm developer provides only the background knowledge in the form of photos with dogs and information on whether there is a dog in the photo or not; then the algorithm works out how to recognise dogs in other photos.[12]

An algorithm can function similarly when assessing the creditworthiness of a potential borrower. It does not demonstrate any human-like reasoning. Instead, using the information provided to it by the developer, it develops its own way of making such an assessment.

Furthermore, as a side note, it is worth mentioning a certain doubt related to the guarantee set out in the provisions of the Banking Law, which **provides the borrower with the right to obtain human intervention in order to have the scoring decision revisited**. Namely, it is doubtful whether a decision issued as a result of human intervention will differ significantly from that issued by an algorithm. It is also likely that a bank employee will fall under the sway of the algorithm's prejudice, so to speak. Decisions by algorithms may indeed be

[11] A. Krizhevsky, I. Sutskever, G. E. Hinton*, ImageNet classification with deep convolutional neural networks,* (in:) *Advances in Neural Information Processing Systems 25,* by F. Pereira (ed.), C.J.C. Burges, L. Bottou, K.Q. Weinberger, La Jolla, CA 2012, pp. 1097-1105.

[12] H. Fry, *Hello world. How to Be Human in the Age of the Machine*, Wydawnictwo Literackie 2019, pp. 113-116.

reconsidered by bank employees, but such reconsideration is not likely to produce a very different result.[13]

Indeed, if automated verification becomes the rule, having specialists trained in analysing creditworthiness may simply become obsolete, with the legislator having little or no influence over this. This is, of course, an issue of secondary significance and a side effect of using algorithms in various areas of life where the legislator cannot always have proper influence. This should be taken into account when discussing the dangers of self-learning algorithms in banking activities, and such dangers should be kept in mind when creating legal regulations.

5. THE ISSUE OF LIABILITY FOR AN INCORRECT CREDITWORTHINESS ASSESSMENT MADE BY AN ALGORITHM

Taking all of the above issues into account, the question arises as to **how the responsibility of banking institutions should be regulated** in relation to situations where the creditworthiness of a person is assessed unfavourably as a result of an algorithmic error. Further, are there any loopholes in the legal regulation in question, and if so, how can the legislator rectify them?

At the same time, it should be emphasised that errors in the functioning of an algorithm do not necessarily have to stem from a technical failure. They may happen if an algorithm, using correct input data provided to it by its creator, makes a wrong assessment as a result of decisions that seem to be irrational from the human point of view.[14] Obviously, the legislator's input is necessary to establish what criteria should be taken into account when making a creditworthiness assessment. In particular, an inaccurate assessment could be considered to be one in which the algorithm makes a decision, based on the previous analyses of other customers, that largely depends on secondary factors (e.g. an individu-

[13] The COMPAS algorithm that was used to assess the risk of repeated offences may be cited here as an example. The algorithm was a tool to assist judges when sentencing. Based on the algorithm's prediction of the likelihood of another crime being committed by a given offender once out of prison, the judge could hand down an appropriate sentence (or modify the duration of imprisonment). However, the public did not always consider the punishments imposed in this way to be fair. See J. Angwin, J. Larson, S. Mattu, L. Kirchner, *Machine bias,* ProPublica, 23 May 2016, hptts://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing (accessed 27 January 2021).

[14] For example, when analysing the expenses of a consumer who wants to take out a loan, a self-learning algorithm could conclude that a positive credit rating should be denied to a customer whose earnings are admittedly high, but who spends a significant portion of their money on consumption considered a sign of laziness, lack of entrepreneurial spirit, etc.

al's habit of spending money on expensive computer games might result in their being assigned a low credit rating), where the algorithm prioritises these over key factors such as earnings, existing liabilities, or the individual's credit history. An erroneous assessment could also include one that would be considered blatantly wrong when reassessed by a human.

The Banking Law does not impose any liability for the misuse of AI algorithms by banks. If we look at the use of AI algorithms through the prism of provisions previously discussed and inherent risks, many doubts arise as to the very legitimacy of their deployment by banks. The provisions relating to the use of artificial intelligence algorithms by banks are at best fragmentary and regulate no more than a fraction of this issue. At the same time, they fail to afford potential borrowers sufficient protection, while the powers granted on the basis of Article 105a of the Banking Law, as already indicated above, seem to be quite illusory.

Moreover, consideration should be given to whether banks should not be obliged to inform customers who decide to conclude a credit facility agreement (as a consequence of which, borrower creditworthiness will be assessed in an automated manner) about the use of AI algorithms. **Currently, the Banking Law does not provide for such obligations at any stage prior to the assessment of creditworthiness.** Furthermore, what needs to be considered is the requisite scope of any such obligation to inform customers, namely, what type of information should be provided to potential borrowers before the initiation of a creditworthiness assessment and credit risk analysis. It is also important to regulate issues related to the responsibility of banks in the event of any misconduct in a situation where the creditworthiness of a potential borrower is assessed by a self-learning algorithm.

In particular, I am of the opinion that a bank should have a fundamental obligation to inform its customers that it makes use of artificial intelligence algorithms to assess borrower creditworthiness. This may seem quite obvious. However, it should be noted that the legislator has not imposed any such obligation on banks at all. A bank is, therefore, not obliged to inform a customer that it makes use of automated tools for assessing creditworthiness. Furthermore, a bank is not obliged to inform its customers about **what kind of data the algorithm will take into account.** A borrower should, however, be aware of what factors are analysed when assessing his or her creditworthiness (if only to be able to improve on certain issues in the future in order to still be able to obtain credit). Obviously, it will not be possible to vest the aforementioned rights in a bank's customer **if the algorithms (which usually constitute a business secret) do not operate in a transparent manner.** In this respect, it should be pointed out that intervention on the part of the legislator appears to be necessary. However, it should be noted that an attempt to introduce such regulation may provoke protests on the part of the banks. Such protests would be particularly likely if the transparency of the functioning of the algorithms involved the disclosure of business secrets.

There is one question that arises when we consider the issue of liability if the assessment of a bank customer's creditworthiness performed by an AI algorithm is erroneous. Namely, one should ask what claims a borrower might have in such a situation. This is because in such cases, the principles relating to contractual liability would not apply as the creditworthiness assessment takes place before the conclusion of the actual credit facility agreement (alternatively, *a culpa in contrahendo* clause could be invoked[15]).

However, the option of resorting to 'classic' civil tort liability as well as to regulations on the protection of personality rights would still appear to be available. The regime of tort liability[16] would certainly require a bank customer to substantiate such prerequisites for liability as the event from which the damage arose, the damage itself as well as the causal link between the event and the damage. As far as damage is concerned, in a situation where damage results from the failure to conclude a contract, it would in most cases be necessary to indicate damage in the form of *lucrum cessans* rather than *damnum emergens*. However, demonstrating that damage was suffered would not be the most problematic issue. It seems that when adopting the "classic" model of civil law liability, the greatest difficulty would lie in demonstrating that fault lay with the bank, since, as indicated above, the erroneous assessment could also be due to the proper functioning of the algorithm. At this point, a general legal loophole related to the use of self-learning algorithms in legal transactions becomes apparent. Specifically, there are no specific regulations that would tighten the civil law liability regime related to the use of AI (for example, providing for a strict liability regime). However, it appears necessary for the legislator to regulate this issue. Moreover, as regards tort liability, a question we should pose is whether the use of self-learning algorithms can take the form of **unlawful behaviour** at all. Indeed, since there are no legal regulations that standardise the use of artificial intelligence by banking institutions (or the use of AI in general), there is also no legal provision that could be violated by the bank's action.[17] A potential borrower would, therefore, encounter a serious problem when trying to demonstrate that a bank's conduct violates the norms of the applicable legal order in any manner whatsoever. The answer here might involve the 'principles of social conduct' (Polish: *zasady współżycia społecznego*). However, those rules do not exist in a vacuum, and they must either

[15] T. Zieliński, *Obowiązek ujawnienia informacji na etapie przedkontraktowym odpowiedzialność z tytułu culpa in contrahendo - uwagi de lege lata i de lege ferenda [Duty to disclose at the pre-contractual stage culpa in contrahendo liability. Comments de lege lata and de lege ferenda]*, PPH 2016, No. 7, pp. 30-38.

[16] G. Karaszewski (in:) *Kodeks cywilny. Komentarz [Civil Code. A Commentary]*, by J. Ciszewski (ed.), P. Nazaruk, Warsaw 2019, Article 415.

[17] M. Wałachowska, *Rozdział V. Sztuczna inteligencja a zasady odpowiedzialności cywilnej* [*Chapter Five. Artificial intelligence and the principles of civil liability*] (in:) L. Lai, M. Świerczyński (ed.), *Prawo sztucznej inteligencji [The Law of Artificial Intelligence]*, Warsaw 2020.

be developed through market practice or imposed (rather indirectly) by the legislator.

A potential borrower may also assert a violation of personality rights by a banking institution. Article 23 of the Polish Civil Code[18] ("**CC**") indicates that irrespective of the protection provided by other regulations, the civil law protects the personality rights (Polish: *dobra osobiste*) of an individual, such as, in particular, health, freedom, honour, freedom of conscience, surname or alias, image, secrecy of correspondence, inviolability of the dwelling, scientific, artistic, inventive and innovative creativity. This catalogue has been developed in both legal commentaries and case law.[19] Obviously, in this context, a question that must be posed is whether the positive assessment of a person's creditworthiness can be treated as a personality right. The case law developed by the courts[20] provides arguments to the effect that creditworthiness is not a personality right given its purely pecuniary nature. In doing so, the case law points out that the phenomenon of creditworthiness is closely linked to the sphere of the property interests of a civil law entity and not to the sphere of its personality. Thus, it would appear that intervention by the legislator is necessary for borrowers to be entitled to an undisputed right to have a previously negative creditworthiness assessment rectified or to be entitled to lodge other claims when their personality interests are violated. Indeed, even if one assumes that creditworthiness, as corresponding to a person's financial reliability, can be regarded as a personality interest, this circumstance should be indisputable and also enforceable in court. However, serious consideration should be given to whether the debt score of an individual, in the context of his or her foresight and proactive approach, personal wealth or responsibility and, similarly, an assessment which may be made available to third parties to a greater or lesser extent (e.g. to other banks or financial institutions within the same capital group) is not subject to the same protection that is afforded personality interests. While it does not follow from a credit score that someone is a 'rouge', a poor credit score may suggest that the person is a 'loser' or an 'untrustworthy individual'. Thus, the latter does profoundly interfere with the personality interests of such individual.

Yet, another issue is the question of whether a bank that uses AI algorithms to assess customer creditworthiness should treat a negative debt score as a professional secret, and should also do so in relation to other financial institutions, including members of the same capital group ('Chinese walls'). Specifically, it

[18] The Act of 23 April 1964, the Civil Code (Journal of Laws of 1964, No. 16, item 93).

[19] J. Gudowski, *Art. 23 [dobra osobiste człowieka]* [Article 23 [Personality interests of a human being]] (in:) *Kodeks cywilny. Orzecznictwo. Piśmiennictwo. Tom I. Część ogólna [The Civil Code. Case Law. Legal Commentaries. Volume One. General Part]*, Warsaw, 2018.

[20] See the ruling of the Court of Appeal in Poznań of 15 November 2007, case no. I ACa 825/07, and the ruling of the Court of Appeal in Warsaw of 19 December 2016, case no. VI ACa 1603/15.

seems reasonable to do so when the assessment is carried out by artificial intelligence algorithms. In my view, intervention by the legislator is also required in this area.

6. SUMMARY

In conclusion, it should be stressed once more that Article 105a of the Banking Law is a gateway enabling banks to use **self-learning artificial intelligence algorithms** in their operations. In view of the continued development of new technologies, the use of automated systems appears to be inevitable. However, the introduction of such possibilities calls for special attention on the part of the legislator.

The use of AI in legal transactions raises a number of questions relating to the scope of such use, the rights vested in the entities whose economic position is weaker as well as the obligations of an entity using extensive technological capabilities. The Polish legislator has regulated the use of AI capabilities in the banking business in a manner that provides more questions than answers. It is also unfortunate that the result of establishing such a rudimentary regulation is that it poses a risk to the interests of bank customers who are often consumers and, therefore, persons whose economic position is much weaker.

Specifically, it is necessary to make those customers aware of how their creditworthiness is assessed and how credit risk is analysed, particularly when the use of AI algorithms is involved. As a matter of fact, the legislator omitted such an obvious issue as the obligation to inform the borrower of these matters in the Banking Law. To protect the interests of the customers of banking institutions, it should also be borne in mind that it may also become necessary to introduce provisions on algorithm operation transparency. This, in turn, may interfere with business secrets.

A real threat is not the use of artificial intelligence as such, but the lack of appropriate legal regulation that would impose standard procedures for the use of new technologies. As it moves forward, technological advancement should be accompanied by relevant legal regulation. In a technical sense, statutory delegation should probably be sufficient to regulate the issue in a fairly quick and flexible manner by means of secondary legislation.

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Katarzyna Czerwińska-Koral
University of Silesia in Katowice, Poland
e-mail: katarzyna.czerwinska-koral@us.edu.pl
ORCID: 0000-0001-9079-5297

DOES RUNNING A FAMILY FARM BY AN INDIVIDUAL FARMER ON THE BASIS OF THE PROVISIONS OF THE ACT OF 11 APRIL 2003 ON SHAPING THE AGRICULTURAL SYSTEM CONSTITUTE MANAGEMENT WITHIN THE MEANING OF MANAGEMENT SCIENCE?

Abstract

The purpose of the article is to determine whether running a family farm within the meaning of the provisions of the Act on shaping the agricultural system has the characteristics of an ordinance within the meaning of the science of ordinance. In addition, by characterizing the term "running a family farm", the purpose is also to illustrate its distinguishing features, taking into account the specific subject of management – a family farm, specific features of the managing entity – an individual farmer and the unique impact of the external environment (specific legal provisions) on the manager's decision-making process.

The article is an attempt to apply the concept of management as it is understood in the science of ordinance in agricultural law, and this is to a specific type of property – a family farm. The dogmatic-legal and theoretical-legal methods were used. The study consists of the following parts: introduction; analysis of the concept of management and characteristics of the manager, analysis of the concept of running a family farm and the

characteristics of the entity running the family farm and the impact of the environment on the farmer's decisions; summaries where conclusions were formulated.

Findings: running a family farm is a special type of management in the understanding of management sciences.

In the legal literature, so far no attempt has been made to implement the concept of ordinance into agricultural law and the characteristics of this type of management. Taking into account the current literature reports, the author wishes to enrich the existing scientific achievements on the ordinance and to signal her contribution to the development of the discipline of management sciences and law.

KEYWORDS

management, act on shaping the agricultural system, family farm, running a family farm, individual farmer, environment

SŁOWA KLUCZOWE

zarządzanie, ustawa o kształtowaniu ustroju rolnego, gospodarstwo rodzinne, prowadzenie gospodarstwa rodzinnego, rolnik indywidualny, otoczenie

1. INTRODUCTION

There is no uniform term for 'management' [*zarządzanie* in Polish] in management science. However, by 'management' we typically mean a set of activities focused on an organisation and encompassing planning, decision-making, organising, and leading which are aligned with the goals of that organisation.

The language of the Agricultural System Structuring Act of 11 April 2003[1] does not employ the term *zarządzanie* (which is 'managing' or 'management' in English); instead, it uses the phrase *prowadzenie gospodarstwa rodzinnego* ('running a family farm'). That leads to a dilemma – can the term 'management' be used in agricultural law and can we talk about the 'management' of an agricultural holding (*zarządzanie gospodarstwem rolnym* in Polish)?

The purpose of this paper is to determine whether or not 'running' a family farm has the features of 'management' within the meaning of management science. The next purpose is to characterise the actions undertaken by the person running a family farm in order to present their special features. All that is to clar-

[1] Consolidated text in Journal of Laws.

ify the special features of a property/organisation such as an agricultural holding (a family farm).

2. THE TERM 'MANAGEMENT'

There are many definitions of 'management' in management science. According to R.W.Griffin, management is a set of activities, including: planning and decision-making, organizing, leading (i.e. leading people), and controlling directed at an organization's resources (human, financial, physical, and information) with the aim of achieving organizational goals in an efficient and effective manner.[2] According to another view, management is about ensuring (creating in a deliberate manner) conditions for an organisation to operate as assumed, that is for the organisation to pursue its mission, achieve its goals as part of the mission and maintain the necessary level of consistency that allows it to survive, that is to stand out from the surroundings, and to develop, or pursue its mission and goals in the future.[3] Therefore, management is an action aimed at causing the functioning of things, organisations or reports, in accordance with the goals of the manager.[4] In any case, management is a professional leadership activity that takes place in an organisation (an institution), regardless of its legal form, size, spatial structure or type of activity, that has a common goal or common goals, and the organisation being managed has the necessary human, material and immaterial resources which are used for the achievement of its goals.[5]

Management is a deliberate, informed, and systematised process. It should start with the identification of problems and setting goals, followed by planning the methods for their achievement, organising, decision-making, communicating, leading and motivating people, as well as control.[6]

There is no definition of 'management' in legal provisions. In legal literature, 'management' is understood as repeated activities performed by a management entity by way of making decisions concerning the activities of the subordinate management entities.[7] The term 'management' in law is typically connected with the management of real estate (assets, resources).

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[2] R.W. Griffin, Podstawy zarządzania organizacjami, Warszawa 2005, p. 6.

[3] Cz. Sikorski, *Nauka o zarządzaniu*, Łódź 2009, p. 22.

[4] B. Gliński, *Mała encyklopedia ekonomiczna*, Warszawa 1974, p. 929.

[5] S. Sudol, *Nauki o zarządzaniu. Pojęcie zarządzania, zakres i granice nauk o zarządzaniu, ich miejsce w klasyfikacji nauk oraz subdyscypliny*, Warszawa 2012, pp. 100-101.

[6] M. Kowalska, *Ewolucja teorii zarządzenia*, "Wiedza Obronna" 2019, Vol. 266-267, No. 1-2, p. 176.

[7] E. Bończyk-Kucharczyk, (in:) B. Baran (ed.), *Nieruchomości. Zagadnienia prawne i zarząd*, Warszawa 2013, p. 662.

Management of real estate is the right of the owner (co-owner) and the duty arising from Article 200 of the Polish Civil Code. The owner may choose to manage it on its own or to entrust the management to a professional manager (administrator). In view of the multitude of owners in situations envisaged under special provisions, there may appear competent bodies that will perform the acts of management.

Article 185(1) of the Real Estate Administration Act of 21 August 1997[8] refers to taking actions and making decisions as manifestations of management.

3. FEATURES OF THE MANAGING ENTITY

When looking at 'management' from the entity perspective, we will answer the question of who manages [an organisation] and what are the features of the manager. That is because management is a deliberate, informed, and systematised process run by people who have been granted adequate decision-taking authorities and scopes of responsibilities.[9] By fulfilling leadership functions, the body managing an organisation (a manager) has an impact on its functioning and development.[10] A management body is an entity that is equipped with managerial competencies. Managerial competencies are special qualities that a management body should have. In other words, the activities undertaken by a manager should be efficient and effective. Efficiency means doing things in the right way or performing tasks in the correct and smart way without unnecessary waste (minimum use of resources that allows the organisation to achieve its goals). Effectiveness means doing the right things or performing the right tasks that lead one to achieve well-set goals (acting successfully). Good management is about being efficient and effective at the same time. 'Organisational effectiveness' is defined as the organisation's ability to adapt to changes taking place in the environment, in an ongoing and strategic manner, and to use its resources in a productive and economical manner to achieve the adopted structure of goals.[11]

The ability to shape, in a conscious and rational manner, the dependence between the elements of the organisational system, the system itself and its environment which is understood as a complex system of multiple trends, events and

[8] Consolidated text in the Journal of Laws of 2023, items 344, 1113, 1463.

[9] M. Kowalska, *Ewolucja teorii zarządzenia*, "Wiedza Obronna" 2019, Vol. 266-267, No. 1-2, p. 176.

[10] S. Sudol, *Nauki o zarządzaniu. Pojęcie zarządzania, zakres i granice nauk o zarządzaniu, ich miejsce w klasyfikacji nauk oraz subdyscypliny*, Warszawa 2012, pp. 100-101.

[11] J. Penc, *Leksykon biznesu*, Warszawa 1997, p. 100.

markets that create the context of the organisation's operations is an important feature of manager's activity.

4. RUNNING A FAMILY FARM

An agricultural holding is a special type of property. It is treated as an enterprise type both in literature and case law. Both property and enterprises (organisations) are managed. The term 'management' (*zarządzanie*) is not used in the provisions of the Agricultural System Structuring Act; instead, the Act uses the phrase *prowadzenie gospodarstwa rodzinnego*, or running a family farm (as a special type of an agricultural holding). Does 'running' a family farm mean 'managing' a family farm?

According to a dictionary of Polish language, *prowadzenie* is a noun derived from the verb *prowadzić*. *Prowadzić* in general terms means to "lead someone to a place/a destination", to result in something. Another meaning of the verb *prowadzić* is to "run something", "supervise something" or "manage something".[12]

Given the linguistic interpretation of the phrase *prowadzenie gospodarstwa rolnego* (running an agricultural holding) and the above-cited definitions of 'management', one needs to conclude that *prowadzenie gospodarstwa rodzinnego* (running a family farm) is managing it, that is leading it, making decisions concerning it and supervising it while taking into consideration specified goals.

Further on, according to the dictionary of Polish language, the term *prowadzić* together with a noun as an object means "to conduct" or "to pursue" the thing that is expressed by the object. This is an argument supporting the thesis that *prowadzenie gospodarstwa rodzinnego* (running a family farm) is actually managing it. It seems necessary to turn our attention to the management object, that is to a family farm.

The conviction that a family farm is the basic production unit in the European agriculture model is and has always been at the core of the basic assumptions behind the Common Agricultural Policy. As regards Polish regulations, Article 23 of the Constitution of the Republic of Poland reads that the family farm shall be the basis of the agricultural system of the Polish State.

A 'family farm' is understood as an agricultural holding or an organised set of assets for agricultural activity, which is run by a natural person on his/her own or together with his/her family members, and which is the basis for their livelihood.

The Agricultural System Structuring Act provides its own definition of a family farm in Article 5(1). According to that article, a family farm is an agricultural holding:

[12] M. Szymczak (ed.), *Słownik języka polskiego. Tom trzeci R-Ż*, Warszawa 1981, pp. 944-945.

1) that is run by an individual farmer, and
2) where the total utilised agricultural area is not greater than 300 hectares.

An agricultural holding is comprised by agricultural land together with forest lands, buildings or parts of buildings, equipment, and livestock if they are, or may be, an organised single economic unit, together with the rights related to the running of an agricultural holding (Article 55^3 of the Polish Civil Code).

5. PROPERTIES (ATTRIBUTES) OF A FAMILY FARM MANAGER

In the case of managing a family farm, the manager must fulfil other criteria imposed by the regulations, in addition to having general managerial competencies. A family farm shall be run by an individual farmer (Article 5 of the Agricultural System Structuring Act).

In accordance with Article 6(1) of the Agricultural System Structuring Act, an individual farmer is a natural person who is the owner, holder of the perpetual usufruct right (*użytkownik wieczysty* in Polish), owner-like possessor (*samoistny posiadacz* in Polish) or a leaseholder (*dzierżawca* in Polish) of agricultural properties with the total utilised agricultural area of under 300 hectares who has agricultural qualifications and who has resided for five years in the commune in which one of the agricultural properties which make up the agricultural holding is located, and who has run that agricultural holding in person during that time.

Therefore, a family farm may only be managed by a natural person or by natural persons who run the agricultural activity as part of an agricultural holding together (spouses, partners in a civil law partnership). Consequently, a family farm may not be run by an organisational unit, a business entity, a commercial partnership, the State Treasury, the National Support Centre for Agriculture (KOWR), the National Property Stock (KZN) or local government units. It is assumed that a natural person runs an agricultural holding in person if:

a) s/he works in that agricultural holding,
b) s/he makes all the decisions concerning running agricultural activity on that farm (Article 6(2)(1)).

Running an agricultural holding in person means that "a natural person works on that farm and makes all decisions concerning the agricultural activity run on that farm" (the Supreme Court Ruling of 20 September 2018, IV CSK 455/17, LEX No. 2577319). The fact that a farm is run by a farmer in person should be evident [...] in that all the decisions concerning the farm functioning are made by the farmer who concludes contracts with suppliers, off-takers, banks, insurers, and who also himself/herself works on that farm. What is more, the farmer should be directly and constantly involved in the activities that are

part of the production activity pursued as part of that agricultural holding and management of that farm.

Introducing the requirement of running an agricultural holding by the manager in person is to eliminate a situation where agricultural land is purchased by people whose personal and professional lives are outside agriculture, and who consider purchase of land to be an investment. Therefore, it is about ensuring that agricultural land remains in the hands of people who are real farmers and who see their future in running a family farm.

Working on a family farm is another feature of the person managing a family farm, that is performing, directly, in person and on a regular basis, activities that are functionally related to the production operations in the agricultural holding, such as ploughing, sowing, harvesting, feeding animals or operating agricultural machinery. The farmer should have all decision-taking powers in regard to decisions concerning the manner and the direction of operations on the family farm. Those powers may not be transferred onto any other person (be it under a contract or by way of an informal arrangement). A leaseholder of agricultural property (*dzierżawca nieruchomości rolnych* in Polish) may become an individual farmer (Article 693ff of the Polish Civil Code). By contrast, the conditions outlined in Article 6(1) of the Agricultural System Structuring Act are not fulfilled if the owner has leased the entire farm, or nearly all agricultural properties that are a part of that farm, to another person. This applies, as appropriate, to other cases where the farm or the properties are given in dependent possession (*posiadanie zależne*). "The mere possession or ownership of an agricultural holding may not be classified as running that agricultural holding unless it involves pursuing an agricultural activity which also includes making decisions concerning the agricultural activity pursued on that farm" (the Provincial Administrative Court in Poznań ruling of 24 April 2014, II SA/Po 93/14, LEX No. 1500398). However, the farmer may employ other people on the farm under any legal basis of employment and for any period.[13] The person running a farm may also give powers of attorney to other individuals who will represent him/her when taking legal acts relating to the running of the agricultural holding; however, granting such power of attorney must not lead to delegating all decision-taking powers onto such individuals (particularly of key nature for the farm).

Article 6(1) of the Agricultural System Structuring Act provides for a separate criterion, notably an individual farmer must have agricultural qualifications; that criterion is meant to link the individual qualities of a natural person with the agricultural activity by requiring that the person is educated in agriculture or has worked in agriculture for a specific number of years.

In addition to other special qualities of a person managing a family farm, the legislator also requires that an individual farmer should reside for at least five

[13] T. Czech, *Kształtowanie ustroju rolnego. Komentarz*, Warszawa 2022, pp. 399-400.

years in the commune in which one of the agricultural properties that make up his/her agricultural holding is located. The domicile criteria were introduced to prevent a situation where individuals would evade the provisions of the Agricultural System Structuring Act and, for example, purchase agricultural properties for investment purchases.

6. IMPACT OF THE EXTERNAL ENVIRONMENT

In the case of an individual farmer who runs a family farm, the external environment has a special impact on the decisions made as part of management. The agricultural business is surrounded, in particular, by formal institutions, that is legal acts and regulations, and institutions that are organisations, or authorities of all types and at all levels.[14]

In the case of family farm management, formal institutions include, in particular, the preamble and the goals set (Article 1 of the Agricultural System Structuring Act) to define the strategies followed by the State to influence the agricultural business in that area, notably:

- improving the protection and development of family farms,
- ensuring adequate management of agricultural land in the Republic of Poland,
- concern for ensuring food security of the citizens,
- supporting sustainable agriculture pursued in accordance with the environment protection requirements and contributing to the development of rural areas,
- improving the structure of agricultural holdings in terms of their area,
- combating excessive concentration of agricultural properties,
- ensuring that agricultural activity in agricultural holdings is pursued by individuals who have the relevant qualifications,
- supporting the development of rural areas,
- implementing and employing instruments for agriculture support, and
- an active agricultural policy of the State.

Apart from the issues of any economic patriotism which is understood as any actions that support the national economy by the state institutions, public administration or local government units, but also by entrepreneurs' organisation or even individual companies, one should also keep in mind that there are specific legal instruments that prompt individual farmers to make specific decisions and that are subordinated to the achievement of the above goals. Those include:

[14] I. Nurzyńska, *Rola instytucji w procesie promowania i rozwoju przedsiębiorczości na terenach wiejskich*, "Wieś i rolnictwo" 2011, No. 31, p. 112.

- special principles of purchasing agricultural properties,[15]
- the duties of an agricultural property buyer,[16]
- special principles of disposing of agricultural properties (shares and participations).[17]

7. CONCLUSION

The fact that the legislator did not explicitly use the term 'management' in regard to a family farm in the Agricultural System Structuring Act does not mean that 'running' a family farm is not 'management'. The analysis performed hereinabove leads to a clear conclusion that running a family farm, as referred to in the Agricultural System Structuring Act, is 'management' within the meaning of management science. There are several arguments supporting that thesis. The term 'management' in management science is most frequently understood as acting in such a way as to cause an organisation's functioning in line with the goals of the manager. Given the linguistic interpretation of that phrase, *prowadzenie gospodarstwa rodzinnego*, or 'running a family farm', is about leading a farm and making decisions that concern it.

At the same time, managing a family farm is a special type of management. It is special due to the very object of management, that is the family farm which, as was demonstrated herein, is a unique type of property, a unique type of an agricultural holding. Next, managing a family farm is special due to the specific qualities of the managing entity, that is an individual farmer. Finally, managing (or, running) a family farm is certainly unique due to the exceptionally high impact

[15] Only an individual farmer may acquire an agricultural property, unless the Act states otherwise. The area of the agricultural property to be purchased and the area of the agricultural properties that make up the family farm of the purchaser may not be larger than 300 hectares of utilised agricultural area (Article 2a(1) of the Agricultural System Structuring Act).

[16] An agricultural property buyer is required to run an agricultural holding that comprises the newly acquired agricultural property for at least 5 years from the date of purchasing that property, and where the agricultural property is bought by a natural person, the person needs to run that agricultural holding in person. During the period, referred to in section 1, the property acquired may not be disposed of or given into possession of other entities (Article 2b).

[17] Where an agricultural property is sold, the leaseholder and KOWR have the pre-emptive right (Article 3), and where an agricultural property is purchased as a result of 1) entering into a contract other than a sales contract or 2) a unilateral legal act or 3) a decision of a court of law, a public administration body or a decision of a court of law or an enforcement authority pursuant to provisions on enforcement proceedings or 4) any other legal act or any other legal event, the National Centre acting for the State Treasury may make a statement regarding the acquisition of that property against the payment of the price for that property (Article 4).

of the external environment (legal regulations, particularly those contained in the Agricultural System Structuring Act) on the manager's decision-making process.

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Aleksandra Główczewska
Nicolaus Copernicus University in Toruń, Poland
e-mail: apensz@umk.pl
ORCID: 0000-0002-3898-8822

REFERRAL VERSUS SERVICE OF AN ADMINISTRATIVE DECISION TO A NON-PARTY TO THE CASE. CONSIDERATIONS AGAINST THE BACKGROUND OF THE ADMINISTRATIVE COURTS' CASE LAW

Abstract

The main purpose of the article is to highlight the differences between the concepts of referral and service of an administrative decision to a non-party of an administrative proceeding. In this context, it is particularly important to analyse the case law of the administrative courts, mainly the recent ones, and the views of the doctrine. The main issues relating to both concepts concerning the party of an administrative proceeding have been indicated. The article also concerns the service of a decision to a deceased person. The consequences of an improper service of an administrative decision have been discussed as well.

KEYWORDS

administrative decision, party to administrative proceedings, referral of a decision, service of a decision, annulment of a decision

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decyzja administracyjna, strona postępowania administracyjnego, przekazanie decyzji, doręczenie decyzji, stwierdzenie nieważności decyzji

1. INTRODUCTION. THE CONCEPT OF A PARTY IN ADMINISTRATIVE PROCEEDINGS

A party in administrative proceedings is a key concept that continues to be a source of deliberation and dispute in doctrine and case law. Given the relationship of the subject of this paper to the concept referred to, it is necessary to discuss the key issues concerning the party and to highlight the elements of this concept that will be important to indicate the differences between addressing and serving a decision to a person who is not a party to the case.

A party is one of the participants in the administrative process, in which it owns certain rights. At the same time, according to the principle of active participation of a party in administrative proceedings, the public administration body is obliged to ensure this active participation of a party at each stage of the proceedings, in accordance with the content of Article 10 of the Code of Administrative Procedure (hereinafter: CAP).[1] The body conducting the proceedings should therefore, first of all, find and notify of the commencement of the proceedings all entities that have the status of a party to the proceedings (Article 61 § 4 of the CAP), and then enable them to actively participate in all activities in the proceedings. This obligation also entails informing the party in good time about the procedural activities taking place.[2] Importantly, when a party has appointed a representative in the case, this obligation must be fulfilled with regard to the representative, who should be informed and allowed to participate in all procedural activities.[3] It remains a truism, however, that where a party's attorney or legal representative is present in administrative proceedings, that party does not become a party to the proceedings. This will be significant in the context of examples of misdirected decisions. It is also an important fact that a party is not obliged to exercise the right of active participation and thus to take part in the pending proceedings. A public administration body is obliged to provide an

[1] Act of 14 June 1960 Code of Administrative Procedure, i.e. OJ 2021.735 as amended, hereinafter: CAP.

[2] Judgment of the SAC of 12 September 2000, III SA 1082/00, LEX no 47981.

[3] Judgment of the SAC of 27 May 1998, I SA/Kr 827/97, LEX no. 33615.

opportunity for a party to exercise its right, but it is not entitled to require a party to exercise that right.[4]

A party in administrative proceedings is, according to Article 28 of the CAP, anyone whose legal interest or obligation is affected by the proceedings or who demands an action of the authority on account of his/her legal interest or obligation.[5] This distinction refers to parties in proceedings initiated *ex officio* or at the request of a party. A. Wróbel points out that a party is a concept occurring on the grounds of procedural law and does not belong to the category of substantive law.[6] Establishing and finding all parties in the proceedings is the duty of the public administration body. It needs to be emphasised that in the context of the discussed issue of directing a decision to a person who is not a party to the case, which is one of the prerequisites for declaring a decision invalid regulated in Article 156 § 1(4) of the CAP, a party is, as indicated by the Supreme Administrative Court (hereinafter: SAC) in 1999, "not only a party to ordinary proceedings concluded with a questioned decision, but also anyone whose legal interest or obligation may be affected by the consequences of declaring a decision invalid. This is a consequence of the supervisory authority recognising a new case in relation to the one settled by the contested decision, and therefore the way is then opened for all parties to these proceedings to verify such a decision".[7] Similarly, in 2010 the SAC stressed that "there does not always have to be an identity between the subjects in ordinary proceedings and in proceedings whose subject is the annulment of a decision, nevertheless it is the subject of the decision under review that determines the circle of subjects who are parties to both ordinary proceedings and proceedings conducted under the so-called nullity procedure".[8] Therefore, it should be indicated after B. Adamiak, that in proceedings for the annulment of a decision, a party is "everyone whose legal interest or duty is affected by the administrative decision which he or she demands to verify or which is subject to verification in proceedings initiated *ex officio*".[9] It will, therefore, not only be a party to the main proceedings, but also all those whose legal interest or obliga-

[4] Judgment of the SAC of 7 May 1999, I SA/Wr 48/97, LEX no. 37244; judgment of the SAC of 1 July 1999, IV SA 595/99, LEX no. 47888.

[5] As the SAC pointed out: "The attribute of party is not demonstrated (...) by a person who bases his/her participation in administrative proceedings on the need to protect or satisfy the public interest. This type of action may be taken within the institution of complaints and motions". Judgment of the NSA of 27 September 1999 IV SA 1285/98, LEX no. 47898.

[6] A. Wróbel in: M. Jaskowska, M. Wilbrandt-Gotowicz, A. Wróbel, *Komentarz aktualizowany do Kodeksu postępowania administracyjnego,* LEX/el. 2022, Art. 28; cf. the judgment of the Voivodship Administrative Court (hereinafter: VAC) in Gliwice of 9 July 2020, III SA/Gl 61/20, LEX no. 3052541.

[7] Judgment of the SAC of 1 December 1999, IV SA 2520/98, LEX No 48669.

[8] Judgment of the SAC of 23 September 2010, II OSK 1399/09, Lex no. 746509.

[9] B. Adamiak, *Przedmiot postępowania w sprawie stwierdzenia nieważności decyzji administracyjnej,*, "Państwo i Prawo" 2001, No. 8, p. 29.

tion is affected by the consequences of the annulment of the decision. In doing so, they do not have to be among those involved in the earlier main proceedings.

In view of the above, the key to determining whether a decision has been addressed to a person who is not a party to the case is to identify the subject about whose rights or obligations, due to his/her legal interest or duty, should have been adjudicated and decided upon in the administrative decision. P. Przybysz rightly emphasises that the decisive factor is whose rights and obligations were adjudicated upon. "The content of the ruling determines to whom a given ruling is addressed".[10]

The above considerations are important in order to achieve the aim of this study, i.e. to determine the differences between the institutions of addressing and serving an administrative decision to a non-party in a case. Thanks to the references to examples from the doctrine and, above all, to the jurisprudence of administrative courts, including the most recent one, the key elements determining the occurrence of the premise of Article 156 § 1 point 4 of the CAP will be indicated.

2. REFERRAL OF A DECISION TO A NON-PARTY IN A CASE

Defining the referral of a decision to a given subject is essential for the subsequent distinction of this concept from the service of a decision. Addressing a decision can be understood as a ruling on the rights and obligations of a given entity. As indicated by the NSA, addressing a decision to a subject means "a situation in which the rights and obligations of a designated entity are determined by a decision".[11] Similarly, the Voivodship Administrative Court (hereinafter: VAC) in Warsaw ruled that it is: "the imposition of obligations on a particular person or the granting of certain rights".[12] In other words, a referral can be equated with indicating a specific entity as an addressee of a decision contained in an issued administrative decision whose legal interest or obligation is affected by a given administrative act. It is, therefore, incorrect to say that referral and service of a decision can be conflated. The delivery of a decision will only be "the performance of an action related to the implementation of the obligation to deliver the decision to the parties".[13]

[10] P. Przybysz, *Kodeks postępowania administracyjnego. Komentarz aktualizowany*, LEX/el. 2022, Art. 156; cf. the judgment of the SAC of 25 August 2010, II OSK 1324/09, LEX no. 737703.

[11] Judgment of the SAC of 14 June .2012, II OSK 484/11, LEX No 1252085; judgment of the SAC of 22.11.2018, I OSK 4034/18, LEX No. 2587930; judgment of the SAC of 5 November 2021, I OSK 3135/19, LEX No. 3279085.

[12] Judgment of the VAC in Warsaw of 1 June 2017, VII SA/Wa 2214/16, LEX no. 2314374.

[13] Judgment of the SAC of 21 January 2020, I OSK 1407/18, LEX no. 2977002.

The essence of directing a decision to a specific entity is crucial for establishing the premise for the annulment of a decision under Article 156 § 1 point 4 of the CAP. This premise occurs when the decision on rights and obligations contained in an administrative decision concerns a person who is not a party to the case. The decision thus determines the rights and obligations of a subject other than the one who has a legal interest in the case.[14]

In analysing the above considerations, it is worth pointing out some examples given in the literature and case law that may be considered as directing a decision to a non-party to the case. Reference is made, *inter alia*, to:[15]

1) the designation as an addressee of the decision of a person with a function in the organisational structure of the entity concerned, instead of the entity that was a party to the proceedings (e.g. the president of the cooperative rather than the cooperative itself);
2) ruling on the rights and obligations of the authority and not the legal entity that was a party to the proceedings;
3) addressing a decision to a person who is not a party to the proceedings, which, however, does not lead to the possibility of annulling an administrative decision when the proceedings have been conducted against a competent entity and this is apparent from the case file;[16]
4) referring the decision to the legal representative or agent of the party.[17]

On the other hand, an incomplete or incorrect indication of the addressee of the decision cannot be considered as addressing the decision to a person who is not a party. These errors should be considered as possible to be supplemented or corrected by rectification (Articles 111-113 of the CAP).

An exceptional case, which is only worth signalling, is that of addressing a decision to a deceased person. In the jurisprudence of the administrative courts, the view is well established that a decision on the rights and obligations of a deceased person constitutes a gross violation of the law within the meaning of Article 156 § 1(2) of the CAP. This is connected with the cessation of a natural person's legal capacity upon his/her death.[18] It is not possible to initiate or conduct

[14] Judgment of the SAC of 5 March 2013, II OSK 2079/11, LEX no. 1305541; judgment of the VAC in Poznań of 7 December 2021, IV SA/Po 891/21, LEX no. 3286504.

[15] P. Przybysz, *op. cit*, Art. 156; cf. M. Michalik, *Strona w postępowaniu w sprawie stwierdzenia nieważności decyzji administracyjnej*, "Roczniki Administracji i Prawa" 2014, n. 14, No. 2, p. 173.

[16] Cf. judgment of the SAP of 19 January 2007, I OSK 350/06, LEX no. 291195; judgment of the SAP of 24 May 2007, II GSK 400/06, LEX no. 351135; judgment of the VAC in Gdańsk of 30 September 2021, III SA/Gd 629/21, LEX no. 3240683; judgment of the VAC in Łódź of 16 April 2021, II SA/Łd 54/21, LEX no 3185171.

[17] Cf. judgment of the VAC in Gdańsk of 30 September 2021, III SA/Gd 629/21, LEX no. 3240683.

[18] Judgment of the SAP of 8 October 2015, I OSK 29/14, LEX No. 1985886; judgment of the SAP of 30 November 2016, I OSK 132/15, LEX No. 2177589; judgment of the SAP of 18 May 2020,

administrative proceedings in relation to such a person or to conclude them by issuing an administrative decision in which their rights and obligations are decided.[19] The fact that the public administration body that conducts administrative proceedings in the case[20] did not know about the party's death is also irrelevant. It should be expected that the authority at any stage of the proceedings will be able to establish the circle of entities that have a legal interest in the administrative case.[21] In addition, addressing a decision to a deceased person is a qualified defect that is not subject to convalidation.[22] In the above context, it is worth adding, following the SAP, that "it is a gross violation of the law to impose obligations or grant rights to a deceased person by an administrative decision and not to deliver the decision to a deceased person who is not the addressee of the decision".[23]

At the same time, the jurisprudence is of the opinion that a gross violation of law does not take place, if apart from the deceased person, also other entities were parties to the given proceedings, or legal successors took the place of the deceased person.[24] This may be the case when it results from the settlement of an administrative decision that the addressee of the decision may also be an heir of the party, who also participated in the proceedings or stepped in the place of the party even before the decision in the case was issued. It should be borne in mind, however, that pursuant to the wording of Article 30 § 4 of the CAP, this may take place only in cases involving transferable and inheritable rights. Additionally, improper findings of the authority made after the death of a party depriving the successors of active participation in the proceedings could constitute grounds for resumption of the proceedings pursuant to Article 145 § 1 item 4 of the CAP.[25]

II OSK 2341/19, LEX No. 3052256; judgment of the SAP of 18 June 2020, I OSK 2193/19, LEX No. 3052013.

[19] P. Przybysz, *op.cit,* article 156.

[20] Judgment of the VAC in Warsaw of 8 January 2013, I SA/Wa 1316/12, LEX no. 1274146; judgment of the VAC in Warsaw of 31 January 2018, IV SA/Wa 2498/17, LEX no. 2744177; judgment of the VAC in Gliwice of 21 January 2022, II SA/Gl 659/21, LEX no. 3302951; judgment of the VAC in Gliwice of 24 March 2022, II SA/Gl 1604/21, LEX no. 3331281; cf. T. Brzezicki, Ł. Przystupa, *Konsekwencje skierowania decyzji o warunkach zabudowy i zagospodarowania terenu do osoby zmarłej niebędącej inwestorem*, "Studia Prawnoustrojowe" 2021, No. 54, pp. 82-84.

[21] Judgment of the SAC of 22 January 2014, I OSK 708/12, LEX no. 1452172.

[22] Judgment of the SAC of 22 January 2014, I OSK 708/12, LEX no. 1452172; judgment of the SAC of 17 March 2022, I OSK 987/21, LEX no. 3329880; judgment of the VAC in Gliwice of 24 March 2022, II SA/Gl 1604/21, LEX no. 3331281.

[23] Judgment of the SAC of 18 May 2020, II OSK 2341/19, LEX no. 3052256.

[24] Judgment of the SAC of 18 December 2020, I OSK 1589/19, LEX No 3121809; judgment of the SAC of 18 June 2020, I OSK 2193/19, LEX No 3052013; judgment of the SAC of 18 June 2020, I OSK 2193/19, LEX No. 3052013; judgment of the WSA in Szczecin of 10 October 2019, II SA/Sz 595/19, LEX No. 2742321.

[25] T. Brzezicki, Ł. Przystupa, *op. cit.,* pp. 86-87.

3. NOTIFICATION OF A DECISION TO A PERSON WHO IS NOT A PARTY TO THE CASE

Addressing a decision to a person who is not a party to the proceedings must be clearly distinguished from the service of a decision, understood as the delivery to a party of the original signed act issued by an administrative authority.[26] This will also be defined as the externalisation of the decision issued by the public administration body.[27] At the same time, there is no doubt that both referral and delivery of an administrative decision should be distinguished from its issuance, which consists in drawing up and signing the decision (in written or electronic form) in accordance with the elements required by the provisions of the CAP.[28]

As a rule, the decision is delivered to the parties in writing (or in the form of an electronic document), however, as stipulated in Article 109 § 2 of the CAP, in the cases listed in Article 14 § 2 of the CAP, the decision may be announced to the parties orally. This refers to situations in which the interest of the party argues in favour of such a solution and the legal provision does not prevent it. The content and significant motives of such a settlement should be recorded by an employee of the administrative body in the file in the form of a protocol or a note signed by the party. The delivery itself is very important, both from the point of view of the party to the proceedings and the public administration body. The issued administrative act produces procedural effects from the date of delivery or announcement to the party. Therefore, the authority is bound by the issued decision from that moment (Article 110 § 1 of the CAP). From the date of delivery of the administrative decision to the party, the time limits for lodging appeal measures start to run (respectively: Article 129 § 2 of the CAP or Article 53 § 1 of the CAP[29]).

The condition for declaring a decision invalid under Article 156 § 1(4) of the CAP does not occur when the decision contained in an administrative decision

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[26] Order of the SAC of 8 May 2014, II GSK 987/14, LEX no. 1467684; judgment of the VAC in Warsaw of 8 June 2018, VI SAB/Wa 62/17, LEX no. 2557270; to the contrary: judgment of the Supreme Court of 12 December 2003, III RN 135/03, LEX no. 116127 (critically reviewed. See P. Kardasz, *Komentarz do art. 109 k.p.a.,* (in:) *Kodeks postępowania administracyjnego. Komentarz do art. 61–126*, M. Karpiuk, P. Krzykowski, A. Skóra (eds.), Olsztyn 2020, p. 313). At the same time, it is stated that failure to deliver the original decision prevents service from being considered effective. Judgment of the SAC of 5 February 2020, I OSK 753/19, LEX no. 2825341. The correct delivery (or announcement) of a decision concludes the decision-making process and settles the case within the meaning of Article 104 of the CAP. The issuance, announcement and delivery of an administrative decision are three separate procedural acts. See E. Frankiewicz, *Wydanie a doręczenie decyzji administracyjnej*, "Państwo i Prawo" 2002, No. 2, pp. 72, 79-80; also: judgment of the VAC in Rzeszów of 28 November 2012, II SA/Rz 895/12, LEX no. 1596490.

[27] P. Kardasz, *op. cit.,* pp. 310-311.

[28] *Ibidem.*

[29] Act of 30 August 2002. Law on proceedings before administrative courts, i.e. Journal of Laws of 2022, item 329 as amended.

is correct, addressed to a competent person who is a party, and the decision has been delivered to a person who is not a party to the proceedings. The institution of service is procedural in nature and cannot affect the validity of an administrative decision. This was also indicated by the NSA in a 2013 judgment, emphasising that "the invalidity of proceedings will, therefore, not occur in a situation where the administrative body has resolved by a decision the rights and obligations of a party to the proceedings, however, it has delivered the decision to another entity not having a legal interest. This is due to the fact that the issue of service of a decision (its introduction into legal circulation) is exclusively procedural in nature. In view of the above, the erroneous determination of the circle of entities to whom the decision is delivered may be considered only in the context of a violation by the administrative body of Article 109 § 1 and 2 of the CAP".[30]

In this context, it would be necessary to analyse the effects of the delivery of an administrative decision, as well as the delivery of this act to a person who was not a party to the proceedings. First of all, pursuant to the content of Article 109 § 1 and § 2 of the CAP, the moment of delivery (in exceptional cases of announcement) of an administrative decision to a party is at the same time the moment when the decision is introduced into legal circulation.[31] According to the content of Article 110 § 1 of the CAP, a decision is binding for the public administration body which issued it.[32] This is to ensure that the authority does not make any arbitrary changes to the issued decision without informing the party. Supplementation or rectification may take place under the procedure of rectification of the decision.[33] However, the decision may be repealed or changed only under the procedure of appealing against the decision by the party.[34] In the case of binding a delivered decision by a party to administrative proceedings, it is worth noting the presence of two views. In doctrine and case law, the position is present that a party is bound by an administrative decision, just like a public administration body, from the moment of its delivery or announcement.[35] This effect is connected

[30] Judgment of the Supreme Administrative Court of 5 March 2013, II OSK 2079/11, LEX No. 1305541; cf. judgment of the Supreme Administrative Court of 25 August 2010, II OSK 1324/09, LEX No. 737703; judgment of the Supreme Administrative Court of 15 September 2011, II OSK 1347/10, LEX No. 1069001; judgment of the Supreme Administrative Court of 5 March 2013, II OSK 2079/11, LEX No. 1305541.

[31] Judgment of the WSA in Białystok of 26 September 2019, II SAB/Bk 65/19, LEX No. 2726104; judgment of the WSA in Warsaw of 15 May 2018, VI SA/Wa, LEX No. 2557583.

[32] Whether the decision is correct or defective is irrelevant to the question of whether the authority is bound by the decision. A Wróbel (in:) M. Jaskowska, M. Wilbrandt-Gotowicz, A. Wróbel, *op.cit,* Art. 110.

[33] Judgment of the WSA in Łódź of 5 February 2008, II SA/Łd 1024/07, LEX No. 510950; judgment of the NSA of 6 February 2019, I OSK 4102/18, LEX No. 2630307.

[34] P. Przybysz, *op.cit.,* Article 110.

[35] B. Adamiak, J. Borkowski, *Postępowanie administracyjne i sądowoadministracyjne*, Warsaw 2018, p. 319; judgment of the NSA of 6.March 2018, I OSK 2523/17, LEX no. 2475470; judgment of the WSA in Warsaw of 27 March 2018, I SA/Wa 1769/17, LEX no. 2560488.

with the possibility for a party to challenge a served administrative decision.[36] On the other hand, it is pointed out that the binding of a party to a served administrative decision occurs only at the moment when the decision becomes final.[37]

The effect of a defective delivery of an administrative decision which was, however, addressed to the correct entity will not invalidate that decision. Here, nevertheless, it would also be appropriate to analyse several cases appearing in the decisions of the administrative courts. Firstly, when an administrative decision has not been delivered to the party's own hands, who has not had an opportunity to become acquainted with the act in due time, but the delivery may be deemed effective within the meaning of the provisions of the CAP (e.g. delivery against a receipt to an adult household member – Article 43, or double advice letter – Article 44 of the CAP). In such a situation, defects in the service of the decision may affect the assessment of whether the party has observed the time limit for lodging an appeal, which, however, in the case of making it probable that the party is not at fault in the failure to do so, may be a premise for the application of the institution of reinstatement of the time limit. Still, incorrect delivery may not lead to a finding that an appeal is inadmissible by the party.[38] It should be emphasised, however, that in the above situation, the service must be deemed effective and the presumption under Article 44 of the CAP cannot be rebutted.[39]

Secondly, it is necessary to consider the case in which the service cannot be considered effective and the party has the right to request the resumption of proceedings pursuant to Article 145 § 1(4) of the CAP. A case in which a party requested the service of a decision in electronic form, which was not taken into account by the authority, may be cited here. As the SAP pointed out: "an attempt to serve a decision in a traditional manner, i.e. by post, in a situation where the addressee requested service in electronic form, results in the fact that, in the absence of a receipt, the authority cannot invoke the fiction of service (...). The authority has no possibility to waive the electronic delivery indicated by the party".[40] The SAP also points out that "deprivation of a party's participation in the proceedings is also deprivation of participation in decisive actions, and therefore includes cases where a party has not been served with a decision".[41] The running of the time limit for requesting the resumption of proceedings, pursuant to Article 148 § 2 of the CAP, begins on the date on which a party becomes aware of the

[36] Judgment of the WSA in Warsaw of 28 February 2020, I SA/Wa 1615/19, LEX no. 3085548.

[37] A. Krawczyk (in:) *Kodeks postępowania administracyjnego. Komentarz*, W. Chróścielewski (ed.), Z. Kmieciak, Warsaw 2019, Art. 110, LEX; judgment of the WSA in Szczecin of 10 May 2019, II SA/Sz 1224/18, LEX no. 2676568.

[38] Judgment of the SAC of 8 May 2009, ref. II OSK 700/08, LEX no. 547178; judgment of the SAC of 1 September 2015, ref. II OSK 691/15, LEX no. 1987301; judgment of the VAC in Gdańsk of 16 January 2018, I SA/Gd 1541/17, LEX no. 2432622.

[39] Judgment of the VAC in Gliwice of 10 June 2020, II SA/Gl 1376/19, LEX no. 3022957.

[40] Judgment of the SAC of 17 December 2020, I OSK 1685/20, LEX no. 3115336.

[41] Judgment of the SAC of 27 April 2020, I OSK 144/19, LEX nr 3030683.

existence of a given decision, not the proceedings themselves, regardless of the source of this information.[42]

Finally, a situation should be indicated in which the service was erroneous due to the infringement of Article 40(2) of the CAP by delivering a letter to a party instead of his/her representative or proxy appointed in the case. The thesis presented by the SAP in 1998 that in such a situation service cannot be deemed effective[43] and remains up-to-date. Similar statements can be found in more recent judgments, where the ineffectiveness of delivery of a letter to a party by omission of his/her representative or proxy is unequivocally expressed.[44] P. Przybysz indicates that the mere delivery of a decision to a party is only informative.[45] B. Kwiatek[46] and A. Wróbel[47] claim similarly, and this view should be agreed with. For the sake of completeness, however, the judgments of the SAP, which adopt a different view on the issue in question, deserve attention and citation.[48]

4. SUMMARY

Summarising the above considerations, it should be pointed out that in the context of distinguishing directing a decision to a person who is not a party to the administrative proceedings from improper delivery, it is of key importance to determine the subject whose legal interest or obligation is affected by the proceedings, in accordance with Article 28 of the CAP. The interpretation of the circumstance leading to the annulment of a decision due to the prerequisite of Article 156 § 1(4) of the CAP cannot be considered in the context of improper delivery of an administrative decision if the addressee of the decision is determined correctly. The administrative courts take a uniform standpoint in this respect, both in older and more recent judgments. The cited views of the VAC and SAC on the issues of delivery of a decision to a person who is not a party to the case, omission of a par-

[42] Judgment of the SAC of 9 May 2018, II OSK 2628/17, LEX no. 2493240; judgment of the SAC of 18 July 2012, I OSK 1025/11, LEX no. 1405616; judgment of the SAC of 5 September 2017, II OSK 2807/15, LEX no. 2365408.

[43] Judgment of the SAC in Warsaw of 26 March 1998, II SA 157/98, LEX No. 41938.

[44] Judgment of the SAC of 23 February 2022, II OSK 2883/20, LEX no. 3333569; judgment of the SAC of 10 November 2017, I OSK 259/17, LEX no. 2464473;

[45] P. Przybysz, *op.cit.,* Article 40.

[46] B. Kwiatek (in:) *Kodeks postępowania administracyjnego. Komentarz do art. 1-60. tom I*, M. Karpiuk, P. Krzykowski, A. Skóra (eds.), Olsztyn 2020, Art. 40.

[47] A. Wróbel, in M. Jaskowska, M. Wilbrandt-Gotowicz, A. Wróbel, *op. cit.,* Art. 40.

[48] See Judgment of the Supreme Administrative Court of 26 August 2021, II OSK 18/21, LEX No. 3231973; Judgment of the Supreme Administrative Court of 26 September 2018, II OSK 125/18, LEX No. 2737931; Judgment of the Supreme Administrative Court of 17 October 2017, II GSK 4055/16, LEX No. 2404367.

ty's representative or proxy, as well as binding a party to a decision delivered, indicate divergences and non-uniformity of the jurisprudence lines. This leads to the conclusion that although these issues have been repeatedly addressed by representatives of the doctrine and administrative courts, there are still numerous and unexplained doubts which often need to be assessed *ad casum*.

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Agnieszka Grzesiok-Horosz
University of Silesia, Poland
e-mail: agnieszka.grzesiok-horosz@us.edu.pl
ORCID: 0000-0002-9810-4216

Piotr Horosz
Cracow Uniwersity of Economics, Poland
e-mail: horoszp@uek.krakow.pl
ORCID: 0000-0001-6547-5072

ON THE NEED FOR COMPREHENSIVE REGULATION OF THE RIGHT OF PERSONAL PORTRAYAL (COMMENTS ON THE INADEQUACY OF THE EXISTING LEGISLATION TO THE REALITIES OF THE INFORMATION SOCIETY ERA)

Abstract

The authors pointed to basic causes of the discrepancy and of the existing interpretative problems with personal portrayal – legislative duality, expressed in severance of the provisions on personal portrayal into two legislative acts, with doubts as to their mutual relationship, laconic and fragmented nature of the legal regime of personal portrayal and its inadequacy to the realities of the information society era. In their opinion, the legislator should comprehensively regulate the problems of personal portrayal and the commercial use of the right of personal portrayal in a separate legislative act, based on the conception of the right of personal portrayal as mixed, personal and economic interest, with a dominant economic aspect, and also regulate a number of specific questions which raise serious interpretative problems in the current legislative framework.

KEYWORDS

personal portrayal, information society, commercialization

SŁOWA KLUCZOWE

wizerunek, społeczeństwo informacyjne, komercjalizacja

1. INTRODUCTION

For a long time, the problems of human portrayal and its protection have been subject to doctrinal considerations[1] and abundant case-law.[2] However, over the recent years, in connection with the exceptionally dynamic development of the Internet and social media, they have assumed, in the Authors' opinion, a special meaning and must be considered in a new context, corresponding to the realities of the contemporary era of information society. This era is characterized by previously unprecedented technological development and globalization of the exchange of information, including the related globalization of interpersonal contacts. Its consequences are the economic, social, and cultural transitions unfolding before our eyes at a previously unknown scale, which entails the need to introduce new legal solutions, adequate to the evolving situation.[3] In this context, attention should be drawn especially to two phenomena. First, one of the effects of technological development is unparalleled ease of fixing and disseminating a portrayal of any given person – in a positive, neutral, or negative context. Second, although the Polish legislator considers personal portrayal as personal interest, nowadays it

[1] For example, cf. E. Wojnicka, *Prawo do wizerunku w ustawodawstwie polskim*, ZNUJ. PWiOWI1990, No.56, p.107 *et seq*.; J. Barta, R. Markiewicz, *Wokół prawa do wizerunku*, ZNUJ. PWiOWI 2002, No. 2, p.11; A. Pązik, *Prawo do wizerunku w obliczu zmian*, ZNUJ PPWI 2010, issue no. 107, p. 127 *et seq*.; T. Grzeszak (in:) J. Barta (ed.), *System Prawa Prywatnego*, Vol. 13, Warszawa 2017, p. 773 *et seq*.

[2] For example, cf. judgment of the Supreme Court (S.C.) of 27 February 2003, IV CKN 1819/00, OSP 2004, No. 6, item. 75; judgment of the S.C. of 20 May 2004, II CK 330/03; judgment of the Court of Appeal in Warsaw of 24 February 2005, VI ACa 721/04. See M. Łoszewska-Ołowska, *Prawo do wizerunku w nauce i orzecznictwie sądów polskich - analiza wybranych problemów*, "Studia Medioznawcze" 2012, No. 1, p. 110 *et seq*.

[3] This conviction regarding the legislative framework on human portrayal was already expressed by the authors in their previous publications: P. Horosz, A. Grzesiok-Horosz, *Ochrona wizerunku w mediach w dobie pandemii*, "Zarządzanie Mediami" 2021, No. 2; id, *Prawo do wizerunku w społeczeństwie informacyjnym*, "Santander Art and Culture Law Review" 2021, No. 1.

is often approached as a commercial interest subject to the terms of commercial transactions, which is a manifestation of a wider tendency, referred to as the commercialization of personal interests.[4]

It is hard to resist the impression that the existing legislative framework, as regards provisions on the protection of personal portrayal, is not only fragmentary and, therefore, unclear but, in the first place, inadequate to the realities of the contemporary information society era, which gives rise to discrepancies between legal practice, on the one hand, and the content and spirit of the relevant provisions, on the other, as well as to serious interpretative problems.

In this article, the Authors wish to present problems caused by the current statutory regime with an intention to initiate a discussion leading to the formulation of a new conception of a legislative framework of the right of personal portrayal, adequate to the realities of the information society era.

At the beginning, the Authors are going to briefly discuss the current statutory framework, and then indicate the opinions of academic authors and judicial practice based on such a framework, with special emphasis on the existing interpretative problems in the context of discrepancies between the content of the applicable provisions and the trading practice sanctioned by case-law. Further on in this article, proposals *de lege ferenda* will be presented, based on the conception of a comprehensive regulation of the right of personal portrayal in a separate legislative act.

2. CURRENT LEGISLATIVE FRAMEWORK

In support of the need to introduce a separate comprehensive legal regime concerning the problems of the right of personal portrayal, as suggested by the Authors, attention should be drawn, first of all, to the specific regulatory duality – following from historical grounds[5] – that is the severance of the provisions on personal portrayal and its protection into two legislative acts. Personal portrayal

[4] J. Sieńczyło-Chlabicz, *Prawo do wizerunku a komercjalizacja dóbr osobistych*, "Państwo i Prawo" 2007, No. 6, 19-34; J. Balcarczyk, *Prawo do wizerunku i jego komercjalizacja. Studium cywilnoprawne*, Warszawa 2009; A. Glanc-Walkiewicz, B. Gadek, *Image merchandising jako element komercjalizacji dóbr osobistych*, "Prawo Mediów Elektronicznych" 2020, No. 1, pp. 4-9; A. Lasota, *Komercjalizacja wizerunku a media społecznościowe,* "Przegląd Prawno-Ekonomiczny" 2018, No. 45, p. 186 *et seq*.; B. Giesen, K. Kurosz, *Wizerunek modela w stosunkach kontraktowych*, ZNUJ PPWI 2021, No. 4, p. 7 *et seq*.; P. Ślęzak, *Komercyjne wykorzystanie wizerunku*, ZNUJ PPWI 2019, No. 1, p. 40 *et seq.*

[5] K. Bojańczyk, (in:) *Prawo autorskie i prawa pokrewne. Komentarz,* M. Machała and R. M. Sarbiński (eds.), Warszawa 2019, p. 1326 and literature cited therein.

was listed in Article 23 of the Civil Code[6] among other human personal interests subject to legal protection. In consequence, also the general provisions on the protection of personal interests under Article 24 apply to personal portrayal.[7] There are no other provisions on human portrayal in the Civil Code. On the other hand, they can be found in the Act of 4 February 1994 on copyright and related rights (UoPA),[8] which however also does not regulate that matter in a particularly extensive way, devoting to it only Articles 81 and 83.

Article 81(1) UoPA attaches key importance to the question of protecting personal portrayal and its dissemination. By a laconic statement that dissemination of a personal portrayal requires consent of the portrayed person, this provision introduces a rule of thumb making the possibility to disseminate personal portrayal dependent on the respective person's consent. Since the discussed provision was contained in UoPA, the term dissemination of a personal portrayal should be understood as the activities referred to in Article 6(3) UoPA, that is making the portrayal publicly available so that the image is accessible to an unspecified number of addressees.[9]

It is generally accepted in academic literature and judicial practice that consent of a given person to the dissemination of their portrayal can be given in any form, although it may not be implied. At this point, it should be highlighted that consent to the dissemination of an image by other persons may not be implied from the mere fact of the image's dissemination by the portrayed person. The burden of proving the fact of consent is with the person disseminating the personal portrayal. It is also assumed that the obtained consent may not be transferred to a third party unless the portrayed person had agreed to such a transfer.[10]

Under Article 81(1) UoPA, consent to the dissemination of personal portrayal is not required, provided that no express stipulation to the contrary has been made if the portrayed person has received an agreed remuneration for modelling. Accordingly, this provision introduces a presumption shifting, in case of

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[6] Act of 23 April 1964 – Civil Code (Journal of Laws of 2022, item1360), hereinafter referred to as KC.

[7] For example, see: J. Buchalska (in:) *Dobra osobiste i ich ochrona*, ed. M. Romańska, Warszawa 2020, p. 140 *et seq*.; N. Skiba (in:) *Dobra osobiste*, I. Lewandowska-Malec (ed.), Warszawa 2017, p. 74 *et seq*.

[8] Consolidated text: Journal of Laws 2022, item 2509 as amended, hereinafter: UoPA. According to Piotr Ślęzak, regulation of the right of personal portrayal in copyright legislation is justified by an assumption that the rights of a person portrayed in a work limit the rights of the work's creator, see *Ochrona prawa do wizerunku*, Katowice 2009, p. 27 *et seq*.; id. (in:) *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*. Ed. P. Ślęzak, Warszawa 2017, p. 552 *et seq*. See also A. Nowak-Gruca, *Użytkownik forever off: problemy cyfrowego „życia po życiu" związane z ochroną wizerunku i korespondencji*, ZNUJ PPWI 2020, No. 1, p. 30 *et seq*.

[9] Cf. K. Bojańczyk, (in:) *Prawo autorskie,* p. 1336 *et seq*.; G. Pacek, (in:) *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, A. Michalak (ed.), Warszawa 2019, p. 650; J. Barta, R. Markiewicz, *Wokół prawa do wizerunku*, p. 18 *et seq*.

[10] P. Ślęzak, *Ochrona prawa do wizerunku*, p. 38.

a dispute, the burden of proof of the missing consent to the dissemination of personal portrayal to the person modelling for consideration, and such a person must demonstrate to have made such an express stipulation. It should be emphasized that Article 81(1) UoPA clearly provides that in situations of modelling free of charge, the model's express consent is required for the dissemination of personal portrayal, and the burden of proof in that respect is with the disseminating party.

Other exceptions to the requirement to obtain consent from the portrayed person to the dissemination of their portrayal are laid down in Article 81 UoPA(2) under which no consent is required to the dissemination of an image of a well-known person if their portrayal has been made in relation to their public function, especially a political, social or professional one, or from a person portrayed only as a detail of a larger whole, such as a meeting, landscape or public event.[11]

It should be emphasized that the legislator did not include within the framework of UoPA any specific provisions on possible economic aspects of disseminating personal portrayal, confining itself to settling the mere question of consent to the portrayal's dissemination and exemptions from the requirement to obtain such consent. The provision of Article 81 UoPA is primarily intended to protect the rights of a given person to their personal portrayal and, as such, it supplements in this regard the above-mentioned Civil Code regime on personal interests.

Protective nature also applies to the provision of Article 83 UoPA, under which Article 78(1) UoPA applies appropriately to claims of a portrayed person in case of dissemination of their portrayal. This provision sets out the claims available to a creator for the violation of his author moral rights. This way, the legislator uses a reference without introducing any separate catalogue of claims available to a party injured by unlawful dissemination of their personal portrayal, and, most importantly, without taking into account the economic aspect of such a situation – clearly recognized both by the doctrine and judicature. At the time being, under Article 83 in conjunction with Article 78(1) UoPA, an injured party may demand that the perpetrator ceases to disseminate the injured party's personal portrayal, takes steps necessary to remove the consequences of violation or, finally – if the violation was culpable – the injured party may seek an award by the court of an appropriate amount of money as compensation for the harm suffered or imposition on the perpetrator of an obligation to pay an appropriate amount of money to a designated social purpose.[12]

Under Article 83 UoPA, the claims mentioned above cannot be asserted after twenty years of the death of the portrayed person.

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[11] For more, see. P. Ślęzak (in:) *Ustawa o prawie autorskim*…, p. 570.

[12] See A. Niewęgłowski, *Prawo autorskie. Komentarz*, Warszawa 2021, p. 850; E. Ferenc-Szydełko (in:) *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, E. Ferenc Szydełko (ed.), Warszawa 2021, p. 561 *et seq.*

3. DOUBTS ARISING UNDER THE CURRENT LEGISLATIVE FRAMEWORK

Neither provisions of KC nor UoPA offer a legal definition of the concept of personal portrayal and the concept is subject to different interpretations, however, definitions formulated by academic authors and in case-law have many contact points. Both literature of the subject and case-law generally recognise as personal portrayal a concrete and fixed 'physical image' or 'representation' of a given person – that is human appearance fixed in a certain way, including the person's features visible at the first glance, identifying him or her as a particular natural person.[13] It is irrelevant what technique has been used to make the portrayal of a given person,[14] however, the image should be fixed in a widely understood plastic art form.[15] There is a general agreement that an indispensable characteristic of a personal portrayal is the possibility of objective recognition – identification of the portrayed natural person,[16] wherein – even if the image is not entirely clear – it suffices that the portrayed person is recognisable to third parties.[17] On the other hand, one cannot understand a mere description of a given party's appearance as a personal portrayal, even if such a description enables that party's unambiguous identification. The question of recognisability was clarified by the Supreme Court, which concluded in the judgment of 27 February 2003[18] that the possibility to recognise a given natural person must be universal and cannot be limited only to a narrow circle of people closest to the portrayed person. That conclusion was approved by academic authors.[19]

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[13] Cf. A. Pązik (in:) *Ustawy autorskie: komentarze. T.2, Prawo autorskie i prawa pokrewne, Ochrona bazdanych, Zbiorowe zarządzanie prawami autorskimi i prawami pokrewnymi*, R. Markiewicz (ed.), Warszawa 2021, p. 1912 *et seq*.

[14] For example, cf. the decision of the Court of Appeal in Katowice, file reference I ACa 158/18 in which the Court concluded that the term 'personal portrayal' should be understood as any representation regardless of its technique.

[15] Por. G. Pacek, (in:) *Ustawa o prawie autorskim…*, p. 648.

[16] J. Sieńczyło- Chlabicz, *Prawo do wizerunku…*, p. 19 *et seq*.; G. Pacek, (in:) *Ustawa o prawie autorskim… ,* p. 649. The Court of Appeal in Warsaw, in the judgment of 9 March 2018 (VI ACa 1694/16, Legalis), pointed out that a necessary condition for the recognition of a given representation of human appearance as personal portrayal is the possibility to assign such a portrayal to a given person, that is the identification of that person by means of the portrayal.

[17] T. Grzeszak, *Glosa do wyroku SA w Łodzi z dnia 28 sierpnia 1996* r., "Monitor Prawniczy" 1997, No. 8, p. 318 *et seq*.; J. Balcarczyk, *Prawo do wizerunku…,* p. 33.

[18] IV CKN 1819/00, OSP 2004, issue no. 6, item 75.

[19] J. Błeszyński, *Glosa do wyroku SN z dnia 27 lutego 2003 r., IV CKN 1819/00*, OSP 2004, issue no. 6, item 75, p. 321. See also G. Pacek, (in:) *Ustawa o prawie autorskim…*, p. 648 and literature cited therein.

However, as regards more specific questions, attempts to precisely define the concept of personal portrayal face difficulties. Both in case-law[20] and in the literature of the subject, one can encounter a wide grasp of the scope of the concept of personal portrayal as personal interest, according to which it can refer not only to the face of a given person but also to that person's entire silhouette, any distinctive features individualising the person as a specific natural person, such as a characteristic tattoo, way of speaking, deportment or even certain props strictly associated with the individual, elements of their clothing or hairstyle.[21] Some of academic authors, however, reject such an opinion as too far-reaching.[22] One can also come across a view that the concept of personal portrayal, apart from the representation of face and the entire silhouette, includes also human voice, referred to as 'audio image', enabling recognition of a given person through the sense of hearing.[23]

Doubts as to the specific scope of the term 'personal portrayal' are, in a large measure, cast by the above-mentioned legislative duality. Even if we accept that the term 'personal portrayal' itself should be understood in the same way under Article 23 KC and Article 81 UoPA,[24] in academic literature there is no agreement as to whether the UoPA provisions on the protection of personal portrayal are a concretization of Article 24 KC or an independent legal regime, which gives rise to problems with determining if the right of personal portrayal subject to protection under Article 23 KC as personal interest and the right of personal portrayal under Article 81 UoPA are the same right or in fact, different rights with different scopes and characteristics.[25] In this context, differences in the opinions of different doctrinal authors are not trivial but relate to the very essence and nature of the right of personal portrayal – which relates to the problem of divergence between the existing legal provisions and legal practice. If, under Article 23 KC, personal portrayal constitutes a personal interest, the right of personal portrayal should be considered as inalienable and non-heritable. On the other hand, however, it would be impossible to disregard trading practice in which, as noted above, the right of personal portrayal is subject to increasing commercialization and often treated as an interest with a measurable value capable of economic assessment,

[20] See e.g., judgment of the Supreme Court of 20 May 2004, II CK 330/03, "Monitor Polski" 2005, No. 2, p. 111.

[21] See J. Sieńczyło-Chlabicz, *Rozpowszechnianie wizerunku osób powszechnie znanych*, "Przegląd Prawa Handlowego" 2003 No. 9; J. Barta, R. Markiewicz, *Wokół prawa do wizerunku*…, p. 12.

[22] See Pązik (in:) *Ustawy autorskie*..., p. G. Pacek, (in:) *Ustawa o prawie autorskim*..., p. 648.

[23] See A. Pązik, (in:) *Ustawy autorskie*..., p. 1917.

[24] A. Matlak, *Cywilnoprawna ochrona wizerunku*, "Kwartalnik Prawa Prywatnego" 2004, No. 2, p. 321.

[25] G. Pacek, (in:) *Ustawa o prawie autorskim*…, p. 647; J. Balcarczyk, *Prawo do wizerunku*, p. 84 *et seq*.; T. Grzeszak, (in:) *System prawa prywatnego*, p. 781 *et seq*.; A. Matlak, *Cywilnoprawna ochrona…,* p. 321.

not to say expressly – an economic right. This practice, based on the UoPA regime and, in the same way, generally accepting the assumption about the independent nature of that regime in relation to the provision of Article 23 KC, is increasingly adhered to by both academic authors and the judicature in which, starting from the judgment of the Supreme Court of 27 April 1977,[26] interpretations were given which recognized an economic value of the right of personal portrayal. Currently, in academic literature, an opinion is often encountered that the right of personal portrayal – at least in the form established under UoPA provisions – is a mixed interest, both personal and economic.[27] However, this is not the only opinion that can be found in literature – there are also voices qualifying the right of personal portrayal, as established under Article 81 UoPA, as an economic right.[28] On the other hand, an opinion also persists according to which this is a case of a personal interest.[29]

It must be noted that although the opinion about a mixed personal and economic nature of the right of personal portrayal corresponds best in its essence to the observable trading practice and the phenomenon of commercialising personal portrayal in the realities of the information society era, it is only quite loosely supported by the applicable legislation. In fact, also in the provisions of the UoPA, the legislator seems not to consider the economic aspect of the right of personal portrayal, which is manifest, for example, in the provision of Article 83 UoPA, prescribing to apply, as noted above, the rule of Article 78(1) UoPA to claims of a person whose personal portrayal has been unlawfully disseminated, as the latter provision sets out remedies available for the violation of author's moral rights. It should also be noted that the legislator, in the provisions of UoPA, in fact, concentrates only on the question of protecting personal portrayal, without addressing in any way the problem of possible commercial use of the right of personal portrayal or reaping benefits from dissemination of a personal portrayal by the portrayed person. One can only agree with the opinion that basing the question of exploitation of a personal image only on the act of consent of the portrayed person, as an element removing unlawfulness of the dissemination, is a flawed solution, often insufficient in contemporary trading practice. Both academic literature and judicature generally identify stark discrepancies between the content of the provisions focusing on the protection of personal portrayal as personal interest and trading practice, which commercializes such personal portrayal, and, in principle,

[26] I CR 127/77, LEX 63627.

[27] See e.g., J. Sieńczyło - Chlabicz, *Prawo do wizerunku*, p. 28; T. Grzeszak, (in:) *System prawa prywatnego*…, p. 548; J. Sieńczyło-Chlabicz, J. Banasiuk, *Cywilnoprawna ochrona wizerunku osób powszechnie znanych w dobie komercjalizacji dóbr osobistych*, Warszawa 2014, p. 338 *et seq.* Cf. also B. Giesen, K. Kurosz, *Wizerunek modela*… p. 5.

[28] J. Barta, R. Markiewicz, *Prawo autorskie*, Warszawa 2016, p. 631 *et seq.* Opinion of Barta and Markiewicz seems to evolve since they had initially pointed to a mixed nature of the rights, see *Wokół prawa do wizerunku,* p. 24 *et seq.*

[29] A. Matlak, *Cywilnoprawna*...., p. 325.

offers interpretations aimed at recognizing the economic aspect of the right of personal portrayal.[30]

Admissibility of consent given by the entitled party to the dissemination of a concretized personal portrayal is, in fact, supported by the provisions of Article 81(1) UoPA, which approach the problem only by excluding the unlawfulness of disseminating such personal portrayal without addressing, in any way, the economic aspects, including the problem of possible remuneration for the consent to the dissemination of personal portrayal. In the Authors' opinion, such an inclusive approach is not expressed in the presumption, under Article 81(1) UoPA, that the portrayed person who modelled for remuneration consented to the dissemination of their personal portrayal since the text of that provision clearly indicates that the portrayed person receives such remuneration for modelling, that is for a merely factual act. Although it is argued in the academic literature – not without justness – that remuneration received by a model generally depends on the expected method and scope of disseminating the model's personal portrayal and, therefore, the remuneration is in fact paid for dissemination. Such opinions indeed correspond to the trading practice, however, they do not have strong support in the text of the above-mentioned provision and, in fact, they are its rather far-reaching interpretation, dictated by a willingness to fill the gap between the practice and literal wording of the applicable legislation.

Adoption of the opinion approved by the Authors about a mixed personal and economic nature of the right of personal portrayal and admissibility of commercializing a concretized right of personal portrayal does not, however, solve all problems arising in this context.[31]

Finally, one should point to a number of interpretative doubts following from the laconic nature of the provisions governing the problems of personal portrayal. For example, one should mention the problem of expressing consent to the dissemination of personal portrayal of a minor or incapacitated person, which question has not been decided in Article 81 UoPA. In academic literature,

[30] Opinion recognising the right to a concretized personal portrayal as second-tier subjective right deriving from the personal right of personal portrayal, which, as such, can be subject to commercial transactions, see B. Giesen, K. Kurosz, *Wizerunek modela*… , p. 5. For more on that subject, see B. Giesen, *O naturze prawa do wizerunku - uwagi na tle rozważań historycznych oraz prawnoporównawczych,* (in:) *Qui bene dubitat, bene sciet: księga jubileuszowa dedykowana profesor Ewie Nowińskiej,* J. Barta, J. Chwalba, R. Markiewicz, P. Wasilewski (eds.), Warszawa 2018, p. 146 *et seq.*

[31] The question remains unresolved of a possible general consent granted by a given person to the dissemination of their personal portrayal, for example, its free use for the purposes of a particular advertising campaign, conducted using various techniques and methods of fixing the personal portrayal or consent granted to the exploitation of a personal portrayal in different situations by a given individual as the so-called brand ambassador. The provision of Article 81 UoPA does not resolve that matter unambiguously, however, its wording seems to suggest that consent of a given person to dissemination of their personal portrayal should always be concretized. For opinions of academic authors, see K. Bojańczyk, (in:) *Prawo autorskie*…, p. 1336.

it is generally accepted that in such cases consent to dissemination of personal portrayal is given by the statutory representatives of a given individual, which in the case of children generally refers to their parents.[32] In fact, however, such an opinion is a reflection of the existing trading practice and raises, among others, theoretical doubts relating to the very nature of personal interests.[33] Besides, it remains unclear, in a situation when remuneration for modelling is to be received by a person with only limited capacity to legal acts, whether dissemination of such a person's portrayal still requires consent from their statutory representative.

The provision of Article 83 UoPA, relating to the remedies available to a person injured by unlawful dissemination of their personal portrayal, gives rise to two kinds of problems. As noted above, the legislator did not decide to formulate a separate catalogue of such remedies although, bearing in mind the specificity of violations of personal portrayal, this would be, in the Authors' opinion, definitely legitimate. Instead, the legislator used the technique of reference to the provisions of Article 78(1) UoPA. This leads to a situation in which, as noted above, a person whose personal portrayal has been unlawfully disseminated cannot seek compensation although, in the case of famous persons – the so-called celebrities, who charge specific fees in the trading practice for a consent to dissemination of their personal portrayal, its dissemination without such a consent – and, in the same way, without paying the expected fee – constitutes sheer loss from the point of view of such celebrities. This gives rise to a situation in which courts examining particular cases must often resort to legal acrobatics, wishing to award compensation for harm to a given person in an amount corresponding to the loss suffered, that is *de facto* compensation for the economic loss sustained by exploiting the person's portrayal without paying remuneration,[34] although they cannot expressly call the amount awarded compensation for economic loss.

Other interpretative problems are posed by the provision contained in Article 83 UoPA *in fine*, according to which the remedies set out in this Article may not be sought after twenty years from the death of the particular person. When determining the period in which it is admissible to seek remedies for unlawful dissemination of a personal portrayal, the legislator did not name the parties who could

[32] For more, see A. Bagieńska- Masiota, *Permission for dissemination of a minor's image*, "Studia Iuridica Lublinensia" 2019 No. 1, p. 9 *et seq*.; A. Sydor-Zielińska, *Rozpowszechnianie wizerunku małoletniego na podstawie Article 81 ust. 2 ustawy o prawie autorskim i prawach pokrewnych*, ZNUJ PPWI 2017 No. 4, p. 79 *et seq*.; Z. Ochońska, *Dysponowanie dobrami osobistymi małoletniego*, ZNUJ PPWI 2019, issue no. 3, p. 103 *et seq*.; J. Haberko, *Udostępnianie i publikowanie wizerunku nasciturusa, noworodka i małego dziecka w świetle zasady dobra dziecka*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2013, issue no. 3, pp. 59-70.

[33] As justly pointed out by Z. Ochońska, *Dysponowanie dobrami*…, p. 104, it should be considered if, bearing in mind the legal nature of the institution of personal interests, it should be admissible at all to dispose of them for a person other than the subject of those interests, bearing in mind respective opinions in the legal doctrine.

[34] See A. Pązik, *Prawo do wizerunku*…, p. 135.

seek such remedies,[35] whereby it must be remembered that one consequence of adopting the opinion about the personal nature of the right of personal portrayal is non-hereditary nature of such right and its extinguishment upon the entitled party's death. It is suggested in the academic literature that the personal portrayal of a deceased person is protected indirectly – by the right to protect the memory of the deceased, which would empower the deceased person's family and persons emotionally attached to the latter to seek such remedies.[36] However, this does not solve the problem of possible economic claims relating to the commercialization of the deceased person's portrayal or of the admissibility to designate by a particular individual in a testament the persons that would be entitled to assert such claims upon the individual's death.

The above overview of interpretative problems relating to the current legislative framework, although only brief and exemplary, bearing in mind the scope of this article, allows to formulate in the next part of the publication conclusions on the causes of such a situation, and to put forward proposals of specific legal solutions.

4. REASONS FOR THE DISCREPANCIES AND SUGGESTED SOLUTIONS

Seeking the sources of the interpretative problems signalled above and of the existing gap between the text of legal provisions on the personal portrayal and legal practice, one can point to three overlapping factors.

The first refers to the above-mentioned regulatory duality expressed in the severance of legal provisions on personal portrayal into two legislative acts – KC and UoPA, which raises doubts as to mutual relations between the rules contained in those acts, and the very concept of personal portrayal, as well as the scope of the right of personal portrayal within the framework of the former or the latter act.

The second – most serious in the Authors' opinion – is the inadequacy of the existing legislation to the realities of the information society era, especially to the progressing commercialization of personal interests, manifested in the legislator's focus on the protection of personal portrayal as strictly personal interest and failure, at the same time, to take into account its economic aspect.

[35] It may be somewhat surprising that the legislator, despite referring to the catalogue of remedies under Article 78(1) UoPA, did not decide, at the same time, to refer to Article 78(2) UoPA, the provision of which points to the parties who, upon the creator's death, may bring an action for the protection of the author's economic rights previously held by the deceased person.

[36] M. Markiewicz, (in:) *Ustawy autorskie: komentarze*, Vol. 2, p. 1943 *et seq*.

This relates to the third factor identified by the Authors causing the indicated interpretative problems – the laconic and fragmented nature of the existing provisions on personal portrayal, giving rise to legal gaps that must be filled by legal doctrine or judicial practice through interpretation which is sometimes only scarcely supported by the text of applicable rules. One example of such a gap is the above-mentioned provision of Article 83 UoPA, in which the legislator concentrates on the protective regime and, at the same time, neglects economic matters relating to the disposal of one's personal portrayal.

In the Authors' opinion, the solution to the identified problems would be a far-reaching reform and expansion of the existing legislation on personal portrayal, which, in principle, would mean its preparation from scratch. Such a legal regime should be comprehensive and account for the technological development enabling global and immediate dissemination of personal portrayal and the phenomenon of its progressing commercialization, manifested in the widespread practice of concluding agreements, the object of which is the exploitation of a given person's portrayal for remuneration paid to such a portrayed person.[37]

In the first place, it seems legitimate to remove the existing legal duality and, in the same way, the signalled difference of opinion caused by such duality – by consolidating the provisions on the human personal portrayal in one piece of legislation.[38] In the Authors' opinion, such a legislative regime should not be limited to the expansion and modification of the rules on personal portrayal under UoPA. Instead, it is advisable to consolidate the provisions in an autonomous legislative act of statutory rank. Such an Act, which the Authors propose to entitle *Personal Portrayal Law*, should encompass provisions covering comprehensively all matters relating to human portrayal, both matters of its protection and exploitation of the right of personal portrayal and its commercialization, especially the question of disposal of the right of personal portrayal, both during the life of a given person and *mortis causa*. Such a solution is justified by the importance and specificity of the subject matter, especially that the underlying problems, in the Authors' opinion, are, in fact, quite loosely related to the matters regulated in UoPA.

Second, the regime covering the problems of personal portrayal should be based on the conception of mixed, personal, and economic nature of the right of personal image, which would not only allow to solve many of the interpretative problems indicated above but, in the first place, would address the progressing commercialization of personal portrayal, as reflected in trading practice. Therefore, the new act should contain both the definition of personal portrayal as such

[37] A. Pązik, *Prawo do wizerunku*…, p. 139.

[38] The Authors avoid the formulation "provisions on the protection of human portrayal" since, in their opinion, focus on the questions of protecting personal portrayal is one of the drawbacks of the existing regime, whereas the problems of personal portrayal and its use – also for economic purposes should be regulated in a comprehensive manner – rules on the protection of personal portrayal would only be a fragment of the proposed regime.

and the definition of – a clearly singled out – right of personal portrayal, defined in the widest possible terms as the right to disseminate personal portrayal and its use in different fields of exploitation. Such a right – considering its economic aspect – should be expressly defined in the act as a right which the entitled party may dispose of by legal acts, and which is heritable, with corresponding restrictions specified in the act deriving from its personal aspect.

Third, the regime should have, as noted above, a comprehensive nature, covering not only protective provisions but also – or perhaps predominantly – provisions on the terms of disposal of the right of personal portrayal, including the question of disposal of the right of personal portrayal of a deceased person. In the Authors' view, it would be advisable to base the new legal regime, in a large measure, on the solutions applicable to the author's economic rights. At first glance, this might seem a certain inconsequence – bearing in mind the author's postulate to separate the provisions on personal portrayal from the UoPA statutory framework and to contain them in a separate legislative act. However, it is justified, on the one hand, by the trading practice, as agreements for the dissemination of a model's personal portrayal are generally structurally close to license agreements used in the context of author's economic rights,[39] and, on the other hand, by recognition of the right of personal portrayal as one of the rights to intangible assets. The inclusion of the provisions on personal portrayal in a separate legislative act is, on the one hand, supposed to enable a comprehensive, separate regulation of that subject matter, and, on the other hand, underline the specificity of the right of personal portrayal.

For the purposes of the new legal regime governing the right of personal portrayal, it could prove especially important to appropriately adapt and modify the constructions of permitted use – both personal and public, fields of a work's exploitation (in the analysed case – fields of a personal portrayal's exploitation) and license agreement.

The construction of permitted personal use could be used especially when modifying the terms of expressing consent to the dissemination of personal portrayal, which – as already indicated by the Authors in their previous publications – should, on the one hand, take into account the prevalence of practices relating to fixation of personal portrayal and its non-commercial dissemination, especially through social media and, on the other hand, commercialization and the economic aspect of the right of personal portrayal. In situations when a given person knows about and agrees to the fixation of their personal portrayal in circumstances justifying an assumption that the portrayal would then be disseminated, one should introduce, in the Authors' opinion, a presumption of the portrayed person's consent to the dissemination of their portrayal when the portrayed party has personal or social ties to the party fixing and disseminating the image, which would

[39] Cf. B. Giesen, K. Kurosz, *Wizerunek modela*..., p. 12.

sanction an already existing practice under which it is common to disseminate, via social media, pictures of entire groups of close persons or even acquaintances.[40] On the other hand, the presumption of consent would not apply when the portrayal of a given person is disseminated for commercial purposes or when the portrayal is fixed in circumstances that could be derogatory to the portrayed person or could expose that person to negative social reactions.[41]

In matters not covered by the indicated presumption, the rule expressly stated in the provisions of the new act should be an expression of a given person's consent to the exploitation of their personal portrayal in an agreement. Whereby, in the Authors' opinion, it would be most advisable to base the proposed solutions on the construction of license agreements used in the context of the author's economic rights. Under such an agreement, the entitled party would grant a license to the use of their personal portrayal in the fields of exploitation specified in the agreement,[42] for a time and in the territory specified in the agreement. Following the solutions adopted for the author's economic rights, it should be presumed that such agreements are concluded for consideration.

Specific provisions should be devoted to the question of license agreements having as their object the use of personal portrayal of persons without a full capacity to legal acts, with a possible differentiation between the situation of persons without capacity to legal acts, where the license agreement would be concluded on behalf of such a person by their statutory representative, and situation of persons with limited capacity to legal acts, who could be empowered to conclude such agreements at the consent of their statutory representative. In both situations, the admissibility of disseminating a personal portrayal fixed in circumstances that could violate the dignity of such a person, expose them to negative social reactions or violate other interests of such a person, should be subject to review by family and guardianship court. Any proceeds from the use of the personal portrayal of a person without the capacity to legal acts, on general terms, should belong to the property of such a person, and not to that of their statutory representative.[43]

Allowing for and expressing in the provisions of the new act the economic aspect of the right of personal portrayal would also allow expanding the catalogue of remedies available to a person whose right of personal portrayal is violated by a claim for compensation,[44] whereby the circumstance should also be taken

[40] See also A. Pązik, *Prawo do wizerunku* …, p. 149, suggesting a possibility to consider a "*sui generis* permitted use with regard to that right."

[41] See P. Horosz, A. Grzesiok-Horosz, *Prawo do wizerunku*..., p. 30 *et seq*.

[42] Similarly in A. Pązik, *Prawo do wizerunku*…, p. 149. For more, see also P. Horosz, A. Grzesiok-Horosz, *Prawo do wizerunku*..., p. 32 *et seq.*

[43] See Z. Ochońska, *Dysponowanie dobrami*…, p. 104.

[44] Such postulates have been put forward in academic literature – for example, see A. Pązik, *Prawo do wizerunku*…, p. 150.

into account if the violator acted for profit. Also in this context, in the Authors' opinion, it would be worth considering the use of solutions developed in relation to the author's economic rights, by allowing the injured party's discretion as to the method of determining the compensation amount as X-times the remuneration the injured party would be entitled to according to the rates adopted in trading practice for granting consent to the use of their personal portrayal in a given field of exploitation. However, considering the personal aspect of the right of personal portrayal, the injured party should also have the option to seek the award by the court of (non-economic) compensation for the harm suffered.

Finally, such a grasp of the right of personal portrayal would allow to unambiguously decide and specify in the provisions of the new act the fate of the right of personal portrayal after the death of the portrayed person, by accepting that the right does not extinguish upon the entitled party's death but only after a certain period specified in legal provisions – as is the case with author's economic rights.[45] Within this period, the right of personal portrayal would be heritable, and the parties entitled to conclude license agreements authorizing the use of personal portrayal of a given person in specific fields of exploitation would be that person's heirs, except for situations undermining the good name of the deceased person.

Provisions of the new act should also clearly specify situations in which it would be admissible to use, in a strictly defined manner, a personal portrayal of a given person without such person's consent (or in regard to a deceased person – without their heirs' consent), by expanding and clarifying the catalogue of such situations, currently contained in Article 81(2) UoPA. Also in this case, it would be useful to rely on the construction of permitted public use applied with regard to the author's economic rights – and to expressly permit, for example, dissemination of a given person's image for information purposes.

5. SUMMARY

As a part of the above considerations on the problems of legal protection and commercialization of human portrayal, the authors, having presented the current legislative framework, pointed to the existing discrepancies between the trading practice and the contents of the existing legal provisions. Both academic authors and judicature attempt to remove such discrepancies, whereby the interpretation offered takes into account the already well-established and constantly deepening

[45] Although the period of 70 years following the creator's death, as provided for in Article 36(1) UoPA for author's economic rights, calculated as per Article 39 UoPA in full years following the year of the creator's death, seems too long in the Authors' opinion. See also A. Pązik, *Prawo do wizerunku*…, p. 149.

practical tendency of commercializing human portrayal. Nevertheless, it is often only quite loosely supported by the text of the relevant provisions, invariably approaching personal portrayal as personal interest. The same refers also to the opinion of a part of academic authors approaching personal portrayal as a mixed, personal, and economic interest – regardless of the fact that this opinion is shared by the authors, who realize that it is poorly supported by the current legislative framework.

The current situation of significant discrepancy between the trading practice and the text of legal provisions is not conducive to legal certainty and trading security. In the authors' opinion, the attempts of legal doctrine and the judicature – although significant – cannot be sufficient, especially bearing in mind sometimes considerable differences in the interpretation of the provisions on personal portrayal. As a result, intervention of the legislator is necessary. To specify its desired scope and direction, the authors pointed to three basic, in their view, causes of the discrepancy and the existing interpretative problems – legislative duality, expressed in severance of the provisions on personal portrayal into two legislative acts, with doubts as to their mutual relationship, laconic and fragmented nature of the legal regime of personal portrayal and – first of all – its inadequacy to the realities of the information society era, characterized by globalization of the information flow and progressing commercialization of personal interests.

In the authors' opinion, expressed in the postulates *de lege ferenda*, presented both in this article and in their previous publications – the legislator should not limit himself to the modification and expansion of the existing provisions, but should comprehensively regulate the problems of personal portrayal and commercial use of the right of personal portrayal in a separate legislative act, based on the conception of the right of personal portrayal as mixed, personal and economic interest, with a dominant economic aspect, and also regulate a number of specific questions which raise serious interpretative problems in the current legislative framework.

In-depth reorganisation of the legislative framework of personal portrayal, as proposed by the authors, should contribute both to the removal of the causes of the existing discrepancies between the literal wording of legal provisions and trading practice and the signalled interpretative problems and to the regularisation of the subject matter in a manner corresponding to the realities of the information society era.

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Weronika Herbet-Homenda
University of Warsaw, Poland
Mail: w.herbet@uw.edu.pl
ORCID: 0000-0003-0255-9353

BREAKING THE GLASS CEILING: IN SEARCH OF THE ROLE OF EUROPEAN COMPANY LAW FOR WOMEN'S EMPOWERMENT

Abstract

Women empowerment agenda plays a crucial law in a global legal debate. Despite years of struggle and undeniable success in several fields, women remain vastly underrepresented in the workforce and business leadership. The areas traditionally associated with gender equality are located within the public law regulations, with the core of labor and social security law. At the same time, it seems that some useful tools can be also provided by private law. Therefore, in the thought of a multi-faced, comprehensive approach, it is worth evaluating the actual and potential law of the European company law regulations. The aim of the article is to present the current legal and research state-of-play, mark the research gaps and formulate hypotheses as to the possible developments in this regard.

KEYWORDS

women empowerment, gender equality, gender diversity, company law, board members, quotas

SŁOWA KLUCZOWE

równouprawnienie kobiet, równość płci, różnorodność płci, prawo spółek, członkowie organów, parytety

INTRODUCTION

Gender inequalities are a critical issue of global concern.[1] The progress toward women's empowerment varies across countries, among which European Union is often credited as a pioneer.[2] With equality as one of its fundamental values, the EU has undertaken several initiatives aimed at closing the gender gap in various areas of life. However, despite the undisputable gains in educational attainment,[3] the European labor market still exhibits a significant imbalance between men and women in terms of professional activity, earnings and occupied positions.[4] Many years into the discussion on gender equality, the so-called glass ceiling still seems firmly in place – women remain vastly underrepresented in the workforce and business leadership, accounting for an average of 30.6% of the board members and only 8.5 % of chairpersons in the largest listed companies in 2021.[5]

Solutions to the problems identified with gender imbalance are commonly associated with public law regulations – in particular, labor and social security law.[6] However, a significant role in this respect can also be played by company law, traditionally located in the private domain. Embodying the concept of corporate social responsibility, the EU has most recently aptly recognized the need to approach the gender gap by influencing corporate practices. Although the landmark directive 2022/2381 provides a valuable starting point for the desired

[1] OECD, *Enhancing Women's Economic Empowerment through Entrepreneurship and Business Leadership in OECD Countries*, Paris 2014.

[2] T. M. Dworkin, C. A. Schipani, *The Role of Gender Diversity in Corporate Governance*, "University of Pennsylvania Journal of Business Law", Vol. 21:1, p. 110.

[3] EC, *Gender Balance in Business Leadership: a Contribution to smart, sustainable and inclusive growth', Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions*, Brussels 2012.

[4] OECD, *Enhancing Women's Economic Empowerment…,* p. 9.

[5] Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, point 18.

[6] See: e.g., Directive (EU) 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Directive (EU) 2019/1157 of the European Parliament and the Council of 20 June 2019 on work-life balance for parents and careers and repealing Council Directive 2010/18/EU.

transition, the solutions introduced therein may not be sufficient for effective achievement of substantive gender balance in European companies. Therefore, it may be argued that to unleash the potential of European societies fully, the current regulatory state still calls for further improvements.

WHY SHOULD WE PROMOTE GENDER DIVERSITY ON COMPANY BOARDS?

The composition of company boards, as the key operation bodies of each corporation, is a practically vital issue, which in terms of the gender criterium, fits into the general discussion on modern corporate governance and corporate social responsibility.[7] As follows from a wide array of literature, the involvement of women on company boards benefits two often contradicted, yet, in this case, complementary, interests of business and society.

In terms of the corporate dimension, it is suggested that having female members on board might provide companies with tangibly improved results.[8] The studies on corporate governance show that a high proportion of women on boards is likely associated with a significantly higher return on sales and return on invested capital, greater productivity and financial performance compared to homogenous teams.[9] Gender-diverse boards also tend to have a broader range of backgrounds, experiences and problem-solving skills,[10] as well as better compliance with ethical and social standards compared to the gender-homogenous bodies.[11] Moreover, female directors are reported to be more diligent in monitoring and thus more efficient in terms of shareholders' interests protection.[12] Various research also points out to positive reputational effects of a gender-balanced corporate environment.[13]

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[7] S. May, G. Cheney, J. Roper (ed.), *The Debate Over Corporate Social Responsibility*, Oxford University Press 2007.

[8] I. Velkova, *Quotas for Women on Corporate Boards: The Call for Change in Europe*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568604 (accessed 23 February 2015), p. 1; Dworkin T.M., Schipani C.A, *The Role of Gender Diversity in Corporate Governance*, "University of Pennsylvania Journal of Business Law", Vol. 21:1, p. 115.

[9] N. M. Carter, H. M. Wagner, *The Bottom Line: Corporate Performance and Women's Representation on Boards 2004-2008*, Catalyst 1 March 2011.

[10] OECD, *Enhancing Women's Economic Empowerment…,* p. 26.

[11] H. Isidro, S. Sobral, *The Effects of Women on Corporate Boards on Firm Value, Financial Performance, and Ethical and Social Compliance*, "Journal of Business Ethics", Vol. 1/2014.

[12] R. Adams, D. Ferreira, *Women in the boardroom and their impact on governance and performance*, "Journal of Business Economics" 292/2008.

[13] S. Brammer, A. Millington, S. Pavelin, *Corporate Reputation and Women on the Boards*, "British Journal of Management", Vol. 17:29/2008; L. Campbell, A. Minguez-Vera, *Gender*

In such a state of research, economic efficiency is often indicated as the main source of legitimacy and a driving force behind various gender-balance policies. However, some authors underline that the women's empowerment agenda should not lose sight of the social issues in play.[14] As noted in the literature, increasing female participation in the boardroom creates cultures of inclusion, increases awareness and diversity and improves the situation of downstream female employees.[15]

CURRENT STATE-OF-PLAY

1.1. EU MANDATORY MEASURES AS A WAY FORWARD

Given the above, the overall advantage of gender diversity on company boards – although still explored and evidenced – is essentially uncontested. The real challenge lies, however, in determining how such a gender-balanced corporate environment can be achieved through tools specific to company law.

Although equality has always been one of the top priorities of the EU (Art. 2 TFEU), the treaty mandate to promote gender equality (Art. 3.3, Art. 157 TFEU and Art. 23 CFR) has not been used in the area of company law for many years. Until 2022, the issues related to gender diversity in the European boardrooms have been addressed only by several Member States under different approaches, including mandatory quotas, voluntary measures or lack of any action.[16] Although, in the end, these attempts have not led to a resounding transition, they did reveal two regularities relevant to designing new legal solutions to the discussed problem.

Firstly, the regulatory model has proven to be the most effective one, continuously impacting gender diversity. On the other hand, the voluntary (corporate governance code) measures have not brought the expected results.[17]

Secondly, the impact assessment of the national regulations underlined the EU dimension of the discussed issue. The scattered and divergent regulatory state at the national level has not only led to discrepancies in the number of female

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Diversity in the Boardroom and Firm Financial Performance, "Journal of Business Ethics" 439-440/2008.

[14] T. M. Dworkin, C. A. Schipani, *The Role of Gender Diversity*..., p. 139.

[15] T. M. Dworkin, C. A. Schipani, *The Role of Gender Diversity*..., p. 108.

[16] I. Velkova, *Quotas for Women on Corporate Boards*…, p. 22.

[17] W. Kang, J. K. Ashton, A. Orujov, Y. Wang, *Realizing Gender Diversity on Corporate Boards*, "International Journal of the Economics of Business" 2022, p. 12-13; I. Velkova, *Quotas for Women on Corporate Boards*…, p. 4; M. Swoy, *Corporate Gender Quotas and Meaningful Female Board Participation,* "California Western International Law Journal", Vol. 52:1/2021, pp. 215-217.

board members among the Member States but also established barriers to the internal market by imposing inconsistent corporate governance requirements on the companies in different jurisdictions.[18] Accordingly, in the recent literature, EU-level measures are believed to be more efficient than any national initiatives.[19]

1.2. DIRECTIVE 2022/2381

The above findings were first acknowledged at the European level debate in 2012 when the European Commission stressed the need to adopt mandatory, EU-wide legislation aimed at improving gender balance on boards across Europe.[20] This demand was not, however, fulfilled until ten years later, with the enactment of the directive 2022/2381 on improving the gender balance among directors of listed companies and related measures.

The scope of the directive is limited to listed companies due to their particular economic importance and trend-setting ability. For those entities, the directive sets a universal objective for women to hold at least 40% of non-executive director positions or 33% of all director positions (both executive and non-executive) by 30 June 20026 (Art. 5.1).

The companies which fail to achieve these thresholds should be obliged to adjust their selection procedure by introducing clear, neutrally formulated and unambiguous criteria established in advance of the recruitment process (Art. 6.1). In the case of equally qualified candidates, the gender preference in favor of the underrepresented sex shall apply (Art. 6.2).

Member States are also required to impose new reporting obligations, regarding i.a.: the gender representation on their boards, the undertaken or planned measures, or the reasons for not achieving the objectives (Art. 7.1).

2. IS THIS ENOUGH?

2.1. GENERAL REMARKS

The general design of the latest regulation, its mandatory character and territory scope deserves approval. As mentioned above, quotas are reported to be an effective method of advancing women into boardrooms in large numbers.[21]

[18] Directive 2022/2381, point 20.
[19] I. Velkova, *Quotas for Women on Corporate Boards*…, p. 40.
[20] EC, *Gender Balance in Business Leadership*, point 77.
[21] I. Velkova, *Quotas for Women on Corporate Boards*…, p. 5, 17.

Assuming that corporations should promote not only the economic interests of their investors but also specific higher social values, introducing quality objectives and reporting duties should not raise significant objections. At the same time, the adopted approach lacks proper deliberation and complexity.

2.2. UNANSWERED QUESTIONS: REASONS AND GOALS

The search for solutions to gender inequalities should begin with identifying the reasons for the current imbalance and correlated objectives that should be pursued. Meanwhile, these primary issues have not been considered by the EU legislator or profoundly researched in the literature. However, the up-to-date studies acknowledge that it is not only the corporate environment and entrenched cultural patterns that stand behind the current situation.

Research suggest that the male dominance on company boards might be, in fact, due to women's reluctance to serve as directors.[22] Most frequently identified barriers to a more significant presence of women in leadership positions include, in particular, work-life balance issues and parenting-related career breaks.[23] However, these difficulties are by no means eliminated by quotas.

Moreover, regardless of the achieved parities, female directors have statistically shorter tenures and are thus less likely to hold leadership roles on the company boards.[24] Therefore, the purely quantitative, threshold-based approach toward gender equality also fails to ensure a substantive balance between the actual influence exercised by male and female directors.

Limiting the women's empowerment agenda to quotas does not, therefore, seem sufficient to achieve the actual, and not only formal, gender balance on company boards.

3. GOING BEYOND SELECTION MECHANISMS: THREE STAGES CALLING FOR ACTION

3.1. GENERAL REMARKS

To adequately address the complex research problem, I propose distinguishing three stages of the transition towards gender equality on company boards,

[22] T. M. Dworkin, C. A. Schipani, *The Role of Gender Diversity*..., p. 119.

[23] OECD, *Enhancing Women's Economic Empowerment...,* p. 25.

[24] Y. Nilli, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, "University of Wisconsin Law School Legal Studies Research Papers", Series Paper No. 1436, p. 152.

including pre-selection, selection and post-selection. Each covers different causes of the observed imbalance and matches solutions to achieve different goals.

3.2. PRE-SELECTION STAGE

As mentioned above, women are generally less willing to take management positions than men, mainly due to the difficulties of maintaining a work-life balance while keeping a top corporate position. The first goal of the gender diversity policy should, therefore, be to encourage women to take on new challenges related to participation in high corporate structures.

Currently, the EU company law does not provide any specific rules enabling convenient reconciliation of the director's role with personal arrangements, requiring a temporary break from professional activity. Directors' duties apply permanently, also during any absences. Consequently, the board members remain constantly liable for the damages incurred by the company due to breach of the entrusted tasks. Thus, the instability entailed in the risk of flexible revocation or the necessity to resign from the office in case of a need for a more extended leave may be a significant deterrent to women in management corporate roles.

This situation can be remedied by introducing a temporary office suspension for a fixed period due to specified circumstances, i.e., parental leave or prolonged illness. On the one hand, such a mechanism enables the directors to reconcile their professional and personal life. On the other, it may be designed in such a way so as not to overburden corporations. Guarantees safeguarding the legitimate interests of the companies may, in particular, include: (i) the appropriate suspension period, (ii) relevant exceptions from the right to demand suspension (e.g., in case of single-person boards), (iii) allowing revocation of the board member even during the suspension period, in case of a conduct-related, legitimate reason, (iv) adequate notice period, (v) ensuring office continuity by temporary replacement (e.g., an obligation to convene a shareholders' meeting and present recommendations as to the substituting director). Similarly, proper legislation can effectively protect the interests of the third parties, including the company's creditors – e.g., by obliging the board to reveal information on the suspension and temporary director in the public registry.

The practical potential of the above proposal is confirmed by German law, which has already introduced similar regulations in 2021.[25] Given the need to harmonize gender equality standards and encourage women to have greater involvement in European company boards, implementation of such a mechanism also at the EU level seems most desirable.

[25] § 84 (3) Aktiengesetz.

3.3. SELECTION STAGE

Having increased the number of female candidates by introducing appropriate mechanisms at the pre-selection stage, the women empowerment agenda should further focus on the selection process. Since, historically, companies are more likely to appoint male directors, ensuring that women take a fair number of boardroom seats is crucial. An adequate tool to achieve this goal is quotas, which provide for the so-called positive discrimination, privileging the underprivileged gender.[26]

In this regard, Directive 2022/2381 is adequate. At the same time, it may be worth considering broadening its scope, currently limited only to listed companies. Both private and public companies can have a significant economic and social impact, dependent on their size. Therefore, some Member States decided to apply the quotas also based on the turnover criterion.[27]

3.4. POST-SELECTION STAGE

As mentioned above, research shows that regardless of the set thresholds, women remain underprivileged in terms of the tenures' duration, entrusted tasks, and opportunities for corporate advancement.[28] Consequently, the next goal of the equality agenda should be to ensure that, once appointed, female directors enjoy a similar influence on the company's operations.

In this regard, a possible solution is extending the reporting obligations, currently focused solely on the quantitative parities. Companies could be obliged not only to point out the number of female directors but also, e.g., their specific roles and tenures.[29] In this way, the shareholders could verify whether the gender balance in a given company is only illusory or real.

4. CONCLUSIONS

The European company law exhibits significant potential to close the gender gap in the corporate environment. At the same time, although the latest legislative trends are welcomed, there is still room for further improvements. The subse-

[26] I. Velkova, *Quotas for Women on Corporate Boards*…, p. 24.
[27] Kang W., Ashton J.K., Orujov A., Wang Y., *Realizing Gender Diversity...,* p. 5-7.
[28] Nilli Y., *Beyond the Numbers*..., p. 152.
[29] Nilli Y., *Beyond the Numbers*…, p. 196.

quent regulatory agenda should consider involvement at the pre-and post-selection stages of shaping company boards' personal composition.

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Katarzyna Kamińska
University of Silesia in Katowice, Poland
katarzyna.kaminska@us.edu.pl
ORCID: 0000-0002-4438-0127

LEGAL AND PSYCHOLOGICAL PERSPECTIVES ON PARENTAL RESPONSIBILITY AND SHARED RESIDENCE AFTER DIVORCE

Abstract

The analysis of current trends in family dissolution indicates that the number of divorces has increased in the European Union in recent decades. And, as divorce rates are increasing year by year, so is the number of children affected. The courts, lawyers and parents themselves are faced with the dilemma of how to regulate family affairs, including relationships between parents and children so that they are most beneficial for the latter. One of the most important and challenging issues remains the habitual residence of the child after divorce. Today, shared residence is an increasingly popular solution among divorced parents and the courts in different European countries are starting to consider shared residence as a more viable option than before. The aim of the paper is to identify post-divorce parenting both from a theoretical and practical point of view. In the first part of the paper, the concepts of parental responsibility and shared residence are presented. Then, shared parenting after divorce is investigated in the relevant legal instruments supporting maintaining positive parent-child relationships. The last part of the paper is devoted to the advantages and disadvantages of shared residence in the light of psychological research.

KEYWORDS

divorce, parental responsibility, shared residence, child custody

SŁOWA KLUCZOWE

rozwód, władza rodzicielska, piecza naprzemienna, piecza nad dzieckiem.

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1. INTRODUCTION

The analysis of current trends in family formation and dissolution indicates that the number of marriages has decreased in the European Union (EU) in recent decades, while the number of divorces has increased. Since the 1960s, the crude divorce rate has doubled, increasing from 0.8 per 1000 persons in 1964 to 1.6 in 2020. The highest crude divorce rates were registered in Denmark, Latvia, and Lithuania. By contrast, divorce rates were lowest in Malta and Slovenia.[1] And, as divorce rates are increasing year by year, so is the number of children affected. The courts, lawyers, and parents themselves face the dilemma of how to regulate family affairs, including relationships between parents and children so that they are most beneficial for the latter. One of the most important and challenging issues remains the habitual residence of the child after divorce. Basically, there are two possibilities: either a child can live with one parent and have regular contacts with the other, or live with both parents. The former option is called sole physical custody. The latter one, joint physical custody, is an increasingly popular solution among divorced parents. Because of living in two houses alternately, it is also called shared residence. The aim of the paper is to identify shared residence both from a theoretical and practical point of view. In the first part of the paper, the concept of shared residence is presented. Then, shared residence is investigated in the relevant legal instruments supporting maintaining positive parent-child relationships. The last part of the paper is devoted to the advantages and disadvantages of shared residence in the light of psychological research.

[1] https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_fewer_divorces (accessed 19 January 2024).

2. TERMINOLOGY AND DEFINITIONS

After a divorce, the principle is that each spouse retains parental responsibility for the child, although it can be removed or restricted by a court. To give parental responsibility to only one of the parents, a special reason is required which must be proved during the trial. Joint parental responsibility takes place when both parents have full parental rights and duties with respect to the child. They are established by virtue of the law from the child's birth until they come of age. The joint parental responsibility concept is related to joint legal custody, which means that each parent has an equal, legal right to make major decisions concerning the child's life and upbringing. In joint legal custody, both parents participate in making long-term decisions concerning the child's living arrangements, administration of assets, medical treatment, citizenship, education, preparation for a future profession, religion and cultural matters.[2] This kind of custody does not include day-to-day decisions about simple things, such as what the child wears or eats. Such matters are decided by the parent with whom the child lives. Nevertheless, it seems that the residential parent should inform the other parent about all vital matters concerning the child. Examples would include a school play, a parent-teacher meeting, a school competition, tutoring or a special diet. The non-residential parent has the right to regularly receive information about the child. If the other parent ignores this issue, it is always possible to make a request to a court to impose an obligation in that regard. The exercise of parental responsibility is basically not possible without having legal custody. In most countries, joint parental responsibility is the preferred or default option after a divorce. For example, in 1983, Finland and Sweden adopted the presumption that the court should give priority to joint parental responsibility if one or both parents apply for it. A similar approach was adopted in England in 1989 and in Germany in 1998.[3]

The divorce of the spouses causes that they do not live together or will no longer be living together soon. The parents who are entitled to joint parental responsibility must reach a decision on the child's place of residence after divorce. Parents may agree, or a judge may order, that the child should live exclusively with one of the parents or alternately with both. Parents must also reach an agreement in the case of a change in the place of residence of the child. In Italian law, for instance, parents determine the child's habitual residence by mutual agree-

[2] J. H. DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, 'Hofstra Law Review' 2015, Vol. 43, No. 4, p. 1012.

[3] K. Kurki-Suonio, *Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective*, 'International Journal of Law, Policy and the Family' 2000, Vol. 14, No. 3, p. 188.

ment.[4] The residential parent is obliged to notify the non-residential parent within 30 days if they change residence. Failure to do so leads inevitably to a duty to pay damages.[5] Overall, the national legislators allow shared residence after divorce, but this is not the rule. Shared residence was explicitly introduced, among others, in Denmark[6], Finland[7] and Norway[8]. By comparison, in Poland, the court may order shared residence, but its concept has not been regulated in the provisions of the Polish Family and Guardianship Code yet.[9] Sole physical custody of a child has been traditionally granted to the mother, and visitation rights – to the father. However, recent studies have shown that shared residence is more beneficial for children (which will be discussed later in the paper) and the courts in different European countries are starting to consider shared residence as a more viable option than before.

Specifically, shared residence means that the child lives with each parent for an equal or substantial amount of time. In fact, it can be a symmetric care arrangement or not. There is no unambiguous answer to the question of what 'substantial amount of time' means, but it is accepted in the jurisprudence that under shared residence, a child spends at least 30% of his time with each parent.[10] Some researchers report that shared residence takes place when children spend at least 104 nights a year in the residence of each parent.[11] Other researchers oppose the idea of specifying the time range when it comes to post-divorce parenting. J.H. DiFonzo thinks that it could not be established that X/Y allocation is the right amount for each child and each family; an individual approach is much more reasonable and practical than a one-size-fits-all idea. In his opinion, a mathematical formula cannot decide custody.[12] G.W. Hardcastle similarly considers that the doctrine has not determined the amount of contacts necessary to maintain close parent-child relationships after a divorce. It is obvious that not having any contact is harmful to the child, but it is impossible to state unequivocally whether X days

[4] Article 316 of the Italian Civil Code (Act of 16 March 1942, initially promulgated in Journal of Statutes 1942, No. 262).

[5] Article 337 *sexies* of the Italian Civil Code.

[6] Section 18a of the Danish Act on Parental Responsibility (Act of 6 June 2007, initially promulgated in Journal of Statutes 2007, No. 499).

[7] Section 9 of the Finnish Act on Custody and Access (Act of 1983, initially promulgated in Journal of Statutes 1983, No. 361).

[8] Section 36 of the Norwegian Children Act (Act of 8 April 1981, initially promulgated in Journal of Statutes 1981, No. 7).

[9] Act of 25 February 1964, initially promulgated in Journal of Statutes 1964, No. 9, item 59.

[10] A.M. Berman, D.P. Kirsh, *Definitions of Joint Custody*, 'Family Advocate' 1982, Vol. 5, No. 2, p. 2.

[11] A. Masardo, *Managing shared residence in Britain and France: questioning a default 'primary carer' model*, 'Social Policy Review 21: Analysis and Debate in Social Policy' 2009, p. 198.

[12] J.H. DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, 'Hofstra Law Review' 2015, Vol. 43, No. 4, p. 1015.

per month is significantly better than Y days per month.[13] It is worth noting that there is sometimes a fine line between shared residence and sole physical custody with significant contacts for the non-residential parent. When the non-residential parent is awarded a right to contact that equals half of the time spent with the child, the residence can, in practice, be shared as well.[14] Furthermore, the frequency of contacts is important, but what is even more important is to have a close relationship with both parents and feel supported by them.[15] The quality of parents' relationship can prevail over the quantity of time spent together.

3. PARENTAL RESPONSIBILITY AND SHARED RESIDENCE IN THE INTERNATIONAL CONTEXT

Shared residence is a growing trend affecting contemporary family law and child custody. This is now widespread in several European countries, such as Belgium, France, the Netherlands and Sweden.[16] Particularly, Belgium and the Netherlands are considered leaders in the accommodation of new family forms after a divorce.[17] However, national regulations do not operate in a vacuum. They are still affected by legal incentives under international and European law. It should be indicated that supranational legislation has now become an integral part of the national systems to which they apply.[18] It is worth taking a closer look at some pieces of legislation relevant to the discussed issues.

The first international treaty to protect the rights of the family and the child was the International Covenant on Civil and Political Rights adopted by the United Nations in 1966 (ICCPR). The provisions of the ICCPR reflect the principle that children should maintain contacts with both parents before, during and after a divorce. Article 23 protects the bond between the parent and the child by

[13] G.W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 'Family Law Quarterly' 1998, Vol. 32, No. 1, p. 210.

[14] T. Sverdrup, The changing concept of 'family' and challenges for family law in the Nordic countries (in:) J.M. Scherpe (ed.), European Family Law Volume II. The Changing Concept of 'Family' and Challenges for Domestic Family Law, Cheltenham-Northampton 2016, p. 203.

[15] F. Cyr, G. Di Stefano, B. Desjardins, *Family Life, Parental Separation, and Child Custody in Canada: a Focus on Quebec*, 'Family Court Review' 2013, Vol. 51, No. 4, p. 537.

[16] M. Kreyenfeld, H. Trappe, *Parental Life Courses after Separation and Divorce in Europe*, Berlin-Rostock 2019, p. 17.

[17] F. Swennen, *The changing concept of 'family' and challenges for family law in the Benelux countries* (in:) J.M. Scherpe (ed.), European Family Law Volume II. The Changing Concept of 'Family' and Challenges for Domestic Family Law, Cheltenham-Northampton 2016, p. 5.

[18] G. De Baere, K. Gutman, *The impact of the European Union and the European Court of Justice on European family law* (in:) J.M. Scherpe (ed.), European Family Law. Volume I. The impact of Institutions and Organisations on European Family Law, Cheltenham-Northampton 2016, p. 46.

assuming that the family should be protected and kept intact to the highest possible degree. Article 24 of the ICCPR refers to the child's welfare. As having bonds with parents is considered to be beneficial for the child, these bonds should be protected by national legislators and courts.[19] Relating the above to the shared residence order, it fully guarantees the child's right to bond with both parents, because they share the day-to-day care of the child and have a major role in the child's upbringing.

The rights expressed in the Convention on the Rights of the Child adopted by the United Nations in 1989 (CRC) can be viewed as supportive of shared parenting. Among these, it is worth mentioning the right to know and be cared for by parents – Article 7(1), and the right not to be separated from parents against their will, except when a court determines that such separation is necessary for the child's welfare – Article 9(1). The CRC provides that separation from parents may be necessary in a particular case, such as one involving abuse or neglect of the child by the parents or one where parents live separately and a decision must be made as to the child's place of residence. However, in accordance with Article 9(3), the child who is separated from one or both parents, has the right to maintain personal relationships and direct contacts with both parents on a regular basis, except if it would be contrary to their welfare. Moreover, the CRC requires a court to consider shared residence first, followed by sole physical custody, if that is what the child's welfare requires.

On the other hand, the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children concluded in 1996 (HCCH) was the first international binding instrument that uses the concept of 'parental responsibility' instead of the term 'parental authority'.[20] Parental responsibility under Article 1(2) of the HCCH includes parental authority or any analogous relationship of authority determining the rights, powers and responsibilities of parents in relation to the person or the property of the child. Basically, the scopes of these two concepts – 'parental responsibility' and 'parental authority' – overlap, although in certain situations, the former may have a broader meaning. For example, in accordance with Articles 95(1), 96 and 98(1) of the Polish Family and Guardianship Code, parental authority (*władza rodzicielska*) is the entirety of rights and duties of parents with regard to their child, whose purpose is to provide the child with due care and to protect its interests. The concept of parental authority in Polish law encompasses 3 elements: care of the person of the child, care of the child's

[19] N. Nikolina, *Divided Parents, Shared Children*, Cambridge-Antwerp-Portland 2015, p. 9.

[20] J. Ferrer-Riba, *Parental responsibility in a European perspective* (in:) J.M. Scherpe (ed.), European Family Law. Volume III. Family Law in a European Perspective, Cheltenham-Northampton 2016, p. 287.

property and representation of the child by the parents.[21] The German legislator uses the term of parental custody (*elterliche Sorge*), indicating the duty and the right to care for the child, particularly for the person of the child and their property.[22] Similarly, the Danish legislator states that custody (*forældremyndighedens*) encompasses both the duty to take care of the child and the right to make decisions about the personal circumstances of the child based on the child's interests and needs.[23] Under Norwegian law, if the parents have joint parental responsibility (*foreldreansvaret*), they have the right and the duty to make decisions for the child regarding personal matters. Their statutory obligation is to bring up and maintain the child properly, as well as to ensure that the child receives an education adapted to his or her ability and aptitude.[24] For comparison, in the Principles of European Family Law regarding Parental Responsibilities, the Commission on European Family Law has developed a comprehensive definition of parental responsibility. Principle 3:1 stipulates that this is a collection of rights and duties aimed at promoting and safeguarding the welfare of the child, in particular: care, protection and education; maintenance of personal relationships; determination of residence; administration of property and legal representation. Parental responsibility is apparently a wider concept and underlines the essence of parenting, i.e. the ongoing care of the child, while the concept of parental authority is usually associated with the rights of parents and hence the child is subordinated to their parents' power.

4. PARENTAL RESPONSIBILITY AND SHARED RESIDENCE IN THE EUROPEAN CONTEXT

Bearing in mind the growing role of international organisations, such as the EU, and the impact of their instruments on national law, these organisations cannot be ignored in the legal discourse regarding shared parenting. In the first place, it is worth taking a look at the Brussels II bis Recast adopted by the Council of the EU in 2019.[25] The long-awaited revision of the Brussel II-bis Regula-

[21] J. Słyk, *The Legal Content of Parental Authority in Polish Family Law*, 'Prawo w Działaniu' ('Law in Action') 2017, No. 32, pp. 86-87.

[22] Section 1626 of the German Civil Code (Act of 15 August 1986, initially promulgated in Journal of Statutes 1986).

[23] Section 2 of the Danish Act on Parental Responsibility.

[24] Section 30 of the Norwegian Children Act.

[25] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

tion[26] entered into force on 1 August 2022. The Brussels II bis Recast, like the HCCH mentioned above, uses the concept of parental responsibility. It means, as defined in Article 2 para. 2(7), all the rights and duties relating to the person or the property of a child which are given to a natural or legal person by a decision, by operation of law or by an agreement having legal effect, including rights of custody and rights of access. The objective of the Brussels II bis Recast is to improve the rules concerning children, especially when it comes to their rights in cross-border family procedures.[27]

Furthermore, it is worth discussing the Convention for the Protection of Human Rights and Fundamental Rights adopted by the Council of Europe in 1950, better known as the European Convention on Human Rights (ECHR). The ECHR set up the European Court of Human Rights (Court) whose judgements are binding on the countries concerned and have led governments to change their legislation and practice in a wide range of matters.[28] Article 8 of the ECHR protects the right to respect for private and family life, making it more difficult for the states to deprive parents of parental responsibility and contacts with the child. This provision is also the core of the Court's case law when it comes to divorce and child custody. In *Keegan v Ireland* (1994), the Court found that "a child has, as far as possible, the right to be cared for by his or her parents" and "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down".[29] In *Karrer v Romania* (2012), the Court noted that the mutual enjoyment by parent and child of each other's company is protected under Article 8 of the ECHR.[30] A longstanding line of case law has found that both parents are on equal footing with respect to their children. This includes the right to maintain a strong bond with the child during and after divorce. When discussing the Court's case law, it is worth mentioning *Kacper Nowakowski v Poland* (2017) case, where it was ruled that the Polish court's judgment to refuse the extension of contacts between father and child was in breach of Article 8 of the ECHR. "The Court underlined the importance of a child preserving and developing his or her ties with his or her family, and considered that, in principle, it was in the child's best

[26] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[27] https://www.era.int/cgi-bin/cms?_SID=c6ae4a6cb553f4070ac21230ab7d473c2d-5c833000648348413759&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=129048 (accessed 19 January 2024).

[28] D. Lima, *The Concept of Parenthood in the Case Law of the European Court of Human Rights* (in:) K. Boele-Woelki and D. Martiny (eds.), Plurality and Diversity of Family Relations in Europe, 2019, p. 104.

[29] 18 EHRR 342 [1994].

[30] Application No. 16965/10.

interests to maintain contact with both parents".[31] The conclusion is that national courts must not violate the right to respect for private life and family life, and should promote and encourage healthy, meaningful parent-child relationships.

In this context, what comes to mind is the problem of a couple's lack of agreement or one parent's objection to joint parental responsibility and shared residence after divorce. The Court in *Buchs v Switzerland* (2014) considered that "the exclusion of shared parental authority where one of the parents opposes it also falls within the margin of appreciation, taking into account the lack of any consensus in this area, the fact that the experts, in any event, found that it was not desirable in the specific circumstances [...]".[32] It follows from this case that national legislators and courts can decide for themselves whether shared residence should only be ordered where both parents agree.[33] In Germany and the Netherlands, for example, this type of custody is not possible when one parent is opposed to that idea. In turn, in Belgium, England, and Wales, France, Ireland, or Sweden, the court can order shared residence without the mutual agreement between parents if it is justified by the child's welfare.[34]

Each parent may submit an application to the Court directly claiming to be a victim of a violation by the state of any of the rights set forth in the ECHR. However, the subject of the Court's decision is not only the parent. Instead, the Court's decisions often concern the rights and well-being of the child. Moreover, the child's welfare is the guiding principle in family law that may override parental rights, even those prescribed in the ECHR. The cases examined by the Court include protection of the child's family bonds and protection of the child from harm and from being abducted. The Court's decisions emphasise the importance of the child's wishes.[35] Similarly, the European Convention on the Exercise of Children's Rights adopted by the Council of Europe in 1996 provides a number of procedural measures to allow children to exercise their rights either themselves or through other persons. Among them is the right to be informed and to express their views (Article 3). The application of the Convention in the proceedings concerning shared residence means that the court should take the child's views and wishes into consideration. In fact, the person who alternates between residences is a child, not their parents.

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[31] Application No. 32407/13.

[32] Application No. 9929/12.

[33] G. Willems, L. Cohen, *International Human Rights Law as a Basis for Reconstructing Legal Relationships between Adults and Children* (in:) J. Sosson, G. Willems, G. Motte (eds.), Adults and Children in Postmodern Societies, 2019, p. 691.

[34] K. Boele-Woelki, F. Ferrand, C. González-Beilfuss *et al*., *Principles of European Family Law Regarding Parental Responsibilities*, Antwerpen-Oxford 2007, p. 133.

[35] D. Coester-Waltjen, *The Impact of the European Convention on Human Rights and the European Court of Human on European family law* (in:) J.M. Scherpe, European Family Law Volume I. The Impact of Institutions and Organisations on European Family Law, Cheltenham-Northampton 2016, pp. 52, 91.

A shared residence order is an organisational and logistical challenge which, in turn, raises the question about the conditions for its application.

5. ADVANTAGES AND DISADVANTAGES OF SHARED RESIDENCE

Joint parental responsibility is deeply rooted in the American family law. The first family law system that implemented joint custody preference was the Californian one. Since the 1980s, an active policy has been conducted to introduce legislation and force courts to give equal contact rights to both parents.[36] In the USA, there is now a common consensus that joint legal custody is the best alternative for children after a divorce. Such custody is granted in most cases, and in a majority of states it is encouraged and even required.[37] For years, there has been a great deal of interest in shared residence as well. That is also why most studies on this matter are published in the USA. In order to evaluate shared residence from a psychological point of view, it is worthwhile to use the experience of the Americans, but also the latest and equally important results of the research carried out by European scientists.

Shared residence has its supporters and opponents. However, most contemporary psychologists claim that children benefit from this kind of custody. This is confirmed by the research conducted by L. Nielsen who says that children in shared residence have better outcomes than those in sole physical custody.[38] By living alternately with each parent, a child has better relationships with both.[39] According to a study on the health and well-being of children whose parents were divorced, conducted by M. Bergström, a child in shared residence suffers fewer psychosomatic problems, including trouble sleeping, headaches, stomach aches, tension, concentration issues, decreased appetite, sadness and dizziness, than a child under single custody.[40] What is also noteworthy is the comparative work

[36] K. Kurki-Suonio, *Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective*, 'International Journal of Law, Policy and the Family' 2000, Vol. 14, No. 3, p. 187.

[37] M.A. Kipp, *Maximizing Custody Options: Abolishing the Presumption against Joint Physical Custody*, 'North Dakota Law Review' 2003, Vol. 79, No. 1, p. 60.

[38] https://ifstudies.org/blog/10-surprising-findings-on-shared-parenting-after-divorce-or-separation (accessed 19 January 2024).

[39] L. Nielsen, *Joint Versus Sole Physical Custody: Children's Outcomes Independent of Parent-Child Relationships, Income, and Conflict in 60 Studies*, 'Journal of Divorce' 2018, pp. 18-19.

[40] M. Bergström, E. Fransson, B. Modin et al., *Fifty moves a year: is there an association between joint physical custody and psychosomatic problems in children?*, 'Journal of Epidemiology & Community Health' 2015, No. 69, pp. 771-772.

of T. Bjarnason and A.M. Arnarsson, who studied shared residence and other family structures in 36 European, Mediterranean and North American countries. One of their conclusions is that shared residence leads to an increase in parents' involvement in parenting, to the distribution of parental duties equally between parents, to the improvement in the quantity and quality time spent together, and to the development of good communication with both parents.[41] R. Bauserman has also come to similar conclusions, saying that joint custody (meaning joint legal custody and/or shared residence) results in more time spent together, better relationships with parents and, therefore, authoritative parenting.[42]

In turn, opponents argue that "the child pays a price in order to have equal access to both parents".[43] They claim that due to shared residence, the child is shuttled back and forth between two homes, and this disrupts stability in their life.[44] However, in the context of stability, it would be worthwhile perhaps to refer to the opinion presented by C.S. Bratt who asserts that children need emotional stability rather than physical stability. Sole physical custody may give physical stability and continuity, but can also be detrimental to the child's emotional well-being. Children in single custody may feel unloved, rejected or ignored by the non-residential parent. Shared residence is more likely to provide a child with emotional stability and the feeling of safety.[45]

In the literature, the potential benefits from shared residence outweigh the potential risks.[46] Nevertheless, shared residence is not preferable to sole physical custody in all cases. If one parent is abusive or neglectful, a single physical custody arrangement is a better solution. It seems that the high level of cooperation between parents is crucial to make shared residence feasible and beneficial for a child. They need to communicate often, see each other, agree on the style of upbringing and discipline, as well as coordinate household routines or rules. There is a wide range of tasks and activities that require ongoing contact. Under shared residence, both parents have the day-to-day care, according to the agreed schedule, but they should be as flexible as possible in the case of any unexpected, unforeseen situations. They

[41] T. Bjarnason, A.M. Arnarsson, *Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries*, 'Journal of comparative family studies' 2011, No. 42(6), pp. 20-21.

[42] R. Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 'Journal of Family Psychology' 2002, Vol. 16, No. 1, p. 98.

[43] A. Singer, *Active Parenting or Solomon's Justice? Alternating residence in Sweden for children with separated parents* (in:) K. Boele-Woelki (ed.), Debates in Family Law around the Globe at the Dawn of the 21st Century, Antwerp-Oxford-Portland, 2009, p. 63.

[44] L.E. Hawkins, *Joint Custody in Louisiana*, 'Louisiana Law Review' 1982, No. 43(1), p. 94; R. Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 'Journal of Family Psychology' 2002, Vol. 16, No. 1, p. 91.

[45] C. S. Bratt, *Joint Custody*, 'Kentucky Law Journal' 1978-1979, Vol. 67, No. 2, pp. 296-298.

[46] K. Kamińska, *Piecza naprzemienna a władza rodzicielska rodziców żyjących w rozłączeniu* [*Joint physical custody and parental authority after divorce or separation of parents*], Warszawa 2022, p. 533.

should also be sensitive to the views and wishes of the child. It is necessary to remember that as the child grows, their needs change and it is possible that a shared residence order will no longer be suitable. The situation of parents may be changing at some point, too. Overall, one of the main prerequisites for shared residence is that the parents manage to avoid conflict. As explained by J.G. Taussig and J.T. Carpenter, it requires substantial adjustment, effort, imagination, cooperation, compromise and maturity.[47] On this basis, it can be concluded that the stronger the relationship between parents, the more frequently a shared residence order should be issued.

6. CONCLUSIONS

The divorce rate is increasing in today's society. Divorce impacts not only the spouses but also their child who has to adapt to a changing situation – new family dynamics, together with a new home, living situation, schools, friends, etc. All this affects children of every age. The rising number of family break-ups results in a need to find ways to mitigate, adapt, reduce, or prevent negative impacts on children. Currently, as a general rule, both parents keep parental responsibility if they later divorce. In recent years, shared residence has become more and more popular. Shared residence means that the child is in the physical care of both parents, the essence of which is that they share their time between two parents' homes. In the light of international and European law, the child has the right to be cared for by their parents even when the relationship between them has broken down. The child has the right to preserve the family ties and the life and habits they used to have before the divorce. This can be achieved by granting physical custody to both parents if the circumstances allow it. The instruments discussed in the paper, including the Court's case law, have a significant influence on law reforms across Europe and on the interpretation of national regulations. They create the minimum standard that the states should respect.

Shared residence has been given attention in the scientific, judiciary, and political environments for a while. A lot of studies have been conducted, but child psychologists do not agree with their results. Most researchers say that children benefit from a shared residence order, reporting better emotional well-being and social adjustment than children in exclusively or predominantly single-parent families. However, this usually relates to the divorced parents who are not involved in litigation. There is also evidence that shared residence may not work well for some families, particularly if parents cannot cooperate with each other and if they live far away from each other. Therefore, it is difficult to draw definite

[47] J. G. Taussig, J. T. Carpenter, *Joint Custody*, 'North Dakota Law Review' 1980, Vol. 56, No. 2, p. 234.

conclusions.[48] However, instead of asking whether the shared residence is good or not, one should inquire into situations when this arrangement works. First and foremost, it must take into account the child's welfare. Special attention should be paid to the age of the child as well as their wishes commensurate with age and maturity. Overall, shared residence works when parents cooperate after divorce, avoid conflict, and have a child-centred approach. As rightly observed by J. Carbone, "the parental model that produces the best outcomes for children is one of supportive partnership".[49]

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[48] J. Miles, R. George, S. Harris-Short, *Family Law. Text, Cases and Materials*, 2019, p. 763.

[49] J. Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 'Santa Clara Law Review' 1999, Vol. 39, No. 4, p. 1095.

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Jakub Kociubiński
University of Wrocław, Poland
e-mail: jakub.kociubinski@uwr.edu.pl
ORCID: 0000-0002-4391-7439

ON THE NEED FOR *PER SE* IMPUTABILITY OF MEASURES TO THE STATE IN EUROPEAN UNION STATE AID LAW*

Abstract

For a measure to be considered State aid, it must satisfy several cumulative criteria, one of which is that it must be imputable to the State. According to existing case law, it is necessary to establish the actual involvement of authorities in a specific transaction. However, given the changing role of the State in the economy, characterized by a growing reliance on professional market players to fulfil public tasks, proving such active involvement can become challenging. Therefore, in this paper, the author proposes the introduction of *per se* imputability to the European State aid acquis. That is a rebuttable presumption that a measure originates from the State when actions are taken by State-owned entities or when a particular course of action is mandated by law.

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KEYWORDS

State aid, State resources, imputability, advantage criterion, Market Economy Operator Test

SŁOWA KLUCZOWE

pomoc państwa, zasoby państwowe, przypisywalność, kryterium korzyści, test operatora rynkowego

INTRODUCTION

In order for a measure to be considered as State aid under Article 107(1) TFEU, it must be imputable to the State.[1] According to a well-established case law dating back to the landmark *Stardust Marine* ruling, imputability requires demonstrating that authorities were involved "in one way or another" in the adoption of the measure.[2] However, the author believes that this approach is increasingly problematic given the changing role of the State in the modern economy, particularly the growing reliance on professional market players (both public and private) to carry out public tasks. The reasons for this inadequacy are twofold. Firstly, government influence can be exerted through numerous subtle and informal channels, making it difficult to detect.[3] Secondly, there are various frameworks in which the State compels entry into business relationships through legislation, without actively participating in subsequent transactions.[4] Such transactions would not have taken place if businesses were free to consider only commercial factors. As a result (at least potentially), they may confer advantage to their partners that are unattainable under normal market conditions.

In light of the points mentioned above, this paper aims to present and justify a proposal for introducing the concept of *per se* imputability. This refers to a rebuttable presumption that a measure is attributable to the State when actions

[1] P. Werner, V. Verouden (eds.), *EU State aid Control. Law and Economics*, Aalphen aan den Rijn 2017, pp. 87-89; K. Bacon (ed.), *European Union Law of State Aid*, Oxford 2017, p. 60.

[2] Case C-482/99 *France v Commission (Stardust Marine)*, EU:C:2002:294, para. 52.

[3] See e.g. M. Bałtowski, P. Kozarzewski*, Formal and real ownership structure of the Polish economy: state-owned versus state-controlled enterprises*, "Post-Communist Economies" 2016, Vol. 28, No. 3, pp. 405-419; P. Wegenschimmel, A. Hodges, *The embeddedness of 'public' enterprises: the case of the Gdynia (Poland) and Uljanik (Croatia) shipyards*, "Business History" 2013, Vol. 65, No. 1, pp. 113-130.

[4] Until now, the majority of cases have focused on systems that mandate the purchase of energy from renewable sources. However, in principle, the issue is not limited to any specific sector.

are taken by State-owned entities or when a course of action is mandated by law.[5] The paper's discussion will be built upon these specific issues, forming the foundation of the analysis. The rationale behind the proposed presumption is also closely tied to the *PreussenElektra* judgment, which considers imputability and State resources criteria as cumulative rather than alternative, contrary to the explicit wording of Article 107(1) TFEU.[6] Regardless of one's personal stance on this interpretative approach, it is important to note that, even if State resources are involved, without imputability, a measure would not qualify as State aid, even if it resulted in the creation of potentially distortive advantages unobtainable normal market conditions.[7] By adopting *per se* imputability approach in such cases, the emphasis in assessment would shift towards evaluating the economic suitability of the measure. In the author's opinion, this approach aligns more effectively with the so-called objective concept of State aid, which requires assessing a measure based on its observable effects and interventionist nature, rather than relying solely on formal criteria.[8] Consequently, it can be argued that if State resources are involved in a transaction that would not have occurred under normal market conditions, it should suffice to presume (albeit rebuttably) that the measure is imputable to the State.

IMPUTABILITY OF ACTIONS OF STATE-CONTROLLED UNDERTAKINGS

In relation to the first situation mentioned, where *per se* imputability can be considered, the resources of public undertakings are generally deemed as State resources for the purpose of State aid assessment under Article 107(1) TFEU.[9] However, these undertakings are expected to be guided primarily by business

[5] The question of *per se* imputability has been mentioned as something potentially worth considering earlier, albeit mostly as *obiter dicta.* See J.A. Winter, Re(de)fining the Notion of State Aid in Article 87(1) of the EC Treaty, "Common Market Law Review" 2004, Vol. 41, pp. 487–501.

[6] Case C-379/98 *PreussenElektra*, EU:C:2001:160, paras 58-62. See also Case C-329/15 *ENEA*, EU:C:2017:671, paras 25-26.

[7] Criteria set out in Article 107(1) TFEU are cumulative. Unlike the rule of reason concept, there is no provision in EU State aid law that allows for flexibility. Consequently, even if a measure is considered distortive, it would not be classified as State aid if it fails to satisfy all of the criteria. See T-67/94 *Ladbroke Racing v Commission*, EU:T:1998:7, para. 52.

[8] E.g., Cases 173-73 *Italy v Commission*, EU:C:1974:71, para. 13; C-75/97 *Belgium v Commission (Maribel bis/ter)*, EU:C:1999:311, para. 25; C-83/98 P *France v Ladbroke Racing and Commission*, EU:C:2000:248, para. 25; C-452/10 P *BNP Paribas and BNL v Commission*, EU:C:2012:366, para. 100.

[9] P. Werner, V. Verouden, *EU State Aid…*, p. 89.

considerations rather than interventionist motives.[10] As a result, the Court, as previously mentioned, also requires proof that authorities were involved "in one way or another" in the decision-making process within these undertakings.[11]

In order to ascertain whether such involvement did indeed occur, the Court, initially in the *Stardust Marine* case, established a set of non-exhaustive indicators that were subsequently elaborated in case law and quasi-codified by the European Commission in the *Notice on the notion of State aid*.[12] Therefore, the assessment of imputability should specifically consider the integration of a public undertaking into the structures of the public administration, the nature of its activities and their normal competitive market conditions in comparison to private operators, the legal status of the undertaking (whether subject to public law or ordinary company law), the level of supervision exerted by public authorities over the undertaking's management, and any other indicators that demonstrate the involvement of public authorities in the adoption of a measure or the unlikelihood of their non-involvement. These indicators should also take into account the scope of the measure, its content, and the conditions it contains.[13] Whereas, in *Van der Kooy* case, the Court specified that one indicator of a public undertaking acting on State "order" is the authorities' ability to veto management decisions, without necessarily being able to impose a specific course of action.[14] Additionally, in *Italy v Commission* and *Commerz Nederland* cases, the Court expanded on imputability criterion by stating that the undertaking must consider "directives or guidelines" issued by a public body.[15] This aspect has been further developed in subsequent case law, notably in *Pearle* and *Doux Elevages* cases, where the Court emphasized the importance of distinguishing between policy-driven State involvement and situations where authorities merely act as facilitators or vehicles for commercial operations.[16] If the State's involvement is purely technical in nature and unrelated to public policy, the measure will not be considered imputable.

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[10] C. Koenig, J. Kühling, *EC control of aid granted through State resources: Public undertakings, Funds, imputability and the importance of how resources are transferred*, "European State Aid Law Quarterly" 2002, Vol 1, No. 1, p. 15.

[11] Case C-482/99 *Stardust Marine*, para. 52.

[12] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C262/1, para. 43.

[13] Cases C-160/19 P *Comune di Milano v Commission*, EU:C:2020:1012, paras 46-48; C-425/19 P *Commission v Italy and Others*, EU:C:2021:154, paras 59-62; T-561/18 *ITD and Danske Fragtmænd v Commission*, EU:T:2021:240, paras 333-334.

[14] Case C-67/85 *Van der Kooy v Commission*, EU:C:1988:38, para. 33.

[15] Cases C-305/89 *Italy v Commission*, EU:C:1991:142, para. 14; C-242/13 *Commerz Nederland*, EU:C:2014:2326, para. 35.

[16] Cases C-345/02 *Pearle and Others*, EU:C:2004:448, para. 37; C-677/11 *Doux Élevage and Coopérative agricole UKL-ARREE*, EU:C:2013:348, paras 40-41.

The author's opinion is that the problem with such indicators is their inherent focus on formal aspects, particularly the institutional setup of State oversight. This relatively narrow focus often disregards the presence of informal means of State influence, which can be difficult to identify at first glance. While the jurisprudence concerning merger control has long dealt with the identification of these subtle forms of influence (albeit in a different context), it has been underutilized in the field of State aid.[17] However, this acquis could serve as a valuable point of reference for understanding potential scenarios in which "decisive influence" and "effective control" – essentially equating imputability – may arise, along with the associated challenges of identifying them.

Notably, the ability to veto decisions of an undertaking, as mentioned in *Van der Kooy*, aligns well with the concept of negative control that is established in merger control acquis.[18] Negative control refers to a situation where a shareholder has the power to create a deadlock in managerial decision-making, ensuring that the undertaking's actions align with their strategic objectives.[19] In *Van der Kooy* and *Salvat* cases, determining the existence of negative control was a straightforward process because it was legally established and the State was the sole entity capable of exercising such control (so, the Court did not have the opportunity to elaborate on the issue).[20] However, there are more complex situations where the aforementioned indicators may be less straightforward to apply. Negative control can be jointly held by a group of shareholders, where their collective influence allows them to block certain decisions or impose their preferred course of action (positive control), while no individual shareholder possesses such authority alone.[21] In the context of State aid, it is conceivable that authorities retain residual shares in predominantly privatized undertakings, without holding any associated voting rights. This is particularly common in post-communist countries.[22]

Although one might argue that when other shareholders are private, there can be no representation of the State without a formal, legally binding "order" from the authorities, the reality may differ. In practice, this group of private shareholders may maintain close proximity to the State and have various connections with the public sector, such as through government contracts. As a minority share-

[17] See e.g. M. Rosenthal, S. Thomas (eds), *European Merger Control*, Munich 2010, pp. 25-38; I. Kokkoris, H. Shelanski, *EU Merger Control A Legal and Economic Analysis*, Oxford 2014, pp. 119-134 and sources quoted therein.

[18] E.g. merger decisions M.3198 - *VW-AUDI/VW-AUDI Vertriebszentren* [2003] OJ C206/14; M.3537 - *BBVA/BNL* [2004] OJ L233/2; M.3876 - *Diester Industrie/Bunge/JV* [2005] OJ C264/5.

[19] M. Rosenthal, S. Thomas (eds), *European Merger...*, p. 32.

[20] Cases C-67/85 *Van der Kooy*, paras 27-38; T-136/05 *Salvat père & fils and Others v Commission*, EU:T:2007:295, paras 154-156.

[21] E.g. Case T-282/02 *Cementbouw Handel & Industrie v Commission*, EU:T:2006:64, para. 42 and decision M.295 - *SITA-RPC / SCORI* [1993] OJ C88/9, para. 73.

