OPOLSKIE STUDIA ADMINISTRACYJNO-PRAWNE

THE OPOLE STUDIES IN ADMINISTRATION AND LAW

Kwartalnik ● Quarterly **Grudzień ● December 2020**

18

Zeszyt ● Issue 4

UNIWERSYTET OPOLSKI ● UNIVERSITY OF OPOLE

ISSN 1731-8297 **https://czasopisma.uni.opole.pl/index.php/osap** **e-ISSN 6969-9696**

SCIENTIFIC BOARD / RADA NAUKOWA
Andrzej Bator (University of Wrocław / Poland)
Silvestre Bello Rodríguez (Universidad de las Palmas de Gran Canaria / Canary Islands)
Maria del Carmen Lázaro Guillamón (Universitat "Jaume I" Castellón de la Plana / Spain)
Daniel Cole (Indiana University Bloomington / USA)
Elena Fasoli (University of Trento / Italy)
Stanisław Hoc (University of Opole / Poland)
Lothar Knopp (Brandenburg University of Technology Cottbus-Senftenberg / Germany)
Wojciech Kowalski (University of Silesia in Katowice / Poland)
Luc Lawrysen (Ghent University, President of the Constitutional Court / Belgium)
Michaela Moravčíková (Trnava University in Trnava / Slovakia)
Vasilica Negrut (Danubius University of Galati / Romania)
Ioana Nicolae (Transilvania University of Brasov / Romania)
Noriko Okubo (Osaka University / Japan)
Tomasz Sokołowski (Adam Mickiewicz University in Poznań / Poland)
Budislav Vukas (University of Rijeka / Croatia)
Jerzy Zajadło (University of Gdańsk / Poland)
José Luis Zamora Manzano (Universidad de las Palmas de Gran Canaria / Canary Islands)

REVIEWERS OF THE ARTICLES INCLUDED IN VOLUME 18, ISSUES 1–4 /
RECENZENCI ARTYKUŁÓW WYDANYCH W TOMIE XVIII, Z. 1–4
Tomasz Bojar-Fijałkowski, *Katažyna Bogdzevič*, *Przemysław Dąbrowski*, *Zbigniew Filipiak*, *Dorota Fleszer*, *Ondřej Frinta*, *Dita Frintová*, *Izabela Gawłowicz*, *Stefan Marek Grochalski*, *Anna Haładyj*, *Jakub Kępiński*, *Anna Muszyńska*, *Marcin Niemczyk*, *Salvatore Puliatti*, *Irena Rajchinovska Pandeva*, *Oana Şaramet*, *Piotr Stec*, *Dorota Sylwestrzak*, *Juraj Vačok*, *Agata Ziółkowska*

EDITOR-IN-CHIEF / REDAKTOR NACZELNY
Włodzimierz Kaczorowski

THEMATIC EDITORS / REDAKTORZY TEMATYCZNI
Stefan Marek Grochalski – European law
Ewa Kozerska – state and law studies
Agnieszka Skóra; *Anna Haładyj*; *Jerzy Jendrośka* – public law
Piotr Stec; *Alicja Jagielska Burduk* – private law

MANGING EDITOR / REDAKTOR PROWADZĄCY
Marta Woźniak

SECRETARY / SEKRETARZ REDAKCJI
Marta Woźniak
Katarzyna Biczysko-Pudełko

ADDRES OF THE EDITORIAL BOARD / ADRES REDAKCJI
Instytut Nauk Prawnych
Uniwersytet Opolski
ul. Katowicka 87a, 45-060 Opole
e-mail: redakcja.osap@gmail.com

Declaration concerning the original version
The Editorial Board declare that the original (referential) version of the Journal is available in the paper form.

https://czasopisma.uni.opole.pl/index.php/osap/studia.php

SPIS TREŚCI

ARTYKUŁY

GLOSY

KRONIKA

CONTENTS

ARTICLES

GLOSSES

CHRONICLE

Articles

Volume 18, Issue 4
December 2020

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2020-11-07
accepted 2020-12-23

Liability within the scope of Cloud Computing services

Odpowiedzialność w zakresie usług Cloud Computing

KATARZYNA CHAŁUBIŃSKA-JENTKIEWICZ
Chief of Department of Cybersecurity Law and New Technologies Law,
Law Institute, War Studies University,
Director of Academic Center for Cybersecurity Policy The law advisor
ORCID: 0000-0003-0188-5704, k.jentkiewicz@akademia.mil.pl

Citation: Chałubińska-Jentkiewicz, Katarzyna. 2020. Liability within the scope of Cloud Computing services. *Opolskie Studia Administracyjno-Prawne* 18(4): 09–22. DOI: 10.25167/osap.3427

Abstract: The issue of acquiring large amounts of data and creating large sets of digital data, and then processing and analyzing them (Big Data) for the needs of generating artificial intelligence (AI) solutions is one of the key challenges to the development of economy and national security. Data have become a resource that will determine the power and geopolitical and geoeconomic position of countries and regions in the 21st century.[1]

The layout of data storage and processing in distributed databases has changed in recent years. Since the appearance of hosting services in the range of ICT services, we are talking about a new type of ASP (Applications Service Providers) – provision of the ICT networks as part of an application). Cloud Computing is therefore one of the versions of the ASP services. The ASP guarantees the customer access to a dedicated application running on a server. Cloud Computing, on the other hand, gives the opportunity to use the resources of a shared infrastructure for many users simultaneously (Murphy n.d.). The use of the CC model is more effective in many aspects. Cloud Computing offers the opportunity to use three basic services: data storage in the cloud (cloud storage), applications in the cloud (cloud applications) and computing in the cloud (compute cloud). Website hosting

[1] This article has been prepared as a result of cooperation at the realization of the research project entitled "The Polish cybersecurity system - a model of legal solutions" The Agreement MON No. GB/4/2018/208/2018/DA] granted by Ministry of National Defence.

and electronic mail are still the most frequently chosen services in Cloud Computing. The article attempts to explain the responsibility for content stored in the Cloud Computing.

Keywords: data protection, personal data, digital content, digital heritage, intellectual property, new technology

Abstrakt: Kwestia pozyskiwania dużych ilości danych i tworzenia dużych zbiorów danych cyfrowych, a następnie ich przetwarzania i analizowania (Big Data) na potrzeby generowania rozwiązań sztucznej inteligencji (AI) jest jednym z kluczowych wyzwań dla rozwoju gospodarczego, ale także dla zapewnienia bezpieczeństwa narodowego. Dane stały się zasobem, który będzie decydował o miejscu oraz pozycji geopolitycznej i geoekonomicznej państw XXI wieku.

Zasady przechowywania i przetwarzania danych w ich rozproszonych bazach zmieniły się w ostatnich latach, a od czasu pojawienia się usług hostingowych w zakresie usług teleinformatycznych mówimy o nowym typie usług ASP (Applications Service Providers), które obejmują udostępnianie sieci teleinformatycznych w ramach aplikacji. Cloud Computing stanowi jedną z wersji usług ASP, która gwarantuje klientowi dostęp do dedykowanej aplikacji działającej na serwerze. Cloud Computing z kolei daje możliwość korzystania z zasobów wspólnej infrastruktury wielu użytkownikom jednocześnie. Zastosowanie modelu CC staje się coraz bardziej efektywne pod wieloma względami. Cloud Computing umożliwia korzystanie z trzech podstawowych usług: przechowywania danych w chmurze, tworzenia aplikacji w chmurze oraz przetwarzania w chmurze (chmura obliczeniowa). Hosting stron internetowych i poczta elektroniczna to nadal najczęściej wybierane usługi w ramach Cloud Computing. W artykule podjęto próbę wyjaśnienia reguł odpowiedzialności za treści przechowywane w chmurze obliczeniowej, przyjmując za kluczowe ustalenie zarówno cech podmiotów świadczących usługę, jak i charakter gromadzonych w niej treści.

Słowa kluczowe: ochrona danych, dane osobowe, treści cyfrowe, dziedzictwo cyfrowe, własność intelektualna, nowa technologia

1. Introduction

The European Commission perceives the role of data sharing and the benefits of AI development in one of its documents, on the basis of which it can develop an artificial intelligence ecosystem that provides the benefits of this technology to the entire European society and economy: "As digital technology becomes an ever more central part of every aspect of people's lives, people should be able to trust it. Trustworthiness is also a prerequisite for its uptake. This is a chance for Europe, given its strong attachment to values and the rule of law as well as its proven capacity to build safe, reliable and sophisticated products and services from aeronautics to energy, automotive and medical equipment" (European Commission 2020). To this end, the Parliament and the Council of the EU have published Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on the Framework for the Free Flow of Non-Personal Data in the European Union.

This Regulation applies to data processing in the broadest sense, encompassing the usage of all types of IT systems, whether located on the premises of the user or outsourced to a service provider. It should cover data processing of different levels of intensity, from data storage (Infrastructure-as-a-Service (IaaS)) to processing of data on platforms (Platform-as-a-Service (PaaS)) or in applications (Software-as-a-Service (SaaS)). Under these conditions, the issue of liability for cloud-based data storage is of particular importance.

2. Analysis

The first services of this type were launched by Amazon – one of the largest e-commerce companies in the world. The CC model cannot be treated as a new type of service, because many solutions used in its area are taken from the already existing ones. However, this model has many characteristic elements that make it unique in comparison to other similar services. These features include: outsourcing, i.e. one of the management strategies, multi-tenancy, sharing resources among many recipients at the same time. R. Marchini indicates that an important multi-tenancy operation is the use of the same copy of the software, run by many users at the same time (Marchini 2010: 8). The problem of multiple-tenancy is very important when constructing contracts. The supplier, due to the multitude of recipients and their dispersion, is forced to unify their pattern as much as possible so that it meets the needs of all the users, while meeting economic and business expectations. Contract templates are often inflexible and usually do not provide for exceptions in the case of individual users. Therefore, a customer who decides to sign such a contract must face certain restrictions. It is then an accession rather than a commission agreement. Another feature is scalability. According to J. Rosenberg and A. Mateos (2011: 36), scalability is "about the cloud platform being able to handle an increased load of users working on a cloud application." The entity using Cloud Computing does not have to report additional demand for resources, as they will be allocated automatically. Another very important term associated with this feature is flexibility. J. Rosenberg and A. Matos mention one more element, that is the main technological factor of cloud computing – virtualization. It is a technology that allows applications to run on many operating systems, running on the same specific physical server at the same time. It allows one to use the full computing power and server resources. It also allows one to quickly create operational systems ready for work in the virtual space. Although this model is mainly used in commercial enterprises, its potential has also been noticed by state authorities and international institutions. To countries, using the solutions offered by the CC model gives the opportunity to not only develop digital business of the state, but can also significantly reduce the costs associated with communication and information technologies (European Commission 2012: 2).

The European Commission, in the document issued in 2012, *Unleashing the Potential of Cloud Computing in Europe*, estimates that harmonization of the digital market based on operating in a public cloud model would increase the GDP by Euro 250 million in 2020. However, it can only be done with the assumption of well-functioning strategies enabling the CC model to operate. The lack of operation in this area implies an increase by only Euro 88 million. The difference is therefore substantial. In addition, it is estimated that the development of this field would create nearly 2.5 million new jobs (European Commission 2012: 7). Apart from the obvious benefits resulting from the development of cloud computing, this process also raises many doubts resulting, for example, from a very high dynamics of change, which involves, among others, the need to adjust legal solutions. Since the provision of services in this model is carried out on an outsourcing basis, this means that the entities involved in the supply chain (data controller, processing, sub-processing) are in most cases subject to other legal regulations regarding, e.g. data protection or have their headquarters in different jurisdictions (Skibińska-Mamzer 2013: 2). Given the pace of CC development in 2012, the Working Group on Data Protection in Telecommunications (Berlin Group) has created a document called the Sopot Memorandum on the processing of data in the cloud. It identified the most important issues that may involve the following examples of risk in the process of Cloud Computing development: continuous technology development; lack of standardized international terminology; huge number of data collected in the clouds; global scope of data processing; cross border and unlimited range of technology; lack of transparency regarding the practices of the service provider, processes and procedures, including whether the service providers entrust subcontractors with any processing and, if so, on what terms; lack of transparency regarding suppliers which causes difficulties in proper risk assessment; too much emphasis on economic issues related to data processing, which may consequently lower their standards (International Working Group on Data Protection in Telecommunications 2012: 2).

The conditions presented above may carry many undesirable actions, such as: committing acts that violate the provisions and principles of data protection and privacy, data may fall under the jurisdiction that does not provide them with a sufficient degree of protection, the administrator may not notice breaches of confidentiality and data security, the administrator may lose control of the data, the possibility of blurring responsibility in the long supply chain (International Working Group on Data Protection in Telecommunications 2012: 3). In the Sopot Memorandum, its authors give recommendations which, in their opinion, may contribute to minimizing the risks arising from the use of services in the Cloud Computing model. These include, among others: care for maintaining high standards of data protection stored and processed in the cloud;

commitment of data controllers to assess the impact on privacy protection and threat assessment, before taking activities in the CC space, standardization of data protection technologies; undertaking efforts for third-party testing and certification; continuous monitoring and assessment of the adequacy of the existing legal framework, which allows data to be transferred across borders and includes protection of the data in the CC model (International Working Group on Data Protection in Telecommunications 2012: 3). At CC, the service provider is not able to provide the user with guarantees regarding the place of data storage. This is due to the fact that the servers on which the data are stored are extensively distributed (Marciniak 2009: 1).

The Cloud Computing model is considered the next stage in the evolution of service delivery methods. It cannot be said that this is a new type of service, because it has developed on the already existing processes and infrastructure. It is often referred to as ISP 5.0 (Internet Service Provider; ISACA 2011: 17). In the CC services, the data controller is of key importance in the context of liability for the stored data. It seems that in the course of data processing this is it that plays the greatest role and has the greatest responsibility. Although it is possible to entrust data to another entity under a contract for processing, this fact does not exclude the controller's liability. If the situation is unclear from a legal point of view, the controller may even incur criminal liability. It is crucial to state that the controller "is responsible for data processing." According to the position set out in Opinion 1/2010 of the Article 29 of the Working Group "the first and foremost role of the concept of controller is to determine who shall be responsible for compliance with data protection rules, and how data subjects can exercise the rights in practice. In other words: to allocate responsibility" (Article 29 Working Party 2012: 7). An entity that processes data completely according to the instructions cannot be considered a controller. It follows that the main criterion in recognizing an entity as a controller will be here independence while making decisions regarding the purposes and means of data processing (Barta, Fajgielski, and Markiewicz 2011: 24). At this point, the question arises whether, based on the principles of personal data protection, the service provider can be recognized as a controller at the same time, or is it only a data processor? Is a CC user such a controller? Answering these questions is extremely important because not only the issue of obligations, but also the responsibilities of the processor depend on it (Article 29 Working Party 2006).

The analysis of the tasks of individual entities participating in the activities of CC, implies that it should be assumed that it is the client – the CC user – that meets almost all the prerequisites for recognizing it as the controller, because it has the power to make decisions regarding the purpose of processing its data. In this case, the supplier will act as the processor. There are situations in which the processing entity, i.e. ISP CC, determines what kind of data it

will process, as well as the principles and methods of data processing. In such a situation, should it still be referred to as the data processor or already the data controller? This problem was raised by the Working Group (GR) Article 29 in Opinion 10/2006 on the processing of personal data by the Society for Worldwide Interbank Financial Telecommunication (SWIFT). Similarly to ISP CC, this entity deals with information exchange and brokerage in transactions between banks, brokerage houses and other financial institutions (Wikipedia n.d.).

Theoretically, it only deals with the processing of data on behalf of service providers. Despite this, SWIFT also sets the standards and rules for this processing itself (Article 29 Working Party 2010). Recognition of each supplier as a controller could significantly limit their field of activity (Marchini 2010: 47). Therefore, although in the Opinion 1/2006, the issue of the controller and the related responsibility is quite broadly discussed, it does not give unequivocal suggestions on how to distinguish the controller from the data processor in the case of services provided in the virtual space. This problem is clarified by a slightly different opinion GR No. 1/2010. According to it, the definition of the "purpose" of processing is sufficient to regard an entity as the controller. However, it may transfer the 'method' of processing in technical and organizational matters to another entity, and this will not change its status of the data controller (Article 29 Working Party 2010). Because determining elementary issues regarding compliance of the processing with the legal provisions also belongs to the data controller (Article 29 Working Party 2010). In practice, in the Cloud Computing, especially in the SaaS model, the customer manages its data and is primarily responsible for all decision-making processes. The decision on the security issues or server locations, however, rests on the ISP CC, which in consequence would allow it to be considered the data controller. It is extremely difficult to clearly define the data controller and the data processor. That is why it is so important for all parties which contract for cloud services to become acquainted with the exact scope of activities of individual entities in relation to the transmitted data. In the case of Cloud Computing services, there can be no unequivocal position that the service provider is a data processor and taking into account the dynamics of changes within cloud services, it would be necessary to create clear rules that would not leave ambiguities and room for abuse.

Since the spread of broadband Internet and wireless connections IT professionals have faced new challenges related to copyright protection. Until now, almost at every level of providing services and products, their authors have had the opportunity to control the recipients. Book authors, music creators and programmers have encountered copyright infringement, but the Internet has significantly intensified this practice. With the dynamic development of the network, in which the number of users is constantly growing, its control is

almost impossible. Problems related to copyright apply to cloud computing on many levels. A very important issue is primarily one related to the conclusion of contracts between the service provider and the recipient. This requires clear rules ensuring that there is no room for any kind of abuse. It will also be very important to consider the issue of providing access to computer programs located in the Cloud Computing space. The same will apply to applications. They clearly require establishing rules for their use, but it should be done in a different way than traditional licensing. The SaaS model, i.e. software as a service, raises the biggest controversy in this respect. Lawyers argue whether the use of software located in the cloud results in concluding a license or whether concluding a license is necessary at all (Góra 2013: 1).

An important problem related to Cloud Computing is storage of data, the number of which is huge and is still increasing, due to the growing popularity of services offered in this model. In recent years we have been witnessing dynamic popularization of social networking sites. Some of them, like Facebook together with Instagram belonging to it, provide the user with the possibility of sharing and storing photos. However, a significant number of users do not realize that the photos become the property of the service provider, which often leads to violation of rights, including personal rights.

In the scope of copyright, the choice of the applicable law and jurisdiction appears to be relevant when using cloud computing. The CC model solution providers have their headquarters in different parts of the world. Most of them are situated in the USA, China and India (Mejssner 2011: 1). This is tantamount to being subject to the jurisdiction of these particular states. Most contracts for the provision of such a type of services include a clause concerning the choice of law. To Polish users it means the need to use the services of foreign entities, and thus, conclude cross-border contracts. This is extremely important because in the event of any contentious issues, the costs of international litigations are enormous. Due to the fact that the largest disputes in this matter are pending in connection with the licensing of these services, Cloud Computing service providers use various tools in their service provision, inter alia, tools that are based on open source licenses. It is a free software element whose main purpose is to allow free access to software to all its users (http://evolpe.pl/open-source). Open source software offers fewer opportunities for abuse of any kind other than the one in which the source code is non-public. Undesirable effects may include the situation when a person who knows a concealed code can use software to track or obtain data. In addition to a publicly available source code, an open source software is also characterized by such elements as: freedom to create derivative works, freedom of re-distribution, non-discrimination of individual users or groups, and free distribution of licenses. In the case of software where the source code is publicly available, the license should include a reservation

that the source code is not allowed to be modified, because such activity would result in blocking its open use.

According to J. Barta, P. Fajgielski and R. Markiewicz, an open source license is "a collective category covering various forms of contracts for computer programs, characterized by making the program available also in the source version (next to a 'machine' version), combined with the authorization to make modifications to the software and its further distribution under this license" (Barta, Figielski and Markiewicz 2011: 234). Therefore, the basic element of this type of license is "obliging the user to provide modification of the program (…) under the same conditions as specified in the license he/she has used (the so-called copyleft software)" (Traple 2010: 295). Sometimes a copyleft is also called a viral elect because a user who adds his intellectual contribution into a given program cannot license it based on traditional rules (Machała 2007: 33). In order to protect the license based on *an open source*, in 1985, thanks to Richard Stallman, Free Software Foundation (FSF) was established. It is this foundation that, at the time of rapid development of Cloud Computing services, introduced a new type of license GNU Afferro GPL (AGPL), created to prevent any acts restricting freedom on the Internet or aimed at collecting too much information about the users. This type of license assumes that if the user uses a program or application placed on the server, he/she must have access to the source code.[2] Apart from that, copyleft assumes that "anyone who distributes this type of software must at the same time transfer the right to its further distribution and modification" (Chałubińska-Jentkiewicz and Karpiuk 2015: 225).

In the article "Data Privacy in the Cloud: Dozen Myths and Facts", Lotar Datermann discusses 12 most popular myths related to data security in the cloud. However, the risk of cloud computing continues to exist and becomes a challenge to data security and privacy policies. The danger is even associated with the fact that the customer's location is often very distant from the location where the servers on which the data are stored are located. This often raises the problem of determining the place of processing the entrusted personal data. On the one hand, the data controller is at risk of losing control over the data, yet on the other one – there is a risk of transferring the data to a third country (Pudo 2015: 1). In the context of the global reach of Cloud Computing services, appropriate legal solutions should be found to help define jurisdiction clearly. The customer is not aware who and to what extent has access to his/her data. Thus, they expose themselves to the risk of poor data access management or simply to a hacker's attack (Muszyński 2012: 1). There are situations where the Cloud Computing model service providers do not delete mass or operational memory after disconnecting with the user (Muszyński 2012: 1). Another problem

[2] License available at: http://www.gnu.org/licenses/agpl.html [accessed: 20.04.2020].

is also an adequate level of data security in terms of privacy and confidentiality. Part of the data is stored in an open form, which increases the risk of it falling into an unwanted possession (Muszyński 2012: 1).

R. Marchini, in his study, gives suppliers several solutions which, in his opinion, will minimize the risk of adverse events and their security effects. First of all, providers' priority should be to maintain an appropriate level of internal and external security. The latter mainly concerns such aspects as: server and network security, data storage method, their encryption and issues related to backup copy (data backup created in the event of loss or damage) (Marchini 2010: 4, 24–25). This also relates to one of the largest cloud service providers, that is Google. In 2012, the company issued the "Privacy Policy" document which deals with many questions related to data and information security. Although the document issued by Google is quite extensive, many IT professionals and market research analysts indicate that there is a lack of transparency in many places of it. This includes the use of the users' data between different services or the acquisition of the users' phone numbers by logging into Google using Android (Stowarzyszenie Bibliotekarzy Polskich 2012).

Another example of a service provider is Facebook. It should be emphasized that in the last few years Facebook's privacy and security policy has been criticized by both users and other public cloud service providers. LinkedIn, like Facebook, is a social networking site which provides services in the Cloud Computing model. On its official website, as in the examples described earlier, we can find information on data security. Unlike Facebook, LinkedIn addresses the issue of its users' data security extensively. Such records constitute a kind of safeguard, which, however, is often perceived by users as the avoidance of the suppliers' liability for security breaches. In the security policy available on the official Google website, we can find information that "Google can be used in a variety of ways, e.g. for searching and sharing information, communicating with other people or creating new content. Thanks to the information obtained from users (e.g. when creating a Google account), we improve these services – we display more relevant search results and more relevant ads, we facilitate contacts with friends and offer faster and simpler ways of sharing content" (Google: 2018). The collection of information occurs in a twofold manner: directly from the user and when using the services offered by Google (e.g., watching YouTube videos). In the second case, data collection is independent of the user who is unaware of this process. The data that Google obtains in this way including location of the user, gives information about the equipment it uses, IP address or information about the mobile network and phone number (Google: 2018). According to the EU experts, Google also violates some of the findings of the "Safe Harbor" program regarding the exchange of personal data between the European Union and the United States and treats them very se-

lectively. It is primarily about the aforementioned use of non-precise concepts, listing only selected confidential data or guaranteeing users the right to access data. Similar accusations were made towards Facebook when in 2014 it turned out that its privacy policy was changing. According to its creators, these were changes of only minor importance. However, they allow collecting even more data on its users. The first change is the introduction of the "Friends nearby" service, which will allow the user to download a signal from mobile devices and provide friends with the information of the user's location. Another is the "Buy" service, which allows the user to buy the advertised product without logging out of Facebook. The company reserves the right to collect location and transaction data. In addition, the website will collect information on the visited websites and used applications more accurately, aiming at adapting the offer as close as possible to our needs.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data contained restrictions on the transfer of data intended for the prevention of control over them by natural persons. It should be noted that, in accordance with the provisions of the Directive, data transfers between Member States should be free and uninterrupted.

Similarly, 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) emphasizes that "the economic and social integration resulting from the functioning of the internal market has led to a substantial increase in cross-border flows of personal data. The exchange of personal data between public and private actors, including natural persons, associations and undertakings across the Union has increased. National authorities in the Member States are being called upon by Union law to cooperate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State".

The situation is different when the entity to which we are sending data is based outside the EU. In the transfer of data outside the European Union, it is very important that many countries, including the United States, do not have an adequate level of protection. This situation required creation of legal regulations that would allow trade between market participants in the US and the EU. In order not to complicate trade relations, the European Commission and the US Department of Commerce created the already mentioned Safe Harbor Privacy Principles, which it is also called the Safe Harbor Principles (Generalny Inspektor Ochrony Danych Osobowych n.d.). The main assumption of the Safe Harbor is to enable the processing of data from the European Union to enti-

ties from the United States. The SLA provisions relating to maintaining the appropriate level of services are extremely important in cloud service contracts. These principles create a certain framework that determines the actual scope of services offered by it, they oblige it to maintain appropriate standards and the level of services it provides, and to make every effort to ensure that it does not change (Marchini 2010: 110). The elementary issues regarding the level of services provided, according to Marchini, should relate to: availability of the service, time of resolving problems, time of responding to inquiries, speed of delivery of resources requested by the customer (Marchini 2010: 114-115).

A very important part of the SLA that should be included in Cloud Computing contracts is to define the extent of a third party participation in the process of service provision and to clearly define their responsibilities. Under the Polish law, this issue is referred to in Article 738 Para 1 of the Civil Code, which states that the contractor of the order may entrust the execution of the order to a third party only if it results from the contract or from a custom, or when the existing circumstances force him/her to do so. In such an event, he/she is obliged to immediately notify the principal about the person and place of residence of his/her deputy and in the event of notification he/she is only responsible for the lack of due diligence in the selection of the deputy. The deputy is responsible for the execution of the order also to the principal. If the contractor of the order is liable for the activities of his/her deputy as for his/her own, their liability is joint and several.

According to the provisions of this article, subcontractors may be selected by the service recipient. This, however, may only occur with the consent of the customer (service recipient). Cloud Computing services often encounter this type of situation. This is due to the fact that as an outsourcing service it involves many subcontractors. If contractors fail to fulfil their obligations, service providers will do everything to demonstrate that they have made every effort to ensure that the service is provided at an appropriate level; however they are not able to control all subcontractors. Therefore, one has to take into account the risk of side effects, e.g. interruptions in the provision of Internet services, program errors, or unreliability of servers. These situations, although not common, result in consequences for several, and sometimes even several million users. In order to protect themselves from liability for such incidents, the recipients of the services, in the contracts they prepare, contain clauses that provide for the exclusion or limitation of their liability in the event of damage caused by system errors. For example, Google included in the regulations regarding the conditions of use of their services that "in no event shall Google, its suppliers or distributors be liable for any loss or damage which cannot be foreseen by reasonable measures" (Google: 2015). Possible damage concerns the mass number of users and not a single customer.

In the Polish law, this situation is permitted by Article 353 Para 1 of the Civil Code. It is also common for the service providers to determine the amount for damages below which they do not bear liability. In addition to the liability for damage presented above, an important issue is also related to the limitation of liability regarding damage caused by inappropriate data processing.

3. Conclusion

It is worth noting that in cloud systems there are not only data provided by the customer, but also data resulting from the use of the cloud. The boundary between customer data and machine data is thus blurred. The data is on the servers of the company which processes it on the basis of a contract with specific clients and is also its own resource. Cloud companies will defend themselves against the transfer of aggregated data, claiming that they are "not their data, but customers' or users'." In relation to the so-called own data "that it is our data because we incurred the costs of their production" and it is difficult to refuse them. It is not possible to limit processing to only one country.

Therefore, we can deal here with personal and non-personal data and – consequently – the question arises which of these data should, for example, be protected by Regulation (EU) 2016/679? Each type of data may be subject to other legal contractual regulations, as well as those resulting from generally applicable laws. It seems possible to create flexible legal solutions based on acts for safe entrustment of data in the model of "fiduciary management", but with a clear system of sanctions for breaking the rules.

Bibliography

Article 29 Working Party. 2006. *Opinion 10/2006 on the Processing of Personal Data by the Society for Worldwide Interbank Financial Telecommunication (SWIFT)*. https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2006/wp128_en.pdf [accessed: 30.04.2020].

Article 29 Working Party. 2010. *Opinion 1/2010 on the Concepts of "Controller" and "Processor"*. https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp169_en.pdf [accessed: 30.04.2020].

Article 29 Working Party. 2012. *Opinion 05/2012 on Cloud Computing*. https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2012/wp196_en.pdf [accessed: 30.04.2020].

Barta, Janusz, Paweł Fajgielski, and Ryszard Markiewicz. 2011. *Ochrona danych osobowych. Komentarz* 5th ed. Warszawa: Wolters Kluwer Polska.

Chałubińska-Jentkiewicz, Katarzyna, and Mirosław Karpiuk. 2015. *Prawo nowych technologii: wybrane zagadnienia*. Warszawa: Wolters Kluwer.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, OJ L 281, 23.11.1995, p. 31.

European Commission. 2012. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Unleashing the Potential of Cloud Computing in Europe"*, COM(2012) 529 final.

European Commission. 2020. *White Paper on Artificial Intelligence – A European Approach to Excellence and Trust*, COM(2020) 65 final.

Generalny Inspektor Ochrony Danych Osobowych. n.d. *Co to jest safe harbor?*. http://www.giodo.gov.pl/317/id_art/1500/j/pl/ [accessed: 19.05.2015].

Google. 2015. *Terms of Service*. http://www.google.com/intl/pl/policies/terms/ [accessed: 25.05.2015].

Google. 2018. *Privacy Policy*. http://www.google.com/intl/pl/policies/privacy [accessed: 12.12.2018].

Góra, Jarek. 2013. *Technologie mobilne – wybrane aspekty praktyczne i prawne – część 2 IP Blog*. http://www.ipblog.pl/2013/02/technologie-mobilne-wybrane-aspekty-praktyczne-i-prawne-czesc-2/#more-1632 [accessed: 12.12.2018].

International Working Group on Data Protection in Telecommunications. 2012. *Working Paper on Cloud Computing. Privacy and Data Protection Issues – "Sopot Memorandum"*.

ISACA. 2011. *IT Control Objectives for Cloud Computing: Controls and Assurance in the Cloud*. Rolling Meadows, IL: ISACA.

Machała, Wojciech. 2007. *Licencja mieszana? Prawnoautorskie aspekty obrotu programami komputerowymi stworzonymi z wykorzystaniem oprogramowania o otwartym kodzie*. Zeszyty Naukowe UJ 1: 28–37.

Marchini, Renzo. 2010. *Cloud Computing. A Practical Introduction to the Legal Issues*. London: BSI.

Marciniak, Marcin. 2009. *Bliższe niż chmura*. http://www.computerworld.pl/artykuly/350736_4/Blizsze.niz.chmura.html [accessed: 13.02.2015].

Mejssner, Barbara. 2011. *Cloud computing: prawo w chmurze nieskuteczne. Rzeczpospolita*. https://www.rp.pl/artykul/724643-Cloud-computing--prawo-w-chmurze-nieskuteczne.html [accessed: 30.04.2020].

Murphy, Lincoln. n.d. *ASP vs SaaS – What's the Difference?*. http://sixteenventures.com/difference-between-asp-and-saas [accessed: 5.11.2018].

Muszyński, Józef. 2012. *Bezpieczeństwo w chmurze*. http://www.computerworld.pl/news/376996_2/Bezpieczenstwo.w.chmurze.html [accessed: 11.05.2015].

Pudo, Bartosz. 2015. *Ochrona danych osobowych a cloud computing*. http://mojafirma.infor.pl/mala-firma/pracownik-i-zus/707750,Ochrona-danych-osobowych-a-cloudcomputing.html [accessed: 11.05.2015].

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), OJ L 119, 4.05.2016, p. 1–88.

Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a Framework for the Free Flow of Non-Personal Data in the European Union, OJ L 303, 28.11.2018, p. 59–68.

Rosenberg, Jothy, and Arthur Mateos. 2011. *The Cloud at Your Service. The When, How, and Why of Enterprise Cloud Computing*. Greenwich: Manning.

Skibińska-Mamzer, Ilona. 2013. *Bezpieczeństwo informacji w cloud computingu – aspekty prawne*. http://www.twojbiznes24.pl/artykuly,10218,17176,bezpieczenstw o-informacji-w-cloud-computingu-aspekty-prawne,strona,2 [accessed: 2.01.2016].

Stowarzyszenie Bibliotekarzy Polskich. 2012. *Czy polityka prywatności Google jest zgodna z prawem UE?*. http://www.sbp.pl/artykul/?cid=6458&prev=540 [accessed: 13.12.2015].

Traple, Elżbieta. 2010. *Umowy o eksploatację utworów w prawie polskim*. Warszawa: Wydawnictwo Oficyna.

Wikipedia. n.d. *Society for Worldwide Interbank Financial Telecommunication*. https://en.wikipedia.org/wiki/Society_for_Worldwide_Interbank_Financial_Telecommunication [accessed: 18.05.2015].

Volume 18, Issue 4
December 2020

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2020-12-21
accepted 2021-01-22

Restriction of public subjective rights to use the environment and freedom of economic activity – concessions and permits

Ograniczenia publicznych praw podmiotowych do korzystania ze środowiska i wolności działalności gospodarczej – koncesje i zezwolenia

EWA KATARZYNA CZECH

Dr. habil., Associate Professor UwB, Faculty of Law, University of Bialystok;
ORCID: 0000-0001-5421-4053, e.czech@uwb.edu.pl

Citation: Czech, Katarzyna, Ewa. 2020. Restriction of public subjective rights to use the environment and freedom of economic activity – concessions and permits**,** *Opolskie Studia Administracyjno-Prawne* 18(4): 23–34. DOI: 10.25167/osap.3428

Abstract: Public subjective rights, as all rights and freedoms set out in the Polish legal order can, in principle, be restricted. Freedom of economic activity is a public subjective right regulated by the standards of the Constitution. In turn, the public subjective right to use the environment was regulated by the provisions of Article 4 of the Environmental Protection Law. In such a legal environment, concessions and permits treated as a restriction of public subjective right of constitutional rank can at the same time be limitations to the public subjective rights provided for in the relevant statutes. It should be noted that the less strategic the sphere of life of the state and citizens is, the gentler the form of restriction. It should be borne in mind, however, that the strategic importance of the state's or citizens' activity cannot be determined in isolation from the state's obligation to protect the environment. This may also be applied to other legal goods, including the environment. However, special care is required in application with reference to the latter. Concessions and permits affect the enjoyment of public subjective right to the environment, both by entities engaged in a business activity and those affected by the said activity. This impact may differ and depends on whether a given permit or concession is granted or refused. However, both granting or refusing to grant them will result in restrictions of public subjective rights to use the environment.

Keywords: public subjective rights to the environment, freedom of economic activity, environment, concessions, permits

Abstrakt: Publiczne prawa podmiotowe, tak jak, co do zasady, wszystkie prawa i wolności określone w przepisach polskiego porządku prawnego, doznają ograniczeń. Wolność działalności gospodarczej jest publicznym prawem podmiotowym uregulowanym normami Konstytucji. Z kolei publiczne prawo podmiotowe do korzystania ze środowiska zostało unormowane przepisami art. 4 ustawy Prawo ochrony środowiska. Taki stan prawny nie powoduje, że koncesje i zezwolenia traktowane jako ograniczenia publicznego prawa podmiotowego rangi konstytucyjnej nie mogą być jednocześnie ograniczeniami publicznego prawa podmiotowego uregulowanego w ustawie zwykłej. Zauważyć należy, że forma ograniczenia jest tym bardziej łagodna im mniej strategicznej sfery życia państwa i obywateli dotyczy. Należy mieć jednak na uwadze, że owa strategiczność dziedzin działalności państwa czy obywateli nie może być określana w oderwaniu od obowiązku ochrony środowiska, będącej zadaniem państwa. Wskazana prawidłowość może być stosowana także w odniesieniu do innych dóbr prawnych, w tym środowiska. W zakresie tego ostatniego dobra prawnego wymagana jest jednak szczególna ostrożność w jej stosowaniu. Koncesje i zezwolenia wpływają na realizacje publicznego prawa podmiotowego do środowiska, zarówno podmiotów prowadzących działalność gospodarczą, jak i podmiotów pozostających w obszarze odziaływania tej działalności. Wpływ ten może być przy tym różny i zależy od udzielenia danego zezwolenia czy koncesji, czy też od odmowy ich przyznania. Zarówno jednak ich przyznanie, jak i odmowa ich przyznania będą wywoływały ograniczenia publicznych praw podmiotowych do korzystania ze środowiska.

Słowa kluczowe: publiczne prawa podmiotowe do środowiska, wolność działalności gospodarczej, środowisko, koncesje, zezwolenia

Introduction

In principle, public subjective rights, as all rights and freedoms set out in the Polish legal order, can be restricted. It is well established in the legal science that the rights and freedoms subject to the regulation of constitutional norms (constitutional laws) are public subjective rights because of their structure as well as the content. It is further argued that constitutional rights are public subjective rights which have been defined by norms of positive law of constitutional rank. These norms justify the rights by defining their content, limits, and legal protection (Wróbel 2010: 332).

The constitutional legislator determined the premises for limitation of the constitutional rights and freedoms primarily in the norms of Article 31 of the Polish Constitution. Whether such premises are present determines the limits of these rights. Following Para 3 of this article, restrictions on exercising constitutional freedoms and rights may be established only by way of a statute and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morality, or freedoms and rights of other persons. At the same time, in accordance with

the will of the constitutional legislator, these restrictions must not violate the essence of these freedoms and rights. It should also be emphasized that such a situation ought to be treated as a limitation of a given right if, by means of internal regulations functioning in a given unit, additional requirements are introduced, e.g. opinions of the unit's internal bodies, which are not provided for by the regulations contained in the acts, and which are established in these internal regulations as an additional premise for the realization of a given right. Cases where law of constitutional rank is limited in this way should be regarded as contrary to Article 31, Para 3 of the Polish Constitution, mentioned above. Introduction of the requirement for realization of a given right in a manner contrary to the binding legal order, by way of an act which has a lower rank than the statue, amounts to the limitation of that right. It should be assumed that each additional positive premise conditioning the functioning of a given right must be treated as its limitation because had it not existed, exercising of a given right would not have to be preceded by its occurrence. The adoption of the opposite interpretation could lead to situations where additional requirements introduced by an act inferior to a statute would make the enjoyment of the right depend on the occurrence of the premise or even preclude an entity from exercising it, for instance, when a public body refuses to issue a positive decision, justifying it with the opinions of, e.g., other authorities which, under applicable statutes, are not required. Therefore, it should be recognized that each restriction of constitutional rights and freedoms requires that two positive and one negative premises should occur jointly. The positive premises are the introduction of a restriction only by way of a statute and the presence of at least one of the following circumstances, i.e. when it is necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or freedoms and rights of others. The negative condition, the existence of which outlaws the limitations of constitutional rights and freedoms, is that these restrictions may not violate the essence of the freedoms and rights. Undoubtedly, the definition of premises for the restriction of public subjective rights must be considered within the framework of a given public subjective right. In the case of freedom of economic activity, the analysis must also include the wording of Article 22 of the Constitution. According to it, the restriction of this freedom can only take place by way of a statute and only because of an important public interest. In the academia, it is indicated that in the case of this freedom, Article 31, Para 3 of the Constitution should be treated as a particularization of Article 22 of the Polish Constitution (Garlicki and Zubik 2016: Art. 22 Lex electronic edition). The operation of thus defined premises has required the intervention of the court and the Constitutional Tribunal.

At the same time, it should be noted that while the freedom of economic activity is a public subjective right regulated by the constitutional norms, the

public subjective right to use the environment was regulated by the provisions of Article 4 of the Environmental Protection Law. The norms of the Basic Law refer to the environment as a legal good, e.g., in the provisions of its Article 74. However, the norms of the Constitution do not set out this public right *expressis verbis*. Nor can it be undisputedly construed as a reflection of the duties of public authorities specified therein (cf. Czech). In such a legal environment, concessions and permits treated as a restriction of public subjective right of the constitutional rank, can simultaneously be limitations to the public subjective rights provided for in the relevant statutes.

1. Permits and concessions as restrictions on public subjective rights to use the environment and freedom of economic activity

In the legal science, imposing requirements of obtaining various administrative permits is considered to be a limitation to the general individual right to freedom from non-statutory interference by the executive, which is understood as a public subjective right. This freedom may be restricted by the imposition of both preventive and repressive prohibitions, consistent with the principles of a democratic state and the rule of law (Kijowski 2000: 64). This view allows for the following reflection. It should be stressed that the form of limitation of such a freedom must result from the relevant provisions of the law in force at least of the statutory rank and can only be applied if the hypothesis of a specific legal norm, in which a specific limitation, e.g. taking the form of a permit, has been defined, is fulfilled. Only such a restriction can be deemed to have been made in accordance with the principles of a democratic state governed and the rule of law. A significant point is that imposing requirements for administrative permits is an expression of non-statutory interference by the executive. It is expressed in the fact that, as a result of a specific decision of a public administration body, there will be a restriction of a given constitutional freedom, which is a public subjective right. This will be the case, for example, if a decision refusing to grant a given permit is issued in violation of the law in which a given public subjective right is defined. The adoption of the non-statutory character of the above-mentioned executive interference does not exempt it from the need to take into account the provisions of the statutory rank, for example, as regards the premises for granting or refusing a given permit. Moreover, due to the existence of statutory delegations, on the basis of which regulations are issued, the provisions of executive acts will be taken into account in the process of issuing specific decisions.

It is also pointed out that the mere introduction of the institution of administrative permission into the Polish legal order takes place in a variety of ways and using various nomenclature, including names. The following phrases

are used for this purpose: 'permit' (641 cases recorded in internal legal acts published in the *Journal of Laws*), 'permission'. (82 cases), 'consent' (315 cases), 'concession' (44), 'license' (29), and occasionally 'entitlement' (95), 'authorization', 'approval', 'acceptance', 'grading', 'reconciliation', and even 'registration' or 'registering'. It is also legitimately argued that none of these names can be attributed a single characteristic that distinguishes it from all the other ones. At the same time, it is stressed that, to a limited extent, this observation applies to acts called 'concessions', because they are usually issued under a single statute. Still, this is only a formal feature and does not apply to all acts bearing this name in positive law. The justification for the separation of a 'concession' is, on the other hand, more closely related to the statutory requirements that justify a decision to refuse it. However, since these are very different reasons, it is difficult to consider this characteristic as material rather than formal and procedural. (Kijowski 2000: 64). Seeing the accuracy of the outlined position, one should certainly bear in mind the dispute of the existing material and legal distinctions between permits and concessions. It can be observed in cases where we are dealing with the affiliation of a business activity to the state and a transfer by means of a concession of the right to exercise it to private entities (cf. Kosikowski 2002: 224; Waligórski 1988: 98). Nevertheless, permits do not involve such an activity. They indeed are a limitation of public subjective rights, such as the public subjective right to use the environment. Their role varies, depending on the type that is subject to analysis. The use and exercise of public subjective rights in practice depends at least on a number of implied concepts used to determine the premises for granting permits.

