Renata Tanajewska, Agnieszka Malarewicz-Jakubów

THE AMBIGUITY OF LAW INTERPRETATION

Abstract. The article is dedicated to the issue of the ambiguity of law interpretation. There are many law interpretation theories. The meaning of a provision of law may be understood differently and applied to different legal circumstances, when it is taken into account the adopted interpretive rules. One may distinguish three types of law interpretation: according to subject, method, and result. The interpretation of law is an indispensable process both in making the law and its application. Automatic application of norms could in many cases lead to unjust decisions. The interpretation of law follows out rational, optimal and legal decisions based on the provisions of law.

Emil W. Pływaczewski

FORFEITURE UNDER ART. 44 AND ART. 45 OF THE PENAL CODE *DE LEGE LATA* AND *DE LEGE FERENDA*

Abstract. In the Penal Code the term forfeiture covers several penal measures of different contents and functions which involve takeover by the State Treasury of the ownership of certain assets that are in the possession of perpetrators of criminal offenses. Besides, there has been distinguished several categories of forfeiture of objects. Moreover, in order to improve the effectiveness of the system aimed at depriving perpetrators of the most dangerous categories of crimes of the money that forms the economic basis for their continued criminal activity the reform of the applicable laws is absolutely necessary.

Ewa M. Guzik-Makaruk

SOCIAL HARM OF AN ACT IN THE LIGHT OF JUDICIAL INTERPRETATION

Abstract. The article presents that social harm of acts has been subject to judicial interpretation in many cases. The author of this article presents the term 'social harm' as a synthetic term covering negative social value of a crime in its various aspects. It involves causing damage or harm, which are the negative consequences of an act that affects one or more persons. With regard to the nature of the harm it may be different: tangible, physical, or intangible – mental or spiritual. When taking into account the degree of social harm of an act it depends on the legal norms that the act breaches. If the forbidden act violates two or more values protected by the criminal law, its social harm is increased. As far as the social harm of an act is concerned, one should remember that, in the comprehensive approach that dominates in doctrine and case law, the social

harm of an act depends on objective and subjective elements. However, there are also immaterial components to the evaluation of the degree of social harm of an act which include: the perpetrator's clean criminal record, good repute, stable lifestyle, personal conditions and characteristics (age, health, family and property situation, education, vocation, successful career), personal characteristics of the victim, the attitude toward the allegations demonstrated by the perpetrator during the judicial process, the perpetrator's admission of guilt, his or her voluntary remedy of the damage caused by the offense, his or her expression of remorse, his or her reconciliation with the victim, the widespread nature of offenses of this type, and the perpetrator's recidivism. Besides, it is important that in evaluating the social harm of an act courts must not consider circumstances that take place both before and after the act.

Grażyna B. Szczygieł

PREREQUISITES FOR EARLY CONDITIONAL RELEASE IN THE INTERPRETATIONS OF REGIONAL AND APPEALS COURTS

Abstract. This article describes the prerequisites which should be fulfilled in order to obtain an early conditional release. The interpretations are given from the regional and appeals courts' points of view. An analysis of the decisions made by appeals courts considering complaints against decisions of regional courts which refuse to grant conditional release raises doubts as to proper interpretation of the prerequisites for conditional release. For this reason some decisions of appeal courts are discussed in this paper. Taking into consideration the differences in interpretation one may conclude that they result from the misunderstanding of the essence of early conditional release. Courts consider conditional release as a reduction of the sentence or a reward, which is not what it is. Conditional release is a test to the perpetrator which involves, if required, supervision and certain duties. When formulating the prognosis, the court must not overlook the fact that in the case of conditional release the process of rehabilitation can take place outside of penitentiary institutions. Thus, the assumption that the process of rehabilitation must be completed makes conditional release pointless.

Katarzyna Laskowska

INTERPRETATION OF EXTREMISM AND ASSOCIATED CRIMES

Abstract. The legal approach to the problem of extremism thathas been adopted in Russia is described in this article. Its objective is topresent extremism-directed crimes, which were criminalized in Russia in 2002. Although there is an explanation of the term extremism it can be said that thebroadness and imprecision of this term makes it difficult to identify theessence of this

phenomenon. Thus, what ought to be identified is the way thatextremism is interpreted in Russia. Moreover, it should be stated that thedefinitions of an extremist organization given in the Act on CounteringExtremist Activities and in the Penal Code are different and are not correlatedat all.

Andrzej Sakowicz

THE PRINCIPLE OF CONFORMING INTERPRETATION OF NATIONAL LAW IN THE AREA OF CRIMINAL LAW. GENERAL REMARKS

Abstract. This paper gives general remarks about the principle of conforming interpretation of national law in the area of criminal law. The unique nature of criminal law, in particular the large number of guarantees intended to protect rights and freedoms connected with liability in criminal law and the conduct of the process leading to realization of such responsibility, is the source of problems with application of interpretation of national law conforming to European law. As far as linguistic interpretation is concerned, it can be stated that it rarely constitutes the final stage of interpretation. Such an interpretation is more and more often losing its priority to systemic, functional, and teleological interpretation. This is due not only to the number of official languages but also to the fact that the EU and its entire legal system are evolving and, consequently, many terms do not have a fixed definition. Also, rejection of the priority of linguistic interpretation is justified by the use of autonomous terms, which are the product of various interests of the member states and the work of numerous law-making bodies in the EU.

Cezary Kulesza

THE RELATIVE NATURE OF ABSOLUTE VIOLATIONS OF THE RIGHT TO DEFENSE AS GROUNDS FOR APPEAL

Abstract. This paper is dedicated to the issue of the relative nature of absolute violations of the right to defense as grounds for appeal. There are distinguished two types of grounds of appeal: a relative and an absolute one. Furthermore, the identification of three basic degrees of violations of the right to defense is made. As far as evaluating the possible influence of violations of the right to defense on the contents of court verdicts is concerned, one must take into account how the right to defense is perceived. Thus, it is believed that the right to defense in the Polish criminal process covers both the substantive aspect (as the sum of guarantees given to the defendant with regard to his defense in a process) and the formal aspect (the defendant's right to receive assistance of a defense counsel).

Ewa Kowalewska-Borys, Aneta Michałowska

THE RIGHTS OF A SUSPECTED PERSON GRANTED IMMUNITY IN THE INTERPRETATION OF THE SUPREME COURT – A CRITICAL REVIEW

Abstract. The authors of this article present a critical review of the rights of a suspected person granted immunity in the interpretation of the Supreme Court. The Supreme Court, instead of only interpreting the binding law, assumed the role of lawmaker and actually created a case law. Apart from the analysis of the provisions, which led to questioning the existence of a legal basis to entitle a person (actually) suspected, who has been granted immunity, to file a complaint against the excessive length of criminal proceedings, one forms a belief that granting privileged people such a right undermines a basic human sense of justice.

Maciej Perkowski, Anna Drabarz

THE INTERNATIONAL EVOLUTION OF THE NOTION OF DISABILITY AND ITS INTERPRETATION FROM THE EUROPEAN UNION LAW PERSPECTIVE

Abstract. In the article the recent evolution of the notion of disability is analyzed with special emphasis on its interpretation from the European Union law perspective. A study on definitions of disability in various EU Member States shows that disability definitions vary from state to state but also inside each state and they differ in relation to different legal purposes. The multiple approaches present in international and domestic legal systems and public policy are described and compared in the article in search of unified and standard language in this field. However, it can be found that no uniform definition of disability in EU law exists.

Sławomir Oliwniak

INTERPRETATION OF THE RIGHT TO PRIVACY IN THE 21th CENTURY. INTRODUCTORY REMARKS

Abstract. In this article the author gives introductory remarks to the interpretation of the right to privacy in the 21th century. Privacy is defined as a human property which enables people to decide about what information they would like to show to the public. What is underlined, is the fact that many people sell their privacy and intimacy voluntarily, because it is the only way to become known.

They provide information about themselves and place their photographs. The risk of such behavior is not analyzed and understood by them at all. In addition, the author also describes three stages of development on the right to privacy and presents two models for the Protection of Privacy.

Artur Olechno

THE "POLISH MODEL" OF LEGAL INTERPRETATION OF LAW AND THE SOLUTIONS IN EASTERN EUROPE

Abstract. This paper touches upon the problem of the "Polish model" of legal interpretation of law and the solutions in Eastern Europe. When writing about legal interpretation in Poland, the amendment to the Voting System from 2006 should be remembered as one which introduced the instrument of individual tax interpretations. With regard to the majority of countries it is seen that the Kelsen's model of control over the constitutional character of the law has been adopted. It means that when deciding about the establishment of legal interpretation of law, the constitution-giver could also elect the constitutional court, apart from the bodies of the traditional separation of powers. In practice, just like in the Poland of the 1990's the selection was limited to two bodies: the Supreme Court and constitutional court.

Andrzej Jackiewicz

THE PRINCIPLES OF UNITARISM, SUBSIDIARITY AND DECENTRALIZATION AS A CONSTITUTIONAL BASIS OF REGIONAL SELF-GOVERNMENT OF THE REPUBLIC OF POLAND

Abstract. The paper aims at analyzing three main principles determining the territorial organization of the Republic of Poland – the principle of unitarism and decentralization based on the standard definition of the principle of subsidiarity. Apart from this the article illustrates how these three principles influence the structure of Poland's territorial system of government and, in particular, the regional government model. The Republic of Poland as a unitary state has some restrictions on the legal status of regions, consisting of limited ability to give Poland's regions an autonomic status in the sense of giving them some attributes of sovereignty.

Katarzyna T. Boratyńska, Anna Budnik

ACCORDING APPLICATION OF THE PROVISIONS OF THE CODE OF ADMINISTRATIVE PROCEDURE AND THE CODE OF CRIMINAL PROCEDURE ON THE BASIS OF THE LAW ON HIGHER EDUCATION – SELECTED ISSUES

Abstract. This paper deals with the according application of the provisions of the administrative procedure code and the criminal procedure code on the basis of the law on higher education. It is essential to consider what decisions will undergo administrative appeal proceedings. Taking into consideration the law on Higher Education it refers to the according application of the provisions of the Criminal Procedure Code in three cases such as: disciplinary proceedings against university teachers, investigation and disciplinary action against students, investigation and disciplinary proceedings against doctoral students at a university and in a research unit. However, the main focus will be on the issue of the proper application of the provisions of the Criminal Procedure Code to university teachers.

Tomasz Machelski

A CRITIQUE OF LAW & ECONOMICS – AN AUSTRIAN SCHOOL PERSPECTIVE

Abstract. In this article the critique of law and economics is made from an Austrian School perspective. The fact that L&E emphasizes the place of the institution of law within the general and common economic structure of society is of a great importance. Furthermore, the methodological foundations of the L&E school are based on the concept of law as an optimal outcome of a judicial balancing of socio-economical costs and benefits. With regard to the Austrian school's methodology it deals with necessary, abstract principles. It can be described in this respect as a process of deducing universal rules from axiomatic propositions. It focus on the need for actual people's choices is the source of requirements for jurisprudence to base its rulings upon. In addition, the Austrian school contends that there are social laws that cannot be verified or refuted merely by reference to observed data; that such laws should significantly determine the impact of positive law and jurisdiction on the economy.

Mariusz Mohyluk

ECHOES OF SOVIET LAW IN THE LEGAL LITERATURE OF THE SECOND REPUBLIC OF POLAND – OUTLINE OF ISSUES

Abstract. This paper is devoted to the echoes of soviet law presented in the legal literature of the Second Republic of Poland. Publications which deal with the constitutional law of the Soviet Union during the Second Republic are enumerated in the chronological order. Taking into consideration the discussion of the interpretation of Soviet constitutional law the monographs of the Vilnius scientists are mentioned. As far as Soviet penal law is concerned, the most extensive and most valuable in terms of content were two publications concerning only the substantiative law (legislation) of 1917–1927 of Soviet penal law, and their deliberations were limited by the specific period and the penal matter. Besides, the most extensive work on civil law in Soviet Russia was also described.

PREFACE

The interpretation of law is one of the most important stages in the process of application of legal norms. It happens quite often that the legal norm, included in the legal rule, causes serious doubts about real meaning and, in consequence, in proper applying to facts. That's why linguistic interpretation is not always the only efficient tool in the process of the interpretation of law. The sentence *clara non suntinterpretanda* cannot always be applied and it is necessary to apply other kinds of legal interpretation, such as functional interpretation or interpretation concluded from the legal system.

The first part of the volume *Studies in Logic Grammar and Rhetoric*, just being presented, entitled *The Interpretation of Law*, contains several texts dedicated to this topic. The prevailing part of them shows the doctrinal approach on this specific topic.

The Editorial Committee intended to concentrate the texts presented in the volume on criminal law, both in substantive and procedural aspects. However some texts concentrate on other branches of law, i.e. constitutional law, EU law, the theory and philosophy of law and the history of law.

The volume is opened by a text by A. Malarewicz-Jakubów and R. Tanajewska about the essence of the interpretation of law, in particular about different kinds of interpretation, illustrated by examples coming from the judicial decisions of the Constitutional Tribunal and the Supreme Administrative Court.

The following texts are dedicated to penal law problems. E. W. Pływaczewski presents the important topic of forfeiture of objects coming from crime in Polish penal law. The author presents also the approach of Polish courts and the evolution of legal regulation, including recent amendments. E. M. Guzik-Makaruk discusses the topic of the social noxiousness (harmfulness) of an act and its consequences in Polish penal law. She presents the interpretation of this term in the judicial decisions of the Supreme Court

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and lower courts and in the doctrine as well. The next text, written by G. Szczygieł, deals with the requirements of the conditional release from serving a full sentence. The author concentrates on presenting the legal requirements which have to be fulfilled by the sentenced person and on the interpretation of these requirements by courts, especially in the appeal proceedings.

The topic of extremism and its criminal law aspects is discussed by K. Laskowska, who describes the problem from a Russian penal law perspective. The author discusses the construction of this crime in Russian law and refers to different opinions presented by Russian doctrine. The range of responsibility is also discussed. Andrzej Sakowicz continues the penal law topics by presenting the rules of interpretation of domestic penal law in accordance with EU regulations. His text is the final one which touches the topic of substantive penal law.

C. Kulesza's text presents criminal proceedings issues in the field of the grounds of appeal. E. Kowalewska-Borys and A. Michałowska present critical remarks about the possibility of complaining about protraction of preparatory proceedings by a person who is protected by immunity. The judgements of the Supreme Court are presented and strongly criticized.

The other texts published in the volume concentrate on other branches of law. The first of them, by M. Perkowski and A. Drabarz, touches the legal aspects of disability. The research made by them to concludes that in different systems of law there is no uniform definition of disability. This also refers to the judgments of the European Court of Justice.

S. Oliwniak makes a few remarks about the right to privacy and changes in its essence in the 21st century. The essence and the protection of the right to privacy in the Internet era has a completely new dimension than even 20 years earlier.

The next two texts are about constitutional law. A. Olechno describes the "Polish model" of legal interpretation and its echoes in East European countries (Russia, Ukraine, Romania, Croatia, Slovenia). The text by A. Jackiewicz presents the relation between rules such as: uniformity, decentralization, and subsidiarity on the basis of the present Polish constitution of 1997. It focuses on the influence of these rules on the territorial structure of Poland.

The last dogmatic text in the volume is prepared by A. Budnik and K. Boratyńska and is dedicated to a very important problem: the applying of the code of penal procedure and the code of administrative procedure for proceedings on the basis of the Act on Higher Education.

The remaining texts published in the volume do not refer to the law being in force, but show certain aspects of legal history or of law in a social and economic context. T. Machelski attempts to compare the views of the Chicago school of economics (Law & Economic) with the views of the Austrian school of economy. He presents a critical approach to the opinions of the Chicago school. The last text, by M. Mohyluk, concentrates on echoes of Soviet law in Polish legal literature in the pre-war period.

The editors of the volume believe that the wide research perspective presented in the texts published in the Studies will encourage Readers to critical discussion.

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THE AMBIGUITY OF LAW INTERPRETATION

1. The concept of law interpretation

When analysing the issue of law interpretation, two theories of the meaning of law will be recalled. This will allow for showing the origins of law interpretation as well as explaining the purpose of law interpretation. L. L. Fuller claimed that law is not only a system of norms, but an enterprise whose aim is to subject human conduct to the governance of rules.[1] The essence of law in this understanding is to create a system of norms which will guarantee observance of law on account of its procedural features and moral references. Then society would obey the law not in fear of sanctions for non-observance, but as a result of legal awareness. This system of norms would be the basis of the idea of legality. L. L. Fuller sets out eight principles the system should possess; that is, generality of rules, publicizing them, non-retroactivity, clarity, non-contradiction, not setting obligations impossible to be fulfilled, stability, and no divergence between adjudication/administration and legislation.[2] Therefore, he assumed that law should be moral internally. R. M. Dworkin notices, however, that even law created according to these principles is not flawless since it is not always possible to apply it automatically. Moreover, he draws attention to the fact that by making law in a general way, norms are not fully adjusted to factual states, and thus become imprecise and need interpretation. Creating general legal conditions leads to legal loopholes and inconsistencies resulting

[1] L. L. Fuller, Moralność prawa, PIW, Warszawa 1978, p. 153.
[2] L. L. Fuller, ..., op. cit., p. 74.

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from the lack of direct reference to specific situations.[3] R. M. Dworkin in his polemics with L. L. Fuller interprets law as an integral whole composed of, apart from the norms of conduct (rules), principles, political directives (policies), and other types of standards.[4] When a rule (norm) is possible to be applied automatically, principles and policies are values which should be considered concurrently with others, and in the case of concurrence, an adequate balance between them should be sought. In consequence norms should be applied with varied intensity and in fact always partially. According to R. M. Dworkin, the principles of law are not a criterion for the law obligation. Legal principles are a tool which, for instance, a judge can use within the framework of legal rules to come to a proper decision in a given case, and there is always one decision of this kind. In line with this concept, principles do not eliminate rules, but support them. When applying the law, it should be interpreted in such a way that it is possible to pass a judgment adequate to the legal and factual state.

Our today's reality makes us aware that the theory of one proper decision adopted by R. M. Dworkin is not fully reflected in administrative or court proceedings. The situation where in the same factual state, with the use of the same provisions of law, two different judgments will be given, is possible. This is a consequence of interpreting law. Whether the interpretation was accurate or not remains irrelevant. It is important that it could be referred to the provisions of law and not go beyond the statutory rights. The purpose of interpretation of law is to establish the meaning of a specific legal provision or its excerpt. However, determining the meaning consists in defining which situations or entities a given norm refers to.[5] This view is commonly accepted both in Poland and worldwide. The Polish Constitutional Tribunal was of a similar opinion in the judgment of 26 March, 1996, file ref. no. W 12/95, OTK 1996/2/16, where it held that the "essence of (...) interpretation (...) is always to establish (explain) the meaning of a specific legal provision giving rise to doubts in the sphere of law application for a number of reasons". However, in the judgment of 11 January, 2011, file ref. IV SA/GI 467/10 the Provincial Administrative Court in Gliwice ruled that "(...) the need for further extralinguistic interpretation methods of the recalled (...) legal norms provides that the purpose of its activity is

[3] R. M. Dworkin, A Matter of Principle, Oxford University Press, Oxford 1985, p. 119–122.

[4] R. M. Dworkin, "The Model of Rules", in: *Philosophy of Law*, J. Feinberg, H. Gross, Wadsworth Pub. Co. Belmont, California 1986, p. 23.

[5] L. Morawski, Zasady wykładni prawa, Dom Organizatora, Toruń 2010, p. 15.

not to create new legal norms or modify them, but establish the content of norms expressed in the analysed provisions. It transpires from the nature of interpretation that it cannot lead to a modifying or creating of new legal norms".

Interpretation of law is significant for resolving a given issue. The consequences resulting from its effect have an influence on the situation of the person they concern. However, depending on the adopted interpretive rules, the meaning of a provision of law may be understood differently and applied to different legal circumstances.

Just like in the case of specifying a definition of law, a lot of law interpretation theories are created.

In the pragmatic sense, the "interpretation of law" is composed of a set of actions referring to some expressions. In the pragmatic sense, the term is understood as a result of acts done in reference to these expressions and consisting in the meanings attributed to these phrases. It is assumed that depending on the context of a situation in which the term "interpretation of law" is used, the phrase may have different meanings. If the term "interpretation of law" emerges in the context of selecting a type of interpretation by the court, i.e. the court adopts linguistic rules of interpretation, the interpretation of law has a pragmatic meaning. However, in a situation where the court gives a judgment based on the adopted interpretation, the interpretation has an anti-pragmatic sense.[6]

Pragmatic "law interpretation" is doing acts which have as their aim the choice of interpretive rules, or application of adequate collision norms in such a way that it is possible to interpret the meaning of a provision correctly. As a consequence of making interpretive acts, it is possible for instance to pass judgment in a given factual state, but based on interpretation rules. Then, passing judgment is preceded by analysis of the factual state in reference to the evidence in the case.

L. Morawski recalls declarative and constitutive theory, and this distinction is very important in the law application. According to the declarative theory, the aim of the interpreter is to recreate the sense of a legal provision. It is not possible to create this sense.[7] The theory of constitutive interpretation is and may be creative in character.[8] The main issue in the case of both theories is to determine an admissible interpretation and its border.

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[6] M. Zieliński, Wykładnia prawa. Zasady, reguły, wskazówki, LexisNexis, Warszawa 2010, p. 43.

[7] L. Morawski, ..., op. cit., p. 18.

[8] L. Morawski, Precedens a wykładnia, "Państwo i Prawo" 1996/10.

The declarative theory is a commonly respected view as it does not pose the risk of adjusting the law to the factual state, which is abusing the function of interpretation. The Polish Constitutional Tribunal in its Resolution of 7 March, 1995, file ref. no. W 9/94, OTK 1995/1/20 declared that the "interpretation established by the Polish Constitutional Tribunal is not and may not be creating legal norms but establishing the correct interpretation of legal norms contained in statutory provisions. (...) The Constitution Tribunal does not take away or add anything to the system of binding legal norms, but only specifies the content of these norms". The position taken by the Constitutional Tribunal inspires a lot of controversy.[9]

M. Safjan notices that there is a major difference between court judgments and judgments of the Constitutional Tribunal. In the first place, what makes them different from court judgments is they are commonly binding in character, deciding not only about individual legal relations between parties to the proceeding or shaping a situation of a specific entity whose rights and obligations are referred to in a specific court judgment. They contain information whose recipients are abstract and undefined, just like in the case of each legal norm. This feature concerns not only the abstract, but also specific control over the constitutional character of law, exercised in the case of legal queries and in reference to the abstract undefined circle of recipients – just like in the case of each legal norm. This feature concerns both abstract and specific control over the constitutional character of law kept in the case of legal queries and in reference to a constitutional complaint. Secondly, judgments of the Constitutional Tribunal are commonly binding, have abstract recipients, and normative content (although in the negative sense); through this they are close to a normative regulation in all the cases where a decision is aimed to eliminate the unconstitutional norm fully or partially. Judgments of the Constitutional Tribunal declaring directly that provisions of law are unconstitutional, or determining the scope of provisions colliding with the Constitution, should be attributed a creative character. This also pertains to so-called positive and negative interpretive judgments. Their aim is to eliminate the unconstitutional content which may be attributed to the examined regulation by way of the adopted rules of law interpretation.[10]

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[9] compare L. Morawski, ... op. cit., p. 19.

[10] Legal consequences of the judgments passed by the Polish Constitution Tribunal, text of statement made by the President of the Polish Constitutional Tribunal, prof. M. Safjan in the Committee of Legal Sciences of the Polish Academy of Sciences on 6 January, 2003.

Acts of creative interpretation are indispensable. They result from such features of legal language as imprecision, general or chaotic character, lack of coherence, or semantic openness. Also, the variation of economic, political, and moral process is influential[11].

2. Types of law interpretation

Types of law interpretation may be classified according to subject, method, and result.

The law interpretation with respect to the subject making an interpretation may be divided into the following types of interpretation: authentic, legal, operative, and doctrinal.

The authentic interpretation is conducted by the same institution which established a given norm. In this way the interpretation made by the same institution has a legal force equal to the legal force of a normative act which was subjected to interpretation. This is the interpretation of the commonly binding force. The official authentic interpretation is contained in the act which is formally binding. The law-making body clarifies the meaning of norms passed by them. Authentic interpretation is interpretation where the intentions of the law-making body are recognized based on preparatory materials or declarations which are not formally binding.[12] In the current legal system there are no decisions referring directly to authentic interpretation. It is permitted as justified by the rule *argumentum a maiori ad minus: cuius est codnere eius est interpretari*. The authentic interpretation is very rare in practice since law-makers do not use the possibility of interpreting the law.[13]

Legal interpretation is made by the institution entitled by virtue of statute to interpret certain provisions of law. This kind of interpretation may have a binding force. The binding force may be limited only in relation to specific entities, or it may not have a binding force.[14] According to the position taken by the Constitutional Tribunal based on Art. 190, judgments of the Constitutional Tribunal on compliance or non-compliance with the Constitution are the commonly binding legal interpretation. The condition

[11] A. Stelmachowski, Wstęp do teorii prawa cywilnego, PWN, Warszawa 1984, p. 434.

[12] L. Morawski, Wstęp do prawoznawstwa, TNOiK, Toruń 2009, p. 206.

[13] J. Nowacki, Z. Tobor, Wstęp do prawoznawstwa, Wolter Kluwer, Warszawa 2012, p. 203.

[14] L. Morawski, ..., op. cit., p. 39.

is that the Constitutional Tribunal should define in the conclusion of the judgment in what meaning and scope the provision is declared as compliant or non-compliant with the Constitution.[15] Moreover, according to Art. 60 of the Law on the Supreme Court of 23 November 2002 (J. of Laws from 2002 No. 240 item 2052), if the judicial practice of common courts of law, military courts or the Supreme Court reveals discrepancies in the interpretation of law, the President of the Supreme Court may present their decision to the Supreme Court composed of seven judges or another applicable panel. It is also the Public Ombudsman, the Public Prosecutor General, and within their jurisdiction the Ombudsman for Children, the President of the Polish Financial Supervision Authority, and the Spokesman for the Insured who may also file a request for resolving discrepancies. There is no, however, clear statutory provision giving commonly binding force to the judgments of Supreme Courts resolving discrepancies. They only have the *imperio rationis* binding force.