[22] M. Bałtowski, P. Kozarzewski, *Formal and real...*, pp. 405-419; P. Wegenschimmel, A. Hodges *The embeddedness of…*, pp. 113-130.

holder, the State can *de facto* impose its will because other shareholders may seek to maintain friendly relations with the government or expect *quid pro quo*.[23] In such cases, State influence, referred to as "directives" in *Italy v Commission* case, would be exercised through informal and discreet channels that are difficult to detect.[24]

If an informal controlling group exists, with at least one entity being State-controlled, the cohesion of this group relies on the shared interests of its members. However, these common interests may be transient, driven by short-term tactical considerations, leading to fluctuating composition within the controlling group over time.[25] Thus, it can be argued that although the State, as a minority shareholder, may have the capacity to enforce its will in some cases, it cannot do so over all other shareholders consistently.[26] While cooperation involving the State as a party may exhibit more stability compared to collaboration among unrelated private enterprises (as parties may seek to maintain amicable relations with the State), the stability of such cooperation none the less cannot be guaranteed. Moreover, it is important to note that in many cases, particularly with recently privatized undertakings, a significant percentage of shares may be owned by employees or individual traders. In instances of fragmented ownership, the shareholder group typically lacks a unified voice and tends to remain passive. This circumstance creates an opportunity for well-organized professional minority shareholders or their group to effectively guide the undertaking.[27]

After considering the points discussed above, it can be argued that neither a single indicator nor a specific set of indicators can guarantee absolute certainty in detecting State influence exercised through informal channels. While it may be unrealistic to expect a completely foolproof set of *ex ante* criteria, none the

[23] See *per analogiam* merger decisions where joint control was identified: M.967 – *KLM/AIR UK* [1997] OJ C372/20; M.1412 - *Hutchison Whampoa/RMPM/ECT* [1999] OJ C127/3. See also M.4249 - *Abertis/Autostrade* [2006] OJ C268/7, paras 6-12 where the Commission stated that commonality of interest may indicate joint control.

[24] Compare M. Bałtowski, P. Kozarzewski, *Formal and real...*, pp. 405-419 with circumstances of case C-305/89 *Italy v Commission*. This problem has been recognized in the State aid context: P. Werner, M. Caramazza, *'State' Aid or Not – This Is the Question*, "European State Aid Law Quarterly" 2019, Vol. 18, No. 4, pp. 525-526.

[25] See T.A. Caplow, *A theory of coalitions in a triad*, "American Sociological Review" 1956, No. 21, pp. 489-493; D.A. Lax, J.K. Sebenius in H.P. Young (ed.), *Negotiation Analysis*, Ann Arbor MI 1991.

[26] See *per analogiam* merger joint venture decisions M.1368 - *Ford/ZF* [1999] OJ C32/5 where the Commission stated that stability of joint venture can be evaluated over 7 years and over 4 years in M.744 - *Thomson / Daimler-Benz* [1996] OJ C 179/3.

[27] Historical trends in attendance at annual shareholder meetings are being analysed: See e.g. M.4730 - *Yara/Kemira GrowHow* [2007] C245/7; M.2574 - *Pirelli/Edizione/Olivetti/Telecom Italia* [2001] C325/12. Additionally, the amount of financial investors and speculative capital is being considered, as these investors typically do not have an active interest in running the undertaking. See M.6718 - *Toyota Tsusho Corporation/CFAO* [2012] OJ C377/3.

less when viewed in the context of the overarching objective of the EU State aid control system, as exemplified by *Air France* case, which emphasises the need to prevent the State from evading Article 107 TFEU by establishing seemingly independent grantors, they fall short.[28] In the author's opinion, there is room for improvement within the realm of possibility to enhance the effectiveness of these indicators.

In this context, the author believes that the primary concern is the assessment of transactions' economic adequacy. In State aid cases, the Market Economy Operator Test (MEOT) is typically employed for this purpose. The MEOT involves evaluating whether the transaction in question would be deemed acceptable to a hypothetical, fully rational private investor.[29] If the answer is negative, it is presumed that the measure being examined serves an interventionist purpose and could potentially qualify as State aid.[30] However, it is important to note that currently, the MEOT is only conducted once all the criteria set out in Article 107(1) TFEU, including imputability, have been established. This means that if the aforementioned soft forms of State influence do not contribute to finding imputability, there will be no opportunity to assess whether the subsequent transaction adheres to normal market conditions.

Upon analysis of the initial postulate in light of the preceding discussion, an important question arises: Can transactions occur that deviate from typical market behaviour, providing an undue advantage to a partner, without being imputable to State actions? The answer is, in principle, yes. In any market economy, there are inherent elements of business risk and information asymmetry that can lead to occasional instances of poor decisions favouring a business partner under specific circumstances.[31] However, it is crucial to note that the MEOT takes into account only the information available at the time the decision to allocate resources was made.[32] The ultimate outcome, assessed retrospectively, is not the primary focus. Rather, the MEOT aims to determine whether the activity in question was economically justifiable based on the circumstances prevailing at the time the decision was made.[33] With this in mind, one can answer the earlier question by stating

[28] T-358/94 *Air France v Commission*, EU:T:1996:194, para. 62.

[29] Cases C-533/12 P and C-536/12 P *SNCM and France v Corsica Ferries France*, EU:C:2014:2142, para. 30; T-11/95 *BP Chemicals v Commission*, EU:T:1998:199, para. 161.

[30] Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale v Commission*, EU:T:2003:57, para. 325; T-163/05 *Bundesverband deutscher Banker v Commission*, EU:T:210:59, para. 277; T-561/18 *ITD and Danske Fragtmænd*, para. 353.

[31] C.R. Leslie, *Rationality Analysis in Antitrust*, "University of Pennsylvania Law Review" 2010, Vol. 158, No. 2, p. 279; J.F. Tomer, *What is behavioral economics?,* "The Journal of Socio-Economics" 2007, Vol. 36, No. 3, p. 468.

[32] T-16/96 *Cityflyer Express v Commission*, EU:T:1998:78, para. 76; T-228/99 and T-233/99 *WestLB*, para. 246; T-425/04 RENV *France and Orange v Commission*, EU:T:2015:450, para. 227.

[33] The ultimate success of an investment can only be assessed *ex post facto*. At that stage, no action can be taken regarding previously approved measures.

that while there may indeed be instances of poor business decisions that lead to undue advantage, the proper implementation of the MEOT should be able to identify transactions that have interventionist motivations.[34]

The indicators discussed earlier, even though by themselves cannot guarantee detecting all State involvement, can serve a purpose in the following interpretive approach: If these indicators, in conjunction with the overall circumstances surrounding the adoption of a measure, indicate a likelihood of the transaction being unmarketlike, the MEOT should be conducted. If the results of the test demonstrate that no rational private investor would invest their capital under such conditions, then the imputability to the State should be presumed.

Whenever a seemingly differentiated approach to public undertakings in comparison to those private is considered, it is also necessary to determine whether it would be in line with the principle of neutrality set out in Article 345 TFEU.[35] This principle (applied in this context) requires equal treatment of all undertakings, regardless of their ownership structure.[36] The author argues that there is no risk of violating this principle. Conducting the MEOT does not imply unequal treatment; rather, it enables the assessment of whether a transaction is unmarketlike and should be evaluated for its compatibility with the Internal Market, as any other State aid. The reason the MEOT does not need to be conducted for private undertakings in the discussed scenarios is simply because their actions do not have the potential to constitute State aid. Therefore, the situation where a private entity acts independently without any State involvement is not comparable to a State-owned undertaking potentially acting in an interventionist capacity. Any differences in approach to these situations arise from objective disparities in their circumstances.[37]

Nevertheless, a cautionary note – of more practical rather than legal nature – regarding the proposed solution must be sounded. In reality, State-owned undertakings engage in numerous routine transactions with other market players, which

[34] See Cases T-156/04 *EDF v Commission*, EU:T:2009:505, para. 228; T-242/12 *SNCF v Commission*, EU:T:2015:1003, para. 292 where the Court held that State acting in its capacity as authority cannot be compared to actions of a private investor in a market economy.

[35] The aforementioned principle is somewhat automatically brought up in this context, although its precise meaning may be subject to discussion, particularly considering the limited availability of case law on the matter. See commentary in B. Akkermans, E. Ramaekers, *Article 345 TFEU (ex Article 295 EC), its meanings and interpretations*, "European Law Journal" 2010, Vol. 16, No. 3, pp. 292–314.

[36] F.-J. Säcker, F. Montag (eds), *European State Aid Law: A Commentary*, Munich 2016, p. 109; M. Klamert in M. Kellerbauer, M. Klamert, J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights*, Oxford 2019, p. 2048.

[37] Article 345 TFEU is interpreted as manifestation of the principle of non-discrimination (M. Klamert in M. Kellerbauer, M. Klamert, J. Tomkin (eds), *The EU Treaties*..., p. 2048). However, discrimination only occurs if there is no objective justification for unequal treatment: See e.g. C-106/83 *Sermide*, EU:C:1984:394, para. 28; C-17/90 *Pinaud Wieger v Bundesanstalt für den Güterfernverkehr*, EU:C:1991:416, para. 11.

is a normal occurrence in all market economies. As a result, it is not feasible to thoroughly examine every transaction of State-run undertakings for a potential interventionist nature. It is impractical both in terms of the sheer number of transactions involved and the legal requirement to uphold the principle of neutrality.[38] Making all such transactions notifiable as potential State aid would be unmanageable. It is worth noting, however, that the current interpretive approach faces similar challenges. Therefore, the proposed approach will not introduce any additional difficulties in this regard. It is important to recognize that, while this limitation does not question the overall feasibility of the proposed solution, it does highlight the inherent challenge of fully addressing all transactions involving State-owned undertakings.

IMPUTABILITY OF ACTIONS OF PRIVATELY OWNED INTERMEDIARIES

Regarding the second part of the paper's postulate, it is currently established in jurisprudence that if a private undertaking is obligated by the State to engage in a particular transaction, it does not qualify as State aid unless the undertaking specifically receives funds for that purpose.[39] It is important to note that these dedicated funds do not necessarily have to originate directly from the public administration but can come from various parafiscal levies, which are legally required but payable directly to the undertaking responsible for their subsequent redistribution.[40]

Irrespective of one's assessment of this approach, which is beyond the scope of this paper, in such cases, the question of imputability shifts to how the private entity distributes the funds received from the State, potentially resulting in what is referred to as indirect State aid.[41] The ruling in *Air France* case provides general interpretive guidance in relation to the presented postulate. The Court stated

[38] In this scenario, treating public and private undertakings differently would have violated the neutrality principle. This is because there would have been no objective difference in the factual circumstances between them, and the sole basis for the differentiated treatment would have been the ownership structure.

[39] Cases C-329/15 *ENEA*, paras 26 & 30; C-706/17 *Achema and Others*, EU:C:2019:407, para. 68; C-434/19 *Poste Italiane*, EU:C:2021:162, para. 43.

[40] Cases T-47/15 *Germany v Commission (EEG 2012)*, EU:T:2016:281, para. 118 & 122-128; C-850/19 P *FVE Holýšov I and Others v Commission*, EU:C:2021:740, para. 46.

[41] For a commentary see: T. Iliopoulos, *Is ENEA The New PreussenElektra?,* "European State Aid Law Quarterly" 2018, No. 1, pp. 19-27; G. Carullo, *State Resources in the Case Law: Imputability Under an Organizational Perspective*, "European State Aid Law Quarterly" 2013, Vol. 12, No. 3, pp. 453-463.

that the State cannot exempt measures from the State aid control regime by dissociating the granting body from the State apparatus, thereby granting it a certain degree of independence that potentially precludes imputability.[42]

The State aid acquis distinguishes between the recipient of State resources and the beneficiary who ultimately receives an advantage unobtainable under normal market conditions.[43] The recipient is considered "invisible" within the State aid control system if it merely acts as a vehicle for State intervention and does not retain any funds for itself, or if it receives only market-based remuneration for its services.[44] State aid can be granted to either the ultimate beneficiary, the recipient, or both the recipient and indirect beneficiary.[45] In light of this case law, the issue of imputability can be framed as follows: If State resources and imputability are considered separate criteria, what level of decision-making discretion can the recipient of State resources have before its actions are no longer imputable to the State?

It is reasonable to conclude that the level of discretion of a private intermediary cannot be simplified into a dichotomous distinction of either full decision-making authority or none at all. In order to determine the imputability of actions by such intermediaries and assess whether they are sufficiently under State control, the case law has elaborated (again disregarding merger control acquis) a set of very general and highly casuistic indicators. These indicators aim to determine whether the intermediary's conduct has been dictated by instructions from public authorities or if the State has exercised dominant influence in the company's decision-making process. For example, in *Volotea*, *Germanwings*, and *easyJet* cases, the Court held that when an intermediary's discretion in selecting partners (the alleged beneficiaries) is "significantly reduced by the criteria and guidelines established by the [State]", then the imputability criterion is met.[46] Whereas in *Commerz Nederland*, the Court stated that the intermediary "had to take into account directives issued by governmental bodies".[47] A complete lack of discretion is thus not required, although the specific level of discretion needed to avoid giving rise to imputability remains unclear.

When considering this case law in conjunction with the general *Stardust Marine*-derived reasoning, it becomes evident that the assessment of imputability

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[42] Case T-358/94 *Air France*, paras 62 & 68.

[43] Cases C-156/98 *Germany v Commission*, EU:C:2000:467, para. 26; C-403/10 P *Mediaset v Commission*, EU:C:2011:533, para. 81.

[44] Case T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) v Commission*, EU:T:2003:217.

[45] E.g., Cases T-424/05 *Italy v Commission*, EU:T:2009:49, para. 108; T-901/16 *Elche Club de Fútbol v Commission*, EU:T:2020:97, para. 36.

[46] Cases T-607/17 *Volotea v Commission*, EU:T:2020:180, para. 92; T-716/17 *Germanwings v Commission*, EU:T:2020:181, para. 97; T-8/18 *easyJet Airline v Commission*, EU:T:2020:182, paras 126-127.

[47] Case C-242/13 *Commerz Nederland*, para. 35.

focuses on two elements: the presence of institutional, formal control and active involvement in the specific decision-making process.[48] However, alongside the previously discussed challenges of identifying informal influence, which remain pertinent here, the author believes that the apparent focus on State involvement in the particular transaction, poses a potential complication.

The reason being that the author believes that imputability of a measure will still occur even if State involvement is limited to the creation of a specific legal framework for subsequent transactions. Initiating a legislative process, whether at the national or regional level, should be considered a clear indication of the authorities' intentions.[49] The question of their subsequent participation in implementation, and how private entities fulfil their legal obligations is a mere technicality. In certain cases, the design of the legal framework can significantly restrict the de facto discretion of private entities, despite their apparent decision-making freedom, potentially leading to imputability. In this context, several problematic areas can be identified.

The specific circumstances related to the scope of a measure can effectively determine who the actual beneficiaries are. It is evident that the *ratio legis* of the measure largely influences the practical aspects of its application. As a result, there may be specific situations where there is only one beneficiary or a limited group of beneficiaries that realistically benefit from the measure.[50] While the measure's scope is determined by objective general criteria in theory, meaning that any eligible undertaking could also benefit, it becomes evident in reality that no other undertaking would meet those criteria.[51]

Furthermore, although the conclusion is not as straightforward in this scenario, if an undertaking receives State resources but operates within a framework that mandates the complete expenditure of allocated funds, it may be compelled to use them in an economically suboptimal manner. This means that it might

[48] This is especially visible in Case C-329/15 *ENEA*. A. Giraud, S. Petit, *The ENEA Judgment: A Formalistic Interpretation of Transfer of State Resources Annotation on the Judgment of the Court (Fifth Chamber) of 13 September 2017 in Case C-329/15 ENEA S.A. v Prezes Urzędu Regulacji Energetyki*, "European State Aid Law Quarterly" 2018, Vol. 2, pp. 308-310.

[49] See C. Koenig, B. von Wendland, *The Art of Regulation: Competition in Europe – Wealth and Wariness*, Cheltenham 2017, pp. 31-44.

[50] This is the case, for example, when regional airports/ local governments aim to promote their region through onboard advertisements. In most instances, they would have no choice but to enter into a contract with the largest carrier operating from that airport. However, the CJEU case law does not explicitly recognize this issue: See J. Kociubiński, *"Cut off one Hydra head, two more would grow back in its place": Challenges in combating concealed state aid to airlines and regional airports*, "European Competition Law Review" 2022, Vol. 43, No. 7, pp. 321-330.

[51] Compare in this context the test of abstract terminology (used to determine whether an act affects entity individually) for example in 789 and 790/79 *Calpak v Commission*, EU:C:1980:159 with circumstances of case C-15/14 P *Commission v MOL*, EU:C:2015:362 where the Court stated that a measure will be selective if despite seemingly abstract criteria only one specific undertaking will be capable of fulfilling them (paras 64-66).

engage in transactions that, although seemingly economically justifiable at the time, are unnecessary for the alleged grantor. If such actions were deemed imputable, the MEOT should be able to detect these unmarketlike operations. Engaging in such unmarketlike transactions solely for the sake of transaction, without any genuine business goal, may result – this part is confirmed in acquis - in conferring an advantage that cannot be obtained under normal market conditions.

Another situation that can be seen as potentially controversial is when the State establishes the parameters of transactions, while a private intermediary, backed by State resources, ultimately decides with whom to conduct these transactions. This situation raises the aforementioned concerns regarding whether such forced transactions can meet business conditions, whether they were necessary, whether the State exerted informal influence in partner selection, and whether the discretion of the intermediary is essentially meaningless under specific circumstances.

However, this also exposes an inconsistency in the case law. On the one hand, based on the existing acquis, the level of discretion where the intermediary selects the counterpart would not meet the criteria for imputability.[52] On the other hand, also according to the existing acquis, sectoral measures and those with limited territorial scope are considered selective.[53] Therefore, it can be contended, relying on the case law regarding selective advantage, that in the scenario described above, the mere fact that State funds were injected into a particular sector constitutes an advantage that is not aligned with normal market conditions, and the selection of exact beneficiaries becomes of secondary importance. This perspective corresponds with the definition of aid programs, as acknowledged by the Court, where there is no requirement to determine the exact beneficiaries of the assistance.[54] It is merely sufficient to analyse the scheme's overall characteristics without going into the detailed situation of each undertaking to determine whether they have benefited or not.[55] Thus, it can be argued that providing funds to a specific sector or area would not have occurred under normal market conditions which, again according to the existing acquis, should be regarded as an advantage within the meaning of Article 107(1) TFEU.[56]

In the opening of the conclusion to this section, it is important to express the view that the requirement of prior transfer of State resources introduces unnecessary complications that hinder the effectiveness of the proposed postulate of *per*

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[52] For example *per analogiam* T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others v Commission*, EU:T:2002:59, para. 254; C-6/12 *P Oy*, EU:C:2013:525, para. 27.

[53] E.g., cases C-248/84 *Germany v Commission*, EU:C:1987:437, para. 18; C-148/04 *Unicredito Italiano*, EU:C:2005:774, paras 44-48.

[54] E.g., cases C-438/16 P *Commission v France and IFP Énergies Nouvelles*, EU:C:2018:737, para. 63; C-337/19 P *Commission v Belgium and Magnetrol International*, EU:C:2021:741, para. 77.

[55] E.g., cases C-15/98 and C-105/99 *Sardegna Lines v Commission*, EU:C:2000:570, para. 51; C-510/16 *Carrefour Hypermarchés and Others*, EU:C:2018:751, paras 32-33.

[56] E.g., cases C-39/94 *SFEI and Others*, EU:C:1996:285, para. 60; C-71/09 P, C-73/09 P and C-76/09 P Comitato "Venezia vuole vivere" and Others v Commission, EU:C:2011:368, para. 98.

se imputability. Assuming that State resources have been transferred, the current interpretative approach to intermediaries' conduct cannot guarantee the detection of all unmarketlike transactions that could potentially distort competition. Thus, adopting the postulate of imputability whenever a transaction is mandated by law provides a room for the MEOT to be employed. However, there are still salient issues regarding transactions that may be economically justifiable in principle but are unnecessary for the grantor or where the selection of partners appears arbitrary (potentially influenced by the State). These cases involve uncertainties and conjectures. It is conceptually questionable, despite being supported by existing case law, to search for economic rationality in situations where an entity is legally constrained to spend all allocated funds or allocate them for specific purposes.[57] Nevertheless, the current approach, using a hypothetical private investor in the MEOT, focuses on assessing whether a transaction is economically justifiable under highly constrained and specific conditions, rather than its overall economic soundness.[58] This highlights a limitation of the MEOT. The constrained circumstances under consideration would have never existed if the State had not created the given framework. Therefore, *per se* imputability in this context should not be seen as a definitive, "silver bullet" type of solution, but rather as a modest improvement.

CONCLUSIONS

From a purely legal standpoint, the preceding discussion has established the general feasibility of the proposed postulate. However, it has also revealed interdependent factors and interpretative approaches that could hinder the efficiency of the proposed solutions. When considering practical implications, the analysis has brought forth a dilemma: Whether the proposed solution might impose an undue burden on control mechanisms and result in a significant number of false alarms.

In terms of the first aspect, the issues of imputability and State resources as cumulative criteria come to the forefront. The problem arising from this interpretive approach is that in practice, there may be transactions that are clearly attributable to the State, at the same time, they exhibit interventionist characteristics, would not be possible under normal market conditions, and could potentially distort competition. Yet when these transactions are carried out by professional market participants without any impact on the State budget, they fall outside the

[57] E.g. cases T-1/12 *France v Commission*, EU:T:2015:17, para. 32; T-165/15 *Ryanair and Airport Marketing Services v Commission*, EU:T:2018:953, para. 166.

[58] Case T-228/99 and T-233/99 *WestLB*, para. 271.

scope of the notion of State aid. A return to a literal interpretation of Article 107(1) TFEU can thus considered a logical proposition, a corollary postulate, enabling effective implementation of *per se* imputability. Although the current interpretive approach undermines the effectiveness of the papers' postulate, it does not fundamentally challenge its core concept.

The practical aspect of the proposed postulate presents a different issue. While the MEOT, if conducted correctly, should be capable of detecting non-market transactions, the practical challenge arises from the existence of numerous transactions mandated by law, and especially routine transactions carried out by State-owned undertakings, which are not notifiable. This raises the issue that the European Commission would heavily rely on spot checks and *ex post* controls, particularly in the latter case. Therefore, the feasibility of the postulate ultimately depends on finding the right balance between the acceptable level of "permeability" in control systems and the additional workload that heightened scrutiny would entail. Regarding the detection of violations, it is not reasonable to expect any interpretive approach to achieve a 100% success rate. However, further research is required to assess the realistically achievable level of effectiveness. In terms of resources, the Commission already conducts random *ex post* controls. Hence, again further analysis is needed to determine whether the existing resources are adequate or if additional resources would be necessary to ensure a sufficient level of detectability.

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Przemysław Litwiniuk
Warsaw University of Life Sciences, Poland
email: przemyslaw_litwiniuk@sggw.edu.pl
ORCID: 0000-0003-2099-157X

CONSTITUTIONAL GUARANTEES FOR PROTECTING THE VALUE OF POLISH MONEY

Abstract

This article outlines the issues related to constitutional guarantees for protecting the value of Polish money in the context of the responsibility for it as specified in Article 227, Paragraph 1(3) of the Constitution of the Republic of Poland. According to this provision, the National Bank of Poland, as the central bank of the state, which has the exclusive right to issue money and to determine and implement monetary policy, is responsible for the value of Polish money. The purpose of the study is to define the subject of the NBP's responsibility, determine the legal standard for the application of instruments for the central bank's fulfilment of its constitutional obligation and seek to answer the question of whether failure to achieve the result which has been set by the legislator involves legal consequences for the unlawful act or the omission of a public authority or the individuals serving as central bank bodies.

KEYWORDS

the National Bank of Poland, the Monetary Policy Council, inflation, value of money, monetary system, monetary policy, Constitution of the Republic of Poland

SŁOWA KLUCZOWE

Narodowy Bank Polski, Rada Polityki Pieniężnej, inflacja, wartość pieniądza, ustrój pieniężny, polityka pieniężna, Konstytucja Rzeczypospolitej Polskiej

I. INTRODUCTION[1]

Constitutional law should be seen as a tool for protecting the axiological foundation that the nation has accepted as the basis for the proper functioning of the Polish state. This primarily includes the systemic values and principles that define the Republic as a 'common good'. Legal science, as one of the forms of seeking and proclaiming the truth, involves discovering and highlighting what should be considered part of this defined set. This is an important task of lawyers, both those who write and teach about the law and those who apply the law or participate in its enactment. After 26 years since the 1997 Constitution, it can be observed that, during this time, various challenges related to the interpretation of its provisions have emerged. One of the most significant challenges was European integration, which was initially approached in a pro-European manner in the first decade of the 21st century, while today, it is taken up in the spirit of revision of the principles formed thus far, which is, unfortunately, taking place even within the framework of the Constitutional Tribunal. Recently, there has also been a need to debate the essence of the rule of law, often emphasising the alleged contradictions between its Polish and European models. The restrictions during the pandemic period revealed significant deficiencies in the understanding and application of constitutional standards applicable when limiting the rights and freedoms of individuals. Finally, the active policy of social transfers carried out in recent years, the extensive state interventionism based on the mechanism of the so-called quantitative easing during the COVID-19 period as well as the supply shocks caused by the pandemic and the Russian aggression against Ukraine, resulted in the phenomenon of high and persistent inflation, which to this day many economies, including Poland, have not managed to cope with.

The subject of this article is an outline of the constitutional guarantees for protecting the value of Polish money in the context of the responsibility defined in Article 227, Paragraph 1(3) of the Constitution of the Republic of Poland.[2] According to the provision contained in this editorial unit of the Constitution, the

[1] Article compiled from the theses of the inaugural lecture delivered by the author at the Faculty of Law and Administration of the University of Warsaw on 28 September 2023.

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

National Bank of Poland, as the central bank of the state with the exclusive right to issue money and to determine and implement monetary policy, is responsible for the value of Polish money. It seems, therefore, that in a period of significant loss of purchasing power of the Polish zloty, when inflation in the last three calendar years (2020-2022) amounted to more than 30%, it is reasonable to consider whether the legislator has created real constitutional guarantees to protect its value. Support in addressing this question may be provided by the conclusions of more detailed enquiries, which include, first and foremost, the definition of the object of responsibility as adopted in the content of the already cited Article 227(1) of the Constitution, the definition of the legal standard for the application of instruments for the fulfilment of the central bank's constitutional duty as well as an attempt to answer the question of whether the failure to achieve the result set by the legislator of the constitutional system entails legal consequences for the unlawful actions or omissions by public authorities and persons serving as central bank bodies.

II. THE VALUE OF POLISH MONEY

The starting point for these considerations is to address the essence of currency in the constitutional sense. It is noteworthy that, in the Constitution, one cannot find any formal establishment or confirmation of the name of the Polish currency – the 'zloty'. It seems that the constitutional system legislator did not regard it as a value equally significant as the emblem, national colours and anthem as mentioned in Chapter I, Article 28, or the capital city of the Republic in Article 29. However, this does not mean that the 'Polish currency' does not qualify as a category of elements of the 'common good' which is referred to in Article 1 of the Constitution. As Marek Zubik accurately pointed out, "the term 'common good' should be understood as the sum of all institutions and conditions that enable individuals and groups to achieve full development through coordinated cooperation, optimal use of various legal, economic and cultural means, guaranteeing the rights of each person as well as creating and securing a just social and economic order and enabling lasting and fair coexistence with other nations".[3] Therefore, the 'Polish currency' – the zloty, as a legal means of payment, a symbol of the national economy and a beneficiary of its reputation, and in its materialised form – as a monetary symbol – serves not only as an economic value but also as a representation of the Polish emblem and historical-patriotic symbolism. It fits into the proposed understanding of the category of the 'common good'.

[3] M. Zubik, *Prawo konstytucyjne współczesnej Polski*, 3rd edition, Warsaw 2022, section no. 65, p. 36.

Therefore, you can argue that the constitutional system legislator, by using the term 'Polish currency' used the so-called well-established concept which is fairly uniformly defined in academia and jurisprudence. Undoubtedly, in the conditions of the enactment of the Constitution in 1997, it was the 'new Polish monetary unit called the zloty', referred to in Article 1, paragraphs 1 and 2 of the Act of 7 July 1994 on the denomination of the zloty.[4] The category of 'monetary unit' includes with its meaning both cash, i.e. banknotes and coins issued by the National Bank of Poland,[5] and non-materialised non-cash money occurring mainly in the form of deposits in bank accounts. The constitutional term 'Polish currency' also encompasses the concept of the 'Polish currency', as referred to in Article 358 of the Civil Code[6] and Article 2, paragraph 1, point 7, of the Foreign Exchange Act,[7] i.e. banknotes and coins that are a legal means of payment in Poland.

Given the above findings, it is worth considering what the subject of constitutional protection is which was established in the third sentence of Article 227(1) of the Constitution being referred to as 'the value of Polish money', for which, according to the cited provision, the National Bank of Poland is responsible.

It has been aptly established in the literature that a monetary unit in circulation can represent the nominal, purchasing, and exchange rate value.[8] The nominal value arises from legal regulations and is presented on bills and coins by means of an appropriate inscription or number. The purchasing value (purchasing power) of a monetary unit is determined in relation to the economic forces of supply and demand in a given market, and at a specific point in time, within the price structure of goods and services. The exchange rate value, on the other hand, is determined by supply and demand in the foreign exchange market and is expressed in relation to the current value of a given foreign currency.

The latter two types of 'value' of the monetary unit are the focus of the NBP's monetary (and exchange rate) policy.[9] Alongside the budgetary policy (fiscal policy) reserved for the competence of the Council of Ministers, monetary policy is

[4] Journal of Laws of 1994, No. 84, item 386, as amended.

[5] According to Article 31 of the Act of 29 August 1997 on the National Bank of Poland (consolidated text: Journal of Laws of 2022, item 2025, hereinafter referred to as the 'NBP Act'), the legal tender of the Republic of Poland are banknotes and coins denominated in zlotys and grosze. In accordance with Article 32 of this Act, the bills and coins issued by the National Bank of Poland are legal means of payment in the territory of the Republic of Poland.

[6] Act of 23 April 1964, Civil Code (consolidated text: Journal of Laws of 2023, item 1610, as amended).

[7] Act of 27 July 2002, Foreign Exchange Act (consolidated text: Journal of Laws of 2022, item 309).

[8] T. Wiśniewski (in:) *Civil Code. Commentary. Tom III. Liabilities. General Part*, 2nd edition, J. Gudowski (ed.), Warsaw 2018, Article 358.

[9] Although macroeconomic policy encompasses various types of policies, it differentiates monetary policy from the exchange rate policy. Contemporary literature presents convincing arguments in favour of the thesis that monetary policy is the primary factor influencing exchange rate volatility. See: E. Ilzetzki, C. Reinhart, K. Rogoff, *Exchange rate volatility and monetary*

a fundamental component of macroeconomic policy. As pointed out in the literature, monetary policy indirectly affects the economy and is less discretionary.[10]

III. THE OBJECT OF RESPONSIBILITY OF THE CENTRAL BANK

In the presented conditions, derived from the legal framework and the rules of macroeconomic policy, it is clear that the National Bank of Poland (NBP) has the capacity (instruments) to influence the value of Polish money in terms of its purchasing power and, to a more limited extent,[11] its exchange rate value. However, this does not mean that the responsibility for this value is reduced to the obligation to maintain it over time with respect to a specific 'basket' of basic prices of goods and services and a 'basket' of basic foreign currencies.[12] The view of the Constitutional Tribunal on this issue, expressed two decades ago, is consistent with the contemporary views of some economists, according to whom low and stable inflation has a positive impact on economic development, and occasional and slight decrease in the value of the Polish currency against the US dollar or the euro may contribute to increasing the competitiveness of the economy and boosting exports. In a judgment dated 24 November 2003, the Constitutional Tribunal assessed that the responsibility of the NBP for the value of Polish money "is not synonymous with an obligation to strive for an increase in this value or merely to maintain it at a constant level, but is understood as assigning to the NBP the duty to conduct monetary policy in a manner conducive to comprehensive economic development and the improvement of the living standards of citizens".[13] From what is stated hereinabove, it follows that, although the protection of the value of Polish money is undoubtedly the primary objective and subject of the responsibility of the National Bank of Poland, it is not possible to directly decode from the provision derived from Article 227(1)(3) of the Constitution what type of conduct

policy, "Vox EU", 4 April 2023, source: https://cepr.org/voxeu/columns/exchange-rate-volatility-and-monetary-policy (accessed 24 September 2023).

[10] Ł. Hardt, *Eseje o polityce pieniężnej czasu niepewności*, Warsaw 2022, p. 71.

[11] The exchange rate of the zloty against foreign currencies has been a floating rate since 12 April 2000.

[12] In the provisions of the pre-constitutional NBP Act, which was in force during a period of significantly increased inflation rates (1989–1997), the essential goal of the central bank was clearly expressed. Article 16(1) of the Act of 31 January 1989, on the National Bank of Poland (consolidated text: Journal of Laws of 1992, No. 72, item 360, as amended) stated that the NBP cooperates with the relevant state authorities in determining and implementing the state's economic policy, with particular regard to strengthening the Polish money.

[13] Judgment of the Constitutional Tribunal of 24 November 2003, K 26/03 (OTK-A 2003, No. 9, item 95).

the central bank's authorities are instructed to take or what type of conduct they are prohibited from taking. Determining the expected attitude of the addressee of this norm, as envisaged by the constitutional system legislator, requires carrying out independent argumentative operations that often refer to premises beyond the legal text, especially to the principles of economic and financial science and empirical knowledge. Therefore, it can be argued that we are dealing here with incomplete normative statements, referred to in the constitutional law as programmatic norms.[14] Legal theorists emphasise that such norms are binding on the addressees but impose *prima facie* duties rather than definitive duties. When applying such norms, the most difficult question to resolve is the extent to which balancing conflicting principles must rely on legal criteria and to what extent it can be based on non-legal values.[15]

IV. THE LEGAL POSITION OF THE CENTRAL BANK

It seems that essential support in determining detailed legal directives regarding the manner (model) of implementing the constitutional responsibility for the value of Polish money can be the result of exegesis of the constitutional functions and the position of the National Bank of Poland and its key organ (from the perspective of the task of establishing and conducting monetary policy) – the Monetary Policy Council.

Under Article 227(1) of the Constitution, the National Bank of Poland is vested with the position of the state's central bank, which, in broad terms, encompasses the role of the state's bank, the issuing function, and the bank of banks function.[16] Furthermore, the Constitution entrusts it with the exclusive right to determine and implement monetary policy. Within the framework of the defined activities, as stated by the Constitutional Tribunal, the "NBP has various instruments for influencing commercial banks, used to adjust the credit and deposit activities of the latter to the priorities of this policy (...). Monetary policy involves shaping the money supply in the economy, and its basic instruments have been specified in the Act on the National Bank of Poland".[17] However, it should be noted that, due to the principle of a social market economy as expressed in Article 20 of the Constitution, the NBP cannot be positioned as an entity replacing or limiting the commercial banking system.

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[14] See: T. Gizbert-Studnicki, A. Grabowski, *Normy programowe w konstytucji*, (in:) J. Trzciński (ed.), *Charakter i struktura norm konstytucji,* Warsaw 1997, pp. 95-113.

[15] *Ibidem*, pp. 112-113.

[16] Judgment of the Constitutional Court of 28 June 2000 K 25/99 (OTK 2000, No. 5, item 141).

[17] Judgment of the Constitutional Court of 16 July 2009 Kp 4/08 (OTK-A 2009, No. 7, item 112).

An important issue which should be the subject of a more detailed *ex-post* assessment is the compatibility with the constitutional concept of central banking and the principle of economic freedom of the decision made in 2006[18] to exclude the supervision of banks from the competence of the NBP. It should be borne in mind that the instruments of exercising this supervision significantly affect the matter of money creation and supply in the economy, which is the essence of monetary policy, and the actual methods used by the supervisory authority with respect to commercial banks bearing the features of sovereign interference in the activities of private economic entities, which the Constitutional Tribunal allowed in the cited judgment, but in favour of the NBP, and not the Polish Financial Supervision Authority, which is unknown to the provisions of the Constitution. It can be argued that the Polish Financial Supervision Authority and Bank Gospodarstwa Krajowego, which is under its supervision, have a more modern and effective range of instruments for protecting the value of Polish money than those decreed for the central bank. However, it is the National Bank of Poland that is responsible for it.

In the provisions of the Constitution (Article 227(2)), the constitutional system legislator defined the bodies of the National Bank of Poland, including the President of NBP, the Monetary Policy Council, and the Management Board of NBP. The President of the National Bank of Poland is appointed by the Sejm (Parliament) upon the President of the Republic of Poland's recommendation for a six-year term. The President of NBP cannot be a member of a political party or a trade union, nor can he engage in public activities incompatible with the dignity of their office. As per Article 227(5) of the Constitution, the Monetary Policy Council includes the President of the NBP as its chairman and individuals with expertise in finance, appointed for six years, in equal numbers by the President of the Republic, the Sejm and the Senate. The NBP Act specifies that the entities mentioned in the Constitution which form the composition of the Monetary Policy Council each appoint three of its members. Each member of the Council carries out their individual term in this body.[19] It also follows from the constitutional provision in question that the selection criterion of "distinguishing oneself with financial expertise" only obligatorily applies to members appointed to the MPC pursuant to Article 227(5) of the Constitution and, therefore, does not apply to the Chairman of the Council, who is *ex officio* the President of the NBP. It should be added that the provisions of the Constitution do not specify the method of appointing the composition of the NBP's Management Board, referring in this regard entirely to a statutory determination.

[18] Act of 21 July 2006 on financial market supervision (Journal of Laws of 2006, No. 157, item 1119).

[19] See: judgment of the Constitutional Tribunal of 24 November 2003, K 26/03 (OTK-A 2003, No. 9, item 95).

It is also noteworthy that, with regard to the powers of the National Bank's authorities, the Constitution only determines in general terms the role of the NBP President as chairman of the MPC, while providing more detailed provisions about the tasks of the Monetary Policy Council. According to Article 227(6) of the Constitution, the Monetary Policy Council annually establishes the principles of monetary policy and presents them to the Sejm concurrently with the submission of the draft budget bill by the Council of Ministers. In addition, the Monetary Policy Council, within 5 months of the end of the fiscal year, submits a report on the implementation of the monetary policy principles to the Sejm. For these reasons, the prevailing view in the literature is that neither the NBP[20] nor the President of the NBP have the status of a constitutional organ of the state, which is reserved for the Monetary Policy Council, as the sole central bank body whose competencies are defined in the Constitution.[21] It is emphasised that this situation places the Monetary Policy Council in a dual role: as an internal body of the National Bank of Poland and as a constitutional organ of the state.[22]

From the aforementioned constitutional provisions aimed at separating monetary policy from direct political influences and pressures, jurisprudence and literature derives the principle of the independence of the National Bank of Poland, which the Constitutional Court has recognised as "one of the basic constitutional principles of [its] functioning".[23] Although this principle is not expressed in the Constitution *expressis verbis*, it is considered to derive from the regulation of the Constitution indirectly (*implicite*) and manifests itself in three aspects: functional, personnel and financial.[24] Such a view of the constitutional position of the NBP and its organs is supported by the exclusive constitutional powers granted to them, the lack of legal instruments for enforcing the political responsibility of those holding the functions of the central bank's organs, their apolitical nature and practical irremovability during their term of office, the catalogue of the NBP's own revenues, which allows the institution to function without the need to obtain funds from the state budget, and the prohibition on covering the budget deficit

[20] Cf.: L. Góral, K. Koperkiewicz-Mordel (in:) M. Safjan, L. Bosek (ed.), *Konstytucja. Komentarz, Vol. II,* Warsaw 2016, p. 1602. These authors state that "the NBP is a constitutional organ of the state performing central banking tasks", while pointing out that its legal nature "escapes uniform classification both in the jurisprudence of the Constitutional Tribunal and administrative judiciary (...) and in the doctrine (...)".

[21] W. Brzozowski, *Niezależność konstytucyjnego organu państwa i jej ochrona*, Warsaw 2016, p. 60.

[22] T. Machelski, *Charakter prawny Rady Polityki Pieniężnej*, "Przegląd Legislacyjny" 2009, No. 3-4, pp. 56-68.

[23] Judgment of the Constitutional Court of 16 July 2009 Kp 4/08 (OTK-A 2009, No. 7, item 112).

[24] A. Łabno, *Narodowy Bank Polski. Pozycja ustrojowa i funkcje. Wybrane zagadnienia*, (in:) M. Zubik (ed.), *Minikomentarz dla Maksiprofesora. Księga jubileuszowa profesora Leszka Garlickiego*, Warsaw 2017, p. 930.

by incurring liabilities in the central bank. Thus, it seems that the legislature has provided the NBP and its bodies with independence in a descriptive, rather than a directive, sense, limiting it only to the subject-object conditions for the performance of constitutionally decreed competencies (tasks).[25]

The principle of the independence of the central bank is also derived from binding international law in the Republic of Poland, primarily from the treaties establishing the European Union. In particular, it follows from Article 130 TFEU[26] that in exercising the powers and performing the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and the ECB, neither the European Central Bank, nor a national central bank, nor a member of any of their decision-making bodies, shall seek or accept instructions from the institutions, organs or organisational units of the EU, the governments of the Member States, or any other body. The institutions, bodies or organisational units of the EU as well as the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or the national central banks in the performance of their tasks. By contrast, under Article 131 TFEU, each Member State shall ensure that its national legislation, including the statutes of its national central bank, is compatible with the Treaties and the Statute of the ESCB and the ECB.

V. THE LEGAL NATURE OF THE ASSUMPTIONS OF MONETARY POLICY

From the above-mentioned constitutional regulations concerning the Monetary Policy Council, it also follows that the key to conducting monetary policy in a given year is an act, determined by the MPC, of unclear legal character referred to as the 'assumptions of monetary policy' in the Constitution. Its definition, nature, level of detail and component elements are not specified by either the Constitution or the NBP Act. The likely point of reference for the constitutional system legislator, who elevated the 'assumptions of monetary policy' to the level of a constitutional act in 1997, was its statutory form under Article 17(2) of the Act of 31 January 1989, on the National Bank of Poland.[27] According to the cited provision of the no longer applicable law, the assumptions of monetary policy were adopted by the Sejm together with the budget law. However, in the current constitutional framework, it appears to be a programmatic document, a kind

[25] See: W. Brzozowski, *op. cit*., p. 62.

[26] Treaty on the Functioning of the European Union (Journal of Laws of 2004, No. 90, item 864/2 as amended).

[27] Consolidated text: Journal Laws of 1992, No. 72, item 360, as amended.

of economic strategy established in conditions of the NBP's distinctiveness and independence from the legislative and executive authorities.[28] However, it cannot be completely denied its normative value, particularly in the parts covering the establishment of the inflation targeting strategy, based on which the MPC seeks to ensure price stability as well as the establishment of monetary policy instruments for the given year.[29] Since 2004, the objective of monetary policy has been to maintain inflation, defined as the percentage annual change in the consumer price index, at 2.5% with a symmetrical deviation range of +/- one percentage point in the medium term.[30] The addressees of the norms contained in the assumptions of monetary policy are the bodies of the National Bank of Poland, and indirectly also the entities of the executive and legislative branches of government responsible for drafting and passing the budget act.[31]

The literature indicates that the assumptions of monetary policy should be treated as a catalogue of objectives of a macroeconomic nature and an orderly and internally consistent set of specific instruments, the application of which should aim to maintain the optimal value of Polish money.[32] It should be borne in mind that the application of certain monetary policy instruments may shape obligations and affect the factual and legal situation of economic participants, particularly financial institutions (e.g. determination of the mandatory reserve rates), thus constituting a sovereign interference in the sphere of constitutionally protected freedom of economic activity. Bearing in mind the definition in the Constitution of the competencies of the NBP, which include the "exclusive right ... to determine and implement monetary policy" (the second sentence of Article 227(1)), it should be noted that the manifestation of the former is the 'determination' of the assumptions of monetary policy ("determination of certain norms and rules

[28] The development of new forms of regulation covered by plans, strategies and programmes is accompanied by the conviction presented in the literature that their common feature is the lack of unambiguity of the nature and legal character, and this diversity manifests itself in terms of the entities that create them, the scope of their addressees, the content, the area of application, the effects of their establishment and the binding force. See: D. R. Kijowski, *Programy, plany i strategie jako podstawa działań organów administracji publicznej*, (in:) J. Zimmermann, P. J. Suwaj (ed.), *Wpływ przemian cywilizacyjnych na prawo administracyjne i administrację publiczną*, Warsaw 2013, p. 245.

[29] Such a view is in line with the view of the Constitutional Tribunal regarding the nature of a normative act, as expressed in its decision of 7 January 2016, U 8/15, item 3.2 (OTK-A 2016, No. 1).

[30] See: *Założenia polityki pieniężnej na rok 2024*, attached to Resolution No. 5/2023 of the Monetary Policy Council of 5 September 2023 on establishing monetary policy assumptions for 2024.

[31] See: Article 227(6)(1), of the Constitution, Article 12(1)(1), and Article 23(1)(2) of the NBP Act.

[32] Z. Ofiarski, *Założenia polityki pieniężnej Rady Polityki Pieniężnej a ochrona ustroju pieniężnego jako wartości publicznej*, "Białostockie Studia Prawnicze" 2020, Vol. 21, No. 1, p. 118.

of influence on the economy in order to achieve the assumed results"[33]), and the latter is the use by the NBP bodies of the regulatory measures provided for by the Act (e.g. by setting NBP interest rates[34]) and from traditional financial and economic instruments (e.g. by conducting open market operations, applying currency interventions[35]). In the Constitutional Tribunal's jurisprudence, the possibility of using direct instruments of sovereign interference by the NBP authorities against commercial banks has been allowed (within the concept of organisational subordination for issuing normative acts of an internal nature), with the reservation that their purpose is the implementation of constitutionally defined public tasks.[36] Therefore, it can be argued that the assumptions of monetary policy, at least in their normative part, are an element of the model of hierarchical control of compliance (legality) of the resolutions of the Monetary Policy Council and the Management Board of the NBP, which are a manifestation of the exercise of the competence to 'implement' this policy. The assumptions themselves should maintain material conformity with the model of their establishment, resulting from the provisions of the Constitution and the provisions of the Act on the NBP.

VI. THE LEGAL ENVIRONMENT FOR CONDUCTING MONETARY POLICY

When discussing the normative model for establishing and implementing monetary policy, you must first consider the relevant provisions of the Constitution and the NBP Act. When it comes to the constitutional model, it is only seemingly limited to the content of the third sentence of Article 227(1) of the Constitution. The value of Polish money is also determined by the decisions of the legislator and the subjects of the executive power with regard to the directions of the budget (fiscal) policy pursued as well as the compliance of the public authorities with constitutional limitations (Article 216(5) of the Constitution) and international obligations, particularly concerning financial stability (Article 126 TFEU).

It is also crucial to properly identify and respect the constitutional position of the budget act as defined in Article 219(1) of the Constitution. In legal doctrine, it is emphasised that the state budget, in constitutional terms, is a "public financial plan of revenue and expenditure, constituting the basis for managing the state's financial affairs". The budget act, as a legal form of the state budget, expresses the defining and guaranteeing meaning of Article 219 of the Constitution, realising

[33] Judgment of the Constitutional Court of 28 June 2000 K 25/99 (OTK 2000, No. 5, item 141).
[34] See: Article 12(2) of the NBP Act.
[35] See: Article 17, paragraph 4, items 2 and 4 of the NBP Act.
[36] *Ibidem*.

the protection of the value of democratic, open, and stable, precisely based on the state budget and the management of public finances for the common good.[37] With such a view of the constitutional position and nature of the state budget, it is impossible to accept the practice, introduced in recent years on a large scale, of programming and implementing significant public revenues and expenditures, amounting to hundreds of billions of zlotys, and incurring state obligations in a para-budgetary formula, using the so-called system of development institutions,[38] including funds created in Bank Gospodarstwa Krajowego,[39] which does not even maintain the standard of being subject to parliamentary and social control, and due to its expansive nature has a negative impact on price stability in the economy.

There are also serious doubts about the selected aspects of the quantitative easing mechanism used during the COVID-19 pandemic with the participation of the National Bank of Poland, which, due to its scale, undoubtedly contributed to a significant increase in the inflation rate after 2020. This mechanism, implemented through open market operations, involves increasing the money supply in the economy by buying financial assets from banks or other securities from the market. However, it is noteworthy that the fundamental part of the assets acquired by the National Bank of Poland intentionally consisted of bonds previously issued and coordinated in a systematic manner by commercial banks as well as debt securities guaranteed by the State Treasury and issued by Bank Gospodarstwa Krajowego for the COVID-19 Counteracting Fund and by Polski Fundusz Rozwoju S.A. In this context, it should be mentioned that Article 220(2) of the Constitution states that "the budget act cannot provide for covering the budget deficit by incurring liabilities in the central bank of the state". As rightly noted in the doctrine, although this provision directly applies to the budget act, considering the entire set of constitutional provisions in this regard, especially the principle of the exclusivity of the budget act and the provisional budget act in determining state revenues and expenditures, there is no doubt that Article 220(2) of the Constitution applies to all acts and even factual actions with such effects. In this sense, the prohibition established in this provision is of a general nature.[40] Within the framework of this constitutional concept of the budget act, you can argue that the engagement of the National Bank of Poland in financing the gov-

[37] T. Dębowska-Romanowska (in:) M. Safjan, L. Bosek (eds.), *ibidem,* pp. 1517-1518.

[38] Act of 4 July 2019 on the system of development institutions (consolidated text: Journal of Laws 2023, item 1103).

[39] See, among others, Article 65 of the Act of 31 March 2020, on amendments to the Act on special solutions related to the prevention, counteracting and control of COVID-19, other infectious diseases and crises caused by them, and certain other acts (Journal of Laws, item 568, as amended), and Article 14 of the Act of 12 March 2022, on assistance to citizens of Ukraine in connection with the armed conflict on the territory of Ukraine (Journal of Laws of 2023, item 103, as amended).

[40] M. Zubik, *op. cit*, section no. 886, p. 362.

ernment's borrowing needs violates the principle of the financial independence of the central bank.

The issue of the NBP's cooperation with the government is also the subject of legal controversy. For while the central bank's mandate is unambiguously defined in Article 227(1) of the Constitution, its statutory form partially deviates from this model. Specifically, according to Article 3(1) of the Act on the NBP, "the primary purpose of the NBP's activities is to maintain a stable price level, while supporting the Government's economic policy, insofar as this does not limit the primary purpose of the NBP". The probable intention of applying such a legislative approach was to limit the central bank's independence by subordinating its actions to the goals defined within the economic policy conducted by the Council of Ministers, as long as it does not negatively affect the protection of the value of Polish money. It seems that the intention of the ordinary legislator, who formulated the provision in question in such a way, did not achieve the desired practical effect. This is because this regulation does not give rise to any authority for the executive authorities (the government, the Minister of Finance) to wield any power to influence the actions of the central bank, nor does it constitute a source of justification for the NBP authorities that would wish to support the Council of Ministers while neglecting their basic constitutional duty. You can assume that, by *a contrario* interpretation, this provision establishes an obligation for the NBP not to support the government's economic policy if it threatens price stability. It can also be argued that this 'subsidiary goal' enshrined in the NBP Act represents a kind of *superfluum* in the regulation. The obligation of the central bank to interact with the government, with respect for their separate constitutional roles, is derived directly from the principle of interaction of authorities, which is derived from the preamble to the Constitution, and on which the fundamental rights of the state were based. This principle is also reflected in the modern economic concepts of conducting economic policy, in which the creators of fiscal policy and monetary policy mutually observe and take into account the relationship between the two policies ('policy mix'), and in the optimal model, make efforts to harmonise them.[41] It should not be forgotten that both components of macroeconomic policy share a common interest and responsibility – the well-being of the economy, which is defined in three fundamental areas: economic growth, unemployment and inflation.[42]

[41] See: F. Bianchi, C. Ilut, *Monetary/Fiscal policy mix and agents' beliefs*, "Review of Economic Dynamics", 2017, vol. 26, pp. 113-139.

[42] D. Begg, S. Fisher, R. Dornbusch, *Makroekonomia*, 3rd edition, Warsaw 2003, p. 19.

VII. THE RESPONSIBILITIES OF THE NATIONAL BANK OF POLAND

The central bank's organs, when interpreting the provisions of the Constitution and the provisions of the NBP Act to determine the content of their duty in given economic conditions, should respect the results of the interpretation made in a pro-constitutional spirit and in line with the values derived from the treaties constituting the European Union. The stability of purchasing power and the credibility of the Polish currency, as an instrument for investment, are essential factors for the development of the domestic economy and its position in the European and global markets.

In terms of the constitutional model against which the effects of the National Bank of Poland's activities can be verified, it is also worth considering the provisions on property protection included in Article 21 and Article 64 of the Constitution. The legal solutions currently in force in Poland already acknowledge and implement the concept of compensation for public authorities' actions that lead to a decrease in the value of property (Article 36, paragraph 3 of the Spatial Planning and Development Act of 27 March 2003[43]). This suggests that a similar model of responsibility could be applied to the consequences of actions or omissions by monetary authorities that result in a decrease in the value of the monetary unit. Defining the prerequisites for such responsibility and the methodology for determining the amount of incurred losses would be an important area of collaboration for legal, economic and financial experts. It would seem that a necessary element of a model for such a responsibility would be a causal relationship between the NBP's failure to take necessary actions or the central bank's taking actions contrary to its constitutional mandate and the established loss of the money's value exceeding the medium-term inflation rate assumed in the monetary policy framework.

The above considerations are not unrelated to contemporary manifestations of undesirable inactivity or the undesirable activity of the Polish central bank, which included the phenomena of refraining from tightening the parameters of monetary policy in conditions of rising inflation, signals of currency interventions aimed at lowering the exchange value of the zloty in the last days of the calendar year in order to increase the posted amount of the NBP's profit for the year, 95% of which goes to the state budget as well as reductions in the interest rates in a situation in which the disinflation path covered by the projection does not indicate a return to the inflation target in the medium-term perspective (by the end of 2025). Such practices can hardly be assessed as consistent with the

[43] Consolidated text: Journal of Laws of 2023, item 977, as amended.

constitutional model, the implementation of which is entrusted to the bodies of the National Bank of Poland.

As already mentioned, members of NBP bodies do not bear political responsibility for their actions. However, this situation does not exclude the possibility of holding them criminally liable, especially for an act specified in Article 231 of the Criminal Code,[44] and in the case of the NBP President, constitutional liability before the State Tribunal for a constitutional offense.

VIII. CONCLUSIONS

In summary, it can be assessed that the Constitution implicitly defines the characteristics that constitute the Polish monetary system. Its essence can be grasped by considering the fundamental values that should be recognised as a manifestation of the constitutional protection of the value of Polish money: the principle of a social market economy, the independence of the central bank and its organs, the exclusivity of the NBP in the issuance of currency and in the determination and implementation of monetary policy, the responsibility of the NBP for the value of Polish money, including the constitutional responsibility of the central bank's president, the principle of conducting fiscal policy based on the budget law, the principle of not covering the budget deficit by incurring obligations in the central bank, the principle of maintaining the stability of public finances, and the principle of respecting binding international obligations of the Republic. Merely respecting the principles decreed by the constitutional system legislator, even without their desired specific legislative concretisation, in a lawful and democratic state, provides sufficient protection for the value of Polish money.

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[44] Act of 6 June 1997 Criminal Code (consolidated text: Journal of Laws of 2022, item 1138, as amended).

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Radosław Łapszyński
University of Warsaw, Poland
e-mail: r.lapszynski@uw.edu.pl
ORCID: 0000-0003-0042-0665

THE ORGANISATIONAL DILEMMA OF NATIONAL REGULATORY AUTHORITIES IN THE EU COUNTRIES: MULTIPLICITY OR UNITY?

Abstract

This paper aims to examine the phenomenon of National Regulatory Authorities (NRAs) tasked with the regulation of various domains, as well as the process of amalgamation of existing specialised authorities that leads to their creation. Firstly, the author presents the materials and research methods used. The second part of the study involves mapping the NRAs currently operating in the EU Member States and creating a typology of such authorities, consisting of single-purpose, multi-sector, and "super regulators". Thirdly, the author verifies his hypothesis that the general consolidation trend of central government administration in Europe also applies to NRAs in the EU Member States and examines selected amalgamations of regulatory agencies in the form of mini case studies. The fourth part addresses the significance of the institutional form (consolidated or specialised) of NRAs from the perspective of regulatory effectiveness, i.e. achieving the EU regulatory objectives.

KEYWORDS

National Regulatory Authorities, consolidation, specialisation

SŁOWA KLUCZOWE

krajowe organy regulacyjne, konsolidacja, specjalizacja

1. INTRODUCTION: GENERAL REMARKS

National Regulatory Authorities (NRAs) constitute a phenomenon directly related to and resulting from European Union law. NRAs are defined as bodies tasked with the protection of competition and consumers in various markets, in particular network industries, such as energy, telecommunications, audiovisual media, or railway. They are considered one type of authority among the broader category of independent administrative bodies,[1] which are described as non-majoritarian, specialised public authorities, separated from other institutions, that are neither directly elected by the people nor directly managed by elected officials.[2]

The EU model of institutional setup of NRAs is general and flexible, providing the Member States with extensive room for manoeuvre in designing national regulators, focusing on setting general rules and expected outcomes, rather than striving for the convergence of institutional models. At the same time, the EU does not respect the full administrative sovereignty of the Member States in this regard because it could potentially undermine its policy objectives, as the NRAs deprived of the guarantees of independence established by the EU law could fail to serve as guardians of the regulated markets.[3] The freedom of the Member States to define (within the boundaries of the EU legal framework) the institutional model of NRAs also applies to determining the number of national agencies and the areas of regulation each of them is responsible for. This implies a relative discretion to create specialised bodies responsible for regulating one regulatory domain (single-purpose regulators), agencies responsible for more than one regulatory domain (multi-sectoral regulators), or "super regulators" tasked with regulating multiple regulatory domains.

Long-term consolidation versus specialisation debate in administrative thought[4] is currently most often decided in favour of consolidation in the legis-

[1] M. Maggetti, *Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review*, "Living Reviews in Democracy" 2010, Vol. 2, pp. 1–10.

[2] M. Thatcher, A. Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, "West European Politics" 2002, Vol. 25.1, pp. 1–22.

[3] D. Sześciło, *Challenging Administrative Sovereignty: Dimensions of Independence of National Regulatory Authorities Under the EU Law*, "European Public Law" 2021, pp. 191–216.

[4] C. Pollitt, G. Bouckaert, *Public Management Reform : A Comparative Analysis*, 2nd ed., Oxford University Press, 2004.

lative practice of European countries.[5] However, public administration scholars have not yet examined whether (and, if so, to what extent) the general consolidation trend of central government administration also applies to NRAs in the EU Member States.

This paper aims to examine the phenomenon of NRAs tasked with the regulation of various domains, as well as the process of amalgamation of existing specialised authorities that leads to their creation. In order to achieve these research objectives, the author carries out desk research of data on regulatory authorities, mini case studies of selected amalgamations of regulators, and legal analysis of EU directives and CJEU's ruling.

The structure of the paper is as follows. Firstly, the author presents the materials and research methods used. The second part of the study involves mapping the NRAs currently operating in the EU Member States and creating a typology of such authorities, consisting of single-purpose, multi-sector, and "super regulators". Thirdly, the author verifies his hypothesis that the general consolidation trend of central government administration in Europe also applies to NRAs in the EU Member States and examines selected amalgamations of regulatory agencies in the form of mini case studies. The fourth part addresses the significance of the institutional form (consolidated or specialised) of NRAs from the perspective of regulatory effectiveness, i.e. achieving the EU regulatory objectives.

2. METHODS & MATERIALS

This study is embedded in the contemporary interdisciplinary approach to public administration research. Among the research methods used, those typical for legalistic paradigms are of key importance. Firstly, the author carries out desk research of data on regulatory authorities currently existing in the EU Member States whose regulatory activity is most heavily based on EU law, i.e. agencies responsible for competition protection, energy, telecommunications, audiovisual media, and railway regulation. The purpose of using this method is to examine which NRAs are consolidated and which specialise in regulating a given sector, as well as to create a typology of NRAs. Additionally, the obtained data on NRAs are subject to quantitative analysis to identify which of the regulatory domains are most often subject to regulation by the same inter-domain regulatory authority and which of the combinations of regulatory domains in one authority are the most common.

As part of the above-described desk research, the author analyses the data on NRAs published on the websites of various institutions. This includes official

[5] D. Sześciło, *Agencification Revisited: Trends in Consolidation of Central Government Administration in Europe*, "International Review of Administrative Sciences", November 2020.

websites of the European Commission, EU regulatory agencies (the European Union Agency for the Cooperation of Energy Regulators – ACER, the Body of European Regulators for Electronic Communications – BEREC), associations of regulators (the European Platform of Regulatory Authorities – EPRA, the Independent Regulators' Group – Rail – IRG-Rail), and individual NRAs.

This is followed by mini case studies aimed at presenting selected amalgamations of regulatory bodies. The author presents information on the context and reasons for the selected amalgamations of regulatory agencies, the rationale behind them, and expectations towards amalgamated NRAs. This part of the study is based on information published on official governmental or regulators' websites, presented in official reports, as well as other grey and academic literature.

Another method used is the analysis of the EU law. In doing so, the author determines whether the single-purpose or multi-sectoral structure of NRAs is legally irrelevant, or whether EU law provides any restrictions or guidelines as to specific amalgamations of regulatory bodies. The legal analysis is based on EU directives regulating the five above-mentioned regulatory domains, as well as the ruling of the Court of Justice of the European Union (CJEU) concerning the conditions of amalgamation of regulatory bodies.

3. NRAS CURRENTLY OPERATING IN THE EU MEMBER STATES

Despite the relative freedom of EU countries to design national regulators, some recurring models can be found in this respect. The number of domains regulated by individual agencies allows the creation of a typology of these bodies, which consists of:

1) single-purpose regulators – responsible for regulating one regulatory domain;
2) multi-sector regulators – responsible for regulating two or three regulatory domains;
3) "super regulators" – responsible for regulating four or five regulatory domains.

As part of the desk study, all regulators of the analysed five regulatory domains (i.e. competition protection, energy, telecommunications, audiovisual media, and railway) in all 27 Member States were assigned to the three above categories (see Table 1 below). This allows some conclusions to be drawn as to the current approach of EU countries to NRAs' institutional setup.

First, it should be noted that the specialised body responsible for regulating one regulatory domain remains the dominant model among NRAs. Currently, in the case of as many as 95 out of 109 NRAs (approx. 87%), Member States have decided to entrust the regulator with only one domain. Looking from the perspective of

regulatory domains, it means that in 95 out of 133 cases (approx. 71%), they are regulated exclusively by certain specialised NRA. Moreover, still in most Member States (14 out of 27; approx. 52%) each of the five areas is regulated by a separate body. These countries include Belgium, Bulgaria, Cyprus, Czechia, Denmark, France, Greece, Ireland, Malta, Poland, Portugal, Romania, Slovakia, and Sweden.

12 multi-sector regulators are operating in the European Union. They were established in Austria, Croatia, Estonia (two of them), Finland, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, and Slovenia. Of the multi-sector regulators, 7 are responsible for regulating two domains and five of them are regulating 2 domains.

There are also two "super regulators": National Authority for Markets and Competition (CNMC) in Spain and Authority for Consumers and Markets in the Netherlands (ACM). The CNMC is responsible for regulating all five areas, while only the Audiovisual media sector is excluded from the scope of ACM's regulation.

The gathered data show that Estonia (with two multi-sector regulators), the Netherlands (with one single-purpose and one "super regulator"), and Spain (with one "super regulator") represent the most pro-consolidation approach to NRA's formation.

It is also worth noting that among the EU Member States, there are instances when more than one regulator is responsible for a given regulatory domain. This is the case in two countries with a federal structure: Belgium (three authorities)[6] and Germany (14 authorities)[7]. In both cases, these are the bodies responsible for regulating audiovisual media. Thus, it can be assumed that the authors of the constitutional laws of these states considered the freedom of speech and media (of which the audiovisual media regulator is one of the institutional guardians) as one of the guarantees of the autonomy of the federal regions from the federal government, which, through regulatory activity in this area, could potentially support broadcasters presenting a centralist optic.

Based on the above data, it can be concluded that the degree of specialisation or consolidation of regulatory bodies in the Member States is independent of factors such as the length of EU membership, territory, population, or GDP. Therefore, the intuition that the size of the regulated sector and the number of entities operating in it force the specialisation of the regulatory body should be considered incorrect.

[6] In Belgium, the distribution of powers between the federal government and the three autonomous regions is organized by the Constitution or by fundamental laws. Cultural matters (including audiovisual) are the responsibility of the regions.

[7] Due to the freedom of broadcasting regulated in Art. 5 sec. 1 of the Basic Law (German constitution), the state is not allowed to exert any influence on radio and television broadcasting in Germany, neither directly nor indirectly via financing. For this reason, media supervision is organised "away from the state". The key regulations in this regard are contained in the State Media Treaty (Der Medienstaatsvertrag – MStV), a treaty between all 16 federal states, which has the status of a state law through corresponding consent laws in all federal states.

Table 1. NRAs in the EU Member States and regulated domains.

No	Country	Regulatory domain				
		Competition protection	**Energy**	**Telecommunications**	**Audiovisual media**	**Railway**
1	**Austria**	Federal Competition Authority of Austria – Bundeswettbewerbsbehörde	Energie Control Austria (E-Control)	Austrian Regulatory Authority for 2Broadcasting and Telecommunications – Rundfunk und Telekom Regulierungs-GmbH (RTR-GmbH)	Austrian Regulatory Authority for Broadcasting and Telecommunications – Rundfunk und Telekom Regulierungs-GmbH (RTR-GmbH)	Schienen-Control GmbH
2	**Belgium**	Belgian Competition Authority – Autorité Belge de la Concurrence – Belgische Mededingingsautoriteit	Commission for Electricity and Gas Regulation – Commission de Régulation de l'Electricité et du Gaz (CREG) – Commissie voor de Regulering van de Elektriciteit en het Gas (CREG)	Belgian Institute for Postal Services and Telecommunications – Institut Belge des Postes et Télécommunications (IBPT) – Belgisch Instituut voor postdiensten en telecommunicatie (BIPT)	Three separate authorities: Higher Audiovisual Council of the Wallonia-Brussels Federation – Conseil Supérieur de l'Audiovisuel de la Fédération Wallonie-Bruxelles (CSA); Flemish Regulatory Authority for the Media – Vlaamse Regulator voor de Media (VRM); Medienrat of the German speaking Community of Belgium – Medienrat der Deutschsprachigen Gemeinschaft Belgiens	Regulatory Body for Railway Transport and for Brussels Airport Operations – Dienst Regulering van het Spoorwegvervoer & van de Exploitatie van Luchthaven Brussel-Nationaal – Service de Régulation du Transport ferroviaire et de l'Exploitation de l'Aéroport de Bruxelles-National
3	**Bulgaria**	Commission for Protection of Competition Republic of Bulgaria (CPC) – Komisia za zashtita na konkurentsiyata	Energy and Water Regulatory Commission (EWRC) – Комисия за енергийно и водно регулиране (КЕВР)	Communications Regulation Commission (CRC) – Комисията за регулиране на съобщенията (КРС)	Council for Electronic Media (CEM) – СЪВЕТ ЗА ЕЛЕКТРОННИ МЕДИИ	Railway Administration Executive Agency – Изпълнителна агенция "Железопътна администрация"
4	**Croatia**	Croatian Competition Agency – Agencija za zaštitu tržišnog natjecanja (AZTN)	Croatian Energy Regulatory Agency – Hrvatska energetska regulatorna agencija (HERA)	Croatian Regulatory 3 Authority for Network Industries – Hrvatska regulatorna agencija za mrežne djelatnosti (HAKOM)	Agency for Electronic Media of the Republic of Croatia – Agencija za elektronicke medije (AEM)	Croatian Regulatory Authority for Network Industries – Hrvatska regulatorna agencija za mrežne djelatnosti (HAKOM)

5	**Cyprus**	Commission for the Protection of Competition (CPC) – Επιτροπή Προστασίας του Ανταγωνισμού	Cyprus Energy Regulatory Authority (CERA) – Ρυθμιστική Αρχή Ενέργειας Κύπρου	Office of the Commissioner of Telecommunications and Postal Regulation (OCECPR) – Γραφείο Επιτρόπου Ρυθμίσεως Ηλεκτρονικών Επικοινωνιών και Ταχυδρομείων (TEPHET)	Cyprus Radio-Television Authority (CRTA) – Αρχή Ραδιοτηλεόρασης Κύπρου	No regulatory body (no railway system established within the territory)[8]
6	**Czechia**	Office for the Protection of Competition – Úřadu pro ochranu hospodářské soutěže (UOHS)	Energy Regulatory Office (ERO) – Energetický Regulační Úřad (ERÚ)	Czech Telecommunication Office – Český telekomunikační úřad (CTU)	Council for Radio and TV Broadcasting – Rada pro rozhlasové a televizní vysílání (RRTV)	Transport Infrastructure Access Authority – Úřad pro přístup k dopravní infrastruktuře
7	**Denmark**	Danish Competition and Consumer Authority – Konkurrence- og Forbrugerstyrelsen	Danish Utility Regulator (DUR) – Forsyningstilsynet	Danish Business Authority (DBA) – Erhvervsstyrelsen	Radio and Television Board c/o Danish Agency for Culture and Palaces, Media Division – Radio og tv-nævnet	Danish Railway Regulatory Body – Jernbanenævnet
8	**Estonia**	Estonian Competition Authority (ECA) – Konkurentsiamet	Estonian Competition Authority (ECA) – Konkurentsiamet	Consumer Protection and Technical Regulatory Authority (CTRA) – Tarbijakaitse ja Tehnilise Järelevalve Amet	Consumer Protection and Technical Regulatory Authority (CTRA) – Tarbijakaitse ja Tehnilise Järelevalve Amet	Estonian Competition Authority (ECA) – Konkurentsiamet
9	**Finland**	Competition and Consumer Authority – Kilpailu- ja kuluttajavirasto	Energy Authority – Energiavirasto (EV)	Liikenne- ja viestintävirasto (Traficom) – Finnish Transport and Communications Agency	Liikenne- ja viestintävirasto (Traficom) – Finnish Transport and Communications Agency	Liikenne- ja viestintävirasto (Traficom) – Finnish Transport and Communications Agency
10	**France**	Competition Authority – Autorité de la concurrence	Regulatory Commission of Energy – Commission de Régulation de l'Énergie (CRE)	Regulatory Authority for Electronic and Postal Communications – Autorité de Régulation des Communications électroniques et des Postes (ARCEP)	Higher Audiovisual Council – Conseil Supérieur de l'Audiovisuel (CSA)	Regulatory Authority for Rail and Road Activities – Autorité de Régulation des Activités Ferroviaires et Routières (ARAFER)

[8] In accordance with Art. 64 sec. 2 of the Directive 2012/34/EU establishing a single European railway area, the obligation to establish a railway regulatory authority shall not apply to Cyprus for as long as no railway system is established within its territory.

11	**Germany**	Federal Cartel Office – Bundeskartellamt	Federal Network Agency for Electricity, Gas, Telecommunications, Posts and Railway – Bundesnetzagentur (BNetzA)	Federal Network Agency for Electricity, Gas, Telecommunications, Posts and Railway – Bundesnetzagentur (BNetzA)	Die Medienanstalten – The Media Authorities (Association of the 14 regional Media Authorities)[9]	Federal Network Agency for Electricity, Gas, Telecommunications, Posts and Railway – Bundesnetzagentur (BNetzA)
12	**Greece**	Hellenic Competition Commission – Επιτροπή Ανταγωνισμού	Regulatory Authority for Energy (RAE) – Ρυθμιστική Αρχή Ενέργειας (PAE)	Hellenic Telecommunications and Post Commission, Εθνική Επιτροπή Τηλεπικοινωνιών και Ταχυδρομείων (EETT)	National Council for Radio and Television (NCRT) – Εθνικό Συμβούλιο Ραδιοτηλεόρασης (ΕΣΡ)	Regulatory Authority for Railways – Ρυθμιστική Αρχή Σιδηροδρόμων (PAΣ, RAS)
13	**Hungary**	Hungarian Competition Authority – Gazdasági Versenyhivatal	Hungarian Energy and Public Utility Regulatory Authority (HEA) – Magyar Energetikai és Közmű-szabályozási Hivatal (MEKH)	National Media and Infocommunications Authority – Nemzeti Média- és Hírközlési Hatóság (NMHH)	National Media and Infocommunications Authority – Nemzeti Média- és Hírközlési Hatóság (NMHH)	National Transport Authority – Nemzeti Közlekedési Hatóság (NKH)
14	**Ireland**	Competition and Consumer Protection Commission (CCPC) – Coimisiún um Iomaíocht agus Cosaint Tomhaltóirí	Commission for Regulation of Utilities (CRU) – An Coimisiún um Rialáil Fóntais	Commission for Communications Regulation (COMREG) – Coimisiún um Rialáil Cumarsáide	Broadcasting Authority of Ireland (BAI) – Údarás Craolacháin na hÉireann	Commission for Railway Regulation (CRR) – Coimisiún um Rialáil Iarnróid (CRI)
15	**Italy**	Italian Competition Authority – Autorità Garante Della Concorrenza e del Mercato (AGCM)	Regulatory Authority for Energy, Networks and Environment – Autorità di Regolazione per Energia Reti e Ambiente (ARERA)	Italian communications authority – Autorità per le Garanzie nelle Comunicazioni (AGCOM)	Italian communications authority – Autorità per le Garanzie nelle Comunicazioni (AGCOM)	Transport Regulation Authority – Autorità di Regolazione dei Trasporti
16	**Latvia**	Competition Council – Konkurences padome	Public Utilities Commission (PUC) – Sabiedrisko pakalpojumu regulēšanas komisija (SPRK)	Public Utilities Commission (PUC) – Sabiedrisko pakalpojumu regulēšanas komisija (SPRK)	National Electronic Mass Media Council – Nacionālā elektronisko plašsaziņas līdzekļu padome (NEPLP)	State Railway Administration of Latvian Republic – Latvijas Republikas Valsts Dzelzceļa administrācija

[9] These are: Bayerische Landeszentrale für neue Medien (BLM); Bremische Landesmedienanstalt; Landesanstalt für Kommunikation Baden-Württemberg (LfK); Landesanstalt für Medien NRW; Landesmedienanstalt Saarland (LMS); Hessische Landesanstalt für privaten Rundfunk und neue Medien (LPR); Landeszentrale für private Rundfunkveranstalter Rheinland-Pfalz (LMK); Landesrundfunkzentrale Mecklenburg-Vorpommern (LRZ); Medienanstalt Berlin-Brandenburg (MABB); Medienanstalt Hamburg-Schleswig-Holstein (MA HSH); Medienanstalt Sachsen-Anhalt (MSA); Niedersächsische Landesmedienanstalt (NLM); Sächsische Landesanstalt für privaten Rundfunk und neue Medien (SLM); Thüringer Landesmedienanstalt (TLM).

17	**Lithuania**	Competition Council of the Republic of Lithuania – Konkurencijos taryba	National Energy Regulatory Council (NERC) – Valstybinė energetikos reguliavimo taryba	Communications Regulatory Authority of the Republic of Lithuania – Lietuvos Respublikos ryšių reguliavimo tarnyba (RRT)	Radio and Television Commission of Lithuania – Lietuvos radijo ir televizijos komisija (LRTK)	Communications Regulatory Authority of the Republic of Lithuania – Lietuvos Respublikos ryšių reguliavimo tarnyba (RRT)
18	**Luxembourg**	Competition Council – Conseil de la Concurrence	Luxemburger Regulatory Institute – Institut Luxembourgeois de Régulation (ILR)	Luxemburger Regulatory Institute – Institut Luxembourgeois de Régulation (ILR)	Luxembourg Independent Media Authority – Autorité Luxembourgeoise Indépendante de l'Audiovisuel (ALIA)	Luxemburger Regulatory Institute – Institut Luxembourgeois de Régulation (ILR)
19	**Malta**	Malta Competition and Consumer Affairs Authority (MCCAA)	Regulator for Energy & Water Services (REWS)	Malta Communications Authority (MCA)	Malta Broadcasting Authority	No regulatory body (no railway system established within the territory)[10]
20	**Netherlands**	Authority for Consumers and Markets – Autoriteit Consument & Markt (ACM)	Authority for Consumers and Markets – Autoriteit Consument & Markt (ACM)	Authority for Consumers and Markets – Autoriteit Consument & Markt (ACM)	Dutch Media Authority – Commissariaat voor de Media (CvdM)	Authority for Consumers and Markets – Autoriteit Consument & Markt (ACM)
21	**Poland**	Office of Competition and Consumer Protection – Urząd Ochrony Konkurencji i Konsumentów (UOKiK)	Energy Regulatory Office (ERO) – Urząd Regulacji Energetyki (URE)	Office of Electronic Communications – Urząd Komunikacji Elektronicznej (UKE)	National Broadcasting Council – Krajowa Rada Radiofonii i Telewizji (KRRiT)	Office for Rail Transport – Urząd Transportu Kolejowego (UTK)
22	**Portugal**	Competition Authority – Autoridade da Concorrência (AdC)	Energy Services Regulatory Authority – Entidade Reguladora dos Serviços Energéticos (ERSE)	National Communications Authority – Autoridade Nacional de Comunicações (ANACOM)	Regulatory Authority for the Media – Entidade Reguladora para a Comunicação Social (ERC)	Mobility and Transport Authority – Autoridade da Mobilidade e dos Transportes (AMT)
23	**Romania**	Competition Council – Consiliul Concurentei România	Romanian Energy Regulatory Authority – Antoritatea Națională de Reglementare în domeniul Energiei (ANRE)	National Authority for Management and Regulation in Communications – Autoritatea Națională pentru Administrare și Reglementare în Comunicații (ANCOM)	National Audiovisual Council (NAC) – Consiliul Național al Audiovizualului	Railway Supervision Council – Consiliul de supraveghere din domeniul feroviar

[10] In accordance with Art. 64 sec. 2 of the Directive 2012/34/EU establishing a single European railway area, the obligation to establish a railway regulatory authority shall not apply to Malta for as long as no railway system is established within its territory.

24	**Slovakia**	Antimonopoly Office of the Slovak Republic – Protimonopolný Úrad Slovenskej Republiky	Regulatory Office for Network Industries (RONI) – Úrad pre reguláciu sieťových odvetví (URSO)	Regulatory Authority for Electronic Communications and Postal Services – Úrad pre reguláciu elektronických komunikácií a poštových služieb (RÚ)	Council for Broadcasting and Retransmission of the Slovak Republic (CBR) – Rada pre vysielanie a retransmisiu	Transport Authority – Dopravny urad
25	**Slovenia**	Slovenian Competition Protection Agency – Javna Agencija Republike Slovenije Za Varstvo Konkurence	Energy Agency – Agencija za energijo	Agency for Communication Networks and Services of the Republic of Slovenia – Agencija za komunikacijska omrežja in storitve Republike Slovenije (AKOS)	Agency for Communication Networks and Services of the Republic of Slovenia – Agencija za komunikacijska omrežja in storitve Republike Slovenije (AKOS)	Agency for Communication Networks and Services of the Republic of Slovenia – Agencija za komunikacijska omrežja in storitve Republike Slovenije (AKOS)
26	**Spain**	National Authority for Markets and Competition – Comisión Nacional de los Mercados y la Competencia (CNMC)	National Authority for Markets and Competition – Comisión Nacional de los Mercados y la Competencia (CNMC)	National Authority for Markets and Competition – Comisión Nacional de los Mercados y la Competencia (CNMC)	National Authority for Markets and Competition – Comisión Nacional de los Mercados y la Competencia (CNMC)	National Authority for Markets and Competition – Comisión Nacional de los Mercados y la Competencia (CNMC)
27	**Sweden**	Swedish Competition Authority – Konkurrensverket	Swedish Energy Markets Inspectorate – Energimarknadsinspekti onen (Ei)	National Post & Telecommunications Agency – Post- och telestyrelsen (PTS)	Swedish Press and Broadcasting Authority – Myndigheten för press, radio och tv (MPRT)	Swedish Transport Agency – Transportstyrelsen

Source: Own analysis based on collected data on regulators in the EU Member States.

Table 1. Legend			
Color		**NRA Type**	**Number of regulated domains**
1		Single-purpose regulator	1
2	3	Multi-sector regulator	2-3
4		"Super regulator"	4-5
		No regulatory body	-

The collected data can be further analysed to obtain a more comprehensive view of the NRAs. This approach allows for determining how often particular regulatory domains are subject to sharing the same regulatory authority with others and which of the domains' combinations occur most frequently. These data enable us to identify the most common decision-making patterns adopted by the Member States when designing national regulators.

Table 2 below shows the frequency at which certain regulatory domains are regulated by single-purpose regulators and by multi-sector regulators/"super regulators". As can be seen from the table, telecommunications is most often (in various configurations) combined with other regulatory domains – as many as 13 NRAs combine their regulation with other domains. At the other end of the spectrum is competition protection – only three times it is regulated by an agency other than the single-purpose regulator. Thus, the competition protection domain should be considered as the most specialised among the EU Member States.

Table 2. How often a given domain is regulated by single-purpose regulators and by multi-sector regulators / "super regulators"?

	Regulatory domain				
	Competition protection	Energy	Telecommunications	Audiovisual media	Railway
Number of times the regulatory domain is regulated by a multi-sector regulator / "super regulator"	3	6	13	7	9
Number of times the regulatory domain is regulated by a single-purpose regulator	24	21	14	20	18

Source: Own analysis based on the collected data on regulators in the EU Member States.

The information collected on domains regulated by each of NRAs also allows for examining the frequency with which individual domains are combined to be jointly regulated by one authority. This enables all available combinations of domains regulated by currently operating multi-sector regulators and "super regulators" to be examined.

According to Table 3, Member States most often decide to combine telecommunications and railways (eight times), telecommunications and audiovisual media (seven times), energy and railways (five times), and energy and telecommunications (five times) in a single regulatory body. In terms of triple combinations, the most common is the one consisting of energy, telecommunications, and railway (which occurs four times).

The most frequent combination (telecommunications and railway) can be considered counterintuitive. This is because it is difficult to find similarly obvious common features of the markets, as in the case of the next entries on the list where it is the use of frequencies and the digitisation factor (telecommunications and audiovisual media) and the organisation of the market based on a physical network (grid) managed mainly by state-owned entities and the call for liberalisation through the implementation of unbundling (energy and railways).

Surprisingly, among the domain combinations occurring only once, there are as many as two consisting of only two regulatory domains. These are the combinations consisting of competition protection and audiovisual media, as well as energy and audiovisual media (both of these combinations only occur in the case of the Spanish "super regulator" – CNMC). This means that the Member States do not see sufficient added value in joint regulation of these domains by a single authority. The reason may be that the state-predicted increase in regulatory efficiency or reduction in domain regulatory costs does not justify the creation of such multi-sector regulators.

Table 3. Frequency of combining the regulation of specific domains within the competence of one authority – all possible combinations.

Combination	Frequency (number of occurrences)
Telecommunications; Railway	8
Telecommunications; Audiovisual media	7
Energy; Railway	5
Energy; Telecommunications	5
Energy; Telecommunications; Railway	4
Audiovisual media; Railway	3
Competition protection; Energy	3

Competition protection; Energy; Railway	3
Competition protection; Railway	3
Telecommunications; Audiovisual media; Railway	3
Competition protection; Energy; Telecommunications	2
Competition protection; Energy; Telecommunications; Railway	2
Competition protection; Telecommunications	2
Competition protection; Telecommunications; Railway	2
Competition protection; Audiovisual media	1
Competition protection; Audiovisual media; Railway	1
Competition protection; Energy; Audiovisual media	1
Competition protection; Energy; Audiovisual media; Railway	1
Competition protection; Energy; Telecommunications; Audiovisual media	1
Competition protection; Energy; Telecommunications; Audiovisual media; Railway	1
Competition protection; Telecommunications; Audiovisual media	1
Competition protection; Telecommunications; Audiovisual media; Railway	1
Energy; Audiovisual media	1
Energy; Audiovisual media; Railway	1
Energy; Telecommunications; Audiovisual media	1
Energy; Telecommunications; Audiovisual media; Railway	1

Source: Own analysis based on the collected data on regulators in the EU Member States.

4. DOMINANT TENDENCY AND SELECTED AMALGAMATIONS' MINI CASE STUDIES

The institutional form of regulators is not constant, which also applies to the number of bodies operating in a given country and the number of domains regulated by each of them. Thus, it is possible to trace the process that led to the state presented in the previous part of the paper, determine the dominant trend (consolidation or specialisation) in the introduced reforms, and find out the reasons for and background of these changes.

The author set forth a hypothesis that the general consolidation trend of central government administration in Europe also applies to NRAs in the EU Member

States. To verify this hypothesis, he sought media information and information contained in official documents or communications on cases from 2000 to 2021 in which the competences of the existing multi-sectoral/"super-regulator" of the five regulatory domains analysed were divided between two or more bodies[11] or where the existing regulatory authorities of these domains were merged into one. Through his search, the author did not find information about any reforms involving the distribution of regulatory competences between new separate bodies, while learning about a number of cases where the opposite reforms were introduced. The above supports the hypothesis that there is a consolidation trend in the institutional structure of national regulators.

Now that the dominant trend is known, it is reasonable to analyse individual cases to learn about the circumstances in which the amalgamations took place. This can be achieved by examining the context and reasons behind the selected amalgamations of regulatory agencies, the rationale for their implementation, and expectations towards the amalgamated NRAs.

The first of the analysed cases is the creation of a Croatian multi-sector regulator of the telecommunications and railway sectors – the Croatian Regulatory Authority for Network Industries (HAKOM). In its present form, HAKOM was established in 2008 after the merger of two former regulatory agencies – the Croatian Telecommunications Agency (HAT) and the Postal Services Council (VPU). Then, on 19 June 2014, the Act on Amendments to the Electronic Communications Act and the new Act on the Regulation of the Rail Services Market entered into force creating a single NRA responsible for the regulation of electronic communications, postal services, and rail services markets – the Croatian Regulatory Authority for Network Industries. This new network regulatory agency was created as the result of the amalgamation of the Rail Market Regulatory Agency (ARTZU) with the Croatian Post and Electronic Communications (HAKOM) and kept its abbreviated name HAKOM to preserve its recognisability.

The 2014 reform was implemented mainly to rationalise public sector spending. Its authors expected that the amalgamation would also have an envisaged synergic effect. In their view, although the combined regulator's domains are different in the technical and technological sense, activities of electronic communications, postal, and rail services are complementary in terms of legal and economic aspects of achieving sustainable competition. As all three of the above-mentioned services are based on networks built by a state-owned incumbent, HAKOM's long experience and extensive expertise in the liberalisation of

[11] Thus, the author did not take into account cases of replacing an existing body with a new one with the same competences, as happened, for example, in Poland with regard to the telecommunications regulatory agency in 2006.

the electronic communications and postal services market were to help liberalise the railway sector.[12]

Similar expectations towards the amalgamated NRAs guided the creation of the Estonian multi-sector regulator of telecommunications and audiovisual media. Consumer Protection and Technical Regulatory Authority (CTRA) was created on 1 January 2019 by merging the Consumer Protection Authority and the Technical Regulatory Authority. This amalgamation was intended to strengthen the market and make the consumer environment safer.[13]

Reasons for increasing regulatory efficiency also underpinned the creation of a German multi-sector regulator in the energy, telecommunications, and railway sectors. The history of this body dates back to the liberalisation of the telecommunications and postal markets. This process led to the creation of the Regulatory Authority for Telecommunications and Posts (RegTP) on 1 January 1998. When the German government decided to strengthen competition for the energy and railway markets as of 13 July 2005 and 1 January 2006, it found that the RegTP's expertise in enabling open access to telecommunication networks would also be useful in these infrastructure markets. To reflect these new regulatory areas, the agency was renamed to Federal Network Agency for Electricity, Gas, Telecommunications, Posts and Railway (BNetzA).[14]

In Spain, the liberalisation of consumer industries, the end of state monopolies, and the need to adapt to European regulations led to the creation of many regulatory bodies. As a result, in 1995, the National Electricity System Commission (predecessor of the National Energy Commission, CNE) was created, followed by the creation of the Telecommunications Market Commission (CMT) in 1996, the Rail Regulation Commission (CRF) in 2003, the State Council for Audio-Visual Media (CEMA) and the National Postal Sector Commission (CNSP) in 2010, as well as the Airport Economic Regulation Commission (CREA) in 2011. Meanwhile, in 2007, a competition protection agency was also created – the National Competition Commission (CNC). In 2013, the unification of the above-mentioned regulatory bodies and the competition protection authority was approved. As a result, the six supervisory entities in existence at the time – National Competition Commission, National Energy Commission, Telecommunications Market Commission, National Postal Sector Commission, State Council for Audio-Visual Media, and Committee of Railway and Airport Regulation – were combined into

[12] HAKOM, *HAKOM Becomes the Croatian Regulatory Authority for Network Industries*, 2014, https://www.hakom.hr/en/hakom-becomes-the-croatian-regulatory-authority-for-network-industries/6849 (accessed 9 May 2023).

[13] CTRA, *Strateegia 2020-2024*, 2019, https://ttja.ee/media/101/download (accessed 9 May 2023).

[14] BNetzA, *Shaping the Future for Germany's Key Infrastructure*, 2020, https://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2020/ImageB.html (accessed 25 August 2021).

one. The "super regulator" thus formed was named the National Authority for Markets and Competition (CNMC). The declared purpose of that merger was to enhance their independence, as well as provide legal certainty and institutional trust by adopting an inclusive view from a regulatory and anti-trust standpoint. The authors of the reform expected the body created as a result of amalgamation to effectively contribute to promoting the modernization of the economy to benefit consumers.[15]

The consolidation of Dutch regulators responsible for competition protection, energy, telecommunications, and railways was presented in a similar way to the previously mentioned one. The creation of the Authority for Consumers and Markets (ACM) was aimed at saving costs and providing synergies in regulatory activities. Additionally, it was also expected that the newly created "super regulator" would be capable of anticipating market developments in a more integrated manner, using consolidated knowledge and expertise.[16]

5. INSTITUTIONAL FORM AND REGULATORY EFFECTIVENESS

Knowing the still prevailing model of specialised agencies and the existing consolidation trend, it is worth examining the significance of the institutional form (consolidated or specialised) of NRAs from the perspective of achieving the EU regulatory objectives, as the objectives of the Member States do not always have to be in line with EU law. This can be answered by examining whether the single-purpose or multi-sectoral structure of NRAs is legally irrelevant, or whether EU law provides any restrictions or guidelines as to specific amalgamations of regulatory bodies.

To some extent, the answer to this question is provided by EU directives regulating individual regulatory domains. As shown in Table 4 below, the directives not for all domains address this issue and the provisions of the directives that do so are rather general. The possibility of creating multi-sector or "super regulators" is explicitly allowed by the directives concerning audiovisual media (Directive 2010/13/EU) and railways (Directive 2012/34/EU). By interpreting Article 5 sec. 1 of the Directive (Eu) 2018/1972, it can be inferred that this is also allowed in the case of the agency regulating the telecommunications sector, as according to this provision, the agency can also be assigned with tasks resulting from other

[15] CNMC, *What Is the CNMC?*, https://www.cnmc.es/en/sobre-la-cnmc/que-es-la-cnmc#objetivo (accessed 5 May 2023).

[16] K. Cseres, *Integrate or Separate - Institutional Design for the Enforcement of Competition Law and Consumer Law*, "SSRN Electronic Journal" 2020.

EU legal acts. This issue is not directly addressed in the directives on energy and competition protection. Nevertheless, since the EU institutions have not questioned the possibility of combining the regulation of these domains with others within one NRA, it can be assumed that such a practice does not contradict the requirements imposed on these agencies.

Table 4. Creation of multi-sector regulators/"super regulators" and EU sectoral directives.

Regulatory domain	Relevant EU legislation	Provision
Audiovisual media	Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (significantly revised in November 2018)[17]	Article 30 sec. 1 Each Member State shall designate one or more national regulatory authorities, bodies, or both. Member States shall ensure that they are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. **This shall be without prejudice to the possibility for Member States to set up regulators having oversight over different sectors.** (…)
Competition protection	No precise reference.	
Telecommunications	Directive (EU) 2018/1972 of the European Parliament and of The Council of 11 December 2018 establishing the European Electronic Communications Code[18]	Article 5 sec. 1 **Member States may assign other tasks provided for in this Directive and other Union law to national regulatory authorities, in particular, those related to market competition or market entry**, such as general authorisation, and those related to any role conferred on BEREC. (…)
Energy	No precise reference.	

[17] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Codified version) (Text with EEA relevance), OJ L 95 of 2010, p. 1.

[18] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) Text with EEA relevance, OJ L 321 of 2018, p. 36.

Railway	Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast)[19]	Article 55 sec. 2 **Member States may set up regulatory bodies which are competent for several regulated sectors, if these integrated regulatory authorities fulfil the independence requirements set out in paragraph 1 of this Article. The regulatory body for the rail sector may also be joined in organisational term with the national competition authority referred to in Article 11 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty (8)**, the safety authority established under Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways (9) or the licensing authority referred to in Chapter III of this Directive, if the joint body fulfils the independence requirements set out in paragraph 1 of this Article.

Source: Own analysis based on the review of EU legislation.

CJEU also provided some guidance on the admissibility of linking domains through amalgamations. This issue was dealt with in the judgment in Case C-424/15 Xabier Ormaetxea Garai, Bernardo Lorenzo Almendros v. Administración del Estado. This case was related to the creation of the Spanish CNMC "super regulator". The act introducing this reform provided for the discontinuation of the mandate of the amalgamated regulators. In the above ruling, the CJEU confirmed the right of states to implement reforms involving merging NRAs. Nevertheless, it was underlined that the will of a Member State to undertake this type of reform cannot be the only justification for premature dismissals.

Based on the ruling, it can be concluded that one of the crucial conditions for a lawful amalgamation is the continuous, uninterrupted term of office of the current agency's management, including the agency's president and his advisers. Thus, in the case of creating a new agency to replace several hitherto existing bodies, the competences of the existing NRAs should be gradually incorporated into the new agency as the term of office of their management ends.

[19] Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast) Text with EEA relevance, OJ L 343 of 2012, p. 32.

6. CONCLUSIONS

NRAs are an integral part of the regulatory landscape of the European Union and its Member States. Taking into account the number of regulatory domains regulated by individual agencies, among those established in the Member States, one can distinguish specialised single-purpose regulators, as well as multi-purpose regulators and "super regulators" regulating various domains.

While the model of specialised agencies still prevails, the trend observed in recent years is pro-consolidation. It led to the creation of 12 multi-purpose regulators, as well as two "super regulators", i.e. the Spanish CNMC and the Dutch ACM.

There is a significant disproportion between the frequency of occurrence of individual domain combinations. The most common are telecommunications and railway, telecommunications and audiovisual media, energy and railway, and energy and telecommunications. Among the least frequent domain combinations are competition protection and audiovisual media, as well as energy and audiovisual media. At the same time, the data collected shows that competition protection is the domain least often regulated by multi-purpose regulators and "super regulators".

In carrying out amalgamations of existing NRAs, Member States aimed at rationalising public sector spending. From the agencies created as a result of such mergers, they expected greater independence and synergy as a result of using consolidated know-how and expertise as to the regulation of freshly liberalised markets.

EU law allows for the amalgamations of NRAs. It does so explicitly or implicitly depending on the domain. As the CJEU judgment in Case C-424/15 shows, the freedom to merge regulatory domains within a single authority does not fully apply to the amalgamation process itself. In carrying out such reforms, the tenure of those holding managerial positions in the bodies to be merged must be respected.

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Zuzanna Łubińska
University of Warsaw, Poland
e-mail: zuzialubinska@gmail.com
OIRCD: 0000-0002-6467-0498

A COMPARATIVE ANALYSIS OF THE ISSUE OF NECESSARY DEFENSE IN TERMS OF TORT LAW

Abstract

This paper addresses a comparative analysis of the issue of necessary defense in terms of tort law. The concept of indispensable defense is most often associated with criminal law. However, it is not the only branch of law in which it occurs. It is also possible to find it on the grounds of the Civil Code. A necessary defense is one of the main counter-narratives which exclude the unlawfulness of an act. As a matter of fact, acting within the framework of necessary defense, we act according to the rules of law. Nevertheless, it is important to act only within the limits of such defense, because exceeding them excludes the unlawfulness of the act.

The subject of this dissertation is to show, compare, and analyze legal regulations defining the right to indispensable defense in Poland and other contemporary countries.

KEYWORDS

tort law, necessity, necessary defense, comparative analysis, assassination

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prawo deliktowe, konieczność, obrona konieczna, analiza porównawcza, zabójstwo

VIM VI REPELLERE LICET – THE ORIGIN OF THE ROMAN RULE

Vim vi repellere licere Cassius scribit idque ius natura comparatur: apparet autem, inquit, ex eo arma armis repellere licere.[1]
Ulpian D. 43.16.1.27

The principle *vim vi repellere licet*, according to which "force can be repelled by force", originated in Roman law and is the foundation of the doctrine of necessary defense (*inculpata tutela*). According to Ulpian's account (placed in *libro sexagensimo nono ad edictum* in D.43,16,1,27), the principle *vim vi repellere licet* in its exact wording was formulated only by Cassius, who lived in the first century AD. This principle referred to the protection of possessions (which in turn means that it was originally an institution of private law, not criminal law). On the other hand, the oldest written basis for the right of defense is the Law of the Twelve Tables (*Leges Duodecim Tabularum*) from the turn of 451/450 BC, which allowed for necessary defense in the case of night-time theft. This way, self-help in its broader sense was to become, first, a permissible, though often drastic, alternative to ending a conflict in the face of a troublesome private lawsuit for the return of a stolen object.[2]

Following the chronology of the history of Roman law, the *lex Aquilia* also provided examples of the permissibility of self-help, which the law guaranteed impunity. The considerable scholarly activity of jurists on this law, confirmed by the extensive title of the *Digesta Justinianum*, includes both casuistic solutions and contains the generalization formulated by Paulus: *vim vi defendere omnes leges omniaque iura permittunt*.

As far as self-help is concerned, there are various divisions of it. The most interesting one with regard to the topic of this paper and also inspiring for scientific deliberations is on the level of activity or inactivity. Self-help can be divided into offensive actions, initiating a change of the factual state (active self-help),

[1] Cassius says that one can repel force with force; for this right is conferred by the law of nature. Hence he holds that it is clear that armed aggression can be repelled by arms.

[2] D. R. Yerenatovna, N. E. Talantuly, B. A. Abaevna and K. Bakhyt *Stages of Formation and Historical Development of the Institute of Necessary Defense*, Middle-East Journal of Scientific Research 14, pp. 33-40, 2013.

and defensive actions (passive self-help), consisting of counteracting attempts to change the factual state by another person. Precisely in the case of passive self-help, we can speak about the birth of the construction of necessary defense, called so today both in the language of private and criminal law.

FUNCTIONS OF NECESSITY

The social function of necessary defense requires special discussion. Referring to the justification of indispensable defense it should be noticed, that it was once sought in the law of nature. Referring to Cicero, it was claimed that this right resulted from the right of every man to defend himself against attacks on his property, so it did not require any additional justification as *lex nata*. T. Bojarski seems to endorse this view, classifying the institution of indispensable defense among inherent rights, which are connected with the sphere of subjective rights of an individual.

In this view, however, one cannot find any reference to the social justification of the legality of such an action, i.e. the social function of necessary defense, which seems to be particularly important. The beginnings of perceiving the social function of this institution can be noticed only in the epoch of Enlightenment. J.J. Rousseau, the creator of the theory of social contract, in the limits of his theory, claimed that every person, who in any way commits an attack on life, health, or other good protected by law, violates the conditions of the contract, which from this moment ceases to protect and bind him. In such a case, the assailed person is, as it were, automatically exempted from respecting any property of the assailant. Grotius and S. von Pufendorf, on the other hand, unanimously argued that in a social contract, the citizens of a state renounce to the state the right to apply self-help against attacks on their goods. However, if the state authority fails to protect them in a particular situation, they regain the right to act against the aggressor in defense of their property and are not liable for damages thus caused. The person acting in necessary defense 'relieves', as it were, the state authorities of the use of means necessary for the defense of the right. This theory of exculpation has also found many supporters in modern times. One of them was A. Gubiński, who stated that necessary defense is justified by the fact that "state authorities cannot always ensure the security of legal goods. Therefore, in the case when there is no officer in place (...) it is necessary to grant an individual the right to assist the state in its tasks".

The basic and undisputed function of the law is to protect the goods considered valuable by the legislator, whether from the perspective of the interests of citizens or social groups, or society as a whole, or from the perspective of the

state. The protective function of the law consists in the fact that the law, by means of establishing prohibitions of certain behaviors that violate or threaten certain social values, or by means of prohibitions of certain behaviors, provides legal protection to these values. This function is realized through the protection of social relations and a certain system of values adopted by the state against attacks on them. From this formulation of the role of law, the protective function of necessary defense can be derived. The legislator, introducing the exclusion of criminal responsibility in the case of violation of the assailant's legal good, when the perpetrator acted in order to repel an unlawful, direct and real attack on a certain legal good – in a special and real way, protects this good in practice. At the same time, by setting the boundaries of acting within the framework of indispensable defense and by penalizing their violation, it also grants certain protection to the assailant and his legal goods.

Another function of necessary defense is the pursuit of justice. An expression of this understanding of the justice function is the state's acceptance of the action of necessary defense. The justice function of indispensable defense satisfies the social sense of justice. At the same time, it should be clearly emphasized that one should not associate a necessary defense with a reaction of revenge or personal serving of justice by the attacked person, but with fulfilling the social sense of justice and fairness by allowing everyone to take an appropriate reaction to an attack on a specific legal good. Indeed, everyone has the right to defend his own goods or the goods of another person against an unlawful, direct and actual attack without having to obtain prior individual permission from a state authority, even if this involves harming the good of the attacker. The legislator's introduction of impunity for indispensable defense, as well as the possibility of mitigating criminal responsibility or renouncing the imposition of punishment in the case of exceeding its limits (and in certain cases even not being subject to punishment) constitute the realisation of the justice function of indispensable defense.

REGULATIONS OF NECESSITY IN DIFFERENT LEGAL SYSTEMS (GERMANY, SWITZERLAND, ESTONIA)

GERMANY, BGB[3]

In Germany, it is the BGB code that is the main source of civil law, so there we find §228, which provides for necessary defense. According to it:

[3] German Civil Code, Bürgerliches Gesetzbuch (BGB).

A person who damages or destroys a thing belonging to another in order to ward off from himself or from another a danger threatened by the thing does not act unlawfully if the damage or destruction is necessary to ward off the danger and the damage is not out of proportion to the danger. If the person acting in this manner caused the danger, he is obliged to pay damages.

It may be inferred from the above-quoted provision that the most important issue allowing one to consider the repulsion of a danger as an act of necessary defense is its proportionality to this danger. As long as the means used to avert the danger from oneself or another person are adequate to the threatened harm, their use does not constitute a violation of the law. The situation will be different when the measures taken significantly exceed the threshold of proportionality. As an example, we can mention here a situation sometimes encountered in housing estates. When children play with a ball, every now and then the ball hits a neighbor's window. The neighbor, after the ball hits his windows a number of times, wants to protect them from being smashed, so he takes out his air rifle and shoots the children. In such a case, one can no longer talk about necessary defense, because at first glance, the neighbor's behavior is disproportionate to the damage that the ball may have caused.

SWISS, CODE CIVILE[4]

In Switzerland, the issue of necessary defense is contained in Article 52 subsection 3 of the Civil Code and reads as follows:

A person who uses force to protect his rights is not liable in damages if in the circumstances the assistance of the authorities could not have been obtained in good time and such use of force was the only means of preventing the loss of his rights or a significant impairment of his ability to exercise them.

Thus, as can be seen, it draws attention to the availability and immediacy of the response of the authorities to the danger. When there is no opportunity for the intervention of the relevant state authorities in due time – a person may use force to repel an attack on a legally protected good. It is also important that the use of force by the injured person is the only means to avert an action threatening the loss of the person's rights or their significant limitation. There are no adjectives in the provision describing an action directed against a person who may use necessary defense.

[4] Swiss Civil Code, Schweizerisches Zivilgesetzbuch (ZGB).

ESTONIA, LAW ON OBLIGATION[5]

In the legal system of the northern Baltic state of Estonia, the issue of self-defense is explicitly mentioned as one of the four possible options for depriving an act of its unlawfulness. As stated in Article 1045 of the Estonian Contract Law, causing damage is not unlawful if the tortfeasor acted in self-defense or in necessity. The entire article reads as follows:

§ 1045 Estonian Law on Obligations of 2001

[...] (2) The causing of damage is not unlawful if:
1) the right to cause damage arises from law;
2) the victim consents to the damage being caused, except in the case where the grant of such consent is contrary to law or good morals;
3) the tortfeasor acted in self-defense or in necessity;
4) the tortfeasor legitimately used self-help to perform or protect the tortfeasor's rights.

In view of the above provision, one may notice an enumeration of reasons defining an act as not unlawful. However, there are no specific forms of self-defense in the provision, and there are no criteria that the behavior should meet in order to be included in the category of acts under the disposition of subsection 3 of Article 1045 of the Estonian Code.

PREREQUISITES FOR THE APPLICATION OF THE COUNTER-OPTION OF NECESSITY IN POLISH CIVIL LAW (ARTICLE 423 CC)

In Poland, the provision describing the use of necessary defense is relatively extensive. Each of its elements has a significant value, and all prerequisites indicated in it must be fulfilled in order to release a person from the responsibility for repulsing an attack. Only after meeting the requirements specified in Article 423 of the Civil Code, we can talk about necessary defense as a counterpractice excluding the unlawfulness of the act.

ARTICLE 423 POLISH CIVIL CODE

A person who acts in self-defense to resist a direct and unlawful attack on any of his interests or those of another person shall not be liable for damage caused to the assailant.

[5] Law on Obligations, Võlaõigusseadus.

The necessary defense in Polish civil law differs slightly from its counterpart under criminal law. It should be pointed out that, in principle, self-help is not allowed as a tool of protection in Polish civil law, because as J. Kozińska notes, the legislator prefers court protection, but the Civil Code in this respect introduces exceptions in the form of necessary defense and allowed self-help.

In fact, it should be pointed out that in Poland necessary defense is defined *expressis verbis* in as many as two provisions of the Civil Code – in Article 423 and Article 343 § 1, so in the part concerning obligations and the part concerning property law.[6]

According to the content of the above-mentioned provisions, the behavior of the perpetrator of the damage, in which exceeding the prohibitions or orders resulting from universally binding norms or rules of social coexistence allows invoking the reason abolishing the unlawfulness, does not constitute a tort. Generally speaking, the provisions of civil law do not contain a strict list of exclusions of unlawfulness, although they mention the most typical ones. One of them is acting in the course of necessary defense, regulated in Article 423. Due to the formula used in the commented regulation, "is not responsible for the damage caused to the assailant", it should be assumed that the exclusion of liability covers the liability for damages based on any basis (principle) provided by civil law.

Actually, all prerequisites quoted in the text of Article 423 of the Civil Code, conditioning the possibility of accepting indispensable defense as the basis for exclusion of civil responsibility, are identical with the prerequisites functioning on the grounds of Polish criminal law. Thus, the following prerequisites must be fulfilled altogether: 1) the occurrence of an attack, 2) the orientation of the attack towards any good of one's own or of another person 3) the direct character of the attack, 4) the unlawfulness of the attack, 5) the necessity of defense.[7]

It is, therefore, an attack contrary to the broadly understood legal order, and therefore also contrary to the principles of social co-existence. The unlawfulness of the assault is repealed by the consent of the person concerned provided, however, that it is legally binding and admissible (e.g. one cannot consent to euthanasia – then the necessary defense could consist in the fact that a doctor seeing another doctor or nurse giving drugs to the patient that are to lead to his death may invoke the necessary defense and e.g. push the person away). If he causes damage (e.g. to the person – bruising, scratching, or damage to property – damage to clothing), he will not be responsible for it. The attack must also be direct, so there must be a temporal connection between the unlawful behavior and the action within the framework of the necessary defense. Defense

[6] R. Sosik, *Self-defense in Polish and American criminal law. A comparative study*, UMCS, 2019.

[7] G. Karaszewski, *Civil Code. Commentary updated*, J. Ciszewski, P. Nazaruk (eds.), LEX/el. 2023, Article 423.

cannot be invoked after a certain time or before the attack. The object of threat can be either non-material goods (e.g. life, health, honor, freedom) or material goods (property), both one's own or someone else's. The value of these goods is irrelevant. Necessity, in turn, is understood as the use of necessary means, adequate to repel the threat to one's own or another person's property. In the circumstances of a particular case, we should, therefore, assess whether there was an excess of necessary defense. It is a matter of assessment of means available in a given situation and their effectiveness. It is even necessary to conclude that without the act causing harm the attack could not have been repelled. Such a standpoint – in contrast to the criminal law – suggests subsidiarity of the necessary defense in the civil law.

DEFINITION OF ASSASSINATION IN POLISH LAW

Continuing the discussion, it follows directly from this wording of provision 423 of the Civil Code that for a counter-narrative situation to exist at all, an attack must occur first. However, it does not always authorize to act in necessary defense. It should be noted that the law allows for defensive action only when three conditions are met: the attack must be direct, unlawful and directed at any good protected by law.

The notion of an attack itself does not cause major problems in interpretation. The term is unanimously defined by Polish doctrine as "human conduct directed against a legally protected good".

An attack must be directed at any good protected by law. The existence of such a good, and also directing the attack at it, is therefore another feature of necessary defense in Poland. However, in this context, it is worth discussing the issue of the scope of goods protected by this institution of law.

A separate feature of an attack, being its characteristic, is unlawfulness, i.e. infringement of some sanctioned norm, and what is important – it does not have to be an action realizing the elements of a prohibited act.

As far as the aspect of directness is concerned – it should be recognized that the legality of defensive actions depends on the time (or rather its lapse in relation to the attack) when they were taken. Defensive actions may be taken only at the time when one is dealing with a direct attack. In deciding the issue of the directness of the attack it is, therefore, a question of establishing the time relationship between the attack and the defensive actions intended to repel it.

SOURCES OF NECESSARY DEFENSE IN COMMON LAW WITH AN EXAMPLE FROM AMERICAN LAW

Transferring the above considerations to the American law, it should first be noted that in the United States, and in fact in the whole common law system, there is no uniform civil law in the shape of that known from the continental legal systems. Americans place the issues of contractual obligations (Contract Law) and the issues of civil liability for committed torts (Tort Law) in separate branches of law. It seems that it results from the Roman tradition, according to which the sources of obligations were symmetrically divided into obligations arising from contracts (*obligationes ex contractu*) and obligations arising from torts (*obligationes ex delicto*).

In American law, the defense of necessity in *inter partes* relations is called tort law. The term "tort" itself is taken from the French language and means 'wrongfulness'. Tort, therefore, means a violation of law, but on the one hand, it is not a violation of contract law, on the other hand, it contains features of a violation of criminal law. In many cases, the offender's act violates both the norms of tort law and the norms of criminal law at the same time, but the liability of the offender is completely different in both cases. The basic difference is the question of the right to bring an action or initiate proceedings. The plaintiff in tort law proceedings is the injured party who sues for damages. In the case of criminal cases, it is a state authority appointed to prosecute criminal offenses.

It should be noted that in the entire culture of common law and, therefore, also in the United States, usually the rules of legal relations *inter partes*, both contract and tort, are determined by the law of precedent and this form operates in most states of the U.S. (with the exception of states such as Texas, where the general rules are codified in the Texas Civil Practice and Remedies Code, which in free translation means "the code of civil practice and remedies of the state of Texas"; or New York and the New York Civil Practice Law and Rules (CPLR).

SUMMARY

Necessary defense is an important element not only of Polish legislation. As it has been proved in this work, the provisions defining it can be found both in the legal systems of European countries operating on the principles of civil law, as well as in the United States – the common law country. The discussed counter-rule is defined and described in various ways in national legislation. In some codes, for example in Poland, in order to qualify an action as a necessary defense

it must satisfy a number of rules already included in the discussed provision. In others, the regulations about necessary defense are more enigmatic.

This does not change the fact, however, that if they have been included in sets of regulations, they are an important part of the legal system of many different countries.

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Konrad Marciniuk
University of Warsaw, Poland
e-mail: k.marciniuk@wpia.uw.edu.pl
ORCID: 0000-0001-9201-6891

LEGAL ISSUES OF SPATIAL PLANNING IN AGRICULTURAL AREAS IN THE LIGHT OF THE AMENDMENT OF THE SPATIAL PLANNING AND DEVELOPMENT ACT OF 7 JULY 2023

Abstract

The author analyses the impact of the law reforming the spatial planning system on issues of shaping agricultural production space and, more broadly, on spatial management in rural areas. Passed on 7 July 2023, the Act represents the largest and most ambitious reform of the spatial planning system in at least 20 years. The new law introduces a number of provisions relating strictly to agricultural areas. The most significant change from this point of view is the expansion of the catalogue of values that must be taken into account by entities participating in spatial planning to include issues related to the shaping of agricultural production space and the development of agricultural production. The consequence of these changes will be an increase in the importance of agricultural space-shaping issues in the spatial planning process. The author also analyses other changes affecting agriculture, including, above all, a further extension of the protection of agricultural land from uncontrolled use for non-agricultural purposes.

KEYWORDS

spatial planning, rural areas, agriculture, agricultural land, agricultural land protection

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planowanie przestrzenne, obszary wiejskie, rolnictwo, obszary rolnicze, ochrona obszarów rolniczych

1. INTRODUCTION

Even a cursory review of the sources of law relating to economic activity leads to the conclusion that agriculture is of particular interest to the legislator. Both the farmer himself and the farm constituting a workshop of the farmer's work, as well as the agricultural activity understood as an activity connected with plant cultivation and breeding and rearing of animals[1] are subject to many legal regulations fundamentally different from those addressed to other types of economic activity. These regulations seek to pursue a variety of political, social and economic objectives. Of these objectives, the one that stands out is of course the implementation of the constitutional principle, according to which the basis of the agricultural system of the state is the family farm,[2] while an equally important factor determining the shape of legal regulations on agriculture is the implementation of the current agricultural policy of the state closely correlated, and in many aspects even subordinated to the implementation of the common agricultural policy of the European Union.[3] This special interest of the legislator in regulating issues

[1] Agricultural activity includes: all agricultural crops (including edible mushrooms), vegetable and horticulture, nursery, breeding and seeding of agricultural and horticultural plants, rearing and breeding of livestock, i.e.: cattle, sheep, goats, horses, pigs, poultry, bees, rabbits, other fur animals, wild animals kept on the farm for meat production (e.g. wild boar, roe deer, fallow deer) and bees, as well as the activity of maintaining agricultural land no longer used for production purposes in accordance with good agricultural and environmental conditions.

[2] Article 23 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No.78, item 483).

[3] The EU Common Agricultural Policy is primarily aimed at providing EU citizens with affordable, safe and high-quality food, guaranteeing a fair standard of living for farmers and protecting natural resources and the environment. The EU agricultural policy is divided into two pillars and covers three main areas of action: direct support (Pillar I), market measures (Pillar I) and rural development (Pillar II). The issue of spatial planning is precisely linked to rural development policy. Rural areas, which cover almost half of Europe, are home to around

related to agriculture undoubtedly results from the importance of this sector in the Polish economy and Polish socio-political reality. Indeed, attention should be paid to the characteristics of agriculture and rural areas in Poland. Rural areas and agricultural areas cover 85% and 52% of the country's area respectively. Rural areas are inhabited by approximately 15 million people – 38% of Poland's total population. A total of around 1.4 million farms are identified.[4] The unique challenges faced by agriculture must also be taken into account. These challenges can create uncertainty and unpredictability in the conduct of business in this sector. In addition to weather and climate pressures, farmers also face persistent market volatility due to unstable demand patterns and fluctuating prices.

As far as the classification of laws regulating agricultural issues according to the regulatory method of laws is concerned, there are mainly two categories: laws belonging to the public-law complex and laws belonging to private law (contained in the Civil Code itself or in other laws of a civil nature). In this regard, it is necessary to share the view expressed many years ago by A. Stelmachowski that the legal situation of the addressees of norms is, as a rule, determined by both categories of laws. For example, in particular, it is not the case that only restrictions of private law nature limit the right to property. In practice, restrictions of public law nature are also very important.[5] It is only by taking the restrictions of both private and public law nature together that the legal situation of the owner can be determined.[6]

There are also many laws which, while regulating issues not *strictly* related to agriculture, consider the specific problems and special nature of this type of activity. An example of such a regulation is precisely the title spatial planning regulated primarily by the provisions of the Spatial Planning and Development

20% of the EU's population. Most of these areas are disadvantaged regions in the EU, with a GDP per capita significantly lower than the EU average. EU rural development measures under the CAP help to: modernise farms by promoting the use of technology and innovation; boost rural development, e.g. by investing in connectivity and basic services; increase the competitiveness of the agricultural sector; protect the environment and mitigate climate change; enhance the vitality of rural communities; ensure generational turnover in agriculture. Rural development policy is a very important tool to support sustainable rural development and agriculture, including organic farming, in the EU. EU funding facilitates the modernisation of farms while encouraging diversification of activities in rural areas. In many respects, rural development policy is complemented by the EU's cohesion policy. It supports sustainable territorial development in particular. The policy consists of the European Regional Development Fund (ERDF) and the European Social Fund (ESF).

[4] https://www.gov.pl/web/wprpo2020/plan-strategiczny-dla-wpr-na-lata-2023-2027-wersja-pelna-22-i-wersja-skrocona-22

[5] For more information, see: F. Longchamps, Ograniczenia własności nieruchomości w polskim prawie administracyjnym, "Przegląd Prawa i Administracji" 1939, No. 1-2.

[6] A. Stelmachowski, *Treść i wykonywanie prawa własności, in: System Prawa Prywatnego, vol. 3: Prawo rzeczowe,* T. Dybowski (ed.), Warsaw 2007, p. 218.

Act.[7] In jurisprudence, attention has long been drawn to the specificity of shaping spatial policy in rural areas,[8] as well as to the specific needs related to the impact on the area structure of Polish agriculture.[9]

2. CHARACTERISTICS OF SPATIAL PLANNING

Spatial planning issues should not be considered by sectors, i.e. from the point of view of individual areas of the economy. This is because the spatial planning issues are horizontal – taking into account a very wide range of conditions, not only economic but also environmental and social. The predominant view in science is that of the need for an integrated approach to spatial planning, which involves the need to combine strategies, policies, plans and actions in such a way as to avoid the formulation of mutually contradictory policies. In practice, legal regulation in the field of spatial planning should create conditions for the broadest possible analysis of conditions in the planning process in order to eliminate contradictions. The indicated principle can also be considered through the prism of the purpose of the current regulation of the Spatial Planning and Development Act. The literature emphasises that this objective is not only to reconcile conflicting interests.[10] Viewed this way, the objective was often understood in a way that required the municipal authorities to take into account the expectations of all property owners. Thus, for example, if the municipal authorities agreed to rezone the land of one of the owners, they should also have agreed to rezone the land of other owners who expected this and who were in a similar legal situation. The effect of such an understanding of reconciling conflicting interests was a significant surplus of land provided in municipalities' spatial development studies (as well as in local plans and decisions on development conditions) for development purposes. Undoubtedly, such an approach was not favourable from the point of view of shaping agricultural productive space, and additionally generated the negative phenomenon of uncontrolled spillover of extensive residential and service development into agricultural areas. This caused numerous conflicts related to the mutual negative impact of agricultural, residential, and service functions,

[7] Act of 27 March 2003 on spatial planning and development, i.e. Journal of Laws 2023, item 977.

[8] See e.g., P. Czechowski, *Kształtowanie terenów budowlanych na obszarach wsi. Zagadnienia prawno-organizacyjne*, Warsaw 1980.

[9] See e.g., K. Marciniuk, *Prawne instrumenty ingerencji władzy publicznej w obrót nieruchomościami rolnymi jako środki kształtowania ustroju rolnego*, Białystok 2019.

[10] M. Szewczyk (in:) Z. Leoński, M. Szewczyk, M. Kruś, *Prawo zagospodarowania przestrzeni,* 2nd ed., Warsaw 2019, p. 200.

and additionally generated substantial costs related to the construction and maintenance of technical, road, and social infrastructure in these areas.

As it was noted by M. Szewczyk, pursuant to Article 1, paragraphs 3 and 4 of the Spatial Planning and Development Act, instead of the previous injunction to seek a compromise, the current wording of the Act introduces a directive to weigh conflicting interests, however not in an arbitrary manner, but on the basis of objective criteria based on the results of economic, environmental and social analyses preceding a given decision. The provisions of the following paragraphs of Article 1 of the Spatial Planning and Development Act introduced requirements to take into account in the studies, in particular, the development needs and possibilities of the municipalities resulting from the economic, environmental and social analyses, demographic forecasts, the possibilities of financing technical and social infrastructure by the municipality and the balance of land allocated for development.[11]

Without denying the special conditions and needs of agriculture,[12] it should be noted that also in rural areas, spatial planning is multifaceted. The changing role and importance of both agriculture and the countryside cannot be overlooked. On the one hand, although nowadays agricultural production contributes less and less to the creation of gross domestic product, to the employment of the population, and to household incomes, still more than half of the country's area is developed as agricultural land, and in some regions agricultural activity is the primary form of economic activity. From this point of view, the spatial development of rural areas is largely determined by agricultural development. On the other hand, rural areas, despite the lower intensity of land use in comparison to cities, perform, apart from agriculture and production, other functions – residential, services, environmental, cultural, and production (to the extent other than agricultural) – which may expose them to the occurrence of conflicting situations in spatial development. Therefore, taking into account the need for multi-functional development of rural areas, it is particularly important to take into account and weigh up the indicated multi-faceted conditions and functions when making decisions on spatial planning in these areas, including, first of all, the creation of spatial planning acts.[13]

[11] M. Szewczyk, *ibid*.

[12] This specificity is pointed out by P. Czechowski, A. Niewiadomski, *Obszary wiejskie a planowanie przestrzenne*, "Studia Iuridica Agraria" 2012, Vol. 10, pp. 227-238.

[13] For more information, see: *Nowe zadania planowania miejscowego w kształtowaniu i zagospodarowaniu przestrzennym obszarów wiejskich*, Z. Ziobrowski, J. Pijanowski (eds.), Kraków 2008.

3. SPATIAL PLANNING IN RURAL AREAS

The Spatial Planning and Development Act – in its previous wording – took into account the specificity of rural areas only to a limited extent. This approach was probably based on the assumption that planning regulations should focus primarily on areas subject to urbanisation processes. With regard to agricultural areas, the legislator's attention was primarily focused on protecting agricultural land from uncontrolled use for non-agricultural purposes and – to a small extent – on shaping the principles for the location of homestead and agricultural-production buildings. At the same time, it should be noted that the main part of the regulations on the protection of agricultural land is the subject of a completely separate law – i.e. the Law on the protection of agricultural and forestry land.[14] Also outside the scope of the Spatial Planning and Development Act, there are extremely important, from the point of view of shaping the agricultural production space, regulations concerning management and agricultural works, i.e. first of all, consolidation and exchange of agricultural land,[15] as well as land melioration.[16] In addition, which is worth emphasizing, a number of issues related to spatial planning in agricultural areas have been regulated in the so-called special laws enacted by the legislator in order to facilitate and accelerate the construction of certain types of technical and road infrastructure, as well as the implementation of housing investments.[17] Special legal conditions for the use of agricultural real estate also result from other regulations of an administrative-legal nature[18] relating to: construction law,[19] nature protection[20] and environmental protection,[21] which – in the most general terms – are aimed at protecting the farmland resource

[14] Act of 3 February 1995 on the protection of agricultural and forest land (consolidated text, Journal of Laws 2022, item 2409).

[15] Act of 26 March 1982 on land consolidation and exchange (consolidated text, Journal of Laws 2023, item 1197).

[16] Act of 20 July 2017 Water Law (consolidated text, Journal of Laws 2023, item 1478).

[17] For example Act of 10 April 2003 on special rules for the preparation and implementation of investments in the field of public roads (consolidated text, Journal of Laws 2023, item 162), Act of 24 July 2015 on the preparation and implementation of strategic investments in transmission networks (Journal of Laws 2023, item 1680, as amended), Act of 5 July 2018 on facilitations in the preparation and implementation of housing investments and accompanying investments (consolidated text, Journal of Laws 2021, item 1538, as amended).

[18] For more information, see: Z. Czarnik, *W sprawie pozaustawowych ograniczeń prawa własności*, "Casus" 2001, No. 1.

[19] Act of 7 July 1994 - Construction Law (consolidated text, Journal of Laws 2018, item 1202 as amended).

[20] Act of 16 April 2004 on nature protection (consolidated text, Journal of Laws 2018, item 1614).

[21] Act of 27 April 2001 - Environmental Protection Law (consolidated text, Journal of Laws 2018, item 799, as amended).

irrespective of the legal title of the entity in possession.[22] A consequence of such a dispersion of the regulations on spatial planning in rural areas is the relatively low importance of the regulations in this respect from the point of view of implementing the assumptions of agricultural policy with regard to shaping the area structure of Polish agriculture. In this context, the question arises to what extent this – in my opinion highly unsatisfactory – state of affairs will change with the entry into force of the most serious reform of the Polish spatial planning system in twenty years. On 24 September 2023, an extensive amendment to the Spatial Planning and Development Act[23] came into force, which also includes a number of changes relevant to agriculture.

4. THE PRINCIPLE OF SHAPING THE AGRICULTURAL PRODUCTIVE SPACE

Perhaps the most significant issue from the point of view of the considerations carried out here is the expansion of the catalogue of values that the legislator requires to be respected and protected when making decisions on spatial planning, including, above all, in the process of shaping and establishing spatial planning acts, as well as when issuing administrative acts on land development. Pursuant to Article 1(1)(a) of the Act of 7 July 2023 amending the Spatial Planning and Development Act, "the needs related to the formation of agricultural production space and the development of agricultural production" were added to the catalogue of these values. Consequently, the extension of the catalogue of values to be taken into account in spatial planning by the needs related to the development of agricultural production space will translate into the necessity to take these needs into account when drawing up the indicated analyses and, consequently, to take the amending act in question into account in the preparation of planning acts (both existing and new).

Moreover, the legislator's action consisting in the extension of the catalogue of values established in the Planning Act, which are to be – by virtue of the Act – taken into account in the spatial planning process, seems to be a rational and systemically correct solution. It should be noted that pursuant to the provision of Article 1(1)(2) of the Act on spatial planning, spatial order and sustainable development are the basis for the public authorities' actions in the matters of allocating land for specific purposes and establishing the principles of its development and

[22] A. Oleszko, (in:) *Prawo rolne,* 2009; B. Rakoczy, *Ochrona środowiska w procesie produkcji rolnej*, (in:) *Prawo rolne*, A. Stelmachowski (ed.), Warsaw 2009, p. 357 *et seq*.

[23] Act of 7 July 2023 amending the Act on spatial planning and development and certain other acts (consolidated text, Journal of Laws 2023, item 1688).

construction. This principle is of key importance when establishing all planning acts, including, in particular, the adoption of a study of the conditions and directions for the spatial development of a municipality, the adoption of local spatial development plans, as well as when making decisions in the form of administrative acts (decisions on land development conditions, decisions on the location of public purpose investments). This principle constitutes a substantive directive resolving in an unequivocal manner that the entire scope and manner of proceedings in the matter of allocating land for specific purposes and establishing the principles of its management must be aimed at shaping and protecting the spatial order and creating conditions for sustainable development. Consequently, the legislator unambiguously requires that all spatial planning activities should aim, first and foremost, at shaping the space in such a way as to create a harmonious whole and, moreover, take into account in orderly relations all functional, social, environmental, cultural and compositional and aesthetic conditions and requirements.

Equivalent to the principle of spatial order is the principle of sustainable development, which is understood as a socio-economic development in which political, economic, and social activities are integrated while maintaining the natural balance and sustainability of basic natural processes in order to guarantee the possibility of satisfying the basic needs of individual communities or citizens of both the present and future generations.

The guiding directive of spatial planning taking into account the principle of shaping spatial order and ensuring conditions for sustainable development is complemented by an extensive catalogue of values indicated in Article 1(2) of the Act on spatial planning, which according to the legislator must be taken into account in the spatial planning process. Without denying their importance, however, it should be pointed out that these values only supplement and, in some cases, clarify the prime directive. Moreover, it is in principle the rule that not all of the values listed in the indicated provision can be fully achieved in every case. However, they must be taken into account in each case and the authorities involved in the drafting of planning acts are obliged to weigh conflicting interests and values.

As already indicated, as a result of the amendment of the Spatial Planning and Development Act of 7 July 2023, the catalogue of these values explicitly includes issues related to both the shaping of agricultural production space and the creation of conditions for agricultural development. Thus, the legislator has already prescribed that the broadly defined interests of agriculture should be taken into account in the spatial planning process, although of course, it does not make this the guiding or dominant principle. The planning decisions must still, above all, implement the principle of spatial order and sustainable development, as well as take into account the other values listed in Article 1(2) of the Act, while implementing the principle of proportionality.

According to this principle developed by the jurisprudence and doctrine, the bodies creating local laws should use such means which are necessary to achieve

a socially useful objective with the least possible detriment (cost) to the individual whose rights will be violated in order to achieve this objective. In administrative jurisprudence, the view has become established that the consequence of the principle of proportionality in spatial planning and development is the necessity to demonstrate each time, when limiting rights and freedoms, that the protection of the environment cannot be ensured in another way and that in a given situation, the good of the environment and human health prevails over the private interest, and that the applied legal instruments provided for in the local plan are the least burdensome for the subject of the right or freedom. The essence of the municipality's planning authority includes, of course, the power to legally interfere in the sphere of the exercise of property right, but in the exercise of this power, the municipality is obliged to be guided by the public interest and to appropriately balance it against the private interest while taking into account the principle of proportionality and rationality in the perspective of the impact on the property right and environmental protection in accordance with the principle of sustainable development.[24]

Issues related to spatial planning in agricultural areas are also the subject of a number of specific amendments. They mainly concern the inclusion of agricultural and rural issues in the creation of new types of planning acts introduced on the basis of the amendment under discussion – municipal general plans.

Thus, in accordance with Article 13b pt. 3(q), the municipal authorities, in formulating the arrangements of the general plan, are to take into account the conditions of spatial development of the municipality, in particular, the agricultural land in the area of the municipality which is agricultural land of the I-III classes and forest land. Thus, the legislator has designated agricultural land of the highest quality classes as a special resource to be protected, which is fully correlated with the provisions of the aforementioned Act on the protection of agricultural and forest land, which covers this type of land with special protection against uncontrolled use for non-agricultural purposes.

5. ENHANCING PROTECTION OF AGRICULTURAL LAND

One of the means of preventing spatial conflicts arising more and more frequently as a result of the coexistence, mainly in the areas surrounding urban agglomerations, of the hitherto predominant agricultural production function with the residential, production, and service functions entering the area, is to be the designation in general plans of agricultural production zones. Pursuant to

[24] See, for example, the judgment of the Supreme Administrative Court of 14 March 2018, II OSK 1281/16, LEX No. 2469106.

Article 13c introduced into the Spatial Planning and Development Act, the area covered by the general plan shall be divided into planning zones in a separable manner. As a result of the division referred to in subsection 1, it is envisaged that municipalities may also designate separate agricultural production zones, in which the risk of the occurrence of the indicated conflicts will be excluded or significantly reduced, as agricultural activity is to be, as a rule, the exclusive use of the properties located in these zones.

The spatial planning system reform under discussion also introduces significant changes with respect to the application of the hitherto common, and in the case of many municipalities even dominant, spatial planning instrument, i.e. decisions on land development conditions. As it is known, according to the hitherto wording of the Act, such decisions may be issued, as a rule, anywhere where local development plans are not in force, provided that the prerequisites for issuing such a decision provided for in Article 61 of the Act on spatial development are met. Pursuant to the solutions introduced under the discussed amendment, the admissibility of issuing such decisions determining the possibility of making changes to land development will be limited only to areas explicitly indicated in the general plan as areas for complementary development. Such a solution will significantly limit the possibility of designating agricultural land for other purposes, as such changes will, as a rule, require the adoption of a local development plan. The method of delimiting the areas on which the possibility to issue development conditions decisions will be retained (i.e. the areas of complementary development), pursuant to the disposition of Article 13m(1) added to the Act, is to be established by way of a regulation by the minister in charge of construction, planning and spatial development and housing in agreement with the minister in charge of rural development. At the same time, the rationale for designating this area of supplementary development is to be based not only on the need to shape spatial order but also on the need for rational agricultural land management, including counteracting the occurrence of spatial conflicts and dispersion of development. Such a solution will force municipalities to look for planning solutions which, on the one hand, will enable new investments to be implemented on agricultural land but at the same time will not hinder agricultural activity. However, as it has been mentioned, after the amendment to the Spatial Planning and Development Act, such solutions are to be of exceptional character. The basic planning instrument is to be local spatial development plans.

The amended Act also changes the rules for making investments in agricultural land involving the construction of installations for the generation of energy from renewable sources. Pursuant to *Article 14(6a),* added as a result of the amendment under discussion, a change in land use concerning unmounted installations of renewable energy sources located: (a) on agricultural land of class I-III and forest land, (b) on agricultural land of class IV, with an installed electrical capacity of more than 150 kW or used for the business of electricity generation – shall be

made solely on the basis of a local plan. This equals the elimination of the possibility of realising such investments on the basis of decisions on development conditions. Such a solution is an expression of the legislator's intention to increase the protection of agricultural land from being used for non-agricultural purposes and, consequently, to aim at preserving the largest possible area of agricultural land in the country. The obvious consequence, however, is to hinder the implementation of investments involving renewable energy sources, which may be problematic from the point of view of the implementation of the energy transition and, in the longer term, the achievement of climate policy objectives.

The aspiration to strengthen the quantitative protection of agricultural land against urbanisation processes is also evident in the solutions concerning the simplified procedure for the adoption of a local spatial development plan introduced under the amended Act. This procedure was intended by the legislator to simplify and shorten the procedure of formal preparation of new investments, and thus to reduce investment barriers. Despite a very limited range of cases,[25] in which such a simplified procedure could be applied, such a solution should be welcomed. However, it should be noted that also in this case the legislator has given primacy to the quantitative protection of agricultural land. Pursuant to Article 27b paragraph 2 added by virtue of the amendment, the simplified procedure does not apply if the local plan or its amendment, referred to in paragraph 1, subparagraph 1 and 2, letters d-l, concern the use of agricultural and forest land for non-agricultural and non-forest purposes requiring the consent referred to in Article 7, paragraph 2, of the Act of 3 February 1995 on the protection of agricultural and forest land. This means that such a procedure will not be applicable to land of the best quality classes (i.e. land of classes I-III).

As a result of the amendment to the Act on spatial planning and development, the legislator introduces another interesting and completely new solution – the integrated investment plan. In the intention of the legislator, this document is a special form of a local plan. Its characteristic feature is a special mode of enactment. The legislator assumes that a draft of such a document will be developed by an investor interested in the realisation of a specific investment in a given area. Although the draft of such a document will obviously have to meet the formal requirements for a local plan and be consistent with the general plan, a private entity such as an investor will have a great deal of freedom in shaping the content of the document. Moreover, both the solutions adopted in the content of this document, as well as the content of the investor's obligations towards the municipality concerning outlays for the necessary technical infrastructure (utility networks), roads and social infrastructure (e.g. kindergartens, schools) will be subject to negotiations conducted between the investor and the municipality. The

[25] The scope of application of the simplified procedure for the adoption of the local plan is set out in Article 27b(1) of the amended Act on Planning and Spatial Development.

arrangements made during these negotiations are to be recorded in the form of an agreement concluded in the form of a notarial deed. The final decision as to the approval of the negotiated document, i.e. the adoption of the integrated investment plan, is to be taken by the municipal council, but it will not be able to introduce any changes to the project presented to it. If, however, the council decides that changes are necessary, it will be necessary to reopen negotiations with the investor regarding his obligations towards the municipality. This is, therefore, a very flexible and potentially very interesting solution which may accelerate and facilitate investment preparation procedures while securing the municipality's interests regarding the costs of constructing the relevant infrastructure. Even in this case, however, the legislator did not agree to limit the protection of agricultural land. Pursuant to Article 37ec, paragraph 2, introduced into the Act, the procedure for adopting the integrated investment plan retains the obligation to obtain consent for changing the purpose of agricultural and forest land for non-agricultural and non-forest purposes if required by separate provisions (i.e. in the case of agricultural land of class I-III). The competence to request such consent was left in the hands of the mayor.

6. OTHER RURAL PLANNING DEVELOPMENTS

The amended Act also contains a number of other specific solutions directly or indirectly concerning agricultural areas. For example, the amendment simplifies the rules for locating farm buildings intended exclusively for agricultural purposes within an existing farm by eliminating the requirement to provide access to a public road for newly constructed facilities of this type (Article 61(3)). However, another amendment concerning development within an agricultural holding goes in the opposite direction. Indeed, under the previous legislation, the issuance of a decision on development conditions for the homestead development was significantly simplified. In the case of this type of investment, in accordance with Article 61(4), the provisions of Article 61(1)(1) of the Spatial Planning and Development Act[26] rule do not apply to homestead development where the area of the farm associated with this development exceeds the average area of a farm in a given municipality. Farmers can, therefore, carry out homestead developments in

[26] Pursuant to Article 61(1) of the Planning and Spatial Development Act, the issuance of a decision on development conditions is possible only if at least one neighbouring plot, accessible from the same public road, is developed in a manner that allows for the determination of requirements for a new development in terms of continuation of parameters, features and indicators of development and land development, including the overall dimensions and architectural form of buildings, building lines and intensity of land use.

areas not covered by local plans without regard to the urban planning parameters of existing developments in the vicinity. This is undoubtedly an important entitlement, especially as in Polish reality local plans for agricultural areas have been adopted very rarely. However, the legislator noticed that in practice this entitlement was relatively often abused. There were cases in which a farmer applied for a decision on development conditions for an area not covered by a local plan, and after obtaining such a decision, using the entitlement arising from Article 63(5) of the Act demanded that the rights arising from such a decision be transferred to an entity which, according to the previous regulations, did not have to be a farmer. In this way, market participants sought to circumvent the provisions protecting agricultural land from conversion to other functions. As a consequence, the non-farmer acquired the right to develop the property by erecting structures on it only nominally constituting the residential facilities of the farm but in practice serving the housing (or economic) needs of persons in no way connected with the farm. Recognising this problem, the legislator limited the possibility of transferring the rights arising from decisions on development conditions issued pursuant to Article 61(4). Such decisions may be transferred to another person provided that the development will be part of that person's agricultural holding and that the area of that agricultural holding exceeds the average area of an agricultural holding in the municipality. In essence, the amendment is a housekeeping one and consists in clarifying the requirements in such a way as to fully maintain the previous intention of the legislator. In particular, this change is neutral from the point of view of the legal situation of a farmer who meets the prerequisites indicated in Article 61(4) in its hitherto wording.

One of the consequences of the discussed amendments to the Act on spatial planning and development is the liquidation of the institution of the study of land development conditions and directions. The subject matter of such documents is to be taken over by the already mentioned general plans. It should be noted, however, that the subject matter of general plans does not coincide with the content of studies of land development conditions and directions. The content of the general plan focuses primarily on determining the purpose (function) of the land. Only to a very limited extent is it supposed to include arrangements concerning the conditions for the development of a given municipality. Issues related to this are to be analysed and determined by the municipalities in strategic documents which are to be created in accordance with the requirements of the Act on municipal self-government.[27]

Pursuant to Article 10e, which, as a result of the entry into force of the Act of 7 July 2023, will be added to the Act on municipal self-government, it will constitute the basis for the preparation of the municipal development strategy.

[27] Act of 8 March 1990 on municipal self-government (consolidated text, Journal of Laws 2023, item 40 as amended).

The municipal development strategy will have to include the conclusions of the diagnosis prepared for the purposes of this strategy and, in particular, determine the findings and recommendations for shaping and conducting the spatial policy in the municipality concerning the principles of shaping the agricultural and forest production space. Such a solution introduces a directive to take into account strategic studies, which are to be the basis for the development of plans and the general principles of shaping the agricultural production space.

The discussed amendment to the Spatial Planning and Development Act also introduces significant changes to a number of other laws. In particular, it is worth noting the amendments to the Act on the protection of agricultural and forest land. As has already been mentioned, the amendment limits the possibility to issue decisions on development conditions only to the areas indicated in general development plans as development supplementation areas, thus very significantly limiting the possibility to use this planning tool. Perhaps it is precisely due to the limited scope and exceptional character that the decisions on development conditions will have as a result of the entry into force of the amending act. In such cases, the legislator decided to eliminate the necessity to obtain the consent of the Minister of Agriculture to change the designation of agricultural land for non-agricultural purposes, even in the case of land of the highest classes. The amendment in question changes the content of Article 7(2a) of the Act on the protection of agricultural and forest land. Pursuant to this provision, the designation for non-agricultural and non-forest purposes of agricultural land constituting agricultural land of the I-III class located in the area of complementary development within the meaning of the provisions on planning and spatial development does not require the consent of the minister competent for rural development. This change seems to be completely rational, especially that, as mentioned in the legislator's intention, the indicated areas of complementary development will be relatively small and, when delimiting them in general plans, the municipal councils will be obliged to take into account the needs of rational management of agricultural land, including prevention of spatial conflicts and uncontrolled dispersion of development. Other, less significant changes in the Law on the protection of agricultural and forest land serve to simplify and rationalise the procedure for obtaining consents for the change of use of agricultural land for non-agricultural purposes in cases where such consents will be required.[28]

[28] Article 7(3) of the Law on the protection of agricultural and forestry land sets a 60-day period for consenting or objecting to the use of certain land for non-agricultural and non-forest purposes, whereby failure to consent or refuse to consent within this period will be tantamount to consent. In addition, Article 7(5), on the basis of which the consenting authority could require the submission of an application in several variants showing different directions of the proposed spatial development, is repealed.

According to the wording of Article 22 of the Amendment Act, the Act on the formation of the agricultural system is also to be amended.[29] However, the main part of these changes is to enter into force only on 1 January 2026. Of these changes, perhaps the most significant is the extension of the scope of application of the Act to all agricultural properties located within the administrative boundaries of cities. This is a consequence of the repeal of Article 1b of the Act on formation of the agricultural system. Pursuant to that provision, limitations in trading in agricultural real estate resulting from the Act did not apply so far to agricultural real estate located within administrative borders of cities, if in relation to such real estate a resolution was adopted on determining the location of a housing investment or an accompanying investment within the meaning of the Act on facilitating the preparation and implementation of housing investments and accompanying investments[30] or if the sale of such agricultural real estate took place in order to implement a housing investment, or an accompanying investment within the meaning of the aforementioned Act. Resignation from this exception (i.e. restriction of the scope of application of the Act on shaping the agricultural system) is a consequence of the intention to repeal the Act on facilitating preparation and implementation of housing investments and accompanying investments as of 1 January 2026[31] (Housing Investment Act). By the way, it is worth explaining that the repeal of this Act is connected with the introduction of the already mentioned integrated investment plan, which, according to the legislator's intentions, is to replace the solutions contained in the repealed Housing Investment Act. Another consequence of the abandonment of the existing special solutions concerning the location of residential development is the repeal, also as of 1 January 2026, of Article 9a of the Act on the formation of the agricultural system, which constituted the basis for the acquisition by the National Support Centre for Agriculture (KOWR) of the ownership of an agricultural property located within the administrative borders of a city, which was acquired under the exceptions concerning the realisation of residential investments and subsequently such an investment was not completed. Such a change is, therefore, also an obvious consequence of the repeal of the said Housing Investment Act. The discussed amending act also introduces a number of housekeeping changes to the Act on the management of agricultural properties of the State Treasury,[32] as well as to the Act on suspension of the sale of the agricultural properties of the State Treas-

[29] Act of 11 April 2003 on the formation of the agricultural system (consolidated text, Journal of Laws 2022, item 2569, as amended).

[30] Act of 5 July 2018 on facilitations in the preparation and implementation of housing investments and accompanying investments (consolidated text, Journal of Laws 2021, item 1538, as amended).

[31] Article 45(6) of the Act of 7 July 2023 amending the Act on spatial planning and development and certain other acts (consolidated text, Journal of Laws 2023, item 1688).

[32] Act of 19 October 1991 on the management of agricultural properties of the State Treasury (consolidated text, Journal of Laws 2022, item 2329, as amended).

ury and Amendments to Certain Acts.[33] Those changes consist in correlating the terms used in those acts to the changes introduced in the Spatial Planning and Development Act – above all by replacing the references to the study of spatial development conditions and directions with references to a new institution, i.e. the general development plan of the municipality.

7. CONCLUSIONS

Summing up the discussion on the significance of the discussed amendment to the Act on spatial planning and development for the spatial management in rural areas, it should be noted that although the scope of the changes introduced is very broad, it concerns the issues of rural areas only to a small extent. Of the changes discussed, the most important one seems to be the extension of the catalogue of spatial planning principles, i.e. the extension of the catalogue of values which the legislator requires to be respected and protected when establishing spatial planning acts, as well as when issuing administrative acts concerning land development. Pursuant to Article 1(1)(a) of the Act of 7 July 2023 amending the Spatial Planning and Development Act, the needs related to the formation of agricultural production space and the development of agricultural production were added to the catalogue of these values. The consequence of these changes will be the increased importance of the issue of shaping agricultural space in the spatial planning process. Another important change is the strengthening of quantitative protection of agricultural land consisting in further restriction of the possibility of changing the designation of this land for non-agricultural purposes. Of course, the question may be asked to what extent such a solution has been dictated by concern for the development of agriculture, and to what extent it is a consequence of the rationalisation of urbanisation processes consisting in limiting the exponentially increasing economic, social and environmental costs of uncontrolled development spreading into poorly urbanised agricultural areas around large urban agglomerations, i.e. the so-called urban sprawl. Nevertheless, from the point of view of agricultural economy, the adopted solutions seem favourable, as they significantly reduce the risk of spatial conflicts resulting from the interpenetration (or direct neighbourhood) of farming activity and, for example, residential or recreational functions. However, the analysis of the discussed amendments to the Spatial Planning and Development Act does not change the general observation that, also after the amendment, the Law takes into account the specificity and needs of shaping the agricultural production space and more broadly – the rural

[33] Act of 14 April 2016 on suspension of the sale of the agricultural properties of the State Treasury and amendments to certain Acts (consolidated text, Journal of Laws 2022, item 507).

areas only to a small extent. In particular, issues related to the consolidation and exchange of agricultural land and the main part of issues related to the protection of agricultural land shall remain outside the scope of the Spatial Planning and Development Act. One can only regret that in the work on the most comprehensive reform of the spatial planning system in over twenty years, the legislator took so little account of the needs and specifics of agriculture. Such a profound reconstruction of the legal regulation on spatial planning created an opportunity to strengthen the impact on the reconstruction of the area structure of Polish agriculture also at the level of spatial planning.

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Ewa Milczarek
University of Szczecin, Poland
e-mail: ewa.milczarek@usz.edu.pl
ORCID: 0000-0003-0726-0959

CONCEPTUALIZATION OF ATTENTIONAL PRIVACY

Abstract

In the twenty-first century, human attention has become the object of interest of entrepreneurs, making it an object of supply. The development of technology related to attracting the attention of recipients is becoming more and more aggravating and increasingly important in the implementation of decision-making processes. Attention, which has so far been of interest to the economy of attention, becomes the subject of a legal analysis of the protection of an individual against unauthorized interference.

The subject of the article is to define what the privacy of attention is and why its conceptualization is necessary for the proper protection of individual rights.

KEYWORDS

privacy, privacy of attention, attention economy

SŁOWA KLUCZOWE

prywatność, prawo do prywatności, ekonomia uwagi

INTRODUCTION

The universality of the classic definition of the right to privacy as "the right to be left alone"[1] has allowed it to remain valid also in the reality of the information society. However, its flexibility translates into a lack of precision. We intuitively sense what actions may constitute a violation of privacy, but it is not easy for us to determine its scope in detail.[2]

As Ruth Gavison points out, the definition of privacy must be consistent in three different contexts. First, we need to have a neutral concept of privacy that allows us to identify when the loss of privacy occurs so that discussions and claims about privacy are understandable. Second, privacy must be consistent as a value, because legal privacy claims are only compelling if the loss of privacy is undesirable. Third, privacy must be a useful concept in a legal context. A concept that allows us to identify those occasions where legal protection is called for, as the law does not interfere with protection against every undesirable event.[3] Hence, despite the difficulties in capturing the nature and limits of privacy, it is important to conceptualize it. Some scholars develop unified theories of privacy in the form of a unified conceptual core, others offer privacy classifications that meaningfully recognize different types of privacy.[4] The American legal doctrine introduced well over a hundred privacy subcategories, including "attentional privacy".[5] The concept of "attentional privacy" is signaled in the doctrine, but it has not been discussed in detail.