In order to illustrate this, it is necessary to refer to concessions and permits seen as limitations to public subjective rights to use the environment and freedom of economic activity. Their analysis is justified by the fact that these restrictions have a simultaneous impact on all the above-mentioned public subjective rights. These restrictions concern numerous rights, i.e. not only the freedom of economic activity, but also public subjective rights to use the environment.

In the legal science, it is reasonable to distinguish between business activities requiring the consent of the state or a local government unit. It is understood as an activity prohibited by a statute. The consent is granted on the basis of the provisions of the Business Activity Law (currently the Law of Entrepreneurs), by granting a permit or concession. The author further indicates that it is permissible to regulate areas of human activity of a complex nature, which are particularly important for the public interest, by means of a concession, which must be clearly defined in the Business Activity Law (currently the Law of Entrepreneurs). In turn, the permit is reserved by the Legislator for small-scale undertakings (Jakimowicz 2002: 306-307).

1.1. Concessions as restrictions on public subjective rights to use the environment and freedom of economic activity

In turn, the norms of the Act of 6 March 2018 on The Law of Entrepreneurs (hereinafter referred to as the LE), indicate that performance of a business activity in areas of particular importance for the security of the state or citizens, or other important public interest, requires obtaining a concession only if the activity cannot be performed as a free activity or after obtaining an entry in the register of regulated activity or a permit (Article 37, Para 1 of the LE). The legislation still lacks in the legal definition of a concession, which determines the need to use the academic commentary in this respect. It is emphasized that a concession is a legal form (legal measure) of restricting the freedom to start, carry out, and end a business activity. In public economic law, concession is a type of decision which entitles an entity to do something (Kiczka 2013: 464). It is also indicated that the concession should be regarded as one of the manifestations of legal rationing of economic activity, consisting of competent public body consenting to undertake and perform an economic activity in a specific field within the scope of and in accordance with the conditions specified in the concession and in separate legal provisions (Strzyczkowski 2011: 216).

In turn, the Supreme Administrative Court, in its judgment of 19 January 1998, took the position that a concession is a form of business rationing. It is a public body's consent for a given entity to undertake and carry out an activity on conditions unilaterally set by the authority issuing the concession. In turn, in its judgment of 8 May 1998, the Supreme Court noted that a concession is a public-legal (personal) entitlement and for this reason, as a rule, it is subject to exclusion from civil law trading (Zdyb and Lubeńczuk and Wołoszyn-Cichocka 2019: electronic edition Legalis). Such a position of the judicature, especially considering the above-mentioned views, makes it necessary to indicate at least a varying perception of a concession as a legal institution. It is indicated that it has the character of a public entity right and therefore it is deprived of the element of certainty in obtaining the required reaction from the state (Boć, Błaś 2010: 506). In the concession, according to the above views, one should also see an act of consent of the public authority to certain behavior of the entities. At the same time, it is a legal form of limiting the freedom to take up, pursue and stop carrying on a business activity. It should be pointed out that the varying perception of a concession may lead to the formulation of interpretations that may theoretically indicate their mutual exclusion, e.g. in terms of seeing a concession as a restriction of freedom of business activity. It should be assumed that in the light of the view expressed on the basis of the provisions of the law on freedom of economic activity, which is no longer in force, a concession was a transfer of certain powers of the state authority in the

sphere covered by the monopoly, which was also connected with the transfer of the concessionaire's power to use such instruments as those used by the administration (Szydło 2005: 212 ff.; Kosikowski 2012: 47 ff.).

Assuming that this position is correct, it should be considered that obtaining a concession is a restriction of the state's public subjective right, i.e. freedom of economic activity, since the freedom to conduct this activity belongs to the state. The dispute about the position constructed in this way should not be explicitly rejected because of the mere doubt about treating the state as an entity of public subjective rights. It is also worth emphasizing that as a form of administrative activity, a concession is an administrative decision, issued on the basis of law, in accordance with the provisions of the Code of Administrative Procedure (Zdyb 2013: 363). At the same time, it should be noted that obtaining it can and usually does limit the public right to use the environment of other entities.

2.2. Permits as restrictions on public subjective rights to use the environment and freedom of economic activity

Another area of rationed activity is the activity requiring a permit. In compliance with Article 41, Para 1 of the LE, obtaining a permit is required to carry out a business activity within the scope specified in separate regulations. It should be noted that the authorities competent in the sphere of granting permits and the conditions for performing the activity covered by the permit, in particular the rules and procedure for granting, refusing, amending, suspending, withdrawing or limiting the scope of the permit, are determined by separate provisions, unless the aforementioned Act provides otherwise. As in the case of concessions, the legislator has not introduced a legal definition of a permit into the applicable legal order. It is indicated in the legal science that a permit is an act of discretion of a competent public administration authority, confirming that an interested entrepreneur can undertake a business activity within the scope defined by the subject matter, because the authority found that all legal requirements have been satisfied. While granting the permit, the public administration body states, among others, that the entity which applied for it meets the prerequisites to conduct the business activity in accordance with the binding regulations (Strzyczkowski 2011: 227 from Zdyb and Lubeńczuk and Wołoszyn-Cichocka 2019). There are three fundamental differences between a permit and a concession, as defined in the legal science. The first of these is the type of business activity requiring a concession or a permit. Concession is reserved for the most strategic areas of activity, those that are particularly important for the security of the state and citizens. In turn, obtaining a permit is necessary to undertake an activity which is important but of less strategic importance for the state. Undoubtedly, there are some areas of economic activ-

ity, whose free exercising could prejudice an important public interest. For this reason, the legislator provides for the obligation to fulfil the specific conditions set out in the law for their commencement and execution as well as obliges the competent authorities to verify whether the conditions have been met; at the same time, however, it recognizes that a milder form of rationing will be sufficient. Due to the fact that the concession is considered to be the most onerous form of rationing for the entrepreneur, reserved for the business activity in areas crucial for the state in the current legal status, it is provided for only in 7 statutes. In turn, permits are a much more frequent form of rationing, as the obligation to obtain them was introduced in almost 30 acts. The second difference indicated is the nature of the administrative decision of the relevant concession and permit. It is assumed that a concession is, in principle, a discretionary decision and a permit is obligatory. This means that the authority must issue a permit if the entrepreneur meets the relevant conditions. Thirdly, the difference concerning which public bodies are authorized to issue a concession and a permit should be indicated. In principle, concessions are granted by the central body (competent minister, or other central body, or the voivodeship marshal). As far as permits are concerned, the competent authority is both the central government administration bodies, central offices and local government, as well as its bodies (Zdyb and Lubeńczuk and Wołoszyn-Cichocka 2019).

It should be noted that, as in the case of a concession, the provisions of the LE do not specify the activities that require issuance of a permit. This matter is regulated in separate regulations. One example is the obligation to obtain a permit for conducting collective water supply or collective sewage disposal activities (Act on collective water supply and collective sewage disposal of 7 June 2001).

Seeing such a perception of permits in the study of law, including their differences from concessions, it is necessary to relate them to the premises for the restriction of constitutional rights and freedoms (public subjective rights as defined in the Constitution). The obligation to obtain permits is defined in standards of the statutory rank. Certainly, the obligation to obtain these permits has its justification, e.g. in the need to protect the environment or freedoms and rights of others. At the same time, it should be remembered that the limitation of a given public subjective right, which is in accordance with the law in force, can only be spoken of if it does not lead to limitation of the essence of a given public subjective right. Therefore, the occurrence of the two positive premises indicated will take place in the case of permits. Only in practice will it be possible to establish unequivocally whether the issuance of permits indicated above, while at the same time obtaining other permits required by law, will not lead to a violation of the essence, e.g. freedom of economic activity or public subjective right to use the environment. In the area of freedom

of economic activity, the content of Article 22 of the Constitution must also be taken into account as regards the premises for restricting this freedom, as well as the positions of the legal sciences, with which it must be agreed that Article 31, Para 3 of the Basic Law is a more specific standard of Article 22 of the Constitution.

Such a perception of a permit leads to the following conclusion: permits constitute a restriction of the freedom of economic activity and public subjective rights concerning the environment, as defined in the norms of Article 74 of the Constitution. At the same time, the refusal to grant a permit, and thus the impossibility to conduct a business activity, usually has a negative impact on the use of public subjective rights to the environment of the entities that applied for these permits. In turn, granting a permit usually has a negative impact on the exercise of public subjective rights to use the environment of those entities which remain within the influence of economic activities carried out on the basis of the obtained permits.

Conclusions

The presented limitations to the public subjective rights of economic freedom and use of the environment, are an expression of the limitation of negative public subjective rights, expressed in the individual's claim to the state not to enter the sphere of previously granted freedom. In the case of the freedom of economic activity, these restrictions are treated in the legal science as rationing of an economic activity (Jakimowicz 2002: 303 ff.). In the case of a concession issued in the scope of activity reserved for the State, we can only speak of rationing with respect to entities other than the State, in the case of acknowledgment of the legitimacy of the view concerning the business activity belonging to the State, the conduct of which is granted through the concession to other entities.

The forms of restrictions on the freedom of economic activity that have been established, indicate their leading feature as discussed above. This is as follows: it is expressed in the existence of a stricter form of limitation on the possibility of exercising public subjective law, in those areas of state activity which are the most strategic areas of activity, especially important for the security of the state and citizens. The less strategic the sphere of life of the state and citizens there is, the more lenient the form of restriction. It should be borne in mind, however, that the strategic importance of the state's or citizens' activity cannot be determined in isolation from the state's obligation to protect the environment. This is indicated by Article 5 of the Constitution. Additionally, it should be pointed out that the binding character of a given individual administrative act is influenced by the fact that in the provisions under which the premises for granting or refusing an administrative privilege were defined, the legislator used implied and undefined concepts.

The above-mentioned pattern as to how strict the restriction of a given subjective right is, applies beyond the scope of business activity for it may also be applied to other legal goods, including the environment. However, special care is required in the application thereof, which is due to the fact that degradation, even of one element of the environment and this even to a small extent, may lead not only to unforeseen, but also serious consequences because of interconnection of the environmental elements.

Undoubtedly, concessions and permits affect the public subjective right to the environment, by both entities engaged in a business activity and ones affected by the said activity. This impact may vary and depends on whether a given permit or concession is granted or refused. However, both granting or refusing to grant them will result in restrictions of public subjective rights to use the environment. Each time, however, it will affect other legal entities. Such a specific situation is clearly influenced by this pattern, which means that limitation of public subjective rights should always be accompanied by appraisal of competitive public and private interests, in addition to a conflict of individual interests.

Bibliography

Primary sources

Legal acts

Ustawa z dnia 6 marca 2018 r. Prawo przedsiębiorców (Dz.U. 2019.0.1292 t.j.) [The Entrepreneurs` Law Act of 6 March 2018, *Journal of Laws 2019*, item 1292, as amended]

Ustawa z dnia 7 czerwca 2001 r. o zbiorowym zaopatrzeniu w wodę i zbiorowym odprowadzaniu ścieków t.j. Dz.U. z 2018 r. poz. 152 ze zm.) [Act on collective water supply and collective sewage disposal of 7 June 2001, *Journal of Laws 2018*, item 152, as amended]

Case law

Wyrok NSA z 19.1.1998 r., II SA 1238/97, Legalis [Judgment of Supreme Administrative Court of 19 January 1998, II SA 1238/97, electronic edition Legalis]

Wyrok SN z 8.5.1998 r., III RN 34/98, Legalis [Judgment of Supreme Court of 08 May 1998, III RN 34/98, electronic edition Legalis]

Secondary sources

Boć, Jan. Błaś, Adam. 2010. Publiczne prawa podmiotowe. W: *Prawo administracyjne*. (red.) Jan Boć. Wrocław: Kolonia Limited.

Czech, Ewa Katarzyna. 2021. Publiczne prawa podmiotowe do środowiska podmiotów korzystających ze środowiska, submitted for printing.

Garlicki, Leszek. Zubik Marek. 2016. W: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Tom I, (red.) Leszek Garlicki, Marek Zubik. Warszawa: Wydawnictwo Sejmowe.

Jakimowicz, Wojciech. 2002. *Publiczne prawa podmiotowe*, Kraków: Zakamycze.

Kiczka, Karol. 2013. Koncesje. W: *System Prawa Administracyjnego*, t. 8A, (red.) Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel. Warszawa: C.H. Beck.

Kijowski, Dariusz. 2000. *Pozwolenia w administracji publicznej, studium z teorii prawa administracyjnego*, Białystok: Temida 2.

Kosikowski, Cezary. 2002. *Koncesje i zezwolenia na działalność gospodarczą*, Warszawa: LexisNexis.

Kosikowski, Cezary. 2012. *Ustawa o swobodzie działalności gospodarczej. Komentarz*. Warszawa: Wolters Kluwer.

Strzyczkowski, Kazimierz. 2011. *Prawo gospodarcze publiczne*, Warszawa: Wolters Cluwer.

Szydło, Marek. 2005. *Swoboda działalności gospodarczej*, Warszawa: C.H. Beck.

Waligórski, Michał. 1988. Charakter prawny pozwoleń na prowadzenie indywidualnej działalności gospodarczej. *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 3, 81-100.

Wróbel, Andrzej. 2010. Prawa podmiotowe publiczne a prawa i wolności konstytucyjne. W: *System Prawa Administracyjnego*. Tom I: *Instytucje prawa administracyjnego*. (red.) Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel. Warszawa: C.H. Beck, 332.

Zdyb, Marian. Lubeńczuk, Grzegorz. Wołoszyn-Cichocka, Agnieszka. 2019. *Prawo przedsiębiorców. Komentarz*, Warszawa, electronic edition Legalis.

Zdyb, Marian. 2013. W: *Ustawa o swobodzie działalności gospodarczej. Komentarz*. (red.) Małgorzata Sieradzka, Marian Zdyb, 363. Warszawa: Wolters Kluwer.

Volume 18, Issue 4
December 2020

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2020-11-09
accepted 2020-12-10

The international legal status of Western Sahara

Status prawnomiędzynarodowy Sahary Zachodniej

ADRIANA KALICKA-MIKOŁAJCZYK
Uniwersytet Wrocławski
ORCID- 0000-0002-1250-5052, adriana.kalicka-mikolajczyk@uwr.edu.pl

Citation: Kalicka-Mikołajczyk, Adriana. 2021. The international legal status of Western Sahara. *Opolskie Studia Administracyjno-Prawne* 18(4): 35–48. DOI: 10.25167/osap.3429

Abstract: Western Sahara is a territory lying in North-Western Africa. It borders Morocco in the north, Algeria in the north-east, Mauritania in the east and in the south, and its north-western coast borders the Atlantic Ocean. The country was colonized by the Kingdom of Spain following the decisions of the Berlin conference held in 1884. After World War 2, it was a Spanish province. When it won the independence in 1956, Morocco demanded that Western Sahara should be "liberated", claiming that the territory belonged to it. In 1963, following the passing of the information by Spain, on the basis of Article 73 letter e) of the Charter of the United Nations, the UN entered Western Sahara in the list of areas which were not governed independently. On 14 April 1976, Morocco and Mauritania signed a convention on establishing their frontier line, on the power of which they executed a division of the territory of Western Sahara. Nowadays the western – the larger – part of Western Sahara's territory is controlled by Morocco. The main aim of this article is to provide an answer to the question of the present condition of the international legal status of Western Sahara.

Keywords: Western Sahara, military occupation, the Polisario Front, the Sahrawi Arab Democratic Republic, international legal personality

Abstrakt: Sahara Zachodnia to terytorium położone w Afryce Północno-Zachodniej, które graniczy z Marokiem na północy, z Algierią na północnym-wschodzie, a także z Mauretanią na wschodzie i na południu, a jego wybrzeże zachodnie jest położone nad Atlantykiem. Zostało ono skolonizowane przez Królestwo Hiszpanii w wyniku konferencji berlińskiej, która odbyła się w 1884 r., natomiast od drugiej wojny światowej stanowiło prowincję hiszpańską. Po uzyskaniu niepodległości w 1956 r. Maroko zażądało „wyzwolenia" Sahary Zachodniej, uznając, że terytorium to należy do niego. W 1963 r., po przekazaniu informacji przez Hiszpanię na

podstawie art. 73 lit. e) Karty Narodów Zjednoczonych, ONZ wpisała Saharę Zachodnią na listę obszarów nierządzących się samodzielnie. W dniu 14 kwietnia 1976 r. Maroko i Mauretania podpisały konwencję o wytyczeniu ich granicy, na mocy której dokonały podziału terytorium Sahary Zachodniej. Obecnie zachodnia, większa część terytorium Sahary Zachodniej kontrolowana jest przez Maroko. Zasadniczym celem niniejszego artykułu jest udzielenie odpowiedzi na pytanie, jaki jest obecnie prawnomiędzynarodowy status Sahary Zachodniej.

Słowa kluczowe: Sahara Zachodnia, okupacja wojskowa, Front Polisario, Saharyjska Arabska Republika Demokratyczna, podmiotowość prawnomiędzynarodowa

1. Introduction

Western Sahara is a territory situated in North-Western Africa. It was colonized by Spain in 1885 and then entered on the list of dependent (non-self-governing) territories in the understanding of Article 73 of the Charter of the United Nations, in which it has remained until now (the list attached to the report of the UN Secretary General of 1 Feb. 2016). The territory of Western Sahara covers 266 thousand square kilometers and is inhabited by over 400 thousand people. In the north, Western Sahara borders Morocco, in the north-east – Algeria, and in the east and the south – Mauritania. The most important branches of economy are fishery, exploitation of natural resources, in particular phosphate rock, the deposits of which belong to the richest in the world, and growing date palms in oases (Parzymies 1976: 80; Ożarowski 2011: 114). The basic goal of the article is to give an answer to the question: What is the international legal status of Western Sahara and, especially, is the territory of Western Sahara a subject of the international law?

2. The issue of Western Sahara

On 20 Dec. 1966, the United Nations General Assembly passed Resolution 2229 (XXI) concerning Ifni and Spanish Sahara, reaffirming "the inalienable right of the peoples of Ifni and Spanish Sahara to self-determination." It demanded from Spain as the administering Power to "determine at the earliest possible date, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation with the Governments of Mauritania and Morocco and any other interested party, the procedures for the holding a referendum under United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination." Next, on 20 Aug. 1974, the Kingdom of Spain informed the UN of their intention to organize – under the UN auspices – a referendum in Western Sahara. Then, on 16 Oct. 1975, upon the request of the UN General Assembly, the International Court of Justice issued its advisory opinion concerning Western Sahara,

in which it was stated that the circumstances and information given to them proved that at the moment of Spanish colonization there existed legal liaisons between the Sultan of Morocco and certain tribes inhabiting the territory of Western Sahara (The advisory opinion on Western Sahara 1975: 12). They also pointed to the existence of rights, including certain rights to the lands, which made legal bonds between the Mauritanian subject and the territory of Western Sahara. Moreover, it acknowledged that the materials and information delivered by the parties did not prove the existence of any link in the sphere of territorial supremacy between the territory of Western Sahara and Morocco and Mauritania. This meant that the International Court of Justice did not find the existence of legal connections that could impact the application of Resolution 1514 (XV) of the UN General Assembly of 14 Dec. 1960, concerning granting independence to colonial countries and nations, in particular the application of the principle of self-determination through free and genuine expression of will of people inhabiting the given territory. In this respect Resolution 1514 (XV) states as follows:

> 1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
>
> 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
>
> 4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

Thus, Resolution 1514 establishes the principles which administrating powers should be governed by while exercising their responsibilities resulting from Article 73 of the Charter of the United Nations. It should be noted that Principle VI stipulates that the right to self-determination is considered to have been executed when a dependent territory becomes an independent and sovereign state or when it associates freely with another independent state, or is integrated with an independent state.

On 14 Nov. 1975 Spain, Morocco and Mauritania signed a declaration of principles (Madrid Accords, also referred to as the Madrid Agreement) which accepted transferring of rights and obligation resting on Spain as the power responsible for administering Western Sahara onto the trilateral administration. Then, on 26 Feb. 1976 Spain informed the UN Secretary General that beginning with that date it ended its presence in Western Sahara and considered itself to be released from any responsibility of the international character in connection

with administering this territory through ceasing to participate in the temporary administration that had been introduced in the above-mentioned Agreement. That did not reflect the truth fully, though, since the Kingdom of Spain has still been administering the airspace of Western Sahara, which constitutes part of the OCE sector of Flight Information Region (FIR) of the Canary Islands (see the maps published on the website of ENAIRE) and that "decolonization of Western Sahara will be accomplished when Saharan society has had the chance to effectively present their views" (Letter of 26 Feb. 1976). As a result, towards the end of 1975, the Kingdom of Spain began withdrawing its administration from the territory of Western Sahara. Simultaneously, the territory was being taken over by Moroccan and Mauritanian troops.

On 14 April 1976, Morocco drew a treaty with Mauritania in which they divided the area of Western Sahara and formally annexed the provinces assigned to it on the power of that treaty (Convention concerning the state frontier line). In the meantime, in this region there broke out a military conflict between Morocco, Mauritania and the Polisario Front. Finally, on 10 Aug. 1979, Mauritania entered into agreement with the Polisario Front and renounced the right to any territorial claims from Western Sahara.

Next, in its Resolution 34/37 of 21 Nov. 1979, concerning Western Sahara, the UN General Assembly reaffirmed the "inalienable right of the people of Western Sahara to self-determination and independence" and expressed their satisfaction with the Mauritania-Sahara agreement concluded in Algiers on 10 Aug. 1979. They also urged Morocco to "join in the peace process" and recommended that the Polisario Front as "the representative of the people of Western Sahara should participate fully in any search for a just, lasting and definitive political solution to the question of Western Sahara." The armed conflict between the Polisario Front and Morocco lasted until 30 Aug. 1988, when both parties accepted, as to the principle, the proposition of solving the conflict presented by the UN Secretary General, which included – in particular – declaration of armistice and organization of a referendum under the auspices of the UN on the issue of the territory's self-determination. However, until today such a referendum still has not been held and Western Sahara has remained incorporated into the territory of Morocco, without the opportunity for the people of Sahrawi to express their will in this respect in a free and independent way.

Thus, it follows from all the factual circumstances which have been outlined above that instead of being able to avail themselves of the right to self-determination, in compliance with the recommendations set out in the consultative opinion on the issue of Western Sahara and in consequence of a series of actions which led to the division of the territory of Western Sahara in 1976 and its annexation in 1976 and 1979, the people of Western Sahara has

been deprived even of a chance of exercising this right under the conditions stipulated in Resolutions 1514 (XV), 1541 (XV), 2625 (XXV) and 3458 A and B (XXX) of the UN General Assembly (van Wasylum 2012: 3; van Wasylum 2013: 6). What is more, while these resolutions stipulated that the right to self-determination means a free choice between three options (Principle VI of Resolution 1541 of (XV) UN General Assembly), including independence, association with another independent state and integration with an independent state, but also admit conducting a referendum (Bedjaoui 2005: 1761; Fastenrath 2012: 1834-1835). In a similar manner, not respecting Resolution 229 of (XXI) the UN General Assembly of 20 Dec. 1966, Pars 4, 5, the UN Security Council Resolution 621 (1988) of 20 Sept. 1988, Par. 2 and Resolution 43/33 of the UN General Assembly of 22 Nov. 1988, Morocco executed integration of Western Sahara with its own territory through a division and annexation of the former without consulting the people of Western Sahara and without the supervision of the UN. Thus, it follows from the above considerations that Western Sahara became incorporated into Morocco without giving the people of this territory an opportunity to express their will in this respect in a free way. Summing up, it needs stating that presently the western part of Western Sahara is controlled by Morocco which considers itself the sovereign of Western Sahara, while the Polisario Front controls a smaller and poorly inhabited part in the east of the territory. Both parts of the territory of Western Sahara are separated from each other with a wall of sand constructed and supervised by the Moroccan Army.

3. The legal status of Western Sahara and its effects

Western Sahara has remained entered on the UN list of dependent (non-self governing) territories since 1963, that is in the understanding of Article 73 of the Charter of the United Nations, according to which:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.

Hence the conclusion that for this reason it belongs to the scope of application of Resolution 1514 (XV) concerning execution of the right to self-determination by colonial nations, as the International Court of Justice stated in Point 162 of the advisory opinion (the list attached to the report of the UN Secretary General of 1 Feb. 2016). Moreover, the letter of 29 Jan. 2002 addressed to the President of the Security Council by the Deputy Secretary General in charge of legal matters, legal advisor Hans Corell, point 6, said that: "transferring the

administration liabilities by the Kingdom of Spain onto the Kingdom of Morocco and the Islamic Republic of Mauritania in 1975 did not exert an influence on the status of Western Sahara as a non-self-governing territory"(Letter of 29 Jan. 2002 addressed to the President of the Security Council, Point 6). Thus, Western Sahara possesses – on the power of Article 73 of the Charter of the United Nations– "a separate status different from that of the territory of the state administrating it, […] until the time when the people of the colony or dependent territory executes its right to self-determination in accordance with the Charter, in particular complying with its goals and principles." In connection with this, Western Sahara makes a dependent territory in the process of decolonization in the understanding of this article, which also means that it is the third subject of the international law. Clearly, it needs underlining the fact, too, that it is not the so-called "disputed territory" due to the fact that according to the international law it is a territory on which there is a conflict going on aimed at demarcating its borders.

It follows from the wording of Article 73 of the Charter of the United Nations that "administrating power" means "the UN member-states which bear the responsibility for management of dependent areas". Morocco has not been responsible for administering Western Sahara since its accession to the UNO in 1956 and has never had that responsibility since it considers itself to be the sovereign of this territory (Milano 2006: 430). Furthermore, it is exclusively the UN General Assembly that can acknowledge a territory as a non-self-governing one and appoint its administrating power (Bedjaoui 2005: 1763; Fastenrath 2012: 1836). The UNO has never acknowledged Morocco to be the administrating power of Western Sahara and persistently – even today – points at Spain as the one entered on the list of dependent territories and administrating powers (Report of the UN Secretary General of 3 Feb. 2017). This conclusion is also confirmed by the letter of 29 Jan. 2002 addressed to the President of the UN Security Council by Deputy Secretary-General in charge of legal matters, legal advisor Hans Corell, according to whom "the Madrid Agreement did not stipulate transferring sovereignty of this territory or did not grant to any of the signatories the status of the administrating power, which Spain could not transfer unilaterally by the way" (Letter of 29 Jan. 2002 addressed to the President of the Security Council, Point 6). What is more, even if it is noted that "Morocco has administrated independently the territories of Western Sahara since 1976," which is an undisputable fact, it is added that "Morocco, however, is not entered as the power administrating this territory in the UN list of non-self-governing territories and – in consequence – does not transmit information relating to this territory on the basis of Article 73, letter e) of the Charter of the United Nations (Letter of 29 Jan. 2002 addressed to the President of the Security Council, Point 7).

If, then, Morocco is not the "administrating power" of Western Sahara, what is its international legal status with reference to the western part of Western Sahara? An answer to this question seems obvious – Morocco is an "occupying power" of Western Sahara in the understanding of Article 42 of the 1907 Hague Regulations, in accordance with the resolutions of which "a territory is considered occupied when it is actually placed under the authority of the hostile army." Moreover, following the jurisdiction of the International Court of Justice, in order to establish whether the state whose army is occupying the territory of another state in the form of intervention, is an occupying power in the meaning given to it by *ius in bello*, it is necessary to examine if there exists sufficient evidence confirming that the authority of the hostile army has been actually established and is exercised in the given zones by the state conducting the intervention (Armed Activities on the Territory of the Congo: 168). Thus, it follows from the considerations presented above that the western part of the territory of Western Sahara remains under the Moroccan occupation. The military conflict which took place in Western Sahara between 1976 and 1988 was an international armed conflict, which makes the resolution of the International Court of Justice apply to the territory of Western Sahara as well. In practice this means that in the present situation the following are applicable: Articles 42 and 43 of the 1907 Hague Regulations, Articles 2 and 64 of the IV Geneva Convention and Article 1 Par 4 of the Additional Protocol (I) of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949, concerning protection of victims of international armed conflicts. Moreover, Article 1 Par 4 of the Additional Protocol (I) extends the application of the four Geneva Conventions of 1949 to cover "armed conflicts in which peoples fight against colonial rule and foreign occupation, exercising their right to self-determination" (Roberts 1985: 254-255). Such is exactly the case of the people of Western Sahara who has not exercised this right and finds itself in the procedure of decolonization (Milanovic 2015: 27-50; Saul 2015: 5-6).

It should also be underlined clearly that the Moroccan occupation in Western Sahara is broadly recognized (Gasser 202: 379; Arai-Takahashi 209: 140; Chinkin 2010: 197-200; Benvenisti 2012: 171; Koutroulis 2012: 171; David 2012: 192; Ruiz Miguel 2013: 107; Dawidowicz 2013: 250-276; Bothe 2015: 1459; Kontorovich 2015: 611-612; the High Court of South Africa of 15 June 2017), including Hans Corell who, as the Deputy UN Secretary General in charge of legal matters, issued a legal opinion dealing with compliance with law of the decision made by the Moroccan authorities on entering into agreement with foreign companies as regards searching for mineral resources in Western Sahara (In a letter of 29 Jan. 2002). What is more, in the opinion of the International Court of Justice, in order to establish if the state whose army stays on the territory of another state because of intervention is an 'occupying power' in the meaning given to

it by *ius in bello*, it needs investigating whether there exists sufficient evidence to confirm the fact that the authority of the hostile army has actually been established and is exercised in given zones by the intervening state (Armed Activities on the Territory of the Congo: 168). Such is the case with regard to the western part of Western Sahara which has remained under the supremacy of Morocco since its annexation in 1976 and 1979. Mauritania retreated from Western Sahara on 14 Aug. 1979, after signing the peace treaty with the Polisario Front. On the very same day the Kingdom of Morocco annexed the part of Western Sahara initially occupied by Mauritania. The latter acknowledged that "forced occupation" in the declaration of the Prime Minister of 14 Aug. 1979 attached to the letter of 18 Aug. 1979 addressed to the UN Secretary-General by the permanent representative of the Islamic Republic of Mauritania at the UNO A/34/427. Since that time it has been administered in an ordered way by Morocco, without an agreement of the people of Western Sahara, who so far has not exercised its right to self-determination (Dessantis 1975: 463-465; Santucci 1976: 359-361).

4. The Sahrawi Arab Democratic Republic

The Polisario Front, according to Article 1 of its status, established on 10 May 1973, is "a national liberation movement, a fruit of the long-lasting Saharan resistance against various forms of foreign occupation" and has been acknowledged by the UNO as the representative of the people of Western Sahara, with its mission to protect its rights that stem from the international law, that is the right to self-determination and permanent sovereignty and control over the natural resources of Western Sahara (as stated in the letter of 29 Jan. 2002 addressed to the President of the UN Security Council in Point 24: "If the resources existing on dependent territories are exploited to the benefit of peoples of these territories, it is on their behalf or upon consultations with their representatives that the exploitation is considered compliant with the duties of administrating powers on the basis of the Charter and in agreement with resolutions of the UN General Assembly, as well as with the principle of »permanent sovereignty over natural resources« expressed in the Charter"). In fact, the UN General Assembly regard the Polisario Front as the second representative of the Western Saharan people (Resolution of the UN General Assembly concerning Western Sahara of 21 Nov. 1979 and of 11 Nov. 1980). It does not hold any special national status of a liberation movement within the auspices of the UNO, like in the case of the Palestine Liberation Organization, which does not mean that it does not possess the legal personality in the international law. On the contrary, the Polisario Front is regarded as a national liberation movement by a number of states (e.g. by the Republic of Benin, the Republic of Yemen, the People's Democratic Republic of Algeria, the Republic of Cabo Verde, the Lao

People's Democratic Republic, Grenada, the Republic of Tunisia, the Islamic Republic of Iran and the Republic of Zambia).

On 27 Feb. 1976, the Polisario Front proclaimed the establishment of the Sahrawi (Saharan) Arab Democratic Republic (SADR). Consequently, in March that year, the Government was formed which consisted (and still does) of almost exclusively members of the Polisario Front. The Government was recognized by Algeria on 6 March 1976. Since that time the state authorities have remained in exile in the City of Tinduf in Algeria and have controlled about 25% of the territory of Western Sahara. The year 1999 saw the declaration of the Constitution of the SADR. According to it, the head of state is the President and the executive power rests on the Government composed of 18 members led by the Prime Minister. The legislative power is in the hands of Parliament – the Sahrawi National Council consisting of 53 deputies. The polity of the SADR is the multiparty democracy based on free market economy. Moreover, there functions in the SADR an independent judiciary, as well.

The practice of different states regarding the treatment of the SADR varies, similarly as in the case of the Polisario Front. So far the SADR has been recognized by 84 states, 34 of which have withdrawn their recognition. Moreover, the national parliaments of the following countries voted their states' recognizing the Sahrawi state: Chile (2009), Australia (2004), Brazil (2014), Sweden (2012). Additionally, the SADR is a party of numerous multilateral treaties (African Charter of Human and Peoples' Rights (1986), African Charter on the Rights and Welfare of the Child (1992), African Continental Free Trade Area (2018), African Convention of Preventing and Combating Corruption (2003), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009), African Union Non-Aggression and Common Defense Pact (2005), Convention of the African Energy Commission (2006), OAU Convention on the Prevention and Combating of Terrorism (2002); Treaty Establishing the African Economic Community (1992), as well as bilateral ones, like agreements drawn with the Islamic Republic of Mauritania and the Kingdom of Morocco: Mauritano-Sahraoui Agreement signed in Algiers on 10 August 1979 between the Islamic Republic of Mauritania and the Polisario Front, a compromising agreement between the Kingdom of Morocco and the Polisario Front, concerning the suspended questions of identification, signed in London on 19-20 July 1997 and the compromising agreement between the Kingdom of Morocco and the Polisario Front, concerning armies, prisoners-of-war and prisoners or persons arrested for political reasons, signed in Lisbon on 29 Aug. 1997. The SADR is also a party of the Geneva Convention of 12 Aug. 1949 on protecting victims of war, as a result of submitting a unilateral declaration on the basis of Article 96 Para 3 of the Additional Protocol relating to prevention of international armed conflicts of 8 Aug. 1977. The SADR exercises the right

of legation and maintains diplomatic relations with 39 states (missions of the third states accredited to the SADR: 15 states: Angola, Cuba, Ecuador, Ethiopia, Ghana, Lesotho, Mexico, Namibia, Nicaragua, Nigeria, South Africa, Uganda, Venezuela, Vietnam, Zimbabwe; diplomatic missions of the SADR: Argentina, Brazil, Chile, Columbia, Haiti, the USA, India, Indonesia, Japan, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovenia, Spain, Sweden, Switzerland, Great Britain, Australia; missions accredited to international organizations: African Union, the EU, the UNO (Geneva and New York). It holds the status of both a member, observer and a guest in numerous international organizations (membership of international organizations with the status of: (1) a member: African Union (1981), Committee of Intelligence and Security Services of African, International Coalition against Enforced Disappearances, International Union of Socialist Youth, Pan-African Lawyers Union, World Federation of Democratic Youth, World Federation of Trade Unions; (2) an observer: Andean Community, International Federation of Red Cross and Red Crescent Societies; (3) a participant: EU-Africa summits, Central American Parliament, Ibero-American summits, New Asian-African Strategic Partnership, Permanent Conference of Political Parties of Latin America and the Caribbean; (4) a guest: Non-Aligned Movement and Socialist International). The SADR performs also *ius standi*, including before the Court of Justice of the European Union in the case the Council versus the Polisario Front (Orz. TSUE z 21.12.2016). The stances assumed by international organizations towards the SADR vary, as well. Such organizations as: the African Union, the European Union, the UNO, Organization of Islamic Cooperation, Rio Group, Union of South American Nations, Non-Aligned Movement, Caribbean Community, support the right to self-determination, the League of Arab States supports the territorial integrity of Morocco, whereas the Arab Maghreb Union has not taken their standpoint.

All in all, it needs stating that the accession of the SADR to the African Union and other international organizations, exercising the active and passive right of legation, concluding bilateral international agreements with Mauritania and Morocco (the ones listed above), obligation to respect the Geneva Convention of 12 Aug. 1949 on protecting war victims, or possibility of using the right of *ius standi*, provide ample evidence which speaks in favour of recognizing legal personality of the SADR in the form granted to states by international law.

5. Conclusion

The basic aim of this publication was to answer the question what the legal international status of Western Sahara is and whether its territory is a subject of

the international law. The legal status of Western Sahara is defined in Article 73 of the Charter of the United Nations, which means that it is a non-self governing territory going through the process of decolonization, whose administrating power is still the Kingdom of Spain. This also means that it is not a subject of the international law. Thus, one cannot but agree with the statement of Advocate-General Melchior Wathelet who concluded that Western Sahara is not a territory whose international status is not defined nowadays: what is not determined presently is not its status, but its future.

Bibliography

Primary sources

Legal acts

Convention concerning the state frontier line established between the Islamic Republic of Mauritania and the Kingdom of Morocco, concluded in Rabat on 14 April 1976, Annuaire de l'Afrique du nord, 1976, vol. 15.

List attached to the report of UN Secretary General of 1 Feb. 2016, "Information relating to the territories transferred on the basis of Article 73 Point e) of the Charter of the United Nations", A/71/68.

Letter of 26 Feb. 1976, addressed to the UN Secretary General by the permanent representative of Spain at the UN, S/11997.

Letter of 29 Jan. 2002 addressed to the President of the Security Council of the UN by the Deputy Secretary General in charge of legal matters, legal advisor, S/2002/161.

Resolution of the UN General Assembly concerning Western Sahara of 21 Nov. 1979, A/RES/34/37.

Resolution of the UN General Assembly concerning Western Sahara of 11 Nov. 1980, A/RES/35/19.

Report of the UN Secretary General of 3 Feb. 2017, on information relating to non-self governing territories, obtained on the basis of Article 73 Letter e) of the Charter of the United Nations, A72/62.

Case law

Advisory opinion concerning Western Sahara, International Court of Justice, 16 October 1975, I.C.J. Reports 1975.

The Saharawi Arab Democratic Republic and Front Polisario v The Owner and charterers of the MV "NM Cherry Blossom", the High Court of South Africa, 15 June 2017, case no. 1487/17.

European Union Council v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Polisario Front), the Court of Justice of the European Union, 21 December 2016, C-104/16 P, ECLI:EU:C:2016:973.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), International Court of Justice, 9 December 2005, C.I.J. Recueil 2005.

Secondary sources

Arai-Takahashi, Yutaka. 2009. *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law.* Martinus Nijhoff.

Bedjaoui, Mohammad. 2005. *Article 73*. In: *La Charte des Nations Unies: commentaire article par article, 3e éd.*, (eds.) Jean-Pierre Cot, and Alain Pellet, 1758-72. Mathias Forteau, Paris: Economica.

Benvenisti, Eyal. 2012. *The International Law of Occupation*, 2 ed., Oxford: Oxford University Press.

Bothe, Melinda. 2015. The Administration of Occupied Territory. In: *The 1949 Geneva Conventions: A commentary*, (eds.) Andrew Clapham, Paola Gaeta and Marco Sassòli, 1445-62. Oxford University Press.

Chinkin, Christine. 2010. Laws of occupation. In: *Multilateralism and International Law with Western Sahara as a Case Study*, (eds.) Neville Botha, Michele Olivier, and Delarey van Tonder, 197-204. Pretoria:VerLoren van Themaat Centre.

David, Eric. 2012. *Principes de droit des conflits armés*, 5e éd. 192. Bruxelles: Bruylant.

Dawidowicz, Martin. 2013. Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement. In: *Statehood, Self-Determination and Minorities: Reconciling Tradition and Modernity in International Law*, (ed.) Duncan French, 250-76. Cambridge University Press.

Dessaints, Jeriel. 1975. *Chronique politique Maroc*. *Annuaire de l'Afrique du Nord* 14:455-72.

Fastenrath, Ulrich. 2012. Chapter XI Declaration Regarding Non-self-governing Territories. In: *The Charter of the United Nations: A Commentary*, *3 ed*., (eds.) Bruno Simma, Daniel Erasmus Khan, Georg Nolte, and Andreas Paulus, 1828-39. Oxford: Oxford University Press.

Gasser, Henry Paul. 2002. The Conflict in Western Sahara – An Unresolved Issue from the Decolonization Period. *Yearbook of International Humanitarian Law* 5:372-85.

Kontorovich, Eugene. 2015. Economic Dealings with Occupied Territories. *Columbia Journal of Transnational Law* 53:605-21.

Koutroulis, Vaios. 2012. The application of international humanitarian law and international human rights law in prolonged occupation: only a matter of time? *International Review of the Red Cross*, 94:165-81.

Milano, Enrico.2006. The New Fisheries Partnership Agreement between the EC and Morocco: Fishing too South? *Anuario español de derecho internacional*, 22:425-39.

Milanovic, Marko. 2015. The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts. In: *The 1949 Geneva Conventions: A commentary*, (eds.)Andrew Clapham, Paola Gaeta, and Marko Sassòli, 27-50. Oxford: Oxford University Press.

Ożarowski, Robert. 2011. Sahara Zachodnia jako przykład afrykańskiego quasi-państwa [Western Sahara as an exampkle of an African quasi-state]. In: *Afryka. Kontynent wyzwań i zagrożeń*, t. 1 [*Africa. A continent of challenges and threats*, vol. 1], (ed.) Margot Stańczyk-Minkiewicz, 109-21. Poznań: Wydawnictwo Wyższej Szkoły Bezpieczeństwa.

Parzymies, Stanisław. 1976. Spór wokół Sahary Zachodniej [The conflict about Western Sahara]. *Sprawy Międzynarodowe*, 4:79-87.

Roberts Andrew. 1985. What is military occupation? *British Yearbook of International Law*, 55:118-35.

Santucci, Jean-Claude. 1976. Chronique politique Maroc. *Annuaire de l'Afrique du Nord*, 15:352-68.

Saul, Ben. 2015. The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources. *Sydney Law School Legal Studies Research Paper*, 15(81): 5-20.

Internet sources

Maps published on ENAIRE website. Access: 22.10.2020. http://www.enaire.es/csee/ccurl/130/603/fir_canarias.swf.