The operative interpretation involves all situations where courts or other bodies apply the law by interpreting it. The operative interpretation is specific in character. It is issued in individual matters.[16] This is not, however, a commonly binding interpretation. An exception to the rule is a situation where the court gives a ruling in the appeals court and this ruling has a binding force also in relation to the lower court and the resolution of the Supreme Court resolving legal issues raising doubts in specific matters.[17] Applying the operative interpretation may have influence on the factual state and creates the legal situation of the entity; that is, the laws and responsibilities depending on the adopted assumptions resulting from the interpretation.[18] In practice it is common to refer in pleadings to the rulings given in similar cases. It serves to support one's position. A paradox arises here – applying a precedent in the legal system where the precedent does not normally exist. It may, however, contribute to the unification of judgments in specific cases. When copying a decision given in a different case, but of the same factual state, the Court establishes the practice of applying provisions of law and their reference to specific factual circumstances. The operative interpretation, apart from the court judgments, administrative bodies, and the Supreme Court, also includes the judgments of the Supreme Administrative

[15] L. Morawski, ..., op. cit., p. 39.
[16] J. Nowacki, Z. Tobor, ... op. cit., p. 210.
[17] L. Morawski, ..., op. cit., p. 46.
[18] J. Nowacki, Z. Tobor, ..., op. cit., p. 210.

Court and individual interpretation of the provisions of tax law made by the Minister of Finance according to Art. 14b of the Tax Ordinance.[19]

The doctrinal interpretation is made by the representatives of the science of law. It is not related to the process of law application or creation. This is analysing provisions of law by writing glossaries for judgments as well as commentaries for legal texts and scientific studies. This is not a binding interpretation, but it has an enormous influence on the operative or legal interpretation.[20] The Constitutional Tribunal in its judgment of 8 May, 2000, file ref. SK 22/99, OTK 2000/4/107 recommended that the judgments and doctrine be used as broadly as possible.

Another group is that distinguishing types of interpretation with respect to method, i.e. the linguistic, systematic, functional, or historical one.[21]

Linguistic interpretation is the interpretation of law based on the analysis of language. It is one of the most fundamental and essential interpretations of the provisions of law. There are four types of language in the analysis of law: the natural (colloquial) language used every day; legal language (most frequently the precise definitions of colloquial concepts written down by the very law-maker), legalese (used by lawyers, often without corresponding synonyms in the colloquial language) and specialist language (used in a given area of science). According to the directive of language interpretation priority, the literal meaning of a provision is considered first when interpreting it.[22] The Supreme Court in its decision of 26 July, 2007, file ref. no. I KZP 16/07 ruled that "in the course of dogmatic exegesis of legal provisions, the idea that these provisions may be the result of irrational act is rejected in advance". It is assumed that "no word in a legal provision is redundant and at the same time the interpretation as a result of which an excerpt of legal text is regarded as redundant is not admissible; and also that the statutory provisions are interrelated and that is why when interpreting them the whole context of the statute should not be ignored. (...) The language interpretation of (...) the provision does not give any reasonable grounds for finding "hidden" meanings in the text or attributing functions going beyond the one which clearly results from its grammatical understanding". The above judgment shows that if it is clearly visible from the literal sense of the provision what the law-making body wanted

[19] L. Morawski, ..., op. cit., p. 47.

[20] L. Morawski, ..., op. cit., p. 49.

[21] J. Wróblewski, Sądowe stosowanie prawa, PWN, Warszawa 1988, p. 128.

[22] L. Morawski, ..., op. cit., p. 117.

to achieve, there is no need to subject the provision to further analysis and search for other meanings.

Systematic interpretation consists in the argumentation of reference to the location of provision in the system of law. What is more, the provisions of law should be supported with arguments in consideration of their place in the internal or external system of law. If a normative act can be found in the fundamental part, its scope of application is narrow. The internal part consists of an introduction, main part, and final provisions. The external part is the place of the act in the system of law; that is, whether it is a regulation, statute, etc. In the interpretation, logical analysis of the whole system of law related to the issue should be made, to rationalize the assumptions of the law-maker.[23] This is known in the literature on the subject as *argumentum a rubrica*.[24]

Functional interpretation encompasses a set of directives which are multifaceted from the point of view of legal provisions, and refer to the function, role and purpose to be fulfilled by a normative act undertaken by the law-making body. The directives of this interpretation talk about referring to what the lawmaker wanted to achieve when issuing a given act. It should be established what norms are accepted in a given society. Within the framework of functional interpretation there is an intentional interpretation. The purpose of legal regulation is understood here as the purpose of the legal provision, the aim of the institution whose provision is an element of and the aim of the whole system of law. When making a legal interpretation, the interpreter must strive to adjust these aims.[25] As a consequence the interpretation may seem to be a complicated procedure.

Historical interpretation is based on the circumstances accompanying the creation of a given provision of law; i.e., it is a complex analysis of facts contributing to the shaping of legal status. Within the framework of its application the historical circumstances which led to the appearance of a given regulation are examined by referring to, for instance, economic, political, state, or social determinants. Currently, this method is applied in a different way than provided for by the theory of law. The present application of historical interpretation has as its aim to make law less rigid based on the current situation, for example the economic one, which had not

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[23] A. Bator, W. Gromski, A. Kozak, S. Kaźmierczyk, Z. Pulka, Wprowadzenie do nauk prawnych (ed. by Andrzej Bator), LexisNexis, Warszawa 2010, p. 264.

[24] M. Zieliński, ..., op. cit., p. 75.

[25] http://prawo-administracyjne.wyklady.org/wyklad/882_wykladnia-systemowa-i-funkcjonalna.html, date of reading: 11/10/2012.

been previously known to the lawmaker.[26] It may apply, for instance, to the bill of exchange Law. Only two amendments have been introduced to the Bill of Exchange Law from April 28, 1936 (J. of Laws no. 37, item 282) from the moment of its creation; only two changes have been introduced (2006.05.13 J. of Laws from 2006r no. 73, item 501; 2013.01.01 J. of Laws from 2012, item 1529), and at the same time its updated version is the interpretation of the provisions of law based on the current legal and economic situation.

The last discussed group are types of legal interpretation with respect to result: the broad and the narrow one.

The broad interpretation of law (*interpretatio extensiva*) is supported by the principle of friendly interpretation of all citizens' rights and freedoms. According to it, all citizens' rights and freedoms may be interpreted in a broad way. The understanding resulting from extralinguistic directives is selected and it is broader than the linguistic understanding. The broad interpretation is in operation when interpreting different rights and freedoms of citizens, especially personal and political rights – since their protection was provided for in the Constitution.[27] Broad interpretation cannot lead to the diminishing of rights of some entities by giving rights to other entities, or by applying the provision of law. The Supreme Court in its judgment of 23 January, 2007, file ref. no. III CSK 278/06, OSNC 2007/12/186 declared that the broad interpretation of the provisions of law posing a limitation on a subjective right is inadmissible. Likewise, the Supreme Court in its resolution of 18 April, 2007, file ref. no. III CZP 139/06, OSNC 2007/11/159 showed that "by construing the provisions of property law and other legal provisions with legal and property effects, the construction (...) which leads to depriving the entitled of property rights in a similar broad construction of law should be avoided".[28]

The broad interpretation of law is also burdened with other restrictions. *Exceptiones non sunt extendendae*, i.e. exceptions shall not be interpreted in a broad way.[29] Often this principle is confirmed by court judgments. In its judgment of 4 January 2007, file ref. no. V CSK 388/06 the Supreme

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[26] E. Łętowska, Podstawy prawa cywilnego, Ecostar, Warszawa 1993, p. 58.

[27] Compare judgment of the Constitutional Tribunal of 10 November, 1998, K 39/97, OTK 1998/6/99, i.e. in reference to Art. 20 of the Law, the National Court Register says that although the phrase "provisions concerning the accused person are applicable to the person subject to vetting procedure (...)" is not very skillful, this provision should be understood in such a way that it is only the rights of the accused resulting from the Code of Penal Procedure).

[28] Compare L. Morawski, ..., op. cit., p. 200.

[29] Ch. Perelman, Logika prawnicza. Nowa retoryka, PWN, Warszawa 1984, p. 133.

Court declared that "Art. 554 of the Civil Code as a special provision on the time limits for claims barred by prescription must be interpreted in a narrow way (...) as the one pertaining to only such claims whose source is a sales agreement. (...) Secondly, (...) the plaintiff may assert another claim whose source is a statute and which is indirectly linked to the prior sale of medicines to individual persons based on prescriptions. This kind of claim, even when adopting the most liberal construction of Art. 554 of the Civil Code, should not be classified as "a sales agreement claim" in the understanding of this provision. The prohibition may result from the fact that the broad interpretation of exceptions may cause adjustment of legal regulations to the factual circumstances, and in consequence each legal situation could become an exception".

Another obstacle is the lack of possibility to interpret intertemporal provisions and nationalization provisions. This results from the fact of transience or momentariness of legal regulations in the first case, and in the second case from limiting personal rights.[30] The situation is similar as regards reliefs, exemptions, and other tax privileges.[31] According to the judgments of the Supreme Administrative Court the provisions concerning reliefs, exemptions and other tax privileges are an exception to the common character and equality in the tax law. Broad interpretation in this scope could lead to an unfair decision.

Another group of provisions covered by the ban on broad construction are special provisions.[32] Special provisions originated in relation to the need to regulate the legal situation of a specific circle of people and circumstances. In view of the above, the broad interpretation cannot be applied in relation to the people or circumstances not mentioned in the statutes defining the scope of subjects or situations where specific subjects acquire special powers. That would be transgressing the borders of interpretation.[33] Other limitations result from the *expressio unius est exclusio alterius* principle, i.e. the law-making body defines in the legal norm the scope of certain situations, persons, and concepts, and it should be assumed that this is a closed catalogue. Therefore, recalling elements from the closed catalogue in cases not connected with the functioning of this catalogue is not possible.

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[30] L. Morawski, ..., op. cit., s. 202.

[31] Compare the judgment of the Supreme Administrative Court of 19 March, 1992, file ref. no. SA/Po 1902/91, ONSA 1993/1/18.

[32] L. Morawski, ..., op. cit., p. 204.

[33] Compare the resolution of the Supreme Court of 7 May, 1992, file ref. no. II UZP 1/92, OSNC 1992/10/173.

On the other hand, if the catalogue contains detailed norms applied in specific situations, these regulations should be applied in the current factual circumstances, compliant with the purpose of provision. Thus, other provisions should not be referred to on account of more favourable directives contained in them. According to the *expressio unius esteiusdem generis* principle, if the catalogue is not closed and the situations or subjects mentioned in it are just examples, it should be assumed that in similar situations or in reference to persons in similar circumstances a given provision will be possible to apply.[34]

The concept of narrow interpretation (*interpretatio restrictiva*) does not appear in court judgments.[35] The narrow interpretation consists in the fact that the scope of applying or forming a given norm, achieved based on functional principles, is inferior to the scopes of norms achieved through application of linguistic rules.[36] The narrow interpretation is acceptable in the case of citizens' obligations and provisions restricting the rights and freedoms they are entitled to. This position is supported by the Supreme Court which, for instance in the judgment of 24 June 2003, file ref. no. III RN/95/02, acknowledges that all circumstances restricting the right of the press to demand information should be interpreted strictly or even narrowly.[37]

3. Creative interpretation of law

In accordance with the judgment of the Polish Constitutional Tribunal of 28 June, 2000, file ref. no. K. 25/99 in the legal state the interpreter must first of all take into consideration the linguistic meaning of a legal text. If the linguistic meaning of a text is clear, then according to the principle *clara non sunt interpretanda* there is no need to reach for other extralinguistic methods of interpretation. In view of the above, the law interpretation may be made only if there are unclear points in the legal text which should be removed. A different position was taken by the Supreme Administrative

[34] L. Morawski, ..., op. cit., p. 206, also compare the First Instance Court of European Communities, in its judgment of 30 November 2005, file ref. no. T-191/04 the Court ruled that the provisions of Art. 8 and 42 of Regulation no. 40/94 on the EC trademark and principles 15, 16 and 20 of the executive order concerning trademarks relative grounds for refusal of registration as well as the proceeding regarding objection.

[35] L. Morawski, ..., op. cit., s. 207.

[36] M. Zieliński, Z. Radwański, Wykładnia prawa cywilnego, in :Studia Prawa Prywatnego, 2006, no. 1, p. 30.

[37] Por. L. Morawski, ..., op. cit., s. 208.

Court. The judgment of 30 November, 2005, file ref. no. FSK 2396/04 declared that "the basis for constitutional control is always a specific content established by way of interpretation since there is no clear, abstract meaning of the provision which may be adopted without any interpretive attempts". This thesis is, according to the Court, broadly presented in the theory of law interpretation. Taking into consideration the position of the Supreme Administrative Court, it should be assumed that the *omnia sunt interpretanda* principle is binding here. The advocates of this concept claim that each reading of the provisions of law inevitably entails its interpretation. Apparently simple provisions of law require making assumptions and adopting definitions as well as a specific understanding of words and contexts which are culturally, linguistically, class, and civilization conditioned.[38]

This is not, however, a creative interpretation of law. In the Polish legal reality, this process is a rare occurrence. The Constitutional Tribunal defends its position on that, saying that the interpretation of law made by it is in compliance with declarative theory. Therefore, it does not have a creative character. In its resolution of 7 March, 1995 file ref. no. W 9/94, OTK 1995/1/20 the Tribunal declares that "interpretation is not and may not be creating new legal norms, but establishing the proper understanding of legal norms expressed in statutory provisions, in compliance with the constitutional principles and with the application of interpretation rules adopted in the legal culture of a democratic state".

A question arises when a legal provision may or should be interpreted in a creative way, although in concordance with the commonly held view that courts should not create new legal norms. The answer to this question is complex. It is difficult to draw a line between creative interpretation of a law compliant and non-compliant with the statutory purpose. On the other hand, what should be taken into consideration is that interpreting the law should take place based on direct understanding; that is, by using all linguistic rules of sense in the first place. If they prove to be insufficient, then the broader interpretation should be applied, however, in such a way that a new law is not created. The issue of relations between the *clara non sunt interpretanda* and *omnia sunt interpretanda* arises here. There is an ongoing dispute among legal theorists concerning this matter.[39] The literature on the subject says that provisions may be interpreted if doubts have the form of

[38] Interpretation and Coherence in Legal Reasoning, First published Tue May 29, 2001 w: http://plato.stanford.edu/entries/legal-reas-interpret/#2.5, date of reading: 11/10/2012.

[39] K. Płeszka, Wykładnia rozszerzająca, Wolters Kluwer, Warszawa 2010, p. 188–197.

a legal issue requiring fundamental interpretation; that is, if they are truly related to the flawed, ambiguous provision of law, unclear about its scope or regarding the terms used in it, whether this situation gave rise to obstacles and discrepancies in the interpretation and application of these provisions in judicial practice, or they must inevitably lead, as a logical consequence, to such discrepancies and obstacles (which was the case in the judgment of the Supreme Court of 26 July, 2007, file ref. no. I KZP 14/00, OSNKW 2000/7-8/59 SN).[40] This view supported by the literature on the subject and rulings of the Constitutional Tribunal diverges from practice to a large extent. The manifestation of this is the frequent role of the judge in the process of law interpretation when passing judgments in cases. Here, the Supreme Court acknowledges that the issue whether the Supreme Court acts within its powers when making a creative interpretation of Art. 632 point1 of the Code of Penal Procedure requires an attitude. With regard to this problem, it should be strongly emphasized that it is not only the law but also the obligation of each court to interpret statutory provisions in a way which is compliant with the Constitution (...) There is no doubt that the direct use of provisions contained in the Polish Constitution as provided for in its Art. 8 section 2 also involves taking account of the constitutional context when interpreting statutes.[41]

The result of correct use of interpretive methods is establishing the semantic sense of an analysed provision with the degree of precision sufficient to resolve a case so as not to infringe the logical purpose of the provision, and be adequate to the factual state at the same time. Creative interpretation is often used in common courts of law, mainly on account of imprecise legal provisions and lack of clarity in the way they are applied.[42]

L. Morawski observes that when applying the rule *clara non sunt interpretanda* the fact that clarity or doubts related to the provision are not only the object of semantic analysis, but also an issue of doctrine and judicial practice. Creative interpretation may help work out a permanent mode of deciding cases based on the same factual state. It allows for unifying law

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[40] Compare L. Morawski, ..., op. cit., p. 52.

[41] Decision of the Supreme Court of July, 26 lipca 2007, file ref. no. I KZP 14/00, OSNKW 2000/7-8/59 SN.

[42] K. Opałek, J. Wróblewski, Zagadnienia teorii prawa, PWN, Warszawa 1969, p. 230, and also the resolution of the Supreme Court file ref. no. III CZP 11/2011 deciding whether a belated complaint about the actions of court enforcement officer based on which the Court ruled that there were grounds for commencing legal proceedings based on Art. 759§2 of the Code of Civil Procedure or resolution of the Supreme Court, file ref. no. III CZP 79/11 where the court decided if the deed of real property donation constituting a legal act covered by an apparent sales agreement was invalid.

in relation to the doubtful issue analysed. This debatable issue is no longer necessary for analysis then.[43] Departure from the *clara non sunt interpretanda* rule is aimed at the in-depth analysis of the controversial provision. Based on the interpretive methods, the legal purpose should be found which is a basis for later application of this rule, when the judiciary will refer to the decisions reached as a result of the analysis made.

A different position is taken by E. Łętowska. In her opinion the law-making role of the judicature can be observed when a provision is presented in a vague or general way, or when the interpretation should be made based on the principles of social harmony. In this respect the court has more freedom of interpretation,[44] since doubts arise in reference to, for instance, the hypothesis or disposition. Sanction, as a rule, is clearly specified in the Polish legal system. It is the ambiguous character of hypothesis or disposition that causes problems in law interpretation. Therefore, when a particular part of the provision is not precise, interpretation is needed in order to find the missing sense. The view held by E. Łętowska that this is how the law-making role manifests itself seems arguable. In her opinion the court creates the law since it completes the sense of a provision by providing it with meaning as the result of semantic analysis. According to the theory presented by E. Łętowska, higher courts have a greater possibility of creative law interpretation as the range of their influence and authority is higher. It should be thus understood that the Supreme Court or the Supreme Administrative Court have a greater freedom of creative interpretation in respect to the final character of their decisions.[45] The decisions of the above-mentioned courts may contest the decisions of lower courts, or should change them. They have a decisive influence upon the shape of challenged decisions. In this respect both the Supreme Court and the Supreme Administrative Court may interpret the provisions in a way that enables them to justify their position and at the same time influence the judicial practice in a given factual state. This is not, however, creating the law but is still its interpretation. In this way E. Łętowska emphasizes that knowledge of judicial decisions is as important as knowledge of the law since it allows for specifying the chances in a court dispute by comparing judicial decisions in a given matter.[46] Therefore, the possibility of making a claim is also based on judicial decisions and not only on the substantive law.

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[43] L. Morawski, ..., op. cit., p. 57.
[44] E. Łętowska, ..., op. cit., p. 54.
[45] E. Łętowska, ..., op. cit., p 54.
[46] E. Łętowska, ..., op. cit., s. 54.

The above views should be subject to critical review as they "overstate" the role of judicial decisions in the way that, according to Łętowska, the law is created through them. The current diversity of judicial decisions in similar or identical cases shows that perceiving the courts as creators of the law carries a high risk. Judicial decisions are not mutually binding and in view of the above, they are regarded to be the interpretation and application of the law, and not its creation.

4. Summary

Interpretation of the law is a complex and multifaceted problem. The idea of interpretation and construction of law are not interpreted in the same way. The literature on the subject allows for using the terms interchangeably.[47] However, this idea has been worked out by judicial practice and doctrine for years. It may be observed that law interpretation is subject to constant semantic improvement. This is an issue on the border of the theory and philosophy of law, often referring to the ethics of law.

Interpretation as a tool whose purpose is to read the meaning and purpose of a legal provision, encompasses the attempts at recreating norms from provisions. This is the sense stricte interpretation. However, if interpretation aims at plugging legal loopholes by way of analogy legis or acceptable creative activity, this is the sense largo interpretation which is closely related to the imperfection of law.[48] By creating legal regulations the law-maker could not anticipate all possibilities of using legal norms. If all possible factual circumstances could be foreseen in the statute, the law would have the shape of a closed catalogue. However, the interpretation of law would not be necessary then. The law should be adjusted to economic relations so as to ensure the legality of, for instance, business entities as well as institutions of authority. The law, however, to a large extent does not meet the expectation. Current changes in the legal situation of Poland are so fast that the constant changing of the law would be troublesome. This could lead to legal disinformation. Law interpretation complements the role of law in the shaping of the legal situation of citizens, which is the sphere of rights and responsibilities.

The interpretation of law is an indispensable process both in making the law and its application. Automatic application of norms could in many

[47] M. Zieliński, Z. Radwański, ..., op. cit., p. 5.

[48] M. Zieliński, Z. Radwański, ..., op. cit., p. 14.

cases lead to decisions unjust in character. The interpretation of law allows for rational, optimal and legal decisions based on the provisions of law. Creating precise law which could anticipate each undertaken act or omission is impossible. The interpretation of law complements the legal system. When the law is applied, it is also interpreted, for instance in the grounds to court rulings.

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FORFEITURE UNDER ART. 44 AND ART. 45 OF THE PENAL CODE *DE LEGE LATA* AND *DE LEGE FERENDA*

I. General remarks

The term 'forfeiture' used in the Penal Code covers several penal measures of different contents and functions which involve takeover by the State Treasury of the ownership of certain assets that are in the possession of perpetrators of criminal offenses.[1] This issue is of particular importance in the case of offenders who are members of organized criminal groups, due to the high value of the assets they acquire as a result of their crimes and the difficulties in proving that the assets have originated from their criminal offenses. The original structure of the articles mentioned in the title of the present paper was far from perfect and, therefore, they have undergone a series of legislative changes.

According to art. 44 of the Penal Code (PC)[2] there are three categories of forfeiture of objects:

[1] More information on this subject can be found in: E. M. Guzik-Makaruk, ed., *Przepadek przedmiotów i korzyści pochodzących z. przestępstwa* [Forfeiture of objects and gains originating from crimes], Wydawnictwo Wolters Kluwer, Warsaw 2012; also, see K. Postulski, M. Siwek, *Przepadek w polskim prawie karnym* [Forfeiture in the Polish criminal law], Kantor Wydawniczy Zakamycze, Kraków 2004; and J. Raglewski, "Przepadek (§18)", in: M. Melezini, ed., *Kary i środki karne. Poddanie sprawcy próbie. System prawa karnego* [Penalties and penal measures. Subjecting the offenders to a test. The system of criminal law], vol. 6, Warsaw 2010.

[2] This article has been given the following wording:
Article 44. §1. The court shall impose the forfeiture of items directly derived from an offence.
§2. The court may decide, and in cases enumerated in law must decide, on the forfeiture of the items which served or were designed for committing the offence.
§3. The forfeiture described in § 2 shall not be applied if its imposition would not be commensurate with the severity of the offence committed and instead the court may impose a supplementary payment to the State Treasury.
§4. In the event that the forfeiture described in §1 or §2 is not possible, the court may

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– forfeiture of objects originating directly from a criminal offense;
– forfeiture of objects that were used or intended for use in order to commit a criminal offense; and
– forfeiture of objects whose production, possession, trade, sending, carrying, or transport are forbidden under a statute.

Art. 44 (1) of the PC applies to forfeiture of objects originating directly from criminal offenses, i.e. objects that have been acquired as a result of implementation of a specific criminal offense. Thus, before the court makes a decision to adjudicate this form of forfeiture, the court always has to determine the existence of a direct relation between the object to be forfeited and the committed criminal offense constituting the subject matter of the court case.[3]

Of note is the fact that art. 44 (1) of the PC provides for an exception to the obligatory forfeiture for the benefit of the State Treasury of objects originating directly from a criminal offense, which pertains to situations where such objects "are to be returned to the victim or to another entity." Also, forfeiture of objects may not apply to objects whose legality of origin raises factual doubts.

Court verdicts regarding forfeiture of objects must indicate on whom and for what acts the penal measure is inflicted. This is particularly important in the case of offenders who are members of organized criminal groups. What sets organized groups whose aim is to commit crimes from other groups of criminals is the fact that the former groups are organized, i.e. have permanent structures, either vertical with a leader who manages the group's activities, or horizontal with a permanent group of members who coordinate the group's activity in accordance with a certain set of rules. Also, organized criminal groups are not established solely to commit

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adjudicate forfeiture of an equivalent of the objects originating directly from the offense or the objects that were used or intended for perpetration of the offense.

§5. The court shall not adjudicate forfeiture of the objects described in §1 or §2 if they are subject to restitution to the victim or to another entitled body.

§6. In the event that the conviction has pertained to an offence of violating a prohibition of production, possession or dealing in or transporting specific items, the court may, and in cases enumerated in law must, decide on the forfeiture thereof.

§7. If the items referred to in §1 or §6 are not the property of the perpetrator, the forfeiture may be decided by the court only in the cases provided for in law; in the case of co-ownership, the decision shall cover only the forfeiture of the share owned by the perpetrator, or the forfeiture of an equivalent of this share.

§8. Objects that are subject to forfeiture shall be transferred to the ownership of the State Treasury at the time the sentence becomes final and valid.

[3] See: verdicts of the Supreme courts: dated 31 March 2005, file no. IV KK 75/05, LEX no. 148222., and dated 15 April 2008, file no. II KK 29/08, LEX no. 388435.

a single crime but rather their members assume that the groups will commit many crimes. A group of acquaintances who get together only to conduct ad-hoc criminal commercial transactions does not constitute an organized criminal group. Also, a group of people who conduct the same criminal activities is not an organized criminal group if the people do not maintain contacts within an organization.[4]

According to the new wording of art. 45 (1) of the PC, courts are required to inflict forfeiture of a financial gain if the following two conditions are met:

1. the offender has acquired a financial gain from the criminal offense, even indirectly; and
2. the gain is not subject to restitution under art. 44 (1) or (6) of the PC.

Let us start by briefly recounting the legislative changes that have resulted in the current wording of art. 45 of the PC.[5]

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[4] More information on this matter, including information on the literature and the case law, can be found in: E. W. Pływaczewski, E. Zatyka, in: E. W. Pływaczewski, ed., *Przestępczość zorganizowana* [Organized crime], Wydawnictwo C. H. Beck, Warsaw 2011, p. 35 ff and p. 220 ff.

[5] This article has been given the following wording:

Art. 45. §1. If the offender has acquired from an offense, even indirectly, a financial gain that is not subject to the forfeiture of objects enumerated in art. 44 §1 or §6, the court shall adjudicate forfeiture of such a gain or its equivalent. The forfeiture shall not be adjudicated in whole or in part if the gain or its equivalent is subject to restitution to the victim or another entity.

§2. In the event of a conviction for a crime from which the offender has, even indirectly, obtained a financial gain of significant value, it is considered that the property that the offender took into his possession or to which he has obtained any title during the perpetration of the offense or after its perpetration, until a sentence, even not final, is pronounce constitutes a gain originating from the offense, unless the offender or another affected person presents an evidence to the contrary.