The research goal of this article is to provide a definition of "attentional privacy". The research methods used in the work are the dogmatic and legal methods and the analysis of the evolution of the right to privacy.

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[1] E. Warren, V. Brandeis, *The Right to Privacy,* "Harvard Law Review" 1890, Vol. IV, No. 5, p. 193.

[2] M. Puwalski, *Prawo do prywatności osób publicznych*, Toruń 2003, p. 13.

[3] R. Gavison, *Privacy and the Limits of Law,* "The Yale Law Journal" 1980, Vol.89, No. 3, p. 422.

[4] B.-J. Koops, B. Clayton Newell, T. Timan, I. Škorvánek, T. Chokrevski, M. Galič, *A Typology of Privacy*, "University of Pennsylvania Journal of International Law" 2016, No. 38, p. 2.

[5] K. Motyka, *Prawo do prywatności i dylematy współczesnej ochrony praw człowieka. Na przykładzie Stanów Zjednoczonych*, Lublin 2006, pp. 122-130; K. Motyka, *Prawo do prywatności*, "Zeszyty Naukowe Akademii Podlaskiej w Siedlcach; Seria: Administracja i Zarządzanie" 2010, No. 85, p. 35.

THE ECONOMY OF ATTENTION

The essence of the information society is the acquisition and use of information[6] in social, cultural, economic, and political life.[7] An abundance of information means a lack of something else: a scarcity of what information consumes, namely the audience's attention. Thus, the wealth of information creates a poverty of attention and the need to allocate that attention efficiently among the abundance of information sources that may consume it.[8] Attention becomes a scarce resource for which enterprises compete. Michael Goldhaber defined the "attention economy" as a subfield of the "internet economy" focusing on the time-consuming dimension of information overload.[9] The goal is to expropriate attention and commercially sell and exploit it.[10]

A dictionary[11] definition of "attention" describes it as a mental disposition characterized by the concentration of thoughts or perceptions on some object, fact, or mental experience, enabling its recognition. We deal with "voluntary attention" when someone tries to notice something or focus on something; in addition to such attention, there is involuntary attention, for which no effort is required nor is it intended. Increasing interference in the space of the individual, which absorbs his attention, is directly related to the development of technology. Williams identified three forms of attentional faculties that are the target of the "industrialized persuasion of the attention economy":[12] the ability to direct awareness and action towards tasks; greater opportunities to direct life from the point of view of higher goals and values; and basic abilities – such as reflection, metacognition, reason and intelligence. Attention is focused on mental engagement with specific information. Information comes to our awareness, we deal with it, and then we decide whether to act.[13] Thus, the main danger posed by information abundance is not that one's attention will be occupied or consumed by informa-

[6] A. Tofler, H. Tofler, *Budowa nowej cywilizacji. Polityka trzeciej fali*, Poznań 1996, *passim*.

[7] K. Krzysztofek, M.S. Szczepański, *Zrozumieć rozwój: od społeczeństw tradycyjnych do informacyjnych*, Katowice 2005, p. 170.

[8] H. Simon, *Designing Organizations for an Information-Rich World. Computers, Communication, and the Public Interest* Baltimore 1971, pp. 40-41.

[9] M. H. Goldhaber, *The attention economy and the Net*, "First Monday" 1997, Vol. 2, No. 4, https://firstmonday.org/ojs/index.php/fm/article/view/519/440 (accessed 1 February 2024).

[10] H. Hotelling, *The general welfare in relation to problems of taxation and of railway and utility rates*. "Econometrica" 1938, No. 6(3), p. 257.

[11] W. Doroszewski (ed.), Słownik języka polskiego, Warszawa, 1996.

[12] J. Williams, *Stand out of our light: freedom and resistance in the attention economy*, Oxford 2018, p. 48.

[13] T. Davenport, J. Beck, *The Attention Economy: Understanding the New Currency of Business*, Cambridge 2020, p. 20.

tion, but rather that the person will lose control of their own attentional[14] and decision-making processes.

Human attention, due to the fact that it is limited in supply, has become a valuable resource for which media and technology companies compete with each other in "attention markets".[15] The key to the process is profiling, which consists in the use of personal data to evaluate certain personal factors, in particular, to analyze or predict aspects regarding the performance of this natural person's work, economic situation, health, personal preferences, interests, credibility, behavior, location or movement.[16] Using this information, you get insight into the user's profile, which is a prediction of his behavior, including consumer behavior. Then, the user's attention is directed to the orientation of the architect's preferred choices, so as to induce him to specific actions (purchases, political choices). The effect of such an action is the limitation of access to information, and thus the limitation of decision-making privacy.

The mere fact of monitoring an individual and smothering them with selected information can cause an invasion of privacy, even if no information is revealed during this process. This type of surveillance is an invasion of privacy of attention due to bringing the user into involuntary, unwanted attention.[17]

ATTENTIONAL PRIVACY CONCEPT

Professor Alan Westin, in his 1966 publication Privacy and Freedom, noted "deep concern about protecting privacy in the face of new pressures from surveillance technology".[18] The intensive development of the Internet has led to the transfer of most social and economic contacts to the Internet, thus facilitating access to information. Technological advances are opening up the possibility of

[14] J. Williams, *ibidem*, pp. 15-16.

[15] T. Wu*, Blind Spot: The Attention Economy and the Law*, "The Antitrust Law Journal" 2019, No. 82*,* p. 771.

[16] Article 3.4. Directive (Eu) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council.

[17] A. Song, *Technology, Terrorism, and the Fishbowl Effect: An Economic Analysis of Surveillance and Searche*s, The Berkman Center for Internet & Society, Research Publication No. 2003-04 5/2003.

[18] A. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's. Part I-- The Current Impact of Surveillance on Privacy*, "Columbia Law Review" 1966, Vol. 66, No. 6, pp. 1003-1050.

performing highly sophisticated surveillance and espionage in ways that the older rules of the game may not be enough to keep in check.[19]

Privacy has traditionally been understood in an informational context, in which an individual determines his own sphere of privacy and can decide what information about himself or herself is shared with others.[20] However, as A. Kopff points out, "personal good in the form of private life is everything that, due to the justified separation of an individual from the general public, serves him to develop his physical or mental personality and maintain the achieved social position […] each individual should be able to independently shape own personality and destiny at will and to demand that this life should not be the subject of sensational interest by other people. Privacy is, therefore, an ontic, necessary dimension of man and thus an inalienable right of his personal nature".[21] Privacy in the information context is, therefore, only one of the dimensions of the functioning of privacy, which has so far enjoyed the greatest interest of researchers. The scope of the right to privacy covers the individual-general relationship, in terms of the individual's control over information about himself, but also in the general-individual context – that is, what information an individual receives in the context of shaping his personality and fate (including attention).

The sources of "attentional privacy" should be sought in the concept of freedom of attention[22] created on the basis of the judgment of the American Supreme Court. The case concerned the privacy of individuals in public spaces in the form of the right to be left alone from broadcasting on trams and buses distracting, annoying radio tunes and advertisements that were regulated by the government.[23] Currently, interference in the sphere of attention of an individual takes place not only in public but also in private spaces through the use of personal devices such as computers or telephones. Through physical access to space, in the form of advertisements, news, etc., metaphorical access is obtained.[24] The advent of information and communication technologies has radically changed the balance between the availability of information and the human ability to process it.

Attentional privacy is the right to leave an individual's attention free from unwanted information and stimuli, such as emails, phone calls and advertise-

[19] S. Strümholm, *Right of Privacy and Rights of The Personality a Comparative Survey; Working paper prepared for the Nordic Conferen.ee on privacy organized by the International Commission of Jurists*, Stockholm 1967, pp. 18-19.

[20] R. Dopierała, *Prywatność w perspektywie zmiany społecznej*, Kraków 2013, p. 25.

[21] Z. Pniewski, *Personalizm społeczno-etyczny jako adekwatna teoria prywatności*, "Roczniki Nauk Społecznych" 1994, Vol. XII (1), p. 110.

[22] W. C. Beatty, *Freedom of Attention for Transit Riders*, "Washington and Lee Law Review" 1952, No. 9(46); D. K. McKnew, *Freedom of Attention*, "Catholic University Law Review" 1952, No. 2 (84).

[23] Judgment of the Supreme Court of the United States of 3 March 1952 in the case of Public Utilities Comm'n v. Pollak, ref. 343 U.S., pp. 451, 455.

[24] B. Rössler, *Der Wert des Privaten*, Frankfurt am Main 2001, pp. 23-24.

ments. It protects solitude and seclusion by providing shielding from unwanted contact, such as disturbing a person's rest or interfering with a person through disruptive or unwanted marketing practices.[25] The right to attentional privacy is intended to protect the individual from attempts to undermine his autonomy by taking away his attention by means of stimuli.[26] In a positive aspect, the right to privacy of attention allows an individual to freely shape their attention by choosing such activities that suit them best, or to refrain from engaging in any activity. The negative aspect of the right to privacy of attention will consist in the legal obligation to refrain from interfering with the sphere of attention reserved for the individual.

The preservation or disruption of the privacy of attention affects other areas of privacy, including: information privacy, which is the ability to regulate the disclosure of sensitive or confidential information; physical privacy relating to being able to define private space and setting boundaries[27] as well as decision-making privacy regarding the ability to choose a particular course of action without interference or disruptions from others.[28]

CONCLUSIONS

Privacy of attention is of key importance in market processes,[29] because access to the attention of an individual leads to sophisticated ways of promotion, primarily the use of profiling, and thus violates decision-making privacy, especially in the field of purchasing decisions.[30] In the attention economy, winning means getting as many people as possible to spend as much time and attention as possible on your product or service because in the attention economy, the rule is that "the user is the product". Hence, many authors indicate that instead of the "age of information", we should talk about the "age of attention".[31]

[25] K. Motyka, Prawo do prywatności, "Zeszyty Naukowe Akademii Podlaskiej w Siedlcach. Administracja i Zarządzanie" 2010, Vol. 85, p. 35.

[26] A. Puri, *The Right to Attentional Privacy*, "Rutgers Law Record" 2021, No. 48(1), p. 219.

[27] *Bioethics Commission, Federal Chancellery – Secretariat, Robots in the Care of Older People Opinion of the Bioethics Commission*, Vienna, Austria, 2018, p. 15.

[28] M. Ienca, F.J. Constantin Vică, B. Elger, *Social and Assistive Robotics in Dementia Care: Ethical Recommendations for Research and Practice*, "International Journal of Social Robotics" 2016, No. 8(4), p. 569.

[29] K. Motyka, Prawo do prywatności, "Zeszyty Naukowe…", *ibidem*, p. 35.

[30] J. Wójcik, *Prywatność jako przedmiot wymiany*, "Roczniki Kolegium Analiz Ekonomicznych" 2018, No. 49, p. 127.

[31] J. Williams, *ibidem*, pp. 16-17.

Privacy protection is related to access control.[32] Currently, the protection of the privacy of attention is only in the hands of network users, who can defend themselves against unwanted interference in a limited way by using, for example, the AdBlock extension. Modern technology makes sending messages less costly by making bulk email easier, but also makes it easier to filter messages without human intervention, which lowers the cost of dealing with unwanted messages.[33] However, this protection is negligible and insufficient.

The close connection between the concept of private life and the evolution of society, which has been the subject of the attention of sociologists or historians, finds a logical extension in legal analysis since protection is determined taking into account the "predictable attitude of the majority of people to this information".[34] Currently, no institutional framework has been created to strike the right balance between the interests of information providers and users.[35]

Conceptualizing attentional privacy is essential to the legal assessment of when it has been violated and when to invoke its legal protection. This protection is another challenge faced by the legislator who should protect the individual from the violation of their rights in the online space. The experience gained so far shows that the information environment generates problems and threats that are different, more intensified than those occurring in the analog world. Therefore, this situation requires other protection tools.

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[32] S. Bok, *Secrets: on the ethics of concealment and revelation*, Oxford 1983, pp. 10-11.

[33] D. Friedman, *Privacy and Technology*, "Social Philosophy & Policy" 2000, No. 17, pp. 186-212.

[34] D. Gutmann, *Le sentiment d'identité, étude de droit des personnes et de la famille,* Année 2000, p. 228.

[35] A. Festré, P. Garrouste, *«L'économie de l'attention»: une perspective d'histoire de la pensée économique*, "OEconomia" 2015, No. 5(5-1), pp. 35-36.

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Emilia Nawrotek
Maria Curie-Skłodowska University, Poland
e-mail: emilia.nawrotek@mail.umcs.pl
ORCID: 0000-0003-4481-6530

PROTECTION OF PRIVATE FORESTS IN THE CONTEXT OF CLIMATE CHALLENGES

Abstract

The discussion will focus on the formation of legal protection of private forests from a multifaceted perspective. Today, private forests in Poland occupy about 19% of the total forest area and are an important element of the country's ecological and economic security. They also play a key role in resolving the ongoing climate crisis. However, private forests in Poland face a number of problems. In the face of climate challenges, loss of biodiversity, and forest degradation, the protection of public forest resources and those in private hands after increasing the number of legal instruments is insufficient. In the coming years, one of the biggest challenges for forestry will be to participate in the efforts to reduce climate change, as well as to adapt to it and cope with its effects.

KEYWORDS

private forest, climate changes, The Common Agricultural Policy

SŁOWA KLUCZOWE

lasy prywatne, zmiany klimatu, Wspólna Polityka Rolna

1. INTRODUCTION

Private forests in Poland today occupy about 19%[1] of the total forest area and are an important element of the country's ecological and economic security. They also play a key role in resolving the ongoing climate crisis. However, private forests in Poland face numerous problems, including high fragmentation and lack of up-to-date management documentation.[2] Moreover, the report of the "Pracownia na rzecz Wszystkich Istot" Association entitled "Lasy poza kontrolą" shows some irregularities also in forests owned by the State Treasury. Over the past 30 years, timber harvesting in Poland in forests managed by the State Forests has more than doubled – from 20 million m3 in 1990 to 49 million m3 (gross volume) in 2019. In all of the 46 forest districts analyzed, timber was harvested for many months on the basis of makeshift harvesting plans.[3] On the other hand, as we read in the Forestry Statistical Yearbook, for many years the area of forests in the country has been systematically but slowly increasing. At the end of the year under review, it increased by 4,400 hectares compared to the state recorded a year earlier.[4]

Sustainable management of private forests can help stem the climate-environment crisis. In addition to proper forest management, the tools to achieve these goals are to increase the power of NGOs and citizens in the environmental decision-making process.

In the face of climate challenges, loss of biodiversity, and forest degradation, the protection of public forest resources and those in private hands after increasing legal instruments is insufficient. In the coming years, one of the biggest challenges for the forestry will be to participate in efforts to reduce climate change, as well as to adapt to it and cope with its effects. In addition, the problem of compensating private forest owners related to their implementation of the protective function of the forest has not been resolved. Meanwhile, the conservation value of forest complexes is not insignificant. The discussion will consider the formation

[1] According to the Statistical Yearbook of Forestry as of 31 December 2021, the area of forest land was 9467.5 thousand hectares, of which forests covered an area of 9264.7 thousand hectares and accounted for 29.6% of the country's area. However, according to the standard adopted for international assessments, taking into account land related to forest management, the share of the area of land of forest land in the country's land area was 30.9%. Broken down into public and private forests, the former account for 7479 thousand hectares (i.e., about 80.7%) of the area of forests, and the latter 1786 thousand ha (i.e. ca. 19,3 %). For more details, see: Główny Urząd Statystyczny, Rocznik Statystyczny Leśnictwa, Warszawa – Białystok 2022, p. 36.

[2] See *Najwyższa Izba Kontroli, Nadzór nad gospodarką leśną w lasach niestanowiących własności Skarbu Państwa*, LZG.410.006.2020, pp. 12-13.

[3] See *Lasy poza kontrolą. Raport o wybranych nieprawidłowościach gospodarki leśnej w obszarach cennych przyrodniczo w Polsce*, Stowarzyszenie Pracownia na rzecz Wszystkich Istot, Bystra lipiec 2021, pp. 4-5.

[4] Główny Urząd Statystyczny, Rocznik Statystyczny Leśnictwa, Warszawa – Białystok 2022, p. 36.

of legal protection of private forests from a multifaceted perspective, covering organizational, legal, and financial issues in the context of climate change.

2. FOREST, PRIVATE FOREST, LAND FOREST

The concept of forest in terms of current legislation is not the same as the one used in biological and natural sciences.[5] For the purposes of this study, it is necessary to use the legal definition of a forest contained in the provision of Article (3) of the Forest Law,[6] which reads as follows: A forest within the meaning of the Law is a land:

1) with a compact area of at least 0.10 hectares, covered with forest vegetation (forest crops) – trees and shrubs and undergrowth – or temporarily deprived of it:

(a) intended for forestry production or

(b) constituting a nature reserve or being part of a national park, or

(c) included in the register of historical monuments;

2) related to forest management, occupied for the following objects and areas used for forest management: buildings and structures, water reclamation facilities, forest zoning lines, forest roads, areas under power lines, forest nurseries, timber storage areas, as well as areas used for forest parking lots and tourist facilities.

The listed land can be considered a forest, although the qualification of land as a forest based on the above criteria may be controversial.[7] Considerations related to the concept of a forest have been the subject of numerous contributions from the literature[8] and case law.[9] The discrepancies center around the qualification criteria, which still have not lived to see unification. Thus, in practice, the

[5] See definitions of the term 'forest': https://sjp.pwn.pl/sjp/las;2477491.html (accessed 15 June 2023); https://www.encyklopedialesna.pl/haslo/las/ (accessed 15 June 2023).

[6] Act of 28 September 1991 – Forest Law (Journal of Laws 2022, item 672).

[7] The Forest Law introduces four criteria for recognizing a piece of land as a forest: natural, spatial, the criterion of use – for forest production, and the criterion of connection with forest management. For more information, see: literature on the definition of a forest and forest land: W. Radecki, *Paragraf i środowisko. Prawna definicja gruntu leśnego i lasu*, Aura 2011, No. 5, p. 36; B. Rakoczy (in:) *Ustawa o lasach. Komentarz*, Warszawa 2011, Article 3., LEX; W. Radecki, *Ustawa o lasach*. *Komentarz*, Warszawa 2011, p. 25.

[8] J. Bieluk, K. Leśkiewicz, *Ustawa o lasach. Komentarz*, Warszawa 2017, pp. 10–22; A. Habuda, *Prawna definicja lasu i kategoryzacja lasów,* (in:) *Polskie prawo leśne*, A. Habuda (ed.), Warszawa 2016, pp. 101-112.

[9] Decision of the Supreme Administrative Court of 2 October 2015, II OSK 308/14, LEX No. 2002652; Decision of the Supreme Administrative Court of 23 April 2013, I OSK 1983/11, LEX No. 1336348.

qualification of land as a forest based on the criterion of use is determined[10] by data from the land register kept on the basis of the Act of 17 May 1989 – Geodetic and Cartographic Law.[11] Based on the geodetic and cartographic law, the Decree of the Minister of Development, Labor and Technology of 27 July 2021 on the registration of land and buildings, Annex No. 1 of the Decree has been published, which defines the rules for classifying land into different land uses. The following categories have been differentiated:

I. forests – denoted by the symbol "Ls", these forests include land defined as a "forest" in the Act of 28 September 1991 Forest Law.
II. wooded and shrub land – denoted by the symbol "Lz" – which is land covered with forest vegetation, the area of which is less than 0.1000 ha.

Article (2) of the Forest Law proclaims the principle of unity of forestry, according to which the provisions of the Act apply to forests, regardless of their form of ownership. The provision of Article 5 of the Forest Law makes a dichotomous division of forests into forests owned by the State Treasury and those not owned by the State Treasury. The principle of unity of forestry does not exclude important distinctions relating to forests not owned by the State Treasury. The concept of "private forests" has not been defined in current Polish law, so in order to define this concept, it is necessary to apply the provisions of the Act 28 September 1991 – Forest Law and court case law. Private forests in Poland are considered to be forests owned by individuals, including forests of associations of private forest owners, land communities, agricultural production cooperatives, machinery rings, religious associations, and social organizations.[12] At the same time, the concept of 'private forests' should not be equated with the concept of 'non-state forests' which is broader and refers to all private forests, including those in the use of local government units, universities, schools, and various educational institutions, research and development units, as well as entrepreneurs with the status of a research and development center. To paraphrase, every private forest will be a non-state forest, while not every non-state forest will be a private forest.[13] From a legal perspective, the legal consequences of the application of dichotomous division give rise to certain legal consequences, as there are fundamental differences concerning the sphere of public ownership of forests owned by the State Treasury, and in relation to the legal regime pertaining to forests that

[10] The issue of the destination criterion has been the subject of two Supreme Court rulings – see in more detail: Decision of the Supreme Court of 28 January 2009, IV CSK 353/08, LEX No. 527250; Decision of the Supreme Court of 28 January 2010, I CSK 258/09, LEX No. 565990.

[11] Act of 17 May 1989 - Geodetic and Cartographic Law (Journal Law 2021, item 1990).

[12] See E. Wysocka-Fijorek, *Społeczne, prawne i ekonomiczne aspekty rozwoju gospodarki leśnej w lasach prywatnych,* Zeszyty Naukowe Szkoły Głównej Gospodarstwa Wiejskiego w Warszawie Problemy Rolnictwa Światowego, Vol. 14 (XXIX), issue 3, 2014, pp. 216–225.

[13] "Gospodarowanie w lasach niepaństwowych – poradnik dla właścicieli" has been prepared and published by the Regional Directorate of State Forests in Białystok in cooperation with the Biebrza National Park as part of the International Forest Day celebrations., pp. 10-11.

are not owned by the State Treasury (including private forests), involving legal instruments for forest management or property protection.

3. LEGAL PROTECTION OF PRIVATE FORESTS

According to the provisions of Civil Code Article 140,[14] the owner (within the limits set by laws and rules of coexistence) may, to the exclusion of others, use things in accordance with the social and economic purpose of his right, in particular, may collect benefits and other income from things. Within the same limits, he may dispose of the thing. Under the provision of Article (64) of the Constitution of the Republic of Poland,[15] this right is protected and can only be restricted by law and only to the extent that it does not violate its essence. The primary means of exercising the right to forest ownership is through sustainable forest management.

Article (5) of the Forest Law makes a dichotomous division of forests into state-owned and non-state-owned forests, including the identification of the authority that supervises forest management. Forest management supervision in the meaning of Article (5) is the protection of certain goods and the hierarchy between them. Such goods are forest resources, including those that are not owned by the Treasury. The term 'supervision' can, therefore, include a general authorization for supervisors to observe the actions of supervised entities and to intervene in emergency and conflict situations, including the authority to take specific measures indicated in the law. In the current state of the law, the supervision of forest management in forests that are not owned by the State Treasury belongs exclusively to the district chief. The regulations provide a basis for distinguishing the tasks of the starost as own tasks and the tasks of the starost as tasks of government administration.[16]

As part of his supervision of forests that are not owned by the State Treasury, the starost issues administrative decisions in the first instance. The entrusting authority can only be the starost who entrusts supervision to the forest head. According to articles of the Forest Law, the starost is obliged to provide funds for the task of supervision. The legal form of entrusting supervision is an agreement. It should be assumed that it requires a written form. The starost cannot impose on the head of the forest district the performance of supervision of forests that are not

[14] Act of 23 April 1964 – Civil Code (Journal of Laws 2022, item 1360).

[15] Constitution of the Republic of Poland Act of 2 April 1997, (Journal of Laws Number 78, item 483).

[16] D. Danecka, W. Radecki (in:) D. Danecka, W. Radecki, *Ustawa o lasach. Komentarz, III edition*, Warszawa 2021, Article (5) LEX.

the property of the State Treasury. Here the will of both parties is necessary. If the forest manager to whom supervision is entrusted issues an administrative decision, he does so on behalf of the starost, regardless of whether the starost entrusts him with his own tasks or tasks of government administration.[17]

According to Article 19 (2) of the Forest Law, simplified forest management plans are drawn up for forests that are not owned by the State Treasury and for forests that are part of the Agricultural Property Stock of the State Treasury. However, for fragmented forests up to 10 hectares in area, which are not owned by the Treasury, the forest management tasks are determined by a decision of the starost issued on the basis of an inventory of the state of forests (Article 19 item 3 of the Forest Act).[18] Thus, the primary task of the district governor in implementing permanently sustainable forest management in private forests is to commission and approve simplified forest management plans – as basic planning documents for forest management in forests that are not owned by the State Treasury, in accordance with the provisions of Articles 21 (1)(2) and 22 (5) of the Forest Law.

Private forest owners should take care of the implementation of forest management tasks. According to Article 13 (1) of the Forest Law, forest owners are obliged to permanently maintain forests and ensure the continuity of their use, and in particular to:

1) preserve forest vegetation (forest crops) and natural swamps and bogs in forests;

2) reintroduce forest vegetation (forest crops) in forests for up to 5 years after removal of the forest stand;

3) care for and protect the forest, including fire protection;

4) reconstruct stands of trees that do not ensure the achievement of forest management objectives contained in the forest management plan, simplified forest management plan or the decision referred to in Article 19 (3);

5) rationally use the forest in a manner that permanently ensures the optimal realization of all its functions by:

(a) logging within the limits not exceeding the productive capacity of the forest,

(b) harvesting raw materials and by-products of forest use in a manner that ensures the possibility of their biological recovery, as well as the protection of undergrowth.

The open-ended catalog of behaviors listed in Article 13(1) is intended to lead to the sustainable maintenance of forests and ensure the continuity of their use. At the same time, these are obligations that the legislator imposes on the forest owner and other obligated entities.[19]

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[17] B. Rakoczy, *Ustawa o lasach. Komentarz*, Warszawa 2011, pp. 38–39.

[18] K. Karpus, *4. Uproszczony plan urządzenia lasu oraz inwentaryzacja stanu lasu* (in:) *Wybrane problemy prawa leśnego*, B. Rakoczy (ed.), Warszawa 2011, LEX.

[19] B. Rakoczy (in:) *Ustawa o lasach. Komentarz*, Warszawa 2011, Article (13), LEX.

Verification of how forest management is carried out by private owners is the responsibility of the district governor, who, under Article 5 (3) of the Forest Law, may entrust the conduct of supervisory matters on his behalf, including the issuance of administrative decisions in the first instance, to the territorially competent District Forest Officer.

If the owner of a forest that is not owned by the State Treasury does not perform the obligations set forth in Article 13 or does not perform the tasks contained in the simplified forest management plan or the decision referred to in Article 19 (3), in particular with regard to:

1) reintroduction of forest vegetation (forest crops),

2) reconstruction of the forest stand,

3) care and protection of the forest, including:

(a) removal of trees overrun by harmful organisms, as well as scrap and tipping,

(b) tending of forest vegetation (forest crops) up to 10 years of age,

(c) fire protection treatments – the district governor orders the performance of these duties and tasks by decision (Article 24 of the Forest Act).

Thus, in the framework of the supervision of private forests, exercised on behalf of the starost, or in the ordinary inspection of the condition of its own forest, if the Forestry Division finds that there is a situation on private land where the duties listed in the aforementioned provision are not being performed, the Forestry Division may notify the starost of the need to initiate administrative proceedings[20] in accordance with Article 61 §1 of the Code of Administrative Procedure.[21]

On the other hand, if a final decision issued under Article (24) of the Forest Law is not voluntarily executed – the owner may be obliged to compulsorily fulfill the obligation under the provisions of the Law on Administrative Enforcement Proceedings.[22]

Since these are non-monetary obligations the authority can only apply two enforcement measures:

1) a fine for the purpose of coercion which, according to Article 121 of the Administrative Enforcement Proceedings Law, may not exceed the amount of:

(a) with respect to natural persons – 10,000 PLN at one time, and impose repeatedly a total of 50,000 PLN,

(b) with respect to legal persons and organizational units – PLN 50,000, and impose repeatedly a total of PLN 200,000;

[20] Act of 14 June 1960 – The Code of Administrative Procedure (Journal of Law 2023, item 775).

[21] https://prawolasu.com/brak-wykonywania-obowiazkow-z-zakresu-gospodarki-lesnej-przez-wlasciciela-lasu-prywatnego/ (accessed 28 June 2023).

[22] Act of 17 June 1960 – Administrative Enforcement Proceedings Law (Journal of Law 2022, item 479).

2) substitute execution at the expense and risk of the obligated party (Article 127 of the Administrative Enforcement Proceedings Law).

4. FUNCTIONS OF FORESTS

Regardless of the form of ownership, as well as management methods, forest ecosystems are providers of many products and services, both marketable and public goods. In a document issued in 1997, the National Forest Policy, it is indicated that forests perform a wide scope of diverse functions, both naturally or as a result of forest management activities. These are:

– ecological (protective) functions providing: stabilization of the water cycle in nature, preventing floods, avalanches, and landslides, protecting soils from erosion and the landscape from steppe, shaping the global and local climate, stabilizing the composition of the atmosphere and its purification, creating conditions for the preservation of the biological potential of a large number of species, ecosystems and genetic values of organisms as well as ensuring the enrichment of diversity and complexity of the landscape, better conditions for the health and life of the population and agricultural production;

– production (economic) functions consisting of preserving the renewability and sustainable use of timber, non-timber uses harvested from the forest and hunting management, developing qualified tourism, profits from the sale of the aforementioned goods and services, as well as functions consisting of creating jobs and contributing to the income tax of the state and local government budgets;

– social functions, which help to: shape favorable health and recreational conditions for society, enrich the labor market, serve to create various forms of use of the forest by the local community, develop degraded areas and marginal soils, strengthen the defense of the country, serve the development of culture, education and science and environmental education of society.[23]

The above-mentioned functions of the forest are considered essential, however, in the context of climate change, which has led to an increased number of extreme weather events in recent years that have threatened the sustainability of forest ecosystems, as well as biodiversity, the ecological function concerning primarily carbon fixation takes on particular importance. Threats involving global climate warming, such as increasing concentrations of greenhouse gases – especially CO2 – in the atmosphere, oblige the international community to make this issue a top priority. However, before the international community became aware

[23] National Forestry Policy, Ministry of Environmental Protection, Natural Resources and Forestry, Document adopted by the Council of Ministers on 22 April 1997, p. 1.

of the effects and threats of climate change, its attention was primarily focused on preventing air pollution and protecting the ozone layer.[24]

The 1997 Kyoto Protocol,[25] an essential element of the United Nations Framework Convention on Climate Change (UNFCCC), enumerated forestry activities that promote increased carbon fixation.

The general principles for balancing the amount of sequestered carbon in forests and the possibility of its inclusion in the total CO2 emissions balance are based on the decisions made at conferences of States Parties to the Convention indicated, with particular reference to the Paris Agreement[26] in 2015. According to the Agreement, Parties should take measures to protect and increase the efficiency, as appropriate, of sinks and reservoirs of greenhouse gases, including forests. Moreover, Parties are encouraged to take steps to implement and support, including through impact-based payments, the existing framework, as set forth in relevant guidelines and decisions already agreed under the Convention, relating to policy-level solutions and positive incentives for activities to reduce emissions from deforestation and forest degradation, and the role of conservation, sustainable forest management and enhancement of forest carbon stocks in developing countries; as well as policy-level alternatives such as joint mitigation and adaptation solutions for integral sustainable forest management, while reaffirming the importance of creating incentives, as appropriate, for the non-carbon benefits of such solutions.

According to the data, currently, forests in Poland, regardless of ownership division, absorb a net 21,960 kt of CO2.[27] Improvements in greenhouse gas reduction can be achieved through appropriate forest management activities. For example, these could include increasing forest area through afforestation of former agricultural land, silvicultural treatments that increase standing stock, extending the life of wood products and recycling them, energy use of wood, or increasing carbon retention in the soil.[28]

Expectations for the role of forests in actions that can mitigate climate change are considerable. Forests have been included in the accounting methodology defined for the land use, land use change, and forestry sector. According to the wording of Regulation (EU) 2018/841 of the Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land

[24] See: J. Ciechanowicz- McLean, *Prawne problemy umów międzynarodowych z zakresu ochrony klimatu*, Gdańskie Studia Prawnicze, Vol. XXXVI, 2016, pp. 107-120.

[25] Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed at Kyoto on 11 December 1997, (Journal of Laws of 2005, item 1683 and 1684).

[26] Paris Agreement to the United Nations Framework Convention on Climate Change, done in New York on 9 May 1992, adopted in Paris on 12 December 2015 (Journal of Laws of 2017, item 36).

[27] https://unfccc.int – Poland's National Inventory Report 2022 – data for 2020 (accessed 15 June 2023).

[28] Report on the State of Forests in Poland 2021… *ibidem*, p. 37.

use, land use change, and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No. 525/2013 and Decision No. 529/2013/EU,[29] it is specified that total emissions must not be greater than total removals in the LULUCF sector. The Polish State bears the responsibility for fulfilling the commitments to achieve the target in the LULUCF sector. Therefore, it is reasonable to support the private sector in increasing the size of the forest stand in Poland. Active forest management contributes to higher carbon sequestration by forests, and most importantly also significantly affects the balance of the entire LULUCF sector.[30]

5. SUPPORT FOR PRIVATE FORESTS IN THE COMMON AGRICULTURAL POLICY: 2023-2027

In November 2019, Parliament declared a climate crisis, calling on the European Commission to ensure that all of its legislative proposals are in line with the goal of limiting global warming to below 1.5°C and the goal of significantly reducing greenhouse gas emissions. The European Commission therefore prepared the European Green Deal, a roadmap for Europe to become a climate-neutral continent by 2050.[31]

The European Commission's proposals for the post-2020 CAP identify forestry as an integral part of rural development, and forest development and sustainable forest management as an element to be included in the support for sustainable and climate-friendly land use.[32] Overall, the Common Agricultural Policy aims to promote smart and resilient agriculture, enhance environmental protection, strengthen climate action, contribute to the EU's environmental objec-

[29] Regulation (EU) 2018/841 of the Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No. 525/2013and Decision No. 529/2013/EU, OJ UE L of 19 June 2018, L 156/1.

[30] See K. Jabłoński, W. Stempski, *Rola lasów i leśnictwa w pochłanianiu gazów cieplarnianych*, Czasopismo Inżynierii Lądowej, Środowiska i Architektury; Journal of Civil Engineering, Environment and Architecture, Vol. XXXIV, issue 64 (4/17), 2016, pp. 163–170.

[31] https://www.europarl.europa.eu/news/pl/headlines/society/20200618STO81513/zielony-lad-klucz-do-neutralnej-klimatycznie-i-zrownowazonej-ue?&at_campaign=20234-Green&at_medium=Google_Ads&at_platform=Search&at_creation=RSA&at_goal=TR_G&at_audience=zielony%20%C5%82ad%20ue&at_topic=Green_Deal&at_location=PO&gclid=Cj0KCQjwtO-kBhDIARIsAL6LoreiQQBGYCpgKO8zUb7bksE1M-66jWUa6mNaxLovuHFOh4mP0J2-QDOUaAiPgEALw_wcB (accessed 15 June 2023).

[32] N. Dobrzyńska, E. Budka, M. Baranowska, *Wsparcie lasów prywatnych w ramach Wspólnej Polityki Rolnej*, (in:) W. Gila, P. Gołos, M. Sułkowska (eds.) *"Lasy prywatne – szanse, problemy wyzwania",* Sękocin Stary 2020, p. 40.

tives and strengthen the socio-economic fabric of rural areas. The formulated specific objectives are already entirely related to environmental issues.[33]

The preamble to Parliament and Council Regulation (EU) 2021/2115 specifies that forestry interventions should contribute to the implementation of the Commission's Communication of 16 July 2021 entitled "A new EU Forestry Strategy 2030" and, where appropriate, to the wider use of agro-forestry systems. They should be based on Member States' national or regional forestry programs or equivalent instruments, which should be developed on the basis of obligations under Regulation (EU) 2018/841 of the European Parliament and the Council and commitments made by participants in the Ministerial Conferences on the Protection of Forests in Europe. Interventions should be based on sustainable forest management plans or equivalent instruments that give due consideration to effective storage and sequestration of carbon from the atmosphere while enhancing biodiversity conservation. They may include forest area development and sustainable forest management, including land afforestation, fire prevention, and the establishment and restoration of agroforestry systems; protection, restoration, and improvement of forest resources, taking into account adaptation needs; investments to guarantee and improve forest protection and resilience, as well as the provision of the forest ecosystem and climate services; and measures and investments to support renewable energy sources and the bioeconomy.[34]

The Forest Strategy[35] clearly emphasizes the role of all forest and land owners and managers. It is noted that their role in providing ecosystem services is crucial and should be supported. Among other things, the strategy aims to develop financial incentives, particularly for private forest owners and managers, to provide such ecosystem services. All measures are to be developed and implemented in close cooperation with Member States, as well as with public and private forest owners and other forest stakeholders, as it is they who will enable the necessary changes and the development of a dynamic and sustainable forest-based bioeconomy in the EU. The Strategy aims to involve all relevant actors and levels of governance, from member states to forest owners and managers, forest and timber sectors, scientists, civil society, and other stakeholders in active cooperation. The action identified in the Strategy, i.e. reforestation and afforestation of biodiverse

[33] B. Jeżyńska, *Pro-environmental Payments as an Instrument of the Biosphere Use Value Protection in Agriculture*, Studia Iuridica Lublinesia, Vol. 29, No. 2 (2020), p. 42.

[34] Regulation (EU) 2021/2115 of the Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No. 1305/2013 and (EU) No. 1307/2013, OJ UE L 435 of 6 December 2021, p. 13.

[35] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – New EU Forest Strategy for 2030 (COM(2021) 572 final), p. 3.

forests, is one of the most effective elements for mitigating climate change and disaster risks in the forestry sector and can provide socio-economic benefits to local communities. The Strategy is assumed to counter the trend of declining net removals from land in the EU, namely from forests, over the past 10 years. Reversing this trend is a prerequisite for achieving the EU's agreed-upon more ambitious climate and biodiversity targets and ensuring forest resilience to climate change so that forests can fulfill their multiple functions.[36]

The new CAP assumptions are in line with the concepts of sustainable development. The environmental-climate dimension is based on a number of specific objectives, including contributing to climate change mitigation and adaptation, also achieved by reducing greenhouse gas emissions and increasing carbon sequestration, and promoting sustainable energy; supporting the sustainable development and efficient management of natural resources such as water, soil, and air, also achieved by reducing dependence on chemicals; contributing to halting and reversing the loss of biodiversity, enhancing ecosystem services, and protecting habitats and landscapes.[37] Strategic plans are a novelty of the CAP 2023-2027 model.[38] Each Member State develops its own plan, which includes instruments known as Pillar I interventions (related to market and income policy) and Pillar II (related to rural development).

The Strategic Plan for the Common Agricultural Policy 2023-2027 includes dedicated instruments which are meant to positively influence the increase of forest resources in Poland. As shown in the document, the SWOT analysis shows that private forests in Poland are characterized by low biodiversity (dominated by coniferous species), which reduces their resilience and natural functions. A measure to help increase diversity in forests is the intervention titled "Increasing biodiversity of private forests". The beneficiaries of this support can be private forest owners or their associations as well as land communities. This mechanism will contribute to the specific objectives of, among others, mitigating and adapting to climate change, including by means of reducing greenhouse gas emissions and increasing carbon sequestration, as well as promoting sustainable energy; supporting sustainable development, and efficient management of natural resources. Assistance under the intervention is granted for the introduction of reforestation in existing forests, taking into account the local habitat, as well as the environmental and climatic conditions of the area. This is supposed to increase CO2 sequestration, thereby contributing to climate change mitigation and ecosystem enrichment. The intervention includes plantings to increase biodiversity in pri-

[36] *Ibidem*, p. 18.

[37] B. Włodarczyk, *Prawne instrumenty ochrony środowiska i przeciwdziałania zmianom klimatu we Wspólnej Polityce Rolnej na lata 2023–2027*, Przegląd Prawa Rolnego, No. 2 (31) – 2022, pp. 14-15.

[38] The Polish strategic plan was approved by the European Commission on 31 August 2022.

vate forests by diversifying the forest structure and species composition of forest stands.[39]

Forests help diversify the landscape and provide habitat for many species of flora and fauna, as well as migration channels for wildlife. The need to increase forest biodiversity is also pointed out in the EU's Biodiversity Strategy 2030,[40] part of the implementation of the European Green Deal. For this reason, the Strategic Plan's support for forest protection also includes Afforestation and Silviculture Premiums (under the afforestation commitment of RDP 2004-2006, RDP 2007-2013, RDP2014-2020 I 8.10). Thanks to this assistance, the main objective of afforestation – carbon sequestration – is realized, as well as the accompanying functions of soil and water conservation. The intervention promotes the preservation of the ecological stability of forest areas by reducing the fragmentation of forest complexes and creating ecological corridors.[41]

Another intervention that compresses the preservation of the ecological stability of forest areas by reducing the fragmentation of forest complexes and creating ecological corridors, and also constitutes a key element of the landscape, important for the preservation of agricultural biodiversity, is the Afforestation and Woodland and Agroforestry Systems Bonus (I 8.8). Beneficiaries carry out obligations as part of the maintenance and care of afforestation and buffer strips.[42]

It is also worth mentioning the intervention − Afforestation of agricultural land (I 10.11.). Under the intervention, afforestation affecting the achievement of the goals of preventing erosion and strengthening the ecological stability of forest areas will be rewarded. The intervention will contribute to the national objective included in the National Program for Increasing Forest Cover, which is to increase Poland's forest cover to 33% in 2050. At the same time, it contributes to fulfilling the action plan, included in the EU's New Forest Strategy 2030, to plant at least 3 billion additional trees in the EU by 2030. Importantly, afforestation will be carried out with native tree or shrub species, including, among others, biocenotic or melliferous species.[43]

[39] Strategic Plan for the Common Agricultural Policy 2023-2027, pp. 932-933, https://www.gov.pl/web/rolnictwo/dokumenty-ps-wpr (accessed 15 June 2023).

[40] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions - EU Biodiversity Strategy for 2030, Brussels, 20 May 2020, COM(2020) 380 final.

[41] Strategic Plan… *op. cit*., p. 734.

[42] *Ibidem*, pp. 821-824, 838.

[43] *Ibidem*, pp. 913-914.

6. CONCLUSION

A common feature of private forests in the EU owned by individuals is the high fragmentation of the area, which prevents realizing their potential. Forests owned by the state predominate, which means that private forest ownership is not as economically important as in other European countries. Supervision of forest management in private forests is carried out by 380 units (314 counties and 66 cities with county rights). Little is known about their values, goals, and motives for forest management.[44]

According to the EU's Biodiversity Strategy 2030, the share of forest areas covered by forest management plans should include all managed public forests and an increasing number of private forests. This will enable forest owners and managers to effectively implement policy goals and priorities related to combating climate change.[45] On the other hand, the NIK Report indicates inadequate supervision of forest management in Poland in forests that are not owned by the State Treasury – which includes, in particular, carrying out activities related to shaping the balance in forest ecosystems, increasing the natural resilience of forest stands, and sustainably maintaining forests and ensuring the continuity of their use. The district governors failed to fulfill their obligation to prepare complete management documentation. They did not conduct reliable verification activities and, as a result, did not enforce fulfillment of the obligations on the forest owners. Cases were also found of administrative decisions not being issued even when information about the omissions of obligated persons was available.[46]

It should be noted that in the last two decades, there has been intensive development of forest policy and forest-related policies, e.g. Forest Europe. In contrast, this has not been reflected in the most important document on forest resources, namely the "National Forest Policy". This document has not seen a revision or update of its provisions for more than 20 years. In principle, the unfavorable situation is mitigated by the inclusion of many objectives and priorities related to forests and forest management in numerous strategic and programmatic documents of environmental policy, biodiversity protection policy, and agricultural policy adopted after 1997. However, the document "National Forest Policy" is the main reference for the formulation of important forestry objectives in program

[44] P. Gołos, E. Wysocka-Fijorek, W. Gil, *Potrzeby w zakresie gospodarowania w lasach prywatnych w opinii przedstawicieli różnych grup interesariuszy,* Sylwan 165 (8), p. 611.

[45] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions − New EU Forest Strategy for 2030 (COM(2021) 572 final), p. 25.

[46] Najwyższa Izba Kontroli, Nadzór nad gospodarką leśną w lasach niestanowiących własności Skarbu Państwa, LZG.410.006.2020, p. 12.

documents, and the lack of revision affects the progressive marginalization of the forestry sector in the ecological, economic and social space.[47]

Forests have a fundamental role in absorbing and offsetting carbon emissions. Forest owners and managers need various incentives, including financial ones, to provide ecosystem services through forest protection and restoration in addition to timber and non-timber materials and products. These actions can increase forest resilience by adopting the most climate- and biodiversity-friendly forest management practices. In the CAP Strategic Plan 2023-2027, only one financial support has been dedicated to private forest owners, i.e. Increasing the biodiversity of private forests (I 10.14). The other interventions described are meant for farmers who meet the criteria of EU regulations. The support is subject to a lump sum and can be used for replanting to increase the biodiversity of existing forests, together with protection of plantings from damage, and maintenance cuts to increase the resilience and healthiness of forest stands. The aforementioned intervention is an inadequate mechanism for mitigation and adaptation to climate change, including reduction of greenhouse gas emissions and increase of carbon sequestration. Given the ongoing climate change, further support should be prepared to be available for private forest owners.

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Adam Niewiadomski
University of Warsaw, Poland
e-mail: a.niewiadomski@uw.edu.pl
ORCID 0000-0002-0838-2686

THE IMPACT OF ZONING CHANGES ON AGRICULTURAL REAL ESTATE TURNOVER[1]

Abstract

The revised planning and zoning regulations in 2023 create new rules for the shaping of space in a municipality. This is to be served by new legal acts which will become mandatory from 2025. This profound reform, not to say revolution in spatial planning, in some part also applies to agricultural land. The new legislation includes regulations relating to agricultural holdings. At the same time, the legislator does not introduce changes to the existing links between real estate turnover and spatial planning. In this respect, the article analyses the legal consequences of such a choice and proposes *de lege ferenda* postulates.

KEYWORDS

agricultural law, agricultural system, agricultural property, spatial planning, local zoning plan

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SŁOWA KLUCZOWE

prawo rolne, ustrój rolny, nieruchomość rolna, planowanie przestrzenne, miejscowy plan zagospodarowania przestrzennego

INTRODUCTION

The Act of 7 July 2023 amending the Act on spatial planning and development and certain other acts[2] is the implementation of one of the so-called milestones of the National Reconstruction Plan. It deals with important issues of space shaping. Undoubtedly, spatial planning has many functions. One of the most important is to organise space and introduce spatial order. This function is important insofar as it influences the others. The introduction of new types of planning acts, especially general plans, will undoubtedly influence the shaping of space for agricultural production.

The new regulations are becoming a challenge for the resolution of various conflicts,[3] not only spatial but, above all, legal ones in rural areas. New regulations[4] have been added to the existing legal chaos related to the rather undefined relations between legal acts issued by commune authorities (such as local spatial development plans) and other entities (for example, one can only mention the regional director for environmental protection authorised to issue plans of protection tasks, which are also acts of local law[5]). An undoubted shortcoming of the new regulations is the rather short *vacatio legis*, in particular, with regard to general plans.

In terms of agricultural regulations, land-use planning since 2016 has had another function of shaping the trade in agricultural real estate. The introduced swaps are out of sync with the current Act on the shaping of the agricultural system. The article will present the legal consequences of the introduction of the spatial planning reform for the agricultural real estate trade. An assessment of

[2] Journal of Laws of 2023, item 1688.

[3] H. Groszyk, A. Korybski, *Konflikt interesów i prawo,* Warsaw 1990; W. Skrzydło, *Ocena rozwiązań prawnych w zakresie zapobiegania konfliktom interesów*, (in:) *Zapobieganie konfliktowi interesów w III RP*, M. Zubik (ed.), Warsaw 2003.

[4] B. Bińkowska, *Obowiązek uchwalania planów ogólnych gmin–aktów prawa miejscowego nowego rodzaju*, "Zeszyty Prawnicze BAS", 2023, No. 78(2), pp. 121-131.

[5] A. Bołtromiuk, *Możliwości i problemy rozwoju obszarów wiejskich objętych europejską siecią ekologiczną Natura 2000 – podsumowanie i rekomendacje*, (in:) *Europejska sieć ekologiczna Natura 2000 jako nowy element otoczenia polskiej wsi i rolnictwa*, idem (ed.), Warsaw 2010; P. Czechowski, A. Niewiadomski, *Selected legal issues of modern forms of environmental protection on the example of national parks and the networks of Natura 2000 sites, taking into account coexistence with agriculture*, "Studia Iuridica", Warsaw 2015, Vol. 61, pp. 35-52.

the adopted solutions and proposed *de lege ferenda* conclusions will also be presented. This new function of spatial planning affecting the trade in agricultural real estate as a result of the amendment has been very much complicated.

The aim of the paper is to present selected issues of the impact of the amendment to the Act on spatial planning and development on rural areas. The main research hypothesis is to indicate that the amendment in question does not solve any problem of spatial planning in rural areas, introducing at the same time legal chaos and haste in the establishment of local law. To exemplify the main assumptions of the article, the issues related to agricultural real estate turnover will be presented through the prism of definitions of these real estates expressed in the Act on shaping the agricultural system. The main structural assumptions of general plans as a planning tool directly influencing the development of rural areas will also be presented.

SPATIAL PLANNING AND THE MARKETING OF AGRICULTURAL REAL ESTATE

One of the key issues related to the new regulations is their impact on the trade in agricultural real estate regulated by the Act of 11 April 2003 on the formation of the agricultural system.[6] This Act has not been amended as regards references to the Act on planning and spatial development. In my opinion, this is the main problem related to the lack of amendment of regulations related to agricultural real estate turnover with simultaneous changes in the scope of planning regulations. Different types of interpretation of the law will not be able to determine the role of general plans, i.e. the most important change in planning and spatial development in relation to the cited Act on shaping the agricultural system.

The definition of agricultural real estate contained in Article 2(1) of the Act on formation of the agricultural system plays a key role in this assessment. This definition defines agricultural real estate as "agricultural real estate within the meaning of the Civil Code, with the exception of real estate located in areas designated in zoning plans for purposes other than agricultural". In the current state of the law, using the linguistic interpretation of the law, it should be clearly indicated that in order to determine whether or not one is dealing with agricultural real estate, it is important to decipher the designation of this real estate in local spatial development plans.[7] The local plan, as the basic and most important planning act, is the determinant of the designation of the property and, together with other pro-

[6] Journal of Laws of 2022, item 2569, as amended.

[7] Cf. also SN Judgment IV CSK 93/12; SN Orders II CSK 9/09; II CSK 467/07; IV CKN 461/01.

visions, shapes the ownership right. Assigning such a role to the local plan seems reasonable and worth emphasising, especially in a situation where the percentage of land covered by spatial planning is increased. Such solutions undoubtedly affect the turnover of agricultural real estate, but they are not sudden due to the rather long time needed to enact the local plan.

It should be noted that in the doctrine of agricultural law,[8] as well as in the civil law,[9] there is an ongoing dispute whether the local zoning plan is the only legal act that makes it possible to determine the agricultural character of the property in the light of the cited definition.[10] The question arises as to the role of not only the local revitalisation plan or the zoning decision, but also the study of the conditions and directions of spatial development.[11] It should also be clearly pointed out that this definition does not refer to other legal acts which may decide on the use of the real estate, such as plans of national parks or plans of protection tasks in Natura 2000 areas.

The problem of determining the agricultural character of the land should also be pointed out. Zygmunt Truszkiewicz points out that the application of the Act on shaping the agricultural system to real property with various types of use should be determined by the dominant function of the real property, i.e. the dom-

[8] Cf. K. Czerwińska-Koral, *Possessio nuda, czyli czy istnieje jeszcze funkcja prawno-korygująca posiadania nieruchomości rolnych?*, "Studia Iuridica Agraria", 2018, No. 16, pp. 39-52; Z. Truszkiewicz, *O kilku podstawowych zagadnieniach na tle ustawy o kształtowaniu ustroju rolnego, part 1,* "Rejent" 2017, No. 10, pp. 41-68; Z. Truszkiewicz, *Wpływ planowania przestrzennego na pojęcie nieruchomości rolnej w rozumieniu Kodeksu cywilnego*, "Studia Iuridica Agraria", 2007, No. 6, pp. 144-155; P. Blajer, *Umowa sprzedaży nieruchomości rolnej po wejściu w życie ustawy z dnia 26.04.2019 r. o zmianie ustawy o kształtowaniu ustroju rolnego oraz niektórych innych ustaw*, "Rejent", 2019, No. 12, pp. 102-140.

[9] K. Czerwińska-Koral, *Pojęcie nieruchomości rolnej jako wyznacznik zasad obrotu nieruchomościami rolnymi*, "Rejent", 2016, No. 6, pp. 52-73.

[10] Cf. K. Czerwińska-Koral, *Zasady obrotu nieruchomościami rolnymi w postępowaniach sądowych po 29.04.2016 r. – wybrane zagadnienia praktyki sądowej. Part 1*, "Przegląd Sądowy", 2018, No. 9, pp. 75-88: "Decisions on land development conditions and other location decisions cannot constitute the sole and categorical basis for determining that a given property is or is not agricultural real estate within the meaning of the Act on shaping the agricultural system. The municipality's zoning study cannot affect the qualification of the property. It should [...] be considered that in the absence of a zoning plan, the definition contained in Article 461 of the Civil Code determines the nature of the property as agricultural and the application of the provisions of the Act. The court is obliged to determine on its own whether the property in question is agricultural property within the meaning of Article 2(1) u.k.u.r.".

[11] Cf. decision of the Supreme Court II CSKP 271/2 in which it was emphasised that "designation of real property subject to proceedings in the study for purposes other than agricultural does not exclude its qualification as agricultural within the meaning of Article 461 of the Civil Code. The agricultural designation of real property meeting the criteria set out in Article 461 of the Civil Code, or more narrowly in Article 2(1) of the Act on the Formation of the Agricultural System of 2003, does not change the fact that, with regard to an insignificant part of that real property, a decision on land development and zoning conditions has been issued allowing its insignificant part to be designated for purposes other than agricultural".

inant way of using it or the dominant purpose.[12] This argumentation is perfectly understandable, however, it presupposes the use of a functional interpretation to determine the definition of agricultural real estate, which may lead to different results. This legal uncertainty related to agricultural real estate trade has not been removed by numerous subsequent amendments to the Act on shaping the agricultural system (in 2023 alone there were 5 such amendments).

Without deciding which of the views of the cited doctrine reflects the *ratio legis* of the regulation contained in Article 2(1) of the Act on shaping the agricultural system, it should be stated that this definition in its current wording does not take into account the discussed amendment to the Act on planning and spatial development. In this case, it does not refer to the introduced general plans, which are to significantly influence the shape of the spatial policy implemented in communes. The fundamental question arises as to whether an agricultural property within the meaning of the Civil Code designated in the general plan for purposes other than agricultural (e.g. industrial or construction) will still be an agricultural property in the light of Article 2(1) of the Act on shaping the agricultural system.[13] This is important as the considerations so far connected with the relation of this definition to the municipality's zoning study or zoning decision concerned acts of law that are not universally binding. In the case of general plans, the issue is completely different as we are dealing with an act of local law.[14] There was also no reference at all to the integrated investment plans as a new planning tool.[15]

This oversight on the part of the legislator should be assessed negatively, all the more so as he introduced relevant changes in another act concerning agricultural real estate trade. Pursuant to Article 24 para. 1 item 1 of the Act of 19 October 1991 on management of agricultural property of the Treasury,[16] "the National Centre manages the Agricultural Property Stock by: first of all, leasing or selling agricultural property for the enlargement or establishment of family farms, according to the principles specified in Chapters 6 or 8, excluding agricultural property: [...] which in the local spatial development plan, local revitalisation plan or local redevelopment plan are designated for purposes other than agricultural or for which in the final decision on the conditions of development and land use the

[12] Z. Truszkiewicz, *Nieruchomość rolna i gospodarstwo rolne w rozumieniu u.k.u.r.,* "Krakowski Przegląd Notarialny" 2016/2, p. 150. There is also an opposing view expressed in: K. Maj, *O potrzebie zmian w ustawie o kształtowaniu ustroju rolnego*, "Krakowski Przegląd Notarialny" 2017/2, p. 26.

[13] A. Niewiadomski, *Rola aktów planistycznych w obrocie nieruchomości rolnymi*, (in:) *Współczesne problemy prawa rolnego i cywilnego. Księga jubileuszowa Profesor Teresa Kurowskiej*, D. Łobos-Kotowska, P. Gała, M, Stańko (eds.), Warsaw 2018, pp. 419-430.

[14] A. Cieśla, *Plan ogólny: konsekwencje dla planów miejscowych*, "Municipal Review", 2023, No. 11, pp. 77-81.

[15] M. Górski, *Zintegrowane plany inwestycyjne – charakterystyka nowego narzędzia planistycznego*, "Samorząd Terytorialny", 2023, No. 10, pp. 23-34.

[16] Journal of Laws of 2022, item 2329, as amended.

manner of development and the conditions of development of the land on which the agricultural real estate is located are specified as other than agricultural, and in the absence of a local plan or a final decision on the conditions of development and land use - real estate covered in the general plan of the municipality by a planning zone other than a multifunctional zone with homestead development, an agricultural production zone or an open zone [....]".[17]

What is surprising in the above-quoted provision is not only its length, but the granting of much broader possibilities of influence of the Act on planning and spatial development and its amendment of 2023 on the possibilities of selling agricultural real estate by the National Support Centre for Agriculture. The inconsistency of the legislator consists in creating completely two different regimes of agricultural real estate trade in Poland – the private-legal one in accordance with the Act on shaping the agricultural system, and the public-legal one described above. While some differences are justified, such as, for example, a tender for disposal of state property, introducing de facto two types of agricultural real estate creates legal chaos. In addition, the above-mentioned provision clearly resolves doctrinal disputes about the significance of, for example, the decision on development conditions in the agricultural real estate trade, ordering its inclusion.

The fundamental question arises why a similar procedure enumerating other planning acts has not been performed in Article 2, point 1 of the Act on shaping the agricultural system. It should be clearly emphasised that this is also important in the context of the possibility of acquiring agricultural real estate by foreigners or preserving the agricultural character of land in accordance with European resolutions.[18] The existing legal chaos requires urgent amendments not only to the Act on shaping the agricultural system, adjusting it to the amendment of the Act on planning and spatial development, but also initiating a discussion on the necessity to create new regulations of trading in agricultural real estate in Poland. The presented inconsistencies with regard to the definition of agricultural real estate in Article 2 point 1 of the Act on shaping the agricultural system are only an example of inappropriate hasty legislation dictated by the need of the moment, in this case the realisation of the so-called milestones. The question also arises as to how the introduced solutions will affect not only the agricultural market in

[17] A. Suchoń, *Wpływ miejscowego planu zagospodarowania przestrzennego na prawne formy dysponowania nieruchomościami rolnymi*, "Studia Iuridica Agraria", 2016, Vol. 14, pp. 131-146.

[18] P. Czechowski, A. Niewiadomski, *Instrumenty prawne reglamentacji obrotu nieruchomości rolnymi w Polsce na tle regulacji wybranych państw europejskich*, "Studia Iuridica", Warsaw 2017, Vol. 72, pp. 87-100; P. Czechowski, A. Niewiadomski, *Mechanizmy prawne ochrony rolnego charakteru nieruchomości w świetle rezolucji Parlamentu Europejskiego z dnia 27 kwietnia 2017 r. w sprawie aktualnego stanu koncentracji gruntów rolnych w UE: jak ułatwić rolnikom dostęp do gruntów?*, "Studia Iuridica", Warsaw 2018, Vol. 78, pp. 102-115.

Poland, but, first and foremost, the competitiveness of Polish agriculture in relation to countries that do not have such restrictions.[19]

I am convinced that the above example of the lack of correlation of the introduced revolution in spatial planning with other legal acts gives serious arguments for a complete change in the way agricultural real estate is traded both in the private and public law sphere. Temporary solutions, such as the prolonged suspension of the sale of agricultural real estate from the Agricultural Property Stock of the Treasury, may no longer suffice and, in the long run, do not serve the postulate of clarity of law.

GENERAL PLANS AND RURAL DEVELOPMENT

An issue related to the trade in agricultural real estate and the possible impact of general plans on this trade is to find an answer to the question of what do general plans change in the functioning and management of rural areas in Poland? As acts of local law (pursuant to Article 13a(7) of the Act on planning and spatial development), general plans will be acts of universally binding law, which means that no addressee of the legal norms will be able to hide behind their ignorance.[20]

According to Article 13a of the Law on planning and spatial development, general plans are to cover entire municipality (excluding closed areas other than those established by the minister responsible for transport). Article 13a(4) indicates that the general plan defines planning zones and municipal urban planning standards. Already at this point, it should be noted that these two elements of the general plan have an impact on rural areas because a planning zone can be agricultural land. Previously, such areas were also defined in the study of conditions and directions of spatial development, but the role of this document was quite different and limited only to influencing the local spatial development plan.[21]

The role of the general plan under the provisions of the cited Article 13a is to be taken into account when drawing up a local development plan. In addition,

[19] M. Nowak, *Problemy polskiego systemu planowania w świetle dyskusji międzynarodowej na temat porównań krajowych systemów planowania przestrzennego. Kluczowe tezy i wnioski*, "Studia BAS", 2023, No. (1), pp. 9-20.

[20] M. Pelc, *Ład przestrzenny jako zadanie własne gminy. Kryzys w zarządzaniu przestrzenią*, "Studia Politologiczne", 2023, No. 67.

[21] A. Kłys, *Instytucjonalny rynek nieruchomości na wynajem-cechy charakterystyczne oraz kwalifikacja przeznaczenia w aktach planowania przestrzennego*, "Nieruchomości@", 2023, No. 4, pp. 309-325.

it constitutes the legal basis for the decision on land development conditions.[22] This completely new role of the planning act, which is to influence the individual administrative decision on land development conditions, is to significantly influence the shaping of the agricultural space. The assumption is that in planning zones designated for agriculture it should not be possible to obtain a zoning decision allowing for development activities, unless municipal urban planning standards provide otherwise.

In addition, Article 13c(2)(7) of the Act specifies that agricultural production zones will be delimited. The problem is the lack of a legal definition of agricultural production, which would enable the delimitation of such zones. Undoubtedly, however, the most important problem is the short time the legislator has allocated for the implementation of these provisions. Developing master plans in little more than a year's time will not, in my opinion, be feasible. Procedural experience with other planning acts has shown that the time required for the passage of such an act should be determined in years.

The legislator has also failed to resolve an important issue that is the aftermath of past practice, but also the wording of this law. The primacy in spatial management will continue to be given to speculative laws and not to the general plan or the local zoning plan. It should be made clear that such an approach does not assume the implementation of spatial order or the principle of sustainable development. These overriding principles of shaping spatial planning seem to recede into the background when there is a need to achieve a rapid investment effect.

It should be postulated that the adopted regulations should be verified in terms of their compliance with other laws, such as those on the protection of agricultural and forestry land, and that the expiry of the municipality's spatial planning studies and the introduction of general plans as a planning tool should be postponed.

SUMMARY

The analysis carried out above leads to several final conclusions. The general remark refers to the unpreparedness in time of the introduced revolution in planning and spatial development. The main addressee of these regulations, i.e. the municipalities are not able to cope with the preparation of at least general plans

[22] A. Suchoń, *Nowelizacja z 13 lipca 2023 r. ustawy o gospodarowaniu nieruchomościami rolnymi Skarbu Państwa oraz ustawy o kształtowaniu ustroju rolnego a rozwój obszarów wiejskich–wybrane zagadnienia*, "PRAWO i WIĘŹ", 2023, No. 4 (47), pp. 509-534.

until 2025. This deadline already urgently requires an amendment[23] due to the consequences related to the expiry of the validity of the study of conditions and directions for spatial development of the municipality.[24] The lack of a study and the simultaneous lack of general plans will make it impossible to carry out any construction investments in Poland, except for those allowed by the current local spatial development plans.

The definition of agricultural real estate in the Act on shaping the agricultural system also requires urgent intervention by the legislator. This definition, which is the key to trading in agricultural real estate in Poland, should not raise major doubts. Taking into account the views of the doctrine and the case law, the conclusion is quite different. Problems with the Act on shaping the agricultural system begin, so to speak, at the very beginning with the definition of the subject of this Act. The amendment to the Act on planning and spatial development has only deepened and intensified the existing doubts. Following the example of the Act on the management of agricultural property of the State Treasury, it should be specified whether only the local spatial development plan is to be taken into account in the trade in agricultural property or whether other planning acts should also be included.

In ordering the above matter *de lege ferenda*, it should be postulated that the meaning of other planning acts than those specified in the Act on planning and spatial development should also be resolved. For example, one can only mention the plans of protection tasks for Natura 2000 areas,[25] which are an act of local law issued by the Regional Director for Environmental Protection. Such a change requires a comprehensive analysis not only of the consequences for the legal system itself but, above all, for spatial planning in Poland.

The revolution in spatial planning that has been introduced, including the introduction of general plans, unfortunately leaves unanswered the question of which planning act determines land use. There is no doubt that it will be the local zoning plan, but the assessment of other planning documents is already not so clear. Above all, the legislator has not been very clear about the role of general plans in rural areas and their relationship not only to the marketing of agricultural property but also to the actual development of the land.

The lack of precise inter-temporal provisions is also not insignificant, in particular, with regard to the circulation of agricultural real estate and its actual

[23] M.J. Nowak, P. Śleszyński, *Opóźnienia w sporządzaniu miejscowych planów zagospodarowania przestrzennego w polskich gminach. Uwarunkowania i bariery*, "Studia Regionalne i Lokalne", 2023, No. *92*(2), pp. 100-115.

[24] K. Sobieraj, *Ocena propozycji ustawowego uchylenia wybranych uchwał rad gmin w zakresie planów miejscowych*, "Zeszyty Prawnicze BAS", 2023, No. 79(3), pp. 213-223.

[25] E. Zębek, *Plany zadań ochronnych jako prawny instrument ochrony obszarów Natura 2000 w województwie warmińsko-mazurskim*, (in:) *Problemy wdrażania systemu Natura 2000 w Polsce*, A. Kaźmierska-Patrzyczna, M.A. Król (ed.), Szczecin-Łódź-Poznań, 2013, pp. 359-374.

development. This applies above all to ongoing investment procedures related, for example, to the location of renewable energy sources in rural areas.[26] This problem is also addressed by the amendment in question, without a clear definition of the scope of application of individual provisions to pending administrative proceedings.

In summary, the change in spatial planning was needed and eagerly awaited. However, the scope of the changes introduced and the legal chaos existing in this area cannot gain a positive assessment. This assessment is all the more worrying if we juxtapose the introduced amendment with the entire system of law, including, above all, the regulations concerning the trade in agricultural real estate.

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Agata Niewiadomska
University of Warsaw, Poland
aniewiadomska@wz.uw.edu.pl
ORCID 0000-0003-2863-2715

RENEWABLE ENERGY SOURCES AS AN OPPORTUNITY FOR THE DEVELOPMENT OF SMART VILLAGES[1]

Abstract

The article presents issues related to the location of renewable energy sources in rural areas. Spatial planning regulations are analysed, as well as other regulations enabling or impeding the development of green energy in rural areas. The legal possibilities of realising investments in renewable energy sources in rural areas through the prism of the Smart Village concept are also assessed. *De lege ferenda* proposals are presented to enable faster investment in renewable energy sources in rural areas. The article also points out the risks for farmers, whose current role has been reduced to renting agricultural property.

KEYWORDS

agricultural law, Smart Village, renewable energy, rural areas, agricultural innovation

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SŁOWA KLUCZOWE

prawo rolne, Smart Village, odnawialne źródła energii, obszary wiejskie, innowacje w rolnictwie

INTRODUCTION

The new geo-political situation related to the war in Ukraine, as well as the development of the European Union's climate policy, known as the European Green Deal, is prompting the search for new energy sources. Renewable energy sources, mainly from the wind or the sun, are coming to the fore in this regard. They are today the future of economic development, but also of agriculture. They bring innovative solutions and, at the same time, contribute to climate protection. They do, however, have their own negative consequences, for example, in the form of violations of the principles of spatial planning or the location of renewable energy sources in environmentally valuable areas.

One of the main places where investment in renewable energy sources on a scale that enables them to be produced for more than just subsistence use is in rural areas. An increase in the location of photovoltaic farms or biogas plants can already be observed. However, investments in the construction of wind farms are much more difficult. The ongoing legal changes, in particular, following the enactment of the Act of 7 July 2023 amending the Act on spatial planning and development and certain other acts,[2] were supposed to accelerate the location of renewable energy sources and enable their development while replacing fossil fuels as an energy carrier.

For the most part, these investments are carried out by specialised corporations and energy companies that acquire agricultural land on their own or, more often, lease it from farmers. This raises quite significant concerns about creating a market of only a few players, where one of the main demands of cheap green energy may not be implemented. Bringing the farmer's interest in these investments down to just the collection of rent seems highly controversial.

A solution to these problems may be the idea of a Smart Village.[3] It is favoured for implementation in rural areas in the latest financial perspective of the European Union. It involves bottom-up initiatives to implement technical progress

[2] Journal of Laws of 2023, item 1688.

[3] L. Naldi, P. Nilsson, H. Westlund, S. Wixe, *What is smart rural development?,* Journal Rural Studies, 2015, No. 40, pp. 90-101.

in the countryside,[4] but also taking into account social or climatic aspects. The advantage of this idea is the emergence of bottom-up initiatives from farmers who will know best what kind of investment the region needs. Therefore, I believe that the Smart Village concept[5] is an opportunity for the development of renewable energy sources in rural areas. However, it requires refinement in terms of financial assistance, as well as the identification of precise opportunities for locating renewable energy sources in rural areas. Without such assistance, these opportunities, not only with the Smart Village concept,[6] but also for individual farmers, may prove to be quite illusory and will only result in the leasing of land for investment.

The aim of this article is to present selected issues in the development of renewable energy sources in rural areas, primarily through the prism of their location, as well as their compatibility with the Smart Village concept. *De lege ferenda* conclusions are also presented, which may prove helpful in the development of these investments.

THE COMMON AGRICULTURAL POLICY AND RENEWABLE ENERGY SOURCES IN RURAL AREAS

The Common Agricultural Policy after 2023 is the result of an evolution linked to the climate transformation of the entire European economy.[7] The European Green Deal[8] refers in large part to the sphere of agriculture and the requirements for the greening of agricultural production.[9] These requirements, such as the fallowing of part of the estate, encounter agricultural protests across Europe. At the same time, abandoning climate protection altogether in Europe will have irreversible consequences for the functioning of agriculture and the economy.

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[4] S. Renukappa, S. Suresh, W. Abdalla, N. Shetty, N. Yabbati, R. Hiremath, *Evaluation of smart village strategies and challenges*, "Smart and Sustainable Built Environment", 2022, https://doi.org/10.1108/SASBE-03-2022-0060.

[5] P. Gerli, J. Navio Marco, J. Whalley, *What makes a smart village smart? A review of the literature*, "Transforming Government: People, Process and Policy", 2022, Vol. 16 No. 3, pp. 292-304.

[6] R. Lankauskienė, Ž. Gedminaitė-Raudonė, *Toward Holistic Perceptions of 'Smart' Growth in Development Paradigms and Policy Agendas*, "Land", Vol. 12, No. 2.

[7] H. Guyomard, C. Détang-Dessendre, P. Dupraz, L. Delaby, C. Huyghe, J.-L. Peyraud, X. Reboud, C. Sirami, *How the Green Architecture of the 2023-2027 Common Agricultural Policy could have been greener*, "Ambio", 2023, Vol. 52 (8), pp. 1327 - 1338.

[8] https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_pl (accessed 10 December 2023).

[9] W. Ziętara, Z. Mirkowska, *Zielony ład – w kierunku rolnictwa ekologicznego czy ekologizacji rolnictwa?*, "Zagadnienia Ekonomiki Rolnej", 2021, Vol. 368 (3), pp. 29-54.

One of the determinants of the implementation of environmentally friendly solutions[10] are solutions aimed at the so-called zero-emission, involving the generation of energy from renewable sources. According to the declaration of the creators of the European Green Deal, in order to achieve the related goals, the EU is acting on various levels. Firstly, it is supporting the development and dissemination of cleaner energy sources, such as marine renewable energy and hydrogen; secondly, it is supporting the integration of energy systems across the EU; thirdly, it is developing interconnected energy infrastructures through EU energy corridors; and finally, fourthly, it is revising existing legislation on energy efficiency and renewable energy, including their 2030 targets.[11]

These general declarations must be translated into legal solutions, which are currently so scarce that their possible effectiveness cannot be assessed. Programme declarations on the European Green Deal must be followed by concrete solutions in the form of European regulations, which would make it possible to undertake investments in the long term.

The new Common Agricultural Policy[12] delegates the fine-tuning of individual solutions to Member States through strategic plans developed by them.[13] In Poland, such a plan has been adopted for the years 2023-2027.[14] It provides for a number of pro-environmental solutions to meet the ambitious EU climate goals. At the very outset of the considerations, it should be noted that this is, for the time

[10] G. Guarini, J.L. da Costa Oreiro, *Ecological transition and structural change: A new-developmentalist analysis*, "Socio-Economic Planning Sciences", 2023, Vol. 90, DOI: 10.1016/j.seps.2023.101727.

[11] https://www.consilium.europa.eu/pl/policies/green-deal/ (accessed 10 December 2023).

[12] A. Niewiadomska, *Prawne aspekty rozwoju obszarów wiejskich w nowej perspektywie finansowej Wspólnej Polityki Rolnej*, "Studia Iuridica", 2021, Vol. 89, pp. 257-268.

[13] Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 laying down rules for support for strategic plans drawn up by Member States under the common agricultural policy (CAP strategic plans) and financed by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No. 1305/2013 and (EU) No. 1307/2013 (Official Journal of the EU 2021 L 435/1).

[14] Currently, according to the Ministry of Agriculture and Rural Development, "The document includes the version of Plan 3.1 approved by the European Commission on 30 August 2023 and the following amendments to the Plan referred to in Article 119(9) of Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 laying down provisions on support for strategic plans drawn up by Member States under the common agricultural policy (CAP strategic plans) and financed by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No. 1305/2013 and (EU) No. 1307/2013: amendments which were notified by the Minister of Agriculture and Rural Development to the European Commission on 10 August 2023, and which apply from 15 August 2023; amendments which were notified by the Minister of Agriculture and Rural Development to the European Commission on 1 December 2023 and which apply from 15 December 2023". – https://www.gov.pl/web/wprpo2020/plan-strategiczny-dla-wspolnej-polityki-rolnej-na-lata-2023-2027-wersja-33 (accessed 10 December 2023).

being, a programme document which has been only marginally encapsulated by relevant national legal acts. Therefore, further considerations are based on programme assumptions and postulated legal provisions.

The Polish Strategic Plan indicates that "the use of renewable energy indirectly contributes to improving the profitability of farms while ensuring an equivalent use of resources. The Plan proposes an intervention for farms concerning the use of different sources of renewable energy. The aim of this intervention is primarily to reduce emissions and contribute to Objective 4 although indirectly, by reducing production costs, the economic effect of this intervention can also be indicated".[15] This means that investment in renewable energy sources is an indirect mechanism affecting farmers' profitability. The observable phenomena of investments in biogas plants or photovoltaic farms indicate the coexistence of agricultural activities and investments in RES (renewable energy sources). These only meet the farmers' own needs, and the energy obtained does not feed into the country's energy system but is used on site. This, of course, contributes to reducing the costs of agricultural production and, as highlighted, indirectly affects agricultural income.[16]

To meet the needs of farmers, the Strategic Plan introduced a specific intervention "On-farm investment in renewable energy and energy efficiency improvements". The declared aim of the intervention is to reduce the pressure of agricultural activity on the environment, through the use of energy from renewable sources, proper management of waste and by-products from agriculture and improvement of energy efficiency.[17] It should be pointed out, however, that this intervention in the Polish Strategic Plan is quite limited. It concerns new equipment for the production of energy from agricultural biogas (electricity or heat or gaseous fuel) up to 50 kW with the possibility of installing energy storage or installations producing energy from solar radiation up to 50 kW with energy storage and energy management systems or with a heat pump – as long as it is an integral part of the installation producing energy from solar radiation, the installation costs of the above mentioned energy production equipment (area A). It may also concern systems improving the energy efficiency of farm buildings used for agricultural production, such as the construction, reconstruction or purchase of

[15] Strategic Plan for the Common Agricultural Policy 2023-2027, p. 107.

[16] Especially since, as indicated in the Plan, "the total production of renewable energy sources from agriculture and forestry accounted for 81.6% of the total production of energy from renewable sources in Poland. In Poland, between 2012 and 2016, renewable energy production from agriculture increased by 55.9% [...] A characteristic feature of renewable energy production in Poland is the large share of solid biomass (firewood, residues from wood processing and forest and park maintenance) in total renewable energy production, which amounted to 71.1% in 2016. This is followed by wind energy, liquid biofuels, biogas and solar energy, whose share of total renewable energy production in the country in 2016 was respectively: 12,0%, 10,2%, 2,9% i 0,7%" – Strategic Plan for the Common Agricultural Policy 2023-2027, p. 141.

[17] Strategic Plan for the Common Agricultural Policy 2023-2027, p. 940 .

biomass boilers, heat recovery systems (e.g. from milk, livestock buildings, litter, slurry), roof glazing, LED lighting, as well as thermo-modernisation of farm buildings used for agricultural production (area B).[18]

The choice of investments favouring only agricultural biogas plants and, alternatively, only photovoltaics may not prove to be a very effective tool due to the rather complicated system of constructing biogas plants. In addition, there are no implementing regulations specifying the possible formal conditions for obtaining a subsidy to benefit from this intervention. Undoubtedly, however, the greatest drawback of the adopted solutions is the use of renewable energy sources only for the needs of agricultural activity. The energy generated on the farm still cannot be discharged effectively into the system, as there is no energy infrastructure capable of receiving the energy generated in such a way.

At the same time, the development of this intervention can be an opportunity for the development of a Smart Village[19] based on agricultural biogas. The establishment of several such biogas plants in one village can make it independent of external energy supplies. This will not only improve the climate but, above all, the profitability of agriculture and thus its competitiveness.[20] The development of well-functioning biogas plants, supported by other green energy devices, can be a stimulus for the development of other spheres of Smart Village formation, for example in terms of social or educational values.

RURAL ENERGY AS AN INSTRUMENT TO SUPPORT THE ENERGY TRANSITION

The mechanisms set out in the Common Agricultural Policy are not the only legal instruments enabling energy transformation towards the use of renewable energy sources. One example of support for Polish agriculture is the Energy for Rural Areas Programme[21] implemented by the National Fund for Environmen-

[18] *Ibid*, pp. 940-941.

[19] L.J. Cole, D. Kleijn, L.V. Dicks, J.C. Stout, S.G. Potts, M. Albrecht, J. Scheper, *A critical analysis of the potential for EU Common Agricultural Policy measures to support wild pollinators on farmland*, Journal of Applied Ecology, 2020, No. 57(4), pp. 681-694.

[20] P.W. Maja, J. Meyer, S. von Solms, *Smart Rural Village's Healthcare and Energy Indicators-Twin Enablers to Smart Rural Life*, Sustainability (Switzerland), 2022, Vol. 14, No. 19; V. Zavratnik, A. Kos, E.S. Duh, *Smart villages: Comprehensive review of initiatives and practices*, "Sustainability (Switzerland)", 2018, Vol. 10, No. 7.

[21] The objective of the Programme is reduction of CO2 emissions – the planned value of the indicator of target achievement is at least 260,000 Mg/year, including: for non-refundable and refundable forms of co-financing – at least 260,000 Mg/year 2). Amount of energy generated from renewable sources – the planned value of the indicator of target achievement is at least 450,000 MWh/year, including: for non-refundable and refundable forms of co-financing – at least

tal Protection and Water Management.[22] It provides subsidies for investments in the construction of: hydroelectric power plants, installations for the generation of energy from agricultural biogas in conditions of high-efficiency cogeneration, and energy storage facilities. In addition, preferential loans are granted for investments in the construction of: hydroelectric power plants, installations generating energy from agricultural biogas under conditions of high-efficiency cogeneration, wind installations and photovoltaic installations.

This comes as an addition to the missing solutions, for example in the field of wind energy generation or, on a larger scale, photovoltaics.[23] These investments can be made not only by individual farmers, but also by existing or emerging energy cooperatives. The latter refers to cooperatives within the meaning of the Act of 16 September 1982 – Co-operative Law (Journal of Laws of 2021, item 648, as amended) or farmers' co-operatives within the meaning of the Act of 4 October 2018 on farmers' co-operatives (Journal of Laws, item 2073), the object of whose activity is the production of electricity, biogas or heat in renewable energy source installations and balancing the demand for electricity or biogas or heat, exclusively for the own needs of the energy cooperative and its members, which intends to apply for inclusion of its data as an energy cooperative in the list referred to in Article 38f(2) of the Act of 20 February 2015 on renewable energy sources (Journal of Laws of 2022, item 1378, as amended).[24]

The emergence of these cooperatives and the potential for a much wider use of grants and loans to invest in renewable energy sources is an opportunity for the development of the Smart Village concept. Admittedly, it is still emphasised that the energy generated is to be used for the needs of the cooperative or its members, but this creates a much wider opportunity for co-operation in the siphoning of such green energy than in the case of individual farmers. Admittedly, the association of farmers into agricultural producer groups is currently in crisis, but energy cooperatives could be the impetus for a new kind of association of farmers who will seize the opportunity given to them.

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450 000 MWh/year 3). Additional capacity of energy generation from renewable sources - at least 90 MW, including for non-refundable and refundable forms of co-financing - at least 90 MW - https://www.gov.pl/web/nfosigw/energia-dla-village (accessed 10 December 2023).

[22] https://www.gov.pl/web/nfosigw/energia-dla-wsi (accessed 10 December 2023).

[23] In the case of investments made by a farmer indicated in section 7.4.3, the construction of one of the following renewable energy source installations with an electrical capacity of more than 50 kW and no more than 1 MW: a) photovoltaic installations (excluding investments on agricultural land constituting agricultural land of classes I-IV - within the meaning of the provisions issued pursuant to Article 26(1) of the Act of 17 May 1989. - Geodetic and Cartographic Law (i.e. Journal of Laws 2021, item 1990, as amended)) ; b) wind installations (excluding investments on agricultural land constituting agricultural land of classes I-IV - within the meaning of the provisions issued pursuant to Art. 26 (1) of the Act of 17 May 1989. - Geodetic and Cartographic Law (i.e. Journal of Laws 2021, item 1990, as amended)) - https://www.gov.pl/web/nfosigw/energia-dla-wsi (accessed 10 December 2023).

[24] *Ibid*.

The proposed scheme should be assessed with some uncertainty given the rather high investment costs and the largely loan-based nature of the aid. Farmers may be apprehensive about taking advantage of it due to the risk of losing significant financial resources in the event of investment failure, in particular, changes to the energy law regarding the use of energy generated for own needs. The numerous amendments to these laws, as well as their level of complexity, rather do not encourage risky investment activities. *De lege ferenda*, the maximum simplification of regulations related to the use of RES energy obtained for own needs and not introduced into the system should be postulated.

PLANNING ASPECTS OF LOCATING RENEWABLE ENERGY INVESTMENTS

The amendment to the Planning and Spatial Development Act introduced in 2023 established significant changes to the location of renewable energy sources. It should be pointed out that this applies to high-power installations. At the same time, it should be noted at the outset that the amendment did not remove the existence of other laws concerning renewable energy installations, such as the so-called distance law related to the location of wind farms.

These provisions have been clarified, not to say tightened. One example is the added Article 14(6a)(2) of the Spatial Planning and Development Act, which states that "A change in the land use concerning: installations of renewable energy sources not installed on a building, located: a) on agricultural land of class I-III and forestry land, b) on agricultural land of class IV, with an installed electrical power of more than 150 kW or used to conduct economic activity in the field of electricity generation, c) on land other than that indicated in lit. (a and b) with an installed electrical capacity of more than 1,000 kW – shall be on the basis of a local plan". On the one hand, this implies a strong protection of land with the best agricultural suitability through the spatial planning procedure but, on the other hand, it actually makes the location of renewable energy sources extremely difficult. The rather large capacities of RES installations enshrined in the above provision are supposed to safeguard against the establishment of entire farms without public consultation. This security of interest, however, in combination with other provisions, constitutes a restriction on the development of RES in rural areas.

Another provision intended to safeguard against uncontrolled development of RES investments is Article 15(7) indicating that "a local plan providing for the possibility to locate buildings also allows for the location of building-mounted renewable energy source installations using only solar energy for energy production and micro-installations within the meaning of Article 2(19) of the Act of 20 February 2015 on renewable energy sources (Journal of Laws of 20 February

2015, item 1436, 1597 and 1681), also in the case of a different land use than production, unless the local plan's provisions prohibit the location of such installations". This provision, referring only to investments in solar energy installations, also refers to spatial planning as a tool which enables the establishment of any RES installation.

In the context of these two provisions cited, the development of renewable energy sources in rural areas will, on the one hand, safeguard against uncontrolled siting, but, on the other hand, will significantly impede the realisation of the idea of a Smart Village based on green energy.

CONCLUSIONS

The presented selected issues which relate to the location of renewable energy sources in rural areas lead to several conclusions. Legal issues concerning the dispersion of regulations related to investments in renewable energy sources come to the fore. In addition to the discussed Act on planning and spatial development, we are dealing with a number of special laws which are subject to numerous amendments. Moreover, they do not create a uniform system that would promote legal certainty. An example of this is the regulations on the location of wind farms and their distance from buildings.

In addition to the planning regulations, it is necessary to point out the need to normalise the problem of feeding the energy obtained into the state's energy system. Insofar as it is possible to carry out investment in connection with renewable energy sources, the possibility of generating income from this becomes a problem due to the need to gain access to consumption and transmission networks. Lengthy and uncertain procedures, as well as Poland's infrastructural backwardness in this regard, are significant obstacles preventing investment in renewable energy sources.

Here, the Smart Village concept can be an aid to the transformation towards green energy. Renewable energy sources can be a part of changes in the countryside aimed not only at increasing profitability but, above all, at social and climate change. The proper use of the instruments provided for Smart Village related to the implementation of innovative solutions may prove to be an opportunity for the development of Polish villages.

However, it should be made clear that any investment in renewable energy sources should be preceded not only by a business plan showing the economic benefits but, above all, by resolving the conflicts between ensuring food security and access to green energy. There is a danger that earmarking too much real estate for

energy investments in the countryside could result in the inability to acquire land for food production, which could ultimately lead to the shortage of food.

Balancing solutions between energy security, climate security and food security is a challenge facing contemporary agriculture not only in Poland, but in the whole of Europe. Like in a lens, the problems of finding the right way to define sustainable development between technological progress,[25] and food production are concentrated in these issues. The Smart Village concept involving bottom-up action initiated by farmers themselves may prove to be the solution to these problems here, as they may know what, apart from economic profit, is important in the process of managing agricultural property. Of course, the State should remain in control in this regard, both in terms of energy and food security.

We should postulate *de lege ferenda* the development of legal solutions facilitating investment in renewable energy sources in rural areas. The measures discussed in the Strategic Plan or the Rural Energy Programme need to be coordinated and secured through appropriate legislation that is consistent. The energy transition opportunity should be exploited without compromising, or even improving, climate protection indicators and ensuring food security.

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Michał A. Piegzik
Edinburgh Napier University, Scotland
m.piegzik@napier.ac.uk
ORCID: 0000-0002-1266-2015

MARRIED COUPLES' SAME SURNAME ISSUE IN JAPANESE FAMILY LAW

日本の家族法における夫婦別氏(別姓)の問題について

Nihon no Kazoku Hō ni okeru Fūfu Betsu Uji (Bessei) no Mondai ni tsuite

Abstract

Despite the traditional postulates of jurisprudence regarding the necessity to introduce flawless bills, each legal system struggles with issues which arouse controversy and become the subject of a lively political and legal debate. Even if the controversy affects millions of people and their private lives, the decision to solve it is limited by government policy. For example, this pattern is reflected in the married couples' same surname issue in Japanese Family Law. Japanese courts investigated it yet did not provide any binding solution. The media have also increasingly raised this problem as an example of a private law defect requiring a fundamental change in the near future. Still, public awareness of the legal controversy is insufficient to overcome it. Even though a large part of Japanese society supports the reform of the married couples' same surname system, the government protects it as an embodiment of Japan's legal tradition and a symbol of family unity. Undoubtedly, the dispute regarding the need to revise Family Law went beyond the legal debate and became a significant political and social issue in the last three decades. Unfortunately, Western legal scholarship is still unaware of this vivid example of the 21st-century rivalry between the liberal/individual and the conservative/collective views in one of the most distinguished private law systems.

KEYWORDS

Japanese Family Law, surname in Family Law, Japan, Family Law

SŁOWA KLUCZOWE

japońskie prawo rodzinne, nazwisko w prawie rodzinnym, Japonia, prawo rodzinne

1. WHAT IS THE MARRIED COUPLES' SAME SURNAME ISSUE IN JAPANESE FAMILY LAW?

The married couples' same surname issue[1] (夫婦別姓の問題, Fūfu Bessei no Mondai) in Japanese Family Law directly results from Article 750 of the Mimpō,[2] entitled "surname of the spouses" (夫婦の氏, Fūfu no Uji). It states that the spouses choose the husband's or wife's surname after concluding a marriage.[3] The construction of this legal norm indicates that the spouses can only choose one surname from the surnames of the husband or wife. Consequently, the newly established family bears the same surname, regardless of whether it is the husband's or wife's surname. Contrary to Polish or Scottish Family Law, Japanese married couples do not have the right to choose a different surname from their spouse. Thus, the system of married couples' surnames established by Article 750

[1] The term literally means "married couples' separate surnames issue" in Japanese, as it calls for introducing a system in which both spouses would be entitled to retain their surnames after entering a marriage. Contrary to this, in Western legal scholarship, the emphasis is put on criticism of the current system of shared surnames. Hence the dispute is more widely known outside Japan as "the married couples' same surname issue". In the article, the author decided to adopt Western terminology.

[2] Mimpō (民法) means the Civil Code in Japanese. Family Law, or more precisely, Relatives Law (親族法, Shinzoku Hō), is formally part of the Japanese Civil Code, specifically its Book Four. The systematics of the Japanese Civil Code results directly from the adoption by Japanese legislators at the end of the 19th century of a pandectic systematics similar to the German BGB. Succession Law (相続法, Sōzoku Hō – Book Five of the Civil Code) together with Relatives Law form Family Law (家族法, Kazoku Hō) in Japanese private law system. Whenever the author uses the term "Family Law" in the article, he refers to the Relatives Law in the Japanese legal system.

[3] The exact content of Article 750: "Following the regulations related to marriage, the spouses take the husband's or wife's surname". Mimpō (Meiji 29-nen Hōritsu Dai 89-Gō); Civil Code (Act No. 89 of the 29th year of the Meiji era [1898]). https://elaws.e-gov.go.jp/document?lawid=129AC0000000089_20220401_430AC0000000059&keyword=民法 (accessed 1 May 2022).

of the Mimpō is based on expressing the same will of both spouses in terms of choosing the surname.

Although Article 750 of the Mimpō does not constitute an independent statutory requirement for contracting a marriage, under separate provisions in Japanese Family Law, the choice of an identical surname is one of the conditions for the recognition of a marriage by the local government and therefore becoming a valid marriage.[4] It results directly from Article 74 Section 1 of the Family Register Act (戸籍法, Koseki Hō), which stipulates that spouses are required to deliver to the public authority office (Head of the Local City/District Office; 市町村長, Shichōsonchō) a written Notice of Marriage (婚姻の届出, Kon'in no Todokede) containing information of the surname after conducting a marriage. Lack of such information or information inconsistent with Article 750 of the Mimpō (e.g. separate surnames) will result in rejection of the Notice by the office and, consequently, nullity of the marriage.[5] Such far-reaching consequences related to the submission of an incomplete Notice result from the adoption by the Japanese legislator of the "notification doctrine" (届出主義, Todokede Shugi) in marriage law. Therefore, a valid legal action must be reflected in its notification to public administration authorities.[6] An expression of this principle is reflected in Article 739 of the Mimpō, which makes the validity of the contracted marriage conditional on meeting the requirements of the Family Register Law in the scope of the Notice discussed earlier. Article 740 of the Mimpō expressly states that if the Notice does not comply with the conditions for contracting a marriage and other statutory formal requirements of the document, it cannot be recognised by the state (受理することができない, Juri suru koto ga dekinai).

Constructed in this way, the requirements of the Notice of Marriage and the potential adverse legal consequences of its invalid submission mean that Japanese jurists noticed the relation between concluding a valid marriage and the spouse's choice of the same surname.[7]

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[4] Koseki Hō (Shōwa 22-nen Hōritsu 224-gō); Family Registration Law (Act No. 224 of 22nd year of Shōwa era [1947]), https://elaws.e-gov.go.jp/document?lawid=322AC0000000224_20220401_503AC0000000042&keyword= 戸籍法 (accessed 1 May 2022).

[5] Similarly, some Japanese legal scholars also emphasise, referring to the judgment of the Supreme Court of 1941, that the Notice recognised by the public administration office has a retroactive legal effect on the marriage, which becomes valid upon its conclusion. F. Tsuneoka, *Kazoku Hō* (*Family Law*), Tokyo: Shinseisha, 2020, p. 43.

[6] Detailed information on the obligations of the spouses related to the Notification of Marriage is available on the official website of the Japanese Ministry of Justice (instructions in Japanese). https://www.moj.go.jp/ONLINE/FAMILYREGISTER/5-2.html (accessed 1 May 2022).

[7] Y. Inubushi, M. Ishii, F. Tsuneoka, T. Matsuo, *Shinzoku * Sōzoku Hō* (*Relatives and Succession Law*), Tokyo: Kobundo, 2020, s. 50-51. A. Motoyama, M. Aotake, K. Habu, T. Mizuno, *Kazoku Hō* (*Family Law*), Tokyo: Nihon Hyōronsha, 2021, pp. 35-36.

An example of the Notice of Marriage form and its partial translation into English is provided below.[8] Information on the choice of surname by the spouses is included in Point 4, entitled "Surname of the Spouses after Marriage" (**婚姻後の夫婦の氏**, Kon'ingo no Fūfu no Uji).

婚　姻　届

令和**元** 年 **5** 月 **7** 日 届出

東京都千代田区 長 殿

受理 令和 年 月 日 第 号	発送 令和 年 月 日
送付 令和 年 月 日 第 号	長印

書類調査	戸籍記載	記載調査	調査票	附票	住民票	通知

		夫になる人	妻になる人
(1)	(よみかた) 氏名	みんじ　じろう 氏 民事　名 次郎	こせき　えいこ 氏 戸籍　名 英子
	生年月日	平成 2 年 2 月 2 日	平成 3 年 1 月 10 日
(2)	住所 (住民登録をしているところ)	東京都千代田区霞が関 一丁目1番1号 世帯主の氏名 民事 一郎	東京都杉並区高円寺北 一丁目1番1号 世帯主の氏名 戸籍 弘
(3)	本籍 (外国人のときは国籍だけを書いてください)	東京都千代田区丸の内 一丁目1 ~~番地~~ 番 筆頭者の氏名 民事 一郎	東京都千代田区平河町 一丁目1 ~~番地~~ 番 筆頭者の氏名 戸籍 弘
	父母及び養父母の氏名 父母との続き柄 (右記の養父母以外にも養父母がいる場合にはその他の欄に書いてください)	父 民事 一郎 続き柄 長男 母 民事 和子 養父 続き柄 養子 養母	父 戸籍 弘 続き柄 長女 母 戸籍 恵 養父 続き柄 養女 養母
(4)	婚姻後の夫婦の氏・新しい本籍	☑夫の氏 ☐妻の氏 新本籍 (左の□の氏の人がすでに戸籍の筆頭者となっているときは書かないでください) 東京都千代田区九段南一丁目1 ~~番地~~ 番	
(5)	同居を始めたとき	平成30 年 12 月 (結婚式をあげたとき、または、同居を始めたときのうち早いほうを書いてください)	
(6)	初婚・再婚の別	☑初婚 再婚 (☐死別 ☐離別 年 月 日)	☑初婚 再婚 (☐死別 ☐離別 年 月 日)
	同居を始める前の夫妻のそれ	夫 妻 1.農業だけまたは農業とその他の仕事を持っている世帯 夫 妻 2.自由業・商工業・サービス業等を個人で経営している世帯 夫☑ 妻☑ 3.企業・個人商店等（官公庁は除く）の常用勤労者世帯で勤め先の従業者数が	

The part of the Notice of Marriage (**婚姻の届**, Kon'in no Todoke) covering information about the spouses' surnames in Point 4 (the husband's name is marked).

[8] A template of the Notice of Marriage can be found on most local/municipal offices' websites.

2. HISTORY OF THE MARRIED COUPLES' SAME SURNAME SYSTEM

Similar to many other countries, the use of surnames in ancient Japan was generally restricted to the upper-class (公家, Kuge) and warriors (武士, Bushi) and strictly banned among the townsmen (町民, Chōmin) and peasants (農民, Nōmin).[9] The custom developed in the early Middle Ages. It was affirmed in the Edo era (1603-1868) when the Tokugawa shogunate administration strictly adhered to class divisions and did not influence the natural evolution of private law. The spouses had separate surnames at that time because they "belonged to" a specific family (家, Ie). The surname was an indicator of social position, a fact more important than the conclusion of marriage and establishing a new family. Once married, the woman mostly came directly under the formal protection of her husband as part of his family, yet she kept her surname as proof of descent from a separate home and a symbolic sign of a covenant between two families.[10]

As a result of the breaching of strict isolation of Japan from international contacts, which lasted for more than two centuries, the Tokugawa shogunate was overthrown after the violent civil war. In 1868, Meiji Emperor restored his power and called for the thorough reform of the country. The new Japanese government initiated the modernisation and centralisation of the state. Feudalism was abolished, yet about 270 separate clan legal systems could not be removed at once since they had to be replaced with one effective national legal system.[11] The Japanese strictly followed the policy of unification of the legal system in the following decades. Surnames have also become the subject of national regulation. In 1870, under the Grand Council of State Edict No. 608, townspeople and peasants were granted the right to use surnames.[12] A year later, universal family registers were established to provide official data on the entire country's population, adopting the principle according to which a household, also described as a family (戸＝家, To=Ie), was the basic unit of the administrative records.[13] In 1875, the Grand

[9] Read more on the history of surnames in Japan: O. Ōta, *Nihonjin no Sei Myoji Namae: Jinmei ni Kizamareta Rekishi* (*Japanese Names, Surnames and Family Surnames: History Engraved in a Human*), Tokyo: Kabushiki Kaisha Yoshikawa Kōbunkan, 2012.

[10] H. Idota, *Edo Jidai no Tsuma no Uji* (*Wife's Surname in the Edo Era*), "Nara Hōgakukai Zasshi" 2000, Vol. 12 (3–4), pp. 67–84.

[11] R. Ishii, Mimpōten no Hensan (*Drafting of the Civil Code*), Tokyo: Sōbunsha, 1979, p. 3.

[12] Meiji 3-nen 9-gatsu, 19-nichi, Daijōkan Fukoku 608-gō "Heimin myōji kyoka rei" (Edict of the Great Council of State No. 608, 19 September of the 3rd year of the Meiji era [1870] "Act Allowing Plebeians to Bear a Surname"), https://dl.ndl.go.jp/info:ndljp/pid/787950/212 (accessed 1 June 2022).

[13] K. Kondō, *Fūfu no Uji ni Kan Suru Oboegaki, ichi* (*Notes on the Surnames of Spouses, part 1*), "Miyagi Kyōiku Daigaku Kiyō" 2015, Vol. 49, pp. 354–368.

Council of State published Edict No. 22, which introduced the obligation for all plebeians to have surnames to sort out issues related to army conscription.[14]

Despite establishing the surname requirement for all citizens, Japan did not have a Civil Code to set the principles for spouses' surnames. Family Law was mainly based on customary law, which varied depending on region and caused significant troubles in unifying the judicial decisions in the whole country. In 1876, the Grand Council of State published the edict upholding the existing spouses' separate surnames system. Except for cases where the wife had to take her husband's surname to have succession rights within her husband's house (夫の家を相続したる, Otto no ie o sōzoku shitaru), the women retained their maiden surname defined as "surname of the place of birth" (所生の氏, Shosei no Uji).[15]

Still, the Japanese legislator perceived establishing the spouses' separate surnames system at the national level as a temporary solution. The Grand Council of State intended to promote a new custom in Family Law, which would introduce the general rule that the wife should have the husband's surname during the marriage.[16] The drafting of the Civil Code began as early as in 1869, but the Japanese jurists encountered many difficulties of a linguistic and substantive nature. The codification project was suspended and resumed several times. Eventually, in 1879, it was entrusted to the French advisor to the Meiji government – G. Boissonade. He soon received the support of the French School of legal jurisprudence graduates, the first generation of Japanese lawyers. Despite the opposition of some Japanese jurists, the draft of the Civil Code prepared under G. Boissonade's supervision, known today as the Old Civil Code (旧民法, Kyū Mimpō), was published in two parts in the spring and autumn of 1890. According to the interregnum set by the cabinet, both parts would come into force on 1 January 1893.[17]

The Old Civil Code did not explicitly mention the issues related to the wife's obligation to change her name after marriage but did it indirectly. Article 243 of the Code introduced the superior position of the head of the household (戸主, Koshu). Koshu was automatically the head of the whole family (一家ノ長, Ikka

[14] Meiji 8-nen 2-gatsu, 13-nichi, Daijōkan Fukoku 22-gō "Heimin Myōji Hisshō Gimu Rei" (Edict of the Great Council of State No. 22, 13 February of the 8th year of the Meiji era [1875] "Act Imposing the Obligation to Bear a Surname by Plebeians"), https://dl.ndl.go.jp/info:ndljp/pid/787955/71, (accessed 1 June 2022).

[15] Y. Sugita, *Fūfu Bessei Hanketsu ni Tai Suru Kōsatsu* (*Considerations on the Judgment on the System of Separate Surnames of Spouses*), "Kyūshū Daigaku Hōseigakukai" 2018, Vol. 12, pp. 19–33.

[16] Waga Kuni ni okeru Uji no Seido no Kenkan (The Reform of the Surname System in our Country), online materials of the Japanese Ministry of Justice, https://www.moj.go.jp/MINJI/minji36-02.html (accessed 1 June 2022).

[17] More about the codification of Japanese civil law and the Civil Code controversy: M. A. Piegzik, *Civil Code controversy in Japan, 1889–1892*, PhD thesis defended at the Faculty of Law, Administration and Economics of the University of Wrocław, Wrocław 2022.

no chō) composed of his/her spouse and other relatives under his/her authority. The second part of Article 243 stated that "the head of the household and his/her family takes the surname of the house [to which they belong – MAP]" (戸主及ヒ家族ハ其家ノ氏ヲ称ス, Koshu oyohi kazoku wa sore kazoku no uji o shō su).[18] Although the Japanese did not specify the gender of the head of the household, this role was traditionally assigned to men since the husband's entry into the wife's family was only an exception in old customary law. Thus, for the first time in Japan, the spouses' surname system was regulated in a codified form. It introduced a patriarchal form of interpreting the family as a wife and other members directly under husband's authority. Consequently, all family members had to bear the surname of the head of the household. The formal recognition of women as a potential head of the household did not change the nature of the Old Civil Code, which promoted the husband's supremacy over his wife within the family.

In May and June 1892, the Imperial Diet finally resolved the Civil Code controversy, which turned out to be the defeat of the "decisive" faction to protect the Old Civil Code. The Japanese parliament decided to postpone the entry into force of the Code to introduce comprehensive amendments. Already in 1893, the drafting of the so-called Meiji Civil Code (明治民法, Meiji Mimpō), which was to reconcile the positions of three independent schools of legal scholarship in Japan – French, English and German. During the Codes Investigation Committee meetings (the body responsible for reviewing the Code), the concept of introducing the principle of the wife taking the husband's surname was maintained, as expressed in the Old Civil Code. However, on 21 October 1895, on the 127th meeting of the Committee, one of its members, Yatsuka Hozumi, noticed a discrepancy between customary law applied to the Edict of 1876 and Article 746 of the Meiji Civil Code, which was a copy of the second part of Article 243 of the Old Civil Code.[19] Another Committee member, Masaakira Tomii, a French School representative widely regarded as one of the three fathers of the Meiji Civil Code, answered his doubts and referred to Article 788 of the Meiji Civil Code. He argued that if the wife were to join her husband's family (=household) through marriage, keeping her maiden surname would greatly inconvenience the whole family. Taking the husband's name was seen to be a much more natural solution. [20]

[18] Translation of Article 243, second sentence, based on the original text of the Old Civil Code; https://law-platform.jp/hist/123028/123028-123098%231/AQDzAQEB#rev-5b0671afea0bef5da7ffbec6 (accessed 1 June 2022).

[19] Contrary to the Old Civil Code, based on the systematics from *The Institutes* of Gaius, the Meiji Civil Code was based on pandectic systematics (introducing the practical division instead of the old logical division), thus referring to the German BGB project. From the Family Law perspective (strictly speaking, Relatives Law), it was separated as Book Four and given a completely different numbering in the Meiji Civil Code.

[20] K. Kondō, *ibid*, p. 360.

Notably, contrary to the Old Civil Code, Article 788 of the Meiji Civil Code mentioned two ways of forming a family: the standard way of "entering the wife into the husband's family through [ordinary] marriage" (妻ハ婚姻ニ因リテ夫ノ家ニ入ル, Wsuma wa kon'in ni yorite otto no ie ni hairu) and the extraordinary "adoption of the husband and son-in-law into the wife's family (=household)" (入夫及ヒ婿養子ハ妻ノ家ニ入ル, Nyūfu oyohi mukoyōshi wa tsuma no ie ni hairu).[21] Thus, it was apparent that the ordinary marriage resulted in entering the wife into the husband's family. M. Tomi confirmed this in his statement, referring to the need to revise the centuries-old Japanese tradition of spouses' different surnames if the wife entered the husband's family. Other members of the Committee supported his view, and when the Meiji Civil Code entered into force on 16 July 1898,[22] the spouses' same surname system in Japan became a fact.

Another critical stage in the development of Japanese Family Law was the period after the end of World War II. One of the effects of the American occupation was the democratisation and liberalisation of the Japanese legal system. In 1946, the Diet passed the new Constitution, which guaranteed broad civil rights and liberties. Following this fundamental change, in December 1947, the part of the Civil Code concerning Family Law was also revised. The article establishing the wife's entry into the husband's family through marriage was entirely removed. The Family Register Law began to regulate the issue of forming a separate family (=household) within the scope of administrative law. As for the norms regulating the spouses' surnames, the Diet removed Article 746 of the Meiji Civil Code and introduced a new Article 750 to protect the formal equality of wife and husband in the family according to the constitutional principle.[23] Since the post-war times, Article 750 of the Mimpō has not changed. The present-day debate on the spouses' same surname issue concerns the system established more than 75 years ago.

[21] Own translation of Article 788 based on the original text of the Meiji Civil Code; https://law-platform.jp/hist/129089d/129089_131009/AQMUAQEB#rev-5af95ea7ea0bef26fd8cb48e, (accessed 1 June 2022).

[22] Meiji 31-nen 6-gatsu 21-nichi, Hōritsu Dai 11-Gō (Act No. 11 of 21 June of the 31st year of the Meiji era [1898]), https://hourei.ndl.go.jp/simple/detail?lawId=0000004759&current=-1, (accessed 1 June 2022).

[23] Kokuritsu Kōbunshokan: Ref. 御 30627100: Mimpō no Ichibu o Kaitei Suru Hōritsu, Goshomei Gempa, Shōwa 22-nen, Hōritsu Dai 222-Gō (Act Amending Part of the Civil Code, Version with Original Signatures, the 22nd year of the Shōwa era [1947], Act No. 222).

3. ALLEGATIONS AGAINST THE MARRIED COUPLES' SAME SURNAME SYSTEM

In the last 30 years, Japanese jurists have published many texts on the flaws of the spouses' same surname system. The article summarises their arguments in several key points and briefly describes them. Their order is not accidental, and it is closely related to the impact on the entire legal system and the rights and liberties guaranteed by the Constitution of Japan.

3.1. INCONSISTENCY WITH ARTICLE 13, ARTICLE 14 PARAGRAPH 1, AND ARTICLE 24 OF THE CONSTITUTION OF JAPAN

According to many Japanese legal scholars, Article 750 of the Mimpō and Article 74 Section 1 of the Family Register Law is inconsistent with Article 13 of the Constitution of Japan, which states that all citizens have the right to respect their individuality

(個人として尊重され る, Kojin to shite sonchō sareru).[24] They argue that despite the legislator's general idea to promote the concept of family unity, the obligation to change surname against the will of one of the spouses to conclude a valid marriage violates the right to protect individual dignity and requires an immediate revision.[25] There is no doubt that a surname, which is a personal right subject to legal protection, is a crucial element of a person's identity from the early stage of life.[26] The decision to change it should be independent, voluntary and not forced by other legal obligations. The situation in which one of the spouses cannot retain his/her current surname (despite the expressed will to do so) because he/she sacrifices his/her personal rights over the fact of getting married is subject to severe criticism.[27]

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[24] Own translation of Article 13 based on the original text of the Constitution of Japan; https://elaws.e-gov.go.jp/document?lawid=321CONSTITUTION (accessed 1 June 2022).

[25] S. Ninomiya, *Kazoku Hō* (*Family Law*), Tokyo: Shinhogaku Library, 2019 (5th ed.), pp. 52-53.

[26] A pair of Japanese psychologists conducted empirical research on three separate groups of students over several years, which proved that a significant percentage of respondents identify with their surname and feel attached to it, regardless of their gender and relatively young age. Detailed results of the study, Y. Ōta, Y. Ishino, *Myōji ni Kan Suru Taido to Jiga Dōitsusei, Kazoku Aidentiti, oyobi Dentōteki Kazokukan to no Kanren: Daigakusei ni okeru Myōji no Yakuwari to sono Seisa no Shinrigakuteki Kenkyū* (*Relationships between Own Surname and Self-Identification, Family Identification and Traditionalist View of the Family: Psychological Research on Students Regarding the Role of Surnames Depending on Gender*), "Shimane Daigaku Kyōiku Gakubu Kiyō" 2010, Vol. 44, pp. 89–103.

[27] Y. Inubushi, M. Ishii, F. Tsuneoka, T. Matsuo, *op. cit.*, p. 51.

Article 14 Section 1 of the Constitution of Japan is also the subject of analysis by Japanese legal scholars. It states that all "citizens are equal before the law and shall not be discriminated in political, economic or social relations because of race, creed, sex, social status or family origin".[28] Even if most couples declare that they voluntarily decided to take the surname of one of them after marriage, the spouses' same surname system may lead to a situation in which one of the spouses will be forced to change surname to conclude a valid marriage. In such a situation, one of the spouses becomes the aggravated party of the matrimonial contract. Most often, this kind of constraint can be assessed as gender discrimination because mutually excluding options (choosing the husband's or wife's surname), motivated by ideological, historical and cultural reasons,[29] allows men (the dominant sex in Japanese society) to force women to make important life decisions contrary to their will. Whilst Japanese courts have repeatedly indicated that Article 750 of the Mimpō is not a ground for discrimination against any sex (as it does not give either men or women the priority to keep their surnames), it should be noted that this provision has unilaterally discriminatory effects on women in Japan's social conditions.[30] Ministry of Health, Labour and Welfare (厚生労働省, Kōseirōdōshō) report of January 2017 confirms this claim and contains historical data on the spouses' surnames.[31] The statistical surveys were conducted from 1975 to 2015 at five-year intervals. The data were divided into five categories: (1) couples marrying for the first time, (2) couples in which a man remarries and a woman marries for the first time, (3) couples in which a woman remarries and a man marries for the first time, (4) couples in which a man and a woman remarry, and (5) a summary of all marriages contracted in the year under review. Despite the visible tendency of the increase in the percentage of men taking a woman's surname after concluding a marriage, women in over 90% of cases take a man's surname in all indicated categories more often. In 2015, 91% of women took the man's surname in the category of remarried couples, while among couples getting married for the first time, the number is as high as 97.1%. The average for all four categories is 96% in favour of men, which proves that the spouses' same surname

[28] Own translation of Article 14 Section 1 is based on the original text of the Constitution of Japan; https://elaws.e-gov.go.jp/document?lawid=321CONSTITUTION (accessed 1 June 2022).

[29] Presented considerations should also not exclude exemptions, i.e., where women force men to change their surnames after getting married. Still, most women must sacrifice their personal rights to conclude the valid marriage. More on the discriminatory nature of spouses' same surname system: R. Kitahara, *Fūfu Bessei wa naze "Kirarawareru" ka?* (*Why Are Separate Surnames "Disliked"?*), "Chūō Daigaku Shakai Kagaku Kenkyūjo Nempō" 2016, 21, pp. 243–257.

[30] T. Tomita, *Fūfu Bessei Ron Sono Ato: 30-nen no Kiseki* (*After the Dispute over the Spouses' Same Surname System: 30 Years of Its Course*), "Gyōsei Shakai Ronshū" 2020, Vol. 32 (4), pp. 169–212.

[31] Contrary to Japan, no national data on the spouses' surnames are published in Poland, and details can be found only at regional registry offices.

system in Japan results in the wife taking her husband's surname. The detailed data for the years 1975–2015 are presented in the table below:[32]

表６　夫妻の初婚－再婚の組合せ別にみた夫の氏・妻の氏別婚姻件数及び構成割合の年次推移

－昭和 50～平成 27 年－

年　次	marriages in total			first marriage for both			remarriage for wife			remarriage for hus.			remarriage for both		
	総数			夫妻とも初婚			夫初婚－妻再婚			夫再婚－妻初婚			夫妻とも再婚		
	総　数	夫の氏	妻の氏	総　数	夫の氏	妻の氏	総　数	夫の氏	妻の氏	総　数	夫の氏	妻の氏	総　数	夫の氏	妻の氏
1975	in total	husb. surname	wife's surname	実　　数　（組） data in numbers											
昭和 50 年	941 628	930 133	11 495	822 382	814 565	7 817	33 443	32 255	1 188	49 063	48 196	867	36 740	35 117	1 623
55	774 702	764 362	10 340	657 373	651 022	6 351	33 512	32 314	1 198	44 042	43 175	867	39 775	37 851	1 924
60	735 850	725 010	10 840	613 387	607 202	6 185	32 854	31 708	1 146	43 222	42 211	1 011	46 387	43 889	2 498
平成 2	722 138	705 630	16 508	589 886	579 834	10 052	35 567	33 810	1 757	47 586	45 900	1 686	49 099	46 086	3 013
7	791 888	770 908	20 980	646 536	633 437	13 099	40 631	38 423	2 208	53 622	51 453	2 169	51 099	47 595	3 504
12	798 138	774 010	24 128	630 235	616 016	14 219	47 939	45 174	2 765	61 272	58 520	2 752	58 692	54 300	4 392
17	714 265	687 607	26 658	533 498	519 055	14 443	50 578	47 261	3 317	66 193	63 058	3 135	63 996	58 233	5 763
22	700 214	674 580	25 634	520 955	506 740	14 215	49 616	46 656	2 960	65 757	62 597	3 160	63 886	58 587	5 299
23	661 895	636 799	25 096	490 664	477 027	13 637	47 020	43 948	3 072	62 999	59 839	3 160	61 212	55 985	5 227
24	668 869	643 236	25 633	494 749	480 708	14 041	47 168	44 174	2 994	64 622	61 298	3 324	62 330	57 056	5 274
25	660 613	635 432	25 181	487 044	473 486	13 558	46 659	43 635	3 024	64 772	61 602	3 170	62 138	56 709	5 429
26	643 749	618 865	24 884	473 772	460 290	13 482	45 609	42 733	2 876	63 392	60 244	3 148	60 976	55 598	5 378
27	635 156	609 756	25 400	464 975	451 288	13 687	45 268	42 263	3 005	63 588	60 420	3 168	61 325	55 785	5 540
2015	構　成　割　合　（%） data in %														
昭和 50 年	100.0	98.8	1.2	100.0	99.0	1.0	100.0	96.4	3.6	100.0	98.2	1.8	100.0	95.6	4.4
55	100.0	98.7	1.3	100.0	99.0	1.0	100.0	96.4	3.6	100.0	98.0	2.0	100.0	95.2	4.8
60	100.0	98.5	1.5	100.0	99.0	1.0	100.0	96.5	3.5	100.0	97.7	2.3	100.0	94.6	5.4
平成 2	100.0	97.7	2.3	100.0	98.3	1.7	100.0	95.1	4.9	100.0	96.5	3.5	100.0	93.9	6.1
7	100.0	97.4	2.6	100.0	98.0	2.0	100.0	94.6	5.4	100.0	96.0	4.0	100.0	93.1	6.9
12	100.0	97.0	3.0	100.0	97.7	2.3	100.0	94.2	5.8	100.0	95.5	4.5	100.0	92.5	7.5
17	100.0	96.3	3.7	100.0	97.3	2.7	100.0	93.4	6.6	100.0	95.3	4.7	100.0	91.0	9.0
22	100.0	96.3	3.7	100.0	97.3	2.7	100.0	94.0	6.0	100.0	95.2	4.8	100.0	91.7	8.3
23	100.0	96.2	3.8	100.0	97.2	2.8	100.0	93.5	6.5	100.0	95.0	5.0	100.0	91.5	8.5
24	100.0	96.2	3.8	100.0	97.2	2.8	100.0	93.7	6.3	100.0	94.9	5.1	100.0	91.5	8.5
25	100.0	96.2	3.8	100.0	97.2	2.8	100.0	93.5	6.5	100.0	95.1	4.9	100.0	91.3	8.7
26	100.0	96.1	3.9	100.0	97.2	2.8	100.0	93.7	6.3	100.0	95.0	5.0	100.0	91.2	8.8
27	100.0	96.0	4.0	100.0	97.1	2.9	100.0	93.4	6.6	100.0	95.0	5.0	100.0	91.0	9.0

Statistics on the spouses' surnames in 1975–2015 based on the Japanese Ministry of Labor, Health and Welfare report.

The last allegation to Article 750 of the Mimpō concerns the consistency with Article 24 of the Constitution, which stipulates that "marriage should be based on the free consent of two genders, and the basis of permanent marriage should be the mutual cooperation of spouses with the equal rights of husband and wife". The second sentence indicates that "concerning the choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters relating to marriage and family, the law should be enacted from the perspective of guaranteeing personal dignity and fundamental gender equality (個人の尊重と両性の体質的平等に立脚して, Kojin no sonchō to ryōsei no taishitsuteki byōdō ni rikkyaku shite)".[33]

[32] Ministry of Labor, Health and Welfare report on the demographic activity published in the 28th year of the Heisei era (2018), Marriage Statistics, https://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyu/konin16/dl/gaikyo.pdf, (accessed 1 June 2022).

[33] Translation of Article 24 is based on the original text of the Constitution of Japan; https://elaws.e-gov.go.jp/document?lawid=321CONSTITUTION (accessed 1 June 2022).

Referring to the above-mentioned discriminatory effect of Article 750 of the Mimpō, some Japanese jurists proved that the necessity for spouses to take the same surname contradicts the principle of gender equality in the family.[34] Women are much more likely to adopt their husband's surname. Even if the change is based on a voluntary decision, they should not choose between respecting their personal dignity and concluding a valid marriage. Apart from the official data of the Ministry of Labor, Health and Welfare, it should also be noted that this issue concerns, to the same extent, men who, despite the initial unwillingness to change their surnames, eventually decided to take the wife's surname to conclude a valid marriage.

Summarising all the objections to Article 750 of the Mimpō, it is worth quoting K. Anbo's and T. Tomonaga's views. They emphasise that having decided to maintain the spouses' same surname system, the Japanese legislator established in Family Law the principle of family protection and the concept of human identity within the family, contrasting with respect for individual rights and gender equality guaranteed by the Constitution.[35]

3.2. DIFFICULTIES RELATED TO ADMINISTRATIVE PROCEDURES

Concluding a valid marriage in Japanese Family Law is associated with adopting a different surname by one of the spouses. Under the provisions of administrative law, the spouse who changes the surname is obliged to apply for new documents confirming the identity and previously obtained qualifications and acquired rights.[36] Such documents include, for example, a passport, driving license, contracts concluded with a bank and insurer, and entries in the land and mortgage register. When applying for a job, a person bearing a changed surname must also obtain new copies of diplomas or certificates confirming a specific education or acquired professional qualifications. K. Yanagi argues that Family Law significantly exposes one of the spouses to the inconvenience of carrying out redundant administrative procedures.[37] Considering the complexity of the Japanese bureaucracy and the official position of Prime Minister F. Kishida, who admitted in 2021 that the process of digitisation of public administration

[34] Y. Honda, K. Itō, *Kokka ga Naze Kazoku ni Kanshō Suru no ka: Hōan, Seisaku no Haigo ni Aru Mono* (*Why Does the Nation Intervene in the Family?: A Contribution to Law and Politics*), Tokyo: Ao Yumi Sha Library, 2017, pp. 120–121.

[35] K. Anbo, *Kempō to Kazoku Hō: Fūfu Bessei sei o Daizai ni (Constitution and Family Law: About the Spouses' Separate Surnames System), "Hōsei Ronsō" 1999, 36 (1), pp. 68-81, T. Tomonaga, Kempō dai 24-jō to Kazoku Hō no Kadai (The Issue of Article 24 of the Constitution and Family Law)*, "Kogakkan Daigaku Nihongaku Rongyō" 2017, Vol. 7, pp. 163–184.

[36] Couples who had an identical surname before concluding marriage should be excluded from this statement.

[37] K. Yanagi (ed.), *Kazoku Hō* (*Family Law*), Tokyo: Saganoshoin, 2020 (4th ed.), p. 32.

still requires much attention from the cabinet,[38] one cannot deny that procedure of changing the surname is a severe administrative and legal issue significantly affecting private life.

3.3. EXPOSURE TO DISCRIMINATION ON THE GROUND OF MARITAL STATUS

Another negative consequence of maintaining the spouses' same surname system in Japanese Family Law is exposing people to discrimination based on their marital status and limited possibilities to protect the right to privacy. In Japanese society, there is a strong notion that a change of surname (most often by a woman for the reasons mentioned above) directly results from a change in marital status. Keeping important private events such as marriage from co-workers and other contractors is nearly impossible. Similarly, the lack of change of surname in a longer perspective, especially by young unmarried women, may indirectly prove that they do not have a husband. Thus, their marital status is known to everyone. J. Kuroda argues that people who change their surnames and those who do not change their surnames for a long time are equally exposed to unnecessary questions and comments about their private life. As for him, they often become victims of "unnecessary harassment" (いらぬハラスメント, Iranu harasumento).[39] While there is no guarantee of avoiding "unnecessary harassment" and protecting privacy in a system that allows spouses to bear separate surnames, it is much more difficult to deduce facts from another person's private life just by observing the changing or retaining its surname.

3.4. REFORM OF THE SYSTEM IN LINE WITH THE EVOLUTION OF PUBLIC VIEWS

As emphasised in research on the Japanese legal history, the adoption of the spouses' same surname system at the end of the 19th century and the decision to maintain it during the post-war reform of Family Law was motivated by the protection of traditional values and family unity. Although, in December 1947, the

[38] According to the official position of the Japanese Ministry of Internal Affairs and Communications (総務省, Sōmushō), due to the COVID-19 pandemic, the process of digitising public administration encountered problems at the fourth and final stage in 2020. See also: *Waga Kuni Dejitaruka Seisaku no Rekishi* (*History of Digitisation Policy in Our Country*), website of the Ministry of Internal Affairs and Communications: https://www.soumu.go.jp/johotsusintokei/whitepaper/ja/r03/html/nd101000.html, (accessed 1 June 2022).

[39] J. Kuroda, *Fūfu no Uji ni Kan Suru – Kōsatsu: Ko no Uji no Henkō o Chūshin ni* (*About the Surnames of Spouses – Divagations: Emphasis on the Aspect of Changing the Child's Surname*), "Kokushikan Hōgaku" 2018, Vol. 51, pp. 227-256.

Japanese Diet introduced formal equality between men and women concerning the choice of surnames after marriage as part of the democratisation and liberalisation of Family Law, due to conservative and patriarchal social relations, women are more often forced to adopt their husband's surname. Public surveys conducted regularly by public institutes and private entities show a clear upward trend in Japanese society in support of reforming the spouses' same surname system.

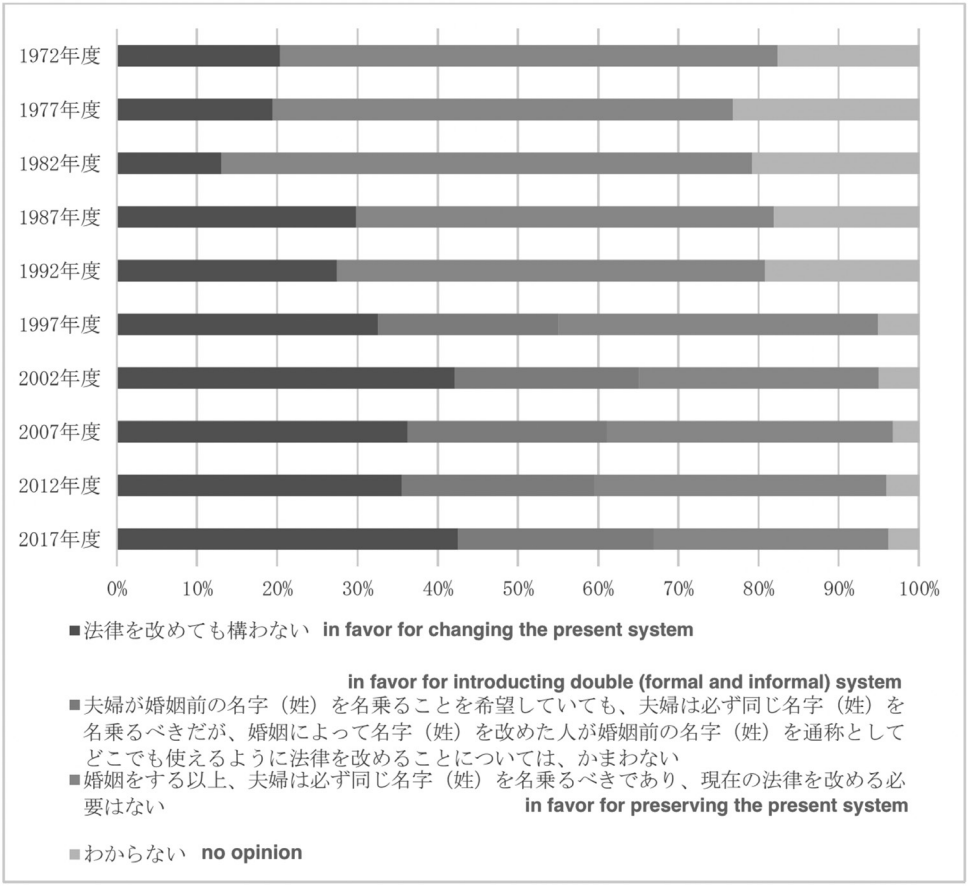

図１：夫婦別姓の法改正に関する意識の変化

（出典：内閣府「家族の法制に関する世論調査（各年版）」）

The results of public opinion polls conducted by the Japanese cabinet in 1972–2017 in support of the reform of the spouses' same surname system. Chart is based on: M. Kamiyama, Fūfu Bessei – Dōnyū e no Sampi to Seido Riyō Kibō no Kitei Yōin (Spouses' Separate Surname System – Main Premises for its Application and Arguments for and Against its Introduction), (in:) Tōhoku Daigakuin Kyōikugaku Kenkyūka (ed.), Tōhoku Daigaku Kyōiku Gakubu Kyōikugaku Jisshū Shakai Chōsa no Riron to Jissen Hōkokusho, Sendai 2019, pp. 66–74.

For example, the data provided by the cabinet for the period from 1972 to 2017 show a significant evolution of the views of the Japanese society. In 1972, about 60% of respondents believed that husband and wife should have the same surname, and only just over 20% of respondents supported the reform of the law towards a more individualised choice of surnames. Almost 20% of responses indicated the lack of a specific position or lack of interest in the subject. For comparison, in 2017: over 40% supported the reform of the spouses' surname system, and 25% believed that spouses should formally bear the same surname, but persons who changed their surname should be legally allowed to use their name before marriage in public and private spheres (a new category of answers, previously not indicated by the respondents), while about 30% of people believed that it was necessary to retain the spouses' same surname system. Less than 5% of responses indicated no clear position or interest in the discussed matter. The chart below presents in detail the data obtained in the years 1972-2017.

Data shows three significant trends in Japanese society. First, the support for a thorough reform of the current system doubled to over 40%, surpassing backing for maintaining the current provisions and becoming the dominant view. Secondly, in the mid-90s, many respondents started to support the spouses' same surname system in the formal sphere (e.g., marriage certificate, family register). Still, they advocated the use of a maiden name in everyday life. Despite their conservative attitude towards formal issues, these people certainly cannot be included among the supporters of the current system, as they see the need to revise Family Law to ensure greater freedom of using surnames. Thirdly, the share of respondents who had no opinion decreased by about five times, and at present, they do not have any influence on the position of other groups. The statistics also show that after more than 40 years of debate on the spouses' same surname issue, 95% of Japanese people can express one of three views.

The latest data from a cabinet survey published in late March 2022 by the public broadcaster NHK (日本放送協会, Nippon Hōsō Kyōkai) shows that 71% of respondents support a full or partial change to the current system, while only 27% are in favour of preserving it.[40] Therefore, the COVID-19 pandemic did not negatively affect the gradual liberalisation of the views of the Japanese on the spouses' surnames issue, and the majority of society expects the reform of the Family Law to be carried out at an unspecified date.

[40] NHK News, 25 March 2022, https://www3.nhk.or.jp/news/html/20220325/k10013551981000.html, (accessed 1 June 2022).

4. ARGUMENTS OF THE SPOUSES' SAME SURNAME SYSTEM SUPPORTERS

Having analysed the arguments of the spouses' same surname opponents, it is necessary to present the adversary position of the supporters of the current system. Because a few Japanese jurists decided to publish texts advocating Article 750 of the Mimpō, the arguments for retaining it can be found in public statements of politicians, press articles or online sources. The paper covers the most frequently raised legal, political and practical reasons for preserving the law enacted in 1947.

4.1. RESPECT FOR THE LEGAL TRADITION

Supporters of the current system claim that there is a deeply held belief in Japanese society that husband and wife should share the same surname. Although opinion polls show support for the reform of Article 750 of the Mimpō, they argue that it is the embodiment of over a hundred years of legal tradition (我が国の伝統文化, Waga kuni no dentō bunka) and one of the unique features of Japanese Family Law that distinguish it from the rest of the world. Indeed, the Meiji government broke the age-old tradition of the spouses' different surnames. Still, the spouses' same surname system had been in force since establishing the codified and unified legal system in Japan. The supporters' reasoning also includes the argument that if the legal tradition regarding the spouses' surname is analysed, one should not consider the duration of the particular system in the legal history but current society's views on what the tradition is. Thus, regardless of the historical and legal arguments, the broad public believes the spouses' same surname system is a Japanese custom.[41]

4.2. PROTECTING FAMILY TIES

According to the opponents of introducing the spouses' separate surname system, the reform of Article 750 will weaken the bond between husband and wife and, thus, the erosion of family values in Japanese society in a longer perspective. As they argue, the state's role is to support the family as the basic unit of society. The same surname of both spouses is the apparent evidence of a valid mar-

[41] The debate on the legal tradition concerning the surnames of spouses is presented (in:) K. Murakami, *Nihon Kindai Kazoku Hō Shiron* (*Debate on the History of Contemporary Japanese Family Law*), Tokyo: Hōritsu Bunkasha, 2020, pp. VI–X.

riage.[42] They also claim that using the same surname strengthens a marriage bond (夫婦の絆, Fūfu no kizuna) and a sense of unity in the family (家族の一体感, Kazoku no ittaikan) between a woman and a man. In contrast, using a separate surname promotes extreme individualism and a lack of more profound attachment to the spouse, who is treated only as a partner in a contract relationship. Still, the supporters of the current system do not condemn more progressive social views, as they often compare Japan to the People's Republic of China and South Korea. In both countries, spouses cannot bear the same surname, which proves to some Japanese legal scholars that their neighbours are stuck in the feudal family model.[43] Although there is no conclusive scientific evidence confirming a stronger family bond between spouses bearing the same surname than those with a separate surname, this argument is being used by Japanese right-wing politicians as the main advantage of Article 750 of the Mimpō.[44]

4.3. PROTECTING THE CHILD'S BEST INTERESTS

A consequence of the spouses' same surname system in Japanese Family Law is the shared surname of both parents and children born in the marriage. According to supporters of this solution, it positively affects the sense of unity within the family and the child's equal identification with the mother and father. Defenders of the current system claim that although Article 750 of the Mimpō refers to the surname of the spouses, it is also a guarantee of the implementation of the child's best interest principle (子の利益, Ko no rieki). This view is mainly based on the belief that the separate surname of the child and one of the parents may negatively influence the child.[45] For example, during the maturation process and in contact with peers, the child might not feel belonging to the commonly accepted family model.

Similarly to claims about a stronger bond between spouses sharing the same surname, there is no scientific evidence confirming the negative impact of the separate surname of the child and one of the parents on the child's psychological development. Additionally, the spouses' same surname system makes children born outside of marriage have a surname that differs from one of the parents, which may expose them to unjustified discrimination due to the marital status of their parents. In contrast, if spouses were allowed to choose their surname freely,

[42] *Ibidem*, p. VI.

[43] Sentakuteki Fūfu Bessei Seido no Hōseika Hantai ni kansuru Chinjō (Petition Concerning Objection to the Introduction of the Spouses' Separate Surname System), Petition of the Tokyo Association for the Protection and Future of Japanese Children of 18 May 2011 to the Sumida District Council in Tokyo, https://www.city.sumida.lg.jp/kugikai/sinsa_report/seigan_chinjo/heiseinijyuninen.files/ chinjyou22-8.pdf, (accessed 3 June 2022).

[44] Opinions of some members of Parliament during their speeches in the Diet. See https://president.jp/articles/-/42857?page=4, (accessed 3 June 2022).

[45] K. Murakami, *op. cit.*, p. VI.

the separate surname of the child and one of the parents would be a social norm sanctioned by the law and thus would reduce the risk of discrimination.[46]

4.4. UNNECESSARY ADMINISTRATIVE AND LEGAL PROCEDURES

Supporters of the spouses' same surname system also argue that couples with separate surnames must consider numerous administrative and legal issues arising after the Family Law reform. These include situations where it will be necessary to prove the marriage or kinship with a child to a public authority or other institution. They mention such examples as obtaining information about the spouse's health (protection of sensitive personal data and personal data in general), applying for a loan or a loan requiring the consent of the spouse (protection against over-credit) and going abroad with a child with a different surname (protection against the abduction of a minor). Since Japanese citizens and residents are not required to have an identity document containing information about their family status or household affiliation (e.g., driving license, passport, residence card), only the public office can issue the document proving a marriage. However, the difficulties presented above are well-known in countries with spouses' separate or mixed surnames system. Japanese attorneys also indicate that the legislator may amend or introduce improvements to administrative procedures in advance.[47]

5. THE DECISIONS OF THE SUPREME COURT

The spouses' same surname issue was also analysed by the Japanese Supreme Court (最高裁判所, Saikō Saibansho), which delivered several decisions on this matter. Even though the system was introduced in the late 19th century and then reformed in 1947, it did not become the subject of judicial complaints until the 1990s. This was directly related to the refusals of the local offices to accept the Notification of Marriage containing information about the spouses' separate surnames. As previously mentioned, the consequence of not submitting the Notice is the nullity of marriage. Couples wishing to conclude a valid marriage and keep their surnames appealed against the decisions of local offices and exhausted the court procedure in lower courts. Thus, the Supreme Court analysed twice the

[46] Statements of Japanese children about their personal experiences regarding questions about parents' separate surnames, published by the newspaper "Asahi", https://www.asahi.com/articles/ASP3M4DJHP31DIFI006.html, (accessed 3 June 2022).

[47] Advocate Y. Hayashi's article on the advantages and disadvantages of the spouses' separate surname system. https://www.adire.jp/lega-life-lab/disadvantages-of-surnames-by-couple356/#l-wptoc5, (accessed 6 June 2022).

spouses' same surname system and its conformity to the Constitution of Japan in 2015 and 2021.

The first of the judgments (ref. number 1023 of 2014) concerned an action brought by five couples seeking damages related to the violation of personal rights in connection with the non-compliance of Article 750 of the Mimpō with Article 13, Article 14 Section 1 and Article 24 Section 1 of the Constitution of Japan. The decision was delivered by the full sitting of fifteen judges on 16 December 2015 and found that the questioned provision of Family Law was not unconstitutional. A separate vote supporting the claim of the discriminatory nature of the prohibition on having different surnames was presented by five judges. In the justification of the judgment, it was indicated that the spouses' same surname system aims to establish a family composed of a married couple and children, according to generally accepted social standards (社会の構成要素である家族, Shakai no kōseiyōsei dearu kazoku). The Supreme Court also referred to protecting the principle of the children's welfare, who should have the same surname as both parents. Judges, however, recognised a different way of thinking of people with a strong sense of being an individual despite being natural persons who make up a family and thus a specific group distinguished by the same surname. Judge Itsurō Terada also submitted a supplementary opinion that there is already an informal but widely accepted custom of using a maiden name by women in everyday life in Japan. Although the initial claim was rejected, it was repeatedly emphasised that the system of separate names was not recognised as an institution without rationale. After all, the Supreme Court expressed a safe stance that introducing the spouses' separate surname system has not been debated in the parliament. Therefore, the legislative body should be responsible for analysing and changing it.[48]

In the second judgment (special appeal number 102 of 2020, 特別抗告, tokubestu kōkoku), the Supreme Court upheld the position of the lower court. It rejected the claim for compensation for damages caused by the local government, which did not recognise the spouses' separate surnames. The verdict was delivered by the entire sitting of fifteen judges on 23 June 2021 and stated that the questioned provision of Family Law was not contrary to Article 14 Paragraph 1, Article 24 and Article 98 Section 2 of the Constitution. The decision followed a claim by three Japanese *de facto* married couples over the Tachikawa City Office's (one of Tokyo's wards) rejection of registration of marriages in which spouses had different surnames. In the justification, the Supreme Court stated that although it is aware of societal changes regarding the spouses' surname issue, there are insufficient grounds for changing the decision from 2015. Four judges

[48] Heisei 26-nen Dai 1023-gō Songai Baishō Seikyū Jiken; Heisei 27-nen 12-gatsu 16-nichi Daihōtei hanketsu (Case concerning the claim for damages No. 1023 of the 26th year of Heisei era [2014]; Judgment of the full membership [Supreme Court] of 16 December 2015), https://www.courts.go.jp/app/files/hanrei_jp/546/085546_hanrei.pdf (accessed 6 June 2022).

disagreed with this interpretation and expressed the opinion that Article 750 of the Mimpō is inconsistent with the Constitution of Japan. The Supreme Court once again stressed that the criticism of the spouses' same surname issue is more political than legal and should be discussed in parliament. Despite rejecting the claim, the judges also stated that the latest judgment should not be treated as imperative to retain Article 750 of the Mimpō, as there are no legal obstacles to introducing married couples' separate system in the future.[49]

The Supreme Court judgments of 2015 and 2021 disappointed critics of the current surname system of spouses, who expected support from the Japanese judiciary to protect individual rights guaranteed by the Constitution. Looking through the prism of the lawsuits, the persons challenging the actions of local governments did not change their previous surnames. They decided to live in a *de facto* marriage, which differs significantly in rights and responsibilities from a valid marriage regulated by the Civil Code. In the current situation, however, it has become apparent that the parliament has the most significant influence on revising the system, which is unfavourable for many couples. In practice, the ruling Liberal Democratic Party (自由民主党, Jiyūminshu-tō), which has had the majority in the House of Representatives for more than 10 years, may independently reform Family Law.

6. PROSPECTS FOR CHANGE

Although in recent years, the Supreme Court has indicated in its judgments that the spouses' same surname system is not a legal issue that needs to be solved through legislative action, the debate on this matter within the legislature began almost 30 years ago. Already in February 1996, the Legislative Committee (法制審議会, Hōsei Shingikai), during its general meeting, presented the "Outline on Civil Code Partial Amendment" (民法の一部を改正す る法律案要綱, Mimpō no Ichibu o Kaisei suru Hōritsuan Yokō). In the third section (entitled "Surnames of spouses"), paragraph one, the Committee suggested reforming Article 750 of the Mimpō and allowing the spouses to have the same surname or keep their surname held before the marriage. The second paragraph also dealt with the child's surname, born in a family whose parents had separate surnames. The

[49] Reiwa 2-nen Dai 102-gō Shichocho Shobun Fukoku Mōshitate Kyakkan Shimpan ni Tai Suru Kōkoku Kikyaku Kettei ni Tai Suru Tokubetsu Kōkoku Jiken; Reiwa 3-nen 6-gatsu 23-nichi Daihōtei kettei (Case Concerning the Rejection of a Special Appeal of a Judgment Dismissing a Complaint Against the Action of a Local Government Office; Judgment of the Full Sitting [Supreme Court] of 23 June 2021), https://www.courts.go.jp/app/files/hanrei_jp/412/090412_hanrei.pdf (accessed 6 June 2022).

Commission recommended introducing a provision requiring spouses to decide on the child's surname when concluding a marriage. This would be limited to two options – the husband's or the wife's surname. Paragraph four described the plan to amend the provisions on surnames of illegitimate children, adopted children and changing the child's surname, yet the article does not present these proposals.

Additionally, the report contained essential provisions in paragraph twelve, section two, in which the transitional issues regarding the potential reform of Family Law were described. In the first point, the Committee proposed introducing the option to return to the family name of the spouse who changed it because of a marriage. However, this right was limited by four conditions – remaining in a valid marriage, obtaining the spouse's consent and submitting a notification with the declaration to return to the old surname to the local government within one year of the entry into force of the Family Law amendments. The second point stated that the return to the surname before the marriage was possible only through the requirements set by the Civil Code and the Family Registry Law, i.e., submitted as an additional notification after concluding a marriage. The third point regulated the issue of the child's surname, which was identical to a decision to return to a surname before the marriage.[50]

The proposal presented above was the first and the last comprehensive project to revise the spouses' same surname system. Since then, no Japanese government has decided to discuss it in parliament, and the outline has not been submitted to the legislative procedure. According to some Japanese scholars, the government's reluctance resulted from too low public support for introducing the spouses' separate surname system and the fear of strong opposition within the party's conservative wing.[51] It was also believed that there was no need to reform Family Law since the pressure from critics of the existing system would be alleviated by the custom of the unrestricted use of the surname before the marriage (especially the women's maiden name) in everyday life.[52] Whilst an upward trend in using the maiden name by women in unofficial situations has been noticed since the 1990s, many couples still want to have the guarantee of keeping their surnames and concluding a valid marriage.

In 2010, the Japanese Ministry of Justice conducted a study across nineteen legal systems, finding that three distinct groups of states allow spouses to have separate surnames.[53] The first of them, including the United States (based on the

[50] Mimpō no Ichibu o Kaisei Suru Hōritsuan Yokō, Hōsei Shingikai Sōkai Kettei, Heisei 8-nen, 2-gatsu, 26-nichi (Outline of the Civil Code Partial Amendment, Recommendation of the Legislative Committee General Assembly, 26 February 8th year of the Heisei era [1996], https://www.moj.go.jp/shingi1/shingi_960226-1.html, (accessed 6 June 2022).

[51] M. Kamiyama, *op. cit.*, p. 66.

[52] J. Kuroda, *op. cit.*, p. 229.

[53] The subject of the study were the legal systems of the following countries: the United States (Illinois, New York, California, Hawaii, Louisiana), Argentina, Great Britain, Israel, Italy, India,

state of New York), the United Kingdom, Germany and Russia, were systems recognising the option of spouses' separate surnames. The second, including Canada (based on Quebec), South Korea, the People's Republic of China and France, were systems with separate spouses' surnames as the main principle. The third, including Italy, was the system allowing a wife to have a double-barrelled surname, regardless of the husband's surname.[54] The survey also found that Japan was the only country which required spouses to choose the same surname.[55]

Notwithstanding the Legislative Committee's Family Law revision proposal from 1996 and the Ministry of Justice research from 2010, the Japanese government has made no official declarations to reform the spouses' same surname system. Although the Supreme Court has recently expressed the view that endorsed the discussion on the issue in parliament, the debate was postponed under the pretext of overcoming the effects of the COVID-19 pandemic. However, the spouses' same surname issue remains a fundamental problem for Japanese couples, as evidenced by recent events. On 13 June 2022, Chiyoda Ward Office refused to register the marriage of two famous Japanese film producers, Kiyoko Kashiwagi and Kazuhiro Soda. They married in the United States in 1997 and submitted the Notice of Marriage with two different surnames, which they used abroad.[56] Whether the couple intends to appeal against the local government's decision is unknown. Still, their experiences remind Japanese politicians that the discussion on reforming the spouses' surname system was not terminated due to the Supreme Court's judgment in June last year.

7. CONCLUSION

The article presented that the spouses' same surname system in Japanese Family Law is an important legal, political and social issue, which remains an entirely open question and heavily depends on the government's action. Despite the introduction of formal equality of men and women in Family Law in 1947, also in the scope of the choice of surnames, Article 750 of the Mimpō has an unequivocally discriminatory effect, as it indirectly forces Japanese women to take their husband's surname under the pretext of protecting family ties and legal tradition. The constitutional examination of the Civil Code and the Family Registry Law

Australia, the Netherlands, Canada (Quebec and British Columbia), South Korea, Saudi Arabia, Switzerland, Sweden, Thailand, Spain, People's Republic of China, Germany, Turkey and France.

[54] Poland has a spouses' hybrid surname system, but the Japanese government did not analyse its legal system.

[55] The website of the Ministry of Justice regarding the spouses' surname system in Japan: https://www.moj.go.jp/MINJI/minji36.html (accessed 6 June 2022).

[56] https://www.nippon.com/en/news/kd908968699080638464 (accessed 16 June 2022).

norms did not bring a favourable solution for critics of the current system, mainly because the Supreme Court did not want to take any side in the dispute which was considered a political problem. According to the latest opinion surveys, majority of the Japanese society expects a revision of the spouses' same surname system shortly. Additionally, one cannot deny that the support for the reform will likely grow over time. The Japanese government, formed for many years by the conservative Liberal Democratic Party, has traditionally avoided commitments to prevent criticism of its right-wing electorate. This tactic, effective in the 1990s, may soon become dire.

The discussion on the spouses' same surname system also has undisputed positive aspects. Despite unofficial support for the current system, the Japanese Ministry of Justice provides reliable data and educates society about this issue. Once the information platform was launched, citizens could read about legal provisions, history, public opinion polls, proposed changes and court judgments regarding Japan's spouses' surname system. After reading the platform, one can also have the impression that the cabinet is trying to explain to the more conservative part of Japanese society that the introduction of the married couple's separate surname system will not result in the removal of the spouses' same surname option. Equally important, it wants to clarify that couples with separate surnames will not have fewer rights compared to those with the same surname. The only drawback of the Ministry of Justice platform is that it has not been updated recently and does not mention the Supreme Court's decision of June 2021.[57]

Finally, while anticipating the reform of Japanese Family Law, I am tempted to say that if Article 750 of the Mimpō were revised in the future, the spouses could choose the same surname (per the current system) or retain their surnames before the marriage. This solution will be consistent with the proposal presented in 1996. No voices suggested considering other options, such as introducing double-barrelled surnames. Indeed, they have been used for years in many countries and appear to be an attractive alternative. However, double-barrelled surnames would also be a significant issue since the Japanese have never used them. Therefore, the potential change different from the proposal of 1996 would require a much broader interference with Japanese law and culture, which certainly would not help to efficiently reform the current system soon.

[57] Sentakuteki Fūfu Betsuuji Seido (Iwayuru Sentakuteki Fūfu Bessei Seido) ni tsuite (About the Spouses' Separate Surname System), https://www.moj.go.jp/MINJI/minji36.html (accessed 14 June 2022).