Ruiz Miguel Carlos. *La responsabilité internationale et les droits de l'homme: le cas du Sahara occidental, Cahiers de la recherche sur les droits fondamentaux*. Access: 9.10.2020. https://www.unicaen.fr/puc/html/ecrire/revues/crdf/crdf11/crdf1110ruiz-miguel.pdf

Van Walsum, Peter. "The question of Western Sahara", 16 December 2012, and "The question of Western Sahara (II)", 7 Feb. 2013. Access: 12.10.2020. http://www.petervanwalsum.com/the-question-of-western-sahara/

Volume 18, Issue 4
December 2020

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2020-11-11
accepted 2020-12-04

Crediting donations towards the legitimate share according to the jurisdiction of the Krakow- and Lvov-based district courts in the Interwar period

Policzenie darowizn na zachowek według orzecznictwa sądów apelacji krakowskiej i lwowskiej w okresie międzywojennym

JÓZEF KOREDCZUK
Uniwersytet Opolski
ORCID: 0000-0002-3471-568X, jkoredczuk@uni.opole.pl

Citation: Koredczuk, Józef. 2020. Crediting donations towards the legitimate share according to the jurisdiction of the Krakow- and Lvov-based district courts in the Interwar period. *Opolskie Studia Administracyjno-Prawne* 18(4): 49–66. DOI: 10.25167/osap.3430

Abstract: The Austrian Civil Code (ABGB), which was in force in the districts of the courts based in Lvov and Krakow in the Interwar period, stipulated the principle of freedom of testing by the testator. That freedom, however, could harm the inheritance rights of the persons who were the nearest to the testator. The institution protecting the rights of these persons was the legitimate share which they were entitled to as heirs-at-law. The basis to assess the height of the legitim was the size of inheritance. However, while estimating the legitimate share, donations which the heirs-at-law (persons entitled to the legitim), heirs and legatees had received from testators were taken into consideration as well. The ABGB provided that in the case where the legitim which the heirs-at-law were entitled to was depleted (not at full height) they could demand completion of it. Questions concerning which donations were taken into account and which were not while estimating the height of the legitim due to different practices in this respect were the subject of many courts' adjudgments. The jurisprudence in this sphere was not uniform. It stipulated compensation of the depleted legitimate share both in kind (in the form of proportional part of the donation) and as a financial benefit, with time evolving towards the latter to a greater and greater extent.

Keywords: ABGB, Krakow and Lvov district courts, donation, heirs-at-law, jurisprudence of courts, legitimate share

Abstrakt: Austriacki kodeks cywilny (ABGB) obowiązujący w okręgach sądów apelacji lwowskiej i krakowskiej w okresie międzywojennym przewidywał zasadę swobody testowania przez spadkodawcę. Swoboda ta mogła jednak niekiedy godzić w prawa spadkowe osób najbliższych spadkodawcy. Instytucją chroniącą prawa tych osób był zachowek, który należał się im jako dziedzicom koniecznym. Podstawą obliczenia wysokości zachowku była wielkość masy spadkowej. Przy obliczaniu zachowku brano jednak pod uwagę także darowizny, jakie otrzymali od spadkodawcy dziedzice konieczni (osoby uprawnione do zachowku) oraz spadkobiercy i legatariusze. ABGB przewidywał, że w przypadku gdy należny dziedzicom koniecznym zachowek był uszczuplony (w niepełnej wysokości), mogli oni domagać się jego uzupełnienia. Kwestie dotyczącego tego, jakie darowizny były brane pod uwagę, a jakie nie przy obliczaniu wysokości zachowku, wskutek różnych praktyk w tym zakresie były przedmiotem wielu orzeczeń sądów. Orzecznictwo sądów w tym zakresie było niejednolite. Przewidywało wyrównanie uszczuplonego zachowku zarówno w naturze (w postaci proporcjonalnej części darowizny), jak i w postaci świadczenia pieniężnego, z czasem coraz bardziej ewoluując w tym kierunku.

Słowa kluczowe: ABGB, apelacja krakowska i lwowska, darowizna, dziedzice konieczni, orzecznictwo sądów, zachowek

One of the progressive principles accepted in the Austrian Civil Code of 1 June 1811 (ABGB) with respect to the inheritance law, which was underlined in the literature on the subject, was the stipulated freedom of testing. It was expressed in the independent disposal of the property by the testator. That freedom could at times harm the inheritance rights of the persons remaining the closest to the testator, though, and – as a result – restrictions with reference to the will of the latter were introduced into the law. The institution in question stipulated in the ABGB, which protected the rights of the closest persons in case the testator should decide to avail himself/herself of the testamentary disposition was that of legitimate share. Thus, persons, entitled to the legitim were called heir-at-law (*heredes necessarii*), deriving from Roman law (Longchamps de Bérier 2018: 12).

In a survey on the reform of the inheritance law and division of land, which was carried out by the Ministry of Agricultural Reforms in 1924, it was stated that "citizens very often make use of the freedom of making last will and are well informed on limitations of the legitimate share which the heir-at-law is entitled to, frequently they are capable of establishing and precisely calculating this legitim" (Ankieta Ministerstwa Reform… 1924: 100, 106). However, this optimistic finding by the Ministry, with regard to the functioning of legitim did not fully reflect the then true reality, since in practice it posed numerous problems to parties as well as courts.

The institution of securing the rights of heirs-at-law in the ABGB raised not only disputes in the doctrine itself, but – first of all – a great deal of emotions of practical nature. Claims arising from the legitimate share were the subject of numerous court rulings (Zarzycki 2019: 616).

According to Para 729 ABGD, if a person who the testator was obliged to leave part of their heritage on the power of the act, suffered harm because of the declaration of last will, they could call the regulation of the act and claim legally the due part of the inheritance. Here it is worth paying attention to the fact that in compliance with Para 755 ABGB also adopted children – in the case of statutory order of inheritance – held the same right to inherit property of the adopter (testator) as legitimate children. They were exclusively not entitled to inherit property of the testator's relations or the spouse if the latter did not give their consent to adoption. They did however have the right to inherit property of their natural parents and relations. The right of the heir-at-law was purely a property right, not dependent on the personal relation of the heir-at-law with the testator. As such it was part of inheritance, therefore – according to Para 537 ABGB, as an inherited one, it was transferred on heirs of the person entitled to legitim. In connection with the above, also heirs of the heir-at-law held the right to claim legitimate share or its complementing, which was confirmed in the ruling of the Supreme Court (file no. III. 1. R. 346//31) of 21 October 1931 (OPSN.dc 1933: 15, poz. 28 A). The analogous stance was accepted by the Supreme Court in its ruling of 27 May 1930 (file no. III. 1. Rw. 2565/29), concerning the case heard earlier by the District Court in Stanisławów (file no. Cg. I. a. 128/28) (OPSC.dc 1931: 89, poz. 248 A). On the other hand, the ruling of the Supreme Court of 3 July 1929 r. (file no. III. Rw. 1350/29), which stated that if the claim of legitim was not submitted by the heir-at-law during his/her life, then it was not transferable to their heirs, should be regarded as disputable and contrary to the case law (OPSN.dc 1930: 17, poz. 61 A).

It needs underlining that the right of legitim could not be seized by writ of execution by a creditor of the heir-at-law for as long as the latter did not claim the legitimate share they were entitled to at the court of law or outside it. This found its confirmation in the ruling of the Supreme Court of 31 October 1933 (file no. C II R 642/33), in the case heard earlier by the Municipal Court in Tyczyn (sentence of 13 May 1932, file no. II C 210/32) and the District Court in Rzeszów – Decision of 27 February 1933 (file no. I 4 Bc 894/32) (*Zbiór Orzeczeń Sądu Najwyższego. Orzeczenia Izby Cywilnej* 1934: 654-655, poz. 334). Prior to this, the same stance was taken by the Supreme Court in its ruling of 30 December 1930 (file no. III. 1 R. 807/30) (OPSN.dc 1931: 148, poz. 425 A).

On the power of the resolution of seven judges of the Supreme Court of 21 October 1931 (file no. 346/31) concerning the case heard earlier by

the Municipal Court in Sądowa Wisznia (Decision of 3 October 1930, file no. A. 235/29) and the District Court in Przemyśl (Decision of 14 February 1931, file no. II. R. 25/31), inheritance of the legitim right was acknowledged to be a legal principle and was entered in the book of legal principles of the Supreme Court. Taking such a decision, the Supreme Court stressed that the right of legitim was a form of strengthening and protecting the rights of the heir entitled to statutory inheritance and did not expire in consequence of the death of the entitled person. In this way the nearly ninety-year-old stance was rejected, which was expressed in the court decree of 31 January 1844 (No. 781 Collection of judicial acts), according to which the right of legitimate share, constituting the heir's-at law liability towards the testator, absolutely expired at the moment of the heir's demise. What is more significant, in compliance with that decree, the right of legitim was not included in the inheritance law (*Głos Prawa* 1932: 117-118, poz. 8; Bartz 1934: 40). Thus, as we can see, the standpoint expressed by the Supreme Court in the legal principle of 1931 with reference to the right of legitimate share brought in an enormous change in relation to the then case law in this respect.

The regulations which the person who was harmed by the testator's declaration of last will could invoke were the rules of the second part of the first section of Chapter 14 ABGB under the title: "On the legitim and crediting towards the legitim or part of the inheritance" (Paras 762-796).

The height of the legitim assumed in Paras 765 and 766 ABGB was dependent on what circle of intestate heirs the entitled person belonged to (Longchamps de Bérier 2018: 12). In the case of the testator's children the legitimate share amounted to a half, while in the case of the remaining heirs-at-law – one third of what they would be entitled to, according to the statutory order of inheritance if the testator had not made their will.

The above-mentioned principles decided that in the case of the heirs entitled to the legitim it was extremely important for them to finally establish the value of the property which the value of the legitim was tied to in turn. The manner of administering and assessing them was defined by Para 784 ABGB which was invested with the new wording following the third amendment of ABGB of 1916.

From among all the heirs-at-law who were entitled to the legitim, the legislator paid particular attention to the testator's closet relatives who were their parents and children. Therefore, according to Para 785 ABGB, upon demand from a child entitled to the legitim, while calculating the value of the heritage one had to take into account also donations that the testator had made when still alive. The object of such donations ought to be added to the heritage, according to their value defined on the basis of Para 794 ABGB. In compliance with it, if whatever the given person had received from the testator was an

immovable object, its value was assessed according to the moment of its receipt by the beneficiary. On the other hand, if the thing they had received from the testator was a movable item, then its value was determined according to the moment when the heritage was due.

Time and life brought along subsequent cases of donations counting into the legitim. In compliance with the ruling of the Supreme Court of 25 August 1931 (file no. III. 1. Rw. 320/31), in the case heard earlier by the District Court in Rzeszów (file no. I. Cg. 129/28), the court decided that the value of services which the entitled beneficiary had received for paid-for activities for the testator should also be included in the donations credited towards the legitim (OPSN. dc 1931: 268-269, poz. 746 A).

Crediting towards the legitim, in compliance with Para 788 ABGB, included also whatever the testator had given to their daughter or granddaughter as a dowry, to their son or grandson in the form of equipping, or still directly when the latter were taking an office, or to commence any business, or as payment of debts of a major child. With reference to daughters, in compliance with Para 788 ABGB, it was only the dowry given to them by father, which was credited towards the legitimate share. They did not have to – like their brothers – count the received equipping into it, which – in the understanding of Para 1218 ABGB – was not a dowry. According to the ruling of the Supreme Court of 15 February 1936 (file no. C II 2308/35), in the case heard earlier by the Court of Appeal in Lvov (file no. CA 15/35) and the District Court in Sambor (file no. I Cg 78/30), the costs of organized weddings were not credited towards the legitim, either (PPiA 1936: 152, poz. 103). Nevertheless, in compliance with the ruling of the Supreme Court of 5 May 1937 (file no. C II 3014/36), in the case heard earlier by the Court of Appeal in Krakow (file no. II CA 806/36), a lawsuit was admissible for establishing that a part of the beneficiary's inheritance was exhausted by the equipping received while the testator was alive (PPiA 1937: 544, poz. 342).

Paragraph 785 stipulated, however, that the above-mentioned donations taken account of while establishing the height of the legitim which the person was entitled to did not cover those which: 1) the testator made at the time when he did not have children entitled to the legitimate share; 2) the testator made from income, which did not result in depletion of their wealth; 3) compensated the moral obligations resting on the testator or were necessary out of decency; 4) were made for causes connected with public utility; 5) were made by the testator to the benefit of persons not entitled to the legitim earlier than two years before the testator's death. And in the case of the spouse this period was binding solely when the marriage was dissolved or there followed a separation. Not including the testator's spouse by the ABGB in the circle of persons entitled to the lawful share raised considerable controversy.

A particular position regarding the circle of statutory beneficiaries was also taken by the testator's spouse who was still alive. According to the ruling of the Supreme Court of 14 December 1926 (file no. III Rw. 785/26) concerning the case heard earlier by the District Court in Wadowice (file no. Bc. III 283/25) and the County Court in Jordanów (file no. C. II 153/25), the statutory part of the inheritance did not include the objects donated to them by the spouse when alive unless such an inclusion was stipulated in the donation agreement and if the donation did not infringe on the rules of Paras 785 and 951 ABGB. The things donated by the testator during their life to their spouse ceased to be inheritance wealth (PPiA.oM 1927: 24-241, poz. 198). The burden counting in the inheritance, which was taken into account while assessing the legitim, did not include either – according to the ruling of the Supreme Court of 24 October 1930 (file no. III. 1. Rw. 496/30) in connection with the case heard earlier by the District Court in Lvov (file no. II. a. Cg. 390/28) – costs of the beneficiary's treatment borne by the testator. It was decided that offering medical aid to one's own spouse is a regular behavior in a marriage (OPSN. dc 1931: 148, poz. 426).

The legitimate share was calculated irrespective of the records and other burdens resulting from the testator's last will. It is until the final allotment, according to Para 786 ABGB, that the legacy – due to incomes and damages still running – should be regarded as relatively joint wealth of the primary beneficiaries and the heirs-at-law, with the assumption that the basis for calculating the legitim – if there did not occur a sale of objects being inherited by the beneficiary without an unexcused dire necessity at the moment of the testator's death and before the actual assignment of the inheritance at the price that was lower than the assessed real value – should be accepted to be the value of the inheritance at the moment of settlement in the sentence on demand of the legitim, being the moment of the actual allotment of the legitimate share. Thanks to that, while calculating the value of the pure inheritance it was possible to include in it its subsequent augmenting or diminishing, in which case the heir-at-law – on the power of Paras 786, 830 and 837 ABGB – had the right to demand submission of relevant accounts to assess the relative share in the income or the loss, as well as in fruits of the inheritance which they were entitled to from the moment of the testator's demise until the actual assignment of the legitim. This was pointed to by the Supreme Court in the ruling of 20 June 1933 (file no. C. II. R. 415/33), in the case heard earlier by the District Court in Krakow (file no. I. Cg. J. c. 2449/30) (OPSN.dc 1933: 152, poz. 400). The above-given principle resulted from the wording of the rule Para 786 ABGB, in particular from the words used in it: "until the actual a" of the legitimate share. It was confirmed in many court's rulings, among others that of Supreme Court of 13 March 1937 in the case heard earlier by the

Court of Appeal in Lvov (file no. I CA 300/36) and the District Court in Lvov (file no. I 2 CJ 441/33) (PPiA 1937: 475, poz. 298). Also, in the ruling of the Supreme Court of 7 September 1932 (file no. III. 1 Rw. 902/32), concerning the case heard earlier by the District Court in Sambor (file no. Cg. III. 39/27), where it accepted the identical stance (OPSN.dc 1933: 68, poz. 158 A).

The owner (testator) had the right to dispose of their property. According to Para 944 ABGB, they could present a given person with the whole of their wealth or with a half of the prospective wealth. They should do this in compliance with statutory regulations, though. Therefore, the whole equipping of their children by the testator, which exceeded the appropriate level stipulated by the rules, ought to be seen as a donation not indifferent from the point of view of the heirs'-at-law right to lawful share. That standpoint was confirmed by the Supreme Court in the ruling of 15 June 1926 (file no. III Rw. 907/26) dealing with the case heard earlier by the District Court in Tarnopol (file no. Bc. III 4/26) and the County Court in Trembowla (file no. C. II 128/25) (PPiA.oM 1927: 12-13, poz. 15).

While establishing the height of the legitim, in accordance with Para 787 ABGB, everything that the heirs-at-law received from the legacy in the form of a gift by will or the testator's other decisions made to their benefit earlier was taken into account. On the other hand, if – at the moment of determining the legitim – donations were to be included – then each heir-at-law had to allow for detraction from the increase in the legitim, resulting from the donations which, according to Para 785 ABGB, could be added to the legacy and which they themselves had received from the testator. The beneficiary who relinquished the inheritance was to be regarded as non-existing while calculating the height of the obligatory part of the legitim.

Therefore, if upon including donations it turned out that the legacy did not suffice to cover the legitim, then – on the power of Para 951 ABGB the heir-at-law could demand from the beneficiary to be given a gift to compensate the missing quota of the legitim. It was to this effect that the Supreme Court ruled in its sentence of 10 February 1932 (file no. III. Rw. 119/32) (OPSN.dc 1933: 111, poz. 290 A). Moreover, the Supreme Court presented different possible forms of satisfying the heir's-at-law claim regarding the missing quota of the due legitimate share in its extensive ruling issued on 17 December 1930 (file no. III. 1. Rw. 1296/30), concerning the case heard earlier by the District Court in Lvov (file no. Cg. II. b. 531/28). In accordance with that ruling, the situation was the easiest to handle if the object of the donation was a given sum of money. Then the satisfaction of the heir's-at-law claim followed through payment of a sum of money. However, the situation got complicated if the object of the donation was a real estate. Then, in compliance with Para 962 ABGB, the heir-at-law could demand the claim to be satisfied from that property,

which could follow through transferring the rights of ownership of the donations onto them. In practice, however, it was impossible, since the beneficiaries many a time had already made various contributions to the property donated to them, or – what was more relevant – developed the land which they had obtained as a donation. That made the possibility of surrendering the property to the heir-at-law unrealizable (OPSN.dc 1931: 271, poz. 752 A).

The beneficiary most frequently endeavored to evade surrendering the donation to cover the missing quota of the legitim through paying the due sum. The interpretation of the courts which – with reference to the situation stipulated in Para 951 ABGB – automatically admitted the possibility of complementing the missing legitim through payment of the suitable sum of money was acknowledged by the Supreme Court as erroneous, though. It underlined that the nature of the claim stipulated in Para 951 ABGB consisted in questioning the donation made, not its height. That is why, according to the ruling of the Supreme Court of 2 June 1925 (file no. III Rw. 803/25), in the case heard earlier by the Court of Appeal in Lvov (file no. Bc. III 676/24) and the District Court in Przemyśl (file no. Cg. I 132/23), the heir-at-law – if they claimed the legitimate share diminished by the donation – could demand from the beneficiary to be given such a part of the donated object in kind (not its financial value) which corresponds to the value of the missing part of the legitim, augmented by adding the value of donations included in the inheritance. This was particularly significant if the object of the donation was a real estate (PPiA.oM 1926: 119-120, poz. 103). Witold Steinberg disagreed with the above-presented standpoint as he argued that the heir-at-law, harmed by excessive donations bestowed during the testator's life, did not hold any rights to a relative share both in movable and immovable property as part of the legacy. This author stressed – at the same time – that in consequence of the amendment of Para 951 ABGB, the position of the beneficiary in relation to the heir-at-law suffered a substantial violation, since as a result the heir-at-law became not only *de nomine* the heir, but indeed was the pecuniary claimant of the inheritance, as well (Steinberg 1931: 514-515).

The line of ruling with reference to Para 951 ABGB, which was represented by the courts, was not uniform and often underwent changing. For instance, the ruling of the Supreme Court of 1929 (file no. III. 1. Rw. 832/29), concerning the case heard earlier by the District Court in Przemyśl (file no. Cg. I. c. 998/28), admitted dualism with reference to both the person receiving the donation and the form of return by them of the donation received to the benefit of the person entitled to the legitim. In compliance with that ruling, if the recipient was not an heir-at-law, then they were obliged to surrender the gift received in kind. On the other hand, if the recipient was an heir-at-law, they were not obligated to surrender the legitim to the harmed party in kind, but were

responsible financially for the surplus of the value of the gift beyond the due legitimate share (OPSN.dc 1930: 104, poz. 365 A). It was only in the pecuniary form that it was possible to return the diminished legitim when the recipient did not possess the object bestowed any longer. Compensation claim in this case was the more justified since restoration of the object to its primary state was impossible as the contentious reality was already in the hands of a third party, with whom the person obliged to complement the legitim did not remain in any legal relationship and from whom the latter had no right to claim surrendering the object. The Supreme Court confirmed this in its ruling of 22 January 1930 (file no. III. 1. Rw. 270/29), in the case heard earlier by the District Court in Lvov (file no. Cg. IX. 286/27) (OPSN.dc 1930: 182, poz. 629 A).

The Supreme Court, assuming the dualistic standpoint, returned also to the first line of ruling within the scope of Para 951 ABGB, admitting the possibility of complementing the lack in the legitim through payment of an appropriate sum of money. In its ruling of 12 May 1931 (file no. III. 1. R. 61/31), concerning the case heard earlier by the District Court in Krakow (file no. XI. Cg. J. 899/29), the Supreme Court stated that the entitled heir-at-law had both the right to claim from the beneficiary such a part of the donated object in kind (could even demand that the given area of land be given to them) that matched the value of the shortage in relation to the whole. It is, however, the defendant (the heir) who had the right to choose in what form they were to satisfy the claim of the entitled heir-at-law relating to the due legitimate share: whether to physically surrender to the former the determined part of land or pay the relevant financial benefit at the assigned height (OPSN.dc 1931: 184, poz. 518 A).

Also, in the literature on the subject we can encounter different interpretations of Para 951 ABGB. In the opinion of Oziasz Rast, the heir-at-law had only a financial claim with regard to the beneficiary, but not the right to surrender the object which was donated. Still, satisfying the above-mentioned financial claim was expected to be executed through realizing the object of donation to which the beneficiary had to agree (Rast 1930: 414-415). On the other hand, Rafał Kanner underlined that compensating the missing sum of the due legitim by the beneficiary protected them from personal responsibility towards the heir-at-law who was harmed in law regarding the legitimate share. In this way there followed a restriction of their property accountability only to the equal financial value of the object of donation received from the testator (Kanner 1938: 157-158). Fryderyk Kurzer, observed that the solution accepted in Para 951 ABGB referred to that contained in Para 2329 of the German Civil Code of 18 August 1896, which ordered that the donation should be surrendered "according to the rules of surrendering an unjustified benefit". That, in turn, in compliance with Para 818 of the German Code, was executed in kind (Kurzer 1932: 437, 446). The intention of the legislator, when it came to

amending Para 951 ABGB, in Michał Kwasik's opinion, was also that covering the missing part of the quota of the legitim – in the first place – was to be made by the legal beneficiary or other persons listed in the disposition of the testator's last will (Kwasik 1938: 242-243).

The regulations of Paras 785 and 951 ABGB, treating about counting donations into the inheritance, were applicable when in the inheritance – as the result of donations made during the testator's life – there was nothing left. At the same time, it was stressed that the amendment of Para 785 ABGB, which was introduced in 1916, was unfavorable to the potential heirs-at-law since it admitted the possibility of crediting donations towards the legitim, which were made by the testator to persons not entitled to the legitimate share only within the period of two years before their death. It was confirmed by the Supreme Court in the ruling of 3 February 1927 (file no. III Rw. 2440/26), in the case heard earlier by the Court of Appeal in Lvov (file no. Bc. III 531/26) and the District Court in Sanok (file no. Cg. I a) 634/25) (PPiA 1927: 12, 121-122, poz. 105).

A claim for the legitim was not the testator's personal debt and did not arise until the moment of their death; it could not be transferred onto the decedent's estate, therefore the complaint of the obligatory part of the heritage, that is the legitimate share, was not lodged against the estate, but against the heirs participating in the succession, even when the decree on inheritance had not been issued yet. According to Para 783 ABGB, it could be lodged against heirs in tail or legatees who were obliged to contribute proportionately to satisfying the claim of the heir-at-law. Part of the representatives of practice did not agree, however, with the above-presented interpretation of Para 783 ABGB, underlining that the rule did not normalize against whom the heir-at-law was entitled to submit their claim of being paid the legitim and merely defined the internal relation between the heir and the legatees. Also, the Supreme Court, in its ruling of 15 April 1931 (file no. III. 1. Rw. 291/31) concerning the case heard earlier by the District Court in Przemyśl (the judgement of 8 February 1930, file no. Cg 144/28) and the Court of Appeal in Lvov (the judgement of 29 August 1930, file no. II. Bc. 526/30), accepted a similar stance (OPSN.dc 1933: 16, poz. 32 A; *Głos Prawa* 1932: 127-129, poz. 17). And it confirmed this a year later in its ruling of 21 June 1932 (file no. III. 1. Rw. 1210/32) in the case heard earlier by the District Court in Brzeżany (file no. I. 1. Cg. J a. 317/30) (OPSN.dc 1933: 49-50, poz. 116 A).

Pursuance of a claim for the legitim, as dealt with in the ABGB, was not dependent on obtaining by the heir-at-law the decree of inheritance to their benefit or conducting inheritance proceedings. Establishment of the property of inheritance and assessment of its value, which were advanced in the inheritance proceedings, were not absolutely binding as regards the conflict of establishing the legitim.

They could then be made in cases of determining the legitim – as the Supreme Court concluded in its ruling of 18 January 1933 (file no. III. 1. Rw. 2464/32) concerning the case heard earlier by the District Court in Nowy Sącz (file no. I. Cg. J. 338/31) – in an individual manner (OPSN.dc 1933: 49, poz. 115 A).

The heir-at-law, entitled to the legitim, could lodge a complaint of contributing to payment of the legitim to them against both all the beneficiaries and individual ones of this group. Nevertheless, they could not claim more from each of them than this individual heir proportionally inherited (OPSN. dc 1931: 56, poz. 163 A) in compliance with the ruling of the Supreme Court of 18 January 1933 (file no. III. 1. Rw. 2464/32).

As already mentioned, a claim for the legitim – beside the one the most often lodged against the beneficiaries participating in the succession – could also be lodged against the legatees. Their responsibility for the legitim in this case – according to Para 783 ABGB – equaled that of the heirs. Their obligation to pay out the legitim was not annulled even by the lack of declaration on acceptance of the legacy, since this was not demanded by the rules of law. Again, this was confirmed by the Supreme Court in its ruling of 5 February 1930 (file no. III. 1. Rw. 1331/29), in the case heard earlier by the District Court in Sambor (file no. Cg. I. 86/27) (OPSN.dc 1930: 182, poz. 628 A i 196, poz. 680 A).

It was possible to lodge a claim for establishing the legitim or its complementing, or revoking the donation because of the beneficiary's ingratitude, or still sue the beneficiary for restricting the donation in compliance with Para 1487 ABGB, within three years following the day of the testator's demise unless there was implemented succession proceedings in the case, on the basis of the testator's last will, in which case the commencement of the three-year period began on the day of declaration of the last will. After the above-mentioned period the claims expired. The question of the statutory limitation of the time of pursuing claims for the legitim was the subject of many court rulings, among others, that of the Supreme Court of 14 June 1938 (file no. C II 3243/37) concerning the case heard earlier by the Court of Appeal in Lvov (file no. I CA 371/37) (PPiA 1938: 494, poz. 297), and also the ruling of the Supreme Court of 31 October 1938 (file no. C II 692/38), in the case heard earlier by the Court of Appeal in Lvov (file. no. I CA 673/37 (PPiA 1939: 14(2), 164).

Even if the entitled person was not aware of their right to legitim, which they held, in compliance with the decision of Chamber III of the Supreme Court of 4 June 1924 (file no. Rw. 1079/23), they were entitled to lodge such a claim (PPiA.oM 1925: 4, poz. 4). The right to pursue the legitim was not dependent, either, on that in the course of inheritance proceedings it should be established that the legitim was violated, being the effect of donations which had been made by the testator. The deadline for claiming the legitim included also the postal time limits stipulated in compliance with Para 89 of the Act

on court organization regarding the time necessary to deliver documents by post. Thus, posting the claim for the legitim at the post office before the expiry of the three-year period following the death of the testator, yet receiving the claim by the court after the statutory term, in accordance with Para 1487 ABGB, resulted in the claim being ineffective and treated as one barred by expiry of a limitation period. This was confirmed by the Supreme Court in its ruling of 8 November 1932 (file no. III. 1. Rw. 1621/32), sustaining the decision taken in this case by the District Court in Nowy Sącz on 10 September 1931 (file no. I. Cg. 34/31) (OPSN.dc 1933: 5, poz. 10 A).

The three-year period of barring claims for the legitim was binding also in compliance with the ruling of the Supreme Court of 12 January 1933 (file no. III. 1 Rw. 2679/32), concerning the case heard earlier by the District Court in Brzeżany (file no. I. Cg. J. a. 36/31), with reference to persons entitled to the legitim, who were settled abroad on the permanent basis. Their abiding outside the country was, in the said case, regarded as absence arising from their fault, which did not make an exception to justify the breech of Para 1485 ABGB, with reference to persons living abroad (OPSN.dc 1933: 139, poz. 364 A). The lapse of time stipulated in Para 1487 ABGB, on the other hand, did not cause any effects if the sued party (obliged to contribute the legitim) in the inheritance proceedings fraudulently and deliberately concealed the fact of existence of claimants (persons) who were entitled to the legitim, like it was decided in the case concluded with the ruling of the Supreme Court of 15 June 1932 (file no. III. 1 Rw. 770/32), heard earlier by the District Court in Tarnopol (file no. Cg. J. a. 39/30) (OPSN.dc 1933: 96-97, poz. 247 A).

Prolongation of the limitation time – and this by ten times – to lodge a claim for the legitim could follow when the testator had left the legitim to their heir-at-law as a legacy. Then the heir-at-law could base their claim on the legal title to the legacy and – at the same time – to the legitimate share. Such a claim was statutorily time-barred after thirty years. The very height of the legitim itself was established, however, relative to the value of the inheritance property at the time of assigning the legitim (OPSN.dc 1930: 133-134, poz. 464 A), that is generally sooner than the lapse of thirty years.

The testamentary beneficiary – the one who received the inheritance – was obliged to pay the legitim to the existing heirs-at-law. If, however, the former did not inherit anything, then – in accordance with the ruling of the Supreme Court of 25 May 1926 (III Rw. 2444/25), concerning the case heard earlier by the Court of Appeal in Lvov (Bc. III 388/25) and the District Court in Przemyśl (Cg. I c) 712/24), they could not be made to either fully or partially satisfy the obligatory part falling to the heirs-at-law (PPiA.oM 1926: 336-337, poz. 291).

It was first of all the entitled persons themselves who were obligated to take care of the issues connected with the legitim, since – in compliance with

Para 162 of undisputed patent – this was not among the responsibilities of the court of inheritance, especially when it concerned majors. However, in the case where the heir-at-law was absent, the person with the rights to claim the legitim in the case of conflict was the guardian appointed by the court to represent the former. On the power of Para 276 ABGB, no rule of the act prevented appointing such a guardian (PPiA.oM 1926: 241-242, poz. 225). The legitim could be claimed solely in the way of court proceedings, in which sometimes not all heirs-at-law could take part, though. In particular, this concerned heirs-at-law who were minors at the time of the testator's death, in which case, in accordance with Paras 18 and 162 of the undisputed patent, if in the legal decision taken by the court of inheritance, which established the height of the legitim assigned to a minor heir-at-law, the parties had not had the way of settling the conflict reserved, then the heir-at-law could not demand a larger legitimate share; neither could the defendant (the party obliged to pay the legitim) lodge complaints concerning the height of the legitim established by the court of inheritance to be paid to the former. That standpoint was shared by the Supreme Court in the ruling of 14 February 1933 (file no. III. 1 Rw. 2513/32), in the case heard earlier by the District Court in Sambor (file no. I. Cg. J. 34/31) (OPSN.dc 1933: 140, poz. 365 A).

Belated though it was, the way out of the problems which could result on the ground of the ABGB with reference to pursuing the compensation of the diminished legitimate share was presented by Jan Gwiazdomorski in 1959. His solution consisted in that

> the person entitled to claiming the compensation of the legitim shall receive from the inheritance – before executing the division of the inheritance – an equivalent portion (in money) of the benefit which the beneficiary has received, following which – while conducting an eventual division of the inheritance later on, the division shall be settled as though the benefit subject to compensation did not occur (since compensation of it occurred before the division). If, on the other hand, the inheritance, which was a rule, does not include money due to be paid to the legal beneficiary entitled to claim the compensation, then the case shall be settled in such a way that before the division the beneficiary obliged to compensate pays to the ones entitled to claim compensation a part of the equivalent value of the benefit received by him, which corresponds to the height of the shares which the heirs are expected to inherit, and then later on, while conducting an eventual division of the inheritance, the benefit subject to compensation is not taken into account since the compensation was effected already before the division" (Gwiazdomorski 1959: 240, ref. 31).

Despite the fact that J. Gwiazdomorski considered the proposed solution to be the best method of compensating the legitim, possessing – in his opinion – exclusively advantages and no drawbacks at all, it never found any application (Koredczuk 2019: 163-164). In my opinion, it was too theoretical and not practical enough.

The 'partitions'-rooted origin of the inheritance law contained in the ABGB did not pose any problem to the pragmatics of the Polish private law (Longchamps de Bérier 2018: 24). On the contrary, it was the Austrian law that the regulations dealing with crediting donations towards the active condition of inheritance were modelled on. They were contained in the decree on inheritance law of 8 October 1946 (Dz.U. nr 60, poz. 328), which also accepted the system of legitimate share. In the decree, Paras 785 and 788 ABGB were made reference to in particular. On the other hand, despite the fact that the rules of the inheritance law of the Polish Civil Code of 23 May 1964 (Dz.U. nr 16, poz. 93 ze zm.), relating to the legitimate share (Articles 991-1011), which are currently in force, are indeed modelled on German and Austrian solutions, obviously, there is hardly any resemblance between them and the ABGB: the longer the point in time when the Austrian Civil Code ceased to be in force in Poland, the less strong its influence is (Księżak 2012: 63, 271).

List of abbreviations

ABGB – Patent cesarski z dnia 1 czerwca 1811 r. – Powszechna księga ustaw cywilnych dla wszystkich krajów dziedzicznych niemieckich Monarchii Austryiackiej (Dz.U.P. nr 87, 472) [The Emperor's Patent of 1 June 1811 – The Common Book of Civil Acts for all the hereditary countries of German Austrian Monarchy]

OPSN.dc – Orzeczenia Polskiego Sądu Najwyższego. Dział cywilny [Verdicts of the Polish Supreme Court. The Civil Department]

PPiA – *Przegląd Prawa i Administracji* [The Review of Law and Administration]

PPiA.oM – *Przegląd Prawa i Administracji. Orzecznictwo w zakresie Małopolski* [The Review of Law and Administration. Jurisdiction concerning Małopolska]

Zb. u. s. – *Zbiór ustaw sądowych* [The Collection of Judicial Acts]

Bibliography

Primary sources

Legal acts

ABGB. Patent cesarski z dnia 1 czerwca 1811 r. – Powszechna księga ustaw cywilnych dla wszystkich krajów dziedzicznych niemieckich Monarchii Austryiackiej (Dz.U.P. nr 87, 472).

Dekret nadworny z dnia 31 stycznia 1844 r. (Zb. u. s. nr 781).

Niemiecki kodeks cywilny z dnia 18 sierpnia 1896 r. (R.G.Bl. s. 195).

Case law

Orzeczenie Izby III S.N. z dnia 4 czerwca 1924 r., Rw. 1079/23; PPiA.oM 1925, R. L, s. 4, poz. 4.

Orzeczenie S.N. z dnia 2 czerwca 1925 r., III Rw. 803/25; PPiA.oM 1926, R. LI, s. 119-120, poz. 103.

Orzeczenie S.N. z dnia 25 maja 1926 r., III Rw. 2444/25; PPiA.oM 1926, R. LI, s. 336-337, poz. 291.
Orzeczenie S.N. z dnia 15 czerwca 1926 r., III Rw. 907/26; PPiA.oM 1927, R. LII, s. 12-13, poz. 15.
Orzeczenie S.N. z dnia 14 grudnia 1926 r., III Rw. 785/26; PPiA.oM 1927, R. LII, s. 240-241, poz. 198.
Orzeczenie S.N. z dnia 3 lutego 1927 r., III Rw. 2440/26; PPiA 1927, R. LII, s. 121-122, poz. 105.
Orzeczenie S.N. z dnia 3 lipca 1929 r., III. Rw. 1350/29; OPSN.dc 1930, R. V, s. 17, poz. 61 A).
Orzeczenie S.N. z dnia 6 listopada 1929 r., III. 1. Rw. 694/29; OPSN.dc 1931, R. VI, s. 56, poz. 163 A).
Orzeczenie S.N. z 1929 r., III. 1. Rw. 832/29; OPSN.dc 1930, R. V, s. 104, poz. 365 A).
Orzeczenie S.N. z dnia 22 stycznia 1930 r., III. 1. Rw. 270/29; OPSN.dc 1930, R. V, s. 182, poz. 629 A).
Orzeczenie S.N. z dnia 5 lutego 1930 r., III. 1. Rw. 1331/29; OPSN.dc 1930, R. V, s. 182, poz. 628 A) i s. 196, poz. 680 A).
Orzeczenie S.N. z 27 maja 1930 r., III. 1. Rw. 2565/29; OPSN.dc 1931, R. VI, s. 89, poz. 248 A).
Orzeczenie S.N. z dnia 24 października 1930 r., III. 1. Rw. 496/30; OPSN.dc 1931, R. VI, s. 148, poz. 426 A).
Orzeczenie S.N. z dnia 17 grudnia 1930 r., III. 1. Rw. 1296/30; OPSN.dc 1931, R. VI, s. 271, poz. 752 A).
Orzeczenie S.N. z dnia 30 grudnia 1930 r., III. 1 R. 807/30; OPSN.dc 1931, R. VI, s. 148, poz. 425 A).
Orzeczenie S.N. z dnia 15 kwietnia 1931 r., III. 1. Rw. 291/31; OPSN.dc 1933, R. VIII, s. 16, poz. 32 A) i *Głos Prawa* 1932, R. IX, nr 203, s. 127-129, poz. 17.
Orzeczenie S.N. z dnia 12 maja 1931 r., III. 1. R. 61/31; OPSN.dc 1931, R. VI, s. 184, poz. 518 A).
Orzeczenie S.N. z dnia 25 sierpnia 1931 r., III. 1. Rw. 320/31; OPSN.dc 1931, R. VI, s. 268-269, poz. 746 A).
Orzeczenie S.N. z dnia 21 października 1931 r., III. 1. R. 346/31; OPSN.dc 1933, R. VIII, s. 15, poz. 28 A).
Orzeczenie S.N. z dnia 10 lutego 1932 r., III. Rw. 119/32; OPSN.dc 1933, R. VIII, s. 111, poz. 290 A).
Orzeczenie S.N. z dnia 15 czerwca 1932 r., III. 1 Rw. 770/32; OPSN.dc 1933, R. VIII, s. 96-97, poz. 247 A).
Orzeczenie S.N. z dnia 21 czerwca 1932 r., III. 1. Rw. 1210/32; OPSN.dc 1933, R. VIII, s. 49-50, poz. 116 A).
Orzeczenie S.N. z dnia 7 września 1932 r., III. 1 Rw. 902/32; OPSN.dc 1933, R. VIII, s. 68, poz. 158 A).
Orzeczenie S.N. z dnia 8 listopada 1932 r., III. 1. Rw. 1621/32; OPSN.dc 1933, R. VIII, s. 5, poz. 10 A).
Orzeczenie S.N. z dnia 12 stycznia 1933 r., III. 1 Rw. 2679/32; OPSN.dc 1933, R. VIII, s. 139, poz. 364 A).
Orzeczenie S.N. z dnia 18 stycznia 1933 r., III. 1. Rw. 2464/32; OPSN.dc 1933, R. VIII, s. 49, poz. 115 A.

Orzeczenie S.N. z dnia 14 lutego 1933 r., III. 1 Rw. 2513/32; OPSN.dc 1933, R. VIII, s. 140, poz. 365 A).
Orzeczenie S.N. z dnia 20 czerwca 1933 r., C. II. R. 415/33; OPSN.dc 1933, R. VIII, s. 152, poz. 400 A).
Orzeczenie S.N. z dnia 31 października 1933 r., C II R 642/33; *Zbiór Orzeczeń Sądu Najwyższego. Orzeczenia Izby Cywilnej* 1934, z. V, s. 654-655, poz. 334.
Orzeczenie S.N. z dnia 15 lutego 1936 r., C II 2308/35; PPiA 1936, R. LXI, s. 152, poz. 103.
Orzeczenie S.N. z dnia 13 marca 1937 r., C II 2766/36; PPiA 1937, R. LXII, s. 475, poz. 298.
Orzeczenie S.N. z dnia 5 maja 1937 r., C II 3014/36; PPiA 1937, R. LXII, s. 544, poz. 342.
Orzeczenie S.N. z dnia 14 czerwca 1938 r., C II 3243/37; PPiA 1938, R. LXIII, s. 494, poz. 297.
Orzeczenie S.N. z dnia 31 października 1938 r., C II 692/38; PPiA 1939, R. LXIV, nr II, s. 164.
Orzeczenie S.A. w Krakowie, II CA 806/36; PPiA 1937, R. LXII, s. 544, poz. 342.
Orzeczenie S.A. we Lwowie, Bc. III 676/24; PPiA.oM 1926, R. LI, s. 119-120, poz. 103.
Orzeczenie S.A. we Lwowie, Bc. III 388/25; PPiA.oM 1926, R. LI, s. 336-337, poz. 291.
Orzeczenie S.A. we Lwowie, Bc. III 531/26; PPiA 1927, R. LII, s. 121-122, poz. 105.
Orzeczenie S.A. we Lwowie z dnia 29 sierpnia 1930 r., II. Bc. 526/30; OPSN.dc 1933, R. VIII, s. 16, poz. 32 A) i *Głos Prawa* 1932, R. IX, nr 203, s. 127-129, poz. 17.
Orzeczenie S.A. we Lwowie, CA 15/35; PPiA 1936, R. LXI, s. 152, poz. 103.
Orzeczenie S.A. we Lwowie, I CA 300/36; PPiA 1937, R. LXII, s. 475, poz. 298.
Orzeczenie S.A. we Lwowie, I CA 371/37; PPiA 1938, R. LXIII, s. 494, poz. 297.
Orzeczenie S.A. we Lwowie, I CA 673/37; PPiA 1939, R. LXIV, nr II, s. 164.
Orzeczenie S.O. w Brzeżanach, I. 1. Cg. J a. 317/30; OPSN.dc 1933, R. VIII, s. 49-50, poz. 116 A).
Orzeczenie S.O. w Brzeżanach, I. Cg. J. a. 36/31; OPSN.dc 1933, R. VIII, s. 139, poz. 364 A).
Orzeczenie S.O. w Krakowie, XI. Cg. J. 899/29; OPSN.dc 1931, R. VI, s. 184, poz. 518 A).
Orzeczenie S.O. w Krakowie, I. Cg. J. c. 2449/30; OPSN.dc 1933, R. VIII, s. 152, poz. 400 A).
Orzeczenie S.O. we Lwowie, Cg. IX. 286/27; OPSN.dc 1930, R. V, s. 182, poz. 629 A).
Orzeczenie S.O. we Lwowie, II. a. Cg. 390/28; OPSN.dc 1931, R. VI, s. 148, poz. 426 A).
Orzeczenie S.O. we Lwowie, Cg. II. b. 531/28; OPSC.dc 1931, R. VI, s. 271, poz. 752 A).
Orzeczenie S.O. we Lwowie, I 2 CJ 441/33; PPiA 1937, R. LXII, s. 475, poz. 298.
Orzeczenie S.O. we Lwowie, Cg. II. b. 531/28; OPSN.dc 1931, R. VI, s. 271, poz. 752 A).
Orzeczenie S.O. w Nowym Sączu z dnia 10 września 1931 r., I. Cg. 34/31; OPSN.dc 1933, R. VIII, s. 5, poz. 10 A).
Orzeczenie S.O. w Nowym Sączu, I. Cg. J. 338/31; OPSN.dc 1933, R. VIII, s. 49, poz. 115 A.
Orzeczenie S.O. w Przemyślu, Cg. I 132/23; PPiA.oM 1926, R. LI, s. 119-120, poz. 103.
Orzeczenie S.O. w Przemyślu, Cg. I c) 712/24; PPiA.oM 1926, R. LI, s. 336-337, poz. 291.
Orzeczenie S.O. w Przemyślu z dnia 8 lutego 1930 r., Cg 144/28; OPSN.dc 1933, R. VIII, s. 16, poz. 32 A) i *Głos Prawa* 1932, R. IX, nr 203, s. 127-129, poz. 17.
Orzeczenie S.O. w Przemyślu, Cg. I. c. 998/28; OPSN.dc 1930, R. V, s. 104, poz. 365 A).
Orzeczenie S.O. w Rzeszowie, I. Cg. 129/28; OPSN.dc 1931, R. VI, s. 268-269, poz. 746 A).
Uchwała S.O. w Rzeszowie z dnia 27 lutego 1933 r., I 4 Bc 894/32; *Zbiór Orzeczeń Sądu Najwyższego. Orzeczenia Izby Cywilnej* 1934, z. V, s. 654-655, poz. 334.
Orzeczenie S.O. w Samborze, Cg. III. 39/27; OPSN.dc 1933, R. VIII, s. 68, poz. 158 A).
Orzeczenie S.O. w Samborze, Cg. I. 86/27; OPSN.dc 1930, R. V, s. 182, poz. 628 A) i s. 196, poz. 680 A).