§3. If the circumstances of a case indicate a high likelihood that the offender mentioned in §2 has transferred to a natural or legal person or an organizational unit without legal personality the property that constitutes a gain acquired as a result of perpetration of an offense, then it is considered that the items that are in the autonomous possession of this person or unit and their property rights belong to the perpetrator, unless the affected person or organizational unit presents evidence of their legal acquisition.

§4. The provisions of §1 or §2 shall apply also in the event of seizure pursuant to art. 292 (2) of the Code of Criminal Procedure to secure potential forfeiture of gains or at the time of enforcement of this measure. The person or unit affected by the assumption defined in §3 may sue the State Treasury to rebut this assumption; until the valid and final decision in the case the enforcement procedure shall be suspended.

§5. In the case of co-ownership, forfeiture shall be adjudicated in relation to the share owned by the offender or to an equivalent of this share.

§6. The financial gain subject to forfeiture shall become the property of the State Treasury at the time the verdict becomes final and in the case mentioned in the second sentence of §4 – at the time the verdict dismissing the suit against the State Treasury.

II. The amendments to art. 45 of the PC

The first amendment of art. 45 of the PC was made in the Act of 9 September 2000[6] in connection with the implementation of the Convention on Fighting Bribery of Foreign Public Officials in International Business Transactions. The results of this amendment include enlargement of the list of persons subject to forfeiture of gains originating directly from crimes to include all criminal offenders. Moreover, the amendment introduced the provision that in the case of professional criminals and members of organized criminal groups or criminal gangs (art. 65 of the PC) who have acquired financial gains of significant value from a crime, courts are required to inflict forfeiture of the gain or its equivalent.[7]

The next amendment was required due to the rather self-evident needs related to the judicial practice and included adoption of the assumptions made in legal systems of other democratic countries related to the fact that the property of offenders convicted for their involvement in organized crime has originated from criminal offenses.[8] The provisions related to such an assumption were introduced in the Act of 13 June 2003.[9] The first assumption is that property that an offender acquired or to which the offender acquired any title at the time of perpetration of an offense or after completion of the offense and before a court sentence, even not final, constitutes a gain acquired as a result of the offense. This assumption applies only to cases where the offender has committed a crime from which he or she has acquired, even indirectly, a financial gain of significant value (art. 45 (2) of the PC).

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[6] On amending the Penal Code statute, the Code of Criminal Procedure statute, the Act on Suppression of Unfair Competition, the Act on Public Procurement, and the Bank Law statute, Journal of Laws of 2000, no. 93, item 1027. See: R. A. Stefański, "Przepadek korzyści majątkowej uzyskanej przez sprawcę z przestępstwa" [Forfeiture of financial gains acquired by offenders as a result of crimes], *Prokuratura i Prawo*, 2001, no. 3, p. 156 ff.

[7] See: J. Brylak, "Instytucja przepadku korzyści w walce z przestępczością zorganizowaną" [Institution of forfeiture of gains in the fight against organized crime], *Wojskowy Przegląd Prawniczy*, 2009, no. 2, p. 63 ff.

[8] This was emphasized, among others by A. Marek (*Komentarz do kodeksu karnego, Część ogólna* [A commentary to the Penal Code. General Part], Warsaw 1998, p. 138). Also, see: A. Marek, "Problemy penalizacji przestępczości zorganizowanej" [Problems of penalization of organized crime], in: L. Tyszkiewicz, ed., *Problemy nauk penalnych. Prace ofiarowane Pani Profesor Oktawii Górniok* [Problems of penal sciences. Works dedicated to Professor Oktawia Górniok], Katowice 1996, p. 128 ff.

[9] On amending the Penal Code statute and certain other statutes, Journal of Laws no. 111, item 1061. More information on this subject can be found in: M. Szewczyk, "Przepadek korzyści majątkowych po zmianach kodeksu karnego" [Forfeiture of financial gains after the amendments to the Penal Code], in: T. Bojarski, E. Skrętowicz, eds., *Nowe prawo karne po zmianach* [The new penal law after the amendments], Lubelskie Towarzystwo Naukowe, Lublin 2002, p. 17 ff.

In other words, this breach of the principle of presumption of innocence and introduction into Polish criminal law of the institution of reverse burden of proof is limited only to serious cases (e.g. economic offenses, tax offenses, and offenses connected with organized crime).

The other assumption concerns the group of persons who are subject to forfeiture. If the circumstances of a case indicate that it is highly likely that the offender has transferred to a natural person, a legal person, or an organizational entity without legal personality, in fact or under any legal title, property that constitutes a gain acquired as a result of a criminal offense, then it is considered that the objects that are in the autonomous possession of such a person or entity as well as their ownership rights belong in fact to the offender.

Both of these legal assumptions are opposable because there are provisions that enable making them void by presenting counterevidence. The affected person may demonstrate that he or she has acquired the property legally and from a legal source. Forfeiture of benefits originating directly or indirectly from criminal offenses is obligatory in all cases.

The above assumptions have led to a debate among the representatives of criminal law doctrine. Some of them allege that the assumptions violate the procedural principle of the burden of proof, defined in art. 5 (1) of the Code of Criminal Procedure (CCP), which rests on the agency conducting the trial, and may raise doubts concerning their compliance with the principle of assumption of innocence provided for in the Polish Constitution and in international law. Moreover, it is not clear why the assumption was limited only to financial gains of significant value (i.e. in excess of 200,000 zlotys), even though it could be very useful in other cases.[10] There are also examples of full approval of the assumptions[11] and the authors of such opinions admit that "(...) in spite of such reservations, the new approach to forfeiture of financial gains to a much greater extent enables implementation of the fundamental assumption of the new penal polity, namely that offenders should be deprived of the benefits resulting from the crimes they have committed."[12]

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[10] See: Z. Sienkiewicz, "Przepadek przedmiotów" [Forfeiture of objects], in: M. Bojarski, ed., J, Giezek, Z. Sienkiewicz, *Prawo karne materialne. Część ogólna i szczególna* [Substantive penal law. General and specific part], LexisNexis, Warsaw 2010, p. 335.

[11] See: W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna* [Polish penal law. General part], Wydawnictwo Znak, Kraków 2010, pp. 460–461; A. Grześkowiak, *Prawo karne* [Penal law], 2nd edition, Wydawnictwo C. H. Beck, Warsaw 2009, pp. 208–2009.

[12] Z. Sienkiewicz, op. cit., p. 335.

III. Forfeiture in court verdicts

The issue of interpretation of the term 'objects' in accordance with art. 44 of the PC has been present in many court verdicts. One of the conclusions is that "traces secured at the crime scene on worthless objects (...) are not objects pursuant to art. 44 of the PC or objects that can be disposed of in ways defined in art. 230–232 of the Code of Criminal Procedure. These are objects that have preserved traces of a crime and, as such, can be used as evidence to find the perpetrator of the crime, while constituting an integral part of the files or an enclosure to the files. Thus, this type of material evidence must be regarded as a part of the case's files or as an enclosure to the files."[13]

In its verdict of 12 September 2009, with reference to a prior resolution of the Supreme Court composed of 7 judges,[14] the Supreme Court pointed out that "(...) an object of an action performed, in the meaning of art. 44 (2) of the PC, is not intended for committing a criminal offense but is one of the objects that determine the very essence of the type of the criminal offense. Consequently, a vehicle used by a drunk driver who commits a criminal offense does not belong to the category of objects that are used or intended, in the meaning of art. 44 (2) of the PC, for committing a crime under art. 178a (1) of the PC.[15] Nevertheless, in one of its later verdicts, the Supreme Court found that "(...) also, a car is not, as a result of forgery or modification of the data tag, an 'object of a performed crime' under art. 306 of the PC. In such a case, the 'object of a performed crime' is the 'identification tag' of the car and not the car itself."[16] Last but not least, in its most recent verdict, the Supreme Court clearly indicated that "The object used for perpetrating a criminal offence is an object whose use is the prerequisite of perpetration of the offense."[17]

Some important verdicts made references to art. 45 of the PC, in its new wording. Of particular importance is the verdict where the Appeals Court in Kraków found to be erroneous its earlier opinion that[18] the financial gain

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[13] Decision of the Appeals Court in Białystok of 17 July 2008, file no. II AKz 226/08, *Orzecznictwo Sądowe Apelacji Białostockiej 2008*, no. 2–3, item 58.

[14] I KZP 20/08, OSNW 2008, no. 11, item 88.

[15] IV KK 110/09, LEX no. 507953.

[16] Verdict of the Supreme Court of 27 June 2012, file no. V KK 100/12, *Biuletyn Prawa Karnego 2012*, no. 7, p. 28.

[17] Verdict of the Supreme Court of 27 June 2012, file no. V KK 100/12, insert to *Prokuratura i Prawo*, 2012, no. 10, item 2.

[18] Included in the not published resolution no. II AKa 41/06.

of a person who illegally sells narcotics is the price he charges minus the amount spent to purchase the narcotics. This time, the Court found that the gain is all the assets obtained while committing the criminal offense of selling narcotics, not just the profit earned.[19] As a result, the Court confirmed the correctness of the earlier verdicts issued by the Appeals Courts in Katowice[20] and in Lublin.[21]

In line with the above interpretation is the decision of the Appeals Court in Kraków which found that "(...) the financial gain subject to forfeiture originating from the defendants' criminal offense is the sum of all the amounts that the defendants earned by selling the narcotics smuggled into Poland, without the costs of purchase of the narcotics and other expenses, such as costs of travel to the place of purchase of the narcotics and the sums paid to the couriers. Crimes are not business activities where profit is calculated by subtracting costs from revenues."[22]

Many court verdicts concern situations where forfeiture cannot be imposed in any form. As has been mentioned, art. 45 (1) of the PC includes a clause that provides for the priority of the rights of third parties in relation to forfeiture of financial gains or their equivalents to the benefit of the State Treasury. In other words, a financial gain or its equivalent cannot be forfeited if the gain is subject to restitution to the victim or another entitled person. Thus, it appears to be rather self-evident that objects originating from crimes and gains mentioned in art. 45 (1) of the PC must first be returned to the victim or another entitled person. Only when there is no such entitled person or when such person cannot be identified, such objects can be forfeited to the benefit of the State Treasury. If the objects have characteristics enumerated in art. 44 (1) and art. 45 (1) of the PC, then their forfeiture is obligatory. Also, their placement in a court deposit requires the court to undertake appropriate activities aimed to identify the person entitled to collect the objects and, if there is no such person, to determine the nature of the objects in order to pronounce a verdict regarding forfeiture of the objects.[23]

Of particular importance in this regard is the verdict of the Supreme Court of 14 May 2008 where the Court extensively explains that "forfei-

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[19] Verdict of the Appeals Court in Kraków, file no. I AKa 255/07, not published.

[20] KZS 5/07, items 57 and 97, not published.

[21] KZS 2/07, item 53, not published.

[22] Dated 16 February 2012, file no. II Akz 409/112, not published. Such rules, as the Court emphasized, can be used only in legal activities.

[23] See: Verdict of the Appeals court in Wrocław of 24 November 2006, file no. II AKz 560/06, *Orzecznictwo Sądów Apelacyjnych 2007*, no. 4, item 15.

ture of objects originating directly from criminal offenses and forfeiture of the equivalents of such objects, and forfeiture of financial gain earned as a result of a criminal offense or its equivalent, cannot be adjudicated if the objects (or gain) originate from (or was earned as a result of) a criminal offense (perpetration of a criminal offense) against property. This is because in situations where the value of the financial gain earned as a result of perpetration of a criminal offense is greater than the value of the harm caused by the offense (...) forfeiture of the gain – pursuant to art. 45 (1), sentence II, of the PC – shall not be adjudicated in the part that is subject to restitution. However, forfeiture of the remaining part of such a gain or its equivalent is subject to obligatory forfeiture. The prohibition regarding adjudication of forfeiture applies irrespective of whether the object originating directly from a criminal offense or the financial gain earned as a result of a criminal offense has been returned to the victim or another entitled person. The wording of the aforementioned provisions, in particular the way the words "is subject to" were used, leads to the clear conclusion that application of the exception to the rule regarding adjudication of forfeiture of objects or gain does not require determination whether the object or gain has already been restituted."[24]

In another verdict, the Supreme Court made reference to the application of art. 412 of the Civil Code (CC) by saying that "(...) if the criminal court adjudicates forfeiture of a gain earned as a result of a criminal offense under art. 45 of the PC (...), then claims regarding forfeiture under art. 412 of the CC are void because the object of forfeiture no longer exists. However, a civil court will be competent if forfeiture is not adjudicated in the criminal proceedings for any reason."[25]

As far as art. 45 (3) of the PC is concerned, the Supreme Court has stated that this regulation is of mixed substantive-procedural nature. The procedural nature of the regulation is due to the fact that it defines the procedure to follow regarding the relevant legal assumption and the method of

[24] WK 11/08, insert to *Prokuratura i Prawo*, 2008/12/3.

[25] Verdict of the Supreme Court of 23 March 2007, file no. CSK 60/07, LEX no. 315405. In the opinion of the Court, it is possible that in a civil procedure the scope of forfeiture will be broader. Adjudication of forfeiture of a gain under art. 412 of the Civil Code is facultative but not arbitrary; consequently, the refusal of a court requires justification, with indication on the criteria of rejection. The petitioner is required to indicate the reasons for applying art. 412 of the Civil Code and is not required to indicate the circumstances that justify a decision not to adjudicate forfeiture as this is in the interest of the respondent (art. 6 of the Civil Code). Cf.: E. Pływaczewski, "Paserstwo a instytucja przepadku świadczenia na rzecz Skarbu Państwa w trybie art. 412 k.c." [Handling of stolen goods versus the institution of forfeiture to the benefit of the State Treasury under art. 412 of the Civil Code], *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1987, no. 2, p. 97 ff.

its rebuttal, while the substantive nature results from the prerequisites for application of the assumption (perpetration of a criminal offense mentioned in art. 45 (2) of the PC, high likelihood of transfer of the gain resulting from the criminal offense by the perpetrator to another person) and the conclusion from the regulation (an asset that is in the possession of another person belongs to the perpetrator). The regulation in question is not subject to exclusion from the *lex mition agit* rule provided for in art. 4 (1) of the PC.[26]

Appeal courts point at the fact that forfeiture of financial gains obtained as a result of sale of narcotics in the meaning of art. 45 (1) of the PC pertains to the profits that should not in any case be reduced by subtracting the costs borne to earn the profit.[27] It is not possible to demand remittance of a sum of money that is subject to forfeiture because the regulations do not provide for such a possibility. The fact that the convict does not have the entire sum is insignificant. The fact that the convict sold psychotropic and intoxicating substances for which he earned specific sums of money means that the convict made a financial gain. Another insignificant fact is that at the time of conviction the offenders have no financial gains or their equivalent because the regulations do not restrict adjudication of the penal measure to situations where the offenders are still in position of the financial gain they have obtained.[28]

Some court verdicts pertain to the issue of desistance from inflicting the penalty of forfeiture of objects. It is emphasized that due to the obligatory nature of adjudication of forfeiture of financial gains from criminal offenses or their equivalents under art. 45 (1) of the PC desistance from adjudication of this penal measure is allowed only in exceptional cases provided for in the statute. The contents of art. 45 (1) of the PC *in fine* indicate that forfeiture must not be adjudicated if the gain or its equivalent is subject to restitution to the victim or another person. On the other hand, the provisions of art. 61 (2) of the PC allow for desisting from adjudicating the penal measure in question only in cases where the court desists from inflicting a penalty. A 'bad' material situation of the defendant may lead to the

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[26] Resolution of the Supreme Court of 17 March 2005, file no. I KZP 4/05, *OSNKW*, 2005, no. 3, item 27.

[27] See, for example: verdict of the Appeals Court in Katowice of 21 December 2006, file no. II AKa 394/06, *KZS* 2007/5/57; and verdict of the same Court of 15 January 2009, file no. II AKa 294/08, *LEX*, no. 491184.

[28] See: verdict of the Appeals Court in Katowice of 26 April 2007, file no. II AKa 64/07, insert to *Prokuratura i Prawo*, 2008, no. 1, item 34; and resolution of the same Court of 12 December 2007, file no. II AKz 815/07, *LEX* no. 578201.

court's decision to desist from adjudicating reimbursement of costs if it is too onerous to the defendant and not only when his income, property, or earning potential substantiates the belief that he will not pay the costs and they will not be enforceable.[29]

IV. Proposals *de lege ferenda* of 2007

Lack of adequate effectiveness in the practical application of forfeiture of objects, gains, and their equivalents has become the basis both for assessment of the applicable laws and for formulation of proposals aimed at expanding the scope of this penal measure.[30] This is because the amendments to the Penal Code introduced by the Act of 13 June 2003 turned out to be too 'soft'. Thus, reform of the applicable laws is absolutely necessary if we are to improve the effectiveness of the system aimed at depriving perpetrators of the most dangerous categories of crimes of the money that forms the economic basis for their continued criminal activity.

In 2007, on the basis of the discussion pertaining to the aforementioned proposal to change the provisions of art. 45 of the PC,[31] a new thoroughly revised proposal was elaborated that took into account the earlier critical and polemical opinions.[32] The proposed instrument is referred to as 'expanded

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[29] See, in particular: verdict of the Appeals Court in Szczecin of 26 July 2006, file no. II AKa 93/06, *LEX* no. 283409.

[30] See: E. W. Pływaczewski, "Przestępczość zorganizowana z punktu widzenia teorii, polityki i praktyki" [Organized crime from the point of view of theory, politics, and practice], in: E. W. Pływaczewski, ed. *Przestępczość zorganizowana – Świadek koronny – Terroryzm: w ujęciu praktycznym* [Organized crime – immunity witness – terrorism: a practical approach], Kantor Wydawniczy Zakamycze, Kraków 2005; E. W. Pływaczewski, W. Filipkowski, Z. Rau, "Odbieranie sprawcom przestępstw wartości majątkowych. Ocena proponowanych zmian art. 45 Kodeksu karnego (wersja projektu na dzień 18 września 2006 r.)" [Deprivation of offenders of financial gains. Evaluation of the recommended changes to art. 45 of the Penal Code (version of the draft as of 18 September 2006)], in: A. Szymaniak, W. Ciepiela, eds., *Policja w Polsce. Stan obecny i perspektywy* [Police in Poland. Current situation and the prospects], vol. 2, Wydawnictwo Naukowe INPiD, Poznań 2007, p. 125 ff.

[31] More information can be found in: E. W. Pływaczewski, "Wokół postulatu tzw. konfiskaty rozszerzonej (rozszerzonego przepadku mienia) [On the proposed so-called expanded confiscation (expanded forfeiture of property)], in: Łukasz Pohl, ed., *Aktualne problemy prawa karnego: księga pamiątkowa z okazji Jubileuszu 70. Urodzin Profesora Andrzeja J. Szwarca* [Current problems of penal law. A commemorative book on the 70th birthday of Professor Andrzej J. Szwarc], Wydawnictwo Naukowe UAM, Poznań 2009.

[32] See, in particular: C. Kulesza, P. Starzyński, "Powrót do konfiskaty mienia?" [Return to confiscation of property?], *Prokuratura i Prawo*, 2008, no. 3, p. 37 ff; Also, cf.: K. Laskowska, "Kara konfiskaty mienia w kodeksie karnym z 1969 r. i w projekcie nowego kodeksu karnego" [The penalty of confiscation of property in the Penal Code

confiscation' or 'expanded forfeiture of property'. During the 5th term of the lower chamber of the Polish parliament (Sejm), the proposal was incorporated into the draft *Act on amending the Penal Code statute, the Penal Fiscal Code statute, the Code of Criminal Procedure statute, the Executive Penal Code statute, and the Press Law statute.* It should be mentioned that, as a part of the public consultations, numerous comments to the draft were made by the Penal and Civil Law Codification Committee, the Supreme Court, the National Judicial Council, the Polish Bar Council, the National Council of Legal Counsels, the 'Iustitia' Association of Polish Judges, and the Association of Public Prosecutors of the Republic of Poland.

In the substantiation for the draft instrument of 'expanded confiscation'/'expanded forfeiture of property', the authors pointed at the fact that the need for intensifying the efforts aimed at suppressing both organized crime and terrorism have led to interest in forfeiture of gains from criminal offenses as both a repressive and a preventive measure. Deprivation of perpetrators of such crimes of the money that constitutes an economic basis for continued criminal activity may be a much more effective means of suppression than even a long prison sentence. Thus, it was necessary to abandon the traditional approach to some instruments of penal law. The new approach is manifested in the elaboration of the so-called 'expanded confiscation'/'expanded forfeiture of property'.

The proposed changes are based on application of a set of legal assumptions that result in a shift of the burden of proof. The prerequisites for application of the assumptions include, among others, proving that the offender has committed forbidden acts as a member of an organized criminal group. The conclusion of the assumption is most often the criminal origins of the entire property in the possession of the offender, or of a part of the property. The instrument is often supplemented with solutions that enable adjudicating forfeiture against third parties to whom the offender transferred his property. In this regard, the currently applicable assumption that property that is subject to forfeiture and that has been transferred to a third party in fact belongs to the offender is expanded to cover also situations where numerous transfers have taken place. This is because, pursuant to the applicable law, this assumption applies only to the first transfer of property by the offender to a third party and successive transfers preclude the possibility to adjudicate forfeiture of such gains.

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of 1969 and in the draft of the new Penal Code], *Prokuratura i Prawo*, 1996, no. 11, p. 37 ff.

In order to effectively counter formation of chains of persons who act as intermediaries in the transfer of financial gains, the draft introduces the principle of joint and several responsibility of persons participating in the transfer of property that is subject to forfeiture for restitution of the property. Consequently, restitution of a gain originating from a criminal offense could be demanded not only from the offender but also from persons who participated in further transfer of the gain, unless such persons acted in good faith.

The authors of the draft emphasize that despite the customary (in particular in English-language literature) term of 'expanded confiscation', this institution has little in common with the additional penalty of confiscation of property, which was provided for in the Penal Code of 1969. This is because that penalty covered property originating from all sources, both legal and illegal. On the other hand, expanded forfeiture of property covers only the property that is assumed to have originated from a criminal offense. The consequence of the application of the aforementioned legal assumption is the possibility to rebut it. In the meaning of the previous penal code, confiscation was of an absolute nature. On the other hand, the objective scope of application of the expanded forfeiture of property is much narrower than the objective scope of application of the confiscation provisions in the Penal Code of 1969. It is basically limited to terrorist crimes and to serious criminal offenses committed by organized criminal groups.

This argumentation of the authors of the draft should only be supplemented by the conclusion that elimination of the penalty of confiscation of property was equal to throwing out the baby with the bath water. The use of penal law to purposes other than protection of values important to society from crime, if limited to practice, should not be used as grounds for eliminating a given instrument from the catalog of penalties and penal measures without thorough analysis of whether it is advisable and safe in specific conditions.[33]

The authors of the draft discussed here are fully aware that it is not always possible in criminal proceedings to demonstrate the connections between the crimes committed and the property of the offender and his or her relatives and business partners participating in transfers of property originating from crimes. This is because offenders who are members of organized criminal groups are often in possession of property of huge value whose origins cannot be connected with any specific criminal offense. Consequently,

[33] E. W. Pływaczewski, "Wokół postulatu tzw. konfiskaty rozszerzonej..." [On the proposed so-called expanded confiscation...], p. 123.

the only solution is to use the proposed instrument, which of course does not deprive the offender and the persons assumed to benefit from the proceeds from criminal offenses of adequate means of defense that consists in demonstrating the legality of their property, thus removing from the scope of the adjudicated penal measure those assets that have been acquired legally and have no links to the offender's criminal activity.

Such a structure of assumptions and means of defense does not lead to excessive difficulties in producing evidence to the affected persons. Thus, the assumptions do not violate, as the authors of the draft have concluded, the principle of proportionality *sensu stricto*. In other words, tests regarding compliance of the draft with art. 31 (3) of the Constitution of the Republic of Poland lead to the conclusion that the solutions proposed in the draft do not violate the principle of proportionality in any of its aspects.

Another important element of the draft's substantiation is the results of the earlier comparative law analysis which covered the legal solutions adopted in other countries pertaining to expanded forfeiture of property, on the background of the international standards of suppression of organized crime and terrorism, which are becoming more and more universal in the area of fight against the most important crimes of this type.

Even though the solutions adopted in different countries vary according to local legal traditions, all of them include expansion of the standard model of forfeiture. Such expansion involves, in particular, the use of the aforementioned legal assumption of illegal origin of property. The structures of the assumptions adopted in the analyzed legal systems are usually more extensive than those provided for in art. 45 of the PC in the wording included in the aforementioned Act of 13 June 2003. This is true of both the grounds for and the conclusions from the assumption.

Introduction of the aforementioned provisions would certainly require appropriate amendments to other statutes, in particular in the Penal Fiscal Code of 10 September 1999 and in some provisions of the Code of Criminal Procedure. The key objective of the amendments to the Code of Criminal Procedure is to enable forfeiture of financial gains that are suspected of having originated from a crime in the event that a condemnatory sentence is lacking because the suspect is hiding, dead, or insane, or because the crime is subject to the statute of limitations. Like in other cases, in this situation the affected persons can demonstrate the legality of the property's origin.

The authors of the draft have also prepared recommendations regarding changes in the press law and the Executive Penal Code, with the latter being mostly of an accommodating nature and resulting from changes in

the structure of art. 45 and art. 33 of the Penal Fiscal Code. The key change in the press law would result from the new wording of art. 37a which would expand the current scope of forfeiture to cover objects that constitute information carriers intended for the preparation of press materials.[34]

Thus, unlike previous amendments in this area, the proposed changes constitute a serious legislative project of a very comprehensive nature due to both the complexity of the problem and the gravity of the threat.

The proposed amendments to art. 45 of the PC presented above have been presented and discussed during the international conference organized under the auspices of the Ministry of Justice held in October 2007.[35] In the light of the presentations given by foreign experts, who discussed both the legal mechanisms and the practice of deprivation of the perpetrators of the most serious crimes of their proceeds, the Polish proposals regarding the so-called expanded confiscation could be considered as far from 'revolutionary', especially that the participants of the conference were also presented a critical analysis of the current legal solutions pertaining to recovery of property and proceeds from criminal offenses. Moreover, comparison of the laws demonstrated that Poland only intends to implement the standards of suppression of the most serious crimes by 'cutting their economic roots' that have been in place for a long time and are becoming more and more universal. The draft discussed here has been adopted by the Council of Ministers and forwarded to the Sejm but, due to the shortened term of the Sejm, work on the draft was not completed.