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Jakub Pietrzak
University of Warsaw, Poland
e-mail: j.pietrzak10@uw.edu.pl
ORCID: 0000-0001-6900-1640

VERIFIABILITY OF LAND DEEDS ISSUED UNDER THE LAW OF 26 OCTOBER 1971 ON THE REGULATION OF OWNERSHIP OF FARMS

Abstract

On 4 November 1971, the Law of 26 October 1971 on the regulation of ownership of farms came into force. It was a one-time piece of legislation aimed at finally regulating the informal trade in agricultural real estate. Despite its incidental effect, the enfranchisement carried out over 50 years ago has had legal effects that are still relevant. The document confirming the ownership of property acquired as a result of enfranchisement is the land title deed, which is an administrative decision. The article aims to provide an overview of the possibility of verifying land title deeds in administrative and civil proceedings.

KEYWORDS

enfranchisement, agricultural real estate, land deed

SŁOWA KLUCZOWE

uwłaszczenie, nieruchomości rolne, akt własności ziemi

I. INTRODUCTION

The issue of proper regulation of the property of individual farms did not see adequate legislative solutions in Poland until 1971.[1] Until then, many holders of agricultural property who actually wielded it as owners and at the same time carried out agricultural work on the land were not owners in the eyes of the law. J. Paliwoda points out the following reasons for this situation:

a) legal restrictions on land circulation in the interwar period and after World War II,
b) restrictions and difficulties in making real estate transactions introduced during the occupation,
c) the high cost of transferring ownership of agricultural property,
d) customs and traditions prevailing in some regions of the country, where either agricultural properties were taken into possession as a result of *de facto* inheritance divisions, without caring about the formal transfer of ownership, or the fact that agricultural properties were acquired under private contracts from sellers without formal proof of ownership,
e) keeping land records according to actual ownership (as allowed by the tax law), which constituted, in the eyes of farmers, an official acceptance of informal land dealing.[2]

Informal trade in agricultural property was confirmed by official data. In 1960, 117,847 sale and donation contracts were registered, in 1963 – 91,574, in 1967 – 55,603, and in 1969 – 53,894.[3] On 26 October 1971, the Sejm of the People's Republic of Poland passed a law on the regulation of the ownership of farms.[4] It entered into force on the date of promulgation, which was on 4 November 1971. As H. Ciepła points out, the enfranchisement law was intended to comprehensively regulate the existing discrepancy between the state of ownership and the state of possession and in order to provide a universal solution.[5] It covered about 2.3 million farms.[6]

[1] J. Paliwoda, *Problemy prawne uregulowania własności gospodarstw rolnych*, Wrocław 1975, p. 9.

[2] *Ibidem*, pp. 9-10.

[3] E. Spirydowicz, M. Rutkowski, *Nowe ustawy rolne*, Warszawa 1972, pp. 11-12.

[4] Act of 26 October 1971 on the regulation of ownership of farms (Journal of Laws of 1971, Art. 27 item 250); hereinafter referred to as the "Enfranchisement Law".

[5] H. Ciepła, *Prawne skutki uregulowania własności gospodarstw rolnych*, Warszawa 1982, p. 163.

[6] J. Kłopotowski, Regulacja własności gospodarstw rolnych, *Gospodarka i Administracja Terenowa* 1972, iss. 5.

The basic premise of the Enfranchisement Law was that the owners of agricultural property were to be those farmers who actually farmed on it.[7] Its provisions refer to the state of affairs existing on the date of its entry into force, i.e. 4 November 1971. The acquisition of ownership of real estate and the legal consequences associated with it occurred on that very date. The exception to this is Article 2 item 1 of the Enfranchisement Law (acquisition of property by dependent holders or the State), according to which it shall occur after the decision on the transfer of real estate is issued and becomes effective.[8]

The Enfranchisement Law provided for two modes of acquiring ownership of real estate. The first of these concerned autonomous holders and provided for the acquisition of ownership of real estate comprising farms as of the date of entry into force of the Enfranchisement Law by operation of law:

a) in the event that the estate is taken into possession on the basis of a contract of sale, exchange, donation, life annuity contract or any other contract for the transfer of ownership, for the abolition of co-ownership or a contract for the division of inheritance, concluded without the form prescribed by law;[9]
b) if the conditions of point a) did not apply, in the case of their uninterrupted possession for an extended period of time: 5 years if possession was obtained in good faith, or 10 years if possession was obtained in bad faith.[10]

The second mode of acquiring ownership of real estate concerned land on which no one had long been farming as an owner.[11] It provided for the possibility of transferring the land to the existing dependent holders or for the State to take them over.[12] If in the first mode, the acquisition of ownership occurred by operation of law and administrative decisions were only declaratory, then in the cases specified in the second mode, these decisions were to be constitutive and the date of legal validity of the decision determined the moment of acquisition of ownership by the dependent holder or the State.[13] Unlike the enfranchisement of autonomous holders, the enfranchisement of dependent holders or the seizure of real estate by the State was still subject to the fulfilment of additional conditions such as the absence of personal management of the land by the owner or members of his or her family and permanent employment in occupations other than farm labour.

Ruling on the determination of the acquisition of real estate by an autonomous holder and the transfer of real estate to the property of a former dependent

[7] M. Kuydowicz, T. Pajor, *Uregulowanie własności gospodarstw rolnych*, Warszawa 1974, p. 9

[8] *Ibidem*, p. 10.

[9] See Article 1, item 1 of the Enfranchisement Law.

[10] See Article 1, item 2 of the Enfranchisement Law.

[11] *Ibidem*, p. 10.

[12] See Article 2, item 1 of the Enfranchisement Law.

[13] H. Ciepła, *ibidem*, p. 65.

holder was transferred to the authority competent for agricultural affairs of the presidium of the district national council. Intricate or contentious cases could be referred to the county enfranchisement commission for consideration. The ruling followed an administrative procedure and culminated in the issuance of a land title deed (hereinafter "AWZ"), constituting an administrative decision. The provisions of the Code of Administrative Procedure applied to cases considered by the bodies for agricultural affairs of the presidiums of national councils and the enfranchisement commissions.[14] The final AWZ was the basis for disclosing the new ownership status in the Land and Mortgage Register.

The Enfranchisement Law was a one-time act and did not shape social relations for the future (except for Article 17).[15] According to the legislature, enfranchisement, due to its one-time nature, should be a short-lived action, which justified entrusting the implementation of the Enfranchisement Law to public administration bodies. This constituted an exception to the principle of deciding civil cases, which undoubtedly include property cases, in civil proceedings (Articles 1 and 2 of the Code of Civil Procedure[16]).

Despite the Enfranchisement Law coming into force more than 50 years ago, it has had quite a considerable impact on the circulation of agricultural property. There are still properties on the market for which the only proof of ownership is just an AWZ.[17] AWZs were issued until 5 April 1982. This was due to the repeal of the Enfranchisement Law by the Act of 26 March 1982 on amending the Civil Code and repealing the Act on the regulation of the ownership of farms.[18] During the implementation of the Enfranchisement Law, it turned out that there were too many problems in the cases, the solution of which posed difficulties for the administrative bodies, which led to the prolongation of the enfranchisement action.[19] As a result, the amendment law transferred the adjudication of real estate acquisition cases by an autonomous holder and for deferred payment of real estate acquisition claims to courts in non-trial proceedings. At the same time, the possibility of transferring cases involving the State's takeover of agricultural property on the basis of decisions issued under Article 2(1) of the Enfranchisement Law to the courts was excluded, as confirmed by the Supreme Court in its resolution of 14 February 1983, ref: III CZP 1/83.[20] The repeal law is still in effect today, making it possible to file petitions in ordinary courts to declare the acquisition of

[14] Law of 14 June 1960 – Code of Administrative Procedure (i.e. Journal of Laws of 2023, item 775).

[15] J. Paliwoda, *ibidem*, p. 38.

[16] Law of 17 November 1964 – Code of Civil Procedure (i.e. Journal of Laws of 2023, item 1550 as amended).

[17] A. Bieda, E. Jasińska, E. Preweda, *Znaczenie aktu własności ziemi w obrocie nieruchomości położonych na terenach wiejskich*, "Infrastruktura i Ekologia Terenów Wiejskich" 2010, iss. 12.

[18] Journal of Laws of 1982 No. 11, item 81, hereinafter referred to as the 1982 repeal law.

[19] Resolution of the Supreme Court of 30 June 1992, ref: III CZP 73/92.

[20] Resolution of the Supreme Court of 14 February 1983, ref: III CZP 1/83.

property by enfranchisement. When repealing the Enfranchisement Law, the legislature expressly stipulated that the acquisition of the right to ownership of real estate under it by operation of law remained in effect, regardless of whether it was established by the issuance of an AWZ by 5 April 1982, or whether the issuance of an AWZ did not occur.

The purpose of this article is to provide an overview of issues related to the possibility of verifying AWZs issued under the Enfranchisement Law under the provisions of the Code of Administrative Procedure and in civil proceedings. It should be emphasized that in the current state of the law, a statement of property acquisition made by a court or, until the repealing law entered into force, made by a local state administration body, is the sole evidence of property acquisition under the Enfranchisement Law (Article 10 of the 1982 repeal law). Due to the limited framework of the study, the issues related to the review of a court decision stating the acquisition of property by enfranchisement will not be discussed in this article.

II. VERIFIABILITY OF THE AWZ UNDER THE PROVISIONS OF THE CODE OF ADMINISTRATIVE PROCEDURE

The Enfranchisement Law itself already provided for an appeal path against AWZs issued at the first instance. A decision of the agricultural affairs authority, as well as a decision of the district enfranchisement commission, could be appealed to the provincial enfranchisement commission, whose decision was final. Since the provisions of the Code of Administrative Procedure applied to the proceedings, it was possible to use extraordinary legal remedies: a motion to reopen the enfranchisement proceedings; and a motion to revoke, amend and annul the AWZ. From the date of entry into force of the Act of 19 October 1991 on the management of agricultural property of the State Treasury,[21] i.e., 1 January 1992, the application of the provisions of the Code of Administrative Procedure on the resumption of proceedings, annulment and revocation or amendment of decisions was excluded to final AWZs issued under the Enfranchisement Act.[22]

The above exemption was the subject of three judgements of the Constitutional Court: the judgement of 22 February 2000, ref: SK 13/98[23], the judgement

[21] Law of 19 October 1991 on the management of agricultural property of the State Treasury (i.e. Journal of Laws of 2022, item 2329 as amended), hereinafter the Law on the management of agricultural property of the State Treasury.

[22] See: Article 63 item 2 of the Law on the management of agricultural property of the State Treasury.

[23] Journal of Laws of 2000, Article 15, item 203.

of 15 May ref: SK 29/99,[24] and the judgement of 10 June 2020, ref: K 11/18.[25] In the aforementioned judgements, the Constitutional Court recognized the compatibility of Article 63 item 2 and 3 of the Law on the management of agricultural property of the State Treasury with the Constitution of the Republic of Poland,[26] giving priority to the principle of permanence of final administrative decisions. The justification stressed that the persons concerned from the time the Enfranchisement Law came into force, and its subsequent repeal, until the entry into force of the Law on the management of agricultural property of the State Treasury had sufficient time to take appropriate legal steps. On the other hand, the principle of the rule of law does not imply the indefinite possibility of revoking final administrative decisions. Also, Article 77 of the Constitution of the Republic of Poland cannot be interpreted in a way that excludes the possibility of introducing time limits for taking to court cases that involve violations of individual rights or freedoms and for compensation for unlawful action by public authorities. The Court stressed that with regard to the persons concerned, who have not taken legal steps for the realization of their claims for many years, the legislator has the option of introducing a regulation that deprives them of the possibility of effective enforcement.

Thus, in the current state of the law, it is not possible to use the extraordinary remedies provided for in the Code of Administrative Proceedings. However, it must be emphasized that the exemption provided for in Article 63 item 2 of the Law on the management of agricultural property of the State Treasury does not include Article 113 § 1 of the Code of Administrative Proceeding concerning the correction of clerical and accounting errors and other obvious mistakes in relation to the AWZ.[27] The possibility of correcting them is not limited by any deadline.[28] The competent authority to adjudicate on the rectification of the AWZ is the municipal authority with jurisdiction according to the location of the property.[29] However, rectification is not a legal remedy. In the literature and jurisprudence, it is generally accepted that rectification cannot lead to a change in the decision. Thus, it is not permissible to rectify a decision that would lead to a redetermination of the case, different from the original one, to amend or supplement the decision.[30] Therefore, it is not permissible to rectify a ruling that would lead to

[24] Journal of Laws of 2000, Article 40, item 474.

[25] Journal of Laws of 2020, item 1047.

[26] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, Article 78, item 483, as amended), hereinafter referred to as the Constitution.

[27] Judgement of the Supreme Administrative Court of 21 March 1996, ref: II SA 432/95.

[28] Judgement of the Supreme Administrative Court of 29 June 1997, ref: IV SA 1015/97.

[29] Judgement of the Provincial Administrative Court in Warsaw of 29 March 2006, ref: IV SA/Wa 2403/05 and the judgement of the Provincial Administrative Court in Krakow of 4 February 2013, ref: III SA/Kr 1764/12.

[30] See: e.g. P. Przybysz, *Kodeks postępowania administracyjnego. Komentarz,* updated to Article 113 of the Code of Administrative Procedure, LEX/el. 2023, and the case law cited therein.

a redetermination of the case, different from the original one, to amend or supplement the ruling. Facts cannot be supplemented, previous findings changed and given a different meaning than before the rectification.[31] Under the rectification procedure, it is not possible to correct a substantive error as an obvious mistake.[32]

The AWZ itself is an administrative decision that is very poor in content and usually contains a brief statement of reasons. The AWZ indicates the person in whose favour the enfranchisement took place, along with the determination of the property, the area of the property, the amount, method and timing of repayments or refers to the exemption from the obligation to repay debts, and in the case provided for in Article 8 of the Enfranchisement Law, the creation of a life annuity right. The above-mentioned content of the AWZ was explicitly indicated by the legislator in Article 12 item 1 and 2 of the Enfranchisement Law and, as a result, it constitutes substantive content that cannot be corrected. Consequently, the erroneous plot number assigned only in the AWZ, where it was given correctly in the administrative file, cannot be changed by way of rectification, despite the lack of need to change the factual findings. A defective area of plots of land,[33] or a change of fractional parts disposed of by persons indicated in the AWZ[34] is also not subject to amendment by way of rectification.

Through rectification, of course, the person in whose favour the enfranchisement took place cannot be changed. However, the AWZ includes not only the names of these individuals, but also their parents' names, place of residence, or date of birth. Case law recognizes that it is permissible to correct a mistake in the sequence of names of the person in whose favour the enfranchisement took place,[35] however, in another state of facts, such a correction could be inadmissible. The rectification must not cause a situation in which there is doubt about the person who was covered by the AWZ. Given that the enfranchisement was mainly related to family and neighbourhood relations, there may be such facts the rectification of which, for example, the name (or surname) of the parents or one letter in the surname, would involve a change in the addressee of the decision, which is inadmissible in the rectification procedure.

[31] Judgement of the Supreme Administrative Court of 24 September 2009, ref. II OSK 1439/08.

[32] Judgement of the Supreme Administrative Court of 24 September 1999, ref. IV SA 1184/97, judgement of the Supreme Administrative Court of 25 October 1999, ref: II SA 1662/99.

[33] Judgement of the Provincial Administrative Court in Warsaw of 29 March 2006, ref: IV SA/Wa 2403/05.

[34] Judgement of the Provincial Administrative Court in Krakow of 4 December 2013, ref: III SA/Kr 354/13.

[35] Judgement of the Provincial Administrative Court in Krakow of 4 February 2013, ref: III SA/Kr 1764/12.

III. VERIFIABILITY OF AWZ IN CIVIL PROCEEDINGS

In view of the fact that Article 63 item 2 of the Law on the management of agricultural property of the State Treasury prevents the application of the provisions of the Code of Administrative Procedure on extraordinary remedies to AWZs, a doubt has arisen as to whether this provision opens up a judicial path to requesting the annulment of AWZs. This view could be justified by the fact that cases of ownership (among other things, to declare the acquisition of property) should be classified as civil law settlements, which should be handled under Articles 1 and 2 of the Code of Civil Procedure in civil proceedings. This issue was finally resolved by the Supreme Court in a resolution of 30 June 1992,[36] indicating that the entry into force of Article 63 of the Law on the management of agricultural property of the State Treasury does not open the judicial path to request the annulment of an AWZ. In its rationale, the Supreme Court said that allowing courts to hear cases of AWZ invalidation would mean allowing judicial review of administrative decisions and the possibility of courts ruling differently from what public administration bodies have ruled.[37] Due to the principle of the division of powers between the courts and the public administration as well as the principle that courts are allowed to review administrative decisions only in cases and in the manner provided by law, review of AWZs would only be possible if there was explicit legislation on the subject.[38] In contrast, Article 63 of the Law on the management of agricultural property of the State Treasury does not contain a provision extending the jurisdiction of common courts to review AWZs. Moreover, in view of the deletion by Article 63 item 1 of the Law on the management of agricultural property of the State Treasury of Article 8 item 4 of the 1982 repeal law, which provided for the transfer to the courts of cases in which an AWZ was revoked or declared invalid, the Supreme Court saw a limitation on the jurisdiction of the courts to review AWZs.

The entry into force of Article 63 of the Law on the management of agricultural property of the State Treasury also excluded the possibility of refusing entry on the grounds that the final AWZ was issued in violation of the provisions of

[36] Resolution of the Supreme Court of 30 June 1992, ref: III CZP 73/92.

[37] Also, the judgement of the Supreme Court of 6 November 1985, ref: III CRN 347/85. In the justification of the judgement, the Supreme Court stated that an application filed after 5 April 1982, to declare the acquisition of property by an autonomous holder on the basis of the Enfranchisement Law is subject to rejection on the grounds that the court route is inadmissible, if the proceedings on the acquisition of property were completed before 6 April 1982 (the date of entry into force of the 1982 repeal law) by a final decision of a local state administration body.

[38] An example of such a provision is Article 8, item 2 of the 1982 repeal law, according to which appeals against an AWZ issued by a territorial primary state administration body in the cases specified in item 1 above shall be forwarded to the competent courts as the second instance in those cases.

the Enfranchisement Law in the Land and Mortgage Register proceedings.[39] It should be emphasized, however, that the exclusion by Article 63 of the Law on the management of agricultural property of the State Treasury of the possibility of application of extraordinary remedies by the Code of Administrative Procedure does not mean that, when deciding a civil case, the court is not authorized to subject an AWZ to legal evaluation due to its subject matter. Without entering into the legitimacy of the AWZ, the court has the power to assess what legal effects the acquisition of real estate by enfranchisement has, among other things, in the sphere of marital property relations.[40] The binding legal force of an administrative act comes down to that area of relations that the administrative body is statutorily appointed to regulate.[41] On the other hand, the adjudication of whether the enfranchised object became part of the spouses' joint property or a separate property of one of the spouses was beyond the cognizance of the authorities issuing the AWZ.

Since the Supreme Court has prejudged the inadmissibility of the judicial route in cases of annulment of the AWZ, it is necessary to consider whether there is a possibility of reviewing the AWZ under Article 10 item 1 of the Land and Mortgage Register Law of 6 July 1982.[42] According to the above-mentioned provision, in the event of a discrepancy between the legal status of a property disclosed in the Land and Mortgage Register and the actual legal status, a person whose right has not been recorded or has been erroneously recorded, or has been affected by the recording of a non-existent encumbrance or restriction, may demand the elimination of the discrepancy. It is accepted in case law that proceedings for reconciliation of the state of the land register with the actual state of the law cannot replace other civil cases, such as those for acquisitions or enfranchisement.[43] As a result, in these proceedings, the court cannot examine whether the interested party acquired ownership of the property on the basis of the Enfranchisement Law, making it necessary to conduct a separate enfranchisement proceeding based on Article 4 of the 1982 repeal law. This thesis is also supported by the wording of Article 10 of the 1982 repeal law, according to which the declaration of acquisition of ownership of real estate made by a court or, until the date of the entry into force of this law, made by a local state administration body, is the sole evidence of the acquisition of ownership of real estate on the basis of the Enfranchisement Law.

[39] Resolution of the Supreme Court of 28 January 1993, ref: III CZP 167/92.

[40] Judgement of the Supreme Court of 21 May 1999, ref: III CKN 244/98.

[41] *Ibidem*.

[42] Law of 6 July 1982 on Land and Mortgage Registers (i.e. Journal of Laws of 2023, item 146, as amended), hereinafter referred to as the Land Records and Mortgage Law.

[43] Judgement of the Supreme Court of 21 March 2013, ref. III CZP 4/13, judgement of the Supreme Court of 27 June 2001, ref. II CKN 413/00, judgement of the Supreme Court of 8 June 2005, ref: I CK 701/04.

In proceedings based on Article 10 item 1 of the Land and Mortgage Law, the court is bound by the final administrative decision (both constitutive and declaratory), by which it cannot issue a ruling that would undermine the decision.[44] Importantly, the court has the authority to examine in these proceedings whether the administrative decision is final and valid.[45] If the administrative decision was not properly served on one of the parties to the proceedings, any determination of finality by the administrative body would be erroneous. However, in the case of AWZ, this rule does not apply. In a resolution of 18 May 1994, the Supreme Court clarified that after the entry into force of Article 63 of the Law on the management of agricultural property of the State Treasury, the court is bound by the AWZ if it has been declared final by a competent administrative authority.[46] This conclusion is drawn from the second sentence of Article 8 item 2 of the 1982 repeal law, according to which the provisions of the Code of Administrative Procedure apply to the proceedings before an appeal is transferred to the competent court as to the time limit for filing an appeal, the grounds and the form. Thus, since the legislature left the preliminary examination to the administrative body, one cannot conclude from such regulation that it delegated to the court the assessment of whether the recognition of the AWZ as final was correct. Due to the continued applicability of Article 8 item 2 of the 1982 repeal law, it would be possible for the court to hear the appeal if a hitherto pending appeal against the AWZ were now found in the case file.[47]

Both in the doctrine of administrative law and in case law, it is unanimously accepted that the omission of the participation of a certain entity as a party in the administrative proceedings and the delivery of the decision to the latter of the parties to the proceedings (if more than one entity is a party) results in the decision being considered final.[48] According to this position, after the expiration of the deadline for the decision to become final, a party to the administrative proceedings not involved in them is only entitled to a request for the resumption of proceedings under Article 145 item 1.4 of the Code of Administrative Procedure.[49] While the legal consequences of incorrectly serving an administrative decision on one of the parties to the proceedings do not amount to a complete disregard of the participation of a certain entity in the proceedings as a party, with regard to the AWZ this distinction is irrelevant. This is due to the inadmissibility of review-

[44] T. Czech, *Księgi wieczyste i hipoteka. Komentarz. Tom I. Księgi wieczyste, Komentarz do art. 10*, LEX el. 2022, thesis 160.

[45] Judgement of the Supreme Court of 7 April 1999, ref: I CKN 1079/97.

[46] Resolution of the Supreme Court of 18 May 1994, ref: III CZP 69/94.

[47] *Ibidem*.

[48] Judgement of the Supreme Court of 21 March 2013, ref: III CZP 4/13, and the case law cited therein.

[49] Judgement of the Supreme Administrative Court of 16 July 2002, ref: II SA 2230/00.

ing the AWZ from the point of view of its finality (see Supreme Court resolution of 18 May 1994, ref: III CZP 69/94).

An exception to the principle that a court is bound by a final administrative decision has been developed in case law based on the concept of absolute invalidity of administrative decisions. It is understood that the court is not bound by decisions with such significant defects that they must be considered invalid, even if this defect was not found in the administrative proceedings.[50] In the justification of the Supreme Court resolution of 9 October 2007, ref: III CZP 46/07, it was pointed out that for several decades the view has remained unchanged that an administrative decision cannot have legal effects despite its formal non-repeal if it suffers from defects that compromise its essence as an administrative act.[51] Such defects included the absence of an authority appointed to rule on a particular matter, the failure to apply any procedure or a clear violation of the rules of administrative procedure, the Supreme Court said. The burden of proof that an administrative decision is vitiated by a defect of absolute invalidity rests with the person who derives legal consequences from this fact. Consequently, if an AWZ contains qualified defects detrimental to the essence of the administrative act, the court will not be bound by it.

Special attention should be paid here to the Supreme Court resolution of 11 March 1994, ref: III CZP 18/94, decided on the basis of a case for reconciliation of the content of the land register with the real state of the law, in which there were two mutually exclusive AWZs.[52] According to the Supreme Court, the exclusion of the admissibility of the revocation of final AWZs also includes situations in which the administrative body has issued two decisions on different dates regarding the same subject of enfranchisement, in favour of two different persons. However, the property dispute that has arisen between these persons shall be resolved by the ordinary court in the proceedings in which its resolution is necessary to settle the case. In the justification for the resolution, the Supreme Court noted that due to the content of Article 10 of the 1982 repeal law, the resolution of the legal issue requires the intervention of the legislature, which would mean that the question of property ownership could not be resolved until an indefinite future date. According to the Supreme Court, in a situation where two different persons have AZWs stating that each of them has acquired ownership of the same property, there is a dispute as to the person of the owner, which must be resolved by the court (Articles 1 and 2 of the Code of Civil Procedure). There shall be no such dispute over ownership when the AWZ is legitimized by only one of the parties, while the other party questions the correctness of the decision. In such a case, the administrative decision, which is not subject to judicial review, is decisive for deciding the case. If the AWZs state mutually exclusive circumstances, there is no

[50] T. Czech, *op. cit*., thesis 163 and 164.

[51] Resolution of the Supreme Court of 9 October 2007, ref. III CZP 46/07.

[52] Resolution of the Supreme Court of 11 March 1994, ref: III CZP 18/94.

basis for assuming that the question of ownership was resolved by an administrative body by a decision not subject to judicial review. Refusal to settle a property dispute would violate Article 14 of the International Covenant on Civil and Political Rights[53] and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[54] which provide that every person has the right to have his or her civil case heard by an independent and impartial court. Under the concept of proceedings in which the resolution of the dispute is necessary for the resolution of the case, the Supreme Court listed cases for reconciliation of the content of the land register with the real state of the law, for eviction from real estate, or for the division of inheritance (however, this enumeration is exemplary). Mutually exclusive AWZs shall be treated as official documents within the meaning of Article 244 item 1 of the Code of Civil Procedure, i.e. as documentary evidence subject to the court's free evaluation (Article 233 item 1 of the Code of Civil Procedure). In such a situation, the AWZs cannot be considered sufficient evidence to assume that the case has been clarified to a firm conclusion. This entails the court's obligation to take further evidence to determine the actual facts of the case, taking into account the contents of the Enfranchisement Law and the status as of 4 November 1971.

In the case law of the Supreme Court, the prevailing view is that an AWZ issued under Article 1 of the Enfranchisement Law constitutes a decision confirming the acquisition of property by operation of law. The declaratory nature of this decision determines that in court proceedings such an AWZ is treated like other official documents within the meaning of Article 244 item 1 of the Code of Civil Procedure.[55] Thus, it is possible and permissible to challenge their veracity as an official document in accordance with the Code of Civil Procedure. In a case decided by the Supreme Court in a judgement of 20 July 2005, ref: II CK 3/05, there was a challenge to the AWZ issued under Article 1 of the Enfranchisement Law. In the facts of the case, the AWZ issued on 30 May 1974 stated the acquisition of the property by the spouses. However, due to its declaratory nature, it could have not, in fact, constituted a confirmation of the acquisition of property jointly by the spouses, since they entered into marriage on 23 February 1974. Thus, they could not have acquired property under the Enfranchisement Law, which regulated possession as of 4 November 1971. Neither could the administrative authorities issuing the AWZs have made binding decisions on the question of whether the acquired property was part of the spouses' joint

[53] International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966 (Journal of Laws of 1977, Article 38, item 167).

[54] Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1933, Article 61 item 284).

[55] Judgements of the Supreme Court of 20 July 2005, ref: II CK 3/05, of 30 November 2004, ref: IV CK 26/04, of 5 September 2001, ref: I CKN 399/09.

property or part of the separate property of one of them, since these questions did not fall within the jurisdiction of the authorities specified in Article 12 of the Enfranchisement Law.[56]

IV. SUMMARY

It follows from the above considerations that verification of AWZs in the current state of the law is possible only in civil proceedings, under quite extraordinary circumstances. The civil court was not given the authority to eliminate the AWZ from the legal transactions. As a rule, the civil court is bound by the contents of the final AWZ. The possibility for the court to deviate from the content of the AWZ occurs mainly with:

a) evaluation in evidence of the AWZ being declaratory as an official document,
b) applying the concept of absolute invalidity of administrative decisions,
c) the existence of two or more AWZs that are mutually exclusive.

It should be noted, however, that Article 63 of the Law on the management of agricultural property of the State Treasury, which prohibits the application of extraordinary remedies to AWZs provided for in the Code of Administrative Procedure, despite being examined three times by the Constitutional Court, has not been eliminated from the legal order. More than 50 years have passed since the enactment of the Enfranchisement Law, and those concerned have had adequate time to take legal action. Priority has been given to the principle of permanence of final administrative decisions over the protection of individual interests of individuals. Thus, individuals should not delay in duly defending their rights, as prolonged inaction may result in deprivation of the opportunity to effectively pursue their claims. Also, it must be borne in mind that nowadays granting the possibility of verifying decisions in which the state of possession as of 4 November 1971 was crucial would involve many difficulties (e.g., determining successors in title, taking into account divisions and changes in property boundaries, changes in the use of property). In practice, it would be very difficult, if not impossible, to carry out such proceedings.

[56] Judgement of the Supreme Court of 21 May 1999, ref: III CKN 244/98.

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Ryszard Piotrowski
University of Warsaw, Poland
e-mail: r.j.j.piotrowski@uw.edu.pl
ORCID: 0000-0002-3801-7364

DEMOCRACY AND THE DEVELOPMENT OF INFORMATION AND COMMUNICATIONS TECHNOLOGY*

Abstract

If we accept that the democratic paradigm involves majority rule being constrained by human rights, including, in particular, the right to privacy, then the continuing encroachments on this paradigm must be seen as a threat to the foundations of democracy. A culture of respect for privacy comes as an indispensable condition for a human being to develop and nurture a personality aware of their individual identity, enabling him or her to assess the performance of public authority in a manner independent of the latter.

In everyday practice, as it happens, people find their affairs to be increasingly determined by non-human factors, a result of the expansion of automated services and stock-exchange transactions, the internet of things, etc.

The rules laid down by constitutions of democratic states are about the exercise of power by sovereign people, not by sovereign algorithms. Such a sovereignty is grounded in the freedom of choice, which involves dialogue, persuasion, and the deliberative process as a basis for making decisions. Artificial intelligence, in the currently existing forms, is not capable of reasoning based on knowledge and culture, nor can it conduct a dialogue in which it could be persuaded to change its view and thus accept a given arrangement.

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No instrument has been developed up to this day that would embrace a spiritual culture, which is intrinsic to humans.

KEYWORDS

human rights, new technologies, democracy, human dignity, right to privacy, constitution, algorithmic society

SŁOWA KLUCZOWE

prawa człowieka, nowe technologie, demokracja, godność człowieka, prawo do prywatności, konstytucja, społeczeństwo algorytmiczne

1. Tools and their development have been changing people and civilizations all the time, and in the process, vital questions have been asked about progress.[1] Actually, the very existence of humanity has been threatened by some of the tools for quite a while. But the novelty of the "new technologies" lies in their capacity to replace humans in their creative skills. Intelligence, once an exclusive property of humans and, to a certain extent, other living beings, has now been embedded in man-made tools – and to a degree that, in some areas, surpasses the skills of their creator. This kind of intelligence is commonly referred to as artificial intelligence (AI).

What is new in new technologies? A tool replacing an inventor becomes even more creative than a human being: An AI has learned to win chess by making moves human grand masters never considered. An AI has discovered a new antibiotic by analyzing molecular properties human scientists did not understand. An AI is transforming how humans are experiencing reality.[2] A tool invented by humans is almost able to gain control over them.

What is human in a human being? Creativity, "the God's spark", makes humans superior over their tools.[3] However, according to the European Parliament Report of 2017, "ultimately there is a possibility that in the long-term, AI could surpass human intellectual capacity".[4]

[1] Cf. N. Postman: *W stronę XVIII stulecia* [Polish edition of *Building A Bridge To The Eighteenth Century*], Warszawa 2001, p. 43.

[2] Cf. H. A. Kissinger, E. Schmidt, D. Huttenlocher: *The Age of AI And Our Human Future*. London 2021, p. 7 *et seq*.

[3] Cf. M. du Sautoy: *The Creativity Code: Art and Innovation in the Age of AI*, Cambridge 2019, p. 20 *et seq.*

[4] Cf. European Parliament, Report with recommendations to the Commission on Civil Law Rules on Robotics, A8-0005/2017, https://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.html (accessed 12 September 2023).

Tools capable of controlling their users, though, have yet to be created. Until recently, it did not seem possible that these would be "thinking tools". No tools existed that would give credence to the idea of replacing judges[5] or law professors with computer technologies that could write a constitution to order, create fictitious evidence for the court, or corroborate non-existent events by blurring the line between lies and truth. This line is of critical importance in a system deserving the description "democratic", in accordance with the European traditions of the concept (it being so much distant from the present day, when governments called democratic, acting in the interests of arms manufacturers, put the world at risk of annihilation). [6]

2. While specific practical applications of artificial intelligence are generally viewed in a positive light, overall assessments of the new technologies and their implications are usually mixed. On the one side, there is a belief in the positive impact of digitization and AI applications on economic development, societal well-being, environmental protection, health care, and education. This conviction is reflected in the position of the European Commission on the future direction of EU regulations and initiatives in the field of artificial intelligence.[7] A rapid AI development, the Commission believes, can improve health care (precise diagnosis, better prevention of diseases), increase the efficiency of farming, help mitigate the negative effects of climate change, increase citizens' safety, and improve the efficiency of production systems. However, as the Commission notes, the development of artificial intelligence also carries potential risks of non-transparent decision-making, discriminatory practices, invasion of privacy, and criminal applications. The Commission's "White Paper" is not a piece of legislation, but rather a set of proposals for action setting the future direction of EU regulations and initiatives in the AI field. This is what makes the document particularly noteworthy: it emphasizes the importance of subjecting AI to human control,[8] and points to the need to regulate the practice of facial recognition in public spaces, which poses threats to human rights and dignity.[9] The Commission also encourages debate on the legitimacy of AI use for remote biometric identification purposes.[10]

However, there is no shortage of views expressing deeper concerns about the adverse consequences of AI domination, where humans play a subservient role to the tools they have themselves created.

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[5] Cf. R. Susskind, *Sądy internetowe i przyszłość wymiaru sprawiedliwośc*i [Polish edition of *Online Courts and the Future of Justice*], Warszawa 2021, pp. 207 *et seq*.

[6] Cf. https://thebulletin.org/doomsday-clock/ (accessed 12 September 2023).

[7] European Commission, *White Paper On Artificial Intelligence – A European Approach to Excellence and Trust*, Brussels, COM (2020) 65 final.

[8] European Commission, *White Paper* …, p. 21.

[9] *Ibidem*.

[10] European Commission, *White Paper* …, p. 22.

The system of information totalitarianism in an algorithmic society, unlike the totalitarian systems known to date, is based on a fundamental cultural change, triggered by the new communication technologies that allow actual information enslavement to assume the cloak of information liberation. After all, the actual resignation of the right to privacy, which is taking place over the Internet, does not reflect a desire to come under surveillance, but rather a new need – for self-creation and self-presentation as a sign of belonging to a community.[11]

Because of the new technologies, "human consciousness is shaped through unprecedented filter, television, computers, and smartphones compose a trifecta offering nearly constant interaction with a screen throughout the day. Human interactions in the physical world are now pushed relentlessly into the virtual world of networked devices".[12] However, the information overload does not translate into an actual expansion of knowledge or wisdom, as is demonstrated by the practice of educational institutions, revealing that "a surfeit of information may paradoxically inhibit the acquisition of knowledge and push wisdom even further away than it was before".[13] The shift towards online education has failed to significantly increase the level of knowledge among graduates of varied schools. As it turned out, the information and communication technologies threaten to "diminish the individual's capacity for an inward quest by increasing his reliance on technology as a facilitator and mediator of thought".[14] Also, the "chatbotization" of education, especially the humanities, sometimes seen as a harbinger of future change in the identity of universities, will not replace the researcher's inherent ability to pose questions and propose hypotheses beyond the current state of knowledge available to chatbots at any given time.

One should agree that the desire for "the pursuit of transparency and connectivity in all aspects of existence, by destroying privacy, inhibits the development of personalities with the strength to take lonely decisions"[15] and, in fact, deprives the individual of the right to their own thoughts. This is because, on the one hand, the operation of search engines isolates the searcher within his or her own "information bubble", considerably undermining democratic dialogue and perpetuating divisions in society. Owing to such profiling, Internet users are provided with information which suits their expectations, interests, and preferences, including political ones. This has the effect of hindering public debate, understood as a potential trigger of change for those encased in their "information bub-

[11] Cf. R. Piotrowski, *Prawo do tożsamości informacyjnej i jego znaczenie w ustroju demokratycznym* [Right to information identity and its importance in the democratic system] (in:) J. Jaskiernia (ed.), *Wpływ standardów międzynarodowych na rozwój demokracji i ochronę praw człowieka* [The impact of international standards on the development of democracy and human rights protection], Warszawa 2013, pp. 490 *et seq.*

[12] Cf. H. Kissinger: World Order, London 2014, p. 348.

[13] *Ibidem*, p. 350.

[14] *Ibidem*, p. 351.

[15] *Ibidem,* p. 353.

bles"[16] and adopting as their own the thoughts that have been served to them. With the information tailored to meet audience expectations – which is necessitated by the requirements of efficient advertising – the audiences' established beliefs are further reinforced, leaving little room for alternative opinions.[17] Because of user profiling by search engines, users receive answers even before they can ask a question,[18] thus being deprived of the right to their own thoughts. And, on the other hand, the operators of various online platforms keep out content they consider inappropriate and thus impose preferred views on users. This, again, tricks people out of the fundamental right to their own thoughts.

3. Being an alternative to individual autonomy, the autonomy of "thinking tools" can pose a threat to individual freedom. Privacy is essential not only as a guarantee of democracy but also as a guarantee of freedom, understood as the individual's agency, a manifestation of his free will. This relationship is identified by Y. N. Harari, writing that "it was reasonable to assume that I had free will, because my will was mainly shaped by the interdependence of internal forces that no one on the outside could see. I could enjoy the illusion that I had control over my decisions, while outsiders could never really understand what was going on inside me or how I made decisions [retranslated]".[19] In Harari's view, we are now "at the cusp of two major revolutions. On the one hand, biologists are deciphering the mysteries of the human body, especially the brain and human emotions. On the other, computer scientists are giving us unprecedented data processing power. When the biotechnology revolution is combined with the information technology revolution, it will create big data-based algorithms capable of watching and understanding my feelings much better than I myself can – which means that power will likely pass from humans to computers. My illusion of free will is presumably going to crumble because every day I will be confronted with institutions, corporations, and government agencies that will understand what was previously my inaccessible inner sphere – and will influence it [retranslated]".[20]

[16] On this subject, cf. E. Pariser: *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think*, New York 2012.

[17] Cf. M. Ainis: *Il regno dell'Uroboro*, Milano 2018, pp. 13 *et seq.*

[18] *Ibidem*. Also cf. R. Piotrowski: Cf. R. Piotrowski: *Prawa człowieka w pułapce technologii i polityki* [*Human rights in a trap of technology and politics*], (in:) J. Jaskiernia, K. Spryszak (eds.), *System ochrony praw człowieka trzeciej generacji wobec nowych wyzwań cywilizacyjnych* [*Third generation system of human rights protection vis-a-vis new civilizational challenges*], Vol. 3, Toruń 2023, p. 377.

[19] See Y. N. Harari: *21 lekcji na XXI wiek* [Polish edition of *21 Lessons for the 21st Century*], Kraków 2018, p. 75.

[20] *Ibidem*. Also cf. R. Piotrowski: *Nowe technologie a nowe prawa człowieka,[New technologies and New Human Rights]* (in:) J. Jaskiernia, K. Spryszak (eds.), *Wyzwania dla powszechnego systemu ochrony praw człowieka u progu trzeciej dekady XXI wieku* [*Challenges for universal system of human rights protection at the beginning of third decade of 21st century*], Toruń 2021, pp. 207 *et seq.*

To meet the new challenges, we need new laws that will affirm age-old notions of human dignity.

The right to personal inviolability, or prohibition of arbitrary encroachments by government – immortalized in the writ of *habeas corpus* – needs to be reinterpreted. In view of the potential dangers of a person's consciousness being interfered with, without their consent, we must proclaim and respect the principle of *habeas mentem*, in order to guarantee an individual's inner freedom or the basis of their dignity.

To an increasing extent, decisions affecting citizens are being made by AI algorithms, rather than by humans. GPT technology[21] attempts to replace the problem-solving ability inherent in humans with such capacity being inserted in a device. In its consequences, in terms of the progressive erosion of people's right to their own thoughts, this technology surpasses the Internet. Gradually and inevitably, the authority laid down in constitutions is drifting further and further apart from the real power wielded by new technology developers. This is evidenced in the apparent ineffectiveness of appeals to democratic governments to halt or slow down research in the field.

Among those warning of the consequences of technological development was Stanislaw Lem, who argued that we are in a technological trap, reflecting the "outcome of a widespread deployment of technogenic solutions, which turns the purported benefits of such widespread deployment into an either one- or many-sided catastrophe, one that becomes more and more recognizable and less and less preventable by those powerful decision-makers to whom this catastrophe owes its prolific extent and strong destructive qualities".[22]

The inevitability of catastrophe was recognized by Nick Bostrom, comparing our situation to that of a child playing with a bomb: "For a child with an undetonated bomb in his hands, a sensible thing to do would be to put it down gently, quickly back out of the room, and contact the nearest adult. Yet what we have here is not one child but many, each with access to an independent trigger mechanism. The chances that we will all find the sense to put down the dangerous stuff seem almost negligible. Some little idiot is bound to press the ignite button just to see what happens".[23]

Elon Musk called for a pause in artificial intelligence research. In his view, "At some point, it may be important to get an independent review before starting to train future systems, and for the most advanced efforts to agree to limit the rate of growth of compute used for creating new models. Therefore, we call on all AI labs to immediately pause for at least 6 months the training of AI systems more powerful than GPT-4. This pause should be public and verifiable and include all

[21] Cf. https://openai.com/blog/chatgpt (accessed 12 September 2023).

[22] Cf. S. Lem: *Pułapka technologiczna*, (in:) *Tajemnica chińskiego pokoju*, Kraków 1996, p. 115.

[23] Cf. N. Bostrom, *Superinteligence, Paths, Dangers, Strategies*, Oxford 2014, p. 259.

key actors. If such a pause cannot be enacted quickly, governments should step in and institute a moratorium".[24]

Geoffrey Hinton considers artificial intelligence a threat to humanity's survival.[25]

New technologies are seen as the underpinning of a new economy described in the literature as "surveillance capitalism", a "new economic order that claims human experience as free raw material for hidden commercial practices of extraction, prediction and sales".[26] Surveillance capitalism gives birth to a new kind of power, namely instrumentarian power which "knows and shapes human behavior toward others' ends. Instead of armaments and armies, it works its will through the automated medium of an increasingly ubiquitous computational architecture of 'smart' networked devices, things, and spaces".[27]

Information and communication technologies, therefore, may pose a systemic threat to democracy, by enabling the "origin of a new instrumentarian power that asserts dominance over society and presents startling challenges to market democracy".[28] These technologies pave the way for an "expropriation of critical human rights that is best understood as a coup from above: an overthrow of the people's sovereignty".[29] The culture of respect for privacy, now being subject to destruction in the system of information totalitarianism, is an indispensable formative condition for men to become aware of their own individual identities, allowing them to judge governments' performance on their own. An individual deprived of privacy is also stripped of dignity, not only as a result of the total surveillance to which they may be subjected[30] but also because of their vulnerability to informational manipulation enabled by the use of new technologies.[31]

The operation and survival of a democratic system depend on a number of factors to which it owes its complex identity. These are listed by Pericles in an inspir-

[24] Cf. https://futureoflife.org/open-letter/pause-giant-ai-experoments (acessed 24 September 2023).

[25] Cf. https://www.technologyreview.com/2023/05/02/1072528/geoffrey-hinton-google-why-scared-ai/ (accessed 24 September 2023).

[26] Cf. S. Zuboff, *The Age of Surveillance Capitalism. The Fight for a Human Future at the New Frontier of Power*, London 2019, p. 1.

[27] *Ibidem*.

[28] *Ibidem*.

[29] *Ibidem*.

[30] Including, in particular, by Pegasus spyware.

[31] Cf. R. Piotrowski: *Współczesne zagrożenia ustroju demokratycznego* [*Contemporary threats to the democratic system*] (in:) K. Rączka, B. Godlewska-Bujok, E. Maniewska, W. Ostaszewski, M. Raczkowski, A. Ziętek-Capiga (eds.), *Między ideowością a pragmatyzmem – tworzenie, wykładnia i stosowanie prawa. Księga jubileuszowa dedykowana Profesor Małgorzacie Gersdorf* [*Between idealism and pragmatism – the making, interpretation and application of law. Jubilee book dedicated to Professor Małgorzata Gersdorf*], Warszawa 2022, pp. 1220 *et seq*.

ing definition of democracy, which deserves to be called a holistic definition.[32] According to Pericles, democracy "is based on the majority of citizens, not on a minority", but at the same time, "in private disputes, every citizen is equal in the face of the law [and] the individual is valued not because he belongs to a certain group, but because of the personal talent he stands for". "In our state life," Pericles goes on, "we are guided by the principle of freedom … in private life, we do not look with suspicious curiosity about the behavior of our fellow citizens, do not reluctant to neighbor … and do not throw at him contemptuous looks … We are guided by forbearance in private life, we respect rights in public life; we are obedient to everybody's power and rights, especially those unwritten, who defend the victims and whose transgression brings universal shame". At the same time, democracy is a system in which "the most opportunities for leisure after work" have been created, and the "everyday charm" of private dwellings "distracts from worries".[33]

Recognizing the need for a holistic understanding of democracy, one must notice the crucial importance of two premises for the operation of this system: 1) the ability to distinguish the majority from the minority, and 2) the ability to distinguish truth from its opposite. These coessential premises now come under dire threat, posed by the development of new technologies.

The blurring of the line separating truth from falsehood is as important for democracy as are the consequences of the combined biotechnology and IT revolutions, bringing about the destruction of man's "illusion of free will".[34] The blatant disregard for principles in international relations and in domestic political practice, the recourse to double standards, and the lying by governments who call themselves democratic have given rise to the notion of post-truth,[35] which, however, by no means legitimizes the destruction of the axiology of a democratic state. With the onset of new technologies, democracy has become – more pronouncedly than in its early days – a permanent spectacle in which the line between reality and the appearance of reality is obscured.[36] The narrated world has become more important than the real world, and the opinion poll numbers are more important than the increasingly irrelevant electoral programs. Democracy comes under threat from the fading of truth and rationality in the political sphere, which has been morphing from rational to emotional. For "political truth", the key

[32] For the holistic definition of the Constitution, cf. R. Piotrowski: *Judges and the Limits if Democratic Power in the Light of the Constitution of the Republic of Poland*, (in:) *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1/2019, p. 224.

[33] Cf. Thucydides: *The History of the Peloponnesian War*, New York – London, p. 123 *et seq*.

[34] Cf. Y. N. Harari: *21 lekcji na XXI wiek* [Polish edition of *21 Lessons for the 21st Century*], Kraków 2018, p. 75.

[35] Cf. R. Keyes: *The Post-truth Era: Dishonesty and Deception in Contemporary Life*, New York 2004.

[36] Cf. R. Piotrowski: *Współczesne zagrożenia ustroju demokratycznego* [*Contemporary threats to the democratic system*], p. 1223.

criterion is winning and clinging to power, rather than conformity of words with facts. Consequently, "it is in the nature of political reality to make war on truth in all its forms [retranslated]".[37] The truth is determined by whoever has the informational advantage resulting from political and financial superiority.

The emergence of the AI software known as GPT creates a system "that generates or manipulates image, audio or video content that appreciably resembles existing persons, objects, places or other events and would falsely appear to be authentic or truthful ('deep fake')".[38] An EU regulation requires the system's users to disclose that the content has been artificially generated or manipulated, but this obligation "shall not apply where the use is authorized by law to detect, prevent, investigate and prosecute criminal offenses or it is necessary for the exercise of the right to freedom of expression and the right to freedom of the arts and sciences guaranteed in the Charter of Fundamental Rights of the EU, and subject to appropriate safeguards for the rights and freedoms of third parties".[39] However, the requirement of appropriate safeguards for third parties' rights and freedoms, laid down in this provision, hardly looks like sufficient protection against such abuses that could lead to the destruction of the democratic system.

New technologies' privacy-destroying applications may encourage such an understanding of democracy where it is seen as unlimited majority power. When perceived in such a way, democracy is actually reduced to a tribal democracy, in which the majority's interests – political, economic, national, and religious – trump human rights.[40]

The notion of integral democracy, as opposed to tribal democracy, refers to a regime where the power of the majority is constrained by human rights (including the rights of minorities), and which rests on a constitutional culture reflecting this constraint and on a basic law confirming it. In a state embracing integral democracy, the sovereign's role is actually performed by laws, which denote the sovereignty of the values that limit the majority rule in order to protect human rights (these rights stemming from inalienable human dignity). Thus, the notion of sovereignty is equated with values that have been translated into laws.[41] Risks

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[37] Cf. H. Arendt: *Prawda a polityka* [Polish translation of *Truth and Politics*], (in:) *Literatura na świecie*, No. 6/1985, p. 166.

[38] Art. 52.3 of the Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM (2021) 206 final.

[39] *Ibidem*.

[40] Cf. R. Piotrowski, *Wybrane dylematy powszechności praw człowieka* [*Certain dilemmas about the universal nature of human rights*], (in:) J. Jaskiernia (ed.), *Uniwersalny i regionalny wymiar ochrony praw człowieka. Nowe wyzwania – nowe rozwiązania* [*Universal and regional dimensions of human rights protection. New challenges, new solutions*], Warszawa 2014, Vol. 1, p. 52 *et seq*.

[41] Cf. R. Piotrowski: *Demokracja nieliberalna czyli oksymoron konstytucyjny* [*Illiberal democracy, or a constitutional oxymoron*], (in:) M. Serowaniec, A. Bień-Kacała, A. Kustra-

associated with majority rule can be reduced by the separation of powers, the rule of law, the supremacy of the Constitution, and by judicial review – a system sometimes referred to as constitutional democracy.[42] Integral democracy, unlike tribal democracy, recognizes the universal nature of human rights. As matters stand, however, modern political culture has increasingly been turning into a culture of tribal democracy, based as it is on post-truths, double standards, supremacy of self-interest, rivalry of all against all, and social inequality.

Those impacting the perception of reality by media and ICT users wield a new kind of power – and this power threatens democracy, understood as freedom of choice.[43] Meta's privacy policy and terms of service are not subject to judicial review in the countries where the company operates, yet they shape public debate and impact the freedom of expression there. In the space shaped by the new information and communication technologies, the exercise of freedom of speech and freedom to participate in public debate has been increasingly contingent on accepting more and more pronounced restrictions on freedom – and these restrictions are not grounded in democratically passed laws. The freedom so restricted is but an illusion of freedom. Enjoying their monopolistic position, online services tend to act as a public authority, for which, however, they have no democratic legitimacy.[44] And yet their real power distorts the basic principles of the state's system of governance, including the principle of popular sovereignty.

4. To meet the new challenges, we need new laws that will affirm age-old notions of human dignity. The right to personal inviolability, or prohibition of arbitrary encroachments by government – immortalized in the writ of *habeas corpus* – needs to be reinterpreted. In view of the potential dangers of a person's consciousness being interfered with, without their consent, we must proclaim and respect the principle of *habeas mentem*, in order to guarantee an individual's inner freedom or the basis of their dignity. This necessitates that a constitutional and international dimension be imparted to a right that stipulates:

– that key state-level decisions impacting human condition, life, and freedom must be made by humans, not automated systems or other AI contraptions;
– if artificial intelligence were to make decisions, then it should be properly equipped with value-based criteria.

Rogatka (eds.), *Potentia non est nisi da bonum. Ksiega Jubileuszowa dedykowana Profesorowi Zbigniewowi Witkowskiemu* [*Potentia non est nisi da bonum. Jubilee Book dedicated to Professor Zbigniew Witkowski*], Toruń 2018, p. 611 *et seq*.

[42] On the notion of constitutional democracy see W. F. Murphy: *Constitutional Democracy*, Baltimore 2007, p. 528 *et seq*.

[43] Cf. R. Piotrowski: *Prawa człowieka w pułapce technologii i polityki* [*Human rights in a trap of technology and politics*], (in:) J. Jaskiernia, K. Spryszak (eds.), *System ochrony praw człowieka trzeciej generacji wobec nowych wyzwań cywilizacyjnych* [*Third generation system of human rights protection vis-a-vis new civilizational challenges*], Toruń 2023, p. 351 *et seq*.

[44] *Ibidem*.

The principle *habeas potestatem humanam* is of crucial importance for the survival of democracy in the contemporary world.

While it seems fair to acknowledge that a democracy may sometimes allow for indispensable restrictions on human rights (with minority rights respected), it must be emphatically demanded that such restrictions may only be imposed by humans exercising legislative, executive, or judicial powers – not by algorithms, computer software and applicable AI forms. The very survival of the democratic system, with its roots in the dignity of the person, requires that the right to privacy and protection of personal data be guaranteed.

The culture of abdication of privacy protection may breed consent to the creation and practical use of technologies capable of penetrating an individual consciousness without his or her consent (the so-called mindreading).

The right to personal inviolability understood as a prohibition on its arbitrary breach by the government – and reflected in the centuries old principle of *habeas corpus* – needs to be reinterpreted. Given the potential threat of interference in a person's mind without that person's consent, constitutions and international law must proclaim the principle of *habeas mentem*. The principle *habeas mentem* according to which everyone's right to intellectual identity and integrity, the right to one's thoughts being free from technological mind-bending interference, is as essential for the survival of the democratic system as the right to be governed by humans – and it may well prove equally endangered. The principle *habeas mentem*, reflecting the need to provide guarantees for human internal freedom, may prove to be the last redoubt of human dignity, threatened as it is by loss of the rights to privacy and to informational identity. Unfortunately, in the contemporary world, the prospects for democracy based on the spiritual culture of human rights protection are even more limited and discouraging, as they have always been.

The democratic system is inseparably linked to human agency, not to even the most sophisticated manmade tools. The right to keep human affairs under human control is among the basic human rights. A situation where people fail to control their tools, far from being a regular feature of the democratic system, may actually portend its failure. Constitutions, therefore, should reiterate the right to keep human affairs under human control, meaning that the status of the individual – their rights, freedoms, and obligations – must not be defined by computer programs alone.

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Agata Pośnik
University of Warsaw, Poland
e-mail: agata.nowinska@poczta.fm
ORCID: 0009-0009-8241-930X

NATIONAL RURAL NETWORK AS A MEASURE SUPPORTING THE IMPLEMENTATION OF EU RURAL DEVELOPMENT POLICY

Abstract

The subject of this article is to present the characteristics of the National Rural Network (NRN) as a legal-administrative form of supporting the process of implementation of the EU rural development policy in Poland. In particular, the analysis covers the issue of the effectiveness of the adopted legal and organizational solutions in the context of the implementation of the Network's objectives, taking into account the experience of subsequent programming periods in the financial perspectives 2007-2013 and 2014-2020, as well as in the currently designed conditions. It has been assumed that the structure of the NRN in Poland, as a Member State, includes administrative entities of central and regional character interacting with other entities involved in the implementation of the rural development policy. The activities of the Network are intended to ensure the inclusion of the stakeholders of the public policy in question (including industry organizations, cooperatives, chambers of agriculture, state research institutes, research and development units, non-governmental organizations, and individuals) in the processes of exchange and development of knowledge. They are also supposed to promote interaction between these stakeholders, which is the essence of "networking" aimed at the better use of support instruments from the funds of the European Union's Common Agricultural Policy.

KEYWORDS

rural areas, social capital, development support, NRN+, Strategic Plan for the Common Agricultural Policy

SŁOWA KLUCZOWE

obszary wiejskie, kapitał społeczny, wsparcie rozwoju, KSOW+, Plan Strategiczny dla Wspólnej Polityki Rolnej

1. INTRODUCTION

The National Rural Network established by Council Regulation (EC) No. 1698/2005[1] is a network for the exchange of information and cooperation between organizations and institutions whose activities are aimed at the better use of support instruments from the European Union's Common Agricultural Policy. It is intended to serve a better flow of information between institutions and organizations involved in activities implemented for the benefit of rural areas and their inhabitants. In terms of subjects, the NRN is a specific organizational structure, including administrative entities of central and regional character interacting with other entities involved in the implementation of the rural development policy. The activities of the Network are intended to ensure the inclusion of the stakeholders of the public policy in question (including industry organizations, cooperatives, chambers of agriculture, state research institutes, research and development units, non-governmental organizations, and individuals) in the processes of exchange and development of knowledge. They are also supposed to promote interaction between these stakeholders, which is the essence of "networking" aimed at the better use of CAP support instruments.

A rural network operates in every Member State of the European Union. The Polish National Rural Network is part of the European Network for Rural Development (ENRD) and has been in operation since 2009.

The subject of this article is to present the characteristics of the National Rural Network (NRN) as a legal-administrative form of supporting the process of implementation of the EU rural development policy in Poland. In particular, the analysis covers the issue of the effectiveness of the adopted legal and organ-

[1] Council Regulation (EC) No. 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) OJ. L. 277 of 21 October 2005, p. 1.

izational solutions in the context of the implementation of the Network's objectives, taking into account the experience of subsequent programming periods in the financial perspectives 2007-2013 and 2014-2020, as well as in the currently designed legal and financial conditions.

2. THE GENESIS OF NRN IN POLAND

The political and programmatic assumptions of the Polish National Rural Network, as well as the purpose of its existence, were initially defined in the National Strategic Plan for Rural Development 2007-2013,[2] as a response to the European Union guidelines, contained in the Council Decision No. 144/2006 of 20 February 2006 on Community strategic guidelines for rural development (programming period 2007-2013).[3] The provisions of Decision No. 144/2006 set out guidelines relevant to the implementation of the Union's priorities, in particular, with regard to the objectives of sustainable development and the renewed Lisbon Strategy for growth and employment as translated into rural development policy.[4] From the point of view of the NRN, the most significant one was Guideline No. 4 on building local employment capacity and diversification. According to its wording, the funds earmarked for LEADER Axis 4 should support the priorities of Axis 1 – "Improving the competitiveness of the agricultural and forestry sector" and Axis 2 – "Improving the environment and the countryside" and, in particular, Axis 3 – "Quality of life in rural areas and diversification of the rural economy". But they also play an important role in the horizontal priority of improving governance and mobilizing the internal development potential of rural areas. The guideline encouraged focusing on supporting key activities such as building local partnership resources, stimulating and promoting skills acquisition, promoting private-public partnerships, promoting cooperation and innovation, as well as improving local governance.[5] It pointed out that local initiatives and support for diversification could play a crucial role in introducing people to new ideas and solutions which are meant to support innovation and entrepreneurship, and can support the activation and provision of local services.

[2] National Strategic Plan, document prepared by the Ministry of Agriculture and Rural Development in July 2007, text: https://www.zbp.pl/photo/alprez/pliki/2.1.1.1.2.1-krajowy-plan-strategiczny.pdf (accessed 30 October 2023).

[3] Official Journal of the EU L 55/20 of 25 February 2006.

[4] M. Król, *Funkcjonowanie Krajowej Sieci Obszarów Wiejskich ze szczególnym uwzględnieniem struktur organizacyjnych, jak również dostępności informacji w ramach KSOW*, Warszawa 2010, p. 4.

[5] Paragraph 3.4 of Council Decision 144/2006 of 20 February 2006 on Community strategic guidelines for rural development (programming period 2007-2013).

This approach and reference to the LEADER approach, which has been implemented across the Union since 1991, focuses on seven key features, i.e. territoriality, "bottom-up" (understood as broad community participation in the formation and implementation of the strategy), integration through comprehensive use of local resources and linking of different economic fields and cooperation of different interest groups, innovation, local management and financing, cooperation (networking) through the exchange of experience and good practices, as well as partnership. This outlines the general character of the NRN as a network that brings together entities that contribute to the development of rural areas and have a direct or indirect impact on the better use of the instruments of the European Agricultural Fund for Rural Development. These include, in particular, regional governments of provinces, as well as local governments of municipalities and counties, professional organizations, chambers of agriculture, departmental institutes, NGOs, research and development units, local action groups, and networks, as well as agreements of these entities. The operation of the network is to foster the realization of the principle of partnership and a modern and effective way of exchanging information and transferring knowledge.[6]

The doctrine emphasizes the nature of the NRN as a tool for building social capital.[7] Rural development is sometimes rightly characterized as local development, and this as category of socio-economic development is defined as "the comprehensive formation of the best possible living conditions in the local environment".[8] The success of local development depends on the building of social capital and its strong commitment to the issues of importance to the community. Given the enormous functional diversity of rural areas (food production, production of raw materials for non-agricultural purposes, as well as non-productive functions of a general social nature: environmental, hydrological, landscape, tourism and recreational, residential, social, and cultural)[9] development of these areas should be sustainable and form the basis of policy in general. However, this multifunctionality, specificity, a certain problematic nature, significant variation in economic and social potential, and even distrust of the central policy, requires the involvement of local clout through the inclusion in the structures of the program responsible for its implementation of all entities interested in its dissemination and at the same time acting as a kind of authority for the recipients of the information carried by the NRN. At the same time, in order to maintain the consistency of action and realiza-

[6] For more on the provisions of the National Strategic Plan for Rural Development 2007-2013 regarding the National Rural Network: M. Król, *ibidem*, p. 5 *et seq*.

[7] B. Kutkowska, T. Pilawka, *Rola Krajowej Sieci Obszarów Wiejskich (KSOW) w budowaniu kapitału społecznego wsi*, "Prace naukowe Uniwersytetu Ekonomicznego we Wrocławiu", 2014, No. 341, p. 105 *et seq*.

[8] J. Chądzyński, *Nowe koncepcje rozwoju - w kierunku rozwoju lokalnych*, (in:) *Region i jego rozwój w warunkach globalizacji*, Warszawa 2007, p. 63 *et seq*.

[9] J. Wilkin, *Wielofunkcyjność rolnictwa. Kierunki badań, podstawy metodologiczne i implikacje praktyczne*, Warszawa 2010, p. 17.

tion of the goal of such a huge apparatus involved in the initiative to disseminate information on instruments of support for rural development, it is necessary to structure the institutions responsible for its implementation and execution in such a way that, without losing the purpose and nature of its action, its effectiveness, consistency, quality, and continuous development are ensured.

For the period 2007-2013, the assumptions for the creation of national rural networks were expressed in the provision of Article 68 of Council Regulation (EC) No. 1698/2005.[10] As indicated, the primary rationale for the introduction of provisions for national rural networks by the European Commission in the quoted regulation was the weaker competitive position of rural areas in relation to urban areas and the need to level the playing field and ensure increased territorial cohesion of the entire territory of the Union. By design, the NRNs were to absorb and, to a much greater extent, replace the networks established under the implementation of the LEADER program. In this context, the NRNs were to become one of the tools supporting the realization of much broader objectives than in the case of the said program.[11] In the Polish legal order, the purpose of the creation of the network was defined by the National Strategic Plan for Rural Development 2007-2013,[12] defining it as "carrying out activities for the development of rural areas, through the exchange and dissemination of information on them among all interested partners, identification, and analysis of good practices, exchange of information relevant to the development of rural areas and transfer of 'know-how' in this regard".[13]

Based on the above-mentioned legal framework and on the basis of EU and national regulations, in particular the Act on RDP,[14] the conditions for the functioning of the National Rural Network in Poland were formulated and the Polish organizational structure of the National Rural Network was created, ensuring the implementation of the Network's objectives set out in RDP 2007-2013. The positive assessment of its functioning at that time led to the maintenance of the National Rural Network also under RDP 2014-2020.[15] The basis for the European Network

[10] Council Regulation (EC) No. 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD); OJ L. 277 of 21 October 2005, p. 1.

[11] M. Drygas, *Krajowa Sieć Obszarów Wiejskich. Dylematy i pożądane kierunki rozwoju na przykładzie doświadczeń wybranych krajów realizujących tego typu przedsięwzięcia*, Warszawa 2010, p. 32.

[12] M. Król, *ibidem,* p. 5 *et seq.*

[13] National Strategic Plan for Rural Development 2007-2013, Ministry of Agriculture and Rural Development, p. 53.

[14] Act of 7 March 2007 on supporting rural development with the participation of the European Agricultural Fund for Rural Development (Journal of Laws of 2007, No. 64, item 427, as amended).

[15] Rural Development Programme 2014-2020, p. 769 *et. seq*., https://www.gov.pl/web/rolnictwo/-program-rozwoju-obszarow-wiejskich-2014-2020-prow-2014-2020 (accessed 24 October 2023).

and the National Rural Networks in the 2014-2020 financial perspective were the provisions of the Regulation of the European Parliament and of the Council (EU) No. 1305/2013.[16] Poland sanctioned the functioning of the National Rural Network for 2014-2020 in the content of the Rural Development Program, and the detailed provisions of the Program were the Act on RDP 2014-2020[17] and the implementing regulations of the Minister of Agriculture and Rural Development.[18]

3. NATIONAL NETWORK OF THE COMMON AGRICULTURAL POLICY – NATIONAL RURAL NETWORK+ (NRN+)

The activities of the NRN will also continue under the Strategic Plan for the Common Agricultural Policy for 2023-2027. On 31 August 2022, The European Commission approved the Strategic Plan for the Common Agricultural Policy, prepared by the Polish government, which provides for the operation of a network called NRN+. The network, in the new financial perspective, will cover a wider range of issues, since it will also cover aspects of the functioning of the first pillar of the CAP. The objectives of the NRN+ are indicated in the Regulation of the European Parliament and of the Council (EU) No. 2021/2115,[19] and its functioning structure in Poland is sanctioned by the provisions of the Strategic Plan Act.[20]

NRN+ is an organizational and legal form of the continuation of the National Rural Network operating since 2009 and the Network for Innovation in Agriculture and Rural Areas (SIR) operating since 2015. The provisions of the partnership model also have not changed. However, its broader scope of jurisdiction remains important. The NRN+ will cover the entire Common Agricultural Policy,

[16] Regulation of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No. 1698/2005 (OJ L 347/487, 20 December 2013, p. 1).

[17] Act of 20 February 2015 on supporting rural development with the participation of the European Agricultural Fund for Rural Development under the Rural Development Program 2014-2020 (Journal of Laws 2015, item 349 as amended).

[18] In particular, the Regulation of the Minister of Agriculture and Rural Development of 17 January 2017 on the National Rural Network under the Rural Development Program 2014-2020 (Journal of Laws of 2017, item 148).

[19] Regulation (EU) No. 2021/2115 of the European Parliament and of the Council of 2 December 2021 laying down rules on support for strategic plans drawn up by Member States under the common agricultural policy (CAP strategic plans) and financed by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No. 1305/2013 and (EU) No. 1307/2013 (Official Journal of the EU of December 6, 2021 L 435/1).

[20] Law of 8 February 2023 on the Strategic Plan for the Common Agricultural Policy for 2023-2027 (Journal of Laws of 2023, item 412).

i.e. pillar I and pillar II issues of the CAP, and will, therefore, undertake networking activities for all areas of intervention identified in the Strategic Plan, and will include a wider range of stakeholders than the NRN in previous years.[21]

4. ORGANIZATIONAL STRUCTURE OF THE POLISH NATIONAL RURAL NETWORK

The planned institutional structure of NRN+ (including the participation of agricultural advisory units) and the involvement of partners (including research institutes, organizations working for agriculture and rural areas, farmers, and entrepreneurs) in the network's tasks are expected to ensure adequate coverage of the network's relevant stakeholders in both pillars of the CAP.

The organizational and institutional structure of the National Rural Network+ (i.e., the so-called network support units) will be formed by the Managing Authority – the Minister of Agriculture and Rural Development, the Agency for the Restructuring and Modernization of Agriculture, provincial governments, and agricultural advisory units. The network will be supported by the Steering Committee for the National Rural Network+, constituting an opinion and advisory body of the Minister of Agriculture and Rural Development, and the implementation of the network's activities, in addition to the network's support units, will involve, as in previous years, partners, i.e. entities actively involved in rural and agricultural development, including those implementing innovations or developing innovative solutions. Access for partners is open and the opportunity to register is available at any time.

The Managing Authority which is the Minister of Agriculture and Rural Development remains unchanged. His tasks include horizontal matters such as drafting regulations and guidelines, overseeing the operation of the Network, responsibility for the preparation of the Action Plan and the CAP Communication Strategy, approval of operational plans, and the implementation of operations under these plans.

The administering entity of NRN+ remains the central unit (from 2007 to 2013 functioning under the name of the Central Secretariat). It is worth mentioning at this point that the role of the central entity at the beginning of the operation of NRN in Poland was entrusted to the Foundation of Assistance Programs for

[21] Strategic Plan for CAP, https://www.gov.pl/web/wprpo2020/zatwierdzony-przez-komisje-europejska-plan-strategiczny-dla-wspolnej-polityki-rolnej-na-lata-2023-2027 (accessed 3 October 2023).

Agriculture FAPA. This occurred through an executive regulation[22] to the Act on RDP 2014-2020.[23] FAPA then implemented the NRN Action Plan for 2007-2013, as well as the NRN Operational Plans under RDP 2007-2013 and the Operational Plans until 2015 under RDP 2014-2020. On 1 January 2018, there was a change in the entity administering KSOW by entrusting the role of the central unit to the Agricultural Advisory Center in Brwinów (CDR in Brwinów).[24] The rationale for the change was the need to consolidate the tasks of the minister responsible for agriculture around the units of the public finance sector competent in these matters, subordinate to or supervised by the minister, as well as to increase his influence and means of supervision in shaping policies related to agriculture in the broadest sense.[25] The Agricultural Advisory Center in Brwinów, together with its branches in Kraków, Poznań, Radom, and Warsaw, is a state organizational unit reporting directly to the Minister of Agriculture and Rural Development. The statutory goal of the Center's activities is to improve the knowledge and skills of its advisory staff and to raise and standardize the standard of services provided by advisors to farmers. The CDR in Brwinów was established by the

[22] Pursuant to the provision of Article 55(4) of the Law on RDP 2014-2020, the minister in charge of rural development could authorize, by regulation, a unit of the public finance sector or a foundation whose sole funder is the State Treasury to act as the central unit of the RDP. In the execution of the statutory authorization, on 30 July 2015. The Minister of Agriculture and Rural Development issued a regulation authorizing the Foundation of Assistance Programs for Agriculture FAPA to act as the central unit of the national network (Journal of Laws of 2015, item 1104).

[23] J. Jagielski, *Fundacja jako podmiot administrujący*, (in:) P. Litwiniuk, A. Milewska, M. Wasilewski (eds.), *Prawne i ekonomiczne uwarunkowania funkcjonowania fundacji*, Warsaw, 2019, p. 91 *et seq.*

[24] By the Act of 21 April 2017 amending the Act on supporting rural development with the participation of the European Agricultural Fund for Rural Development within the framework of the Rural Development Program 2014-2020 (Journal of Laws of 2017, item 892), by virtue of Article 1(1) of the same Act, changing the wording of Article 55(4) of the amended Act, the possibility of entrusting the role of the central unit of the National Rural Network to a foundation whose sole funder is the State Treasury was excluded, and the existing entrustment expired on 31 December 2017. In implementation of the above, by a decree of 12 September 2017 on authorizing the Agricultural Advisory Center, based in Brwinów, to act as the central unit of the National Rural Network under the Rural Development Program 2014-2020, the Minister of Agriculture and Rural Development authorized the Agricultural Advisory Center, based in Brwinów, which is a unit of the public finance sector, organizationally subordinate to the minister responsible for rural development, to act as the central unit of the National Rural Network. For more on the role of the Foundation of Assistance Programs for Agriculture FAPA in the implementation of RDP 2014-2020, see P. Litwiniuk, *Fundacja Skarbu Państwa jako podmiot wdrażający instrumenty Wspólnej Polityki Rolnej*,(in:) *Integracja europejska jako determinanta polityki wiejskiej. Aspekty prawne*, P. Litwiniuk (ed.), Warszawa 2017, p. 32.

[25] Explanatory Memorandum to the Draft Law on Amendments to the Law on Support for Rural Development with the European Agricultural Fund for Rural Development under the Rural Development Program 2014-2020, https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=2736 (accessed 21 October 2023).

Act of 22 October 2004 on agricultural advisory units,[26] which came into force on 1 January 2005. In addition to the CDR in Brwinów, there are 16 provincial agricultural advisory centers within the agricultural advisory units. The task of the CDR in Brwinów, as the central unit of the NRN, is to ensure the functioning of the network and the implementation of its tasks at the national level and the provincial level – to the extent not reserved for regional units. In particular, its task still involves all issues related to the implementation of the operational plan, including the implementation of individual operations at the national level, cooperation with network units, monitoring and reporting. Very important issues from the point of view of the nature of NRN, also include the identification of entities cooperating within NRN+, enabling them to join in the implementation of the network's tasks and activating them. Other tasks concern the matters related to the administration of the network: servicing the steering committee, setting up thematic groups, supporting cooperation and information flow between the network's support units and other entities.

The question of the future functioning of the regional units of the NRN is an interesting one. Both provincial governments and provincial agricultural advisory centers (WODR) have been designated for this role. Their tasks have not been differentiated in principle. One and the other, as regional units, will carry out the tasks of the network at the provincial level aimed at topics related to the development of rural areas, through the implementation of activities under the operational plan. In the previous programming period, the division of tasks was different. The provincial governments remained the regional units of the NRN, while the provincial agricultural advisory centers were responsible for coordinating the Network for Innovation in Agriculture and Rural Areas (SIR) operating within the framework of the NRN in individual provinces, and only within the scope of this thematic network did they implement the objectives of the NRN. It should be noted that before the transfer of the functions of the central unit to CDR in 2018, the Center acted as the coordinator of the SIR Network.

In the new financial perspective, the tasks of regional units, both provincial governments and provincial agricultural advisory centers, include, in particular, the identification of partners, cooperation with network units, the creation of thematic groups, and the conduct of information and promotional activities on the CAP Strategic Plan, in accordance with the Communication Strategy for 2023-2027. Diagnosing the needs of the provinces in terms of the actions necessary to be taken towards improving the implementation of the Common Agricultural Policy and cooperating with the local contact points of European funds in terms of information on existing opportunities for support from national and

[26] Act of 22 October 2004 on agricultural advisory units (Journal of Laws of 2004, No. 251, item 2507, as amended).

European funds for the development of rural areas is left to the sole responsibility of local governments.

The very extensive management apparatus of the NRN also includes the Agency for the Restructuring and Modernization of Agriculture, which, as in previous years, will carry out the tasks specified in the CAP Communication Strategy for 2023-2027, as well as the Steering Committee for the National Rural Network+ formed by the representatives of public administration, science, agricultural consulting, as well as partners: social and industry organizations operating in the field of agriculture and rural areas. The Committee is to indicate and correct the directions of the network and facilitate the exchange of knowledge, experience, and cooperation of various entities.

5. CURRENT OBJECTIVES OF THE NATIONAL RURAL NETWORK+

For each CAP programming period, an NRN Action Plan is adopted, which is a projection of the Network's intervention logic, responding to the specific needs of rural development policy as defined in programming documents. The intervention logic of the NRN includes the program priorities, which constitute the thematic objectives of the Network, and illustrates the links between the objectives of the NRN and the tasks of the Action Plan through which the objectives can be achieved. The premise of the NRN intervention logic is to effectively achieve the goals of the Network and support the implementation of the priorities of the Common Agricultural Policy. Within the framework of the Action Plan, operational plans (previously biennial, and under the 2023-2027 Strategic Plan, annual) are developed, listing all operations that will be implemented to achieve the goals of the NRN.

The functioning of the NRN is intended, in particular, to increase the involvement of all stakeholders in the implementation of rural development policy (from 2024 onwards, including the first pillar of the CAP), to inform the public about the implemented programs and funding opportunities, as well as to disseminate information about the results of the implemented support policies. This is done through the dissemination of good practices, the creation of platforms, the organization of forums and events to facilitate the exchange of experiences between stakeholders, the collection of information and the facilitation of its dissemination, as well as the networking of funded structures and projects, such as LAGs and EPI operational groups.

Taking into account the numerous and very diverse group of addressees of NRN activities, the operations undertaken are carried out through a variety of

means. These include pieces of training, seminars, meetings, workshops, conferences and congresses, fairs, outdoor events, exhibitions, publications, press releases, broadcasts, films, advertising spots on radio and television, analyses, expertise, and scientific research. Of course, the listed forms of activities are not a closed catalog. The operations proposed by the units of the NRN management apparatus, including external partners, are evaluated, in particular, from the perspective of the policy priorities they are to implement, as well as from the perspective of the NRN objectives to be achieved. Each operation implemented within the Network is to play a supporting role in relation to rural development policy.

The NRN+ activities defined for 2023-2027 are as follows:

1. Collection, analysis, and dissemination of information on activities and good practices implemented or supported under the CAP Strategic Plan.
2. Developing the competence of the administration and other entities involved in implementing the CAP Strategic Plan.
3. Exchange of experiences and mutual learning among stakeholders.
4. Promote cooperation and networking of EPI and LAG operational groups or similar structures.
5. Develop links with other strategies or networks funded by the European Union.
6. Contribution to the further development of the CAP.
7. Participation in the activities of the European CAP network.
8. Information and promotion of the CAP Strategic Plan.

Each operational plan, which is a kind of executive act of the action plan, will include a description of the operations planned for implementation with an indication of the priority to which the operation corresponds and the objective and name of the RSPC activity with which the operation is consistent. Structured in this way, the document seems to realize the basic objective of supporting the state's CAP policy. Keeping in mind that although the NRN covers the entire country, yet is supposed to present a bottom-up and local approach to the implemented operations, each year's operational plan consists not only of a plan developed centrally by the central unit but also regional plans created by regional units. While such a "fragmentation" of the plan raises the risk of duplication of the implemented operations, it should at the same time ensure full utilization of resources and reach the widest possible audience. An important role in the effective selection of tools used will be played by the adopted procedure for qualifying operations for the plan and the distribution of funds allocated for operations implemented by units remaining part of the institutional apparatus of the NRN and external partners, whose cooperation within the NRN determines the implementation of the idea of effective networking.

6. CONCLUSIONS

The NRN is the first formal legal and organizational structure to deal with agricultural and rural development policy at the central and regional levels in a way that differs from the traditional sectoral approach.

It seems that the continuation of the process of socialization of the structure of the NRN understood as the involvement in its work of an increasing number of administrative entities in the area of agricultural policy and social partners, may justify the purpose of creating and the legitimacy of the functioning of this structure. NRN in its current form, where all the institutions involved in the implementation and functioning of the Network are organizationally subordinate to the Minister of Agriculture and Rural Development, raises some reservations about the mechanism's fit with the process of decentralization and deconcentration of public administration and the transposition of strategic decisions at the NRN level into the area of local needs.

The functionality of the new National Rural Network will be determined by the policy of the Managing Authority, which should include measures aimed at strengthening its efficiency, greater credibility, and democratization of processes, taking into account the bottom-up perspective and issues of equality of access to the services offered. Thus, the issue of designing the procedural process of qualifying operations for implementation remains important, as well as the distribution of funds provided for their implementation between institutions involved in the administration of the NRN and social partners. It seems that this division should take into account, first of all, the criterion of effectiveness of the actions taken, and not only the institutional location of their operators.

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Julia Pytko
University of Warsaw, Poland
e-mail: gj.niedziela@gmail.com
ORCID: 0000-0001-8189-6862

THE ROLE OF PUBLIC SECTOR ENTITIES IN IMPROVING ENERGY EFFICIENCY – CHARACTERISTICS OF ENERGY PERFORMANCE CONTRACTS

Abstract

Improving energy efficiency is one of the EU's key actions to mitigate climate change. The public sector is expected to play a key role in the fight against climate change. Therefore, it is useful to describe the role of public sector entities in improving energy efficiency and the legal tools they can use for this purpose. One such tool is the energy performance contract. In this article, the characteristics of normative and non-normative acts adopted at EU and national levels in the field of energy efficiency have been identified. It also analyses the provisions on energy performance contracts in order to show what such a contract is and how its essential elements should be designed. The identification of the fundamental problems arising from the current provisions on the conclusion of energy performance contracts will contribute to the possibility of redesigning these provisions or creating new legal frameworks in a way that better responds to the needs of market participants.

KEYWORDS

energy efficiency, energy performance contract, public sector entities

SŁOWA KLUCZOWE

efektywność energetyczna, umowa o poprawę efektywności energetycznej, jednostki sektora publicznego

1. INTRODUCTION

The fight against current climate change can take several forms. One of them is the implementation of measures to improve energy efficiency. The inspiration for writing this article and addressing the issues related to energy efficiency came from the statement in national and EU documents that the public sector should play a key role in improving energy efficiency, both at the local, regional and national levels. Therefore, if the public sector is to set the direction in the field of energy efficiency, it is necessary to provide it with appropriate tools to achieve this goal. The analysis of the following documents and legal acts dealing with the issue of energy efficiency led to the introduction of the model of financing energy efficiency improvement projects based on an energy performance contract. An energy performance contract can be one of the tools with which public sector bodies can fulfil the role to which they have been appointed by the provisions of EU and national law. For these reasons, this article has attempted to characterise these contracts and highlight the main problems related to their conclusion on the Polish market. It should be noted that the model of implementing investments on the basis of energy performance contracts is popular and has been used for many years by entities operating in the private sector. Therefore, it is even more worthwhile to consider why this model is still rarely chosen by public sector entities.

The first part of the article explains what energy efficiency is and how it has been regulated at EU and national levels. In addition to describing the legislative changes, this part also contains an analysis of those acts dealing with energy efficiency which, although not of a normative nature, have a significant influence on the content of the adopted directives, laws and regulations. This introduction to the subject of energy efficiency is intended to show the importance and growing impact of energy efficiency on the development of the EU and national energy sectors.

The focus of the next part of this article is to analyse the individual elements that make up the content of Article 7 of the Polish Energy Efficiency Act. Getting acquainted with the concepts used by the Polish legislator in this provision is crucial for identifying some of the problems related to the conclusion of energy performance contracts. The analysis of this provision will also facilitate the understanding of the principles of concluding energy performance contracts.

The fourth point of this article is the proper analysis of energy performance contracts. It should be noted, however, that this analysis by no means exhausts the range of issues related to such contracts. In this article, the description has been limited to the problems related to the subjectively essential elements of these contracts, i.e. their parties and the obligations that are based on them, as well as the risks that result from the fulfilment of these obligations. It should also be noted that the issue of concluding energy performance contracts can be described as interdisciplinary. It is influenced by various legal acts, not only those related to climate change or energy law but also those related to public procurement or public-private partnerships. For these reasons, this article does not deal with all the issues related to the conclusion and interpretation of energy performance contracts.

2. ENERGY EFFICIENCY IN EU AND NATIONAL LEGISLATION

In the last years, improving energy efficiency has become an issue of crucial importance. The European Union has adopted a number of legal acts and strategies to promote energy efficiency measures, which in turn have contributed to the implementation of these regulations in the national legislation of individual Member States, including Poland. The aim of this part of the article is to show how the EU's energy efficiency objectives have been and are still being shaped, and how their constant evolution affects Polish legislation in this area.

2.1. EU LEGISLATION

The Treaty on the Functioning of the European Union[1] (hereinafter: TFEU) is undoubtedly the starting point for analysing EU legislation on energy efficiency. It contains the basic objectives of the EU's energy policy, including the promotion of energy efficiency and energy savings (Article 194(1)(c) TFEU). The subsequent part of this provision establishes the obligation of the EU institutions to establish legal measures necessary to achieve this objective, as well as the other objectives listed in this article (Article 194(2) TFEU).

The consequence of fulfilling the above obligation was the adoption of the Energy Efficiency Directive[2] in 2012 (hereinafter: Directive 2012/27/EU). Direc-

[1] The Treaty on the Functioning of the European Union (Official Journal 2004, No. 90, item 864/2 as amended).

[2] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (Official Journal EU L 2012, No. 315 as amended).

tive 2012/27/EU required each EU Member State to set national indicative energy efficiency targets and also set the EU's overall target of increasing energy efficiency by 20% by 2020.

Over the years, the European Union has started to take measures that have led to the identification and implementation of increasingly ambitious objectives that shape the EU's energy policy, with a particular focus on aspects related to climate change.[3] In 2018, the European Commission proposed a review of the provisions of Directive 2012/27/EU. As a result of this review, the Regulation on the Governance of the Energy Union and Climate Action[4] (hereinafter: Regulation 2018/1999) and the Directive amending Directive 2012/27/EU on energy efficiency[5] (hereinafter: Directive 2018/2002) were adopted in December 2018. As a result of the adoption of the above-mentioned legal acts, the energy efficiency target stated in Directive 2012/27/EU has been clarified – it assumes a reduction of primary and final energy consumption to the level of 32.5% by 2030 compared to the energy consumption projections for 2030 prepared in 2007.

Regulation 2018/1999 and Directive 2018/2002 transpose into legislation the "energy efficiency first" principle first communicated in 2016 as part of the "Clean Energy for all Europeans" package.[6] This principle requires energy efficiency to be treated not only as one of the objectives of EU energy policy but also as a full-fledged energy source in which both public and private entities can invest before investing in more costly and complex energy sources.[7] The "energy efficiency first" principle was then clarified in the European Commission's 2021 Recommendations,[8] which provide examples of its implementation in the decision-making process, mainly in the energy sector.

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[3] T. Skoczkowski, S. Bielecki, *Efektywność energetyczna – polityczno-formalne uwarunkowania rozwoju w Polsce i Unii Europejskiej*, Polityka Energetyczna – Energy Policy Journal 2016, Vol. 19, Note 1, p. 9.

[4] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No. 663/2009 and (EC) No. 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No. 525/2013 of the European Parliament and of the Council (Official Journal EU L 2018, No. 328 as amended).

[5] Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency (Official Journal EU L 2018, No. 328).

[6] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions, and the European Investment Bank, *Clean energy for all Europeans*, Brussels 2016.

[7] See: https://energy.ec.europa.eu/topics/energy-efficiency/energy-efficiency-targets-directive-and-rules/energy-efficiency-first-principle_pl?etrans=pl (accessed 20 August 2023).

[8] Commission Recommendation (EU) 2021/1749 of 28 September 2021 on Energy Efficiency First: from principles to practice – Guidelines and examples for its implementation in decision-making in the energy sector and beyond.

The European Union did not stop at the above-mentioned changes in the climate objectives in the field of energy efficiency and proposed two further reviews of the provisions of Directive 2012/27/EU. These were linked to the adoption of the "Fit for 55" package in July 2021[9] and the "REPowerEU" plan[10] in May 2022. The first of these strategies aimed to increase energy efficiency in relation to primary and final energy consumption to 39% and 36% respectively by 2030. REPowerEU, on the other hand, set the above targets at 41% and 39% respectively. At the beginning of 2023, the Council of the European Union and the European Parliament reached a preliminary agreement on the new energy efficiency target, setting it at 11.7% compared to the energy consumption forecasts for 2030 prepared in 2020 (compared to the 2007 forecasts, this level is therefore 40.5% for primary energy consumption and 38% for final energy consumption).[11] The above provisions were confirmed by the Council of the European Union on 25 July with the adoption of the amended version of Directive 2012/27/EU.[12] Following publication in the Official Journal of the European Union, the new energy efficiency rules will enter into force after 20 days.[13]

2.2. NATIONAL LEGISLATION

The issues related to energy efficiency in the Polish legal system were mainly regulated by the Act of 20 May 2016 on Energy Efficiency[14] (hereinafter: the Energy Efficiency Act). This Act replaced the previous Act of 15 April 2011 on energy efficiency due to the need to transpose the provisions of Directive 2012/27/EU into Polish law.

The Energy Efficiency Act introduces a legal definition of energy efficiency, according to which it is the ratio of the amount of the utility effect obtained by a given object, technical device or installation in typical conditions of its use, or operation to the amount of energy consumed by this object, technical device or installation, or as a result of the performed service necessary to obtain this effect (Art. 2, point 3 of the Energy Efficiency Act). The term "utility effect" used in

[9] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *"Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality*, Brussels 2021.

[10] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *REPowerEU Plan*, Brussels 2022.

[11] See: https://www.europarl.europa.eu/news/pl/press-room/20230309IPR77212/parliament-and-council-negotiators-agree-on-new-rules-to-boost-energy-savings (accessed 20 August 2023).

[12] See: https://www.consilium.europa.eu/pl/press/press-releases/2023/07/25/council-adopts-energy-efficiency-directive/ (accessed 20 August 2023).

[13] See: https://www.cire.pl/artykuly/serwis-informacyjny-cire-24/rada-ue-przyjela-dyrektywe-o-efektywnosci-energetycznej (accessed 20 August 2023).

[14] Consolidated text: Journal of Laws of 2021, item 2166.

the above definition is in turn defined as the effect obtained as a result of the energy supply to a given object, technical device or installation, in particular, the performance of mechanical work, thermal comfort or lighting (Article 2(4) of the Energy Efficiency Act).

In order to better understand the concept of energy efficiency, it is worth applying the simplification proposed by M. Porzeżyńska, according to which energy efficiency is the ratio of utility effect to energy consumption. Consequently, energy efficiency can be designed on two levels: by increasing the utility effect with the same energy consumption (e.g. lighting a larger number of rooms with the same amount of energy), or by reducing energy consumption while maintaining the same utility effect (e.g. maintaining the same temperature in a room while reducing the fuel consumption necessary to heat that room).

Energy consumption itself can also be considered in two ways. The first is the typical energy consumption of a given object, technical device or installation. The second refers to the energy consumed as a result of performing a service necessary to achieve a specific utility effect. The extension of the concept of energy efficiency to include the second of the above-mentioned aspects was made on the basis of the current Energy Efficiency Act and has significant implications in the context of concluding energy performance contracts. The provision of specific services that affect energy consumption is the essence of such contracts.

However, the Energy Efficiency Act is not the only act containing provisions on energy efficiency. For example, the law of 29 August 2014 on the energy performance of buildings[15] or the law of 21 November 2008 on the promotion of thermal modernisation and renovation and on the central register of emissions from buildings.[16]

The above-mentioned acts can be described as legal acts of a specific nature. However, the issue of energy efficiency also falls within the scope of a legal act of a systemic nature, which in the Polish legal system can be considered to be the Act of 10 April 1997 – the Energy Law[17] (hereinafter: Energy Law).[18] One of the objectives of this Act is to ensure the economical and rational use of fuels and energy (Article 1(2) of the Energy Law). Therefore, energy efficiency is not a directly identified category under the Energy Law. This is emphasised by Z. Muras and M. Swora, among others, who also point out that the legislator's specification of the objective of ensuring the economical and rational use of fuels and energy (which is undoubtedly related to the concept of energy efficiency) highlights the

[15] Consolidated text: Journal of Laws of 2021, item 497.
[16] Consolidated text: Journal of Laws of 2022, item 438.
[17] Consolidated text: Journal of Laws of 2022, item 1385.
[18] A. Kościuk, *Prawo energetyczne. Komentarz*, 2nd Edition , Article 1.

specificity of the axiology characteristic of the Energy Law while maintaining the consistency of the content of this act with the specific provisions.[19]

When talking about energy efficiency, it should be emphasised that the issues related to it go beyond the sphere of purely normative acts. An example of this is the Energy Policy of Poland until 2040,[20] a key document of a strategic nature, which sets the directions for the development of the national energy sector (hereinafter: PEP 2040). The legal basis for the adoption of the national energy policy is the Energy Law, of which Article 13 lists the objectives of this policy. These include ensuring the growth of the competitiveness and energy efficiency of the economy. Similarly to the objectives of the Energy Law itself, the improvement of energy efficiency in the Polish legal system does not function as an objective in its own right, but as a means to achieve other objectives. The authors of the PEP 2040, sharing the above interpretation, point out that the improvement of energy efficiency has a horizontal and cross-cutting character and should be taken into account when implementing other measures listed in the remaining specific objectives of the PEP 2040.[21]

However, improving energy efficiency is not only a matter of sustainable use of fuels and energy or contributing to the better functioning of the Polish economy. The authors of the PEP 2040 point out that it indirectly contributes to ensuring the country's energy security "by reducing the demand for fuels and energy and the import of raw materials".[22]

The above interpretation is reflected in the assumptions for the update of the PEP 2040, published at the end of March 2023 by the Office of the Prime Minister under the title "Strengthening security and energy independence".[23] The need to update the PEP 2040 is dictated by the current geopolitical situation, including the war in Ukraine, the embargo on fuels from Russia and a significant increase in energy prices. As part of the assumptions, it is proposed to base the Polish energy policy on another, fourth pillar, namely energy sovereignty. This sovereignty, along with technological diversification and capacity expansion based on domestic sources, the development of renewable energy sources or the use of nuclear energy, consists precisely in improving energy efficiency. This will reduce the electricity demand, which in turn will reduce the demand for certain raw materials and decrease the impact on society and the economy of possible

[19] Z. Muras, M. Swora, *Prawo energetyczne. Tom I. Komentarz do art. 1-11s*, Z. Muras, M. Swora (eds.), 2nd Edition 2, Article 1.

[20] Announcement of the Minister of Climate and Environment of 2 March 2021 on the national energy policy until 2040 (Official Journal of 2021, item 264).

[21] *Ibidem*, p. 75.

[22] *Ibidem*, p. 75.

[23] See https://www.gov.pl/web/premier/zalozenia-do-aktualizacji-polityki-energetycznej-polski-do-2040-r-pep2040--wzmocnienie-bezpieczenstwa-i-niezaleznosci-energetycznej (accessed 19 August 2023).

interruptions in the supply of electricity (the so-called blackouts).[24] The update of the PEP 2040 is therefore a document that is eagerly awaited by many, including businesses, local authorities and citizens themselves. However, according to industry sources, the expected update of the PEP 2040 could take place at the turn of 2023 and 2024.[25]

3. THE ROLE OF PUBLIC SECTOR ENTITIES IN IMPROVING ENERGY EFFICIENCY

According to the Energy Efficiency Act, a public entity may implement and finance a project or similar projects aimed at improving energy efficiency on the basis of an energy performance contract (Art. 7 para. 1 of the Energy Efficiency Act). A detailed explanation of the meaning of the quoted provision requires a deeper analysis due to its key importance in the context of the issues discussed in this article.

3.1. A PUBLIC SECTOR ENTITY

The Energy Efficiency Act defines a public entity by referring to Article 4 of the Act of 11 September 2019 – Public Procurement Law[26] (hereinafter: Public Procurement Law). The cited article introduces a catalogue of entities that are considered to be contracting entities to which the provisions of the Public Procurement Law apply. The above-mentioned catalogue includes (i) public financial sector entities within the meaning of the provisions of the Act of 27 August 2009 on Public Finances[27] (hereinafter: Public Finances Act), (ii) state organisational units without legal personality which do not belong to the public financial sector entities, (iii) the so-called public law entities which do not belong to the public financial sector entities and (iv) associations of entities mentioned in the previous points.

Due to the subject matter of this article, the legal issues associated with the classification of certain entities as contracting authorities will not be examined in detail. However, it is worth mentioning some examples of these entities, as this

[24] *Ibidem*, p. 2.

[25] See: https://swiatoze.pl/aktualizacji-pep2040-nie-bedzie-a-przynajmniej-nie-za-kadencji-tego-rzadu/ (accessed 19 August 2023).

[26] The Act on energy efficiency refers in this provision to the wording of the Public Procurement Law of 2021 with subsequent amendments – Journal of Laws 2021, items 1129 and 1598.

[27] Consolidated text: Journal of Laws of 2023, item 1270.

may prove helpful in understanding which of them can potentially become parties to energy performance contracts.

The first group includes entities that constitute the public finance sector in Poland. They are listed in Article 9 of the Public Finances Act and include, among others, public authorities, local government units, the Social Insurance Fund (*Zakład Ubezpieczeń Społecznych*), the National Health Fund (*Narodowy Fundusz Zdrowia*) and the Polish Academy of Sciences (*Polska Akademia Nauk*). Examples of entities included in the following categories are given, *inter alia*, by A. Gawrońska-Baran, who states that the second category includes the State Forests (*Państwowe Gospodarstwo Leśne Lasy Państwowe*), the third category includes entities such as the National Bank of Poland, State Television and Radio, while the fourth category is made up of associations of the above entities, for which the legislator has not provided a specific legal form.[28]

The above distinction shows that the intention of the legislator was to cover a possibly wide group of entities with the category of public sector entities. This is evidenced, for example, by the use of the term "public sector entity" in the Energy Efficiency Act and not "public finance entity", which would automatically limit the scope of this term to the entities listed in Article 9 of the Public Finance Act.

3.2. A PROJECT SERVING TO IMPROVE ENERGY EFFICIENCY

Another term used in Article 7 of the Energy Efficiency Act which deserves more attention, is a project to improve energy efficiency. This term has been defined in the Energy Efficiency Act as an action consisting in making changes or improvements to an object, technical device or installation as a result of which energy savings are achieved (Article 2 item 12 of the Energy Efficiency Act). The catalogue of energy efficiency improvement projects is listed in Article 19 of the Energy Efficiency Act. These include, for example: insulation of industrial equipment, reconstruction or renovation of a building, modernisation or replacement of lighting, energy recovery and the use of energy generated in renewable energy installations. The list of energy efficiency projects was also determined on the basis of the announcement of the Minister of Climate and Environment of 30 November 2021.[29] However, energy efficiency improvement contracts are mentioned only once in the above-mentioned announcement. In Section 2 point 10 of the announcement, it was only stated that a project for improving energy efficiency is the reconstruction or renovation of a public utility building on the basis of an energy performance contract. At this point, it is worth mentioning the

[28] E. Wiktorowska, A. Wiktorowski, P. Wójcik, A. Gawrońska-Baran, *Prawo zamówień publicznych. Komentarz aktualizowany*, 2023, Article 4.

[29] Official Gazette of the Government of the Republic of Poland (Monitor Polski) 2021, item 1188.

first problem related to the conclusion of energy performance contracts in Poland. The indication that they can only be concluded in the context of the reconstruction or renovation of a public utility building significantly limits the scope of potential projects that could be implemented using such contracts.

An energy efficiency project should not be confused with the concept of an energy efficiency measure, which has a broader scope than the project itself. Article 6(2) of the Energy Efficiency Act introduced a catalogue of such measures. The lack of use of expressions such as "in particular" or "others not mentioned in this article" in this catalogue indicates that it is a closed catalogue. Thus, the Polish legislator considers the following as measures to improve energy efficiency: (i) implementation and financing of a project to improve energy efficiency, (ii) purchase of equipment, installations or vehicles characterised by low energy consumption and low operating costs, (iii) replacement of the equipment, installations or vehicles in use with the equipment, installations or vehicles referred to in point (ii) or their modernisation, (iv) implementation of a thermal modernisation project, (v) implementation of an environmental management system and (vi) implementation of low-emission projects.

It is, therefore, necessary to compare the content of Article 6(2)(1) with the wording of Article 7(1) of the Energy Efficiency Act. After comparing these two articles, it is possible to reformulate the second of these provisions as follows: A public entity may apply an energy efficiency improvement measure referred to in Article 6(2)(1) on the basis of an energy performance contract. The proposed amendment of this provision shows that the Polish legislator has already limited the scope of energy efficiency measures implemented on the basis of an energy performance contract at the level of the terms used in the provisions. Therefore, it is worth considering why an energy performance contract cannot be concluded for the purpose of applying other energy efficiency measures as well. Such a regulation, which is present in the current wording of the Energy Efficiency Act, seems to be inconsistent not only with the EU perspective but also with the intentions of the legislator himself.

The use of the phrase "a project or projects of the same type" in Article 7 of the Energy Efficiency Act is problematic for reasons similar to those described in the previous paragraph. It suggests that an energy performance contract may cover either a single project (such as the upgrading of a specific public utility building) or several projects but only those of the same type. For example, it is possible to conclude an energy performance contract for a project covering the entire municipality but only in the context of the replacement of street lighting. The above approach, which can be seen in the cited regulation, is, for example, inconsistent with market practice, according to which energy performance contracts can serve as a basis for the implementation of various projects aimed at improving energy efficiency (e.g. a contract covering the modernisation of building management systems as well as the installation of PV panels).

4. ENERGY PERFORMANCE CONTRACT

As regards the most important element of this article for the purposes of Article 7 of the Energy Efficiency Act, it is necessary to quote the legal definition of an energy performance contract introduced by Directive 2012/27/EU. According to this definition, an energy performance contract is an agreement between the beneficiary and the provider of an energy efficiency improvement measure, which is verified and monitored throughout the duration of the contract, where investments (works, supplies or services) in this measure are paid for in relation to a contractually agreed level of energy efficiency improvement or another agreed energy performance criterion, such as financial savings (Article 2(27) of Directive 2012/27/EU).

It should be noted that the Energy Efficiency Act does not provide its own definition of an energy performance contract. Therefore, when discussing the individual elements of such a contract, it is necessary to refer directly to the definition contained in Directive 2012/27/EU. It should be emphasised that there are discrepancies between the terminology used in Directive 2012/27/EU and the terminology used in the Energy Efficiency Act (most likely due to the limitations of translating), which may pose a challenge in interpreting the individual legal norms regulating the conclusion of such contracts.

However, it should be noted that the provisions of Directive 2012/27/EU and the Energy Efficiency Act will be helpful in understanding what energy performance contracts are and how they should be structured. Further analysis of these contracts will be based on the contents of the Guide to the Statistical Treatment of Energy Performance Contracts, prepared by Eurostat and the European Investment Bank in May 2018[30] (hereinafter: the Guide), and the Guidelines for Energy Performance Contracts, prepared by the Ministry of Climate and Environment in March 2023[31] (hereinafter: the Guidelines).

4.1. PARTIES TO THE ENERGY PERFORMANCE CONTRACT

According to the definition in Directive 2012/27/EU, the parties to an energy performance contract are the beneficiaries and the providers of an energy efficiency improvement measure. It should be noted that Directive 2012/27/EU does not define any of the above terms. On the other hand, according to the Energy Efficiency Act, the parties to such a contract are public entities (whose issues

[30] *A Guide to the Statistical Treatment of Energy Performance Contracts*, Eurostat and European Investment Bank, 2018.

[31] *Guidelines for Energy Performance Contracts (Wytyczne do umów o poprawę efektywności energetycznej)*, Ministry of Climate and Environment, 2023.

have already been addressed in the previous part of the article) and providers of services related to energy consumption. Article 7(4) of the Energy Efficiency Act states that such a provider is an entity, including an entity with its registered office or place of residence outside the territory of the Republic of Poland, which provides services consisting in the implementation of projects aimed at improving energy efficiency.

However, regardless of the terminology used in Directive 2012/27/EU and the Energy Efficiency Act, such providers are commonly referred to as ESCOs (an acronym for Energy Saving Company or Energy Service Company) [32] and will be referred to as such in the following parts of this article.

It is worth noting that the Energy Efficiency Act does not specify whether another public entity (or another entity operating within the public sector that is not a public entity) can be an ESCO company. The provisions of Directive 2012/27/EU, which, as mentioned above, do not define the terms "beneficiary" and "provider of an energy efficiency improvement measure", will not be helpful in this respect either. However, the Guidelines state that the concept of an ESCO company corresponds to the definition of a "contractor" contained in Article 7(30) of the Public Procurement Law.[33] However, the doctrine emphasises that the scope of the term "contractor" should be interpreted as broadly as possible, regardless of the legal form that the entities that are contractors have chosen for the purpose of carrying out their activities.[34]

The answer to the question posed in the previous paragraph is of fundamental importance from the perspective of the risks borne under the energy performance contract (which will be described in the further part of this article). However, for the purposes of this section, it is necessary to refer to the content of the Guide, which indicates that, from the perspective of the statistical recording of energy performance contracts, an ESCO company should be classified outside the government and local government sector[35] (for simplicity's sake, outside the public sector). According to the Guidelines, in order to verify such a classification, it is first necessary to check whether a given ESCO is controlled by the public sector. Control is undoubtedly a broad concept and its existence should be determined on a case-by-case basis. However, the authors of the Guide indicate that control means, *inter alia*, (i) the public sector holding 51% of the shares and voting rights in the ESCO company, (ii) the public sector holding 25% of the shares in the ESCO company, which gives the public sector the right to veto significant deci-

[32] The catalogue of entities offering services related to energy consumption on the Polish market is available at the following link https://www.gov.pl/web/klimat/lista-dostepnych-dostawcow-uslug-energetycznych (accessed 16 September 2023).

[33] *Guidelines*..., p. 119.

[34] E. Wiktorowska, A. Wiktorowski, P. Wójcik, A. Gawrońska-Baran, Prawo zamówień publicznych…, Article 7.

[35] *A Guide*…, p. 21.

sions of the ESCO company, and (iii) where the public sector does not hold any shares in the ESCO company, having the right to veto significant decisions of the ESCO company, for example on the basis of an agreement on the financing of a particular ESCO company.

4.2. THE OBLIGATIONS OF THE ESCO COMPANY IN THE ENERGY PERFORMANCE CONTRACT

The main obligation of the ESCO company is to implement a project serving to improve energy efficiency. As indicated in the Guidelines, the ESCO company must provide a comprehensive investment approach to the implementation of a given project, which means designing, financing, performing construction works, ensuring adequate supplies and services, etc.[36]

The main obligation of the ESCO company is to implement a project to improve energy efficiency. As stated in the guidelines, the ESCO company has to provide a comprehensive investment approach to the implementation of a given project, i.e. design, financing, construction, ensuring adequate supplies and services, etc.[37]

According to Article 7(2)(1) of the Energy Efficiency Act, the implementation of an energy efficiency improvement project must contribute to the achievement of specific energy savings. The energy saving is the amount of energy that constitutes the difference between the energy potentially consumed by a given object (device or installation) in a given period before the implementation of the project serving to improve energy efficiency and the energy consumed by this object (device or installation) in the same period after the implementation of this project, taking into account the normalised external conditions affecting energy consumption (Article 2(10) of the Energy Efficiency Act). For this reason, energy performance contracts are also called contracts with guaranteed savings.[38]

Thus, on the basis of the energy performance contract, the ESCO company is obliged to (i) implement the investment process for the construction of a specific project and (ii) guarantee the specified energy savings achieved as a result of the process referred to in point (i). Looking at these obligations, it should be noted that their implementation is burdened with various types of risks. It should also be emphasised that the construction risk should be understood in a broader sense than just the risk of carrying out construction works within the meaning of the

[36] *Guidelines...*, p. 18.
[37] *Guidelines...*, p. 18.
[38] See: https://kape.gov.pl/epc-esco (accessed 16 September 2023).

provisions of the Polish Building Law.[39] This risk is also related to the implementation of all investments aimed at improving energy efficiency.[40]

As already indicated in the previous part of the article, the determination of which party to the energy performance contract is obliged to bear these risks is a key issue for the popularity of concluding such contracts on the Polish market. It should be noted that one of the main reasons why Polish public entities were reluctant to enter into such contracts was the fact that the issue of ESCOs bearing the risks for their obligations was not sufficiently regulated in Polish law. It is also noted that the lack of an appropriate regulatory environment in this respect was one of the main barriers to the use of energy performance contracting in Poland.[41]

In particular, the Energy Efficiency Act did not specify whether and to what extent the obligations arising from energy performance contracting affect the level of public debt and the deficit of the public finance sector. However, this ambiguity was clarified by the adoption of the amendment to the Energy Efficiency Act in 2021,[42] which added Section 3 to Article 7. According to this provision, the obligations arising from the energy performance contract do not affect the level of public debt and the deficit of the public finance sector if the ESCO company bears most of the construction risk and the risk of achieving the guaranteed energy savings.

This regulation was then further clarified by the adoption of the Regulation of the Minister of Funds and Regional Policy of 22 December 2021 on the scope of the construction risk and the risk of achieving the guaranteed level of average annual energy savings and the detailed factors taken into account in their assessment.[43] This regulation contains a catalogue of events that may affect the occurrence of the above risks.[44] In addition, this Regulation sets out the factors that will be taken into account in assessing the risks arising from the implementation of the obligations under the energy performance contracting scheme. These include, among others: the share of public funds in the investment costs incurred by the ESCO company for the creation of new fixed assets or the improvement of existing ones; the nature, timing and amount of payments made by the public entity to the ESCO company; the settlement rules in case the assumed level of energy savings is not achieved or is achieved at a higher level than agreed in the

[39] M. Pawełczyk, *Prawo energetyczne. Efektywność energetyczna Tom I. Komentarz*, M. Czarnecka, T. Ogłódek (eds.), 2nd Edition, 2023, Article 7.

[40] Justification for the government draft of the Act amending the Act on energy efficiency and some other acts, parliamentary print number 957.

[41] P. Bertoldi, B. Boza-Kiss, A. Toleikyte, *Energy Service Market in the EU*, Publications Office of the EU, 2019, p. 117.

[42] The Act of 20 April 2021, amending the Act on energy efficiency and some other acts (Journal of Laws of 2021, item 868).

[43] Journal of Laws, item 2452.

[44] See: https://wartowiedziec.pl/rozwoj-i-fundusze/60672-ryzyka-przy-umowie-o-poprawe-efektywnosci-energetycznej-jest-projekt-rozporzadzenia (accessed 17 September 2023).

energy performance contract; changes in the legal provisions affecting the implementation of the energy performance contract; the rules for early termination of the energy performance contract, or the date of expiry of the energy performance contract.

The adoption of the amendment to the Energy Efficiency Act and the abovementioned Regulation should be seen as an important positive step that may contribute to the development of the implementation of energy efficiency projects by public sector entities on the basis of energy performance contracting in Poland.[45]

4.3. THE OBLIGATIONS OF THE PUBLIC SECTOR ENTITY UNDER THE ENERGY PERFORMANCE CONTRACT

The main obligation of the public entity arising from the energy performance contract is to pay the ESCO company a remuneration for implementing the energy efficiency improvement project. However, as stated in Article 7(2)(2) of the Energy Efficiency Act, the amount of this remuneration depends on the energy savings achieved as a result of the implementation of the energy efficiency improvement project. Based on the energy performance contract, the financing model of such a contract looks, therefore, as follows: the ESCO company invests its own financial resources in the implementation of a specific project and recovers the costs incurred (together with the remuneration) through payments spread over time.[46]

It should be noted that the method of remuneration of the ESCO company under the energy performance contract is the main factor distinguishing this type of contracts from public-private partnership contracts. Public-private partnership contracts are regulated by the Act of 19 December 2008 on public-private partnership[47] (hereinafter: the Act on public-private partnership). It is noted that the energy performance contract is a specific type of public-private partnership contract.[48] This statement is somewhat confirmed by Article 7(6) of the Energy Efficiency Act, according to which the provisions of the Act on public-private partnership shall apply to energy performance contracts (with the exception of some provisions) in matters not regulated by this Act. However, there are many differences between energy performance contracts and public-private partnership

[45] Examples of projects financed in the ESCO formula are available at this link: https://www.gov.pl/web/klimat/przykladowe-projekty-finansowane-w-formule-esco (accessed 17 September 2023).

[46] See: https://www.umww.pl/artykuly/55681/pliki/formulaescofinal.pdf (accessed 17 September 2023).

[47] Consolidated text: Journal of Laws of 2023, item 1637.

[48] Information on changes in the Act on energy efficiency and the Act on public-private partnership regarding Energy Performance Contracts (EPC), Ministry of Funds and Regional Policy, Public-Private Partnership Department, 2022.

contracts, and as mentioned above, the method of payment is one of the most important. The Guidelines have highlighted that the remuneration of the ESCO company is closely linked to the energy savings it achieves and always comes from the budget of a given public sector entity, while the remuneration of the private partner in the PPP contract is most often based on the availability fee or user fees and depends on the actual availability or actual use of the subject of the project.[49]

5. CONCLUSIONS

The analysis presented in this article shows that the potential for improving energy efficiency in the public sector, using a model based on the conclusion of energy performance contracts, is enormous. Undoubtedly, the legislative and programmatic actions taken by the European Union in this regard should be considered as necessary and crucial, not only in the fight against climate change but also in the shaping of a sustainable economy and a fair energy transition. The dynamics of these actions, and consequently of legislative changes, is very high. Therefore, Poland, as a member of the European Union, is facing an ambitious challenge to meet the requirements imposed by the EU institutions.

However, the legislative changes adopted by the Polish legislator in recent years indicate that it is making intensive and comprehensive efforts to meet these requirements. An example to support this thesis is the adoption of the new Energy Efficiency Act, as well as the adoption of its further amendments, and also (which is particularly important in the context of energy performance contracts concluded by public sector entities) the regulation in Polish law of issues related to the impact of obligations arising from energy performance contracts on public debt and the public finance sector deficit.

Equally important, the issue of improving energy efficiency is not only the subject of interest in legislation. It is also present in documents of a strategic nature, such as the PEP 2040, as well as in support materials prepared for public entities that explain the most complicated issues related to the conclusion of energy performance contracts, such as the Guidelines prepared this year by the Ministry of Climate and Environment.

The legislative and promotional measures described above have not yet eliminated all the barriers and problems in popularising the model of implementing energy efficiency projects based on energy performance contracts. It has been repeatedly pointed out in this article that the terminology used in the provisions of Directive 2012/27/EU and the Energy Efficiency Act is often imprecise, which

[49] *Guidelines*... p. 25.

actually contributes to limiting the scope of concluding energy performance contracts by public entities. Undoubtedly, the Polish legislator should pay attention to this issue in the future, as the introduction of appropriate amendments to the legal provisions at low cost may contribute to a better understanding of the rules governing the conclusion of energy performance contracts and, consequently, to a more frequent use of this model by public sector entities.

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Krzysztof Radzikowski
University of Warsaw, Poland
e-mail: k.radzikowski@wpia.uw.edu.pl
ORCID: 0000-0001-6246-8838

CONTEMPORARY DILEMMAS OF TAXATION EQUALITY

Abstract

The article confronts the most important political and economic thoughts dealing with the way of distributing the tax burden in society with contemporary socio-economic conditions and with the current tax legislation. The essence of the analyzed problem is the traditional dilemma of a flat tax or a progressive tax. In the economic terms, the Polish tax system, treated as a whole, together with social security (ZUS) and health care contributions (NFZ), is not progressive, but regressive, because in percentage terms, the effective burden generally decreases with increasing wealth (the nominal tax rates are flat with the exception of progression in case of PIT). The Polish Deal did not change the fundamental conclusion on the regression of the Polish tax system, although some social groups recorded an increase in the tax burden on personal income (PIT together with ZUS and NFZ contributions).

KEYWORDS

taxation equality, progression of taxation, regression of taxation, Polish Deal

SŁOWA KLUCZOWE

równość opodatkowania, progresja opodatkowania, regresja opodatkowania, Polski Ład

1. INTRODUCTION

The aim of the article is to confront the most important political and economic thoughts dealing with the way of distributing the tax burden in society with contemporary socio-economic conditions and with the current tax legislation. The examined problem combines the ideas of equality, solidarity, and justice, but all these values are self-contained and autonomous,[1] and – in accordance with the title of this article – the aim of further analysis is to assess the Polish tax system in terms of the equality postulate.

The article is an extended version of the speech at the 21st Conference of the Faculty of Law and Administration of the Warsaw University entitled *Równość i nierówność w prawie* (*Equality and inequality in law*) (Warsaw, 28 February 2020) and is also associated with speeches at the 20th Conference of the Faculty of Law and Administration of the University of Warsaw entitled *Solidarność i dobro wspólne jako wartości w prawie* (*Solidarity and the common good as values in law*) (Warsaw, 1-4 March 2019)[2] and at the 23rd Conference of the Faculty of Law and Administration of the University of Warsaw entitled *Prawo w epoce populizmu* (*Law in the era of populism*) (Warsaw, 18 March 2022).[3] In the course of the analysis, I also refer to a series of articles published in the monthly magazine "Doradztwo Podatkowe. Biuletyn Instytutu Studiów Podatkowych".[4]

Traditionally, the principle of equality is expressed by the dictum "treat equals equally, and the different – differently". Equality does not imply sameness, and the prohibition of discrimination is not the same as the prohibition of differentiation: differentiation remains permissible when it serves justice, only unjust differ-

[1] On treating solidarity and equality as determinants of justice: A. Stoiński, *Idea sprawiedliwości społecznej. Wstępna klasyfikacja znaczeń*, Olsztyn 2017, pp. 103-118; in the legal context: A. Bielska-Brodziak, I. Bogucka, *Solidarność jako termin prawny i jego funkcjonowanie w praktyce orzeczniczej*, (in:) *Idea solidaryzmu we współczesnej filozofii prawa i polityki*, A. Łabno (ed.), Warszawa 2012, pp. 223-230.

[2] K. Radzikowski, *Polski system podatkowy wobec postulatu sprawiedliwości społecznej*, w: *Solidarność i dobro wspólne jako wartości w prawie*, ed. D. Bach-Golecka, Warszawa 2021.

[3] K. Radzikowski, *Prawo podatkowe w cieniu populizmu (na przykładzie Polskiego Ładu)*, "Studia Iuridica" 2022, No. 91.

[4] K. Radzikowski, *Współczesne dylematy równości i sprawiedliwości opodatkowania*, "Doradztwo Podatkowe. Biuletyn Instytutu Studiów Podatkowych" 2020, No. 12 (part 1), 2021 No. 1 (part 2), 2 (part 3) and 3 (part 4).

entiation is prohibited.[5] Discrimination consists not only in the different treatment of a group with the same essential feature,[6] but also in the equal treatment of entities who are significantly different from each other (precisely: entities belonging to significantly different categories may but do not have to be treated differently, and in this situation, equal treatment will often violate the principle of equality).[7] However, the principle of equality does not imply the prohibition of imposing specific obligations or the requirement to guarantee specific rights.[8]

Referring the above to public-law financial relations – the level of wealth (property) should be considered an important feature. The principle of equality does not require the introduction of specific levies or benefits, but it is a guideline for their structure and character. The essence of the analyzed problem is the traditional dilemma of a flat tax or a progressive tax, i.e. the answer to the question of how much the richer should pay higher taxes than the poorer: proportionally or overproportionally to the level of wealth[9]?

The contemporary debate on socio-economic issues is within the limits set by liberalism on the one hand, and on the other – by the broadly understood left-wing trends referring to the concept of the so-called welfare state. The views from before the era of classical economics are rejected as utopian or anachronistic (e.g. physiocracy or mercantilism). Let us follow the arguments invoked in this debate over the past two centuries.

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[5] *Cf.* W. Sadurski, *Równość wobec prawa*, "Państwo i Prawo" 1978, No. 8-9, pp. 52 *et seq*.; J. Falski, *Konstytucyjna zasada równości w orzecznictwie Trybunału Konstytucyjnego*, "Państwo i Prawo" 2000, No. 1, pp. 49 *et seq*.; M. Ziółkowski, *Zasada równości w prawie*, "Państwo i Prawo" 2015, No. 5, pp. 95 *et seq*.; judgments of the Constitutional Tribunal: of 3 Sep 1996, ref. No. K 10/96; of 18 Dec 2000, ref. No, K 10/00; of 28 Mar 2004, ref. No. K 40/04 and of 11 Nov 2010, ref. No, K 2/10.

[6] For example, judgments of the Constitutional Tribunal: of 9 Mar 1988, ref. No. U 7/87; of 17 May 19999, ref. No. P 6/98; of 4 Jan 2000, ref. No. K 18/99; of 18 Apr 2000, ref. No. K 23/99; of 21 Jun 2001, ref. No. SK 6/01; of 5 Oct 2005, ref. No. SK 39/05; of 24 Oct 2005, ref. No. P 13/04, of 11 Dec 2006, ref. No. SK 15/06; of 19 Dec 2007, ref. No. K 52/05; of 23 Mar 2010, ref. No. SK 47/08; of 15 Jul 2010, ref. No. K 63/07; of 21 Jan 2014, ref. No. SK 5/12 and of 13 May 2014., ref. No. SK 61/13.

[7] *Cf.* judgments of the Constitutional Tribunal: of 23 Oct 1995, ref. No. K 4/95; of 29 Sep 1997, ref. No. K 15/97; of 6 May 1998, ref. No. K 37/97; of 19 Apr 2011, ref. No. P 41/09; of 12 Jul 2012, ref. No. 24/10; of 19 Dec 2012., ref. No. K 9/12 and of 21 Jul 2014, ref. No. K 36/13.

[8] Judgment of the Constitutional Tribunal of 9 June 2010, ref. No. K 29/07.

[9] Progression of taxation consists in an overproportionate increase in burdens in relation to the tax base reflecting the level of wealth; the opposite of progression is regression, while proportional tax is characterized by a uniform percentage rate regardless of the amount of the tax base, without any reliefs, exemptions, exclusions and tax-free amount, and such elements are included – with a uniform percentage rate – the so-called flat tax, which thus gains a mildly progressive character in the lower tax base ranges (colloquially, the concepts of flat and proportional taxes are treated as synonymous).

2. POLITICAL AND ECONOMIC THOUGHTS TOWARD TAXATION EQUALITY

The problem of distributing the tax burden in society, from the point of view of equality and justice as well as efficiency, was dealt with, among others, by A. Smith, D. Ricardo, J. B. Say, J. S. Mill, K. Marks, A. Wagner, F. Neumark and J. M. Keynes. Their opinions still determine the views of an ideal tax system, both on the doctrinal and journalistic level, as well as in political practice.

Adam Smith believed that citizens should contribute to the state in proportion to the income they receive under its care (the so-called equivalence theory). This idea is interpreted in various ways. The phrase "proportionally" suggests a flat tax, but it does not exclude progression, because the proportion does not refer to wealth but to protection (benefits) from the state, and this increases overproportionally to the level of wealth.[10] Importantly, A. Smith's views refer to his contemporary feudal society, a large part of which was not burdened with any public levies, and to the poll taxes levied at that time with a fixed amount, regardless of the level of wealth – in comparison, even a flat tax burdening the entire society is beneficial to the poor. A. Smith also advocated imposing consumption taxes on luxury goods instead of necessities.

According to the so-called David Ricardo's 'Edinburgh rule', the tax should be neutral in the sense that it leaves the citizen in more or less the same financial situation in which it found him (tax neutrality). This rule is unanimously interpreted as a postulate of proportionality of taxation and a ban on treating the tax as a mechanism for redistributing financial resources and equalizing property differences in society.[11]

Jean Bertrand Say, a popular follower of classical liberal thought in Francophone countries, advocated a low, though progressive, tax and giving fiscal burdens a social function – as long as it did not threaten the maintenance of the standard of living of individual citizens.[12] Income tax was supposed to provide 2/3 of budget revenues, and indirect taxes – only 1/3. This postulate was implemented by the English income tax (measured after deducting costs), divided into 5 quotations, shaped from the turn of the 19th century to the beginning of the 20th century depending on the sources of income, together with the so-called super tax – a progressive tax on the excess of the sum of all quotes over a certain minimum.[13]

Considered the precursor of the so-called modern social liberalism, John Stuart Mill treated the tax as a sacrifice to society and not as a measure of benefits

[10] A. Gomułowicz, in: A. Gomułowicz, D. Mączyński, *Podatki i prawo podatkowe*, Warszawa 2016, pp. 52-54.

[11] *Ibidem*, pp. 62-67.

[12] N. Gajl, *Teorie podatkowe w świecie*, Warszawa 1992, pp. 53-55.

[13] *Ibidem*, pp. 59-61.

obtained from it, and the contribution to the state was supposed to be such that everyone felt the same level of burden (the so-called theory of equal sacrifice). Interpretations of this thought are controversial. On the one hand, J. S. Mill criticized progression as a mechanism of wealth redistribution, on the other hand, he expressed the principle of ability to pay, because the tax should only be charged on what remains after deducting the subsistence minimum. What is more, it is not the calculated tax that is to be equal, but the feeling of its burden, and the wealthy to a lesser extent than the poor feel the same loss of income – both in absolute (amount) and relative (percentage) terms.[14]

The principle of ability to pay is the canon of modern thinking about the tax system: as an emanation of universality and equality. It is supposed to ensure fair taxation.[15] Referring to the thought of J. S. Mill, Arnold J. Cohen Stuart proposed the concept of equal proportional sacrifice: the same percentage burden on the loss of marginal utility of income leads to the progression of taxation.[16] Similarly, Francis Y. Edgeworth argued that the loss of benefits for the rich due to taxation is less than for the poor, so the parity of benefits foregone determines a strong progression to equalize after-tax income.[17]

Adolf Wagner formulated a thesis on the constant increase in public expenditure and the needs of the state budget along with the development of state functions (the so-called Wagner's law). He also drew attention to the redistributive function of taxation: the tax does not only play a fiscal role, as it corrects social inequalities, thanks to which global demand increases to the benefit of all (poorer consume proportionately more income than richer who accumulate it).[18] A. Wagner was in favor of the so-called global tax, which accumulates all income streams and gives a smooth progression, while distinguishing between the so-called funded income (obtained from capital/property) from the so-called unfunded income (obtained from work), and considered it fair and beneficial for society that funded income should be taxed higher and more progressively than unfunded income. Importantly, A. Wagner did not undermine the foundations of his contemporary liberal

[14] A. Gomułowicz, (in:) A. Gomułowicz, D. Mączyński, *Podatki* ..., pp. 69-70; R. Gwiazdowski, *Podatek progresywny i proporcjonalny: doktrynalne przesłanki, praktyczne konsekwencje*, Warszawa 2007, pp. 100-102.

[15] *Cf.* A. Gomułowicz, *Zasada sprawiedliwości podatkowej*, Warszawa 2001, pp. 47 *et seq*.; R. Mastalski, *Prawo podatkowe*, Warszawa 2018, pp. 7-9, 36-41; T. Wołowiec, *Zasada sprawiedliwości w opodatkowaniu*, (in:) *Organizacje komercyjne i niekomercyjne wobec wzmożonej konkurencji oraz wzrastających wymagań konsumentów*, A. Nalepka, A. Ujwara-Gil (eds.), Nowy Sącz 2009, pp. 311-323; E. K. Drozdowski, *Zasada zdolności płatniczej a polski system podatk*owy, Poznań 2018, pp. 28-42.

[16] A. J. Cohen Stuart, *On Progressive Taxation*, (in:) *Classics in the Theory in Public Finance*, R. A. Musgrave, A. T. Peacock (eds.), New York 1958, pp. 48 *et seq*.

[17] H. Peyton Young, *Sprawiedliwy podział*, Warszawa 2003, pp. 153-157.

[18] A. Gomułowicz, (in:) A. Gomułowicz, D. Mączyński, *Podatki* ..., pp. 73-82.

state. He did not want to violate property or hamper economic development, and changes in the property structure of society were to be gradual and quite limited.

Karl Marx and Friedrich Engels came from different assumptions. They considered a classless society (equal in terms of property) in which there would be no place for both private property and taxes to be the goal, but until this goal was achieved (through revolution) they advocated a high tax burden and strong progression, which would lead to the confiscation of private property.[19]

Fritz Neumark emphasized that there are no universal rules for the distribution of the tax burden, and, in fact, equality understood in the abstract requires, individualized and unequal treatment (he was in favor of progression).[20]

The socio-economic policy of the Western world in the 20th century was dominated by two tendencies: interventionism and neoliberalism.

The first comes from the thought of John M. Keynes from the period of the so-called Great Depression at the turn of the 1920s and 1930s, and its essence is to increase consumer demand in periods of economic downturn through financial transfers to society (e.g. remuneration for public works).[21] Tax policy must be subject to business cycles (in principle, J. M. Keynes was in favor of progression), but in periods of recession the tax burden must decrease, so public needs should be financed at the expense of the budget deficit (public debt).[22]

The foundations of the neoliberal theory were created by the so-called Austrian school (Ludwig von Mises and Friedrich von Hayek) and developed by the so-called Chicago school/Chicago boys (Milton Friedmann). Neoliberals are against progression and taking into account the life situation of the taxpayer because it overcomplicates the tax system and makes it fiscally inefficient and only seemingly fair: a progressive income tax primarily affects the middle class, not the upper class, and hinders the social advancement of the poor, as it deprives them of the results of intensive work.[23] Statistical data undermine its ability to correct social inequalities (as measured by the so-called Ginni coefficient).[24]

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[19] K. Marks, F. Engels, *Manifest partii komunistycznej*, https://www.ce.uw.edu.pl/wp-content/uploads/2018/10/4.-kapitalizm_marks_engels_manifest-komunistyczny.pdf, p. 14 (accessed 31 December 2023).

[20] A. Gomułowicz, (in:) A. Gomułowicz, D. Mączyński, *Podatki* ..., pp. 81-89.

[21] It is worth noting that Michał Kalecki developed the theory of business cycles simultaneously with J. M. Keynes, but his works, although generally considered more comprehensive and convincing, remained less popular due to the language barrier (he published in Polish and French, not in English).

[22] R. Gwiazdowski, *Podatek* ..., pp. 106-111.

[23] R. Gwiazdowski, *Podatek* ..., pp. 13-14 , 171 *et seq*.

[24] M. Pasternak-Malicka, *Dylemat sprawiedliwości podatkowej subiektywnej w perspektywie liniowej oraz progresywnej stawki podatkowej w świetle badań własnych*, AUMCS Sectio H Oeconomia 2017, No. 51, pp. 274 *et seq*.; *cf*. the criticism of the credibility of the so-called Ginni coefficient and alternative proposals: A. Walasik, *Redystrybucyjna funkcja finansów publicznych w ujęciu teoretycznym*, Katowice 2008, pp. 70-77 and 89-95. A flat income tax has been introduced in many countries of Central and Eastern Europe, although its impact on the wealth strat-

To sum up this part of the considerations, it should be pointed out that according to liberal thought, the burden proportional to the level of wealth is fair and economically effective, as it encourages more efficient work, and the resources thus accumulated stimulate the entire economy (also to the benefit of the poor). While, contrary to appearances, the progression of taxation does not benefit anyone, as it hinders the economic development of the whole society and promotes the so-called gray economy, which for the rich is a kind of punishment for more efficient work, and for the poor, it does not make any difference. Whereas the concept of the so-called welfare state is based on an active social policy financed by high progressive taxes, which burden not only current income, but also previously accumulated wealth.

The liberals highlight two paradoxes of the progressive income tax: 1) it affects people with relatively high earnings at the peak of their professional aspirations, but omits a group of even more affluent people with previously accumulated wealth (including inheritance) who do not run taxable activity any longer, and 2) numerous reliefs and tax avoidance, which raises along with the level of wealth, actually brings the progressive scale closer to a flat one. These paradoxes are also noticed by contemporary left-wing supporters, however – unlike the liberals who advocate proportional taxation of income, without taking into account costs, exemptions, reliefs, tax-free amount and individualization of the taxpayer's life situation[25] – they are in favor of a progressive property tax (on capital, real estate and inheritance), which is supposed to better reflect the diversity of the society due to accumulation of wealth and rewarding the management through shares in the capital.[26]

3. TAXATION EQUALITY VS ECONOMIC SOURCE OF TAX

In the general view, the dispute over the equality and fairness of the distribution of the tax burden boils down to the personal income tax (PIT),[27] although the

ification of the society is disputed, as it does not strictly coincide with the distribution of income inequalities: K. Lewkowicz-Grzegorczyk, *Redystrybucyjne konsekwencje wprowadzenia podatku linowego w wybranych krajach UE*, (in:) *Ewolucja roli podatków i systemów podatkowych we współczesnych gospodarkach*, J. Szołno-Koguc (ed.), Lublin 2019, pp. 142-156.

[25] R. Gwiazdowski, *Podatek* ..., pp. 13-14, 171 *et seq.*

[26] T. Piketty, *Kapitał w XXI wieku*, Warszawa 2015, p. 644 *et seq.*; A. Atkinson, *Nierówności: co da się zrobić?*, Warszawa 2017, pp. 297-338; *cf* critically: G. Reisman, *Pikkety's Capital: Wrong Theory, Destructive Program*, TJS Books 2014; Polish translation: G. Reisman, *Kapitał i kapitalizm XXI wieku, czyli od błędnej teorii do destrukcyjnych reform Piketty'ego*, Warszawa 2015.

[27] Act of 26 July 1991 on personal income tax (consolidated text, Journal of Laws of 2022, item 2647, as amended; hereinafter: PIT Act).

above-mentioned philosophers and economists spoke about the tax system in its entirety and about the relationships between different types of burdens (income tax was formed relatively recently, so the outlined statements treat it more as a postulate than an empirical reality).

I see three reasons for this phenomenon. First of all, PIT is most burdensome to taxpayers, in a subjective sense, because we encounter it commonly in the context of remuneration for work (regardless of the legal title), while turnover taxes remain hidden in the total price of purchased goods and services (they are noticed by entrepreneurs), and in an objective sense, as it is more difficult to shift than other types of taxes (especially turnover taxes).[28] Secondly, PIT takes into account the personal situation of the taxpayer (property, family, living costs, etc.). Thirdly, currently, PIT is levied on a progressive scale, which evokes emotions and affects the social sense of justice.

According to the state budget data for the years 2019-21, which confirm the regularities from previous years, PIT accounts for approx. 15% of the tax revenue, while turnover taxes such as VAT and excise duty, account for approx. 45% and almost 20%, respectively (for comparison, corporate income tax CIT – only 10%).[29] In the light of this regularity, there should be no doubt that – contrary to the common perception – the postulate of taxation equality, including the reference to the principle of ability to pay, should be examined not so much in the context of individual taxes, and especially PIT, which is most exposed in political discussions and socially visible, but in the context of a comprehensive system of public burdens, taking into account the life situation of taxpayers and the phenomenon of tax shifting.

While the need for a comprehensive assessment is emphasised in the literature, it is usually limited to a strictly defined tax system.[30] Meanwhile, it is nec-

[28] Turnover tax (the so-called indirect tax) is settled by the seller, but it is an obligatory part of the price, so in the model approach its burden is borne by the buyer, and ultimately the final consumer who does not run a business and has no possibility of further shifting. Consequently, although the tax is paid by entrepreneurs, the economic burden is borne only temporarily (until it is shifted to the next links in the chain of trade), and consumers, as a rule, are guided by the total price, having no idea what is the percentage of the turnover taxes included in it. In the model approach, income and property taxes (the so-called direct taxes) are charged to the taxpayer's assets.

[29] https://www.gov.pl/web/finanse/sprawozdanie-roczne-za-2019-rok, https://www.gov.pl/web/finanse/sprawozdanie-roczne-za-2020-rok, https://www.gov.pl/web/finanse/sprawozdanie-roczne-za-2021 (accessed 31 December 2023). These data do not include 1) contributions under the social insurance (ZUS) and health insurance (NFZ) systems, which are charged to personal income in a similar way and in a comparable amount to PIT (originally, these contributions were not separated from personal income) and 2) shares of local government units (LGUs) in the revenues from both income taxes PIT and CIT (they are the most important source of revenue for LGUs). As a consequence, burdens on personal income are more important for the entire public finance system than it results from the data on PIT and the state budget.

[30] *Cf.* A. Gomułowicz, *Zasada* ..., pp. 54-56.; E. K. Drozdowski, *Zasada* ..., pp. 168 *et seq.*

essary to take into account all tax burdens, in particular public-law fees as well as ZUS and NFZ contributions, together with the parts financed by entrepreneurs for the benefit of employees and contractors, which effectively reduce personal income in the sense that they could, at least partially, increase the remuneration of employees and contractors (the total burden on personal income is colloquially referred to as the tax wedge).[31] From the socio-economic point of view, this approach is more accurate to refer to the economic source burdened with the tax (dilemmas: work or capital, and savings or consumption) than to the formal and legal criterion of the subject of taxation (income, turnover, property).

The views outlined earlier were formulated with regard to the 19th-century liberal state, which only played the role of the proverbial "night watchman", remaining without responsibility for the well-being of its citizens, the vast majority of whom lived in poverty unimaginable by today's standards, without security for old age and in case of illness. Along with the development of the so-called welfare state, the importance of the redistributive role of the state (benefits, subsidies, social welfare, etc.) has been increasing, while the method of spending budget revenues also has become a determinant of taxation justice.[32] As a consequence, these benefits significantly adjust the burden of taxation and, together with taxes, are assessed in terms of the postulate of equality within the broadly understood public finance system.

When considering the equality and fairness of taxation, it is impossible to ignore the problem of the efficiency of the tax system. On the legal theory level, concerns are expressed about the possibility of combining fairness with the effectiveness of taxation,[33] while economics treat these goals as divergent and competing with each other.[34] The most fiscally effective option is to maximize the scope of taxation (both object and subject) and minimize the unit tax burden (in terms

[31] In the model approach, fees are remuneration for a specific service provided by the public authority (e.g. stamp duty for performing an official act) and often do not flow directly to the state budget, but to separate funds for specific expenditure purposes (a fund is an exception in the budget law, which binds specific streams of public expenditure and revenue). Nevertheless, in most cases, there is no equivalent benefit for an individual benefit (i.e. for a specific citizen or entrepreneur), so such payments have the nature of a typical tax. ZUS and NFZ contributions differ from a typical tax in the sense that they specify equivalent benefits: retirement and health care, respectively, where only in the case of social insurance the amount of the benefit depends on the amount of individual contributions, while in health insurance, the contribution is a condition for being covered by medical care, however, its scope does not depend on the amount of individual contributions, but on the general availability of medical services and individual medical indications.

[32] J. Gliniecka, J. Harasimowicz, *Z zagadnień teorii podatku*, "Glosa" 1997, No. 5, p. 2.

[33] A. Gomułowicz, *Zasada …*, p. 13; *idem*, *Problemy teorii opodatkowania w Polsce (artykuł dyskusyjny)*, "Glosa" 1996, No. 4, p. 3.

[34] F. Grądalski, *Wstęp do teorii opodatkowania*, Warszawa 2004, pp. 35-39; on the economic dilemma of justice (equality) and efficiency *cf.* T. Kwarciński, *Sprawiedliwość czy efektywność? Analiza wykorzystująca ekonometryczny model wzrostu gospodarczego z historycznie optymalnym zróżnicowaniem płac*, "AUL Folia Oeconomica" 2007, No. 213, pp. 109 *et seq*.

of the total amount and the percentage).[35] These principles are best illustrated by Jean Baptiste Colbert's well-known statement about the art of plucking geese so that there is as much feather as possible and as little screaming as possible: the lion's share of tax revenue comes from the core section of society, not from a handful of rich people, so the tax luxury has no fiscal significance and only affects social awareness (gives a sense of justice but not budget revenues).

As can be seen from the above-mentioned statistical data, turnover taxes are the most fiscally effective ones, which in the economic sense burden the society's consumption expenditures, while entrepreneurs incurring investment expenditures are relieved of their burden. Accumulated savings are also not subject to these taxes. Turnover taxes reflect the principles of universality and minimization of the individual burden: while income tax is not paid by persons whose income does not exceed the tax-free allowance, they benefit from reliefs, incur losses, etc. All consumers are charged with turnover taxes, regardless of their level of wealth and other conditions life, and the unit burden is relatively moderate and hidden in the total price of goods and services. Turnover tax rates are flat, and with the increase in the level of wealth, the share of consumption expenditure charged with these taxes decreases, and the share of investment (savings) free of these taxes increases, so effective taxation is regressive in relation to the income at the disposal of households.[36] The excise duty has undergone a significant evolution. Traditionally, it was imposed on a narrow range of goods considered luxury (e.g. yachts, jewellery, furs, cars), and recently – mainly consumer goods with fixed demand (apart from tobacco and alcohol, mainly energy carriers such as liquid fuels, electricity, coal and gas).

The conditions outlined above show that in public-law financial relations, the criterion of equality in terms of property should be related to two variables: 1) the level of wealth understood as a whole, and 2) resources or activities encumbered with public levies or entitling to public benefits. Resources and activities may be subject to differentiated treatment depending on the current tax and social policy. However, this differentiation should not be of a discriminatory nature, and the level of wealth considered as a whole should act as a corrective factor that adjusts the burden of contributions and the intensity of aid in accordance with the principles of fairness and solidarity within the framework of standards of the so-called welfare state.

Guided by the indicated criteria, the postulate of taxation equality should be considered in the following areas: 1) the amount of the tax burden, 2) the distribution of the tax burden between work and assets (property, capital), 3) the distribution of the tax burden between consumption and savings, and 4) the distribution

[35] *Wstęp do nauki polskiego prawa podatkowego*, W. Modzelewski (ed.), Warszawa 2010, pp. 31-32.

[36] H. Kuzińska, *Rola podatków pośrednich w Polsce*, Warszawa 2002, pp. 34-37.

of the income tax burden among individual groups of taxpayers and sources of revenue.

Moreover, the collection of taxes and contributions should be confronted with redistributive benefits for society.

4. CURRENT SOCIO-ECONOMIC CONDITIONS VS TAX POLICY

Referring to the analysis in the series of articles indicated in footnote No. 4, I confront the postulates outlined above with the contemporary socio-economic situation and tax policy.

Two seemingly opposite socio-economic trends can be observed: on the one hand, the uninterrupted increase in the level of wealth and the reduction of extreme poverty, but on the other hand, since the 1980s, a marked exacerbation of social inequalities, both globally and within most countries (the accumulation of wealth is accompanied by the fact that hired work does not guarantee a way out of poverty due to the barrier of costs of education, health care, etc.). Although in absolute terms, the indicators of wealth and quality of life are increasing, in relative terms, they are decreasing with the increasing level of debt burden of both society and individuals. This regularity undermines the so-called trickle-down theory, according to which the accumulation of wealth stimulates the entire economy ("drips") to the benefit of the poorer through investment and employment.

Since the turn of the 1980s and 1990s, as a result of political changes, the Polish economy has been developing and the level of wealth of the entire society has been increasing. Nevertheless, it is the so-called dependent market economy characterized by low innovation and labor costs as well as support for foreign investments (also through tax incentives) in the service and production sectors with low added value in relation to the research and design as well as marketing and sales phases. Social inequalities and social insecurity are increasing (mainly due to the non-standard forms of employment, the so-called junk contracts), and the Marxian conflict of labor and capital turns out to be surprisingly topical.

The problems of the pension system are also growing. Firstly, contrary to the tendency to increase life expectancy, for political reasons, the retirement age was lowered as of 1 October 2017 and differentiated by gender: for men – 65 years, for women – 60 years.[37] Moreover, many professional groups are entitled to the privilege of early retirement (effectively we are dealing with the lowest retirement age in the EU). Secondly, the abandonment of otherwise controversial pension funds (OFE) improves the state's current assets at the cost of postponing, against

[37] Act of 16 November 2016 amending the Act on old-age and disability pensions from the Social Insurance Fund and certain other acts (Journal of Laws of 2017, item 38).

the constantly deteriorating demographic trends, the problem of financing pension benefits.

Poland meets the contemporary standards of a welfare state (high share of social spending in GDP). It is worth emphasizing that it enforced an increase in minimum rates for hired work, regardless of the legal form in which it is provided.[38] Despite income inequalities higher than the EU average, we are dealing with lower than the EU average inequalities in property, education and health (the former result from the intergenerational accumulation of wealth limited in the Socialist socio-economic system, but in the near future they will grow along with the progressing society getting richer). In connection with an active social policy based on redistribution mechanisms, expenditure inequalities have also been decreasing for several years, and thanks to the good economic situation (at least until the COVID-19 crisis) the same applies to unemployment. Nevertheless, the consumption effects of the "Rodzina500+" (Family500+) program could be achieved at a much lower cost if it did not cover the whole society, but only poor people, while at the same time discriminating against single parents with one child (only from July 2019 the benefit covered the first child in the family). This program failed to achieve its most important goal – to increase the fertility rate. It had a negative impact on women's professional activity and buried hopes for an active predistribution policy that would be more favorable in the long term.[39]

Until the 1970s, world economic policy was governed by interventionism, characterized by high progressive taxes, while in the 1980s, the neoliberal school emerged, guided by the paradigm of tax neutrality and a low and flat rate. The significant tax cut has increased the debt burden of society as a whole, as governments have had to borrow capital that has not been collected as tax revenues, and the interest paid by the financial elites is a burden on all of us.

Contemporary tax systems reflect two basic trends that are intensifying in countries that are just aspiring to become fully developed (in Europe, according to the division into the so-called old and new EU under the 2004 enlargement *caesura*).

Firstly, it is about incentives for investment through lower taxation of capital (business activity) in relation to labor and consumption. Moreover, with the increase in the level of wealth and the size of business activity, the possibilities of using optimization instruments increase, which allow you to hide income and/or assets or disclose them in countries with a low (zero) tax rate, instead of where they were earned. As a result, the effective tax burden is lower than the nominal tax rate, while international corporations are paying much lower taxes than small

[38] Act of 22 July 2016 amending the Act on the minimum remuneration for work and certain other acts (Journal of Laws of 2016, item 1265, as amended).

[39] Predistribution is defined as access to infrastructure and public benefits in order to prevent social inequalities before they arise, and redistribution – financial transfers mitigating the effects of existing social inequalities.

and medium-sized enterprises, and hired labor remains the highest taxed group. This phenomenon is not offset by the tendency to increase the income tax of the richest citizens in connection with economic and financial crises and special social needs. These burdens are often called solidarity taxes, they have a clear political overtone with marginal fiscal significance, and often turn out to be counterproductive from this point of view, as they cause the affected people to flee abroad (change their residence) to other countries (the famous example of France).

Secondly, the importance of indirect taxes that burden consumption (mainly VAT and excise duty) is growing. In the aftermath of the 2008 financial crisis, there was a tendency across the EU to raise VAT rates, while rates of income taxes levied on business activity were not changed or even lowered (with the exception of the so-called solidarity taxes charged to a narrow group of the richest citizens). New indirect burdens were also introduced: 1) special taxes on the banking sector, the burden of which was largely shifted to society by increasing the prices of services (commissions, interest rates, etc.) and 2) additional selective taxes that burdened the consumption of many everyday goods in addition to excise duty (e.g. sugar or alcohol).

5. FEATURES OF THE POLISH TAX SYSTEM (LEGAL STATUS UNTIL THE END OF 2021)

Referring to the analysis in the series of articles indicated in footnote No. 4, it should be stated that the Polish tax system, together with ZUS and NFZ contributions, is not progressive but regressive. In percentage terms, the effective burden generally decreases with increasing wealth, albeit in an uneven manner. This regularity results from three groups of factors.

Firstly, indirect taxes with flat rates and regressive character in relation to the level of wealth are the most effective in fiscal terms. As can be seen from the above-mentioned statistical data, we note a clearly higher share of these taxes in budget revenues than in most developed countries, while the low shares of CIT and PIT prove the effectiveness of tax avoidance by entrepreneurs and wealthy individuals. Next to the traditional VAT and excise duties, the following have been added: 1) levy on sweetened beverages (the so-called sugar tax),[40] 2) levy

[40] Article 12a *et seq*. of the Act of 11 September 2015 on public health (consolidated text, Journal of Laws of 2022, item 1608, as amended).

for alcoholic beverages up to 300 ml,[41] 3) tax on certain financial institutions,[42] and 4) retail sales tax.[43] The first two taxes (hidden under the name of fees) are similar to the traditional excise duty (subject to the lack of harmonization at the EU level). Whereas, the last two taxes are of a revenue nature, as they are charged to turnover without deduction of costs: a) total assets, dominated by the value of granted loans and b) revenues from sales, so the transfer of their burden to buyers (consumers) is not a model design feature and depends on market conditions, but it has taken place to a large extent (both taxes apply only to entities meeting the criterion of a sufficiently high turnover threshold).

Secondly, when we talk about income taxes, CIT is characterized by a flat rate, and despite the nominally progressive PIT rates, the total burden on personal income (including ZUS and NFZ contributions) is close to a flat rate, with the peak at the middle class of hired workers under the Labor Code. Differentiation of the so-called tax wedge, depending on the legal basis of employment, has a negative impact on the labor market, and causes, among others: 1) the fiction of self-employment, when an entrepreneur works in a manner typical of an employment relationship (the phenomenon intensifies with the increase in income) and 2) the increase in popularity of the so-called junk contracts concluded under civil law (in the short term, they can be beneficial for both the employee and the employer).