Orzeczenie S.O. w Samborze, I Cg 78/30; PPiA 1936, R. LXI, s. 152, poz. 103.
Orzeczenie S.O. w Samborze, I. Cg. J. 34/31; OPSN.dc 1933, R. VIII, s. 140, poz. 365 A).
Orzeczenie S.O. w Sanoku, Cg. I a) 634/25; PPiA 1927, R. LII, s. 121-122, poz. 105.
Orzeczenie S.O. w Stanisławowie, Cg. I. a. 128/28; OPSN.dc 1931, R. VI, s. 89, poz. 248 A).
Orzeczenie S.O. w Tarnopolu, Bc. III 4/26; PPiA.oM 1927, R. LII, s. 12-13, poz. 15.
Orzeczenie S.O. w Tarnopolu, Cg. J. a. 39/30; OPSN.dc 1933, R. VIII, s. 96-97, poz. 247 A).
Orzeczenie S.O. w Wadowicach, Bc. III 283/25; PPiA.oM 1927, R. LII, s. 240-241, poz. 198.
Orzeczenie S.P. w Jordanowie, C. II 153/25; PPiA.oM 1927, R. LII, s. 240-241, poz. 198.
Orzeczenie S.P. w Trembowli, C. II 128/25; PPiA.oM 1927, R. LII, s. 12-13, poz. 15.
Orzeczenie S.G. w Tyczynie z dnia 13 maja 1932 r., II C 210/32; *Zbiór Orzeczeń Sądu Najwyższego. Orzeczenia Izby Cywilnej* 1934, z. V, s. 654-655, poz. 334.
Głos Prawa. 1932, 9(2-3), 117-118, poz. 8.
OPSN.dc 1930, R. V, s. 133-134, poz. 464 A).
PPiA.oM 1926, R. LI, s. 241-242, poz. 225.

Secondary sources

Ankieta Ministerstwa Reform Rolnych w sprawie prawa spadkowego i podzielności gruntów. 1924. *Przegląd Notarialny*, 3(2-3), 100-107.
Bartz, Antoni Władysław. 1934. Zachowek jako przedmiot dziedziczenia. *Przegląd Sądowy*, 10(2), 39-46.
Gwiazdomorski, Jan. 1959. *Prawo spadkowe*. Warszawa: Państwowe Wydawnictwo Naukowe.
Kanner, Rafał. 1938. Ubezskutecznienie darowizny z Para 951 ust. austr. dla uzupełnienia uszczuplonego zachowku. *Głos Adwokatów*, 13(5), 156-158.
Koredczuk, Józef. 2019. *Dziedziczenie nieruchomości w świetle orzecznictwa sądów apelacji lwowskiej w okresie międzywojennym*. Wrocław: E-Wydawnictwo. Prawnicza Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego.
Księżak, Paweł. 2012. *Zachowek w polskim prawie spadkowym*. Warszawa: LexisNexis Polska.
Kurzer, Fryderyk. 1932. Odwołanie darowizny z powodu uszczuplenia zachowku. *Głos Adwokatów*, 7(8-9), 436-446.
Kwasik, Michał. 1938. Uwagi o nowelizacji roszczenia ze znowel. Para 951 austr. u. c. *Czasopismo Sędziowskie*, 12(5), 241-244.
Longchamps de Bérier, Franciszek. 2018. Stałość a zmienność szczegółowych regulacji prawa spadkowego Niepodległej. *Forum Prawnicze*, 2(46), 3-24.
Rast, Ozjasz. 1930. Do interpretacji Para 951 u. c. o odwołaniu darowizny z powodu ukrócenia zachowku wedle brzemienia III. noweli. PPiA 15, 412-415.
Steinberg, Witold. 1931. Odwołanie darowizny z powodu uszczuplenia zachowku. *Głos Prawa* 1931, 8(11), 513-519.
Zarzycki, Zdzisław. 2019. Uwagi nad książką Józefa Koredczuka pt. Dziedziczenie nieruchomości w świetle orzecznictwa sądów apelacji lwowskiej w okresie międzywojennym, E-Wydawnictwo. Prawnicza Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, Wrocław 2019, ss. 289; ISBN 978-83-66066-57-1 (druk) i ISBN 978-83-66066-58-8 (online), *Krakowskie Studia z Historii Państwa i Prawa*, 12(4), 609-619.

Volume 18, Issue 4
December 2020

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2020-11-06
accepted 2021-01-19

Intimate relations in the workplace and sexual harassment – remarks following the Supreme Court's ruling of 23 January 2018, Number III PK 13/17

Bliskie relacje w zakładzie pracy a molestowanie seksualne – uwagi na gruncie orzeczenia Sądu Najwyższego z 23 stycznia 2018, III PK 13/17

RADOSŁAW T. SKOWRON
Izba Adwokacka w Krakowie
ORCID: 0000-0002-9973-2660, rs@legalskills.eu

Citation: Skowron, Radosław. 2020. Intimate relations in the workplace and sexual harassment – remarks following the Supreme Court's ruling of 23 January 2018, Number III PK 13/17. *Opolskie Studia Administracyjno-Prawne* 18(4): 67–82. DOI: 10.25167/osap.3431

Abstract: In the paper, the author, revolving around the Supreme Court's ruling linking close human relations in the workplace to the deterioration of management practices, critically analyses the dominant viewpoint espousing the need to strike out intimate behaviours from organizations. The author points to the significant impact of management theories, feminist trends and managerialization of law on the escalating de-sexualization of the workplace. In the article, it is evidenced that the overbearing conviction about the negative impact of intimate and sexual bonds on the working relations demands reinterpretation. It is also shown that consideration of sexual and intimate behaviours in organizations, irrespective of sex structures in these organizations, may paradoxically contribute to sex discrimination. The author offers the idea to modify the rules of employers' liability depending on the sex structure and the number of women holding positions of authority and responsibility.

Keywords: sexual harassment, sex segregation, sex discrimination, equality in workplace

Abstrakt: W tekście autor, wychodząc od poglądu Sądu Najwyższego o negatywnym wpływie bliskich relacji w zakładzie pracy na zarządzenie przedsiębiorstwem, poddaje krytycznej analizie dominujące stanowisko głoszące potrzebę eliminowania w środowisku pracy zachowań

intymnych. Artykuł wskazuje na wpływ nauk o zarządzaniu, ruchów feministycznych oraz tzw. menedżeryzacji prawa na postępującą deseksualizację organizacji. Autor udowadnia, że dominujący pogląd o negatywnym wpływie relacji intymnych i seksualnych na stosunki w miejscu pracy wymaga zrewidowania oraz wykazuje, że traktowanie zachowań o naturze seksualnej i intymnej w oderwaniu od struktury płci w stosunkach zatrudnienia może paradoksalnie przyczyniać się do dyskryminacji ze względu na płeć. W pracy proponuje się zmianę reżimów odpowiedzialności odszkodowawczej pracodawcy w zależności od struktury płci oraz od tego, czy kobiety obsadzane są na stanowiskach związanych w władzą i odpowiedzialnością.

Słowa kluczowe: molestowanie seksualne, dyskryminacja ze względu na płeć, segregacja płciowa, równość w zatrudnieniu

1. Introduction

In its ruling of 23 January 2018 (III PK 13/17), the Supreme Court, while analysing the rules of the Labour Code dealing with mobbing, expressed an evaluation according to which "the existence in the workplace of intimate relations between superiors and certain employees hampers the effective management and preserving an objective evaluation made by the superiors, which requires a special supervision on the part of the employer's management in the aspect of preventing eventual discrimination or mobbing." In the factual state of the ruling, two superiors maintained intimate personal relations with two women-employees, which was found to result in a worse treatment of the other workers.

The view expressed in the analysed settlement is brought down to negative evaluating the influence of intimate relations arising or developing in the workplace on effective and productive functioning of the company. Close interhuman relations are supposed to stand in the way of efficient performance of official duties and the employer should exercise due diligence in order that such intimate relations ought not to have a negative impact on management of the company. The ruling under analysis appeared at the peak moment of the social movement *#MeToo*, which could as well affect the presented stance (Tippett 2018: 229-302).

It seems that the thesis put forward by the Supreme Court is too far-fetched as regards acceptance of the rights of the employer to interfere with the personal life of employees, and its paradoxical consequence can be a rise in inequality in the workplace as well as increased discrimination of women based on sex. The ruling of the Supreme Court concentrates on intimate relations and sexual behaviors in employment, totally neglecting the question of the structural phenomenon of inequality of the sexes in the workplace. The view that a company is not a proper forum to build close relations between employees is probably the result of a fusion of three intellectual currents.

Firstly, such an evaluation appears to be a consequence of the existing current of management sciences, which has been in existence for over a hundred years, enjoying invariably considerable popularity. According to it, contemporary organizations ought to be depersonalized spaces void of passions, emotions or desires (Weber 2011: 17-36). Similarly, Taylorism, the classical method of organization of work, assumes that managers define the targets by means of their intellect, while employees use their bodies to achieve them and are to suspend their emotions during this time (Ćwiklicki 2011: 135-137). Theories of management and organization do not refer directly to the sphere of sexuality and intimacy, yet since they treat workplace as a sphere of rationality and order, it is obvious that close interhuman relations are excluded there. Sexuality and intimacy are – in consequence – perceived as opposition to reason and logic in the workplace, as phenomena that should be eliminated, forbidden, disciplined and controlled (Anderson 2017: 51-90).

Secondly, the opinion expressed in the said ruling of the Supreme Court seems to be an acceptance of views adhered to by feminist movements postulating the a-sexuality ethic and a-sexual professional approach at the workplace. Liberal feminism treats sexuality as fetters which women should shake off in the labor market (Helios and Jedlecka 2016: 15-58). None other than Margaret Mead – the godmother of sexual revolution – stated that sexuality in the workplace should be "eradicated in the same way as incest" (Mead 1989: 31-33).

Thirdly at last, the synthesis carried out by the Supreme Court appears to be a manifestation of the trend defined in sociology of law as the so-called *managerialization of law*. This view assumes that the practice and rhetoric of the personnel responsible for managing the company reinterpret norms of law limiting prerogatives of managers in the direction of solutions that are more innovative, more rational and more progressive (Edelman, Fuller and Mara-Drita, 2001: 1589-1641). The analysis done in the framework of this current of sociology underlines the manner in which organizations react to legal regulations through satisfying requirements of law with properties that are suitable for the personnel managing the company (Sześciło 2012: 5-16).

A practical manifestation of the dynamically developing management of close relationships in the workplace are multiplying internal instructions and policies referring to intimate relations between workers. They are getting increasingly popular in international corporations (Doll and Rosopa 2015: 439-453). Only in the United States over 40% of companies have such regulations in operation (Society for Human Resource Management 2013). In their most basic forms they prohibit such simple behaviors as joking, making gestures or suggestions with sexual connotations. Some, which are referred to as the so-called *dating policy* or *fraternization policy*, directly prohibit building close relationships between workers (Wallgren and Tidefors 2016: 84-97). Another solution is the so-called

date-and-tell policy, according to which each intimate bond should be reported to the employer. In its extreme case, interference on the part of employer in workers' conducts of sexual nature takes the form of the so-called *love contracts*, in compliance with which employees upon reporting their relationship to the employer are obliged to declare that the relation is of voluntary nature and will not have any negative impact on the situation in the company (Silverbrand 2009: 155-179). The race in this respect continues – the streaming platform that is the best-known throughout the world has introduced the rule of 5 seconds, which prohibits the worker to look at a co-worker for longer than 5 seconds (Timpf: 2018). The aim of all regulations of this kind is to eliminate undesired situations in such a way as to effectively limit any responsibility of the employer for sexual abuse, mobbing or infringement of personal rights.

As the Supreme Court's ruling in question concerns employment hierarchy in which superiors were male and subordinates were female and as most of the victims of sexual harassement are female (2018; 2007), then the paper focuses on women as individuals being both more vulnerable to imbalances of power and more exposed to undesired behaviors.

The research goal of the paper is to determine whether the dominating view of a negative influence of intimate and sexual relationships on relations in the workplace may require to be redefined and to prove that treating behaviors of the sexual and intimate character in isolation from the structure of the sexes in employment-based relations, as it takes place in the ruling of the Supreme Court under analysis, can contribute to discrimination of women. The aforementioned purposes will both be achieved by applying the formal-dogmatic approach.

2. The myth of the a-sexual workplace

The Supreme Court's concentration, in the said ruling, solely on the very intimate relations themselves poses a danger of treating sexual harassment as an isolated problem, not as a symptom of the structural phenomenon which is inequality of men and women regarding employment relations. The result may be such that employers or courts can take action against persons responsible for defined behaviors sexually marked and simultaneously do nothing or very little to deal with the hierarchy of the sexes in the workplace. Drawing attention away from the real problem of discrimination because of sex in employment, the sexual sanitization may in consequence weaken the postulate of equality of the sexes. What is more, the stress laid on elimination of sexual behaviors in the workplace can encourage workers to present and formulate their negative discrimination-related experience in the narration of sexual harassment, which – in turn – can obscure the real problem of systemic inequality of the sexes. As a result, women can complain of bawdy jokes when in fact their main

fear concerns the caste system which often relegates women to taking posts of lower pay and lower status.

The popularity of the above-indicated regulations and policies shaping the range of intimate relations at work seems not to aim at preventing discrimination in employment at all, but to chiefly restrict employer's liability connected with formation or tolerance of space in which sexual behaviors are perceived in separation from the sex structure and are treated as excesses. Still, the very behavior of sexual or intimate nature itself does not mean real discrimination based on sex yet. Anyway, Article 18^{3a} Para 6 of the Labor Code defining sexual harassment does not require verifying at all whether the effect or intended action by the perpetrator was indeed discrimination based on sex through depriving the victim of determined possibilities related to work. The definition of sexual harassment assumes in advance that it is always a manifestation of discrimination on grounds of sex, without the requirement that this were the intention or effect of the perpetrator's action. Attention should be paid to the fact that after all the goal of the above-mentioned internal policies and regulations dealing with intimate relations in the workplace is not improvement of the structural position of women in work environment, but elimination of defined behaviors of sexual nature, including consensual, which could impact the employer's liability. On the other hand, the tools which are more favorable regarding fight against sexual harassment of women seem to be those improving, in a systemic way, the situation of women in the sphere of their employment, promotion, training and evaluation in work environment.

If we regard sexual harassment as a consequence of certain psychic inclinations of individual perpetrators or their inadequate sensitivity, not as a consequence of the sex structure in the given company, only then does it make sense to concentrate solely on regulating workers' sexual and intimate behaviors through prohibitions and discipline. The effect of sexual harassment understood in this way is just the common practice of preventing the abuse through creating suitable procedures of considering individual complaints concerning acts of sexual harassment in the workplace. What is more, the result is often perceiving separation of the sexes not as the cause of sexual abuse, but as a mechanism which is supposed to prevent such a behavior. If sexual tension is perceived to be the problem, then the applied solution is elimination of this tension by separating the sexes. Accordingly, some companies while delegating their employees to go on business trips do order women and men to stay in different hotels (Atwater, Tringale, Sturm, Taylor and Braddy 2019: 17-31), whereas others forbid holding working meetings between a man and a woman behind closed doors (Philipps i Tsatsas), which practice has come to be ironically dubbed into *an open door policy*. If the Vice-President of the US refuses to meet women at work without the presence of third parties (Blake 2017), it is not surprising that 30% of men

in American companies apply the same practice (Mahdawi 2019). Then, how can women gain access to individual training or mentoring if their meetings with men in the workplace are hampered? How can they show that they are group players if they cannot set out on a business trip with men? If there is a climate created of isolating women and evading them, which employer will want to employ or promote them? Thus, separating the question of sexuality at work from the full organizational context of the company seems mistaken.

All the three intellectual trends mentioned in the introduction (Taylorism, feminism and managerialization) assume that it is possible to distinguish and isolate the sexual element and intimate sphere from the other ones related to the functioning of a company. As a result, there follows a conviction that if the sphere of intimacy can be separated from other behaviors, then it is possible to penalize it in a uniform manner, as well. A totally different perception of sexuality derives from Michael Foucault who asserted that sexuality as a social creation constantly and completely penetrates all human behaviors in all organizations (Focault 2010: 130-167). In consequence, some sociologists write about organizational sexuality (Hearn, Sheppard, Tancred-Sheriff Burrell 1989: 24-49). According to this framework, sexuality is not a static attribute which workers can take with them to work or not, yet it is an incessantly renegotiated process that follows between people. Here, sexuality is not a biological component, but a phenomenon appearing in relations between employees. Providing work is often primarily a social activity, it is not viable to separate sexuality from work. Sexuality is thus a common and frequent element of human relations, not a rare or exceptional private feature (Perez and Liberman 2010: 98-116). As a result, sexual harassment cannot be treated as a catalogue of defined sexually-oriented behaviors which can be identified and disciplined.

Meanwhile, along with technological and global transformations which Polish civic society is being subjected to, the workplace has remained one of the few places where representatives of different social groups can get to know each other better (Kiersztyn 2017: 200-230). People who work with one another, enter into closer relations for a longer span of time to achieve common targets, which – in consequence – can make a source of exceptionally intimate relationships – those typical of colleagues, friends or sexual ones. Polish studies indicate that 34% of romances commence at work (2011). When the employer forbids or discourages employees from maintaining intimate relations between one another, at the same time they deprive the latter of the chance to find a partner in the environment which offers them the greatest potential. And if, additionally, such sexual or romantic relations make the basis for imposing disciplinary penalties or other negative consequences, then there forms a climate of smothering bonds of friendship or solidarity among the employees. Many of them can as a result be afraid that showing interest in a colleague can lead to

being charged with sexual harassment. It is therefore hard to expect employees representing different environments to build close bonds and relations, be it sexual or extra-sexual, if they are bound to worry that such emotional getting closer to another person in the workplace entails a risk either of legal consequences or connected with their reputation.

The old goal of Taylorism, that is having a sterile company in which employees are free from human emotions and concentrate on turning their whole potential to the benefit of the employer does not reflect the rich and complex roles which work plays in man's life. To the majority of people in employment, work is not only and exclusively a source of income (Jabłonko 2014: 127-135). It provides a way to find oneself in society and to offer this society some values, to fight with one's weaknesses, to strike relations and build a network of contacts, to leave something behind; but it is also a source of community with others or a way to better understand one's own emotions.

In this light, sexuality is not only an attribute of individual persons, but a dynamic force which is developed in relations formed by, among others, such institutional spaces as a company. Thus, sexuality will not always have the character of discrimination based on sex and will not always be destructive to the work environment. It can also serve various positive aims. And in the same way as many people build and express their personality through behaviors of the sexual nature, workers as a group can make reference to sexual interaction, for example, in order to lessen the strain, reduce boredom, form mutual solidarity or express resistance towards oppressive practices of their superiors. Indeed, results of some studies prove that romance in the workplace can – in certain circumstances – increase productivity (Verhoef and Terblanche 2015: 287-310).

Thus, contrary to the existing conviction, intimate relations in the workplace do not always have to result in harming or depreciating women. Everything will depend here on the structural context in which such intimacy or sexuality are expressed. Women working in companies dominated by men are far more often confronted through hostility from men, and men intentionally use behaviors of sexual nature to brand them as different or 'leprous'.

At the same time, studies prove that women employed in more integrated and egalitarian companies a lot more frequently voluntarily participate in building sexual relations in such places and get pleasure from them (Brandl, Mayrhofer and Reichel 2007: 634-645). It probably results from the fact that in such environments the number of women and proportion of the sexes allow women to shape norms of sexual behaviors in the workplace according to one's own expectations and needs. Instead then of assuming that women will always treat sexual behaviors as a manifestation of abuse or aggression, it would rather be necessary to provide greater integration of women in companies, and first of all – so that they should more often be represented on posts of authority

and power. This will allow women to actually co-decide about the character of culture of work.

It turns out that identical behaviors of sexual nature are perceived in a different way by employees, depending on whether they occur in the work environment where women are in the majority and where they hold managerial posts or positions with responsibility (Schultz 2010: 1203-1221). Thus, contrary to theses propagated by the above-mentioned currents in sciences of management and feministic currents, sexuality in the company is not always perceived by women as discrimination of them. In such situations everything depends on how much women and men are integrated with each other in the given company and also on how many women hold posts connected with authority and responsibility (Kanter 1993: 217-245). Sexual abuse should therefore be perceived first of all as a mechanism of marking women as different and such that are not fit to perform given functions in the workplace. Ignoring this motivation of the abuser can only too easily result in overlooking the relation between sexual abuse and segregation of the sexes in the workplace.

Working environments where women are more numerous and better integrated as well as occupy positions connected with authority primarily pose a lesser threat and risk to women of being sexually harassed. Additionally, they create chances to co-decide about what the norm is, to overcome stereotypes and to define what sexually-marked behaviors are acceptable. American studies point to the fact that in integrated environments women do not treat jokes or suggestions of sexual character as acts of abuse (Foster and Fullagar 2018: 148-160). Rosabeth Kanter is of the opinion that where there are few women or where they hold lower posts, they are treated as representatives of their sex, as symbols, not as individual subjects with full personality (1993: 208-210). This phenomenon was defined as the so-called *tokenism* (Zimmer 1988: 64-77). In consequence of the mentioned studies, it seems that a rise in the women's presence on posts connected with authority and responsibility may allow all the women in the company to express their sexuality more freely.

Thus, in opposition to the recommendations of the Supreme Court, it seems necessary to reconsider the traditional conception of rationality which governs the workplace in favor of a broader framework that acknowledges sexuality and intimacy to be inseparable elements of life in organizations.

3. De-sexualization and de-segregation

The way in which the weight of close relations in the workplace is perceived by the Supreme Court does not allow either women or men to positively experience sexuality and intimacy in the company. This can enhance dynamics which encourages women to formulate their objections and claims through

narration of sexual harassment – even when the objections are brought down to a much more vital one concerning inequality with regard to employment. The circumstance in which the employer defines and disciplines sexual behaviors, encourages employees to use the language of sexual harassment, not one connected with structural features of the given organization.

The very fact itself that enterprises treat sexual harassment with greater attention than discrimination based on sex, which is not related to the former, results in that women formulate their claims through referring to the sphere of sexuality. As a result they can report the problem of sexual behaviors when, in fact, their signal concerns the question of men's authority and hierarchy in the employment – the phenomena that cannot be presented with the idiom of sexual harassment. Sexist jokes that are popular with men in the workplace typically aim to build the culture of masculine identification and solidarity through showing women as outsiders (Gołczyńska-Gondras 2009: 1151-1185). The problem with such jokes does not concern their content, but the fact that they serve to isolate women. By treating sexist comments exclusively as a manifestation of aggressive masculine personality and not as a manifestation of structure of the sexes and men's dominance, women deprive themselves of the possibility of demanding changes of the organizational character. Consequently, the systemic inequality of the sexes is brought down to a vulgar joke or a provoking utterance.

The language and narration of sexual harassment can easily be made use of to name other behaviors of co-workers or superiors, which do not have their names and whose intention or effect is to humiliate or isolate the employee. In the English literature on the subject such behaviors are collectively referred to as *managerial abuses*, ones suffered from superiors. Due to the fact that such behaviors do not fall into any collective category, victims of these abuses include them in the category of sexual harassment (Lopez, Hodson and Roscigno 2009: 3-27). Harassment is becoming thus a kind of medium through which all abuses in the company are formulated and communicated.

To the majority of workers, deciding whether the given sexual behavior has the character of harassment will depend on who commits it. This shows only that sexuality in the workplace becomes significant in a full organizational context. Studies conducted in the branch of gastronomy in the United States revealed that waitresses perceived behaviors marked with intimacy and sexuality like gestures, jokes, touching or embracing completely differently when they were made by waiters and when the same came from workers in the kitchen (Guiffre & Williams 1994: 378-401). Additionally, still in a different way when they were made by white males and those of different skin color. Latino and Afro-American men working in the back facility were excluded from the women's sphere of intimacy. The above leads to the conclusion that internal regulations

and policies concerning sexual harassment cannot be and probably are not used objectively, but first of all against persons perceived as different. Thus, no company can be completely de-sexualized. The rules and norms aiming at elimination of sexuality will favor forms of sexual behaviors of the dominant group instead. Should then regulations relating to sexual harassment at work not reflect such values that will allow enriching human experience instead of bringing them down to de-sexualized and hence de-humanized representation of human nature?

As it has been shown above, work is not only a source of maintenance, but also fulfils a series of other functions co-forming human identity. Work environment today is one of the few places where people who belong to different social groups and represent different classes can achieve common goals jointly and severally, and invest their lives with common significance. As Arie Hochschild maintains, "to many people the company has become the center of their dreams and needs" (2001: 106-116). Whether or not we acknowledge this to be positive, in the case of the majority of human beings, work is one of the fundamental spheres forming human life. In the world where increasingly many interhuman relations are of the short-lived and superficial character, those at work have a chance to be deeper, based on greater trust and long-lasting. Work environment is a space to favor establishment of intimacy between people (Jakimiuk 2016: 43-54). Close cooperation over a long period of time, linked to attaining a common goal, joint living through successes and failures must make workers come closer to one another. Mutual interests may act like an aphrodisiac and the bonds which are formed in connection with pursuing them can be far stronger than those created outside work environment.

Obviously, not all intimate relationships include sexual behaviors. There arises a natural temptation to maintain this intimacy in the workplace and to eliminate sexuality. One must remember, though, that in the face of longer and longer hours, being the result of omnipresence of mobile devices and in consequence – less and less time devoted to socializing, work remains one of the basic fields of looking for a partner (Kacprzak-Wachniew 2014: 147-162). In practice, it would be hard to divide employees' behaviors into intimate and sexual since the line between the two is too vague. Besides, it is hardly possible to imagine a situation in which employees – confronted with the policy prohibiting sexual behaviors, which is in force, should be ready to develop intimate relations and manage them solely in such a way as to keep them intimate exclusively at work, but sexual outside it. What is more, in the face of rules that prohibit defined conducts (touching, embracing, gestures), workers can simply be afraid that their behavior will be presented and interpreted in an unfavorable light. This can also lead to a rise in mutual distrust among co-workers if an intimate gesture can bring about disciplinary consequences. This

means that the value of work, which the sense of bond with one's colleagues forms, can easily be wasted because of a regulation concerning sexual harassment. Suppressing the sphere of sexuality at work, it is only too easy to stifle human energy, vitality and human bonds.

It needs remembering that internal rules and policies which prohibit defined conducts of sexual nature are not created with participation of those whom they concern the most, that is employees. The authors of such recommendations are typically lawyers, personnel departments and external consultants, who aim to suitably shape employer's liability for acceptance or tolerance of sexual harassment. Employees do not have then any influence on defining the culture and norms of sexual behaviors in the workplace. In these rare cases where they can co-decide about such norms, their satisfaction with work is on the increase, while complaints of sexual harassment do not occur (Sturm 2000: 458-568). Thus, instead of endeavoring to root out sexual behaviors, eradicating them from the company, it is perhaps worth attempting to create such a workplace, where everybody can be both a competent worker and a subject of sexual behaviors. Therefore, the solution should not be elimination of the sphere of sexuality, but guaranteeing that women have a greater influence on how this sexuality is defined and experienced. As Rosemary Pringle writes, "Sexuality cannot be prohibited. Instead, by making it more present and more visible, women can become a subject of sexual discourses, but not their objects" (1997: 75-80).

In other words, the problem with sexual harassment is not that it relates to sexuality, but that it makes discrimination based on sex. And this eradication of discrimination should be the guiding principle behind rules dealing with labor law, not elimination of sexuality. As it has been mentioned above, sexual harassment is a result of stratification based on sex, which occurs in the workplace and differences in the status and pay, which result from it. In places where women are not fully integrated or treated as equals, they will – with a high probability – be subjected to acts of sexual and other-than-sexual discrimination. Hence, employers should not be, like the Supreme Court decided in the ruling mentioned in the introduction, encouraged to de-sexualize the work environment, but to secure its full de-segregation. It is the emphasis mistakenly laid by anti-discrimination regulations on sexuality of employees' behaviors that leads to formation of an a-sexual space. In consequence, abandoning such optics can change the employers' way of thinking and shift the point of gravity from an analysis of sexuality to one of systemic discrimination of women.

Therefore, rules ought to encourage greater integration of women so that they should have a greater say in establishing norms of behaviors in the given company. As it was mentioned earlier, whether women perceive the given conduct to be sexual harassment seems to depend, in the first place, on the proportions of employment of the sexes in the company and the extent to

which women occupy positions connected with authority and responsibility (Studzińska 2015: 23-35). Perhaps it is worth essaying to work out such a model of employer's liability for sexual harassment that is dependent on how much the employer has been able to integrate both sexes and what proportion between them there is. Thus, the employer who has managed to integrate the sexes to a defined high degree, both regarding the proportion in the overall number of women and men and the number of the former occupying managerial posts, would be held responsible but exceptionally for creating conditions for sexual harassment. In turn, the employer who has created conditions for segregation would bear this responsibility somehow automatically, through – for example – shouldering relevant burden of proof. Such a regulation would encourage employers to desegregate working environment and not to de-sexualize it. The employer would not feel the pressure any longer to concentrate on sexual behaviors of the employees and their intimate relations at the workplace and signals of actual sexual harassment would be treated as a stimulus to verify the existing relations between the sexes, which – after all – is the aim of rules that regulate fight against sex-based discrimination in employment. As a result, women working in integrated companies would enjoy greater freedom to decide about norms of sexual and intimate behaviors, while women working in places of high segregation would have greater easiness in holding the employer responsible for letting harassment occur. Employers would know where they stand as regards different kinds of responsibility created by new regulations (it would be necessary to consider a few degrees of this responsibility depending on the proportion of the sexes) and would be encouraged at the same time to strengthen de-segregation as well as increase the share of women's holding positions that offer greater responsibility.

The aim of the new look at regulations concerning sexual harassment and discrimination based on sex in the workplace would not be inspiring all organizations to develop greater sexualization of work culture; neither would it mean encouraging superiors to accept all intimate behaviors in their full effect. The aim would be to create such a working environment that would allow superiors and employees to co-decide about the culture and norms of acceptable conducts so that the atmosphere at work were free from sexual harassment, yet – simultaneously – not burdened with the pressure to suppress intimate relationships.

4. Conclusions

As it has been pointed out above, to many employees intimacy in the workplace is a vital element of identity, allowing them to fight alienation, improve morale and increase enthusiasm. It also favors formation of a community and creativity. Building bonds at work can be the base of a friendship or simply – mentor-like relations which are valuable tools of professional development.

It needs remembering that rational goals and motivations which companies and employers are guided by are subsequently applied in interhuman relations dominated by human personalities, emotions and passions. Sexuality and intimacy are thus an inseparable component of life in organizations. Stronger integration of women in the workplace will allow making companies not as much free from sexuality as safe for sexuality.

In this light, the opinions expressed by the Supreme Court in the ruling referred to in the introduction, which point to a negative impact of intimate relations between workers and management of the company, appear clearly to be missing the point: the goal of the employer should not be an increased control over close relationships which are formed between employees, but elimination of structural inequalities between women and men. Instead of de-sexualization of the employees' environment, employers ought to focus on its de-segregation through securing an appropriate proportion of the sexes as regards both the overall number of employees and – first and foremost – positions connected with authority and responsibility.

One of the ways which could be applied in the process of de-segregation and – at the same time – would allow natural development of human sexuality, would be changed rules of employer's responsibility, statutorily-constituting a stiffened regime for employers who do not integrate the sexes and inclining towards exempting from liability those who have successfully and fully accomplished such an integration.

Bibliography

Primary sources

Legal acts

Ustawa z dnia 26 czerwca 1974 r. – Kodeks pracy. Dz.U. 2020, poz. 1320, tekst jednolity.

Case law

Wyrok SN z 23 stycznia 2018 r., III PK 13/17. Dostęp: LEX nr 2449668.

Secondary sources

Anderson, Elisabeth. 2017. *Private government: How employers rule our lives (and why we don't talk about it)*, Princeton, 51-90.

Atwater, Leanne, Allison Tringale, Rachel Sturm, Scott Taylor i Philip Braddy. 2019. *Looking Ahead: How what we know about sexual harassment now informs us of the future*, Organizational Dynamics, vol. 48, n. 4, 17-31.

Blake, Aaron. 2017. *Mike Pence doesn't dine alone with other women*. Online: https://www.washingtonpost.com/news/the-fix/wp/2017/03/30/mike-pence-doesnt-dine-alone-with-other-women-and-were-all-shocked/. accessed: 6.02.2020.

Brandl, Julia, Wolfgang Mayrhofer i Astrid Reichel. 2007. *Gender-egalitarian culture and differences in strategic integration among women and men in HR director positions*, Management Research News, vol. 30, 634-645.

Ćwiklicki, Marek. 2011. *Współczesne oblicza tayloryzmu.* W: *Rozwój koncepcji i metod zarządzania*, red. Janusz Czekaj, Marek Lisiński, Kraków, 135-157.

Doll, Jessica, Patrick Rosopa. 2015. *Workplace romances: examining attitudes experience, conscientiousness, and policies*, Journal of Managerial Psychology, vol. 30, n. 4, 439-453.

Edelman, Lauren, Sally Fuller i Iona Mara-Drita. 2001. *Diversity Rhetoric and the Managerialization of Law*, American Journal of Sociology, vol. 106, n. 6, 1589-1641.

Foster, Pamela, Clive Fullagar. 2018. *Why don't we report sexual harassment? An application of the theory of planned behavior*, Basic and applied social psychology, vol. 40, n. 3, 148-160.

Foucault, Michel. 2010. *Historia seksualności*, Gdańsk, 130-167.

Golczyńska-Grondas, Agnieszka. 2009. *Relacje między kobietami a mężczyznami w świetle dowcipów internetowych*, Acta Universitatis Lodziensis Folia Sociologica, n. 34, 71-88.

Guiffre, Patti, Christine Williams. 1994. *Boundary lines: labelling sexual harassment in restaurants*, Gender and Society, vol. 8, n. 3, 378-401.

Hearn, Jeff, Deborah Sheppard, Peta Tancred-Sheriff i Gibson Burrell. 1989. *The sexuality of organization*, Nowy Jork, 24-49.

Helios, Joanna, Wioletta Jedlecka. 2016. *Wpływ feminizmu na sytuację społeczno-prawną kobiet*, Wrocław, 15-58.

Hochschild, Arlie. 2001. *The time bend, when work becomes home and home becomes work*, Londyn, 106-116.

Jabłonko, Olga. 2014. *Praca zawodowa jako wartość uniwersalna w życiu człowieka*, Prace Naukowe Wałbrzyskiej Wyższej Szkoły Zarządzania i Przedsiębiorczości, n. 4, 127-135.

Jakimiuk, Beata. 2016. *Środowisko pracy jako obszar budowania poczucia własnej wartości i relacji z innymi*, Universitatis Mariae Curie-Skłodowska Lublin Polonia Sectio J, vol. XXIX, n. 4, 43-54.

Kacprzak-Wachniew, Kamila. 2014. *Zmiany w sposobie poszukiwania partnera życiowego – przegląd badań dotyczących użytkowników portali randkowych*, Teraźniejszość – Człowiek – Edukacja, vol. 68, n. 4, 147-162.

Kanter, Rosabeth. 1993. *Men and women of the corporation*, Nowy Jork, 217-245.

Kiersztyn, Anna. 2017. *Voice and insecurity: political participation among members of the precariat* W: *Civil Society Revisited: Lessons from Poland*, red. Kerstin Jacobsson, Elżbieta Korolczuk, Nowy Jork, 200-230.

Lopez, Steven, Randy Hodson I Vincent Roscigno. 2009. *Power, status and abuse at work: General and sexual harassment compared*, Sociological Quarterly, vol. 50, n. 1, 3-27. Mahdawi, Arwa. 2019. *Men now avoid women at work*. Online: https://www.theguardian.com/lifeandstyle/2019/aug/29/men-women-workplace-study-harassment-harvard-metoo. accessed: 6.02.2020.

Martyniak, Zbigniew. 1996. *Metody organizowania procesów pracy*, Warszawa, 17-36.

Mead, Margaret. 1978. *A proposal: we need taboos on sex at work*, Redbook, n. 150, 31-33.

Perez, Bianca, Aaron Liberman. 2010. *Sexuality in the workplace: where do we stand?*, The Health Care Manager, vol. 29, n. 2, 98-116.

Philipps, Caroline, Nick Tsatsas. 2017. *Male bosses avoid being alone with women at work*. Online: https://www.thehrdirector.com/features/cultural-change/male-bosses-avoid-alone-women-work/. accessed: 5.02.2020.

Pringle, Rosemary. 1997. *Feminist theory and the world of the social*, Current Sociology, vol. 45, n. 2, 75-89.

Quinn, Beth. 2000. *The paradox of complaining: law, humor, and harassment in the everyday work world*, Law and Social Inquiry, vol. 25, n. 4, 1151-1185.

Schultz, Vicky. 2010. *Feminism and workplace flexibility*, Connecticut Law Review, vol. 42, n. 4, 1203-1221.

Silverbrand, Ian. 2009. *Workplace romance and the economic duress of love contract policies*, 2009, Villanova Law Review, vol. 54, 155-179.

Studzińska, Anna. 2015. *Gender differences in perception of sexual harassement*, Toulouse, 23-35.

Sturm, Susan. 2000. *Second generation employment discrimination*, Columbia Law Review, vol. 101, n. 3, 458-568.

Sześciło, Dawid. 2012. *O pomostach między prawem a współczesnymi nurtami zarządzania publicznego*, Zarządzanie Publiczne, nr. 4, 5-16.

Timpf, Katherine. 2018. *Netflix bans employees from looking at each other for more than five seconds*. Online: https://www.nationalreview.com/2018/06/netflix-five-second-staring-rule/. accessed: 27.01.2020.

Tippett, Elisabeth. 2018. *The legal implications of MeToo movement*, Minnesota Law Review, vol. 103, 229-302.

Wallgren, Lars, Inga Tidefors. 2016. *Workplace romances: Going to work is amazing and really fun*, International Journal of Psychological Studies, vol. 8, n. 3, 84-97.

Weber, Max. 2011. *Racjonalność, władza, odczarowanie*, Poznań, 89-101.

Verhoef, Hendrika, Lourie Terblanche. 2015. *The effect of dissolved workplace romances on the psychosocial functioning and productivity of the employees involved*, Social Work, vol. 51, n. 2, 287-310.

Zimmer, Lynn. 1988. *Tokenism and women in the workplace: the limits of gender-neutral theory*, Social Problems, vol. 35, n. 1, 64-77.

Internet sources

Centrum Badani Opinii Społecznej. *Molestowanie seksualne*. 2018. Komunikat z badań nr 98/2018. Online: https://www.cbos.pl/SPISKOM.POL/2018/K_098_18.PDF. accessed: 27.01.2021.

Centrum Badania Opinii Społecznej. *Molestowanie seksualne*. 2007. Komunikat z badań nr BS/35/2007. Online: https://www.cbos.pl/SPISKOM.POL/2007/K_035_07.PDF. accessed: 26.01.2021.

Centrum Badania Opinii Społecznej. *Zdrady i romanse*. 2011. Komunikat z badań nr BS/90/2011. Online: https://www.cbos.pl/SPISKOM.POL/2011/K_090_11.PDF. accessed: 22.01.2020.

Society for Human Resource Management. Raport '*SHRM Survey Findings: Workplace Romance*'. 2013. Online: https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/default.aspx. accessed: 3.02.2020.

Volume 18, Issue 4
December 2020

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2020-11-02
accepted 2021-01-19

The crime of the so-called prenatal injury and the issue of unpunishability of the mother of a conceived child

Przestępstwo tzw. uszkodzenia prenatalnego a zagadnienie niekaralności matki dziecka poczętego

JAN SOBIECH
Uczelnia Łazarskiego w Warszawie
ORCID: 0000-0002-7242-9530, jasobiech@gmail.com

Citation: Sobiech, Jan. 2020. The crime of the so-called prenatal injury and the issue of unpunishability of the mother of a conceived child. *Opolskie Studia Administracyjno-Prawne* 18(4): 83–94. DOI: 10.25167/osap.3432

Abstract: The article considers the crime of the so-called prenatal injury, which is stipulated in Article 157a of the Polish Criminal Code. The question of the possibility of unpunished interference of the mother in the body of her unborn child is undoubtedly an important and controversial aspect of modern criminal law, especially in the context of the principles of protecting human life and health. The article also touches on philosophical and legal subjects, namely the moment when a person is created and subsequently protected by the state and law. Finally, the article answers the question whether the current legal status should be maintained and how it could possibly be revised.

Keywords: child, mother, life, health, transgression

Abstrakt: Artykuł dotyczy rozważań nad przestępstwem tzw. uszkodzenia prenatalnego, które zostało stypizowane w art. 157a k.k. Kwestia możliwości bezkarnej ingerencji matki w ciało swego nienarodzonego dziecka stanowi niewątpliwie istotny i kontrowersyjny aspekt współczesnego prawa karnego, zwłaszcza w kontekście zasad ochrony życia i zdrowia ludzkiego. Artykuł dotyka także tematów natury filozoficzno-prawnej, a mianowicie momentu, w którym powstaje człowiek i zostaje objęty opieką ze strony państwa i prawa. Wreszcie artykuł odpowiada na pytanie, czy aktualny stan prawny powinien zostać utrzymany i jakie są możliwości jego ewentualnej korekty.

Słowa kluczowe: dziecko, matka, życie, zdrowie, występek

1. Introduction

The purpose of this article is to analyse the subject of unpunishability of the mother of a conceived child, who commits the crime of the so-called prenatal injury, which is typified in Article 157a Para 1 of the Polish Criminal Code, which reads: "Whoever causes damage to the body of a conceived child or health disorder that threatens his life shall be subject to a fine, restriction of liberty or imprisonment for up to two years" (Act of 6 June 1997 – Polish Criminal Code, Journal of Laws No 88, item 553 – hereinafter CC). The regulation concerning the mother's unpunishability is included in Article 157a Para 3 of the CC, and it constitutes the second main area of interest here. The purpose of this paper is to prove that this standard is both controversial and imprecise. In order to support these theses, an appropriate analysis shall be conducted on the juridical-linguistic as well as purposive-functional level.