During the 6th term of the lower chamber of the Sejm, the proposal took the form of a parliamentary *bill on amending the Penal Code statute, the Penal Fiscal Code statute, the Code of Criminal Procedure statute, the Executive Penal Code statute, and the Press Law statute.*[36] The assumptions of the bill are comprehensive and originate from the standard solutions implemented in a number of member countries of the European Union. In particular, enlargement of the scope of application of the legal assumptions to include perpetrators of terrorist crimes and crimes committed by organized criminal groups or criminal gangs definitely deserves support, due to

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[34] Consequently, these will include not only the matrix but also the hard drive and any other objects containing a recording of the material in a way that prevents its distribution.

[35] Conference titled "Expanded Confiscation as a Modern Measure in the Fight against Organized Crime," Warsaw, Belweder Palace, 18 October 2007.

[36] See: A. Sakowicz, *Opinia o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks karny wykonawczy oraz ustawy – Prawo prasowe (druk nr 640) z dnia 30 października 2008 r.* [Opinion on the amendment to the Code of Criminal Procedure statute, the Executive Penal Code statute, and the Press Law statute (print no. 640) of 30 October 2008], not published.

its merits and its similarity to solutions adopted in other legal systems (the institution of expanded forfeiture has been implemented in about a dozen European countries).[37] What one can expect in this area is that the works that have been initiated will be completed and not started anew in a way that will resemble reinventing the wheel, especially that in the field in question there are still no solutions that guarantee the maximum 'neutralization' of the incarcerated members of organized criminal groups who today reap benefits from the proceeds of their earlier crimes.

Of course, the effectiveness of the proposed amendments to the criminal law should not be overestimated. Certainly, in the absence of effective work of tax offices and court executive officers and various organizational and technical instruments, they will be futile and will not effectively prevent transfers of property by criminals to third parties in order to avoid its forfeiture.

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[37] More information on this subject can be found in: M. Kotowska, E. Jurgielewicz, K. Laskowska, E. Zatyka, J. Wiśniewski, A. M. Michałowska, M. Perkowska, J. Arciszewski, in: E. M. Guzik-Makaruk, ed., *Przepadek przedmiotów i korzyści...* [Forfeiture of objects and gains...], op. cit., pp. 54–210.

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SOCIAL HARM OF AN ACT IN THE LIGHT OF JUDICIAL INTERPRETATION

Introduction

Judicial interpretation (construction) is one of the types of interpretation that have limited binding effect. The limitation of the binding effect means that judicial interpretation is restricted to a specific case. Binding interpretation in specific cases is made by the court of first instance, the appeals court, and the Supreme Court. The interpretation made by the court of first instance applies only to the specific verdict. If the verdict becomes final, the interpretation of a legal provision adopted by the court becomes binding for the parties in the proceedings, but only in the specific case. On the other hand, the interpretation made by the appeals court is binding to the court of first instance to which the case is remanded. The interpretation made by the Supreme Court is binding to all cases deciding in the specific case.[1]

All adjudicating panels of the Supreme Court are bound by the principles of law; however, it must be indicated that Resolutions of the Supreme Court that define guidelines pertaining to interpretation of laws and judicial practices do not have the force of legal principles. For many years, of particular importance have been guidelines concerning interpretation of the law and judicial practice; for the most part, they have played a positive role in ensuring proper interpretation of laws by courts. They had binding force until 31 December 1989 in the sense that their breach constituted an absolute ground for an appeal as was considered a violation of the norms of substantive law.

[1] S. Oliwiniak, in: A. Jamróz, ed., *Wstęp do prawoznawstwa* [Introduction to jurisprudence], Białystok 2007, pp. 134–135.

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According to current law, the Supreme Court may only make resolutions intended to clarify legal provisions that raise doubts or whose application has resulted in different verdicts, and resolutions with decisions regarding legal matters that raise serious doubts in specific cases.[2]

One of the criminal law subjects that are referred to in numerous court verdicts is the social harm of an act. Social harm of an act constitutes a substantive element of an offense. As the Latin phrase goes, *nullum crimen sine periculo sociali*, i.e. there is no crime without social harm. In this specific phrase, the word 'social' means 'to the society', and the word 'harm' means real likelihood of occurrence of negative consequences that will result in harm and bring about fatal outcomes.[3]

The legislator does not define social harm but defines the circumstances that must be taken into account when evaluating the degree of social harm. The term 'social harm' is a synthetic term covering negative social value of a crime in its various aspects. The negative value may refer to ethics, usefulness, or order. In various types of crimes, the arrangement of those values is different.[4] The linguistic interpretation of the term 'social harm of the act' allows for the assumption that what it expresses is the feature of an act that takes the form of violation or possible violation of a legal value or the interest of an individual or society as a whole. Social harm involves causing damage or harm, which are the negative consequences of an act that affects one or more persons. The nature of the harm may be different: tangible, physical, or intangible – mental or spiritual.[5]

The degree of social harm of a specific behavior that has the features of a forbidden act may be higher or lower, thus allowing comparison of individual forbidden acts to one another. In this sense, social harm is gradable.[6]

The Penal Code (P.C.) defines several legally relevant degrees of social harm: negligible, higher than negligible (art. 1 (2) of the P.C.), insignificant

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[2] Art. 59 and art. 60 of the Act of 23 November 2002 on the Supreme Court, Journal of Laws no. 240, item 2052, as amended.

[3] J. Zientek, "Karygodność i wina jako przesłanki odpowiedzialności w nowym kodeksie karnym" [Culpability and guilt as prerequisites for responsibility in the new penal code], *Prokuratura i Prawo*, 1998, no. 6, pp. 7–32.

[4] S. M. Przyjemski, "Glosa do wyroku SN z dnia 28 czerwca 2005, file no. WA 14/05" [A gloss to the verdict of the Supreme Court of 28 June 2005, file no. WA 15/05], *Wojskowy Przegląd Prawniczy*, 2006, no. 1, p. 161.

[5] M. Derlatka, "Społeczna szkodliwość czynu a definicja przestępstwa" [Social harm of an act and the definition of a crime], *Prokuratura i Prawo*, 2006, no. 6, pp. 123–127.

[6] J. Majewski, in: A. Zoll, ed., *Kodeks karny. Część ogólna. Komentarz. Tom I. Komentarz do art. 1–116 k.k.* [Penal code. General part. A commentary. Volume I. A commentary to art. 1–116 of the penal code], Zakamycze 2004, 2nd edition, thesis 1 to art. 115 (2) of the P.C.

(art. 66 (1) and art. 59 of the P.C.), and significant (art. 94 (1) of the P.C.). Determination that an act exceeded the threshold of the negligible degree enables distinguishing a misdemeanor from a criminal offense. A criminal offense is defined as a forbidden act whose social harm is of a degree that is higher than negligible.[7] If an act has no social harm, it must be treated the same as the occurrence of a circumstance defined in art. 17 (1) (2) of the Code of Criminal Procedure (C.C.P.), which is defined as "the perpetrator has not committed a crime."[8] As has been rightly observed in case law, the degree of social harm of an act is the immanent characteristic of an act that enables differentiating insignificant acts from serious ones and considering as criminal offenses only those acts that cause true and real harm to specific values of individuals or the entire society. This variable characteristic of an act that formally has all the characteristics of a specific forbidden act is subject to individual evaluation and, depending on specific subjective and objective circumstances, may be considered as negligible, insignificant, high, or particularly high.[9] It must be mentioned that in the current Penal Code, the legislator does not use the terms of high or particularly high degree of social harm of an act; however, historically speaking, the social harm of an act, which constituted a substantive element of a criminal act under the previous 1969 penal code, was also gradable. Although the previous Penal Code did not use the terms of high or particularly high degree of social harm of an act, these terms were present in the historical Decree of 12 December 1981 on the procedure to follow in special cases concerning criminal offenses and misdemeanors during martial law. In the Decree, the legislator provided for a high and particularly high degree of social harm of an act.[10]

As B. Kunicka-Michalska was right in observing, based on the Penal Code of 1997, courts do not analyze, and are not even authorized to analyze, the social harm of acts. They only analyze the degree of social harm in the light of art. 1 (2) of the P.C. and art. 115 (2) of the P.C.[11] According

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[7] M. Budyn-Kulikm, in: M. Mozgawa, ed., "Kodeks karny. Komentarz" [Penal code. A commentary], 3rd edition, *LEX*, theses 1 and 2 to art. 115 (2) of the P.C.

[8] Decision of the Supreme Court of 5 December 2012, file no. III KK 211/06, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2006, no. 1, p. 2357.

[9] Verdict of the Appeals Court in Katowice of 13 January 2005, file no. II AKa 455/04, *Prokuratura i Prawo* – insert, 2006, no. 1, p. 21; verdict of the Appeals Court in Kraków of 20 June 2000, file no. II AKa 99/00, *Krakowskie Zeszyty Sądowe*, 2000, no. 7–8, p. 39.

[10] Journal of Laws of 1981, no. 29, item 156.

[11] B. Kunicka-Michalska, "Z problematyki społecznej szkodliwości czynu" [On the problem of social harm of an act], *Przegląd Prawa Karnego*, 1998, no. 18, p. 5.

to art. 115 (2) of the P.C., "in evaluating the degree of social harm of an act, the court takes into account the type and nature of the violated value, the extent of the damage done or threatened, the method and the circumstances of the act, the gravity of the duties breached by the offender, the intent and the motives of the offender, the type of the violated principles of caution, and the extent to which they were breached."[12] E. Plebanek was right in observing that the statutory definition of the circumstances that influence the evaluation of the degree of social harm of the act, given in art. 115 (2) of the P.C., constitutes a legal definition of the measures of degree of social harm.[13]

The aforementioned regulation has become the object of numerous verdicts of the Supreme Court and of appeals courts, mostly in the following four aspects: a list of circumstances determining the social harm of an act, elements that do not influence the social harm of an act, evaluation of various factual states with regards to the social harm of an act, and so-called incidents of lower importance.

I. List of circumstances determining the social harm of an act

As A. Marek was right in observing, the degree of social harm of a forbidden act is determined by the subjective and objective prerequisites indicated in the aforementioned law. These prerequisites are evaluative. The type and nature of the violated value is the legal value that is affected by the forbidden act. The most reliable criterion for evaluation of the importance of values is the penalty carried by different types of criminal offenses, although what is quite useful in the evaluation of the 'importance' of a violated value is a gradation of the values according to their types, as defined in the Specific Part of the Penal Code.[14] According to K. Mielcarek, assumption of the negligible degree of harm of an act should depend most of all on the criterion of the lower thresholds of the penalty as so-called penalty minimums reflect the lowest degree of social harm for a specific set of criminal offenses. The higher the statutory penalty (in par-

[12] Act of 6 June 1997, Journal of Laws of 1997, no. 88, item 553, as amended.

[13] E. Plebanek, "Wypadek mniejszej wagi – kilka uwag w sporze o charakter instytucji i jego praktyczne konsekwencje" [Incidents of lower importance – a few comments on the dispute on the nature of the institution and its practical consequences], *Czasopismo Prawa Karnego i Nauk Penalnych*, 2011, no. 1, pp. 81–98.

[14] A. Marek, "Kodeks karny. Komentarz" [Penal code. A commentary], *LEX*, thesis 2 to art. 115 (2) of the P.C.

ticular its lower limit), the lower the likelihood that the act should not be punishable.[15]

The Supreme Court has a slightly different outlook on this issue. In one of its verdicts it was stated that one cannot in any case assume that the statutory penalty influences the evaluation of the harm of the act that a person has allegedly perpetrated. Such an evaluation should be conducted in conformance to the provisions of art. 115 (2) of the Penal Code, i.e. should be strictly related to the circumstances of the acts themselves: their subjective and objective aspects. In no case can one conclude that a specific category of criminal offenses (e.g. crimes against health) can be considered *a priori* to be socially harmful. Such evaluation must always be performed for each specific offense.[16] As has rightly been observed in the literature, an act that is qualified as one of high general-abstract social harm (e.g. a traffic accident) may, in an analysis of specific circumstances, turn out to be of negligible social harm.[17]

Let us now briefly describe the measures of social harm of acts enumerated in art. 115 (2) of the P.C.

The extent of the damage done or threatened refers not only to damage to property but also to damage to other legally protected values or the extent of the threat to such values caused by the criminal act, e.g. an attempt.

On the other hand, the method and circumstances of the perpetration of the act cover a broad scope of circumstances that characterize both the committed act and the perpetrator. The circumstances must be considered regardless of whether they have been included in the statutory features of the associated act (qualified or privileged type).

The importance of the duties breached by the perpetrator constitutes a criterion that indicates the normative concept of guilt. The very word 'importance' is evaluative and leaves plenty of room for arbitrary evaluation in judicial practice.

Form of intent is a rather imprecise term which refers to the description of direct and eventual intent provided for in art. 9 (1) of the P.C.

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[15] K. Mielcarek, "Znikoma społeczna szkodliwość czynu w praktyce prokuratorskiej i sądowej" [Negligible social harm of an act in the practice of public prosecutors and courts], *Instytut Wymiaru Sprawiedliwości, Prawo w Działaniu*, 2008, no. 5, items 195–239.

[16] Verdict of the Supreme Court of 8 December 2004, file no. II KK 210/04, *LEX*, no. 155024.

[17] E. Plebanek, "Glosa do wyroku SN z dnia 23 September 2008, file no. WA 37/08" [A gloss to the verdict of the Supreme Court of 23 September 2008, file no. WA 37/08], *gloss LEX/el.*, 2009.

The perpetrator's motivation is a collective term covering all the intellectual and emotional elements that determine the perpetrator's attitude and that explain why he or she has committed the crime. The type of violated caution principles and the degree of their violation are criteria for evaluation of inadvertent crimes which usually involve a lack of caution, although caution principles can be violated willingly too. Lack of caution has an objective aspect when an area has certain procedures that are legally defined or have been recognized in case law, e.g. safety principles in road traffic; it also has a subjective aspect related to the perpetrator's disregard for the duty to be cautious, which is necessary for finding that the perpetrator's acts constitute willful misconduct.[18]

If breach of principles of caution that are mandatory in certain circumstances constitutes a feature of the objective side of a forbidden act committed willfully and, consequently, is the prerequisite of illegality of the perpetrator's behavior, then the importance of the breached principles of caution and the extent to which they were breached must be considered, in the context of all the prerequisites defined in art. 115 (2) of the P.C., as being of key importance to the evaluation of the degree of social harm of such an act.[19]

As far as the list of circumstances that determine the degree of social harm of an act is concerned, in their verdicts courts have been unanimous and considered the list of circumstances given in art. 115 (2) of the P.C. as a closed one and found that the circumstances that have a large influence on the evaluation of the social harm of specific behaviors depend on the type of forbidden act that is in question. Moreover, the provision is of an objective-subjective nature, with objective circumstances being considered of key importance. Case law does not enable extensive interpretation of elements that influence the evaluation of social harm of acts by prohibiting extensive interpretation both to the advantage and to the disadvantage of the perpetrator.[20] The degree of social harm of an act depends, among

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[18] A. Marek, "Kodeks karny. Komentarz" [Penal code. A commentary], *LEX*, thesis 2 to art. 115 (2) of the P.C.; decision of the Supreme Court of 15 February 2007, file no. IV KK 273/06, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, p. 444.

[19] Verdict of the Supreme Court of 1 February 2006, file no. V KK 226/05, *Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa*, 2006, no. 5, p. 44.

[20] Verdict of the Supreme Court of 23 June 2009, file no. II KK 13/09, *LEX*, no. 512956; decision of the Supreme Court of 17 December 2010, file no. V KK 383/10, *Prokuratura i Prawo* – insert, 2011, no. 4, p. 4; decision of the Supreme Court of 4 March 2009, file no. V KK 22/09, *LEX*, no. 495325; verdict of the Supreme Court of 16 September 2008, file no. A 35/08, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2008, no. 1, item 1849; verdict of the Supreme Court of 26 April 2007, file no. WA 18/07, *Orzecznictwo*

others, on the legal norms that the act breaches. If the forbidden act violates two or more values protected by the criminal law, its social harm is increased.[21]

Since the list of circumstances given in art. 115 (2) of the PC is closed, then if in the evaluation of the degree of social harm of an act the circumstances enumerated in the aforementioned article are not considered, or if circumstances not enumerated there are considered, then claims that substantive law has been breached are justified.[22]

The approach to the list of elements that influence the evaluation of the degree of social harm of an act is similar in the doctrine. It is assumed that art. 115 (2) of the P.C., while providing courts with a list of circumstances that should be considered when evaluating the degree of social harm of an act, does not list such circumstances as examples only but rather provides a closed list that cannot be modified in any way in the current law, for instance by adding other circumstances that have not been enumerated in the aforementioned article.[23] All of the enumerated circumstances are linked to the act, its objective and subjective aspects (the form of the intent, the motivation), and the degree of social harm can only be determined based on evaluation of the act itself, as opposed to evaluation of the perpetrator.[24] When discussing the social harm of an act, one must keep in mind the fact that, in the comprehensive approach that dominates in doctrine and case law, the social harm of an act depends on objective and

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Sądu Najwyższego w Sprawach Karnych, 2007, no. 1, item 988, *Biuletyn Prawa Karnego*, 2008, no. 11, p. 65; verdict of the Supreme Court of 25 September 2007, file no. WA 34/07, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, item 2047; decision of the Supreme Court of 23 June 2008, file no. WZ 36/08, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2008, no. 1, item 1285; verdict of the Supreme Court of 11 October 2006, file no. II KK 52/06, *LEX*, no. 202113; verdict of the Appeals Court in Katowice of 13 January 2005, file no. II AKa 455/04, *Prokuratura i Prawo* – insert, 2006, no. 1, p. 21.

[21] Verdict of the Supreme Court of 26 April 2007, file no. WA 18/07, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, item 988.

[22] Verdict of the Supreme Court of 12 December 2006, file no. IV KK 395/06, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2006, no. 1, p. 2413; decision of the Supreme Court of 23 May 2007, file no. II KK 28/07, *LEX*, no. 280699; verdict of the Supreme Court of 3 April 2008, file no. WA 11/08, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2008, no. 1, item 807.

[23] J. Majewski, op. cit., thesis 5 to art. 115 (2) of the P.C.; J. Giezek, ed., "Kodeks karny. Część ogólna. Komentarz" [Penal code. The general part. A commentary], *LEX*, 2007, theses 3 and 5 to art. 115 (2) of the P.C.; J. Warylewski, "Przegląd orzecznictwa z zakresu prawa karnego materialnego za rok 2006" [Review of the verdicts in the area of substantive penal law in 2006], *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2007, no. 2, pp. 11–42.

[24] Verdict of the Supreme Court of 8 June 2005, file no. WA 13/05, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2005, no. 1., item 1129.

subjective elements. On the other hand, the circumstances related to the perpetrator are not important to the determination and only influence the penalty.[25]

II. Elements that do not determine the social harm of an act

Closely related to the problem of the measure of social harm of an act is the problem of verdicts of the Supreme Court and the appeals courts that are based on elements that do not determine the degree of the social harm of an act. The elements include the perpetrator's clean criminal record, his or her good repute, stable lifestyle, and the fact that he or she supports a child.[26] Other circumstances that are definitely not included in the list enumerated in art. 115 (2) of the P.C. include the personal conditions and characteristics of the perpetrator, the personal characteristics of the victim, and the attitude of the perpetrator demonstrated in the course of the proceedings given the allegations he or she is facing.[27]

Thus, it is not permissible to make evaluation of the degree of social harm of an act dependent on factors that are not directly linked to it and were present before or after the offense (e.g. the perpetrator's admission of guilt, voluntary remedy of the harm caused by the offense, his or her expression of remorse, and his or her reconciliation with the victim), and on factors that characterize only the broadly defined personality of the perpetrator, in particular the elements that the Penal Code defines as "the personal conditions and characteristics of the perpetrator," such as his or her age, health, family and property situation, education, vocation, etc.[28] Similarly, the subjective belief of the victims that they have been hurt cannot have a significant impact on the evaluation of the degree of social danger of the act committed by the perpetrator and, in particular, of the guilt of the perpetrator.[29] This is because the degree of guilt is not included in the

[25] Verdict of the Supreme Court of 8 July 2003, file no. WA 31/03, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2003, no. 1, item 1517.

[26] Verdict of the Supreme Court of 11 April 2011, file no. IV KK 382/10, *LEX*, no. 846390; decision of the Supreme Court of 21 August 2008, file no. V KK 257/08, *LEX*, no. 449083.

[27] Decision of the Supreme Court of 4 March 2009, file no. V KK 22/09, *LEX*, no. 495325.

[28] Resolution of the Supreme Court of 16 September 2008, file no. SNO 68/08, *LEX*, no. 491427; decision of the Supreme Court of 25 June 2008, file no. V KK 1/08, *Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa*, 2008, no. 9, item 75.

[29] Decision of the Supreme Court of 9 September 2008, file no. WZ 53/08, *LEX*, no. 458865.

list of circumstances that determine the degree of social harm of an act that is given in art. 115 (2) of the P.C.[30]

As early as in 2004, the Supreme Court pointed at the invalidity of the opinions expressed in some verdicts of courts of lower instances that used criteria for determination of the degree of social harm of an act that were not included in the list of circumstances to be used in such evaluations provided by the Penal Code (art. 115 (2) of the P.C.). This problem was most pronounced when an act was determined to be of negligible social harm due to the circumstances pertaining to the perpetrator (his or her age, clean criminal record, good repute, professional success, etc.). Such reasoning is in clear conflict with the objective-subjective concept of evaluation of the degree of social harm of an act.[31]

The perpetrator's behavior after the criminal offense is detected is clearly not a part of the objective-subjective (comprehensive) approach to the substantive contents of a crime defined in art. 115 (2) of the P.C.[32] Case law emphasizes that in evaluating the social harm of an act courts must not consider circumstances that take place after the act.[33]

As for a long time has been assumed in practice, widespread occurrence of offenses of a given type cannot influence the evaluation of the degree of social harm of an act either. Widespread occurrence of crimes, if it is generally recognized, can be considered by a court in its determination of a penalty as a part of general prevention.[34] The so-called general prevention is irrelevant to evaluation of the degree of social harm of an act because it is not included in the list of circumstances enumerated in art. 115 (2) of the P.C.[35]

Recidivism is certainly an aggravating factor and has a significant impact on the penalty, but in its nature it pertains to the perpetrator and not

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[30] Decision of the Supreme Court of 26 September 2006, file no. WK 12/06, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2006, no. 1, item 1808.

[31] Verdict of the Supreme Court of 2 April 2004, file no. IV KK 25/04, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2004, no. 1, item 668.

[32] Verdict of the Supreme Court of 25 September 2007, file no. WA 34/07, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, item 2047.

[33] Verdict of the Supreme Court of 19 October 2005, file no. IV KK 234/05, *LEX*, no. 164274.

[34] Verdict of the Appeals Court in Kraków of 14 May 2008, file no. II AKa 50/08, *Krakowskie Zeszyty Sądowe*, 2008, no. 7–8, p. 64; verdict of the Appeals Court in Katowice of 30 November 2006, file no. II AKa 289/06, *Krakowskie Zeszyty Sądowe*, 2007, no. 5, p. 60.

[35] Decision of the Supreme Court of 12 April 2007, file no. WZ 10/07, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, item 818.

to the offense and has no impact on the evaluation of the degree of social harm of the offense committed by the perpetrator.[36]

Of note is the fact that M. Filar was ahead of the case law pertaining to this problem; in 1997 he stated that art. 115 (2) of the P.C. clearly and with clear intention limits the scope of the term 'social harm' to only those circumstances that are strictly related to the features of the act, thus excluding circumstances that are outside of the features of the offense and that pertain either to the perpetrator's characteristics "outside of the act" (e.g. his previous life, his clean criminal records, his repute, etc.), or to the general situation (the widespread occurrence of the offense).[37]

III. Evaluation of various facts with regard to the degree of social harm of an act

In their adjudication, the Supreme Court and the appeals courts have analyzed, on many occasions, specific facts and considered them with regard to the degree of social harm of an act. For instance, in the case of a robbery, it was observed that, due to the dual object of protection (i.e. property on the one hand and the inviolability, freedom, health, and life of a person on the other), the degree of social harm depends, on the objective side, not on the value of the item that was robbed (which is often accidental and not related to the intent of the perpetrator who simply takes whatever the victim has on him), but rather the extent of the threat to the health or even the life of the victim. The further perpetrators of robbery go beyond the threshold of violence against the victim, which *in concreto* is required to incapacitate the victim, the higher the degree of social harm must be considered in the criminal-law evaluation of the offense.[38] The offense of robbery has a qualified form which involves the use of a dangerous tool or a firearm. Although the use of a "firearm" or "another similarly dangerous object" meets the features of a crime committed in accordance with art. 280 (2) of the P.C., the degree of social harm of such an act involving the use of, for example, gas pistols, is quite different than that of an act involving the use of, for example, a knife or a metal rod. There is a difference between the

[36] Verdict of the Appeals Court in Katowice of 22 January 2004, file no. II AKa 497/03, *Krakowskie Zeszyty Sądowe*, 2004, no. 9, p. 69.

[37] M. Filar, "Podstawy odpowiedzialności karnej w nowym kodeksie karnym" [Grounds for criminal responsibility in the new penal code], *Palestra*, 1997, no. 11–12, p. 7.

[38] Verdict of the Appeals Court in Lublin of 14 September 2009, file no. II AKa 124/09, *LEX*, no. 550505.

act of a perpetrator who intends to commit robbery, even with a firearm, if the victim is an accidental person who, as the perpetrator expects, may carry assets and items worth, at best, several hundred zlotys, and the act of a perpetrator who plans to rob a convoy carrying large sums of money worth hundreds or even tens of thousands of zlotys.[39]

Of note is the rightful opinion, which is universal in case law, that by committing an act that violates legal values protected by several laws, perpetrators commit offenses with a higher degree of social harm than if their acts violated only one provision of criminal law.[40]

In one of its verdicts, the Supreme Court has referred to the social harm of an act defined in art. 263 of the P.C., i.e. holding, manufacturing, and trading in firearms and ammunition. It decided that the quantity and type of ammunition held by the perpetrator without the required permit is a circumstance that should influence the evaluation of the degree of social harm of the act. The crime defined in art. 263 of the P.C. is aimed against the security of the public and of individuals, and the threat to the security is proportional to the quantity of the ammunition produced, held, or made available to unauthorized persons by a person who does not hold the required authorization.[41]

Of note is also the verdict of the Supreme Court in a case involving a criminal offense under art. 158 of the P.C. which penalizes so-called participation in a fight. The Supreme Court stated that it must not be assumed that evaluation of the social harm of an act allegedly committed by the defendant depends on the victim's consent to participate in the fight; thus, by expressing his "intent to participate in a fist fight," the victim consented to specific consequences in the form of bodily injuries. This introduction by the Court, in evaluation of the degree of social harm of an act, of a kind of exclusion of illegality of the act consisting in a "fist fight" is quite incomprehensible.[42]

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[39] Verdict of the Appeals Court in Katowice of 8 October 2009, file no. II AKa 97/09, *LEX*, no. 553871.