The progression of personal income burden is disrupted by the following factors: 1) only two PIT rates – 17% (previously: 18%) and 32% (the limit is the income threshold of PLN 85,528),[44] while more than 98% of taxpayers remain covered by the former and the problem of progression does not apply to them, 2) a flat PIT rate of 19% for entrepreneurs,[45] 3) lump-sum tax deductible costs for employment contracts in the amount of PLN 250 (previously: PLN 111.25) per month, while for civil law contracts they amount to 20% (sometimes even 50%) of revenue,[46] and entrepreneurs account for all actual expenses incurred, and what is more, abuses involving purchases used for private purposes are frequent – unlawful, but difficult to control on a mass scale (this also applies to deducting VAT, which effectively increases the level of income), 4) frequent – unlawful, but difficult to control on a mass scale – underestimation by entrepreneurs of the PIT tax base and the amount of ZUS and NFZ contributions resulting from not recording turnover (also applies to VAT, which also effectively increases the level of income) and remuneration paid to employees, 5) flat-rate ZUS and NFZ contribu-

[41] Article 9^2 sec. 11 *et seq.* of Act of 26 October 1982 on upbringing in sobriety and counteracting alcoholism (consolidated text, Journal of Laws of 2023, item 165, as amended).

[42] Act of 15 January 2016 on tax on certain financial institutions (consolidated text, Journal of Laws of 2023, item 623, as amended).

[43] Act of 6 July 2016 on retail sales tax (consolidated text, Journal of Laws of 2023, item 148, as amended, collection of this tax was suspended until the end of 2020).

[44] Article 27 sec. 1 of the PIT Act.

[45] Article 30c of the PIT Act.

[46] Article 22 sec. 2 and 9 of the PIT Act.

tions with suspension of collection of the first of them after exceeding the income threshold (30 times the average salary per year),[47] 6) flat-rate ZUS and NFZ contributions for entrepreneurs, calculated from 60% of the average salary (regardless of the actual income), with the possibility of reduction and suspension of collection in the initial period (the so-called start-up relief),[48] and the calculation based on actual income, when it does not exceed 30 times the minimum wage (the so-called small ZUS in force from 1 January 2019 to the end of January 2020 and the so-called small ZUS plus, in force from 1 February 2020),[49] 7) exclusion from ZUS and NFZ contributions of certain so-called junk forms of employment, 8) numerous flat-rate or lump-sum forms of taxation (regardless of actual income),[50] 9) exclusion from PIT (similarly: CIT) of agriculture and forestry, regardless of the area, type of crops or breeding and the scale of profits, subject to the so-called special activities (e.g. greenhouses),[51] and 11) preferential KRUS contributions for farmers in relation to ZUS. This privilege is still available also to entrepreneurs in possession of at least 1 ha of agricultural land.[52]

The progression is intensified by the following factors: 1) tax-free amount of a clearly degressive nature (from 2017),[53] and 2) child relief, which consumes the tax remaining after deduction of NFZ contributions.[54] However, the amounts of deductions are so low (especially in the first case) that this effect applies only to the lower end of the tax scale (people with the lowest income). Similarly, but in a narrow subjective scope, the so-called zero PIT for young people: exemption from tax on income earned by people under 26 years of age (up to PLN 85,528 per year).[55] On the opposite side of the tax scale range, from 2019, the progression is strengthened by an additional solidarity levy in the amount of 4% of the surplus of income of natural persons over PLN 1 million (income of the Solidarity Fund,

[47] Article 19 of the Act of 13 October 1998 on the social insurance system (consolidated text, Journal of Laws of 2022, item 1009, as amended; hereinafter: ZUS Act).

[48] Article 18a of ZUS Act and Article 18 sec. 1 of the Act of March 6, 2018, Entrepreneurs' Law (consolidated text, Journal of Laws of 2023, item 221, as amended).

[49] Article 18c of the ZUS Act.

[50] First of all, on the basis of the Act of 20 November 1998 on flat-rate income tax on certain revenues earned by natural persons (consolidated text, Journal of Laws of 2022, item 2540, as amended).

[51] *Cf.* Art. 2 sec. 1 point 1 of the PIT Act.

[52] Article 5a of the Act of 20 December 1990 on social insurance for farmers (consolidated text, Journal of Laws of 2023, item 208, as amended).

[53] In 2009-16 it amounted to slightly more than 3,000 PLN per year; starting from 2017, it amounts to PLN 6,600 (PLN 8,000 in 2018-19) and decreases (unevenly) to zero at the tax base of PLN 127,000 PLN per year and higher; for people earning over 11,000 PLN in 2017 and 13,000 PLN in 2018-19 and below the rate change the threshold from 18% to 32%, i.e. PLN 85,528.50 per year the tax-free amount was retained in the previous amount (*cf.* Art. 27 sec. 1a of the PIT Act).

[54] Article 27f of the PIT Act (this relief is not granted in the case of bringing up only one child after exceeding the threshold of PLN 56,000 per year for each parent).

[55] Article 21 sec. 1 point 148 of the PIT Act.

originally called the Solidarity Fund for the Support of People with Disabilities).[56] It has a narrow scope as it has been estimated that it burdens approx. 21,000 people and brings the Fund about PLN 1.150 billion annually.[57]

Thirdly, there is no general tax on the value of property, especially real estate, but there are selective taxes on individual assets, and – except for construction structures related to business activity – the tax base for agricultural, forestry, or real estate taxes does not depend on the value (*ad valorem*) but per area, and the amount of tax remains symbolic (except for entrepreneurs).[58] The legislator also resigned from taxing the transfer of property (regardless of its value) between relatives in the event of inheritance or donation.[59]

6. POLSKI ŁAD (THE SO-CALLED POLISH DEAL) (EFFECTIVE FROM 2022)

The regularities outlined above raise objections from the point of view of equality and fairness of taxation. The Polish Deal was an attempt to rebuild the tax system. It focused on the burdens of personal income most felt by the society: PIT together with ZUS and NFZ contributions (other issues are omitted).

The main goal of the Polish Deal is to create a friendly and fair tax system, and the stabilization of budget revenues strained by the COVID-19 pandemic is of secondary importance.[60] The government referred to the judgment of the Constitutional Tribunal of 28 October 2015, which emphasizes the principle of the ability to pay.[61] Therefore, the Polish Deal is primarily intended to influence the social sense of justice, while – despite the regulations aimed at tightening the collection – it does not increase budget revenues from PIT, but on the contrary, it

[56] Article 30h of the PIT Act (unlike in the case of the "basic" PIT, the revenues from the solidarity levy are not shared by LGUs and it does not constitute the basis for transferring 1% to a public benefit organization) and Art. 3 sec. 2 of the Act of 23 October 2018 on the Solidarity Fund (consolidated text, Journal of Laws of 2020, item 1787, as amended).

[57] Justification of the draft act referred to in footnote No. 56, Sejm paper No. VIII.2848.

[58] Article 4 sec. 1 and Article 5 sec. 1 of the Act of 12 January 1991 on local taxes and fees (consolidated text, Journal of Laws of 2019, item 1170, as amended), Article 4 and 6 of the Act of 15 November 1984 on agricultural tax (consolidated text, Journal of Laws of 2020, item 333, as amended) and Article 3 and 4 of the Act of 30 October 2002 on forestry tax (consolidated text, Journal of Laws of 2019, item 888, as amended).

[59] Article 4a of the Act of 28 July 1983 on inheritance and donation tax (consolidated text, Journal of Laws of 2021, item 1043, as amended).

[60] Act of 29 October 2021 amending the Personal Income Tax Act, the Corporate Income Tax Act and some other acts (Journal of Laws of 2021, item 2105); *cf.* justification of the project, Sejm paper VIII.1531.

[61] Ref. No. K 21/14.

forecasts a decrease by approx. PLN 15 billion annually (approx. PLN 10 billion state budget, approx. PLN 13 billion budgets of LGUs as a share in income from PIT, while the revenue of the National Health Fund (NFZ) is to increase by approx. PLN 8 billion).[62] It emphasizes the reduction of the tax burden. The changes are favorable or at least neutral for 24 million people (90% of taxpayers).[63]

The indicated objectives are to be implemented in four directions of action: 1) tightening the progression of taxation, 2) simplifying settlements, 3) tightening tax collection and eliminating tax fraud, and 4) introducing investment incentives.

The changes include:

- increasing the tax-free amount to PLN 30,000 for taxpayers subject to general rules according to the tax scale (salaries or pensions up to PLN 2,500 per month are not to be taxed at all),[64]
- raising the income threshold to PLN 120,000, after which the 32% tax rate applies,[65]
- no possibility to deduct NFZ contributions from tax (previously 7.75%),[66]
- NFZ contributions for entrepreneurs based on the actual level of income (abolition of the lump-sum privilege),[67]
- exemption from tax on certain types of income (employment, self-employed business activity) in the case of professionally active pensioners, parents of at least 4 children and persons returning to the country (transfer of permanent residence to Poland) – up to the amount of the former tax threshold (85,528 PLN) (exemptions cannot be cumulated – it also applies to the so-called zero PIT for young people),[68] and
- relief for the middle class earning income from employment under the Labor Code or from business activity (settlement on general terms according to the tax scale) in order to neutralize the increase in the burden resulting from the progressive elements of the tax structure. It is about shifting the progression effect to the upper-income brackets (above PLN 11,141 per month) because according to the basic regulations of the Polish Deal, the limit for increasing charges is PLN 5,701 per month.[69]

[62] Regulatory impact assessment, attachment to the Sejm paper VIII.1531.

[63] *Ibidem*.

[64] Article 27 sec. 1 u.p.d.o.f.

[65] Article 27 sec. 1 u.p.d.o.f.

[66] Repeal of Article 27b of the PIT Act.

[67] Article 81 sec. 2 of the Act of 27 August 2004 on health care services financed from public funds (consolidated text, Journal of Laws of 2022, item 2561, as amended).

[68] Article 21 sec. 1 points 148 and 152-154 in connection with Article 21 sec. 44 of the PIT Act.

[69] Article 26 sec. 1 point 2a in connection with Article 26 sec. 4a-4c of the PIT Act.

The ideological reasons stand behind the abandonment of the possibility of jointly settling the tax of a single parent raising a child with this child, which interferes with the progression effects similarly to joint taxation of spouses.[70]

Subsequent changes from 1 July 2022 include:

- lowering the basic tax rate to 12% (the rate for the second income bracket is still 32%),[71]
- abolition of the relief for the middle class (with retroactive effect from 1 January 2022, but with a one-time option to use it if the new taxation conditions turn out to be less favorable in 2022),[72]
- entrepreneurs who apply a flat rate can deduct NFZ contributions up to the statutory limits (similarly for those settling on a flat-rate basis or under the simplified rules referred to as the tax card),[73]
- renewal of a joint tax settlement of a single parent with this child in a less favorable form (as a rule, the progression adjustment factor is 1.5 – except for parents of disabled children, for whom it is 2 as before).[74]

7. SUMMARY

According to the analysis, the Polish tax system, treated as a whole, together with ZUS and NFZ contributions, is not progressive, but regressive because, in percentage terms, the effective burden generally decreases with increasing wealth (at least until the end of 2021).

Due to the limited scope, property taxes elude this assessment. Turnover taxes are characterized by a mild and fairly uniform regression, while income taxes together with ZUS and NFZ contributions (the so-called tax wedge) are close to a linear distribution, subject to the following factors. Firstly, in the lower income brackets, the effects of progressive factors are visible: child relief, new rules of the tax-free amount and the so-called small ZUS (small ZUS plus), while the exclusion of agriculture from PIT and ZUS and numerous lump sums shift the regression of taxation up the social structure. Secondly, there is a difference between the tax wedge depending on the legal form of employment: the highest burdens are borne by hired employees under the Labor Code.

The middle class bears the heaviest burdens, especially workers hired under the Labor Code, and at the same time, they receive redistributive assistance lim-

[70] Repeal of Article 6 sec. sec. 4-4b of the PIT Act.
[71] Article 27 sec. 1 of the PIT Act.
[72] Article 30c sec. 2 point 2 of the PIT Act.
[73] Repeal of Article 26 sec. 1 point 2aa in connection with art. 26 sec. 4a-4c of the PIT Act.
[74] Article 6 sec. 4c-4h of the PIT Act.

ited by the level of wealth to a limited extent. The paradox of the highest burden on the middle class is correctly perceived by both the liberal and left-wing, although they differ in their assessment and directions of proposed changes, while public opinion formulates the accusations about the lack of protection of the poorest and postulates of a clear progression of taxation.

These allegations should be treated with great caution. Firstly, it is by no means the case that the poorest bear the highest burdens in terms of percentages, and the progression of taxation has the adverse effect of discouraging people from working and saving. Secondly, an active social policy based on redistributive mechanisms must be taken into account. Poland is a typical welfare state and expenditures in this respect do not differ from the EU average (lower absolute values result from a lower standard of living of the entire society). There is no pre-distributive policy aimed at preventing social inequalities before they arise (access to education, health care, and broadly understood infrastructure), but – as evidenced by the results of polls and elections – the majority of voters appreciate direct financial transfers, spent at the discretion of the beneficiary, at the same time awareness of the regressive nature of the tax system as a whole is missing. It can be expected that "building in" the function of equalizing wealth inequalities into the tax system by giving it a progressive character, combined with a reduction in the level of redistribution, would provoke dissatisfaction in the society. The dilemma of burdening the poor with income tax, considered in philosophy, sociology, and economics, loses its significance because, as the analysis proves, in fact, they do not pay any tax, but only ZUS and NFZ contributions. Moreover, these are covered by various forms – unknown in the 19th-century country – aid financed from public funds. Therefore, the problem of the traditionally understood tax-free subsistence minimum is eliminated.

In this context, it seems crucial not so much to change the structure as to tighten the tax system in order to increase the total sum of budget revenues. The activities undertaken by the government for several years in the first place (rightly so!) focused on the so-called VAT loophole, and in the second – on combating direct taxation avoidance and profit transfer abroad (however, the effectiveness of these activities is debatable).

The economic crisis related to the COVID-19 pandemic reinforced the outlined regularities. New indirect taxes (e.g. sugar levy, levy on alcoholic beverages) were accompanied by a reduction in personal income burdens for certain social groups (e.g. the so-called zero PIT for young people) with an increase, limited by the level of wealth, for others (e.g. limiting the use of the tax-free amount) (legal status until the end of 2021). Changes in the taxation of personal income turn out to be chaotic and do not improve the condition of public finances, but only antagonize society and give rise to justified suspicions of favoring groups that currently support the currently ruling politicians. This kind of approach violates the principle of equality and is not conducive to the implementation of the related

ideas of solidarity and justice. However, in the current political conditions, it is difficult to expect a reliable verification of these allegations in the light of constitutional standards.

The above trends have been intensified by the Polish Deal, which breaks the fundamental principles of an effective tax system: the priority of the fiscal function and the pursuit of minimizing the unit burden while maximizing the scope of taxation. It is striking that the Polish Deal is by no means intended to increase budget revenues, but on the contrary – it assumes their decrease, which in itself undermines the sense of any tax reform. It is only about changing the distribution of burdens for various groups of the population due to PIT, ZUS and NFZ contributions. However, this change does not result from rational economic premises or from a coherent system of axiological values, but is chaotic and gives the impression of randomness. The propaganda message emphasized the reduction of burdens for the majority of society, however, the benefits usually amount to a few or a dozen PLN a month and have long been neutralized by inflation caused by the increase in public debt due to the implementation of the populist socio-economic policy.

In real terms, the level of burdens on the majority of society does not change, while some social groups experience a significant increase (primarily entrepreneurs and the most affluent hired workers). The propaganda message has emphasized this increase as an expression of tax justice. However, the Polish Deal is accompanied by a constant increase in the fiscal importance of indirect taxes, which are regressive in nature, so in the percentage sense (in relation to disposable income) they are a greater burden for the poorer than for the richer.

When considering the tax system as a whole, the legislator and the government by no means care about the interests of the poor, but only keep up appearances to do so, acting in the area most susceptible to populist legislation, because indirect taxes are much less visible than PIT together with ZUS and NFZ contributions.

As a consequence, the Polish Deal did not change the fundamental conclusion on the regression of the Polish tax system, although some social groups recorded an increase in the tax burden. Considering that this increase concerns the most visible burden on personal income, it is not surprising – contrary to the arguments of the government and the legislator – that the allegation of violation of the equality and justice (instead of restoring equality and justice, the changes have increased inequalities and perpetuated perceptions of injustice).

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Mikołaj Ryśkiewicz
University of Warsaw, Poland
e-mail: mikolaj@ryskiewi.cz
ORCID: 0000-0001-9628-5001

THE RISKS OF CONTEXT-FREE EVALUATION OF LEGISLATIVE LANGUAGE SOLUTIONS (POLEMICAL ARTICLE)

Abstract

The purpose of this paper is a creative polemic with the theses expressed by Katarzyna Sornat in her article concerning the analysis of selected Polish legislation from a normativist point of view. However, the Author adopts only the methodology of normative linguistics and ignores the achievements of legal theory, which leads to omitting the whole contextual layer of the examined texts, and thus impoverishes K. Sornat's analysis. Critical comments to her conclusions serve to observe how sensitive the social space is to the introduction of technical changes to the law and why the analysis of the state law must also take into account the directives of its interpretation.

KEYWORDS

legislation technique, linguistic error, legal language

SŁOWA KLUCZOWE

technika legislacji, błąd językowy, język prawny

1. INTRODUCTION

The 83rd issue of *Studia Iuridica* published an article by Ms. Katarzyna Sornat entitled "The language of legislative texts and its normative evaluation – on the example of selected legal acts".[1] In this work, the Author, using her normativist[2] skills, analysed several normative acts published in the Journal of Laws of the Republic of Poland in November and December 2016. The study resulted in the listing of accusations against the legislator in connection with his imperfect handling of the Polish language.

This article is an attempt to polemicize with the criticism expressed by the Author. The legislator can – and should – be rebuked for any stumbling blocks and sloppiness, since, as the Author herself aptly notes, legislation is a matter of great public importance, but it is inappropriate in this criticism to dismiss lightly the wealth of research resources offered by legal theory. In my opinion, most of the remarks made by the Author, although arguably in line with the doctrine of normative linguistics, ignore the research context, which includes the principles of law interpretation and related principles of law-making. This, unfortunately, leads to a significant impoverishment of the presented argument that consequently does not constitute a sufficiently reliable set of demands directed at the legislator.

2. THE PROBLEM OF METHODOLOGICAL ASSUMPTIONS

The Author begins her argument with the remark that the purpose of her article is not to "stigmatize anything or anyone",[3] although the very attempt to comment critically on the legislature's language is a thing worth praising, not the scepticism she is trying to defend against with this sentence. The technique of legislation, after all, can only develop adequately under conditions of free discussion, which for obvious reasons presupposes positions of approval and doubt.

Drawing the contextual landscape of her work, the Author adds that – as a philologist – she does not agree with the view that "a Polonist should not evaluate legislative texts using the criteria provided for general Polish, since they [these

[1] K. Sornat, *Język tekstów legislacyjnych i jego ocena normatywna – na przykładzie wybranych aktów prawnych*, "Studia Iuridica" No. 83 (2021), DOI: 10.31338/2544-3135.si.2020-83.15.

[2] I understand "normativism" here as a derivative of normative linguistics, also called prescriptive linguistics, which assumes the existence of a normative pattern in language against which a given speech act can be syllogistically compared and its "correctness" checked. The Author herself uses this term to describe this type of approach to language, see *ibidem*, pp. 223, 229.

[3] Nonetheless, she uses precisely the expression "stigmatization" and its category several times to describe her desired stance on linguistic errors in her assessment, cf. *ibidem*, pp. 221, 230.

texts] are written in a specific language, characteristic of lawyers".[4] However, it should be doubted whether such a view actually functions, let alone is "circulated", but the Author does not provide her sources to help adequately address this issue. There does not seem to be a belief in the public discourse that linguists are incompetent to evaluate legal language; on the contrary, this is repeatedly done and is not met with scientific outrage. As an example of the involvement of linguists in legal discourse, one can cite the work of the Constitutional Committee of the National Assembly, whose expert was Professor Jerzy Bralczyk. Perhaps the Author is referring to the view that the evaluator of legal texts – regardless of his education – should not only use the philological method (or any other), but necessarily also take into account the legal perspective. Such a belief actually prevails quite widely,[5] being at the same time my own, because it stems from the assumption that the achievements of legal theory in the field of legal interpretation have their justification and should not be frivolously ignored. Their rejection is at the same time the source of the fundamental shortcoming of the work under discussion – the deprivation of its fundamental context.

As justification for the discussed decision to choose a purely normative method, the Author points out that the legal language, "despite its peculiar terminology and phraseology (…) cannot be considered a separate code (…) because it has not developed (…) its own grammar".[6] Such a procedure calls for the expression of several doubts. First – the legal language has not only developed its own terminology and phraseology, but at the same time, on syntactic grounds, it is so separate from the common Polish language that its noun formation can be interpreted as another feature that distinguishes it from the rest of the general language.[7] At the same time, it is a part of the language with a unique feature, which is the formal separation – statements in this register are formulated only by the legislator in a strictly defined constitutional procedure.[8] Secondly – without going into the recognition of the development of one's own grammar as a prerequisite for recognizing something as a separate code – it should be noted that the

[4] *Ibidem*, p. 230.

[5] As an example, we can cite the words of M. Sobieszewska summarizing this problem well: "The interpretation of legal texts, as opposed to other texts [emph. M.R.], requires knowledge of the rules of legal interpretation in order to determine the real will of the legislator". - cf. M. Sobieszewska, *Juryslingwistyka: między językiem a prawem*, "Studia Iuridica Lublinensia" Vol. 24, No. 4 (2016), DOI: 10.17951/sil.2015.24.4.123., p. 123.

[6] K. Sornat, *ibidem*, p. 220.

[7] Legal language is above average noun-formative, as pointed out, for example, by A. Malinowski. Cf. A. Malinowski, *Pomiar czytelności polskiego tekstu prawnego*, "Państwo i Prawo" No. 5 (2017), p. 11.

[8] Here, I use the distinction between legal and juridical languages (or legal language and legalese – depending on the translation), common in jurisprudence, which was initiated by Bronislaw Wróblewski. There is no risk of a terminological discrepancy with the article under comment, since the Author also uses it. - cf. p. 221.

Author has not justified why it is precisely the recognition of something as a separate code that is necessary to be scientifically obliged to apply some additional criteria of analysis beyond merely evaluating it from the perspective of normative linguistics (for this is the spirit of the statement). The Author concludes these considerations with the remark that, speaking of legal language, she has in mind "rather a *legal style*, understood as a special (functional) variety of general Polish, subject to normative evaluation from the perspective of the principles of general language".[9] Such a position also calls for scepticism. The Author chooses to analyse "legal style", but sticks to the subjective conception of legal language (if she decided to analyse style, she could also reach for non-normative or at least non-statutory texts).

The desired state, according to the Author, is a "correct" language, i.e. without "errors and faults, i.e. functionally unjustified innovations".[10] However, this raises the question – left without an explanation by the Author – as to which innovation can be considered functionally justified and which not. Further analysis will be aimed at indicating that the innovations that the Author cited as examples of errors, implicitly assuming their non-functionality, may turn out to be more functional than they might appear at first glance. Also, the "requirement to adhere to the principles of the model standard in all types of official contacts", which the Author unjustifiably deems "perfectly valid", raises some problems. It is obvious that the legislator should take care of the linguistic quality of the law-making, but it is not necessarily saying that this quality must automatically be measured by compliance with the opinions of selected linguists on linguistic correctness, if only for the reason that compliance, even if considered a component of quality, is not the only nor most important component.[11]

Thus, it seems that the methodological problems begin when the Author recognizes that there is a "circulating" opinion about the incompetence of Polonists as to the evaluation of legal texts. Such an opinion, as mentioned, does not prevail, but it serves the Author – as part of the presentation of an approach that differs from her [opinion] – to choose an alternative methodology, grounded only in the theses of normative linguistics. In order to justify such a decision, K. Sornat denies the separate status of the legal language, which, while maybe correct in foundation, is at the same time a justification for rejecting the entire theory of legal interpretation, which, after all, is immanently linked to language. Having instead rejected this context, the Author chooses a normativist catalogue of errors

[9] *Ibidem*, p. 221, italics as written by the Author.

[10] *Ibidem*.

[11] After all, among the so-called directives of legal language clarity, unambiguity, comprehensibility, conciseness, or cataphaticity are also mentioned. – cf. T. Gizbert-Studnicki, *Język prawny z perspektywy socjolingwistycznej*, Cracow 1986, p. 103 *et seq*..; A. Nowak-Far, *Katafatyczny kod prawa*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" Vol. 76, No. 3 (2014), DOI: 10.14746/rpeis.2014.76.3.1.

to evaluate the chosen legislation. The main shortcoming of such an approach, however, is related to the fact that the legislator, when constructing legal texts, takes this very context into account, and it strongly affects the linguistic shape of the created legislation. Hence, failure to take it into account in the analysis may lead to shortcomings in its results.

3. ABANDONED METHODOLOGICAL INSTRUMENTATION

In order to be able to more precisely address the allegations made by the Author, it is worth at least briefly describing the two pillars of the omitted context – the directives for the creation and interpretation of the law. Those two are very much intertwined and their individual principles ideologically correspond with each other.

The Author recognizes one of them – the directives for law-making contained in the Rules of Legislative Technique[12] (hereinafter: ZTP, which is the Polish abbreviation). She points to the directives to draft legal regulations concisely and synthetically so that they are understandable to their addressees (§§ 5 and 6), to avoid complicated syntax (§ 7), and to use words in their basic meaning (§ 8(1)). In principle, the catalogue of the cited provisions does not raise any objections, although the Author's analysis touches primarily on § 7, which mentions not only simple syntax but also the accepted rules of the Polish language and the avoidance of multiple compound sentences. The study refers to the remaining paragraphs in a cursory manner at most. At the same time, it is worth noting that the ZTP does not directly mention the rules of the Polish language in a context other than syntax. An appropriate normative point of reference here could be the Polish Language Act,[13] which in Article 3(1) indicates that the protection of the Polish language consists, among other things, in taking care of its correct use (but does not specify against what standard this correctness should be measured).

However, the Author omits equally relevant subsequent paragraphs of the ZTP. Paragraph 10, in particular, will prove particularly interesting in the context of the Author's allegations, and it concerns the labelling of equal notions with equal terms, and different notions with different terms. This corresponds with the second pillar of the omitted context, which is the theory of legal interpretation.

Within the framework of the theory of legal interpretation and the directives formulated in the course of scientific discussion, among other things, the

[12] Annex to the Regulation of the Prime Minister of 20 June 2002 on the "Principles of Legislative Technique", Journal of Laws of 2016, item 283.

[13] Act of 7 October 1999 on the Polish language, Journal of Laws of 1999, No. 90, item 999 as amended.

prohibition of synonymous and homonymous interpretation is pointed out. The prohibition of synonymous interpretation is based on the assumption that different phrases should not be assigned the same meaning, and the prohibition of homonymic interpretation – hence the same phrase should not carry different meanings. Combined with the assumption of the rationality of the legislator (often challengeable, but nevertheless useful), these principles lead to the suggestion of an interpretation that assumes that the legislator shapes the law in a deliberate manner, and if he decides on a particular linguistic procedure, he does so consciously and thus attempts to refer to a fragment of reality different from what would be the case with a different expression. This nuanced approach often eludes interpreters, who advocate changes to the law without delving into the consequences this will have for its application.

4. SELECTED PROBLEMS WITH THE AUTHOR'S ALLEGATIONS

The statistical analysis conducted by K. Sornat is not objectionable. It seems that within the framework of the methodology adopted, the Author consistently and coherently uses specific terms and reliably classifies linguistic phenomena into the category of "errors" with its internal typology. However, reservations are raised by the Author's specific objections to the analysed corpus.

4.1. "INAPPROPRIATE" USE OF THE -ĄC[14] PARTICIPLE

K. Sornat cites the following statement from the law under review: "Uwzględniając skargę, sąd na żądanie skarżącego przyznaje od Skarbu Państwa sumę pieniężną w wysokości od 2000 do 20 000 złotych". ["Taking into account the complaint, the court shall, at the request of the complainant, award a sum of money from the State Treasury in the amount of 2,000 to 20,000 zlotys".] suggesting that it would be correct in this situation to replace the word "uwzględniając" ["taking into account"] with the prepositional phrase "po uwzględnieniu" ["after taking into account"].[15] Similarly, she cites a blanket provision that directs the Prime Minister to issue a regulation with the words "Prezes Rady Ministrów

[14] Some subtleties of the Polish language may escape the reader unfamiliar with the nuances of Polish grammar here. In this example, it is important to know that there are essentially two types of adverbial participles in Polish: contemporary and antecedent. Contemporary adverbial participles can be recognized by the ending "-ąc" and semantically signal the simultaneity of the described action with respect to the main verb in the sentence.

[15] Again: to a reader unfamiliar with Polish, this change may seem absurd or trivial – it's just adding "after". In Polish, however, this changes the grammatical concept of this sentence, since it

określi (…), uwzględniając (…), biorąc pod uwagę (…), mając na uwadze (…)" ["The Prime Minister shall determine (...), taking into account (...), considering (...), having regard to (...)"]. Here, too, the Author's object of criticism is the use of participles, particularly such a large accumulation of them, she believes this raises "even more doubt".[16]

The flaw in this approach stems from ignoring the semantic difference resulting from the proposed alternative. With regard to the first example, the Author herself correctly notes that her proposal emphasizes the unevenness of the actions expressed in the two constituent sentences. Indeed, the construction "[p]o uwzględnieniu skargi, sąd (…) przyznaje" ["after taking the complaint into account, the court (…) shall award"] outlines a picture of the court's work, in which first, the complaint is considered valid and only later, some monetary sum is awarded. However, the Author fails to see (since she does not refer to it) the possibility that the legislator d e l i b e r a t e l y [emph. M.R.] uses the construction of temporal simultaneity. Such a procedure may have at least two motivations: (1) psychological and (2) pragmatic. The (1) psychological motivation suggests such a strong coupling between the validity of the complaint and the amount awarded that the court should make these two decisions in a single train of thought. The (2) pragmatic motivation, on the other hand, rests on the fact that such a grammatical approach cuts off doubts about whether the court should (formally) make one decision or two, promoting the economy of the proceedings. Psychological motivation can be successfully applied to the Prime Minister's case as well. These activities (taking into account and considering factors) are supposed to occur necessarily d u r i n g [emph. M.R.] the process of issuing a decree. In blanket regulations, by the way, such use of participles is quite common.

The Author comments on these examples, pointing out that "correctness" in this regard is extremely important due to the fact that we are dealing with important state documents, in which precision and comprehensibility are more important than economy.[17] If the economy of a statement is understood as its conciseness, then the Author's thesis is not justified by the ZTP she cites, as it treats all principles equally (cf. §§ 5, 6), without indicating any hierarchy between them. The literature also recognizes the problem of optimization of these rules, emphasizing their asymptotic or even contradictory nature.[18] This results from the fact that it is often not possible to connect precision and comprehensibility at the same time.[19] It should also be noted that if, in fact, the above argument is

transforms contemporary adverbial participle into a prepositional phrase with a gerund. The latter is more commonly used in the Polish language, as it is simpler.

[16] K. Sornat, *ibidem*, pp. 224-225.

[17] K. Sornat, *ibidem*, p. 225.

[18] M. Andruszkiewicz, *Problem jasności w języku prawnym – aspekty lingwistyczne i teoretycznoprawne*, "Comparative Legilinguistics" Vol. 31 (2018), DOI: 10.14746/cl.2017.31.1, p. 19.

[19] T. Gizbert-Studnicki, *ibidem*, pp. 103-104.

sensible, i.e. the legislator's use of a participle instead of a verb-noun spells out a slightly different picture of reality, then the effect of this is just the opposite of K. Sornat's conclusions, since "breaking" the model norm here will lead to greater precision of expression. Indeed, the rigid use of constructions promoted by normative linguists would impoverish the possibility of putting reality into the words of the law.

The conclusion put forward by the Author in connection with this phenomenon also raises some concerns, for she suggests that the "best" solution is to completely abandon participle constructions in legal language.[20] This is a very strong thesis, considering that it is quite an important part of the Polish language resource. Abandoning it will result in the need for complex linguistic procedures attempting to render the same fragment of reality as close as possible to how the previous category did. At the same time, replacing participles with prepositional phrases in the form of preposition + noun would greatly intensify the predominance of nouns in the legal corpus, which would contribute to intensifying the effect of heavy style. This seems to make it a suboptimal solution.

4.2. ERRORS IN AGREEMENT

Describing a different error, the Author notes that it is very common in legal language to use a singular judgment next to a several-element entity, e.g., "podmiot reprezentujący Skarb Państwa, organ administracji rządowej lub osoba zastępowana przekazuje Prokuratorii Generalnej informacje (…)" ["the entity representing the State Treasury, a government administrative body or a deputized person provides information to the Attorney General's Office (...)"].[21] According to the Author's opinion, the correct form here would be the pronouncement "przekazują" ["(they) provide"].[22] Although one may have objections of lesser force against this remark, it should be noted that – again – perhaps the legislator deliberately uses such syntax in order to be able to signal the fact that these actions are performed by only one of these entities. In a situation where the singular is used in combination with a conjunction or alternative, the result could be an interpretation of the provision leading to the recognition that the competence in question is vested only in all of the indicated entities at the same time. The use of the singular "anticipatory" closes the way to such an interpretation.

[20] K. Sornat, *ibidem*., p. 225.
[21] K. Sornat, *ibidem*.
[22] K. Sornat, *ibidem*.

4.3. BAD SENTENCE FORMATION AND SECONDARY SYNTACTIC RELATIONSHIPS

K. Sornat then goes on to criticize the erroneous sentence formation, pointing out that in most cases the correction of such a phenomenon would involve introducing new elements into the statement. This remark alone may raise some concerns because if a statement meant the same thing after adding certain elements, its meaning would also remain the same after taking them away again. This, in turn, contradicts the directive of interpretation, which prohibits an interpretation that would lead to deeming some part of the text superfluous. Thus, once again, we enter the territory of semantic nuances. At the same time, however, this does not imply nihilism in approaching the possible technical repair of the quality of normative acts in an attempt to strive for a stable meaning – such amendments are possible, but require deeper thought and care. As an example of carelessness, the Author points out, for example, the construction "[o]bniżenie wynagrodzenia zasadniczego sędziego o 5%-20% na okres od sześciu miesięcy do dwóch lat" ["[t]he reduction of a judge's basic salary by 5%-20% for a period of six months to two years"] pointing out that a syntactical ambiguity results in the string "wynagrodzenia zasadniczego sędziego" ["judge's basic salary"], presumably following the intuition that it could mean "wynagrodzenie zasadnicze" ["basic salary"] and, in inversion, "sędziego zasadniczego" ["basic judge"].[23] However, this problem is not due to the sloppiness of the legislator's language, but on the contrary, due to his diligence. "Wynagrodzenie zasadnicze" ["Basic salary"] is, in fact, a systemically well-established construction with its own definition, which appears at least in the Labour Code (Article 77^3 § 3(1)).[24] However, since § 9 of the ZTP states that "In a law, the terms that are used in the basic law for a given field of affairs, in particular, in the law referred to as 'code' or 'law', should be used." The 'rigid' adherence to the code construction requires the highest praise in this case, as it positively affects the consistency of the entire system. It is worth adding that this passage comes from the amendment to the Law on the System of Common Courts, so a law that is fundamentally distant from the Labour Code – all the greater reason to appreciate the concern for terminological uniformity.

In case of another doubt, the Author suggests replacing the phrase "identyfikacja ruchomości sędziego" ["identification of the judge's movables"] with the construction "identyfikacja ruchomości należących do sędziego" ["identification of movables belonging to the judge"] or "identyfikacja ruchomości będących

[23] This, too, is an example that is not easy to render directly in English. The confusion in this case stems from the fact that the grammatical constructions of "basic salary" and "judge's salary" both use a genitive case, with the result that the combined construction of "judge's basic salary" could refer the word "basic" to both salary and judge.

[24] Act of 26 June 1974 - Labour Code (Journal of Laws of 1974, No. 24, item 141 as amended).

własnością sędziego" ["identification of movables owned by the judge"]. The first objection to these proposals is that civil law demands great care in handling terms like 'belonging' or 'ownership', since they mean quite different things and are not easily interchangeable. The second – that the Author does not mention whether perhaps "ruchomości sędziego" ["judge's movable property"] is also not an established legal construction, which the legislator should not swat away on the altar of editing the sentence formation.

4.4. SYNTACTIC HOMONYMY

Another of the Author's objections is the occurrence of syntactic homonymy in legal texts, i.e. the identification of the subject of a sentence with the complement form, which leads to ambiguity as to who is the performer of a given action, and what its result is. As an example here, she cites the sentence "Wniesienie odwołania w terminie wstrzymuje wykonanie orzeczenia". ["The timely filing of an appeal suspends the execution of the judgment".] in which, according to her, it is unclear whether the filing of an appeal leads to the suspension of the execution of the judgment, or whether the execution of the judgment results in the filing of an appeal. It seems that the so-called reasonable person can reject the second interpretation out of hand, as it is difficult for the execution of a ruling to result in someone filing an appeal – this would be an interpretation leading to absurdity, and as such should also be avoided. The solution proposed by the Author ("wniesienie odwołania w terminie skutkuje wstrzymaniem wykonania orzeczenia" ["the filing of an appeal within the deadline results in the suspension of the execution of the judgment"]) may dilute the unambiguous meaning of the previous wording suggesting that the judgment is suspended by operation of law itself and immediately. Instead, the use of an expanded construction could lead to support the understanding that some decision still needs to be issued to confirm it.

4.5. MISUSE OF PHRASES GOVERNING THE GENITIVE

In the case of this remark, one has to agree with K. Sornat, at least as far as the sensibility of the consequences of implementing her proposal is concerned. After all, if one tries to transform legal texts from noun-oriented to slightly more verb-oriented, they will certainly gain a certain "vividness" that will raise the level of their communicability. The Author rightly notes that the use of complementary phrases and the accumulation of noun forms are manifestations of a heavy style. The literature recognizes the existence of this problem, signalling

the need to refrain from using nouns. At the same time, it is proven that more verb-heavy texts are more efficiently read and remembered by the audience.[25]

5. FINAL REMARKS

The Author conducted an exploratory analysis of several selected laws in an effort to assess their linguistic correctness from the perspective of normative linguistics. She accomplished this task well, as her work provides conclusions that are full of meaning once this paradigm is adopted. However, the problem of the analysed work is not the Author's normative incompetence (which cannot be observed), but her selectivity in methodological choices resulting in significantly impoverished interpretations of the described phenomena. As mentioned, in the process of law-making, the legislator is aware of the entire contextual layer of the directives of legislation and interpretation, so depriving oneself of them at the stage of analysing such a text leads to erroneous – or at least very truncated – conclusions.

The purpose of this article is not to undermine any reflection on the technical repair of the quality of normative acts. This one seems necessary, however not for normative reasons, but rather for intelligibility reasons. After all, the literature does not indicate that the source of problems in evaluating legal language is "linguistic errors", but rather its "heaviness" or "nouniness". At the same time, correcting any of these dimensions will result in the need to face the challenge of vagaries of interpretation so often cited in the argument above. This does not mean that such attempts should not be made, but rather that they should be made with what is called due caution.

K. Sornat concludes her article with the observation that more frequent recourse to correctness studies on the part of legislators and their mastery of the "rules of grammar" will result in greater precision of statutory information and improve the public image of the institutions represented by the law. Again – but for the last time – I am left to disagree with her here. As indicated earlier, a greater variety of linguistic solutions – despite the possibility of their critical evaluation by normativists – can lead to greater, not lesser, precision of texts, so harmonizing them in the face of the – already quite fluid – "linguistic norm" can mean petrification of statutory language and impoverishment of its tools. As for the image of public institutions, on the other hand, insofar as it is affected by legal texts, the thesis that it is lower than it could be precisely because of normativist lapses has not been empirically confirmed so far. Exaggerated attention to com-

[25] L. Sokołowski, *Wpływ struktury gramatycznej tekstu na jego rozumienie*, "Zeszyty Prasoznawcze" Vol. 8, No. 4(34) (1967).

pliance with the normativist pattern could lead to the perpetuation of the image of these institutions as distant from their addressees, and after all, the law should use such words (sentences) that "listeners and readers will be able to understand".[26]

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[26] Lord Denning, quoted by M. Sobieszewska, *ibidem*, p. 126.

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Vukan Slavković
University of Montenegro, Kotor, (Montenegro)
e-mail: vukan.s@ucg.ac.me
ORCID: 0000-0002-0151-464X

MENTAL INCAPACITY DEFENSE IN ANGLO-AMERICAN LAW AND THE DEFENDANT'S ABILITY TO APPRECIATE CRIMINALITY OF HIS CONDUCT

Abstract

The purpose of this study is to provide a more complete account of the significant judicial innovations in the handling of family murder cases, with comparable interest in the subject of insanity defense. In order to analyze the determinants of reactions to the trials, the author also explored American federal and State law concerning the verdicts. Although the M'Naghten Rule was the dominant test, after the publication of the *Model Penal Code*, every American state that seriously considered incapacity defense reform legislatively or judicially adopted the MPC test. According to 18 U. S. C. §17, a federal defendant has had to prove that the "severe" mental disease made him "unable to appreciate the nature and quality or the wrongfulness of his acts". Until 2020, state supreme courts disagreed on the constitutionality of abolishing the insanity defense. Several states had abolished or attempted to abolish the traditional, affirmative insanity defense and replaced it with a *mens rea* approach. The United States Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment does not require the States to adopt an insanity defense based on a defendant's ability to understand that his crime was morally wrong.

KEYWORDS

mental incapacity, criminal law, family murder, affirmative defense, *mens rea* approach

SŁOWA KLUCZOWE

niepoczytalność, prawo karne, morderstwo rodzinne, obrona oparta na zarzucie niepoczytalności, podejście *mens rea*

'Who are you?'
'I'm nobody now'
'Where have you just come from?'
'From the house of sorrows.'
'But you do believe that it is really I?'
'I must believe, though, of course, it would be much more
comforting to consider you the product of a hallucination.'
'Well, so, if it's more comforting, consider me that.'

Mikhail Bulgakov, *Master and Margarita*[1]

1. INTRODUCTION

History has recognized some form of incapacity defense for thousands of years. Ancient societies distinguished between blameworthy and blameless acts of harm. English *common law* followed the same principles, noting the inability to distinguish good from evil as an excuse for legal insanity. Around the 14th century, there was a shift in which insanity became recognized as a complete defense. By the 18th century, courts commonly used the "knowledge of the good and evil" test in insanity cases.[2]

The *Criminal Lunatics Act of 1800,*[3] drafted in a mere 4 days, contained four sections. The first section provided for the special verdict of insanity, such that, if a person charged with treason, murder or a felony was acquitted of insanity, the court should order him into strict custody until "His Majesty's Pleasure be Known" [3, p. 1]. The second section of the act concerned persons indicted for any

[1] M. Bulgakov, *Master and Margarita*, Penguin Classics, London, 2001, p. 297

[2] M. Silvestro, "Kahler v. Kansas: The Supreme Court Case to Decide the Constitutionality of Abolishing the Traditional Insanity Defense and Reconcile the Split Among the Circuits", *UIC Law Review*, Vol. 53, No. 3, 2021, p. 638.

[3] 39 & 40 Geo. III, c. 94.

offense, who were found to be insane upon arraignment. The court was thereby empowered arbitrarily to hold the person in strict custody until "His Majesty's Pleasure be Known". The section also applied to persons who appeared to be insane during a trial, and others discharged for want of prosecution [3, p. 2]. Section 3 of the Act denied bail to any "persons discovered and apprehended under circumstances that denoted a derangement of mind, and a purpose of committing a crime" [3, p. 3].[4] If a Justice of the Peace declared a person as a "dangerous person suspected to be insane", that person could not be bailed, unless by two Justices of the Peace.[5]

American efforts to prevent or punish family violence began in New England in the 1640s with the passage of the first laws. Afterward, there have been periods of history that included reforms against family violence and significant efforts to criminalize it.[6]

Part of U.S. law on insanity has its roots in the soil of English jurisprudence from the 17th century through the late 19th century. The bulk of the developed law has derived from the writings of early English scholars and a handful of well-known, frequently referenced cases. Two forms of the insanity defense have English *common law* origins. The *irresistible impulse test* is formally referred to as the volitional impairment test and excuses conduct when a jury finds that a defendant could not conform his conduct to the requirements of law due to mental illness. The so-called *McNaughten* test is a cognitive test to determine a defendant's culpability according to whether he was able to discern the distinction between right and wrong.[7]

In the modern criminal law of England and Wales, there is no general "diminished capacity" defense, although diminished responsibility is a special partial defense to murder which, if successfully pleaded, reduces the defendant's liability to (voluntary) manslaughter.[8] The elements of the insanity defense were established in the *R v McNaughten* case in 1843 (the *McNaughten* rules) and have remained largely unaltered since.

[4] 1800 Criminal Lunatics Act, https://filippomsposini.files.wordpress.com/2019/09/1800-criminal-lunatics-act.pdf (accessed 27 March 2023).

[5] G. Lilienthal, A. Nehaluddin, "*Deconstructing the Criminal Defense of Insanity*", *International Journal for the Semiotics of Law*, Vol. 30, No. 1, 2017, p. 163

[6] E. Pleck, "Criminal Approaches to Family Violence, 1640-1980", *Crime and Justice*, 1989, Vol. 11, p. 19.

[7] J. Moriarty, *The Role of Mental Illness in Criminal Trials*, Routledge, New York, 2001, p. XI.

[8] Homicide Act 1957, p.2 as amended by the Coroners and Justice Act 2009, p. 52.

2. LEGAL INSANITY

Concerning incapacity defense, American courts focused on the defendant's ability to distinguish right from wrong and on the fact that those not fit for punishment must be acquitted.[9] Virtually every US jurisdiction that permits the defense requires insanity claims to comport with the jurisdiction's general test for criminal responsibility. The affirmative defense of legal insanity has always been controversial, but every state had some form of the defense until the time of *Hinckley*.[10] In the-early part of the 20th century, a few states tried to abolish the defense legislatively[11] but all such attempts were rejected by the states' appellate courts. After M'Naghten,[12] virtually all US jurisdictions adopted some form of the English cognitive test, although starting with the Parsons[13] case in Alabama, a minority of jurisdictions also adopted a control test[14] in addition to the M'Naghten standard. There were, of course, criticisms of M'Naghten. It was allegedly not flexible enough because its test was expressed in all-or-none terms, was not scientific enough, and it unduly limited the scope of expert testimony.

Nonetheless, M'Naghten remained the dominant test until the second half of the 20th century. Jurisdictions were given great freedom to allocate the burden of persuasion at any level, including requiring the defendant to prove legal insanity beyond a reasonable doubt, thus increasing the risk of wrongful conviction. Jurisdictions were permitted to place the persuasion burden on the prosecution beyond a reasonable doubt once the defendant met the production burden, and most did so.[15] In 1962, the American Law Institute published the *Model Penal Code*, in order to bring rigor, and precision to the *common law* of crimes. Its insanity defense provision is as follows:

Section 4.01. Mental Disease or Defect Excluding Responsibility.

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either

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[9] M. Silvestro, "Kahler v. Kansas: The Supreme Court Case to Decide the Constitutionality of Abolishing the Traditional Insanity Defense and Reconcile the Split Among the Circuits", *ibidem*, p. 638

[10] *United States v. Hinckley*, U.S. District Court for the District of Columbia - 525 F. Supp. 1342 (D.D.C. 1981).

[11] *State v Lange*, 123 So 639, 641-42 (La 1929) (finding a violation of the state due process clause); *Sinclair v State*, 132, pp. 581, 584-87 (Miss 1931) (finding a violation of the federal due process, equal protection, and cruel and unusual punishment clauses); *State v Strasburg*, 110 pp. 1020, 1023-24 (Wash 1910) (finding a violation of the state due process clause).

[12] *Cl & Fin* [1843] 8 Eng Rep 718.

[13] *Parsons v State*, 81 Ala 577(1887).

[14] These tests are sometimes referred to as "irresistible impulse" or "volitional tests".

[15] S. Morse, "Before and after Hinckley", in: R. Mackay (ed.) *The Insanity Defence: International and Comparative Perspectives*, Oxford University Press, Oxford, 2022, pp. 199-200.

to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[16]

Insanity requires a different sort of incapacity, or rather incapacities: the *cognitive* incapacity to "appreciate the criminality [wrongfulness] of conduct," and the *volitional* one to "conform conduct to the requirements of the law". The Code drafters responded to what they perceived as the shortcomings of the then-dominant insanity test, first set out in an advisory English opinion from 1843, *M'Naghten's Case*.[17] Here is the *M'Naghten* test in its original formulation:

> "To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong".[18]

The "defect of reason" means that the defendant's powers of reasoning were impaired, more than to the extent of a simple inability to resist impulses or exercise emotional control.[19]

The drafters had consulted with mental health professionals and believed the new test was an improvement on both M'Naghten and control tests. It notably included a control prong. It required only a lack of substantial capacity, not a lack of all capacity to appreciate or to conform. Further, its cognitive prong gave lawmakers the choice between appreciation, not knowledge of criminality (legal appreciation) or of wrongfulness (moral appreciation), and did not focus on 'knowledge' narrowly conceived. After the publication of the MPC test, every state that seriously considered insanity defense reform adopted the MPC test legislatively or judicially.[20]

On 21 June 1982, a Washington, D.C. jury found John W. Hinckley, Jr. Not Guilty by Reason of Insanity (NGRI) on all charges arising from his attempted assassination of President Reagan. The public's negative reaction stimulated

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[16] The American Law Institute. 1985. *Model penal code, Official draft and explanatory notes.* Philadelphia: The American Law Institute, pp. 61-62.

[17] 1 C. & K. 130, 4 St. Tr. N.S. 847 (1843). M'Naghten set out to assassinate Prime Minister Sir Robert Peel, convinced that spies were following him "night and day". He killed Peel's private secretary instead, mistaking him for Peel. After M'Naghten's acquittal on grounds of insanity, the House of Lords asked for clarification of the law of insanity.

[18] M. Dubber, *An introduction to the Model Penal Code*, Oxford University Press, Oxford, 2015, pp. 200-201.

[19] C. Brants, A. Jackson & F. Koenraadt, "Culpability compared: Mental capacity, criminal offences and the role of the expert in common law and civil law jurisdictions", *Journal of International and Comparative Law*, Vol. 3, No. 2, 2016, pp. 419-420.

[20] S. Morse, "Before and after Hinckley", *ibidem*, p. 200.

reforms of the insanity defense. The day after the Hinckley verdict was reached, the Delaware legislature passed a law providing a Guilty But Mentally Ill verdict alternative in insanity cases.[21] According to §407 (a) "Where a defendant's defense is based upon allegations which, if true, would be grounds for a verdict of 'guilty, but mentally ill' or desires to enter a plea to that effect, no finding of 'guilty, but mentally ill' shall be rendered until the trier of fact has examined all appropriate reports (including the pre-sentence investigation); has held a hearing on the sole issue of the defendant's mental illness, at which either party may present evidence; and is satisfied that the defendant was in fact mentally ill at the time of the offense to which the plea is entered. Where the trier of fact, after such hearing, is not satisfied that the defendant was mentally ill at the time of the offense, or determines that the facts do not support a 'guilty but mentally ill' plea, he shall strike such plea, or permit such plea to be withdrawn by the defendant".[22]

Within a month of the Hinckley verdict, the House and Senate were holding hearings on the insanity defense. A measure proposed shifted the burden of proof of insanity to the defense. Joining Congress in shifting the burden of proof were a number of states. Within three years after the Hinckley verdict, two-thirds of the states placed the burden on the defense to prove insanity, while eight states adopted a separate verdict of 'guilty but mentally ill', and one state (Utah) abolished the defense altogether. In addition to shifting the burden in insanity cases, Congress also narrowed the defense itself. *The Insanity Defense Reform Act of 1983* required the defendant to prove a 'severe' mental disease and eliminated the 'volitional' or 'control' aspect of the insanity defense.[23]A federal defendant had to prove that the 'severe' mental disease made him "unable to appreciate the nature and quality or the wrongfulness of his acts".[24]

To be found NGRI, a defendant must have a mental health condition that so greatly impacts his ability to comprehend his actions that they cannot be held criminally responsible for them. NGRI is raised in about one percent of felony cases and is only successful in fifteen to twenty-five percent of those cases. Separately, an individual can be found incompetent to stand trial if he is not stable enough to participate in the proceedings. Once the individual regains competency, he is considered rehabilitated and can be tried. Alternately, a defendant might be mentally ill but found competent to stand trial, to begin with. At either point, once the defendant is found competent, the district attorney can also offer

[21] V. Hans, D. Slater, "John Hinckley, Jr. and the Insanity Defense: The Public's Verdict"*, The Public Opinion Quarterly* 1983, Vol. 47, No. 2, pp. 202-203.

[22] An Act to amend Chapter 4 and Chapter 39, Title 11 of the Delaware Code relating to crimes and criminal procedure; and providing for certain verdicts in criminal cases, *https://legis.delaware.gov/SessionLaws/Chapter?id=24068*, (accessed 22 March 2023).

[23] H.R.3771 – Insanity Defense Reform Act of 1983, *https://www.congress.gov/bill/98th-congress/house-bill/3771?s=1&r=99*, accessed 5 April 2023.

[24] L. Douglas, "The Trial of John W. Hinckley, Jr.", *Popular Media*, Vol. 55, 2007.

an NGRI plea arrangement, which accounts for the vast majority of the NGRI cases. If no plea deal exists, however, a defendant's fate will be decided by a jury, who is far less likely to issue a verdict of insanity than judges.[25]

According to 18 U. S. C. §17, "It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence".[26]

3. "SETTLED INSANITY" DOCTRINE AND VOLUNTARY INTOXICATION WITH NARCOTICS

Temporary insanity is a defense that can be used when the defendant believes he shouldn't be held criminally liable for his actions due to a temporary impairment in his ability to make sound judgments. A temporary insanity defense may be suggested by a criminal lawyer when it can be established that the circumstances leading up to the criminal act had an immediate impact on the defendant's state of mind.

To successfully establish a defense of temporary insanity, it must be shown that the defendant was suffering from a mental defect at the time the criminal act occurred and that this defect affected the defendant's ability to differentiate between right and wrong.[27]

Like the insanity defense generally, but even more so, juries rarely acquit based on temporary insanity. If some courts treated temporary insanity as a special plea during prior periods, the claim no longer possesses much of a distinct character. Like regular insanity claims, virtually every jurisdiction that permits the defense requires temporary insanity claims to comport with the jurisdiction's general test for criminal responsibility. In jurisdictions that follow the M'Naghten test, for example, a defendant pleading temporary insanity must, like any insanity pleader, establish that at the time of the crime, he was unable to understand the nature and quality of his acts or their wrongfulness. In addition, he must establish that the disabling condition was caused by a "diseased mind". Occasionally, legal

[25] B. Wendzel, "Not Guilty, Yet Continuously Confined: Reforming the Insanity Defense", *American Criminal Law Review*, Vol. 57, No. 2, 2020, p. 395.

[26] Title 18 – Crimes And Criminal Procedure, https://uscode.house.gov/browse/prelim@title18/part1/chapter1&edition=prelim (accessed 1 April 2023).

[27] *Understanding What It Means to Plea Temporary Insanity*, https://www.fitch-stahlelaw.com/understanding-what-it-means-to-plea-temporary-insanity (accessed 6 April 2023).

implications do flow from the decision to plead temporary rather than permanent insanity.[28]

Each state has the responsibility of determining how it defines and upholds a defense of temporary insanity. There are four basic standards that states follow – the M'Naghten Rule, the Irresistible Impulse Test, the Model Penal Code Test, and the Durham Rule. The temporary insanity defense is a recognized, viable defense in some forty-four states. Four states – Idaho, Kansas, Montana, and Utah – do not recognize insanity as a defense at all. It follows, *a fortiori,* that these states also do not recognize temporary insanity as a defense.[29] According to Arizona Revised Statutes, Title 13 – Criminal Code, Section 13-502, Subsection A, "A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct".[30]

American courts wrestled with the question of exactly what type of mental disease or defect would suffice to relieve a defendant of criminal responsibility. Early cases held that voluntary intoxication could induce temporary insanity that would relieve a defendant of criminal responsibility if the insanity was of a 'settled nature".[31]

The California Supreme Court reached a finding in overturning the conviction of Valerie Kelly, who, after taking mescaline and LSD some fifty to one hundred times over a two-month period, stabbed her mother with an assortment of kitchen knives. Trial testimony established that Kelly was not acting simply as a person who, after ingesting drugs or alcohol, was unable to perceive reality and reason properly. Rather, the drug abuse was deemed the indirect cause of a legitimate, temporary psychosis that would last even when the defendant was temporarily off drugs.[32]

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[28] R. Covey, "Temporary Insanity: The Strange Life and Times of the Perfect Defense", *Boston University Law Review*, Vol. 91, No. 5, 2011, pp. 1607-1609.

[29] The Insanity Defense Among the States, *https://www.findlaw.com/criminal/criminal-procedure/the-insanity-defense-among-the-states.html* (accessed 26 March 2023).

[30] Title 13 – Criminal Code, *https://www.azleg.gov/arsDetail/?title=13* (accessed 4 April 2023).

[31] *People v. Travers*, Supreme Court of California, 5 March 1891, 88 Cal. 233 (Cal. 1891).

[32] R. Covey, "Temporary Insanity: The Strange Life and Times of the Perfect Defense". *Boston University Law Review*, Vol. 91, No. 5, 2011, p. 1630.

The California Supreme Court was called upon to explain the meaning of settled insanity. In *People v. Kelly,*[33] the court was asked to determine whether an eighteen-year-old defendant, who had been continuously using hallucinogenic drugs for approximately one year prior to attacking her mother, could have been legally insane at the time she "repeatedly stabb[ed] her with an array of kitchen knives". Despite expert testimony that the defendant suffered from an organic brain defect caused by the drugs that rendered her 'dingy', the trial court held that the defendant could not meet the definition of legal insanity because her condition was not settled and permanent.

According to the California Supreme Court, the trial court was mistaken in construing 'settled' to mean only 'permanent'. The term 'settled' was apparently broad enough to include both permanent and temporary insanity. Under the reasoning of the California Supreme Court, a defendant might be excused from criminal liability if he committed crimes while insane, even if the insanity was only temporary, as long as that insanity was of a settled nature.

However, Section 25.5 of California's Penal Code makes the insanity defense unavailable to defendants whose insanity is solely the result of voluntary ingestion of drugs and/or alcohol. Section 25.5 significantly narrows the availability of the insanity defense because 'temporary' insanity excuses criminal behavior only if it is at least in part the result of "an organic mental disease or defect".[34]

According to Section 120 of the Senate Bill 1171,[35] "Section 25.5 of the California Penal Code is amended and renumbered to read: "In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances (Section 29.8.)".[36]

Under the 'settled insanity' doctrine, insanity that results from habitual or extended use of intoxicants, even if the use of the intoxicants was voluntary, can be a defense if the effects of the extended use of the intoxicants have caused either temporary or permanent mental or physical damage to the defendant.[37] In such cases, "the plea of insanity avails the party", just as with any other reason-inhibiting disease or condition, as long as the defendant can establish the necessary elements of the insanity defense – i.e., that he did "not know at the time he committed the act, that he was doing an immoral and unlawful act". To assert a settled

[33] *People v. Kelly*, 516 P.2d 875, 883 (Cal. 1973) (holding that the defendant may have been insane at the time she stabbed her mother even if the insanity resulted from "repeated voluntary intoxication").

[34] S. Davoudian, "California Homicide Law: The Basics", *Loyola of Los Angeles Law Review*, Vol. 36, No. 4, 2003, pp. 1602-1604.

[35] SB 1171 (Chapter 162) was passed by the Senate on 6 July 2012.

[36] BILL NUMER 1171, *http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1171_bill_20120723_chaptered.html* (accessed 30 March 2023).

[37] J. Hall, *General principles of criminal law*, Lawbook Exchange, New York, 1960, p. 112.

insanity claim, the defendant must establish that the triggering cause was the underlying condition brought about by the extended use of intoxicants, and not the effects of the intoxicant when the crime was committed.[38]

A greater number of temporary insanity claims predicated on intoxication succeed where defendants claim the intoxication was involuntary or pathological. For example, defendants have found some success in cases in which the temporary insanity allegedly resulted from the use of Prozac, Halcion or other selective serotonin reuptake inhibitors (SSRIs). The defendants have been successfully raising a defense of Halcion-induced intoxication to obtain reversals of their convictions.[39]

Such claims have been permitted, notwithstanding that the drugs were consumed voluntarily, on grounds that the resulting psychological reaction was unanticipated and thus 'pathological' in nature. In these cases, courts quite readily concede that the effects of intoxication are often indistinguishable from other disabling causes of cognitive dysfunction.[40]

4. JUDICIAL PRACTICE

4.1. THE *MENS REA* APPROACH

Until March 2020, state supreme courts disagreed on the constitutionality of abolishing the insanity defense. Several states had abolished or attempted to abolish the traditional, affirmative insanity defense and replaced it with a *mens rea* approach. The *mens rea* approach will likely lead to more mentally ill, criminal defendants being incarcerated rather than receiving the treatment they need. The purpose of the traditional insanity defense is to ensure that criminal culpability is only imposed upon those individuals who have the mental capacity to comply with the law. The purpose of the *mens rea* approach, however, only allows a criminal defendant to introduce evidence showing the existence of mental disease in order to negate intent.[41]

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[38] R. Covey, "Temporary Insanity: The Strange Life and Times of the Perfect Defense", *ibidem*, pp. 1629-1630.

[39] T. Myers, "Halcion Made Me Do It: New Liability and a New Defense - Fear and Loathing in the Halcion Paper Chase", *University of Cincinnati Law Review*, Vol. 62, No. 2, 1993, p. 605.

[40] R. Covey, "Temporary Insanity: The Strange Life and Times of the Perfect Defense", *ibidem*, pp. 1630.

[41] M. DiSilvestro, *Kahler v. Kansas: The Supreme Court Case to Decide the Constitutionality of Abolishing the Traditional Insanity Defense and Reconcile the Split Among the Circuits*, *ibidem*, p. 634.

In 1995, the state of Kansas passed a law (Kan. Stat. Ann. § 22-3220) which revoked the traditional insanity defense. Defendants could no longer argue that, because of their mental illness, they were incapable of distinguishing right from wrong. Instead, defendants with mental illness were only permitted to argue that their mental illness prevented them from forming the specific intent (or *mens rea*) needed to commit the crime.[42]

In early 2009, Karen Kahler filed for divorce from James Kahler and moved out of their home with their two teenage daughters and a 9-year-old son. Over the following months, James Kahler became more and more distraught. On Thanksgiving weekend, he drove to the home of Karen's grandmother, where he knew his family was staying. Kahler entered through the back door and saw Karen and his son. He shot Karen twice while allowing his son to flee the house. He then moved through the residence, shooting Karen's grandmother and each of his daughters in turn. All four of his victims died. Kahler surrendered to the police the next day and was charged with capital murder.[43]

Under Kansas law, a defendant may raise mental illness to show that he "lacked the culpable mental state required as an element of the offense charged". Kansas does not recognize any additional way that mental illness can produce an acquittal, although a defendant may use evidence of mental illness to argue for a lessened punishment at sentencing. Prior to trial, Kahler filed a motion arguing that Kansas' treatment of insanity claims violates the Fourteenth Amendment's Due Process Clause.[44] He asserted that Kansas had "unconstitutionally abolished the insanity defense" by allowing the conviction of a mentally ill person "who cannot tell the difference between right and wrong". The trial court disagreed and the jury returned a conviction. During the penalty phase, Kahler was free to raise any argument he wished that mental illness should mitigate his sentence, but the jury still imposed the death penalty. The Kansas Supreme Court affirmed. The United States Supreme Court granted *certiorari*.[45]

A challenge like the Kahler'*s* case must achieve high standards. Under well-settled precedent, due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of American people

[42] 2006 Kansas Code – 22-3220, *https://law.justia.com/codes/kansas/2006/chapter22/statute_12094.html#:~:text=Defense%20of%20lack%20of%20mental,is%20not%20otherwise%20a%20defense* (accessed 21 March 2023).

[43] STATE v. KAHLER (2018), *https://caselaw.findlaw.com/ks-supreme-court/1888978.html* (accessed 7 April 2023).

[44] Due Process Clause is found in both the Fifth and Fourteenth Amendments to the United States Constitution, which prohibit the deprivation of "life, liberty, or property "by the federal and state governments, respectively, without due process of law.

[45] R. Barkow *et. al*., *Casenote Legal Briefs for Criminal Law, Keyed to Dressler and Garvey*, Aspen Publishing, 2022, p. 110.

as to be ranked as fundamental [*Snyder v. Massachusetts*, 291 U.S. 97 (1934)].[46] According to Kahler, Kansas has impermissibly jettisoned the moral-incapacity test for insanity. Both *Clark*[47] and *Leland*[48] described that test as coming from *M'Naghten*. But Kahler stated that the moral-incapacity inquiry emerged centuries before that decision, thus forming part of the English common-law heritage this country inherited. The test served for all that time and continues into the present as the touchstone of legal insanity. Kansas has altogether "abolished the insanity defense", in disregard of hundreds of years of historical practice. So Kahler concluded that the moral incapacity standard is a "principle of justice so rooted in the traditions and conscience of American people as to be ranked as fundamental".

The Kansas Supreme Court rejected his argument, relying on an earlier precedential decision. There, the court denied that any single version of the insanity defense was so "ingrained in the American legal system" as to count as "fundamental". The court thus found that "due process does not mandate that a State adopt a particular insanity test".[49]

On 7 October 2019, the United States Supreme Court heard arguments about the case *Kahler v. Kansas,*[50] discussing questions and concerns about the constitutionality of abolishing the insanity defense. On 23 March 2020, the Court ruled that the Due Process Clause of the Fourteenth Amendment does not require the States to adopt an insanity defense based on a defendant's ability to understand that his crime was morally wrong.[51]

4.2. THE AFFIRMATIVE INSANITY DEFENSE

4.2.1. THE MODEL PENAL CODE RULE

The New York state uses the Model Penal Code rule as a general test for criminal responsibility. The burden of proof is on the defendant.[52] According to Section 40.15 of the New York Penal Code (Mental disease or defect), "In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the

[46] *Snyder v. Massachusetts*, 291 U.S. 97 (1934), *https://supreme.justia.com/cases/federal/us/291/97/*, (accessed 29 March 2023).

[47] *Clark v. Arizona*, 548 U.S. 735 (2006).

[48] *Leland v. Oregon*, 343 U.S. 790 (1952).

[49] *Kahler v. Kansas*, *https://casetext.com/case/kahler-v-kansas-1*, (accessed 3 April 2023).

[50] *Kahler v. Kansas*, 140 S. Ct. 1021, 206 L. Ed. 2d 312 (2020).

[51] 18-6135 *Kahler v. Kansas* (03/23/2020), *https://www.supremecourt.gov/opinions/ 19pdf/18-6135_j4ek.pdf* (accessed 8 April 2023).

[52] The Insanity Defense Among the States, *https://www.findlaw.com/criminal/criminal-procedure/the-insanity-defense-among-the-states.html* (accessed 26 March 2023).

time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either:

1. the nature and consequences of such conduct; or

2. that such conduct was wrong".[53]

The New York Penal Law became effective on 1 September 1967. It was "the first major and comprehensive revision of the Penal Law since 1881".[54] According to Section 1046 of the prior Penal Law of the state of New York, second-degree murder was characterized as killing with a design to produce death but without accompanying deliberation and premeditation.[55] The New York Law Revision Commission found that the law of murder had been rendered "vague and indefinite" and that "„bare intent to kill" had been "confounded with deliberation".[56] The first statute which graded murder was enacted in Pennsylvania in 1794. It subsequently became a model in many other jurisdictions for similar legislation, dividing murder into two degrees and limiting capital punishment to the higher degree. The Pennsylvania Act provided that "all murder which shall be perpetuated by means of willful, deliberate and premeditated killing shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree. In view of the dictionary meanings of the words 'deliberate' and 'premeditated', those who drafted the statute undoubtedly had in mind that only those murders which were thoughtfully conceived well in advance of the actual killing would fall within the first-degree category.[57] "To deliberate" means "to weigh in the mind; to consider the reasons for and against; to consider maturely; to reflect upon; ponder". "To premeditate" means "to think on and revolve in the mind, beforehand; to contrive and design previously".[58]

According to Section 125.25 of the current New York Penal Law, a person is guilty of murder in the second degree when:

1. with intent to cause the death of another person, he causes the death of such a person or of a third person;

2. under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person;

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[53] New York Penal Law 1 September 1967 (revised 16 March 2013), https://ypdcrime.com/penal.law/article40.php#p40.15 (accessed 7 April 2023).

[54] H. Levine, "The New York Penal Law: A Prosecutor's Evaluation", *Buffalo Law Review*, Vol. 18, No. 2, 1968, p. 269.

[55] J. Joseph, "Deliberation and Premeditation in First Degree Murder - Cummings v. State", *Maryland Law Review*, Vol. 21, No. 4, 1961, pp. 352-353.

[56] R. Byrn, "Homicide Under the Proposed New York Penal Law", *Fordham Law Review*, Vol. 33 No. 2, 1964, p. 178.

[57] J. Joseph, *Deliberation and Premeditation in First Degree Murder – Cummings v. State*, *ibidem*, pp. 350-351.

[58] N. Webster, *Webster's Third New International Dictionary of the English Language*, Merriam-Webster, Springfield, 1981.

3. acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants;

4. under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person; or

5. being eighteen years old or more, while in the course of committing rape in the first, second or third degree, criminal sexual act in the first, second or third degree, sexual abuse in the first degree, aggravated sexual abuse in the first, second, third or fourth degree, or incest in the first, second or third degree, against a person less than fourteen years old, he intentionally causes the death of such person.

Murder in the second degree is a class A-I felony.[59]

If the defendant intentionally or recklessly caused the death of another person, he could face a homicide charge. There are several different offenses in the New York criminal code related to taking the life of another person including homicide, manslaughter and murder. Of all of the crimes related to homicide, the most serious are murder in the first degree, murder in the second degree, and aggravated murder. Each is a class A-I felony, meaning that if someone is convicted, he could be sentenced to life.[60]

4.2.1.1. THE MURDER OF DEFEO FAMILY

Ronald Joseph DeFeo, Jr. was an American mass murderer, the eldest son of the family, who was tried and convicted for the killings of his father, mother, two brothers and two sisters.[61] On 13 November 1974, all of the victims were shot with a .35 caliber lever action Marlin 336C rifle at around three o'clock in the morning.

He was taken to the local police station for his own protection after suggesting to police officers at the scene of the crime that the killings had been carried out by a mob hit man, because there was animosity between them and the Defeos regarding the car dealership.[62] Defeo was placed in protective custody as the police followed up on his story and investigated.

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[59] New York State Law, *https://ypdcrime.com/penal.law/article125.php#p125.25* (accessed 6 April 2023).

[60] NY Penal Law § 125.25: Murder in the second degree, *https://criminaldefense.1800nynylaw.com/new-york-penal-law-125-25-murder-in-the-second-degree.html* (accessed 27 March 2023).

[61] *People v. DeFeo,* Indictment No. 1251/74, at 1-2 (N.Y. Sup.Ct., Suffolk County, Jan. 6, 1993).

[62] V. Plaza, *American mass murderers,* Lulu Press, Morrisville, 2015, p. 136.

However, a further search of the DeFeo residence turned up an empty box in Butch DeFeo's room that was for the .35 caliber Marlin 336C rifle that he had purchased of late.[63] An interview with DeFeo at the station soon exposed serious inconsistencies in his version of events. When pressed by the detectives regarding the sequence of events and estimated time of deaths of the victims, DeFeo's story about the murders quickly became contradictory.[64]

The following day he confessed to carrying out the killings himself, and the alleged hitman had an alibi proving he was out of state at the time of the killings.[65] DeFeo said that he discarded blood-stained clothes, the Marlin rifle and cartridges into a storm drain on his way to the dealership, where he arrived at around six a.m. At the time, DeFeo was on probation and under surveillance as a drug user.[66]

DeFeo's trial began on 14 October 1975. His lawyer mounted an affirmative defense of insanity, with Defeo claiming that he killed his family in self-defense because he heard their voices plotting against him.[67] Representing the New York State was Suffolk County Assistant District Attorney. While the defense psychiatrist argued in support of DeFeo's claims of insanity, suggesting that he was "neurotic and suffered from dissociative disorder", the prosecution psychiatrist asserted that DeFeo abused LSD and heroin and suffered from antisocial personality disorder, but was certainly aware of his actions at the time of the crime and able to distinguish right from wrong. On 21 November 1975, the insanity defense failed to convince the jury, as with a unanimous vote, Ronald Defeo, Jr. was convicted on six counts of murder in the second degree. On 4 December 1975, he was sentenced to six concurrent terms of twenty-five years of imprisonment.[68]

On 27 March 1978, the Appellate Division, Second Department, unanimously affirmed the conviction[69] and on 23 May 1978, the Court of Appeals denied leave to appeal.[70]

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[63] R. Flowers, *The Amityville Massacre: The DeFeo Family's Nightmare (A True Crime Short),* CreateSpace, Scotts Valley, 2017.

[64] V. Plaza, *American mass murderers*, *ibidem*, p. 136.

[65] Ten years have passed since a similar case and the greatest mass murder that happened in Serbia. On 9 April 2013, a murderer in the village Velika Ivanca, near Mladenovac, killed 13 relatives and neighbours in cold blood. It was around 5 a.m. when the shooting began. Most of the villagers were sleeping in their homes and some of them tried to escape, but they fell down under the bullets. The chain of murders, which lasted around half an hour, ended with the arrival of the police and the attempt of the perpetrator to commit suicide. He later succumbed to injuries in the hospital.

[66] R. Flowers, *The Amityville Massacre: The DeFeo Family's Nightmare (A True Crime Short), ibidem.*

[67] V. Plaza, *American mass murderers, ibidem*, p. 136.

[68] R. Flowers, *The Amityville Massacre: The DeFeo Family's Nightmare (A True Crime Short), ibidem.*

[69] *People v. DeFeo,* 61 A.D.2d 1141, 403 N.Y.S.2d 165 (2d Dep't 1978).

[70] *People v. De Feo,* 44 N.Y.2d 952, 408 N.Y.S.2d 1032, 380 N.E.2d 342 (1978).

4.2.2. THE M'NAGHTEN RULES

4.2.2.1. ATTEMPTED MURDER OF KEAL FAMILY AND "COMMAND DELUSION"

In Keal [2022] EWCA, the England and Wales Court of Appeal decided that the defense of insanity is not available to a defendant who, owing to a disease of the mind leading to a defect of reason, believed that his actions were being externally controlled. Any other answer would require an inappropriate departure from the M'Naghten rules.

Robert Keal attempted to kill his father, mother and grandmother with weapons including knives, scissors and a cricket bat, during a sustained attack at their shared home. There were moments during the attack when Keal apologized to his victims and stated that he was unable to stop himself. To his mother, at one point he said, "I'm sorry, this isn't me, it's the devil". At trial, the psychiatric experts agreed that Keal was seriously unwell and in a psychotic state at the time of the offence. He satisfied the first two requirements in the M'Naghten rules that a defendant who claims insanity must prove that he was, at the time of the alleged offence, (1) suffering from a "disease of the mind", (2) leading to a "defect of reason". However, the experts also agreed that Keal understood the "nature and quality" of his actions, ruling out a defense under requirement (3a) of the rules. In order to qualify as insane, therefore, Keal had to prove the alternative limb, (3b) that he "did not know that what he was doing was wrong"; a test that was itself paraphrased in M'Naghten in terms of the accused not being "conscious that the act was one which he ought not to do". Experts disagreed on this last issue and Keal was convicted. On appeal, defense counsel rehearsed an argument, rejected by the trial judge, that Keal's belief that he lacked control over his actions was relevant to whether he satisfied limb (3b).[71]

The appellant had a history of mental health problems, ADHD and drug addiction. He had struggled with drug addiction from late adolescence. Tindal Lord Chief Justice, giving the majority judgment, said that the answer must depend on the nature of the delusion. However, making the assumption that he acted under such partial delusion only and was not in other respects insane, they thought his actions had to be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment.[72]

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[71] M. Grainger, "Insanity and command delusions", *The Cambridge Law Journal*, Vol. 81, No. 3, 2022, pp. 467-468.

[72] *R v Keal* [2022] EWCA Crim 341 – Mental Health Law Online, *http://www.bailii.org/ew/cases/EWCA/Crim/2022/341.html* (accessed 25 March 2023).

The four expert psychiatrists produced a joint report which was placed before the jury. They identified areas of agreement in the following terms (in line with the questions arising under the M'Naghten rules): At the time of the incident, the defendant was seriously mentally ill (psychotic and deluded) and this impaired his capacity for rational thought. He was suffering from a disease of the mind that led to a defect of reason, but the defendant knew the nature and quality of his actions. The experts disagreed to what extent his disordered mental state impaired his ability to know that what he was doing was wrong.

The conclusion of two psychiatrists that the appellant did know that what he was doing was wrong was based on the following feature. He was apologizing whilst carrying out the attacks. When his father asked him to stop, he was able to reappraise the situation. The presence of delusions does not necessarily mean that free will has been removed.

The other two psychiatrists said that the psychotic events happened over a period of time and the feeling of compulsion would not necessarily be constant. The intensity of the compulsion can wax and wane over time. The fact that he was feeling sorry for what he was doing did not mean that he was not compelled to do it. The extent of the appellant's mental illness was such that the rational ability to decide right and wrong was damaged. To apply rational views to episodes of psychosis misses the point. The effect of the psychotic incident is to disorder thoughts.[73]

The judge heard argument concerning the legal directions in respect of the defense of insanity, and in particular on the meaning of 'wrong' within the M'Naghten Rules. Mr Campbell-Tiech Queen's Counsel for the appellant submitted that the defense of insanity was available to a psychotic and deluded defendant who was aware that his act was wrong but believed himself to be compelled to perform it. The prosecution submitted that this argument was an extension of the definition of 'wrong', for which there was no legal foundation.[74]

On appeal, it was contended that the trial judge had misdirected the jury by failing to direct them that even if the appellant knew what he was doing was wrong (inferred from his apologies), the defense of insanity would be established if he believed that he had no choice but to commit the act in question.[75] The Court of Appeal revisited the scope and applicability of the M'Naghten rules on the scope of the defense of insanity and held that those rules meant that the defense

[73] KEAL, R. V., *https://www.casemine.com/judgement/uk/6234d015b50db9e904de8e2c*, (accessed 31 March 2023).

[74] *R v Keal* [2022] EWCA Crim 341 – Mental Health Law Online, *http://www.bailii.org/ew/cases/EWCA/Crim/2022/341.html* (accessed 25 March 2023).

[75] Serious Crime Bulletin No. 1 – London, *https://redlionchambers.co.uk/wp-content/uploads/2023/02/RLC-SERIOUS-CRIME-BULLETIN-issue-1-Feb-20235.pdf* (accessed 28 March 2023).

was not available to a defendant who, although he knew what he was doing was wrong, believed that he had no choice but to commit the act in question.[76]

CONCLUSION

U.S. law on insanity in part has its roots in the soil of English jurisprudence from the 17th century through the late 19th century. The bulk of the developed law has been derived from the writings of early English scholars and a handful of well-known, frequently referenced cases. Virtually every U.S. jurisdiction that permits the defense requires insanity claims to comport with the jurisdiction's general test for criminal responsibility. The M'Naghten Rules remained the dominant test until the second half of the 20th century. After publication of the *Model Penal Code*, every state that seriously considered insanity defense reform adopted the MPC test legislatively or judicially. *The Insanity Defense Reform Act of 1983* required the defendant to prove a 'severe' mental disease and eliminated the 'volitional' or 'control' aspect of the insanity defense. According to 18 U. S. C. §17, a federal defendant has had to prove that the 'severe' mental disease made him "unable to appreciate the nature and quality or the wrongfulness of his acts".

To successfully establish a defense of temporary insanity, it must be shown that the defendant was suffering from a mental defect at the time the criminal act occurred and that this defect affected the defendant's ability to differentiate between right and wrong. Like regular insanity claims, virtually every jurisdiction that permits the defense requires temporary insanity claims to comport with the jurisdiction's general test for criminal responsibility. The temporary insanity defense is a recognized, viable defense in some forty-four states. Four states - Idaho, Kansas, Montana and Utah – do not recognize insanity as a defense at all. It follows, *a fortiori,* that these states also do not recognize temporary insanity as a defense.

American courts wrestled with the question of exactly what type of mental disease or defect would suffice to relieve a defendant of criminal responsibility. Under the reasoning of the *California Supreme Court,* a defendant may be excused from criminal liability if he committed crimes while insane, even if the insanity was only temporary, as long as that insanity was of a settled nature.

Until March 2020, state supreme courts disagreed on the constitutionality of abolishing the insanity defense. Several states had abolished or attempted to abolish the traditional, affirmative insanity defense and replace it with a *mens*

[76] Insanity defense not available to defendant who knew he acted wrong but believed he had no choice (Court of Appeal), *https://uk.practicallaw.thomsonreuters.com/w-034-8938?transitionType=Default&contextData=(sc.Default)&firstPage=true*, (accessed 2 April 2023).

rea approach. The purpose of the traditional insanity defense is to ensure that criminal culpability is only imposed upon those individuals who have the mental capacity to comply with the law. The purpose of the *mens rea* approach, however, only allows a criminal defendant to introduce evidence showing the existence of mental disease in order to negate intent. On 23 March 2020, the Court ruled that the Due Process Clause of the Fourteenth Amendment does not require the states to adopt an insanity defense based on a defendant's ability to understand that his crime was morally wrong.

The analyzed judicial practice focuses on the defendants with a history of mental health problems and drug addiction, who believed that their actions were being externally controlled. In *R v Keal* case, the M'Naghten's test was used, which is geared to the defense of error of law rather than to that of mental deviation. In *People v. DeFeo*, the *Model Penal Code* test incorporated a "free will" formula. Lack of "substantial capacity to conform one's conduct to the requirements of law" means, in the last analysis, that he "could not, substantially, have acted otherwise than he did act". It is one thing to assume a philosophical position of 'free will' as justifying punitive state intervention in principle and an entirely different thing to attempt 'proving' by legal methods that a given individual did or did not possess 'free will'.

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Beata Stępień-Załucka
University of Rzeszów, Poland
e-mail: beata@kpmz.pl
ORCID: 0000-0003-1802-680X

THE CONSTITUTIONAL RIGHT TO PRIVACY AND THE OPERATION OF ALGORITHMS VERIFYING ELECTORAL PREFERENCES FROM THE FACE

Abstract

New technologies bring not only many opportunities but also many risks. Some of them we have already got used to, while others still pose a challenge. The latter undoubtedly includes constantly evolving algorithms. Every day we learn about new possibilities for their application. Unfortunately, these possibilities or applications do not always go hand in hand with the existing rights and freedoms and increasingly pose a threat of their infringement. Recently, research results have been published on the recognition of individuals' voting preferences from their faces by an algorithm. Such a possibility in application carries the risk of violation of constitutional rights, including the right to privacy. In this paper, this problem will be developed. First, the essence of the right to privacy will be examined and then, based on the research on facial recognition biometrics, I will present the scope and consequences of its violation.

KEYWORDS

privacy rights, algorithms, face recognition, new technologies

SŁOWA KLUCZOWE

prawo do prywatności, algorytmy, rozpoznawanie twarzy, nowe technologie

1. INTRODUCTION

The 21st century is already considered a breakthrough period in the use of artificial intelligence and algorithms. The most popular ones concern positioning, they are currently used when we want to read news or do shopping on the Internet. With some bitterness, however, it should be said that they have become commonplace, i.e. we know that they exist and we know a certain outline of how they work. However, there are also algorithms whose functioning is completely beyond our knowledge. In other words, we know that they exist, but we do not know how they work. An example of this type of algorithm is the one which uses facial biometrics to determine political preferences. Its operation raises many questions and doubts. These are related, firstly, to the scope of operation of this algorithm and, secondly, to the implementation of constitutional rights and freedoms, including, above all, the constitutional right to privacy. Therefore, in this article, I will try to find an answer to the question of whether the functioning of this kind of algorithm allows the realisation of the right to privacy and whether nowadays, based on the activities of algorithms, we can talk about privacy at all.

2. THE RIGHT TO PRIVACY

The research area thus outlined firstly compels us to define the constitutional right to privacy.

The evolution of the right to privacy dates back to the article "Right to Privacy". Its authors were two scholars viz. Samuel D. Warren and L. D. Brandeis, who first used this term in 1980 and defined the framework of this right.[1] It should be noted, however, that, first of all, these scientists described the negative aspect of this right, i.e. the right to be left alone, and secondly, that privacy had already existed before this text[2] appeared, whereas the idea of the right to

[1] S. D. Warren, L. D. Brandeis, *The Right to Privacy*, "Harvard Law Review" 1890, Vol. IV, No. 5, https://groups.csail.mit.edu/mac/classes/6.805/articles/pivacy/Privacy_brand_warr2.html.

[2] W. Brzozowski, *Prawo do prywatności*, (in:) W. Brzozowski, A. Krzywoń, M. Wiącek (eds.), *Prawa człowieka*, W. Brzozowski, A. Krzywoń, M. Wiącek, Warszawa 2019, p. 174.

protect the sphere of private life had been developing successively, unevenly in all countries.[3]

In Poland, it was also evolving gradually, starting with the Constitution of the 3rd of May,[4] through the March Constitution,[5] the April Constitution[6] and the Constitution of the People's Republic of Poland (after changes introduced by the Act of 14 February 1976, Journal of Laws No. 7, item 36 with amendments).[7]

At present, the Constitution of the Republic of Poland of 1997, stipulates the right to privacy in Article 47 stating that "Everyone has the right to protection of his private life, family life, honour and good name, and the right to decide about his personal life. In addition to the above obligation to respect and protect privacy and prohibiting interference with this right, is the provision of Article 51 of the Constitution of the Republic of Poland, containing information autonomy.[8]

So what is this right to privacy? Constitutional regulation has not led to the development of a uniform definition of the right to privacy in science. It is identified with the guarantee of freedom and equality, but it is also perceived as a tool to protect one's identity and dignity against discrimination, unauthorised interference in the private sphere of an individual, abuse, or reductionism.[9] Besides, as far

[3] K. Kakarenko, J. Sobczak, *Odpowiedzialność za przestępstwa popełnione w sieci a kwestia prywatności*, (in:) K. Chałubińska-Jentkiewicz, K. Kakarenko, J. Sobczak (eds.), *Prawo do prywatności jako reguła społeczeństwa informacyjnego,* Warszawa 2017, pp. 2-3.

[4] The 3rd of May Constitution, referring to the earlier legal tradition, guaranteed religious freedom and personal freedom - the latter, however, limited only to the noble state. M. Wild, *Komentarz do art. 47 Konstytucji RP*, (in:) M. Safjan, L. Bosek, (eds.), *Konstytucja RP*, Vol. I, Warszawa 2016, p. 1163.

[5] The March Constitution guaranteed in Article 95 "complete protection of life, liberty and property" without distinction of origin, nationality, language or race. It also indicated the conditions for limiting personal liberty (Article 97), certified freedom of movement (Article 101), the secrecy of correspondence and letters (Article 106) and freedom of conscience and religion (Article 111). M. Wild, *Komentarz do art. 47 Konstytucji RP...* , p. 1163.

[6] The April Constitution guaranteed personal freedom and the inviolability of the dwelling and the secrecy of correspondence (Article 68, paragraph 2), "the possibility of developing their personal values and freedom of conscience, speech and association" (Article 5(2)). M. Wild, *Komentarz do art. 47 Konstytucji RP…*, p. 1163.

[7] In the case of the Constitution of the People's Republic of Poland, the foundations for the protection of the right to privacy can be traced back to the amendments introduced by the Law of 14 February 1976, Journal of Laws No. 7, item 36 with changes, concerning freedom of conscience and religion (Art. 82(1)), inviolability and personal freedom (Art.87(1)), inviolability of dwellings and secrecy of correspondence (art. 87(2)). At the same time, it should be noted that these changes in the period of the People's Republic of Poland were theoretical, not practical, and their implementation did not take place until the 1990s. More on the evolution of the right to privacy. M. Wild, *Komentarz do art. 47 Konstytucji RP...*, p. 1163.

[8] M. Karpiuk, *Konstytucyjne prawo do ochrony prywatności i jego ograniczenie ze względu na bezpieczeństwo państwa. Przykład informacji niejawnych*, (in:) K. Chałubińska-Jentkiewicz, K. Kakarenko, J. Sobczak (eds.), *Prawo do prywatności jako reguła społeczeństwa informacyjnego,* Warszawa 2017, pp. 2-3.

[9] M. Sitek, *Prawa (potrzeby człowieka) w ponowoczesności*, Warszawa 2016, p. 181.

as dignity is concerned, both academia[10] and the jurisprudence of the Constitutional Tribunal emphasise the fact that the protection of privacy and informational autonomy is a consequence of the protection of inherent and inalienable human dignity, which was explicitly expressed by the Constitutional Tribunal in one of its justifications.[11]

This lack of uniform definition of the right to privacy results from the fact that privacy is defined in many ways. Besides, in the literature, there is a view that it is such a broad notion that in determining its essence one should concentrate on distinguishing its various forms and contexts in which privacy is endangered rather than on a strict rule.[12] Therefore, as a rule, it should be assumed that in a narrow sense, the term is understood as a state within the framework of which an individual decides on the scope and extent of the information made available and also communicated to other persons. On the other hand, in a broad context, it is a state in which an individual makes concrete decisions concerning himself, excluding the interference of third parties.[13] Hence, in the doctrine, we can find definitions which speak about the right of an individual to decide and control the disclosure of information about oneself.[14] Writing about the right to privacy, L. Garlicki points out that it is a collective notion, covering quite a wide spectrum of rights, the core of which is the sphere of autonomy and identity of an individual. In other words, it is the personal space of each individual, to which he can allow access to other persons or deny that access to them. This space concerns: the sphere of sexuality, knowledge of origin, reputation, information about addictions and health, housing as well as communication with the environment.[15]

The considerations presented so far make it possible to define the object of privacy protection in various aspects of human life, which include the protection of the integrity and inviolability of this good in particular through the protection of life, health, and human dignity. Moreover, this protection also includes the expectation of the individual that without his or her consent other persons will

[10] M. Karpiuk, *Konstytucyjne…,* p. 199.

[11] "The protection of privacy and informational autonomy is a consequence of the protection of inherent and inalienable human dignity" (Art. 30 Constitution), Decision of the Constitutional Court of 30 July 2014, K 23/11, Journal of Laws of 2014, item 1055.

[12] K. Łakomiec, *Prawo do ochrony prywatności w kontekście informacji o stanie zdrowia Autoreferat rozprawy doktorskiej, napisanej pod kierunkiem prof. dr hab. Marka Zubika,* p. 4, https://www.wpia.uw.edu.pl/uploads/media/5d98c8180784e/autoreferat.pdf?v1 (accessed 1 September 2021).

[13] J. Rzucidło, *Prawo do prywatności i ochrona danych osobowych,* p. 153, https://repozytorium.uni.wroc.pl/Content/52920/PDF/09_Jakub_Rzucidlo.pdf (accessed 1 September 2021); P. Sarnecki, *Komentarz do art. 47*, (in:) L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2006, Vol. II, p. 248.

[14] K. Badźmirowska-Masłowska, *Wizerunek dziecka w Internecie a zagrożenia prawa do prywatności*, (in:) K. Chałubińska-Jentkiewicz, K. Kakarenko, J. Sobczak (ed.), *Prawo do prywatności jako reguła społeczeństwa informacyjnego*, Warszawa 2017, p. 54.

[15] W. Brzozowski, *Prawo do prywatności*…, p. 174.

not acquire knowledge of the spheres of activity of the individual which he or she does not want to disclose to them.[16] The essence of this right lies, therefore, in the fact that it is the individual himself who determines when, how, and to what extent information about him is made available to others.[17] Moreover, the dimension of access to this information is also important. The sphere of private life will thus include circumstances in relation to which the primacy of the individual's interest should be assumed over the public interest. Consequently, in the case of the right to privacy, there is a presumption of primacy of the right of the individual to be left alone over the public interest or the interest of other entities.[18]

On the basis of the foregoing, it may be stated with conviction that privacy is a good of special constitutional value[19] and the right to privacy may be regarded as a general clause on the basis of which the individual finds protection both in his relations with other individuals and with the State. Privacy is a sphere which should not be exposed to external interference, and the individual himself, as a result of his autonomy, has the right to set limits on the accessibility of his personal life to other outsiders.[20]

The importance and significance of the right to privacy mean that it enjoys special protection. It is confirmed by the fact that, in accordance with Article 233 para. 1 of the Constitution, this right is inviolable under martial law and a state of emergency.[21] Consequently, no circumstances, not even exceptional or extreme ones, allow the legislator to relax the prerequisites the fulfilment of which would entitle him to invade the sphere of private life, without exposing himself to the charge of unconstitutional arbitrariness.[22]

It is important to add that the right to privacy is not a right that enjoys absolute constitutional protection. In Article 31 para. 3 of the Constitution, the legislator has determined the premises on the basis of which this right may be subject to limitations.[23] It is important, however, that such limitations may be established only by statute and only when they are necessary in a democratic state under the

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[16] J. Taczkowska-Olszewska, *Autonomia informacyjna jednostki a zarządzanie cyfrową tożsamością. Granice autokreacji*, (in:) K. Chałubińska-Jentkiewicz, K. Kakarenko, J. Sobczak (eds.), *Prawo do prywatności jako reguła społeczeństwa informacyjnego*, Warszawa 2017, p. 45.

[17] K. Łakomiec, *Prawo do...*, p. 4.

[18] J. Taczkowska-Olszewska, *Autonomia…*, p. 45.

[19] J. Uliasz, *Konstytucyjna ochrona prywatności w świetle międzynarodowych standardów*, Rzeszów, 2018, p. 26.

[20] M. Karpiuk, Konstytucyjne...., pp. 2-3. Cf. P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku*, Warszawa 2008, p. 116.

[21] R. Piotrowski, *Prawo do prywatności i ochrony danych osobowych jako wartości konstytucyjne*, (in:) A. Mednis (ed.), *Prywatność a jawność – Bilans 25-lecia i perspektywy na przyszłość*, Warszawa 2016, p. 19.

[22] Decisions of the Constitutional Court of 20 June 2005 , K 4/04 OTK –A 2005, No. 6 , item 64.; 20 March 2006. K. 17 /05 OTK-A 2006, No. 3, item 30.

[23] M. Florczak-Wątor, *Komentarz do art. 47 Konstytucji RP*; (in:) P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, pp. 169-170.

rule of law for reasons of security, public order, or the protection of the environment, health, and public morals or the freedoms and rights of others, on condition that they may not affect the essence of the rights and freedoms.[24] An example of a restriction of the right to privacy based on one of the above grounds may be the need to ensure security. Indeed, security is a component of the public interest and if necessary security cannot be guaranteed, the right to privacy will give way to it. In other words, the right to privacy will be reduced in favour of security and the private interest will be subordinated to the public interest, taking into account the principle of proportionality.[25] As a reminder, it should be added that this principle protects constitutional rights and freedoms from undue interference by the legislator. This is done on the basis of a kind of proportionality test, which consists in answering the following questions:

1) whether the introduced regulation serves and is necessary for the formation of the legal order,

2) whether the goal intended by the legislator is possible to achieve without infringing the legal standards that define the essence of the rights it regulates,

3) whether the regulation is necessary for the protection of the interest of a specific constitutional value with which it is connected, and finally,

4) whether the introduction of the regulation is in proportion to the burden it imposes on the citizen.[26]

3. FACIAL BIOMETRICS AS A NEW TECHNOLOGY

Biometrics is the science that deals with the identification and verification of the identity of individuals on the basis of their physical, physiological or behavioural characteristics, called biometrics. Biometric methods use personal – unique, permanent, and measurable – characteristics for this purpose.[27] Biometrics are based, for example, on face, retina or fingerprint scanning and recognition, which have become part of the everyday use of new technologies. Biometrics

[24] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* , Warszawa 2019, p. 120.

[25] M. *Karpiuk, Prawo do prywatności w warunkach nowych technologii*, (in:) K. Chałubińska-Jentkiewicz, M. Karpiuk (eds.), *Prawo nowych technologii. Wybrane zagadnienia*, Warszawa 2015, pp. 321-322.

[26] B. Banaszak, *Prawo konstytucyjne*, Warszawa 2015, p. 379.

[27] T. Mendyk-Krajewska, *Biometryczne metody sprawdzania tożsamości w nowych zastosowaniach*, p. 35, http://rocznikikae.sgh.waw.pl/p/roczniki_kae_z54_03.pdf (accessed 1 September 2021); Y. Liu, Identifying Legal Concerns in the Biometric Context, "Journal of International Commercial Law and Technology" 2008, Vol. 3, Issue 1, p. 45 in.; E.J Kindt, *Biometric applications and the data protection legislation. The legal review and the proportionality test*, "Datenschutz und Datensicherheit" 2007, Vol. 31, Issue, 3, pp. 166-170.

are used to unlock smartphones, iPads, and computers; finger biometrics are part of the passport procedure.[28]

In addition, in most European countries there has been a rapid increase in the number of cameras in the public domain for video surveillance. This is also related to biometrics and is now seen as a remedy for certain social problems (especially hooliganism) and as an effective tool for catching criminals by recognising faces and automatically matching them with suspects. As a result, over the years monitoring has become an essential component of crime prevention.[29]

It is, therefore, safe to say that biometrics has become a widely used means of verifying a person's identity. This has been made possible by the new technologies that have evolved in the last decade. Thus, biometric techniques have become reliable means of authentication. Face recognition technology has gained the most popularity. It allows for discreet and easy verification[30] and is a non-invasive and contactless way of identifying a person.[31]

This kind of verification is made either on the basis of revealed or undisclosed, hidden activity. The essence of an undisclosed activity lies in the fact that the verification of an individual is carried out without the individual's knowledge and consent. In both cases, verification is carried out using an increasing number of algorithms. Thus, it is possible that an individual is not even aware that at a given moment he or she is being verified by an algorithm that creates an "image" of the individual, "following" his or her facial expressions and gestures against his or her knowledge and will. This image is a collection of information about the subject, which is verified by the algorithm.[32] Currently, such an image of a person can be created by an algorithm in the field of voting preferences.

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[28] T. Wanat, *Akceptowalność automatycznego rozpoznawania twarzy nabywców w handlu detalicznym*, "Handel Wewnętrzny" 2015, No. 3(356), p. 306.

[29] L. D. Adkins, *Biometrics: Weighing Convenience and National Security against Your Privacy*, "Michigan Telecommunications and Technology Law Review" 2007, Vol. 13, Issue 2, p. 456; *Biometrics in Large-Scale IT. Recent trends, current performance capabilities, recommendations for the near future*, https://www.eulisa.europa.eu/Publications/Reports/Biometrics%20in%20Large-Scale%20IT.pdf (accessed 1 September 2021); Ł. Szwejka, *Rola monitoringu wizyjnego w prewencji kryminalnej,* "Społeczeństwo i Rodzina" 2016, No. 47 (2), pp 80–93, https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/37900/szwejka_rola_monitoringu_wizyjnego_w_prewencji_kryminalnej_2016.pdf?isAllowed=y&sequence=136 (accessed 1 September 2021); J. Szwierz, P. Matczak, A. Dąbrowski, A. Wójtowicz, *Monitoring wizyjny i jego wpływ na straty spowodowane przestępczością. Przykłady z wybranych polskich miast,* "Studia z Polityki Publicznej. Public Policy Studies" 2020, No. 7 (25), p. 51 *et seq.*; B*iometrics: the state of the art in public safety*, "Nec Public Safety Whitepaper", https://mex.nec.com/es_MX/safety/pdf/wp_biometrics.pdf (accessed 1 September 2021).

[30] Z. Erkin, M. Franz, J. Guajardo, S. Katzenbeisser, I. Lagendijk, T. Toft, *Privacy-Preserving Face Recognition*, https://www.researchgate.net/publication/221655685_Privacy-Preserving_Face_Recognition (accessed 1 September 2021).

[31] T. Wanat, *Akceptowalność...*, p. 306.

[32] Z. Erkin, M. Franz, J. Guajardo, S. Katzenbeisser, I. Lagendijk, T. Toft, *Privacy-Preserving...*

Namely, the results of research in the field of verification of voting preferences of individuals by an algorithm have been made public in the literature. The created algorithm can verify political orientation only on the basis of photos.

What's more, the study found that the algorithm is not wrong in more than 70 percent of cases. The study was divided into two stages. In the first stage, the algorithm "was learning". This learning process consisted in the collection of data, i.e. the algorithm studied the face, scanned its features, and coded the support declared by the person studied for a liberal or a conservative. In other words, the algorithm was learning the facial characteristics of people who support liberals and conservatives, and in this way learned how to recognise a person who supports liberals or a person who supports conservatives. The next stage of the study was the self-verification of persons and their political views by the algorithm. Based on the collected data, the algorithm was tasked with determining the political views of individuals from dating and Facebook profiles being shown only one profile. In this way, over a million photos were analysed, on the basis of which the algorithm correctly identified the political views of as many as 72 percent of people.[33] It should be emphasised, however, that the study used single photos of people. Thus, the algorithm assigned political views to the verified person on the basis of only one profile of the person. Therefore, it can be assumed that based on a larger number of photos of the verified person, the accuracy with which the algorithm would determine his or her political preferences would be higher. It is, therefore, safe to say that the potential of the algorithm was not fully exploited in the study. This means that perhaps in the near future, we will see similar studies with more precise results, perhaps even oscillating around the 90 percent effectiveness of the algorithm.

4. THE PERFORMANCE OF A FACIAL ALGORITHM RECOGNISING POLITICAL PREFERENCES IN THE CONTEXT OF THE RIGHT TO PRIVACY

The next question remains: what do these research results mean in practice and, above all, what is their significance for the realisation of the constitutionally guaranteed right to privacy? The answer to the above may come as a surprise. As unbelievable it may seem, by unlocking a phone through face ID we can make available data concerning our electoral preferences. What is most controversial, however, is that people being polled by this type of algorithm may be completely

[33] M. Kosiński, *Facial recognition technology can expose political orientation from naturalistic facial images,* "Nature. Scientific Reports" 2021, Vol. 11, article number 100, https://www.nature.com/articles/s41598-020-79310-1#Sec2 (accessed 1 September 2021).

unaware that their political preferences are being verified at any given time. This means that we can submit data on support for the party we favour, the party whose views we identify with, not only without being aware of it but even with clear objections to this kind of action. Such a situation is particularly dangerous from the perspective of the implementation of the right to privacy. This is because in such conditions this right cannot be realised effectively, and the operation of an algorithm of this kind directly violates it. The question is: when confronted with such advanced technology, can we still talk about privacy at all?

Unfortunately, when confronted with technology, we still seem to be helpless. This helplessness results from two fundamental issues. Firstly, there is a lack of knowledge about how algorithms work and how the data they collect is used. Secondly, there is a lack of legal regulation which defines the framework within which algorithms operate on the web.

In this matter, it means that such an algorithm operating on the web and recognising people's voting preferences from their faces will deprive an individual of his or her sphere of autonomy, a personal space that is reserved only for that individual. The individual, when confronted with the operation of such an algorithm without his or her consent, will be stripped of information in a sphere that not only he or she does not have to disclose if he or she does not want to, but which is reserved exclusively for him or her. And it is up to each individual to decide whether or not to share it. In other words, the operation of such an algorithm would constitute an unauthorised external interference in the right to privacy, and learning about one's electoral preferences by unauthorised persons may have the same consequences as a breach of the principle of the secrecy of the ballot. Namely, as M. Chmaj writes, depriving the individual – voter of certainty that no positive or negative consequences will occur in relation to him or her.[34] At the same time, it should be remembered that data on electoral preferences is special. Their use by unauthorised persons may have even more far-reaching consequences, posing a direct threat to democracy. This is due to the fact that a facial recognition algorithm in combination with an algorithm responsible for positioning data on the web can send an individual to specific websites with information discrediting the party the individual supports or confirming the individual's preferred choice of party.

Additional justification for the above thesis may be found in the fact that it has been widely acknowledged by science that it is contrary to the right to privacy and freedom of data positioning on the web. It needs to be reminded that an individual's privacy is infringed in the network not only when a particular person is individualised and identified by name and surname, but also when he or she is

[34] M. Chmaj, *Zasady polskiego prawa wyborczego*, (in:) *System wyborczy w Rzeczypospolitej Polskiej*, M. Chmaj, W. Skrzydło, Warszawa 2008, p. 51.

individualised on the basis of being singled out as a result of activity in the digital environment.[35]

Moreover, an extra-constitutional light may be shed on this issue by the position of the European Commission Commissioner M. Vestager of February 2021, who, on the basis of the possibilities offered by algorithms connected with face recognition by city cameras, and on the basis of the experience of events in Hong Kong and the way the police there identify protesters, stated that remote verification of faces is illegal and violates the law of the European Union. As a result, a legislative solution is to be prepared at the European level in the near future.[36]

5. SUMMARY

Summing up the above considerations, I would like to express a certain reflection that we are usually afraid of what is unknown and we are only just getting to know algorithms and their possibilities. However, this learning process and use must be accompanied by legislation that will secure the implementation of fundamental constitutional rights, as well as other rights and freedoms. This is all the more so because nowadays there is no guarantee that algorithms of this kind are not at work, as the scientific world has already found a technical solution to protect individuals from abuse arising from violation of the right to privacy through facial recognition of voting preferences. The scientific answer to this algorithm is a program – a different algorithm – which, by means of strongly enhanced privacy, allows only basic data to be recognised and not to be unauthorisedly processed by different kinds of algorithms.[37]

However, no matter how uncertain the performance of these types of algorithms is, it remains certain that facial recognition of political preferences of verified individuals violates the constitutionally guaranteed right to privacy and, what is more, constitutes a threat to the essence and functioning of democracy not only in Poland, but also worldwide.

[35] W. Lis, *Zjawisko profilowania jako przejaw naruszenia prawa do prywatności w środowisku cyfrowym*, (in:) K. Chałubińska-Jentkiewicz, K. Kakarenko, J. Sobczak (eds.), *Prawo do prywatności jako reguła społeczeństwa informacyjnego,* Warszawa 2017, p. 177.

[36] *Komisja Europejska: zdalne rozpoznawanie twarzy łamie prawo*, https://www.telepolis.pl/tech/prawo-finanse-statystyki/komisja-europejska-zdalne-rozpoznawanie-twarzy-lamie-prawo (accessed 1 September 2021).

[37] Z. Erkin, M. Franz, J. Guajardo, S. Katzenbeisser, I. Lagendijk, T. Toft*, Privacy-Preserving....*

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Ilona Szwedziak
University of Warsaw, Poland
e-mail: iszwedziak@wz.uw.edu.pl
ORCID: 0009-0001-6593-0300

A ROLE OF LOCAL GOVERNMENT IN SHAPING THE DISTRICT HEATING SECTOR

Abstract

Traditionally, all aspects related to energy sector regulation in Poland, including district heating, are connected with state regulatory authority, i.e. the President of the Energy Regulatory Office. The aim of this article is to present a significant and often underestimated role of local government in creating and shaping local district heating markets. This micro-level regulation is all the more important taking into consideration specific features of district heating that differentiate it from other energy sectors.

KEYWORDS

district heating sector, monopoly, local character, regulation, municipal government

SŁOWA KLUCZOWE

sektor ciepłowniczy, monopol, lokalny charakter, regulacja, samorząd gminny

1. INTRODUCTION

The district heating sector is one of the elements of the national energy system consisting of five energy subsystems: electricity, gas, heating, solid fuel subsystem, and liquid fuel subsystem. The criterion for distinguishing the subsystems is the nature of the energy carriers they supply to end users (Jeżowski, 2008, p. 195, Niedziółka, 2018, p. 114).[1]

Broadly understood district heating (DH) secures the needs of consumers and industrial customers (Wrzalik, Kucęba, 2019, p. 27). However, it must be noted that DH differs from other energy subsectors significantly. These differences contribute to the fact that in the case of DH sector, it is not always possible to adopt solutions introduced in other fields from energy sectors. In the case of district heating, the heat delivered to consumers (by means of a carrier – hot water or steam) is transmitted through a separate infrastructure – the network (Niedziółka, 2018, p. 121). The basic and most important difference is that, unlike electricity and gas markets, DH is not a single (and national) market but it consists of many local markets. This, among others, implies that, unlike the electricity and gas sectors, system heat suppliers are not mutual competitors as district heating systems, as a rule, are designed not as interconnected but as isolated units (Wissner, 2014, p. 63).

The situation of the district heating sector is far more complicated by the fact that, in addition to its specific characteristics, the regulatory environment is created as multidimensional, which is manifested by the fact that, in addition to a special regulator dedicated to the execution of tasks in the area of district heating, a number of other administrative bodies hold competences in this area.

In this regard, special attention should be paid to the specific tasks assigned to municipal governments, which perform statutory obligations and thus should be considered as authorities playing a key role in the functioning of local heat markets.

2. SPECIFIC FEATURES OF THE DISTRICT HEATING SECTOR

The era of liberalization of energy sectors, which began in the 1980s, was a manifestation of the general trend of liberalization of the economy. The process led to positive global changes, at the same time it resulted in modest efficiency (productivity) gains in these sectors and – as in some countries – hardly visi-

[1] The literature also shows a market structure extended by the mining sector. See e.g. Zamasz, 2008 p. 12.

ble direct benefits for households. However, it is pointed out that liberalization has significantly improved the management of monopolistic tools, prospects for competition and innovation, as well as the quality of instruments to control emissions, e.g. by the emergence of a mechanism to trade these emissions (Pollitt, 2012, p. 135). The general liberalization trend, however, did not cover the district heating sector, which due to having specific features could not be subjected to the processes envisaged, among others, for the electricity or gas sector.[2] These specific features characterizing the DH sector (local heat markets) include network (infrastructural) character, local character of the monopolistic structure of the DH markets, as well as the obligation to achieve public goals.

2.1. DH AS AN INFRASTRUCTURE NETWORK SECTOR

The operation of the district heating sector is inextricably associated with the need for a specific infrastructure network. Infrastructure networks are complex technical systems which, for example, enable energy carriers (heat) to be moved (transported) over long distances. At the same time, the infrastructure network consists not only of specific transmission lines but also of various types of technical equipment that enable the control of network operation and technical facilities. This complexity means that infrastructure networks can be defined as network sectors (Szydło, 2005, p. 54). The DH sector, built from various technical and organizational elements, is thus a typical infrastructure network, and the sector itself should be recognized as an infrastructure sector.

According to the Polish Energy Law,[3] the term 'grids' is understood as interconnected and cooperating installations, used for the transmission or distribution of fuels or energy, belonging to energy enterprises.[4] A similar definition – with reference to district heating – can be found in the ordinance on detailed principles of shaping and calculating tariffs and settlements for heat supply, according to which a district heating grid is an interconnected device or installation used to transport and distribute heat from heat sources to heat substations.[5] The district heating network together with the equipment or installations cooperating with it for the generation or consumption of heat form a district heating system.[6] The network is a closed circuit, which is why heating networks powered from different or

[2] The strong differentiation of heat markets has also been influenced by the strong dependence on local conditions and historical past (Niedziółka, 2010, p. 85).

[3] The Act of 10 April 1997 Energy Law (O.J. 2023, item 1762).

[4] Art. 3 pt 11 of the Energy Law.

[5] See: Para. 2 pt 15 of the ordinance of the Minister of Climate from 7 May 2020 on the detailed rules for the setting and calculating tariffs and billing for heat supply (O.J. 2020, item 718).

[6] See Para. 2 pt 21 of the ordinance of the Minister of Economy from the 15th of January on the detailed conditions for the operation of district heating systems (O.J. 2007, item 92).

even the same sources are usually not connected.[7] The chain of the entire process includes activities from heat generation to its delivery to the end user. The literature on the subject divides networks according to their purpose into municipal, industrial, and mixed-use (Szkarowski, Łatowski, 2012, p. 19).

What is crucial, the length of the network determines the extent of the local heat markets and also affects the so-called heat losses. In other words, the longer the network, the greater the losses of generated heat entering the network. Therefore, due to the high sensitivity of heat energy to transport (heat losses), district heating systems are as a rule only built in agglomerations with a sufficiently high concentration of customers, i.e. building density.[8] The design of district heating networks depends on various factors, such as the terrain, distance from the point of collection, the needs of the customers, and the type of medium, while the final choice of the shape of the network also determines whether the designed network will be dedicated to existing or prospective customers (Nantka, 2012, p. 158).[9] For these reasons, each DH network is characterised by certain differences and can be described as unique.

What is crucial for the development of local district heating markets in Poland is that the length of the DH network is being expanded. During the 20-year period of the monitoring of licensed district heating companies, the length of the network increased from 17,312.5 km in 2002 to 22,578.43 km in 2022.[10]

2.2. LOCAL CHARACTER OF THE DH MARKETS

As it was indicated above, in the case of the DH sector the extent of the network (its length) determines the local character of the DH markets. The specific nature of heat supply (network transmission) means that, unlike other energy markets (electricity or gas), there is no internal heat market on a national scale and individual heat supply systems are only local in nature (Szatybełko-Połom, 2005). This 'locality' (local character) is described as "occurring in a specific area, having

[7] See for example, the decision of the President of the Office of Competition and Consumer Protection nr RKT- 40/2012 from 28 November 2012 and decision Nr RKT 39/2014 from 27 November 2014.

[8] See the decision of the President of the Office of Competition and Consumer Protection nr RKT – 69/2006 from 28 September 2006.

[9] In the case of network infrastructure, there is also a call for intensification of its use, resulting from the conditions associated with the implementation of network investments. As W. Dołęga points out, the intensification of network infrastructure consists, among other things, of the appropriate location of generation sources and consumers eliminating transmission congestion or the modernisation of existing power lines and substations increasing their transmission capacity. Although the remarks refer to the power sector, it can be assumed that they remain applicable also to the heat infrastructure (Dołęga, 2016).

[10] District Heating Sector in Numbers – 2022. A Report of Polish Energy Office Authority, p. 7.

a character typical of a particular place".[11] For district heating, local extent means one or more localities (Ropuszyńska-Surma, Węglarz, 2012, p. 145). Therefore, the activity of district heating companies also has a local dimension, limited, on the one hand, by the distribution network and, on the other, by the lack of economic and technical possibilities for transporting heat over long distances. Thus, it should be concluded that the heat sector in Poland is a set of local heat markets. The local nature of the DH markets also means that the customer cannot choose the company supplying the energy carrier through the network, and the supplier has limited opportunities to attract new customers (Niedziółka, 2010, pp. 84-85).

The size of the local market, i.e. the length of the network and the number of customers supplied with heat, determines the volume of heat production and consequently, among other things, the need to apply to the President of the Energy Regulatory Office for an appropriate license (Szwedziak-Bork, 2016, p. 37). The geographical fragmentation of district heating companies also affects the diversity of their type and scope of activities, as well as their degree of involvement in the district heating activities (Niedziółka, 2010, pp. 87-88).

2.3. MONOPOLISTIC STRUCTURE OF THE DH MARKETS

Traditionally, the district heating sector has been considered to have the characteristics of a natural monopoly, as the parties, apart from the contract, are bound by a permanent (usually very capital-intensive) connection (Boroń *et al*., 2010, p. 14). The district heating systems, therefore, remain in principle natural monopolies in both – heat generation and distribution.

A natural monopoly is described as a situation where one firm – which satisfies market demand – can produce a given good or bundle of goods at a lower cost than any combination of more firms (Borkowska, 2009, p. 153). A natural monopoly is, therefore, understood as a factual state that determines the conditions for the rational conduct of an economic activity, which makes it the exclusive property of one entity. In this case, the activity of another entity carrying out economic activity is unreasonable in the light of the criteria adopted, determining a certain rationality in the conduct of economic activity (Strzyczkowski, 2007, p. 237). Specific technical, economic, and legal conditions mean that energy markets are structured as oligopolies (usually duopolies) or monopolies. In both market forms, companies have an influence on the terms and conditions of transactions (Ropuszyńska-Surma, Węglarz, 2012, p. 148).[12]

[11] See: online Dictionary of the Polish Language (internetowy Słownik Języka Polskiego), available at: www. sjp.pl.

[12] The authors present an interesting analysis of the conduct of a monopoly – district heating company operating in the local heat market in the face of an attempt of market entrance by a new player (a second district heating company). Based on the game theory, more specifically a non-ze-

As pointed out in the literature, despite the over 30-year-long process of building a free market and implementing the ideas of liberalism and competition, a characteristic feature of the DH market remains the lack of freedom of choice for the producer and heat consumers since the monopolistic nature of the local markets significantly disturbs the chance of balancing the interests of producers and consumers of system heat (Niedziółka, 2010, p. 89).[13]

In the case of local heat markets, it is also pointed to the historical conditions and urbanization systems of Polish agglomerations that determine the monopolization of the heat market. It should be noted that the existence of a monopoly in the heat market is determined not only by the fact that the heat source is central for a given agglomeration, but also by whether the ultimate consumer (end user) has the possibility to access heat on market terms (Kardasz, 2009).

2.4. AN OBLIGATION TO PROVIDE PUBLIC SERVICES

In general, public services are defined as types of services that are characterised by three criteria. Firstly, such services are provided to the public and/or in the public interest. Secondly, the provision of such services is carried out in a regulated or standardised manner (sometimes only to some extent). Thirdly, the services are provided directly or indirectly by public sector organizations (Sauter, 2014).

At the level of EU regulation, public services are referred to as "services of general economic interest". The concept of services of general economic interest is not defined in the EU law. The Commission has clarified in its Quality Framework that "SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention. A PSO is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission".[14] It is also underlined that the SGEI concept may apply to different

ro-sum game, the analysis was conducted according to the Cournot model, with the players' strategies being the volume of production (See: Ropuszczyńska-Surma, Węglarz, 2012, pp. 146-156).

[13] A different opinion regarding the qualification of district heating sector as a natural monopoly is presented by W. Lisewicz, who stresses that the heat market should be considered as competitive (See Lisewicz, W. , *Podobieństwa i różnice w regulacji działalności ciepłowniczej w Polsce i w Niemczech. Czy ciepłownictwo to monopol naturalny?,* PUG No. 9, 2007). A similar approach is presented by M. Wierzbiński, stating that there are many indications that the district heating company cannot achieve a monopolist position on the local heat market due to the alternative methods of heating buildings. In consequence, the author postulates that this should result in considering gradual deregulation of the sector and complete abandonment of regulation of heat prices and transmission services. (Wierzbiński, 2015, p. 291).

[14] A Quality Framework for Services of General Interest in Europe COM(2011) 900 final of 20 December 2011.

situations and terms, depending on the Member States. For this reason, EU law does not create any obligation to designate formally a task or a service as being of general economic interest, except when such obligation is laid out in the Union legislation (e.g. universal service in the postal and telecommunication sectors).[15]

Although Polish energy regulations do not explicitly use the terms 'public services' or 'services of general economic interest', there is no question that the Energy Law imposes certain specific obligations on energy companies, in particular, those involved in the transmission and distribution of electricity, gas and heat (Szydło, 2005, p. 148). In this context, the provision of public services is a part of broader obligations related to the achievement of public goals mentioned, among others, in the Polish Energy Law.[16] On this ground, the generation and supply of heat to customers can be classified as a service of general economic interest.

It should be also pointed out that in Polish legislation the category of public services or SGEI is the closest to the category of "the tasks of a public utility character" introduced to the Act of 8 March 1990 on the municipal government.[17] Public utility includes own tasks of local government units aimed at the ongoing and uninterrupted satisfaction of the collective needs of the population through the provision of universally accessible services (Dudzik, 1998). The literature indicates that the provision of services of a public utility nature is attributed to services related to the supply of electricity. However, due to the role played by thermal energy (i.e. heat) in meeting the needs of households, this sector should also be considered as providing such services (Krzykowski, 2022, p. 221).

3. REGULATION AND REGULATION OF NETWORK SECTORS – GENERAL REMARKS

With regard to market mechanisms and structures, regulation can be defined as certain rules or individual actions that are taken by government bodies, either directly affecting the allocation mechanism in the market or directly influencing

[15] Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest. Commission Staff Working Document. Brussels, 29 April 2013, SWD(2013) 53 final/2.

[16] According to Article 1.2 of Polish Energy Law: The purpose of the Act is the creation of the conditions for sustainable development of the country, energy security, efficient and rational use of fuels and energy, development of competition, counteracting negative consequences of natural monopolies, consideration of natural environment protection requirements and obligations stemming from international agreements and balancing the interests of energy enterprises as well as fuel and energy customers.

[17] Act of 8 March 1990 on the municipal government (O.J. of 2023, item 40).

the decisions of consumers (Spulber, 1989, p. 24). It is also pointed out that regulation comprises mostly rulemaking while others extend it to include rule monitoring and rule enforcement (Hood, Rothstein, and Baldwin, 2001).

Therefore, regulatory actions will include state intervention in the market, which without this intervention would be subject to free (and in this sense unlimited) play by the actors present in it. Interventionism (public intervention) thus means that the state influences the course of economic processes and activities (Kabza, 2014, p. 22), orienting the market economy towards the realisation of goals that would be unachievable using only the incentives arising from market mechanisms (Strzyczkowski, 2011). The aim of regulatory action is not to eliminate natural monopolies, as *de facto* it is to control the behaviour of the company operating the infrastructure network (Elżanowski, 2017, p. 42). The state plays a key role in counteracting the negative effects of monopolies by implementing and applying regulatory tools.[18] The tools used as part of public intervention in the Polish district heating sector include, in particular: licensing of activities, heat price tariffs, and the obligation to ensure that all consumers and energy sales companies, on the basis of equal treatment, provide services for the transmission or distribution of gaseous fuels or energy (the so-called Third Party Access rule).

As pointed out in the literature, sector-specific regulation (sectoral regulation) should use certain unambiguous criteria, i.e.

- be based on clearly defined policy objectives in the sector,
- be limited to the minimum necessary to achieve the stated objectives,
- contribute to a level of legal stability in a dynamic environment,
- be technology-neutral, especially in view of the convergence of different sectors,
- respect the principle of proportionality, not going beyond what is necessary to achieve the objectives (Piątek, 2004, pp. 159-160).

It should be noted that in the case of regulation of the heating sector, these criteria do not seem to be respected. This is evident, among others, in relation to the assumption of a clear definition of sectoral policy objectives, where, in the case of the Polish energy system, contradictory political declarations are often made, e.g. regarding the transition of the economy away from fossil fuels and the use of renewable energy sources (Brauers, Oei, 2020). Similar comments can be made regarding the level of legal stability, which, with regard to the regulation of the district heating sector, does not correspond to the dynamics of change or does not adapt to a turbulent, changing environment. This leads to the fact that regulation of the district heating sector can be assessed as inconsistent and inadequate.

[18] One of the first market regulation tools introduced by the Energy Law was the concession (Niedziółka, 2010, p.103).

4. COMPLEX REGULATORY FRAMEWORK OF THE DH SECTOR

The complicated nature of the district heating sector in Poland is also exacerbated by the fact that it is subject to the supervision of the regulatory authority and other bodies that directly or indirectly influence its functioning. What is more important, the authorities are positioned at different law-making levels, i.e. national, local, and European. Thus, in the case of the district heating sector, three levels of the regulatory environment affecting this sector can be distinguished.

At the national level, regulatory powers over district heating companies are exercised by statutorily empowered entities – public administration bodies and local government units. The authorities with competences in regulating the district heating sector include those with primary (key) influence on activities in the sector with the leading role of the President of the Polish Energy Office (Polish: *Prezes URE*), and other authorities which, even if only fragmentarily, exercise competences in the area of district heating (e.g. the Minister of Climate and Environment).

Polish regulations relating to the district heating sector attribute a special role to local government – in particular to municipalities (i.e. municipal councils), which in this respect should be treated as the factual creator of local heat markets as the scope of activities assigned to them significantly affects the operation of district heating companies. It should also be noted that it is currently the municipalities that remain the main initiators of change in the fight against air pollution in Poland.[19]

In addition to the national (and local) regulatory environment of the district heating sector, the European Union should also be considered as an important element influencing the future character of this sector. After Poland's accession to the European Union in 2004, regulation of the district heating sector is also taking place at the EU level, as under the Treaty on the Functioning of the European Union[20] the field of 'Energy' is a shared competence between the EU and the Member States.

It should be highlighted that at the EU level, the specificity of district heating remains strongly emphasised, allowing the Member States to regulate the legal model of district heating differently (Elżanowski, Czuba, 2011, p. 87). This understanding of DH is determined by the fact that it is difficult to speak of the existence of a cross-border element in the case of heat, as it is not, in principle, subject

[19] It is worth noting, for example, the municipality of Żywiec and its actions taken in the fight for clean air. For more see: the report of the Energia Forum "Anti-Smog Roadmap for Żywiec. Clean heat by 2030" which indicates what steps should be taken to get rid of smog by 2030. Available at https://forum-energii.eu/pl/analizy/antysmogowa-mapa-drogowa (accessed 4 November 2023)

[20] Treaty on the Functioning of the European Union (O.J. C 326, 26/10/2012 pp. 0001- 0390).

to exchange between the Member States. On this basis, it can be concluded that there is no single European heat market.

5. LOCAL GOVERNMENT AS A "*DE FACTO* CREATOR" OF THE DISTRICT HEATING MARKETS

A special role in the functioning of the district heating sector has been assigned to the local governments, in particular, the municipalities. It is worth noting that the municipality remains at the same time a significant consumer of fuels and energy and, in many cases, a producer and supplier of heat (Kasprzyk, 2004). As a rule, the local government may perform its duties in two ways, i.e. by ensuring that the inhabitants' needs are met by using the services of entities professionally engaged in the supply of heat, or it may use for this purpose energy companies of which it remains the owner. However, the most beneficial solution for meeting the collective needs of the community must be taken into account (Zamasz, 2007, p. 39). The municipality should consider local technical, economic, and organisational conditions when deciding on the method of supply (Kasprzyk, 2004, pp. 53-54).

Existing regulations have imposed various obligations on local authorities in relation to the heat supply (as well as the supply of electricity and gas). According to the Municipal Government Act, obligations referring to heat supply have been classified to the collective needs of the community and categorized as one of the municipalities' own tasks.[21] The Energy Law provides further clarification in terms of tasks by listing its own tasks related to heat supply. These include, among others: planning and organising heat supply in the municipality area; planning and organising energy efficiency measures and promoting energy-saving solutions in the municipality area; assessing the potential of high-efficiency cogeneration and energy-efficient heating or cooling systems in the municipality area.[22]

With reference to the planning and organisation of the heat supply in the area of the municipality, the borough leader (mayor, president of the city) shall prepare a proposal of the assumptions for the heat supply plan, taking into account the plans made by the energy companies for the area of that municipality and the proposals necessary for the preparation of the draft assumptions.[23] In doing so,

[21] See Art. 7.1.3 of the Act on the municipal government. The doctrine points out that the catalogue of own tasks is characterised by considerable stability, and that changes mostly consist of additions to existing tasks, undertaken in each case with evident respect for the principle of subsidiarity. (Płażek, 2023).

[22] See Art. 18.1 of the Energy Law.

[23] For more see Art. 16 of the Energy Law.

the energy companies' plans should take into account the provisions of the local spatial development plan.[24] Draft assumptions shall be drawn up for the municipal area for at least 15 years and updated at least every 3 years. If the plans of energy enterprises do not satisfy the assumptions, the borough leader (mayor, city president) shall prepare a heat, electricity, and gaseous fuels supply plan for the entire area of the commune or for its part. The proposal of the plan shall be prepared on the basis of the assumptions passed by the commune council and shall be compliant with them.[25]

The Commune Council shall adopt the assumptions to the heat, electricity, and gaseous fuels supply plan, and shall review the remarks, comments, and opinions received while the proposal of the assumptions was publicly available[26] and the voivodship governor shall investigate the consistency of the energy and fuel supply plans with the state energy policy and with the existing provisions.

The municipality's tasks concerning the planning and organisation of the energy efficiency measures and the promotion of solutions to reduce energy consumption in the municipality's area were imposed following the entry into force of the Energy Efficiency Act. As indicated in the literature, they can be implemented e.g. through promotional campaigns dedicated to the local community or the development of appropriate plans by the borough leaders (mayors, presidents of the cities) (Orzech, Stefaniuk, 2016).

With regard to the task of estimating the potential for high-efficiency cogeneration and energy-efficient district heating or cooling in the municipality's area, it is indicated that, in practice, the municipality – in order to provide a reliable assessment – will have to collect information from energy companies with cogeneration units in its area. The same modus operandi will be bound by assessing the potential for energy-efficient district heating or cooling systems (Orzech and Stefaniuk, 2016).

It is emphasised that the increasing technical potential for energy generation and supply, including heat generation using small local energy systems, means that organisational models aimed at increasing community participation in the energy sector are becoming increasingly common (Sokołowski, 2016).

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[24] There is doubt about the qualification of the development plans submitted by energy companies as a means of ensuring the achievement of the municipality's tasks and, in a broader context, energy security. Firstly, it seems that companies should have a real influence on the creation of supply policy tools by municipalities, taking into account the fact that it is the supply plans that can have a significant impact on investment decisions taken by energy companies. Secondly, the tools currently provided by the legislator have not established mechanisms to involve energy companies more closely in the shaping of local energy security conditions and thus support municipal actions in this area. See more Ziemski, K.M. (2012). *Planowanie energetyczne. Skuteczność aktualnych regulacji* (in:) K. Ziemski (ed.), *Energetyka a samorząd. Prawne uwarunkowania rozwoju energetyki lokalnej w Polsce*. Poznań: Wydawnictwo Naukowe UAM.

[25] See Art. 20.1. of the Energy Law.

[26] See Art. 19 of the Energy Law.

The tasks assigned to the municipality make it possible to assign to it an overarching role in the process of influencing the local district heating markets and the district heating companies operating in these markets, acting as an entity:

– shaping the municipality's energy policy on the supply of electricity, heat, and gaseous fuels;
– conducting business activity related to the supply of electricity, heat, and gaseous fuels;
– consuming fuels or energy (Kasprzyk, 2004).

Significantly, the fact that in many cases the State or local government units have disposed of district heating companies does not exempt the municipality from the obligations referred to in the Municipal Government Act. The obligation to supply residents with heat can also be implemented through 'soft' measures such as identifying desirable district heating investments in spatial development plans or animating cooperation between district heating operators and supporting joint investment projects (Lewandowski, 2013, pp. 71-72).

Such highlighting of the role of local government contributes to the fact that its importance in the district heating sector as an entity influencing the shaping of heating policy on local markets is increasing. On the other hand, it is pointed out that the tools left at the disposal of local government units are regulated in a fragmented and vague manner, which is why they do not constitute a sufficiently effective legal basis to achieve the set goals (Ziemski, 2012, p. 12).

However, it is worth noting the statement included in the document "Energy Policy of Poland until 2030", which stated that *"strategic planning in the district heat sector is made more difficult (a change introduced by the Government Legislation Centre) due to local government failings to comply with the obligation imposed on them as regards preparing the assumptions to the plan of commune heat supply"*[27] – with rather poor assessment of local governments, and the statement contained in "Energy Policy of Poland until 2040" (in force), where it has been indicated that *"the involvement of local authorities and local energy planning has a special role in the implementation of the state policy on district heating. Heat needs are met close to the place of residence and heat markets are local in nature. In 2018, only 22% of communes had a planning document for the supply of heat, electricity and gas fuels. Therefore, it is necessary to increase the activity of communes, poviats and voivodeships in the field of local energy planning, the aim of which is the rational use of energy resources, maximisation of the effective use of the existing energy infrastructure, development of low-emission energy sources and improvement of air quality. Planning should be based on real cooperation between local government units, taking advantage of local syner-*

[27] The resolution of the Council of Ministers from 10 November 2009 – "Energy Policy of Poland until 2030", p. 32.

gies and potential".[28] This means, on the one hand, that municipalities will play a leading role in local heat market issues. On the other hand, it means that it is the municipalities that will be burdened with numerous responsibilities in relation to the design of local heat markets.

Unquestionably, the tasks of municipalities in the area of heat supply planning confirm the view present in the literature of the relevance of local authorities and their significant role in the district heating sector (Hettinga *et al*., 2018; Bush *et al*., 2018; Kelly, Pollitt, 2014; Bulkeley, Kern, 2006). It is underlined that the case for involvement of local governments is particularly strong, given their connections to local actors, wide-ranging local responsibilities such as social housing provision, and commitments to wider social and environmental concerns such as fuel poverty and air quality (Bush *et al*., 2018, p. 85). Moreover, local authorities are situated closer to the citizens, placing them in a better position than a national or regional government to inform and educate their citizens. Local authorities are also in a position to broker collaborations between citizens, local businesses, and NGOs in order to facilitate the transition to clean energy technologies (Hettinga *et al*., 2018, p. 278). Such an important role of local authorities means that it may be necessary in the future to further transfer district heating tasks from the national to the local level.

6. CONCLUSIONS

There is no doubt that in the face of the new challenges facing the district heating sector, including, in particular, those related to climate protection in its broadest sense, the role of local government will increase. Energy management by local governments should be considered not only in the context of the obligation to supply heat, but also as an important aspect of the implementation of the state's energy policy bringing tangible economic, ecological (environmental) and social effects. Unquestionably, the tasks of municipalities in the area of heat supply planning confirm the view present in the literature of the relevance of local authorities and their significant role in the district heating sector (Hettinga *et al*., 2018; Bush *et al*., 2018; Kelly, Pollitt, 2014; Bulkeley, Kern, 2006). It is underlined that the case for involvement of local governments is particularly strong, given their connections to local actors, wide-ranging local responsibilities such as social housing provision, and commitments to wider social and environmental concerns such as fuel poverty and air quality (Bush *et al*., 2018, p. 85). Moreover, local authorities are situated closer to the citizens, placing them in a better

[28] The resolution of the Council of Ministers from 2 February 2021 – "Energy Policy of Poland until 2040", p. 58.

position than a national or regional government to inform and educate their citizens. Local authorities are also in a position to broker collaborations between citizens, local businesses and NGOs in order to facilitate the transition to clean energy technologies (Hettinga *et al*., 2018, p. 278). Such an important role of local authorities means that it may be necessary in the future to further transfer district heating tasks from the national to the local level.

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Michał Ścibura
University of Warsaw, Poland
e-mail: m.scibura2@student.uw.edu.pl
ORCID: 0000-0002-8090-0871

INVESTMENT AND CONSTRUCTION PROCESS OF RENEWABLE ENERGY SOURCES AFTER RECENT REGULATORY CHANGES

Abstract

Renewable energy sources remain the key to a successful energy transition. This article provides an overview of the investment process for all renewable energy sources on the grounds of Polish law. Firstly, it covers the main framework of the investment process in Poland in terms of permit-granting and identifies the administrative decisions required for the construction of renewable energy ventures. On such grounds, further addressed are specific spatial, environmental, and construction issues related to the investment process of particular types of renewable energy installations – wind, solar, water, tidal, geothermal, ambient, and biofuel energy, as well as renewable hydrogen. Such an up-to-date study is particularly relevant given the recent major changes in the law.

KEYWORDS

renewable energy sources, investment process, permitting, permit-granting, administrative law

SŁOWA KLUCZOWE

odnawialne źródła energii, proces inwestycyjny, zezwalanie, udzielanie pozwoleń, prawo administracyjne

1. INTRODUCTION

It was the 1990s that marked the beginnings of the renewable energy market in Poland.[1] Since then, not only has there been intense growth in the demand for green energy, but also a flourishing of legislation on the domestic and international levels. The current Constitution of the Republic of Poland[2] dedicates the greatest attention to environmental protection of all the constitutions so far.[3] It was also not without significance that Poland became a member of the European Union, which obliged authorities and citizens to comply with the EU environmental requirements and implement the European Union's energy and climate policies.[4] A number of legal acts to regulate the green economy have also been adopted in the national legal system.

When viewed from the perspective of investments in renewable energy sources ("RES"), such a state of law presents both an opportunity and a challenge. On the one hand, it encourages factual interest in investing in green energy installations and makes it possible to overcome the possible unfavourability of the authorities as well as the reluctance of certain social groups. Whereas, on the other hand, it requires all investors to maintain a heightened focus on environmental, spatial, and construction aspects of their projects. After all, it should not be forgotten that RES installations, despite their globally positive contribution to the state of the environment, are also in themselves construction projects, whose implementation and operation are not exempt from negative impacts, even if only temporary.

The main objective of the investment and construction process is the development and commissioning of a construction object, and its immanent parts are administrative acts (decisions).[5] The purpose of this article is to present the Pol-

[1] A. Pultowicz, *Przesłanki rozwoju rynku odnawialnych źródeł energii w Polsce w świetle idei zrównoważonego rozwoju*, Problemy Ekorozwoju, Vol. 4, No. 1, Lublin 2009, p. 111.

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

[3] B. Wierzbowski, B. Rakoczy, *Prawo ochrony środowiska. Zagadnienia podstawowe*, 7th edition, Warszawa 2018, p. 38.

[4] K. Tomaszewski, A. Sekściński, *Odnawialne źródła energii w Polsce – perspektywa lokalna i regionalna*, Rynek Energii, No. 4(149), Warszawa 2020, p. 10.

[5] Cf. M. Pchałek, R. Cieślak, Ł. Oleszczuk, *Realizacja przedsięwzięć infrastrukturalnych. Aspekty prawnośrodowiskowe*, Warszawa 2019, pp. 15-16.

ish legal conditions governing the initial stages within the investment process of renewable energy ventures (permit-granting). With the recent major amendments to the law, which not only introduced significant changes to the investment process, but also expanded the definition of RES to include new technologies, such an up-to-date study seems particularly relevant.

2. INVESTMENT PROCESS IN POLAND

Discussing the specifics of the proceedings for different types of green energy investments in detail requires a prior familiarization, *in abstracto*, with the model layout of Polish administrative proceedings aimed at obtaining approval for the development of a project.

For many projects, the first administrative stage of the investment process is the obtaining of an environmental decision[6] that determines the environmental conditions under which the project may be developed. On the grounds of Article 71 sec. 2 of the EIA Act,[7] such a decision is required for projects likely to always have a significant impact on the environment, as well as for projects likely to potentially have a significant impact on the environment. A comprehensive list of projects classified into each category is provided in the EIA Act implementing regulations, currently the 2019 EIA Ordinance.[8] The environmental decision, in accordance with Article 86 of the EIA Act, binds the administrative bodies issuing subsequent decisions within the investment process and, thereby, has a preliminary (prejudicial) character with respect to future permits.[9]

The investment must also comply with local planning and zoning objectives. Currently, following the recent amendment to the Spatial Planning and Development Act[10] ("SPDA"), spatial policy instruments are divided into general and

[6] A. Haładyj, *Decyzja o środowiskowych uwarunkowaniach a pozwolenie emisyjne (analiza wzajemnych zależności)*, Państwo i Prawo, No. 7, Warszawa 2022, p. 64.

[7] Act of 3 October 2008 on providing information on the environment and its protection, public participation in environmental protection and environmental impact assessments (consolidated text: Journal of Laws of 2023, item 1094 as amended).

[8] Ordinance of the Council of Ministers of 10 September 2019 on projects likely to have a significant impact on the environment (Journal of Laws of 2019, item 1839 as amended).

[9] P. Sadowski, D. Lebova, *Administracyjnoprawne ograniczenia realizacji przedsięwzięć wynikające z konieczności uzyskania decyzji środowiskowej*, Annales Universitatis Mariae Curie-Skłodowska. Sectio G. Ius, 1 (64), Lublin 2017, pp. 125-136; B. Rakoczy, *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz*, Warszawa 2010, p. 241; judgment of the Supreme Administrative Court of 16 September 2008, II OSK 821/08, ONSA 2009.

[10] Act of 27 March 2003 on spatial planning and development (consolidated text: Journal of Laws of 2023, item 977, as amended).

individual acts. These include respectively, general plans (Art. 13a *et seq*. of the SPDA), local plans (Art. 14 *et seq*. of the SPDA), local plans adopted in the simplified procedure (Art. 27b of the SPDA), and integrated investment plans (Art. 37ea *et seq*. of the SPDA), as well as administrative decisions, i.e. the decision on development conditions (Art. 59 *et seq*. of the SPDA) and the decision on the location of a public purpose investment (Art. 50 *et seq*. of the SPDA). Eligible forms of zoning for a given project depend on its characteristics. With regard to RES installations, significant changes were introduced by the 2023 Amendment to the SPDA[11] ("AmSPDA"), pursuant to which, once the general plan of a municipality is adopted, which may take place no later than 31 December 2025, the use of local plans will be mandatory to locate installations not mounted on a building (i) on agricultural land of classes I-III and forest land regardless of capacity, (ii) on agricultural land of class IV, with an installed electrical capacity of more than 150 kW or used for the business of electricity generation, (iii) with an installed electrical capacity of more than 1,000 kW regardless of the land class.[12]

However, neither the environmental decision nor the zoning acts prejudge the right to start construction.[13] Construction works for industrial renewable energy projects will usually require a building permit, as stipulated in Article 28 sec. 1 of the Construction Law.[14] Some of the infrastructure may be approved in a simplified procedure through a notification of construction made to the architectural and construction authority, provided it does not raise an objection, within 21 days from the delivery of the notification (Art. 29 secs. 1, 3 in conj. with Art. 30 sec. 5 of the Construction Law). Before certain categories of buildings can be used, an occupancy permit must also be obtained (Art. 55 of the Construction Law).

Additionally, depending on the nature or location of the planned project, the investment process may involve further administrative proceedings. For ventures related to the use of water for energy purposes, as well as for carrying out works involving reconstruction or decommissioning of water facilities, the investor shall obtain a water law permit (Art. 35 sec. 3 item 6 and Art. 17 sec. 1 items 3-4 in conj. with Art. 389 of the Water Law[15]). Placement of energy systems on buildings (micro-installations) listed in the National Register of Monuments, as well as the location of facilities in areas listed in the Register will require the approval of

[11] Act of 7 July 2023 amending the Act on spatial planning and development and certain other acts (Journal of Laws of 2023, item 1688).

[12] Article 14 sec. 6a items (2)(a-c) of the SPDA in conj. with Article 58 of the AmSPDA.

[13] Judgment of the Voivodeship Administrative Court in Rzeszów of 14 September 2017, II SA/Rz 187/17.

[14] Act of 7 July 1994 – Construction Law (consolidated text: Journal of Laws of 2023, item 682 as amended).

[15] Act of 20 July 2017 – Water Law (consolidated text: Journal of Laws of 2023, item 1478 as amended).

the Voivodeship Conservator of Monuments (Art. 39 of the Construction Law).[16] Separate permits are required to provide transportation services to the investment properties (Art. 29 sec. 1 of the Public Roads Act[17]). Additional proceedings under special regulations will also be required for situations of an extraordinary location of the property, such as in flood risk areas, mining sites or areas, health resort areas, historically contaminated areas, archaeological observation areas, as well as for works at sea or geological and mining activities.

3. RES INSTALLATIONS AND THEIR INVESTMENT PROCESS

Polish legislation, headlined by the Renewable Energy Sources Act[18] ("RESA"), identifies as renewable energy sources non-fossil energy sources including wind energy; solar energy; aerothermal energy; geothermal energy; hydrothermal energy; hydropower; wave, current and tidal energy; ambient energy; energy derived from biomass, biogas, agricultural biogas, biomethane, bioliquids and renewable hydrogen. In the following section of the paper, devoted to the detailed aspects of investment proceedings for specific types of RES installations, the abovementioned categorization taken from Polish law is, therefore, adopted, despite the doctrinal accusations of it being an inaccurate implementation of European directives.[19] Each renewable energy source is characterized by individual technical conditions and may require distinct permits for its realization, making it purposeful to discuss their permit-granting dissected by specific types of installations.

Aside from the sectoral division, the RESA also introduced the categorization of RES installations based on the parameters of installed power capacity, enabling the separation of prosumer or self-supply investments from high-profile, advanced ventures, as well as the differentiation of both the legalization require-

[16] The principles of carrying out works adjacent to monuments are set out in Article 36 *et seq.* of the Act of 23 July 2003 on the protection and care of historical monuments (consolidated text: Journal of Laws of 2022, item 840 as amended).

[17] Act of 21 March 1985 on public roads (consolidated text: Journal of Laws of 2022, item 1693 as amended).

[18] Act of 20 February 2015 on renewable energy sources (consolidated text: Journal of Laws of 2023, item 1436, as amended).

[19] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) (OJ L 328, 21 December 2018). The definition in the current directive refers to energy from renewable sources or renewable energy (*de facto* a different concept) and takes the form of "energy from renewable non-fossil sources, namely wind, solar (solar thermal and solar photovoltaic) and geothermal energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas". For the standpoint of the doctrine, cf. A. Malinowski, *Definicje nieuzasadnione* (in:) *Błędy formalne w tekstach prawnych*, Warszawa 2020, p. 65.

ments and the degree of formalization of the investment procedure. Article 2 of the RESA in sections 18 and 19 adopts the definition of a micro-installation and a small installation, with projects beyond this framework understood as "large installations". A micro-installation is defined as a renewable energy source installation with a total installed electrical power not exceeding 50 kW and connected to a power grid with a nominal voltage lower than 110 kV, or an installation with a cogenerated thermal power not exceeding 150 kW, with a total installed electrical power not exceeding 50 kW. A small installation, on the other hand, is a renewable energy source installation with a total installed electrical power greater than 50 kW but not exceeding 1 MW and connected to an electricity grid with a nominal voltage lower than 110 kV or with a cogenerated thermal power capacity greater than 150 kW but not exceeding 3 MW, in which the total installed electrical power is greater than 50 kW and not exceeding 1 MW.

3.1. WIND ENERGY

Wind energy is a type of kinetic energy of moving air masses, and it is classified as a renewable energy source.[20] According to the adopted normative division, electricity from wind energy in Poland can be generated (i) on land in micro-installations, (ii) on land in wind power plants, as well as in (iii) offshore wind farms. Micro-installations have the same meaning here as in the RESA, and denote renewable energy source installations with a total installed electric capacity of no more than 50 kW. A certain novelty, however, is the introduction in Article 1 item 1 of the Wind Power Investment Act[21] ("WPIA"), formerly known as the 10h Act, of a supplementary definition under which a "wind power plant" is a renewable energy source installation, consisting of a construction part (constituting a building within the meaning of the Construction Law) and technical equipment, including technical elements,[22] in which electricity is generated from wind energy, with a capacity greater than the capacity of a micro-installation.

3.1.1. ONSHORE WIND POWER INSTALLATIONS

Wind power generation in **land-based micro-installations** remains a relatively approachable investment from the perspective of required administrative proceedings. First of all, wind installations with a total nominal capacity of less

[20] M. Dończyk, M. Korzon, O. Skibicki, M. Stupak, *Źródła odnawialne* (in:) *Odnawialne źródła energii. Poradnik dla inwestorów oraz wytwórców energii*, Warszawa 2022, p. 21.

[21] Act of 20 May 2016 on investments in wind power plants (consolidated text: Journal of Laws of 2021, item 724).

[22] As technical elements, Article 1 item 2 of the WPIA denotes the rotor with blade assembly, power transmission assembly, generator, control systems and nacelle assembly including the mounting and rotation mechanism.

than 100 MW not located in areas covered by forms of nature protection and those with a total height of no more than 30 meters do not at all constitute projects likely to have a significant impact on the environment within the meaning of the EIA Ordinance,[23] and, therefore, do not require an environmental decision. The WPIA provisions do not apply to micro-installations, thus there is no obligation to locate them on the local plan. A zoning decision will be required only in the case of a change in land use or a change in the use of a building, which is unlikely to occur in the case of micro-installations. Furthermore, under Article 15 sec. 4 of the SPDA, a local plan allowing for the concurrent siting of buildings provides for locating micro-installations on them, also in the case of a land use other than production, unless the provisions of the local plan prohibit the siting of such installations.

A building permit and an occupancy permit will be required only when the wind turbine is to be placed on a separate foundation and when the height of the structure exceeds 3 meters,[24] or when the assembly of the micro-installation takes place next to a building listed in the register of historical monuments.[25] The construction of wind turbines higher than 3 meters, but mounted on a building,[26] as well as installations not exceeding 3 meters located in an area entered in the register of monuments, can be legalized in a simplified procedure (notification),[27] while all other wind micro-installations do not require proceedings before an architectural and construction administration body at all.

However, **wind power plants** (recalling – installations using wind energy with a capacity of more than 50 kW), as projects of much larger scale and gravity, are featured by a much more formalized and demanding investment procedure. Any wind energy structures whose total height is greater than or equal to 30 meters and projects in areas covered by forms of nature protection will at the very least constitute projects likely to *potentially* have a significant impact on the environment,[28] and, therefore, requiring a decision on environmental conditions. Whereas onshore installations using wind energy to generate electricity with a total nominal capacity of not less than 100 MW are considered projects likely to *always* have a significant impact on the environment.[29]

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[23] *A contrario* § 3 sec. 1 item (6)(a-b) of the EIA Ordinance. Furthermore, installations designed solely to power road and rail signs, road or rail traffic control or monitoring devices, navigation signs, lighting devices, billboards and advertising boards, even if they are located in areas covered by forms of nature protection, do not constitute projects having a significant impact on the environment.