Another aim of the article is to analyse the legal and philosophical aspect of this issue, namely the question of how long the mother has the possibility to decide about the life and health of her child. Does she have the right to do so throughout the pregnancy, or only until the foetus is able to function independently outside her body? Or perhaps all crimes against the health and life of a conceived child should be treated as crimes against a natural born person?

2. The scope and nature of the crime of prenatal injury under Article 157a Para 1 of the Criminal Code

At the beginning, it is necessary to consider the nature and scope of the crime of causing injury to the body of a conceived child or causing a life-threatening impairment to its health. Looking at the linguistic and juridical side of the problem, it is undoubtedly a summary offence, prosecuted by public prosecution, which can be committed both by action and omission (through negligence), but only intentionally, with direct or possible intent.

It is worth referring here to the decision of the Court of Appeal in Gdańsk, which stated that: "Undoubtedly, the perpetrator's intent regarding the crime committed by him is determined by his mental attitude at the time of commencing the criminal act or while committing it. An intent is defined in Article 9 Para 1 of the CC as a process occurring in the perpetrator's psyche, expressed in the conscious will to commit a prohibited act, whereby the intent, both specific and indirect, pertains to the phenomenon of objective reality, the real course of mental processes, and therefore it is not a concept from the field of judgements or values" (Judgement of the Court of Appeal in Gdańsk of 27 April 2017, II AKa 95/17, LEX No 2372259).

The act does not provide for the possibility of inadvertent fulfilment of the constituent criteria of this crime. One should agree here with the theses of Rajnhard Kokot that the lack of symmetry in this respect leads to the weakening of the protection of a conceived child under the criminal law. The sanctions provided for in Article 157a Para 1 of the CC are most often applicable as a result of a deliberate or unintentional breach of the obligation to carefully address the legal right protected by the norm contained in this provision (Kokot 2015: 953).

However, one should take into consideration that rectifying this situation by introducing the possibility of unintentionally committing the crime stipulated in Article 157a of the CC would have to automatically lead to the creation of its mitigated form. This, in turn, would have to result in reducing the available penal sanctions for this crime, which are already relatively low. Most likely, therefore, unintentionally causing the so-called prenatal injury would be punishable by a fine, restriction of liberty or imprisonment for up to one year. Such a solution, as one of three postulated alternatives, is proposed by Marzena Czochra (2018: 41–42). The question is whether, in this configuration, the sanction would be in a rational proportion to the sanction for the same crime committed intentionally. Numerous doubts arise here, which will be discussed later in the text.

Theoretically, the crime stipulated in Article 157a Para 1 of the CC is universal in nature, because it can be perpetrated by anyone whose actions lead to the result specified in the disposition of this norm. On the other hand, if it is committed by omission, then it will constitute an individual crime (*delictum proprium*), as it will apply to a person who has a legal obligation to prevent the so-called prenatal injury. Michał Królikowski describes this entity as "the guarantor of the rights or the guardian against the source of danger" (Królikowski 2017: 326).

In the vast majority of cases, this entity will be the mother of a conceived child, who, however, is not included in the statutory description of the criteria of the crime, which is a condition for the occurrence of an individual crime. Ryszard Krajewski believes that in this case it should be considered that we are dealing with a common crime (*delictum commune*) (Krajewski 2007: 14).

The subject of the performance activity in this case is undoubtedly the body of a conceived child or its organism (Konarska-Wrzosek 2020: thesis 2). In its jurisprudence, the Supreme Court ruled that this term covers a child from conception to the onset of labour pains or the occurrence of medical indications for performing a caesarean section, and in the case of a surgical caesarean section terminating the pregnancy at the request of the pregnant woman – to the first medical procedure directly aimed at performing such an operation (Resolu-

tion of the Supreme Court of 26 October 2006, I KZP 18/06, PiP 2007, No 5, p. 144; Decision of the Supreme Court of 30 October 2008, I KZP 13/08, OSNKW 2008, No 11, item 90; Judgement of the Supreme Court of 27 September 2010, V KK 34/10, OSNKW 2010, No 12, item 105). Królikowski correctly acknowledges that in the case of a surgical caesarean section, the first medical action directly aimed at performing such a procedure marks the moment of commencement (Królikowski 2017: 327). It is worth noting, as Rajnhard Kokot does, that the act does not differentiate the intensity of the protection of the health of the conceived child according to the stage of its development, as it does in the case of the crime of termination of pregnancy, where the criterion of the ability to live independently outside the mother's body is a condition determining the qualified mode of the crime under Article 152 Para 3 and Article 153 Para 2 of the CC (Kokot 2015: 952).

Ewa Plebanek approaches the matter somewhat differently, claiming that after the appearance of an additional circumstance in the form of the medical necessity to terminate pregnancy before the coming of natural childbirth, or after the commencement of preparatory activities for surgical caesarean section (preceding the commencement of natural childbirth), an unborn child who is able to live outside the body of the pregnant woman and at the same time is not in the phase of natural delivery should be considered to be a referent of the term "human" and not "conceived child," despite being in the "prenatal period of development" (Plebanek 2016: 11).

The above-mentioned issue was addressed by the Constitutional Tribunal in its judgement of 28 May 1997, which stated quite unequivocally: "The value of legal interest covered by constitutional protection, such as human life, including life at the prenatal stage of development, cannot be subject to any differentiation. There are no sufficiently precise and justifiable criteria allowing for such a differentiation with respect to the stage of development of human life. Therefore, human life becomes a value protected under the Constitution from its outset. The same applies to the prenatal stage" (Judgement of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No 2, item 19).

On the other hand, the unborn child status is subject to far-reaching restrictions in the practice of a vast majority of European countries, primarily in connection with the legalisation of the so-called abortion on request, as well as the occurrence of specific medical indications for performing the procedure. This tendency is also sustained by the development of the liberal jurisprudence of the European Court of Human Rights. It is worth recalling here the widely commented and controversial judgement of the ECHR of 20 September 2018 in the case of *Annen v. Germany* (ECHR 309/2018). The adjudicating panel decided that the freedom of expression under Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms of

4 November 1950 (Journal of Laws 1993, No 61, item 284) does not give the right to label abortion performed by designated doctors as premeditated murder (cf. Wiak 2018: 52–53).

There is considerable controversy as to whether the concept of a "conceived child" includes those conceived as a result of in vitro fertilisation. Shall such a position be accepted, the subject of the performance activity would include a human embryo remaining outside the mother's body (*ex vivo*). A similar position is adopted by, among others, Andrzej Zoll (2017: 381) and Michał Królikowski (2017: 327). Magdalena Budyn-Kulik believes otherwise (2020: thesis 4). Jacek Postulski takes a middle position, claiming that the juridical regulation of Article 157a of the CC does not mean that a fertilised egg is not a human being, but only reflects a certain criminal policy or even, as the author describes it in the light of the analysed provision, "a legislative case" (Postulski 2007: 151). On the other hand, Krzysztof Wiak gives arguments in favour of the admissibility of liability of the perpetrator of killing a human embryo in vitro pursuant to Article 157a Para 1 of the CC. When interpreting this provision, the application of the *a minore ad maius* rule would lead to the conclusion that since the legislator prohibits causing negative effects to the health of a conceived child, it shall be all the more forbidden to cause an even more negative effect in the form of the conceived child's death (Wiak 2017: 841).

Ryszard Krajewski is of the opinion that the above interpretation cannot be used since it would violate the *nullum crimen sine lege* principle, because it is not possible to create new types of prohibited acts, not specified explicitly in the penal act, by way of interpretation. Moreover, it would contradict the systemic interpretation of the acts against a conceived child included in Chapter XIX of the Criminal Code (Krajewski 2007: 13). Michał Królikowski shares these reservations, believing that the perpetrator causing the death of an embryo in vitro should be responsible to the same extent as in the case of causing "less grave" damage, i.e. an injury to the body or impairment of health that preceded the death (Królikowski 2017: 328).

Either way, this kind of argumentation can only obtain partial, conditional approval with the proviso that we consider an embryo in vitro as a human being. This question seems contentious for a reason, as it concerns issues of definition that have not been actually regulated and are subject to various interpretations, to a large extent depending on the philosophical and religious attitude.

Under the analysed provision, the subject of protection is the health and life of a conceived child as a legal good independent of legal rights relating to other persons, including the pregnant woman (Zoll 2017: 380). It is the direct subject of protection. It can also be concluded that this provision indirectly protects to some extent the right of the mother of the conceived child, or the parents, to

the proper development of the child (Szwarczyk 2016: 426; Krajewski 2007: 13). On the other hand, by applying a linguistic interpretation, it follows that the condition of liability under Article 157a Para 1 of the CC is not any injury to the unborn child or impairment of health, but only such that leads to a threat to the child's life. This is also what Violetta Konarska-Wrzosek believes, adding that there must be a real risk of death of the conceived child (2020: thesis 3).

Krzysztof Wiak is of the opinion that the subject matter of this crime covers bodily injury to a conceived child, regardless of the gravity of the damage caused; it can therefore even be a minor injury. This thesis should be accepted, because the legislator specifies neither the effects of the injury nor the seriousness of such harm. It is also the case in the other of the aforementioned effects, namely the impairment of health, which is punishable only when it poses a threat to the life of the conceived child (Wiak 2017: 841).

Violetta Konarska-Wrzosek approaches this issue similarly, defining injury to the body of a conceived child as "causing external or internal injuries of a permanent nature to the anatomy of a conceived child, which negatively impacts on the structure of tissues, organs or larger parts of the body of the conceived child" (Konarska Wrzosek 2020: thesis 3).

Undoubtedly, the crime under Article 157a Para 1 of the CC is an offence with criminal consequences, as there must be at least one of the two features of a prohibited act specified in the legal norm disposition. Magdalena Budyn-Kulik points out that the features of this crime do not necessarily include the result in the form of the death of the conceived child (Budyn-Kulik 2020: thesis 2). This conclusion seems obvious, since this feature of a prohibited act goes beyond those included in Article 157a Para 1 of the CC. In the latter case, we would consider it to be the crime of termination of pregnancy, depending on the existence or non-existence of the woman's consent, pursuant to Article 152 or 153 of the CC.

The provision of Article 157a Para 1 of the CC clearly indicates that this crime has no aggravated or mitigated form. Article 157a Par 2 of the CC, which concerns the activities of a physician, provides for a clause of impunity that is similar to a state of higher necessity, as its features of a prohibited act are medical actions taken by a physician, necessary to remove the danger threatening the life and health of the pregnant woman or conceived child (Zoll 2017: 382). This opinion is shared by Michał Królikowski, who takes the position that in order to apply this clause of impunity, additional conditions must be met: 1. the woman's consent to perform a medical activity (especially a medical procedure); 2. the physician's lack of intent to cause the feature of a prohibited act described in the act; 3. the physician's behaviour consisting in performing a medical activity that is necessary in a given circumstance, provided the choice and man-

ner of performing the activity complies with the medical science (Królikowski 2017: 328). Leon Tyszkiewicz adds that these actually include two reasons for a clause of impunity – a state of higher necessity and performing the necessary medical activities (Tyszkiewicz 2016: 953). Subsequent Article 157a Para 3 of the CC concerns the mother's clause of impunity, which will be developed in the next part of the article.

The crime under Article 157a Para 1 of the CC is punishable with the already mentioned alternative sanction in the form of a fine, restriction of liberty or imprisonment for up to 2 years. It is worth noting that, due to the low penalty for this crime, Article 58 Para 1 of the CC is applicable here, which recognises the primacy of non-custodial penalties ("If the law provides for an option of the type of penalty, the court shall impose the penalty of deprivation of liberty without suspending execution thereof, only when no other penalty or penal measure would serve the purpose thereof") as well as Article 59 of the CC, which admits the possibility of waiving the penalty ("If the offence is subject only to a penalty of a deprivation of liberty not exceeding 3 years, or to a lesser penalty, and the social consequences of the act are not great, the court may renounce the imposition of the penalty if it decides to impose a penal measure at the same time, and the purpose of such a penalty is thus served by the measure"). Due to the low penalties provided for in the act, the court may also conditionally discontinue the criminal proceedings under Article 66 Para 1 of the CC ("The court may conditionally discontinue the criminal proceedings if the guilt and social consequences of the act are not significant, there are no doubts about the circumstances under which it was committed, and the attitude of the offender, who has not previously been penalised for an intentional offence, as well as his or her personal characteristics and way of life to date, provide reasonable grounds to assume that even if the proceedings are discontinued, he or she will observe the legal order, and particularly that he or she will not commit an offence").

The court also has the option, and – at the request of the injured party or the entitled person (in this case, it is logical that it will be primarily the child's mother) – an obligation to award compensation for the harm suffered (Article 46 Para 1 of the CC). If there exist serious impediments, the court may instead order an excess of up to PLN 200,000 for the aggrieved person or, in the event of this person's death, for the closest person (Article 46 Para 2 of the CC). On the other hand, if the perpetrator is convicted of an intentional crime against life and health, e.g. the crime under Article 157a Para 1 of the CC, the court may order an extra payment for the Victims and Post-release Assistance Fund at the amount of up to PLN 100,000 (Article 47 Para 1 of the CC in connection with Article 48 of the CC).

3. The child's mother non-punishability clause in the crime of prenatal injury

At the beginning of these considerations, it should be emphasised that releasing the mother of a conceived child from criminal liability does not contradict the criminal nature of the act she performs, as it is undoubtedly reprehensible; especially since it is clearly visible that it meets the legal criteria for a prohibited act (Krajewski 2007: 18). Barring prosecution in this situation seems highly controversial, even if the mother's engagement in risky behaviour during pregnancy is inadvertent, without her anticipating the possibility of certain consequences, let alone when she does it intentionally, being aware of the negative consequences for the life or health of her child. On the other hand, it is worth noting that not persecuting the mother makes sense if the conceived child is refused personhood; in other words, if his murder becomes a kind of mitigated crime.

In addition to these considerations, this section will raise other issues connected with Article 157a Para 2 of the CC, namely those related to medical activities aimed at saving the health and life of a child. Of interest shall be the very behaviour of the mother that may be situated at the intersection of activities described in Article 157a Para 2 and 3 of the CC, i.e. in a situation where she refuses her consent to a medical procedure performed in order to save the health and life of a child, but this is a matter of a separate issue, undoubtedly extensive.

At the beginning, attention should be drawn to certain controversies connected with the substantive side of the subject of unpunishability of the mother of a conceived child. First, there is no doubt that it is primarily the biological mother in whose case the so-called non-punishability clause will be applied. Taking into account the linguistic and systemic interpretation, in provisions pertaining to pregnancy, conceived children or childbirth (Articles 149, 152–154, 157a of the CC), the legislator uses the term "mother" to denote a person in whose body the conceived child (foetus) develops, because it is with this person's body that the biological (physical) aspect of motherhood is connected (Budyn-Kulik 2020: thesis 8). However, significant doubts are raised by the subject of surrogate motherhood. Taking into consideration the linguistic interpretation that it is (only) the mother of a conceived child who shall not be punished, all other "secondary" variants should be left outside the scope of this regulation (for more on this subject, cf. Górowski 2011: 5–24).

Konarska-Wrzosek recognises the non-punishability clause to be a compatible solution, according to which the mother of a conceived child "shall never be held liable in any form" (2020: thesis 5). This thesis seems highly controversial, as it is difficult to assume in advance that the mother did not contribute to the

occurrence of specific health damage in the child or subsequent developmental defects resulting from it. Moreover, Konarska-Wrzosek perceives the non-punishability clause as a pragmatic solution, because many factors may occur in the prenatal phase that will lead to bodily harm or impairment of health of the conceived child, which would make it difficult to determine which of them would be decisive (Konarska-Wrzosek 2020: thesis 5).

In this context, one should agree with the theses of Krzysztof Kurosz, who rationally recognises that the mother's behaviour that does not exceed the normal risk for the conceived child, such as poor nutrition or exposure to stress, should not be taken into account here (Kurosz 2017: 109). Although the woman should exercise greater care during pregnancy, behaviour that does not meet the criteria for deliberate and harmful action against the foetus should go unpunished.

On the other hand, one should be very cautious about the subject of the mother's risky sexual contacts, e.g. prostitution. Kurosz takes the position that this matter is delicate and although he is undoubtedly right here, it should not follow that the conceived child should not enjoy any form of protection (Kurosz 2017: 109). In this situation, if the above criteria were used, the mother could be liable for her actions, as she should be aware that by engaging in risky sexual behaviour she may do harm to the life or health of her child. Of course, in order to be able to use the category of wilful misconduct here, an indispensable premise would need to be the awareness of being pregnant.

A form of behaviour that commonly leads to the so-called prenatal injury is the use of alcohol or other intoxicants by the mother of a conceived child. Especially in the former case, the extent of the damage caused may be very significant, often irreversible, even fatal (for more on the statistics and consequences of alcohol abuse by pregnant women, cf. Bernfeld, Mazurkiewicz 2017: 36–74). Therefore, it is necessary to consider how to treat the behaviour of a mother who accepts the possibility of the emergence of such consequences in her child, the state of her insanity being left aside for now. Therefore, one cannot agree with Konarska-Wrzosek's thesis that it would not be justifiable to punish with a criminal penalty the mother of a conceived child who intentionally harms it during pregnancy (e.g. by trying to terminate an undesirable pregnancy on her own, by drinking alcohol or taking drugs), because it is mostly she who will bear the burden of the fact that the child will be born sick or disabled and, as a consequence, she will be responsible for caring for it (Konarska-Wrzosek 2020: thesis 5).

An example of a case that is closely connected with these deliberations is the case of a mother of a conceived child who consumed large doses of alcohol for three days despite being in the 38th week of pregnancy. She was aware of

the negative consequences of her actions. As a result, she caused an impairment to unborn child's health in the form of a severe withdrawal syndrome with apnea and convulsions, which is a life-threatening disease. In the judgement of 20 January 2015, the District Court in Słupsk acquitted the defendant of the charge of committing a crime under Article 156 Para 1 point 2 of the CC (in this case, it was a crime punishable by imprisonment for at least 3 years), recognising that, on the basis of this provision, human health is protected only from the moment of birth or the commencement of activities aimed at performing caesarean section (Judgement of the District Court in Słupsk of 20 January 2015, VI AKa 624/14, LEX No 1839629). By adopting the unlimited formula of the clause of the mother of a conceived child, she could not be held liable under Article 157a Para 3 of the CC. In practice, therefore, despite committing a seemingly serious and intentional crime against her child, the mother remained unpunished.

However, Mikołaj Małecki is critical of the above ruling, arguing that this kind of the mother's behaviour should not result in her impunity. If a child who has already been born suffers from impairment of health, then it is no longer the so-called prenatal injury according to Article 157a of the CC, but the violation of bodily activities or causing an impairment of human health as defined in Articles 156 or 157 of the CC. Therefore, Małecki concludes that "The Criminal Code does not exclude the criminal liability of a conceived child's mother whose impact on the foetus disrupted the normal functioning of the child after birth due to health disorders" (Małecki 2016).

However, such theses deserve only partial recognition. On the one hand, it seems irrational to treat the mother of a conceived child, who does not take into account the health and life of her child, as a person who is not subject to punishment. On the other hand, following the interpretation above, one could conclude that the mother will not be responsible for the death of an unborn child as a result of alcohol intoxication, but if she fails to kill him, she will be liable after the childbirth.

4. Conclusions

It is hard to suspect that the legislator's intention was to achieve such a state of affairs in which one could use *ad absurdum* argumentation; therefore, taking into account all the considerations above, a simple legislative solution should be adopted that would remove Article 157a Para 3 of the CC from the Polish legal system. As a result, anyone who would commit the crime of the so-called prenatal injury, with the exception of a doctor undertaking medical activities under Article 157a Para 2 of the CC, would be punishable under Article 157a Para 1 of the CC.

An alternative would be the possibility of introducing the already mentioned mitigated form of the crime of the so-called prenatal injury, but with the proviso that this could only apply to the mother. The provision of Article 157a Para 3 of the CC could have the following wording: "The mother of a conceived child who commits the act set out in Para 1 shall be subject to a fine, restriction of liberty or imprisonment for up to 2 years." Such a solution could, however, lead to the situation in which the legal good in the form of the protection of the life and health of a conceived child, which already seems to be insufficiently protected anyway, would suffer even further damage.

Bibliography

Primary sources

Legal acts

Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Journal of Laws 1993. No 61, item 284.

Act of 6 June 1997 – Criminal Code, Journal of Laws 1997, No 88, item. 553.

Case law

The judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No 2, item 19.

Resolution of the Supreme Court of 26 October 2006, I KZP 18/06, PiP 2007, No 5.

Decision of the Supreme Court of 30 October 2008, I KZP 13/08, OSNKW 2008, No 11, item 90.

The judgement of the Supreme Court of 27 September 2010, V KK 34/10, OSNKW 2010, No 12, item 105.

Judgment of the District Court in Słupsk of 20 January 2015, VI AKa 624/14, LEX No 1839629.

Judgment of the Court of Appeal in Gdańsk of 27 April 2017, II AKa 95/17, LEX No 2372259.

Judgment of the ECHR of 20 September 2018 in the case of *Annen v. Germany* (ECHR 309/2018).

Commentaries

Budyn-Kulik, Magdalena 2020. In: *Kodeks karny. Komentarz,* ed. Marek Mozgawa, thesis 2,4,8. Warsaw: Wolters Kluwer.

Konarska-Wrzosek, Violetta. 2020. In: *Kodeks karny. Komentarz,* ed. Violetta Konarska-Wrzosek, thesis 2,3,5. Warsaw: Wolters Kluwer.

Rainhardt, Kokot. 2015. In: *Kodeks karny. Komentarz,* ed. Ryszard Stefański, 952–953. Warsaw: C.H. Beck.

Królikowski, Michał. 2017. In: *Kodeks karny. Część szczególna,* vol. 1, *Komentarz. Art. 117–221,* ed. Michał Królikowski, Robert Zawłocki, 326–328. Warsaw: C.H. Beck.

Szwarczyk, Maciej. 2016. In: *Kodeks karny. Komentarz,* ed. Tadeusz Bojarski, 426. LEX.

Tyszkiewicz, Leon. 2016. In: *Kodeks karny. Komentarz,* ed. Marian Filar, 953. Warsaw: Wolters Kluwer.

Wiak, Krzysztof. 2017. In: *Kodeks karny. Komentarz,* ed. Alicja Grześkowiak, Krzysztof Wiak, 841. Warsaw: C.H. Beck.

Zoll, Andrzej. 2017. In: *Kodeks karny. Część szczególna,* vol. 2: *Komentarz do art. 117–211a,* ed. Włodzimierz Wróbel, Andrzej Zoll, 380–382. Warsaw: Wolters Kluwer.

Studies and articles

Bernfeld, Barbara, Mazurkiewicz Jacek. 2017. "Za młody by pić". Naruszanie prawa do życia lub zdrowia dziecka przez pijące alkohol kobiety ciężarne. In: *Nasciturus pro iam nato habetur. O ochronę dziecka poczętego i jego matki,* ed. Jacek Mazurkiewicz, Piotr Mysiak, 36–74. Wrocław: Jacek Mazurkiewicz.

Czochra, Marzena. 2018. Kwestie sporne dotyczące strony podmiotowej przestępstwa uszkodzenia ciała lub rozstroju zdrowia dziecka poczętego. *Roczniki Nauk Prawnych*, 4(28), 41–42.

Górowski, Wojciech. 2011. Zastępcze macierzyństwo a prawo karne – ocena obecnego stanu prawnego. *Czasopismo Prawa Karnego i Nauk Penalnych*, 1(15), 5–24.

Krajewski, Radosław. 2007. Przestępstwo uszkodzenia ciała lub rozstroju zdrowia dziecka poczętego. *Prokuratura i Prawo*, 6.

Kurosz, Krzysztof. 2017. Środki ochrony nasciturusa przed ryzykownymi zachowaniami matki w okresie ciąży. In: *Nasciturus pro iam nato habetur. O ochronę dziecka poczętego i jego matki,* ed. Jacek Mazurkiewicz, Piotr Mysiak, Wrocław: Jacek Mazurkiewicz.

Plebanek, Ewa. 2016. Życie i zdrowie dziecka poczętego jako przedmiot prawnokarnej ochrony (wybrane problemy wykładnicze w perspektywie najnowszych propozycji legislacyjnych). *Czasopismo Prawa Karnego i Nauk Penalnych*, 4.

Postulski, Jacek. 2007. Definicja pojęcia "człowiek" w rozumieniu prawa karnego materialnego. *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 3.

Wiak, Krzysztof. 2018. Ochrona życia i zdrowia dziecka w prawie karnym. In: *Prawo karne w ochronie praw dziecka,* ed. Alicja Grześkowiak, Igor Zgoliński, 52–53. Bydgoszcz: Kujawsko-Pomorska Szkoła Wyższa w Bydgoszczy.

Internet sources

Małecki, Mikołaj. *Pijany noworodek*. Accessed on 22.01.2020. https://www.dogmatykarnisty.pl/2016/09/pijany-noworodek/

Volume 18, Issue 4
December 2020

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2020-11-10
accepted 2021-01-22

The metropolitan union in Pomorskie Province. The Senate draft act analysis

Związek metropolitalny w województwie pomorskim. Analiza senackiego projektu ustawy

JAKUB H. SZLACHETKO
Wydział Prawa i Administracji Uniwersytetu Gdańskiego
ORCID: 0000-0002-4152-5394, jakubszlachetko@gmail.com

Citation: Szlachetko, Jakub H. 2020. The metropolitan union in Pomorskie Province. The Senate draft act analysis. *Opolskie Studia Administracyjno-Prawne* 18(4): 95–106. DOI: 10.25167/osap.3433

Abstract: The local government reforms of the 1990s created a three-tier local government system. The results of the reform are generally perceived as positive. However, it is pointed out that the legislator has not completed the political transformation process. This is the outcome of a failure to introduce an adequate and effective system of managing large cities - metropolises. In 2017, the first "metropolis" was established in the form of the Górnośląsko-Zagłębiowska Metropolia (Upper Silesia-Dąbrowa Basin Metropolis, GZM). The act sparked a nationwide discussion with other metropolises voicing their demands, including Gdańsk, Gdynia and Sopot, which make up the core of the Tri-City. The Senate of the Republic of Poland, having listened to the Pomeranian (Pomorskie Province) local government officials and experts, put forward a legislative initiative. This article discusses it.

Keywords: metropolitan government, metropolitan area, metropolitan union

Abstrakt: Reformy samorządu terytorialnego z lat 90. XX wieku stworzyły trójszczeblowy system samorządu terytorialnego. Rezultaty reform są odbierane, generalnie rzecz ujmując, pozytywnie. Wskazuje się jednak, że prawodawca nie zamknął procesu transformacji ustrojowej. Nie wprowadził bowiem adekwatnego i skutecznego systemu zarządzania wielkimi miastami – metropoliami. W 2017 r. została powołana pierwsza „metropolia" w postaci Górnośląsko-Zagłębiowskiej Metropolii. Ustawa otworzyła ogólnokrajową dyskusję, w której swoje żądania artykułowały inne metropolie, w tym też Gdańsk, Gdynia i Sopot stanowią-

ce rdzeń Trójmiasta. Senat Rzeczypospolitej Polskiej, wsłuchując się w głos pomorskich samorządowców i ekspertów, wystąpił z inicjatywą ustawodawczą. O niej jest ten artykuł.

Słowa kluczowe: samorząd metropolitalny, obszar metropolitalny, związek metropolitalny

1. Introduction

On 9 October 2015, the Sejm (the Lower Chamber) of the Republic of Poland adopted an act on metropolitan unions – hence closing a decade-long debate on the optimal organizational form of large city local governments. This bill – although far from being flawless – had numerous positives, and above all, it was trailblaizing and broke the political and legal deadlock. It provided grounds for establishing novel associations grouping communes (Polish: *gmina*) and counties/districts (*powiat*), referred to as "metropolitan units". However, the government administration bodies responsible for shaping and managing metropolitan policy (both in terms of delimitation, as well as creation) lead to the "death" of the act in question through the failure to publish executive acts. The state of legislative inactivity lasted approximately 2 years and ended with the act being repealed. On 9 March 2017, the Sejm of the Republic of Poland adopted the Act on the Metropolitan Union in the Śląskie Province (*województwo*), which – pursuant to Article 62 – derogated its precursor: "The act on 9 October 2017 on metropolitan unions (Dz. U. No. 1890 of 2016, item 2260) shall expire." The act on systemic and framework character was repealed by the act providing for special legal and financial solutions – as such, strongly inspired by the already known structure – solely for a single metropolitan area (Katowice and its functional area), leaving other areas outside the metropolitan policy and regulatory framework (socio-economic geography and urban planning professionals argue about the issue of identification and delimitation of metropolitan area; depending on the approach and method, it is estimated that there are from several to a dozen or so metropolises within the Republic of Poland; however, it should be noted that the recently applicable "National Spatial Development Concept 2030" assumed the existence of 10 such functional areas, namely, the Silesia, Warsaw, Tri-City, Wrocław, Poznań, Łódź, Kraków, Toruń-Bydgoszcz, Szczecin and Lublin conurbations). The legislator, disregarding the constitutional principle of equality (both for residents, as well as local government communities) before the law, definitely deprived the largest cities of the possibility for in-depth communal integration via a metropolitan union.

However, without going into historical, legal or political details – even more so that numerous scientific and expert elaboration have been developed in this field, it should be noted that the aforementioned activities of the legislator opened a "wish market". Various draft acts appeared, including:

- draft act on the Poznań Metropolitan Union (2016);
- draft act on the Metropolitan Union of the Capital City of Warsaw (2017);
- draft act on the Wrocław Metropolitan Union (2018);
- draft act on the Łódź Metropolitan Union (2019) or ultimately, the draft act on the metropolitan union in Pomorskie Province – which is the subject matter of this article.

The local governments of large cities, deprived of the possibility to form metropolitan unions, while at the same time encouraged by solutions dedicated for the Górnośląska-Zagłębiowska Metropolis or "Upper Silesia-Dąbrowa Basin Metropolis" (since this is the official name of the metropolitan union, established by way of the regulation of the Council of Ministers of 26 June 2017 on the establishment of the "Upper Silesia-Dąbrowa Basin Metropolis" metropolitan union within Śląskie Province), including financial mechanisms (which should be stressed, since the metropolitan union was provided with an additional financial source; as stipulated by Article 52 sec. 1 of the aforementioned act, it is entitled to a 5% income tax), started to demand adopting further individual acts. This is also the context for the Gdańsk-Gdynia-Sopot Metropolitan Area Association and the local self-government units associated therein, striving to establish similar legal regulations, which is reflected, among others, by the Senate's legislative initiative. On 10 September 2020, the Senate of the Republic of Poland adopted an act on submitting the draft act on the metropolitan union within Pomorskie Province to the Sejm (form No. 646).

The objective of this article is to analyse the organizational and functional solutions proposed in the draft act on the metropolitan union within Pomorskie Province.

2. Metropolitan union structure

It should be noted that the applicable provisions of the law concern two public administration entities referred to as a "union" (Polish: *związek*) – a communal union and a metropolitan union, which shall not be equated with each other, since they exhibit different constitutive features (although they form a common category of territorial local government units). Therefore, the metropolitan union is a generic form of a union of local government units, and not of a communal union – and such an assumption shall be adopted in further considerations.

Both the communal, as well as the metropolitan unions are "corporations of corporations" ("tier II corporations"), composed of local government units. These are special purpose organizations, established to perform public tasks and satisfy social needs. For this purpose, they were empowered by the legislator with separate legal subjectivity (both public and private law) and own bodies (decision-making/control and executive). Nonetheless, this is where the struc-

tural similarities end. However, it should be noted that the metropolitan union is an in-depth form of communal integration, which is evidenced by, among others, the fact that: (1) the legislator granted it legally protected independence (as opposed to a communal union), and (2) it has an own task category (which also distinguishes it from a communal union) (Szlachetko 2018).

Article 1, which mostly duplicates the features of the Upper Silesia-Dąbrowa Basin Metropolis, though with – certain – differences, is crucial from the perspective of the planned metropolitan union's structure. Pursuant to the cited provision:

- "2. A metropolitan union is an association of communes and districts of Pomorskie Province, characterized by the existence of strong functional bonds and the advancement of urbanization processes, located within a spatially-coherent area, inhabited by at least 1,000,000 residents";
- "3. The metropolitan union contains cities with district rights: Gdańsk, Gdynia and Sopot";
- "4. A metropolitan union can be composed solely of districts where at least half of the communes compose the metropolitan union."

Therefore, according to the assumptions of the legislator, the metropolitan union is to be an association ("corporation of corporations", "second-tier corporation") both of communes, as well as districts of Pomorskie Province. This is a significant novelty, given the Silesian Act, which basically ignored the existence of a district self-government within the metropolitan union. The legislator's mistake will be remedied in the draft in question, and the planned union will integrate all local government units. Communes and districts will have an equal membership status, and hence, will influence the organization and functioning of the new metropolitan union. The question arises in this context: Is a district self-government within metropolitan areas really required or maybe the metropolitan union should be its natural legal successor. It seems that there is no need to create a peculiar four-tier structure. However, there is no doubt that – should the legislator fear such a decision – the integration of the local government with the metropolitan union structure is better than leaving it outside of it.

The planned metropolitan union will be a legal entity – both in terms of public, and private law regulations. Pursuant to Article 2 secs 1 and 2 of the draft act: "1. The metropolitan union shall conduct public tasks on its own behalf and on its own responsibility, manages the union's property independently and manages the finances based on the budget. 2. The metropolitan union is a legal entity."

Providing the metropolitan union with legally protected independence is a novel, yet interesting, legal solution. Pursuant to the wording of Article 2 sec. 3: "The independence of the metropolitan union shall be subject to ju-

dicial protection." Only the local government units (provinces, districts and communes), which are a form of public authority decentralization (hence the independence, which constitutes the essence of the decentralization phenomenon) have been previously benefiting from the systemic trait of independence. Communal unions, with their legal structure similar to that of metropolitan unions, which are a form of local government task decentralization, did not have the privilege of independence. The Silesian Act was the first to change this state of affairs, whereas the draft Pomeranian act petrifies it. Assigning independence to metropolitan unions entails providing them with an own task category. Conducting such tasks independently bears the hallmarks of public authority decentralization. In this context, metropolitan unions and communal unions are a manifestation of completely different system-related trends.

3. Metropolitan union authorities

In the context of the metropolitan union's authority, the legislator was consistent and scrupulously duplicated the majority of the Silesian Act provisions. The existing differences arise primarily from structural diversity (let us note that the Pomorskie Metropolitan Union is an association of not only communes but also districts). As far as the remaining scope is concerned, the provisions of the draft Pomeranian Act and the Silesian Act are concurring. According to Article 18 of the draft act: "The bodies of the metropolitan union shall be: 1) assembly; 2) metropolitan union board."

A union assembly is a decision-making and control body, consisting of delegates appointed by associated local government units – communes and districts. Pursuant to Article 23 of the draft: "1. The assembly is made up of delegates from: 1) communes constituting the union – one from each commune; 2) districts constituting the union – one from each district. 2. The delegates referred to in sec. 1 are voits (commune head), mayors, presidents of cities and starosts (district head) or persons duly authorized by them". The assembly is a decision-making and control body, and also assigns persons to particular positions (e.g., a board). Whereas the board of a union is a collective executive body, elected by the assembly. Its duties include, among others, representing the union, executing assembly resolutions, financial management, as well as managing, coordinating and controlling metropolitan organizational units.

The "democracy deficiency" is a significant drawback. The procedure of forming a union is not of the democratic nature, in the sense that it is made up of virilists and not of the metropolitan community representatives. Furthermore, the latter do not have any impact on the appointment of the union's board. This is a consequence of adopting a "collective-type" and not "community-type" subjectivity of the metropolis, which was not mitigated by the legislator through

any institution or mechanism – e.g., in terms of participatory or deliberative democracy. The aforementioned state of affairs will have an adverse impact on the metropolitan union, the existence of which will not embed itself in the consciousness or identity of the metropolitan community, which is a clear mistake.

The only attempt to democratize metropolitan life is a report on its state. Pursuant to Article 35 of the draft: "1. The metropolitan union shall be obliged to draw up a report on the state of the metropolitan union. The report shall be presented to the assembly, decision-making and control bodies of local government units comprising the union, as well as the residents. 2. The procedure for drawing up the report on the state of the union and debating it shall be governed by the statute of the union." However, it does not seem for the perception of this particular solution to change the overall assessment of the democratization degree of the planned metropolitan union.

4. Metropolitan union own tasks

Both in the scientific and public domains, the greatest attention is drawn to the issue of identification (and delimitation) of metropolitan areas, as well as the optimal organizational and legal form of a metropolitan self-government. It goes without saying that they are issues extremely significant in terms of the nature and shape of metropolitan policy and regulations; however, it seems that they are not the most important. It is hard to deliberate on an institution, omitting or, at least, minimizing its target functionality or using legal language terms – scope of activity and public tasks. Institution functionality should be the starting point in each case of the work on the assumptions of an administrative reform.

The functionality of the metropolitan union was referred to by the project drafter in Article 12 of the draft act. Pursuant to its wording: "The metropolitan union shall perform public tasks in the field of: 1) shaping the spatial order; 2) union's area development policy; 3) mass transit organization and management; 4) metropolitan passenger transport; 5) organizing and coordinating sustainable mobility development; 6) development of the national and regional road network within the union's area; 7) promoting the union and its area; 8) adapting to climate change and environmental protection." The aforementioned statutory provision provokes certain reflections.

First of all, it should be noted that the catalogue of tasks of the Pomorskie Metropolitan Union is slightly different from that of the Silesian Union. Of course, the "core" is the same: (1) development policy, (2) metropolitan spatial planning, and (3) broadly understood transport policy. This peculiar triad (development-space-transport) is an inherent field of activity of a metropolitan self-government, simply determining its essence. The functionality of

the planned metropolitan union is, however, governed in greater detail, since it covers "adapting to climate change and environmental protection" (Article 12 sec. 1 cl. 8 of the draft act). The decision of the drafter on expanding the union task catalogue is comforting; however, it seems that it could cover also other areas of social and economic life, such as: (1) crisis management, (2) water and sewage management, (3) waste management, (4) health care, and possibly, (5) higher education and science.

On a side note, it is regrettable that the draft Pomeranian Act does not conform to the conceptual and terminological context of the Silesian Act, including the functionality of the union. For example:

- "union area development policy" (Article 12 sec. 1 cl. 2 of the draft Pomeranian Act), "social and economic development of the metropolitan union area" (Article 12 sec. 1 cl. 2 of the Silesian Act) – are clear signs of the lack of conceptual and terminological consistency of the drafter, and not a substantive difference in the wording of a public task;
- "mass transit organization and management" (Article 12 sec. 1 cl. 3 of the draft Pomeranian act), "planning, coordination, integration and development of mass transit, including road, railway and other rail transport" (Article 12 sec. 1 cl. 3 of the Silesian Act) – it seems that in reality, it is about the same public tasks;
- "organization and coordination of sustainable mobility development" (Article 12 sec. 1 cl. 5 of the draft Pomeranian Act), "planning, coordination, integration and development (…) of sustainable urban mobility" (Article 12 sec. 1 cl. 3 of the Silesian Act) – also in this case, it seems that they refer to identical public tasks;
- "development of national and provincial road network within the union area" (Article 12 sec. 1 cl. 6 of the draft Pomeranian Act), "cooperation in determining the routing of national and provincial roads within the metropolitan union area (Article 12 sec. 1 cl. 5 of the Silesian Act) – in this case, the interpretation of the provision leads to conclusions on the slightly different wording of the tasks in question, which in turn raises a question regarding the ratio legis (principle behind it).

It would be advisable to propose standardizing the nomenclature.

Importantly, public tasks of a metropolitan union (both existing and planned) are of an own task nature, which makes the union structurally similar to local government units on the one hand, and distinguishes it from communal unions which perform only commissioned (or entrusted) tasks, on the other one.

Besides the aforementioned public tasks, the planned union will have the power to also perform tasks commissioned and entrusted by way of relevant agreements. Pursuant to Article 12 sec. 2 and 3 of the draft act: "2. Pursuant to an agreement concluded with a local government unit, the metropolitan union

shall be entitled to conduct public tasks falling within the scope of activity of a commune, district or provincial self-government or to coordinate the execution of such tasks. 3. Pursuant to an agreement concluded with a government administration body, the metropolitan union may execute public tasks falling within the scope of activity of government administration."

A drawback of the draft act is the lack of specific legal tools for the execution of public tasks under Article 12. Undoubtedly, the metropolitan union will be able to utilize these competences, which are actually provided for by the legislator for such entities. For example, the union will implement development policy in the form of a strategy, referred to in Article 9 cl. 3 of the Act of 6 December 2006 on the principles of development policy. However, the indicated stipulation provides for public tasks, which are not entailed by any "hard" competences. It is enough to mention:

- shaping the spatial order;
- organizing and coordinating sustainable mobility development;
- adapting to climate change and environmental protection.

The fact that the drafter equips a metropolitan union with "a framework study of the conditions and directions of metropolitan union spatial management" (Article 23 cl. 3 of the draft) is kind of a curiosity – incidentally, it is a tool necessary and justified in every way, which is – at the same time – withdrawn by the legislator from legal transactions. It should be pointed out that pursuant to Article 8 cl. 7 of the Act of 15 July 2020 on amending the act on development policy and certain other acts, Chapter 2a of the act on spatial planning and development ("Metropolitan spatial planning") becomes null and void.

The aforementioned issue is not resolved by Article 13 of the draft act. Indeed, in sec. 1 it stipulates that: "In order to conduct tasks referred to in Article 12, the metropolitan union may, based on statutory rights, proclaim local enactments, which are applicable within its area." However, there are no relevant statutory authorizations, based on which a union could proclaim local enactments. In this respect, the draft act does not add any novelties to the applicable legal system. The provisions of Article 13 itself – although justified and confirming the validity of the beliefs of this part of the legal doctrine, being in a position that delegating law-making powers to local government unit unions is permitted – however, are not sufficient to accomplish a real change. The intervention of the legislator should be entailed by amendment of material administrative law acts, providing for appropriate legal grounds.

5. Metropolitan union area

As a rule of thumb, the planned metropolitan union will function on two territorial levels. This results from the structure of the union which is an association of both communes and districts. Thus, the union's borders and area

will be a consequence of communal affiliation on the one hand, and district affiliation on the other. This concept is ascertained by Article 1 sec. 4 of the act, which stipulates: "The metropolitan union can be composed solely of the districts where at least half of the communes compose the metropolitan union."

The document under analysis provides for certain general criteria that should be taken into account in the course of delimiting a metropolitan area. Apart from the wording of Article 1 sec. 2 of the draft act – since it loses its importance due to the individual nature of the act, reference shall be made to the provisions of Article 4 sec. 3. Pursuant to its wording, delimitation takes into account:

- existing forms of cooperation between communes and districts;
- functional bonds and the advancement of urbanization processes, including planning decisions within the applicable spatial development plan for Pomorskie Province;
- homogeneity of the settlement and spatial system, taking into account social, economic and cultural ties.

In practice, the importance of the "existing forms of cooperation between communes and districts" should be stressed. This phrase primarily means the Gdańsk-Gdynia-Sopot Metropolitan Area Association, which is a specific outpost of a metropolitan self-government within the broadly-understood Tri-City area. Currently, the OMGGS is composed of:

- 3 cities with district rights; Gdańsk, Gdynia, Sopot – hence, the Association satisfies the requirement referred to in Article 1 sec. 3 of the draft act;
- 8 districts (Gdański, Nowodworski, Tczewski, Malborski, Kartuski, Pucki, Wejherowski and Lęborski);
- 46 communes.