[40] Verdict of the Supreme Court of 26 April 2007, file no. WA 18/07, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, item 988; verdict of the Appeals Court in Kraków of 10 May 2007, file no. II AKa 79/07, *Krakowskie Zeszyty Sądowe*, 2007, no. 6, p. 40.

[41] Verdict of the Supreme Court of 31 May 2001, file no. WA 16/01, *LEX*, no. 553878.

[42] Verdict of the Supreme Court of 11 March 2003, file no. WA III KKN 17/01, *LEX*, no. 77443.

IV. Incidents of lower importance

A rather extensive number of court verdicts have been announced since the introduction of the 1997 Penal Code pertaining to the so-called "incidents of lower importance." The Supreme Court is of the opinion that the basic criterion for evaluating incidents of lower importance is the degree of social harm of the associated acts. In its analysis, the courts must take into account the circumstances enumerated in art. 115 (2) of the P.C., namely the type and nature of the violated value, the scope of the committed or potential damage, the methods and circumstances of the act, the importance of the duties violated by the perpetrator, the degree of guilt, the motivation, and the objective of his or her actions.[43] What determines whether an act is an incident of lower importance is the objective and subjective features of the act, with particular focus on those elements that are characteristic of the specific type of criminal offenses. On the objective side, of particular importance are the behavior and the actions of the perpetrator, the means used, the nature and scope of the caused or potential damage to a legally protected value, and the time, place, and other circumstances of the act. The circumstances that are particularly important on the subjective side are the degree of guilt, the motivation of the perpetrator, and the objective of his or her actions.[44]

Basically right is also the opinion, expressed in case law, that an act of hooliganism must not be regarded as an accident of lower importance.[45] This opinion has been expressed on the background of the crime of robbery under art. 280 (1) of the P.C. which, depending on its specific circumstances, may be considered an act of hooliganism.

However, it appears that since the degree of social harm of an act is the basic criterion for the evaluation of whether an act can be considered an incident of lower importance, then the hooligan nature of an act does not by itself prevent the act from being qualified as an incident of lower importance.

Similarly, the value of the object of the criminal offense is only one of the elements that influence the evaluation of the degree of social harm of an act and the fact that it is low does not by itself determine the low social

[43] Verdict of the Supreme Court of 14 January 2004, file no. V KK 121/0, *LEX*, no. 83755.

[44] Decision of the Supreme Court of 14 January 2004, file no. V KK 106/11, *LEX*, no. 1044068.

[45] Verdict of the Appeals Court ine Wrocław of 29 September 2010, file no. II AKa 270/10, *LEX*, no. 621279.

harm of an act and does not translate into automatic qualification of the act as an incident of lower importance. What determines whether an act is an incident of lower importance is the degree of social harm of the act; the criteria for its evaluation are precisely defined in art. 115 (2) of the P.C. The low value of the object of the offense does not *a priori* lead to the assumption that the offense is an incident of lower importance.[46]

The allegation of violation of substantive law related to incidents of lower importance can be considered as reasonable if the plaintiff demonstrates that in considering the case the court took into account circumstances other than those enumerated in art. 115 (2) of the P.C. or ignored some of those circumstances.[47]

As a conclusion, it should be stated that the qualification of specific acts as incidents of lower importance is not an easy task for courts. Given the fact that it is not clear when acts should be considered as incidents of lower importance, the continued presence of this institution in the Penal Code is debatable and deserves to be discussed.[48]

Conclusion

The social harm of acts has been subject to judicial interpretation in many cases. As far as the list of circumstances that determine the degree of social harm of an act is concerned, in their verdicts courts have been unanimous and considered the list of circumstances given in art. 115 (2) of the P.C. as a closed one, and found that it must not be extended or reduced by way of judicial interpretation.

The following circumstances are immaterial to the evaluation of the degree of social harm of an act: the perpetrator's clean criminal record, good repute, stable lifestyle, personal conditions and characteristics (age, health, family and property situation, education, vocation, successful career), personal characteristics of the victim, the attitude toward the allegations demonstrated by the perpetrator during the judicial process, the perpetrator's admission of guilt, his or her voluntary remedy of the damage

[46] Verdict of the Appeals Court in Katowice of 15 December 2005, file no. II AKa 375/05, *LEX*, no. 183821.

[47] Decision of the Supreme Court of 10 December 2008, file no. II KK 235/08, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2008, no. 1, item 2540.

[48] K. Banasik, "Wypadek mniejszej wagi w prawie karnym" [Incidents of lower importance in penal law], *Prokuratura i Prawo*, 2008, no. 3, pp. 48–67.

caused by the offense, his or her expression of remorse, his or her reconciliation with the victim, the widespread nature of offenses of this type, and the perpetrator's recidivism. Case law emphasizes that in evaluating the social harm of an act courts must not consider circumstances that take place both before and after the act. The only circumstances that may be considered are those enumerated in art. 115 (2) of the P.C. that were present on the date of the act.

The fairly large number of court verdicts pertaining to the substantive characteristics of offenses, i.e. the social harm of acts, clearly demonstrates that this is not an easy problem, not only for theoreticians of law but also for bodies responsible for its implementation.

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PREREQUISITES FOR EARLY CONDITIONAL RELEASE IN THE INTERPRETATIONS OF REGIONAL AND APPEALS COURTS

Conditional release, as emphasized in the Recommendation concerning conditional release,[1] is one of "the most effective and constructive ways to prevent recidivism and to promote return to a life in the society as a part of planned, supported, and supervised reintegration of prisoners with the society."

This institution of conditional release provides an opportunity for the release, earlier than provided for in the court sentence, of a convict from a prison, which is particularly important due to the recognized negative aspects of a prison sentence. Of course early conditional release is possible on the condition that the prognoses regarding the behavior of the convict after his or her release from the penal institution are positive. According to art. 77 (1) of the Penal Code (PC), "a person penalized with a prison sentence may be conditionally released by the court from the institution where he or she is to serve the rest of his or her sentence only when the person's attitude, characteristics, and personal conditions, the circumstances of the offense, and the behavior after its perpetration and during the sentence justify the belief that the convict will abide by the law after the release and, in particular, will not perpetrate a crime again." The list of prerequisites on which the formulated prognosis should be based is a definite one. Thus, conclusions regarding a positive prognosis may be based solely on the circumstances enumerated in art. 77 (1) of the PC.[2]

[1] Recommendation Rec (2003) 22 of the Committee of Ministers for member states on conditional release, adopted by the Committee of Ministers on 24 September 2003, during the 853rd meeting of deputy ministers. *Przegląd Więziennictwa Polskiego 2011*, no. 72–73, pp. 291–301.

[2] J. Lachowski, *Warunkowe zwolnienie z reszty kary pozbawienia wolności* [Early conditional release from prison], Warsaw 2010, p. 253.

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One must also mention the formal prerequisite, namely the requirement that the convict serve the part of the prison sentence that is provided for in the relevant statute or defined in the court sentence. According to art. 77 of the PC, a convict may be conditionally released once he or she has served at least half of the sentence. Nevertheless, the legislator has provided for an exception to the abovementioned rule. In the case of repeated offenders, the formal prerequisites are more stringent; they may be granted conditional release after serving 2/3 of the sentence (convicts sentenced under art. 64 (1) of the PC) or 3/4 of the sentence (convicts sentenced under art. 64 (2) of the PC). Convicts serving a 25-year prison sentence may be conditionally released only after they have served 15 years, while convicts serving life sentences – after they have served 25 years. Of note is the fact that the legislator has not prevented any group of convicts from being granted conditional early release. Another notable fact is that the court pronouncing the sentence may, in particularly justified cases, impose more stringent limitations on the granting of conditional release, compared to those provided for in art. 78 of the PC.

The filing of a petition for early release by the entitled person, namely, according to art. 161 of the Executive Penal Code (EPC), the convict, his or her attorney, the director of the penal institution, or the probation officer, results in the duty of the penitentiary court[3] – of course if the convict has served the required part of the sentence – to evaluate the prerequisites enumerated in art. 77 of the PC as to whether they justify the assumption that after the release the convict will abide by the law and, in particular, will not commit any crimes again.

An analysis of the decisions made by appeals courts considering complaints against decisions of regional courts refusing to grant conditional release raises doubts as to proper interpretation of the prerequisites for conditional release. Due to the framework of this paper, it is difficult to analyze all the available decisions of appeals courts[4] and, consequently, only those where the court's interpretation of art. 77 of the PC raises significant reservations are discussed here.

The first item to be discussed is the interpretation of the phrase "only when" used in art. 77 (1) of the PC. Some appeals courts[5] considering

[3] Penitentiary courts are divisions of regional courts.

[4] The decisions mentioned in the paper can be found at: http://lex.online.wolterskluwer.pl.

[5] See: decision of the Appeals Court in Łódź of 23 March 1999, II AKz 114/99; decision of the Appeals Court in Kraków of 21 June 2000, II AKz 217/00; decision of the

complaints against refusals to grant conditional release assume that the rule is that the convict must serve the entire penalty, i.e. the entire sentence that has been pronounced, and in a continuous manner. As the Appeals Court in Łódź[6] emphasized, the legislator's intent was to make early conditional release a nearly exceptional institution; most certainly, the legislator did not intend to allow for a liberal use of the aforementioned law. This conclusion can be drawn for example by comparing the contents of the previous and current law; the present law enables the court to grant the privilege in question "only when...." As to this interpretation, it must be noted that the use of conditional release cannot be judged as liberal or restrictive. The policy regarding the use of conditional release should be rational.[7] No provision in the Penal Code or the Executive Penal Code mentions that conditional release is an exceptional institution. The two codes do not provide any substantiation for the interpretation that the convict must have served the entire sentence. As S. Lelental was right in observing,[8] such interpretation is not possible under art. 77 (2) of the PC "which enables only imposing more stringent limitations on the granting of conditional release and only in justified cases." The phrase "only when" indicates that conditional release should depend on a positive prognosis formulated on the basis of all of the prerequisites enumerated in art. 77 (1) of the PC.[9]

As to the prerequisites for the prognosis, an analysis of the decisions of the appeals courts substantiates the conclusion that penitentiary courts, in formulating prognoses regarding the convicts' behavior after their release from the penitentiary institution, often go beyond the list of prerequisites of

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Appeals Court in Gdańsk of 22 August 2000, II AKz 630/00. Also see: decision of the Appeals Court in Kraków of 27 June 2000, II Akz 214/2000 – referred to in S. Lelental, "Warunkowe przedterminowe zwolnienie w orzecznictwie Sądu Najwyższego i sądów apelacyjnych w latach 2000 (II półrocze) – 2002" [Early conditional release in verdicts of the Supreme Courts and appeals courts in the years 2000 (2nd half) – 2002], *Przegląd Więziennictwa Polskiego 2003*, no. 40–41, pp. 193–194.

[6] Decision of the Appeals Court in Łódź of 23 March 1999, I AKz 114/99.

[7] See: G. Wiciński, "Glosa do postanowienia s. apel. z dnia 23 marca 1999 r. II AKZ 114/99" [Note to the decision of the Appeals Court of 23 March 1999, II AKZ 114/99], in: *System Informacji Prawnej Lex (Lex Omega)* 09/2012. Also see: J. Lachowski, op. cit, p. 249.

[8] S. Lelental, op. cit., p. 194.

[9] See: E. Bieńkowska, in: G. Rejman, ed., *Kodeks karny Część ogólna, Komentarz* [Penal Code, General Part, a commentary], Warsaw 1999, p. 1174; Z. Świda, "Charakter i stosowanie instytucji warunkowego przedterminowego zwolnienia z odbycia reszty kary pozbawienia wolności" [Nature and use of early conditional release], in: K. Krajewski, ed. *Nauki penalne wobec problemów współczesnej przestępczości Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle* [Penal sciences in response to the problem of contemporary crime. A jubilee book published on the occasion of the 70th birthday of Professor Andrzej Gaberle], Warsaw 2007, p. 376.

the prognosis provided for in art. 77 (1) of the PC. One of the prerequisites referred to by penitentiary courts[10] in their decisions to refuse to grant conditional release, which was not enumerated in the aforementioned article, is the nature of the committed act.

Another prerequisite referred to by penitentiary courts[11] that is not enumerated by the legislator, either, is the long period until the end of the penalty or the length of the period that has been served by the convict. An example is the decision of the Regional Court in R. which, as the basis for refusing to grant early conditional release, used the facts that the convict was serving a long prison sentence among others for the offense of armed robbery and the end of the sentence was fairly distant. In the appeal proceedings, the Appeals Court in Lublin[12] was right in observing that, since the convict has served over half of his sentence and is formally entitled to apply for a conditional release, the length of the prison sentence and the type of offense he has committed should be of no importance in the consideration of his conditional release. After all, such circumstances were not enumerated in art. 77 (1) of the PC. Moreover, the Appeals Court determined that the Regional Court, in evaluating the convict's behavior, found it to be appropriate but did not take into account a number of facts that were important to the formulation of the prognosis, namely the fact that the convict had earned several dozen rewards and only one disciplinary penalty; the fact that the convict served the penalty in a system of programmed influence and that he fulfilled the obligations defined in the individual influence program; the fact that he worked outside of the penal institution, commuted without an escort, and properly performed his duties as an employee; and the fact that the convict had been granted many temporary leaves from the penal institution and returned on time. The fact that the Regional Court overlooked these facts indicates that, in its formulation of the criminological prognosis, the court did not analyze those circumstances that, in the opinion of the legislator, were important to the decision regarding conditional release. The court did so in spite of its duty to consider all the circumstances enumerated

[10] See: decision of the Appeals Court in Lublin of 8 August 2007, II Akzw 527/07; decision of the Appeals Court in Lublin of 28 December 2005, II Akzw 880/05; decision of the Appeals Court in Lublin of 7 November 2001, II Akzw 563/01; decision of the Appeals Court in Lublin of 15 April 2009, II AKzw 285/09.

[11] See: decision of the Appeals Court in Lublin of 28 December 2005, II Akzw 880/05; decision of the Appeals Court in Lublin of 7 November 2001, II Akzw 563/01; decision of the Appeals Court in Wrocław of 21 October 2004, II AKzw 709/04; decision of the Appeals Court in Wrocław of 13 October 2004, IIA Kzw 685/04; decision of the Appeals Court in Lublin of 26 October 2005, II AKzw 622/05.

[12] decision of the Appeals Court in Lublin of 27 October 2010, II AKzw 846/10.

in art. 77 (1) of the PC and to indicate which of them prevented it from formulating a positive prognosis and why it was so. In the context of going beyond the statutory list of prerequisites for the prognosis, of note is the decision of the Regional Court in R. which refused to grant conditional release to a convict. In the substantiation of its decision the Court did indicate that the behavior of the convict in the penitentiary institution was correct and that he enjoyed good repute before his incarceration, but a positive socio-criminological prognosis could not be formulated because the convict claimed, despite his conviction, that he had not committed the offense, and the circumstances of the offense were extremely aggravating. The Appeals Court in Lublin[13] changed the decision of the Regional Court and did grant a conditional release to the convict. The Court was right in assuming that "the convict's subjective opinion as to whether he had committed the crime for which he was sentenced must not be used as a prerequisite that can by itself prevent granting conditional release to the convict." The findings of the Appeals Court clearly demonstrated that the convict's behavior prior to his incarceration and in prison allowed for a substantiated opinion that he would abide by the law and would not commit a crime after his release from the penitentiary institution.

Another example is the decision of the Regional Court in R. where the court refused to grant a conditional release to a convict. The Appeals Court in Lublin,[14] which considered the complaint against this decision, found that the even though the Regional Court indicated circumstances that confirmed positive opinions about the convict, it substantiated its refusal to grant conditional release with the long period of time until the end of the sentence and the convict's lack of concrete plans for the future. The Appeals Court in Lublin remanded the case and alleged that the Regional Court, in its formulation of the criminological prognosis, did not take into account all the statutory conditions for the prognosis. Moreover, it was right in observing that a prognosis must not be formulated based on circumstances that, even though they do pertain to the convict, are not included in the statutory list of prerequisites for the prognosis. The long period of time until the end of the penalty is certainly one of the circumstances.

Another such circumstance is the type of the crime committed. An example is the decision of the Regional Court in R.[15] which substantiated its refusal to grant conditional release with the fact that the convict was serving

[13] decision of the Appeals Court in Lublin of 1 March 2006, II AKzw 124/06.

[14] Decision of the Appeals Court in Lublin of 26 October 2005, II AKzw 622/05.

[15] Decision of the Appeals Court in Lublin of 27 October 2010, II Akzw 846/10. Also

a long prison sentence for an armed robbery. As the Appeals Court in Lublin found when considering the complaint against this decision, the Regional Court overlooked a number of facts that were of significant importance in the light of art. 77 (1) of the PC, such as the fact that the convict had received several rewards, served the sentence in a programmed influence system and performed the tasks defined in the individual program, was employed outside of the penitentiary institution and commuted without an escort, and was granted leave from the penitentiary institution and breaks in the sentence. As the Appeals Court found, the Regional Court did not conduct a thorough analysis of the circumstances that were important to the formulation of the prognosis. Instead, the Court focused on circumstances that are not enumerated in art. 77 (1) of the PC.

Very interesting are the arguments used by the public prosecutor in his complaint regarding the decision of the Regional Court in Zamość regarding the granting of early conditional release on the basis of a positive criminological prognosis. The public prosecutor alleged that the Court made erroneous factual findings which were used to substantiate its decision and influenced its content. In the public prosecutor's opinion, the Court was wrong to assume that the socio-criminological prognosis for the convict was positive in a situation where the length of the part of the sentence that has been served by the convict and the evaluation of its adequacy and proportionality given the circumstances of the offense committed led to a contrary conclusion. The Appeals Court in Lublin,[16] in its consideration of the public prosecutor's complaint, found that the positive criminological prognosis was substantiated by the following circumstances: the convict's behavior in the penitentiary institution, the statutory rewards and the lack of disciplinary penalties, the fact that the convict served the sentence in a programmed influence system and performed tasks defined in the individual influence program, the fact that the convict was employed outside of the penitentiary institution and commuted without an escort, the fact that there were no negative observations concerning his performance of work, the fact that he was granted several leaves, his critical attitude toward the crime he committed, the lack of addictions that would hinder his adaptation to life outside of the penitentiary institution, his continued contacts with his family members

see: decision of the Appeals Court in Kraków of 8 April 2003, II Akz 125/03, discussed in S. Lelental, "Warunkowe przedterminowe zwolnienie w orzecznictwie Sądu Najwyższego i sądów apelacyjnych w latach 2003–2004" [Early conditional release in verdicts of the Supreme Courts and appeals courts in the years 2003–2004], *Przegląd Więziennictwa Polskiego* 2005, no. 49, pp. 272–273.

[16] Decision of the Appeals Court in Lublin of 24 April 2010, II AKzw 291/10.

who were interested in his situation and were supportive, the fact that he had a permanent residence, and the fact that he continued his education by taking weekend courses. Given the above, the Appeals Court was right in finding that the prerequisites defined in art. 77 (1) of the PC had been fulfilled and upheld the decision of the Regional Court. Of note is the fact that the public prosecutor's argument regarding the length of the part of the sentence that has been served by the convict is not listed as one of the prerequisites of the prognosis.

The next important issue is consideration, in the evaluation of the premises enumerated in art. 77 (1) of the PC, of the directives regarding the length of the penalty enumerated in art. 53 of the PC. In his complaint against the decision of the Regional Court in J. G. to grant conditional release, the public prosecutor alleged that "when deciding on an early conditional release, it is necessary to take into account the prerequisites considered by the Court making the essential decision, namely the intent to prevent depreciation of its verdict and a transfer of the decision on the length of the prison sentence to the enforcement procedure stage." The Appeals Court in Wrocław[17] did not share this opinion. The Appeals Court upheld the decision of the Regional Court and rightly indicated that the degree of social harm of the act, the satisfaction of the social sense of justice, and the need to form the legal awareness of the public are not elements that can be used as a basis for formulation of the prognosis regarding the convict's behavior after his release from the penitentiary institution. Moreover, the Appeals court noted that such prerequisites do influence the length of the prison sentence, but the relevant decision must not be made by the penitentiary court but by the sentencing court which, in the light of art. 77 (2) of the PC, may impose more stringent limitations on the use of conditional release.

Notably, appeals courts are not unanimous on this issue. An example is the decision of the Appeals Court in Szczecin[18] which shared the opinion of the Regional Court in K., expressed in its decision to refuse to grant conditional release, that fulfilling the prerequisites enumerated in art. 77 (1) of the PC must not automatically lead to the granting of conditional release, as the directives of the measure of the penalty enumerated in art. 53 of the PC oppose it. In the opinion of the Appeals Court, the prerequisites used by the court considering the essence of the case must be taken into

[17] Decision of the Appeals Court in Wrocław of 24 January 2007, II Akzw 76/07.

[18] Decision of the Appeals Court in Szczecin of 24 October 2010, II AKzw 819/10.

account so that the valid sentence is not depreciated and that the decision regarding the length of the penalty is not transferred to the enforcement procedure. Evidently, the Appeals Court used the same arguments as the public prosecutor in the case discussed above.

In the context of this decision, it must be noted that art. 77 of the PC does not require determination of whether the objectives of the penalty have been achieved, as art. 90 (1) of the 1969 Penal Code did, which was universally criticized at that time.[19]

Another important matter that must be discussed here is the interpretation by courts of one of the prerequisites of the criminological prognosis, namely the circumstances of the offense. As the decision of the Appeals Court in Wrocław[20] indicates, the Regional Court in O. substantiated its refusal to grant conditional release by stating that "the circumstance of the offense under art. 148 (1) of the PC that prevents formulation of a positive diagnosis is the fact that the consequence of the offense was the death of the victim." The Appeals Court, in considering the complaint of the convict against the decision of the Regional Court in O. pointed out that "the Regional Court failed to see, first, that if it was not for the death of the victim as a consequence of the offense, the convict would not be the perpetrator of homicide and, secondly, this interpretation of the circumstances of the offense, which leads to a negative prognosis, would automatically prevent granting conditional release to perpetrators of such offenses (...)."

Courts often are selective in choosing the prerequisites for the prognosis and in their decisions they focus on only one element of the prognosis, while disregarding the others. An example of this is the decision of the Regional Court in Kraków where the court refused to grant a conditional release to a convict. The Court, in considering an application for a conditional release, found that the behavior of the convict in the penitentiary institution was proper, but refused to grant the conditional release due to its concern about her observance of law in the future due to the circumstances of the offenses (art. 282 and art. 278 (1) of the PC) and the convict's failure to make any effort to mend the damage done. In the Court's opinion, this demonstrated the significant demoralization of the convict. The Appeals

[19] More information can be found in: S. Lelental, "Warunkowe przedterminowe zwolnienie" [Early conditional release], in: M. Melezini, ed., *System Prawa Karnego T. 6, Kary i środki karne Poddanie sprawcy próbie* [Penal law system, vol. 6. Penalties and penal measures. Submission of offenders to tests], Warsaw 2010, p. 1079. Also see: J. Lachowski, op. cit., pp. 107–108.

[20] Decision of the Appeals Court in Wrocław of 12 January 2005, II Akzw 1123/04.

Court in Kraków,[21] which considered the complaint against that decision, was right in observing that the Regional Court unreasonably focused on the circumstances of the offense and disregarded other circumstances that were important to the formulation of the prognosis regarding the convict's behavior after release from the penitentiary institution. Those other circumstances, as the Appeals Court found, were a positive opinion of the convict in her community, 28 statutory rewards, multiple leaves and timely returns to the penitentiary institution, proper implementation of an individual influence program, performance of work and public works, a critical attitude toward the committed offense, strong bonds with the family, and efforts to pay the process costs awarded by the court to the auxiliary prosecutor. The Appeals Court was also right in observing that the circumstances of the offense are one of many elements, and not the sole element, that should be used as a basis for the formulation of the prognosis regarding the convict's behavior after her release.

Another example is the opinion of the Regional Court in L. The Court refused to grant conditional release and substantiated its decision with the unstable behavior of the convict before his incarceration in the penitentiary institution and his reprehensible behavior in the initial period of the sentence. The Appeals Court in Lublin,[22] which considered the convict's complaint against the decision of the Regional Court, found that, according to the opinion provided by the penitentiary institution, the convict's behavior was initially objectionable, as demonstrated by his disciplinary penalties. However, with time, his behavior improved, as demonstrated by the statutory rewards he earned, the permits to take leave he was granted, his completion of a trade training course, his diligent performance of public works at the penitentiary institution, and his contact with the probation officer during his leave granted under art. 165 (2) of the Penal Code. Thus, the Regional Court did not conduct a comprehensive analysis of all the circumstances enumerated in art. 77 (1) of the PC. Notably, when formulating a prognosis, the court must take into account the attitude and behavior of the convict in the entire period spent in the penitentiary institution. Only then can the court determine if the changes in the convict's attitudes are permanent and will cause the convict to abide by the law in the future.

The aforementioned decisions of appeals courts demonstrate that both regional courts considering applications for early conditional release and appeals courts considering complaints against decisions regarding conditional

[21] Decision of the Appeals Court in Kraków of 13 December 2001, II AKz 484/01.

[22] Decision of the Appeals Court in Lublin of 27 December 2007, II AKZ 1015/07.

releases do not always interpret the essential prerequisites of conditional release in conformance to the legislator's intent. Their assessment of the prognostic value of the prerequisites enumerated in art. 77 of the PC also raises some objections.

The fact that decisions to grant early conditional release are facultative does not make them arbitrary. According to art. 77 (1) of the PC, the only prerequisite of a conditional release is a positive prognosis that substantiates the belief that the convict will abide by the law and, in particular, will not commit crimes again after his or her release. The prognosis should be formulated on the basis of the prerequisites enumerated in the aforementioned article. These include the convict's attitude, his or her personal characteristics and conditions, the circumstances of the offense, and the convict's behavior after the offense and during the sentence. The list of prerequisites of the prognosis includes circumstances that, under the Penal Code (art. 53 (2)) are taken into account by the sentencing court, namely the convict's personal characteristics and conditions, the circumstances of the offense, and the behavior of the convict after the offense was perpetrated. This is not accidental, as the same circumstances can play different roles in different institutions of the penal law. In the case of the institution in question, the aforementioned circumstances are considered from a different point of view. They can be important to the evaluation of changes in the convict's attitudes and characteristics, given the change of the attitude as a result of the educational influence during his or her time in the penal institution.[23] Thus, in formulating criminological prognoses, courts must consider all the circumstances enumerated in art. 77 (1) of the PC; of course, not all of them will be equally important to the formulation of the prognosis. Importantly, courts must not consider other circumstances. The courts' decisions discussed above and research on this problem[24] indicate that, in their substantiations of refusal to grant early conditional release, courts make references to the length of time until the end of the sentence, the inadequacy of the part of the sentence served given the total length of the sentence, the nature and type of the offense, and the fact that the convict has not admitted to committing the offense.