[24] *A contrario* Article 29 sec. 3 item (3)(a) in conj. with Article 28 section 1 of the Construction Law.

[25] Article 29 sec. 7 item 1 of the Construction Law.

[26] Article 29 sec. 3 item (3)(a) of the Construction Law.

[27] Article 29 sec. 4 item (3)(a) in conj. with Article 29 sec. 7 item 2 of the Construction Law.

[28] § 3 sec. 1 item (6)(a-b) of the EIA Ordinance.

[29] § 2 sec. 1 item (5)(a) of the EIA Ordinance.

Pursuant to Article 3 of the WPIA, the location of wind power plants can be made exclusively on the basis of a local plan, which means that in the absence of such, it is not possible to locate a wind power plant on the basis of a zoning decision.[30] All this means that the investor must apply to the municipal council for the adoption or amendment of a local plan. It is not possible to adopt a plan for a wind power plant in a simplified procedure[31] nor, according to some authors, to implement an integrated investment plan.[32]

The localization restrictions provided for wind power plants, however, do not stop there. Article 4 of the WPIA introduces an important stipulation, according to which the distance from residential buildings at which wind power plants can be located must be at least equal to ten times its total height (10h rule). The purpose and *ratione lege* of the provision was to ensure that a wind power plant does not pose a threat in the form of a negative impact on residential zones.[33] In practice, however, this resulted in the exclusion of 99% of Poland's territory from wind investments in the 2016-2023 period.[34] Nonetheless, the WPIA amendment of 9 March 2023 provided for the possibility of determining a different distance (though not less than 700 meters) in the local plan,[35] therefore increasing the coverage of areas appropriate for the development of wind farms. Finally, the construction of wind power plants also requires obtaining a building permit[36] and an occupancy permit once the works are completed.

3.1.2. OFFSHORE WIND FARMS

Undertakings involving the construction of production structures aimed at generating electricity from offshore wind energy have been specifically regulated in Poland by the Offshore Wind Farms Act[37] ("OWFA"), which defines an "offshore wind farm" as an installation constituting a separate set of energy genera-

[30] Judgment of the Supreme Administrative Court of 15 March 2018, II OSK 2305/17.

[31] Article 27b sec. 1 item 1 of the SPDA.

[32] *Wind energy in Poland. 2023 Report*, Polish Wind Energy Association, TPA Poland / Baker Tilly TPA, DWF, 2023, pp. 49, 145; A. Palukiewicz, J. Perzyna, *Co dalej z inwestycjami OZE? Kto zyska, a kto straci?*, published on cire.pl, 2023 (accessed 17 October 2023).

[33] Judgment of the Supreme Administrative Court of 5 March 2019, II OSK 926/17.

[34] R. Krupa-Dąbrowska, *Rząd od lat obiecuje poprawić przepisy, a farmy wiatrowe nie mogą się rozwijać*, published on prawo.pl, 2022 (accessed 17 October 2023); M. Szyrski, *Ocena realizacji konstytucyjnej zasady pomocniczości w prawie odnawialnych źródeł energii*, Samorząd Terytorialny, No. 5, Warszawa 2018, pp. 21-31.

[35] Article 1 item (6)(a) of the Act of 9 March 2023 amending the Act on investments in wind power plants and certain other acts (Journal of Laws of 2023, item 553).

[36] Cf. judgment of the Voivodeship Administrative Court in Olsztyn of 28 April 2016, II SA/Ol 273/16; M. Przybylska, *Zasada odległościowa w procesie inwestycyjnym elektrowni wiatrowej i zabudowy mieszkaniowej a działania organów samorządowych*, Państwo i Prawo, No. 4, Warszawa 2018, p. 112.

[37] Act of 17 December 2020 on promoting electricity generation in offshore wind farms (Journal of Laws of 2022, item 1050).

tion facilities, including one or more offshore wind turbines,[38] a medium-voltage grid with substations located on the sea, excluding equipment on the upstream side of the transformer or transformers located at the substation. The permitting procedure for offshore wind farms is of a special nature and can be characterized by the obligation to obtain a number of specific administrative decisions.

Offshore wind farms, according to Article 23 sec. 1a of the Offshore Territories Act[39] ("OTA"), may only be located in the exclusive economic zone. The erection and use of offshore wind farms in internal marine waters and the territorial sea is prohibited. Offshore areas are covered by a spatial development plan for internal waters, the territorial sea, and the exclusive economic zone, adopted by the Council of Ministers in an ordinance.[40] The plan delineates areas intended for renewable energetics, in which offshore wind farms are allowed to be erected. These areas amount to a total of 2,340 km^2, representing 10% of the exclusive economic zone.[41] As the spatial development plan is in effect, offshore wind farms are, therefore, not eligible for obtaining a zoning decision and must comply with its provisions.

In accordance with § 2 sec. 1 point (5)(b) of the EIA Ordinance, installations using wind energy to generate electricity located in the offshore areas of the Republic of Poland are projects likely to always have a significant impact on the environment and, therefore, require an environmental decision preceded by an environmental impact assessment. Like any project of such magnitude, offshore wind farms will require a building permit[42] and an occupancy permit.

The distinctive nature of sea-based wind energy projects is also implicit in the aforementioned obligation to obtain exceptional administrative permits. This is because it is impossible to build a turbine at sea without permanently disturbing the seabed, and such activities, defined in the OTA as the erection and subsequent use of artificial islands, structures, and devices, require a permit establishing their location and specifying the conditions for their implementation (Article 23 sec. 1 of the OTA). Such a permit shall be issued, in the case of areas covered by a spatial development plan, by the territorially competent director of the maritime office, following an opinion from the ministers responsible for state assets,

[38] An offshore wind turbine, as defined by the OWFA, is a single, self-contained unit of equipment used to generate electricity solely from offshore wind energy (Article 3 item 4 of the OWFA).

[39] Act of 21 March 1991 on offshore territories of the Republic of Poland and maritime administration (consolidated text: Journal of Laws of 2022, item 457, as amended).

[40] Ordinance of the Council of Ministers of 14 April 2021 on the adoption of a spatial development plan for internal sea waters, territorial sea and exclusive economic zone in the scale 1:200000 (Journal of Laws of 2021, item 935).

[41] *Potencjał lokalizacyjny polskich obszarów morskich* (in:) *Plan zagospodarowania przestrzennego polskich obszarów morskich*, Morska Energetyka Wiatrowa, published on the official website of the Republic of Poland – gov.pl.

[42] Cf. judgments of the Voivodeship Administrative Court in Warsaw of 9 September 2013, III SA/Wa 653/13, III SA/Wa 654/13, III SA/Wa 655/13.

energy, economy, climate, culture and protection of national heritage, fishing, environment, geology, internal affairs, the Minister of National Defense and the Head of the Internal Security Agency. Moreover, it may be issued only after the applicant has obtained the preliminary connection conditions.[43] Additional permits are also required for the construction of infrastructure accompanying an offshore wind farm – laying and maintaining cables, also in the areas of internal waters and territorial sea (e.g., routing a connection from a farm located in the exclusive economic zone to land through internal waters and territorial sea). The details of administrative proceedings for the issuance of a permit to erect artificial islands and a permit to lay cables are regulated in Chapter 4 of the OTA.

In addition, interference with the seabed to the extent that it allows for effective installation of wind turbines may require geological works to determine the geological and engineering conditions of the offshore wind farm foundation, as well as the equipment and facilities included in the power derivation unit. Carrying out such works requires a decision to approve geological work projects and geological documentation within the meaning of the Geological and Mining Law[44] ("GML"). These decisions are issued by the geological administration authority. There may also arise the need to obtain a water law consent for the use of water for energy purposes, should a broad understanding of this definition be adopted.

Many investment decisions for offshore wind farms are subject to immediate enforcement.[45] In addition, the OWFA provides for a number of *leges speciales* provisions on the issuance of decisions and appeal proceedings.

3.2. SOLAR ENERGY

Photovoltaic panels convert solar energy into electricity, which cannot only be consumed on an ongoing basis or stored but also sold, depending on the type of installation.[46] In the case of photovoltaic power plants, the degree of complexity of the permitting procedure depends on the size of the installation.

In light of § 3 sec. 1 item 54a of the EIA Ordinance, only projects involving the construction of a photovoltaic farm with a development area exceeding 2 hectares[47] require a decision on environmental conditions. Smaller farms, with a surface area exceeding 0.5 hectares, are also subject to this obligation, but only insofar as they are located in areas covered by forms of nature protection or in

[43] Article 23 secs. 2 and 5b of the OTA.

[44] Act of 9 June 2011 – Geological and Mining Law (consolidated text: Journal of Laws of 2022, item 1072 as amended). Cf. Article 80, Article 93, Article 161 sec. 3 item 2a of the act.

[45] Article 76 sec. 1 of the OWFA.

[46] Judgment of the Supreme Administrative Court of 23 October 2015, II OSK 372/14.

[47] According to § 3 sec. 1 item 54a of the EIA Ordinance, the surface area of a photovoltaic installation is determined by the outline of the outer edge modules of the panels.

buffer zones of such areas. In principle, therefore, photovoltaic micro-installations will not be classified as projects requiring an environmental decision.

Solar installations have been the installations mostly affected by the changes introduced under the AmSPDA. Before, there were virtually no restrictions regarding the possibility of locating them on zoning decisions, except for the soil classes I to III. However, once the general plans go into effect (no later than 31 December 2025), photovoltaic installations with an installed capacity of more than 150 kW on agricultural land class IV, and with the capacity exceeding 1000 kW on all land classes – will require a local plan. The construction of photovoltaic micro-installations not located on the ground (placed on buildings) is slightly different – a zoning decision will be required only when the land utilization changes as a result of the construction.[48] The presumption of compliance with the local plan for building-mounted installations provided in Article 15 sec. 4 of the SPDA is even more favorable for solar installations, as it applies to them regardless of capacity (not just to micro-installations).

A building permit will be required for the execution of photovoltaic devices with an installed capacity of more than 150 kW. Therefore, there is no general obligation to obtain a building permit for solar micro-installations, with the exception of projects that require an environmental impact assessment, photovoltaic panels built at objects listed in the register of monuments, or for the installation of panels on buildings on account of their reconstruction, which itself requires a building permit.[49] The installation of photovoltaic devices with an installed capacity of up to 150 kW onto a building is possible under the simplified legalization procedure, i.e. by making a notification.[50] For photovoltaic devices with an installed electrical power of more than 6.5 kW, there is also an obligation to approve the project of these devices with a fire protection expert as regards their compliance with fire protection requirements, as well as to notify the authorities of the State Fire Service about the completion of works and the intention to proceed to the operation.[51]

3.3. GEOTHERMAL ENERGY

Geothermal energy, as defined by Article 2 item 10 of the RESA, is energy of a non-anthropogenic nature accumulated in the form of heat beneath the Earth's surface. In the case of geothermal projects, in addition to the typical decisions in the investment procedure, the investor will be required to undergo the full legal-

[48] Letter from the General Office of Construction Supervision, *W sprawie montażu ogniw fotowoltaicznych na obiektach budowlanych oraz wolnostojących ogniw fotowoltaicznych*, published on gunb.gov.pl (accessed 17 October 2023).

[49] Article 29 secs. 6-7 of the Construction Law.

[50] Article 29 sec. 3 item (3)(c) of the Construction Law.

[51] *Ibidem*.

ization path for the exploitation of underground waters regulated in the GML. It should be emphasized that within the meaning of Article 5 sec. 1 of the GML, thermal waters constitute fossils and, therefore, all regulations on the extraction of such are applicable to them altogether.

Pursuant to Article 95 sec. 1a of the GML, documented deposits and the need to secure their extraction or use must be incorporated into general and local plans. Thus, as a rule, the construction of geothermal power plants shall be based on a local plan. The remarks made with regard to the AmSPDA remain relevant.

The extraction of fossils from a deposit by an underground method[52] with a mineral output of no less than 100,000 m^3 per year is a project likely to *always* have a significant impact on the environment within the meaning of § 2 sec. 1 item 27 of the EIA Ordinance, while in smaller volumes it constitutes a project likely to *potentially* have a significant impact on the environment. Moreover, the very exploration or prospecting of mineral deposits by underground methods and performed through boreholes with a depth of more than 1,000 meters in protection zones of water intakes, in protection areas of inland water reservoirs and in areas covered by forms of nature protection, as well as in each case where the borehole performed has a depth of more than 5,000 meters, will constitute projects likely to potentially have a significant impact on the environment.[53] Subject to this ordinance is also the construction of facilities for the extraction of groundwater with a capacity of not less than 1,100 m^3 per hour (as projects always likely to have a significant impact on the environment) and those with a capacity of between 10 m^3 and 1,100 m^3 per hour (as projects likely to potentially have a significant impact on the environment).[54]

The legalization process for geological and mining activities is particularly complicated. It is first necessary to identify the hydrogeological conditions of the area in question; if the available geological information makes it possible to identify the conditions, one can immediately proceed with the preparation of a geological work project, which is then subject to approval by the geological administration body.[55] Groundwater prospecting is in itself an activity that does not yet require a concession.[56] The intention to proceed with geological works must be reported to the relevant authorities, and if they are to be carried out at a depth of more than 100 meters or with blasting agents, it will be necessary to prepare a mining operation plan and have it approved.[57] The results of geological

[52] For capturing geothermal energy, the main method is to create boreholes to geothermal hot water reservoirs. Such drillings are similar in technology to oil wells. Cf. E. Gołąbeska, A. Harasimowicz, *Wybrane problemy związane z realizacją systemów wykorzystujących zieloną energię*, Białystok 2023, p. 43.

[53] § 3 sec. 1 item 44 of the EIA Ordinance.

[54] § 2 sec. 1 item 37 and § 3 sec. 1 item 73 of the EIA Ordinance.

[55] Article 79 sec. 1, Article 80 sec. 1 of the GML.

[56] Article 21 sec. 1 in conj. with Article 10 sec. 1 of the GML.

[57] Article 105 sec. 2 item 2 in conj. with Article 108 sec. 11 of the GML.

work should be presented in the form of geological documentation, which is also subject to approval by decision.[58] Subsequently, a deposit development project should be developed, together with an opinion of the Director of the District Mining Authority.[59] Finally, on the basis of the steps taken above and holding a set of relevant decisions, the investor should obtain a concession for the exploitation of thermal waters, which is granted by the voivodeship marshal or the poviat starost – in accordance with Articles 21 and 22 of the GML. Through Article 106 of the GML, the provisions of the Construction Law apply to mining facilities, including with regard to the decision which grants a building permit.

Pursuant to Article 10 sec. 2 of the GML, thermal waters are covered by the mining property belonging to the State Treasury and, therefore, the use of such waters will require obtaining a legal title, which under the current law occurs only through a paid mining usufruct agreement, effective as of the date of the concession.[60]

By all accounts, the investment process for geothermal energy is highly complicated. In addition to advanced formalism, the high costliness of geothermal energy operations may also be an obstacle for investors – one borehole of average depth costs more than ten million zloty.[61] The above factors can often make geothermal investments unprofitable.[62]

3.4. HYDROENERGY

Hydropower projects involve, within the meaning of the RESA, the use of mechanical energy of water, excluding energy obtained from pumped storage hydroelectric power plants or hydroelectric power plants with a pumped storage component. In light of the literal wording of the provisions of Article 2 sec. 22 in conj. with Article 2 sec. 12 of the RESA, as well as the European Union definitions, pumped storage power plants have not been included among renewable energy sources, which might be due to the fact that the existence of this type of generation only makes sense if there is a nearby conventional power plant with

[58] Article 88 sec. 1 in conj. with Article 93 sec. 2 of the GML.

[59] *Wody mineralne. Poradnik inwestora*, National Research Institute – National Geological Institute, 2022, published on pgi.gov.pl (accessed 17 October 2023).

[60] K. Szamałek, *Dokumentowanie wody jako kopaliny wielosurowcowej – potrzeba dyskusji i zmian*, Górnictwo Odkrywkowe, Vol. 57, No. 2, Wrocław 2016, p. 48.

[61] U. Wojciechowska, *Nieopłacalność geotermii to mit*, Czysta Energia 11/2013 (147).

[62] J. Kapuściński, A. Rodzoch, *Geotermia niskotemperaturowa w Polsce i na świecie. Stan aktualny i perspektywy rozwoju. Uwarunkowania techniczne, ekonomiczne i środowiskowe*, Ministry of Environment, Warszawa 2010, p. 103.

occasional surplus energy,[63] or that they emit greenhouse gases from the decay processes of aquatic flora.[64]

According to Article 211 sec. 2 of the Water Law, waters of the territorial sea, internal marine waters, inland flowing waters, and underground waters are the property of the State Treasury and, therefore, the use of such waters for energy purposes will require additional legalization beyond the typical investment scheme.

The status of hydropower plants in terms of environmental impact is relatively obvious. Under § 3 sec. 1 item 5 of the EIA Ordinance, such installations constitute projects likely to potentially have a significant impact on the environment and a decision on environmental conditions is, therefore, necessary for their construction. What is perhaps less clear, however, is the scope of meaning of the term "hydropower plant", given that – unlike in the case of wind power – there has been no normative implementation of a relevant definition. By analogy, it could presumably be considered that hydroelectric micro-installations for self-supply (in this sense, not constituting hydropower plants) could be treated as projects that do not require an environmental decision, although according to the position of the Ministry of Climate and Environment:

> "*Hydropower micro-installations are subject to the same procedures at the investment and operation stage as small and large hydroenergy. [...] As a project likely to potentially have a significant impact on the environment, a hydropower micro-installation is subject to an environmental impact assessment. The investor must also obtain a water law permit [...] In addition, the investor will have to obtain a building permit*".[65]

In practice, the obligation to obtain an environmental decision and a building permit should, therefore, be considered a foregone conclusion in the context of any investment aimed at the energetic use of water's kinetic potential, regardless of its size or installed capacity. Some facilitation may also be provided by the fact that, according to administrative judicature and part of the doctrine, the location of hydropower plants can be effected by means of a zoning decision, and the existence of a local plan is not required.[66] However, the remarks made with regard to the AmSPDA remain relevant.

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[63] J. Nowak, *Elektrownia szczytowo-pompowa*, Delta, published on elektrownie.manifo.com (accessed 9 October 2023).

[64] G. Peczkis, *Elektrownie szczytowo-pompowe. Możliwości wykorzystania likwidowanych kopalń*, Pompy Pompownie 1/2021, Silesian University of Technology.

[65] P. Rapacka, *Nie tylko fotowoltaika. Czy w Polsce jest miejsce dla mikroinstalacji wodnych?*, 2022, published on globenergia.pl (accessed 17 October 2023).

[66] J. Mazurkiewicz, *Energetyka wodna*, National Energy Respecting Agency, 2018; judgment of the Voivodeship Administrative Court in Gdańsk of 17 May 2018, II SA/Gd 21/18. See also on the contrary: A. Bernatek-Jankiel, *Małe elektrownie wodne w systemie planowania przestrzennego w Polsce*, Journal of Ecological Engineering 33:7-12, 2013.

The use of water for energy purposes, including hydropower, constitutes a water service within the meaning of Article 35 sec. 3 item 6 of the Water Law, thus requiring a water law permit. It should be noted that an application for a water law permit for the damming of surface waters with a piling structure with an accumulation height of more than 1 meter and equipped with devices that enable the regulation of flow, or for the dependent use of water by several facilities, shall be accompanied by a draft of a water management instruction containing a description of how the water will be treated and how the needs of all users benefiting from the water resources affected by the water management instruction will be met.[67]

Since flowing waters and the land underneath are owned by the State Treasury, it will also be necessary to obtain the right to use the property, which only comes in the form of a usufruct imposing an annual fee in accordance with Article 261 sec. 1 of the Water Law.

3.5. WAVE, CURRENT AND TIDAL ENERGY

The power of sea tides – in a broad sense – includes any use of the mechanical energy of marine tides or wave motion for the production of electricity.[68] Due to the high cost of infrastructure and the early, "not fully matured"[69] development phase of such a technology in general, it has been, in fact, the least used way of obtaining energy from renewable sources so far.[70] Some experts even admit that this way of using water energy is impossible to apply in Poland,[71] because for such a purpose the difference in water levels between high tide and low tide must be at least 5 meters, and there are merely about hundred points meeting such a condition throughout the whole of Europe.[72] Currently, the potential of tidal currents, except for the dam located at the mouth of the French river Rance, is not used anywhere in the European Union.[73]

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[67] Article 407 sec. 3 of the Water Law.

[68] J. Norwisz, T. Musielak, B. Boryczko, *Odnawialne źródła energii – polskie definicje i standardy*, Rynek Energii, No. 1/2006, p. 3.

[69] Cf. point 1.6 of the Opinion of the European Economic and Social Committee, *Opportunities for the exploitation of marine energy as a renewable energy source (own-initiative opinion)*, OJ. EU. C. of 2017. No. 34, p. 53.

[70] K. Fodrowska, *Elektrownie wodne w Polsce*, 2021, published on enrad.pl (accessed 17 October 2023).

[71] E. Przybyło, P. Sołowiej (supv.), *Energia pływów morza* (in:) *Energia wody – edukacyjno-informacyjny system sieciowy*, University of Warmia and Mazury, published on www.uwm.edu.pl (accessed 17 October 2023).

[72] P. Olszowiec, *Elektrownie pływowe nabierają mocy. Gigawaty z... arktycznych mórz*, Energia Gigawat, 2008.

[73] Cf. point 3.3, Opinion of the European Economic and Social Committee, *Opportunities...*, *ibidem*.

From the perspective of legal theory, the investment process for tidal power plants under Polish law is, however, worth considering. It seems that in the absence of a specific regulation, this type of an installation could be qualified as a hydropower plant, which, within the meaning of § 3 sec. 1 item 5 of the EIA Ordinance, constitutes a project likely to potentially have a significant impact on the environment and thus requires an environmental decision. In practice, determining environmental conditions for the realization of such a project may be problematic insofar as science has not yet definitively investigated to what extent the energy of water currents can be exploited (and thus weakened) without disturbing environmental sustainability.[74] It is also difficult to determine the applicable procedure for spatial management, but in view of the already discussed fact that a spatial development plan has been adopted for Polish maritime areas, the practical possibility of locating this type of investment on the basis of a zoning decision would, in principle, be excluded anyway. No grounds can also be found for exempting wave and tidal installations from the requirement to obtain a building permit.

Furthermore, at least some of the tidal technologies (such as submarine mills) will require a permit for the erection or use of artificial islands, structures, and devices in marine areas, as well as a permit for laying and maintaining cables in these areas. Most likely, it will also be necessary to obtain a water law permit typical for hydropower plants, since according to Article 3 of the Water Law, the act's provisions also apply to internal marine waters.

3.6. AMBIENT ENERGY

Under the newly added Article 2 item 11^1 of the RESA, ambient energy means naturally occurring thermal energy and energy accumulated in the environment with constrained boundaries, which may be present in surface or sewage water and the air, excluding exhaust air. According to point 6 of the preamble to Commission delegated regulation (EU) 2022/759, ambient energy is present in ambient air (formerly known as aerothermal) and ambient water (formerly known as hydrothermal).[75] With the adoption of the ambient energy approach, aerothermal and hydrothermal energy have consequently been replaced by this broader umbrella term within the definition of RES in EU acts. Keeping all three terms in the RESA should, therefore, be considered superfluous, and legislative efforts should be made to regulate them under the joint category of ambient energy.

[74] *Energia prądów morskich, pływów i falowania*, 2022, published on e-magazyny.pl (accessed 17 October 2023).

[75] Commission Delegated Regulation (EU) 2022/759 of 14 December 2021 amending Annex VII to Directive (EU) 2018/2001 of the European Parliament and of the Council as regards a methodology for calculating the amount of renewable energy used for cooling and district cooling (OJ L 139, 18 May 2022).

By far, the most common technology for harvesting ambient energy relies on heat pumps.[76] In principle, domestic or self-supply heat pumps do not require an environmental decision.[77] Spatial management of heat pumps depends on their type, but as long as their installation does not result in changes to the land use or the use of a building or part of a building, a zoning decision shall not be necessary.[78] In case, however, a local plan is in force, its provisions must be taken into account. Installation of heat pumps with a capacity of up to 150 kW does not require a building permit or notification, provided that it is not implemented on a building listed in the register of monuments or in an area listed in the register of monuments.[79] In addition to the above, special regulations may need to be considered – the GML (if boreholes were to be drilled) or the Water Law (in the case of digging a water well, i.e. a water facility). Relevant administrative incentives for heat pumps were introduced by the Council Regulation (EU) 2022/2577.[80] However, it is noteworthy that ongoing legislative action in the European Union aimed at phasing out F-gases from the European Economic Area may undermine the easiness of investing in heat pumps.[81]

Other ambient energy capture technologies, such as acoustic noise, ambient radio frequency or piezoelectricity, are at this point rather experimental,[82] i.e. not operational at a scale requiring administrative legalization.

3.7. BIOMASS, BIOGAS, BIOLIQUID AND BIOMETHANE ENERGY

Biomass is used for energy purposes in the processes of direct incineration of solid or gaseous biofuels or by conversion to liquid fuels. It includes, in particular, substances of vegetal or faunal origin, constituting waste and residues from agricultural, alimentary and forestry production, as well as waste that undergoes

[76] Cf. R. Lowes, D. Gibb, J. Rosenow, S. Thomas, M. Malinowski, A. Ross, P. Graham, *A policy toolkit for global mass heat pump deployment*, Regulatory Assistance Project. CLASP, Global Buildings Performance Network, 2022, p. 11; P. Rapacka, *Europa zainstalowała w 2022 r. rekordową liczbę pomp ciepła*, published on teraz-srodowisko.pl (accessed 14 October 2023).

[77] Environmental decision shall be required only with regard to the development of groundwater intakes deeper than 100 meters (§ 3 sec. 1 item (43)(b) of the EIA Ordinance) and facilities for the extraction of groundwater with a capacity of not less than 10 m^3 per hour (§ 3 sec. 1 item 73 of the EIA Ordinance).

[78] *A contrario* Article 59 sec. 1 of the SPDA.

[79] Article 29 sec. 4 item (3)(c) and sec. 7 of the Construction Law.

[80] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy (OJ L 335, 29 December 2022).

[81] Proposal for a Regulation of the European Parliament and of the Council on fluorinated greenhouse gases, amending Directive (EU) 2019/1937 and repealing Regulation (EU) No. 517/2014 (COM/2022/150 final).

[82] Cf. A. Tatuś, *Energy harvesting – pozyskiwanie energii elektrycznej z otoczenia*, Elektronika Praktyczna, published on ep.com.pl (accessed 14 October 2023).

biodegradation.[83] The use of biomass and biogas often makes it possible to carry out cogeneration, i.e. the simultaneous production of electricity and heat using the same fuel.[84] Normative definitions of biomass, biogas, bioliquids, and biomethane[85] are contained in Article 2 items 1, 3, 3c and 4 of the RESA. Despite their qualification as renewable energy sources, the use of biofuels involves incineration, which results in a different range of environmental impacts than in the case of other RES installations discussed above.

Installations for the energetic combustion of fuels, including biomass, biogases, bioliquids and biomethane, with a thermal capacity of not less than 300 MW constitute projects likely to always have a significant impact on the environment, while such installations with a capacity of not less than 25 MW, or when using solid fuel – not less than 10 MW, are projects likely to potentially have a significant impact on the environment.[86] Lower-capacity biofuel power plants will not require an environmental decision. More so, also installations for the sole production of biofuels (excluding agricultural biogas plants) that meet specified criteria will be obliged to obtain an environmental decision.[87]

It appears that all forms of zoning may apply to biofuel facilities[88] – both local plans, including local plans adopted in a simplified procedure and integrated investment plans, as well as zoning decisions, with general limitations introduced in the AmSPDA applicable. Zoning of agricultural biogas plants enjoys special regulations, including Article 64aa of the SPDA and the Agricultural Biogas Act.[89]

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[83] W. Pawłowski, *Biogazownia jako element mający pozytywny wpływ na zmiany środowiskowe przestrzeni wiejskich*, Inżynieria Ekologiczna, Vol. 18, Iss. 5, 2017, p. 161.

[84] P. Lampart, P. Kowalski, *Kogeneracja w oparciu o źródła biomasy / biogazu* (in:) A. Cenian, T. Noch (eds.), *Ekoenergetyka – zagadnienia technologii, ochrony środowiska i ekonomiki*, Gdańsk 2010, p. 121 *et seq*.

[85] According to its definition, biomethane is a gas derived from biogas, agricultural biogas or renewable hydrogen. The remarks given in this chapter will only apply to biomethane derived from biofuels.

[86] § 2 sec. 1 item 3, § 3 sec. 1 item 4 of the EIA Ordinance.

[87] Such installations are indirectly referred to in the provisions of § 2 sec. 1 item 47 and § 3 sec. 1 items 47 and 82 of the EIA Ordinance, according to which projects likely to *potentially* have a significant impact on the environment include installations for the production of fuels from plant products and installations related to waste processing, with an installed electrical capacity of no more than 0.5 MW or producing an equivalent amount of agricultural biogas used for purposes other than electricity production. Meanwhile, projects likely to *always* have a significant impact on the environment are waste processing facilities capable of receiving waste in quantities of no less than 10 tons per day or with a total capacity of no less than 25,000 tons. It should be noted, however, that installations for the production of agricultural biogas (within the meaning of Article 2 sec. 2 of the RESA) are exempt from this obligation. In this case, though, an entry in the register of agricultural biogas producers is required (Article 26 of the RESA).

[88] Cf. E. Wielańczyk, *Biogazownie – długa droga od pomysłu do realizacji*, Wspólnota, No. 2, 2010, p. 6.

[89] Act of 13 July 2023 on facilitating the preparation and implementation of investments in agricultural biogas plants and their operation (Journal of Laws of 2023, item 1597).

The construction of biofuel power plants and biofuel production facilities shall, in principle, require a building permit. The only exception is agricultural biogas micro-installations, subject only to notification.[90]

In addition to the above, the operation of biofuel plants may also require a decision authorizing waste processing[91] in accordance with Article 41 of the Waste Act.[92] However, the use of non-hazardous biomass (i.e. natural substances from agricultural or forestry production) for energy production by processes or methods that do not cause harm to the environment nor endanger human life and health, is exempt from the obligations of this act.

If such a plant was to process livestock by-products (e.g., feces), it would be furthermore necessary to authorize a supervised activity with the poviat veterinarian.[93] A decision from the Office of Technical Inspection is also required for tanks and boilers operating under pressure, in light of Article 5 secs. 1-2 of the Technical Inspection Act.[94]

Finally, due to their relatively extended environmental impacts (incl. emissions), biofuel plants require additional environmental permits. Depending on the specifics of a given project, these may include water law permits for water intake, discharge of industrial wastewater or agricultural use of wastewater to the extent not covered by ordinary water use and wastewater collection; a waste treatment permit, as well as permits for the introduction of gases or dust into the air (generally for installations with a capacity of more than 10 MW).[95] For installations of thermal processing of non-hazardous waste with a capacity of more than 3 Mg per hour and for recovery or disposal using anaerobic digestion with a processing capacity of not less than 100 Mg per day, it will be possible to obtain a single integrated permit in this regard, instead of a number of sectoral permits.[96]

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[90] Article 29 sec. 3 item (3)(e) of the Construction Law.

[91] E. Wielańczyk, *op. cit*., p. 8.

[92] Act of 14 December 2012 on waste (consolidated text: Journal of Laws of 2022, item 699 as amended).

[93] Articles 23(1)(a) and 24(1) of the Regulation (EC) No. 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (*Animal by-products Regulation*) (Official Journal of the EU L 300, 14 November 2009).

[94] Act of 21 December 2000 on technical inspection (Journal of Laws of 2022, item 1514). See Article 5 secs. 1-2 of the act in conj. with § 1 of the Ordinance of the Council of Ministers of 7 December 2012 on types of technical equipment subject to technical inspection (Journal of Laws of 2012, item 1468).

[95] Item 1 of the appendix to the Ordinance of the Minister of Environment of 2 July 2010 on cases in which the introduction of gases or dust into the air from installations does not require a permit (Journal of Laws of 2010, No. 130, item 881).

[96] Article 201 sec. 1 of the Act of 27 April 2001 – Environmental Protection Law (consolidated text: Journal of Laws of 2021, item 1973 as amended), in conj. with the appendix to the Ordinance of the Ministry of the Environment of 27 August 2014 on the types of installations that may cause

3.8. RENEWABLE HYDROGEN

In 2023, the RES catalog was broadened to include renewable hydrogen, which is understood as hydrogen produced from renewable energy sources in a renewable energy facility, including through electrolysis[97] (green hydrogen).

As per the definition, in order for the hydrogen to be considered renewable, it must be produced in an RES facility. Possible production technologies include therefore power-to-gas (P2G) systems with the usage of renewable electricity – wind, solar (yellow hydrogen), hydrothermal, hydropower, wave, current and tidal, ambient and biofuel energy; as well as reforming of biogas.[98] Since the production of renewable hydrogen must be connected to another RES plant, the legalization of newly developing hydrogen plants will often be tied to the investment process of renewable energy projects.

Polish regulations on the investment process do not yet include provisions dedicated to renewable hydrogen plants. As of now, it is often assumed that such projects qualify as installations for the production of substances using chemical processes to manufacture basic products or intermediates of inorganic chemistry,[99] which, within the meaning of § 2 sec. 1 item (1)(b) of the EIA Ordinance, constitute projects always having a significant impact on the environment and thus require an environmental decision. It will then be a project requiring an environmental impact assessment, which also implies the obligation to obtain a building permit under Article 29 sec. 6 of the Construction Law. With regard to spatial development, it seems that all forms of legalization are valid unless the main facility next to which the hydrogen plant would operate requires a specific form of zoning itself (e.g. wind power plants). Other possible legal requirements include an occupancy permit and an integrated permit,[100] as well as a water law permit (the electrolysis process involves the use of water).

4. CONCLUSIONS

The investment and construction process for RES ventures in Poland can be tangled. Investors must obtain multiple administrative decisions, all in the pre-

significant pollution of particular natural elements or the environment as a whole (Journal of Laws of 2014, item 1169).

[97] Article 2 item 36a of the RESA.

[98] H. Hyunah Cho, V. Strezov, T.J. Evans, *A review on global warming potential, challenges and opportunities of renewable hydrogen production technologies*, Sustainable Materials and Technologies, Vol. 35, 2023.

[99] Cf. R. Frączek, *Studium wykonalności instalacji do produkcji, sprężania, magazynowania i dystrybucji wodoru – część II*, published on zielonagospodarka.pl (accessed 14 October 2023).

[100] *Ibidem*.

scribed order. Besides the typical pattern, many additional proceedings arise from the characteristics of a given technology or from special conditions of the location of the planned project. Implementing projects is also not eased by rapidly changing legislation, which often introduces new policies or obligations. Although there happen to be facilitations as well, staying abreast of changes can be a difficulty in itself. Therefore, it is essential to issue up-to-date summaries of the investment procedures every so often. Naturally, it is advisable to consult a technical and legal advisor before undertaking any investment activities – despite the authors best efforts to present the issues in detail, this paper cannot constitute tailored legal advice for any given case.

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Paulina Trzaskowska-Machalska
University of Warsaw, Poland
e-mail: p.trzaskowska@wp.pl
ORCID: 0000-0001-9242-6049

WILL THE IMPLEMENTATION OF THE ACT ON THE PROTECTION OF PERSONS WHO REPORT BREACHES OF LAW FOSTER THE DEVELOPMENT OF WHISTLEBLOWING IN POLAND?

Abstract

In my article, I have described the scope of whistleblower protection under the bill aimed at implementing Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of EU law. I have described issues such as the scope of whistleblower protection – which entities are protected, the whistleblower's good faith as a condition for obtaining the whistleblower status, the scope of applications – the scope of matters that can be reported by the whistleblower, establishing safe channels for reporting and confidentiality – ensuring whistleblower's anonymity. Implementation of the PPWRBL Act is not sufficient to increase the popularity of whistleblowing in Poland. I tried to prove that the problem with the perception of whistleblowers in Poland is rooted in our historical experience and a lack of trust in society and it is necessary not only to implement the EU Directive but also to organize a social campaign in order to build a culture of acceptance for whistleblowers.

KEYWORDS

whistleblowing, whistleblowers, public interest, right to inform, European standards

SŁOWA KLUCZOWE

sygnalizowanie nieprawidłowości, sygnaliści, interes publiczny, prawo do informowania, standardy europejskie

INTRODUCTION

Whistleblowing, or reporting irregularities, remains a rather unpopular issue in Poland. The topic started to be on the public agenda only after the Public Life Openness Bill,[1] and later also the previous Liability of Bodies Corporate for Punishable Acts Bill[2] emerged. Those two bills were to introduce the first regulations in Poland aimed at protecting whistleblowers.[3] Unfortunately, the protection ensured for whistleblowers under the discussed bills as well as irregularity reporting rules were governed only selectively and failed to provide for appropriate protection for the reporting individuals. Upon the conclusion of the Parliament term, both bills were subject to the discontinuation principle and currently are no longer processed.

The issue of whistleblower protection returned no sooner than upon the works on a bill aimed at implementing Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of EU law.[4] According to the Directive's assumptions, the implementing acts were supposed to enter into force by 17 December 2021. In Poland, the obligation to implement the provisions of Directive 2019/1937 encouraged the

[1] Public Life Openness Bill of 8 January 2018.

[2] Previous Liability of Bodies Corporate for Punishable Acts Bill submitted by the Government and filed with the lower house of the Parliament on 11 January 2019 (hereinafter: the LBC Bill). The new one – Liability of Bodies Corporate for Punishable Acts Bill no. UD 421 does not contain regulations on whistleblower protection.

[3] Before the works on the bills started, a whistleblower could have only adduced the provisions of the Labour Code (Article 100(2)(4)), the Civil Code (Articles 23 and 24), the Penal Code (Article 212) or the international law, e.g. the United Nations Convention against Corruption and the Council of Europe's Civil Law Convention on Corruption.

[4] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of UE law (OJ L 305, p. 17) (hereinafter: Directive 2019/1937).

works on the protection of persons who report breaches of law bill.[5] Despite the lapse of the time limit set out in Directive 2019/1937, as of the publication date of this paper, the PPWRBL Bill has not entered into force.

According to the EU Whistleblowing Monitor,[6] a service monitoring the progress in implementing the Directive, Poland is not the only country in delay with the implementation. As many as fifteen Member States are in such delay, while Hungary has not even started works aimed at introducing relevant domestic regulations. Thus, the current status of the Directive implementation is not optimistic.

In my opinion, the situation is alarming and it is necessary to introduce the relevant regulations as soon as possible. This opinion may be backed up by the research referred to on the European Union's website,[7] according to which as many as 81% of the respondent Europeans did not report cases of corruption that they have experienced or witnessed, and as many as 85% of the respondents are of the opinion that workers very rarely or rarely report concerns about potential danger or potential damage to the society in fear of legal and financial consequences.[8]

As mentioned before, most Member States have not yet implemented Directive 2019/1937; in the said period only ten States ensured full protection of individuals reporting breaches. In the other countries, the protection provided was partial and regarded only specific sectors or categories of workers, e.g. in the case of fighting corruption or only in the government sector.[9] Yet, it is requisite to implement regulations that will pertain to all entities, regardless of the economic sector in which they operate. After all, abuse and unlawful behaviours may occur everywhere, both in a private company and a public organisation, both in small and large entities. Abuse may regard varying areas, such as competition law, corruption, labour law, operational health and safety, environmental protection or tax obligations. Legislators should ensure that there are relevant regulations in place encouraging businesses to introduce whistleblowing programmes, and that those regulations afford appropriate protection to whistleblowers. It is of great importance as whistleblowing involves huge risks for those who report abuse. People who decide to report a breach risk their career and source of income, and in some

[5] Protection of persons who report breaches of law bill of 14 October 2021 (hereinafter: the PPWRBL Bill).

[6] https://www.whistleblowingmonitor.eu/country/ (accessed 2 August 2022).

[7] Report requested by the European Commission, Special Eurobarometer 470, corruption, http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2176, published in December 2017.

[8] *Ibidem*.

[9] European Commission, *Whistleblower protection: Commission sets new, EU-wide rules*, http://europa.eu/rapid/press-release_IP-18-3441_en.htm (accessed 1 September 2022).

cases suffer from serious and long-term financial, health, image and personal repercussions.[10]

In the light of the above considerations, Directive 2019/1937 needs to be implemented as soon as possible. It is essential, however, to carefully design the implementation so that it governs the whistleblowing institution and protects the interests of whistleblowers in a comprehensive way.

According to Directive 2019/1937, a reporting person is a person who reports information about breaches of European Union law and who has acquired information on breaches in a work-related context (Articles 2 and 4). The protection ensured by the Directive applies both to workers and persons employed under other legal relations, such as: self-employed persons, shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, as well as volunteers and paid or unpaid trainees, persons working under the supervision and direction of contractors, subcontractors and suppliers (Article 4).

The PPWRBL Bill governs the scope of its application in a similar manner, where according to the Bill a reporting person is a natural person who reports or discloses publicly information about a breach of law acquired in a work-related context. The PPWRBL Bill provides that reporting persons include but are not limited to: a worker (even when the employment relation has terminated), a person providing work services under a basis other than employment relation (including under a civil-law contract), a business owner, a shareholder, a member of a legal person's corporate body, a person providing work services under the supervision and direction of a contractor, subcontractor or supplier, including under a civil-law contract, a trainee and a volunteer (Article 4).

It is a very broad personal scope as compared to the previous Public Life Openness Bill,[11] which never allowed to confer the whistleblower status to individuals performing work on behalf and for the account of another person under a civil-law contract, which, given how popular it is to hire people otherwise than under labour code employment, deprives a massive part of the society of protection.[12] The personal scope of the PPWRBL Bill, on the other hand, is defined

[10] H. Szewczyk, *Whistleblowing w zakładzie pracy. Zarys problematyki* (in:) *eadem*, *Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia*, Warsaw 2020.

[11] The whistleblower status was supposed to be conferred on: a worker provided that the information regarded his or her employer, a natural person exercising a profession on his or her own behalf and for his or her own account and/or running a business as part of exercising such a profession, or a business owner bound with a contractual relation with the entity to which the information pertains (Article 61(4) of the Public Life Openness Bill of 8 January 2018).

[12] The Liability of Bodies Corporate for Punishable Acts Bill defines the personal scope by conferring the whistleblower status on: a worker of a body corporate, a member of a corporate body, a person acting on behalf and/or in the interest of a body corporate under a legal transaction or a contract (Article 11(1) of the LBC Bill that was filed with the lower house of the Parliament on 11 January 2019).

broadly enough to cover all potential whistleblowers and thus provide them with sufficient protection.

However, the material scope of a report to be protected raises doubts. According to Article 2 of Directive 2019/1937, a reporting person shall be provided with protection with regard to reports in the following areas:

- public procurement;
- financial services, products and markets, and prevention of money laundering and terrorist financing;
- product safety and compliance;
- transport safety;
- protection of the environment;
- radiation protection and nuclear safety;
- food and feed safety, animal health and welfare;
- public health;
- consumer protection;
- protection of privacy and personal data, and security of network and information systems.

It also pertains to breaches relating to EU competition rules, breaches affecting the financial interests of the Union and, due to their negative impact on the correct operations of the internal market, breaches of rules and/or arrangements regarding corporate tax the purpose of which is to obtain a tax advantage (Article 2(1) of Directive 2019/1937).

A material scope so defined fails to cover a very important area, i.e. worker rights. Issues such as employment protection, OHS rules, equality and human rights constitute major areas of whistleblowers' activity and should not be ignored when contemplating protection. As Directive 2019/1937 sets forth only the minimum scope of whistleblowing regulations by the Member States, the issue of worker rights should be definitely accounted for in the Directive implementation by the particular countries. Unfortunately, the material scope defined in the PPWRBL Bill (Article 3) is identical to the one in the Directive. Providing protection also in the case of worker rights issues, especially mobbing and workplace discrimination, is of particular importance as, according to research, these are breaches most often reported by whistleblowers in a company.[13]

Another area not covered by the application of the statute is corruption. I believe that a material scope so defined is definitely too narrow; limiting it to the areas specified in the Bill may lead to situations where many people reporting major breaches of the law (such as corruption or mobbing) will lack protection.

[13] *Ochrona sygnalistów w Polsce. Świadomość pracowników i praktyki w firmach. Raport z badania pracowników firm sektora prywatnego*, Research by ARC Rynek i Opinia ordered by braf.tech, 2021, https://brief.pl/wp-content/uploads/2021/06/210609_Raport-z-badania-pracowniko%CC%81w_braftech.pdf (accessed 24 November 2021).

In addition, the option provided for in the PPWRBL Bill for an employer to introduce at their workplace an obligation to report other breaches than those referred to in the Bill needs to be outlined in more detail. The Bill is not clear about whether the reporting person will enjoy the same protection as a person reporting a breach listed in Article 3(1) of the PPWRBL Bill where an option is introduced at a workplace to report breaches other than those listed explicitly in the Bill, as well as whether reports of breaches of internal regulations or ethical standard should be proceeded in the same way as the breaches referred to in Article 3(1), including in the case of external reports. Due to the uncertainty of how to proceed in the case of an expanded report catalogue which exceeds the scope of the statute, employers may resign from such a solution in fear of additional obligations that they could avoid if the proposed wording of Article 3(2) did not apply. In my opinion, it is necessary to introduce additional regulations to eliminate the described concerns, including those based on which an employer will be able to decide whether a report made as described above should be proceeded in the statutory mode or the non-statutory one where the reporting person is not conferred the whistleblower status.

On the other hand, when comparing the material scope of the PPWRBL Bill and the one defined in the LBC Bill, it may be concluded that the material scope of the latter is defined too broadly. According to the LBC Bill, the scope is extended to cover the reports of suspicion of preparation, attempt or commitment of a prohibited act, failure to meet obligations or abuse of powers, failure to exercise due care and irregularities in the organisation of the operations of a body corporate which could lead to the commitment of a prohibited act (Article 11(1) of the LBC Bill). Such a material scope seems to be even too broadly defined. For example, many situations may be reported under the pretext of failure to exercise due care, which do not necessarily pose a danger to the public interest.

I would propose that the material scope be regulated so as to include irregularities that involve any actions dangerous to the public interest, any violations of generally applicable law, internal regulations or ethical standards applicable at an employer's organisation, without an exhaustive list of areas to which the breach of law pertains.[14] This would allow to ensure the highest protection possible and cover all breaches (including those disregarded in the PPWRBL Bill).

Another material issue regarding the regulations on whistleblowers is the scope of the protection. According to Directive 2019/1937, protection provided should include protection against all forms of retaliation. For the sake of example, only the following measures are named: dismissal, demotion and other retaliation forms (Article 19), as well as effective, proportionate and dissuasive penalties applicable to persons who retaliate against individuals reporting breaches (Arti-

[14] Whistleblower protection bill prepared by Batory Foundation, Helsinki Foundation for Human Rights, the Trade Union Forum and the Institute of Public Affairs, http://www.sygnalista.pl/projekt-ustawy/ (accessed 5 March 2019).

cle 23). Such a definition of the scope of protection guarantees security for whistleblowers while not closing the list of potential behaviours and covering all the possible repressions.

According to the PPWRBL Bill, retaliation may not be undertaken against a reporting person (Article 11), and the reporting person may not be treated unfavourably due to his or her report or public disclosure (Article 12). Unfavourable treatment includes but is not limited to behaviours such as refusal to establish an employment relation, termination of an employment relation with or without notice, reduction of salary, or withholding of or disregarding in promotion (Article 12). It is not an exhaustive catalogue of possible retaliation measures but only a list of examples. Furthermore, the ban on retaliation also covers facilitators (Article 21). However, the difference between 'retaliation' and 'unfavourable treatment' and the related protection measures and sanctions must be more precise. According to Article 2(2) of the PPWRBL Bill, retaliation is a direct or indirect action or omission caused by a report or public disclosure, which infringes or may infringe the rights of the reporting person and/or causes or may cause harm to the reporting person. Article 11 of the PPWRBL Bill provides for a ban on retaliating against the reporting person. Furthermore, Article 12(1) of the Bill provides for a ban on unfavourable treatment due to a report or public disclosure, while paragraph (2) lists examples of unfavourable treatment. Thus, a question arises whether all cases of groundless unfavourable treatment are at the same time retaliation (subject to a penal sanction) as well as whether there are other prohibited retaliation forms that don't constitute unfavourable treatment.[15]

In the Public Life Openness Bill (Article 66 and 67), whistleblowers are afforded only scarce protection against all possible retaliation forms of an employer. The whistleblower protection covers only a ban on contract termination by the employer, amendment of its terms and conditions to less favourable ones, and a refund of legal representation costs related to the incurred negative effects of a report. Thus, it does not take into account all the possible repressions, such as threats, disciplinary actions, disregarding in promotion or selection for education events, or isolating the whistleblower from other workers.

The LBC Bill, on the other hand, provides for an option to request a return to work, damages or other financial compensation if the whistleblower's worker rights have been infringed or the employment relation with him or her has been terminated (Article 13). Such a definition of the protection scope provides whistleblowers with an opportunity to abuse their rights, as the general term 'infringement of worker rights' offers an extensive field of interpretation.

In light of the above, I recommend that any forms of retaliation be banned and a non-exhaustive list of exemplary banned repressions be added. In my opin-

[15] Comments to the protection of persons who report breaches of law bill filed as part of social consultations by Law Firm Baker McKenzie https://legislacja.rcl.gov.pl/docs//2/12352401/12822851/12822854/dokument538127.pdf (accessed 7 April 2022).

ion, it is not advisable to include an exhaustive list of all banned repressions as it is difficult to predict all possible scenarios of employers' actions. I believe that the broadest range of protection is provided for by the solution proposed in the PPWRBL Bill, where a general ban on retaliating is set forth and the worker may not be treated unfavourably. In addition, a non-exhaustive catalogue of behaviours that may be considered as unfavourable treatment is added. However, the difference between 'retaliation' and 'unfavourable treatment' and the related protection measures and sanctions must be more precise.

Directive 2019/1937 also gives guidelines on how the Member States should regulate the issue of channels of informing about irregularities. According to the Directive (Articles 5 and 7), reporting persons should have an opportunity ensured to report abuses in their organisations to public authorities and the media, where the main reporting channel should be within the organisation. A whistleblower should first report information to his or her employer via internal reporting channels.

In exceptional situations, it is also possible to provide protection to a whistleblower who has disclosed information publicly, e.g. through social media, TV or newspapers. This is possible where one of the following two prerequisites is met:

(1) the whistleblower first used other reporting channels (as part of an internal procedure or to central/EU authorities) but this has not brought any results and the whistleblower has not received appropriate feedback within a specific time limit (either 3 or 6 months), or

(2) the whistleblower has reasonable grounds to believe that:

– the breach may constitute an imminent or manifest danger to the public interest, e.g. where there is an emergency situation or a risk of irreversible damage, or

– in case of making a report, he or she will be at risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.[16]

Such channels of reporting are in line with international standards and afford protection to whistleblowers in various situations. This is because it is impossible to establish one way of reporting which will appropriately protect the interest of all potential reporting persons. Directive 2019/1937 imposes an obligation on Member States to establish such channels of reporting irregularities that ensure the confidentiality of the identity of the reporting person, which is the very foundation of the whistleblower protection mechanism (Article 9). Such a guarantee stems from the international standards and is a necessary element of ensuring a sense of security.

[16] Article 15 of Directive 2019/1937.

In terms of reporting channels, both the Public Life Openness Bill and the PPWRBL Bill did not meet the international norms of irregularity reporting procedure. The Public Life Openness Bill provided that irregularities may be only reported to a prosecutor (Article 65(1)), whereas the PPWRBL Bill provided for a procedure of reporting to a management unit of a body corporate or to a person in charge of external oversight (Article 11). So, both the Bills failed to provide for a reporting procedure compliant with international standards, according to which a report should be first made within the organisation in which the whistleblower works. Next, if an internal report is impossible or no action has been undertaken, it is possible to make a report with public authorities (in particular regulatory and supervisory bodies, law enforcement agencies or state control and law protection agencies). And only then, as a last resort, is it possible to make a disclosure in the media. It might be considered that the PPWRBL Bill might have proposed such a solution as, according to the Bill, a report may be made within the organisation, to state authorities and by providing information about a breach of law to the public.

The PPWRBL Bill provides for an option of internal reports, which should be understood as provision of information about a breach of law to the employer, external reports, i.e. provision of information about a breach of law verbally or in the written or electronic form to the Commissioner for Human Rights or a public authority (which should be understood as head and central bodies of central government administration, field bodies of central government administration, state bodies with the exception of the Commissioner for Human Rights, executive bodies of local government administration, regional chambers of auditors, the Chief of the General Staff of the Polish Armed Forces and the Financial Supervision Authority[17]), and public disclosure (provision of information about a breach of law to the public). Importantly, the reporting person may make an external report without a previous internal report.[18]

Another aspect which guarantees protection to whistleblowers is the right to confidentiality. This right was infringed in the Public Life Openness Bill. According to Article 65(7) of the Public Life Openness Bill, a prosecutor was obliged to inform the employer that the whistleblower status has been conferred on a person employed by them. Such a solution not only meant the possibility to disclose a whistleblower's details but even the prosecutor's obligation to notify the employer of a received report. The Public Life Openness Bill completely failed to address the issue of confidentiality of whistleblowers' reports. Only the PPWRBL Bill provides for appropriate regulations on reporting confidentiality.[19]

[17] Article 2(6) of the PPWRBL Bill.

[18] Article 35 of the PPWRBL Bill.

[19] This regards both internal reports (Article 30 of the PPWRBL Bill) and external reports (Article 41 of the PPWRBL Bill).

Pursuant to Directive 2019/1937, a whistleblower should have reasonable grounds to believe that the information reported is true at the time of reporting and that such information falls within the scope of the Directive (Article 6(1)). The Directive provides for appropriate sanctions for mala fide whistleblowers; such a solution is aimed at providing protection only to persons who have reasonable grounds to believe that the information reported was true at the time of reporting and that such information fell within the scope of the Directive (Article 23(2)). This is because the Directive's aim is to protect persons reporting irregularities, not reports of detrimental or offensive nature or those aimed at groundless reputation damage. However, reporting persons deemed to have acted maliciously will be subject to a presumption of innocence and will have the right to a fair hearing, the right to defence and access to a fair trial (Article 22(1)). The bona fide requirement is to prevent situations where protection is afforded to persons who made a malicious report, only to harm the entity subject to the report.

The whistleblower protection proposed in Directive 2019/1937, in the vast majority of its solutions, provides very broadly defined protection and has been governed comprehensively; it remains merely a minimum standard though. The Commission encourages the Member States to expand the protection by establishing a comprehensive whistleblower protection system and to go beyond the minimum standards guaranteed in the Directive.

Certainly, actions aimed at promoting whistleblowers and whistleblowing programmes are of essential meaning. It is important to raise society's awareness about the options provided for in the statutes protecting whistleblowers. It is necessary to provide for an effective legal system guaranteeing appropriate protection to a whistleblower. In order to ensure a possibly broad protection, i.e. a possibly broad definition should be developed of the material scope of breaches subject to reporting as well as of the personal scope. Another material issue is also the provision of possibly multiple channels of reporting (inside an organisation, to public authorities and to the media). It is legislators who are burdened with the obligation to provide appropriate protection to whistleblowers.

However, in order to foster a culture of reporting irregularities, it is essential to change the way of thinking and the image of whistleblowers in society. It is necessary to transform the image of a whistleblower and fight stereotypes and the identification of whistleblowing with denunciation. In my opinion, the perception of a whistleblower by society is one of the biggest problems and factors preventing people from reporting irregularities. It is essential to build the appropriate awareness and treat information shared by whistleblowers as acting in the public interest rather than denouncing or intending to harm somebody.[20] Without chang-

[20] M. Kutera, *Whisteblowing jako narzędzie wykrywania oszustw gospodarczych*, Faculty of Management and Social Communication, Jagiellonian University, http://kolegia.sgh.waw.pl/pl/KZiF/czasopisma/zeszyty_naukowe_studia_i_prace_kzif/Documents/Malgorzata%20Kutera.pdf (accessed 23 February 2020).

ing the patterns of how society thinks and perceives whistleblowers, ensuring even the broadest protection for people reporting irregularities will not significantly boost the number of reports.

CONCLUSION

To sum up the above analysis of the Bills, I believe that both the Public Life Openness Bill and the LBC Bill in the proposed wording would not provide sufficient protection to whistleblowers. The PPWRBL Bill, on the other hand, deserves positive evaluation, it is necessary, however, to introduce certain amendments, particularly with regard to the scope of protection (the material scope) to cover the broadest possible scope of potential reports.

The conducted analysis proves, however, that the mere implementation of the PPWRBL Act is not sufficient to increase the popularity of whistleblowing in Poland. As results from research carried out by the Compliance Institute, as many as 42% of the interviewed compliance officers pointed out that irregularity reporting is found improper in the Polish culture, even if it is done in good faith. In my opinion, this is caused by the fact that a whistleblower in Poland is a person perceived in a negative light as a denouncer, or informant.[21] I believe the problem with the perception of whistleblowers in Poland is rooted in our historical experience and a lack of trust in society and the state deeply instilled in us by the partitions, occupations and communism. In the literature on the subject, it is underlined that the attitude to whistleblowing is inextricably linked to the mentality of a society and that the societies of the former socialist bloc have a bigger problem with accepting whistleblowing as something evaluated positively.[22]

Therefore, in order to promote a culture of reporting irregularities it is necessary to build a culture of acceptance for whistleblowers. Common actions must be undertaken both by business owners, who should raise awareness among their employees, and through the involvement of trade unions which should guard the regulations introduced by employers.[23] Worthy of note are also the results of the conducted research, which shows a clear difference between a mostly pos-

[21] *Raport Compliance w Polsce 2021. Systemy zarządzania zgodnością: między pandemią a nowym ładem*, Compliance Institute and Wolters Kluwer Polska, under the auspices of Viadrina Compliance Center at the European University Viadrina, 2021.

[22] D. Tokarczyk, *Wprowadzenie. Whistleblowing jako problem prawny, organizacyjny (korporacyjny) i etyczny* (in:) *idem*, *Whistleblowing i wewnętrzne postępowania wyjaśniające*, Warsaw 2020.

[23] A. Wojciechowska-Nowak, *Skuteczna ochrona prawna sygnalistów. Perspektywa pracodawców, związków zawodowych oraz przedstawicieli środowisk prawniczych*, Batory Foundation, Warsaw 2014, p. 3.

itive evaluation of reporting bribery to a supervisor and the share of respondents, which is lower by as many as 39 percentage points, that they would do the same themselves. This difference in approach shows that respondents are aware that whistleblowing, although justified by the ethical and legal norms they know, may involve negative consequences for the whistleblower. The respondents admit that moral rightness lies with whistleblowers, that if they act in good faith and in the public interest they deserve broad legal protection, but nevertheless they themselves would often resign from reporting an irregularity. It is not only about the consequences from the employer but also the social aspect and reactions of co-workers to the report, such as ostracism from co-workers, isolation, verbal and non-verbal signs of aversion as well as a sense of lack of acceptance.[24] These concerns are clearly visible in the respondents' answers to the question of what, in their opinion, would be the reaction of their co-workers to a whistleblower reporting corruption at the workplace to the employer. The three most popular answers, chosen by 55% of the respondents, included only those with negative overtones. Definitely fewer people (15%) expressed a belief that a whistleblower would enjoy rewarding reactions, including as few as 2% of respondents expecting the defence of the whistleblower against the supervisor. Expectations of 10% of the respondents were that the attitude of the people towards the whistleblower would not change after his reporting a breach of law committed by a co-worker.[25]

Considering the results of the research described above and the fact that the most sceptical group about the treatment of a whistleblower by co-workers has turned out to be students, who in nearly 70% have responded that there would be ostracism at the workplace,[26] it seems that relevant education should be carried out not only in businesses but also at schools. It would be advisable to raise awareness about whistleblowing in society and form its positive image early enough, as well as to start education about values, and show the difference between just and unjust behaviours and about social attitudes.[27] I believe it is necessary to introduce in curricula, at all levels of education, ethics lessons, which would discuss the topics of common good and attitudes towards law and civic life.[28]

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[24] D. Głowacka, A. Płoszka, M. Szczaniecki, *Wiem i powiem. Ochrona sygnalistów i dziennikarskich źródeł informacji*, Warsaw 2016, pp. 27–28.

[25] G. Makowski, M. Waszak, *Gnębieni, podziwiani i... zasługujący na ochronę. Polacy o sygnalistach. Raport z badania opinii publicznej*, Batory Foundation, Warsaw 2019, https://www.sygnalista.pl/wp-content/uploads/2019/06/Internet_Raport_sygnalisci_12-06.pdf (accessed 7 April 2022).

[26] *Ibidem*.

[27] According to the interpretation of Andrzej Powałowski, justice in business activity is understood as business owners complying with the requirements of the applicable law (just means in accordance with law). See A. Powałowski, *Sprawiedliwość społeczna a wsparcie udzielane przedsiębiorcom* (in:) *Aksjologia publicznego prawa gospodarczego*, A. Powałowski (ed.), Warsaw 2022.

[28] G. Makowski, M. Waszak, *Gnębieni, podziwiani...*

Poles' approach to awarding whistleblowers is equally interesting. A report about compliance in Poland shows that nearly 60% of the respondents rejected the idea of awarding whistleblowers for providing information.[29] Despite such a negative approach in Polish society, I believe that introducing awards for whistleblowers would be advisable in order to popularise whistleblowing. In my opinion, however, such measures should be introduced only after conducting appropriate social campaigns about whistleblowers. It is worthy of note that whistleblowing awarding works well in the US and UK.

An awarding system shows how important is the whistleblowers' role in disclosing, investigating and charging illegal and unethical behaviours. Financial awards help reduce reporting persons' fears of community ostracism (and the related need to change the job) and help raise awareness among other workers by promoting ethical behaviours and those aimed at the good interest of the business.[30] Let us note that owing to whistleblowers and information provided by them it is possible to minimise the negative effects of illegal and unethical behaviours.

To summarise the above considerations, let me note that it is necessary for Poland to undertake actions as soon as possible to implement the EU Directive aimed at protecting persons reporting breaches of law. Unfortunately, in my opinion, the mere implementation of the PPWRBL Act will not suffice to increase the popularity of whistleblowing. In order to increase the number of reports made by whistleblowers it is requisite to start a social campaign aimed at raising awareness among Poles about whistleblowers and acting in the public interest. Such actions should be undertaken, among others, by social organisations. Undoubtedly, it will also be necessary to launch an information campaign in organisations, institutions and schools. Taking account of the variety of target groups, i.e. workers, their superiors and management, taking account of the varied education, industry and age (in the case of schools), it is crucial to provide information which is most adequate to their role in the whistleblower protection policy. The basic goal must be to disseminate knowledge about new regulations, including what and whom to report to, what reports are legally protected, what such protection involves and the fact that, by reporting irregularities, we act in the public interest.[31] A shift in thinking is needed here to stop treating whistleblowing as denunciation or activity aimed at revenge or obtaining some benefits by the whistleblower. In my opinion, a barrier to increasing the popularity of whistleblowing in Poland is not only the lack of appropriate regulations but also, and maybe even most of all, the Polish mentality and the stereotypes deeply rooted in the society. This is why legislation activity aimed at implementing Directive 2019/1937 should be undertaken in par-

[29] *Ibidem*.

[30] P. Chmiel, *Sygnalizowanie nieprawidłowości (whistleblowing)*, "Przegląd Antykorupcyjny CBA" 2016, No. 2, p. 42

[31] G. Makowski, M. Waszak, *Gnębieni, podziwiani*...

allel with information campaigns to build a positive narrative around the role of whistleblowers in society.[32]

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Michał Tutaj[*]
University of Warsaw, Poland
e-mail: m.tutaj@wpia.uw.edu.pl
ORCID: 0000-0002-4904-7876

ISLAM AND INTERESTS. REMARKS ON TURKISH CIVIL LAW AND RECENT TURKISH MONETARY POLICY

Abstract

This article is intended to depict the historical approach to interests in Turkey and in the Ottoman Empire as well as to describe the current the Turkish interest-related legal framework and its historical changes. This is to verify whether the recent governmental rhetoric and turn to Islam anyhow affect the shape of the Turkish civil law. To do so, the article refers to the Swiss private law (as a "donor" legal system for Turkey) and the Ottoman laws and customs related to charging interests.

The reason for such examination is due to Turkey's latest non-conventional monetary policy. Namely, despite high inflation, the central bank does not increase interest rates. At the same time, the Turkish President makes statements that any interests are not compliant with Islam and the holy texts ban making interest-bearing transactions. This context makes checking the shape of the Turkish private law particularly interesting for comparative private law researchers.

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KEYWORDS

Turkey, interests, Islam, interest rates, civil law, comparative law

SŁOWA KLUCZOWE

Turcja, odsetki, islam, stopy procentowe, prawo cywilne, prawo porównawcze

INTRODUCTION

The primary aim of this article is to examine the complicated relations between Islam, statue-based private law, and the needs of the current economic system. For this reason, I would like to take a closer look at the crucial – at least from the economic perspective – legal institution of law obligations, i.e. interests.

Charging interests has been problematic in the history of many societies since ancient times.[1] The problem of debts and accruing interests resulted in the Solon reforms in Athens. The writings of Aristotle explored the conception that money is merely a legal tender. Consequently, money is a sterile thing that cannot bear further money.[2] Thus, it is not surprising that three great monotheistic religions – Christianity, Judaism, and Islam refer to taking interests in their Holy Books and the problem of interests has been explored by scholars of those religions as well.[3] As explained below, the discussion on charging interests is still of great significance in Islam.

This article's perspective is focused on Turkey. This choice is not accidental, as Turkey is one of the best examples of the complicated relations between state, society, law, and religion. Turkey is the country which experienced one of the most radical changes in its legal system, including the extraordinary changes

[1] Briefly in this regard see F. Alperen, *La Differenciation de L'Interet en Droit Turc et en Droit Suisse,* Lausanne 1947, pp. 8-13; also H. Elbir, *Fahiş faiz meselesi: (tarihte ve Türk hukukunda),* "Istanbul Üniversitesi Hukuk Fakültesi mecmuası", Vol. 18, No. 3-4, 1952, pp. 855-859.

[2] For more on classic writings in this regard, see B. Dankowska-Prokop, *Pieniądz i procent w rozważaniach Przedstawicieli antycznej i średniowiecznej myśli ekonomicznej*, "Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach", No. 334, 2017, pp. 23-27; W. Visser, A. McIntosh, *A Short Review of the Historical Critique of Usury, "*Accounting, Business & Financial History", Vol. 8, No. 2, 1998, pp. 176-177.

[3] On interests in Judaism , see e.g. A. Shaikh Mahmud, *Judaism and Interest*, "Islamic Studies" Vol. 20, No. 1, 1981, pp. 47–82; the comprehensive explanation of the phenomenon in Christianity, see e.g. J. T. Noonan (jr.) *The Scholastic Analysis of Usury*, Harvard 1957; J. Burke, *The Scholastic Analysis of ZIRP: Justice, Usury, and the Zero Interest Rate Policy,* "Journal of Markets & Morality", Vol. 17, No. 1 2014, pp. 105-124.

in the field of private law in the 1920s. The scope – and method – of changes have been so distinctive and irrespective of social factors (e.g. religion) that many scholars describe Turkey as one of the most distinctive examples of legal transplantations.[4] On the other hand, the current political establishment in Turkey emphasizes Turkey's Islamic roots and openly admits that Islam should play a role in the decision-making process and legislation. As a confirmation of that, in recent months, we could see references to Islam in the process of implementing Turkish monetary policy.

Thus, to elaborate on relations between Islam, statue-based private law, and the needs of the current economic system, I would like to set up the following structure. In the first section, I will briefly present the latest economic difficulties of Turkey together with the narration on interest rates. The second section will elaborate on interests in Islam. In the third one, I will shortly discuss the Turkish and Ottoman legal history and the State-Islam relation as well as the approach to interests in the Ottoman period. The fourth section will be on interests in the current private law of the Turkish Republic. The last section will contain conclusions and other remarks.

1. TURKISH ECONOMY AND MONETARY POLICY

Recep Tayyip Erdoğan motivated the introduction of the presidential political system in Turkey by saying that it would allow him to revive the economy.[5] However, for some time, Turkey has been experiencing severe economic difficulties, at least from the monetary perspective. As of January 2024, the official inflation rate (i.e. consumer price index – *Tüketici Fiyat Endeksi*) reached 64.86% year to year,[6] but in the past, the numbers were even higher – e.g. in November 2022, the index was 85.51% year to year.[7] Unofficial calculations provided by academics belonging to the Inflation Research Group (ENAGrup) are even worse as they

[4] See e.g. A. Watson, *Legal Transplants and European Private Law*, Ius Commune Lectures on European Private Law, 2006, pp. 6-8, http://awf.ius.bg.ac.rs/legal_transplants.pdf (accessed 22 February 2024); A. Watson, *Legal Transplants. An Approach to Comparative Law*, Athens 1993, p. 98.

[5] A. Spancerska, *Problemy gospodarcze Turcji a polityka zagraniczna,* "Biuletyn Polskiego Instytutu Spraw Międzynarodowych", No. 149, 2022, https://www.pism.pl/publikacje/problemy-gospodarcze-turcji-a-polityka-zagraniczna (accessed 22 February 2024).

[6] Data provided by the Turkish Institute of Statistics – https://data.tuik.gov.tr/Bulten/Index-?p=Tüketici-Fiyat-Endeksi-Ocak-2024-53622&dil=1 (accessed 22 February 2024).

[7] Data provided by the Turkish Institute of Statistics – https://data.tuik.gov.tr/Bulten/Index-?p=Tuketici-Fiyat-Endeksi-Ekim-2022-45799 (accessed 22 February 2024).

indicate 129.11% (as of January 2024) year to year[8] as a more probable inflation score. As of 27 November 2022, the Turkish currency (i.e. Turkish Lira) is at historically low levels – 1 EUR is worth 33.6058 and 1 USD is worth 30.977 (as of 22 February 2024).[9] The unemployment rate and the export and gross domestic product growth indexes remain at moderate or positive levels, but still, the inflation rate increase and decline of the Turkish lira have been dramatic in recent years. The harsh inflation results in increasing numbers of young people wanting to settle abroad and in protests among workers.[10]

One can say that this could be just one – although quite extreme – of the cases of war- and Coronavirus-related economic turmoil the world has been experiencing since 2022. However, in the case of Turkey, the story is a bit different given that Turkey has been coping with the steady devaluation of the lira since at least 2012. The inflation rate was high in 2018 (reaching the peak of 25.24% in October), then it dropped to 10-20%, but since November 2022 the dynamic of increases has sky-rocketed (e.g. the index jumped from ca. 36% to ca. 49% between December 2021 and January 2022). Thus, the phenomenon is not new.

There are multiple macroeconomic factors that may be blamed for the above-described turmoil. However, one of the most exposed in media is the specific, "contrarian" Turkish monetary policy. The generally accepted approach among economists is that central bank interest rates should be increased in order to combat inflation by incentivizing trading participants to make savings.[11] However, the Turkish President, Recep Erdogan, has been expressing the opposite opinion and pushing to further lowering the Central Bank interest rate (at least till June 2023 when the rate started to rapidly go up). The resistance presented by the Central Bank policymakers, leaning towards the more conservative approach to interest rates, for a long time, was ineffective in blocking the "Erdoganomics". Many of them have been dismissed in recent years – for example, Murat Çetinkaya in 2019[12] and Naci Agbal in 2021.[13]

There may be multiple reasons for keeping the interest rates low even despite very high inflation. Some may say that incentivizing exports and concentrating on the gross domestic product is just more important for the government than combating inflation. However, it seems that the "unorthodox" monetary policy may have also other roots – the Islamic belief that interests are forbidden in

[8] ENAGrup Consumer Price Index (E-CPI) for January 2024 – see https://enagrup.org/?hl=en (accessed 22 February 2024).

[9] Data provided by Yahoo Finance – https://finance.yahoo.com/currencies/?.tsrc=fin-srch (accessed 22 February 2024).

[10] A. Spancerska, *Problemy...*

[11] R. Scott, *Inflation Targeting Turns 20*, "Finance & Development", 2010, pp. 46-49.

[12] https://www.economist.com/finance-and-economics/2019/07/11/recep-tayyip-erdogan-sacks-the-head-of-turkeys-central-bank (accessed 22 February 2024).

[13] https://www.cnbc.com/2021/03/22/turkeys-lira-plunges-after-erdogan-sacks-central-bank-chief.html (accessed 22 February 2024).

the light of Islamic law (also known as *sharia*[14]). Indeed, in the speech made on 17 November 2021, we could hear Recep Erdogan say:

"I am saying clearly and openly, interest is the cause of inflation. I am saying to those who try to twist it into something different do not try in vain, we will release the back of this nation from the scourge of interest. […] You are seeing what inflation has brought us here. What is happening to our friends. As long as I am in office, I will continue my struggle against interest until the end, and I will keep combating inflation. We must know that *nass* is in this topic. Since *nass* is there, what is up to you or me? Why don't we look at this thing from the perspective of the values of our lineage? We will look at this thing from this perspective and take our steps accordingly".[15]

What is important, the cited passage makes a reference to *nass* which is the Arabic term translatable into "canonical, written text" appearing in the Quran or Sunnah[16] as opposed to rules that are not canonical and unconfirmed in writing.[17] As a side note, it is worth noting that a very similar message was delivered in December 2021 as well[18] and a general anti-interest approach was taken even before.[19] At that time, we could hear Erdogan saying "As a Muslim, I'll continue to do what is required by *nass*".

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[14] In this manuscript, I understand *sharia* as an equivalent of "Islamic law", even though from a linguistic perspective, *sharia* can have a broader meaning – for more details see: S. Vesey-Fitzgerald, *Nature and Sources of the Shari'a* (in:) M. Khadduri, H. Liebensky (eds.), *Law in the Middle East*, Washington 1955, pp. 85-112. Please also note that translation of Arabic terms into English and fitting them into the Western conceptual framework are always to some extent flawed; some interesting attempts to define "sharia", "Islamic law", "Islamic jurisprudence" see M. Sadowski, *Islam. Religia i prawo,* Warsaw 2017, p. 188.

[15] *Açık ve net söylüyorum, faiz sebeptir, enflasyon neticedir. Bunu farklı yere çevirme gayretine diyorum ki, boşuna uğraşmayın, biz faiz belasını bu milletin sırtından kaldıracağız.* […] *Enflasyonun buralarda ne hale geldiğini görüyorsunuz. Bizim arkadaşlarımıza ne oluyor. Bunu görevde olduğum sürece faizle mücadelemi sonuna kadar sürdüreceğim, enflasyonla mücadelemi sürdüreceğim. Şunu bilmemiz lazım, bu konuda Nas ortada. Nas orda olduğuna göre sana bana ne oluyor. Biz değerler silsilemiz içinde olaya buradan niye bakmıyoruz? Olaya buradan bakacağız ve adımımızı ona göre atacağız.* Cited from https://www.karar.com/guncel-haberler/son-dakika-erdogandan-grup-toplantisinda-kritik-aciklamalar-1639765 (accessed 22 February 2024). All translations from Turkish are made by myself.

[16] K. Vikor, *Between God and the Sultan. A History of Islamic Law*, New York 2005, pp. 53; J. Schacht, *An Introduction to Islamic Law*, Hong Kong 1982, p. 90. More on Sunnah and Quran as sources of Islamic law – see K. Vikor, *Between*…, pp. 53-88; B. Prochwicz-Studnicka, *Usul al-fi qh. Czym są klasyczne sunnickie „korzenie/podstawy wiedzy o prawie"?*, Czasopismo Prawno-Historyczne, Vol. 65, No. 1, 2013, pp. 11-51.

[17] R. Peters, P. Bearman (eds.), *The Ashgate Research Companion to Islamic Law*, New York 2016, p. 14.

[18] See https://www.bloomberg.com/news/articles/2021-12-19/turkey-s-erdogan-says-islam-demands-lower-rates-and-so-does-he (accessed 22 February 2024).

[19] Briefly J. Lechner, A. Erdemir, *Conspiracy and cronyism: Turkey's economic spiral,* https://www.lowyinstitute.org/the-interpreter/conspiracy-cronyism-turkey-s-economic-spiral (accessed 22 February 2024).

By mentioning *nass*, Erdogan makes a clear reference to the rules of *sharia*. This is not very surprising given that Islam has been always in Erdogan and his mother party (AKP – Party of Justice and Progress) agenda. Both Erdogan and AKP acquired popularity in the 2000's as the opposition towards the more secularly oriented (and in some cases Kemalist) parties.

By using the *sharia*-based term Erdogan clearly refers to the Islamic ban on interests. Thus, I would like to elaborate shortly on this Islamic ban on interests.

2. INTERESTS IN ISLAM

Islam emphasizes the need to eradicate any discord and abuse between people,[20] so it is not surprising that the problem of interests closely connected to falling into debt was discussed from the beginning of this religion. That is why the issue of interests in Islam is deeply rooted in the Quran as well as in the Sunnah (i.e. the histories from the life of Muhammad and his companions).

For example in the Quran, we can read:

Those who consume interest will stand ˹on Judgment Day˺ like those driven to madness by Satan's touch. That is because they say, "Trade is no different than interest (riba)." But Allah has permitted trading and forbidden interest (riba). Whoever refrains – after having received warning from their Lord – may keep their previous gains, and their case is left to Allah. As for those who persist, it is they who will be the residents of the Fire. They will be there forever.

Allah has made interest (riba) fruitless and charity fruitful. And Allah does not like any ungrateful evildoer. [...]

O believers! Fear Allah, and give up outstanding interest (riba) if you are ˹true˺ believers. (2:275-279, *the Cow*[21]).

In Sunnah, there are some additional explanations to understand what is covered by the ban. For example, in one of the most popular collections of *hadiths*, the following words of the prophet are cited:

The Prophet said, "The selling of wheat for wheat is riba (usury) except if it is handed from hand to hand and equal in amount. Similarly, the selling of barley for barley is riba except if it is from hand to hand and equal in amount, and dates for dates is usury except if it is from hand to hand and equal in amount".[22]

The English translation shows the main issue related to the interest ban – the meaning of the term *riba* strongly condemned in the sources above. Some

[20] H. Elbir, *Fahiş...,* p. 859.

[21] Translation as provided at https://quran.com/2 (accessed 22 February 2024).

[22] Sahih al-Bukhari, book 34, hadith 121, translation as provided at https://sunnah.com/bukhari (accessed 22 February 2024).

authors tend to translate it into "usury" which in our everyday understanding means usually morally wrong loaning practices (i.e. taking too high interests). For other translators, *riba* is the equivalent of any type of interest, since the quoted *hadith* bans all transactions that result in receiving more commodity (wheat, silver, dates, etc.) upon some time than the commodity given. The discussions on what is and what is not *riba*, and whether it can be spread over other types of contractual exploitation are vast in the history of Islamic jurisprudence.[23] Thus, describing them in detail exceeds the framework of this manuscript. However, equating interest with *riba* seems to become the dominant opinion and is often described as the orthodox position.[24] As such, it was used to create the idea of Islamic economics allowing to defend Islamic civilization against foreign influences.[25] It later fueled the dynamic development (from the 1970s) of the industry of Islamic banking – the sector of entities providing interest-free financial services. The interests are replaced by traditional or new legal devices allowing to "replace" interests with other payments covering the gain of the financing entity. The whole structure is usually based on profit-loss sharing mechanisms (e.g. in the contract of specific partnerships – *mudarabah* and *musharaka*) or some types of leasing (e.g. *ijara* and *murabha*).

The orthodox approach was expressed for example in the well-known *riba* judgment of the Supreme Court of Pakistan issued in 2002.[26] A similar view can be seen in resolution No. 13 dated 16 October 1986[27] of the Council of the International Islamic Fiqh Academy (a subsidiary organ of the Organization of Islamic Cooperation).

Nevertheless, it is worth noting that many writers find the orthodox approach incorrect. Some of them say that the Quranic *riba* is related to specific practices of the pre-Islamic Arabia (i.e. doubling the debt of a borrower upon his default in repayments).[28] Thus, it has little in common with current financial services and

[23] Shortly in this regard see e.g. M. Farooq, *The Riba-Interest Equation and Islam: Reexamination of the Traditional Arguments*, "Global Journal of Finance and Economics", Vol. 6, No. 2, 2009, pp. 99-111; B. Seniawski, *Riba today: Social Equity, the Economy, and doing Business under Islamic Law*, "Columbia Journal of Transnational Law", Vol. 39, 2001, pp. 701-728, E. Richardson, *The Shari'ah Prohibition of Interest,* "Trinity Collage of Law Review", Vol. 11, 2008; M. Noorzoy, *Islamic Laws on Riba (Interest) and Their Economic Implications*, "International Journal of Middle East Studies", Vol. 14, No. 1, 1982, pp. 3-17.

[24] H. Sharawy, *Understanding the Islamic Prohibition Of Interest: A Guide To Aid Economic Cooperation Between The Islamic And Western Worlds*, "Georgia Journal of International and Comparative Law", Vol. 29, 2000, p. 163, also M. Farooq, *The Riba-Interest…,* pp. 100-101.

[25] T. Kuran, *Islamic Economics and the Islamic Subeconomy*, "The Journal of Economic Perspectives", Vol. 9, No. 4, 1995, p. 156.

[26] Part of this judgment is available in English in the journal: *Review Judgement on Ribā: The Supreme Court of Pakistan (Sharī'at Appellate Bench)*, "Islamic Studies", Vol. 41, No. 4, 2002, pp. 705-724.

[27] Available at https://iifa-aifi.org/en/32245.html (accessed 22 February 2024).

[28] See e.g. T. Kuran, *Islamic …*, pp. 156-157.

products. Others also claim that the ban covers only excessive interests (*riba* = usury), so the reasonable ones are compliant with *sharia*.[29] Thus, modern bank rates and saving bonds are permitted by law (see, e.g. opinion of the rector of the al-Azhar University[30]). For many also, the use of interests, even by a pious Muslim, can be justified by the principle of necessity because the interest-based system has now become a universal necessity and no country or person can live without it.

To sum up this section, the equation between *riba* and interests is the dominant opinion among Islamic jurists nowadays. This results in a ban on interests instead of their reduction in numbers. Nevertheless, as explained below, in the history of Islam, the orthodox approach was not commonly accepted and the practice of charging interests was popular. The history of the Ottoman Empire proves it clearly.

3. INTERESTS IN THE OTTOMAN TIMES

The predecessor of the Republic of Turkey was the Ottoman Empire. It was ruled by a sultan whose official titles included also *padishah*, *khan*, emperor and – the most distinctive one – *caliph*. Although the Ottomans' legal right to the title of *caliph* (the Ottomans had no set blood ties with former Arab *caliphs*) was controversial and, for a long time, not frequently used,[31] its application tells us something about the nature of the Ottoman state. Whereas the title of *sultan* has always had a military- and power-rooted connotation, *caliph*, on the other hand, was understood as the leader of the Muslims. Thus, its use stressed the meaning of Islam in the Ottoman state. Indeed, the Ottoman Empire was the Islamic state in which Islamic law (*sharia*) played an important role among Islamic subjects.[32] It regulated a great part of social interactions and in many aspects, *sharia* was directly applicable (e.g. in family law), since – as mentioned above – the scope of

[29] M. Farooq, *The Riba-Interest…,* pp. 100-103.

[30] N. Çağatay, *Ribā and Interest Concept and Banking in the Ottoman Empire*, "Studia Islamica", No. 32, 1970, p. 68.

[31] C. Imber, *Imperium Osmańskie* [translated by P. Zarawska], Cracow 2018, p. 165. In fact, it was rediscovered in the 18th century when there was a political need to retain some type of formal but ineffective supervision over Crimean Tatars after the Russian conquest – see S. Shaw, *Historia Imperium Osmańskiego i Republiki Tureckiej. Vol. 1,* pp. 1280–1808 [translated by B. Świetlik], Warsaw 2016, p. 148.

[32] Non-Muslims were grouped, according to their belief, in *millets* – communities governed by local religious authority and having wide autonomy (including their own legal system and judiciary). In addition, foreigners were often subject to capitulations – special privileges enabling foreign powers to execute jurisdiction over their subjects.

sharia is quite extensive and covers also matters that – from a Western perspective – seem loosely related to religion.

The modernizing reforms of the 19th century (known as the *tanzimat* reforms) did not change the landscape. Even though this period is marked by the wave of Western-inspired reforms (including the implementation of several legal codes), aiming at the creation of a modern nation-like Ottoman identity, the role of Islam was not changed significantly. This is clearly visible in the example of *Mecelle*. This the so-called "Ottoman civil code",[33] which, in fact, was not a modern code (it regulated only some areas of law, mainly the law of obligations), in its first Article indicates that this act of lawmaking comes from God and is a kind of excerpt from works of Islamic jurisprudence (namely, Hanafi legal school).[34] This – rather conservative – method of reformation of civil law prevailed over the idea of the creation of a less religion-related and more "Western" civil code.

However, even though Islam set up the legal framework, the situation with charging interests was problematic. As sources show, charging interests was very common in the 17th century Ottoman towns,[35] even if it was primarily hidden under the application of *istiğlal*. This institution consisted of the sale of a given good by a "borrower" for a given sum ("borrowed sum") to a "creditor". Immediately after this, the good was rented, for example, for a year. The rent tranches were hiding the interests of the creditor, even though from the formal perspective this gain had a different legal title (i.e. paying rent). As mentioned above, the toleration for *hila* (traditional legal device) to conceal interest-bearing loans was met in *sharia* literature. However, their acceptance in the Ottoman society and among the Ottoman jurists was further-reaching. The Ottoman-time jurists in many contexts simply used names of classical institutions used to test the limits of interest ban as a substitute for simple interests.[36] The use of *istiğlal* was so common and

[33] In my opinion, when it comes to *Mecelle*, the term codification – in its proper meaning – should not be used. This is because *Mecelle* does not meet the criteria of codification as a legal act that attempts to be coherent, holistic (i.e. covering all aspects of a given branch of law) and put in systematic order. *Mecelle* lacks this systematic order and is not holistic. Nevertheless, *Mecelle* is commonly described as the "Ottoman civil code". For more on codification criteria, see e.g. T. Giaro (in:) W. Dajczak, T. Giaro, F. Longchamps de Berier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warsaw 2009, p. 81; J. Rudnicki, *Dekodyfikacja prawa cywilnego w Polsce*, Bielsko-Biała 2018, pp. 24-29.

[34] Article 1: *The science of Islamic jurisprudence consists of a knowledge of the precepts of the Divine Legislator in their relation to human affairs.*[…] *As regards the section dealing with civil obligations, the questions which are of the most frequent occurrence have been collected together from reliable works and set out in this Code in the form of Books [...]* – cited from https://www.iium.edu.my/deed/lawbase/al_majalle/al_majalleintro.html (accessed 22 February 2024).

[35] H. Gerber, *State, Society, and Law in Islam,* Albany 1994, p. 100.

[36] H. Gerber, *State...*, p. 101.

the acceptance of interests was so wide that *murabha*, in its classical meaning[37] of the classical institution used to circumvent the interest ban, disappeared[38] in the Ottoman Empire and, instead, it was understood as the profit gained in an economic transaction, including the interest demanded in loan transactions.[39] Moreover, in more contemporary times, in the Turkish language, we can see the distinction between acceptable interests described by the word *faiz* in contrast to usury interests being *riba*.[40]

What is more, the analysis of *fetvas* (i.e. legal opinions) shows that judges (*kadi*) and jurists (*mufti*) accepted the practice of lending money with *isirbah* (meaning "interests").[41] So, it becomes apparent that "interests", despite the *sharia* ban, were becoming more and more tolerable both in commercial practice and in the reality of courts. What is more, *muftis*, in their legal opinions, sometimes even suggested that persons agitating against reasonable interests should be punished. It can be reasoned by the fear of rifts and commotion among the local population.

This admissibility may be also due to the fact that one of the previous *kanuns* and *firmans* (i.e. sultan legislation) accepted taking interests in the amount of max. 10% annually (max. 15%-20% for some commodities[42]). The numbers were generally the same as the numbers accepted by *muftis*. Charging interests in the excess of 15% could have been punished – e.g. Sultan Ahmet (living between the 16th and 17th century) ordered such usurers to be sent to jail and to galleys.[43] Therefore, when comparing the Ottoman approach to interests with the approach of classical Islam, it appears that Ottoman society was much more accepting towards interests. The government itself took interest-bearing loans from Galata bankers.[44] This is well reflected in one of the works of Nabi, the 16th-17th century poet, who wrote: "To make a living in provinces, engage in commerce, agriculture or interests (*riba*)".[45]

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[37] A contract used to create a financing structure in which the seller and buyer agree to the cost and markup of an asset. The markup takes place of interest that makes it an acceptable form of credit sale under Islamic law.

[38] H. Gerber, *State*..., p. 205.

[39] M. Berber, *From interest to usury: The transformation of murabaha in the Late Ottoman Empire*, 2014, https://acikbilim.yok.gov.tr/handle/20.500.12812/632225 (accessed 22 February 2024), p. 1.

[40] N. Çağatay, *Ribā*…, p. 68.

[41] N. Çağatay, *Ribā*..., pp. 61-64; H. Gerber, *State*..., pp. 105-106.

[42] H. Inalcik, *Capital Formation in the Ottoman Empire*, "The Journal of Economic History", Vol. 29, No. 1, 1969, p. 106, 139. Nevertheless, Çağatay is more strict and indicates that 15% was the absolute maximum of acceptable interests – see N. Çağatay, *Ribā*..., p. 64.

[43] N. Çağatay, *Ribā*..., p. 65.

[44] H. Elbir, *Fahiş*…, p. 866.

[45] Nâbî, *Hayriyye*, Ankara 2019, verse 416, p. 76.

In addition, in Ottoman towns, there were multiple Ottoman-specific[46] *waqfs* (i.e. pious foundations) devoted to supplying credit to the public; known also as cash *waqfs*. *Waqfs'* traditional function was to manage public utility areas and buildings (such as caravanserais or mosques) and accumulate resources for this purpose. The accumulation of resources was usually based on immovable endowment allowing to generate income.[47] However, the donation of cash to create a cash pool that could be utilized for providing credits for people was rather unusual from the perspective of tradition and classical Islam teachings on interests as well as on pious foundations. The existence and maintenance of cash *waqfs* was in practice impossible without generating income from its activity (i.e. charging interests on loans). Nevertheless, in the 16th century, the Ottoman *şeyhülislam* (the great *mufti*) without much hesitation confirmed that cash *waqfs,* despite some opinions against them, should be permitted due to their popularity and irrevocability among the population of the European part of the Ottoman Empire and due to the Hanafi acceptance of using some movables to establish *waqf*.[48] The scholars of that time also claimed that the admissibility of cash *waqfs* is better suited to the reality of contemporary society. After some time, the cash *waqfs* were fully legitimized by the legal and political system of the empire.[49]

The acceptance of interest-rooted cash *waqfs* could have different reasons, but it is very likely that challenging this institution, due to its popularity, could have a dramatic negative impact on the socio-economic situation at that time. It could also depict the growing engagement of *muftis* in state administration and state affairs even if it came for the price of their decreasing freedom of opinion on religious matters.

Nonetheless, the cash *waqfs* were successful in the Ottoman Empire in a way that allowed them to survive its collapse. After the period of supervision by the Foundations Administrations in the Republican Turkey, they were organized in the *Vakiflar Bankasi* (the Bank of Foundations). In this form, they have been operating since then. Today the bank remains one of the biggest financial institutions in Turkey.

It is worth noting that the *Mecelle* did not contain a single provision on interests,[50] although it regulated some institutions that if properly used in practice

[46] More on this institution and its reception in the Ottoman society – see J. Mandaville, *Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire*, "International Journal of Middle East Studies", Vol. 10, No. 3, 1979, pp. 289–308; M. Bulut, C. Korkut, *A Look at the Cash Waqfs as an Indicator of Ottoman Financial Mentality* "Vakıflar Dergisi", 2019, pp. 116–32, also briefly - H. Inalcik, *Capital...*, pp. 134-135.

[47] That is the reason why many mosques, even today, are surrounded by bazaars.

[48] H. Gerber, *State...*, p. 103, J. Mandaville, *Usurious...*, pp. 298-300.

[49] On the process, see T. Özcan, *The Legitimization Process of Cash Foundations: An Analysis of the Application of Islamic Law of Waqf in the Ottoman Society*, "Istanbul Üniversitesi Ilahiyat Fakültesi Dergisi", Vol. 18, 2008, pp. 236-248.

[50] H. Elbir, *Fahiş...,* p. 866.

could replace interests.[51] The reference to interests exists in the Commercial Code of 1850 since this law was to a great extent translated from the French Commercial Code of 1807. What is interesting, the Ottoman Commercial Code did not mention the interest cap of 12% present in the French version.[52] Nevertheless, the main direction of legislation of *tanzimat* period aimed to restrict the interest rates and some types of unjust barter contracts instead of eliminating the interests completely; even though there was no linguistic difference between interests and usury at the beginning of this period.[53] The law of 1852 set the interest cap at 8%. The next regulation of 1864 stipulated a 12% ceiling for interests, but what is more important, it abandoned the Islam-related language and tried to separate the meaning of usury (*riba*) from the interests (*faiz*).[54] In 1885, the ordinance lowered the maximum interest rate at 9% and regulated some additional aspects such as a) imposing the time limitation of compound interest to the period of max. 3 years of accrual, b) allowing the judge to reduce usurious interests without invalidation of the whole contract, c) stating that the amount to repay could not be higher than the amount of the capital borrowed.[55] The legal framework did not change till the end of the Ottoman Empire's existence and the 1885 ordinance had a long-lasting impact also in the Republican times. I will discuss this point later.

However, the acceptive stance on interests could be the reason for the dynamic development of banking in the Ottoman Empire.[56] In 1838, the government issued the first gold-changeable banknotes. They were used as a currency in circulation and their bearers could demand to buy them back by the government after eight years upon payment of 8% interest. The ephemeral Bank of Constantinople was working for only a couple of years (1847-1852), but the Ottoman Bank (est. 1856 in London) and Agriculture Bank (est. 1863 as the "Fund for Public Improvement") appeared to be more successful. What is worth noting – those banks did not abstain from charging interest. They were acting as regular banks and were highly engaged in interest-bearing loans. It seems that the development of banking in the Ottoman Empire could have been less dynamic if there had been no historically acceptive approach to taking interests.

Nevertheless, to sum up this section, I would like to stress that Ottoman tradition was moderately approving of interest-bearing loans and other similar activities. That may be the reason why the Ottoman Empire, as observed by H. Gerber,[57] was less developed when it came to commerce and finance than the sys-

[51] F. Alperen, *La Differenciation*..., p. 17.

[52] M. Berber, *From interest*…, pp. 62-64.

[53] M. Berber, *From interest*..., p. 63.

[54] H. Elbir, *Fahiş...,* pp. 866-867.

[55] For Turkish language texts of these laws, see – M. Berber, *From interest*..., pp. 85-89; for more on the ordinance, see F. Alperen, *La Differenciation*..., pp. 23-25.

[56] Briefly see N. Çağatay, *Ribā*..., pp. 66-67.

[57] H. Gerber, *State*..., p. 107.

tem of classical Islam and the Arab Empire.[58] In the Ottoman Empire, there was just no need to develop sophisticated systems and complicated legal devices if the interest-bearing transactions were accepted to a reasonable extent.

As a side note, it is interesting that in both the history of Islam and Christianity, pious organizations were the entities that facilitated wider acceptance of interest-bearing loans. This is because Christian *montes pietatis* were the credit organizations whose practice was to provide the poor with cheap, but interest-bearing loans. Due to these interests, the activity of *montes pietatis* was challenged by some theologians and jurists. However, their activity was finally approved by the Fifth Lateran Council due to their role in easing the living conditions of the poor.[59]

4. THE REPUBLIC OF TURKEY AND CHARGING INTERESTS

However, what makes Turkey exceptional from this perspective is the radical change it experienced after the I World War. The territorial, economic, and demographic losses combined with revolting minorities and occupation by Allied Forces brought the Ottoman Empire to collapse. It was replaced by the nation-state of the Turkish Republic factually led by Mustafa Kemal Pasha (later known as Ataturk). He, together with his political faction, pushed Turkey on a secularization path. Part of this change was the transplantation of several legal codes from different countries. For the purposes of this work, the most important law reform was the translation and implementation – with rather minor changes – of the Swiss Civil Code (ZGB) together with the Swiss Code of Obligations. Indeed, it was a revolution, given the previous experience with rather cautious civil law reforms (*Mecelle*) and given the completely different socio-economic background in Turkey and in Switzerland. In particular, family law stipulating non-religious monogamic marriages was a very big change.

Thus, when analyzing the approach to the interests of Turkish lawmakers and the potential impact of the Ottoman or Islamic tradition, it is worth taking a look at the regulation of interests in Turkish civil law now and in the past. The analysis should also depict whether private law is prone to the impact of external factors such as religion. In my opinion, the main focus should be on the general law of obligations instead of the commercial law (in Turkey, interest-bearing transac-

[58] Briefly on early devices to provide crediting without infringing interest ban, see e.g. A. Udovitch, *Credit as a Means of Investment in Medieval Islamic Trade*, "Journal of the American Oriental Society" Vol. 87, No. 3, 1967, pp. 260-264.

[59] See the resolution of 4 May 1515 (http://www.intratext.com/IXT/ENG0067/_PE.HTM) (accessed 22 February 2024); more on the controversy *re montes pietatis,* see e.g. J. Majka, *Encyklika 'Vix pervenit' i jej wpływ na rozwój katolickiej nauki o lichwie, "*Roczniki Teologiczne", Vol. 6, No. 2, 1958, pp. 35-36.

tions for professionals are separately regulated in the law of commerce). This is because the Swiss roots of the general Turkish law of obligations provide a better basis for the analysis of the potential impact of non-legal factors than in the case of commercial law. In addition, the general law of obligations should be more susceptible to any such factors as it regulates also non-professional relations. The non-professional spheres, e.g. family law, are often indicated as the areas more prone to the impact of social factors.

The first Turkish Civil Code[60] and Code of Obligation[61] were part of the above-mentioned revolution of laws and secularization. Their analysis allows us to understand whether Turkish authorities tried to somehow differ their regulation from the Swiss regulation in order, for example, to follow the regulation of interests in a way similar to the one taken in the Ottoman period (e.g. by imposing the same interest cap).

In the main sections of TCO 1926 covering interests, we can see the exact reflection of the regulation of the Article 73 of the Swiss Code of Obligation of 30 March 1911[62] which recognizes both the right of parties to contractually determine the amount of interest rate and the impact of other factors (e.g. custom). Namely, in Article 72 of TCO 1926, we read as follows:

If someone is obliged to pay interest, but the amount is not fixed either by contract or by law or custom, the interest shall be paid at the rate of five per cent per annum. (It does not prejudice public law measures preventing the abuse in the matter of contractual interest).[63]

It is worth noting that this five per cent default amount was drastically increased to 30% in 1984, with the option to be increased up to 80% upon the decision of the Council of Ministers, by the special law regulating statutory and default interests.[64] LSDI Article 1 indicated that in the case of a lack of contractual arrangements, the interest rate above should be applicable for both dealings under the TCO 1926 and the Turkish Commercial Code.

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[60] Turkish Civil Code of 4 April 1926 (Tur. *Türk Kanunu Medenisi*) law no. 743, Official Journal: 04.04.1926/339; hereinafter referred to as "TCC 1926".

[61] Turkish Code of Obligation of 22 April 1926 (Tur. *Borçlar Kanunu*) law no. 818, Official Journal: 08.05.1926/366; hereinafter referred to as "TCO 1926".

[62] The Swiss Code of Obligations of 30 March 1911 (Ger: *Obligationenrecht*), the Swiss Official Compilation of Federal Legislation: no. 220; all translations of this code are semi-official as they come from the official Swiss governmental website: https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en (accessed 22 February 2024).

[63] *Bir kimse faiz vermesine mecbur olupta miktarı ne mukavale ile ne de kanun veya örf ve adet ile muayyen değil ise bu faiz senevi yüzde beş hesabiyle tediye olunur. (Mukavele ile faiz meselesinde suiistimalin meni hukuku amme kanunlarına aittir.)*

[64] The Law on Statutory and Default Interests of 4 December 1984 (Tur. *Kanuni Faiz ve Temerrüt Faizine İlişkin Kanun*) law no. 3095, Official Journal: 19 December 1984/18610, hereinafter referred to as "LSDI".

This change correlated with high inflation in Turkey in the 80s and was a result of the changing socio-economic circumstances.[65] The interesting aspect of this law is that it was passed at the time when Turgut Özal and his Motherland Party, both with moderately pro-Islam agenda, were in power.

A similar pattern can be seen with the regulation of default interests. The TCO 1926 original text (Article 103) reflected the Swiss one (Article 104) and stipulated the annual interest rate of 5% applicable even if parties agreed contractually on the lower interest rate. The wording was as follows:

A debtor who defaults in the payment of a sum of money shall be obliged to pay interest for the past days at the rate of five per cent per annum, even if a lesser interest rate is stipulated in the contract.

If more than five per cent interest is stipulated in the contract, either directly or in the form of a commutation in instalments, this interest may also be demanded from the defaulting debtor.[66]

[…][67]

In this case, the LSDI not only increased the interest rate to 30% (with the option of an increase upon the decision of the Council of Ministers), but also implemented the mechanism of claiming higher interests depending on macroeconomic interest rates. Namely, if the bank discount at the place of payment and at the time of payment was higher than 30%, even if there was no contract between parties, default interest could be demanded according to the rediscount interest rate stipulated by the Central Bank of the Republic of Turkey for short-term credits (Article 2 LSDI).[68]

The other interesting point is that the LSDI Article 5 formally confirmed the non-applicability of the Ottoman interest laws (*Murabha Nizamanamesi*) of the late 19th century that have been briefly described above. This provision was necessary because of debate in the Turkish judiciary and jurisprudence over the legal

[65] As mentioned in the reasoning of the Court of Cassation judgement dated 23 February 1994 (judgment E: 1993/5-600, K: 1994/80); also cited in the European Court of Human Rights Judgment of 9 July 1997, *Akkus v. Turkey*. The economic factors are also referred to in the discussion paper related to one of the amendments of the LSDI – see https://www5.tbmm.gov.tr/sirasayi/donem21/yil01/ss116m.htm (accessed: 22 February 2024).

[66] *Bir miktar paranın tediyesinden temerrüt eden borçlu mukavele ile daha az bir faiz tayin edilmiş olsa bile geçmiş günler için senevi yüzde beş hesabiyle faiz tediyesine mecburdur. Akitte doğrudan doğruya veya taksite raptedilmiş komüsyon şeklinde yüzde beşten ziyade bir faiz şart edilmiş ise bu faizde temerrüt eden borçludan istenebilir.*

[67] The third paragraph containing the translation of the respective paragraph of the Swiss Code of Obligation and allowing to apply a default interest rate in business dealings higher than 5% per year if the normal bank discount rate at the place of payment is over 5% was deleted upon implementation of the Turkish Commercial Code in 1956.

[68] *Ödeme yerinde ve ödeme zamanındaki banka iskontosu yukarıda açıklanan miktardan fazla ise, arada sözleşme almasa bile, ticari lalenle temerrüt faizi, T.C. Merkez Bankasının kısa vadeli krediler için öngördüğü reeskont faiz oranına göre istenebilir.*

impact of the Ottoman laws, especially the Ordinance of 1885,[69] on any potential limitation of interest rate. As mentioned above, the TCO (Article 72) reserved the applicability of the special public law regulations preventing abuses in the matter of contracts, but there was no general cap on interest rate in the private law sphere. For this reason, the Turkish Court of Cassation in a couple of judgments in the 30s and 40s confirmed the applicability of the old ordinance to some extent.[70] The most important judgement was made in 1943 and stated that the restrictions of the ordinance of 1885 remain in force in non-commercial relationships except for the maximum interest rate which was lowered to 8.5%[71] (instead of 9% arising from the ordinance) when it comes to the transactions covered by the 1933 Act on Money Lending.[72]

Therefore, there are at least two observations regarding the older Turkish obligation law to be kept in mind for the purpose of further paragraphs.

Firstly, the Turkish law of that period, similarly to the Swiss regulations, as a principle, granted parties a high level of contractual freedom when establishing the interest rate. However, the recognized and judicially confirmed applicability of the Ottoman laws on the interests are important mitigants showing the more protective approach of Turkish law.

Secondly, when compared to the Swiss framework, the Turkish regulations were more changeable – there was the LSDI introduced as a special law dedicated to this issue and the interest rate was increased. Contrary to the Turkish code, the Swiss regulations on interests in the general law of obligations have been maintaining the 5% interest rate since the Code of Obligation came into force. The Swiss lawmakers seem to trust in general rules protecting parties against exploitation of straitened circumstances (Article 21 of the Swiss Code of Obligation) and relatively new special protection reserved for consumers only.[73] Namely, the Federal Law on Consumer Credit[74] (Article 14) stipulates – as a principle – the interest rate of 15% for consumer credits, but allows the Federal Council to indicate a different interest rate. The Council uses this power and established the rate at the level of 10 (or 12 in some cases) percentage points increased by the indices

[69] On this issue, see F. Alperen, *La Differenciation*..., p. 109 *et seq*.

[70] The applicability of some Ottoman laws should not be very surprising given the consensus that the Republic of Turkey is the continuation of the Ottoman Empire – see P. Dumberry, *The Consequences of Turkey Being the 'Continuing' State of the Ottoman Empire in Terms of International Responsibility for Internationally Wrongful Acts,* "International Criminal Law Review", Vol. 14, 2014, pp. 261-273.

[71] F. Alperen, *La Differenciation*..., p. 112.

[72] Act on Money Lending of 8 June 1933 (Tur. *Ödünç para verme işleri kanunu*) – law no. 2279 Official Journal: 18.06.1933/2430.

[73] P. Tercier, P. Pichonnaz, H. Develioğlu, *Borçlar Hukuku. Genel Hükümler*, Istanbul 2016, p. 347.

[74] The Federal Law on Consumer Credit (Ger. *Bundesgesetz über den Konsumkredit*) of 23 March 2001, the Swiss Official Compilation of Federal Legislation: no. 221.214.1.

3-month compounded Saron (Swiss reference rate – "Swiss Average Rate Overnight"). Thus, the issue of interests seems to be of more significance in the case of Turkey.

Nevertheless, there are no signs of the older Turkish law tending to eliminate or highly curb the interests.

The newer civil law regulations – i.e. the new Turkish Civil Code[75] and the new Code of Obligation[76] allow us to see whether the law has changed anyhow in order to e.g. address the current authorities' negative opinion on charging interests. What is important, the LSDI remains in force although it has been subject to some non-revolutionary adjustments (e.g. in 1999, 2005 and 2018).

In Article 120 of the TCO 2011, we can see the following wording:

The annual default interest rate is stipulated by law binding in the moment when the obligation arises, unless parties agree otherwise.

The annual default rate agreed contractually cannot exceed the statutory rate, as regulated in the paragraph above, by more than 100%.[77] […]

In Article 88 of the TCO 2011, addressing the interest rate for legal transactions, the wording is as follows:

The annual interest rate in the interest-bearing obligations should be set in line with the law applicable as of the day when the interest obligation arises; unless parties agree otherwise.

The contractually agreed interest rate cannot exceed the statutory interest rate, as laid down in the paragraph above, by more than 50%.[78]

The "statutory interest rate" in the two Articles above relates to the modified mechanism provided by the current wording of the LSDI. Its Article 1 stipulates a 12% statutory annual interest rate for both interests arising from the TCO 2011 and the new Turkish Code of Commerce[79] if there is no contractual arrangement in this regard.[80] There is also an option to increase/lower or convert the interests into monthly ones upon the President's – previously Council of Ministers' – deci-

[75] Turkish Civil Code of 8 December 2001 (Tur. *Türk Medeni Kanunu*) law no. 4721, Official Journal: 08.12.2001/24607; hereinafter referred to as "TCC 2001".

[76] Turkish Code of Obligation of 11 January 2011 (Tur. *Türk Borçlar Kanunu*) law no. 6098, Official Journal: 04.02.2011/27836; hereinafter referred to as "TCO 2011".

[77] *Uygulanacak yıllık temerrüt faizi oranı, sözleşmede kararlaştırılmamışsa, faiz borcunun doğduğu tarihte yürürlükte olan mevzuat hükümlerine göre belirlenir. Sözleşme ile kararlaştırılacak yıllık temerrüt faizi oranı, birinci fıkra uyarınca belirlenen yıllık faiz oranının yüzde yüz fazlasını aşamaz.*

[78] *Faiz ödeme borcunda uygulanacak yıllık faiz oranı, sözleşmede kararlaştırılmamışsa faiz borcunun doğduğu tarihte yürürlükte olan mevzuat hükümlerine göre belirlenir. Sözleşme ile kararlaştırılacak yıllık faiz oranı, birinci fıkra uyarınca belirlenen yıllık faiz oranının yüzde elli fazlasını aşamaz.*

[79] I.e. Turkish Code of Commerce of 13 January 2011 (Tur. *Türk Ticaret Kanunu*) law no. 6102, Official Journal: 14.02.2011/27846; hereinafter referred to as: "TCoC".

[80] *Borçlar Kanunu ve Türk Ticaret Kanununa göre faiz ödenmesi gereken hallerde, miktarı sözleşme ile tespit edilmemişse bu ödeme yıllık yüzde oniki oranı üzerinden yapılır.*

sion (Article 1 para. 2). Indeed, such a decision was taken in 2005 by the Cabinet of Recep Tayyip Erdoğan which established the interest rate at the level of 9%.[81]

Consequently, if there is no contractual determination of the interest rate, a 9% annual interest rate applies to both the default interest rate and interest rate for legal transactions. If there is an agreed interest rate, it is by law capped at 13.5% for interest-bearing transactions and 18% per year for default interests.

The LSDI (Article 3) contains specific rules for compound interests. As a principle, it is forbidden, but the applicability of respective regulations of TCoC is reserved. Indeed, the TCoC has a provision enabling limited compound interests (Article 8 para. 2) which can be perceived as a confirmation of the quite long-lasting accepting approach to applying anatocism.[82] Apart from that, the TCoC general section on interests expresses the freedom of contracting when it comes to purely business-to-business relationships (Article 8 para. 1), but also refers to the application of special regulations related to statutory, capital and default interests (Article 9). This makes the LSDI applicable to business relationships and creates controversy whether the TCO 2011 applies to the business-related dealings. Nevertheless, it seems that the leading opinion is that this code is *lex specialis* towards the TCO 2011,[83] and thus it is not subject to the TCO 2011 limitations on the amount of interest rates (as described in the paragraph above). It is also worth noting that the TCoC contains some contract-specific regulations for interests (e.g. Article 1019 on interests in ship mortgage).

So, to summarize the regulation of interests in commercial relationships, the LSDI remains the prevailing legal act, but allows business dealings to take a more "lenient" position. Namely, it allows to apply compound interest and does not create an interest rate cap.

What is also worth emphasizing, current Turkish private law not only allows to charge interests. In some cases, it even obliges some entities to charge these. This can be seen in the example of Article 441 of TCC 2001 laying down the rules for the use of money of a person under guardianship:

Money that is not necessary for the needs of the person under guardianship or to manage his/her assets, in order to get gains from interests, should be placed on the domestic bank account indicated by the guardianship authority or used to buy State Treasury bonds.

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[81] More on that – see K. Yağcı, *Anapara faizi ve temerrüt faizine üst sinir getiren TBK m. 88 ve TBK m. 120 hükümlerinin ticari faizler (TTK m. 8 ve TTK m. 9) bakimindan uygulanabilirliği*, "İstanbul Hukuk Mecmuası", Vol. LXXI, No. 2, 2013, pp. 421-438.

[82] See F. Alperen, *La Differenciation*..., p. 102 and Cassation Tribunal judgement of 1930 referred to there.

[83] K. Yağcı, *Anapara*…, pp. 431-435, P. Tercier, P. Pichonnaz, H. Develioğlu, *Borçlar Hukuku*…, pp. 348-349.

The guardian stalling for a month to use money in this way is liable to cover the damages arising from the loss of interests.[84]

To sum up, in Turkey, the interests are more comprehensively regulated and more changing over time than in the case of the source legal system of Switzerland. In Turkey, there is a special law covering this subject (LSDI), and the tools to swiftly (i.e. without changing the law by parliament) affect the interest rates are more far-reaching (i.e. they are not limited to consumer loaning) than in Switzerland. In addition, the provisions on interests in the TCO 2011 are significantly longer than the regulation on interests in the Swiss Code of Obligations.

Moreover, the interest rates both in the case of default interests and interests in interest-bearing legal transactions (unless otherwise agreed) are higher than in the Swiss law of obligation. Even at the time of the revival of the Islamic agenda at the times of Turgut Özal, the interest rate in private transactions was increased, which was simply driven by economic factors. This is an additional argument that there are no signs of the influence of Islamic and governmental "anti-interest" narration in the field of private law.

If any influence or inspiration can be considered, one may claim that the fluctuation (9-12%) of the standard interest rate under the LSDI and TCO 2011 resembles the late Ottoman laws which had been in force until the promulgation of LSDI. So, even though there is no confirmation in any discussion papers/reports accompanying Turkish civil law legal acts, the Ottoman tradition in this regard seems to have some impact. Or at least it shows the traditionally acceptable number of interest rates.

There is, however, an important "anti-interest" innovation when comparing the TCO 1926 and the TCO 2011. The former did not impose the maximum interest rates (only the minimum one – in the case of default interests) and the function of capping the interests was on the above-mentioned Ottoman laws on interests (at least until their formal expiration). The change between the TCO 1926 and the TCO 2011 was implemented in order to protect debtors, since in practice too high interests had been imposed by lenders.[85] As far as we can see in the official act, there was no other reasoning (e.g. leaning towards interest-free Islamic economics) behind this mechanism than the general protection of debtors. Thus, it is hard to attach this change to any anti-interest policy of the Turkish lawmakers. This is demonstrated by a mention in the referred justification that says that there is a preference to not insert the exact amount of interest rates into the TCO 2011

[84] *Vesayet altındaki kişinin kendisi veya malvarlığının yönetimi için gerekli olmayan paralar, faiz getirmek üzere, vesayet makamı tarafından belirlenen millî bir bankaya yatırılır veya Hazine tarafından çıkarılan menkul kıymetlere çevrilir. Paranın yatırılmasını bir aydan fazla geciktiren vasi, faiz kaybını ödemekle yükümlüdür.*

[85] See the justification for the TCO 2011 as available at https://www5.tbmm.gov.tr/sirasayi/donem23/yil01/ss321.pdf (22 February 2024), pp. 60-61 (re: interest-bearing obligations), pp. 70-71 (re: default interests).

because this is a basic law and the number of due rates may be changed due to economic changes.

In addition, despite recent changes, both the TCO 2011 and LSDI as well as the TCC 2001 keep using the traditional Turkish (and Ottoman) term *faiz* instead of making any reference to the traditional Arab word of *riba*. As I have observed before on the example of the institution of betrothal,[86] sticking to the language of the code and previous regulations, instead of traditional, custom/religion-rooted vocabulary, is one of the distinctive features of the working legal transplants. Thus, the example of interest rates provides an additional argument that the Swiss legal transplant has been accepted by the "body" of the Turkish law.

CONCLUSIONS

The Turkish jurisprudence from the very beginning of the TCC 1926 life observed that there are two main approaches to the interest in law. The first approach is to emphasize the freedom of contracting (and thus a rather critical one towards any limitations of the interest rates). The opposite approach is accepting towards any top-down regulation of interest rates.[87] The analysis provided above – and, in particular, the fact of sticking to the Ottoman laws restricting applicable interest rates, shows that the Turkish law from the beginning has taken a more protective approach than the Swiss legal system.

However, there are no signs of any Islam-motivated changes – despite the orthodox-Islam-rooted speeches of the Turkish president. The body of the implemented private law seems to be invulnerable to the political agenda and impact of Islam. That is not surprising if we remember the discussions related to the concept of legal transplants. According to them, private law remains the field of legal scholars and professionals, not politicians. Consequently, private law can be quite invulnerable to many factors external to the law itself like the customs or religion of the local community. The history of interests (at least by now) has given additional arguments for the supporters of Watson.

Anyway, if we want to trace any signs of the impact of a given extra-legal tradition or social factors on law, it appears the Ottoman tradition was more relevant for shaping the law (e.g. the standard amount of interests) than the current Islamic teachings and Islamic tradition. Moreover, the analysis of historical reasonings behind some legal acts shows that in the Republic of Turkey, the biggest impact on interest-related laws was arising from economic rather than sociological fac-

[86] M. Tutaj, *Przeszczep prawny w działaniu – uwagi na przykładzie instytucji zaręczyn w prawie tureckim*, "Kwartalnik Prawa Prywatnego", Vol. XXXI, No. 3, 2022, pp. 523-524.

[87] H. Elbir, *Fahiş...,* p. 854.

tors. That is an additional argument for those who believe that Islam has limited influence on private law.

Nevertheless, the issue of interests and their regulation in the private law regulations is worth attention. If they appear to be changed in the direction of limiting contractual freedom to determine interest amount or lowering the rates, this may mean that Islam-related agenda can start affecting private law. This is particularly likely given the far-reaching competences of the Turkish president (arising from the law of 2018) in private law.

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Hanna Wolska
University of Gdańsk, Poland
e-mail: hanna.wolska@prawo.ug.edu.pl
ORCID: 0000-0002-9806-6336

STATUS OF THE PRESIDENT OF THE OFFICE OF ELECTRONIC COMMUNICATIONS AS A MEDIATOR IN THE FIELD OF TELECOMMUNICATIONS SERVICES

Abstract

The subject of this paper is an analysis of the status of the role of the President of the Office of Electronic Communications in the area of mediation concerning telecommunications services. The paper includes a legal analysis relating to the subject and object aspect of mediation in the area of telecommunications services. It also presents the procedure and the type of actions undertaken by the President of the Office of Electronic Communications in terms of disputes covered by its jurisdiction as a mediator. The article also answers the question whether the juxtaposition of the role of a regulator and a mediator in one body can lead to an abuse of one of these positions.

KEYWORDS

mediation, President of the Office of Electronic Communications, consumer, provision of publicly available telecommunications services

SŁOWA KLUCZOWE

mediacja, Prezes Urzędu Komunikacji Elektronicznej, konsument, dostawa publicznie dostępnych usług telekomunikacyjnych

1. INTRODUCTION

Economic regulation as a mode of action of the public administration can be analysed from a functional aspect, indicating the role of the entities implementing it. When performing the regulatory function, national public administration bodies are obliged to implement detailed regulations and strictly enforce the behaviour of entrepreneurs. At the same time, their competences include the concretisation of the law, while it takes the form of formulating only such legal norms, which will depend on supra-statutory legal acts. Some of the bodies with a regulatory function also have the competence to resolve disputes amicably through mediation proceedings. One of the authorities entrusted with the role of a mediation entity is the President of the Office of Electronic Communications.

The subject of this paper and, at the same time, the basic research issue is the analysis of the status of the President of the Office of Electronic Communications as a mediator in the field of telecommunications services. The paper sets out three main research questions. The first one relates to determining the subject and object scope of disputes in which the President of the Office of Electronic Communications may act as a mediator. The second one relates to establishing the scope of activities undertaken by the President of the Office of Electronic Communications in terms of disputes covered by its jurisdiction as a mediator. The last one concerns an attempt to answer the question whether the juxtaposition in one body of the role of a regulator and a mediator may lead to an abuse of one of these positions.

2. SUBJECT AND OBJECT SCOPE OF MEDIATION

Pursuant to Article 109 of the Act of 16 July 2004, Telecommunications Law[1] (hereinafter: Telecommunications Law), a civil law dispute between a consumer and a provider of publicly available telecommunication services may be settled

[1] Journal of Laws of the Republic of Poland: Journal of Laws of 2022, item 1648, as amended.

amicably through an out-of-court consumer dispute resolution procedure.[2] Thus, under the Telecommunications Law, mediation conducted by the President of the Office of Electronic Communications is available in civil law disputes between a consumer and a provider of publicly available telecommunications services.

The term 'consumer' is defined in Article 2(18) of the Telecommunications Act. It means a natural person applying for or using publicly available telecommunications services for purposes not directly related to his/her business or profession. Public providers, on the other hand, are telecommunications enterprises within the meaning of Article 2(27) of the Telecommunications Act.[3] On the other hand, the notion of a publicly available telecommunications service should be understood as a telecommunications service available to the general public (Article 2, point 31). Thus, it should be concluded that the aforementioned mediation is not subject to disputes involving subscribers who are not consumers and those related to services provided in non-public networks.

The literature on the subject indicates that within the meaning of paragraph 1 of Article 109 of the Telecommunications Act, a civil law dispute means a disputed civil case.[4] At the same time, it should be pointed out that according to Article 1 of the Act of 17 November 1964, the Code of Civil Procedure,[5] civil cases mean all kinds of cases from the relations in the field of civil law, family and guardianship and labour law, as well as those in the field of social security and others to which the provisions of this Code are applied by virtue of special acts. The judicature also draws a distinction between civil cases in the substantive

[2] The legislator's insertion of provisions on out-of-court dispute resolution into telecommunications law is the result of the implementation of recommendations from the Universal Service Directive. Article 34 of the Directive requires Member States to ensure that transparent, non-discriminatory, simple and inexpensive out-of-court procedures are made available for dealing with unresolved disputes between consumers and enterprises providing electronic communications networks and/or services, arising within the scope of this Directive and relating to the conditions or performance of contracts concerning the provision of such networks and/or services. Member States shall adopt measures to ensure that such procedures enable disputes to be settled fairly and promptly and may, where warranted, adopt a system of reimbursement and/or compensation. Such procedures shall enable disputes to be settled impartially and shall not deprive the consumer of the legal protection afforded by national law. Member States may extend these obligations to cover disputes involving other end-users, see A. Krasuski, *Prawo telekomunikacyjne. Komentarz*, Commentary to Article 109, Lex/el. 2015 (accessed 1 October 2023).

[3] A telecommunications undertaking shall be understood as an entrepreneur or another entity authorised to carry out a business activity pursuant to separate regulations, which carries out a business activity consisting in the provision of telecommunications networks, the provision of accompanying services or the provision of telecommunications services, whereby a telecommunications undertaking authorised to: a) provide telecommunications services, b) provide public telecommunications networks or the provision of accompanying services shall be understood as an 'operator'.

[4] S. Piątek, *Prawo telekomunikacyjne. Komentarz*, commentary to Article 109, Lex/el. 2019 (accessed 1 October 2023).

[5] Journal of Laws of the Republic of Poland: Journal of Laws of 2023, item 1550, as amended.

sense (i.e. those arising out of civil law relations) and those in the formal sense (i.e. those not arising out of civil law relations, but which are subject to recognition in civil proceedings). At the same time, it is emphasised that in case of doubt as to the nature of a case, there is a presumption that this is a civil case.[6]

Civil law disputes that may be the subject of out-of-court consumer dispute resolution proceedings are primarily disputes related to the performance of contracts for the provision of telecommunications services (Article 56(1)). On the other hand, a civil case does not lose its character if some elements of the civil law relationship (e.g. prices, obligation to conclude a contract) are shaped by public law norms or administrative decisions.[7]

The body conducting the proceedings is the President of the Office of Electronic Communications. Pursuant to § 29 of Ordinance No. 33 of the President of the Office of Electronic Communications of 31 December 2019 on granting organisational regulations to the Office of Electronic Communications, the tasks of the Department of Consumer Policy include conducting ADR proceedings in the area of civil law disputes between a consumer and a provider of publicly available telecommunications services for the Mazowieckie Voivodeship and coordinating the activity of the delegations in the organisation of ADR proceedings[8] in the area of civil law disputes between a consumer and a provider of publicly available telecommunications services, and, in justified cases, conducting such proceedings or delegating them to the delegacies. Thus, in the remaining voivodeships, the conduct of proceedings in civil law disputes between a consumer and a provider of publicly available telecommunications services is the responsibility of individual delegacies of the Office of Electronic Communications.

3. PROCEDURE AND SCOPE OF ACTIONS UNDERTAKEN BY THE PRESIDENT OF THE OFFICE OF ELECTRONIC COMMUNICATIONS

Proceedings in civil law disputes between a consumer and a provider of publicly available telecommunications services shall be conducted at the request of the consumer, as well as *ex officio* by the President of the Office of Electronic Communications if the protection of the consumer's interest so requires. How-

[6] A. Partyk, *Pojęcie sprawy cywilnej*, Published: LEX/el. 2015 (accessed 10 October2023). Judgment of the Supreme Court of 13 October 2017, I CSK 20/17, LEX No. 2401832; Judgment of the Court of Appeal in Białystok of 15 March 2017, I ACa 857/16, LEX No. 2300231.

[7] S. Piątek, *Prawo telekomunikacyjne. Komentarz*, commentary to Article 109, Lex/el. 2019 (accessed 1 October 2023).

[8] ADR stands for alternative dispute resolution.

ever, such proceedings cannot be initiated at the request of the provider of publicly available services. Adoption of such a solution shows that the legislator's will was for the institution of mediation proceedings to serve exclusively to secure and protect the interests of the consumer.[9] Moreover, as some authors point out, providers of publicly available telecommunications services, which act as professional entities, have greater financial and organisational possibilities to use other means of resolving disputes with consumers than mediation proceedings before the President of the Office of Electronic Communications.[10] Nevertheless, it seems justified to grant both parties to the dispute the possibility to submit an application for mediation to the President of the Office of Electronic Communications. The above will enable a more complete implementation of the principle of effective dispute resolution, which should be implemented by the possibility to use amicable proceedings that can lead to a quick resolution of a conflict by both parties to the dispute.[11]

Mediation conducted by the President of the Office of Electronic Communications is voluntary and does not exclude the possibility to pursue claims in court proceedings.[12] The condition for it to be conducted is that both the consumer and the provider of publicly available telecommunications services agree to it. The consumer expresses his or her consent by filing a request for mediation with the President of the Office of Electronic Communications, and the provider of publicly available telecommunications services does so by joining the mediation proceedings. The voluntariness of mediation also means that, in the course of mediation, the parties may withdraw from it. If at least one of the parties declares that he or she does not consent to an amicable resolution of the matter, the President of the Office of Electronic Communications shall withdraw from the mediation proceedings.[13] The above shall also apply to the proceedings initiated *ex officio* by the President of the Office of Electronic Communications.

The President of the Office of Electronic Communications shall refuse to examine a civil law dispute between a consumer and a provider of publicly available telecommunications services when its subject matter falls outside the categories of disputes falling within its jurisdiction. He may also refuse to consider a dispute in the event that: 1) the consumer has not, prior to submitting an

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[9] H. Wolska, *Prezes Urzędu Komunikacji Elektronicznej*, (in:) M. Jas-Nowopolska, K. Łuczak, H. Wolska*, Zakres działania, kompetencje i zadania organów regulacyjnych na rynkach infrastrukturalnych,* Warszawa 2018, p. 45.

[10] E. Galewska, *Zastosowanie mediacji w sporach z udziałem konsumentów w sektorze telekomunikacyjnym*, (in:) D. Szostek, J. Gołaczyński (eds.), *Konsument w świecie cyfrowym,* Katowice 2015, p. 92.

[11] H. Wolska, *Model relacji pomiędzy krajowymi organami administracji publicznej a przedsiębiorcami*, Warszawa 2022, p. 246.

[12] Judgment of the Regional Court in Poznań of 28 December 2018, XV Ca 1579/18, *Legalis.*

[13] K. Gajda-Roszczynialska, *Spory o ochronę indywidualnych interesów konsumentów w postępowaniach cywilnych*, Warszawa 2012, Lex/el.

application for the initiation of proceedings for out-of-court resolution of consumer disputes, made an attempt to contact the provider of publicly available telecommunications services and resolve the dispute directly, including the failure to exhaust the complaint procedure; 2) the dispute is trivial or the application for the initiation of proceedings for out-of-court resolution of consumer disputes will cause inconvenience to the provider of publicly available telecommunications services; 3) a case over the same claim between the same parties is pending or has already been considered by the President of the Office of Electronic Communications, another competent entity or a court; 4) the value of the subject matter of the dispute is lower than the financial threshold specified in the implementing regulations to the Telecommunications Act; 5) the consumer has applied for the initiation of proceedings for out-of-court settlement of consumer disputes after one year from the day on which he/she made an attempt to contact the provider of publicly available telecommunications services and resolve the dispute directly; 6) the consideration of the dispute would cause a serious disturbance to the operation of the President of the Office of Electronic Communications.[14]

During the mediation proceedings, the President of the Office of Electronic Communications acquaints the provider of publicly available telecommunications services with the consumer's claim, presents the parties to the dispute with the provisions of law applicable to the case and a proposal for resolving the dispute.

In order to streamline the proceedings, the President of the Office of Electronic Communications may also set a deadline for the parties to conciliate the case.[15] Some authors stress that the above actions make the President of the Office of Electronic Communications play the role of a conciliator rather than a mediator.[16] However, one cannot agree with the above position due to the fact that mediation is a tripartite process led by an impartial person with the simultaneous participation of the parties to the dispute. In the case of conciliation, a special conciliation committee takes the place of the mediator. This can be a standing committee or an *ad hoc* committee appointed by the parties to the dispute. At the same time, there is a special procedure for the appointment of the conciliation commission. Each party to the dispute appoints its conciliators and then the commission is supplemented by neutral conciliators in a number that ensures them a majority on the commission. The role of the commission, on the other hand, is to propose a settlement that would be acceptable to the parties to the dispute or allow them to reach their own settlement. The committee's conclusions are merely a proposal

[14] Article 109(8) of the Telecommunications Act.

[15] H. Wolska, *Prezes Urzędu Komunikacji Elektronicznej*, (in:) M. Jas-Nowopolska, K. Łuczak, H. Wolska, *Zakres działania, kompetencje i zadania organów regulacyjnych na rynkach infrastrukturalnych,* Warszawa 2018, p. 45.

[16] A. M. Arkuszewska, *Mediacja z operatorem pocztowym i dostawcą publicznie dostępnych usług telekomunikacyjny*ch, ADR 2012, No. 1, *Legalis*.

addressed to the parties, without any binding force.[17] Furthermore, the role of the mediator may not only consist in organising and conducting talks (negotiations) between the parties, but also in the possibility of actively participating in working out the substantive content of the agreement, including the presentation of possible ways of resolving the dispute. The mediator leads to a compromise that is satisfactory to the parties to the dispute.[18]

The provisions of the Telecommunications Law do not explicitly specify in what form a positive resolution of a dispute by the President of the Office of Electronic Communications takes place, nor what effects it produces. It should be noted, however, that pursuant to Article 109(3) of the Telecommunications Act, the provisions of the Act of 23 September 2016 on out-of-court settlement of consumer disputes[19] shall apply to the extent not regulated. This Act, in Article 40(3), stipulates that the authorised entity shall, immediately after the last action in the proceedings on out-of-court resolution of consumer disputes, draw up a protocol of the proceedings which shall contain, at least, information on their outcome. In turn, the protocol shall be immediately delivered to the parties who may not agree to the submitted proposal for dispute resolution or comply with it. Thus, the President of the Office of Electronic Communications does not have any power to impose his/her solution in a commanding manner on the parties to the conflict.[20]

4. SUMMARY

The President of the Office of Electronic Communications is a central organ of government administration that is both a regulator and a mediator. Entrusting the President of the Office of Electronic Communications with the role of a mediator stems from his knowledge and experience, which are necessary to resolve disputes between consumers and the provider of publicly available telecommunications services. The competence of the President of the Office of Electronic Communications in the area of mediation is also justified by the fact that he is a body that is widely respected, as evidenced by the number of requests submit-

[17] According to the PWN Great Dictionary of Foreign Words, conciliation means "the amicable settlement of international disputes through the establishment of a conciliation commission which examines the situation and puts forward non-binding proposals for resolving the conflict". M. Bańsko (ed.), *Wielki słownik wyrazów obcych PWN*, Warszawa 2003, p. 661.

[18] H. Wolska, *Model relacji pomiędzy krajowymi organami administracji publicznej a przedsiębiorcami*, Warszawa 2022, p. 248.

[19] Journal of Laws of the Republic of Poland: Journal of Laws of 2016, item 1823, as amended.

[20] H. Wolska, *Model relacji pomiędzy krajowymi organami administracji publicznej a przedsiębiorcami, Warszawa 2022,* p. 248.

ted for mediation proceedings. In 2019-2022, the President of UKE, conducted numerous ADR proceedings in the field of telecommunications services. In 2019, 1024 applications were received, of which the President of UKE refused to consider 5.7%.[21] In 2020, 855 applications were received for the President to initiate proceedings and 6% of them were left without consideration.[22] Whereas, in 2021 the President processed 561 ADR applications and in 2022, the number was 561.[23] The juxtaposition of the two functions – regulatory and mediation – in one body also does not lead to an abuse of one of these positions. The President of the Office of Electronic Communications, as a mediator, does not have any power to impose his or her settlement in a commanding manner on the parties to the conflict. On the other hand, the very idea of creating a mediator in the telecommunications law should be assessed positively. Mediation can be an effective and low-cost means of conflict resolution and its result is always the success of both parties.

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[21] Report on the activities of the President of the Office of Electronic Communications in the field of out-of-court consumer dispute resolution (ADR) in 2019.

[22] Report on the activities of the President of the Office of Electronic Communications in the field of out-of-court consumer dispute resolution (ADR) in 2020.

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Mateusz Zagozdon
University of Warsaw, Poland
e-mail: m.zagozdon2@student.uw.edu.pl
ORCID: 0000-0003-3819-1431

RIGHT OF PRE-EMPTION TO LAND UNDER INLAND STANDING WATERS

Abstract

In the Polish legal system, the statutory right of pre-emption could be exercised in respect of various types of real properties. Some of them, due to their specific characteristics, are protected by the state, such as agricultural real properties or forest land. However, the scope of the pre-emption right is sometimes unclear and the application of this right can lead to problems in practice. This claim can be made against the right of pre-emption to land under inland standing waters due to the fact that the definition of inland standing waters may be complicated. This article is focused on the complicated scope of the right of pre-emption to land under inland standing waters and shows, by means of specific examples, which aspects need to be verified during the examination and whether the pre-emption right should be exercised. After a brief introduction to the subject discussed, the author presents the key definitions used in the Water Law. The next part of the article discusses relevant issues concerning the definition of real property. The author also examines individual cases in which real property meets the legal requirements for the application of the right of pre-emption, but the exercise of this right is doubtful. The final part of the article is a summary of the author's reflections.

KEYWORDS

Water Law, inland standing waters, pre-emption right

SŁOWA KLUCZOWE

prawo wodne, śródlądowe wody stojące, prawo pierwokupu

1. INTRODUCTION

The right of the pre-emption to real properties is a right granted to a specific entity to purchase real property with priority over any other entity to which it will be sold.[1] However, sometimes it is not easy to verify over any doubt and assess whether the real property meets the conditions for exercising this right. As a result, a sale agreement is concluded with unnecessary conditions and the sale is prolonged, which can be of considerable economic importance. On the other hand, the sale of real property without the statutory right of pre-emption leads to the invalidity of the sale agreement in accordance with Article 599 § 2 of the Civil Code[2] (hereinafter referred to as the Civil Code). The situation of the contracting parties is aggravated by the fact that such a legal action cannot be validated. An example of such an unclear regulation is Article 217 Section 13 of the Water Law Act[3] (hereinafter referred to as the Water Law), which grants the right of pre-emption to the State Treasury, represented by the Starost, acting in agreement with the Minister responsible for water management, in the event of the sale of real property comprising land under inland standing waters.

The provision of Article 23 Section 1 of the Water Law defines inland standing waters as inland waters in lakes and other natural bodies of water not directly connected, in a natural way, with surface inland flowing waters. Section 2 indicates that the provisions on inland standing waters apply accordingly to waters located in depressions of land created by human activity that are not ponds. A literal interpretation leads to the conclusion that the right of pre-emption applies to land under a small body of water, designed for aesthetic purposes, on the real property developed with a single-family building. The ambiguity of the regulation is also evidenced by the fact that the Ministry of Maritime Affairs and Inland

[1] R. Strzelczyk, *Prawo nieruchomości*, Warsaw 2019, p. 427.

[2] Act of 23 April 1964 Civil Code (Journal of Laws of 2022, item 1360 as amended).

[3] Act of 20 July 2017 Water Law (Journal of Laws of 2022, item 2625 as amended).

Navigation[4] issued an opinion on the matter (hereinafter referred to as the Ministry's Opinion), which was intended to clarify possible ambiguities. This article is an analysis of the subject of the pre-emption right under Article 217 Section 13 of the Water Law, the doctrinal voices, and the interpretation of the authorities.

The first part focuses on explaining the key concepts related to the issue of real property on which bodies of water are located. The following part focuses on the relevant issues relating to the definition of real property and the particular situation where real property meets the statutory prerequisites for the application of the pre-emption right, but where the exercise of this right may be questioned. The summary contains the author's conclusions and reflections.

2. INLAND STANDING WATERS

The provision of Article 217 Section 13 of the Water Law grants the Starost, acting in agreement with the Minister responsible for water management and representing the State Treasury the right of pre-emption in the event of the sale of real property that includes land under inland standing waters. Therefore, the definition of inland standing waters needs to be analyzed. Referring to Article 19 of the Water Law, all waters other than internal marine waters and waters of the territorial sea should be considered inland waters. The first term is defined in Article 4 of the Act on Maritime Areas of the Republic of Poland and Maritime Administration[5] (hereinafter referred to as the Maritime Areas Act), in conjunction with Article 16 point 29 of the Water Law. The territorial sea, on the other hand, is the area of marine waters 12 nautical miles wide (i.e. 22,224 m), calculated from the baseline of that sea, according to Article 5 of the Law on Maritime Areas.

According to Article 23 Section 1 of the Water Law, standing inland water shall be regarded as inland water in lakes and other natural bodies of water not directly connected, in a natural way, with surface inland running waters. According to the dictionary definition, a lake is a depression in the ground filled with spring water, river water, rainwater, or a natural inland body of standing water.[6] Other natural water bodies include, e.g. pounds, i.e. inland bodies of surface water, formed naturally or created artificially,[7] ponds, i.e. bodies of water in a natural or

[4] Legal opinion on the pre-emption right in the case of sale of land under inland standing waters prepared by the Ministry of Maritime Affairs and Inland Navigation, https://www.gov.pl/web/gospodarkamorska/opinia-prawna-w-sprawie-prawa-pierwokupu-w-przypadku-sprzedazy-gruntow-pod-srodladowymi-wodami-stojacymi (accessed 2 July 2023).

[5] Act of 21 March 1991 on maritime areas of the Republic of Poland and maritime administration (Journal of Laws 2023, item 960).

[6] W. Doroszewski (ed.), *Słownik języka polskiego*, Vol. III, H-K, Warsaw 1964, p. 411.

[7] *Ibidem*, p. 733.

excavated depression,[8] or lagoons meaning a sea bay separated from the high seas by a spit of land.[9] This list is for illustrative purposes only and is not intended to be an exhaustive one.[10] Waterholes – natural mid-field and mid-forest water bodies up to 1 hectare in size, not subject to soil classification – may also be indicated,[11] and the pre-emption right shall apply to the land on which they are situated.[12] However, lakes or other bodies of water may not be directly associated with surface inland flowing waters, i.e. with 1) natural watercourses and the springs from which these watercourses originate, 2) lakes and other natural bodies of water with continuous or periodic natural inflow or outflow of surface water, 3) artificial bodies of water situated on flowing waters, and 4) canals. These waters, under Article 211 Section 2 of the Water Law, are the property of the State Treasury. W. Gonet[13] rightly noted that, in practice, it is difficult to resolve whether a water body is directly associated with flowing waters. For example, due to the shape of the shoreline, spotting a narrow stream that flows into or out of a body of water can be problematic. Moreover, such inflow or outflow may be periodic, which does not affect the application of Article 217 Section 13 of Water Law as the trading of the properties on which the bodies of water are located in general. According to Article 216 Section 2 of Water Law, inland flowing waters are not subject to civil trade except in cases specified in the Act. It cannot be excluded that a body of water will gain periodic access to flowing waters as a result of natural processes. When such a body of water is the subject of a sale, even careful verification may not be sufficient, especially when the agreement is concluded during a period in which the relationship with flowing waters does not happen. The agreement will be invalid under Article 216 Section 2 of the Water Law. The owner of such real property can only be the State Treasury, and the parties to the sale agreement are left in the mistaken belief that the ownership has been transferred to the buyer. Dense vegetation obstructing a watercourse may also affect the assessment of the nature of the water body in question.[14]

According to Article 23 Section 2 of the Water Law, the provisions on inland standing waters apply accordingly to waters in depressions of land resulting from human activity that are not ponds. However, the provision contains several unclear phrases. Firstly, it does not specify what a "depression of land" means.

[8] *Ibidem*, p. 7.

[9] W. Doroszewski (ed.), *Słownik języka polskiego*, Vol. X, Wyg-Ż, Warsaw 1968, p. 593.

[10] K. Maj, *O ustawowym prawie pierwokupu nieruchomości w ustawie prawo wodne z dnia 20 lipca 2017 roku*, (in:) Krakowski Przegląd Notarialny, No. 3, 2017, p. 60.

[11] Article 4 point 10 of the Act of 3 February 1995 on the protection of agricultural and forestry land (Journal of Laws of 2022, item 2409).

[12] W. Gonet, *Problematyka prawa pierwokupu gruntów pod śródlądowymi wodami stojącymi, przysługującego Skarbowi Państwa*, (in:) Gdańskie Studia Prawnicze, No. 3(51)/2021, pp. 53-54.

[13] *Ibidem*, p. 53.

[14] K. Maj, *O ustawowym prawie pierwokupu nieruchomości…*, p. 58.

The dictionary definition of "depression" identifies it as a place that is concave or set back into something.[15] The Water Law does not contain any specification as to surface area or depth, which leads one to assume that Article 23 Section 2 of the Water Law applies to any depression of land that is filled with water and is not a pond. However, the problem may relate to the distinction between a pond and another body of water. On the other hand, the phrase "resulting from human activity" suggests that it refers to those depressions of land which have an anthropological origin and are the result of, for example, earthworks. How such depressions should be treated if some of them are artificial while others are the result of natural processes? It is also questionable whether the water should be in these depressions as a result of natural or human activity. An appropriate application of Article 23 Section 1 of the Water Law leads to the conclusion that waters in man-made depressions should not be directly naturally connected to flowing surface waters, as in such situations they cannot be treated as inland standing waters.[16]

As the above analysis indicates crucial definition of the right of pre-emption from the Water Law remains ambiguous in many cases. Article 23 Section 2 of the Water Law is unclear and the reconstruction of the legislator's intentions by the participants in the trade is subjective which may lead to different results in each case. It is not possible, on the basis of its content, to indicate precisely which depressions of land are inland standing waters. The catalogue of surface-standing waters is not bound to a minimum surface area and even small bodies of water created by natural forces will meet the definition in Article 23 Section 1 of the Water Law. It can be problematic to decide whether a water body, despite siltation and grass growth, should still be considered as a type of inland standing water. The scope of Article 217 Section 13 of the Water Law appears to be too broad and a literal interpretation of the provision may lead to absurd conclusions. The pre-emption right can be applied to real properties that are of little or even no relevance to the proper management of water, however, it limits the rights of the owner.

3. THE REAL PROPERTY GENERAL ISSUES

In view of the scope of the article, it is crucial to define the concepts of real property and land.

According to Article 46 of the Civil Code, real property is defined as parts of the earth's surface that constitute a separate subject of ownership (land), buildings permanently connected to the land or parts of such buildings, if under specific provisions they constitute a separate subject of ownership from the land. For land

[15] W. Doroszewski (ed.), *Słownik języka polskiego*, Volume X, Wyg-Ż…, p. 508.

[16] W. Gonet, *Problematyka prawa pierwokupu gruntów*…, p. 54.

properties two criteria must be met: part of the plot must be separated by marked external boundaries and it must constitute a separate object of ownership.[17]

Although there are two different views regarding real property as land, the dominant view in the doctrine[18] and the accepted one in the judiciary[19] is that real property is a land surface for which a land and mortgage register has been established. In civil law, the terms "landed property" and "land" should be considered synonymous.[20]

As real property may consist of one or more plots of land,[21] the terms "real property" and "plot of land" are not identical and must be clearly distinguished. According to paragraph 7 Section 1 of the Ordinance on the registration of land and buildings,[22] a registered land parcel is a continuous area of land located within one registration area, homogenous in legal terms, separated from the surroundings by the boundaries of the registered parcels.

The provision of Article 217 Section 13 of the Water Law refers not to real property but to a specific type of land, i.e. concerns land under inland standing waters. Such a formulation may lead to the conclusion that, in principle, there is no separate object of ownership on which the pre-emption right could be exercised. A particular object may in fact be considered to be land, defined by its external borders, but not a piece of land with undefined borders, which is not geodetically divided into a separate cadastral parcel.[23] This approach seems to be too restrictive. It is more reasonable to assume on the basis of Article 37a Section 1 of the Forest Act[24] that the right of pre-emption applies to the entire real property. What is more, if only part of the real property meets the prerequisites for the right of pre-emption, this right may be exercised with respect to the whole of it.[25]

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[17] Ł. Żelechowski, (in:) K. Osajda (ed.), *Prawo cywilne. Komentarz, T. I, Przepisy wprowadzające (art. I-LXV PWKC), Część ogólna, Własność i inne prawa rzeczowe (art. 1-352 KC)*, Warsaw 2013, p. 543.

[18] A. Kaźmierczyk, (in:) M. Habdas, M. Fras (eds.), *Kodeks cywilny. Komentarz, T. I. Część ogólna (art. 1-125)*, Warsaw 2018, pp. 352-354.

[19] E.g.: Decision of Supreme Court dated 30 October 2003 r. (IV CK 114/02); Resolution of Supreme Court dated 7 April 2006 (III CZP 24/06); Resolution of Supreme Court dated 17 April 2009 (III CZP 9/09); Resolution of Supreme Court dated 21 March 2013 (III CZP 8/13); Judgment of Supreme Court dated 29 December 2020 (I CSK 27/19).

[20] Footnote No. 1613, A. Kaźmierczyk, (in:) M. Habdas, M. Fras (eds.), *Kodeks cywilny. Komentarz…*, p. 351.

[21] T. Sokołowski, (in:) M. Gutowski (ed.), *Kodeks cywilny. T. I. Komentarz. Art. 1-449*, Warsaw 2016, p. 279.

[22] Ordinance of the Minister of Development, Labour and Technology of 27 July 2021 on the registration of land and buildings (Journal of Laws of 2021, item 1390).

[23] P. Czubik, *Pierwokup gruntów pod wodami stojącymi – refleksja na kanwie ustawy z dnia 20 lipca 2017 r. Prawo wodne*, (in:) Nowy Przegląd Notarialny, No. 3, 2017, p. 7.

[24] Forest Act of 28 September 1991 (Journal of Laws of 2022, item 672 as amended).

[25] W. Fortuński, M. Kupis, *Prawo pierwokupu w nowym prawie wodnym*, (in:) Nowy Przegląd Notarialny, No. 2 (75), 2018, pp. 21-22.

The overlap between the boundaries of the real property and the area of land under water means that the application of the right of pre-emption should not cause major difficulties – the subject of the pre-emption right will be separated.[26] However, it is possible that the area covered by water may only be a part of the real property. The method of exercising the pre-emption right, constructed in this way, is imprecise and may in practice be a subject of individual interpretations by judges and notaries.[27]

The above comment is reinforced by the fact that the Ministry of Maritime Economy and Inland Navigation has issued a legal opinion (hereinafter referred to as the Opinion of the Ministry), which appears to be a response to the doubts that arise when a body of water is located on a real property. The need for such a document is evidence that Article 217 Section 13 of the Water Lawis not an example of the most perfect legislation and that the scope of the subject matter of the right of pre-emption is problematic in the practice of trading. Legal opinions of this kind, although they may provide interpretative guidelines for Starosts, notaries and contracting parties, should not be treated as an unquestionable interpretation of the law. Even less do they create obligations or claims.