The novel legal solution in terms of metropolitan area delimitation was provided for by the legislator in Article 1 sect 4. Pursuant to its wording: "The boundaries of the metropolitan area can extend beyond the province borders." The proposed provision is substantively justified since expert studies (geographic, urbanistic and transport) unequivocally indicate the presence of "strong functional bonds" between the communes of Warmińsko-Mazurkskie Province, and the Tri-City "core" (Gdańsk, Gdynia and Sopot), with the "gravitational" force of Elbląg particularly visible. Therefore, adopting an act in such a form and shape will allow including certain local government units of the neighbouring province in the Pomeranian Metropolitan Union.

6. Conclusions

A discussion on the optimal form of large city local governments has spanned over decades, and although various conceptual and terminological ideas

have appeared (e.g., urban complexes, agglomerations or, ultimately, metropolises), they essentially mean the same – streamlining the process of managing urbanized areas and conducting public tasks therein. Science or politics have introduced numerous concepts in terms of institutionalizing metropolises to the public domain. They include a relatively large number of draft acts – particularly valuable documents, since they express a precise and structured legal and systemic idea. The proposals taking the form of a draft include the following:

- draft act on the Warsaw Commune Complex and the system of the capital city of Warsaw (1994);
- draft act on the Warsaw Capital District (2000);
- draft act on the Capital City of Warsaw and the Warsaw Urban Complex (2001);
- draft act on amending the act introducing a basic three-tier territorial division of the state (2005);
- draft act on the creation and performance of tasks by agglomeration unions (2007);
- draft act on the development of cities and metropolitan areas (2007);
- draft act on the development of cities, regional development centres and metropolitan areas (2008);
- draft act on the Regional Communal Union "Silesia" (2008);
- draft act on urban policy and cooperation between local government units in this regard (2008);
- draft act on the urban policy of the state and cooperation between local government units in this regard (2009);
- draft act on the Upper Silesia and Dąbrowa Basin Metropolitan District (2012);
- draft act on cooperation within a local government for local and regional development (2013);
- draft act on a metropolitan district (2013);
- draft act on the Poznań Metropolitan Union (2016);
- draft act on the metropolitan union in Pomorskie Province (2016);
- draft act on the Metropolitan Union of the Capital City of Warsaw (2017);
- draft act on the development of cities and metropolitan areas (2017);
- draft act on the Wrocław Metropolitan Union (2018);
- draft act on the Łódź Metropolitan Union (2019).

Without going into detailed discussions, it should be stressed that these drafts generally go in two opposite directions, in terms of creating a metropolitan self-government based on a legal structure, that is: (1) a union of local government units (referred to as an urban or metropolitan complex, as well as a metropolitan area or union), and (2) a local government unit (a new unit, with the structure reminiscent of a commune, district or province; the concepts of a metropolitan district or a MEGApolis also appeared in this context)

(Szlachetko 2020). These are common tendencies, found in many legal cultures and states – one could even risk the thesis that they are not mutually exclusive. The target solution seems creating a metropolitan self-government in a new, supra-communal form that will still remain a local government unit, being a community of the residents, manifesting itself within the local consciousness and awareness, managed in a democratic manner and conducting a number of public tasks of metropolitan nature and range. Such a state of affairs is, however, achievable only in the long run, since a social change requires time, and such processes (as shaping the awareness, building social relations or creating metropolitan identity) are complex and difficult. Therefore, it seems that the measure leading to obtaining the ultimate objective are other organizational forms of a metropolitan self-government, based on the concept of uniting (e.g., commonly used self-government associations or metropolitan unions). They are an avant-garde for target solutions, create the "grounds" for the reform among local communities, and make people accustomed to the perception of a normative and actual reality through other categories. In other words, local government unit associations are a stage in achieving metropolitan success. All this should contribute to the increasing disapproval of the legislator, who seems to fail to notice these regularities and not only fails to maintain the status quo, but takes retroactive measures (such as the derogation of the Act on metropolitan unions, which has a universal application).

Bibliography

Primary sources

Legal acts

Act of 6 December 2006 on the principles of development policy, cons. text. Dz.U. of 2019, item 1295.

Act of 9 October 2015 on metropolitan units, Dz.U., item 1890 and of 2016, item 2260.

Act of 9 March 2017 on the Metropolitan Union of Śląskie Province, Dz.U. of 2017, item 730 and of 2020, item 1378.

Act of 15 July 2020 on amending the act on the principles of development policy and certain other acts, Dz.U. of 2020, item 1378.

Regulation of the Council of Ministers of 26 June 2017 on the creation of the "Upper Silesia-Dąbrowa Basin Metropolis" metropolitan union within Śląskie Province, Dz.U. of 2017, item 1290.

Draft act on the Metropolitan Union in Pomorskie Province (form No. 646).

Secondary sources

Bąkowski Tomasz, Gajewski Rafał, Szlachetko Jakub, Ważny Karol, 2016, *Ustawa o związkach metropolitalnych. Komentarz,* Wolters Kluwer Polska, Warszawa.

Dolnicki Bogdan, Marchaj Roman, 2017, *Górnośląsko-Zagłębiowska Metropolia,* Ruch Prawniczy, Ekonomiczny i Socjologiczny, rok XXIX, z. 3, pp. 73-89.

Dolnicki Bogdan, Marchaj Roman, 2017, *Związek metropolitalny w województwie śląskim,* Samorząd Terytorialny, vol. 7-8, pp. 5-18.

Lisowski Piotr, *Status związku metropolitalnego* [w:] B. Dolnicki (red.), *Organizacja i funkcjonowanie aglomeracji miejskich,* Wolters Kluwer Polska, Katowice, pp. 194-207.

Mikuła Łukasz, 2010, *Metropolia a region – problemy ustrojowe i polityczne,* Acta Universitatis Lodziensis, nr 245, pp. 49-64.

Mikuła Łukasz, *Funkcjonowanie i integracja aglomeracji poznańskiej w opinii mieszkańców i polityków lokalnych*, Poznań 2011.

Moll Tomasz, 2017, *Ustawa o związkach metropolitalnych – rozwiązania słuszne czy kompromisowe?*, Przegląd Prawa Publicznego, nr 7-8.

Moll Tomasz 2018, *Organ wykonawczy związku metropolitalnego w województwie śląskim* [w:] Bogdan Dolnicki (red.), *Organizacja i funkcjonowanie aglomeracji miejskich*, red. B. Dolnicki, Warszawa.

Ofiarska Małgorzata, 2018, *Kształtowanie się koncepcji związku metropolitalnego w Polsce po 1990 r.,* Przegląd Prawa i Administracji, nr 3833.

Szlachetko Jakub, Gajewski Rafał (red.), 2016, *Instytucjonalne formy współdziałania jednostek samorządu terytorialnego na obszarach metropolitalnych,* Gdańsk.

Szlachetko Jakub, 2018, *Związek metropolitalny jako związek jednostek samorządu terytorialnego sui generis* [w:] B. Dolnicki (red.), *Organizacja i funkcjonowanie aglomeracji miejskich,* Wolters Kluwer Polska, Katowice, pp. 345-356.

Szlachetko Jakub, 2020, *Raport Instytutu Metropolitalnego z dnia 10 kwietnia 2020 r. w sprawie zakresu działania i formy organizacyjnej samorządu metropolitalnego (MEGApolis)*, Wydawnictwo Instytutu Metropolitalnego.

Zachariasz Igor, 2015, *Koncepcja utworzenia powiatów metropolitalnych* [w:] Piotr Kopyciński (red.), *Sprawne państwo. Propozycje zmian w funkcjonowaniu jednostek samorządu terytorialnego w Polsce*, Wydawnictwo Uniwersytetu Ekonomicznego w Krakowie, Kraków.

Volume 18, Issue 4
December 2020

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2020-12-10
accepted 2021-01-19

Proceedings relating to the disciplinary liability of prisoners in the State of New York

Postępowanie w przedmiocie odpowiedzialności dyscyplinarnej więźniów w stanie Nowy Jork

TOMASZ SOBECKI
Najwyższa Izba Kontroli
ORCID: 0000-0001-6010-3528, tomasz_sobecki@wp.pl

Citation: Sobecki, Tomasz. 2020. Proceedings relating to the disciplinary liability of prisoners in the State of New York. *Opolskie Studia Administracyjno-Prawne* 18(4): 107–122. DOI: 10.25167/osap.3434

Abstract: Prison disciplinary actions constitute one of the essential and – at the same time – necessary elements of penitentiary proceedings, which serve to ensure order and institutional security. When they are undertaken and conducted in a reasonable and moderate, and especially fair manner, then these activities not only protect the health, safety and security of all people participating in prison life, but also constitute a positive factor in the process of rehabilitation of prisoners. The article presents the rules of disciplinary proceedings in the State of New York.

Keywords: disciplinary proceedings, prisoner**,** prison**,** prisoner rehabilitation

Abstrakt: Działania dyscyplinarne stanowią jeden z zasadniczych, a zarazem niezbędnych elementów postępowania penitencjarnego, które służy zapewnieniu porządku oraz bezpieczeństwa instytucjonalnego. Gdy ich podejmowanie i prowadzenie następuje w sposób rozsądny i umiarkowany, a zwłaszcza sprawiedliwy, wtedy czynności te służą nie tylko ochronie zdrowia, bezpieczeństwa i zabezpieczeniu wszystkich osób uczestniczących w życiu więziennym, ale również stanowią pozytywny czynnik w procesie resocjalizacji więźniów. W artykule przedstawiono zasady postępowania dyscyplinarnego obowiązujące w stanie Nowy Jork.

Słowa kluczowe: postępowanie dyscyplinarne, więzień, więzienie, resocjalizacja więźniów

I

The fundamental principles of disciplinary action in individual American penitentiary laws have been influenced by the rich jurisprudence of the Supreme Court of the United States and, following its judicature – of federal district courts and courts of appeals. In the U.S. legal and penitentiary system, an inmate was initially treated as a slave of the state – one who had forfeited not only his liberty as a result of conviction, but practically all his personal rights, as stated in *Ruffin v. Commonwealth* (Rock 2009: 1; Lasocik 1993: 147; U.S. Supreme Court – 62 Va. 790, 796/1871). In subsequent years, according to a modified version of this position – the so-called hands-off doctrine – the courts adopted the premise that they had no power to exercise supervision over prison administration. In keeping with this doctrine, it was recognized that controlling the methods and procedures of disciplining inmates was beyond the competencies of courts (Court of Appeals 9 – 187 F 2d.850; Court of Appeals 10 – 213 F2d 771; Court of Appeals 9 – 240 F2d 910; 290 F 2d 632; Calhoun 1977: 220-222; Gutterman 1992: 870-872; Millemann 1971: 36-38). In 1974, in the landmark case of *Wolff v. McDonnell* (Judgment of the U.S. Supreme Court 1974 – 418 U.S. 539, 555-56), the Supreme Court unequivocally stated that there is no iron curtain drawn between the Constitution and American prisons; at the time, there was a total of 196,000 inmates in all of the state and federal prisons (Borchardt 2012: 470). The Supreme Court made further important decisions following this judgment, which significantly affected not only the content of penitentiary regulations adopted in individual U.S. states, but also the scope of inmates' legal protection, not only in the area of disciplinary liability. In this respect, suffice it to quote the judgments of *Procurnier v. Martinez* (Judgment of the U.S. Supreme Court 1974 – 416 US 396), *Pell v. Procurnier* (Judgment of the U.S. Supreme Court 1974 – 417 US 817), *Baxter v. Palmigiano* (Judgment of the U.S. Supreme Court 1976 – 425 US 308), *Bounds v. Smith* (Judgment of the U.S. Supreme Court 1977 – 430 US 817) or *Meachum v. Fano* (Judgment of the U.S. Supreme Court 1976 – 427 US 215).

In regard to disciplinary action, the second case law – alongside *Wolff v. MacDonnell* – that had a significant impact on the form of disciplinary proceedings and the extent of inmates' rights in their course was the decision in the case of *Sandin v. Conner* (Judgment of the U.S. Supreme Court 1995 – 515 U.S. 472). It set a new, higher standard that had to be met in order for an inmate to be able to demonstrate that he has a constitutional right which he was deprived of as a result of the actions of the prison administration authorities (Goldman 2004: 423 et seq.). According to this judgment, if the penalty administered to an inmate following a disciplinary hearing does not impose atypical and significant hardship in relation to ordinary events in everyday life during imprisonment,

the inmate is not entitled to use the minimum procedures laid down in *Wolff v. McDonnell*. According to the position of the U.S. Supreme Court, inmates' rights could still be interpreted from the due process of law clause set forth in the 14th Amendment to the U.S. Constitution, or they could be granted on the basis of state penitentiary regulations, but the protection against violation will only be applicable when, as a result of the actions of the prison authorities, atypical and significant hardship was imposed on the inmate in relation to the ordinary incidents of prison life (Weisman 1997: 913-914; Lee 2004: 800-805). Atypical hardship means treatment significantly different from the way in which other inmates are treated. Significant hardship occurs when the treatment of the inmate is significantly severe, not just inconvenient or irritating.

These judgments of the U.S. Supreme Court – which, due to the length of this article, cannot be described in detail – in practice set out the legal framework for all state penitentiary legislation and had a significant impact on the jurisprudence of both state and federal courts with respect to the protection of the rights of inmates accused of violating the disciplinary rules of conduct in force in prison.

For comparative purposes, the article will outline the main solutions in force in the State of New York in the field of inmates' disciplinary liability.

II

Disciplinary action constitutes one of the essential and indispensable elements of correctional proceedings, which serve to ensure order and institutional safety. When it is undertaken and applied in a reasonable, moderate and above all fair manner, this action not only protects the health, safety and safety of all participants in prison life, but also constitutes a positive factor in the process of rehabilitation of inmates. Section 250.2. Compilation of Codes, Rules and Regulations of The State of New York, Title 7 – Department of Corrections and Community Supervision (hereinafter: CRR-NY tit. 7).

The proportionality of disciplinary action is highlighted in Para 250.2c of CRR-NY tit. 7, indicating that it will be taken only in such measures and degree as is necessary, taking into account the principle of gradation. The aforementioned clause stresses that disciplinary action is aimed at regulating an inmate's behavior within acceptable limits and assisting in achieving compliance by the entire inmate population with required standards of behavior. Further important, even fundamental, principles are indicated in Para 250.2e-f, which state that disciplinary measures should not be overly severe because the disciplinary program should rely on certainty and promptness of action rather than severity. Secondly, disciplinary action must be neither arbitrary or "capricious" nor administered for the purpose of retaliation or revenge. Corporal punishment

is absolutely forbidden. It must not be used for any purpose and under any circumstances.

Disciplinary action which results in imposing penalty on an inmate in the State of New York is comprehensively regulated in Chapter 7 of the New York Codes, Rules and Regulations. The norms contained therein are of a dualistic nature, including both substantive and procedural provisions. As indicated in Para 250.1 of CRR-NY tit. 7, the provisions of Chapter 7 shall be applied when an inmate violates a rule or regulation governing his behavior, fails or refuses to comply with an instruction given to him by an employee of the department acting within the scope of his official duties, or attempts to escape or escapes or engages in any other unlawful conduct. Therefore, the basis for initiating disciplinary action against an inmate is the fact that he has committed a specific disciplinary offense.

III

In *Wolff v. McDonnell*, the U.S. Supreme Court did not consider whether a prisoner has the right to know the content of internal prison rules indicating what behavior is prohibited and what penalties may be imposed on an inmate in the course of disciplinary action. In other words, the question revolves around two considerations: Is the penitentiary administration obliged to promulgate written rules of conduct and announce them in such a way that inmates can read them? Secondly, must the language of the rules be sufficiently clear and precise to leave no doubts as to what conduct is prohibited? Therefore, it is a matter of sufficient specificity of the act, i.e. whether the regulations may simply prohibit an act, or whether the text must specify the prohibited behavior in such a way that an inmate can clearly distinguish prohibited behavior from non-prohibited behavior (Babcock 1981: 1015).

As emphasized in the literature, the need to maintain order, discipline and institutional security coupled with the unequal relations between the incarcerated and penitentiary officers constitute a strong argument for requiring prisons to promulgate written rules and make them known to prisoners (Babcock 1981: 1015). It is also generally accepted that the content of prison regulations specifying prohibited behavior must be sufficiently clear and understandable to inform prisoners of prohibited behavior (Sullivan 1974: 310-311).

New York penitentiary law requires that each inmate be provided with their own copy of internal prison regulations. A detailed list of prohibited behavior in all correctional facilities, whose violation will result in appropriate disciplinary action, is provided in Para 270.2 of CRR-NY tit. 7. The opening section 270.2A clearly states that in the event that a disciplinary offense is simultaneously a penal law offense, an inmate will be criminally liable regard-

less of disciplinary liability. The subsequent 25 thematically grouped sections (rules series 100-124) specify various types of prohibited behavior. For example, the rules contained in series 100 (Assault and Fighting) prohibit assaulting or inflicting bodily harm upon another inmate, practicing or instructing others in martial arts (e.g. rule 100.14 Para 270.2B prohibits practicing or training other inmates in aikido, judo, karate, jujitsu or kung fu, while rule 100.15 Para 270.2B prohibits unauthorized sparring, wrestling, body-punching, or other forms of disorderly conduct). The provisions in series 101 specify Sex Offenses, series 102 (Threats) prohibits making threats against others under any circumstances, series 103 (Bribery and Extortion) prohibits any attempts to bribe or extort any person, series 104 (Riot, Disturbances and Demonstrations) specifies behavior related to riots and other actions which may disrupt order in the facility (e.g. rule 104.12 indicates that it is forbidden to lead, organize, participate, or urge other inmates to participate, in a work-stoppage, sit-in, lock-in, or other actions which may be detrimental to the order of facility). Series 105 (Unauthorized Assembly or Activity) prohibits forming a group of inmates or joining an assembly of inmates without authorization. Series 106 (Refusal to Obey a Direct Order) states that each prisoner shall obey all orders of department personnel promptly and without argument. Series 107 (Interference with an Employee or Other Person) prohibits any obstruction or interference (physical, verbal, written) with prison employees. The provisions of series 108 (Escape and Abscondence) regulate issues connected with undertaking an escape or attempting an escape, including the possession of any article or paraphernalia related to such an intent.

IV

New York penitentiary legislation establishes a three-tier system of disciplinary hearings (Para 270.3a of CRR-NY tit. 7). Its structure depends on the severity of the investigated disciplinary offense. The lowest tier – violation hearings – determines allegations of minor violations of rules of conduct by an inmate. Analogously, the second tier – disciplinary hearings – is used to investigate violations of average severity. Finally, at the superintendent's hearing – the third tier of disciplinary hearings – the superintendent as a disciplinary authority conducts proceedings investigating the most serious offenses, including penal law offenses.

An important role in the structure and course of disciplinary action is played by a review officer, i.e. an officer of the rank of lieutenant or above (one person or more, depending on the needs) appointed by the prison superintendent. This requirement, however, is relatively obligatory, because according to Para 251.2.1 of CRR-NY tit.7, if a sufficient reason exists, the superintendent

may designate some other employee to serve as the review officer. The function of the review officer is specified in Para 251.2.2 of CRR-NY tit.7. Pursuant to this section, the review officer receives misbehavior reports on the violation of the standards of inmate behavior that were issued by officers at the facility during the day. The main task of the review officer is to review the reports and consider the seriousness of the alleged violations and refer the reports to the appropriate disciplinary body for action. If the violation is substantiated and warrants only a penalty of loss of recreation and other privileges, excluding correspondence and visitation privileges, for up to 13 days, the report is referred to the violation officer who then hears the case in a violation hearing. If the violation is substantiated and warrants a penalty of loss of privileges up to 30 days, including confinement to a cell or room (keeplock) for a period up to 30 days, the misbehavior report is forwarded to the disciplinary hearing officer for appropriate action. Finally, when the review of the misbehavior report leads to the conclusion that a penalty more severe than the above may be imposed, the report is forwarded to the superintendent for designation of a hearing officer to conduct the superintendent's hearing.

Submitting a report to the review officer does not mean that it will automatically be referred to one of the three disciplinary bodies for action. It is the prerogative of the review officer to dismiss the report when he deems it to be unfounded, or he may return it to be rewritten. Once an inmate specified in the report is keeplocked, the review officer is obliged to review their status and may order the release of an inmate who is no longer a threat to the safety and security of the facility or to himself.

Moreover, when the submitted report shows that an inmate has engaged in an act of self-harm, the review officer shall refer the report to the deputy superintendent for security, who fulfils the function of the review officer and who has the authority to dismiss the charge if he or she believes, due to the inmate's mental state or for any other reason, that proceeding to a hearing would serve no useful purpose.

Section 251.2.2 of NYCRR tit. 7 includes an extremely important rule according to which a review officer shall not act as a hearing officer in any proceeding arising from a misbehavior report which he or she has reviewed.

As demonstrated by the considerations above, a fundamental role in the activities of a review officer is played by the misbehavior report. Basic regulations in this regard are contained in Para 251.3.1(a) of NYCRR tit. 7, according to which any inmate misbehavior that violates the rules of conduct in the facility or involves danger to life, health, safety or property, must be immediately included in a written misbehavior report. The document is drawn up by an officer (or another employee) who has witnessed the incident or who has ascertained the

facts of the incident. In a situation where more than one officer has knowledge of the facts, each of them is required to make a separate report; however, this activity is also relatively obligatory, as Para 251.-3.1 of NYCRR tit. 7 provides that in the latter case, one joint report signed by all officers may be submitted.

The report must contain a detailed specification of the particulars of the alleged incident of misbehavior, a reference to the rule number allegedly violated by an inmate and a brief description of the rule, and an indication of the date, time and place of the disciplinary offense. When more than one inmate was involved in the incident, the report should indicate the specific role played by each inmate. If two or more incidents are involved, all of them may be included in a single misbehavior report. However, each incident must be separately stated (Para 251.-3.1(c) of NYCRR tit. 7).

Pursuant to the provisions of Para 251.3-1(d) of CRR-NY tit. 7, a report that has been reviewed by the review officer and is submitted for investigation, either in the disciplinary hearings or in the superintendent's hearings mode, must contain three instructions: firstly, that no statement made by the inmate in response to the disciplinary charge may be used against him in a criminal proceeding; secondly, that the inmate has the right to call witnesses if approved by the hearing officer; and thirdly, that if the inmate has been restricted pending a hearing for the misbehavior report, he may submit a motion for its annulment. In the case of a report that has been referred for examination at the lowest tier, i.e. in the violation hearings mode, only the first of the statements above must be contained in it.

A few additional remarks should be made regarding the subject of being advised about the possibility of using testimonies made in the course of disciplinary action during subsequent penal proceedings. It is noteworthy that this issue is highly controversial, both in jurisprudence and in the doctrine, and it is closely connected with the right to remain silent. Suffice it to mention here the ruling of the U.S. Supreme Court in the case of *Baxter v. Palmigiano* or rulings of lower courts, e.g. in the cases of *Tench v. Henderson*; *Worthen v. State of Oklahoma* (Babcock 1981: 1044). In fact, virtually every federal district court of appeals has ruled that the disciplinary action in the penitentiary facility does not violate the so-called "double jeopardy" principle that prevents an accused person from being tried twice on the same charges, which is contained in the fifth amendment to the U.S. Constitution. What is more, as there is no one penitentiary system in the USA, the penitentiary regulations in individual states may require prison officials to read an inmate his *Miranda* rights regarding the fifth amendment privilege. Seven states (Colorado, Hawaii, Louisiana, Massachusetts, Mississippi, Washington, District of Columbia) provide this right in all cases, four states (Louisiana, Mississippi, Washington and the District of Columbia) extend the obligation to inform the inmate at all stages of the proceeding,

three states (Colorado, Hawaii, Massachusetts) only require it at the hearing, eight states (Idaho, Indiana, Iowa, Missouri, Nevada, Rhode Island, Vermont, West Virginia) require the *Miranda* warnings only where criminal charges may be pending, with six of them (Idaho, Indiana, Iowa, Missouri, Nevada, Rhode Island, Vermont and West Virginia) mandating it at the investigative stage of the proceedings (Babcock 1981: 1044; Judgment of the Supreme Court of Utah – 61 P.3d 1019, 1037/2002; Federal Courts of Appeal – 158 F.3d 1215, 1220/1998; 59 F.3d 102, 105/1995; 58 F.3d 802, 806-08/1995; 41 F.3d 1150, 1152/1994; 11 F.3d 1143, 1144-45/1993; 867 F.2d 1255, 1259/1989; 672 F.2d 690, 691-92/1982; 429 F.2d 258, 261/1970; 349 F.2d 370, 372/1965; 161 F.2d 973, 974/1947; Brown 1996; Colussi 1980).

1. Violation hearing

As already noted, violation hearings, in which minor violations of the rules of prisoner conduct are heard, constitute the lowest tier in the three-tier system of disciplinary action. The violation hearing procedure is conducted by a designated violation officer of the rank of sergeant or above. One or more persons may be designated to function as a violation officer, depending on the needs of the facility (Para 252.1(a) of NYCRR tit. 7). The tasks of the violation officer include interrogating the inmate and then hearing and determining allegations of rule violations contained in the misbehavior report.

The procedure in this mode is as follows. After receiving the report from the review officer, the violation officer appoints the date of a disciplinary hearing, which must be held within seven days of the writing of the misbehavior report (Para 251.-5.1(c) of NYCRR tit. 7). The violation officer is not required to deliver a written notice of charges to the inmate before the hearing, which undoubtedly affects the inmate's ability to prepare an adequate line of defense. It is only during the hearing that the violation officer provides the inmate with a report specifying the charges. The participation of the inmate in the proceedings is not obligatory – he has the right to refuse to attend. If the inmate does not exercise this right and decides to attend, he may present documentary evidence, submit a written statement on his behalf, and reply to the charge – with the consent of the violation officer. It should be noted, however, that in this procedure the inmate does not have the right to call witnesses on his behalf, which may also significantly increase the difficulty in proving his statements. Importantly, the violation officer is not bound in any way as to the manner of conducting the hearing and may allow any evidence necessary to aid in his decision (Para 252.3(b) of NYCRR tit. 7).

The provisions governing violation hearings do not provide the inmate with the right to counsel. Nevertheless, according to Para 252.4 of NYCRR tit. 7, a non-English speaking or illiterate inmate must be given translated charges and

provided with an interpreter during the hearing. Similarly, in the case of a deaf inmate who uses sign language to communicate, he should receive the assistance of a sign language interpreter during the hearing. A hard of hearing inmate who uses an amplifier must have the opportunity to use it during the hearing.

Upon affirming a charge, the violation officer may impose the following penalties:

– loss of all or part of recreation (game room, day room, television, movies, yard, gym, special events) for up to 13 days; this penalty may be suspended for a period of 13 days;

– loss of maximum of two of the following privileges: one commissary buy, excluding items related to the inmate's health and sanitary needs, withholding of radio for up to 13 days, withholding of packages for up to 13 days, excluding perishables that cannot be returned. Also in this case, the loss of privileges may be suspended for a period of 13 days;

– the imposition of additional work, other than a regular work assignment, for a maximum of seven days. This work must not be performed on Sundays and public holidays. Moreover, it must not last more than nine hours a day.

– counsel and/or reprimand (Para 252.5(a) (1-4) of NYCRR tit. 7).

After the violation hearing, the officer is obliged to deliver to the inmate a written statement indicating the imposed penalty. It should take place as soon as possible (immediately), but not later than 24 hours after the conclusion of the hearing.

The disciplined inmate has the right to appeal against the decision to the superintendent. However, in order for the appeal to be effective, it must be submitted within 24 hours of the receipt of the violation disposition. The superintendent is obliged to consider the appeal within seven days of receiving it. An important prerogative of the superintendent is the right to reduce the penalty at any time during which it is in effect, despite the prior upholding of the decision made in the course of the violation hearing (Para 252.7 of NYCRR tit. 7).

2. Disciplinary Hearing

Disciplinary hearings are the second tier of disciplinary proceedings serving the purpose of determining allegations of rule violations of medium severity (Para 270.3(a) (2) of NYCRR tit. 7). Analogously to first-tier disciplinary action, in the course of disciplinary hearings, an important role is played by a disciplinary hearing officer of the rank of lieutenant or above, who is responsible for conducting disciplinary hearings in an impartial manner, as indicated in Para 253.1(a) of NYCRR tit. 7. The latter principle is further strengthened by stressing that no person who has participated in any investigations of the acts, nor any person who has prepared the misbehavior report on which the hearing is held, may act as the hearing officer on that charge (Para 253.1(b) of NYCRR tit. 7).

The disciplinary hearing officer is appointed by the superintendent. The number of these officers depends on the needs of the facility – it is permissible to appoint more than one such officer. Also in this case, the rules admit the possibility of disregarding the formal requirement of having the appropriate rank, because in accordance with Para 253.1(a) of NYCRR tit. 7, the superintendent may designate another person from among the prison personnel to perform this function.

Compared to first-tier disciplinary proceedings, a disciplinary hearing is much more formalized. After receiving the report from the review officer, the disciplinary hearing officer appoints the date of the disciplinary hearing, which must take place within 14 days of writing the misbehavior report. Subsequently, it is his duty to serve on the accused inmate a copy of the misbehavior report containing the charges. Therefore, the phrase "misbehavior report" used in Para 253.6 (a) of NYCRR tit. 7 actually corresponds with the written notice of charges as specified in *Wolff v. McDonnell,* which must be delivered at least 24 hours before the date of the hearing. As highlighted in Para 251.3 in connection with Para 253.3 of NYCRR tit. 7, the misbehavior report shall include a detailed specification of the particulars of the alleged incident of misbehavior, a reference to the rule number allegedly violated by the inmate and a brief description of the rule, and an indication of the date, time and place of the disciplinary offense; if more than one inmate was involved in the incident, the report should indicate the specific role played by each inmate. If the accused inmate is illiterate or does not speak English, he should be provided with a translated notice of the charges and statements of evidence relied upon and reasons for actions taken. In this case, the presence of an interpreter is also required during the disciplinary hearing. Similarly, in the case of a deaf inmate who uses sign language, he should receive the assistance of a qualified sign language interpreter during the hearing. A hard of hearing inmate who uses an amplifier must also have the opportunity to use the device during the hearing.

Pursuant to Para 253.4 of NYCRR tit. 7, if an inmate faces punishment under the disciplinary hearing procedure, then he should be provided with assistance by a designated person. In this situation, the provisions of Para 251-4.1 of NYCRR tit. 7 are applicable. According to them, an inmate shall be provided with assistance when he does not speak English, is illiterate, uses sign language, has been charged with the use of drugs or other intoxicating substances, is confined pending a superintendent's hearing.

Unlike in the case of violation hearings, in second-tier disciplinary action the inmate has the right to call witnesses in his defense (Para 253.5 of NYCRR tit. 7) as long as it does not jeopardize institutional safety or correctional goals. In the event of denying this right, the hearing officer must provide the inmate with a written statement indicating the reasons for the denial, in particular

specifying the threat to institutional safety. The witnesses testify at the hearing in the presence of the inmate unless the hearing officer determines that it may jeopardize institutional safety. In a situation where the witness is interviewed out of the presence of the inmate, the interview is recorded. The recording of the statement is made available to the inmate. This rule may be waived when doing so could pose a threat to institutional safety.

An inmate may call a witness by informing his assistant or the hearing officer before the hearing, or informing the hearing officer during the hearing.

The procedure is as follows: upon receipt of a misbehavior report, the hearing officer delivers it to the inmate at least 24 hours before the disciplinary hearing. However, if the inmate has requested an assistant and is eligible for an assistant in accordance with the provisions of Paras 251-4 of NYCRR tit. 7, the hearing may not be held until 24 hours after the assistant's meeting with the inmate.

An inmate has the right to be present at the hearing, unless he has refused to attend or is excluded for reason of institutional safety. Section 253.6 of NYCRR tit. 7 requires that the entire hearing must be electronically recorded.

An inmate present at the hearing has the right to be heard, and is allowed to submit relevant documentary evidence or written statements on his behalf.

If an inmate is found guilty of the charge as a result of a disciplinary hearing, the hearing officer may impose one or more of the following penalties:

– counsel and/or reprimand;

– loss of one or more privileges for a period of up to 30 days, with the exception of correspondence and visiting privileges;

– confinement to a cell or a special housing unit under keeplock admission for a period of up to 30 days;

– restitution for loss or intentional damage to property up to $100;

– the imposition of additional work other than a regular work assignment for a maximum of seven days, excluding Sundays and public holidays.

In the event of overlapping of penalties imposed in various hearings, the more restrictive penalty shall be applied first.

The hearing officer may suspend imposition of any penalty for a period of up to 90 days. However, this penalty will be imposed if a new misbehavior report is filed against the inmate during this period.

As soon as possible, but not later than 24 hours after the hearing, the inmate is given a written statement of the disposition of the hearing, listing the evidence relied upon by the hearing officer in reaching his decision and the reasons for any penalties imposed.

The inmate should be instructed on the right to appeal to the facility superintendent. The written appeal must be submitted within 72 hours of the receipt of the disposition.

The superintendent or his designee are obliged to issue a decision within 15 days of receipt of the appeal.

The superintendent may reduce the penalty at any time after the decision is issued.

3. Superintendent's hearing

The third and final tier of disciplinary action in the course of which the gravest disciplinary offenses are reviewed is the superintendent's hearing.

As in the case of first- and second-tier disciplinary action, in the course of the superintendent's hearing an important role is played by the hearing officer, called superintendent's hearing officer, who is either the superintendent or a person designated by the superintendent, of the rank of captain or above. It is within the discretion of the superintendent to appoint another employee to conduct the superintendent's hearing. Pursuant to Para 254.1, the following persons are excluded from conducting the proceeding: a person who actually witnessed the incident; a person who was directly involved in the incident; the review officer who reviewed the misbehavior report, or a person who has investigated the incident.

The formal charge must comply with the requirements specified in Para 251.03 of NYCRR tit. 7. (arg. ex Para 254.3 of NYCRR tit. 7).

An inmate who does not speak English must be provided with a translated version of the charges and the reasons for the disciplinary action. An interpreter must be present at the hearing. A deaf person must be provided with the assistance of a sign language interpreter, whose presence at the hearing is obligatory. If the accused inmate uses a hearing aid, he must be allowed to use it during the hearing (Para 254.2 of NYCRR tit. 7).

The formal charge must consist of the misbehavior report prepared in accordance with the provisions of Para 251-3.1 of NYCRR tit. 7.

The inmate has the right to the assistance of a designated person pursuant to Para 251-4 of NYCRR tit. 7.

In the case of the superintendent's hearing, an inmate has the right to call witnesses, but this is a limited right. The inmate may be denied this right if summoning witnesses would jeopardize institutional safety. In the event of denial, the inmate shall be given a written statement indicating the reasons for the denial, including the specific threat to institutional safety.

Witnesses (for the prosecution and defense) testify at the hearing in the presence of the accused inmate, unless the hearing officer decides otherwise due to safety considerations. Also in this case, when witnesses are interviewed in the absence of the accused inmate, their testimonies are recorded. The re-

cording is made available to the inmate, unless the hearing officer has made a different decision for safety reasons.

An inmate may request a witness to be called by either informing his assistant before the hearing or informing the hearing officer during the hearing (Para 254.5 of NYCRR tit. 7).

As for the procedure, it is similar to the second-tier proceedings. After receiving a misbehavior report, the hearing officer delivers its copy to the inmate at least 24 hours before the hearing; if the inmate has requested an assistant, the hearing may not start until 24 hours after the assistant's initial meeting with the inmate.

An inmate has the right to participate in the hearing, unless he refuses to attend it or is excluded for reasons of institutional safety. The entire hearing must be electronically recorded. An inmate also has the right to reply to the charge and/or evidence and submit relevant documentary evidence or written statements on his behalf. Where there are reasonable doubts as to the mental condition or intellectual capacity of the inmate, the hearing officer must consider evidence regarding the inmate's condition (Para 254.6 of NYCRR tit. 7).

After the hearing, if the inmate admits the charges or if the hearing officer affirms the charges on the basis of the evidence, one or more of the following penalties may be imposed on the inmate:

– counsel and/or reprimand;

– loss of one or more privileges for a specified period, however correspondence may be withheld with a particular person only where the inmate has been involved in improper conduct in connection with correspondence with such person;

– loss of visiting privileges for a specified period where the affirmed charges involve improper conduct as a result of the inmate's presence or conduct in connection with a visiting, family reunion or special events program.

A loss of visiting privileges may be imposed only where the affirmed charges involve the violation of any rule under rule series 100-102, 108, 113-115.

At the same time, pursuant to Para 254.7 of NYCRR tit. 7, as soon as possible, but not later than 24 hours after the hearing, the inmate shall be given a written statement of the disposition of the hearing, listing the evidence relied upon by the hearing officer in reaching his decision and the reasons for any penalties imposed.

An inmate may appeal to the commissioner within 30 days of the receipt of the disposition. The commissioner or his designee shall issue a decision within 60 days of the receipt of the appeal. After examining the appeal, the commissioner may affirm the hearing disposition, modify it by dismissing certain charges and/or reducing the penalty imposed. It is also admissible to reverse the hearing disposition and order a new hearing.

In the event of a new hearing, the penalty imposed at the new hearing may not exceed the penalty imposed at the original hearing (Para 254.8 of NYCRR tit. 7).

At any time during which the imposed penalty is in effect, the superintendent may reduce the penalty (Para 254.9 of NYCRR tit. 7).

Summary

By its very nature, penitentiary isolation carries the risk of abuse of rights of the persons deprived of liberty. A prison is a place of maximally increased social interaction, which may result in the clash of opposing interests causing tension and conflicts, often resolved by arbitrary decisions of the penitentiary administration. This prompts the inmate to conformism to the institutional rules of conduct. The overriding goal is to ensure institutional safety. Therefore, disciplinary penalties are inevitable in prison, as they constitute a measure forcing inmates to follow the rules of collective life.

One of the fundamental tasks is therefore to organize an effective and transparent mechanism regulating the rules of determining inmates' disciplinary liability. The procedure shall simultaneously respect the principles of procedural economy and allow inmates to effectively protect their subjective rights. Disciplinary action will be an effective means of disciplining only if it is transparent and conducted in accordance with the established rules of the game.

The presented model of proceedings with regard to disciplinary liability of inmates in the State of New York shows a wide range of possible solutions. It is undoubtedly a very interesting idea to differentiate the procedure depending on the severity of the disciplinary offense committed by the inmate. It seems to be important, especially from the perspective of economy and the principles of efficiency. Substantive decisions are made at the internal level, by means of dispositions made by the designated personnel. The same procedure is used to consider any appeal lodged by the incarcerated. This solution makes it possible to free the judicial authorities from hearing trivial and minor cases, thus increasing the efficiency of the proceedings. At the same time, the procedures have been developed in such a way that they do not prejudice the constitutionally guaranteed subjective rights of prisoners. The analysis of the solutions in force in the State of New York shows that inmates have effective and necessary legal instruments enabling them to effectively assert their rights protected by law.

Abbreviation used

NYCRR tit. 7 – *New York Codes, Rules* and *Regulations*, Title 7 – Department of Corrections and Community Supervision.

Bibliography

Primary sources

Legal acts

Compilation of Codes, Rules and Regulations of The State of New York, Title 7 Department of Corrections and Community Supervision.

Case law

Judgment of the U.S. Court of Appeals for the *9th* Circuit in the case of Stroud v. Swope, 1951 – 187 F 2d.850.

Judgment of the U.S. Court of Appeals for the 8th Circuit in the case of Garcia v. Steele, 1951 – 193 F.2d 276.

Judgment of the U.S. Court of Appeals for the 10th Circuit in the case of Banning v. Looney, 1954 – 213 F2d 771.

Judgment of the U.S. Court of Appeals for the 9th Circuit in the case of State of Oregon Sherwood v. T. Gladden, 1957 – 240 F2d 910.

Judgment of the U.S. Court of Appeals for the 9th Circuit in the case of Hatlield v. R. Bailleaux, 1961 – 290 F 2d 632.

Judgment of the U.S. Court of Appeals for the 11th Circuit in the case of United States v. Mayes, 1998 – 158 F.3d 1215, 1220.

Judgment of the U.S. Court of Appeals for the 9th Circuit in the case of United States v. Brown, 1995 – 59 F.3d 102, 105.

Judgment of the U.S. Court of Appeals for the 2nd Circuit in the case of United States v. Hernandez-Fundora 1995, file ref. no. 58 F.3d 802, 806-08.

Judgment of the U.S. Court of Appeals for the 7th District in the case of Garrita v. Fiedler, 1994 – 41 F.3d 1150, 1152.

Judgment of the U.S. Court of Appeals for the 3rd Circuit in the case of United States v. Newby, 1993 – 11 F.3d 1143, 1144-45.

Judgment of the U.S. Court of Appeals for the 10th Circuit in the case of United States v. Rising, 1989 – 867 F.2d 1255, 1259.

Judgment of the U.S. Court of Appeals for the 8th District in the case of Kerns v. Parratt, 1982 – 672 F.2d 690, 691-92.

Judgment of the U.S. Court of Appeals for the 1st District in the case of Fano v. Meachum, 1975 – 520 F.2d 374, 376 n. 1.

Judgment of the U.S. Court of Appeals for the 5th Circuit in the case of United States v. Lepiscopo, 1970 – 429 F.2d 258.

Judgment of the U.S. Court of Appeals for the 4th Circuit in the case of Hamrick v. Peyton, 1965 – 349 F.2d 370, 372.

Judgment of the U.S. Court of Appeals for the 6th Circuit in the case of Gibson v. United States, 1947 – 161 F.2d 973, 974.

Judgment of the Utah Supreme Court in the case of State v. Kell, 2002, Utah – 61 P.3d 1019, 1037.

Judgment of the U.S. Supreme Court 1974 – 418 U.S. 539, 555-56.

Judgment of the U.S. Supreme Court 1974 – 416 US 396.
Judgment of the U.S. Supreme Court 1974 – 417 US 817.
Judgment of the U.S. Supreme Court 1976 – 425 US 308.
Judgment of the U.S. Supreme Court 1977 – 430 US 817.
Judgment of the U.S. Supreme Court 1976 – 427 US 215.
Judgment of the U.S. Supreme Court 1995 – 515 U.S. 472.

Secondary sources

Babcock W. 1981. Due Process in Prison Disciplinary Proceedings, *Boston College Law Review*, vol. 22.

Borchardt D. 2012. The iron curtain redrawn between prisoners and the Constitution, *Columbia Human Rights Law Review*.

Brown R.S., Double Jeopardy: Can Non-Monetary Civil Sanctions Constitute Punishment under the Fifth Amendment?, *University of Baltimore Law Forum*, vol. 26, No 3, 1996.

Calhoun E. 1977. The Supreme Court and The Constitutional Rights of Prisoners: A Reappraisal, *Hastings Constitutional Law Quarterly*, vol. 4.

Colussi J.S. 1980. An Application of Double Jeopardy and Collateral Estoppel Principles to Successive Prison Disciplinary and Criminal Prosecutions, *Indiana Law Journal*, vol. 55.

Goldman M.Z. 2004. Sandin v. Conner and Intraprison Confinement: Ten Years of Confusion and Harm in Prisoner Litigation, *Boston College Law Review*, vol. 45.

Gutterman M. 1992. Prison Objectives and Human Dignity: Reaching a Mutual Accommodation, *Brigham Young University Law Review*.