The differences in interpretation are due, to an extent, to the misunderstanding of the essence of early conditional release. Courts consider condi-

[23] See: A. Zoll, in: A. Zoll, ed., *Kodeks karny część ogólna komentarz T I* [Penal Code. General part. Vol. I], 3rd issue, Warsaw 2007, pp. 884–885. J. Lachowski, op. cit., p. 254.

[24] See: P. Wiktorska, *Czekając na wokandę Warunkowe przedterminowe zwolnienie młodocianych* [Waiting for the verdict. Early conditional release of minors], Warsaw 2010, p. 285.

tional release as a reduction of the sentence or a reward, which is not what it is. Conditional release is a test to the perpetrator which involves, if required, supervision and certain duties. When formulating the prognosis, the court must not overlook the fact that in the case of conditional release the process of rehabilitation can take place outside of penitentiary institutions. The assumption, which some courts make, that the process of rehabilitation must be completed makes conditional release pointless.

Basing refusal to grant conditional release on circumstances that are not enumerated in art. 77 (1) of the PC may have a negative impact on the effects of prison sentences. It is during their service of the sentence in penitentiary institutions, according to art. 67 (1) of the PC, that convicts must be encouraged to participate in formation of socially desirable attitudes, to include the will to abide by the law. How can convicts be persuaded to abide by the law if courts, in matters that are of such great importance to the convicts, breach substantive law? A refusal to grant conditional release solely based on arguments pertaining to general prevention is not permissible and, according to the doctrine,[25] violates substantive law.

Grażyna B. Szczygieł, Associate Professor, Department of Criminal Law, University of Bialystok

[25] A. Marek, *Kodeks karny Komentarz* [Penal Code. A commentary], Warsaw 2007, p. 198.

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INTERPRETATION OF EXTREMISM AND ASSOCIATED CRIMES

After the terrorist attacks of 11 September 2011, many countries in the world implemented laws pertaining to terrorism and broadly-defined terrorist crimes. Currently, these laws are only being refined and made more detailed. However, the associated analysis of the terrorism, its mechanisms and background has led to the exposure of another phenomenon that constitutes a threat to the security of many states, namely extremism. So far, different countries have assessed extremisms in different ways and have adopted different solutions intended to eliminate/restrict this problem. The present paper describes the legal approach to the problem of extremism that has been adopted in Russia. Thus, the subject of this paper is extremism-directed crimes, which were criminalized in Russia in 2002. From a penal-law point of view, such crimes are an interesting category of behavior.

Further parts of the paper will first present the definition of extremism and then describe the legal interpretation of extremism provided for in Russian law and the penal responsibility for acts considered as acts of extremism. The analysis will be based on the Act of 2002 on Countering Extremist Activities,[1] the 1996 Penal Code of the Russian Federation,[2] and relevant criminal-law literature.

[1] Федеральный Закон Российской Федерации от 25 июля 2002 года, Но 114-ФЗ "О противодействии экстремистской деятельности", Собрание законодательства Российской Федерации 2002, NO. 30, p. 3031.

[2] Уголовный кодекс Российской Федерации от 13.06.1996 No. 63-ФЗ (принят ГД ФС РФ 24.05.1996), http://www.consultant.ru/popular/ukrf/.

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1. The definition of extremist activity (extremism)

The term "extremism" was first defined in Russian law in art. 1 (1) of the Act of 2002 on Countering Extremist Activities. According to this Act, "extremist activity (extremism) shall be defined as:

- forcible change of the foundations of the constitutional system and violation of the integrity of the Russian Federation;
- public justification of terrorism and other terrorist activities;
- excitation of social, racial, national or religious strife;
- propaganda of exclusiveness, superiority or deficiency of individuals on the basis of their social, racial, national, religious or linguistic identity or their attitude to religion;
- violation of rights, freedoms, and legal interests of humans and citizens depending on their social, racial, national, religious, or linguistic identity or their attitude to religion;
- preventing citizens from exercising their electoral rights and the right to participate in a referendum or violating the secrecy of vote, with the use of violence or a threat to use violence;
- preventing legal activity of state bodies, local authorities, electoral committees, religious associations, or other organizations, with the use of violence or a threat to use violence;
- committing crimes with motives enumerated in art. 63 (1) (e) of the Penal Code of the Russian Federation (political, ideological, racial, national, or religious hatred or hatred toward any social group);
- propaganda and public show of Nazi attributes or symbols similar to Nazi attributes;
- public calls for the said activity or mass distribution of extremist materials, as well as their production and storage for the purpose of mass propagation;
- false accusation, made in public, of a person holding a state office in the Russian Federation or a state office of an entity of the Russian Federation of committing, while in office, acts enumerated in the present Act as crimes;
- organizing and preparing the said behavior and encouraging its commitment;
- financing of the said behavior or supporting its organization, to include by providing access to educational facilities, printing and publishing facilities, material and technical base, telephone, fax and other communications, and information services."

As the above indicates, the definition used by the legislator is rather broad. Its complex nature is due to the fact that it mentions such important elements as motives (hatred: religious, racial, etc.), means of influence (violence or its threat), characteristics of specific offences (e.g. several crimes against the system of government and the crime of terrorism).[3] This broad and imprecise definition of extremism makes it difficult to identify the essence of this phenomenon. Therefore, what should be identified is the way that extremism is interpreted in Russia.

According to S. A. Lantzov, extremism should be defined as the use of extreme means to achieve certain objectives. One of the means is calls for violence and for terrorist acts. The objective of extremism is to destabilize social and state structures.[4] On the other hand, according to I. V. Katarghina, extremism can be defined as "violent acts or threats of violence by individuals or social groups that result from any destructive religious or secular propaganda and are intended to achieve objectives in ways that are not socially acceptable by causing damage or other consequences when solving local problems by destabilizing the current situation and the functioning of state and local authorities."[5] According to A. N. Smertin, extremism should be defined as achieving political objectives by various means, to include by use of violence. It is a "political-legal phenomenon that is characterized by different scopes and directions, depending on its objectives."[6]

There are many more definitions of extremism. However, the above definitions suffice to draw conclusions regarding several common characteristics of terrorism. The author who has presented a synthetic description of those characteristics is N. M. Dyachkova.[7] The elements of definitions of extremism that are used the most often are "a unique way of solving complex social problems," "a set of extreme methods of political struggle," "an activity causing damage to the foundations of the state's system of government or social relations," "violent illegal acts due to religious, racial, and social motives," "activity of individuals and legal persons that use violent

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[3] The complexity of this definition is shown by: А. И. Долгова, Экстремистская преступность, in: А. И. Долгова, ed., Криминология, Moscow 2010, p. 733.

[4] С. А Ланцов, Террор и террористы, St. Petersburg 2004, p. 163.

[5] И. В. Катаргина, Соотношение правовых дефиниции "экстремизм" и "терроризм" в современном российском законодательстве, Проблемы в российском законодательстве 2009, No. 1, p. 194.

[6] А. Н. Смертин, Экстремизм и терроризм: некоторые подходы к определению понятий, Вестник Санкт-Петербурского Университтета МВД России 2009, no. 1, p. 54.

[7] More information can be found in: Н. М. Дьячкова, Проблемы экртемизма на современном этапе, in: А. Г. Кубальник, ed., Актуальные проблемы современного уголовного права и криминологии, Stavropol 2010, p. 71.

methods to violate the fundamental constitutional principles that guarantee civil freedoms and liberties."

Other authors add such elements as "lack of tolerance for persons with other views, use in propaganda of ideology and religious slogans, domination of emotional influence on others, and creation of an image of a charismatic leader."[8]

Thus, in general, extremism is characterized by unique methods of influence (mostly violence or its threat), objectives (propagation of religious, national, and social hatred), and consequences (material and immaterial damage to the state and the society).

Also, many persons are of the opinion that extremism[9] is analogous to radicalism, terrorism, nihilism, and revolutionism. One can assume that many of the aforementioned characteristics of extremisms do make it similar to terrorism; these include threats to use violence, inciting strife between different nationalities, and forceful takeover of the government.[10] Consequently, Russia needs to elaborate and define more specific and detailed features of extremism. This is because the current definition of extremism mentions that "public justification of terrorism and other terrorist activities" constitute an important component of extremism. Thus, the definition of extremism is much broader than that of terrorism.

A refined definition of extremism is needed also due to the presence of its multiple manifestations,[11] which include various forms of extremism: political, nationalistic, religious, youth, ecological, anti-globalist, and moral. Some authors also distinguish organized criminal extremism.[12] Such divisions are due to the multiplicity of methods used by extremists. These include "use of physical force against persons (killing, injuring, limiting freedom), destruction of real property (fire, explosion), and mental influence on persons (threats, blackmail, incitation of panic)."[13] As one can see, these methods are similar to those employed by terrorists.

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[8] Г. И. Чечель, Некоторые особенности преступлений экстремистской направленности, in: А. Г. Кубальник, ed., Актуальные проблемы современного уголовного права и криминологии, Stavropol 2010, p. 224.

[9] E.g.: Д. В. Олшанский, Психология терроризма, www.//ezolib.ru/5445.html.

[10] Н. М. Дьячкова, op. cit., p. 69.

[11] Л. В. Баева, Экстремизм: природа и формы проявления, http://www.aspu.ru/images/File/ilil/Bayeva_extremizm.pdf.

[12] С. В. Иванцов, Экологический терроризм как новое проявление современной организованной преступности, "Черные дыры в российском законодательстве" 2008, no. 1, p. 180.

[13] В. В. Лунеев, Российский экстремизм: политика и реалии, Криминологический Журнал Байкальского Государственного Университета Экономики и Права 2009, no. 2, p. 30.

As V. V. Luneev[14] emphasizes, in Russia extremism is politicized and all the amendments to the 2002 Act on Countering Extremist Activities have contributed to it.

2. Responsibility for extremist activities in Russia

There is a reason why extremism was defined in Russian federal law. It was assumed that many elements of extremism have features of specific crimes. In the Russian Federation's Penal Code of 1996, extremism is regulated in the following provisions: art. 280 (public calls for extremist activities), art. 282 (incitement of hatred and degradation of human dignity), art. 282^1 (organization of extremist groups), and art. 282^2 (organization of activities of extremist groups). The aforementioned provisions are briefly characterized below.

Art. 280 of the Penal Code of the Russian Republic provides for penal responsibility for public calls for extremist activities. Such behavior carries the following penalties: a fine in the amount of up to 300,000 rubles or equal to wages or other income of the convict for a period of up to 2 years, forced labor for a period of up to 3 years, detention for a period of 4 to 6 months, or deprivation of liberty for up to 3 years, together with a prohibition to hold certain posts or to conduct certain activities for a period of up to 3 years. If the offense is perpetrated using mass media, it carries the penalty of forced labor for a period of up to 5 years together with an optional deprivation of the right to hold certain posts or conduct certain activities for a period of up to 3 years, or the penalty of deprivation of liberty for up to 5 years together with the deprivation of the right to hold certain posts or conduct certain activities for a period of up to 3 years.

This offense is regulated in chapter X entitled "Crimes against the foundations of the constitutional system of government and the security of the state." This indicates that the object of protection is very broadly-defined. It includes the constitutional system of government, security of the state, human freedoms, and the political system.

An important element of this offense is the definition of "extremist activity (extremism)" which is discussed earlier in the paper. The word "call" is defined as taking actions intended to influence one's decisions and will in order to effect a forceful takeover of the government and a change in the

[14] Ibid., p. 32.

system of government. This may be done verbally, in writing, or through the mass media.[15] It must be assumed that such calls have the nature of incitation.[16] Its "public" nature indicates that the activity is addressed to an unspecified group of people. Most often such calls take place during meetings, gatherings, demonstrations, etc.[17] An act is considered to be a crime if it is committed deliberately with a direct intent. Persons who can be held responsible for such crimes are citizens of the Russian Federation, foreigners, as well as stateless persons aged 16 or older. The qualified type of the crime involves propagation of extremist information through the mass media (radio, television, press, Internet). Of note is the fact that propagation of extremist materials[18] in Russia is forbidden.

Art. 282 of the Penal Code of the Russian Federation criminalizes behavior consisting in incitation of hatred and degradation of the dignity of individuals or groups of persons due to their gender, race, nationality, language, origin, attitude toward religion, and membership in any social group, committed publicly or using mass media. This offense carries the penalty of 100,000 rubles to 300,000 rubles, or the amount equal to the wages or other income of the convict for a period of 1 year to 2 years, or deprivation of the right to hold certain posts or perform specific activities for a period of up to 3 years, or mandatory work for a period of up to 360 hours, or corrective work for a period of up to one year, or forced labor for up to 2 years, or deprivation of liberty for a period of up to 2 years. A heavier sentence is provided for in the case of the above-mentioned acts committed using violence or threats of violence, by a person who uses his or her official position for this purpose, or by an organized group. This offense carries the penalty of 100,000 rubles to 500,000 rubles, or the amount equal to the wages or other income of the convict for a period of 1 year to 3 years, or deprivation of the right to hold certain posts or perform specific activities for a period of up

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[15] В. М. Лебедьев, in: В. М. Лебедьев, ed., Комментарий к уголовному кодексу Российской Федерации, Moscow 2010, p. 713.

[16] А. В. Наумов, in: В. И. Радченко, ed., Комментарий к уголовному кодексу Российской Федерации, Moskow 2009, p. 528; А. И. Рарог, in: А. И. Рарог, ed., Комментарий к уголовному кодексу Российской Федерации, Moskow 2009, p. 510.

[17] В. М. Лебедьев, op. cit., p. 713; А. И. Рарог, op. cit., p. 510.

[18] Art. 1 (3) of the 2002 Act on Countering Extremist Activities, defines extremist materials as "documents or information on other carriers intended to be announced that call for conducting extremist activities or justify or substantiate the need to conduct such activities, to include the documents prepared by the leaders of the National Socialist German Workers' Party, the fascist party of Italy, publications justifying or substantiating national and (or) racial superiority or justifying the practice of committing military or other crimes aimed at full or partial destruction of any ethnic, social, racial, national, or religious group."

to 5 years, or mandatory work for a period of up to 480 hours, or corrective work for a period of 1 year to 2 years, or forced labor for up to 5 years, or deprivation of liberty for a period of up to 5 years.

Of note is the fact that the article of the Penal Code does not define specific features of the crime but, instead, describes only its general direction (incitation of hatred for various reasons).[19] Thus, it can be concluded that incitation of hatred can also be defined as incitation of conflict between citizens for various reasons (on various grounds).[20] Such incitation is done publicly and is addressed to an unspecified group of people, mostly through the mass media. Such propaganda may pertain to confirmation of the exclusion or deficiency of persons due to their religion, nationality, or race.[21] On the other hand, degradation of human dignity is a manifestation of discrimination of specific persons for reasons mentioned in the law.[22]

The offense is characterized by intentional guilt and direct intent. Persons who can be penalized for this offense must be at least 16 years of age.

Art. 282^1 of the Penal Code of the Russian Federation penalizes the organization of extremist groups. The offense consists in "creation of an extremist group, i.e. an organized group of persons, with the intent to prepare or commit extremism-directed crimes and leading such an extremist group, its part, or structural unit constituting a part of such a group, as well as creation of an association of organizers, leaders, or other representatives of structural units of such a group for the purpose of elaboration of plans and (or) conditions for committing extremism-directed crimes." This offense carries the penalty of a fine equal to up to 200,000 rubles or equal to wages or other income of the convict for a period of up to 18 months, or forced labor for a period of 4 years, together with limitation of freedom for 1 year to 2 years, or with deprivation of liberty for a period of up to 4 years, together with deprivation of the right to hold certain posts or perform certain activities for a period of up to 10 years, and with limitation of liberty for a period of 1 year to 2 years. Membership in such groups carries a penalty of a fine equal to 40,000 rubles or to wares or other income of the convict for a period of up to 3 months, or forced labor for a period of up to 2 years, with

[19] Out of the 4 offenses discussed here, the offense governed by art 282 of the Penal Code of the Russian Federation takes place most often. For instance in 2002, 74 such offenses were reported, in 2005 – 80, and in 2008 – 182. More information can be found in: А. И. Долгова, op. cit., p. 743.

[20] А. В. Наумов, op. cit., p. 530.

[21] В. М. Лебедьев, op. cit., p. 718.

[22] А. В. Наумов, op. cit., p. 530.

optional deprivation of the right to hold certain posts or perform certain activities for a period of up to 3 years, together with limitation of liberty for up to 1 year, or optional deprivation of liberty for a period of 2 years, and with optional deprivation of the right to hold certain posts or conduct certain activities for a period of up to 5 years, together with limitation of liberty for a period of up to 1 year.

All of the above-mentioned offenses committed by a person who takes advantage of his or her official position carry the penalty of a fine equal to 100,000 rubles to 300,000 rubles, or to wages or other income of the convict for a period of 1 year to 2 years, or forced labor for a period of up to 5 years, together with optional deprivation of the right to hold certain posts or conduct certain activities for a period of up to 3 years, with limitation of liberty for a period of 1 year to 2 years, or with deprivation of liberty for a period of up to 6 years, with optional deprivation of the right to hold certain posts or conduct certain activities for a period of up to 10 years, and with limitation of liberty for a period of 1 year to 2 years.

Moreover, the annotation to this article provides for acquittal from penal responsibility of a person who voluntarily resigns from participation in the activities of a social or religious group which is subject to a valid court's decision regarding its dissolution or a ban on its operations in connection with its conduct of extremist activities. Such acquittal may take place when the activities of this person have no features of other crimes. Another annotation to art. 282^1 of the Penal Code of the Russian Federation defines the term "extremism-directed crime." The term is defined as a crime motivated by political, ideological, racial, national, or religious hatred, or hatred toward any social group.

The law provides that such a group is an organized group of persons[23] established in order to prepare or commit certain crimes.[24] Now, it is necessary to define the characteristics of such a structure. According to V. Bykov[25] who studies the dogmatic aspects of organized crime, such groups are characterized in particular by their permanency (consolidation and unchanging membership, principles of acceptance and rejection of new members), their

[23] According to art 35 (3) of the Penal Code of the Russian Federation, an offense committed by organized crime is a forbidden act that was performed by a constant group of persons that had been established for the purpose of committing one offense or many offenses.

[24] The problem of classification of extremist organizations as organized criminal structures is discussed in: Д. Саркисов, Организация экстремистского сообщества, Уголовное право 2010, no. 2, pp. 63–67.

[25] В. Быков, Признаки организованной преступной группы, Законность 1998, no. 9, pp. 6–7.

constant perpetration of crimes (constant joint perpetration of crimes in order to achieve profits), their stable structure (the leader as the organizer and commander, active members of the group and lower-ranking members of the criminal group), division of roles during the perpetration of crimes, absolute discipline (enforced discipline and unconditional subordination to the leader), distribution of the proceeds from crimes (according to the members' roles, their position in the hierarchy and structure of the group), common funds (a monetary fund for bribes handed to state officials and for benefits paid to members of the group who are serving prison sentences and to their families).

Thus, to conclude the discussion of the definition of the basic characteristics of organized criminal groups, it must be said, as V. Bykov did, that the key characteristics of a criminal group is its duration and the strength of the criminal bonds between members, which are usually achieved in the course of the multiple perpetration of crimes. Organized groups of persons are characterized by the presence of relationships between them, the unity of their objective, their mutual commitments, and observance of a general discipline.[26] Of note is the fact that the Russian legislator was too quick to put an equal sign, with regard to the degree of organization and hierarchic structure, between organized groups and criminal groups (criminal organizations).

According to art. 282^1 of the Penal Code of the Russian Federation, creation of the aforementioned structures is intended to prepare or commit an extremism-directed crime. Thus, the objective of such a group is to create conditions for perpetrating acts in this category. This can be concluded from the regulation that defines such behavior as, most of all, a form of preparation for an extremism-directed crime, without actual perpetration of the crime itself.[27]

The crime in question also involves leading such a group or its structural units (by acting as the boss or leader) and creating an association of organizers, leaders, or other representatives of the structural units of the group (in order to facilitate coordination of joint actions).[28]

Interestingly, the definition of an extremist organization is also given in the 2002 Act on countering extremist activities. According to this definition, an extremist organization is "a social or religious association or other organization with regard to which, pursuant to the present Act, a court has

[26] Ibid., pp. 4–5.

[27] Ibid., p. 517.

[28] А. И. Papor, ed., op. cit., p. 517.

issued a valid decision on dissolution or ban on its operations in connection with its performance of extremist activities." Thus, the definitions of an extremist organization given in the Act on Countering Extremist Activities and in the Penal Code (art. 282^1) are different and are not correlated at all.[29]

The perpetrators of the crime are organizers, leaders, and members of extremist organizations. The organizers and leaders are responsible for the operations of the organization, implement their policies, define their strategies, establish the plans of the organization, and make relevant decisions. The members, on the other hand, take part in specific undertakings.[30]

The perpetrators take actions in a deliberate manner. The persons who can be penalized for this offense must be at least 16 years of age.

Art. 282^2 of the Penal Code of the Russian Federation provides for penalization of organization of the activities of extremist organizations, i.e. the activity of social or religious organizations with regard to which a court has issued a valid decision on dissolution or ban on its operations in connection with its performance of extremist activities. This offense carries the penalty of a fine equal to 100,000 rubles to 300,000 rubles or to wages or other income of the convict for a period of 1 year to 2 years, or forced labor for a period of up to 3 years, together with optional deprivation of the right to hold certain posts or conduct certain activities for a period of up to 2 years, or detention for a period of 4 to 6 months, or deprivation of liberty for a period of up to 3 years, together with optional deprivation of the right to hold certain posts or conduct certain activities for a period of up to 10 years, and with limitation of liberty for a period of 2 years.

Membership in such groups carries a penalty of a fine equal to 200,000 rubles or wages or other income of the convict for a period of up to 18 months, or forced labor for a period of up to 2 years, with optional limitation of liberty for a period of up to 1 year, or detention for a period of up to 4 months, or deprivation of liberty for a period of up to 2 years, together with optional deprivation of the right to hold certain posts or conduct certain activities for a period of up to 5 years, together with limitation of liberty for a period of up to 1 year. The annotation to this article provides for acquittal from penal responsibility of a person who voluntarily resigns from participation in the activities of a social or religious group which is

[29] Due to the significant inconsistency and difficulties with identifying the penal law features of an extremist group, it is recommended that this term be governed by administrative law. See: А. Н. Мондохонов, Понятье экстремистской организации в уголовном кодексу РФ, Вестник Академии Генеральной Прокуратуры РФ 2009, No. 5, p. 33.

[30] В. М. Лебедьев, op. cit., p. 722.

subject to a valid court's decision regarding its dissolution or a ban on its operations in connection with its extremist activities. It was assumed that the activities of such a person must have no features of other offenses.

It must be emphasized that the activities of organizations and associations that violate the Constitution of the Russian Federation and other statutes can be banned pursuant to various regulations. Dissolution of an organization means that its functioning is prohibited despite the fact that it is legally registered; dissolution must be adjudged by a court. The regulations penalize situations where court verdicts are not observed and the organizations (despite a valid verdict) continue to function.[31] The offense is characterized by intentional guilt and direct intent. The perpetrator of such an offense is the funder or leader of an extremist organization or its structural unit. It may also be a rank-and-file member of a dissolved extremist organization.[32] Persons who can be penalized for this offense must be at least 16 years of age.

The Russian Penal Code defines 12 other extremism-motivated offenses. These include:[33] homicide; deliberate causing of serious bodily injury; deliberate causing of moderate bodily injury; deliberate causing of light bodily injury; battery; torture; threat of killing or of deliberately causing serious bodily injury; violation of equal human and civil rights and freedoms; implicating minors in criminal offenses; hooliganism; vandalism; and desecration of mortal remains and graves. All in all, the Russian legislator provides for penal responsibility for acts related to extremist activities in as many as 16 articles. It appears that the feature of extremism is provided in too many regulations.

It should be observed that also the 2002 Act on Countering Extremist Activities contains regulations pertaining to responsibility for conducting extremist activities. Such responsibility is provided for in articles 9, 10, and 15 of the Act.

Art. 9 provides for the responsibility of social and religious associations and other organizations for conducting extremist activities. According to this article, the Russian Federation prohibits establishment and functioning of social and religious associations as well as other organizations whose aim is to conduct extremist activities. Conduct of extremist activities by social or religious organizations or their structural units may lead to their disso-

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[31] В. М. Лебедьев, op. cit., pp. 724–725.

[32] А. И. Рарог, op. cit., p. 519.

[33] В. В. Лунеев, Российский экстремизм..., op. cit., p. 31; С. В. Борисов, Уголовная ответственность за преступления экстремистской направленности, Moskow 2009, pp. 14–15.

lution. This may take place when the organizations violate human and civil rights and freedoms, cause harm to people, human health, the natural environment, law and order, security, property, the legal and economic interests of natural or legal persons, the society, or the state. If a social or religious organization is not a legal person, its functioning may be banned by a court decision based on a notification of the Prosecutor General of the Russian Federation or a different prosecutor, or based on a notification of a federal state registration body or its field counterpart. A court verdict regarding dissolution of a social or religious organization also leads to dissolution of the organization's regional branches (affiliated entities or structural units). The property of the dissolved organizations, after the claims of its creditors have been satisfied, is transferred to the Russian Federation. The relevant decision is made by a court at the time of its verdict on dissolution of the social or religious organization. A list of social and religious organizations that are subject to valid court verdicts regarding their dissolution or ban on their functioning can be found on the Internet at the web sites of the federal bodies of the executive branch of government that are in charge of registration of such organizations. Moreover, such a list is published in official periodicals identified by the government of the Russian Federation.

Art. 10 of the Act contains a provision concerning "stopping the functioning of a social or religious association." According to the provision, specific persons holding official posts, if it is found that a social or religious organization has caused (or there is a risk that it will cause) violation of many rights, legal and economic interests of natural and legal persons, and damage to health and property, may make a decision to stop (block) the functioning of such an organization until the relevant notification has been considered by a court. The decision of that person is subject to an appeal pursuant to a specific procedure. Stopping the functioning of a social or religious organization involves the deprivation of those organizations and their structural units of the right to use the mass media, organize meetings, demonstrations, etc. Such organizations are also deprived of the right to take part in elections and to use the money deposited in their bank accounts. If the court does not issue a verdict that requires dissolution or bans functioning of the organization, the aforementioned rights of the organization are reinstated and the organization may resume its activities. This happens after the verdict becomes final and binding.