The Ministry's opinion places great emphasis on the designation in the land register, citing Article 21 Section 1 of the Geodetic and Cartographic Law,[28] according to which the data contained in the land and building register constitute the basis for economic planning, spatial planning, assessment of taxes and benefits, designation of real property in land and mortgage registers, public statistics, real property management and the register of agricultural holdings. Paragraph 9 Section 4 of the Land and Building Register Ordinance divides land into those under: 1) internal marine waters, designated by the symbol "Wm", 2) flowing surface waters, designated by the symbol "Wp", and 3) standing surface waters, designated by the symbol "Ws". Following the Opinion of the Ministry, the pre-emption right applies to the last category only.

Nevertheless, the importance of land registration in determining the subject of the pre-emption right should not be overestimated. Firstly, the designation should only be relevant in cases where the water is actually located on the real property. However, if, it is no longer filled with water, the designation with the symbol "Ws" should be irrelevant. Having regard to Article 23 Section 2 of the Water Law, it cannot be ruled out that there will be water-filled depressions on the real property, which have been created by human activity, but the land register will not be updated. The owner's action cannot be a condition for the pre-emption right. It seems that the land register has an important but auxiliary function only, while the analysis of the actual state of affairs on the property is most relevant.

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[26] P. Czubik, *Pierwokup gruntów pod wodami stojącymi – refleksja…*, p. 7.

[27] *Ibidem*, p. 7.

[28] Act of Geodetic and Cartographic Law of 17 May 1989 (Journal of Laws 2021, item 1990 as amended).

Doubts arise when the water body is only part of the real property. In such situations, when a fragment of land is marked "Ws", the pre-emptive right should be referred to the whole real property.[29] However, it has to be decided whether the inclusion in one land and mortgage register of several plots of land, where only one meets the conditions of Article 217 Section 13 of the Water Law, should lead to the application of the pre-emption right to all plots of land included in the one land and mortgage register? The answer must be twofold, as it depends on the scope of the sale agreement. If only the plot of land on which the body of water is located, marked "Ws" in the land register, is sold, then the pre-emption right extends only to this particular plot of land. What is relevant for the exercise of the right is the scope of coverage by the sale agreement, so it should not be extended to plots of land that are not the subject of the transaction. The purchase of a plot of land and its detachment from the original land and mortgage register results in the inability to exercise the pre-emption right with regard to the rest of the land covered by that register. Since it relates to real property comprising land under inland standing waters, there are no grounds for covering with pre-emption right plots of land that used to be in the same land and mortgage register with a plot of land covered by such pre-emption right. A different approach must be taken in the case where all plots of land from the same land and mortgage register are sold, and only one of them fulfills all conditions to exercise the right of pre-emption. In such a case, this right should apply to the entire real property i.e. all plots of land constituting the subject of the transaction. However, this principle cannot be applied when the subject of the sale is an area formed by plots of land located in several land and mortgage registers. This would lead to the extension of the scope of the pre-emption right to real property which has no significance for water management, but to be sold in the same transaction with plots covered by water. The sale of several plots of land, one of which meets the conditions for the application of the pre-emption right, while there are other plots in the land and mortgage register, is also complex. Plots of land that are sold together with a plot of land that meets the criteria of Article 217 Section 13 of the Water Law will be subject to the right of pre-emption. However, to the other plots of land in the same land and mortgage register, which were not the subject of the sale agreement, Article 217 Section 13 Water Law should not be applied. It would be irrational to claim that a plot of land is covered by the pre-emption right despite the fact that it does not meet the statutory criteria, but was in the same land and mortgage register with the plot of land that did meet these criteria. Therefore, the contracting parties may cover in conditional agreement the plot of land in respect of which the right of pre-emption may be exercised, and later sell the other plots of land that do not meet the statutory conditions for the application of the right of pre-emption.

[29] W. Fortuński, M. Kupis, *Prawo pierwokupu…*, p. 22.

The analysis concerning the definition of land and the scope of application of Article 217 Section 13 of the Water Law indicates the imprecise nature of this regulation. The designation of land with the symbol "Ws" in many cases does not provide a comprehensive answer for determining the scope of the pre-emption right. Opting for the definition of real property as plots covered by the same land and mortgage register leads to the conclusion that this right applies in the event of the sale of real property, partially covered by inland standing waters. The inclusion of several plots of land in the same land and mortgage register in the transaction leads to the conclusion that the right of pre-emption applies to all of them if only one meets the criteria of Article 217 Section 13 of the Water Law. In the case of the sale of real property from several land and mortgage registers, the pre-emption right can only be applied to the one on which inland standing waters are located.

4. SUBJECT MATTER OF PRE-EMPTION RIGHT - DETAILED ANALYSIS

The content of Article 217 Section 13 of the Water Law indicates that the pre-emption right may be exercised in a wide range of factual situations. Reducing the above regulation to absurdity, an artificial pit filled with water would meet the conditions for exercising the right. Thus, since a literal interpretation of the regulation leads to absurd conclusions, it seems most reasonable to refer to the purposes of the Act. These can be reconstructed on the basis of Article 1 of the Water Law. The management of water in accordance with the principle of sustainable development, in particular, with the shaping and protection of water resources, the use of water and the management of water resources, may be relevant when analyzing individual facts.

It is necessary to point out those situations in which the right of pre-emption does unquestionably not apply. By its nature, it may only be exercised by the right holder in the event of the conclusion of a sales agreement and, therefore, will not apply to real property comprising land under inland standing waters disposed of otherwise than by the conclusion of a sales contract.[30] Internal sea waters and territorial sea waters are also excluded from the scope of the right of pre-emption, as they are not inland waters. Ponds with intermittent inflow or outflow of water cannot be treated as inland standing waters, which also leads to the fact that they cannot be covered by Article 217 Section 13 of the Water Law.[31]

[30] Examples of this are the conclusion of a donation agreement or exchange agreement.

[31] W. Gonet, *Problematyka prawa pierwokupu gruntów*..., pp. 53-54.

The right of pre-emption applies to land under inland waters in lakes and other natural bodies of water that cannot be associated with inland flowing waters. These include lakes or ponds within the meaning of Article 4 Section 10 of the Act on the protection of agricultural and forestry land. The designation of the land in the register with the symbol "Ws" does not seem to be necessary in these circumstances. More difficulties in providing an unambiguous assessment are caused by depressions of land created as a result of human activity. They can be classified as ditches within the meaning of Article 16 Section 47 of the Water Law, according to which they are artificial channels leading water continuously or periodically, with a bottom width of less than 1.5 meters at the mouth. However, these lands cannot be classified as inland standing waters and are not covered by the pre-emption right.[32] This position was also adopted in the Ministry's Opinion. An interesting view was expressed by W. Fortuński and M. Kupis indicating that water in ditches is collected not for water management purposes, but for appropriate or efficient use of land adjacent to these ditches in connection with agricultural, industrial, or residential activities.[33] The criterion adopted may also apply to other cases. One has to wonder whether such reasoning can be applied to other circumstances and other subjects of the sale agreement.

The construction of roads sometimes involves the need to drain water, which is assisted by retention basins. They fulfill the prerequisites to qualify under Article 232 of the Water Law – they are depressions of land created by human activity. They are built to collect and drain water. On the other hand, it seems that the overriding purpose is to enable the proper use of roads. Given this circumstance, it would have to be concluded that the application of the right of pre-emption would be questionable in this case. However, considering the literal interpretation of Article 217 Section 13 in conjunction with Article 23 Section 2 of the Water Law, it shall be concluded that the right of pre-emption may be applied.

The case of land containing bogs or moorlands is also complicated. It seems that finding the answer in this case requires reference to the provisions of the Regulation on the registration of land and buildings. According to point 25 of Schedule 1 – Classification of land into particular land uses, land under standing surface water does not include the indicated areas, but is wasteland, according to point 9 of that Schedule. The legislator includes in this category *i.a.* bogs, mudflats, meltwaters, moors, swamps, mires, and land covered by waters that are unsuitable for fish production – ponds, waterholes, post-peat pits. The importance of the land register in determining the subject of the right of pre-emption cannot be overestimated, but it seems that the above areas will not constitute the subject of the right of pre-emption under Article 217 Section 13 of the Water Law, as they constitute agricultural land – wasteland.[34] In order to carry out proper water management, such areas are not of

[32] *Ibidem*, pp. 54-55, see also: W. Fortuński, M. Kupis, *Prawo pierwokupu*…, p. 17.

[33] W. Fortuński, M. Kupis, *Prawo pierwokupu*…, p. 18.

[34] W. Gonet, *Problematyka prawa pierwokupu gruntów...*, p. 56.

key importance, and limiting the right of ownership in this case would constitute an excessive burden imposed on the owner. In order to carry out proper water management, such areas are rather not important, and restricting the right of ownership in this case would be an undue burden imposed on the owner.

It seems more common in the market to sell real properties developed with a single-family house on which there are waterholes[35] to improve the aesthetics of the garden or swimming pools built for recreational purposes. In this case, it would be irrational for the purposes of the Water Law to exercise the pre-emption right under Article 217 Section 13 of the Water Law.[36] For water management that kind of real property is not relevant. The above conclusion is supported by the small size of backyard water bodies. The pools, apart from their small size, are most often filled with water containing chemicals to ensure their cleanliness, and thus the applicability of the pre-emptive right seems doubtful.

In the Opinion of the Ministry, the above problem has been partially solved, as it has been indicated that in the case of pools and ponds located on real property, the right of pre-emption does not apply, as the water in them is not of natural origin. However, such wording is unclear and leads to other potential issues. Determining what the opinion makers meant by the natural origin of the water is problematic – is it the method of supply, the source of drawing, or perhaps the chemical composition? The problem also arises when water has accumulated in waterholes or pools as a result of rainfall or snow melting. In the doctrine, M. Kupis and W. Fortuński pointed out that the right of pre-emption would then apply[37] and, given the content of the Ministry's Opinion, one would have to agree with this statement. On the other hand, the rational approach as well as the reference to the objectives of the Act do not justify the above view. The importance of such small reservoirs for water management can be considered limited. Such land covered by the right of pre-emption, and consequently also to the houses erected on it, which form part of the land, leads to the imposition of a highly onerous burden on the trading participants. In the case of swimming pools, the filling with rainwater or snowmelt can only be temporary, as the water will disappear as a result of natural physical processes, making the application of the pre-emption right all the more absurd. Equally skeptical is the inclusion in its scope of land under open pools, thermal baths, or salt pans.[38] This is because they are mainly created for recreational or rehabilitation purposes.

[35] These are ponds other than those covered by Article 4 Section 10 of the Agricultural and Forestry Land Protection Act.

[36] W. Fortuński, M. Kupis, *Prawo pierwokupu*…, pp. 18-19, see also: Legal opinion on the pre-emption right …, p. 1, and Reply to Interrogation No. 18492 by the Undersecretary of State at the Ministry of Maritime Affairs and Inland Navigation, https://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=60E82B8D (accessed 2 July 2023).

[37] W. Fortuński, M. Kupis, *Prawo pierwokupu*…, p. 19.

[38] W. Gonet, *Problematyka prawa pierwokupu gruntów*..., p. 56.

It is also common that fire tanks are located on industrial plants or warehouses. Paragraph 3 Section 1 point 2 in conjunction with paragraph 8 Section 1 of the Ordinance of Ministry of Administration and Internal Affairs on fire water supply and fire roads[39] indicates that if there is no water source providing the required amount of water for firefighting purposes, such water may be provided by *i.a.* natural or artificial body of water. If they are an object, not connected to the ground, it is difficult to see how the pre-emption right maybe exercised. However, it cannot be excluded that they represent a depression in the ground, filled with water and created by human activity. The literal interpretation of Article 217 Section 13 *et sq.* of the Water Law leads to the conclusion that in the case of selling such real property, the pre-emption right may be exercised. As in the case of swimming pools, it is difficult to find justification for the exercise of the pre-emption right. The purposes of the Water Law, as defined in Article 1, are incompatible with the function of this type of body of water. Their location next to industrial plants or warehouses is intended to ensure adequate fire safety, as required by the law. The building located on the land, the technical infrastructure (e.g. internal roads), and the fire tank form a coherent whole. It also seems controversial to exercise the pre-emption right over a real property only because the fire tank is located in a depression of land whereas if it were an object standing on the surface of the property, it would be impossible to exercise the right. Finally, it is difficult to agree that in every case of the sale of real property on which an industrial plant or warehouse is located and of which the land under a fire reservoir is a part, it is justified to exercise the pre-emption right in favour of the State Treasury. It is strengthened by an argument that in some cases under paragraph 3 Section 1 point 2 in conjunction with paragraph 8 Section 1 of the Ordinance of the Minister for Internal Affairs and Administration on fire water supply and fire roads such as fire tanks are the only way to provide sufficient fire protection. In addition to the acquisition of the real property, production or storage buildings, which are of no significance for water management, would also be taken over. In such situations, the exercise of the right by the State Treasury would be difficult to be rationally explained by considerations of the Water Law.

A different view should be taken on a body of water on former mining areas of sand, gravel, gypsum, or peat. These areas, when filled with water, will be subject to the pre-emption right under Article 217 of the Water Law. However, if this land is developed for fish farming purposes, the land will no longer be subject to the pre-emption right.[40] The extension of the right of pre-emption to mined land and land created after gravel pits where water has accumulated is also confirmed in the Ministry's Opinion.

[39] The Ordinance of Ministry of Administration and Internal Affairs of 24 July 2009 on fire water supply and fire roads (Journal of Laws of 2009, item 1030).

[40] W. Gonet, *Problematyka prawa pierwokupu gruntów...*, p. 55 and K. Maj, *O ustawowym prawie pierwokupu nieruchomości…*, p. 64.

An interesting case is the land underneath sedimentation tanks where wastewater is collected in order to be treated and put back into circulation. These facilities are a component of wastewater treatment plants, are the product of human activity, and are located in depressions in the ground. Although they meet the criteria to be covered by the provision of Article 23 Section 2 of the Water Law, it is difficult to consider them as the subject of the right of pre-emption. First of all, they are filled with wastewater, which only becomes clean water after a proper treatment process. The sedimentation tanks are part of the sewage treatment plant and, therefore, exercising the pre-emption right only to them would result in the impossibility of operation of such plants, while extending such a right to the plant itself would be an expansive interpretation, which is impermissible in the case of limiting the right of ownership. Even if we accept that sewage treatment plants can be seen in terms of the use and management of water resources (Article 1 in fine of the Water Law), it is difficult to agree that the State Treasury has exclusivity in this sphere, which is confirmed, for example, by Article 3 Section 1 in conjunction with Article 1 Section 1 point b of the Act on collective water supply and collective sewage disposal.[41] It is, therefore, questionable whether the pre-emption right to acquire land under sedimentation ponds is covered.

The land under the water in the well is not covered by the operation of Article 217 Section 13 of the Water Law. Such water cannot be classified as surface water as it is, by its nature, groundwater. The provision of Article 16 Section 68 of the Water Law includes in this concept all the waters below the surface of the ground in the saturation zone, including groundwater in direct contact with the ground or subsoil.[42] Consequently, the sale of the property with the well on it will be free of pre-emptive rights.

Hypothetically, the wording of Article 217 Section 13 in conjunction with Article 23 Section 2 of the Water Law also prompts consideration of the case of the sale of real property on which there are depressions of land filled with water which form part of an animal enclosure located in a zoo within the meaning of Article 5 Section 11 of the Nature Conservation Act.[43] The land under such basins should not be subject to the pre-emption right. This is because they play a vital role in shaping the semi-natural ecosystem in which the animals on display inhabit. They are, therefore, sometimes necessary for a species to be able to function in a zoo. The relevance of such reservoirs for the purposes indicated in Article 1 of the Water Law appears to be low. Furthermore, if the zoo grounds were a single registered parcel of land, the right of pre-emption would have to be exercised over the entire zoo, which is irrational from the point of view of the Act.

[41] Act of 7 June 2001 on Collective Water Supply and Collective Sewage Disposal (Journal of Laws of 2023 item 537).

[42] K. Maj, *O ustawowym prawie pierwokupu nieruchomości*…, p. 64.

[43] Act of 16 April 2004 on nature protection (Journal of Laws 2022, item 916 as amended).

Finally, the reference should be made to the Opinion of the Ministry, in which it is indicated that the pre-emption right from the Water Law applies only to the sale of land covered by inland standing waters acquired from the State Treasury after the date of entry into force of the Act in accordance with the procedure indicated in Article 217 of the Water Law. This position is derived from paragraph 55 of the Regulation of the President of the Council of Ministers on "Principles of Legislative Techniques".[44] The presented view is controversial. First of all, it is not justified to take into account the content of Article 217 Section 13 of the Water Law. The provisions of Article 217 Section 1 and 2 of that act refer to "land under inland standing waters owned by the State Treasury". A comparison with Article 217 Section 13 of the Water Law, which refers to "land under inland standing waters", makes it possible to conclude that if the legislator had wanted to extend the pre-emption right only to land acquired from the State Treasury, this would have been reflected in the wording of the provision. The method of interpretation presented in the Opinion of the Ministry significantly alters the wording and meaning of Article 217 Section 13 of the Water Law, narrows the subject-matter scope of the pre-emption right and, in principle, leads to the creation of a completely new provision. Finally, it should be noted that the Ministry's Opinion is in no way a binding interpretation. It is also difficult to see it as a document on which courts dealing with possible disputes may base their decisions. Moreover, the assumptions adopted in the Ministry's Opinion are an addition to the Water Law of certain elements that were not introduced by the legislator.[45]

As can be seen from the analysis presented above, the multiplicity of factual situations and the variety of objects that can be qualified as "man-made depressions of land" containing water make it difficult to determine the subject scope of the right of pre-emption under the Water Law. The wording of Article 217 Section 13 in conjunction with Article 23 Section 2 of the Water Law should be considered first and foremost, but these articles do not provide a sufficiently precise answer. An uncritical application of the literal interpretation leads to unacceptable conclusions, as the pre-emptive right would then be applied to such reservoirs which are of no significance for water management. This is unacceptable, as this entitlement constitutes a significant restriction of the right of ownership. It is, therefore, first and foremost necessary to apply a purposive interpretation, which rationalizes Article 217 Section 13 of the Water Law.

[44] Ordinance of the Prime Minister of 20 June 2002 on the "Principles of Legislative Techniques" (Journal of Laws of 2016, item 283).

[45] Fortuński, M. Kupis, *Prawo pierwokupu*…, p. 20.

SUMMARY

The conducted analysis of the right of pre-emption from the Water Law reveals a number of problems associated with this right granted to the State Treasury. The problem seems to be twofold. Firstly, it is sometimes difficult to determine whether the subject of the right of pre-emption is only one property or several, and how to deal with a situation in which the subject of the sale and the plots in the Land Register do not coincide. In addition, the multiplicity of cases in which a property may be sold, on which there are depressions of land created as a result of human activity, other than ponds, makes it difficult to see the rationality of applying the provisions on the right of pre-emption of the real property.

First of all, it is difficult to define the subject scope of Article 217 Section 13 of the Water Law. Sale agreements may concern not one, but several or even dozens of plots of land for which a common Land Register is kept, and only part of them will have a body of water constituting inland standing waters. In this situation, it seems that the right of pre-emption should be extended to the entire property in the sense of the Land and Mortgage Register, which, however, cannot apply if several Land and Mortgage Registers are kept for the plots. Extending its application to the other real property, just because it is covered by the same agreement as the real property subject to the right of pre-emption, should be considered too burdensome for the owners and thus unacceptable. There are also problems with the interpretation of Article 217 Section 13 of the Water Law because a literal interpretation leads to the conclusion that the right of pre-emption should be applied to various real properties. It happens more than once that adopting this position leads to absurd results. It is difficult to agree that real properties developed with a single-family house with a swimming pool or pond, as well as industrial plants with fire reservoirs, are important for shaping the country's water management. The issuing of a legal opinion by the Ministry of Maritime Affairs and Inland Navigation only confirms the ambiguity of the regulations. It is not always possible to refer to the land designation in the Land Register, although this is undoubtedly helpful. A more appropriate attitude is to assess each case individually and apply a purposive interpretation, relying heavily on the content of Article 1 of the Water Law.

These problems do not make the pre-emption right unenforceable, but they are a source of practical problems that arise when selling a property on which any body of water in a depression of land is located. The ambiguity in the identification of the object, the complicated notification procedure, and the problematic resolution of the coincidence of pre-emption rights should be considered undesirable for the participants in the transaction.

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Agnieszka Ziółkowska
University of Silesia, Poland
e-mail: agnieszka.ziolkowska@us.edu.pl
ORCID 0000-0002-9933-2667

Anna Gronkiewicz
University of Silesia, Poland
e-mail: anna.gronkiewicz@us.edu.pl
ORCID 0000-0003-1603-0565

INTENSIFICATION OF DIGITALIZATION OF PUBLIC ADMINISTRATION AND THE DIGITAL DIVIDE

Abstract

Currently, in Poland, the process of digitalization of public administration and public services has reached an exceptionally fast pace. On the one hand, this phenomenon is an expression of the state's attempts to improve the functioning of public administration and keep up with the changes taking place throughout Europe and the world, and on the other hand, it is a serious threat to social groups at risk of digital exclusion. At the same time, the actions taken so far are not comprehensive and ignore key issues such as digital and media education and care for the digital culture of society.

KEYWORDS

digitalization of public administration, digital exclusion, individual's dignity

SŁOWA KLUCZOWE

cyfryzacja administracji publicznej, wykluczenie cyfrowe, godność osobista

1. INTRODUCTION

Today, we treat digitalization, and even automatization of public administration activities as a way to increase administration efficiency and modernization.[1] We perceive information technology (IT) as an opportunity to increase individuals' access to administrative proceedings and improve the services provided by public administration. Although the current Polish society is called an information society,[2] neither access to computer devices nor the ubiquity of the Internet, nor widespread ability to use them in dealing with public administration are universal. Notably, many studies confirm that young people called the digital natives are not that digital at all. According to the Digital Poland Foundation and its 2021 Digital Fitness test, the skills of elementary and secondary school students are at an intermediate level.[3] The IT Fitness Test measuring digital literacy levels

[1] See A. Monarcha-Matlak, "Wpływ komunikacji elektronicznej na prawo administracyjne", (in:) *Prawo administracyjne dziś i jutro*, J. Jagielski, M. Wierzbowski (eds.), Warszawa 2018, pp. 152–159; W. Góralczyk, "Akty administracyjne "wydawane" przez komputer" (in:) *Jednostka wobec władczej ingerencji organów administracji publicznej. Księga jubileuszowa dedykowana Profesor Barbarze Adamiak*, J. Korczak, K. Sobieralski (eds.), Wrocław 2019, pp. 139–148; F. Geburczyk, "Automatyzacja załatwiania spraw w administracji samorządowej a gwarancje procesowe jednostek. Uwagi de lege ferenda w kontekście ogólnego rozporządzenia o ochronie danych (RODO)", *Samorząd Terytorialny* 5/2021, pp. 21–32; M. Błażewski, "Automatyzacja pozyskiwania i analizowania danych jako przejaw informatyzacji czynności materialno-technicznych organów administracji publicznej podejmowanych w toku postępowania administracyjnego", (in:) *Kierunki rozwoju jurysdykcji administracyjnej*, M. Szewczyk, L. Staniszewska, M. Kruś (eds.), Warszawa 2022, pp. 289–296.

[2] See *Społeczeństwo informacyjne – problemy rozwoju*, A. Szewczyk (ed.), Warszawa 2007; *Społeczeństwo informacyjne,* Warszawa 2008; E. Ziemba, *Zrównoważone społeczeństwo informacyjne*, J. Papińska-Kacperek (ed.), Katowice 2017; L. Haber, M. Niezgoda, *Społeczeństwo informacyjne. Aspekty funkcjonalne i dysfunkcyjne,* Kraków 2006; S. Haq, "Information Society and Public Administration: The Theoretical Bonding", *Journal of Alternative Perspectives in the Social Sciences* 3.2/2011, pp. 320–335.

[3] The second edition of Digital Fitness – which is a test of digital skills – was conducted from October 1 to 30 November 2021. In total, 5984 students from 16 voivodeships took the test. See "Uczniowie nie popisali się wiedzą z umiejętności cyfrowych. Trójka z minusem na Digital Fitness" 30 March 2022, https://digitalpoland.prowly.com/184502-uczniowie-nie-popisali-sie-wiedza-z-umiejetnosci-cyfrowych-trojka-z-minusem-na-digital-fitness (accessed 15 October 2022).

in 2022 yielded similar results.[4] Furthermore, according to many other available reports or studies, remote learning emphasized the inequality in terms of access to networks and equipment, revealing that students are unprepared to use computers.[5] At the same time, adults also revealed varying levels of digital competence,[6] which among seniors is even negligible.[7] Digital exclusion of seniors is captured in the POLSenior survey, which indicates that half of the population of Polish seniors (56.6%) is affected by the digital divide, meaning the inability to use the Internet. Moreover, 72.3% of seniors are not interested in learning basic computer or Internet skills.[8] This state of affairs is partly due to economic and

[4] The test was first held in 2022 in four Visegrad countries (the Czech Republic, Poland, Slovakia, and Hungary). In Poland, it has so far tested 8707 students from primary and secondary schools. See P. Miedziński, "Kompetencje cyfrowe uczniów sprawdzone w IT Fitness Test. Wyniki nie zachwycają" 17 October 2022, https://cyberdefence24.pl/cyber24-day/kompetencje-cyfrowe-uczniow-sprawdzone-w-it-fitness-test-wyniki-nie-zachwycaja (accessed 20 October 2022).

[5] See A. Bartol, J. Herbst, A. Pierścińska, *Wykluczenie cyfrowo-społeczne w Polsce. Stan zjawiska, trendy, rekomendacje 2021,* p. 30. The report was inspired by Orange Poland and the Orange Foundation and the Shipyard Foundation, https://admin.fundacja.orange.pl/app/uploads/2021/11/RAPORT_WYKLUCZENIE-SPOLECZNO-CYFROWE-W-POLSCE_2021.pdf (accessed 22 December 2021). As the authors of the report emphasize, digital exclusion does not affect only seniors but also younger people with low levels of education, rural residents, people with disabilities, or people in crisis of homelessness, and even early school-age children.

[6] See A. Wątor, S. Czubkowska, "I ty możesz być wykluczony. Polska dzieli się na tę A i B na podstawie nierówności społeczno-cyfrowych", https://spidersweb.pl/plus/2021/11/wykluczenie-spoleczno-cyfrowe-nierownosci-internet (accessed 5 February 2023); M. Fraser, "Co dziesiąty Polak w żaden sposób nie chroni swoich urządzeń w sieci, bo nie wie jak" 15 December 2021, https://cyberdefence24.pl/cyberbezpieczenstwo/co-dziesiaty-polak-w-zaden-sposob-nie-chroni-swoich-urzadzen-w-sieci-bo-nie-wie-jak (accessed 1 June 2022).

[7] M. Szymaniak, A. Wątor, "Dałeś dziadkowi komórkę pod choinkę. Teraz razem nauczcie się serfować po sieci" 27 December 2021 (accessed 30 December 2021), https://spidersweb.pl/plus/2021/12/wykluczenie-spoleczno-cyfrowe-seniorzy.

[8] See E. M. Kwiatkowska, H. Kujawska-Danecka, A. Lange, P. Popowski, B. Wojtyniak, "Wykluczenie cyfrowe," (in:) *Polsenior 2. Badanie poszczególnych obszarów stanu zdrowia osób starszych, w tym jakości życia związanej ze zdrowiem*, P. Błędowski, T. Grodzicki, M. Mossakowska, T. Zdrojewski (eds.), Gdańsk 2021, pp. 979–994. See also the report *Jakość życia osób starszych w Polsce w pierwszym roku pandemii COVID-19. Raport z badania, kwiecień 2021*, p. 16. The report was compiled by the SeniorHub Instytut Polityki Senioralnej (SeniorHub Institute for Senior Policy) operating within the Zaczyn Foundation. https://seniorhub.pl/wp-content/uploads/2021/05/raport-jakosc-zycia-osob-starszych-09.pdf (accessed 22 December 2021). It indicates that among Seniors 60+, only 28.8% use the Internet, while 71.2% do not use the Internet. Central Statistical Office research presented similar results. According to the Office, the reasons why in the past three months people aged 60–74 did not use the Internet are as follows: 1) no need to use the Internet (27.4%), 2) lack of appropriate skills (23.1%), 3) lack of appropriate equipment (6.8%), 4) help from another person to use the Internet (6.2%). In 2021, 21.8% of people aged 60–74 used (in the last twelve months preceding the survey) government services provided via the Internet. See D. Wyszkowska, M. Gabińska, S. Romańska, *Sytuacja osób starszych w Polsce. Główny Urząd Statystyczny. Urząd Statystyczny w Białymstoku,* Warszawa, Białystok 2022, p. 66, https://stat.gov.pl/obszary-tematyczne/osoby-starsze/osoby-starsze/sytuacja-osob-starszych-w-polsce-w-2021-roku,2,4.html (accessed 5 February 2023).

social reasons, such as the lack of a well-developed culture of lifelong learning in Poland, which would facilitate the development of digital competencies or their growth among adults and seniors.[9] Moreover, despite Poland's ageing population, electronic communication with public administration bodies insufficiently utilizes possibilities of artificial intelligence to increase service comfort for people with disabilities or seniors, even though such solutions exist and are used around the world.[10] Many IT solutions or tools are introduced with the needs of public administration bodies in mind, not those of individuals.[11] Finally, the pandemic revealed that civil servants do not take full advantage of public administration's digital solutions.[12] The digital services' inability to tackle objectively existing constraints of the financial and competence capabilities in the broader society may further exacerbate the digital divide, thus leading to social exclusion understood as the lack of access to certain goods necessary for normal functioning in the society.[13] Thus, digital exclusion introduces another division in the society, which is adverse to social cohesion.[14] However, state authorities are not interested

[9] According to the representatives of the Ombudsman and other specialists dealing with the rights of seniors, their protection is far from sufficient. See M. Wróblewski, "Ochrona praw osób starszych w działalności Rzecznika Praw Obywatelskich jako krajowej instytucji ochrony praw człowieka", *Ruch Prawniczy Ekonomiczny i Socjologiczny* 3/2012, p. 138; B. Mikołajczyk, "Rola samorządów w zapobieganiu ageizmowi – niedostatki polskiej polityki", (in:) *Administracja w demokratycznym państwie prawa. Księga jubileuszowa Profesora Czesława Martysza*, A. Matan (ed.), Warszawa 2022, pp. 420–434.

[10] P. Polański, "Zwalczanie bezprawnych treści oraz zapewnienie dostępności cyfrowej z pomocą algorytmów sztucznej inteligencji", (in:) *Prawo sztucznej inteligencji,* L. Lai, M. Świerczyński (eds.), Warszawa 2020, pp. 312–314.

[11] Examples include local government units, in which according to the study, such a way of implementing e-services is due to a lack of analysis of their own needs, a negligible level of digital awareness among decision-makers, and the effect of imitation resulting from the competitiveness between municipalities. See K. Drgas, "Przesłanki wdrażania cyfryzacji jednostek samorządu terytorialnego finansowanej ze środków unijnych", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1/2019, p. 203, D. Chaba, "Warunki cyfryzacji samorządu terytorialnego w Polsce", *Samorząd Terytorialny* 5/2021, pp. 17–18.

[12] This is confirmed by successive audits of the Supreme Audit Office. Among others, the conclusions indicate that offices are unprepared for remote work and operate inefficiently. See "Informacja z dnia 23.09.2021r. o wynikach kontroli Organizacja pracy zdalnej w wybranych podmiotach wykonujących zdania publiczne w związku z ogłoszeniem stanu epidemii" (LBI.430.003.2021 reg. no. 135/2021/P/21/059/LBI), Warszawa 2021 https://www.nik.gov.pl/plik/id,25063,vp,27811.pdf (accessed: 5 February 2023); "Informacja z dnia 11.01.2022r.o wynikach kontroli Funkcjonowanie urzędów administracji publicznej w okresie pandemii COVID-19" (LSZ.430.005.2021 reg. no. 173/2021/P/21/094/LSZ), Warszawa 2022 https://www.nik.gov.pl/plik/id,25613,vp,28386.pdf (accessed 5 February 2023).

[13] A. Stawicka, "Wykluczenie cyfrowe w Polsce", Warszawa 2015, p. 3, https://www.senat.gov.pl/gfx/senat/pl/senatopracowania/133/plik/ot-637_internet.pdf (accessed 28 September 2022) .

[14] See A. Demczuk, "Brak dostępu do infrastruktury i usług ICT jako nowy typ wykluczenia w społeczeństwie informacyjnym", (in:) *Dyskryminacja. Przyczyny. Przejawy. Sposoby zapobiegania,* M. Lesińska-Staszczuk, J. Wasil (eds.), Lublin 2016, pp. 101–118.

in understanding the causes of the digital divide, as evidenced by the lack of any discussion on the digitalization and automatization of life and public services, along with possible related opportunities and issues.[15] Meanwhile, despite virtually no debate about the possible consequences of the digitalization of life, the inadequacy of services to citizens' needs, and insufficient technical infrastructure (transmission capabilities)[16] – which is the state's responsibility[17] – the Polish government has recently increased the number of e-services.

2. SELECTED SPHERES OF PUBLIC ADMINISTRATION DIGITALIZATION

Undoubtedly, the broadly understood process of digitalization of public administration is part of the problem of e-administration understood as a set of organizational and technical projects aimed at supporting the administration in its tasks with tools, means of information technology, ICT, and automation.[18] The *ratio legis* of legal regulations aimed at the digitalization of public administration is to be uninterrupted contact with the office, integration of various activities in a single channel, automatic verification of submitted forms, status monitoring, notification activities automation, electronic expression of opinions and submission of positions, single data entry into registers,[19] and information dissemination. Thus, the process of public administration digitalization includes both substantive and procedural law.

[15] According to the Supreme Audit Office, the state's efforts to raise digital competence in society have been insufficient. See "Informacja o wynikach kontroli z dnia 11.01.2022r. Działania organów administracji publicznej na rzecz podnoszenia kompetencji cyfrowych społeczeństwa" (KAP.430.017.2021, reg. no. 182/2021/P/21/003/KAP), https://www.nik.gov.pl/plik/id,25577,vp,28343.pdf (accessed 5 February 2023).

[16] I. Święcicki, "Nierównomierna jakość dostępu do internetu w Polsce w dobie pandemii COVID-19", Polski Instytut Ekonomiczny, Warszawa, November 2021, https://pie.net.pl/wp-content/uploads/2021/11/PIE-Raport_Nierownomierna-jakosc.pdf (accessed 5 February 2023).

[17] See M. Fraser, "Kanownik: Polski nie stać na dalsze opóźnienia ws. wdrożenia 5G" 26 October 2021, https://cyberdefence24.pl/polityka-i-prawo/kanownik-polski-nie-stac-na-dluzsze-opoznienia-ws-wdrozenia-5g (accessed 6 November 2021); A. Grzeszak, "5G? Raczej byle G. PIS zapowiadał rewolucję, a wyszło jak zawsze" 26 September 2022, https://www.polityka.pl/tygodnikpolityka/rynek/2181740,1,5g-raczej-byle-g-pis-zapowiadal-rewolucje-a-wyszlo-jak-zawsze.read (accessed 30 October 2022).

[18] R. Tadeusiewicz, "Problemy formowania e-administracji jako składnika społeczeństwa informacyjnego," (in:) *Od społeczeństwa industrialnego do społeczeństwa informacyjnego*, A. Siwik (ed.), Kraków 2007, p. 393.

[19] See J. Janowski, *Administracja elektroniczna,* Warszawa 2009, p. 60.

In the former, we observe the expansion of e-administration. In a way, the growth of services provided by the public administration with the use of IT instruments answers public expectations regarding increased accessibility to services. An example may be the process of public records digitization. The entity keeping the register in electronic form must fulfill the obligations arising from Article 14 of the Act of 17 February 2005, on the digitalization of entities implementing public tasks[20] and, in particular, keep a register in a manner that ensures compliance with the minimum requirements of ICT systems if the register operates by means of ICT, in a manner consistent with the minimum requirements of public registers and exchange of information in electronic form; also, to enable the provision of information to the register and make information from the register available electronically if the register operates by means of ICT. Thus, such registers allow information to be created and made available online. Making the registered data public by the system administrator allows entities to use the information and data contained in them for purposes other than their original purpose of collection.[21] Noteworthy, public registers serve informative, protective,[22] and registrative functions.[23] Meanwhile, the digitalization process of public collections and records is continuous, and it cannot be considered complete. Instead, we should assume that at this stage it is only at its early stage of development.

Digitalization of administrative procedures results from numerous amendments to the Code of Administrative Procedure,[24] especially Articles 14 and 39. As a result of the changes, e-delivery became a mandatory and priority one. This solution is considered advisable, as its essence is to revolutionize the previous approach in this regard.[25] If e-delivery proves impossible, only then will the public administration body deliver letters in paper form upon receipt by the designated operator using the public hybrid service – referred to in Article 2(7) of the Act of 18 November 2020, on electronic delivery[26] (hybrid delivery) – or by its employ-

[20] Journal of Laws 57/2023.

[21] K. Wojsyk, "Informatyzacja rejestrów publicznych a bezpieczeństwo państwa", (in:) *Rejestry publiczne. Jawność i interoperacyjność*, A. Gryszczyńska (ed.), Warszawa 2016, p. 193.

[22] For more on these functions see T. Stawecki, *Rejestry publiczne. Funkcje instytucji,* Warszawa 2005, pp. 34–37, 39–41.

[23] According to the doctrine of administrative law public register is a collection of information about persons, things, or rights, which is characterized by the manner of creation (it is created on the basis of universally applicable law), the public character of the body that maintains the register, transparency, the decision as a legal form of actions taken by the registration body with respect to the data contained therein, and the legal consequences as a result of keeping and disclosing information in the register (See T. Stawecki, *Rejestry publiczne*, p. 29).

[24] Act of 14 June 1960, Code of Administrative Procedure (uniform text of Journal of Laws of 2022, item 2000 as amended).

[25] P. Wajda, Art. 39 "komentarz do artykułu" [Commentary to the Article] (in:) *Komentarz*, R. Hauser, M. Wierzbowski (eds.), Warszawa 2021, p. 516.

[26] Journal of Laws 569/2020.

ees or other authorized persons or bodies (traditional, paper-based delivery).[27] The introduction of registered delivery seeks to ensure the sender's and the addressee's identification, guaranteeing timely and precise delivery.[28] The literature indicates that when adopting the Act on Electronic Delivery,[29] the legislator focused on the inclusiveness of e-delivery, so the adopted solutions may be perceived as an element of social inclusion, integration, and the so-called e-inclusion.[30]

In turn, communicating public information by means of digital tools – including the Bulletin of Public Information – is to ensure that individuals learn of current matters that may affect their decision-making processes and exercise of subjective rights. Access to public information pursuant to Article 1(1) of the Act of 6 September 2001, on access to public information[31] is of fundamental importance for individuals' knowledge of their rights and obligations, while guaranteeing legal certainty and building trust in the state. At the same time, the bulletin is the basic form of disseminating public information. Moreover, the judicature emphasizes that the legitimacy of the adopted solution is not excluded even by the circumstance that the interested entity has no computer or direct access to the Internet.[32] Indeed, in the era of universally developing digitalization, the individual can use paid access to the Internet like cafeterias or free-of-charge possibilities on premises of public utility units like libraries, which furthermore provide assistance from persons with appropriate qualifications in the use of computer equipment. Thus, the adopted solution fully enables the realization of the citizen's constitutional right to obtain information of public authorities and persons performing public functions, as formulated in Article 61 of the Constitution of the Republic of Poland. However, making use of the right granted in the Constitution – confirmed by the Act on access to public information – requires from an individual competencies in searching for the desired content online.

Considering the above, we should assume that the public administration faces two important goals. On the one hand, it constantly needs to fulfill the tasks and obligations imposed on it, and on the other hand, it should aim to improve its functioning through the implementation of IT tools, but even in this area, the

[27] A. Ziółkowska, "Postępująca informatyzacja administracji publicznej a wykluczenie cyfrowe obywateli, czyli czy istnieje zagrożenie inkluzji administracji publicznej? Przyczynek do dyskusji", (in:) *Administracja w demokratycznym państwie*, A. Matan (ed.), p. 856.

[28] P. Wajda, Art. 39 in: *Kodeks postępowania administracyjnego*, R. Hauser, M. Wierzbowski (eds.), p. 516.

[29] Journal of Laws 569/2020.

[30] *Doręczenia elektroniczne. Komentarz*, M. Wilbrandt-Gotowicz (ed.), Warszawa 2021, p. 37.

[31] Journal of Laws 902/2022.

[32] From the justification of the verdict of the Supreme Administrative Court in Szczecin dated 3 September 2008, II SA/Sz 505/08, Legalis.

public administration is quite skeptical.[33] However, increasing the efficiency of the administration's operations as a result of digitalization occurs without considering the public's IT competencies or the accessibility of tools necessary to access e-services. The beneficiary of e-administration services needs software-compatible tools like computers, laptops, or smartphones. Meanwhile, e-administration should follow the current principle of universality of its services, ensuring both the use of ICT systems by the public administration and their consistency.[34] Furthermore, a determinant of e-administration's efficiency should be to ensure the digital accessibility of public entities' websites and mobile applications.[35] This accessibility is to bridge the digital divide. Above all, the development of electronic services must ensure that citizens trust the state and its services, including online services. It seems that this can be achieved by providing public services of good quality, in accordance with the applicable law, and by simultaneously considering the needs of seniors or other special groups at risk of exclusion. Unfortunately, in Poland, analog administration is not sufficiently accessible to people with special needs, so e-government solutions replicate these behaviors.[36] Widely publicized measures for digital accessibility in public administration bodies relevant to seniors or the disabled remain largely declarative. Despite the Act on digital access or even the Act of 19 July 2019, on ensuring accessibility for persons with special needs,[37] a great deal of work remains to be done to ensure digital accessibility in public administration. People with special needs directly signal the matter: despite the fact that two years have passed since the Act on digital access was introduced, public offices and entities performing public tasks remain unprepared to implement its provisions.[38] Even representatives of doctrine also point to problems in implementing the assumptions of digital accessibility in

[33] See: "Usługi chmurowe w sektorze usług publicznych", https://chmura.gov.pl/zuch/static/media/Wytyczne%20dla%20administracji%20publicznej%20-%20PL.PDF (accessed 8 February 2023); "Chmura dla sektora publicznego – dlaczego warto ją wykorzystać?", https://atende.pl/pl/blog/chmura-dla-sektora-publicznego---dlaczego-warto-ja (accessed 8 February 2023).

[34] M. Błażewski, "Zasada powszechności elektronicznej administracji", *Folia Iuridica Universitatis Wratislaviensis* 1/2018, pp. 230–232.

[35] Significant factors in this respect are the government's Accessibility Plus Program 2018–2025, dealing with the accessibility of spaces, products, or services for people with disabilities, and the Act of 4 April 2019, on digital accessibility of websites and mobile applications of public entities in Journal of Laws 82/2023.

[36] For example, official forms with a too-small font invisible to seniors, or the lack of printed forms in special formats for the blind (using Braille) or for the deaf (in the forms of an audio recording).

[37] Journal of Laws 2240/2022.

[38] According to A. Marcinkowski, Head of Fundacja Widzialni, which is also a certifying body. Cf. R. Horbaczewski, Publiczne witryny wciąż nieprzyjazne dla niepełnosprawnych 15 November 2021, https://www.prawo.pl/samorzad/strony-urzedow-nieprzyjazne-osobom-niepelnosprawnym,511649.html (accessed 20 November 2021).

public administration bodies – both in general[39] and in particular terms in relation to specific cases, such as providing access to public information to people with special needs[40] or electronic communication in administrative proceedings after changes resulting from the introduction of e-delivery.[41] Polish Ombudsman also raised the issues of digital accessibility, or rather its lack in administration's operations.[42]

3. THE DIGITAL DIVIDE

The increase in the use of new technologies and the associated changes in how we communicate multiply social exclusion, understood as the restriction of an individual's access to rights, resources, and opportunities. The public administration's digitalization process revises how it operates both internally and in relation to individual addressees of its activities. At the same time, new technologies are still not available to all citizens, which results in the division of society and gives rise to the mentioned problem of e-exclusion.

According to the OECD,[43] the digital divide consists in social inequality between individuals, households, businesses, and regions in the level of socio-economic development, related to both access to and use of ICT. Therefore, the digital divide is two-dimensional, stemming not only from the lack of access to the Internet but also from inadequate competence in its use in dealing with public administration. An additional barrier resulting in e-exclusion is the lack of an

[39] See A. Rogacka-Łukasik, "Wybrane środki służące zapewnieniu dostępności cyfrowej dla osób z niepełnosprawnościami", (in:) *Aksjologiczne i prawne aspekty niepełnosprawności*, A. Drabarz (ed.), Białystok 2020, pp. 201–202, 203, 210–211.

[40] Ł. Żyła, "Cyfrowy dostęp do informacji i danych o funkcjonowaniu państwa a prawo do informacji jako prawo człowieka", (in:) *Otwarte dane i ich ponowne wykorzystanie w prawie polskim. Wybrane zagadnienia*, M. Bernaczyk (ed.), Wrocław 2018, pp. 70–71, 77–87.

[41] M. K. Adamczyk, "Korespondencja elektroniczna z organem administracji publicznej w okresie przejściowym", *Studia Prawnoustrojowe* 58/2022, pp. 7–17.

[42] For example, the Ombudsman applied to the Prime Minister twice in 2021 on the failure of public administration bodies to implement the provisions of the act on digital access See Ł. Starzewski, "Co z zapewnieniem dostępności stron internetowych podmiotów publicznych? Rzecznik pisze do premiera" 3 March 2021, https://bip.brpo.gov.pl/index.php/pl/content/rpo-pyta-o-dostepnosc-stron-internetowych-podmiotow-publicznych (accessed: 1 May 2021) ; Ł. Starzewski, "Dostępność cyfrowa stron internetowych i aplikacji mobilnych podmiotów publicznych. Rzecznik pisze do Premiera" 1 December 2021, https://bip.brpo.gov.pl/pl/content/rpo-premier-dostepnosc-cyfrowa-internet-aplikacje-mobilne-podmioty-publiczne (accessed 20 December 2021).

[43] *Understanding the Digital Divide*, OECD, Paris 2001, p. 5, https://www.oecd-ilibrary.org/science-and-technology/understanding-the-digital-divide_236405667766 (accessed 17 December 2022).

appropriate device or software that would be compatible with e-services.[44] The literature points to three types of digital divide: global exclusion, social exclusion, and civic exclusion.[45] The causes of the digital divide lie in sociodemographic[46] and economic conditions.

In the face of the current financial crisis caused first by the Covid-19 pandemic and the Russian invasion of Ukraine, the demographic condition has, and will in the near future significantly impact the intensification of exclusion in every sphere, including the digital one. In the sociodemographic layer, the digital divide occurs as a result of both individual decisions (self-exclusion) and external circumstances, such as failure to ensure the availability of ICT systems to serve people with disabilities. The linguistic aspect is also significant as with the increase in Internet access, there arises the problem of multilingualization.[47] To reduce the digital divide, increasing confidence in the administration will be insufficient. The authorities must also change society's mentality, which may only be possible via the development of digital competencies through education, both in schools, for young people, and out-of-school adults.

What will certainly not reduce the digital divide, but may reinforce it, is the introduction of governmental programs[48] to equip young people with computer equipment without improving existing IT education[49] – or in the absence

[44] A. Ziółkowska (in:) Księga jubileuszowa, *Postępująca informatyzacja administracji…,* p. 858.

[45] P. Norris, *Digital Divide: Civic Engagement, Information Poverty, and the Internet Worldwide,* Cambridge: Cambridge University Press, 2001, p. 4.

[46] See K. Doktorowicz, "Europejskie społeczeństwo informacyjne w unijnej polityce regionalnej. Nierówności i szanse", (in:) *Społeczeństwo informacyjne: Aspekty funkcjonalne i dysfunkcjonalne*, L. Haber, M. Niezgoda (eds.), Kraków 2006, p. 52; W. Brown, "The Digital Divide", (in:) *Learning in the Digital Age*, T. Asino (ed.), Stillwater: Oklahoma State University, 2002; P. Attewell, "The First and Second Digital Divides," *Sociology of Education* 74/2001, pp. 252–259; J.van Dijk, "Digital Divide: Impact of Access", (in:) *The International Encyclopedia of Media Effects*, P. Rössler, C. A. Hoffner, L. van Zoonen (eds.), Chichester 2017, pp. 1–11.

[47] J. Kreft, "Wymiary i model wykluczenia cyfrowego", (in:) *Społeczeństwo informacyjne: gospodarka, technologie, procesy*, C. Hales, B. Mikuła (eds.), Kraków 2012, p. 184.

[48] In January 2023, the Prime Minister announced a government program to provide students with computers for learning. See "Darmowe laptopy dla uczniów. Kto skorzysta z rządowego programu?" 24 January 2023, https://serwisy.gazetaprawna.pl/edukacja/artykuly/8644599,darmowe-laptopy-szkola-uczniowie.html (accessed 25 January 2023); or "Komputery dla uczniów IV klasy szkoły podstawowej – konferencja prasowa z udziałem ministra Przemysława Czarnka" (24 January 2023), https://www.gov.pl/web/edukacja-i-nauka/komputery-dla-uczniow-iv-klasy-szkoly-podstawowej--konferencja-prasowa-z-udzialem-ministra-przemyslawa-czarnka (accessed 25 January 2023).

[49] See S. Czubkowska, M. Szymaniak, K. Kopańko, "Latami w Polsce cyfryzowano szkoły, zamiast cyfryzować edukację. Jak to teraz naprawić", https://spidersweb.pl/plus/2021/01/cyfrowa-szkola-nauka-zdalna-rewolucja-homotechnicus (accessed 14 February 2022).

of digital/media education[50] – and digitalizing administrative services without considering the specific situation of seniors, who may not be interested in online services.[51] Furthermore, the lack of education and the simultaneous failure to improve the transmission infrastructure may lead to wasting public funds due to individuals' inability to use the equipment or services offered. Therefore, the first thing to consider would be transmission infrastructure and its security, followed by appropriate education of both young people and adults, only then organizing e-administration in such a way that it introduces only the necessary and useable services. Finally, the digitalization of life, including administration life, is associated with certain risks like increased risk of cyberattacks, identity theft, personal data protection, and online privacy – all these matters were nowhere to be seen in any public campaign in recent years. Moreover, providing young people with appropriate equipment does not eliminate many other problems,[52] increasing or creating new ones instead.[53] The public authorities' announcement of gifting

[50] In Poland, the problem of the lack of education has been repeatedly raised. See M. Fraser, *#CyberMagazyn: Jakich zmian trzeba w polskiej cyberedukacji?*, 23 October 2021, https://cyberdefence24.pl/social-media/cybermagazyn-jakich-zmian-trzeba-w-polskiej-cyberedukacji (accessed 5 February 2023); S. Czubkowska, "Czas wprowadzić do szkół edukację medialną. To ostatni dzwonek, by wychować cyfrowo świadome społeczeństwo" 4 November 2021, https://spidersweb.pl/plus/2021/11/edukacja-medialna-szkoly-cyfryzacja-bigtech (accessed: 2 February 2023). Interesting solutions as to media education are in place in Finland or Estonia, where it is provided from an early age through all levels of education. See E. Mackintosh, "Finland is Winning the War on Fake News: What It's Learned May Be Crucial To Western Democracy" 23 March 2022, https://edition.cnn.com/interactive/2019/05/europe/finland-fake-news-intl/ (accessed 30 March 2022); A. Yee, *The Country Inoculating Against Disinformation* 31 January 2022, https://www.bbc.com/future/article/20220128-the-country-inoculating-against-disinformation (accessed 14 February 2022).

[51] An interesting example is the campaign conducted in Spain "Soy mayor, per no idiota" (I Am Old, Not an Idiot) awarded the European Citizen's Award. The goal of the campaign and related petitions was to restore ATMs or bank branches, which were removed in recent years, particularly during the coronavirus pandemic, precluding seniors in terms of withdrawing money. The campaign emphasized that not all seniors use the Internet and are able to use electronic banking. As a result, without waiting for the relevant laws to be passed, some financial institutions like Caixa Bank decided to introduce changes and keep bank branches. See A. Zielińska, "To idzie starość," *Tygodnik Polityka* 50/2022, pp. 64–66; R. Minder, "I'm Old, Not an Idiot": One Man's Protest Gets Attention of Spanish Banks" (25 March 2022) https://www.nytimes.com/2022/03/25/world/europe/spanish-banks-protest-carlos-san-juan-de-laorden.html (accessed 5 February 2023).

[52] For example, the problem of obesity among the youngest, the problem of loneliness among teenagers, or the problem of depression, suicide, or self-harm. See B. Kasprzycka, "Kasprzycka: Na kryzys dzieciństwa bliska relacja z laptopem [OPINIA]" (2 February 2023), https://serwisy.gazetaprawna.pl/edukacja/artykuly/8651253, laptopy-dla-czwartoklasistow-chatboty-przemyslaw-czarnek-kryzys-dziecinstwa.html (accessed 5 February 2023).

[53] See J. Dymek, "Usieciowiony sadyzm," *Tygodnik Przegląd* 44/2021, pp. 18–20; B. Igielska, "Cyberprzemocy nie pokonamy w tydzień", *Tygodnik Przegląd* 9/2021, pp. 17–19; A. Żelazińska, "News jak wirus", *Tygodnik Polityka* 10/2020, pp. 18–20; J. Żakowski, "Zamknięci w bańkach", *Tygodnik Polityka* 43/2020, pp. 24–26; A. Kaźmierska, W. Brzeziński, "Handlarze gniewem", *Tygodnik Powszechny* 45/2021, pp. 12–18; J. Dymek, "Algorytmy nienawiści", *Tygodnik Przegląd*

computer equipment to young people seems to be another example of the privatization of state tasks, in this case: educational tasks. The potential "gift" in the form of equipment is not the same as relevant education, which thus becomes the responsibility of parents who are not necessarily proficient in computer use.[54] At the same time, the announced gifting program provides no information about the potential change of the core curriculum or the introduction of digital education.[55] What is noteworthy, the problem of lacking digital hygiene among young people and the negative impact of constant access to the Internet (mainly through smartphones) has already been recognized in more digitally developed countries.[56] In Poland, at the level of the Ministry of Education and Science, there are no specific measures or guidelines for restricting access to electronic devices at school or the

46/2021, pp. 40–41. See M. Spitzer, *Cyfrowa demencja. W jaki sposób pozbawiamy rozumu siebie i swoje dzieci*, trans.by A. Lipiński, Słupsk 2013; J. Szmyd, *Zagrożone człowieczeństwo. Regresja antropologiczna w świecie ponowoczesnym,* Katowice 2015; S. Vaidhyanathan, *Antisocial Media. Jak Facebook oddala nas od siebie i zagraża demokracji*, trans. by W. Mincer, K. Sosnowska, Warszawa 2018; J. M. Twenge, *iGen. Dlaczego dzieciaki dorastające w sieci są mniej zbuntowane, bardziej tolerancyjne, mniej szczęśliwe – i zupełnie nieprzygotowane do dorosłości*, i co to oznacza dla nas wszystkich*, trans. by O. Dziedzic, Sopot 2019; S. Zuboff, *Wiek kapitalizmu inwigilacji. Walka o przyszłość ludzkości na nowej granicy władzy*, trans. by A. Unterschuetz, Poznań 2020.

[54] As an example, we can point to parents who were unable to provide support to their children during remote learning in the pandemic, because they were not computer literate. See P. Wilczyński, "Znikający uczniowie", *Tygodnik Powszechny* 26/2020, pp. 28–31.

[55] Undoubtedly, Poland has both a functional and digital illiteracy problem. The latter is characterized by an inability to use digital tools and realize their goals in cyberspace. See A. Skudrzyk, *Czy zmierzch kultury pisma? O synestezji i analfabetyzmie funkcjonalnym*, Katowice 2005, pp. 52–53.

[56] Noting the negative impact of smartphones on children and adolescents, some countries banned their use by students at school. According to researchers, constant use of smartphones, and thus online presence, leads to elevated stress levels, anxiety disorders, atrophied analytical skills, or reduced vocabulary, which does not have a positive effect on academic performance but the opposite: it leads to distraction or even lower IQ. Such bans have been introduced in, among other places, France (2018), Greece (2020), Italy (2021), some regions of Spain (2015), and China (2021). See C. Calvier, "Les téléphones portables seront interdits dès la rentrée scolaire" 31 July 2017, https://www.lefigaro.fr/actualite-france/2018/07/30/01016-20180730ARTFIG00201-les-telephones-portables-seront-interdits-des-la-rentree.php (accessed 5 February 2023); A. Ledson, "The Mobile Phone Ban In French Schools, One Year On. Would It Work Elsewhere?" 30 August 2019 (accessed 5 February 2023), https://www.forbes.com/sites/alexledsom/2019/08/30/the-mobile-phone-ban-in-french-schools-one-year-on-would-it-work-elsewhere/?sh=4f8f3b155e70; P. Benito, Ó. Vicente-Chirivella, "Banning Mobile Phones in Schools: Evidence from Regional-level Policies in Spain," *Appiled Economic Analysis* 30.90/2022, pp. 153–175, https://doi.org/10.1108/AEA-05-2021-0112 (accessed 5 February 2023); A. Vourdoumpa, "Greece Bans Mobile Phones in Schools" (26 June 2018), https://www.sbs.com.au/language/greek/en/article/greece-bans-mobile-phones-in-schools/a047dvsld (accessed 5 February 2023); J. Wakefield, "China Bans Children from Using Mobile Phones at School" (2 February 2021), https://www.bbc.com/news/technology-55902778 (accessed 5 February 2023).

use of IT tools during learning, such as ChatGPT-type artificial intelligence.[57] Various NGOs definitely do more for children's media education and digital hygiene through various social campaigns, programs, or training.[58] The situation is similar with regard to seniors, who in terms of education can primarily count on NGOs or universities of the third age. This is because so far, the Polish government has introduced no systemic solutions for seniors interested in using the Internet, both in terms of computer equipment availability and useability.[59] Notably, seniors are less experienced users of the Internet, so they are definitely more exposed to various risks.[60]

[57] B. Sieja, "ChatGPT zakazany w pierwszych szkołach? Praca domowa przestaje mieć sens?" (7 January 2023), https://www.komputerswiat.pl/aktualnosci/nauka-i-technika/chatgpt-zakazany-w-pierwszych-szkolach-praca-domowa-przestaje-miec-sens/ncvb9bp (accessed 5 February 2023); P. Auguff, "Prestiżowa uczelnia wprowadza zakaz posługiwania się sztuczną inteligencją" (27 January 2023), https://edukacja.dziennik.pl/artykuly/8647349,francja-instytut-science-po-zakazal-studentom-poslugiwania-sie-sztuczna-inteligencja-chatgpt.html (accessed 5 February 2023).

[58] An example is the Dajemy Dzieciom Siłę Foundation (https://fdds.pl/), which for years has been running social campaigns on children's use of the Internet, targeting them, their parents, and guardians. The campaigns were *Dodaj znajomego* (Add a Friend; since 2015), *Chroń dziecko w sieci* (Protect Your Child Online; since 2 February 2017), *Offline Challenge* (October 2018), *Uważni rodzice* (Attentive Parents; November 2017 – January 2018), *Nie hejtuję-reaguję* (I Don't Hate – I React; November – December 2019), *Domowe Zasady Ekranowe* (Home Screen Rules; 18 February – 18 March 2020). Moreover, within the framework of the *Dziecko w sieci* (Child Online) program, the Foundation deals with problems related to violence using electronic media and the Internet, harmful online content, sexting, online grooming, dangerous contacts or abuse of electronic media, organizing the Polish edition of the international Safer Internet Day and the International Conference "Keeping Children and Young People Safe Online" and the Digital Youth Forum. The Foundation undertakes some of the activities with the National Research Institute NASK (which received this status in 2017, see https://www.nask.pl/) as the Polish Center of Safer Internet Program/Digital Europe UE (See https://www.saferinternet.pl/). Furthermore, NASK regularly conducts social and educational research, such as *Nastolatki 3.0 (Teenagers 3.0), Rodzice Nastolatków 3.0 (Teenagers' Parents), Patostreamy w opinii polskich internautów (Patostreams According to Polish Internet Users)*. All these activities and their conclusions have so far failed to convince those in power to make changes in the field of education for the introduction of digital/media education in primary and secondary schools.

[59] The Polish Deal program indicates that the government will establish local centers for digital competence development, for example in libraries. However, there is no specific information on their financing, the competence of the people employed by them, their organization, and so on. Moreover, there is no legislative initiative on this issue. See Polski Ład, CyberPoland 2025, item "Lokalne centra rozwoju kompetencji cyfrowych", https://www.gov.pl/web/polski-lad/cyberpoland-2025 (accessed 5 February 2023).

[60] See M. Fraser, "Jakie ryzyka czekają w sieci na jej najbardziej doświadczonych życiowo, starszych użytkowników?" (17 November 2021), https://cyberdefence24.pl/social-media/jakie-ryzyka-czyhaja-w-sieci-na-jej-najbardziej-doswiadczonych-zyciowo-starszych-uzytkownikow (accessed 5 February 2023); M. Fraser, "Cyberprzestępcy podszywają się pod aplikację mObywatel" (25 August 2021), https://cyberdefence24.pl/bezpieczenstwo-informacyjne/cyberprzestepcy-podszywaja-sie-pod-aplikacje-mobywatel (accessed 5 February 2023).

Summarizing, the mere digitalization of schools and public services[61] will not suffice to combat the digital divide, as the basis should be school education and courses for adults, including seniors, along with a real and transparent debate on the functioning of the state in the era of digital transformation. Finally, contrary to the stipulations of the Polish Deal program,[62] it seems that the digital form should not be the default one,[63] and the possibility of choice should be the standard when using administrative services. After all, we should disagree with the assumption that the basis for the functioning and thinking about the citizen–administration relationship is to be the principle of digital by default, which results in the framing of the traditional form of administrative services as only an exception. I would argue that citizens should be able to choose the form and manner of handling administrative matters at the beginning of, for example, an administrative procedure[64] or before using other administrative services. Polish Ombudsman's 2023 appeal "Internet ma wspierać, a nie wykluczać" (Internet Is to Support, Not Exclude) confirms the need for such a solution.[65] The Polish Ombudsman's appeal refers to the 2023 resolution obliging all contributors to ZUS (Social Insurance Institution) to have a profile on the PUE Electronic Services Platform.[66] Questioning the adopted solution, the Polish Ombudsman once again draws attention to the inadequacy of audiovisual content on public institutions' websites for people with disabilities. On the other hand, the response of the President of ZUS is troubling, if only because she refers in it to an unspecified assumption about the possibility of adopting in the future a regulation introducing exclusive electronic communication with the institution she is running. Moreover, the fact that citizens and

[61] M. Fraser, "#CyberMagazyn: Polski Ład a wykluczenie cyfrowe. Czy cyfryzacja rozwiąże wszystkie problemy?" (17 July 2021), https://cyberdefence24.pl/polityka-i-prawo/cybermagazyn-polski-lad-a-wykluczenie-cyfrowe-czy-cyfryzacja-rozwiaze-wszystkie-problemy (accessed 5 February 2023).

[62] The Polish Deal is a program established by the Council of Ministers in 2021. It aims to rebuild Poland's economy after the Covid-19 pandemic, reduce social inequality, and provide better living conditions for all citizens. See Resolution No. 84/2021 of the Council of Ministers, dated 1 July 2021, on the establishment of the Government's Polish Governance Fund: Strategic Investment Program RM-06111-84-21. The fund was established pursuant to Article 65 of the Act of 31 March 2020, amending the Act on Special Arrangements for Preventing, Countering, and Combating Covid-19, Other Communicable Diseases and Emergencies Caused by Them and Certain Other Laws in Journal of Laws 568/2020.

[63] See Polish Deal, component CyberPoland 2025, point "Usługi prawdziwie cyfrowe", https://www.gov.pl/web/polski-lad/cyberpoland-2025 (accessed 5 February 2023).

[64] G. Sibiga, *Stosowanie technik informatycznych w postępowaniu administracyjnym ogólnym* (Warszawa 2019), p. 247.

[65] M. Kuczyński, "Internet ma wspierać, a nie wykluczać" (a recording) 6 January 2023, https://bip.brpo.gov.pl/pl/content/rpo-nagranie-internet-ma-wspierac-nie-wykluczac (accessed 5 February 2023).

[66] Ł. Starzewski, "Seniorka przeciw elektronicznym rozliczeniom z ZUS. Wyjaśnienie prezes ZUS Gertrudy Uścińskiej" (19 January 2023), https://bip.brpo.gov.pl/pl/content/rpo-seniorzy-elektroniczne-rozliczenia-zus-odpowiedz (accessed 5 February 2023).

the Polish Ombudsman misunderstood the above obligation as the only possible way to submit declarations via an electronic portal testifies to the poor quality of the introduced regulations and the related information campaign, to which the President of ZUS refers in her response. The above example clearly confirms the need to establish the principle of choice as the basis of communication in the administration-citizen relations.

4. INDIVIDUAL'S DIGNITY AS THE FOUNDATION OF PUBLIC ADMINISTRATION DIGITALIZATION

The concept of dignity is a subject of interest to philosophy,[67] ethics, sociology, psychology, theology,[68] and law. It is colloquially referred to as the concept of humanity. The issue of individual's dignity is of interest to both international[69] and domestic law.[70]

The reference to human dignity in the Polish Constitution means that it is the central value of the legal order, a meta-norm, and the foundation of human rights. Moreover, it is an expression of the state's adoption of a personalistic approach. Dignity is to belong to every individual regardless of age, citizenship, or other determinants.[71] Freedoms and rights asymmetrically derive from human dignity, so the latter is their source and simultaneously their axiological justification.[72] Moreover, inherent rights are an emanation of human dignity.[73] Sometimes, dig-

[67] See M. Sadowski, "Godność człowieka – aksjologiczna podstawa państwa i prawa", *Wrocławskie Studia Erazmiańskie* 1/2007, pp. 8–27; P. Dutkiewicz, *Problem aksjologicznych podstaw prawa we współczesnej polskiej filozofii i teorii prawa,* Kraków 1996, p. 103.

[68] H. Koch, "Godność człowieka – niezbywalnym prawem i fundamentem ładu społecznego", *Legnickie Studia Teologiczno – Historyczne*, 1.10/2007, pp. 90–104.

[69] Let us note the Universal Declaration of Human Rights, in which human dignity is invoked already in the preamble, or the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and in a number of acts of other types such as for example conventions. See also I. Antonowicz, "Ochrona godności człowieka w prawie międzynarodowym", *Annales UMCS. Sectio G*, 1/1990, p. 9.

[70] On the national level, it is necessary to recall Article 30 of the Polish Constitution, which stipulates that the inherent and inalienable human dignity is the source of human and civil freedoms and rights.

[71] Cf. M. Błachut, *Postulat neutralności moralnej prawa a konstytucyjna zasada równości,* Wrocław 2005, pp. 14–148.

[72] P. Polak, J. Trzciński, "Konstytucyjna zasada godności człowieka w świetle orzecznictwa Trybunału Konstytucyjnego", *Gdańskie Studia Prawnicze* XL/2018, p. 261.

[73] Judgment of the Constitutional Court of November 15, 2000, P 12/99, Journal of Laws 100.1085/2000.

nity is understood as the right to rights.[74] However, the individual's dignity is presented in a non-uniform manner: sometimes as human dignity and, at other times, as personal dignity.[75] Despite no legal definition of this concept, it seems appropriate to assume that we should understand dignity as a set of norms that ensure the individual a spiritual and material foundation for developing their personality, along with the actual opportunity for comprehensive participation in the political, economic, and cultural life of their community,[76] while remaining a trait inherent in every human being, which can be neither gained nor lost.[77] Thus, the term "dignity" is on the one hand spacious, and on the other hand, it requires supplementation and revision due to the changing reality. Although the scope of human dignity is quite often limited to social issues and social exclusion arising from economic problems – as well as the protection of health and life – we should also scrutinize it from other perspectives.

Today, dignity plays an important role in other spheres as well and requires a more elaborate reflection, especially through the prism of digital inclusion. It is then that dignity provides a legal or moral basis for combating the phenomenon of social exclusion.[78] In this sense, the issue of dignity should be related to digital (in)equality. The aforementioned inequality can be manifested "in access to the Internet, extent of use, knowledge of search strategies, quality of technical connections and social support, ability to evaluate the quality of information, and diversity of uses".[79] According to Complak, human dignity is a legal category that allows us to distinguish a group of "human dignity" rights, which include, among other things, the right to cultural and social development, which is currently increasingly possible through equal access to digital solutions offered also by public administration. Despite the positive assessment of the process of administration's digitalization, scholars increasingly discuss the problem of the digital divide also in reference to access to public administration. In this context, experts highlight the problem of equality in access to e-administration and indicate the unresolved problems of thus provided administration services. Although

[74] J. Zajadło, "Normatywne funkcje pojęcia "przyrodzona i niezbywalna godność człowieka" (na marginesie art. 30 Konstytucji RP)", (in:) *Ochrona człowieka w świetle prawa Rzeczpospolitej Polskiej*, S. Pikulski (ed.), Olsztyn 2002, p. 489.

[75] J. Zajadło, "Godność jednostki w aktach, międzynarodowej ochrony praw człowieka", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* LI.2/1989, p. 111; S. Zieliński, "Rozumienie godności człowieka i jej znaczenie w procesie stanowienia i stosowania prawa. Propozycja testu zgodności regulacji prawnych z zasadą godności człowieka", *Przegląd Sejmowy* 4.153/2019, pp. 110–111.

[76] J. Zajadło, "Godność jednostki", p. 114.

[77] Order of the Constitutional Court of 21 September 2011, Ts 220/10, *Legalis* 1351593.

[78] J. Blicharz, "W poszukiwaniu źródeł ochrony prawnej przed zjawiskiem wykluczenia społecznego w polskim prawie", (in:) *Ochrona prawna*, p. 39.

[79] P. DiMaggio, E. Hargittai, W.R. Neuman, J.P. Robinson, "Social Implications of the Internet", *Annual Review of Sociology* 27/2001, p. 310.

digital solutions should be evaluated positively, as they indeed resolve difficulties associated with the closure or reduction of stationary functioning of public bodies and institutions during the Covid-19 pandemic, the lack of sufficient "networking" of all areas of Poland, lagging systems, or an excess of content that makes them hardly readable or intuitive often questions not only the entity for which they were introduced but also the dignity of the citizens who wish or must use digital instruments in contact with public administration.

5. SUMMARY

Digital transformation plays a key role for the state's development because it simultaneously affects public administration and state services while influencing the economy, society, and politics. Moreover, digital transformation remains a necessity that unavoidably engenders many questions and risks. The IT transformation of public administration requires systemic and structural measures in place of the current fragmentary approach. In Poland, the authorities lack comprehensive holistic thinking, not to mention social sensitivity in matters of the state's digitalization.[80] Notably, even though the state recognized the need to develop an information society in 2020, Poland still has no separate ministry responsible for IT solutions and digitalization. The Prime Minister of Poland performs the function of the Minister of Digitalization and, from 2021, the Chancellery of the Prime Minister has only one secretary of state responsible for IT solutions.[81] The

[80] As Professor J. Kreft rightly indicates, Poles' attitudes – including authorities – are characterized by techno-solutionism, which is a dead end. See M. Fraser, "#CyberMagazyn: Prof. Kreft: Cyfrowy solucjonizm to ślepa uliczka" [Interview] (9 July 2022), https://cyberdefence24.pl/prywatnosc/cybermagazyn-prof-kreft-cyfrowy-solucjonizm-to-slepa-uliczka-wywiad (accessed 5 February 2023). According to some experts, state authorities do not pay attention to the country's digital sovereignty, in view of which Poland is losing its steerage to digital giants. See M. Fraser, "#CyberMagazyn: Polska traci sterowność względem cyfrowych gigantów" [Interview] (27 November 2021), https://cyberdefence24.pl/polityka-i-prawo/cybermagazyn-polska-traci-sterownosc-wzgledem-cyfrowych-gigantow-wywiad (accessed 5 February 2023). The authorities' actions in this regard seem incomprehensible. On the one hand, they desire to digitize the state, and on the other hand, they submit the administration to technological giants. See M. Fraser, "Polska blokuje jednolity unijny podatek korporacyjny. Co dalej z opodatkowaniem Big Techów?" (7 April 2022), https://cyberdefence24.pl/biznes-i-finanse/polska-blokuje-jednolity-unijny-podatek-korporacyjny-co-dalej-z-opodatkowaniem-big-techow (accessed 5 February 2023). At the same time, there is a lack of trust for domestic specialists with experience in introducing IT solution in the state (See M. Fraser, "Czy Jaroszewski został zwolniony z CERT-u za bycie państwowcem?", 10 November 2021), https://cyberdefence24.pl/polityka-i-prawo/czy-jaroszewski-zostal-zwolniony-z-cert-u-za-bycie-panstwowcem (accessed 5 February 2023).

[81] Since June 2021, the person holding the post has been Janusz Cieszyński, who is also secretary of state at the Chancellery responsible for informatization and Government Plenipotentiary for Cyber Security.

lack of a designated ministry undeniably hinders the implementation of strategic tasks in this area, resulting in excessive dispersion, lack of control, and randomness of both planning acts aimed at increasing citizens' digital potential and the digitalization process of the administration itself. There are no activities intended to shape and increase the society's digital culture, while there are insufficient activities in digital or media education for young people and seniors, along with those at risk of digital exclusion.

Undoubtedly, the digitalization of public administration is a process that should be determined by planning, sequentiality, and evaluation, albeit the latter seems to be completely neglected in the process of the state's and administration's digitalization.[82] The process of implementing e-administration should position the citizen and the entrepreneur at the center, focus on their needs, and direct its actions toward customers. In other words, the digitalization of public administration should be citizen-oriented, while the rational legislator should recognize the social groups that are vulnerable to exclusion due to these changes. Indeed, the condition for accelerating or slowing down the process of public administration's digitalization should be the degree of digital maturity of both government employees and individuals.[83] Unfortunately, we may get the impression that in Poland social media literacy is wrongly equated by many – including the authorities – with digital competence. In 2022, the percentage of people using government services online in the past twelve months was 55.4% among the population of people aged 16–74. In doing so, the most common form of using e-services was searching for information on public administration websites. On an annual basis, the share of those downloading official forms increased by 1.7 percent-

[82] This is because no conclusions were drawn from the existence of non-functioning web applications like the applications related to Covid-19. See E. Fabian, "Prawo nowych technologii a innowacyjność. Wykorzystywanie istniejącej wiedzy", (in:) *Internet. Cyberpandemia. Cyberpandemic*, A. Gryszczyńska, G. Szpor (eds.), Warszawa 2020, pp. 479–489; S. Czubkowska, "Z polskiej aplikacji do walki z Covid -19 skorzystało tylko 7 tys. osób. Kosztowała miliony teraz jest w powolnej agonii" (5 August 2021), https://spidersweb.pl/plus/2021/08/aplikacja-protego-covid-pandemia (accessed 5 February 2023); or in view of inoperative ICT systems like the application and system covering the operation of the 112 emergency number. See S. Czubkowska, "Numer alarmowy 112 miał ratować życie. Teraz sam potrzebuje pomocy. System w Polsce jest przestarzały. E-tam państwo Vol. 4" (7 June 2021), https://spidersweb.pl/plus/2021/06/numer-112-alarmowy-problemy-awarie-pandemia (accessed 5 February 2023); K. Michałowski, "Poprawić dostępność aplikacji Alarm 112.Odpowiedź MSWiA" (26 October 2022), https://bip.brpo.gov.pl/pl/content/rpo-mswia-dostepnosc-aplikacja-alarm112-odpowiedz (accessed 5 February 2023); or even in the face of mistakes in the operation of government agencies in the online space (disclosure of email data during Census 2021), See "GUS ujawnił e-maile kilkuset Polaków biorących udział w Spisie Powszechnym" (30 September 2021), https://niebezpiecznik.pl/post/gus-ujawnil-e-maile-polakow-bioracych-udzial-w-spisie-powszechnym (accessed 5 February 2023).

[83] Cf. E. Dobrolyubova, "Measuring Outcomes of Digital Transformation in Public Administration: Literature Review and Possible Steps Forward", *The NISPAcee Journal of Public Administration and Policy* XIV.1/2021, p. 72.

age points to 29.1%. Considering the purpose of using the Internet to interact with the administration, we may distinguish the following forms: (1) searching for information (29.3%); (2) downloading or printing official forms (29.1%); (3) sending completed tax returns (28.9%); (4) obtaining personalized data (25.4%); (5) receiving official correspondence or documents to one's account (23.2%); (6) applying for benefits (15.9%); (7) booking appointments (13.2%); (8) using public records (8.1%); (9) requesting official documents (6.1%); (10) making other requests, claims, or complaints (1.3%).[84] When introducing digitalization, the state must undoubtedly include in its plans how its beneficiaries use e-solutions. Thus, it should first educate the public and officials, and the accessibility of e-administration. In addition to increasing the state's networking, streamlining ICT systems, or eliminating unnecessary services/applications, and improving inaccessible ones, the authorities should focus on the quality of e-services. That is the authorities should improve poorly prepared official web forms or improperly constructed forms in a specific language, unintuitive interface, and the lack of standards regarding people with special needs.

The uncritical affirmation of IT tools can lead to a situation in which instead of an increased efficiency of public administration, we will witness a gradual efficiency decrease[85] and the administration's becoming increasingly hermetic. It appears that this is what is currently happening, as certain solutions have been introduced without proper preparation and consideration of citizen needs, only for show, or sometimes even only for electoral purposes. Thus, there is a constant need to standardize e-administration services,[86] increase the ICT systems interoperability,[87] and adapt them to the needs of people with disabilities. The IT development has positive and negative effects. On the one hand, citizens can handle some matters electronically, but on the other hand, the access is not universal, especially for people who are for various reasons digitally excluded. Bridging the gap between the digitally included and the digitally excluded is one of the

[84] See M. Gumiński, W. Guzowski, M. Huet, K. Juszczak, M. Kwiatkowska, P. Mordan, M. *Społeczeństwo informacyjne w Polsce w 2022 r.*, Główny Urząd Statystyczny, Urząd Statystyczny w Szczecinie, Warszawa-Szczecin 2022, pp. 127–128, https://stat.gov.pl/obszary-tematyczne/nauka-i-technika-spoleczenstwo-informacyjne/spoleczenstwo-informacyjne/spoleczenstwo-informacyjne-w-polsce-w-2022-roku,1,16.html (accessed 5 February 2023).

[85] K. Chocholski, "W stronę wyższej kultury administrowania", (in:) *Dziesięć lat polskich doświadczeń w Unii Europejskiej. Problemy prawnoadministracyjne,* Vol. 1, J. Sługocki (ed.), Wrocław 2014, pp. 644–645.

[86] P. Świtał, *Standaryzacja usług w administracji elektronicznej* in: *Wzorce i zasady działania współczesnej administracji publicznej*, B. Jaworska-Dębska, P. Kledzik, J. Sługocki (eds.), Warszawa 2020, p. 967.

[87] M. Błażewski, "Sfery równości w dostępie do elektronicznej administracji", (in:) *Równość w prawie administracyjnym*, J. Korczak, P. Lisowski (eds.), Warszawa 2018, pp. 198–200.

most important challenges in the digital transformation of public institutions,[88] a guarantee of individual dignity, and a manifestation of social equality.

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Agata Niewiadomska
University of Warsaw, Poland
e-mail: aniewiadomska@wz.uw.edu.pl
ORCID: 0000-0003-2863-2715

NEW LABOUR CHALLENGES IN POLISH AND EUROPEAN AGRICULTURAL LAW[1]

Summary

New technologies, artificial intelligence, or the digitalisation of the economy are challenging lawyers in terms of the functioning of the existing legal instruments as well as the creation of completely new ones. The challenges of the digitalisation era mainly concern labour law. Traditional work performed at the employer's premises is still of great importance, while at the same time the legislator, if only in Poland, regulates new types of employment relationships, such as remote working. However, there is a problem, which is analysed in the article, of how these new legal mechanisms can be applied in various sectors of the economy. One example where this seems to pose difficulties is agriculture. Because some activities in traditional agriculture have to be done physically, the new legal mechanisms may prove ineffective. The article identifies contemporary challenges to labour and agricultural law that need to be implemented, due to technological advances. *De lege ferenda* postulates have been identified in relation to remote working in agriculture, precision farming, agriculture 4.0, or the Smart Village concept. At the same time, it is emphasised that the implementation of all these mechanisms and legal solutions will not be effective without adequate funding.

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KEYWORDS

labour law, agricultural law, agricultural labour, digitisation of agriculture, innovation, agriculture 4.0

SŁOWA KLUCZOWE

prawo pracy, prawo rolne, siła robocza w rolnictwie, cyfryzacja rolnictwa, innowacja, rolnictwo 4.0

INTRODUCTION

The development of new technologies is influencing the way work is done. A rather trivial statement shows that it is followed by the need to develop new legal solutions in the field of labour law, such as, for example, remote work. The legal solutions adopted in Poland create new opportunities for development and unprecedented professional activation.[2] However, they are also connected with quite significant risks in terms of employee control, personal data protection, employee liability, occupational health and safety rules, as well as remuneration methods.

The solutions adopted to open labour law in the area of modern technologies are also applicable in agriculture, provided that we are dealing with an employment relationship. However, it should be clearly indicated, due to the specificity of agriculture, that the application of, for example, regulations on remote working[3] may prove to be very limited. The article will present an assessment of modern labour regulations through the prism of agricultural law regulations. At the same time, the challenges facing labour law in the agricultural sector in the era of digitalisation and computerisation of Polish agriculture will be identified. These challenges are not limited to remote working, they also apply to, for example, precision agriculture,[4] the concept of agriculture 4.0,[5] or the use of unmanned

[2] I. Coopmans, J. Dessein, F. Accatino, F. Antonioli, D.Bertolozzi-Caredio, C.Gavrile-scu, P. Gradziuk, G. Manevska-Tasevska, M. Meuwissen, M. Peneva, A. Pettit, J. Urquhart, E. Wauters, *Understanding farm generational renewal and itsinfluencing factors in Europe*, "Journal of Rural Studies", 2021, Vol. 86, pp. 398-409. DOI: 10.1016/j.jrurstud.2021.06.023.

[3] L. Florek, *Prawne ramy pracy zdalnej,* "Z Problematyki Prawa Pracy i Polityki Socjalnej", 2021, pp. 1-14. 19, 10.31261/zpppips.2021.19.06.

[4] A. Dominik, *System rolnictwa precyzyjnego*, Centrum Doradztwa Rolniczego w Brwinowie, Oddział w Radomiu, Radom, 2010, pp. 1-20.

[5] S.O. Araújo, R.S. Peres, J. Barata, F. Lidon, J.C. Ramalho, *Characterising the Agriculture 4.0 Landscape – Emerging Trends, Challenges and Opportunities*, "Agronomy", 2021, Vol. 11,

objects for agricultural work. Already today, farmers are using, for example, biosensors, barn sensors and radio transmitters, artificial intelligence algorithms, data processing and databases on cloud servers, as well as the internet of things in their work.

With the challenges facing agricultural labour law also come the risks, which will be tentatively identified in the article. Their explication requires an in-depth analysis, not only legal but above all economic. The implementation of modern technologies is not without the need for investment and, consequently, an increase in the level of public support directed to agriculture. The identification of employment challenges in the digital age should not only take into account the specificity of agriculture, against the background of other sectors of the economy but also distinguish local problems, as the agricultural sector in different countries is at different stages of development in this regard.

There are several important challenges facing labour law but also agricultural law. Firstly, how to apply remote working regulations in agriculture. The infrastructure in rural areas does not seem to be sufficiently prepared. Secondly, how to implement new legal and technical mechanisms related to the digital age in agriculture. The main problem is not only the funds needed for this but also convincing farmers that these solutions will be more beneficial and profitable for them. Thirdly, the challenge is to determine the reconciliation of the various legal mechanisms for shaping labour relations in the countryside, with the new regulations introduced. Most farmers in Poland work either on family farms or in the shadow economy. The challenge is to construct such regulations that would encourage farmers to work in accordance with labour law norms. Fourthly, the challenge is to define the direction of farmers' professional activity, while at the same time ensuring the functioning of at least food security. The law should develop such mechanisms which will allow the professional future of farmers to be shaped, including the impact of the digital age, while at the same time ensuring that the food security of other citizens is guaranteed. The abrupt departure of farmers to other professions may result in a lack of food on the market and thus violate the basis of the functioning of any state.

These are only the most pressing of the challenges facing the Polish legislator in regulating the relationship between labour law and agricultural law in the era of digitalisation and computerisation. New legal instruments, such as the programmes within the National Strategic Plan or solutions centred around the Smart Village,[6] provide help in this respect. However, this requires increased regulation

p. 667. https://doi.org/10.3390/agronomy11040667; S. Monteleone, E.A. de Moraes, B. Tondato de Faria, P.T. Aquino Junior, R.F. Maia, A.T. Neto, A. Toscano, *Exploring the adoption of precision agriculture for irrigation in the context of Agriculture 4.0: The key role of internet of things*, "Sensors", 2020, Vol. 20(24), p. 7091. https://doi.org/10.3390/s20247091 (accessed 20 December 2023).

[6] L.J. Cole, D. Kleijn, L.V. Dicks, J.C. Stout, S.G. Potts, M. Albrecht, J. Scheper, *A critical analysis of the potential for EU Common Agricultural Policy measures to support wild pollinators*

and is shaped according to the needs not only of technical progress but also of farmers.[7]

1. LEGAL POSSIBILITIES OF APPLYING MODERN LABOUR REGULATIONS IN AGRICULTURE

Agriculture, through its specificity in both the legal and economic sense, is at a differentiated stage in the implementation of modern technologies. On the one hand, we are dealing with traditional agriculture, where the basic work is the farmer's own labour on a small individual farm.[8] This is usually done with traditional tools. There is also no hired labour involved. We can only find regulations concerning this work in the sphere of social insurance of farmers and special norms concerning this sphere. This type of work of farmers in Poland is predominant. The implementation of modern technologies or digital innovations in this area is dictated by financial possibilities, which usually depend on public aid and European funds allocated as support for agriculture.

On the other hand, we have super-modern agriculture, which already from the creation of the business plan is programmed to use modern technology at every stage of agricultural production. It is not just about modern equipment, more efficient plant protection measures, or animal husbandry (each with its own corresponding regulation). Above all, the use of remotely controlled autonomous devices,[9] such as drones, for example, or robots for production planning, production control, and damage prevention, is noticeable.[10] Here, skilled hired labour is also often used. These farms are either large-scale or oriented towards highly specialised production. Remote working is also used on such farms. Despite their rather small quantitative representation, they are the backbone of the agricultural economy due to the volume of agricultural products supplied to the market, as well as the rate of real estate occupation. At the same time, it is on these farms

on farmland, "Journal of Applied Ecology", 2020, Vol. 57(4), p. 681-694; P. Gerli, J. Navio Marco, J. Whalley, *What makes a village smart? A review of the literature*, "Transforming Government: People, Process and Policy 16", 2022, No. 3, pp. 292-304.

[7] A.L Rossouw, M. Garbutt, *Six Roles of ICT in Alleviating Depopulation of Rural Villages Through Improved Quality of Life*, "Lecture Notes in Networks and Systems", 2023, Vol. 624, pp. 341 – 351.

[8] B. Karwat-Woźniak, *Zasoby pracy w polskim rolnictwie indywidualnym i ich wykorzystanie*, "Rocznik Naukowe Ekonomii Rolnictwa i Rozwoju Obszarów Wiejskich", 2015, Vol. 102(1), pp. 70-84.

[9] S. Weymann, *Autonomous agricultural vehicles – the search for new solutions*, "Agricultural Horticultural Forestry Technology", Vol. 6, pp. 4-8.

[10] J. Barwicki, W. Romaniuk, *Wykorzystanie zdalnych systemów rejestracji danych do kontroli pól uprawnych*, "Problemy Inżynierii Rolniczej", 2015, Vol. 1 (75), pp. 15-24.

that we most often have to deal with the application of labour legislation, due to the employment of hired labour.

There is also a third picture of Polish agriculture, as it were, defined by financial aid from the Common Agricultural Policy. It is a medium-sized agricultural holding which benefits from European funds and conducts a fairly traditional way of agricultural production. At the same time, in the process of this production, elements of remote work are used, such as obtaining funds and their settlement, as well as submitting applications, which usually takes place electronically. In this respect, the farmer has to make use of new digital tools to obtain assistance. The subsidies obtained are also funds that are often dedicated to the development of agricultural innovation.

The challenge for the legislator will be to find legal solutions for the use of modern technologies in each of the three cases indicated above. The regulations introduced in 2023 with regard to amendments to the Labour Code[11] do not seem to solve the problem, as the rules for undertaking remote work described there may only be suitable for large-scale farms whose operation is largely based on hired labour. Therefore, it is necessary to look not only for financial incentives for farmers to implement innovations on their farms but also to develop such legal instruments for the possibility of using new ways of employing workers, if only remotely, so that this takes into account the specific nature of agriculture and its various possibilities in Poland. Due to the above typological diversity of agricultural holdings, the assessment of the existing labour legislation in each of the types indicated will be different. Remote working will turn out to be completely useless on small, individual farms, while it will become a necessity on large-scale farms. This differentiation also requires a different legislative approach to the use of modern technology on the farm.

Nowadays, the most numerous legal opportunities for the application of remote working[12] in Poland can be seen in highly specialised farms. There, remote working is not only about filling in applications or electronic business and administrative services but also about the day-to-day running of agricultural operations, using autonomous vehicles or even artificial intelligence. For this, however, well-trained employees are needed who know how to operate this modern equipment and exploit all its possibilities. Therefore, the challenge, perhaps not legal, but organisational, will be to educate farmers to implement innovations on their farms.

In the Polish Labour Code, as amended in 2022 (Act of 2022 amending the Labour Code Act and certain other acts 2022[13]), remote work is considered,

[11] K. Ziółkowska, *Praca zdalna po zmianach w Kodeksie pracy*, "Radca Prawny Zeszyty Naukowe", 2023, pp. 55-72, doi10.4467/23921943RP.23.014.18363.

[12] M. Król, *Praca zdalna – cechy, uwarunkowania, implikacje dla procesu pracy,* Katowice 2022, pp. 53-59.

[13] Act of 1 December 2022 amending the Act – Labour Code and certain other acts (Journal of Laws, item 240).

according to Article 67,[18] to be work that can be performed wholly or partly at a place indicated by the employee and agreed with the employer on a case-by-case basis, including at the employee's home address, in particular, using means of direct communication at a distance.[14] On a traditional farm, when working with animals or plants, remote work conceived in this way may not be feasible. At most, it will only be an element of the existing labour duties, such as, for example, remote feeding of animals through pre-installed machines. At the same time, the elimination of traditional work in favour of remote working in agriculture seems to be impossible, even assuming disproportionately high costs in relation to the expected benefits. Therefore, remote working in agriculture should be implemented gradually for each type of a farm.

The Labour Code, in the aforementioned amendment, introduces three types of remote work: total remote work – work performed exclusively remotely (100% of the remote working time); partial remote work, the so-called hybrid work – work performed partly at the workplace and partly in the form of remote work; occasional remote work – performed each time at the employee's request submitted in writing or electronically, for a maximum of 24 days per calendar year.[15] In the case of traditional agriculture, hybrid and occasional work may be of practical importance in application. Combining part of the duties performed remotely and part physically seems to be one of the most sensible solutions. The challenge for agriculture is undoubtedly the implementation of the first type which is exclusively remote working. Returning to the division into the three basic farm types, it seems most likely to occur on large farms as an ancillary function rather than directly in agricultural production.[16]

A rather significant challenge with regard to remote working in agriculture may be its level of profitability.[17] In principle, remote work should be paid in the same way as traditionally performed work. This is undoubtedly made highly difficult by the lack of criteria for determining the remuneration of remote work in agriculture, due to the lack of a market for this work. It is clear that remuneration rates for remote work in agriculture cannot be determined through legislation, but a market for such work needs to be built up in order to talk about the profitability of such work. This requires time and convincing people of the benefits of remote working in agriculture.

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[14] J. Retyk, *Wpływ definicji pracy zdalnej na rynek pracy w Polsce*, "Z Problematyki Prawa Pracy i Polityki Socjalnej", 2022, pp. 1-16, 20. 1-16. 10.31261/zpppips.2022.20.02.

[15] P. Pokutycka, *Praca zdalna jako nowa instytucja prawa pracy*, "Z Problematyki Prawa Pracy i Polityki Socjalnej", 2022, pp. 1-18, 21. 1-18. 10.31261/zpppips.2023.21.01.

[16] M. Lichaczewska-Ziemba, *Zasoby pracy w polskim rolnictwie i czynniki je determinujące*, (in:) A. Siedlecka, D. Guzal-Dec (eds.), *Rynek pracy wobec wyzwań przyszłości. Ewolucja i współczesne uwarunkowania*, Biała Podlaska, 2022, pp. 175-197.

[17] W. Józwiak, J. Sobierajewska, M. Zieliński, W. Ziętara, *Poziom dochodowości pracy a możliwości rozwoju gospodarstw rolnych w Polsce*, "Zagadnienia Ekonomiki Rolnej", 2019, Vol. 2(359), pp. 28-41.

Other conditions stipulated by the legislation will also have an impact on remuneration. Remote working may be performed at the employer's instruction: during a state of emergency, a state of epidemic emergency or a state of epidemic emergency and for a period of 3 months after their cancellation or during a period in which it is temporarily impossible for the employer to ensure safe and hygienic working conditions at the employee's current place of work due to force majeure – if the employee submits, immediately prior to the instruction being given, a declaration in paper or electronic form that he/she has the premises and technical conditions to perform remote work.

In this respect, special conditions have been introduced for parents (especially women) of young children to facilitate remote working. Pursuant to the Polish Labour Code, the employer is obliged to consider the request of a pregnant employee, an employee raising a child up to the age of four,[18] as well as an employee caring for another member of the immediate family or another person in a common household with a disability certificate or a certificate of significant disability, to perform remote work, unless this is not possible due to the organisation of work or the type of work performed by the employee.

These undoubted facilities may not be sufficient for farmers due to the different social security systems. The question arises whether remote work will fall under the regulation of the Act on social insurance of farmers. Will remote work be an agricultural activity within the meaning of Article 6(3) of the Act on social insurance of farmers (it is understood to be an activity in the field of plant or animal production, including horticulture, fruit growing, beekeeping, and fishing)? The challenge for the legislator will be to find an answer to the question of whether remote work can fall under the agricultural activity understood in such a way. The crop or livestock production phases include many activities in their scope. There is certainly a place for remote work there as well. However, this requires a redefinition of the way in which a modern farm is run and how agricultural work is controlled, if only in terms of adjudicating accidents at work. The regulations of the aforementioned Act on social insurance of farmers are not adapted to the functioning of remote work in the Polish legal system in this respect. The success of the new legal mechanisms of labour law will be determined, *inter alia*, by the coherence of regulations related to social security. Working out this coherence seems to be the biggest challenge for the Polish legislator.

[18] B. Godlewska-Bujok, *Work-Life Balance po polsku – najważniejsze refleksje po nowelizacji z 2023 r.* "Radca Prawny. Zeszyty Naukowe", 2023, Vol. 2(35), pp. 11-26.

SMART VILLAGE AND THE CHALLENGES OF LABOUR LAW

One of the more modern solutions for the functioning of agriculture favoured by the European legislator is the Smart Village concept. It assumes that local communities undertake various coordinated actions aimed at implementing innovations in a given village.[19] Sometimes these are single undertakings such as the purchase of computers, organizing educational activities, and promoting agricultural products. Most often, however, they are a combination of different ideas for the better functioning of a village. One such element developed in the example of smart cities is remote working.[20] In rural areas, it is only just emerging, as highlighted in the previous section.

There are many examples of such Smart Villages in Europe, as well as in Poland.[21] At the same time, it is a concept that is reflected in both European regulations and national legislation.

Undoubtedly, Smart Villages can be a legal mechanism that will not only be a transmitter of modern solutions to agriculture but, above all, through a rather flexible legal framework and open financing, can help promote and develop new labour regulations. It will depend on the ideas of farmers to what extent remote working mechanisms will be implemented, no longer necessarily in traditional agriculture. One example is agricultural product exchange, not in traditional markets but through online sales. At the same time, questions arise here as to whether we do not jeopardise food security in this way. Will the remote sale of agricultural produce, for example, be sufficient to meet society's food needs? These types of solutions could be multiplied by adding advanced robot technology, drones, and devices based on artificial intelligence in agriculture.

The Smart Village concept in itself is a challenge for Polish farmers because it will be up to them to decide which solutions will become the point of development of their environment. Therefore, labour law should already offer such legal instruments that will not only encourage a change in the professional activity of farmers by moving away from agriculture[22] but, above all, will take into account, for example, the diverse scope of work, as well as the combination of remote and traditional work, which in most cases is physical.

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[19] D. Guzal-Dec, *Intelligent development of the countryside – the concept of smart villages: assumptions, possibilities and implementation limitations*, "Economic and Regional Studies", 2018, Vol. 3, pp. 32-49 https://doi.org/10.2478/ers-2018-0023 (accessed 20 December 2023).

[20] S. Wyrwich-Płotka, *Praca zdalna jako element koncepcji inteligentnego miasta*, "Studia Miejskie", 2021, vol. 39, pp. 71-81. 10.25167/sm.2790.

[21] A. Niewiadomska, *Koncepcja Smart Village w kontekście zrównoważonego rozwoju*, "Studia Iuridica", 2021, Vol. 87, pp. 376-387.

[22] W. Kołodziejczak, *Nadwyżka zatrudnienia w polskim rolnictwie – projekcja na tle państw Unii Europejskiej*, "Zeszyty Naukowe Szkoły Głównej Gospodarstwa Wiejskiego w Warszawie Problemy Rolnictwa Światowego", 2016, Vol. 16(31), 1, p. 130.

The National Strategic Plan itself links the development of the Internet in the countryside with the possibility of remote working and, above all, remote learning. Because it will not be possible to pursue the implementation of modern solutions in the countryside, and thus changes in the work structure, without farmers obtaining modern knowledge. Given that their training in stationary form is impossible due to the scope and dimension of work, an opportunity for the development of the digital age in agricultural labour law is to educate farmers remotely and acquaint them with the possible benefits of implementing modern solutions on their farms.

As emphasised in the National Strategic Plan Smart Village "which is based on a bottom-up initiative of the inhabitants to find practical solutions to the various local problems they face and to take advantage of the opportunities offered by new technologies (e.g. bioeconomy, digitisation, RES). The availability of new technologies, especially digital ones, will be an important factor influencing the labour market as it will enable people to find employment, especially young people, without having to migrate, e.g. teleworking (National Strategic Plan[23]). There are high hopes here for the young generation's approach to remote work and the digitalisation of agriculture. The Polish legislator sees this as one of the recipes for stopping the processes of leaving agriculture and the ageing of the countryside. Without people educated in modern technologies, modern ways of undertaking remote work will mean nothing in rural areas. The challenge, therefore, is to convince young farmers that education in precisely the agricultural sector and staying in the countryside is an opportunity for them to develop.

The aforementioned National Strategic Plan envisages not only the development of Smart Villages but above all Smart Farming and smart SMEs in rural areas (National Strategic Plan, p. 296). Smart Farming in this sense refers to the management of farms using modern information and communication technologies to increase the quantity and quality of products while optimising the required human labour. This will reduce traditional agricultural labour in favour of the use of innovation and digitisation in the broadest sense. For example, Smart Farming includes sensors: soil, water, light, humidity, and temperature management; software: specialised software solutions targeting specific farm types or application-independent IoT platforms; autonomous tractors. These are just a few examples of cutting-edge solutions that will affect the way agricultural work is done in the future. What is needed is not only legal solutions that shape the possibilities for legal use of these technical devices but also legal solutions for influencing work using these devices. The standard rules of legal liability or health and safety may not be sufficient.

[23] Plan Strategiczny dla Wspólnej Polityki Rolnej na lata 2023-2027 (PS WPR 2023-2027) Act of 20 December 1990 on social insurance for farmers (Journal of Laws 2023, item 208, as amended), p. 66.

The smart solutions proposed by the European law for the countryside will affect the need to find new solutions for labour relations, which will divide traditional work in the countryside and remote work or other (yet to be defined) work using modern techniques and digitalisation. It is largely up to the citizens how these solutions will work, as the European legislator gives them the choice of how to implement a given invention. However, the law should be prepared for basic instruments that will favour the development of agriculture, as well as labour law.

3. PRECISION FARMING AS A NEW CHALLENGE FOR LABOUR LAW

Precision farming is not yet a legal category in Poland. This in itself is a challenge for the legislator as technological progress necessitates the creation of a full regulation taking into account many aspects of implementing innovative solutions in the countryside, including labour law. Precision farming is a comprehensive farming system that adapts individual elements of agrotechnology to changing conditions in specific parts of a field, depending on the current state of plant development or soil properties. The necessary data are acquired and processed using highly developed navigation and information technologies.[24]

Precision farming reduces costs as well as increases profits and yields.[25] In the long term, it makes it possible to care for the environment and improve the climate by means of precise dosing of plant protection products. At the same time, it already requires funding and training at this stage. These two non-legislative factors are a challenge for the legislator as he has to define a funding framework and certify acceptable precision farming systems taking care of safety in various dimensions.

For example, this system takes into account the use of drones in agriculture. Already today, satellite systems are used to control applications, e.g., for direct payments and to verify farmers' plots (their size, types of crops). However, the use of drones requires a more comprehensive regulation of the following issues: the use of space above another person's property, the security of data collected, its processing, the confidentiality of acquired know-how, system for controlling the use of these devices, and finally, the definition of what type of agricultural work will be covered by the operation of these devices and under which social security scheme they will be eligible.

[24] https://mrjagrotim.pl/pl/aktualnosci/34/rolnictwo-precyzyjne-czym-jest-i-jakie-daje-korzy (accessed 29 September 2023).

[25] https://rolnictwoprecyzyjne.eu/ (accessed 29 September 2023).

In precision agriculture, the use of land as a factor of agricultural production is becoming less and less important. Moving away from the theory of land-centrism and more efficient use of owned property thanks to modern technologies is a challenge for the Polish legislator. Contemporary regulations, such as the Act on the formation of the agricultural system, clearly indicate the necessity of redefining the role of real estate in the development of Polish agriculture. Accurate measurement and implementation of appropriate sowing or plant protection measures will, in the long term, make it possible to set aside a large part of the land of low nutritional value. The challenge for the legislator will be to define the fallowing and reuse of this land.

A *de lege ferenda* postulate is the introduction of a law on precision agriculture. It must combine administrative aspects (real estate management, state aid), civil aspects (property boundaries, protection of business secrets), environmental aspects (use of permissible plant protection products), or finally labour and social security law (defining, for example, whether drone work is an agricultural activity). This new approach to agriculture, including the concept of Smart Village and agriculture 4.0, presents an opportunity for Polish farmers to develop and increase their profitability.

CONCLUSIONS

The analysis presented above shows that modern technologies and the digitalisation era pose many challenges to both agricultural and labour law. These mainly concern the regulation of new working rules in agriculture with modern IT tools, as well as the implementation of new equipment.

In order to enable agriculture to function and increase its competitiveness, the Common Agricultural Policy supports innovation in agriculture, making it one of the determinants, along with climate protection, of the implementation of the new budget. Undoubtedly, the availability of finances, simplified legal procedures, and effective control of the funds spent will accelerate the intensification of efforts to make agriculture function in such a way as to respond to the digital challenges of the 21st century.

One of the identified challenges is the implementation and development of remote work in agriculture. The three basic farm types identified, while not exhaustive of all possible examples, show that the situation here is highly varied. While on medium and large farms that can afford to invest in innovation, remote work is possible and will certainly be developed, on small farms it will be limited, if introduced at all, to online applications for obtaining support from the Common Agricultural Policy. A solution is also required not only for the issue of protection of personal data of the persons working but also of the know-how of a farm mak-

ing use of, for example, the exclusive right to a plant variety or remotely planning the structure of crops. This requires new regulations combining agricultural and labour law, such as the Precision Farming Act, which has already been postulated *de lege ferenda* that would regulate, for example, the use of drones in agriculture or other autonomous devices.

Modern agricultural law and, by extension, labour law have not kept pace with the development of farming techniques and the farmers' need to acquire new methods of farming. The development of digitisation in agriculture and the consequent different approach to certain aspects of farm work requires not only financial incentives and public aid but, above all, appropriate legal regulations protecting the farmer from the negative effects of new technical solutions.

It seems indisputable that not all of the activities of an agricultural worker can be carried out remotely. Agriculture requires the presence of a farmer or agricultural worker for many activities, such as the operation of highly specialised machinery. The challenge, not only financially, but also logistically and then legally, will be to identify those places where this traditional farmer work can be replaced by digital solutions or technical devices. Relieving farmers of the burden of modern equipment, while providing high financial support, should foster the development of agriculture and then it will be possible to call it agriculture 4.0.

An exemplification of these challenges is the Smart Village concept, which is gaining in popularity. Where it is the farmers themselves who identify their needs, such as the fairly mundane internet access, and with the help of public funds try to implement them. The challenge for labour and agricultural law will be to develop legal instruments that can implement such complex concepts.

The lack of support for farmers and their reluctance to innovate may result in a change in their professional activity. Already today, statistics show a trend away from the farming profession, despite remaining in the countryside. Legal solutions will also have to be prepared for these people, which will enable them to work remotely in other professions while remaining in the countryside and using its infrastructure. This is facilitated by the professionalisation of the farming occupation, where the majority of aid from the European Union is directed at active farmers. Reconciling the move away from agriculture and its professional nature becomes a challenge for lawyers, who will have to identify possible legal instruments that will favour the reconciliation of the modern approach to professional work outside agriculture with that of the agricultural sector.

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FROM THE FACULTY

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Grażyna Bałtruszajtys

Dariusz Mańka

CHRONICLE OF THE FACULTY OF LAW AND ADMINISTRATION 2019-2020-2021

The objective of this short Chronicle is to highlight some aspects of the Faculty's life, the legislative changes modifying its functioning, research, teaching activities, participation in the life of the University of Warsaw and in the international scientific life.

When compared to the 2020 QS ranking, the position of the Faculty of Law and Administration at the University of Warsaw has risen to one between 151 and 200, while in last years we were ranked between 201 and 250. The University of Warsaw reached 349th place in the rating. That same year, the Faculty was ranked first for the second consecutive year in the prestigious Ranking of Polish Law Faculties (Ranking No. XIV) organised by *Dziennik Gazeta Prawna*. In turn, the Faculty was ranked second in the 2020 Ranking of Law Faculties by *Rzeczpospolita*. Also in 2020, the Faculty of Law at the UW was included for the first time in the Shanghai Ranking (*Shanghai's Global Ranking of Academic Subjects*) and ranked 201-300.

In the academic year 2020/2021, the Polish Accreditation Committee conducted an evaluation programme for the Faculty of Law. The assessment process resulted in Resolution No. 627/2021 of 8 July 2021, in which the Presidium of PAC granted the Faculty accreditation to conduct law studies for the longest possible period (6 years). In view of the very favourable results of the audit, the PAC Evaluation Team awarded the Faculty with a quality certificate.

The Faculty actively participated in public life, which was reflected, among other things, in the resolutions adopted on important issues. On 16 December 2020, the Faculty Council adopted a resolution connected to the draft amendment to the Act – Law on the System of Common Courts brought to the Sejm on 12 December 2019. During its meeting on 16 December 2019, the Faculty Council adopted a resolution concerning the position of the Council of the Faculty of Arts and Sciences of the UW on the introduction of solutions for the protection of the environment. At a meeting on 29 June 2020, the Faculty Council adopted resolutions on the Supreme Court and the LGBT community. On 7 September 2020, the Faculty Council gave a positive opinion on adopting a resolution on the situation in the Republic of Belarus. The Council also gave a positive opinion on adopting a resolution on changing the system of creating and enlarging national parks. At a meeting on 19 October 2020, a resolution was adopted on lifting the immunity of Judge Beata Morawiec by the Disciplinary Chamber of the Supreme Court and other proceedings before the Disciplinary Chamber. In turn, at its meeting on 19 April 2021, the Council expressed a positive stance on judicial independence by adopting a resolution to that effect. During a meeting on 18 October 2021, it adopted a resolution in support of the Resolution of the Committee of Legal Sciences of the Polish Academy of Sciences on the decision of the Constitutional Tribunal of 7 October 2021 and issued a positive opinion on the resolution supporting the appeal to the Government of the Republic of Poland on the situation of migrants at the Polish border.

In April 2019, a team for the development and monitoring of a gender equality plan at the WPiA was established. The activities of the team were part of broader activities undertaken at the University which are related to the development of a gender equality plan as part of the HR Excellence programme. The team included Prof. Dobrochna Bach-Golecka (Chair), Dr Agnieszka Gutkowska, Bernadetta Piekarska, MA, Dr Michal Warcinski and Prof. Dr Marek Zubik.

In the following years, the Faculty actively participated in the Science Festival. The person responsible for the Festival events organised by the Faculty was Dr Małgorzata Dziewanowska. Many people in the Faculty were involved in these activities. In 2020, the Programme Council and the Organising Secretariat of the Warsaw Science Festival expressed their appreciation to Dr Małgorzata Dziewanowska and all the people involved in the 24th edition of the Festival. The acknowledgements were sent to the Dean, Prof. Tomasz Giaro.

In 2019-2021, the life of the Faculty was significantly affected by the implementation of the higher education reform under the so-called Constitution for Science (i.e. the Act of 20 July 2018 – Law on Higher Education and Science, Journal of Laws of 2018, item 1668 as amended) as well as the COVID-19 pandemic. The epidemic threat and the associated international restrictions significantly reduced opportunities for scientific mobility. Many conferences and events were cancelled or held remotely. The pandemic had similar consequences in the area of teaching

and the day-to-day operations of the Faculty. Teaching, thesis defences and the deliberations of university and faculty bodies took place remotely for some time. Due to the outbreak of the pandemic in Poland, the Faculty Council meeting in March 2020 was cancelled. From 27 April 2020 onwards, the Faculty Council held online meetings. In turn, when the so-called Constitution for Science entered into force, it entailed structural changes at the University and the Faculty, modifications in promotion procedures and curriculum reform in the courses run by the Faculty. Nevertheless, based on the "Reports of the College of Deans of the Faculty of Law and Administration" for 2018/2019, 2019/2020 and 2020/2021, compared to the "Report..." for 2017/2018, it can be concluded that the high level of scientific activity of the Faculty staff was maintained, both in the context of participation in foreign scientific conferences and in scientific publications.

In order to implement the provisions of the so-called Constitution for Science in 2019-2021, a number of changes were necessary. On 26 June 2019, the UW Senate adopted Resolution 443 on the adoption of the Statute of the University of Warsaw. The UW Senate also adopted the new "Regulations for Studies", the "Regulations for Doctoral Schools" (June) and the "Organisational Regulations" (September). In October 2019, the UW Senate adopted the "Regulations on benefits for students and doctoral students" and the "Work Regulations".

Following the adoption of the new "UW Statutes", the Faculty Regulations had to be adapted to their provisions. Work on the new Faculty Bylaws had already been underway since 2018. A team was set up, discussions took place at the meetings of the Faculty Council and the Dean's College. Many discussions, meetings and the involvement of the Student Council led to the implementation of the provisions of the Act. A departmental structure of the Faculty consisting of chairs (possibly also of departments at the same organisational level) was adopted. The Faculty Council, at its meeting on 14 October 2019, gave a positive opinion on these changes and, on 18 November 2019, passed a resolution, by open vote, to adopt the draft Rules of the Procedure of the Faculty of Law and Administration of the University of Warsaw. On 12 December 2019, the Rector of the UW issued Order No. 183 on the Regulations of the Faculty of Law and Administration.

In accordance with the provisions of the new Regulations, the Department conducts research – it is independent in this respect – as well as the teaching process. The Vice-Dean for Student Affairs provides a schedule of hours to the Head of Department. The Head of the Department may be the direct supervisor of the Department's employees (§ 13(3) of the Statutes). The Head makes requests concerning the hiring of employees for the Department, is responsible to the Dean for the research conducted, and reports to the Vice-Dean for Student Affairs on the teaching conducted by the Department. Chairs are only created by amending the Regulations.

Managers are required to coordinate the research and teaching work carried out in the Department. They report directly to the Deans. This is the model

adopted by almost all Faculties of Law in Poland. A total of 34 Chairs and Departments were initially granted subjectivity. According to the Dean authorities, the choice of Chairs was also optimal from the point of view of parameterisation. Employees have to publish in high-scoring periodicals. The Head of the Department should, in this situation, be the person who, on the one hand, ensures that the articles are published and, on the other hand, helps younger employees to publish their articles properly.

The Institutes lost the right to conduct doctoral defences and, as of 12 December 2019, the Institutes were abolished as a result of the new Faculty Regulations coming into force. A group of Chairs share a secretariat (on an assignment basis coinciding with the existing service model).

During the Faculty Council meeting on 14 January 2019, Vice-Dean Dr Dobrochna Bach-Golecka presented the work completed so far by the team for the discipline of legal sciences, consisting of Prof. Władysław Czaplinski (European Centre), Prof. Dobrochna Bach-Golecka (coordinator), Prof. Maria Rogacka-Rzewnicka, Dr Jacek Wiercinski, Prof. UW and Prof. Andrzej Rzepliński (Faculty of Applied Social Sciences and Resocialisation). The team prepared a report on the status of the discipline of legal sciences. The initial projected parameterisation category calculated for the increased composition of the legal sciences discipline was approaching category A. According to the team, a specific feature of the legal sciences discipline at the UW is the strong presence of foreign law schools (American, British, French, Italian, Spanish, Chinese and the first edition of the Israeli law school), which might be the basis for comparative research and provide stronger internationalisation of legal studies. Another positive element of the Faculty was the functioning of the Centre for Space Law as a unit of national importance, as well as the promotion of Polish law as part of the activities of the School of Polish Law at the Taras Shevchenko University in Kiev.

In the university elections to the Council for Scientific Excellence held in April 2019, Prof. Dr Tomasz Giaro and Prof. Dr Aleksander Chłopecki won their seats. The Council for Scientific Excellence replaced the Central Commission for Degrees and Titles on the basis of the so-called Constitution for Science.

On 11 September 2019, the Rector issued an Ordinance on the establishment of scientific councils of disciplines at the University of Warsaw. The scientific councils of disciplines, according to the new UW Statute, are in charge of: awarding doctoral and post-doctoral degrees, setting criteria for the evaluation of achievements of academic teachers, selecting members of teaching councils, appointing council representatives to competition committees and conducting nostrification proceedings. The councils also coordinate activities related to the preparation of an evaluation of the scientific activity of the UW within a given discipline and present the Senate with an assessment of the level of research in relation to international standards. According to the new UW Statutes, up to 1/3 of the members of the councils are appointed by the Rector, while the others

are elected. The council also includes a representation of doctoral students. For the 2019-2020 term, these are: prof. dr hab. Małgorzata Gersdorf (Chairperson); dr hab. Wojciech Brzozowski, Professor of the University (Deputy Chairperson); dr hab. Dobrochna Bach-Golecka, Professor of the University; dr hab. Zuzanna Benincasa, Professor of the University; dr hab. Maciej Bernatt; dr hab. Piotr Bogdanowicz; dr hab. Maria Boratyńska; dr hab. Tatiana Chauvin; prof. dr hab. Aleksander Chłopecki; Dr Vita Czepek; Prof. Dr Piotr Girdwoyń, Dr Kacper Gradoń, Dr Aleksander Grebieniow, Prof. Dr Ewa Gruza, Dr Patrycja Grzebyk, Prof. Dr Robert Grzeszczak, Dr Marek Grzybowski, Dr Agnieszka Gutkowska, Dr Karol Karski, DSc; Prof. Dr Wojciech Kocot, Dr Beata Kozłowska-Chyła, Dr Wojciech Machała, Dr Katarzyna Myszona-Kostrzewa, Dr Barbara Namysłowska-Gabrysiak, Dr Adam Niewiadomski, Dr Jakub Pawliczak, Dr Jacek Piecha, Dr Krzysztof Pietrzykowski, Dr Magdalena Porzeżyńska, Dr Mateusz Pilich, Dr hab. Dorota Pudzianowska; Prof. Dr Maria Rogacka-Rzewnicka, Dr Marcin Stębelski, Prof. Dr Krystyna Szczepanowska-Kozłowska, Dr Dawid Sześciło, Dr Karolina Tetłak, Dr Jarosław Turłukowski, Dr Jakub Urbanik, Professor of the University; Dr hab. Andrzej Wach, Professor of the University; Dr hab. Paweł Wajda, Professor of the University; Dr hab. Paweł Waszkiewicz; Dr hab. Karol Weitz; Dr hab. Marcin Wiącek, Professor of the University; Dr Jan Winczorek; Dr hab. Anna Zawidzka-Łojek, Professor of the University; Dr hab. Marek Zubik; Dr hab. Sławomir Żółtek, Professor of the University; mgr Rafał Smoleń (representative of doctoral students). In turn, for the term 2021 - 2024, the Council of the Discipline of Legal Sciences consists of the following staff: Chairperson – Prof. Dr Robert Grzeszczak, Deputy Chairperson – Dr Patrycja Grzebyk, Prof. UW; Deputy Chairperson – Dr Aleksander Jakubowski, Dr Maciej Bernatt, Prof. UW; Michal Dr Bitner, Dr Piotr Bogdanowicz, Prof. UW; Dr Witold Borysiak, Prof. Dr Adam Bosiacki, Dr Wojciech Brzozowski, Prof. UW; Dr Łukasz Chojniak, Dr Vita Czepek, Dr hab. Dorota Dzienisiuk; Dr Aleksander Grebieniow, Dr Piotr Grzebyk, Dr Aleksander Gubrynowicz, Dr Jowanka Jakubek-Lalik, Dr Jacek Jastrzębski, Prof. UW; Dr Karol Karski, Prof. UW; Dr Beata Kozłowska-Chyła, Dr Krzysztof Koźmiński, Dr Wojciech Machała, Dr Eliza Maniewska, Dr Katarzyna Myszona-Kostrzewa, Prof. UW; Dr Adam Niewiadomski, prof. UW; Dr hab. Maria Nowak, prof. UW; Dr hab. Joanna Osiejewicz, prof. UW; Dr Jakub Pawliczak; Dr Jacek Piecha; Dr hab. Mateusz Pilich, prof. UW; Dr hab. Piotr Pomianowski, prof. UW; Dr Magdalena Porzeżyńska; Dr hab. Dorota Pudzianowska; Dr hab. Jan Rudnicki; Dr hab. Piotr Rylski, prof. UW; Prof. Dr hab. Krystyna Szczepanowska-Kozłowska; Dr hab. Dawid Sześciło; Dr Karolina Tetłak, Dr Jarosław Turłukowski, Dr Marcin Wiącek, Prof. UW; Dr Paweł Wojciechowski, Prof. UW; Dr Dagmara Woźniakowska-Fajst, Dr Anna Zawidzka-Łojek, Prof. UW; Dr Tadeusz Zembrzuski, Prof. UW; Marek Zubik, Dr Sławomir Żółtek, Prof. UW; Alexander Martin Juranek, MSc (PhD students' representative).

The Faculty Council at its meeting on 16 December 2019, in a secret ballot, passed a resolution to elect the following member to the Faculty Teaching Council: dr hab. Wojciech Brzozowski; Dr Ryszard Piotrowski, Professor of the University; Prof. Tomasz Giaro; Prof. of Apprentice Dr Anna Zawidzka-Łojek; Prof. of Apprentice Dr Marcin Wiącek; Prof. of Apprentice Dr Piotr Bogdanowicz; Dr Jowanka Jakubek-Lalik; Dr Beata Kozłowska-Chyla; Dr Krzysztof Koźmiński; Dr hab. Paweł Wojciechowski, Dr Dorota Dzienisiuk, Dr Jan Rudnicki, Dr Rafał Stankiewicz, Professor of the University, Dr Mateusz Pilich, Dr Andrzej Bielecki, Dr Adam Krzywoń, Dr Michał Królikowski, Prof. of the University, Dr Michał Bitner, Dr Magdalena Porzeżyńska, Prof. Dr Krystyna Szczepanowska-Kozłowska, Dr Piotr Kładoczny, Dr Karolina Panfil. The obligation to elect the Teaching Council results from the provisions of the new Act and the UW Statutes.

The Scientific Council of the Legal Sciences Discipline at its meeting on 28 January 2020 appointed the following committees:

- Nostrification Commission composed of Dr Tatiana Chauvin; Prof. Dr Karol Karski; Dr Jarosław Turłukowski.
- Discipline Development Committee composed of Dr Piotr Bogdanowicz; Dr Aleksander Grebieniow; Dr Piotr Grzebyk; Professor of the University Dr Maria Rogacka-Rzewnicka; Professor of the University Dr Marcin Wiącek.
- Discipline Evaluation Committee composed of Dr Patrycja Grzebyk, Dr Beata Kozłowska-Chyła, Dr Adam Niewiadomski.
- Competitions committee composed of Dr Wojciech Machała; Prof. Dr Marcin Wiącek.
- The Employment Committee is composed of Dr Wojciech Machała; Prof. Dr Marcin Wiącek.
- Rector's Commission for Promotions to Professorial Positions in the Discipline of Legal Sciences, composed of Prof. Dr Piotr Girdwoyń; Prof. Dr Krystyna Szczepanowska-Kozłowska; Prof. Dr Marek Zubik; Prof. Sławomir Żółtek.

At the meeting of the Faculty Council on 24 February 2020, the matter of the appointment of the Academic Staff Employment Committee and the Competition Committee, which the Faculty was obliged to establish by an order of the Rector, was considered. The Academic Council of the Discipline of Legal Sciences, at its meeting on 28 January 2020, appointed Dr Wojciech Machała and Professor of the University Dr Marcin Wiąck as its representatives to the two said Commissions. The Council assumed that the same persons should be elected to the two Commissions and decided on the appointment of the Commissions composed of Prof. Dr Małgorzata Gersdorf – Chairperson, Prof. Dr Jacek Jagielski, Prof. Dr Piotr Girdwoyń, Prof. Dr hab. Sambor Grucza (Institute for Specialist and Intercultural Communication), Prof. Dariusz Kuźmina (Faculty of Journalism, Information

and Bibliology), Prof. Dr Krystyna Szczepanowska-Kozłowska, Jakub Urbanik, Prof. Karol Karski, Prof. Dr Adam Krzywoń, Dr Wojciech Machała.

The higher education reform has also changed the procedure for the election of Faculty Authorities. Under the new regulations, the Rector appoints the Dean of the Faculty and, with the consent of the students, the Vice-Dean for Student Affairs. Candidates for the Dean and Vice-Dean for Student Affairs are put forward by the Faculty. The election of candidates for the Dean and Vice-Dean for Student Affairs is conducted by the Faculty Election Committee. At its meeting on 16 December 2019, the Faculty Council adopted a resolution on the election of the Faculty Election Committee, consisting of Dr Lech Jaworski, Prof. Dr Robert Jastrzębski, Dr Witold Borysiak, mgr Maciej Kruk, mgr Monika Cichorska, mgr Elżbieta Kozera, Mr Tomasz Tarczyński. In February 2020, the Faculty Electoral Commission determined the members of the Faculty Electoral College, which included 127 representatives of independent academic staff, 30 representatives of other academic staff, 37 representatives of doctoral students and students, and 10 representatives of non-academic staff. The committee also passed a resolution to determine the composition of the Faculty Council: 127 independent academic staff, 29 representatives of other academic staff, 40 representatives of doctoral students and students, 10 representatives of non-academic staff. On 15 June 2020, an indicative ballot of candidates for the position of the Dean was held. Of the 4 persons put forward, only Prof. Tomasz Giaro agreed to stand as a candidate and was elected. The UW Rector accepted Prof. Giaro's candidacy and appointed him as the Dean of the Faculty of Arts and Sciences. Members of the Faculty Electoral College, who were students and doctoral students, agreed that Dr Andrzej Bielecki, whom the Rector appointed to the post, should be the candidate for the Vice-Dean for Student Affairs. Dean Giaro appointed Dr Piotr Grzebyk as the Vice-Dean for Research and International Cooperation and Associate Professor Dr Marek Grzybowski as the Vice-Dean for Finance. The newly elected College of Deans began their four-year term in October 2020. In June 2020, the independent academics sitting in the Faculty Electoral College elected Professor of the University doc. Dr Sławomir Żółtek as the UW Senator from the WPiA.

At its meeting on 8 October 2020, the Faculty Council passed a resolution to support the nomination of the following individuals to the UW Senate Committees for the 2020-2024 term:

- Senate Committee on Finance: Dr Marek Grzybowski,
- Senate Committee on Academic Affairs: Prof. Dr Piotr Grzebyk, Prof. Dr Jakub Urbanik,
- Senate Committee on Personnel Policy: Dr Michał Raczkowski,
- Senate Committee on Spatial Development: Dr Katarzyna Zalasińska,
- Senate Committee on Social Affairs: Prof. Anna Zawidzka-Łojek,
- Senate Committee for Students, Doctoral Students and Quality of Education: Dr Jan Rudnicki,

- Senate Legal and Statutory Affairs Committee: Prof. Dr Marek Zubik,
- University Disciplinary Committee: Prof. Dr Szymon Pawelec,
- Disciplinary Committee for Students and Doctoral Students: Dr Jarosław Turłukowski,
- Disciplinary Appeals Committee for Students and Doctoral Students: Dr Małgorzata Barzycka-Banaszczyk.

At the same meeting, the Faculty Council, established the standing faculty committees for the 2020-2024 term:

- Research Commission: Prof. Dr Katarzyna Myszona-Kostrzewa, Prof. Paweł Przybysz (student), Dr Piotr Grzebyk, Prof. Dr Małgorzata Król-Bogomilska, Prof. Dr Robert Jastrzębski, Dr Zbigniew Banaszczyk.
- Committee on Budgets: Dr Marek Grzybowski, Dr Piotr Pomianowski, Prof. Hanna Litwińczuk, Dr Barbara Namysłowska-Gabrysiak, Dr Tomasz Kamiński, Prof. Michał Królikowski.
- Audit Committee: Prof. Dr Marek Zubik, Dr Krzysztof Koźmiński, Prof. Dr Krystyna Szczepanowska-Kozłowska, Prof. Dr Jacek Jagielski, Dr Aleksander Gubrynowicz.
- Library Committee: Prof. Jan Kozakoszczak (student), Prof. Radosław Jarocki (student), Prof. Jerzy Poczobut, Prof. Wojciech Brzozowski, Dr Tomasz Królasik, Marzanna Ciastek, MSc, Dr Maciej Giaro, Dr Dariusz Mańka.
- Tender Committee: Dr Marek Grzybowski, Iwona Kłosowska, MSc, Dr Kacper Gradoń, Dr Michał Bitner, Dr Adam Szafrański.

At its meeting on 8 October 2020, the Faculty Council considered the matter of giving an opinion on the Dean's candidates for the Faculty Employment and Competition Committees. The Dean proposed the following candidates: Prof. Dariusz Kuźmina (external candidate), Prof. Magdalena Olpińska-Szkiełko (external candidate), Prof. Jacek Jastrzębski, Prof. Karol Karski, Prof. Małgorzata Gersdorf, Prof. Szymon Pawelec, Prof. Marcin Wiącek and Prof. Piotr Grzebyk.

The Faculty Council, at its meeting of 19 October 2020, issued a positive opinion on the appointment of Professor Dr Małgorzata Gersdorf as the Chair of the Competition and Employment Committee of the Faculty of Arts and Sciences of the University of Warsaw.

The Faculty Council, at its meeting on 14 December 2020, expressed a positive opinion on the appointment of the Assessment Committee of the Faculty of Law and Administration of the University of Warsaw for the 2020-2024 term, which was composed of Prof. Dr Hanna Gronkiewicz-Waltz, Prof. Dr Barbara Maria Namysłowska-Gabrysiak, Prof. Dr Hanna Litwińczuk, Prof. Dr Maciej Kaliński, Professor of the University Hanna Litwińczuk; Prof. Dr Rafał Stankiewicz, Prof. Dr Katarzyna Myszona-Kostrzewa, Dr hab. Piotr Grzebyk, Prof. Dr Beata Glinka (Faculty of Management); Dr Natalia Garner (Faculty of Political Sciences). Members of the Evaluation Committee are appointed by the Rector following a proposal of the Dean.

At its meeting on 14 December 2020, the Faculty Council adopted a resolution on the election of the following persons to the Faculty Teaching Council for the term 2021-2024: Professor of the University Dr Wojciech Brzozowski, Prof. dr hab. Tomasz Giaro, Professor of the University Dr Sławomir Żółtek, Dr hab. Dariusz Szafrański, Dr hab. Dorota Dzienisiuk, Professor of the University dr hab. Marcin Wiącek, dr hab. Tadeusz Zembrzuski, dr hab. Jan Rudnicki, Professor of the University Sławomir Lewandowski DSc, Michał Bitner, DSc, Krzysztof Koźmiński, DSc Paweł Wojciechowski, DSc, Michał Szwast, DSc, Dr Jowanka Jakubek-Lalik, Dr Valeri Vachev, Michał Królikowski, DSc, Dr Agnieszka Stępkowska, Dr Karolina Tetłak, Dr Magdalena Bławat, Dr Marcin Stębelski, Dr Magdalena Słok-Wódkowska, Piotr Pomianowski, DSc.

There have been changes to the Faculty's staff:

Dr Piotr Bielarczyk, Dr Hanna Gajewska-Kraczkowska, Dr Monika Latos-Miłkowska and Prof. Marek Safjan left the Faculty in 2019.

Emeritus Prof. Dr Maria Katarzyna Sójka-Zielińska, a long-time employee of the Institute of the History of Law, passed away in 2019.

In 2019, the academic title of professor was awarded to Dr Robert Grzeszczak.

The position of full professor was awarded to Prof. Dr Małgorzata Korzycka and Prof. Dr Adam Opalski in 2019.

The position of associate professor at the UW was awarded to Dr Cezary Banasiński, Dr Zuzanna Benincasa, Dr Katarzyna Myszona-Kostrzewa, Dr Konrad Osajda, Dr Rafał Stankiewicz, Dr Marcin Wiącek, Dr Paweł Wojciechowski and Sławomir Żółtek in 2019.

In 2019, the postdoctoral degree was conferred to Dr Adam Bodnar, Dr Piotr Bogdanowicz, Dr Lech Jaworski, Dr Krzysztof Koźmiński, Dr Konrad Marciniuk, Dr Adam Moniuszka (at another University), Dr Barbara Namysłowska-Gabrysiak, Dr Jan Rudnicki, Dr Dariusz Szafranski, Dr Maciej Ślifirczyk, and Dr Anna Zbiegień-Turzańska.

In 2020, the following staff left the Faculty: Prof. Tadeusz Ereciński, Prof. Ludwik Florek, Prof. Maria Szyszkowska, Prof. Zbigniew Jędrzejewski, Dr Adam Bodnar, Dr Marcin Ciemiński, Dr Włodzimierz Bendza, Dr Katarzyna Królikowska, Dr Karol Muszyński, Dr Piotr Lewulis, Dr Marcin Olechowski, Dr Daniel Mańkowski.

The outbreak of the pandemic in Poland in the spring of 2020 caused delays in the procedures of awarding degrees. At a remote Faculty Council meeting on 27 April 2020, Prof Wojciech Brzozowski, who sits on the Discipline Council, together with Vice-Rector Duszczyk agreed that the procedure of awarding degrees needed to be restored. The Act of 16 April 2020 on special support instruments in connection with the spread of the SARS-CoV-2 virus opened the way for the conferral of degrees in remote proceedings, but its implementation took place through UW internal regulations. That is, it was not a sufficient basis for conducting these promotion proceedings remotely. Therefore, the UW Authori-

ties introduced the appropriate changes to its internal regulations to enable the resumption of the proceedings.

In 2020, the title of professor was awarded to Dr Rafał Stankiewicz.

Dr hab. Dobrochna Bach Golecka obtained the position of Associate Professor at the UW in 2020.

In 2020 (until 30 September), the postdoctoral degrees were conferred to Dr Cezary Blaszczyk, Dr Marcin Dziurda, Dr Kacper Gradoni, Dr Piotr Grzebyk, Dr Bogusław Lackoroński, Dr Arwid Mednis, Dr Jan Podkowik, Dr Dorota Pudzianowska, Dr Michał Raczkowski, Dr Anna Rossmanith, Dr Magdalena Słok-Wódkowska, Dr Ewa Stefańska, Dr Maciej Taborowski, Dr Jan Winczorek, and Dr Łukasz Żelechowski.

The following staff members left the Faculty in 2021: Prof. Jerzy Poczobut, Prof. Elżbieta Kornberger-Sokołowska, Prof. Małgorzata Korzycka, Dr Kacper Gradoń, Dr Konstantinos Balamosev, Dr Agnieszka Koniewicz, Dr Dominik Jaśkowiec, Dr Katarzyna Kowalska, Dr Paweł Dąbrowski, Dr Arkadiusz Radwan, Dr Marek Grzywacz, Dr Joanna Mazur and mgr Robert Obrębski.

In 2021, long-time employees of the Institute of the History of Law, Prof. Dr Witold Wołodkiewicz and Prof. Dr Michał Pietrzak, Deputy Dean of the Faculty in 1978-1981, passed away. Dr Andrzej Kojder and Prof. Dr Andrzej Malinowski – employees of the Institute of the Sciences of State and Law – also passed away. Dr Joanna Błeszyńska-Wysocka, a long-standing employee of the Institute of Civil Law, died the same year.

The following staff members were hired as professors at the university in 2021: Dr Zbigniew Banaszczyk, Dr Tatiana Chauvin, Dr Piotr Rylski, Dr Paweł Waszkiewicz and Dr Tadeusz Zembrzuski.

The academic title of professor was awarded to Prof. Dr Marcin Matczak, Prof. Dr Konrad Osajda and Dr Aleksandra Wiktorowska in 2021.

From 1 October 2020 to 30 September 2021, postdoctoral degrees conferred by the Scientific Council of the Discipline of Legal Sciences were awarded to the following members of the staff: Dr Arwid Mednis, Dr Anna Rossmanith, Dr Jan Winczorek, Dr Maria Nowak, Dr Maciej Miłosz Sokołowski and Dr Aleksandra Nowak- Gruca.

Faculty members who continued to hold a number of positions at the University of Warsaw between 2019 and 2021.

Professor of the University dr hab. Sławomir Żółtek took office on 1 September 2020 as the UW Vice-Rector for Students and Quality of Education for the term 2020 - 2024. In accordance with the UW Statutes, Prof. Żółtek was appointed as Vice-Rector by the newly elected UW Rector, Prof. Alojzy Nowak. Representatives of students and doctoral students are consulted on the selection of the vice-rector in charge of educational affairs.

The following Faculty employees were appointed to the Scientific Council of the discipline of Legal Sciences (15 persons): Dr Dobrochna Bach-Golecka, Dr Piotr Bogdanowicz, Dr Kacper Gradoń, Dr Prof. Ewa Gruza, Dr Robert Grzeszczak, Dr Prof. Karol Karski, Dr Dorota Pudzianowska, Dr Dawid Sześciło, Dr Karolina Tetłak, Dr Jarosław Turłukowski, Dr Jakub Urbanik, Dr Paweł Waszkiewicz, Dr Jan Winczorek. Non-faculty members of the Council are: Maciej Bernatt, Dr (Faculty of Management) and Patrycja Grzebyk, Dr (Faculty of Political Science and International Studies).

Three members of the Faculty were appointed to the Council of the Doctoral School of Social Sciences: Dr Robert Grzeszczak, Professor of the University and Dr Krzysztof Kaleta.

Dr Katarzyna Julia Kowalska was appointed as Disciplinary Ombudsman for Student and Doctoral Affairs for the term 2019 - 2020.

The Scientific Council of the Discipline of Legal Sciences at its meeting on 18 October 2021 elected Prof. Dr Konrad Osajda as the representative of the discipline of legal sciences to the Scientific Council of the Domain.

During the period under review, faculty members also held numerous functions outside the university (many already noted in previous chronicles):

Dr Beata Kozłowska-Chyła was appointed to the Entrepreneurship Council of the President of the Republic of Poland.

Dr Maciej Taborowski, Assistant Professor in the Department of European Law, was appointed Deputy Ombudsman on 6 May 2019.

Doc. Dr Marek Grzybowski was elected president of "The European Law Faculties Association" (ELFA) on 12 April 2019 at the assembly in Turin.

Dr Adam Szafrański was appointed as Disciplinary Ombudsman of the Minister of Science for 2019-2022 within the social sciences (in the field of legal sciences).

Prof. UW Dr Robert Grzeszczak was appointed to the 2019 Chapter of the Competition for Master's and Doctoral Theses at the Office of Competition and Consumer Protection.

Prof. UW Dr Marcin Matczak was appointed by the Senate of the Warsaw Medical University to the WUM Academic Council in 2019 for the first term as one of the elected members from outside the WUM academic community.

Dr Tomasz Kaminski was appointed in 2019 to the International Law Association Committee in London to examine the status of submarine cables and pipelines (ILA Committee: Submarine Cables and Pipelines under International Law). The Committee has a 4-year mandate.

Dr Paweł Waszkiewicz is the third European to be invited to the Editorial Board of Homicide Studies. This is an interdisciplinary and international scientific journal published by Sage Journals, on the new MNiSW list of 100 pts.

Dr Jakub Urbanik was re-elected to the International Committee of Papyrology, the governing body of the International Association of Papyrologists.

Dr Dobrochna Bach-Golecka, MD, was appointed to the Advisory Board of the European Medical Law Association in 2019.

On 20 December 2019, Prof. Dr Adam Opalski received an appointment from the European Commission to the expert group on company law and corporate governance, thus Prof. Opalski now participates in all 3 working groups on company law that exist in Europe.

In 2020, the following were elected to the Committee of Legal Sciences of the Polish Academy of Sciences: Dr Wojciech Brzozowski, Professor of the University dr hab. Robert Grzeszczak, Professor of the University dr hab. Ryszard Piotrowski, Dr hab. Mirosław Wyrzykowski and Prof. dr hab. Marek Zubik.

Prof. Dr Robert Grzeszczak was elected President of the Committee of Legal Sciences of the Polish Academy of Sciences in 2020.

Head of the Department of Confessional Law at the Faculty of Law of the University of Warsaw, Dr Wojciech Brzozowski was elected vice-president of the Polish Confessional Law Society for the 2020 -2024 term.

Dr Kacper Gradoń attended the World Health Organisation (WHO) 1st WHO Infodemiology Conference (30 June - 16 July 2020) as the only participant from Poland. Dr Gradoń was also invited to be a WHO expert on information epidemiology (in the context of information warfare and disinformation campaigns).

Prof. Dr Robert Grzeszczak became a member of the *Advisory Board of the Research Institute, Centre & Units (RICUs) of University College Cork - National University of Ireland, Cork* (UCC) as of 1 December 2020.

In July 2021, Dr Marcin Wiącek, Professor of the University, was appointed as Ombudsman.

On 26 September 2021, by the decision of the Reporting and Elective General Meeting of Delegates of the Polish Fencing Association, Prof. Dr Tadeusz Tomaszewski was elected President of the Board for the term 2021-2025.

Faculty members who received decorations and awards.

Prof. Dr Małgorzata Gersdorf received the 2019 Theodor Heuss Prize awarded by the Th. Heuss Foundation for the promotion of political education and culture in Germany and Europe (previous laureates include Günter Grass, Helmut Schmidt, Vaclav Havel and Jürgen Habermas). Prof. Gersdorf was also awarded the Internationaler Demokratiepreis Bonn by the Internationaler Demokratiepreis Association (previous laureates include Federica Mogherini, Reporters Without Borders and Vaclav Havel).

On 14 January 2019, Professor Eleonora Zielińska received the UW Rector's Award for Lifetime Achievement.

Dr Tadeusz Zembrzuski took first place *ex aequo* with Dr Piotr Rylski in the Second Edition of the Competition for the award of the President of the Gen-

eral Prosecutor's Office of the Republic of Poland for the best habilitation thesis, the best doctoral thesis and the best master's thesis in the field of judicial law. The competition was held in memory of Stanisław Bukowiecki. The topic of the habilitation thesis of Dr T. Zembrzuski was: "Invalidity of proceedings in a civil trial". Habilitation thesis topic of Dr P. Rylski was: "Participant in non-procedural proceedings".

Dr Sławomir Żółtek was awarded second prize in the LIV Competition "State and Law" for the best habilitation thesis in 2019.

Prof. Dr Ewa Gruza was awarded the individual award of the 2nd degree of the Minister of Science and Higher Education in 2020 for significant achievements in organisational activities (Disciplinary Committee at the General Council for Science and Higher Education).

Dr Andrzej Harla was awarded the individual award of the 2nd degree of the Minister of Science and Higher Education in 2020 for significant achievements in organisational activities (Disciplinary Committee of the General Council for Science and Higher Education).

Professor of the University Dr Robert Jastrzębski, Dr Jarosław Turłukowski and Dr Michał Sadłowski received a thank-you note (a kind of university award) from the President of the National University "Odessa Legal Academy" in 2020 for organising the E.V. Vaskovskiy School of Polish Law at the Faculty of Civil and Economic Justice and for participating in the roundtable entitled "Impact of COVID-19 on the development of civil legislation of Ukraine and Poland".

Dr Marcin Szwed was awarded second prize in the LV Competition "State and Law" in 2020 for his doctoral thesis entitled "Forced placement in a psychiatric institution in the light of contemporary human rights protection standards".

Dr Mateusz Żuk was awarded first prize in the 18th edition of the 2020 competition of the Polish Patent Office for his doctoral thesis "The dependence of trademark protection on its distinctiveness in European Union law".

The 2020 Prize of the Minister of Development, Labour and Technology was awarded to Dr Łukasz Żelechowski for his habilitation thesis "Protection of distinctive signs in the law against unfair competition. Structural issues".

Employees of the Faculty of Law and Administration of the University of Warsaw were recognised in the ninth edition of the prestigious "Rising Stars Lawyers – Leaders of Tomorrow 2020" competition organised by Wolters Kluwer Polska. Dr Adam Ploszka was ranked 6th and Dr Magdalena Porzeżyńska was ranked 8th.

Prof. Malgorzata Gersdorf is the recipient of the prestigious 2021 Dutch human rights award, the Gez Medal. The Gez Medal is an award given since 1987 to individuals or organisations for their fight for democracy and against dictatorships, racism and discrimination. The Geuzenpenning Foundation honoured Prof. Gersdorf as a symbol of impartial justice in Poland. Laureates of the award in

previous years included German President Richard von Weizsäcker (1990), Czech President Vaclav Havel (1995) and Chinese oppositionist Harry Wu (1996).

Dr Piotr Grzebyk Vice-Dean for Research and International Cooperation of the UW's Faculty of Arts and Sciences, was awarded the First Level Individual Prize of the Minister of Education and Science in 2021 in the category of "significant achievements in organisational activities". The award in this category is given for, among other things, expanding international cooperation, developing cooperation with the socio-economic environment or effective management of the entity that creates the system of higher education and science.

In 2021, the Hippolyte Cegielski Society in Poznań conferred on Prof. Dr Witold Modzelewski the Dignity of Outstanding Personality of Organic Work and the Honorary Award of the Golden Hippolyte. The Golden Hippolyte is an annual distinction awarded since 2001 by the Poznań-based Hipolit Cegielski Society, and the statuette is presented together with the title of Outstanding Personality of Organic Work. The award is given to people who have permanently inscribed themselves in the public consciousness by promoting patriotic attitudes, respect for positivist values and organic work as the source of the nation's prosperity.

Professor Witold Modzelewski was awarded the Medal of the Senate of the Republic of Poland for 2021. This medal is a special distinction, awarded for the entirety of Mr Witold Modzelewski's activities through which he has contributed to the development of the Republic of Poland.

The habilitation dissertation of Dr Marcin Dziurda entitled "Special judicial capacity" received a special award in the 12th edition of the competition of Wolters Kluwer Polska and "Przegląd Sądowy" for the legal book that was most useful in the practice of justice in 2019.

Dr Iga Krystyna Małobęcka-Szwast received the 2021 Prime Minister's Award in the category of Outstanding Doctoral Dissertations for her thesis entitled "Role of big data in assessing abuse of a dominant position by data-driven online platforms under EU competition law", as the only person representing legal sciences.

In 2021, the Competition Jury of the LVI National Competition "State and Law" for the best postdoctoral and doctoral theses in the field of legal sciences awarded a distinction in 2021 to Dr Aleksandra Orzeł-Jakubowska for her doctoral thesis entitled "Arbitration judiciary in the light of constitutional standards".

Chairs and departments, conducted research, prepared opinions, expert reports and published textbooks, exercise materials, articles, reviews and glosses.

In 2019, Faculty members published: 764 publications, including 347 articles, 83 monographs and edited monographs, as well as 334 chapters.

In 2020, there were 818 publications by Faculty members, including 361 articles, 83 monographs and edited monographs, as well as 374 chapters.

In 2021, there were 743 publications by Faculty members, including 389 articles, 56 monographs and edited monographs, as well as 298 chapters.

The entry into force of the so-called Constitution for Science involved extensive changes to the evaluation of the discipline of legal sciences which caused a lot of controversy in the community. Faculty evaluation was to be determined by the score of all employees. Only four publications were taken into account for each research-active member of staff (i.e. formally employed in a research and teaching position, research or in a teaching position as long as he or she had made the appropriate N declaration). This meant that people who had published a lot and in good journals up to that point were not able to produce a discipline score on their own, as they could only report four publications. 10% of the evaluation score was to depend on the amount of funding received from external sources, including primarily grants implemented by those submitted to the discipline, and the number of N.

The Faculty was intensively preparing for the new evaluation rules. Directionally, the Faculty's activities were aimed at increasing the publication output of research and research-teaching staff and improving the quality of this output in terms of evaluation, increasing the number of grants implemented at the Faculty, as well as introducing mechanisms for monitoring scientific activity. Administrative support for the acquisition of external funding by staff in the form of a newly established Development Section was also introduced.

Research was conducted in the following NCN projects:

In 2019, the Faculty received a grant from the National Science Centre under the MINIATURA 2 competition for the scientific action entitled "Genesis and development of the concept of supra-constitutional norms in the French science of public law". The person implementing the activity was Dr Krzysztof Kaleta.

The research project of Dr Piotr Pomianowski, entitled "Uregulowania prawne relacji między dziedzicami a chłopami na centralnych ziemiach polskich w okresie od zniesienia poddaństwa do uwłaszczenia", was qualified for funding by NCN in 2019 (OPUS 16 competition).

Dr Łukasz Pisarczyk, Prof. UW, was awarded an OPUS 17 grant from the National Science Centre in 2019 to carry out a research project entitled "European framework agreements from the perspective of Central and Eastern European countries".

Dr Pawel Waszkiewicz's research project entitled "Social media in the work of law enforcement agencies" was shortlisted for NCN funding in 2019 (OPUS 16 competition).

Dr Andrzej Moniuszko was awarded a MINIATURE 3 grant from the National Science Centre in 2019 to carry out a research project entitled "Functioning of the relational court during the reign of Sigismund III Vasa – source queries".

The research project of Kacper Choromanski, MSc (supervisor: Prof. Dr Piotr Girdwoyń), entitled "A new methodology for categorisation of blood traces revealed by the chemiluminescence method, at the scene of an incident, which can distinguish between washable traces and traces left in a passive manner" was qualified for funding by NCN in 2019 (PRELUDIUM 16 competition).

Patryk Gacka, MSc, a doctoral student of Prof. dr hab. Karol Karski, was awarded a grant in the ETIUDA 7 competition of the National Science Centre in 2019 for the project "Status of the victim of crime in international criminal law". Mr Gacka received a PhD scholarship for 12 months and completed a 3-month research internship at Rutgers University in the United States (Institute for Law and Philosophy, internship supervisor: Prof. Douglas Husak).

In 2020, Dr Alexander Grebieniov won a grant under the NCN competition – SONATA 15 – for a project entitled "Law in books vs law in action. On the controversies surrounding inheritance contracts in Roman law".

Dr Magdalena Słok-Wódkowska was awarded a grant in 2020 as part of the NCN competition – OPUS 18 – for a project entitled "International economic law during the digital transformation: trends, regulatory models and specific solutions for e-commerce and data".

Dr Maria Nowak won a grant in 2020 as part of the NCN competition – OPUS 18 – for a project entitled "Law in the social networks of late antique Afrodito".

Prof. Marcin Matczak was awarded a grant in the 2020 NCN competition – OPUS 19 – for a project entitled "How to make legal interpretation more objective. Applying naturalistic philosophy of language to law".

Prof. Konrad Osajda was awarded a grant in 2020 as part of the NCN competition – OPUS 19 – for a project entitled "Quo Vadis company law? Modern institutions of capital company law through the prism of the regulation of the simple joint-stock company".