Lasocik Z. 1993. Ochrona praw więźniów w Massachusetts, *SP*, z. 2-3.

Lee D.H. 2004. The Law of Typicality: Examining the Procedural Due Process Implications of Sandin v. Conner, *Fordham Law Review*, vol. 72.

Millemann M.A. 1971. Prison Disciplinary Hearings and Procedural Due Process – The Requirement of a Full Administrative Hearing, *Maryland Law Review*, vol. 31.

Rock G. 2009. *Prisoners' Rights Handbook*, Philadelphia.

Sullivan M.W. 1974. Implications of Morrissey v. Brever for Prison Disciplinary Hearings in Indiana, *Indiana Law Journal*, vol. 49.

Weisman S.T. 1997. Sandin v. Conner: Lowering The Boom on The Procedural Rights of Prisoners, *The American University Law Review*, vol. 4.

Volume 18, Issue 4
December 2020

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2020-11-30
accepted 2021-01-19

Evolution of the Customary International Law on Cultural Property Plundered in War

Ewolucja międzynarodowego prawa zwyczajowego w zakresie dóbr kulturalnych w czasie konfliktu zbrojnego

ZHANG YADONG
Law School, Renmin University of China
ORCID: 0000-0001-8466-2383, elegantyadong@outlook.com.

Citation: Yadong, Zhang. 2020. Evolution of the Customary International Law on Cultural Property Plundered in War, *Opolskie Studia Administracyjno-Prawne* 18(4): 123–136. DOI: 10.25167/osap.3435

Abstract: This article presents an unambiguous evolutionary sequence of historical events leading to the development of customary international law, seen with reference to the mutual influence and transformation of legal philosophy, practice and codification on plundering cultural property during wars. The contemporary legal rules and customs working against taking cultural property as spoils of war are rooted in the eighteenth century, and were consistently developed in the nineteenth and twentieth centuries. Restitution appears the best remedy for the country of origin, especially in the condition where the plundered cultural property is existent and identifiable. Achieving this goal depends on the cooperation and coordination throughout the world, based on a wider customary international law space.

Keywords: cultural property, plunder of cultural property, customary international law, spoils of war

Abstrakt: Artykuł niniejszy prezentuje w sposób chronologiczny ewolucję międzynarodowego prawa zwyczajowego w odniesieniu do zaboru dóbr kulturalnych. Autor opierając się na przedstawionych wybranych wydarzeniach historycznych mających wpływ na tę sferę prawa wojennego, wskazuje na wzajemne zależności i przeobrażenia w prawniczej filozofii, praktyce i kodyfikacji. Obecnie obowiązujące prawne regulacje i obyczaje zabraniające zaboru dóbr kulturalnych jako łupów wojennych zrodziły się w wieku osiemnastym i były konsekwentnie rozwijane w wieku dziewiętnastym i dwudziestym. Zwrot zagrabionych dóbr państwu, które

jest ich właścicielem, wydaje się najlepszym wyjściem, szczególnie w sytuacji, gdy zrabowane przedmioty pozostają w stanie nienaruszonym i są identyfikowalne. Osiągnięcie tego celu jest uzależnione od współpracy i koordynacji działań na całym świecie, realizowanych w szerszej przestrzeni prawa międzynarodowego.

Słowa kluczowe: dobra kulturalne, zabór dóbr kulturalnych, międzynarodowe prawo zwyczajowe, zdobycze wojenne

1. Formation of rules prohibiting looting of cultural property initially in modern international law in Europe

Originally, beginning with the Westphalian Peace Treaty (Penna 1997: 258) of 1648, European monarchs started to give up plundering enemies' cultural property during wars. Thus, from the mid-17th to the 18th centuries, plundering cultural property across Europe was almost completely abandoned during armed conflicts (Bordwell 1908: 62). Until the end of the 18th century, European states had avoided plundering cultural property in wars on this basis. This was the earliest foundation of modern international law in which European sovereign states took unified action on the protection of cultural property. This practice of determining common regional rules through the form of treaties and implementing them and obeying each other among these European countries, is one of the necessary conditions for customary international law.

Technically speaking, if a country is capable of participating in a war and winning, thus this country would never lack in the possibility of plundering the wealth of invaded territory. Even if some countries were too weak to participate in robbery during the war, it was not a common reason for all sovereign states that gave up plundering of cultural property. Naturally, when sovereigns have a strong interest in art and are capable of plundering these treasures, they have no reason to abandon plunder. Third, although the winning countries could plunder cultural properties based on the conventional right to conquer, they give up plundering. Obviously, the giving up looting does not result from the lack of a legal basis. The author believes that abstaining from looting is due to changes in the concepts of the right to conquer, which had been limited by the ideal of justice in war. The changes to the right to conquer are mainly reflected in the areas outlined below.

Because of the impact of the Enlightenment thought, since the middle of the 17th century, some leading scholars in the area of international law have initiated in-depth discussions on the restrictions on war and on the right to conquer. Most of these statements link the looting of cultural property with the doctrine of Military Necessity, which determines whether cultural property can be looted, or what kind of property can be looted in war. Pufendorf, for instance, claimed that humanitarian law requires us not to destroy any enemy's

property except in the condition of necessity (1931: 256). Huge Grotius argued that there is no need to use armed force with reference to spheres that are not threatening the army during the war and which provide the spiritual support for society, like temples and church properties (1925: 751). And on the basis of Huge Grotius's idea, De Vattel proposed to make further restriction on the properties which should not be confiscated, precluding more kinds of cultural property from the scope of the booty (1758: 168). The military necessity doctrine later became a basic principle of the law of war, laying the foundation for the basic legal rules concerning protection of cultural property in the 19th-century wars.

As we all know, historically, the tendency of preference and appreciation for works of art and cultural objects, was intensively aroused by the thriving of humanism from the Renaissance era (Biroy 1997-1998: 205-206). This tendency also affected the interest of later jurists when they paid attention to the safeguards of cultural property. According to de Vattel, international law absolutely negated savage and unlimited vandalism of cultural property (1797: 370). Cicero's remarks, along with De Vettel's, played a vital role in reversing public legal thoughts and social ideal from plundering of cultural property. Gradually, European countries began to avoid plundering enemy's artworks and cultural objects, and through the Westphalian Treaty, they established rules to prevent plunder of cultural property during war at the level of international law. Following that, European monarchs complied with the Westphalian Treaty agreements for more than 100 years, thereby overturning the brutal custom of plundering cultural property in wars and establishing new international customary law standards through national practice. Consequently, by the end of the 18th century, rules prohibiting the looting of cultural property were formed regularly in the international law as the status of international custom in wars.

2. Deepening of the forbiddance on the looting of cultural property in the nineteenth century in Europe

From 1794 to 1814, the sovereign of France Empire, Napoleon, carried out a well-planned and long-lasting pillage of works of art and cultural relics across the then Europe. (For the details of Napoleon's confiscation of artistic treasures consult Gould (1965: 31, 34, 48.). His predatory behavior is strictly violated and traitorous for the rules against the plunder of cultural property that had been formulated earlier and generally adhered to by European society. Nevertheless, the author believes that the rules of banning cultural property looting in Europe in those unbearable days, was strengthened, but not weakened, by Napoleon's action. The reasons are as follows: first of all, Napoleon's predatory plunder showed that he had clearly understood and recognized that in the scope of legal feasibility, the right to conquer in Europe at that time did not permit to

plunder anymore; secondly, the public held a seriously negative attitude to his uncivilized behavior in Europe, which revealed that the degree of civilization in Europe at that time could no longer accept such predation; and finally, the response of other countries proved the existence of the rules against plundering, and further enhanced these rules. Countries insisted, as long as the plundered cultural property was supervised and identifiable, that return of these cultural objects was to be the sole way to remedy.

The first main method of looting cultural property by France is secret looting supported by the government. As the monarch, Napoleon secretly dispatched cultural experts with his armed forces to plunder artifacts during the Belgian campaign and kept them secretly (Mainardi 1989: 156). There was no need to do it in secret if Napoleon thought he had the right to do so. His actions precisely showed that plundering cultural relics and works of art was not an unrecognized area or judged as the right to natural warfare at that time (Mainardi 1989: 156). The second method of looting cultural property by France is by treaty to confiscate it. During the Italian campaign that began in 1796, on conduct of their monarch, Napoleon, France started to transfer the ownership of the looted artwork by signed treaties, for instance, the armistice with the Duke of Modena on 17 May 1796, the treaty with the Duke of Parma on 18 May 1796, the armistice with the Pope's representative in Bologna on 23 June 1796, and the Treaty of Tolentino with the Pope in February of 1797 (Treue 1961: 149-150). Based on these treaty provisions that infringed the basic principles of the previous law of war, Napoleon more confidently seized artefacts, beautified his plunder, and used treaties to justify the confiscation. These actions show that Napoleon was well aware of the basic rules of the law of war that no longer allowed the plunder of cultural property.

Citizens of defeated states are naturally outraged by their loss of cultural property. Additionally, the robbery by France provoked great rage out of France, which spread widely and fast among groups of artists, art dealers and patrons from all over the world (Treue 1961: 149-150). The exception were the Italian people at that time, who actively protested against Napoleon's looting, numerous scholars, and even some French troops who stood up against the dealings and asserted that the deed of France and Napoleon was illegal and should be punished. French soldiers also argued that the French government should return all such criminal gains. Despite the force of opposition to such a crime, it would not put an obstacle to the continuous plunder by French troops. Still, it was the first time for the whole society to express their extreme voice of objection to the legitimacy of the plunder by France (Treue 1961: 149-150). The uncivilized behaviors made by France and Napoleon, sparked the international outcry and strong condemnation. The notable French archeologist, Quatreme`re de Quincy, was opposed to Napoleon's predatory behavior and insisted that

countries should not hold the special right to obtain the property from the defeated (Mainardi 1989:156). In addition, he suggested that art should not be used as a war collection (Quynn 1945: 439). According to his standpoint, the departure of artworks from the country of origin is a kind of destruction; the artworks which had been looted from original space to another place, equaled to be destroyed, because their artistic, historical, aesthetic value could only be entirely displayed in their original environment (Quynn 1945: 439). Quatreme`re's ideas provided a philosophical basis for the rules against plundering cultural property, and further provided a legal basis for returning plundered artifacts to their original environments.

A strong voice of objection to Napoleon's predation was heard not only in European civil societies, but also in other sovereign states of Europe. The Duke of Wellington in Britain, who was arguing vigorously against Napoleon and later served as a diplomat in France, believed that the looted cultural property should be returned to its original states, because Napoleon's plundering had violated the basic rules of the law and the ethic of war (See the Letter of the Duke of Wellington to Viscount Castlereagh, dated in Paris on 23 September 1815, as reprinted in 3 British & Foreign State Papers (1815-1816): 207). Besides, Lord Castlereagh, a British parliamentary diplomat, also stated that Napoleon's plundering was "contrary to every principle of justice and the usage of modern warfare" (Letter from Viscount Castlereagh to Plenipotentiaries of Austria, Prussia, and Russia (Sept. 1815), as reprinted in 3 British & Foreign State Papers (1815-1816): 204) and insisted that the plundered cultural property should be returned to its original homeland.

Based on the general rules prohibiting the looting of cultural property, the return of looted cultural property is the most natural and reasonable remedy. Richard Zouch believes that as long as the looted artwork is restored, returning to the country of origin and restitution should be the only accepted solution. No matter whether the relevant compensation would be supported by law, the compensation cannot substitute the role of status quo ante. Upon request, Britain returned the American art as a trophy to the Pennsylvania Academy of Fine Arts during the American-British War of 1812 (Letter from Viscount Castlereagh to Plenipotentiaries of Austria, Prussia, and Russia (Sept. 1815), as reprinted in 3 British & Foreign State Papers (1815-1816): 204).

The practice of returning cultural property after Napoleon's failure proved that this relief method is generally accepted. The return of cultural property is not an arbitrary exercise of power by the winner, but an expression of international law against the plunder of cultural property. Thereafter, the second Paris Treaty signed on 20 November 1815, officially confirmed the right of restitution, and France was obliged to return the plundered cultural property (Chapman 1998: 55). As long as the plundered cultural property is still unmissed

and identifiable, it should be returned to the original country. This idea was once again practiced by the sovereign states and became a generally believed ideal which, in the process of establishing the rules of customary international law, got constantly strengthened.

Since the second half of the 19th century, countries started to codify the law of war, and these legislations existed in customary international law in the form of domestic law (Kalshoven 1973: 24). Naturally, customary regulations prohibiting the plunder of cultural property also should be classified into the scope of codification. The regulation against plundering of cultural property was initially stipulated in the Lieber Code of 1863 of the United States, then reflected in the Brussels Declaration of 1874 and the Oxford Handbook of 1880, and it was finally stipulated in the 1899 and 1907 The Hague Conventions. Compared with the Code of Lieber, these subsequent international legal documents did not create new rules against the looting of cultural property but articulated the old rules clearly and specifically again. Since the development of the state of natural law to the universal recognition of various countries, the rules prohibiting the plunder of cultural property have had the binding force on customary international law.

In the world at large, The Lieber Code of 1863 was the earliest officially codified law of war (Carnahan 1998: 215), which included the regulation of prohibiting plunder of cultural property. It took the fine arts as the private property of churches. Accordingly, Article 35 specifically required protection of classical artworks, libraries, scientific collections and precious tools; Article 36 provided an exception to the principle against the plunder of cultural property: "The ruler of a conquering country or nation can order the detention and removal of them for the benefit of that nation. The ultimate ownership will be settled by a subsequent peace treaty"; similarly, property belonging to churches and art museums should not be confiscated, except for military necessity (Article 38) (The Instructions for the Government of Armies of the United States in the Field, General Order No 100, 14 April 1863 (the Lieber Code of 1863), Articles 34, 35, 36, 38 in: 3 U.S. Department of War, The War of The Rebellion: A Compilation of the Official Records of the Union and Confederate Armies 1902: 148).

The above clauses from "Lieber Code", revealed the plain customary rules against the looting of cultural objects in the mid-nineteenth century. Because Lieber drafted the code, based on the regulations and customs relating to war in that century. In the design of the regime for protecting cultural property, Lieber's thoughts on military necessity specifically enlarged the criteria of previous military necessity principles into three aspects: ongoing, urgent, and subversive (Lieber 1995: 34). Equally, he believed that unless the necessary

military criteria were met, art of monuments, churches, religious temples, and libraries, should not be destroyed in a war.

The "Liberian Code" greatly promoted the codification of the custom rules in war in the 19th century, especially in promoting the prohibition of plunder of cultural property (Carnahan 1998: 215). The rule had a huge impact on groups of government legal counselors, diplomats, jurists, and many more (Sandholtz 2008: 115). Eventually, these legal professional practices affected their countries in which they worked, which in turn influenced the development of international treaties in the field of the law of war. Therefore, the "Liberian Code" is an important milestone and turning point in the development of international customary law on plunder of cultural property during wars. Essentially, it offered the basic thoughts and materials for the regulation of international customary law with reference to war, including The Brussels Declaration of 1874 and the Oxford Handbook of 1880.

The Brussels Conference was originally initiated by Russia in 1874. Fifteen European countries participated in the conference and adopted the International Declaration on the Law of War and Customary Law (the Brussels Declaration) (Project of an International Declaration Concerning the Laws and Customs of War, adopted by the Conference of Brussels, 27 August 1874, as reprinted in 1 AJIL Supp. (1907): 6-107). The Brussels Declaration was the first legal document of war compiled by the international community, including rules against looting of cultural property. Similar to the Libre Code, the Brussels Declaration treated the special property belonging to art museums and churches as private property (Project of an International Declaration Concerning the Laws and Customs of War, adopted by the Conference of Brussels, 27 August 1874, as reprinted in 1 AJIL Supp. (1907): 96-107). Different from the Lieber Code, the Declaration provided for stricter rules against predation, which argued that the principle of military necessity could not make the exception to the confiscation of private property (Project of an International Declaration Concerning the Laws and Customs of War, adopted by the Conference of Brussels, 27 August 1874, as reprinted in 1 AJIL Supp. (1907): 96-107). Although the Brussels Declaration was not universally accepted by the participating States because they were not prepared to accept its strict legal obligations. However, the relevant provisions set for the protection of cultural property adopted by symbolized regulations of prohibiting plunder of cultural property, which were generally accepted by all the countries at that time as international customs.

In 1880, the Institute of International Law organized a committee to research the Brussels Declaration of 1874, and then issued *The Oxford Handbook* in February 1880 (Institute de Droit International, Les Lois De La Guerre Sur Terre, 1880 [The Laws of War in Land] (The Oxford Manual of 1880), The U.S. Committee of the Blue Shield (uscbs.org/1880-oxford-manual.html). At

that time *The Oxford Handbook* stipulated the strictest rules for prevention of looting of cultural property. Article 53 directly stated that the property of institutions devoted to art and religion cannot be taken away. It also stipulated that "any damage or intentional damage to the institution, historic monuments, archives, artwork or science is strictly prohibited unless it is urgently required by the military necessity.The provisions on cultural property also proclaimed the establishment of rules of customary international law at the time. The preamble of the Handbook aimed to comply with the law of war by "compiling feasible ideas that have been accepted in our time" and "in line with the progress and needs of civilized armies." (Institute de Droit International, Les Lois De La Guerre Sur Terre, 1880 [The Laws of War in Land] (The Oxford Manual of 1880), The U.S. Committee of the Blue Shield (uscbs.org/1880-oxford-manual.html preface).

The Oxford Manual was copied and distributed to various governments, with the declaration that it was the duty of each government to issue the copies to their armies. Most governments accepted this initiative at that time.

The Hague Peace Conferences of 1899 and 1907 signed the considerable achievement of codifying the laws of war and customary law in the form of conventions (Martel (ed.) 2012: 1-2). These conferences respectively adopted two conventions on the laws and customs of the Army. Both conventions provided rules prohibiting plunder of cultural property. Article 56 of the Second Hague Convention of 1899 stipulated that "the property of religious, charitable and educational institutions and artistic and scientific institutions, even state property, shall be considered private property" (The Hague Conventions II of 1899, ibid., Article 56). Most of the regulations of the two conventions merely reaffirmed rather than established rules of international law, and the provisions related to the protection of cultural property were also some of the provisions of restating international law of war. The unanimous adoption of the rules in accordance with the Brussels Declaration reflected the fact that the major powers participating in the Hague Peace Conference accepted that the regulations established in the Brussels Declaration were the main rules of the law of war and remained in force at the time.

By the end of the 19th century, most of the countries had accepted the conventional obligations of the regulations codified in the Brussels Declaration, which led to the convoking of the Hague Conventions of 1899 and 1907. The two Hague meetings aimed to define the laws and customs of war applicable to all countries. The first Hague Conference (1899) was attended by representatives of 26 countries (Martel [ed.] 2012: 3), including all the major European states, and the countries from America and East Asia. The second Hague Conference (1907) included all the participants in the first Hague Conference and seventeen other countries in Central and South America (Martel [ed.] 2012: 3).

3. Advancing of the ban on looting of cultural property in the twentieth century

The development and advance for protection of cultural property in the twentieth century was also accumulated during the war. In response to criticism of cultural property looting and destroying during World War I, Germany started to send full-time personnel to the army and the occupied government in 1914 to protect art treasures, historic buildings, and monuments under its control (Posner 1944: 215-216). Germany also sent professionals to protect the archives of the occupied France, Belgium and Poland from destruction in the early 1915 (Posner 1944: 215-216). The practice that Germany also employed experts to protect archives, art treasures and monuments reflected the requirements of customary international law and the regulations prohibiting the looting of cultural property in the Hague Convention.

Afterwards, the restitution after the war made the significant influence on the international customary law in the scope of cultural protection. The relevant provisions for the return of looted cultural property were promulgated through a series of inter-State peace treaties after the war as the format of bilateral or multilateral treaty. This process began in the 1919 Treaty of Versailles, which required Germany to return plundered cultural property to France, Belgium and other countries (The Treaty of Versailles, Articles 245, 246, 247, 225 CTS (1919): 303-304). The peace treaty reiterated that as long as looted or stolen cultural property was retained and identifiable, return was the only remedy (Marchisotto 1973-1974: 699).

The law of war during World War II put an emphasis on the military's responsibility to protect cultural property in combat; in particular, special agencies were established and professionals were hired to work with the military to protect cultural property (General Eisenhower issued an order in 1943 to place the responsibility of protecting cultural property "squarely upon the shoulders of every commander and, in turn, every officer and every soldier" - as quoted by Robert M. Edsel (Edsel 2013: 66). For instance, the U.S. government established a specialized agency called the Roberts Commission in June 1943 to preserve fine art works and monuments; in the fall of that year, the U.S. government also developed a military plan called "Monuments, Fine arts and Archives" (MFA&A). To prevent unnecessary damage to cultural sites, MFA&A engaged the Roberts Commission to hire art professionals who provided the armed forces with maps that could identify churches, palaces, museums, historic buildings and monuments to protect them from war damage (Sandholtz 2008: 115). The efforts of these specialized agencies to protect cultural property during the war and to collect information identifying these cultural properties not only consolidated

the rules for preventing the plunder of cultural property during the war, but also laid the foundation for the return of plundered cultural property after the war.

Afterwards, the Allies first established the principles on the return of plundered cultural property in the London Declaration (Declaration Regarding Forced Transfers of Property in Enemy-controlled Territory (the London Declaration of 1943), 8 Department of State Bulletin (1943): 21-22) of 1943, and issued formal adoption to all relevant powers, including neutral nations. The Allies declared that any illicit transfer or transaction of plundered cultural property during war was void (Declaration Regarding Forced Transfers of Property in Enemy-controlled Territory (the London Declaration of 1943), 8 Department of State Bulletin (1943): 21-22). The "Declaration" set out the legal basis for the post-war plundering of the country of origin of cultural property. The Declaration was implemented through a series of international treaties and domestic legislation all around the world, and this enforcement had the distinctive features of customary international law. The widespread return after the war showed that no matter how serious the plunder of cultural property was, the rules prohibiting the dealings were deeply rooted in the international community.

During the Second World War the plunder of cultural property became more complicated and hidden, so the London Declaration of 1943 offered a broad interpretation of the use of "force or duress" (Declaration Regarding Forced Transfers of Property in Enemy-controlled Territory (the London Declaration of 1943), 8 Department of State Bulletin (1943): 21-22). The interpretation included all forms of transfer of property and even transactions that appeared to be legal in form. Subsequent international agreements and domestic regulations also acted up to this broad interpretation. Furthermore, according to the Bonn Convention of 1952, cultural property given as a gift should also be found in the scope of restitution; if the gift is obtained through direct or indirect coercion or the use of an individual's public office, it shall be returned; in this Convention, the scope of return also included the cultural property acquired by common purchase, unless it had been brought into another country and used for sales purpose (The Bonn Convention of 1952, chapter IV, Article 1.2(a), ibid., p. 90-91).

In the aspects of criminal regulation, according to the verdict of the Nuremberg trial, looting of cultural property was not only illegal during World War II, but also criminal (International Military Tribunal (Nuremberg), Judgment of 1 October 1946, p. 55 (crime of aggression.info/documents/6/1946_Nuremberg_Judgement.pdf).). For example, Rosenberg, a group led by Einsatzstab Rosenberg, was found guilty of "robbing cultural property." (International Military Tribunal (Nuremberg), Judgment of 1 October 1946, p. 55 (crime of aggression.info/documents/6/1946_Nuremberg_Judgement.pdf), p. 114-115). The Nuremberg Tribunal opposed the looting of cultural property under Article 56

in the Hague Conventions of 1899 and 1907. The court held that the article was based on customary international law recognized by all civilized nations.

After the entry into force of the Fourth Hague Convention in 1907, another convention devoted to protection of cultural property in war strengthened the rules dealing with looted cultural property: The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Treaty of Rollich 1935), which was the first attempt to formulate the convention in Americas. It proclaimed that cultural property and all institutions devoted to art, culture and education, should be treated as neutral and be protected absolutely, unless these were used for the military purposes. Unfortunately, this process was suspended by the Second World War. After the war, the UNESCO General Assembly continued its efforts and eventually developed the 1954 Hague Convention and its first protocol. The 1954 Hague Convention and its first protocol represented the official birth of the first special convention for the protection of cultural property in armed conflicts.

4. The choice between recourse and retention

Despite international consensus today on the ban on illicit trafficking in cultural property, there are still many voices of opposition to the return of cultural property looted during the 19th- and the 20th-century wars. First, as mentioned earlier, some scholars mistakenly believe that general international law did not prohibit the plunder of such cultural property in international armed conflicts in the 19th and the 20th centuries. Therefore, the institutions that hold these cultural properties now believe that these collections belong to them due to ownership, so they do not open channels for dialogue or negotiation on return of the cultural properties in their possession.

Moreover, the concept of "internationalism" of cultural property regards cultural property as the common heritage of the world. Therefore, people of all countries should have a common voice when determining the fate of such cultural property. This argument is often used as a defense against return of cultural property. In the cases where the country of origin of the looted cultural property is determined, it often causes widespread controversy.

Mere asking for a return for moral or political reasons is not enough to dismiss the reasons current holders consider the trusteeship or legitimate commercial purchases; however, customary international law provides new ideas to solve this problem. As mentioned earlier, the ban on plundering of cultural property during a war began in the mid-17th century. After continuous development, it has evolved into established rules of customary international law and has been established as a universal customary international law. At the beginning of the century, this rule applied to all countries and has continued to do so until today. Relying on this rule, restitution is the only remedy for

illegal acts of robbery or confiscation of cultural property during a war. This rule applies as long as the protected stolen work is retained and identifiable. Various peace negotiations and returns in the 18th and the 19th centuries have repeatedly proven that the passing of time will not make the right to return the pillaged cultural relics disappear. This reason provides a strong legal basis for a return request from the country of the looted cultural property origin.

5. Conclusion

The practice of not plundering cultural property, which began in the middle of the seventeenth century, confirmed the general understanding of the simple natural laws of the world. By the end of the twentieth century, rules of customary international law prohibiting plunder of cultural property had been established. Although the practice of the rule appeared mainly in Europe, it reflected the natural laws of modern military behavior and has found universal applicability. Wartime rules prohibiting looting of cultural property were initially established in the second half of the 17th and the 18th centuries and were deeply consolidated in customary international law of war in the 19th and the 20th centuries. Therefore, the traditional right to conquer cannot survive in the new pattern of international law. History showed that Napoleon tried to restore this special right, but ultimately failed. A century later, Hitler tried again to reinstate this practice, but also failed. The evolution of the rules prohibiting plunder of cultural property during a war showed that the rule was not limited to the rules of war on European territories, but should also apply to general customary international law in the rest of the world in the nineteenth and early twentieth centuries. As long as the looted cultural property is retained and identifiable, returning the restored material is the only way to obtain relief for the rights and interests of the country of origin. For example, during the Second Opium War in 1860, the British and French forces looted China's Old Summer Palace and took away countless valuable art treasures; even more than a century afterwards the Chinese government must still demand the return of the looted objects for legitimate reasons. Based on international customary law generally accepted by the international community, establishing a consultation mechanism and formulating bilateral and multilateral treaties is the best way to return cultural property at the legal level. This expectation depends on the joint efforts of the future international community.

Bibliography

Biroy, Victoria A. 1997-1998. *Prize or Plunder? The Pillage of Works of Art and The International Law of War*, 30 NYU JIL & Politics.

Bordwell, Percy. 1908. *The Law of War Between Belligerents: A History and Commentary*, Chicago: Callaghan & Co.

Carnahan, Burrus M. *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, The American Journal of International Law 92 (2): 213-231.

Chapman, Tim. 1998. *The Congress of Vienna – Origins, Processes, and Results*, London and New York: Routledge.

De Vattel, Emer. 1758. *The Law of Nations, or Principles of the Law of Nature.*

Edsel, Robert M. 2013. *Saving Italy: The Race to Rescue a Nation's Treasures from the Nazis.*

Gould, Cecil. 1965. *Trophy of Conquest, The Muse'e Napole'on and the Creation of the Louvre*, London: Faber and Faber.

Gordon Martel (ed.), 2012. *The Encyclopedia of War*, Massachusetts: Wiley-Blackwell.

Grotius, Hugo. 1925. *De Jure Belli ac Pacis Libri Tres De Jure Belli ac Pacis Libri Tres*, trans. Francis W. Kelsey, Vol. 2 of *The Classics of International Law*, ed. James Brown Scott, Francis W. Kelsey trans., Oxford.

Kalshoven, Frits. 1973. *The Law of Warfare: A Summary of its Recent History and Trends in Development*, 1973. Geneva: Henry Durant Institute.

Mainardi, Patricia. 1989. *Assuring the Empire of the Future: The 1798 Fête de la Liberté*, *Art Journal* 48 (2): 155-163.

Marchisotto, Alan. *The Protection of Art in Transnational Law*, 7 Vanderbilt JTL (1973-1974), p. 695-699.

Ouynn, Dorothy Mackay. 1945. *The American Historical Review* 50 (3), April, p. 437–460, https://doi.org/10.1086/ahr/50.3.437

Puvendorf, Samuel. 1931. *Elementtorum Jurisprudentiae Universalis Libri Duo* [Two Books on the Elements of the Universal Law] William A. Oldfather trans., Indianopolis: Liberty Foud.

Sandholtz, Wayne. 2008. *Dynamics of International Norm Change: Rules against Wartime Plunder*, European Consortium for Political Research, Vol. 14(1): 101–131 [DOI: 10.1177/1354066107087766]

Treue, Wilhelm. 1961. *Art Plunder: The Fate of Works of Art in War and Unrest*, Basil Creighton trans., Dusseldorf: Droste Verlag,

Glosses

Volume 18, Issue 4
December 2020

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

COMMENTARY
received 2020-10-29
accepted 2020-12-17

"Everything in their power": a gloss to the European Court of Human Rights' judgement in the case of Tsezar and Others v. Ukraine[1]

„Wszystko, co w ich mocy": glosa do wyroku Europejskiego Trybunału Praw Człowieka w sprawie Tsezar i inni przeciwko Ukrainie

KATERYNA KRAKHMALOVA

Research Adjunct (postdoc fellow), Centre of Migration Research, University of Warsaw
adiunkt badawczy, Ośrodek Badań nad Migracjami, Uniwersytet Warszawski
ORCID: https://orcid.org/0000-0003-4940-6952, k.krakhmalova@uw.edu.pl

Citation: Krakhmalova, Kateryna. 2020. "Everything in their power": a gloss to the European Court of Human Rights' judgement in the case of Tsezar and Others v. Ukraine. *Opolskie Studia Administracyjno-Prawne* 18(4): 139–150. DOI: 10.25167/osap.3437

Abstract: This gloss summarizes and analyzes one of the recent key judgments of the European Court of Human Rights' (ECtHR) in the case concerning Ukraine, while considering the context of hybrid warfare and the special place case-law of the ECtHR has in the Ukrainian legal system. The judgement addresses both: the right to access to the courts and the issue of suspended social payments due to hostilities, the extent of obligations of the state defending itself against aggression towards its nationals and the delicate balance between security, human rights and humanitarian considerations; and as such has much deeper relevance and applicability than to Ukraine alone.

---

[1] Judgement of the European Court of Human Rights (Fourth Section Chamber) from 13 February 2018 (final 2 July 2018) in the case of Tsezar and Others v. Ukraine (applications nos. 73590/14, 73593/14, 4635/15, 5200/15, 5206/15 and 7289/15). Available at http://hudoc.echr.coe.int/eng?i=001-180845. Date of access: 19.10.2020.

The phrase "everything in their power" comes from the previous Court's judgement in the Khlebik v. Ukraine case, which is cited by the Court in Para 55 of the present case as equally applicable to it in description of actions taken by the Ukrainian authorities here.

Keywords: European Court of Human Rights, hybrid warfare, Ukraine, access to court, suspension of social payments, internal displacement, security and human rights, extent of obligations of the state defending itself against aggression, margin of appreciation.

Abstrakt: Glosa ta podsumowuje i analizuje jeden z niedawnych kluczowych wyroków Europejskiego Trybunału Praw Człowieka w sprawie Ukrainy, jednocześnie zwracając uwagę na kontekst wojny hybrydowej i szczególne miejsce, jakie orzecznictwo ETPCz zajmuje w ukraińskim systemie prawnym. Wyrok ten porusza kwestie prawa dostępu do sądu oraz zawieszenia świadczeń społecznych wskutek działań wojennych, zakresu obowiązków państwa broniącego się przed agresją wobec swoich obywateli oraz delikatnej równowagi pomiędzy bezpieczeństwem, prawami człowieka i względami humanitarnymi oraz jako taki jest o wiele głębszy i relewantny w znacznie szerszym zakresie, niż tylko w stosunku do Ukrainy.

Słowa kluczowe: Europejski Trybunał Praw Człowieka, wojna hybrydowa, Ukraina, dostęp do sądu, zawieszenie świadczeń społecznych, przesiedlenia wewnętrzne, bezpieczeństwo i prawa człowieka, zakres obowiązków państwa broniącego się przed agresją, margines uznania

1. The significance of the case, its background and context

The case under analysis is, arguably, both rare and important: rare - because the European Court of Human Rights unanimously decided in favor of the state and against the individual claimants (no violation of Article 6 Para 1 of the Convention and inadmissible the remaining part of the complaint) (Tsezar and Others v. Ukraine: resolutive part). Such an outcome is not very common when considering the very design of the Convention, which was drafted in the aftermath of the Second World War to protect individuals against the state in the first place (Council of Europe 2010: 16,18). It is also unusual because the winning state was Ukraine. According to Court statistics, in the cases involving Ukraine from 1959 to 2019, out of 1,413 judgements only 19 were decided to have no violations, approximately 1.3% (ECtHR statistics). (For comparison, for Poland, with 1,178 judgements, 130 were with no violations, or about 11%) (ECtHR statistics).

Even though this case has several specific issues related particularly to Ukraine it is important to examine it in a larger context, as in the Court's own words "it would be artificial to examine the facts of the case without considering […] general context [of the] hostilities in the region." (Tsezar and Others v. Ukraine: Para 48) With this case the European Court of Human Rights has been faced with the rather difficult and fine task of untangling the extent of human rights obligations of the state defending itself against aggression and imperative to protect some of the very fundamental individual human rights with a new type of military conflict and special place of and trust in its jurisprudence in Ukraine in the background.

1.1. The war in Ukraine. A new type of military conflict

Between November 2013 and February 2014, Ukraine and its society went through a series of transformational changes which started with Euromaidan protests inspired by the desire to protect the European vector of political development and values, and transformed into a much wider democratic revolution, later called the Revolution of Dignity, involving a change of the state's political elites. The then political change overlapped in time with the military one. Taken together with the fact that Ukraine twenty years prior to that had given away its nuclear arsenal in exchange for the security assurances from the USA, the UK and the Russian Federation, in compliance with the Budapest Memorandum of 1994 (Budapest memorandum), the country was particularly vulnerable at that moment. This vulnerability was used by the Russian Federation first for the annexation of Crimea and later for the rise of Russian-backed separatists in the East of Ukraine and the war.

In 2014, armed groups took over the governmental buildings in the East of Ukraine, began to escalade financial institutions in the Donetsk and Luhansk regions and proclaimed the two so-called "People's Republics", which the government of Ukraine considers to be terrorist organizations (Tsezar and Others v. Ukraine: Paras 6-8). Several months after that a meeting took place between Ukrainian and American senior officials and/or security experts, defining the ongoing conflict. The US side concluded that "the situation in eastern Ukraine is not about Ukraine, but is all about NATO" and a new type of threat, which is the "hybrid warfare" (Howard 2015: 235). "The components of this new type of warfare are nothing like we in the West have seen before," with one of them being the information warfare. (Howard 2015: 235; on the information warfare as part of the hybrid warfare, the criticism and utility of the latter and its application to the situation in Ukraine see also, e.g. Reichborn-Kjennerud, Cullen 2016).

Decisions of international courts and tribunals in circumstances of the information warfare carry additional significance in establishing facts. Moreover, taking into account their peculiar place in the Ukrainian legal system, judgements delivered by the European Court of Human Rights play here a special role.

1.2. The role and place of the ECtHR's judgements in the Ukrainian legal system

In general, the Ukrainian legal system is classified as belonging to the civil law, as opposed to the common law in terms of the sources of law. However, according to Article 17 Section 1 of the Law of Ukraine "On execution of judgements and application of the practice (case-law) of the European Court of Human Rights" "the courts while adjudicating the cases apply the Convention

and practice (case-law) of the Court as a source of law" (Law No. 3477-IV). During the law-making process, draft laws and by-laws undergo legal expertise before registration, while the laws and by-laws already in force are checked and administrative practices are systematically controlled in order to make sure they correspond to the Convention and Court's practice (Law No. 3477-IV: Article 19). It is compulsory for judgements of the Court to be executed according to both Article 46 of the Convention (ECHR) and Article 2, Section 1 of the above cited Ukrainian law, while officials entrusted with such responsibilities who are found guilty of non-execution or improper execution of judgements [for or against Ukraine] face administrative, civil or criminal responsibility (Law No. 3477-IV: Art. 16).

In the comprehensive work, comparing the impact of the ECHR on national legal systems of the 18 selected countries, and in particular, contrasting Russia and Ukraine, "A Europe of Rights", Angelika Nußberger not only mentions the described above Ukrainian statutory provision on implementation of Convention by domestic courts, but also points out the special place of the Convention by referring to the Ukrainian Constitutional Courts' conclusion on international treaties' status in the hierarchy of the legal acts (being beneath the Constitution, but above the country's laws and by-laws) (Nußberger 2008: 626, 627, 658, 661).

While it is true, that according to the latest update of the Department for the Execution of Judgements of the ECtHR from October 2020 there was a number of cases against Ukraine under the Committee of Ministers' supervision and problems with execution of some of the ECtHR's decisions in Ukraine, there were also main reforms adopted (see the Department statistics, 2020) and at least declared openness to do more in this regard, with the parliamentary hearing on execution by Ukraine of ECtHR judgements being held as recently as on 9 December 2020 (Department, 2020). Scholars also underline that high numbers of both – applications, violations (and consequently – executed/non-executed decisions) are also linked, among the other things, with positive public perception of the ECtHR in Ukraine (Gnatovskyy, Ioffe 2017). The trust and popularity of the ECtHR may be illustrated by the fact that cases submitted to it are often the ones of the high state and societal importance. For example, currently there are more than 6,500 individual applications related to the situation in the East of Ukraine or Crimea and five interstate cases between Ukraine and Russia pending before the Court (ECtHR Ukraine. Press country profile 2020: 12).

2. Key facts of the case, legal reasoning and commentary

While the case in question has received some, albeit, modest, commentary on the part of the Government (Ministry of Justice of Ukraine 2018), interna-

tional community (UNHCR 2018) and NGOs like the Kharkiv Human Rights Protection Group (Ochotnikova 2018) and Ukrainian Helsinki Human Rights Union (Procenko 2018), it has not been at this point a subject of the wider academic analysis, which this gloss aims to change.

In the case of Tsezar and Others v. Ukraine, seven applicants (all of them – nationals of Ukraine, who presented their cases themselves) in late 2014 and early 2015 lodged complaints against the state of Ukraine connected with the suspension of social benefits, including pensions, to them on the territory which the Government of Ukraine due to hostilities did not control (Tsezar and Others v. Ukraine: Paras 1, 3).

The case was decided by the seven-judge Chamber of the European Court of Human Rights in February of 2018 (and became final in July 2018) and concerned four alleged violations of the Convention:

(1) Article 6 Para 1 and/or Article 13 of the Convention in conjunction with Article 1 of Protocol No. 1 (alleged impossibility to access a court for challenging suspension due to removal of the courts from the territories where hostilities were taking place);

(2) Article 1 of Protocol No. 1 (alleged violation of the right to peaceful enjoyment of one's possessions, i.e. social benefits);

(3) Article 14 in conjunction with Article 6 and Article 1 of Protocol No. 1 of the Convention (alleged discrimination in relation to property rights and access to fair trial of those living on territories that were temporarily not under control by the Government in comparison to those living on the controlled ones); and

(4) Article 2 Para 1 of the Convention (decreased standard of living as an alleged violation of the right to life) (Tsezar and Others v. Ukraine: introductory part and Paras 40-81).

In order to resolve the case, the Court had to establish several relevant facts. One of such facts was that in the parts of the Donetsk and Luhansk regions of Ukraine, beginning in April 2014 there appeared armed groups, taking over governmental buildings, offices of the financial institutions (including the National Bank of Ukraine) located there, attacking transport and employees of the Ukrainian postal service and starting the creation of the so-called "Donetsk People's Republic" and "Luhansk People's Republic." (Tsezar and Others v. Ukraine: Paras 6, 8, 9). Another fact was that in response the Government launched an anti-terrorist operation, several months afterwards suspending social benefit payments in the territories that were not under state control and by the change of the law first transferred the jurisdiction of the courts from those areas to the ones on the territories nearby it controlled and later relocated the courts there (Tsezar and Others v. Ukraine: Paras 7, 12-14).

Relevant Ukrainian legislation at the time provided that suspension was done in order to "secure the lives and health of employees of banking institutions and their clients, and ensure the stability of the banking system of Ukraine as a whole" (Tsezar and Others v. Ukraine: Para 20); that people had the right to receive their social benefits, but this could only be done on territories controlled by the Government, thus they should have registered on the controlled territory as internally displaced persons at their actual place of residence and receive these benefits/payments there (Tsezar and Others v. Ukraine: Paras 21-30).

The Court also established that two out of the seven applicants had actually registered at controlled territory and received not only reinstallment of social benefits, but what was also due to them for the period of suspension (Tsezar and Others v. Ukraine: Para 16). Another two travelled between uncontrolled and controlled areas, with one person also registering at the controlled territory without asking for reinstallment of social benefits (Tsezar and Others v. Ukraine: Paras 17,19). All accounts of travel occurred after the respective Ukrainian courts had been moved to controlled territory and could have addressed the applicants' grievances [before they applied to the ECtHR] (Tsezar and Others v. Ukraine: Para 54).

While evaluating the four alleged violations, the Court started with admissibility requirements (ECHR: Art. 29 Para 1; Rules of the Court: 54-2 and 54A-1). The failure to exhaust local remedies was one of such requirements not being met thus resulting in inadmissibility of the part of the application related to the alleged violation of Article 2 Para 1 of the Convention, right to life (Tsezar and Others v. Ukraine: Para 80, 81). On the same grounds, due to the failure to exhaust local remedies (i.e. challenge the suspension of social payments in Ukrainian courts first) was declared inadmissible part of the application relating to Article 1 of Protocol No. 1, right to property (Tsezar and Others v. Ukraine: Paras 71,72). Besides, here the Court expressed certain doubts regarding the victim status of those two applicants who actually had their social payments successfully reinstalled using the existing system (Tsezar and Others v. Ukraine: Paras 66, 67).

The alleged discrimination claim (related to Article 14 in conjunction with Article 6 and Article 1 of Protocol No. 1 of the Convention) also was found to be inadmissible as manifestly ill-founded (Tsezar and Others v. Ukraine: Para 78). In the Court's assessment of the situation of the applicants who lived on the territories not controlled by the Government (and where specific measures were taken due to the fact of ongoing hostilities there) was not analogous to the situation on the territories which were under control and in such measures there was no need (Tsezar and Others v. Ukraine: Paras 75-77).