Art. 15 of the Act regulates the responsibility of citizens of the Russian Federation, foreigners, and stateless persons for conducting extremist activities. According to the article, persons belonging to the aforementioned categories are subject to penal, civil, and administrative responsibility for

their conduct of extremist activities. Moreover, persons conducting extremist activities have limited access to government jobs, careers in the military and in law enforcement agencies, to jobs in or operation of detective agencies, security companies, and educational institutions. This is to ensure the security of the state and the society. In the event that the leader or a member of a social or religious organization makes a public statement calling for extremist activities, without saying that he or she is expressing his or her own opinion, and in the event that a court verdict becomes binding and final, which penalizes such a person for perpetration of an extremism-directed offense, such an organization is required, within 5 days of the statement, to publicly declare its lack of consent to the opinions or behavior of this person. If the organization fails to provide such a declaration, it is assumed that the organization's ideology contains elements of extremism. The provision also requires penalization of persons who are the authors of publications containing even one characteristic of extremism.

The aforementioned regulations provide for largely non-penal (mostly administrative) ways to respond to the activities of extremist organizations.

To conclude the discussion on the legal interpretation of extremism and extremism-directed crimes in Russia, it must be stated that the regulations in question are very broad, unclear, imprecise, and very severe. They appear to be an example of an unnecessary process of creation of new categories of offenses by the legislator. This leads to the conclusion that in Russia, in addition to the independent growth of criminal offenses, the legislator, too, may contribute to the formation of new ones. The question is, why?

One could assume that the reason for introducing the relevant regulations is the government's effort to effectively control society and to quickly and effectively penalize acts aimed against the government or its representatives. The idealistic assumption is that the regulations were intended to prevent the creation/restoration of hatred and extreme nationalism in Russia. However, in practice, they appear to be intended to further other objectives.

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THE PRINCIPLE OF CONFORMING INTERPRETATION OF NATIONAL LAW IN THE AREA OF CRIMINAL LAW. GENERAL REMARKS

1. Poland's access to the European Union not only affected the political, economic, and social life, but also constituted a breakthrough in the legal system, in particular in its axiological foundations, and in the application of law.Certain changes took place in the interpretation of law: terms such as 'consistent interpretation', 'interpretative obligation', 'principle of purposive interpretation', 'loyal interpretation', 'harmonious interpretation', 'benevolent interpretation', 'conciliatory interpretation', and 'concurring (concurrent) interpretation'.[1] It is no surprise that such changes have taken place since one of the fundamental methods of ensuring the effectiveness of European law is the principle of interpretation of national law in conformance to European law. This principle is an element of the system of rules used in order to achieve a correct and uniform application of *acquiscommunautaire* in all the member states of the European Union.

2. In the beginning of this discussion it should be emphasized that the legal ground for the requirement to interpret domestic law in conformance to European law is art. 10 of the Treaty Establishing the European Community (hereinafter referred to as the TEEC). This was confirmed by the European Court of Justice (CJ) in the case *von Colson and Kamann vs. North Rhein-Westphalia* (C-14/83) where it stated that the duty imposed on member states in art. 10 of the TEEC (i.e. the duty to undertake

[1] See: S. Prechal, Directives in EC Law, Oxford 2005, p. 181; G. Betlem, The Doctrine of Consistent Interpretation – Managing Legal Uncertainty, Oxford Journal of Legal Studies 2002, vol. 22, no. 3, pp. 397–418; S. Lefevre: "Interpretative communications and the implementation of Community law at national level", ELR, 2004, vol. 29, no. 6, pp. 808–822; A. Wentkowska, A 'Secret Garden' of Conforming Interpretation – European Union Law in Polish Courts Five Years after Accession, Yearbook of Polish European Studies 2009, Vol. 12, pp. 127–148.

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all appropriate efforts of a general or specific nature in order to ensure performance of the duties under the Treaty and resulting from the activities of the Community's institutions) applies also to national courts which, when applying domestic laws, in particular regulations implementing a directive, must interpret them in the light of the wording and the purpose of the directive. In its judgment, the CJ introduced the term 'indirect effect' which refers to application of domestic laws issued for the purpose of implementation of a directive. According to this principle, courts should perform interpretation of regulations "in the light of the wording and the purposes" of a directive which, by itself, does not have direct effect. This conclusion was inferred from the duty of member states of the European Union to ensure achievement of the purpose of directives. It was assumed that since a directive has no direct effect, its purposes related to application of domestic law can be achieved only in this way. The CJ went even further and stated that national courts should assume the intent of full performance of the duties defined in the directive and avoid applying domestic laws only after they find that they cannot be reconciled in any way with the directive.[2]

Currently, the duty to interpret domestic law in conformance to European law is based on the principle of loyalty (art. 4 (3) of the TEEC) and the need to ensure the effectiveness of the norms of European law in accordance with their purposes. The aforementioned principle translates into the duty to ensure the effectiveness of community law (*effet utile*), which covers both the duty to issue acts of domestic law implementing European directives (which is unequivocally provided for in art. 249) and, possibly, to issue appropriate acts of law that implement community regulations, if this turns out to be necessary to ensure proper application of regulations. Moreover, the principle of loyalty indicates that the duty to interpret

[2] See, The judgment of 16 December 1993 in case no. C-334/92, Wagner Miret v. Fondo de garantiasalarial, ECR, 1993, p. I-6912, paragraph 20–22: (...) "it should be borne in mind that when it interprets and applies national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned. As the Court held in its judgment in case 106/89 Marleasing v La ComercialInternacional de Alimentación [1990] ECR I-4135, paragraph 8, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty. 21. The principle of interpretation in conformity with directives must be followed in particular where a national court considers, as in the present case, that the pre-existing provisions of its national law satisfy the requirements of the directive concerned."

domestic law in conformance to European law exists in the light of the wording and the purposes of directives in order to achieve the results defined in the directives. Such propositions were expressed in the judgment of the CJ of the EU of 5 October 2004 in joined cases C-397/01 to C-403/01, where the Court stated that:

> 113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC.[3]
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> 114. The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it.[4]
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> 115. Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.[5]

The CJ drew the same conclusions in another judgment (C-334/92, *Wagner-Miret*) where it also stated that "national law must be interpreted so far as possible in conformity with directives. It is for the national court, within the limits of its discretion under national law, when interpreting and applying domestic law, to give to it, where possible, an interpretation which accords with the requirements of applicable Community law and, to the extent that this is not possible, to hold such domestic law inapplicable. It must be stressed that the interpretation of national law – in conformity with Community law – is reserved to the national courts." It should be added that the principle of interpretation of domestic law in accordance

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[3] See to that effect, inter alia: the judgments in Von Colson and Kamann, paragraph 26; Marleasing, paragraph 8, and FacciniDori, paragraph 26; see also: case C-63/97 BMW [1999] ECR I-905, paragraph 22; Joined Cases C-240/98 to C-244/98 OcéanoGrupo Editorial and SalvatEditores [2000] ECR I-4941, paragraph 30; and Case C-408/01 Adidas-Salomon and Adidas Benelux [2003] ECR I-0000, paragraph 21.

[4] See, to that effect: Case C-160/01 Mau [2003] ECR I-4791, paragraph 34.

[5] See, to that effect: Carbonari, paragraphs 49 and 50, and Case C-408/01 Adidas-Salomon and Adidas Benelux [2003] ECR I-0000, paragraph 21.

with European law should be observed by the legislator, whose duty is to implement the obligations that are binding on the state in the domestic law.

The aforementioned judgment also indicated that the principle of interpretation of domestic law in accordance with European law should apply in the case of assumed conformance of domestic law adopted earlier with a directive.

When discussing the interpretation of domestic law in the context of European law, one must keep in mind that national courts have the duty to interpret domestic law, adopted both before and after European laws, in a way that is to the maximum extent conforming to the wording and purpose of the directive, so as to ensure achievement of the purpose of the directive. As the Court of Justice held in its judgment in Case 106/89 Marleasing v La ComercialInternacional de Alimentación [1990], ECR I-4135, paragraph 8, "in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty."

National courts are required to apply interpretations of all national laws that conform to both primary and secondary Community law. The requirement applies to all national laws, adopted both before and after the adoption of a given European act of law, and includes the duty to interpret national law in ways that ensure, to the maximum possible extent, achievement of the provisions and purposes of the acts of Community law determined in the light of the entire Community law and the judgments of European courts. Thus, it can be assumed that the principle of interpretation conforming to European law applies mostly to national laws that are adopted in order to implement a given directive. Nevertheless, it is not limited to interpretation of European laws, as the national courts are required to take into account all the national laws when evaluating how they can be applied, so as to avoid results that are in contradiction with the purpose of the directive.[6]

It must also be emphasized that each interpretation involves application of national law, in particular that adopted in order to implement a directive. The CJ also indicated that it is possible to define the limits of conforming interpretation. The limits depend on the general principles of law, in partic-

[6] See: the judgment of the CJ of 25 February 1999 in case Carbonari et al (C-131/97), Court Reports 1999 r., p. I-1103, 50.

ular the principle of security of legal transactions and the *lex retro non agit* principle. Moreover, a limit on the application of conforming interpretation is established by the letter of the law of each member state. This is because interpretations *contra legem*, which ignore the letter of the national law, are not permitted.[7]

3. The European Union was established by the Treaty of Maastricht. This treaty had a 'pillar' structure, by which each pillar was distinguished by a different manner in which the law was derived, its binding effect, and compliance monitoring.[8] The first pillar was based on the EC Treaty. The second pillar was where a common defense and foreign policy takes shape. The third pillar concerned cooperation in the areas of justice and home affairs. Until the Treaty became effective, the issue of application of interpretations conforming to Community law in the criminal law did not exist. When the European Union was created and the third pillar (police and judicial cooperation in criminal cases) was established, the problem appeared of application of such interpretations in the case of national criminal laws implementing framework decisions.[9] However, this has been the source of many problems, especially that the unique nature of cooperation in criminal cases has been the source of many concerns. What was emphasized in particular was the intergovernmental nature of cooperation in this area. The role of the individual member states was preponderant in the third pillar, in contrast to the first pillar, in which the organs of the Community had more influence. What was also indicated was the absence in the third pillar of the principle of loyalty. The literature was not unanimous on this matter.[10] Only the judgment of the CJ of 16 June 2005 in case C-105/03 (the case of Maria Pupino) brought an unequivocal solution. In the aforementioned judgment, the CJ stated that:

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[7] Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969.

[8] E. Denza, The intergovernmental pillars of the European Union, Oxford 2002, pp. 311–322.

[9] See G. Conway, Juridical interpretation and the third pillar. Ireland's acceptance of the European arrest warrant and the Gözütok and Brügge case, European Journal of Crime, Criminal Law and Criminal Justice 2005, Vol. 2, pp. 255–283.

[10] Cf.: C. Mik, Wykładnia zgodna prawa krajowego z prawem Unii Europejskiej [Conforming interpretation of national law with European Union law], in: S. Wronkowska, ed., Polska kultura prawna a proces integracji europejskiej [Polish legal culture and the process of European Integration], Kraków 2005, pp. 148–149.

> 41. The second and third paragraphs of Article 1 of the Treaty on European Union provide that that treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe and that the task of the Union, which is founded on the European Communities, supplemented by the policies and forms of cooperation established by that treaty, shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their people.
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> 42. It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions, as the Advocate General has rightly pointed out in paragraph 26 of her Opinion.

In its judgment in Pupino, the CJ held that "the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU."[11] The final part of the latter sentence indicates that when interpreting national law, the national court must refer not only to the act of secondary law (the framework decision) but also to the provisions of primary law, in this case the Treaty on European Union. After all, it is easy to notice that the basic purpose of acts of secondary law is to implement the provisions of the treaty that are the legal basis for their adoption. This requirement has been clearly emphasized in the judgments of the CJ pertaining to Community law.

In the Pupino case, the CJ added that the duty of the national court to refer to the framework decision in its interpretation of national criminal law is subject to limitations arising from general principles of law, to include in particular the principle of legal certainty and the principle that law does not apply retroactively. Both these principles, according to the CJ, prevent, among other things, situations where, based on the framework decision and

[11] Case C-105/03 Pupino [2005] ECR I-5285, paragraph 43. See also Opinion of Mr Advocate General Mengozzi delivered on 20 March 2012. Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge, Case C-42/11, ECR 2012; M. Fletcher, R. Lööf, W. C. Gilmore, EU Criminal Law and Justice, Cheltenham 2008, pp. 36–38.

irrespective of the statute implementing it, the duty in question would lead to determination or aggravation of penal responsibility of persons violating provisions of criminal law.[12] The latter limitation clearly pertains to situations where a conforming interpretation leads to determination or aggravation of responsibility under substantive criminal law, in particular by creation, one could say *per analogiam*, of a new type of crime.

Further in its judgment in the Pupino case, similar to the aforementioned Community case law, the CJ defines the limits of conforming interpretation by stating that:

> 47. The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.

The above text indicates that the Court confirmed the need to consider fundamental rights when interpreting the framework decision concerning the position of victims in criminal proceedings. This idea was further developed in the judgment of the CJ of 9 October 2008, in case C-404/07 *György Katz v. István Roland Sós*, where the Court found it to be necessary to observe the rights under art. 6 of the European Convention on Human Rights. The Court stated that:

> 48. (...) theFramework Decision must be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the ECHR, are respected.
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> 49. It is therefore for the referring court to ensure in particular that the way in which the evidence is taken in the criminal proceedings, viewed as whole, does not prejudice the fairness of the proceedings for the purposes of Article 6 of the ECHR, as interpreted by the European Court of Human Rights.

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[12] See for example, in relation to Community directives: Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, paragraph 24, and Joined Cases C-387/02, C-391/02 and C-403/02 Berlusconi and Others [2005] ECR I-0000, paragraph 74. The Court has ruled that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see: Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 13, and Case C-60/02 X [2004] ECR I-0000, paragraph 61).

4. The CJ's judgment in the Pupino case became a milestone in the evolution of interpretation of criminal law in conformance to European law. It shows that application of European criminal law in criminal cases may not automatically and in a binding manner constitute grounds for modification of the constitutional norms that are higher in the hierarchy of the legal system. Adoption of an opinion to the contrary would mean that inclusion of the above duty in the process of interpretation of national criminal law may cause deterioration of the legal situations of individuals and lead to doubts from the point of view of constitutional provisions.[13] Consequently, it will not always be possible to interpret national law in conformance to the 'European' interpretation model and the postulate of interpretation that is conforming "to the highest degree possible."

The unique nature of criminal law, in particular the large number of guarantees intended to protect rights and freedoms connected with liability in criminal law and the conduct of the process leading to realization of such responsibility, is the source of problems with application of interpretation of national law conforming to European law. This was clearly demonstrated in the implementation of the framework decision concerning the European arrest warrant and the interpretation of the part of the code of criminal procedure that became the target location for the implementation of this cooperation tool. The experiences related to the European arrest warrant have demonstrated the fact that a number of problems, to include coincidence between conforming interpretation and the supreme nature of constitutional norms eventually led to amendment of the constitution by the parliament. To set aside the problems related to the European arrest warrant, it needs to be stated that European law constitutes an independent source of law that may not be abrogated by provisions of national law, irrespective of their importance. Thus, it is not appropriate to make

[13] See: P. Kardas, Rola i znaczenie wykładni prowspólnotowej w procesie dekodowania norm prawa karnego. Uwagi na marginesie uchwały SN z dnia 3 marca 2009 r. (I KZP 30/08) [The role and importance of conforming interpretation in the process of decoding of criminal law norms. Comments on the margin of the resolution of the Supreme Court of 3 March 2009], CzPKiNP 2009, no. 2, pp. 23–27; M. Królikowski, Wokół problemów z zasadą nullum poena sine lege przy dostosowaniu kary orzeczonej w innym państwie członkowskim Unii Europejskiej [On the problems with the principle ofnullumpoena sine lege in adjustment of a penalty adjudicated in another member state of the European Union]; CzPKiNP, 2009, no. 2, pp. 33–54; P. Wiliński, Zasada nullum poena sine lege a wykonanie kary wobec osoby przekazanej w trybie ENA [The principle ofnullumpoena sine lege and the execution of a penalty agains a person transferred in accordance with the EAW procedure], CzPKiNP 2009, no. 2, pp. 55–70; A. Sakowicz, Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim [The principle of ne bis in idem in criminal law from pan-European perspectives], Białystok 2011, p. 20 ff.

references to the principles and concepts of national law when evaluating the validity of measures adopted by EU institutions, as this would negatively affect the uniformity and effectiveness of European law. Also, it is not reasonable to establish constitutional guarantees in order to protect its priority over the norms defined in European criminal law. This is because observance of fundamental rights is a part of EU law and a general principle of law (art. 6 (3) of the TEEC), and consequently the defense of fundamental rights must be guaranteed in the framework of the structure and the purposes of the EU. It appears that constitutional rules should be modified only when the process of decoding of a constitutional norm does not enable unequivocal compliance with a European norm. In order to determine if this is the case, it is necessary to perform interpretation so as to cover all the national acts of law, irrespective of their level.[14]

5. National courts must first reconstruct the interpretation model which constitutes a reference point in the process of decoding the norm included in a provision of the national law.[15] What this means is that a national body must analyze the provisions of the European law and interpret them taking into account not only their letter but also their context, system, function, and purpose.[16] Proper interpretation of the secondary law in the light of the primary law must also be ensured. In addition, it must be determined whether the directives define the minimum or the maximum standard. One must also not forget about the special importance in this process of reconstruction of the preamble of the act of law and the case law of the Court of Justice. Even the above general remarks lead to the conclusion that autonomous interpretation of European law must be based on systemic and functional priorities.[17]

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[14] See: P. Kardas, P. Kardas, Rola i znaczenie wykładni prowspólnotowej w procesie dekodowania norm prawa karnego. Uwagi na marginesie uchwały SN z dnia 3 marca 2009 r. (I KZP 30/08) [The role and importance of conforming interpretation in the process of decoding of criminal law norms..., pp. 24–25.

[15] K. Płeszka, "'Ius' i 'lex' w prowspólnotowej wykładni prawa krajowego ['Ius' and 'lex' in the conforming interpretation of national law], in: Prawo, władza, społeczeństwo, polityka. Księga jubileuszowa profesora Krzysztofa Pałeckiego [Law, power, society, politics. A jubileebook of Professor Krzysztof Pałecki], Kraków 2006, p. 102.

[16] C. Mik, Wykładnia zgodna... [Conforming interpretation...], op. cit., p. 130.

[17] Interpretation of the purpose must also be mentioned; more information can be found in: D. Fiedorow, Wykładnia celowościowa prawa wspólnotowego w orzecznictwie sądów Unii Europejskiej [Interpretation of the purpose of community law in the judgments of courts of the European Union], in: C. Mik, ed., Wykładania prawa Unii Europejskiej [Interpretation of European Union law], Toruń 2008, pp. 59–85.

This opinion has been confirmed in the judgments of the CJ which indicated that, even though linguistic interpretation is regarded as the starting point for the interpretation of European law, it rarely constitutes the final stage of interpretation.[18] However, linguistic interpretation is more and more often losing its priority to systemic, functional, and teleological interpretation.[19] This is due not only to the number of official languages but also to the fact that the EU and its entire legal system are evolving and, consequently, many terms do not have a fixed definition. Also, rejection of the priority of linguistic interpretation is justified by the use of autonomous terms, which are the product of various interests of the member states and the work of numerous law-making bodies in the EU. As a result, the center of gravity of the *in dubio pro Communita* interpretation has shifted to systemic interpretation and the increasingly dominant functional interpretation. Certainly this is due to the need to achieve the maximum outcomes using the current laws given the presence of differences between the legal systems of the member states and to eliminate discrepancies and conflicts between national laws and EU laws.[20]

Going back to the discussion of the phases of interpretation conforming to European law, it must be stated that the next step is to decode the norm present in the national law based on the internal rules of interpretation, while applying a conforming interpretation. The outcome of this process should be confronted with the interpretation model, which does not always lead to a desirable outcome. If the linguistic interpretation leads to an unequivocal result which is in contradiction with the European norm, the conforming interpretation cannot become the binding interpretation *contra legem* as only the national legislator has the power to change the law. This applies to both constitutional norms and to norms expressed in regular statutes.

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[18] See C. Gulman, Methods of interpretation of the European Court of Justice, Scandinavian Studies in Law 1980, vol. 24, pp. 198–199.

[19] A. Kalisz, Wykładnia i stosowanie prawa wspólnotowego [Interpretation and application of community law], Warsaw 2007, p. 156; also the publications given there; M. Górka, Zasada stosowania języków państw członkowskich w systemie prawnym Unii Europejskiej [The principle of use of the languages of member states in the legal system of the European Union], RadcaPrawny, 2004, no. 3, p. 23 ff.

[20] Some authors present their critical opinions whereby departure from linguistic interpretation is a "compensation" of the shortage of democracy in the EU. For example, M. Klatt alleges that there are no grounds for different evaluations of the linguistic limits in relation to the community law and the national law, see M. Klatt, Theorie der Wortlautgrenze. Semantische Normativität in der juristischen Argumentation, Baden-Baden 2004, p. 26.

It must be added that in order to determine what is a *contra legem* interpretation in specific cases, it is necessary to analyze the national law and to apply interpretation methods adopted in the national law. This is not self-evident as there are judgments of the CJ where the Court suggested that "national courts are required to interpret their national law within the limits set by Community law, in order to achieve the result intended by the Community rule in question."[21] This opinion can be considered as justified only if norms of the European law can be applied directly. If, despite the application of a conforming interpretation, a norm of the national law remains in conflict with the European model norm, the national court has the duty to desist from applying the national norm and must use the European norm, if it is suitable for direct application. For this to happen, the European law must be clear, unconditional, and independent of its implementation by national or EU bodies. Only when the above criteria have been met, can the norm be referred to before national judicial and law enforcement bodies.

It should be added that in European law, it is the primary law that has direct effect. According to art. 288 indent two of the TEEC, regulations are fully binding and are applied directly in all member states and, consequently, all norms included in regulations have direct effect. The situation is different in the case of directives because, in principle, a directive normally constitutes an indirect mode of legislating or regulating, which is applied through national laws that implement them into the legal systems of member states. Directives have direct effect only in exceptional situations. An example is a situation where a directive has not been implemented on time or has been implemented incorrectly. As the CJ has emphasized in its judgments, even in such special situations provisions of directives cannot impose duties on

[21] See: Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, and Case C-262/97 Engelbrecht [2000] ECR I-7321, paragraph 39; as for what is the reference point in the case of determination of a contrallegem interpretation, see: S. Biernat, "Wykładnia prawa krajowego zgodnie z prawem Wspólnot Europejskich" [Interpretation of national law conforming to the law of European communities], in: C. Mik, ed., Implementacja prawa integracji europejskiej... [Implementation of European integration law...], p. 134; C. Mik, "Wykładnia zgodna..." [Conforming interpretation...], pp. 132–133, 159–161; K. Kowalik-Bańczyk, "Prowspólnotowa wykładnia prawa polskiego" [Conforming interpretation of Polish law], EPS, 2005, no. 12, pp. 9–18; M. Szpunar, Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego [Liability of private entities for breaching Community law], Warsaw 2008, pp. 170–173, and the judgment of the CJ of 8 October 1987 in case Kolpinghuis Nijmegen (C-80/86), [1987] ECR I-3969, paragraph 13; judgment of the CJ of 4 July 2006 in case Adeneler et al. (C-212/04), [2006] ECR I-6057, paragraph 110; judgment of the CJ of 23 April 2009 in case Angelidaki et al. (C-378/07), [2009] ECR I-3071, paragraph 199; judgment of the CJ of 16 June 2005 in case Pupino (C-105/03), [2005] ECR I-5285, paragraph 44 and 47.

individuals. This is the result of the proposition that state bodies cannot benefit from their failure to implement or their incorrect implementation of a directive.[22]

The above leads to the conclusion that every European norm can be a model for conforming interpretation but, if norms cannot be applied effectively, only some of them will bring about the desired result in the form of direct effect. This feature of European law cannot constitute *per se* grounds for liability in criminal law or its aggravation. As the CJ was right in observing in its judgment in the Berlusconi case:

> 74. In the specific context of a situation in which a directive is relied on against an individual by the authorities of a Member State within the context of criminal proceedings, the Court has ruled that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.[23]

The limits of the national court's departure from the literal wording of the law in favor of a conforming interpretation are derived from the contents of the national law and the interpretation methods adopted in the national law. If linguistic interpretation does not lead to identification of an unequivocal norm coded in the national law, then systemic and functional interpretation is required. At this stage, the national court is required to check whether the contents of the norm, given one of the possible meanings of the interpreted provision of national law, is not in conflict with the norms of EU law. In the event of such conflict, the court must reject this meaning of the phrase being interpreted that leads to this conflict. As the judgments of the CJ rightly indicate:

> 115. Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.

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[22] See: B. Kurcz, Wspólnoty Europejskiej i ich implementacja do prawa krajowego [European communities and their implementation into the national law], Kraków 2004, pp. 204–223.

[23] Judgment of the CJ of 3 May 2005 in the joined cases C-387/02, C-391/02, and C-403/02, Penal proceedings against Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others, [2005] ECRI-3565, paragraph 74.

> 116. In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.[24]

In order to avoid breaching European law, the national court should "do everything within its capacities," taking into account all the norms of the national law, in order to guarantee the effectiveness (*effet utile*)[25] of the norms of EU law. Thus, the national court is required, pursuant to the principle of conforming interpretation, to take into account all the national norms and to interpret them to the widest possible extent (to include the norms of the constitution) in the light of the wording and the purpose of the respective EU law, so as to achieve the result anticipated in it. Nevertheless, such a process of decoding of the norm is subject to certain limitations.

As the judgments of the CJ indicate, the obligatory nature of such interpretation cannot "have the effect of determining or aggravating the liability in criminal law"[26] or violate the principle of legal certainty and the principle that law must not be applied retroactively. Thus, it appears that interpretation conforming to European laws cannot lead to an expansion of the scope of application of norms of national law pertaining to penal law or have other effects that are disadvantageous to the persons who face liability in criminal law.[27] This is prevented by the *nullumcrimen sine lege* principle. That rule is one of the general legal principles underlying the constitutional

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[24] See: the judgment of the CJ of 5 October 2004 in case Pfeiffer (C-397-403/01), [2004] ECR I-8835, paragraph 115–116; judgment of the CJ of 16 July 2009 in case Mono Car Styling SA, in liquidation v. DervisOdemis et al. (C-12/08), Court Reports, 2009, p. I-6653, paragraph 63.