Paweł Słup, a doctoral student at the Faculty of Law and Administration of the University of Warsaw, obtained a grant in 2020 as part of the NCN competition – PRELUDIUM 19 – for a project entitled "Derivative action: an effective instrument for holding members of capital company bodies liable for damage caused to the company?".

Gniewomir Wycichowski-Kuchta won a grant in 2020 as part of the NCN competition – PRELUDIUM 19 – for a project entitled "Rethinking Property. Structures of court justifications in reprivatisation cases".

Katarzyna Ziółkowska, MA, a doctoral student of Prof. Dr Marek Wierzbowski in the Department of Administrative Law and Procedure, was the winner of the 2020 ETIUDA 8 competition. The prize for the laureate was a research grant for the project "Legal framework of the digital transformation of public

administration with the use of distributed ledger technology" and a four-month research internship at the University of Malta at the Centre for Distributed Ledger Technologies.

Prof. Jakob Stagl (Chair of the European Legal Tradition) was awarded a grant from the MAESTRO 12 programme in 2021 for a project entitled "Temple of Justice. Foundations of a systemic interpretation of the Digests".

Dr Jan Podkowik (Chair of Constitutional Law) received a grant from the OPUS 20 programme in 2021 for a project entitled "Good faith in constitutional law".

Dr Jagna Mucha (Chair of European Law) was awarded a grant from the SONATA 16 programme in 2021 for a project entitled "Public law enforcement of collective consumer interests in Poland against the background of European Union law – between theory ('law in books') and practice ('law in action')".

Dr Jarosław Turłukowski (Chair of Commercial Law) received a grant from the MINIATURA 4 programme in 2021 for a project entitled "Application of third-country law under the EU Succession Regulation No. 650/2012".

Dr Anne-Marie Weber-Elżanowska (Chair of Commercial Law) was awarded a grant from the MINIATURA 5 programme in 2021 for a project entitled "Corporate social responsibility and legal vehicles for doing business – an analysis of the legitimacy of introducing the so-called 'benefit corporation' as a new type of commercial company into the Polish legal order".

The National Science Centre awarded Dr Bartosz Wołodkiewicz (Chair of Civil Procedure) a MINIATURA 5 grant in 2021 for a project entitled "Appropriateness of foreign procedural law in civil proceedings. A legal-comparative approach".

Dr Magdalena Porzeżyńska was awarded a grant from the National Science Centre in the MINIATURA 5 competition in 2021 for a project entitled "Obligations of Member States resulting from irregular expenditure of funds when implementing projects co-financed from EU funds in the light of European Union law".

Dr Marcin Romanowicz was awarded a grant from the National Science Centre in the MINIATURA 5 competition in 2021 for the project entitled "Eye-tracking as a source of neuro-evidence in criminal and civil proceedings: in search of a critical theory for the evaluation of evidence provided by forensic neuropsychology".

In 2021, the National Centre of Science qualified 4 projects from the Faculty for funding in the OPUS 21 competition. Among the winning applications were projects led by: Prof. Dr Tomasz Giaro ("Historical Sources of Polish Contract Law"), Prof. Dr Paweł Waszkiewicz ("Cameras in the Work of Law Enforcement Agencies and the Judiciary"), Prof. Dr Leszek Bosk ("The Role of Medical Ethics Codes and Professional Standards in Biomedicine and their Relevance to Private Law Liability"), Prof. Dr Konrad Osajda ("The Invisible Hand of the Testator.

The private foundation as a tool for multigenerational decision-making about the fate of assets after death").

In 2021, the National Centre for Science qualified 3 projects from the Faculty for funding in the PRELUDIUM 20 competition. The winning proposals included projects led by: Marta Kozak-Maśnicka, MA ("The legal situation of a whistleblower in Polish labour law"), Maciej Kruk, MA ("A look at the role of literal meaning in the interpretation of law from a philosophical and linguistic perspective"), and Maciej Grześkowiak, MA ("The gap between the principle of temporary shelter and refugee status in universal refugee protection systems: scope, consequences and remedies").

The scholarship for an outstanding young scientist - MNiSzW was awarded in 2019 to Dr Marzena Wojtczak, Dr Aleksander Jakubowski, M.Sc. Maciej Pisz (INPA). In 2021**,** Dr Maciej Sokołowski and Wojciech Engelking, MA, received this scholarship.

Diamond Grants - MNiSiSW awarded in 2019:

* Magdalena Ossowska, thesis topic: "Ius dereliquendi. The right of the owner to abandon a thing in the European legal tradition".

* Weronika Wojturska, thesis topic: "Construction of administrative contracts with particular reference to public-private partnerships in health care – a legal and comparative study".

* Gniewomir Wycichowski-Kuchta, thesis topic: "Legitimisation of criminal law in the context of its Europeanisation. Barriers and perspectives".

Research was conducted in the following NCBiR projects:

Prof. Ewa Gruza was awarded a research grant submitted together with the Ithaca Foundation (consortium leader) and UW-M, which was implemented between 2019 and 2021. The grant is part of the Gospostrateg I competition: *Development of a system of legal, institutional and IT solutions to improve the search and identification and support of the relatives of missing persons*.

Research under programmes organised by NAWA:

Patryk Gacka, MSc, a doctoral student of Prof. Karol Karski, was awarded in the competition of the National Academic Exchange Agency within the Ivanova programme (out of 70 qualified applications, 8 belong to the social sciences and only 2 to the legal sciences). Gacka, MA, stayed at the Center for International Criminal Justice at the Vrije Universiteit Amsterdam (12-month stay, since 1 September 2019). In addition to conducting his own research on the position of the victim in international criminal law, he was involved in teaching students and took part in the scientific life and other scientific projects of the Centre. The proposal also envisaged frequent visits to international tribunals in The Hague, including, in particular, attendance at the International Criminal Court.

Dr Maria Nowak, from the Department of Roman and Ancient Law, was awarded a grant in 2020 under the M. Bekker programme organised by the National Agency for Academic Exchange. The grant of PLN 165,000 was used to cover the costs of her stay at the University of Leiden (the Netherlands).

Dr Pawel Banasi (Department of Philosophy of Law and the Science of State) was awarded a SPINAKER grant in 2021 for a project entitled "Law and philosophy: a series of intensive international summer and winter schools".

A team from the UW Polish Centre for Law and the Economy of China, consisting of Paulina Uznańska, MA, Maksymilian Piekut, MA, and Dr Piotr Grzebyk were awarded a grant in 2021 under the STER Internationalisation of Doctoral Schools programme.

Other research projects:

Prof. Dr Tadeusz Tomaszewski together with Prof. Dr Piotr Girdwoyn, , as members of a three-person research team, were awarded a grant financed by the European Funds for Digital Poland ZP/NIFC-10/2019 for the project entitled "Conducting scientific research based on a scribal analysis of the manuscripts of Fryderyk Chopin – the original manuscripts (originals) of unquestioned manuscripts of Fryderyk Chopin, including long and short scribblings and signatures, and compiling the results of this research in the form of partial reports and a final report containing a description of the research, the classification of Fryderyk Chopin's manuscripts made, and the final conclusions". For formal reasons, the project was prepared within the framework of the Polish Forensic Association (the F. Chopin Institute structured the tender offer in such a way that the University of Warsaw could not be the project proponent in the competition), but two-thirds of the research team were employees of the Warsaw University Department of Forensic Science, and the project itself was of a prestigious character, not to mention its scientific value, and had great marketing potential for our Department.

Dr Jagna Mucha was the winner of the 28th edition of the prestigious START competition of the Foundation for Polish Science in 2020. Among the 100 outstanding young scholars, there were only two lawyers: Dr Mucha from the Faculty of Law at the University of Warsaw and 1 person from the University of Silesia.

Dr Witold Borysiak was awarded a scholarship from the Max Planck Institute for Comparative and International Law in Hamburg to carry out a research project in the summer months of 2020 entitled "Succession law – the hereditability of claims for the compensation of non-pecuniary damages".

Paweł Słup, MA, who is preparing his dissertation under the supervision of Prof. Dr Konrad Osajda was awarded a scholarship in the competition of the Capital City of Warsaw for 2020 to realise a research project entitled "Private-legal forms of financing municipal projects by residents against the background of solutions of American law".

Dr Marzena Wojtczak (Chair of Roman and Ancient Law) was awarded a 2021 *Humboldt Research Fellowship* by the Alexander von Humboldt Foundation. The research stay took place at the Freie Universität Berlin.

Prof. Dr Robert Grzeszczak was awarded a grant in the 2021 Deutsch-Polnische Wissenschaftsstiftung/Polish-German Foundation for Science competition. The grant was implemented by the representatives from the following Universities: Warsaw, Leipzig and Potsdam, and the research topic was "Deutschland und Polen in einer differenzierten Europäischen Union" ("Germany and Poland in a differentiated European Union").

In 2021, the Board of Directors of the Polish-German Foundation for Science settled the competition and awarded a grant to Prof. Dr Jacek Wierciński and Prof. Arkadiusz Wudarski of the European University Viadrina to carry out research on the topic: "The powers of the state to interfere in family life. State and family in the dispute over the welfare of the child" ("Staatliche Eingriffsbefugnisse in das Familienleben: Kindeswohl im Spannungsverhältnis zwischen Staat und Familie").

The grant, in which Dr Paweł Marcisz was a collaborator, received funding from the Independent Research Fund of Denmark in 2021. The project leader was Prof. Joanna Lam from the University of Copenhagen.

Scholar Prof. Dr Jakub Urbanik was awarded a scholarship at the Käte Hamburger Kolleg in Münster "Einheit un Vielhat im Recht/Legal Unity and Pluralism" in 2021 for the academic year 2022/2023.

Studia Iuridica – the department's journal received 100 points in the list of journals.

The results of much research conducted at the Institutes were presented at international and national conferences. As in previous years, scientific circles organised or prepared many conferences and actively participated in them.

On 1-2 March 2019, the 20th Faculty Conference entitled "Solidarity and the Common Good as Values in Law" took place. The first day of the Conference consisted of an opening session and four thematic sessions. The opening lecture of the Conference entitled "Community above the law" was delivered by Prof. Dr Marcin Król. Other speakers in the opening session were: Prof. Dr Sławomir Lewandowski "'Solidarity' and 'common good' in contemporary Polish and in Polish legislation. A linguistic-logical analysis"; Dr Jarosław Kuisz, "Solidarity and revolution. On selected aspects of the legal legacy of NSZZ 'Solidarność' (1980-1981)"; Dr Ryszard Piotrowski, Prof. UW "Solidarity and the common good and the limits of public authority".

The first thematic session was devoted to tax and criminal law. The moderator of the criminal law part was Dr Sławomir Żółtek. The following papers were delivered: dr hab. Monika Płatek, prof. UW "Measures of solidarity – the case of KOZZD Gostynin"; Dr Katarzyna Julia Kowalska "System of free legal

and civil counselling in Poland as an example of implementation of the principle of social solidarity"; Doc. dr Piotr Kładoczny "Common good as a limitation clause of freedom of expression in Polish criminal law"; dr hab. Paweł Waszkiewicz "SOCMint. Selected practical and legal issues". The legal and tax part was moderated by Doc. dr Marek Grzybowski. The speakers included: Prof. dr hab. Witold Modzelewski "The common good, the interest of the individual and the public interest in the process of creating tax law"; Dr Maria Supera-Markowska "Pursuing socially useful goals in the framework of the public benefit activities of non-governmental organisations and their legal and tax obligations – an attempt to assess the adequacy of legal and tax solutions to the specificity of the activities of NGOs"; Dr Jakub Pawliczak "Maintenance of adult children in the light of the principle of family solidarity"; Dr Krzysztof Radzikowski "Solidarity tax vs: Does the Polish tax system realise the postulates of social justice and solidarity?".

The next thematic session dealt with international law and business law. The moderator of the international law part was Dr Anna Zawidzka-Łojek. The following papers were delivered: dr hab. Aleksander Gubrynowicz "The idea of solidarity and the common good in the light of the 'Law of Nations...' Emera de Vattel"; Prof. Dr Maria M. Kenig- Witkowska "Solidarity and the common good in international environmental law"; Dr Tomasz Kamiński "Solidarity and the common good in the international law of the sea and the so-called 'creeping jurisdiction' of coastal states"; Dr Magdalena Słok-Wódkowska "Solidarity in international economic law in the era of Trump and the crisis of multilateralism". The legal-economic part was moderated by Dr Dorota Krekora-Zając. The speakers were: Dr Adam Szafrański "The common good in energy law"; Dr Karol Muszyński, Dr Paweł Skuczyński "Shortcomings of the constitutional regulation of self-governments of public trust professions in the light of empirical research"; Dr Karol Muszyński, Dr Jan Winczorek "Law in economic activity – a way of controlling uncertainty or its source?"; Dr Jan Winczorek "Improving access to law: eight reasons, seven ways and the case of Poland".

The third thematic session focused on the issues of administrative and civil law and legal doctrines and history. The administrative-civil part was moderated by Dr Tomasz Lasocki. Speakers included: Dr Jowanka Jakubek-Lalik "The concept of the common good as the axiological basis for the operation of local government in Poland"; Dr Zbigniew Gromek "The good of the local government community and its realisation"; Dr Aleksander Jakubowski "Determining the circle of parties to administrative proceedings and the protection of the common good"; Dr Leszek Bosek, Prof. UW "Interpersonal ties as personal goods or categories of the common good?"; Dr Witold Borysiak "Solidarity as a basis for tort liability in cases of failure to provide assistance". In turn, the moderator of the historical and doctrinal part was Dr Wojciech Brzozowski. The following papers were delivered: Prof. Dr Adam Bosiacki "Application and abuse of the principle of social solidarity and the common good in the Polish and foreign legal

systems. Fundamental problems"; Dr Władysław Kulesza "Can democracy be a threat to the implementation of the idea of solidarity and the common good in law?"; Dr Cezary Błaszczyk "Solidarity and the common good as basic values of the doctrine of democratic confederalism and the political-legal order of the Democratic Federation of Northern Syria"; Dr Marzena Wojtczak "Solidarity and individualism. Monks, monasteries, law"; Dr Paweł Borecki "The common good as a determinant of the relationship between the state and churches and other religious associations".

The final session, moderated by Dr Dobrochna Bach-Golecka, was devoted to the concept of the common good. The speakers were: Dr Aleksander Stępkowski, Prof. UW "Genesis of the concept and identity anthropology of the category of common good"; Dr Michał Pełka "Are legal values objective?"; Dr Marcin Romanowicz "Silence between individualism and collectivism? The axiological genealogy of the constitutional principle of the common good".

On the second day of the 20th Faculty Conference, students and doctoral students delivered their papers.

On 28 February 2020, the 21st Faculty Conference "Equality and Inequality in Law" was held. The inaugural lectures were delivered by Prof. Dr Tomasz Giaro "Equality and Inequality in Law. Inaugural lecture"; Dr Agnieszka Stępkowska "The Romans and their law: institutions of a non-egalitarian society"; Dr Adam Szafrański "Does support for e-cars contradict the principle of equality? Reflections with the principle of sustainable development in the background"; Professor of the University dr hab. Ryszard Piotrowski "Constitutional dilemmas of equality".

The second session was devoted to criminal law. The speakers were: Dr Magdalena Błaszczyk, Dr Anna Zientara "The system of collective punishment after 1 July 2015 and the principle of equality before the law. Observations in the light of the most recent jurisprudence of the Constitutional Tribunal"; Dr Krzysztof Szczucki "The twilight of classical criminal law in the light of the principle of equality before the law"; Dr Piotr Kładoczny "Identical behaviour – different sanctions. Influence of the victim status on the state's criminal law reaction on the example of insult"; Dr Katarzyna Kowalska "Article 72 of the Act on Counteracting Drug Addiction and access to treatment and educational and preventive programmes in the area of addiction".

The next session dealt with financial law and new technologies. The following papers were presented: Dr Krzysztof Radzikowski "Contemporary dilemmas of equal taxation"; Dr Kamil Zaradkiewicz "Economic boycott and discrimination in the light of constitutional standards"; Dr Arwid Mednis "Profiling algorithms as a source of discrimination"; Katarzyna Chojecka, MA "Legal aspects of redlining as a discriminatory practice in the digital space".

Session four revolved around labour law issues. The speakers were Dr Eliza Maniewska "The pursuit of equality as the essence of labour law"; Dr Aleksander

Jakubowski "Selected problems of equality and inequality in social welfare law"; Katarzyna Wieczorek, MA, Jakub Rumian, MA "The current state of collective bargaining in Poland and the denouement of social inequality".

Session five covered ecology and sustainable development. The speakers were Dr Cezary Blaszczyk "Equality in the doctrine of ecology and the social market economy"; Dr Dariusz Mańka "Equality and property in classical orientations of political-legal thought"; Professor of the University dr hab. Paweł Wojciechowski "Privileging of individual farmers – regulation introducing restrictions in the trade of agricultural property in the implementation of the principle of sustainable development"; Dr Marcin Stębelski "Special treatment of families in the context of the principle of equality as a way of implementing the principle of sustainable development".

International aspects were addressed in session number six. Speakers included: Dr Tomasz Kamiński "Sovereign equality and the use of reprisals by states"; Rafał Szewczyk, MA "From freedom to equality. Landlocked States versus the International Law of the Sea"; Aldona Łasińska, MA "Statelessness in the Dominican Republic. Judgment of the Constitutional Court of the Dominican Republic depriving Dominicans of citizenship of Haitian origin"; Philippe Chauvin, MA "The principle of equality in France: law vs. justice".

The final seventh panel, in turn, was devoted to philosophical and legal aspects. The following papers were presented: Professor of the University Dr Sławomir Lewandowski "The relational nature of equality and inequality in law in logical terms"; Dr Zbigniew Cywiński "Who is 'everyone'? Two faces of legal discrimination"; Dr Michał Pełka "Ronald Dworkin's theory of equality"; Dr Marcin Romanowicz "Equality instead of dignity or equality with dignity? The question about the sources of fundamental subjective rights"; Dr Władysław Kulesza "Minority as majority in a democratic system. Principle of constitutional law or legal fiction?".

On 12 March 2021, the XXII Faculty Conference "Law during the Covid-19 pandemic" was held remotely. The first session was moderated by Prof. dr hab. Marek Zubik. The speakers were: Professor of the University dr hab. Leszek Bosek "State of the epidemic – constitutional and comparative legal aspects"; Professor of the University dr hab. Ryszard Piotrowski "Democracy in a state of pandemic. Reflections on the Polish experience", Prof. dr hab. Jan Rudnicki and dr hab. Krzysztof Koźmiński "Experiences of the COVID era and development trends of contemporary law"; Prof. dr hab. Jan Podkowik "Human rights in times of pestilence – challenges for judicial protection of individual rights in the era of the COVID-19 pandemic".

The second session was moderated by dr hab. Marcin Dziurda. The speakers were: dr hab. Piotr Rylski "Transformations of Polish civil proceedings and the COVID-19 pandemic"; dr hab. Tadeusz Zembrzuski "Limitations of openness of proceedings in civil cases in the era of the pandemic – a need of the moment

or a permanent solution?"; Professor of the University dr hab. Szymon Pawelec "Z problematyki stosowania tymczasowego aresztowania w czasach pandemii"; Dr Katarzyna Girdwoyń "Sittings and hearings in criminal cases online – how do the English do it?".

The next session was moderated by Professor of the University dr hab. Paweł Wojciechowski. The papers were presented by: Dr Karolina Wojciechowska "Wybrane regulacje 'covidowe' w prawie i postępowaniu administracyjnym"; Professor of the University dr hab. Adam Niewiadomski "Proceedings related to the granting of aid from European funds to farmers under conditions of a pandemic"; Dr Michał Szwast "Jurisprudence of administrative courts in cases of fines imposed in epidemic conditions by state provincial sanitary inspectors"; Dr Mariusz Rypina "The constitution as a basis for eliminating from circulation sanepid decisions imposing administrative fines for non-compliance with prohibitions related to the eradication of Covid-19".

The fourth session was chaired by Prof. Dr Jacek Jagielski. The speakers were: Dr Jowanka Jakubek-Lalik "Local government of Polish cities in the light of the urban resilience concept"; Dr Maciej Sokołowski "Soft lockdown: Japanese legal solutions during the COVID-19 pandemic"; Dr Karolina Tetłak "Restrictions on economic activity in connection with COVID 19"; Dr Maciej Berek "Legislative procedure during the pandemic legal and factual conditions".

The fifth session was moderated by Dr Piotr Grzebyk. The speakers were: Prof. Ludwik Florek "Remote working during a pandemic"; Prof. Beryl ter Haar "COVID19 and CSR"; Dr Eliza Maniewska "Epidemic and the limits of employer wage risk".

Session six was moderated by Prof. Dr Anna Zawidzka-Łojek, MD. Speakers: Dr Beata Janiszewska "Patient rights in the era of the pandemic"; Dr Robert Rybski "Legal status of persons vaccinated against COVID-19"; Dr Maria Boratyńska "Legal and ethical dimensions of immunization"; Dr Iga Małobęcka-Szwast "To measure or not to measure? The acceptability of measuring body temperature in the COVID 19 pandemic"; Dr Cezary Blaszczyk "Animal welfare and the COVID-19 pandemic".

The final session was moderated by Prof. Dr Piotr Girdwoyń. The speakers were: Dr Paweł Waszkiewicz "Big Brother of the Year Pandemic. Surveillance in the COVID-19 era"; Dr Piotr Lewulis "Evidence of Remote Living. Results of a preliminary study on the use of social media content in Polish court proceedings"; Dr Magdalena Błaszczyk "Were all the changes to the Penal Code introduced during the SARS-CoV-2 epidemic state necessary?"; Dr Maria Supera-Markowska "Tax policy in Spain in the Covid-19 pandemic era"; Dr Marcin Romanowicz "The epidemic state as a non-normative emergency. Repetition of the dispute between Carl Schmitt's decisionism and Hans Kelsen's normativism".

In 2019-2021, the department hosted 31 national scientific conferences and 19 international scientific conferences.

On 17 October 2019, Professor Witold Wolodkiewicz's doctoral renewal ceremony took place in the Senate Hall of the UW. The deans of the faculties of Law and Administration and "Artes Liberales" delivered speeches in honour of the Jubilarian. A scientific conference in honour of Professor Witold Wołodkiewicz entitled "In the world of mules there are no rules. Itinerari di diritto romano. Roman law in the wilderness", took place on 18 October 2019. Papers were given by Tomasz Giaro "Il ritorno dei Nazisti", Paola Santini "Fascibus renovatis: un simbolo romano al servizio del totalitarismo", Carla Masi Doria "Au-delà des frontières... nei mari del sud: impero e dritto romano in una prospettiva di law and literature", Cosimo Cascione "Sul ritorno delle variae causarum figurae: dubi ed errori nella Codificazione del 1942", Fabiana Tuccillo "Strani decemviri: Pomponio, le XII tavole e interpretazioni (pseudo)storiche nel dritto bizantino", Agnieszka Kacprzak "Topos peri gamou. Vantaggi e svataggi dell'avere una moglie", Anna Tarwacka "The Mystery of the action iniusti repudii", Alessandro Manni "Una prospettiva su 'La prescription de l'action pénale à Rome'", Zuzanna Benincasa "L'esclusione di un socio dalla partezipazione alle perdite", Jakub Urbanik "Come nasce una regola? Sulle regole giuridiche nell'Egitto romano".

It should be noted that during the period indicated, the possibilities to organise any scientific events were significantly reduced due to the COVID-19 epidemic emergency in force.

In the field of international cooperation, existing agreements (within the framework of the University's contracts) were continued, as were new initiatives.

There were 163 academics, 49 PhD students and 119 students on overseas trips in 2018/2019-2021.

The Faculty organised international conferences and the academic circles and foreign law schools in our Faculty participated in the preparations.

The Faculty of Law and Administration has the following foreign law schools:

1. American Law (2018/2019 – 60 students, 2019/2020 – 70 students, 2020/2021 – 70 students);
2. British Law (2018/2019 – 114 students, 2019/2020 – 52 students, 2020/2021 – 50 students);
3. French Law (2018/2019 – 30 students, 2019/2020 – 24 students, 2020/2021 – 20 students);
4. Spanish Law (2018/2019 – 9 students, 2019/2020 – 5 students, 2020/2021 – 17 students);
5. German Law (2018/2019 – 36 students, 2019/2020 – 23 students, 2020/2021 – 30 students);
6. Italian Law (2018/2019 – 11 students, 2019/2020 – 8 students, 2020/2021 – 9 students);

7. China Law and Economy (2018/2019 – 42 students, 2019/2020 – 25 students, 2020/2021 – 47 students).

In September 2019, the Faculty hosted the second edition of the Israeli Law Summer School, organised in cooperation with the Faculty of Law of the Tel Aviv University, with the support of the Dialogue programme. Twenty-eight students took part, and the lecturers were professors from the Tel Aviv University as well as Judge and Retired Vice President of the Supreme Court of Israel, E. Rubinstein. The School is coordinated by Dr Jakub Urbanik. On the occasion of the opening of the School, the Faculty hosted H.E. Ambassador Nominate of Israel, Alexander Ben Zvi.

On 8 November 2019, the British Law School organised a lecture entitled "Looking Backwards, Looking Forwards: Anglo-Polish Legal Relations After Brexit", delivered by His Honour Judge George Dobry CBE, QC.

On 12 December 2019, Boudewijn Sirks, Prof. em. University of Oxford and All Souls College, delivered a lecture entitled "Law, Time, and Savigny" as part of the Leon Petrażycki Lecture Series.

The Faculty also organised a seminar on 25 September 2020 entitled "Indigenous Peoples: Theory And Practice", with Canadian lawyer, Steven Cooper as the keynote speaker.

The 20th Leon Petrażycki Anniversary Lecture entitled "The aesthetics of law beyond the state" was delivered by Horatia Muir Watt, Professor at the School of Law of the Institute of Political Science in Paris. The lecture took place on 29 October 2020 at noon in the Senate Hall in the Kazimierz Palace.

On 18 November 2020. NOHA at the University of Warsaw organised a webinar in English with Ms Jane Connors serving, on behalf of the UN, as Victims' Rights Advocate, an advocate for persons sexually abused by UN staff.

The Polish Centre for China Law and Economic Studies and the School of Law and Economics of China organised (remotely) the conference "Global Education – how to connect Asia and CEE" on 27-28 March 2021 and the conference "15th Annual General Conference of the European China Law Studies Association (ECLS)" on 24-26 September 2021.

The Spanish Law School organised a conference on 16 May 2019 on "Current problems and challenges in the employment of workers in Poland and Spain in the context of the development of economic cooperation". In turn, on 20-21 May 2021 (remotely), a conference on "Current problems of public finances and legal conditions of entrepreneurial activity in Polish-Spanish economic relations" was held. This was the 5th Polish-Spanish Scientific Conference organised by the School.

As part of the activities of the Centre for Canon Law, on 28 June 2021, Joseph H.H. Weiler (New York University School of Law, Harvard University) gave a guest lecture entitled "It is not what goes into the mouth that defiles a person, but it is what comes out of the mouth that defiles (Matt. 15:11). So why do (some) Jews observe Kosher?".

The Faculty Council at its meeting on 18 October 2021 adopted a resolution to name the School of German Law after Professor Marcus Lutter (Marcus-Lutter-Deutsche Rechtsschule).

In 2019-2021, the following number of students benefited from the Erasmus plus (hereinafter: Erasmus) mobility programmes: 351 students of the WPiA under short-term Erasmus studies, 23 students of the WPiA under Erasmus internships and 6 students of the WPiA under bilateral agreements concluded at UW level.

In 2019, an Erasmus agreement was signed with the Scandinavian Institute of Maritime Law, Petroleum and Energy Law Department, University of Oslo in Norway. Additionally, there were bilateral agreements concluded at UW level, which provided for the exchange of law students.

Within the framework of Erasmus, our Faculty welcomed: 295 foreign students on short-term Erasmus studies (from the agreements of the WPiA). Moreover, there were guest students (full principle of payment for the ECTS credits realised at the WPIA) and students who indicated the WPiA UW as the second unit (the WPiA receives a subsidy from the Ministry for the ECTS they realise).

Academic staff travelled for lectures under the STA programme (Erasmus programme) and under the STT programme (also Erasmus) in numbers similar to previous recruitments (a dozen applications).

As part of the research activities in the Chairs and Departments, research was undertaken, the results of which were presented at scientific trips and conferences.

Chair of the European Legal Tradition

Until 2020, the Head of the Department was Prof. Dr Tomasz Giaro, MD. He was replaced in this position in 2020 by Prof. Dr Jan Rudnicki, MD.

Staff have attended conferences and presented the following papers:

Dr Jan Rudnicki – *New draft of the Chinese civil code* at the conference "China in the Challenges of a New Era", Kraków, 11 May 2019, JU Faculty of Law and the Chinese Law Association; *Who is really the weaker party? Roman experience and the 21st century law* at "University of Pretoria International Consumer Law Conference (UPICLC 2020)", Pretoria 21-23 September 2020 [online]; Univeristy of Pretoria.

Prof. Dr Tomasz Giaro – *Freedom of Contract in its Political Context* at the conference "4th Sino-Polish Seminar on Comparative Law. The Theory and Practice of Contract Law", Beijing 25 April 2019; Institute of Law, Chinese Academy of Social Sciences; *Les conceptions de l'Europe en histoire du droit* at the conference "Conferences Georg Simmel", Paris, 3 December 2019; *Law & Finance and the culpa in contrahendo* at the conference "Legal Issues on the Belt and Road Investment and Financial Services", Chongquing, China, 2 November 2019, The South-West University of Political Science and Law (SWUPL); *Il ritorno dei*

nazisti at the conference "In the world of mules there are no rules", 18 October 2019, WPiA UW.

Chair of Roman and Ancient Law

The Head of the Department is Dr Jakub Urbanik, Professor of the University.

Staff have attended conferences and presented the following papers:

Dr Jakub Urbanik, Prof. of the University of Zurich – *The (Roman) marriage: social and legal approach* at the conference "Ubi tu Gaius, ibi ego Gaia", Zurich 4-5 April 2019, University of Zurich; *It Is Easier for a Camel ... Emphyteusis and the Economy of Heaven and Earth* at the conference "Zürcher Ausspracheabende zur Rechtsgeschichte", 4 April 2019, University of Zurich and at the conference "Clerics in Church and Society", 26 – 27 April 2019 UW; *Lo status e il diritto tra il centro e la periferia: sulla permanenza dei diritti locali nell'impero romano* at the conference "Seminario internazionale di studi romanistici"; 20 June 2019, Frederick II University of Naples; *Public Land Leases Turn Inhumane. Imperial Grace and Local Custom(s), or the Status of Local Law under Roman Rule Revisited* at the conference "29th International Congress of Papyrology", Lecce 28 July – 03 August 2019, Università del Salento; *Nomikoi in the Roman Courts (and out of them)* at the conference "LXXIIIe Session de la Société Internationale Fernand de Visscher pour l'Histoire des Droits de l'Antiquité", 02-07 September 2019, University of Edinburgh; *Julian Latins in the Gnomon of Idios Logos* at the Santiago conference Beyond the Black Hole: locating Julian Latins in the Roman Empire, 26/27 September 2019, Concello de Cultura Galega de Compostela; *BGU 183: Marriage contract and property division* at the conference "Central Workshop: Law and Society in Times of Change: Theory and Praxis in Roman, Byzantine and Islamic Egypt", 02-04 October 2019 Berlin, Humboldt Univeristy; *The controversy in P. Budge* at the International Conference "Documentary practices in Edfu in the 7th century: administration and exercise of justice at the end of the Byzantine period and in the first decades of the Arab conquest", 02-03 November 2019, Cairo, IFAO; *Studio sull'enfiteusi in età tardo antica: clausole documentarie tra la prassi e la legge imperiale: il caso di p. Lond. II 483 e P. Cairo Masp. III 67299* at the conference "Ravenna Capitale xi, Localizzazioni e tracce di atti negoziali", 22/23 November 2019; *On Status creating factors in Roman law* at the conference Seminar: Personal Status in Roman and Talmudic Law 25 November 2019: Hebrew University, Mandel Scholion Research Center; *Marrying the Greek Way: Ekdosis in Hellenistic and Roman Times* public lecture 26 November 2019: Hebrew University, Mandel Scholion *Research Center; A Price for Arbitration: Fines in Settlements of Claims* at the conference "Elenchus instrumentorum 2(5): Price.", 27-28 November 2019 Tel Aviv University, Berg Institute of History of Law; *Qué hay de nuevo en el caso de Dionysia?* (with José Luis Alonso) at the conference "Jornandas de Papirologia" 9.5: 15-16 July 2019, online, Universidad de Sevilla, Universidad Complutense; *Repackaging Court Decisions: the case-studies of P. Oxy. 237 and SB 12139* at

the conference "Metaphrasis: selection, adaptation, and transformation in Documentary Practice and Beyond", 14, 22, 27, 29 July, online, University of Athens; *Freedom of religion vs. lgbt+ rights – the Polish perspective* at the conference "Religious Freedom to Curtail Freedom", online, 24 September 2020, International Academy of Family Lawyers.

Dr hab. Zuzanna Benincasa, Professor of the University – *Roman jurists vis-à-vis issues related to hunting wild animals: the concept of appropriation in the views of Trebatius* at the Meeting of the Polish Philological Society Poznań Branch, Poznań, 21 May 2019; *From res nullius to wild animals as fructus fundi. Venationes and profits from hunting in the deliberations of Roman jurists* at the National Meeting of Romanists 26 June 2019, Department of Roman and Ancient Law UW and Section of Ancient Law KNoKA PAN; *Roman maritime loans: a type of maritime insurance, a joint venture or a covert way of investing the money into maritime trade* at the conference II International Seminar "Roman maritime law", 10-11 April 2019, WPiA UG; *L'esclusione di un socio dalla partecipazione alle perdite* at the conference "In the world of mules there are no rules. Itinerari di diritto romano In the world of mules there are no rules. Roman law in the wilderness", 18 October 2019, WPiA UW.

Dr hab. Maria Nowak, Professor of the University – *Legitimation of children in late Antiquity* at the conference "Rechtshistorikertag: Forum der Jungen", Zurich, 7 September 2020 (online).

Chair of the History of the System and Polish Law

The Head of the Department is Prof. Dr Andrzej Zakrzewski.

Staff have attended conferences and presented the following papers:

Prof. dr hab. Andrzej Zakrzewski – *Systemic distinctions of the Grand Duchy of Lithuania before and after the Union of Lublin* at the conference "Two unions: parliamentary union with Prussia, Union of Lublin", Toruń, 17-18 May 2019, PTH, WNH UMK; *Union of Lublin – an attempt at bilateral balance sheet* at the conference "Unions of the Grand Duchy of Lithuania with the Kingdom of Poland: The problem of sovereignty", Mińsk 23-24 May 2019, Institute of History of the National Academy of Sciences of Belarus, Polish Institute in Minsk; *Current problems of research on the Union of Lublin – a non-Polish historian of law perspective* at the conference "The Union of Lublin and the paths of development in Eastern Europe in the XVI-XVII centuries", Moscow, 11 June 2019, Institute of Russian History RAN, Polish Institute in Moscow; The *unpleasant consequences of the lack of the notion of "Rzeczpospolita"* at the conference "Polish and Ukrainian narratives of the former Polish-Lithuanian Commonwealth", Warsaw, 13-14 December 2019, Eastern House Foundation, Academy East; *Wincenty Skrzetuski SP Lithuanian split ego. Lithuania vis-à-vis the Crown in the Polish-Lithuanian Commonwealth of the 16th-18th centuries* at the conference "The Union of Lublin 1569 – Unions in Central Europe", Warsaw, 14-15 November 2019, Archiwum Główne Akt Dawnych; *Vision of Poland of the Jagiellons in the works of Paweł*

Jasienica at the conference "Paweł Jasienica. On the centenary of his birth", Łódź 7-8 November 2019, IH UŁ.

Dr Piotr Pomianowski, Prof. of the Faculty of Law. – *Codification achievements of the constitutional Kingdom of Poland* (with Anna Klimaszewska) at the Symposium "Sources connect us", 19 September 2019, WPiA UJ; *Legal position of women in the Duchy of Warsaw and the Congress Kingdom in the light of normative acts and practice documents* at the Seminar named after Professor Anna Żarnowska, 26 September 2019, IH UW; The legal position of women *in the Civil Code of the Kingdom of Poland against a comparative background* at the conference "Forgotten, absent, unnecessary, unwanted – women's (in)presence over the centuries", Warsaw 26-27 October 2019, Faculty of Neophilology, UW; *Achievements and perspectives of the editing of historical and legal sources from the period of the Duchy of Warsaw and the Congress Kingdom (up to 1830)* at the conference "Achievements and perspectives of the editing of historical sources of the 19th century and sources in a foreign language and a foreign language in sources", Warsaw 18 November 2019, IH UW; The *December Decree in the light of documents of legal practice* at the conference 5th Symposium of Polish State and Law Historians "Polish advocacy and notariat – history and contemporaneity", Łódź 2 December 2019, WPiA UŁ; *Annulment of marriage in the Polish-Lithuanian Commonwealth. An attempt to estimate the scale of the phenomenon* at the 4th All-Polish Scientific Conference in the series "Spring Meetings of the Young", 15 April 2019, UŁ; *The civil code as part of national identity in the Congress Kingdom of Poland* at the conference "XXVth Annual Forum of Young Legal Historians", Brussels, 5-7 June 2019, Association of Young Legal Historians, Vrije Universiteit Brussel, Université libre de Bruxelles, Université Saint-Louis Bruxelles; *The problems of application of the Napoleonic Code in the Polish countryside* at the conference "Fourth biennial conference of the European Rural History Organisation", Paris 9-14 September 2019.

Dr Adam Moniuszko – *King's courts in the Polish-Lithuanian Commonwealth at the turn of 16th century at the* conference "Letters, Law and Court in Polish Livonia – the Case of David Hilchen", Talinn 16-17 April 2019, Under and Tuglas Literature Centre of the Estonian Academy of Sciences; *Iura Masoviae Terrestria: re-edition and continuation of the edition* at the Symposium "Sources connect us", 19 September 2019, WPiA UJ; *Palestra at the royal courts in the first half of the 17th century: a research reconnaissance* at the 5th Symposium of Historians of the Polish State and Law "Polish advocacy and notariat – history and contemporaneity", Łódź, 2 December 2019, WPiA UŁ.

Department of Religious Law

The Head of the Department is Dr Wojciech Brzozowski, MD, Professor of the University.

Staff have attended conferences and presented the following papers:

Dr Wojciech Brzozowski, Professor of the University – *The consequences of the entry into force of the 1997 Constitution for the Polish denominational legislation* at the conference XVI Ogólnopolskie Sympozjum Prawa Wyznaniowego entitled "The 30th Anniversary of the Religious Laws. Is a reform of confessional law in Poland needed?", Olsztyn, Tumiany, 6-8 May 2019; WPiA UW-M in Olsztyn, Polish Confessional Law Society; *The principle of autonomy of religious communities in the jurisprudence of the European Court of Human Rights* at the conference "Around the principle of mutual independence and autonomy of the Church and the State", Warsaw, 14 June 2019; WPiA UW; *Can the constitutional court accelerate democratic backsliding? Lessons from the Polish experience* at the conference The Role of Courts in Contemporary Legal Orders; Sofia, Bulgaria, 29-30 March 2019; Faculty of Law, Sofiiski Universitet "Sveti Kliment Ohridski"; *The Constitutional Court as a Constitutional Zombie: Another Lesson from the Polish Crisis* at the ICON-S Conference 2019: Public Law in Times of Change?"; Santiago, Chile, 1-3 July 2019; International Society of Public Law (ICON-S), Pontificia Universidad Católica de Chile; *Whatever works: Constitutional interpretation in Poland in times of populism* at the conference "Constitutional Interpretation in European Populist Regimes"; Budapest, Hungary, 5-6 December 2019; International Association of Constitutional Law (IACL) Research Group on Constitutional Interpretation; *Prohibition of face veiling in public places – between the European Court of Human Rights and the UN Human Rights Committee* at the 17th National Symposium on Religious Law entitled. "Jurisprudence in Religious Cases"; WPiA URz, Polish Society of Religious Law (Kombornia, 22-24 September 2020, online presentation; *Polonia* (national report) at the conference "COVID-19 y libertad religiosa", 13 November 2020, online presentation; Grupo de investigación REDESOC, Universidad Complutense de Madrid; *Counting the pages: The level of scrutiny applied by the European Court of Human Rights to religious education cases* at the conference "Flashpoints: Human Rights, Law & Religion"; 14 December 2020, online presentation; Centre for Rights and Justice, Nottingham Law School, Nottingham Trent University.

Dr Paweł Borecki, Prof. of the Faculty of Law – *The common good as a determinant of the relationship between the state and churches and other religious associations* at the 20th Conference of the WPiA UW "Solidarity and the common good as values in law"; Warsaw, 1-4 March 2019; WPiA UW; *On the need to correct the rules of teaching religion in public school* at the 16th All-Poland Symposium of Religious Law entitled "The 30th Anniversary of Religious Laws. Is a reform of confessional law in Poland needed?"; Olsztyn, Tumiany, 6-8 May 2019; WPiA UW-M in Olsztyn, Polish Confessional Law Society; *Normative principle of secularity of the state and its erosion in Poland after 1989* at the 2nd National Scientific Seminar entitled "Religion in public life", Gdynia, 23-24 May 2019; Faculty of Humanities and Social Sciences, Naval Academy, Polish Religious Association; *The principle of independence and autonomy of*

the Church and the State in constitutional works in Poland in 1989-1997 at the conference "Around the principle of mutual independence and autonomy of the Church and the State", Warsaw, 14 June 2019, WPiA UW; *Speech at the "Panel on the legal protection of old cemeteries"* at the conference "(Un)forgotten cemeteries"; Warsaw, 23 October 2019; Ombudsman, Christian Theological Academy in Warsaw.

Department of Administrative History

The Faculty Council, at its meeting on 18 March 2019, adopted a resolution on the establishment of the Department of Administrative History and issued a positive opinion on the appointment of dr hab. Robert Jastrzębski as the Head of the Department. Dr hab. Robert Jastrzębski, Professor of the University remains Head of the Department.

Staff have attended conferences and presented the following papers:

Dr hab. Władysław Kulesza – *Was the People's Republic of Poland a sovereign state? A question from the field of legal theory and history of not only twentieth-century Europe* at the conference "Cultural achievements in the People's Republic of Poland", 1-4 April 2019 Nałęczów, All-Poland inter-environmental scientific conference. Wszechnica Polska; *Populism-problems definitions* at the conference "Dilemmas and perspectives of democracy. 9-6 April 2019 Warsaw. All-Poland scientific conference". KN of Legal Comparative Studies of the Faculty of Law of the University of Warsaw; *School reform of Janusz Jędrzejewicz as an element of building authoritarian order* at the conference "Masters, pedagogues, teachers" on 25-28 November 2019 in Nałęczów.

Chair of the Philosophy of Law and the Science of the State

The Head of the Department is Professor of the University dr hab. Tatiana Chauvin.

Staff have attended conferences and presented the following papers:

Prof. Dr Tatiana Chauvin – *Law and Science – Cooperation or Test of Strength* at the 29th World Congress of the International Association for Philosophy of Law & Social Philosophy "Dignity-Democracy-Diversity", 7-12 July 2019, Lucerne (Switzerland), University of Lucerne, IVR International Association for Philosophy of Law & Social Philosophy.

Dr Tomasz Stawecki, Professor of the University – *Interpretatio hostilis as a concept of interpretation of the constitution* at the conference Second Krakow Constitutional Symposium: "The Constitution, the rule of law and its enemies. Theory and Practice", 28 September 2019, Kraków (Poland), Jagiellonian University; *Political Logic and the New Eristics. On the application of the Constitution in an illiberal democracy* at the conference of the 3rd All-Poland Constitutional Justice Roundtable "Constitutionalism in the 21st century and judicial review of the constitutionality of law", 22 November 2019, Warsaw, UKSW; *Two faces of judicial decision making. On the concept of judicial precedent in the Civil Law*

countries at the 29th World Congress of the International Association for Philosophy of Law & Social Philosophy "Dignity-Democracy-Diversity", 7-12 July 2019, Lucerne (Switzerland), University of Lucerne, IVR International Association for Philosophy of Law & Social Philosophy; *Key values for the justice system and actions taken to reinforce them* at the conference "The Exchange Programme for Judicial Authorities", 9-20 September 2019, Utrecht-Hague-Amsterdam (the Netherlands), comparative law seminar organised by the European Judicial Training Network, Brussels; *Evidentiary motions and proceedings in administrative court proceedings in Poland* (paper in Polish, simultaneous translation) at the conference "Deutsch-polnisches Vergleichsseminar für Verwaltungsrichter" (German-Polish seminar for administrative court judges), 28-30 October 2019, Berlin (Germany).

Dr Jan Winczorek – *Moral communication and legal uncertainty in small and medium enterprises* at the "Luhmann Conference 2020. Moral communication. Observed with social systems theory", Dubrovnik, Croatia (remote) 15-18 September 2020; *The access to justice gap and the rule of law in Poland* (with Karol Muszyński) at the conference "Socio-legal Perspectives on the Rule of Law", 27-28 November 2020, Center for Interdisciplinary Labour Law Studies, Europa-Universität Viadrina, Juristische Fakultät.

Chair of the History of Political and Legal Doctrines

The Chair is headed by Prof. Dr Adam Bosiacki.

Staff have attended conferences and presented the following papers:

Prof. Dr Adam Bosiacki – *Contemporary Russian historiography towards Poland and its security problems* at the Meeting of the Institute of Military History and Special Services of the Academy of Military Art, Warsaw, 28 February 2019; *Application and Abuse of the Principle of Social Solidarity and Common Good in the Polish and Foreign Legal Systems. Fundamental Problems* at the 20th Faculty Conference, Solidarity and the Common Good as Values in Law, 1 March 2019; Reflections on the Essence of Territorial Self-Government at the Conference "Territorial Self-Government in Political and Legal Thought", UPH in Siedlce, 16 April 2019; Panelist at the 2nd Constitutional Debate organised by the Association of Descendants of the Great Sejm, under the patronage of the President of the Republic of Poland, Royal Castle in Warsaw, 6 April. Participants: senator Piotr Andrzejewski, Prof. Dr Marian Grzybowski (UMK, retired judge of the Constitutional Tribunal), Prof. Dr Dariusz Dudek (KUL); *Nothingness and the Problems of the Theory of Law* at a conference entitled Nothingness, organised by the WPiA UW, the Institute of Philosophy UW and the Philosophical Quarterly "Kronos", WPiA UW, 17 May 2019; *Legal Challenges of post-communism. The Polish Experiences* at the 4th Annual CEENELS Conference, Legal Innovativeness in Central and Eastern Europe, Moscow, 14-15 June 2019, Vyshaya School of Economics; *Plato's Charm. Legal Nihilism and Legal Absolutism in the Service of Ideology and Instrumentalisation of Law in*

Modern Times at the XVIII National Meeting of Chairs of Political and Legal Doctrines entitled. "The value of law. From legal absolutism to legal nihilism", WPiA UMCS, 17 September 2019; *Application and abuse of the principle of social solidarity and the common good in the Polish and foreign legal system. Fundamental Problems* at the 20th Faculty Conference "Solidarity and the common good as values in law", 1 March 2019; *Политические концепции на польских землях русского раздела в связи с выборами в государственную думу до 1917 года* at the international academic conference Rossiyskij liberalizm i Gosudarstvennaja Duma Rossii: 1906-1917 gg, Oriel (Russia) and subsequently published as a book; *Влияние поляков - депутатов Государственной Думы Российской империи на политические концепции республиканской России инезависимой Польши* at the plenary session of the 14th International Conference "Poles in Russia", organised by Cuban State University, Polish Institute of the Polish Embassy in Moscow, Union of Poles in Russia, Krasnodar: 17 October 2019.; *Reconciliation, Transformation, Historical Policy: Legal Aspects of Settlements with Totalitarian System Towards Poland since 1989* at a workshop with the Faculty of Law of the University of Nuremberg (Erlangen-Nűremberg), entitled "Dealing with the Totalitarian Regimes: Polish-German Dialogue". 21 October 2019; *Forms of Constitution and Democracy in Legal History* at the Doctoral Seminar at the Faculty of Law, University of Zurich, 10 March 2020; *Post-Conflict Justice* panel lecture. Zygmunt Wojciechowski Western Institute, Federal Ministry of Justice of Germany (Bundesministerium der Justiz und für Verbraucherschutz), Marshal's Office of the Wielkopolska Region, Poznań 21-22 January 2020; *Constitutional Conventions and Political Standards in Political Reality of the 3rd Polish Republic, since 1989* at the conference "Uncodified Constitutions and the Question of Political Legitimacy", Warsaw, 20 November 2020; Lazarski University; *Evolution of the Concept of Territorial Self-Government 1789-1939: Legal and Political Aspects* at the conference "30 Years of Territorial Self-Government in Poland Traditions, Systemic Position, Significance for Development", Warsaw, 24 November 2020, WPiA UW; *V protivorec carju. Pol'skij klasičeskij liberalism v pol'skoj klasičeskoj mysli v pervoj polovine 19-go veka in t[ak] n[azyvaemom] Korolestve Polskom* at the conference Obščestvenno-političeskaja mysl' rossijskogo liberalizma serediny XVIII - načala XX vv, "XII Muromcevskiye Čtenia", Eagle (Russia), 9-10 October 2020; Orlovskij Gosudarstvennyj Universitet, Juridičeskij Fakul'tet.

Dr Cezary Blaszczyk – *The ideology of democratic confederalism and the rule of law* at MESA Annual Meeting 2019, New Orleans (USA) 14-17 November 2019; Middle East Studies Association; *Animal welfare and the COVID-19 pandemic* at the XXII Faculty Conference of the WPiA UW, Warsaw, 12 March 2021.

Chair of Logic and Legal Argumentation

In January 2020, Faculty Council passed a resolution to change the name of the Department of Logic and Legal Informatics to the Department of Legal Logic and Argumentation.

Until 2020, the Head of the Department was Prof. Dr Andrzej Malinowski who was succeeded in this position by Dr Slawomir Lewandowski, Professor of the University.

Staff have attended conferences and presented the following papers:

Dr hab. Slawomir Lewandowski, Professor of the University – *'Solidarity' and 'common good' in contemporary Polish and in Polish legislation. A linguistic and logical analysis* at the 20th Faculty Conference of the WPiA UW "Solidarity and common good as values in law", WPiA UW, 1-2 March 2019.

Dr Jacek Petzel – *Artificial intelligence and the law* as part of the 2019 New Horizons of Law Conference.

Chair of Constitutional Law

The Chair is headed by Prof. dr hab. Marek Zubik.

Staff have attended conferences and presented the following papers:

Prof. dr hab. Marek Zubik – *Constitutional court in Poland. Changes in the political position and authority of the Constitutional Tribunal in the last decade* at the conference "Verfassungsgerichte und politischer Wandel", 10-11 January 2019, Berlin; Wissenschaftskolleg zu Berlin, Max-Planck-Institut; *On the enemies and paradoxes of democracy* at the Second Kraków Constitutional Symposium "Constitution and the rule of law. Theory and practice", Krakow, 28 September 2019; WPIA UJ; *To make what is just strong or what is strong just* at the conference "Judge as citizen", Smardzewice, 4-6 October 2019; Judges' Association "Themis"; *Constitutional guarantees of financial independence of local self-government units* at the LXI All-Polish Congress of Constitutional Law Chairs and Departments "Ustrojowa niezależność samorządu terytorialnego", Dobroń, 4-6 November 2019; WPiA UŁ; *Poland's Constitutional Breakdown – Book Discussion* at the conference "Public Law in Times of Change?", Santiago de Chile, 1-3 July 2019; International Society of Public Law; *Judicial Dialogue in Europe. Between harmony and cacophony on the example of personal data protection* (co-referents: J. Podkowik, R. Rybski) at the conference "Public Law in Times of Change?", Santiago de Chile, 1-3 July 2019; International Society of Public Law; *Cooperation – Meeting of Legal Cultures* at the conference Building the Community of Shared Future for Mankind and International Law, Beijing, 30-31 October 2019; Institute of International Law of the Chinese Academy of Social Sciences; contributions on the conference theme "Polish Constitutionalism", Artus Court, 6 March 2020; UG WPiA; *Old and New Challenges of Human Rights Protection* at the LXII All-Polish Meeting of Constitutional Law Chairs and Departments "Issues of Fundamental Rights", online, 5-6 November 2020; UW-M; moderation of a panel at the conference "30 Years of Local Self-Government in Poland", mixed mode: Warsaw and online, 24 November 2020; WPiA UW; *The independent regulatory agencies in the perspective of Polish constitutionalism* and chairing the second session at the conference "Independent Regulatory Agencies & Administrative Governance in Arab Countries: Regional & International Per-

spectives"; online, 8-9 December 2020; The United Arab Emirates University – College of Law, The International Association of Constitutional Law (IACL), The Arab Association of Constitutional Law (AACL), Konrad-Adenauer-Stiftung.

Dr Ryszard Piotrowski, Professor of the University – *How to restore the rule of law? Commentary* at the conference "How to restore the rule of law?", Warsaw, 14 January 2019; Batory Foundation; *Solidarity and the common good and the limits of public authority at the* 20th Faculty Conference of the WPiA UW "Solidarity and the common good as values in law", Warsaw, 1 March 2019; WPiA UW; *The role of the state in the economy – constitutional considerations* at the expert seminar "The role of the state in the economy", Warsaw, 20 March 2019; Institute of Expert Debate and Analysis and Institute of Statistics and Demography of the Warsaw School of Economics (SGH); *Special prosecutor – anachronism or systemic necessity?* at the conference "Necessary and desirable changes to the prosecutorial system in Poland", Warsaw, 22 March 2019; WNPiSM UW; *Constitutional prerequisites for the activity of judges in defending their independence and independence of the courts* at the conference "Postures of judges in a situation of threat to judicial independence", Warsaw, 27 March 2019; Lazarski University; *Reflections on the Constitution of the People's Republic of Poland* at the conference "Cultural achievements in the People's Republic of Poland", Nałęczów, 3 April 2019; Polish Branch of the European Culture Association; *Agricultural system in the light of the* Polish Constitution at the conference "Constitutional conditions of agricultural system in Poland", Warsaw, 5 April 2019; NSZZ RI "Solidarność" Mazowiecka, Central Agricultural Library; *New technologies and the limits of democratic power* at the conference "Dilemmas and perspectives of democracy", Warsaw, 5 April 2019; Scientific Circle of Legal Comparative Studies, WPiA UW; *Legal status of judges of the Constitutional Tribunal elected in violation of the provisions of the Basic Law and the issue of their responsibility* at the conference "Power and responsibility", Gdynia, 11 April 2019; E. Kwiatkowski Higher School of Administration and Business; *Dispute about the concept of democracy* at the debate "State and Law", Warsaw, 15 April 2019; Judges and European democracies at the conference "The future of Europe based on the rule of law", Warsaw, 26 April 2019; Supreme Court; *Reporting of tax schemes – constitutional aspects* at the conference "Uszczelnienie systemu podatkowego – where are we heading?", Warsaw, 21 May 2019; National Chamber of Tax Advisers; *Reflections on the future of the National Judicial Council* at the conference "The National Judicial Council as a guardian of judicial independence", Warsaw, 29 May 2019; Lazarski University; *Taming lawlessness. Remarks on the systemic consequences of statutory changes concerning the* Constitutional *Tribunal and the National Council of the Judiciary* at the conference "Constitution and the rule of law. Theory and Practice", Kraków, 28 September 2019; WPiA UJ; *Reflections on the Role of Scientific Authority in Constitutional Law* at the conference "Masters, Pedagogues, Teachers", Nałęczów, 28 Novem-

ber 2019; Polish Branch of the European Culture Association; *The Impact of the New Technologies on Democracy: New Human Rights and the Reinterpretation of Separation of Powers* at the conference "Public Law in Times of Change?", Santiago de Chile, 1-3 July 2019; International Society of Public Law; *Remarks on the Dispute over Democracy in Poland* at the conference Andalusian Symposia on Slavic Studies, Granada, 9-11 July 2019; Sección Departamental de Filología Eslava de la Universidad de Granada; *Constitutional Dilemmas of* Equality at the XXI Conference of the WPiA UW "Equality and Inequality in Law", Warsaw, 28 February 2020, WPiA UW; statement on changes in the judicial system at the "Forum for the Rule of Law", Warsaw, 31 January 2020, org. President of the Polish Academy of Sciences; Statement on the current status of the National Council of the Judiciary at the "Forum for the Rule of Law", Warsaw, 6 April 2020, org. President of the Polish Academy of Sciences; *Principle of sustainable development in the light of the Constitution of the Republic of Poland* (expert panel "Sustainable development") at the conference "Poznań All-Polish Congress of Young Scientists", Poznań (remote), 14 September 2020, UAM in Poznań; *Judgment of the Constitutional Tribunal in the case K 1/20 in the light of the Constitution of the Republic of Poland* at the conference "Strike all the way to the horizon". Expert panel on the Constitutional Tribunal's verdict on abortion, online, 4 November 2020, Faculty of Pedagogy, UW; *Institutional protection of entrepreneurship and business – constitutional aspects* at the conference "Challenges of Banking", online, 5 November 2020; Polish Bank Association, Koźmiński University, ALTERUM Centre for Research and Analysis of the Financial System; Local self-government as a constitutional institution in Poland at the conference "30 years of local self-government in Poland", mixed mode: Warsaw and online, 24 November 2020, WPiA UW; Axiology of bicameralism – experiences and hopes at the conference "The role of bicameralism in the democratic system", online, 12 December 2020; Scientific Circle of Legal Comparative Studies at the WPiA UW; *Problems in EU-Poland relations from the perspective of constitutional law* at the conference "Quo vadis Unio a racja stanu Polski", online, 16 December 2020; Department of European Union Law and Institutions, Faculty of Political Sciences and International Studies, UW; *Democracy in a state of pandemic. Reflections on the Polish experience* at the XXII Faculty Conference "Law during the COVID-19 pandemic", online conference, 12 March 2021, UW Faculty of Political Science and International Studies; presentation at the editorial discussion of the Constitutional Review on the 100th anniversary of the March Constitution, online, 19 March 2021.

Dr Adam Krzywoń – *Formación de la opinión pública libre* at the conference "Elecciones y Tribunal Europeo de Derechos Humanos", Barcelona, 10 October 2019; Universidad de Barcelona, Academia Interamericana de Derechos Humanos; *Populismo Constitucional en Europa* at the conference Populismos contemporáneos y Estados democráticos, Madrid, 28 October 2019;

Madrid Institute for Advanced Study; *Rule of Law and judicial independence* at the online seminar series "European Judicial Space and Rule of Law: Cooperation, Dialogue and Independence", online, 19 November 2020; Jean Monnet Eucons, Universidad de Murcia; *Polish Justice System in Chaos: The Consequences of the Political Assault on the Judiciary* at the conference "Rechtsreformen in Ostmitteleuropa, Gesetz oder Willkür?", online, 25 November 2020; Osteuropa Kolleg NRW, Ruhr Universität Bochum; Honors College Lecture *How do populist and autocrats learn from the past? A fascist-populist moment in modern politics and constitutionalism*, online, 2 March 2021; Texas State University: Department of World Languages and Literatures, Department of History and Honors College.

Dr Jan Podkowik – *Accountability in the robotic era. Towards new effective remedies to protect individuals?* at the conference "Public Law in Times of Change?", Santiago de Chile, 1-3 July 2019; International Society of Public Law; *Judicial Dialogue in Europe. Between harmony and cacophony on the example of personal data protection* (co-conveners: Prof. Marek Zubik, Dr Robert Rybski) at the conference "Public Law in Times of Change?", Santiago de Chile, 1-3 July 2019; International Society of Public Law; *Human Rights in Times of Contagion – Challenges for the Judicial Protection of Individual Rights in the Era of the COVID-19 Pandemic* at the XXII Faculty Conference "Law during the COVID-19 Pandemic", online conference, 12 March 2021, WPiA UW.

Chair of the Sociology of Law

The Head of the Department is Dr Aleksander Stępkowski, Professor of the University.

Staff have attended conferences and presented the following papers:

Dr Aleksander Stępkowski, Professor of the University – *Wawrzyniec Goślicki's treatise on the perfect senator and questions about the European identity of contemporary Europe at the* conference "Polish sources of European values", Warsaw – Polish Community Association, 11 May 2019. The Ignacy Paderewski Foundation for the Rebuilding of Democracy. Ignacy Paderewski; *Democracy in the light of the social teaching of the Catholic Church* at the conference "Dilemmas and Perspectives of Democracy", UW, 5 April 2019, Scientific Circle of Legal Comparatistics, WPiA UW; *Genesis of the concept and anthropological identity of the category of common good at the* conference "Solidarity and Common Good as Values in Law", WPiA UW 1-4 March 2019, WPiA UW; *Philosophical identity of contemporary feminism and its key concepts* at the XXV Anual Scientific and Practical Conference: "Problems of State Building and Human Rights Protection in Ukraine", Lviv, 7 February 2019, Ivan Franko National University of Lviv; *The role of the state in respecting the right of parents to raise their children in accordance with their beliefs* at the national conference "Constitution and European Law", Warsaw, 27 November 2019, Association of Polish Lawyers; *On the relationship between the naturalistic and positivis-*

tic components of modern legal culture, in the perspective of the views of Leon Petrażycki at the XXXVII Human Rights Days at the Catholic University of Lublin, entitled Human Rights in the Perspective of Natural Law. On the centenary of Hanna Waśkiewicz's birth, 9-10 December 2019; *Trois approches théologiques et l'avenir de la culture juridique occidentale: de la solidarité vers la libération absolue* at the conference "La loi de solidarité, vers une fraternisation selon la théologie et le droit – colloque international". Université Toulouse 1 Capitole, Faculté de Droit, Montauban 16-18 Septembre 2019; *Future of the Western Legal Culture* at the conference "The Future: 14th Annual Vanenburg Meeting. The Center for European Renewal", Oxford, 5-8 September 2019.

Department of Economic Analysis of Law

The Head of the Department is Dr Krzysztof Koźmiński.

Staff have attended conferences and presented papers:

Dr Krzysztof Koźmiński – *Ritual slaughter in Poland – a legal, moral or historical-economic dilemma?* at the conference "Freedom, Religion and Sovereignty. Modern Phenomena and Future Challenges", Warsaw 28 September 2019; Institute of Justice; *Law as an instrument – do the promoters of Law & Economics present a nihilistic perspective?* at the XVIII All-Poland Congress of Chairs of Political and Legal Doctrines, Lublin 17-19 September 2019, WPiA UMCS; *CJEU judgment on 'franking' loans, consequences for consumers, banks, economy and state budget* – continuation at a nationwide webinar – with participation of representatives of several academic centres, 23 April 2020, Responsible Finance Club at the European Financial Congress, paper title: "The problem of franking credits – systemic challenges".

Chair of Financial Law

The Chair is headed by Professor Dr Witold Modzelewski.

Staff have attended conferences and presented the following papers:

Prof. Dr Witold Modzelewski – *Unconventional ways of escaping taxation with goods and services tax and extorting refunds of this tax in 2007-2018* at the conference "Blaski i cienie 15-lecia harmonizacji prawa podatkowego", 2 July 2019, Warsaw, WPiA UW; *Skutki i zagrożenia assimilacji językowo-kulturowej. Visions of assimilation of national minorities 100 years ago* at the conference "Masters, Pedagogues, Teachers", Nałęczów 25-28 November 2019; Wszechnica Polska Szkoła Wyższa in Warsaw, Association of Philosophers of Slavic Countries, Polish Branch of the Venice-based European Culture Association; *Evaluation of the effectiveness of legal instruments aimed at eliminating tax evasion and obtaining undue tax refunds introduced in Poland in 2016-2019* at the 4th International Conference "Legal security of the state and the taxpayer and a fair tax system in the process of European integration: Poland-Slovakia-Ukraine-Germany", 6-7 November 2020, online; *Elimination of internal disparities in excise taxation as a way to increase the fiscal efficiency of the tax* at the National Scien-

tific Conference: "Excise tax: experience and directions of evolution in times of recession", Warsaw, 28 January 2021, WPiA UW.

Prof. Dr Hanna Litwińczuk – participation in the panel *Relationships of tax law with economic and financial law* at the 2nd Kraków All-Polish Scientific Conference on Tax Law "Tax law in the system of law. Inter-industry relations of legal norms and institutions", Krakow 15-16 June 2019.; *General norms versus special norms against tax avoidance* at the conference organised by the Department of Tax Law, Jagiellonian University, 17 June 2019; participation in the panel *General norms versus special norms against tax avoidance* at the Conference of the National Council of Tax Advisers on 21 May 2019; participation in the conference EATLP Congress 2019 Madrid 6 - 8 June 2019 "Tax Procedures"; *Part II: PPT - PPT versus LOB and anti-conduit* at the conference "Webinar Structure and operation of the PPT", 23 March 2021, International Fiscal Association and Warsaw School of Economics.

Chair of Administrative Law and Procedure

The Head of the Department is Prof. Dr Jacek Jagielski.

Staff have attended conferences and presented the following papers:

Prof. Dr Jacek Jagielski – *Legal and economic determinants of public law foundations* at the International Scientific Conference entitled "Legal and economic determinants of foundation functioning", Warsaw 7 June 2019; Department of Finance, Faculty of Economic Sciences, Warsaw University of Life Sciences.

Prof. Dr Marek Wierzbowski – *The legal form of REITs in the planned law* at the conference "The weight of ESG factors in the construction of the operating model of real estate investment trusts for rent (REITs)", Sopot 30 March 2021; European Financial Congress.

Prof. Dr Rafał Stankiewicz – *Adequacy and proportionality as the new general principles of the Code of Administrative Procedure* at the conference "Code of Administrative Procedure after changes in 2017 – 2019", Warsaw 9 October 2019; Department of Administrative Law of the Institute of Legal Sciences of the Polish Academy of Sciences.

Dr hab. Piotr Przybysz, Prof. of the University – *On the need to revise some views on enforcement proceedings in administration* at the conference "Law on enforcement proceedings in administration. Contemporary times and perspectives", Toruń 9 May 2019; WPiA UMK in Toruń.

Dr Dorota Pudzianowska – *The statelessness framework, public interest and new securitarianism* at the conference "Public Law in Times of Change?", Santiago de Chile, 1-3 July 2019; The International Society of Public Law and Pontifical Catholic University of Chile in Santiago; *Debate concerning same-sex marriage in Poland – law, culture and religion at play* at the conference "Beyond 748 – Same sex marriage and family", Taipei, 23-24 October 2019, Academia Sinica; Polish LGBT cases before the ECtHR at the conference "The role of the

European Court of Human Rights in defending the rule of law in Poland", Warsaw (Online), 27 July 2020, Batory Foundation Legal Expert Team.

Dr Maciej M. Sokołowski – *AI and climate-energy policies of the EU and Japan* at the Conference the Global Impact of Artificial Intelligence Across Industries-Law & Policy, London (Online), 4 September 2020, the United Kingdom, Kingston University London; *Regulatory models for tackling the novel coronavirus: public law regulation in the COVID-19 pandemic and post-pandemic times* at the Conference on Global Public-Private Law Approaches to the COVID-19 Pandemic, Singapore (Online), 10 September 2020, Singapore Management University.

Dr Katarzyna Zalasińska – *Heritage management at the local level – challenges related to the protection of intangible cultural heritage* at the conference of the series "Legal forms of heritage protection and care for monuments" entitled "Segments of cultural heritage – between the protection of tangible and intangible heritage", organised by the Scientific Circle of the Legal Protection of Cultural Property of the Jagiellonian University Law Students' Library Society in cooperation with the Institute of the Law of Heritage Protection, Kraków, 4-5 June 2020.

Chair of Labour Law and Social Policy

The Chair is headed by Prof. Dr Małgorzata Gersdorf.

Staff have attended conferences and presented the following papers:

Prof. Dr Małgorzata Gersdorf – Speech by the First President of the Supreme Court at the international conference "The future of Europe based on the rule of law", Warsaw, 26 April 2019, Supreme Court; Speech by the First President of the Supreme Court at the "II Congress of Polish Lawyers", Poznań, 1 June 2019, National Council of Legal Advisers, Supreme Bar Council and Iustitia Association of Polish Judges; *Limitations of judicial independence and the rule of law in Poland* at the conference of the Norwegian Bar Association, 16 October 2019, Oslo; *Limitations of judicial independence and the rule of law in Poland* – speech at the award reception in Bonn 11 December 2019; *Challenges for the rule of law in Poland and Europe* at the conference of the Netherlands Association for the Judiciary, 29 November 2019, The Hague.

Dr hab. Małgorzata Barzycka-Banaszczyk – moderator of the panel: "Axiological and legal dimension of disciplinary responsibility" at the conference "Disciplinary responsibility of students. New Challenges - Old Problems", Warsaw, 9 May 2019, Disciplinary Committee for Students and Doctoral Students of UW and WPiA UW under the patronage of the Rector of UW; *Disciplinary responsibility of students and doctoral students,* February 2021; *On work in an interdisciplinary perspective – considerations in the reality of the state of the ongoing pandemic* at a conference organised by the Department of Labour Law and Social Policy of the Jagiellonian University March 2021.

Dr hab. Piotr Grzebyk, Professor of the University – *Trade union freedoms of persons performing work in non-standard forms of employment* at the

XXII Meeting of Chairs and Departments of Labour Law and Social Insurance, "Employment in the post-industrial era", Warsaw, 17-18 May 2019, Faculty of Management, UW; *Platform workers in EU & Poland* at the conference 5th Sino-Polish Seminar on Comparative Law, 16-20 September 2019, Chinese Academy of Social Sciences, WPiA UJ, WPiA UJ, WPiA UŚ and School of Law and Economy of China UW; *Impact of the amendment of the Trade Union Act on the Polish model of the right to strike* at the conference "Amendment of the Trade Union Act – one year after its enactment on 21 November 2019", Kraków, Department of Labour Law and Social Policy, Jagiellonian University and Department of European and Collective Labour Law, University of Łódź; *How to Teach Chinese Law. Polish Research Center for Chinese Law and Economy case* at the conference "Methodology of researching and teaching Chinese law", 18th October 2019 Saint Petersburg State University; *Chinese Investment in Infrastructure in Poland. The case of COVEC (China Overseas Engineering Group Co Ltd) at the* conference "International Conference on Finance & Law" at SWUPL Chongqing, 2 Nov 2019; *Chinese Companies in CEE. COVEC Case and Public Procurement Law* at the conference entitled "Global Perspectives of One Belt One Road Initiative", 26-27 November 2019, Tbilisi Open University.

Dr Michał Raczkowski – Summary of the panel "Will TCAs allow for the negotiated approximation of labour standards in transnational corporations across the EU? What conditions might be conducive and what are the barriers?", seminar "Will TCAs allow for the negotiated approximation of labour standards in transnational corporations across the EU?", Gdańsk, 25 February 2021 (remote conference), NSZZ Solidarność.

Chair of Agricultural Law and Food Protection System

The Head of the Department is Dr Adam Niewiadomski, Professor of the University.

Staff have attended conferences and presented the following papers:

Dr Adam Niewiadomski, Professor of the University – *Public participation in the creation of Natura 2000 areas* at the All-Polish Scientific Conference "Local development of rural areas. Legal aspects of local social activity", UMCS Lublin, 20 May 2019; *Local economic activity in Natura 2000 areas* at the All-Polish Scientific Conference "Local development of rural areas. Legal aspects of local economic activity", Maria Curie-Skłodowska University, Lublin, 11 April 2019; *Housing Specustawa a turnover of agricultural real estate* at the All-Polish Scientific Conference of Real Estate Law. "Business vis-à-vis legal changes", Poznań, 10 April 2019; *Role of spatial planning in real estate trading* at the 3rd All-Polish Scientific Conference "Contemporary Problems of Agricultural and Food Law", 10 March 2021, UŚ in Katowice.

Dr Paweł Wojciechowski, Profesor of the University of Silesia – *Food Security and Restrictions on Agricultural Property Trading* at the conference "Agricultural Law – New Challenges", Department of Agricultural Law and Spa-

tial Management of the Faculty of Law and Administration of the University of Silesia in Katowice, 5 June 2019.

Chair of Insurance Law

The Chair is headed by Dr Magdalena Szczepańska.

Staff have attended conferences and presented the following papers:

Dr Magdalena Szczepańska – *Analysis of the client's needs when concluding a contract for the next insurance period* at the conference "Insurance Distribution Act – interpretation and implementation of the Act", 22 May 2019, Warsaw, Polish Insurance Association, UW.

Dr Dorota Dzienisiuk – *ZUS – The role of the Administrative Commission for Social Security* at the Anniversary Conference "15 years of Poland in the system of coordination of social security systems of the European Union. Good preparation in the past is a benefit for the future.", 27 May 2019; *Workers' Capital Plans and Social Security and Labour Law* at the XXII Congress of Chairs and Departments of Labour Law and Social Insurance, Warsaw, 17-18 May 2019; participation in the panel discussion "Legal Framework of the Social Security of Labor Migrants" at the XXV Annual Scientific and Practical Conference "Problems of State Building and Human Rights Protection in Ukraine", Faculty of Law, Ivan Franko National University of Lviv, 7-8 February 2019; participation in the panel: Social Insurance and the ZEKS at the Seminar entitled "Strategy for the Ratification of the Revised European Social Charter: a flash operation or a long march?", Wrocław, 21 October 2019, Kraków, KK NSZZ "Solidarność" and the Department of Labour Law and Social Policy, Jagiellonian University; *The role of the concept of universality in particular types of social insurance* at the conference "Universality of social insurance in theory and practice", Wrocław, 22 November 2019, Department of Labour Law UWr and the Court of Appeal in Wrocław; *Protection of employees' personal data in employee capital plans* at the conference "Personal data protection in collective labour law", Warsaw, 3 March 2020, Kozminski University; *Retirement of female university teachers* at the conference "On Women in the Modern World", Warsaw 22 September 2020, WPiA UW; *Selected legal problems with PPK* at the conference "PPK and PPE as forms of saving for old age – selected aspects", online scientific seminar, 25 March 2021, Warsaw-Łódź Branch of the Polish Social Insurance Association, Centre for Atypical Employment Relations, Faculty of WPiA UŁ, II Branch in Łódź Social Insurance Institution.

Department of Economic and Banking Administrative Law

The Head of the Department is Prof. Dr Hanna Gronkiewicz-Waltz.

Staff have attended conferences and presented the following papers:

Dr Adam Szafrański – *Electromobility as a Tool to Achieve Sustainable Development Goals* at the International Conference "Security and Regulation in the Energy Market" – UŁ 23-24 May 2019.

Department of Administrative Science

The head of the Department is Dr Arwid Mednis.

Staff have attended conferences and presented the following papers:

Dr Arwid Mednis – *ISAC as a venue for incident information sharing – what should be the required level of competence?* At the conference "Competency needs in cyber security and electronic communications in light of planned regulatory changes", Warsaw 2 October 2020, PTI Communication Platform – MS Teams, Sectoral Competence Council Telecommunications and Cyber Security, WPiA UW, UKSW, Polish Chamber of Informatics and Telecommunications, Polish Informatics Society, Scientific Centre for Law and Information Technology, PARP; *Directions of legal regulation of artificial intelligence – administrative law perspective* at the conference "New technologies and artificial intelligence. Legal and practical aspects of the trust ecosystem.", 16-17 October 2020, online conference on the Live Webinar platform, KEN Pedagogical University of Kraków, Institute of Law and Economics, Information Processing Centre – National Research Institute, WPiA UKSW and Academy of New Technologies Law UP; *Cyber security and data protection* at the XII Scientific Conference "Security on the Internet Cyberpandemic", online, 22-23 October 2020. UKSW, National Centre for Cyber Security Sectoral Competence Council Telecommunications and Cyber Security Polish Informatics Society Scientific Legal and Informatics Centre; moderation of the panel entitled "The most common mistakes when ensuring the security of personal data – a case study" and lecture entitled *Data security on the example of the case of Morele sp. z o.o.* at the conference "XVIII Samorządowe Forum Kapitału i Finansów", 26-30 October 2020. International Congress Centre in Katowice, including online part, Municipium S.A.; *Electronic Communications Law – current status and prospects for changes* at the conference "International Conference of ELSA Warsaw on Space and Telecommunications Law", 26-27 March 2021, online, ClickMeeting platform. ELSA Poland; *How to prepare for and respond to DPA regulatory audits – the Polish perspective* at the conference "Poland's Data Protection Law: Trends, Risks & Opportunities", 23-25 February 2021, online, privacy laws & business.

Dr Dawid Sześciło – *Independence of Regulatory Authorities under EU Law: Failed Attempt to Create Fourth Branch of Government?* at the 27th NISPAcee Annual Conference, "From Policy Design to Policy Practice", 24 - 26 May 2019 Prague (Czech Republic); *Re-Emergence of Positive State as a Response to Government Performance Crisis? The Case of Poland* at the 2019 Transatlantic Dialogue conference "Restoring the Administrative State: Trust, Engagement, Security, and Identity" 20 - 22 October 2019, Austin W. Marxe School of Public and International Affairs Baruch College, New York City.

Department of Human Rights

The Head of the Department is Dr Marcin Wiącek, Professor of the University.

Staff have attended conferences and presented the following papers:

Dr Marcin Wiącek, Professor of the University – *Legal nature of virtual currency* at the conference "New horizons of law (2). Debate on blockchain", Warsaw, 28 February 2019, WPiA UW; *Foundation as a subject of civil society in the light of the constitution* at the conference "Legal and economic conditions of the functioning of foundations", Warsaw, 7 June 2019, SGGW; *Artificial Intelligence and Human Rights* at the conference "European Law Institute 2019 Annual Conference and Meetings", Vienna, 4-6 September 2019; *Blockchain – a technological opportunity for the economy, business and public administration* at the conference "Congress 590", Rzeszów, 7-8 October 2019.

Chair of Civil Procedure

The Head of the Department is Prof. Dr Karol Weitz.

Staff have attended conferences and presented papers:

Prof. Dr Karol Weitz – *Contemporary Problems of Codification of Civil Procedure Law* at the conference "Problems of Codification in 100 years of the Codification Commission of the Republic of Poland", Kraków, 15-16 November 2019, organised by the Law Commission of the PAU and the WPiA of the Jagiellonian University; *Abuse of civil procedural 'law'* at the All-Polish Scientific Conference "New shape of the Polish civil trial", Łódź, 6 December 2019, organised by the WPiA of the UŁ.

Dr hab. Tadeusz Zembrzuski, Professor of the University – *Extraordinary complaint – role, meaning, perspectives* at the conference "Access to legal protection in civil court proceedings" – All-Polish Meeting of Chairs and Departments of Civil Procedure, Muszyna, 21 September 2019; WPiA UJ, WPiA USz and WPAiE UWr; *Changes in the exploratory proceedings. Appeals* at the conference "Nowela KPC", Warsaw, 25 September 2019; Ad Exemplum Trial Law School; *Seizure of things in movable enforcement* at the conference "Assessment of the functioning of the laws on judicial officers and enforcement costs – possible directions of changes", Warsaw, 1 October 2019; Institute of Legal Sciences of the Polish Academy of Sciences; *Zażalenie po nowelizacji, czyli o standard środka zaskarżenia* at the conference "Zmiany w prawie cywilnym procesowym", Szczecin, 22 October 2019; CSU Faculty of Law and Administration, Chamber of Bailiffs in Szczecin and the Regional Chamber of Legal Advisers in Szczecin; *Examination of the court's jurisdiction after the amendment of the Civil Procedure Code of 4 July 2019 and the rules of civil procedure* at the conference "Big amendment of the CCP of 4 July 2019 – Axiological Assumption", Łódź, 28 November 2019; WPiA UŁ; *Jurisdiction in Cases under Civil Law Involving Consumers* at the VII International Scientific Consumer Conference "Complaints, Mediations and Other Proceedings in Consumer Matters", 27-28 October 2020, Cracow University of Economics and the Association of Consumer Advocates; *Restrictions on the openness of proceedings in civil cases in the era of the pandemic – the need of the moment or a permanent solution?* at the XXII Scientific Conference of the

WPiA UW "Law during the Covid-19 pandemic", Warsaw, 12 March 2021; *Trust of a party and refusal of an attorney* to *prepare an extraordinary appeal* at the conference "Professional secrecy and other instruments of protection of trust in legal professionals in civil proceedings", Łódź, 26 March 2021, organised by the WPiA UŁ.

Dr Andrzej Wach, Professor of the University – *Settlement of legal disputes, including football disputes* at the All-Polish Scientific Conference entitled "A Day with the Law in Football", on 11 March 2021, UJ and European Law Students Association [ELSA]; *Activities of the Football Arbitration Court* at the *PZPN* at the National Scientific Conference entitled "ADR in sport", organised on 19 March 2021 in Toruń by the Scientific Circles Lex Sportiva Sports Law and SKN Konsensus Academic Mediation operating at the Faculty of Law of the Nicolaus Copernicus University in Toruń.

Dr hab. Andrzej Grzegorz Harla – *Appeal from rulings of the disciplinary commission* at the All-Polish Scientific Conference, "Legal responsibility of a judicial officer", Wrocław, 9 October 2020 ; UWr, Chamber of judicial officers in Wrocław, Scientific and Training Centre at the National Council of Judicial Officers.

Dr Marcin Dziurda – *Action and trial for damages caused to a limited liability company or joint-stock company* at the conference "II Forum of Civil Litigation Law. Commercial Company Relationship Cases in Civil Litigation and Judicial Enforcement", Łódź, 20 November 2020, WPiA UŁ; moderator of 2nd Panel at the WPiA UW conference "Law during the COVID-19 pandemic".

Dr hab. Piotr Rylski, Professor of the University – *The influence of bilateral treaties with third states on jurisdiction and recognition of decisions in matters from succession – Polish perspective* at the conference "Application Of The Succession Regulation in the EU Member States", Katowice September 2019, conference organised by the WPiA UŚ; *Subjective scope of access to* legal *remedies – model approach* at the conference "Access to legal protection in civil court proceedings" – All-Polish Meeting of Chairs and Departments of Civil Procedure, Muszyna, 21 September 2019.; WPiA UJ, WPiA USz and WPAiE UWr; *The new shape of the appeal in the civil process* at the conference "The new shape of the Polish civil process", conference organised by WPiA UŁ, December 2019; *How far does a court have to go concerning its duty to assess the applicability, and eventually its duty to apply, consumer law ex officio?* at the Symposium on the Limits of the Procedural Autonomy of the Member States in Consumer Law Cases, organised by Ghent University; *Legal Comparative Aspects of the* Impact *of Pandemics* on Civil Procedure at the conference "Impact of COVID-19 on Civil Procedure" – 5 June 2020, Editorial Committee of the quarterly Polish Civil Process, Scientific Society of Civil Litigators and SSP "Iustitia"; *Reform of civil procedure in the era of pandemic – Polish experience* at the conference "Civil Courts Coping with Covid", 23 April 2021, University of Leiden; *Judgements and*

Appeals at the conference "Comparative Procedural Law and Justice (CPLJ)", 23 February 2021, Max Planck Institute in Luxembourg; *Transformations of Polish civil procedure and the COVID-19 pandemic* at the XXII Scientific Conference of the WPiA UW "Law during the Covid-19 pandemic", Warsaw, 12 March 2021.

Chair of Civil Law

The Chair is headed by Professor Dr Maciej Kaliński.

Staff have attended conferences and presented the following papers:

Prof. Dr Leszek Bosek – *State of the epidemic – constitutional and comparative legal aspects* at the XXII Faculty Conference "Law during the Covid-19 pandemic", Warsaw (online), 12 March 2021, WPiA UW; *Testing proportionality of anti-epidemic emergency measures under EU law* at the conference "10th Annual Cambridge International Law Conference", Cambridge, UK (online), 18-20 March 2021, the Cambridge International Law Journal; *Anti-epidemic emergency measures under Polish law in a comparative, historical and jurisprudencial perspective* at the International conference "Responses to COVID crisis in Central and Eastern European Countries – New Frontiers of Health Law", Belgrade, Serbia (online), 18-19 March 2021, the Institute of Social Sciences – Center for Legal Research, in cooperation with the Faculty of Law of Erasmus University in Rotterdam, the Faculty of Law of the University of Maribor and the Association for Medical and Health Law of Serbia (SUPRAM); *The State of Epidemic Emergency and the State of Epidemic in a comparative perspective* at the International Conference "Issues in the Development of Sociological Theory: Conceptual Strategies for the Study of Social Consequences of COVID-19 Pandemic", Kyiv, Ukraine (online), 18-19 December 2020, Taras Shevchenko National University of Kyiv.

Dr Jacek Wierciński, Professor of the University – *Recognition of the conclusion and dissolution of a marriage in cross-border relations* at the conference "Marriage, its conclusion and registration in the international context", Łódź, 15 March 2019 ; WPiA UŁ; *Guardianship courts' decision-making in cases concerning a minor's passport and the issue concerning the decision-making in cases of the so-called 'relocation'' of a minor* at the conference "VI Congress of the Association of Family Judges Pro Familia", Zakopane, 15-19 September 2019.; Association of Family Judges Pro Familia; *Substituted consent of the court of the child's country of permanent residence to the child's settlement abroad* at the training course of the National School of Judiciary and Public Prosecution, Lublin, 6-8 May 2019; *Planes of resolving a conflict between parents as to the child's place of permanent residence at the* training course of the National School of Judiciary and Public Prosecution, Dębe, 6-8 November 2019.

Dr Maria Boratyńska – *Boundaries of professional autonomy of a nurse* at the conference "Multidimensionality in intensive care – from birth to death", Warsaw 7 April 2019, WUM; *New medical technologies and telemedicine, artificial intelligence and medical due diligence at the* conference "Challenges of innovation for economics and law in health care" UKSW, Warsaw, 21 May 2019; *No obligation*

to disclose medical confidentiality at the 4th All-Polish Scientific Conference on Patient's Rights: "Patient's Right to Medical Confidentiality", Białystok, 31 May - 1 June 2019, Pro Humanae Vitae Medical and Pharmaceutical Law KN at the Department of Civil Law, Faculty of Law, University of Bialystok; *Crippled body – prosthetic body* at the conference "IV Spring School of Bioethics.The body in medicine and bioethics", Jabłonna, 24-26 June 2019, Jabłonna, Committee on Bioethics of the Presidium of the Polish Academy of Sciences; *Medical decisions concerning unconscious patients* at the conference "Legal aspects of treatment and medical decisions in non-standard and difficult situations", Wrocław, 27 September 2019, Lower Silesian Medical Chamber and UWr; *Confidentiality of health data of patients with limited or excluded decision-making competence* at the conference "Data protection in scientific research", Kraków, 28-30 November 2019; Polish Bioethics Society; *Legal and ethical dimensions of immunization* at the XXII Faculty Conference "Law during the Covid-19 pandemic", Warsaw (online), 12 March 2021, WPiA UW; Legal and *ethical dimensions of immunization* at the All-Polish Scientific Conference "Patient and medical staff towards information technology – legal and social aspects", Szczecin (online), 22 March 2021, WPiA UŚ.

Dr Beata Janiszewska – *Protection of patient confidentiality from the perspective of civil law* at the 4th All-Polish Scientific Conference on Patient's Rights "Patient's right to medical confidentiality", Białystok 31 May – 1 June 2019, Pro Humanae Vitae Medical and Pharmaceutical Law KN operating at the Department of Civil Law, Faculty of Law, University of Białystok; *Guarantee dimension of expert opinion evidence in incapacitation cases* at the conference "Court in psychiatry. Psychiatry in court", Warsaw, 9 October 2018; Ombudsman for Patients' Rights and the Department of Medical Law of the Medical University of Łódź; *Adjudication in cases of placement in care and treatment institutions* and *Permission (consent) of the guardianship court to provide health services to a minor patient (Art. 32 and 34 of the Medical and Dental Professions Act)* at the conference "The Role of the Family Court in the Light of Changes in the Law, VI Training Congress of the Pro Familia Family Judges Association", Zakopane, 15 - 19 September 2019; Pro Familia Family Judges Association; Medical Power of Attorney at the conference "Legal Aspects of Treatment and Medical Decisions in Non-standard and Difficult Situations", Wrocław, 27 September 2019; WPAiE UWr, Interdisciplinary Medical Law and Ethics Laboratory and Lower Silesian Medical Chamber; *Consent for admission to a psychiatric hospital in the era of pandemics* at the conference "E-Congress of Forensic Psychiatry", 17 October 2020; Conway Group sp. z o.o.; *Access to Public Health Services in the Face of the COVID-19 Pandemic – and Patients' Rights* at the conference Access to Public Health Services in the Face of the COVID-19 Pandemic, XXIV edition of the Legal Education Days organised by ELSA Poland in the group of this Association in Warsaw, 18 November 2020; ELSA Poland; *Patients' Rights in the Era of the*

Pandemic at the XXII Faculty Conference "Law during the Covid-19 Pandemic", Warsaw (online), 12 March 2021, WPiA UW.

Dr Marcin Krajewski – *The role of court jurisprudence in determining the limits of protection of persons injured in motor vehicle accidents* at the conference "Third party liability insurance for motor vehicle owners – a new look at a well-known institution", Poznań 27 November 2019; Department of Civil, Commercial and Insurance Law, Adam Mickiewicz University, Poznań.

Dr Kamil Zaradkiewicz – *Economic boycott and discrimination in the light of constitutional standards* at the XXI Faculty Conference "Equality and Inequality in Law", Warsaw, 28 February 2020, WPiA UW.

Chair of Commercial Law

The head of the department is Prof. Dr Konrad Osajda.

Staff have attended conferences and presented the following papers:

Prof. Dr Konrad Osajda – summary of the conference "In the centenary of the Polish legal regulation of the limited liability company", Warsaw, 22 February 2019, Department of Commercial Law, WPiA UW; chair of the panel on Banking Law at the conference "IV International Conference on Comparative Law", Warsaw, 15-16 March 2019, ELSA Poland; moderator of the conference "Exclusion of a partner from a limited liability company", VII Open Scientific Meeting, Warsaw 25 March 2019, Chair of Commercial Law of the WPiA UW; *Perspectives on the development of inheritance law* at the conference "Current issues of inheritance law", XI Jagiellonian Colloquium, Kraków 12 April 2019, Chair of Civil Law, WPiA UJ; *Presentation of the ideas and assumptions of the Private Law Commentaries* at the conference "Civil Procedure Reform", Warsaw 17 May 2019, WPiA UW and C.H. BECK; Moderator of the conference "Disentangling Corporate Governance from Securities Market Imperatives through Data-Driven Finance", 8th Open Scientific Meeting, Warsaw 21 October 2019, Chair of the Commercial Law Department of the WPiA UW; *Directors' Liability for an Insolvent Company's Debts: Comparative Law Remarks* at the conference "Special Lectures Series", Vienna, 3 September 2019, PAN Scientific Station Vienna; *Regulatory Challenges for Inheritance Law* at the conference "The Current Shape of Polish Inheritance Law in the Context of Social Changes of the 20th and 21st Century", Poznań, 9 January 2021. WPiA UAM, online.

Dr hab. Artur Nowacki, Professor of the University – *The scope of the right to conduct the company's affairs and representation in the case of a shareholder's heir or a purchaser of his entire rights and obligations* at the conference "Congress of Chairs of Commercial Law", Katowice, 19-20 September 2019, WPiA UŚ.

Dr Anna Zbiegień-Turzańska – *Effects of the so-called false organ of a capital company* at the conference "Changes in the Commercial Companies Code 2019" organised on 10 April 2019 by the Scientific Circle of Company Law of the Faculty of Law of the University of Warsaw.

Chair of Intellectual Property and Intangible Property Law

The Chair is headed by Prof. Dr Krystyna Szczepanowska-Kozłowska.

Staff have attended conferences and presented the following papers:

Prof. Dr Krystyna Szczepanowska-Kozłowska – *Trademark infringement* at the "Annual Conference on EU Trade Mark and Design Law", Trier, 8-9 October 2020, ERA - Academy of European Law.

Dr Lech Jaworski – *Hybrid Orientation as a phenomenon in the literary culture of the People's Republic of Poland* at the conference "Cultural achievements in the People's Republic of Poland"; Nałęczów (Al. Lipowa 16, Willa Ewelina), 1-4. April 2019; Anthropological School of Philosophy of Law by Maria Szyszkowska, Wszechnica Polska, Association of Philosophers of Slavic Countries, Polish Branch of the Venice-based European Culture Association; The *right of a journalist as an author of press material to anonymity in the light of copyright law* at the conference "Splendor and shadows of contemporary copyright law... Consequences that the adopted Directive on copyright and related rights in the digital single market will have for copyright and OZZ laws"; Warsaw (WH UW, Sala Kolumnowa), 25 May 2019.

Dr Wojciech Machała – *Copyright without an author? Selected subjective problems of copyright law* at the conference "Splendor and shadows of contemporary copyright law", Warsaw, 25 May 2019, Faculty of Management UW; *Citation in a scientific work* at the conference "The future of scientific research in the light of copyright law, ethical codes of scientists and criteria for assessing the quality of research", Katowice, 31 January-1 February 2020, Polish-American Fulbright Commission.

Dr Łukasz Żelechowski – *Protection of unregistered distinctive signs within unfair competition law* at the conference "Regional e-Seminar for Judges and IP Enforcement Professionals Programme", Riga, 10 September 2020 (online conference), WIPO – World Intellectual Property Organisation, Patent Office of the Republic of Latvia, EUIPO – European Union Intellectual Property Office; *Conflict with public policy and good morals as an obstacle to trademark registration* at the conference "Open scientific meetings of the Chair of Intellectual Property, Jagiellonian University", Kraków (remote formula), 4 December 2020.

Department of Forensic Science

The Chair is headed by Prof. Dr Tadeusz Tomaszewski.

Staff have attended conferences and presented the following papers:

Prof. Dr Tadeusz Tomaszewski – *From Reasearch on the Handwriting of Fryderyk Chopin* and *the European forensic science area* (co-author: Piotr Girdwoyń) at the conference "Disskusjonnye woprosy teorii i praktiki sudiebnoj ekspertyzy", Narodno-Obszestwiennyy Centr Ekspertizy, Rossiyskiy Gosudarstvennyy Universitet Pravosudii, Moscow 2019; *Another bubble? On the draft law on experts* (co-author: Piotr Girdwoyń) and *Errors in criminal cases* (co-author: Piotr Girdwoyń) at the "X Jubilee Meeting of Chairs, Departments and Labo-

ratories of Forensic Science, Conference Forensic Science vs. Miscarriages of Justice", UMK Toruń 26 June 2019; What we already know, and what we do not know yet, about the handwriting of the great composer (based on the research of manuscripts from the collection of the Fryderyk Chopin Museum), co-authors: M. Goc, P. Girdwoyń, at the conference "XIX International Wrocław Symposium on Writing Research", UWr, Wrocław, 7-8 October 2020.

Prof. Dr Piotr Girdwoyń – *From Reasearch on the Handwriting of Fryderyk Chopin* and the *European forensic science area* (co-author: Tadeusz Tomaszewski) at the conference "Disskusjonnye woprosy teorii i praktiki sudiebnoj ekspertyzy", Narodno-Obszestwiennyy Centr Ekspertizy, Rossiyskiy Gosudarstvennyy Universitet Pravosudii, Moscow 2019; *Another bubble? On the draft law on experts* (co-author: Tadeusz Tomaszewski) and *Errors in criminal cases* (co-author: Piotr Girdwoyń) at the "X Jubilee Meeting of the Chairs, Departments and Laboratories of Forensic Science, Conference Forensic science vs. miscarriages of justice", UMK Toruń 26 June 2019; What We Already Know and What We Don't Yet Know About the Handwriting of the Great Composer (based on the research on the manuscripts from the collection of the Fryderyk Chopin Museum), co-authors: M. Goc, Tadeusz Tomaszewski, at the "XIX International Wrocław Symposium on Written Research", UWr, Wrocław 7-8 October 2020.

Prof. dr hab. Ewa Gruza – *Errors in expert witness opinions – in the context of wrongful convictions* at the X Congress of Chairs of Forensic Science – "Forensic science in the face of miscarriages of justice", 26-28 June 2019, WPiA UMK Toruń; *Missing* persons – *an effective search model or the need for change* at the conference "Forensic aspects of searching for missing persons", 15 November 2019, WPAiE UWr; *Adult gone missing: the unobvious aspects of the battle for privacy in the digital age* (co-authored by P. Lewulis and D. Mańkowski) in the 1st International ICT Conference – "Law and Criminology in the New Digital Era", Seville 20-21 January 2020, Loyola Universidad; *When a person goes missing* at the conference "Forensic Psychology and Criminology", Tygiel Foundation, 12 June 2020; *Searching for missing persons* at the KN Temida Webinar, 30 June 2020; *Expert's responsibility for the opinion given and the limits of judicial findings* at the "XIX International Wrocław Symposium on Written Research", Wrocław 7-8 October 2020.; UWr; *Hangman the victim or victim the hangman* at the conference "Family violence in an interdisciplinary approach", Temida Scientific Circle UW, Warsaw, 29 October 2020; *Forensic science of tomorrow – facts and myths at the KRIMED conference*, VI All-Polish Scientific Conference "Research methods in forensics and forensic medicine", Tygiel Foundation, Lublin, 20 November 2020.

Dr Paweł Waszkiewicz, Professor of the University – *Security policy – Why do we usually choose to entrust health issues to experts in the field (doctors) and in the area of security to experts in everything (politicians)?* At the conference "Great Conversations on Security", POLIN Museum of the History of Polish Jews,

Warsaw 20 February 2019; *SOCMint. Selected Practical and Legal Issues* at the 20th Faculty Conference of the WPiA UW entitled "Solidarity and the Common Good in Law"; *The Perpetrator is in the First Volume. The work of the so-called X-Files* at the Omerta Judicial and Penitentiary Section of the KNSP UKSW, Warsaw 21 May 2019; *Public Place, Public Figures, and Public Opinion: The Murders of Paweł Adamowicz (Mayor of Gdańsk (2019)) and Gabriel Narutowicz (President of Poland (1922))* at the "Homicide in public places Homicide Research Working Group 2019 Annual Meeting", Clearwater Beach, FL; *Environmental Criminology* at the "New Directions in Criminology" conference, Warsaw, 7 June 2019, PAN; *Social media in law enforcement work. A research perspective;* and *Miscarriages of justice and the so-called X-Files. A case study* (co-author Magdalena Tomaszewska-Michalak) at the conference "Forensic science towards miscarriages of justice", Toruń, 28 June 2019; *Big Brother of the Year Pandemic. Surveillance in the COVID-19 era* at the XXII Faculty Conference, "Law during the Covid-19 pandemic", Warsaw, 12 March 2021.

Dr Kacper Gradoń – *Open Source Intelligence and SocMint: the Information Goldmine for Law Enforcement, Surveillance States, Criminals and Terrorists Alike* at the 3rd SecHuman Summer School conference "Brave New World: Security for Humans in Cyberspace", 3-6 June 2019, Horst Görtz Institute for IT Security, Ruhr-Universität Bochum, Germany; *Artificial Intelligence and future crimes* at the Future Crime opportunities arising from Artificial Intelligence conference, 14-15 February 2019, Buckinghamshire, UK; *Are we ready for Future Crimes?* at the NYPD Police Leadership Seminar conference, New York 31 January 2020, John Jay College of Criminal Justice; plenary lecture at the Catalan Police 300th Anniversary Conference, 25-27 September 2019. On 9-11 October 2019, Dr Gradoń participated, as the only academic participant from Central Europe, in a conference entitled "Law Enforcement in a Connected Future", organised by Europol and Interpol.

Chair of International Criminal Procedure

The Chair was converted from the Department of International Criminal Procedure by resolution of the Faculty Council of 14 December 2020.

The Chair is headed by Dr Szymon Pawelec, Professor of the University.

Staff have attended conferences and presented the following papers:

Dr hab. Szymon Pawelec, Professor of the University – *Problematics of the implementation of the institution of peace courts from a legal and criminal perspective* at the Seminar "Peace Courts", Warsaw, 22 September 2020, Institute of Justice; *Selected aspects of criminal cases involving electronic evidence* at the conference "V4CyberPower", online international conference, 3-4 December 2020, Institute of Justice, Ministry of Justice; *From the problematics of the use of pre-trial detention in times of pandemic* at the XXII Faculty Conference "Law during the Covid-19 pandemic", Warsaw, 12 March 2021.

Prof. Dr Piotr Kruszyński – *Problematics of the implementation of the institutions of the courts of peace from a legal and criminal perspective* at the Seminar "Courts of Peace", Warsaw, 22 September 2020, Institute of Justice.

Chair of Criminal Law

The Head of the Department is Prof. Dr Małgorzata Król-Bogomilska.

Staff have attended conferences and presented the following papers:

Dr Magdalena Blaszczyk – Issues for discussion: *I. Offence law in the system of law II. Further future of the misdemeanours law* at the debate "Fundamental problems and the future of misdemeanour law" organised by INP PAN on 6 March 2019 within the framework of the research project of the National Centre of Science for 2017-2020, entitled *Reform of the misdemeanours law*; headed by dr hab. Paweł Daniluk, Prof. of INP PAN; *Were all the changes in the criminal code, introduced during the SARS-CoV-2 epidemic state, necessary?* at the Faculty Conference of the WPiA UW "Law during the Covid-19 pandemic", Warsaw, 12 March 2021.

Dr Sławomir Żółtek, Professor of the University – *Blockchain and the law* at the conference "Blockchain – law, business, technology", Warsaw, 7 June 2019, WPiA UW; *Blockchain in banking – possibility or necessity* at the conference "VII Congress of Banking Law and Information", Warsaw, 6 June 2019, Union of Polish Banks; *Blockchain in finance* at the conference "XI Congress of Banking Law and New Technologies", Warsaw, 15 April 2019, WPiA UW; *Blockchain and the media* at the conference "Media and Threats – Challenges in the Digital Age", Warsaw, 12 April 2019, National School of Public Administration; *On new technologies in business transactions* at the conference "Dilemmas and Perspectives of Democracy", Warsaw, 5 April 2019, WPiA UW; *Persistent carrier and blockchain technology* at the conference "Blockchain – a challenge for law and security in the 21st century", Warsaw, 29 March 2019, Sejm of the Republic of Poland; Blockchain *technology and the financial market – selected legal aspects* at the conference "Blockchain – how to use it in the banking sector", Warsaw, 22 March 2019, Polish Bank Association; Moderator of the Panel on Criminal Law at the conference "Solidarity and the common good as values in law", Warsaw, 1 March 2019, WPiA UW; *Law and Blockchain* at the conference "New Horizons of Law", Warsaw, 28 February 2019, WPiA UW; *Blockchain – legal challenges* at the conference "Outer Space, Cybersecurity and Security Law – International, Regional and National Challenges", Warsaw, 28 November 2019, Academy of Military Art; *Abuse of law – a criminal law perspective* at the conference "Abuse of law and agricultural law", Borsuki, 13 December 2019, FAPA Foundation Polish Chamber of Cooperative Banking; *Blockchain and cryptocurrencies – opportunities and dangers* at the conference "Cryptocurrencies – opportunities and dangers", Emów, 15 January 2020, Internal Security Agency.

Department of Criminology

The Head of the Department is Dr Monika Płatek, Professor of the University. Staff have attended conferences and presented papers:

Dr Monika Płatek, Professor of the University – *The Statutory Establishment of the Centre in Gostynin*, co-panelist with Ewa Dawidziuk – BRPO, Scientific Circle 15 January 2019; *Street Law Clinic – effective way to teach law at the Universities*, TED Fulbright presentation, Warsaw, 29 January 2019; *The Formation of an Authoritarian Regime, Criminal Law Dimension, Poland*, lecture at the International Conference "The Formation of an Authoritarian Regime", Faculté de Droit, Universite de Tour, France, 1 February 2019; *Contacts of the deprived of liberty with their families in the light of the jurisprudence of the European Court of Human Rights and the European Prison Rules and the UN Rules*, lecture at the International Scientific Conference "Social Activities for Prisoners and their Families", UKSW, Faculty of Pedagogical Sciences, 25 February 2019; *Measures of Solidarity, Case of KOZZD – Gostynin*, at the XXth Conference of the Faculty of Law and Administration of the University of Warsaw, entitled "Solidarity and the Common Good as a Common Good. Solidarity and the Common Good as Values in Law", WPiA UW, Warsaw, 1 March 2019; *Women's Rights in the Modern World* at the SWPS Conference, "Women's Rights in Global and Cultural Perspective". Warsaw 8 March 2019; *Neutrality of Law – Theory and Practice from a Gender Perspective*, Lecture of the Study of Clinical Psychiatry, University of Poznań, Poznań, 9-10 March 2019; *Sexual Offences – Prevention*, WPiA UW, UW Human Rights Forum, 26 March 2019; *Legal Situation* of *Women in the Military – Sexual Harassment and Bullying*, at a conference in the Polish Parliament 14 May 2019; *Gender in Law and Practice*, inaugural lecture at the "II Women's Congress", Toruń, City Hall, 19 May 2019; *Sexual offences of priests against children*, lecture and participation in the discussion towards the bill and accountability of sexual abuse in the Catholic Church. Conference at the Polish Parliament 20 May 2019; *Violation of Human Rights in the Law of 22 November 2013, on the Treatment of Persons with Mental Disorders Posing a Threat to the Life, Health or Sexual Freedom of Others (Journal of* Laws *2014, item 24 as amended)*, lecture and participation in a seminar organised at the Kraków Branch of the Institute of Law of the Polish Academy of Sciences, 30 May 2019; Timothy Garton Ash – *Elections and the Rule of Law*. Participation in the debate. Open Republic Foundation, Batory, Warsaw, 5 June 2019; *New Directions in Criminology*, participation in discussion, Polish Academy of Sciences, Warsaw; participation in the discussion – conference "Around the principle of mutual independence of autonomy of the Church and the State", WPiA UW Lipowa 4, Warsaw, 14 June 2019; Wrocław, 27 June 2019; *Presentation of the Draft Law and participation in the Discussion; on the Truth and Reparation Commission in cases related to violations of sexual freedom and morality by clergy,* Sejm of the Republic of Poland, 1 August 2019, Warsaw; *Contemporary challenges*

for the judiciary, Shadow Cabinet Panel. *Women*'s Congress, 20 September 2019, Warsaw; *Women's rights; Constitution and practice*, lecture and participation in a debate organised by Senator Barbara Borys Damięcka with the participation of Krystyna Janda, 3 October 2019, Warsaw; *Family – also human? How and whether the law respects family relations in detention*, lecture at the XII National Seminar of the series "Protective measures in psychiatry" entitled "Family – a protective measure in psychiatry in the family aspect", Department of Forensic Psychiatry and the Board of the Polish Psychiatric Association (PTP), 23 October 2019, Warsaw; *The child – selected issues – from the Constitution and the Convention on the Rights of the Child through family law to criminal law* at the conference "The subjectivity of the child in upbringing, education and the system of law", Płock, 18 November 2019; Participation in the debate at the Seminar on the problems of opinion and adjudication on the basis of the Act of 22 November 2013 on proceedings towards persons with mental disorders posing a threat to the life, health or sexual freedom of others, Office of the Ombudsman 23 November 2019, Warsaw; *The crime of bullying. Causes and consequences of the management of excesses*, lecture at the XI Lublin Criminal Seminar, "Bullying", WPiA UMCS 9 December 2019; *KeyNote Lecture, what is specific about Eastern European gender-based violence (GBV)?* At the Third International European Conference on Domestic Violence, 3 September 2019; ecdv-oslo.org. Oslo, Norway; *Law versus Justice. Crime and punishment, or appropriateness of punishment to crime. The relationship between the magnitude of crime and the severity of punishment*, Guest Lecture Etvos Lorenz University Budapest, Hungary, 5 October 2019; *Keynote Speaker lecture – Who's Afraid of Gender and Why? Gender Studies – the Path for Prospect* at the International Conference "Gender Studies and research 2019: Centenary Achievements and Perspectives", Gender Studies Centre Faculty of Communication Vilnius University Lithuania, 21-23 November 2019; *From words to action – how do we stop domestic violence in the European Union?* at the conference "Stop the backlash – stop domestic violence", The Federation of Mother and Child Homes and Shelters organized in cooperation with the Finnish Ministry of Social Affairs and Health and Women against violence Europe, Wave, conference connected to the Finnish EU Presidency 24-26 November 2019; *Violations of the law in the execution of protective measures in KOZZD Gostynin* at the conference on the functioning of KOZZD Gostynin, Senate of the Republic of Poland, 19 January 2021; *The struggle for Abortion Law in Poland,* Lund University 15 February 2021; Health Law Project Lund University; Faculty of Law.

Department of Criminal Procedure

The Head of the Department is Prof. dr hab. Maria Rogacka-Rzewnicka.

Staff have attended conferences and presented the following papers:

Prof. dr hab. Maria Rogacka-Rzewnicka – *Regulating the principles of incurring costs in selected legal systems of other countries* at the conference "Costs of the Criminal Process", Kraków, 8 March 2019, WPiA UJ; *On the lim-*

its of party autonomy in the framework of the implementation in criminal proceedings of the idea of participatory justice at the conference IX Congress of Chairs of Criminal Procedure "Quo vadit processus criminalis?", Łódź, 16-18 September 2019; WPiA UŁ; *The nature of disciplinary responsibility of students and employees of higher education institutions. Axiological and legal reflections* at the conference "Disciplinary responsibility of students new challenges – old problems", Warsaw, 9 May 2019, UW; *Instability of Criminal Law as a Factor of Penal Anti-culture Exemplified by Polish Criminal Procedure* at the conference "Changing Cultures in Criminal Law and Penal Policy in Europe", Warsaw, 21 May 2019, IPSiR UW.

Chair of European Law

The Chair is headed by Dr Anna Zawidzka-Łojek, Professor of the University.

Staff have attended conferences and presented the following papers:

Prof. Dr Maria M. Kenig-Witkowska – Moderator and participant in the panel "Towards the Global Pact for the Environment", European Parliament, 6 February 2019.

Prof. Dr Robert Grzeszczak – Introductory paper at the conference "Reparations from Germany after World War II in the light of the international law", Warsaw 30 January 2019, Leon Koźmiński Academy, Willi Brandt Centre UWr and KN European Law UW; *Development of the Polish science of European integration organisations* at the conference "Polish science of international law – legacy of the past, challenges of the present" Lublin, 8-10 May 2019; *Migration crisis and its repercussions on the state of the European Union*, European Open Lecture, Warsaw, 14 May 2019, European Commission Representation in Poland; *Regulation and policy in the European Union – what kind of Union is worth dreaming about and what kind of Union should be counted on?* At the conference "The rule of law and fundamental values in the legal order of the European Union", Gawrych Ruda, 30-31 May 2019, European Commission Representation in Poland, Department of Public International Law, Faculty of Law, University of Białystok, OIRP and ORA in Białystok and Themis Judges Association; *Hertie School* of *Governance – Intergovernmental bilateral relations* at the conference "Workshop Bilateral relationships among EU countries. New approaches and challenges", Berlin, 11-12 April 2019, *Good regulation and the principle of economic freedom in the case of European insurance law* at the 59th Anniversary of the Law Faculty conference, International Scientific Conference "Law and Multidisciplinarity", Niš (Serbia), 12-13 April 2019, Faculty of Law; *Scope of application of the CJEU judgment C-260/18 in the Dziubaks case*, expert debate on the judgment C-260/18 on 13 November 2019, Warsaw – Foksal Conference Centre; *Erosion of the division of power and a new legal order in the European Union* at the International Society of Public Law (ICON-S Conference 2019), Public Law in Times of Change, 1-3 July 2019, Santiago de Chile, Facultad de Derecho, Pontificia Universidad Católica de Chile; *Making sure European laws are fit for*

purpose – the better regulation principles in the European Union at the 6th International Scientific Conference Social Changes in the Global World, 5-6 September 2019, University of Shtip (North Macedonia).

Dr hab. Dobrochna Bach-Golecka, Professor of the University – *Reflections on the autonomy of canon law* at the conference "Around the principle of mutual independence and autonomy of the Church and the State", Warsaw, 14 June 2019. Department of Confessional Law, WPiA UW; *Current Challenges of Canon* Law at the conference within the series New Horizons of Law (3) entitled "Law in the international space", 11 April 2019, WPiA UW; *On the inadequacies of the EU human rights protection system* at the conference "In varietate concordia – challenges of the European law", Warsaw, 30 March 2019, KN European Law; *Origins of Life. Regulatory Challenges Related to the Protection of Pregnant Women* at the conference "Women in Law", 7 March 2019, Faculty of Law, University of Białystok; *Constitutional Foundations of European Integration. A Polish Perspective* at the conference "Problems of State Building and Human Rights Protection in Ukraine", Lviv, 7 February 2019, Faculty of Law, University of Lviv; *Good governance and the Brexit decision* at the conference "Looking Backwards: Looking Forwards. Anglo-Polish Legal Relations after Brexit. Conference in Memory of His Honour of George Dobry CBE QC (1918-2018)", 8 November 2019, British Law Centre at the UW Faculty of Law; *Alternative methods of dispute resolution in case of health damages. Recent developments in a comparative perspective* at the conference "Bringing Justice Closer to European Citizens", 25-26 October 2019, WPiA UG; *Human dignity and privacy within the European context of reproductive rights* at the conference "XXIX World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR) Dignity, Democracy, Diversity", 7-12 July 2019. Luzern; *On Women in Science*. Polish Regulatory Challenges at the "Women in Law" Conference, 10 March 2020, WPiA UwB; *Rights of Indigenous Peoples* at the Global South Conference, 21 February 2020, ISP PAN; *Recent developments of papal social thought on indigenous peoples at the* conference "Indigenous peoples: theory and practice", 25 September 2020, WPiA UW; *Economics in papal teaching from the encyclical "Rerum Novarum" to "Fratelli tutti"* (remote) at the conference "Church and State – on the 130th anniversary of the encyclical *Rerum novarum*", organised by the Department of Sociology of Law and the Circle of State and Law Sciences "Pro Patria", WPiA UW, 27 March 2021.

Dr Piotr Bogdanowicz, Professor of the University of Bristol – *Modification and Eventual Termination of Complex Public Contracts in EU law* at the conference "Contract Theory Workshop", University of Bristol, 20-21 June 2019; *Sharing Economy and Public Procurement To Collaborate, or not to Collaborate?* at the conference "Public Procurement: Global Revolution IX", University of Nottingham, 17-18 June 2019; *Dissemination of Good Practice in Public Procurement* at the conference "Professionalising Public Procurement", Kraków, 29 June 2020.

Dr hab. Magdalena Słok-Wódkowska – *The EU's regional trade agreements and the challenges of international electronic commerce* (together with Joanna Mazur, MA) at the conference "European Trade Study Group", Bern 12-14 September, University of Bern and World Trade Institute; *Data Altruism vs Data Protectionism in a Time of Crises: Searching for a Path for International Regulations for Open Government Data* (jointly with Joanna Mazur, MA, remotely) at the conference "10th Annual Conference of the Cambridge International Law Journal National Sovereignty and International Co-operation: The Challenges of Navigating Global Crises", Cambridge, 18-20 March 2021, University of Cambridge (Cambridge International Law Journal).

Chair of International Private and Commercial Law

The Chair is headed by Professor Dr Adam Opalski.

Staff have attended conferences and presented papers:

Prof. Dr Adam Opalski – *The Polish Simple Joint Stock Company* at the conference "13th European Company And Financial Law Review Symposium", Kraków, 27 September 2019; WPiA UJ.

Dr Mateusz Pilich – *Rule of law – an international law perspective* at the conference "The future of Europe based on the rule of law", Warsaw, 26 April 2019; Supreme Court of Justice.

Department of Public International Law

The Head of the Department is Dr Karol Karski, Professor of the University.

Staff have attended conferences and presented the following papers:

Dr Tomasz Kamiński – *Solidarity and the common good in the international law of the sea and the so-called "creeping jurisdiction" of coastal states* at the conference "Solidarity and the common good as values in law", Warsaw, 2 March 2019, WPiA UW; *Codification of the status of maritime bays within the UN in the light of the views of Professor Wojciech Góralczyk* at the conference "Polish science of international law – legacy of the past and challenges of the present", Lublin, 8-10 May 2019, WPPKiA KUL and WPiA UMCS; *How to eat the cake and have the cake. Some remarks on the readmission of migrants smuggled from Afghanistan* at the conference "International legal subjectivity and its contemporary aspects", organised in Warsaw by the ILA Polish Group, 10-11 October 2019; *Straight Baselines and Maritime Borders of State* at the conference "Days of Law 2019", Brno, Faculty of Law Masaryk University, 21-22 November 2019; *Is scanning allowed ? Non-intrusive means of inspection of the diplomatic bag in the light of international law* at the conference "Law and Multidisciplinarity", Niš (Serbia), 12-13 April 2019; Faculty of Law University of Niš; *Scanning as a non-intrusive means of inspection of the diplomatic bag in the light of international law* lecture 14 January 2021, Goce Delcev University in Stip, Faculty Of Law Stip, Republic of N. Macedonia.

Department of International Aviation and Space Law

The Head of the Department is Dr Katarzyna Myszona-Kostrzewa, Professor of the University.

Staff have attended conferences and presented the following papers:

Dr Katarzyna Myszona-Kostrzewa, Professor of the University – Polish Manfred Lachs Centre for Space Law – History and Challenges at the conference "Current Challenges of Space Law and International Security", Department of International Aviation and Space Law, WPiA UW, 15 November 2019.

Dr Aleksander Gubrynowicz – *The idea of solidarity and the common good in the light of "The Law of Nations ..." Emera de Vattel* at the conference "Solidarity and the Common Good as Values in Law", 1-4 March 2019, WPIA UW; *Feliks Leliwa-Słotwiński's views on public international law against the background of European internationalism of the 18th and 19th centuries* at the conference "Polish international law scholarship – the legacy of the past and the challenges of the present", 8-10 May 2019, Lublin, Chair of Public International Law of the Maria Curie-Skłodowska University and Chair of the International and American Law of the Catholic University of Lublin under the auspices of the Polish Group of the International Law Association (ILA); *Geopolitical changes at the turn of the 1980s and 1990s in the perspective of the WRL authorities and the Hungarian democratic opposition* at the conference "Disintegration of the Communist Bloc. Geopolitical Aspect", Regional Centre for International Debate in Kraków, Centre for Political Thought and IPN Branch in Kraków, 11 June 2019; *Between Western tradition and Soviet doctrine: Some remarks on the application of international law by the Hungarian People Courts* at the conference "The communist crimes: the individual and state responsibility", 9-10 November 2020, Institute of Justice, Warsaw.

In 2019-2021, the Faculty presented a rich teaching offer to students. There are more than 200 teaching units covering subjects from the 'C' group (specialisation lectures, conversation classes and seminars, foreign law schools and the Law Clinic). Our students can also undertake parallel studies within the framework of agreements signed by the WPiA with other faculties of the UW (Faculty of Management, Faculty of Economic Sciences, Faculty of Journalism and Political Science). Students also benefited from the MOST programme, under which they studied at the law faculties of other Polish universities.

The Faculty Council, at its meeting on 14 January 2019, adopted resolutions on the introdcution of new study programmes for the faculties: Full-time Law and Part-time Law, First Degree Administration and Second Degree Administration, as well as Financial Law and Treasury. In accordance with the requirements of the new Law on Higher Education and Science, separate study groups for full-time and part-time students were also introduced.

From the 2019/2020 academic year onwards, doctoral studies in the discipline of legal sciences are being moved to the School of Social Sciences as a result of

the activity aimed at establishing its own doctoral school in 2019. The Faculty secured a pool of 25 guaranteed places for doctoral students in the discipline of law. Recruitment to UW Doctoral Schools followed new rules. The dissertation project, the candidate's presentation and their previous scientific activity were essential. The Faculty's reservations were aroused by the too short deadline associated with the adoption of the new rules. The number of doctoral students of one supervisor was limited to five or, in individual cases (at the personal request of the supervisor), to six doctoral students. The first recruitment to the Doctoral School of Legal Studies was carried out in September 2019.

At its meeting on 18 February 2019, the Faculty Council adopted resolutions on the establishment of studies in the field of Administration of the first and second degree – full-time studies, as well as the adoption of programmes for these studies.

On 1 April 2019, an agreement was reached to integrate the UW's Centre for Local Self-Government and Local Development into the WPiA. Among other things, it became necessary to adopt the study rules that would apply to the students in the new faculty. The Faculty Council, at its meeting on 17 June 2019, adopted a resolution on the introduction of the study rules for the WPiA Local Government and Local Development Studies course.

The Faculty Council, at its meeting on 23 September 2019, adopted a resolution on the establishment of an additional training course for the candidates for the supervisory board members.

The Law Clinic continued to provide free legal assistance to people in need and at risk of discrimination during the 2019-2021 academic year. The work of male and female students in the clinic also provided them with an opportunity to gain practical skills in providing legal advice to clients and contributed to the development of the idea of *pro bono* work. During the academic years 2019-2021, a total of 1209 clients were admitted to the Clinic and a total of 416 students were involved in the work during this time. The most frequent cases carried out by students with which Clients came in oscillated around the topics of criminal law and proceedings, civil law, with particular emphasis on family and inheritance cases, labour law and social insurance, as well as administrative law and cases in the field of assistance to refugees and refugee women in Poland. The following sections were active at the Law Clinic during the aforementioned years: criminal law section – victims of violence and discrimination (coordinator: dr hab. Barbara Namysłowska-Gabrysiak - Head of the Clinic); labour law section (coordinator: dr hab. Małgorzata Barzycka-Banaszczyk); civil law section I (coordinator: dr hab. Zbigniew Banaszczyk); Civil Law Section II (coordinator: dr hab. Maria Boratyńska); Criminal Law Section – Temporary Detainees (coordinator: dr Piotr Kładoczny); Human Rights Section – Refugees (coordinator: dr Małgorzata Dziewanowska); Medical Law Section – Civil (coordinator: dr hab. Maria Boratyńska); the International Jurisprudence section (coordinator: Dr Barbara Namysłows-

ka-Gabrysiak); Medical Law – Criminal and Professional Liability section (coordinator: Dr Katarzyna Syroka-Marczewska); Criminal Law – Harm Reduction section (coordinator: Dr Piotr Kładoczny); the Administrative Law section (coordinators: Prof. Dr Jacek Jagielski and Dr Katarzyna Syroka-Marczewska) and the Criminal Law "Innocence" section (coordinator: Dr Piotr Kładoczny). In the 2018/2019 academic year, the UW Law Clinic started international cooperation in the form of developing a project to create, together with Clinics from Ukraine and in cooperation with the Foundation of University Legal Clinics, a school for teaching legal skills to university teachers. On 17-19 June 2019, a two-day training course was organised on the premises of the UW Law Clinic as part of the project "1st International School of Teaching Legal Skills" with Ukraine. On 14-15 October 2019, the UW Law Clinic together with the Helsinki Foundation for Human Rights organised a conference entitled "Amicus curiae: achievements, perspectives, challenges", the main aim of which was to promote the institution of *amicus curiae*, to present best practices on the application of the opinion of a friend of the court in proceedings at the national and international level, and to identify problems related to the use of this legal instrument. In the academic year 2020/2021, the Coordinator of the Human Rights section, Dr Małgorzata Dziewanowska, was awarded the main prize for her non-governmental activities in the Social Entrepreneur category, in a competition organised by the Faculty of Management of the UW. In March 2021, the coordinator of the criminal medical law section Dr Katarzyna Syroka-Marczewska conducted a workshop in English within the framework of the project of the University Legal Clinics Foundation on conducting training for a group of supervisors of developing law clinics in Montenegro, while Dr Barbara Namysłowska-Gabrysiak, within the framework of the project, conducted lectures and workshops in English on clinical teaching methodology for a group of supervisors of developing law clinics in Kosovo and Montenegro. On 28th June 2021, the clinic was ranked first in the annual ranking of student legal clinics. This was the sixth ranking of student legal clinics in Poland, within which the Law Clinic of the Faculty of Law of the University of Warsaw, as the only clinic in Poland, took the first place for the fourth time. This is thanks to all the people working at the Law Clinic of the WPiA UW. The 2022 National Conference on harm reduction organised by the UW Law Clinic in cooperation with the non-governmental organisation "Polish Network on Drug Policy" was held. As part of the activities at the UW Law Clinic, students also went on a number of foreign trips related to establishing cooperation with other law clinics, as well as on clinical study visits, e.g. the section on counteracting gender discrimination, together with its coordinator Dr Barbara Namysłowska-Gabrysiak, visited two law clinics in Berlin: the Humboldt University and the Freie University, and the human rights section of Dr Małgorzata Dziewanowska, visited Montenegro. The criminal law sections coordinated by Dr Piotr Kładoczny – Temporary Detainees, Harm Reduction and "Innocence" also conducted trial observations, including in

Warsaw, Kraków, Łódź, Słupsk and Ostrowiec Świętokrzyski. The students of the "Innocence" section, under the leadership of the coordinator Dr Piotr Kładoczny, created a legal opinion for the Supreme Court supporting a cassation in a drug trafficking case. Employees of the UW Law Clinic published articles and a number of other scientific studies on the issue of clinical education of students and the system of free legal counselling in Poland, including the article "The role of law clinics in educating future female lawyers on the issue of counteracting gender discrimination" by Dr Barbara Namysłowska-Gabrysiak published in the journal "Clinic", the publication of Dr Piotr Kładoczny entitled "The role of law clinics in educating future female lawyers on the issue of counteracting gender discrimination". "Evaluating slander evidence in judicial practice", contained in the item "The institution of a small crown witness – practice, controversies, challenges" edited by Michał Hara and Marcin Mrowicki, and the publication by Dr Małgorzata Barzycka-Banaszczyk. "Student disciplinary tort. Grounds and prerequisites for liability" published in Legal Education in 2021. Since 2019, every year, the Law Clinic of the WPiA UW has been awarded 1st place in the national ranking of University Legal Clinics. The work of the UW Law Clinic's secretariat was managed, as in previous years, by Ms Elżbieta Pawlak, while Ms Monika Dubielecka was the secretary.

A number of new research and teaching centres were also established at the Faculty during the period described.

The Centre for Research on the Legal Aspects of Blockchain Technology was established by the Faculty Council at its meeting on 14 January 2019. Dr Sławomir Żółtek was appointed as the Head of the Centre. The objective of the Centre is the analysis of legal issues concerning the so-called distributed ledger technology (DLT). The scope of research includes regulatory (STO/ICO, digital currencies, distributed ledgers in public administration – official documents, notarial deeds, registers), civil (smart contracts), international (jurisdiction in the case of Internet ventures, e.g. in the case of the creation of financial instruments without actual issuance), and legal (in the case of the creation of financial instruments without actual issuers), criminal law (criminal liability for e.g. an illegal public offering), etc. The founders of the Centre are Dr Sławomir Tadeusz Żółtek (Head of the Centre), Prof. Marcin Wiącek of the University of Warsaw and attorney Michał Dymiński.

The Centre for Canon Law was established at the same Faculty Council meeting. Dr Dobrochna Bach-Golecka was appointed as the Head of the Centre. The establishment of the Centre was connected with the existing scientific activities concerning canon law (scientific conferences) and didactic activities (classes on canon law in English). It aims to intensify these activities by, among other things, offering classes in canon law in Polish as a way to enhance their legal education.

The Faculty Council, at its meeting on 23 September 2019, adopted a resolution on the establishment of the Inter-Institutional Centre for Digital Technology

Law and Entrepreneurship, as well as a positive opinion on the appointment of Dr Cezary Banasiński as the Head of the Centre and Prof. Adam Bosiacki as the Deputy Head.

At its meeting on 1 June 2020, the Faculty Council adopted a resolution to establish the Faculty "Centre for International and European Labour Law Studies" under the direction of Dr Beryl ter Haar.

The Medical Law and Biotechnology Laboratory at the former Institute of Civil Law was transformed into the Centre for Medical Law and Biotechnology at the Faculty of Law, University of Warsaw. The head of the Centre is Prof. Dr Leszek Bosek, UW.

The Faculty Council, at its meeting on 21 June 2021, adopted a resolution on the establishment of an Interdisciplinary Medical and Pharmaceutical Criminal Law Laboratory.

The COVID-19 outbreak forced changes in didactics. On 23 March 2020, the Minister of Education issued a decree on specific solutions during the period of temporary restrictions on the operation of units of the educational system in connection with the prevention, counteraction and eradication of COVID-19, according to which didactics at the UW, including the Faculty, went into the remote mode. Classes were conducted via Google Meet and Zoom platforms. The Act of 16 April 2020 on special support instruments in connection with the spread of the SARS-CoV-2 virus introduced the possibility of conducting examinations remotely. By decision of the Rector, examinations in the summer session 2020 were conducted remotely – oral examinations via Google Meets, written examinations via the Campus platform. It was also made possible to conduct defences of master's and doctoral thesis remotely. In May 2020, the Vice-Dean of Student Affairs appointed a Remote Examination Coordinator in the person of Dr Michał Szwast. Heads of the departments appointed people within their units who were responsible for conducting remote examinations. The coordinator was in direct contact with them on all examination-related issues. Analogous rules applied in the winter semester 2020/2021.

The following students have received many accolades and awards.

Ms Aleksandra Chudaś, MISH student and fifth-year law student, seminarian of UW Prof. Dr Grzeszczak, was recognised in 2019 by *Forbes* magazine as one of the 25 outstanding Poles under 25 in the 'social activity' category.

The Scholarship of the Minister of Science and Higher Education for students and doctoral students for outstanding achievements for the academic year 2018/2019 was awarded to: a seminarian of Prof. UW Dr Katarzyna Myszony-Kostrzewa – Ms Zuzanna Buszmann and a seminarian of Prof. UW Dr Robert Grzeszczak – Ms Agnieszka Warsewicz, in addition to: Zofia Andryskowska, Barbara Krzyżewska, Dominik Łukowiak, Mariusz Olczykowski, Dominika Sarek, Paweł Słup, Aleksandra Tychmańska, Weronika Wojturska, Aleksandra

Wójcik and 4 additional persons who did not agree to make their names public in the event of receiving the scholarship or who did not attach an appropriate statement to the application.

Mr Filip Lubiński, a law student from the MISH College, was awarded 2nd place in the 2019 Meta-Economic Essay Competition organised by the Polish Economic Institute for his essay "The Role of the State and Law in Adam Smith's System", prepared under the supervision of Dr Krzysztof Kaleta.

Grzegorz Szymborski, MA student of Dr Piotr Pomianowski, was admitted to the College of Europe in Natolin.

Ms Anita Kucharska'smaster's thesis entitled "Consumer Protection in the Economy of Cooperation in European Union Law", written under the supervision of Professor Robert Grzeszczak in the Department of European Law, won the First Prize in the competition of the President of the Office of Competition and Consumer Protection for the best master's thesis on consumer protection in 2019.

Mr Jakub Emil Sadurski's master's thesis entitled "Vertical restrictions imposed on online sales in selective distribution systems", written under the supervision of Professor Robert Grzeszczak in the Department of European Law, won the First Prize in the competition of the President of the Office of Competition and Consumer Protection for the best master's thesis on competition protection in 2019.

Fifth-year seminarians under Prof. UW Dr Robert Grzeszczak – Mr Piotr Krajewski and Mr Hubert Bekisz – were successfully recruited for a prestigious study course – the one-year European Legal Studies programme at the College of Europe in Bruges.

The Department's students won the third place in the 25th edition of the Central and Eastern European Moot Competition (2-5 May 2019), organised by Juris Angliae Scientia in collaboration with the Court of Justice of the European Union and the University of Cambridge in Luxembourg at the Court of Justice of the European Union. The team from the WPiA UW was composed of: Hubert Bekisz (5th year), Julia Jeleńska (3rd year), Krzysztof Poplawski, Ewa Rodzik (both 4th year), and the team coaches were: Will Odogwu (BLC) and Patryk Polek (participant in last year's CEEMC). The award for the best speaker in the entire competition went to Ms Julia Jeleńska. 16 universities participated in the competition.

Faculty student team: Krzysztof Ślaski and Paweł Góra won the M. Sczaniecki History and Law Olympiad. In 2019, our Faculty organised the finals for 10 Polish universities.

Student Jan Krajewski – President of the Board of the Student Government of the WPiA UW was awarded a full scholarship by the Chinese partner to participate in the School in Chinese Political and Legal Culture programme at Shanghai University in 2019. The scholarship also included seminars in the courts and public administration bodies of the People's Republic of China.

Student Mateusz Winczura was awarded a scholarship from the Minister of Science and Higher Education for outstanding achievements in the 2018/2019 academic year as a result of a reconsideration of his application.

Dr Magdalena Zmysłowska's thesis entitled "Resignation from the status of a listed company and protection of the interests of minority shareholders", supervised by Prof. Aleksander Chłopecki, was selected by the Competition Jury as the best doctoral thesis on the capital market, winning the Prize of the President of the Management Board of the Warsaw Stock Exchange.

Mariusz Kacperkiewicz, MSc, won the first place in the 2nd Edition of the 2019 Competition of the President of the Public Procurement Office for the best master's thesis on public procurement. The thesis was supervised by Professor Dr Adam Brzozowski.

Bartłomiej Ślemp, MA – a graduate of the Faculty of Law and Administration of the University of Warsaw and the author of the master's thesis entitled "The institution of corrective and equalisation payments to local government units in the light of the jurisprudence of the Constitutional Tribunal", prepared under the scientific supervision of dr hab. Marcin Wiącek, prof. UW, was among the laureates of the competition for the best master's thesis, organised by the Supreme Administrative Court in 2019.

The project called "School of Eagles", under the leadership of Professor of the University dr hab. Sławomir Żółtek, received funding from the Minister of Science and Higher Education in the amount of PLN 1.7 million in 2020. The aim of the project was to create an educational pathway for exceptionally talented students, winners of national and international subject olympiads, as well as the best students on the basis of results obtained in the first year of studies, through the implementation of high-quality academic education based on the tutoring system.

Scholarships of the Minister of Science and Higher Education for 2020 were awarded to the following WPIA students: Barabas Martyna, Gorazdowski Maciej, Grześkowiak Maciej, Hau Maksymilian, Jeleńska Julia Anna, Kapica Kamil, Krajewski Jan, Ossowska Magdalena, Skwarcan Maria, Sławiński Ariel, Wisławska Aleksandra, and Wojturska Weronika.

Ms Agata Miętek's doctoral thesis entitled "Freedom of contract and its limitations in shaping the content of the employment relationship" was awarded the third place, while Ms Marta Kozak-Maśnicka's master's thesis entitled "Employment through online platforms and applications on the example of Uber" was awarded the first place in the 21st Competition of the Institute of Labour and Social Affairs for the best master's and doctoral theses in the field of labour problems and social policy in 2020. The supervisor of both theses was Prof. UW Dr Łukasz Pisarczyk.

Ms Monica de Silva's master's thesis entitled "How Does Law Protect Religion in War? International Protection of Freedom of Religion in Armed Conflicts", prepared under the supervision of Dr Wojciech Brzozowski, was awarded

the first place in the 31st Competition of the Minister of Foreign Affairs for the best master's thesis in contemporary international relations (one of the thematic areas of the competition is human rights) in 2020.

Ms Karolina Wierzbicka's, MA thesis entitled "The impact of European Union law on Polish anti-smoking and anti-alcohol regulations" was awarded second place in the XI competition of the Europe Direct-Bydgoszcz European Information Point, the Robert Schuman European Centre and the Higher School of Economics for the best BA and MA thesis on contemporary international relations of the European Union in 2020. The thesis was supervised by Dr Dobrochna Bach-Golecka.

Jakub Orkisz, MSc, for his master's thesis entitled "Establishing and conducting business on the territory of Poland and China by foreign entities", prepared under the supervision of Professor of the University dr hab. Konrad Osajda, received a prize awarded in 2020 in a competition organised by the Polish-Chinese Business Council to cover the costs of a one-year stay and studies at a selected university in China.

In 2020, Marta Powolny's master's thesis entitled "Antitrust proceedings in the jurisprudence of the European Court of Human Rights", written under the supervision of Prof. Dr Marek Zubik, won the 1st prize in the competition of the President of the Office of Competition and Consumer Protection for the best master's thesis on competition protection.

In 2020, Mr Adrian Żur received the 2nd prize in the competition of the President of the Office of Competition and Consumer Protection for the best master's thesis on consumer protection, for the thesis entitled "Tracking consumer activity on the Internet in the light of European Union law", written under the supervision of Professor of the University dr hab. Robert Grzeszczak.

Mr Mikołaj Kowalczyk, a fifth-year seminarian with Prof. Dr Robert Grzeszczak, was accepted to the prestigious European Interdisciplinary Studies Programme at the College of Europe in Bruges in 2020 and was awarded a full scholarship by the Polish Ministry of Foreign Affairs.

The Chapter of the third edition of the competition for the 2020 Prize of the President of the General Prosecutor's Office of the Republic of Poland awarded the first prize to Ms Paulina Zaborowska for her thesis entitled "Objection from a default judgment in civil proceedings" under the supervision of Dr hab. Piotr Rylski in the Department of Civil Procedure. The second prize in the competition was awarded to Ms Monika Ziarno, author of the thesis entitled "Fragmentation of claims in civil proceedings" under the supervision of Prof. Dr Karol Weitz at the Department of Civil Procedure. The third prize was awarded by the Chapter to Ms Magdalena Hilt for her thesis entitled "Prima facie evidence in civil proceedings" under the supervision of Prof. Dr Tadeusz Zembrzuski at the Chair of Civil Procedure. In addition, the Chapter distinguished two participants in the competition: Mr Paweł Słup for his thesis entitled "Abuse of a company form in the context of

the institutions of legal abuse" under the supervision of Dr hab. Konrad Osajda in the Department of Commercial Law, and Mr Łukasz Pawłowski, author of the thesis entitled "Due diligence in the context of the institution of abuse of rights. Due diligence in liability for damages – the problem of fault or illegality?" under the supervision of Dr Zbigniew Banaszczyk in the Department of Civil Law.

In the Commercial Law Review Competition for 2020 for the best master's thesis in the field of commercial law, a distinction was awarded to Ms Katarzyna Zarzycka, MA, for her thesis entitled "Corporate governance through the eyes of Warren Buffett" written at the Department of Commercial Law under the supervision of Prof. Dr Michał Romanowski.

Written under the supervision of Prof. UW Dr Wojciech Brzozowski, Monika de Silva's master's thesis entitled "How Does Law Protect Religion in War? International Protection of Freedom of Religion in Armed Conflicts" was awarded the 2nd prize in the MA thesis category in the XXII edition of the Prof. Remigiusz Bierzanek Competition for 2020.

The award of the Minister of Development, Labour and Technology for 2020 went to Michał Nita for his Master's thesis "Protection of a reputable trademark in Chinese and Polish law – a comparative analysis".

The WPiA UW team composed of: Kaja Stelmaszewska, Olga Szkodzińska and Agnieszka Wójcik won the 1st place in the All-European International Humanitarian and Refugee Law Moot Court Competition (5th Edition, 2020) organised by the Faculty of Law of the University of Ljubljana in cooperation with, among others, the International Committee of the Red Cross. This was the first time that the 1st place in this international competition was awarded to a team from Poland. In the finals, the team from the Faculty of Law of UW defeated the team from the University of Ljubljana.

The 6th edition of the National Moot Court competition from Commercial Arbitration in 2020 was won by a team from our department "*Alea Iacta Est*" consisting of Jan Wojciechowski, Bartosz Gazda, Michał Pituła and Sebastian Juszczak.

The team of the WPiA UW, consisting of: Agnieszka Wójcik, Jakub Karasiewicz, Katarzyna Soszyńska and Michał Malicki, won the first place in the International Moot Court Competition in labour law – "The Hugo Sinzheimer Moot Court Competition 2020 – online edition". Mr Michal Malicki won the individual prize for the best speech in the competition.

Ms Weronika Wojturska's master's thesis entitled "Application of outsourcing in cloud computing technology in the light of the domestic insurance market – written under the supervision of Professor of the University dr hab. Paweł Wajda, was awarded first place in the competition for the best master's thesis organised in 2020 by Mentor S.A.

Ms Weronika Wojturska's master's thesis entitled "Application of outsourcing in cloud computing technology in the light of the domestic insurance market",

written under the supervision of Prof. Dr Paweł Wajda took the third place in the competition for the best master's thesis or doctoral thesis in 2020 organised by Polskie Wydawnictwo Ekonomiczne S.A. in Warsaw and the editors of the *Przegląd Ustawodawstwa Gospodarczego* monthly.

Ms Weronika Wojturska was the only UW representative to receive a laurel at the 8th Pro Juvenes Student Environment Awards Gala in the category of Outstanding Student Scientist organised by the Student Parliament of the Republic of Poland in 2020.

Thirteen students from the UW's Faculty of Arts and Sciences were awarded a scholarship from the Minister of Science and Higher Education for outstanding achievements for the 2020/2021 academic year.

Mr Michał Nita's thesis entitled "Protection of a reputable trademark in Chinese and Polish law – a comparative analysis" won the 2nd place in the 5th edition of the thesis competition in the field of economic cooperation between the Republic of Poland and the People's Republic of China, organised by the Polish-Chinese Business Council in 2021.

In the 32nd edition of the Competition of the Minister of Foreign Affairs for the best master's thesis on contemporary international relations in 2021, five graduate students of the Faculty of Law and Administration of the University of Warsaw were distinguished. The 1st place was awarded to Mr Maciej Grześkowiak for his thesis entitled "Selected legal aspects of the return of refugees from Syria to their homeland". The second place was awarded *ex aequo* to Ms Justyna Danilo for her thesis entitled "The views of the European Court of Human Rights on religious symbols and clothing in the public space" and to Mr Jakub Lompart for his thesis entitled "Disarmament and non-proliferation of nuclear weapons in the light of public international law". Distinctions were awarded to Mr Maciej Gorazdowski for his thesis entitled "The standard of protection of free elections in the jurisprudence of the European Court of Human Rights" and Mr Emil Śliwiński for his thesis entitled "Criminal liability in the jurisprudence of the European Court of Human Rights and the Constitutional Court".

In 2021, Ms Maja Kubit (Master's student of Prof. M. Kenig-Witkowska) was awarded 2nd prize in the Women in Law Foundation – Law with Technology competition, for her Master's thesis entitled "The development of artificial intelligence in the light of European Union law – contemporary dilemmas and challenges for EU legislation".

Ms Anna Czuchryta's Master's thesis entitled "The standard of proof in European Union competition law", written under the supervision of Prof. Dr Robert Grzeszczak in the Department of European Law, won the first prize in the competition of the President of the Office of Competition and Consumer Protection for the best master's thesis on competition protection (for 2020).

Mr Paweł Milewski's master's thesis entitled "Participants in proceedings for the abolition of co-ownership" defended under the supervision of Dr Piotr Rylski

received a distinction in the fourth edition of the 2021 competition for the award of the President of the General Prosecutor's Office of the Republic of Poland for the best master's thesis in the field of Judicial Law in memory of Stanisław Bukowiecki. Ms Weronika Wojturska's thesis ("Application of cloud computing outsourcing in the light of the domestic insurance market") also received a distinction.

The team of WPiA UW students, consisting of: Monika Walczak, Ola Kochman, Krzysztof Walczyk, Sam Shannon (team coach: Dr Agnieszka Zwolińska) won the finals of the Hugo Sinzheimer Moot Court Competition in European Labour Law. Mr Krzysztof Walczyk and Sam Shannon were recognised as the best speakers of the entire competition.

The Ministry of Education and Science, as part of the "Best of the Best 4.0" competition in 2021, awarded Ms Małgorzata Biszczanik (supervisor: Dr Aleksander Grebieniow) a grant of PLN 11,000 for a project entitled "*Leges sine morbius vanae*, or how Roman law influenced the shaping of the modern right to court", and Ms Ewa Tokarewicz, Mr Karol Piwoński and Mr Jan Bałdyga (supervisor: Dr Rafał Morek) a grant of PLN 62,000 for a project entitled "Competition in International Investment Arbitration – Foreign Direct Investment International Arbitration Moot 2021".

Mr Borys Tencer, from Prof. Robert Grzeszczak's MSc seminar, was selected as a research assistant in the prestigious international Horizon2020 project in 2021. The project entitled "Developing Participatory Spaces using a Multi-stage, Multi-level, Multi-mode, Multilingual, Dynamic Deliberative Approach" was coordinated by the University of Siena.

In the XXIII edition of the Competition for the best master's thesis in the field of commercial law, organised in 2021 by the Editorial Board and publisher of the monthly magazine "Przegląd Prawa Handlowego" – Wolters Kluwer Polska Sp. z o.o. – the first prize was awarded to Mr Maciej Magnowski (for his thesis "Representations and warranties in share sale agreements governed by Polish law"), and a distinction was awarded to Mr Filip Lisak (for his thesis "Commodity derivatives in the European and Polish legal order").

In the 2021 competition of the Patent Office, the first distinction of the Minister of Education and Science was awarded to Ms Paulina Perkowska, MA, for her master's thesis entitled "Copyright protection of a musical work in the light of the development of artificial intelligence in the light of European Union law" (supervisor: Prof. Dr Robert Grzeszczak).

In the 2021 competition of the Patent Office, the 2nd prize of the Minister of Culture and National Heritage was awarded to Klaudia Kinastowska, MA, for her Master's thesis "Legal and copyright challenges concerning digital works with particular reference to the issue of exhaustion of rights" (supervisor: Prof. Dr Krystyna Szczepanowska-Kozłowska).

Ms Agnieszka Wójcik's master's thesis entitled "Security detention of civilians in non-international armed conflicts in the views of the European Court of

Human Rights" (under the supervision of Professor of the University dr hab. Marcin Wiąck) received the third degree award in the 2021 Competition of the Minister of Foreign Affairs for the best master's thesis.

In the XXIII edition of the Institute of Labour and Social Policy's competition for the best doctoral and master's theses for 2021 in the field of labour and social policy, distinctions were awarded to MA theses by Agata Grochowska, MA ("The sharing economy and economically dependent self-employment in Spanish and EU law", supervisor: Dr Dobrochna Bach Golecka), and Monika Walczak, MA ("The European Social Charter – analysis and prospects for ratification of its revised version in the Polish legal system", supervisor: Prof. Marcin Wiącek, DSc student).

Faculty students were active in the scientific field at university level. Law students were elected by student organisations to the Consultative Council for the Student Academic Movement at the Rector of the UW. The tasks of this Council include the awarding of grants from the budget for the implementation of the tasks of the University's student organisations and University's doctoral student organisations operating at the UW. In 2019, the Faculty was represented on the Council by students Emil Ratowski and Hubert Taładaj. In the following 2020 term, the following students sat on the Council on behalf of the Faculty: Emil Ratowski, Hubert Taładaj, Kamil Słomiński and Krzysztof Jaworski. In 2021, the following Faculty students were elected to the Consultative Council: Krzysztof Jaworski, Hubert Taladaj and Kamil Słomiński.

The Students' Council of the Faculty of Law was very active in representing the interests of the students to the Faculty authorities, and was very active in the work on the reform of the study programme. Social and cultural activities were carried out, and every year the student government organised an 'orientation day', a St Nicholas' party, a 'blood donation day' and a 'Law Student Santa Claus' event. Fund-raisers to help the people in need were also organised, including those being part of the Great Orchestra of Christmas Charity.

For the 2019/2020 term, the composition of the WPiA UW Student Government was: Gabriela Niedziałkowska – Chairperson, Szymon Piotrowski – Vice-Chairperson, Tomasz Kozłowski – Financial Officer, Emilia Banaś – Chairperson of the Promotion and Practices Committee, Magdalena Matysiak – Chairperson of the Culture Committee, Martyna Szczuko – Chairperson of the Practices Committee, Krzysztof Worek – Chairperson of the Didactics Committee.

During the 2020/2021 term, the main positions in the WPiA UW Student Government were held by: Paweł Przybysz – Chairperson, Maria Najfeld – Vice-Chairperson, Grzegorz Szymański – Financial Officer, Natalia Grębowiec – Chairperson of the Promotion and Practices Committee, Mateusz Laskowski – Chairperson of the Culture Committee, Kamila Siatka – Chairperson of the Practices Committee, Tadeusz Pyzel – Chairman of the Committee on Teaching.

The Closing Ceremony of the 2018/2019 Academic Year was held on 1 July 2019.

The inauguration of the new academic year 2019/2020 at UW's WPiA took place on 24 September 2019.

The inauguration of the 2020/2021 AcademicYear at the UW's WPiA took place on 2 October 2020.

In the 2019/2020 academic year, 102 graduates received diplomas with distinction from the Faculty of Law. In the 2020/2021 academic year, the number of diplomas with honours in the Faculty of Law was 121, while the 2021/2022 academic year saw 143 graduates with honours in the Faculty of Law.