The only part of the application, which successfully passed from the admissibility stage to merits, was the one related to access to the court (Article 6

Para 1 and/or Article 13 of the Convention in conjunction with Article 1 of Protocol No. 1 of the Convention). The Article 13 was not examined, as from the beginning the Court evaluated that Article 6 in this case would be a *lex specialis* in relation to it (Tsezar and Others v. Ukraine: Para 41). Regarding Article 6, in its turn, the Court agreed that inability of the applicants to access the court in their native Donetsk was a limitation of the right to access to the court (Tsezar and Others v. Ukraine: Para 50). However, this right can be limited (for pursuing a legitimate aim and proportionally), here it was limited because of hostilities and the state has margin of appreciation in deciding how to resolve the problem in safeguarding the essence of the right in such a situation (Tsezar and Others v. Ukraine: Paras 47, 48, 51). Citing its findings in the previous case about Ukraine, Khlebik v. Ukraine (where it had already been confirmed that Ukrainian authorities did "everything in their power" to properly safeguard effectiveness of Article 6 rights there), the Court once again concluded that "[Ukrainian] authorities took the steps reasonably expected of them to ensure the proper functioning of the judicial system, making it accessible to the residents of the territories currently outside of the control of the Government." (Tsezar and Others v. Ukraine: Para 55) Therefore, there has been no violation of Article 6 of the Convention (Tsezar and Others v. Ukraine: Para 56).

There are at least two further comments which need to be made about this judgement. One is procedural and the other one is related to the subject matter raised.

With regard to the procedure, it is interesting to see the slight difference in application by the Court of the exhaustion of the local remedies rule. While non-exhaustion of local remedies was the reason for inadmissibility for the two other claims, in the alleged Article 6 violation proceedings it is not addressed at the admissibility stage, even though, arguably, it could have been assessed at this stage as well, most probably rendering this part of the claim inadmissible too. Nevertheless, the claim of Article 6 went on to being reviewed on the merits and was decided on merits – though the Government mentioned non-exhaustion of local remedies (i.e. opportunity for the applicants to address Ukrainian courts before the ECtHR) in its submission (Tsezar and Others v. Ukraine: Para 45). Realization of Article 6 has special instrumental significance for other rights and is rooted in prohibition of denial of justice in international law (Vitkauskas, Dikov 2012: 23) – however, it is not clear whether this difference can be explained by this fact or if there was another reason for it.

The subject matter of the case – the issue of social payments, including pensions, in Ukraine, deserves an additional commentary and clarification. Additional legislation in relation to the payment of social benefits, including pensions, the necessity to adopt which has arisen due to hostilities, remains a point

of contention in Ukraine. There are both state security and human security, humanitarian and human rights considerations very closely and inextricably intertwined with one another in it. On the one hand, there is the objective factor of hostilities. In the situation, where Ukraine is defending itself against aggression there are important considerations for both state security and human security (of the financial institutions' employees and courts' workers). As this judgement clearly shows, the state has done everything it could and should have according to its obligations under the Convention in order to protect the essence of the rights in question in relation to its nationals. There was/is simply no possibility to pay social benefits in territories not controlled by the Government and the only feasible thing was/is to do so on the controlled territory. On the other hand, this requires people to move from the uncontrolled territories to the controlled ones, crossing the "contact line", and humanitarian organizations are alarming about those who were killed, have been injured or suffered other health complications during the crossing (UN OCHA 2019: 9), as well as about those, who are unable (disabled, immobile, alone) to move (UN OCHA 2019: 3).

3. Closing remarks

For substantiating its judgement in this case, the Court resorted to its previous judgement in Khlebik v. Ukraine (as described above). In the same way, the current case could set either a positive or negative precedent important for determination of the outcome in the subsequent cases. In fact, this already happened in Chirok and Others v. Ukraine (Chirok v. Ukraine). This was the case being brought to the ECtHR after the Tsezar. In Chirok v. Ukraine, 10 coalminers from the town of Zorynsk in the Luhansk region claimed violations under the same set of articles as in the Tsezar and Others v. Ukraine, and the Court found the case to be indistinguishable from Tsezar and inadmissible (with two parts of the claim being manifestly ill-founded and two having non-exhausted local remedies) (Chirok v. Ukraine: Paras 9, 14, 17, 22-28, 36, 37, 41).

However, this does not mean that it would be futile for the Ukrainian nationals to address the ECtHR with claims related to worsening of their social payments (or other payments) situation due to hostilities (after exhausting local remedies and meeting all the rest of the admissibility conditions). First of all, different materially important facts may lead to different outcomes. Second, and more important: the Court accepts and reviews cases based on how the parties submitted them. In the case of Khlebik v. Ukraine, in Para 66, "the Court notes at the outset that the scope of its examination of the case is delimited by the fact that the application is directed against Ukraine only (contrast, for example, Ilaşcu and Others v. Moldova and Russia [GC], no. 48787/99, ECHR

2004VII)." (ECtHR Khlebik v. Ukraine). If it is submitted against one state, then the Court must review it against this one state. However, the current hostilities in Ukraine have a cause. And as the Court formulated it in the Ilaşcu and Others v. Moldova and Russia case, when another state, namely Russia, supports the separatists, politically and militarily, this also triggers its responsibility for what is taking place on the uncontrolled territory (ECtHR Ilaşcu and Others v. Moldova and Russia: see, e.g. Paras 380-382, 394).

List of abbreviations

ECHR, the Convention – the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)

ECtHR, the Court – the European Court of Human Rights

UN OCHA – United Nations Office for the Coordination of Humanitarian Affairs

Bibliography

Primary sources

Legal acts

Budapest Memorandum (Memorandum on Security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons). Budapest, 5 December 1994. Text registered with the Secretariat of the United Nations. Available at https://treaties.un.org/doc/Publication/UNTS/No%20Volume/52241/Part/I-52241-0800000280401fbb.pdf. Date of access: 12.12.2020.

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. Council of Europe. Available at https://www.echr.coe.int/Documents/Convention_ENG.pdf. Date of access: 20.10.2020.

Rules of the Court [European Court of Human Rights], 1 January 2020 edition. Registry of the Court, Strasbourg. Available at https://www.echr.coe.int/documents/rules_court_eng.pdf. Date of access: 22.10.2020.

The Law of Ukraine dated 23 February 2006 No. 3477-IV. – On execution of judgements and application of the practice (case-law) of the European Court of Human Rights. Vidomosti Verhovnoi Rady Ukrainy (VVR), 2006, N 30, st. 260 zi zm. Available also at https://zakon.rada.gov.ua/laws/show/3477-15/print. Date of access: 20.10.2020.

Case law

Decision of the European Court of Human Rights (Fourth Section Committee) from 13 November 2018 in the case of Oleg Petrovich Chirok v. Ukraine (application No. 3309/15) and 9 other applications. Available at http://hudoc.echr.coe.int/eng?i=001-188429. Date of access: 23.10.2020.

Judgement of the European Court of Human Rights (Fourth Section Chamber) from 13 February 2018 (final 2 July 2018) in the case of Tsezar and Others v. Ukraine (ap-

plications Nos. 73590/14, 73593/14, 4635/15, 5200/15, 5206/15 and 7289/15). Available at http://hudoc.echr.coe.int/eng?i=001-180845. Date of access: 19.10.2020.

Judgement of the European Court of Human Rights (Fourth Section Chamber) from 25 July 2017 (final 11 December 2017) in the case of Khlebik v. Ukraine (application No. 2945/16). Available at http://hudoc.echr.coe.int/eng?i=001-175656. Date of access: 22.10.2020.

Judgement of the European Court of Human Rights (Grand Chamber) from 8 July 2004 in the case of Ilaşcu and Others v. Moldova and Russia (application No. 48787/99). Available at http://hudoc.echr.coe.int/eng?i=001-61886. Date of access: 22.10.2020.

Secondary sources

Council of Europe. 2010. *The Conscience of Europe. 50 Years of the European Court of Human Rights*. London: Third Millennium Publishing Limited (first published in 2010). Available on-line in separate chapters. The cited here chapter is available at https://www.echr.coe.int/Documents/Anni_Book_Chapter01_ENG.pdf. Date of access: 20.10.2020.

Howard, Glen E. 2015. Ukrainian security policy and the threat from the East: key findings from Kyiv (presentation at the US-UA Working Group: yearly summit, June 19, 2014). *Kyiv-Mohyla Law and Politics Journal*, 1 (2015), 233-236. Also available at http://kmlpj.ukma.edu.ua/article/view/52711/49374. Date of access 18.10.2020.

Reichborn-Kjennerud, Erik, Patrick Cullen. 2016. What is Hybrid Warfare? Research report/NUPI Policy brief, 1 (2016). Available at: https://core.ac.uk/download/pdf/52131503.pdf. Date of access: 12.12.2020.

Nußberger, Angelika. 2008. The Reception Process in Russia and Ukraine. In: *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, eds. Helen Keller, Alec Stone Sweet, 603-674. Oxford University Press.

Vitkauskas, Dovydas, Grigoriy Dikov. 2012. *Protecting the Right to a Fair Trial under the European Convention on Human Rights*. Council of Europe Human Rights Handbooks. Council of Europe. Strasbourg. Available also at https://www.echr.coe.int/LibraryDocs/Vitkauskas2012_EN.pdf. Date of access: 22.10.2020.

Internet sources

Department for the Execution of Judgements of the European Court of Human Rights. Country Factsheet (statistics). Ukraine. Last update 04.10.2020. Date of access: 12.12.2020. Available at: https://rm.coe.int/1680709769. [Referred to as Department statistics]

Department for the Execution of Judgements of the European Court of Human Rights. Parliamentary hearing on execution by Ukraine of ECHR judgments. Newsroom entry from 11.12.2020. Date of access: 12.12.2020. Available at: https://www.coe.int/en/web/execution/-/parliamentary-hearing-on-execution-by-ukraine-of-echr-judgments. [Referred to as Department]

European Court of Human Rights statistics. Violations by Article and by State, 1959-2019. Date of access: 19.10.2020. Available at https://www.echr.coe.int/Documents/Stats_violation_1959_2019_ENG.pdf.

European Court of Human Rights. Ukraine. Press country profile. Date of access: 19.10.2020. Available at https://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf.

Gnatovskyy, Mykola, Yulia Ioffe. Twenty Years of the ECHR in Ukraine. EJIL: Talk! (Blog of the European Journal of International Law), Blog entry from 18.09.2017. Date of access: 12.12.2020. Available at: https://www.ejiltalk.org/twenty-years-of-the-echr-in-ukraine/.

Ministry of Justice of Ukraine. Ministry of Justice has gained one more important victory on the way to international recognition of occupation of the "ORDLO" by the country-aggressor in the European Court of Human Rights. Entry (in Ukrainian language) at the official internet page from 14.02.2018. Date of access: 11.12.2020. Available at: https://www.kmu.gov.ua/news/ministerstvo-yusticiyi-zdobulo-she-odnu-vazhlivu-peremogu-na-shlyahu-do-mizhnarodnogo-viznannya-okupaciyi-teritoriyi-ordlo-krayinoyu-agresorom-v-yevropejskomu-sudi-z-prav-lyudini.

Okhotnikova, Nataliia. Betrayal is cancelled or Three myths about the decision of the ECtHR regarding payment of the pensions in the Donbas. Article (in Ukrainian language) from 13.02.2018. Date of access 11.12.2020. Available at: http://khpg.org/index.php?id=1518538521.

Procenko, Olena. The lack of control should not mean lack of responsibility: case of Khlebik v. Ukraine (with a part on the case Tsezar v. Ukraine). Article (in Ukrainian language) from 16.02.2018. Date of access 10.12.2020. Available at: http://ehrac.org.uk/wp-content/uploads/2018/02/no_control_not_amount_no_responsibility_khlebik_v_ukraine_UKR.pdf.

UNHCR. Ukraine Thematic Factsheet. January-February 2018. Brief commentary on the case at the P. 7. Date of access: 10.12.2020. Available at: https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/2018_02_unhcr_ukraine_legislative_update_final.pdf.

United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA). Ukraine: 2019 Humanitarian Response Plan (HRP) published 31 January 2019. Date of access: 20.10.2020. Available at https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/ukraine_2019_humanitarian_response_plan_en.pdf.

Acknowledgement

This research has received contribution from the project funded by the National Science Centre, Poland, "Securitisation (de-securitisation) of migration on the example of Ukrainian migration to Poland and internal migration in Ukraine" (Project nr 2018/31/B/HS5/01607).

Chronicle

Volume 18, Issue 4
December 2020

ISSN 1731-8297, e-ISSN 6969-9696
https://czasopisma.uni.opole.pl/index.php/osap

CHRONICLE
received 2020-10-15
accepted 2020-10-20

The 400th anniversary of the death of Stanisław Żółkiewski, Hetman and Great Crown Chancellor, Senator of the Polish-Lithuanian Commonwealth

400. rocznica śmierci Stanisława Żółkiewskiego, hetmana i kanclerza wielkiego koronnego, senatora Rzeczypospolitej Obojga Narodów

WŁODZIMIERZ KACZOROWSKI
University of Opole
ORCID: 0000-0001-5784-9716, WKaczorowski@uni.opole.pl

Citation: Kaczorowski, Włodzimierz. 2020. The 400th anniversary of the death of Stanisław Żółkiewski, Hetman and Great Crown Chancellor, Senator of the Polish-Lithuanian Commonwealth. *Opolskie Studia Administracyjno-Prawne* 18(4): 153–164. DOI: 10.25167/osap.3438

Abstract: In the period of Nobles' Democracy, the art of war of the Polish-Lithuanian Commonwealth attained the highest level, making a real phenomenon in the then Europe. It owed its development, among others, to outstanding Hetmans of the Crown and Lithuania, victors in many battles, leaders surrounded by fame and admiration, genuine patriots. In the hall of fame of Grand Hetmans, Field Hetmans and Lithuanian Hetmans, a most prominent place is taken by Stanisław Żółkiewski (1747-1620).

On 13 June 2019, Members of Parliament passed an occasional resolution dedicating the year 2020 to Stanisław Żółkiewski. The resolution reads, among others, "Stanisław Żółkiewski always put the good of Poland above his own benefits, stood faithfully on the side of successive kings, also in internal conflicts, despite the critical opinion of Sigismund III's politics. He advocated religious tolerance and easing conflicts. […] The *Seym* of the Republic of Poland, upon acknowledging the great contributions of Stanisław Żółkiewski, creator of the victory of Klushino and a conqueror of Moscow, tenacious defender of the Mother Country for which he sacrificed his life, establishes the year 2020, which marks the occasion of the 400th anniversary of his death, the Year of Hetman Stanisław Żółkiewski."

Keywords: hetman, chancellor, senator, *Seym*, Polish-Lithuanian Commonwealth

Abstrakt: W okresie demokracji szlacheckiej sztuka wojenna Rzeczypospolitej Obojga Narodów osiągnęła najwyższy poziom, stanowiąc prawdziwy fenomen w ówczesnej Europie. Swój rozwój zawdzięczała między innymi wybitnym hetmanom koronnym i litewskim, zwycięzcom wielu bitew, wodzom otoczonym sławą i podziwem, autentycznym patriotom. W poczcie staropolskich hetmanów wielkich i polnych koronnych i litewskich poczesne miejsce zajmuje Stanisław Żółkiewski (1547–1620).

Dnia 13 czerwca 2019 r. parlamentarzyści w drodze okolicznościowej uchwały ustanowili rok 2020 Rokiem Hetmana Stanisława Żółkiewskiego. W uchwale czytamy między innymi: „Stanisław Żółkiewski zawsze przedkładał dobro Polski ponad własne korzyści, stał wiernie po stronie kolejnych królów, także w wewnętrznych sporach, mimo krytycznego zdania o polityce Zygmunta III. Opowiadał się za tolerancją religijną i łagodzeniem konfliktów. […] Sejm Rzeczypospolitej Polskiej, uznając wielkie zasługi Stanisława Żółkiewskiego, twórcy wiktorii kłuszyńskiej i zdobywcy Moskwy, wytrwałego obrońcy Ojczyzny, za którą oddał swoje życie, ustanawia rok 2020 w 400-lecie Jego śmierci Rokiem Hetmana Stanisława Żółkiewskiego".

Słowa kluczowe: hetman, kanclerz, senator, sejm, Rzeczpospolita

1. Introduction

The Polish-Lithuanian Commonwealth was a state established as a result of the union concluded between the Kingdom of Poland and the Grand Duchy of Lithuania at the *Seym* held in Lublin in 1569. In compliance with the act of the Union of Lublin, there was established one state with the common monarch bearing the double title of the King of Poland and the Grand Duke of Lithuania. The Polish-Lithuanian Commonwealth spreading over the territory of 1 million square kilometres united the lands of the Kingdom and the Duchy upon annexation of the lands of Smolensk and Czernihiv in 1618 (Uruszczak 2010: 188). According to European historians, states covering an area of 1 million square kilometres were classified in the category of empires. The Polish-Lithuanian state was inhabited by 8-10 million people who were greatly varied as regards the nationalities and religions. The Lublin Union changed the system of power in Central-Eastern Europe and strengthened the Grand Duchy of Lithuania in the fight for regaining of the provinces lost to Moscow in the 15th and the 16th centuries. In the history of the Kingdom of Poland that was a period of glory and might of the Polish-Lithuanian military forces and dominance in this part of Europe. For the first time, beginning with the turn of the 15th and the 16th centuries, the Commonwealth had stood a chance of subordinating Moscow and the ruling Dynasty of Polish Vasas – that of taking over power in the state bending under the yoke of the absolute socio-political system. Regaining Smolensk in 1611, taking the tsar's throne by King Vladislav Vasa and the annexation of the lands of Smolensk, Czernihiv and Seversk, testify to the visible increase in the significance of the Polish-Lithuanian Commonwealth during the reign of the first Vasa on the Polish throne, Sigismund III (1588-1632) (Nagielski 2012b: 7). It was also during the reign of this ruler that

Figure 1. Portrait of Stanisław Żółkiewski,
National Museum in Krakow, inv. no. MNK I-219

the Kingdom organized many military campaigns against the Habsburgs, Moscow, Sweden, Cossacks, Turkey, the Tartars, as well as to Moldova and Wallachia. The fight which the Kingdom launched against the Muslim Empire of Turkey was of a particular dimension, since it was waged in defence of whole Europe and the Christian faith. In this way the Polish state became the bulwark of Christianity (*antemurale christianitatis*).

In the period of the Nobles' Democracy, the art of waging wars reached its climax in the Polish-Lithuanian Commonwealth, making a real phenomenon in the then Europe. It owed its development, among others, to outstanding Hetmans of the Crown and Lithuanian Hetmans, victors in many battles, leaders surrounded by fame and admiration, true patriots (Leśniewski 2003: 4). In the hall of fame of Old Poland's Grand Hetmans, Field Hetmans of the Crown and Lithuanian Hetmans, the prominent place is taken by Stanisław Żółkiewski (1547-1620).

2. Stanisław Żółkiewski among the patrons of the year 2020

In 2019, the Parliament of the Republic of Poland decided the patronage for the successive year 2020. In this way, the following outstanding persons were honoured: St John Paul II (the centenary of birth), Grand Hetman of the Crown Stanisław Żółkiewski (the 400th anniversary of the death), philosopher Roman Ingarden (the 50th anniversary of the death), writer, journalist and publicist Leopold Tyrmand (the centenary of birth and the 35th anniversary of the death). Moreover, the year 2020 is also celebrated as the centenary of the Battle of Warsaw and Poland's Wedding to the Sea, which took place in Puck.

On 13 June 2019, the MPs – on the basis of Article 33a of Rules of the Sejm – by way of an occasional bill, established the year 2020 to be the Year of Stanisław Żółkiewski. At this point, the resolution says, among others, "Stanisław Żółkiewski always put the good of Poland over his own benefits, faithfully stood on the side of successive kings, also when it came to internal disputes, despite having a critical opinion of Sigismund III's politics. He advocated religious tolerance and soothing conflicts. […] The Sejm of the Republic of Poland, in acknowledgement of the great contributions of Stanisław Żółkiewski, the creator of the victory of Klushino and conqueror of Moscow, persevering defender of his Mother Country for which he sacrificed his life, establishes the year 2020, being the 400th anniversary of his death, the Year of Hetman Stanisłw Żółkiewski."

3. Origin, youth and education of the future Hetman

The House of Żółkiewski, coat of arms "Lubicz" settled down in Red Ruthenia, their ancestral nest being the village of Żółkiew situated in the land of Chełm, in the County of Krasnystaw (not to be mistaken for the town of Żółkiew located c. 25 km away from Lvov, which was founded by Hetman Stanisław Żółkiewski in 1603 on the ground of the village of Winniki). The future Hetman and Great Crown Chancellor was born in 1547 in the village of Turynka. He was the third child (following Mikołaj and Anna) of Stanisław

Żółkiewski (c. 1520-1588), Castellan of Halicz (1580-1581), Voivode of Bełz (1581-1585), Voivode of Russia (1585-1588), buried in the Lvov cathedral, and Zafia Lipska of Goraj, coat of arms "Korczak". Stanisław Żółkiewski, Sr, belonged to the deputies' elite, since he represented the nobility of the Voivodeship of Bełz four times in sittings of the *Seym* (1556/1557 in Warsaw; 1569 in Lublin – he signed the Union of Lublin Act; 1576 in Cracow – the coronation *Seym* of Stefan Batory; 1578 in Warsaw). Following his nomination to the position of Castellan of Halicz in 1580, he became a senator of the Commonwealth. He was also an excellent soldier who took part in the Moscow campaign in 1580. Owing to his experience gained in public offices as well as the accumulated wealth (towards the end of his life he owned 30 villages), he gained a significant position as a magnate in the Commonwealth.

Stanisław Kobierzycki (c. 1600–1665), historian and writer, in his work entitled *Historia Władysława królewicza polskiego i szwedzkiego* [A history of Vladislav, the Polish and Swedish King], wrote that Stanisław Żółkiewski Jr, "came from an old family […]. When the future leader reached his adolescence, he was sent to be educated by his relation – Jan Zamoyski, who realized the boy's exceptional abilities" (2005: 310). Stanisław Żółkiewski's education developed at two stages. Initially, he was taught by private preceptors at home, and then was sent to the cathedral school in Lvov. He gained his knowledge mainly in the fields of Latin, history, philosophy, natural sciences and ancient literature. In the opinion of Stanisław Kobierzycki, he was a brilliant expert in history. "He made his decisions in well-thought-over a way not only owing to his experience, but also because of continuous reading in older and newer historians. What he had read, he remembered so well that – if anybody quoted a fragment with mistakes, he was ready to instantly correct the person, quoting whole pages to the amazement of his listeners" (2005: 310-311). The model of education of the young magnate should properly include also his education at one or several foreign universities. However, the Senior of the House of Żółkiewski decided that studies abroad were too costly and sent his son to the court of his relative Jan Zamoyski (1542-1605), a graduate of the University of Padua, doctor of both laws, perfectly educated humanist, prospective Chancellor and Grand Hetman of the Crown, who was the Secretary to Sigismund Augustus at that time. Consequently, Stanisław Żółkiewski arrived in Cracow in 1566 and took the post of a King's secretary combining it with transport of correspondence and carrying out tasks delegated to him. His service at the King's court fell on years which were of breakthrough importance to the Commonwealth. On 7 July 1572 the last of the Jagiellonian Dynasty – Sigismund II Augustus – died in Knyszyn. This gave rise to the rule of monarchs chosen in free *viritim* elections in the Polish-Lithuanian Commonwealth.

4. Hetman and Grand Crown Chancellor

The first interregnum factually, but not formally, came to an end on 16 May 1573 by proclamation made by Grand Marshal of the Crown, Jan Firlej, of Henri de Valois, French Dauphin, to be the King elect of the Commonwealth, having been chosen prior to that (11 May) in the fields of Kamień, a village near Warsaw. That candidate was also supported by Jan Zamoyski and Stanisław Żółkiewski. On 6 July 1573 Polish envoys led by Adam Konarski, Bishop of Poznan, set out from Międzyrzecz and headed for Paris. They were to officially inform the Dauphin of France of his being elected and obtain the elect's promise to fulfil the conditions which were set in connection of the choice. Among the thirteen persons selected on 16 May by the states, there was Jan Zamoyski accompanied by six trusty persons, among others, Stanisław Żółkiewski. During the journey the latter got acquainted with the western culture, customs and different art of war. In 1574, while being part of the delegation of envoys accompanying Henri de Valois during his journey to the Commonwealth, Jan Zamoyski delegated Stanisław Żółkiewski to go to Vienna to the court of Holy Roman Emperor Maximilian II Habsburg.

In 1575, Stanisław Żółkiewski participated in his first war expedition against the Crimean horde which crossed the frontier of Volhynia, Podolia and Red Ruthenia. Fortunately, the Tartars retreated and as a result Żółkiewski did not take part in any battle. Two years later, he participated in the war which Stefan Batory fought with Gdansk. Żółkiewski commanded then Jan Zamoyski's rota (military detachment) being part of the army commanded by Court Hetman Jan Zborowski and Starost of Puck, Ernest Weiher. That relatively small, amounting to 1.3 thousand cavalrymen and 700 infantrymen army, even if a select one, opposed far more numerous detachments commanded by von Koln, trying to break the land blockade and capture Tczew. Von Koln's detachments were taken by surprise by Zborowski on 17 April 1577 on a narrow causeway on Lubiszew Lake. As a result of the attack of the armoured regiment several thousand rebels were killed. In the battle, Mikołaj Żółkiewski – Stanisław's elder brother who was in command of Jan Zamoyski's armoured regiment distinguished himself in combat, but got seriously wounded on the battlefield. It was probably for his outstanding services in the war against Gdansk that Stanisław Żółkiewski was nominated King's secretary in 1578.

In the years 1579-1581, Stanisław Żółkiewski took part in Stefan Batory's expeditions to Moscow. On 20 September 1580, in the battle at Toropets, he was in command of his own regiment and greatly contributed to the final victory over the many times more numerous enemy.

During the split election on 19 August 1587, Żółkiewski voted Sigismund III Vasa. He was one of the defenders of Cracow against Archduke Maximilian

Habsburg, chosen by part of the nobility to be the king and intending to accomplish his coronation. Still, after his failed charge, the Archduke withdrew to Silesia, where on 24 January 1588 a battle was fought near Byczyna. Stanisław Żółkiewski commanded then a hundred-horse regiment of Cossacks in the rank of a cavalry captain. Risking his life, he managed to break the ranks of the enemy and seized the Emperor's yellow standard with the black eagle. Until today it has been kept in the crown treasury in the Wawel Castle. Zółkiewski, badly wounded in his leg, was taken off the battlefield. From then on he would walk with a limp till the end of his life.

On 7 March 1588, upon the request of Jan Zamoyski, Grand Hetman of the Crown, King Sigismund III Vasa, nominated Stanisław Żółkiewski Field Hetman of the Crown. Again, the contribution he had made in the war against Archduke Maximilian reaching for the Polish crown, most likely led to the nomination.

The year 1595 saw the beginning of military expeditions led by Jan Zamoyski to Moldova. Stanisław Żółkiewski held the function of the closest collaborator to the Grand Hetman of the Crown, which he performed with utmost success. He participated in the victorious Battle of Cecora, and in 1596 quelled the Cossacks' rebellion led by Severyn Nalyvaiko, whom he defeated in the battle in the wilderness of the Sołonica River. In 1600, Żółkiewski took part in the battle on the Telezina River near the village of Bukov. He commanded the so-called head troops regiment which – according to the Old Polish art of waging wars – was supposed to make the breaking charge. The fight ended in the victory of Jan Zamoyski and Stanisław Żółkiewski, which in turn made it possible to put Simion Movila, who was a boyar disposed in a friendly way towards the Polish-Lithuanian Commonwealth, on the country's throne.

Beginning with 1601, Żółkiewski led actions against the Swedish in Livonia, capturing Valmiera (Wolmar) and Weissenstein (Biały Kamień). In June 1602, he defeated the Swedish in the Battle of Reval (present-day Tallinn in Estonia).

During the Sandomierz Rebellion in the years 1606-1609, the Hetman took side of Sigismund III Vasa. Stanisław Łubieński (1573-1640), senator and historian, in his work *Rozruchy domowe w Polsce w latach 1606–1608* [The domestic riots in Poland in the years 1606-1608] emphasized:

> When it turned out that the rebels do not have peaceful intentions and provoke more and more new disturbances, the King – in order to put an end to them – summoned Stanisław Żółkiewski, the Castellan of Lvov and the Field Hetman, man of many virtues. Already as a youth, during the rule of King Stefan, he enjoyed recognition and respect and that not owing to the family connections with Jan Zamoyski, but due to his courage and excellent abilities. Earning successive military ranks, he gained such fame that Zamoyski himself made use of his counsel during wars. The latter acknowledged Żółkiewski to be his most worthy deputy. […] When Żółkiewski arrived in Warsaw, the King welcomed him with highest esteem and demanded that Żółkiewski give him advice as to the measures which needed to be taken in the then situation. […] Żółkiewski,

> glad that the King trusted him, declared his support and promised to try to persuade the Voivode [Mikołaj Zebrzydowski] not to take such actions. If the other one should not follow his recommendations, he would – with all his might – oppose such actions and would defend the King of the Commonwealth if the need arose" (2009: 82).

On 6 July 1607, in the Battle of Guzów, nearby Radom, the hetmans: Stanisław Żółkiewski, Jan Karol Chodkiewicz and Jan Potocki defeated detachments of the rebels. Sigismund III Vasa forgave the rebels after their lost battle (Pawłowska-Kubik 2019: 160–248).

In 1609, Stanisław Żółkiewski took part in the Muscovy War, also in the siege of Smolensk, and on 4 July 1610, in the Battle of Klushino, he beat the seven times more numerous detachments led by Dmitry Shuisky (Gawron 2012: 23-45), forced the muscovite boyars to choose Prince Vladislav Vasa to be the Tsar and in September of the same year he marched into Moscow (Nagielski 2012a: 47-68). At the ordinary *Seym* held in Warsaw on 29 October 1611, in the Senatorial Hall of the Royal Castle, he presented Sigismund III Vasa with the standards he had won in Moscow and dethronized Tsar Vasiliy Shuisky. In the literature on the subject, that event is referred to as the tribute paid by Shuisky Tsars (see: Byliński, Kaczorowski 2012: 135-141; Chrościcki, Nagielski [eds.] 2012; Gałuszka 2019: 171–203). The triumph of Hetman Żółkiewski, connected with the ceremony of presenting Shuisky Tsars to Sigismund III was captured in the form of a plafond painting by Tomasz Dolabella.

However, the victories in battlefields did not win Stanisław Żółkiewski the desired and coveted grand hetman's mace. He was forced to stand up to his own inferiors who, towards the end of 1612, upon having returned from Moscow, formed a confederation, waiting in vain to get the due soldier's pay. In the successive years, he took to fighting Tartars' invasions of Ukraine and Podolia. Despite the military actions which he had undertaken, Żółkiewski did not gain a wider recognition. The biggest danger to the Commonwealth followed in the Summer of 1617. Iskender Pasha set off leading 50 thousand Turks, Tartars, Moldovans, Wallachians and Transylvanians to take revenge for the devastating Cossacks' campaigns at the Black Sea. On 12 September 1617 the Turkish Army stood opposite the Polish camp on the bank of the Dniester. Negotiations were commenced in consequence of which the Peace of Busza was signed on 23 September 1617. Stanisław Żółkiewski ceded the control over Transnistrian principalities to the Turks.

Thirty years after Stanisław Żółkiewski was nominated a field hetman, he was granted the Grand Hetmanship on 6 February 1618, and on 6 March 1618 – the Great Seal of the Crown. The last two years of his life were not easy for the deserving chief. Again he met with attacks of magnates when – as a result of the battle against Tartars' horde, which he lost near Orynin on 28 September 1618 – the Tartars ravaged Podolia and Volhynia.

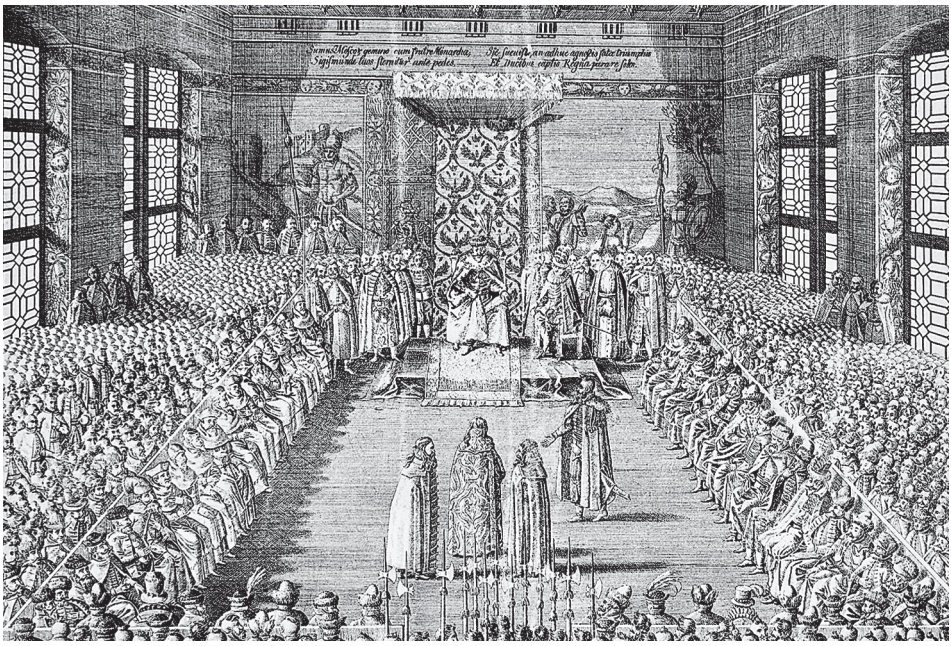

Figure 2. Presentation of Tsar Vasiliy IV Shuisky and his brothers as prisoners, copperplate by Tomasz Makowski, according to Tomasz Dolabella, from the collection of graphics of the National Museum in Krakow, inv. no. MNK III, ryc. 36474

In August 1620, expecting an attack of the Turkish, 73-year-old Żółkiewski organized an expedition to Moldova with the aim to strengthen the position of Gaspar Graziani on the throne as a Moldavian prince who supported the Polish-Lithuanian Commonwealth. From 7 September 1620 he fended off attacks led by Iskender Pasha's Tartars and Turks near Cecora. Finally, the Polish detachments were forced to retreat. Wanting to avoid disgrace, the aged Hetman refused to flee and suffered a hero's death on 6 October 1620. On the following day, 5 kilometres south of Mohilyv, some Turkish found the Hetman's body. He had had his right hand severed and a deep wound in his brow. His head, stuck on a piqué, was sent by Iskender Pasha to the Khan in Istanbul. For two years it could be seen over the entrance to the Sultan's palace. The envoys sent by Regina of the Herburts, Stanisław Żółkiewski's widow, managed to regain the rest of the body. The Hetman's corpse was buried in St Lawrence collegiate church in Żółkiew (Polak 2020: 305-306).

5. Senator of the Polish-Lithuanian Commonwealth

The General *Seym* of the Polish-Lithuanian Commonwealth consisted of two chambers: senatorial and representatives. The Senate comprised: archbishops of

Gniezno and Lvov, bishops ordinary, voivodes, higher and lower castellans and officials of the central offices. In turn, the representatives' chamber was composed of deputies from the provinces, who were chosen by pre-parliaments there.

Before Stanisław Żółkiewski stayed a senator, he had been a deputy representing the Land of Halicz at the ordinary (pacifying) *Seym* held in Warsaw (between 6 March and 23 April 1589), during the sessions of which, on 9 March 1589, the Treaty of Bytom and Będzin was concluded. Among the signatures under the treaty there is that of Stanisław Żółkiewski, Starost of Hrubieszów. On 30 April 1590, he received a dignitary's office – the Castellany of Lvov, which entailed his entering the Senate of the Commonwealth. On 28 February 1608 Stanisław Żółkiewski became a senator of a much higher rank, since he had been promoted to the post of Voivode of Kiev. As it follows from research conducted by me, (Kaczorowski 1993: 86), Stanisław Żółkiewski participated in 16 *Seyms*: 1590/91, 1592, 1593, 1597, 1598, 1603, 1605, 1607 (as the Castellan of Lvov), 1609, 1611, 1613 (I), 1613 (II), 1615, 1616, 1618, 1619 (as the Voivode of Kiev). At the ordinary *Seym* of 1618 he received the office of Great Crown Chancellor and – as a minister – had his seat in the upper chamber during sessions of the ordinary *Seym* in 1619, where he belonged to the group of Members of Parliament distinguishing themselves at that time.

6. Diarist and epistolographer

Stanisław Kobierzycki, mentioned earlier, stated that Stanisław Żółkiewski was an excellent expert in history and "when he was not engaged in wars, he wrote a diary of the Moscow campaign run by King Sigismund – in the Polish language and in the military style. He explains in it everything in a true and wise manner. Very often, among so many public duties, he was looking for entertainment in literature." Żółkiewski is the author of a diary of the years 1609-1611 under the title *Początek i progres wojny moskiewskiej* [The beginning and progress of the Muscovy War] written in 1612 (1st edition Żółkiewski 1833; 9th edition Żółkiewski 1966; see also Urwanowicz 2011: 55–65). The diary offers a valuable resource for both historians and researchers in the Polish language. An important place in Żółkiewski's output is also taken by the famous *Testament*, in which the Hetman included recommendations for his son Jan (1591-1623): "First of all things, stick with the Christian common faith firmly and effectively; for its sake shed your blood and sacrifice your life […] to the Polish King, your Lord, offer your faithful services, likewise to the Commonwealth – your Mother Country." Still another piece of Żółkiewski's literary creativity is his speech of 1602, modelled on Seneca the Elder and known as *Z swazoriej Seneki filozofa i innych niektórych autorów zebrał żołnierz jeden… z mężnych*

przykładów pobudkę do cnoty [From speeches of Seneca, the philosopher, and other authors a soldier gathered… brave examples offering an impulse for virtue]. The Hetman's output includes also a rich epistolographic collection. In his letters, written in beautiful Polish, he expressed his civic and soldier's faithfulness to the Polish state.

Stanisław Żółkiewski's tombstone in St Laurent collegiate church in Żółkiew features the engraved symbolic quote from *Aeneid* (song IV, verse 625): *Exoriare aliquis nostris ex ossibus ultor* [Rise an unknown avenger from my bones!], which was later referred to the Hetman's famous great grandson – King Jan III Sobieski. There, one can also find Żółkiewski's favourite maxim that comes from one of Horace's odes: *Dulce et decorum est pro Patria mori* [It is sweet and fitting to die for the homeland]. Stanisław Żółkiewski and his soldiers were commemorated in the fields of the last battle they fought. In the place of the Hetman's heroic death (presently the village of Berezovka in Moldova, formerly the Polish village Laszki), upon the initiative of his son, Jan, a commemorative monument was erected, bearing the plaque which lists merits of Stanisław Żółkiewski in the service of the mother country and the Latin quote mentioned above. The legend of Stanisław Żółkiewski has lived in the social consciousness for centuries, finding its reflection in many literary works and in iconography (cf. Polak 2020: 312-337).

Bibliography

Primary sources

Legal acts

Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 13 czerwca 2019 r. w sprawie ustanowienia roku 2020 Rokiem Hetmana Stanisława Żółkiewskiego. M.P. poz. 602.

Printed sources

Kobierzycki, Stanisław. 2005. *Historia Władysława królewicza polskiego i szwedzkiego*, wyd. Janusz Byliński, Włodzimierz Kaczorowski, przeł. Marek Krajewski, Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Łubieński, Stanisław. 2009. *Droga do Szwecji Zygmunta III, króla polskiego i szwedzkiego, w 1593 roku. Rozruchy domowe w Polsce w latach 1606–1608*, wyd. Janusz Byliński, Włodzimierz Kaczorowski, przeł. Adam Benedykt Jocher, Sylwia Szczygieł, Opole: Wydawnictwo Uniwersytetu Opolskiego.

Żółkiewski, Stanisław. 1833. *Historia wojny moskiewskiej aż do opanowania Smoleńska, przez Stanisława Żółkiewskiego kanclerza i hetmana w. kor. r. 1611*, wyd. Konstanty Słotwiński. Lwów: b.wyd.

Żółkiewski, Stanisław. 1966. *Początek i progres wojny moskiewskiej*, wstęp i oprac. Jarema Maciszewski. Warszawa: Państwowy Instytut Wydawniczy.

Secondary sources

Byliński, Janusz i Kaczorowski, Włodzimierz. 2012. *Smoleńsk 1609–1611. Szkic z dziejów nadgranicznej twierdzy*, Opole: Wydawnictwo i Drukarnia Świętego Krzyża.

Chrościcki, Juliusz A. i Nagielski, Mirosław (red.). 2012. *Hołd carów Szujskich*. Biblioteka „Baroku", t. 1. Warszawa: Wydawnictwo Neriton.

Gałuszka, Justyna. 2019. „Akt sławny, wielki i nigdy w Polszcze niewidziany…". Warszawski triumf Stanisława Żółkiewskiego (1611) na tle uroczystości z 1583 roku, *Zapiski Historyczne*. 84(2), 171–203.

Gawron, Przemysław. 2012. Bitwa pod Kłuszynem 1610 roku. W: *Hołd carów Szujskich*. red. Juliusz A. Chrościcki, Mirosław Nagielski, 23–45. Biblioteka „Baroku", t. 1. Warszawa: Wydawnictwo Neriton.

Kaczorowski, Włodzimierz. 1993. *Senatorowie Rzeczypospolitej uczestniczący w sejmach z lat 1587–1632*. Opole: nakł. autora.

Leśniewski, Sławomir. 2003. *Wielcy hetmani Rzeczypospolitej*. Warszawa: Wydawnictwo MADA.

Nagielski, Mirosław. 2012a. Polacy na Kremlu 1610–1612. W: *Hołd carów Szujskich*. red. Juliusz A. Chrościcki, Mirosław Nagielski, 47–68. Biblioteka „Baroku", t. 1. Warszawa: Wydawnictwo Neriton.

Nagielski, Mirosław. 2012b. Wstęp. W: *Hołd carów Szujskich*. red. Juliusz A. Chrościcki, Mirosław Nagielski, 7–10. Biblioteka „Baroku", t. 1. Warszawa: Wydawnictwo Neriton.

Pawłowska-Kubik, Agnieszka. 2019. *Rokosz sandomierski 1606–1609. Rzeczpospolita na politycznym rozdrożu*. Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika.

Polak, Wojciech. 2020. *Żółkiewski pogromca Moskwy. Biografia*. Kraków: Biały Kruk.

Uruszczak, Wacław. 2010. *Historia państwa i prawa polskiego*, t. 1 *(966–1795)*. Warszawa: Wolters Kluwer Polska.

Urwanowicz, Jerzy. 2011. *Początek i progres wojny moskiewskiej*, czyli o Stanisława Żółkiewskiego „ochocie do usłużenia królowi jegomości i Rzeczypospolitej". *Białostockie Teki Historyczne*, 9, 55–65.

REDAKTOR
Jacek Jędrzejowski

REDAKTOR TECHNICZNY
Jolanta Brodziak

KOREKTA
Jacek Jędrzejowski

SKŁAD I ŁAMANIE
Barbara Zwolińska-Kobiela

PROJEKT OKŁADKI
Jolanta Brodziak

© Copyright by Uniwersytet Opolski
Opole 2020

ISSN 1731-8297
e-ISSN 6969-9696

Wydawnictwo Uniwersytetu Opolskiego, 45-365 Opole, ul. Dmowskiego 7–9.
Wydanie I. Nakład: 70 egz.
Składanie zamówień: tel.: 77 401 67 46, e-mail: wydawnictwo@uni.opole.pl
Druk i oprawa: Totem.com.pl