[25] Judgment of the CJ of 16 July 2009 in case Mono Car Styling SA, in liquidation, v. DervisOdemis et al. (C-12/08), Court Reports, 2009, p. I-6653, paragraph 64. See also: C. Mik, "Wykładnia zgodna..." [Conforming interpretation...], op. cit., p. 161; M. Szpunar, Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego [Liability of private entities for breaching Community law], pp. 172–174; S. Biernat, in: J. Barcz, ed., Prawo Unii Europejskiej [Law of the European Union], p. I-291.

[26] The Court has ruled that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (judgment in Case 14/86 Pretore di Salò [1987] ECR 2545; judgments in Case 152/84 Marshall [1986] ECR 723, paragraph 48, and in Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 9.

[27] P. Kardas, Rola i znaczenie wykładni prowspólnotowej w procesie dekodowania norm prawa karnego. Uwagi na marginesie uchwały SN z dnia 3 marca 2009 r. (I KZP 30/08) [The role and importance of conforming interpretation in the process of decoding of crim-

traditions common to the Member States. It is also enshrined in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the ECHR'), the first sentence of Article 15(1) of the International Covenant on Civil and Political Rightsand the first sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union. It is a specific enunciation of the principle of legal certainty in substantive criminal law. Moreover, on the basis of that rule, which also prohibits the extensive interpretation of criminal provisions to the disadvantage of the person concerned, the interpretation of national law in accordance with directives in criminal proceedings is subject to strict limits.

This leads to the belief that the direct effect of the norms of European law and interpretation of criminal law in accordance with the principle of conforming interpretation is subject to limitation due to the *nullumcrimen-nullapoena sine lege* principle. This is also confirmed by the judgment of the CJ of 12 December 1996 in case *Criminal proceedings against X* (joined cases C-74/95 and C-129/95), where the court stated that:

> 24. (...). However, that obligation on the national court to refer to the content of the Directive when interpreting the relevant rules of its national law is not unlimited, particularly where such interpretation would have the effect, on the basis of the Directive and independently of legislation adopted for its implementation, of determining or aggravating the liability in criminal law of persons who act in contravention of its provisions.
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> 25. More specifically, in a case such as that in the main proceedings, which concerns the extent of liability in criminal law arising under legislation adopted for the specific purpose of implementing a directive, the principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law. That principle, which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (...).[28]

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inal law norms..., p. 21; M. Szpunar, Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego [Liability of private entities for breaching Community law], pp. 179–180.

[28] See: the judgment of the CJ of 12 December 1996 in case Criminal proceedings against X (joined cases C-74/95 and C-129/95), [1996] ECR I-6609, paragraph 25.

6. In the context of the above discussion, the opinion that, in the process of reconstruction of a normative model in criminal law, national courts conducting interpretation conforming to EU law are limited by general legal principles, to include the principle of legal certainty, the *nullumcrimen sine lege*, and the principle that law cannot be applied retroactively, is fully justified.[29] These principles reflect both the constitutional standards and the legal culture that determines the model of liability in criminal law and the system of rules that guarantee the rights and freedoms of individuals.

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[29] The judgment of the CJ of 3 May 2007 r. in case Advocatenvoor de Wereld (C-303/05), [2007] ECR I-3633, paragraph 49.

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THE RELATIVE NATURE OF ABSOLUTE VIOLATIONS OF THE RIGHT TO DEFENSE AS GROUNDS FOR APPEAL

Non exemplis, sed legibus iudicandum est (C.7,45,13)

Books on the topic named in the title of this paper present a fairly uniform definition of grounds for appeal as defaults which, if found by the appeal body to be present, lead to certain procedural consequences for the appealed decision. Unlike appeal allegations, which are subjective claims of a party regarding defaults made by the court of first instance, they are, in a sense, objective.[1] The relation between these two terms is that only those allegations can be legally effective that make reference to the statutory regulations of appeal allegations, i.e. articles 438–440 of the Code of Criminal Procedure (CCP).[2]

The grounds for appeal, regardless of their effectiveness, can be divided into the following two groups:

1) relative grounds for appeal, which are defaults that lead to procedural consequences in the form of annulment or change of a verdict; however, this takes place only if the grounds were raised by the appealing party in the appeal allegations;
2) absolute grounds for appeal, which are defaults that always lead to procedural consequences in the form of annulment of a verdict, i.e. regardless of whether the appealing party raised them in the appeal allegations or not. The appeal body must consider them irrespective of the limits

[1] See: S. Waltoś, *Proces karny. Zarys systemu* [Penal process. An outline of the system], 10th ed., Lexis Nexis Warsaw 2009, p. 540.

[2] See: M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne* [Polish criminal procedure. Basic theoretical assumptions], Warsaw 1984, p. 384; P. Piszczek, "Postępowanie odwoławcze" [Appeal procedure], in: B. Bieńkowska, P. Kruszyński, C. Kulesza, P. Piszczek (P. Kruszyński, ed.), *Wykład prawa karnego procesowego* [A lecture on the criminal procedure law], 3rd edition, Białystok 2004, p. 404.

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of the appeal, the allegations raised, and the impact on the contents of the verdict. A verdict where absolute grounds for appeal are confirmed may be annulled during the session of the appeal body, without the need to arrange a hearing.

The absolute grounds for appeal mentioned in the books on this subject, in addition to those enumerated in art. 439 of the CCP, include the obvious unfairness of the verdict which leads to a change or an annulment of the verdict (art. 440 of the CCP) and erroneous classification of an act which requires the appeals court to correct it, irrespective of the limits of the appeal and the allegations raised, but without making any changes to the factual findings (art. 455 of the CCP).[3]

The process defaults that constitute grounds for appeal include violations of the right to defense. Having analyzed the scope of the right to defense, P. Wiliński has identified the following three basic degrees of violations of this right (in the order of decreasing gravity):[4]

1) absolute violations of the right to defense (1st degree violations regulated in art. 439 (1) of the CCP);
2) relative violations that influence the contents of the verdict (2nd degree violations regulated, among others, in art. 438 (2) of the CCP; and
3) relative violations that do not influence the contents of the verdict (3rd degree violations that are not gross and are the least harmful to the defendant from the process point of view).

As P. Wiliński has stated, whether a relative violation of the right to defense can influence the contents of a verdict (and, consequently, should be included in the 2nd or 3rd group of violations) depends not only on its nature but also on the circumstances of the case. Seeing certain ambiguities in the use of the term 'gross violation' with regard to absolute and relative violations, P. Wiliński found (based on his analysis of court verdicts) that the term 'gross violation' should apply to all violations that can be considered as 1st and 2nd degree violations, while it should not apply to those violations that, in the opinion of the court, could not influence the final verdict. He emphasized that these findings are important because of the provisions of art. 523 of the CCP which limit the scope of cassation to

[3] See: S. Waltoś, op. cit., pp. 542–544; J. Grajewski. *Przebieg procesu* [Course of the process], 5th edition, C. H. Beck, Warsaw 2012, pp. 312–315. On the other hand, P. Piszczek seems to be limiting the list of grounds for appeal to art. 439 of the CCP and finds the provisions of art. 440 and 455 to be only exceptions to the rule that the court is bound by the limits of the measure of appeal. See: P. Piszczek, op. cit., pp. 414–419.

[4] P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym* [The right to defense rule in the Polish criminal process], Zakamycze 2006, pp. 539–541.

absolute grounds for appeal and other gross violations of law, if they could have influenced the contents of a verdict.[5]

As a result, P. Wiliński's concept of three degrees of violations of the right to defense can be reduced to the proposition that the absolute nature of such violations can be ascertained by the appeals court or the Supreme Court according to the list presented in art. 439 of the CCP and that the relative nature of such violations can be ascertained by an arbitrary decision of the courts.

In this context, of note is the problem of proving that violations of the right to defense have influenced the contents of a verdict. As has been mentioned, the allegation of 'relative' violation of the right to defense is raised by the defendant and is adjudged by the court pursuant to art. 438 (2) of the CCP, i.e. "a breach of the procedural regulations if it could have influenced the contents of the verdict." Even if the defense (in particular the defense counsel) is able to prove the occurrence of a 'breach', proving the influence of this default on the contents of the verdict is highly problematic. An interesting example is the decision of the Appeals Court in Białystok of 27 April 2006 (II AKz 93/06, OSAB 2006/1/43) in which the court stated: "Failure to inform the defense counsel about the date of the session concerning prolongation of pre-trial detention, despite the fact that such a guarantee is provided for in art. 249 (5) of the CCP, and failure to act in accordance with the duty provided for in art. 117 (2) of the CCP – the activity shall not be performed (...) – constitutes gross violation of the suspect's right to defense. Because the aforementioned breach of process law is not included in the list of absolute grounds of appeal, it is subject to evaluation with regard to its impact on the contents of the verdict. The complaint does not indicate, besides the failure to inform the defense counsel, that the lack of his participation in the session influenced the status of the case to an extent that would disqualify the appealed verdict" (emphasis by C. K.).

According to W. Wróbel, interpretation of the law is clearly a part of courts' duties; however, in his opinion, "[a]llegations of law-making appear when courts derive from a legal provision a legal norm which, in the opinion of the critics, is not expressed in the provision in question. However, acceptance of such allegations depends on the assumption that there is only one possible way of interpretation of the provision in question and, conse-

[5] P. Wiliński, op. cit., pp. 541–548, and the court verdicts given there.

quently, only one possible outcome of such interpretation."[6] As. W. Wróbel has indicated, because of the often functional and technical nature of criminal process norms, supplementation of the lacking clear regulations is often allowed, among others by way of analogies. However, this cannot apply to norms that constitute guarantees, often more effectively than provisions of substantive law. In his opinion, "[t]hey must not be limited by way of any analogy and their expansion in this manner requires correlation with the principle of equal arms."[7]

As for the opinion of W. Wróbel regarding the allegation of courts' law-making, it must be stated that the interpretation of the phrase 'breach of procedural regulations, if it could have any influence on the contents of the verdict', is certainly unequivocal. However, it appears that the provisions of art. 438 (2) of the CCP only require finding that the influence of the default on the contents of the verdict was likely.[8] As to the requirement, defined in the aforementioned court verdict, that the degree of influence "would disqualify the appealed verdict," it appears to be an over-interpretation of the indicated relative grounds for appeal and, consequently, may constitute law-making.

Such a high likelihood cannot be required in evaluating the influence of a default on the contents of the appealed verdict, which S. Pawela defines, with reference to the previous CCP of 1969, as a hypothetical cause-and-effect relationship between the default and the contents of the verdict.[9]

On the other hand, S. Zabłocki indicates that when considering the influence of a specific violation of the process regulations on the contents of

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[6] W. Wróbel, "Prawotwórcze tendencje w orzecznictwie Sądu Najwyższego w sprawach karnych. Mity czy rzeczywistość?" [Law-making tendencies in the verdicts of the Supreme Court in criminal cases. Myths or reality?], in: *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci profesora Andrzeja Wąska* [In the circle of theory and practice of criminal law. Book dedicated to the memory of Professor Andrzej Wąsek], Lublin 2005, p. 386.

[7] Ibid., p. 389, and the resolution of the Supreme Court of 16 December 2003, KZP 35/03, OSNKW 2004, No. 1 item. 5, mentioned there. The opinion regarding creative interpretation of criminal law by the Supreme Court is also shared by P. Kardas; see: P. Kardas, "Kontrowersje wokół pojęcia 'osoba pełniąca funkcję publiczną'. Rzecz o kreatywnej wykładni przyjmowanej w orzecznictwie oraz granicach zakresowych typu czynu zabronionego określonych w ustawie" [Controversies regarding the term 'public official'. On the creative interpretation adopted in case-law and on the limits of the scope of the type of forbidden act defined in the statute], *CzPKiNP*, 2011, no. 1, p. 79 ff.

[8] Information on the role of confirmation of likelihood in criminal process can be found in, e.g.: R. Kmiecik, E. Skrętowicz, *Proces karny. Część szczególna* [Criminal process. Specific part], 5th edition, Zakamycze 2006, p. 356.

[9] S. Pawela, *Względne przyczyny odwoławcze* [Relative grounds for appeal], Warsaw 1970, p. 26.

a verdict, the so-called negative test is very useful. In his opinion, a confirmed process default may be considered as one that does not constitute grounds for challenging a verdict if the court reasonably concludes that the default was so unimportant that, if it did not take place, the verdict would have been the same as the one that was issued with the default in place.[10]

However, it appears that it is hard to make reliable predictions concerning, for example, the extent to which the aforementioned absence of defense counsel during a session in which the court makes the decision to prolong pre-trial detention affected the contents of the court's decision. What is more important is that in this situation the defense counsel is deprived of the very possibility to make verbal presentation of his position and to argue with the public prosecutor.

When evaluating the possible influence of violations of the right to defense on the contents of court verdicts, one must take into account how the right to defense is perceived. Pursuant to art. 42 (2) of the Constitution and to art. 6 of the CCP, it is believed that the right to defense in the Polish criminal process covers both the substantive aspect (as the sum of guarantees given to the defendant with regard to his defense in a process) and the formal aspect (the defendant's right to receive assistance of a defense counsel).

Of note is also the opinion of A. Murzynowski who emphasizes the importance to the defense of the defendant's right to use the assistance of a defense counsel which is often (inappropriately, in his opinion) referred to as formal defense.[11] Even though A. Murzynowski does not explain what such 'inappropriateness' means, one can assume that he agrees with the opinion expressed many years ago by M. Cieślak, who said that "in particular the term 'formal defense' may lead to the belief that what it means is purely formal performance of duties required pursuant to the principle of defense, which would be a pernicious error."[12] This opinion, formulated as early as in the 1950's, appears to point at the defense counsel's passive attitude in his defense of the accused. However, given the dramatically limited options of the defense in the contemporary criminal process, it is wrong to blame defense counsels only. Even though the quality of a defense coun-

[10] S. Zabłocki, in: *Komentarz do art. 438 k.p.k.* [A commentary to art. 438 of the CCP], DW ABC, 1998.

[11] A. Murzynowski, *Istota i zasady procesu karnego* [The essence and principles of criminal process], 3rd edition, Warsaw 1994, p. 275.

[12] M. Cieślak, *Dzieła wybrane* [Selected works], vol. I, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2011, p. 126, note 6 and the literature mentioned there.

sel's work should be considered as one of the guarantees of due process,[13] it must be stated that, in the context of the Polish criminal process system in 21st century, there are constraints on the effectiveness of the defense that are independent of the defense counsel's efforts. For example, if courts assess the frequently passive, out of necessity, role of the defense counsel as 'purely formal', thus devaluing the influence of the defense counsel's involvement on the outcome of the process,[14] then it is inevitable that the importance of violations of the right to defense will become reduced.

Therefore, in the context of the subject of this paper, what deserves particular attention is the equivocal meaning of the term 'right to defense' and the resulting inconsistent evaluation of the consequences of its violations. The right to defense is nowadays considered to be an element of due process and its normative content goes far beyond the 1997 Code of Criminal Procedure (art. 6 of the CCP) and includes the 1997 Constitution (art. 42 (2)), art. 6 of the European Convention on Human Rights (art. 6 (3)), art. 14 (3) of the International Covenant on Civil and Political Rights (ICCPR) of 19 December 1966 (Journal of Laws of 1997, no. 38, item 167), and the evolving European law. Consequently, violations of the right to defense are interpreted by courts not only in the context of those acts of law but also in the context of the rich case law of the ECHR in Strasbourg, the ECJ in Luxembourg, and the case law of Polish courts. In particular the ECHR, with reference to the participation of a defense counsel in a criminal process (i.e. the so-called formal defense), uses such terms as 'effective defense' and 'real defense', thus creatively expanding the meaning of this term to cover not only entire court proceedings but also preparatory proceedings.[15] Therefore, it is impossible to provide unequivocal definition of these terms, as their sources are not legal norms (to include international ones) because they were first used in the verdicts of European courts.

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[13] See, e.g.: C. Kulesza, "Jakość obrony formalnej jako warunek rzetelnego procesu (refleksje prawnoporównawcze)" [Quality of formal defense as a condition of due process (comparative law reflections)], in: J. Skorupka, ed., *Rzetelny proces karny: księga jubileuszowa Profesor Zofii Świdy* [Due criminal process: a jubilee book for Professor Zofia Świda], Warsaw, Oficyna a Wolters Kluwer business, 2009, pp. 145–167.

[14] More information can be found in: C. Kulesza, "Od obrony formalnej do obrony realnej? Nowa rola obrońcy w projekcie reformy procedury karnej" [From formal defense to real defense], in: *Księga pamiątkowa ku czci Prof. J. Skupińskiego* [Commemorative book for the honor of Professor J. Skupiński], (accepted to be printed).

[15] See, e.g.: C. Kulesza, "Developments of the European criminal justice systems: defence perspective", in: E. Pływaczewski, ed., *Current problems of the penal law and criminology / Aktuelle Probleme des Strafrechts und der Kriminologie*, Warsaw, Lex a Wolters Kluwer business, 2012, pp. 317–336, and the court verdicts mentioned there.

The subject of this paper is limited to absolute violations of the right to defense which translate into absolute grounds for appeal defined in art. 439 (1) (10) and (11) of the CCP. These grounds are clearly linked to violations of the right to defense in both its formal and its material aspect and, according to the statute, they include:
item 10) – the defendant in a court proceeding had no defense counsel in a case defined in art. 79 (1) and (2) and in art. 80, or the defense counsel does not participate in the activities in which his participation is mandatory; and
item 11) – a case is adjudicated in absence of the defendant, when his presence is mandatory.

The absolute nature of all process defaults under art. 439 (1) of the CCP consists in the fact, as has been observed in the books on this subject, that the first regulation formulates an absolute legal assumption regarding their influence on the contents of the appealed verdict.[16] Thus, unlike in the case of relative grounds for appeal, e.g. under art. 438 (2) of the CCP, not only is the appealing party (most often the defendant or his defense counsel) exempt from the duty to prove the influence but also the appeal court (or the Supreme Court) may prove or assume the lack thereof.[17] In the case of relative violations, it is necessary to prove (or demonstrate the high likelihood of) not only occurrence of such a violation of the mandatory procedures but also to demonstrate the cause-and-effect (detrimental) relationship with the verdict. On the other hand, in the case of absolute grounds for appeal, proof (or demonstration of high likelihood) of such grounds is sufficient. This is because the essence of a legal assumption is such that if fact A takes place the statute requires that procedural consequence B be assumed which, in this case, means that the verdict must be annulled to the benefit of the defense (see art. 439 (2) of the CCP).

Moreover, it must be noted that the indication by the defense counsel, in the cassation motion regarding the verdict issued by the court of 2nd instance, of the presence of an absolute ground for appeal under art. 439 (1) of the CCP 'opens the gate' for the defense counsel to adjudication of this extraordinary means of appeal by the Supreme Court, thus freeing him from the limitations imposed by art. 523 (2) of the CCP (i.e. the premises for the penalty of a prison sentence without conditional suspension of its execution). If the defendant is penalized with a prison sentence with conditional suspen-

[16] See, e.g.: S. Waltoś, op. cit., p. 361.

[17] See, e.g.: Verdict of the supreme court of 11 February 2009, II KK 256/08, Biul. PK 2009/4/5–6.

sion of its execution (or a more lenient penalty, e.g. a fine) and the defense counsel does not reasonably claim the occurrence of one of the grounds for appeal defined in art. 439 (1) of the CCP, then the cassation motion will not be accepted by the president of the appeals court (art. 530 (2) of the CCP).

Therefore, apparently unequivocal provisions of the aforementioned art. 439 (1) (10) and (11), which include such phrases as "the defense counsel did not participate in the activities" and "adjudicated during absence of the defendant, when his presence was mandatory," should be interpreted in a consistent manner. Nevertheless, even a superficial analysis of the verdicts of the Supreme Court and appeals courts indicates that this is not the case. In the case of the ground for appeal under art. 439 (1) (10) of the CCP, this may be due to the 'blanket' nature of this regulation which makes reference to the legal norm derived from the provisions of art. 79 (1) and (2) and art. 80 of the CCP.

This substantiates a controversial proposition that restrictive interpretation of the aforementioned regulation pertaining to the right to defense by the Supreme Court and appeals courts may lead to non-statutory restrictions on the availability of cassation as an extraordinary means of appeal.

I. It must be noted that as far as the grounds for appeal under subparagraph 10 are concerned, courts use both extensive and restrictive interpretation, which sometimes leads to differences in verdicts. In order to verify the above proposition, verdicts of the Supreme Courts and appeals courts have been divided into categories in the context of their potential inconsistency. The verdicts were quoted on the basis of propositions selected by the LEX publishing company, which means than they may not take into account all the aspects arising from their substantiations.

1) According to the verdict of the Supreme Court of 22 April 2010 (II KK 268/09, OSNwSK 2010/1/881), violation in the form of the accused person's lack of a defense counsel when defense is mandatory takes place when a single required defense counsel defends many defendants, even if their interests are contradictory (the same conclusion was expressed in the verdict of the Supreme Court of 7 December 2004 (IV KK 276/04, LEX no. 163269) and in the verdict of the Appeals Court in Lublin of 12 April 2011 (II AKa 45/11, LEX no. 895934)).

In the aforementioned verdicts, the courts use such terms as 'reality of formal defense' and 'material defense' as opposite to the sole presence of a defense counsel during a hearing, if the counsel is unable to actually undertake any action (see the verdict of the Supreme Court of 6 October 2010 (IV KK 82/10, OSNwSK 2010/1/1893), the verdict of the Supreme

Court of 15 January 2008 (V KK 190/07, OSNKW 2008/2/19), and the decision of the Supreme Court of 15 November 2006 (IV KK 188/06, OSNwSK 2006/1/2170)).

2) In its verdict of 8 June 2008 (III KK 419/03, OSNKW 2004/7–8/74), the Supreme Court indicated that preventing communication of the defendant with the defense counsel during the absence of other persons, during process activities that are important from the point of view of defense, may constitute an absolute ground for appeal under art. 439 (1) (10) in fine of the CCP if it is found that it is equivalent to lack of participation of the required defense counsel in the activities where such participation is mandatory.

On the other hand, in one of its verdicts (II AKa 169/08, KZS 2009/10/50), the Appeals Court in Kraków appears to have chosen a different approach, as it stated that not every restriction on contacts between the defendant and the defense counsel demonstrates that the defense counsel does not participate in activities where such participation is required and, consequently, such restriction is not equivalent to preventing substantive defense of the accused person (art. 439 (1) (10) of the CCP).

3) In its fairly uniform verdicts, the Supreme Court has assumed that the CCP does not provide for exemption of the defense counsel from the mandatory participation in any part of a hearing in cases where defense is mandatory (the verdict of the Supreme Court of 11 February 2009, II KK 256/08, Biul. PK 2009/4/5–6; decision of the Supreme Court of 27 February 2007, I KZP 38/06, OSNKW 2007/3/23).

– The Supreme Court makes a more restrictive interpretation of art. 439 (1) (10) in the same verdict of 2 March 2010 (III KK 307/09, LEX no. 583859) where it states that if the absence of a defense counsel who is subject to mandatory defense concerns only a small portion of the hearing related to one of the alleged offenses, in a proceeding that is complex both subjectively and objectively, and if the defense counsel participated in the hearing during adjudication of the remaining alleged offenses, then the appealed verdict has to be annulled only in the part pertaining to the specific offense. A similar position of the Supreme Court is visible in the verdict of 1 April 2005 (V KK 346/04, LEX no. 148226), where the Court observed that only if the court had been informed by the defense counsels about their division of duties, the interpretation would be permissible that in the scope of defense assumed by the defense counsel who did not exercise it in the situation described in art. 79 (1) and (2) of the CCP and in art. 80 of the CCP, the defendant was deprived of a defense counsel in the meaning of art. 439 (1) (10), first sentence, of the CCP.

4) In its analysis of the relationship between the defendant and the defense counsel, the Appeals Court in Katowice, in its verdict of 25 March 2011 (II AKa 449/10, LEX no. 846487), found that "[a]situation where the circumstances of a specific case indicate that the defense counsel of a defendant has filed an appeal contrary to the defendant's will, intentions, and interest and has not undertaken all possible actions in this regard that are beneficial to the defendant, even though he could and was able to do so, must be considered as equivalent to a situation where a defendant has no defense counsel in a criminal process with respect to implementation of substantive defense, which constitutes an absolute ground for appeal in the meaning of art. 439 (1) (10) of the CCP."

Yet another approach can be seen in verdicts which indicate that:

– "A rejection of a motion to change the court-appointed defense counsel substantiated by loss of trust of the defendant in the counsel does not deprive the defendant of defense (art. 439 (1) (10) of the CCP)." (verdict of the Appeals Court in Kraków of 24 November 2010 (II Aka 216/10, KZS 2010/12/48)).

– Moreover, the same Court, in its decision of 30 March 2009 (II AKo 26/09, KZS 2009/5/40) assumed, among other things, that the court is not required to determine whether the attorneys performing duties as the defense counsels have acted in accordance with the expectations of the defendants and that "[o]nly the visible and evident violations of the duties of the defense counsel may constitute grounds for the Court asking the defendant if his rights are not breached or issuing orders in situations provided for in the law."

5) According to the verdict of the Supreme Court of 11 May 2010 (III KK 399/09, LEX no. 598845), a motion for compulsory appearance at an appeal hearing, depending on the Court's decision, has to result in participation in the hearing of the defendant or, in the event of a refusal to grant compulsory appearance, in the requirement to appoint a defense counsel, whose participation in the appeal hearing becomes mandatory, even with the consequences (in the event of adjudication in the absence of a defense counsel) mentioned in art. 439 (1) (10) of the CCP (the same statement was made in the verdicts of the Supreme Court of 3 December 2007 (V KK 448/06, LEX no. 361429) and of 31 August 2005 (V KK 58/05, OSNKW 2005/11/113)).

– The Supreme Court appears to adopt a different position in its verdict of 4 February 2009 (III KK 290/08, LEX no. 486546) where it concluded that failure to perform the duty under art. 451 of the CCP does not constitute a breach under art. 439 (1) (10).

6) In its verdict of 19 September 2007 (III KK 130/07, LEX no. 310629.), the Supreme Court stated that the mandatory defense provided for in art. 79 (2) of the CCP becomes mandatory at the time of occurrence of circumstances that hinder the defendant's exercise of substantive right to defense and hearings without participation of a defense counsel in this situation constitute a breach of the provisions of art. 439 (1) (10) of the CCP (the same conclusion can be drawn from the verdict of the Supreme Court of 24 July 2007 (III KK 60/07, OSNwSK 2007/1/1716)).

– The Supreme Court appears to demonstrate a different approach in its verdict of 18 April 2012 (IV KK 366/11, Biul. PK 2012/5/18) where it assumes, among other things, that the mandatory defense requirement provided for in art. 79 (2) of the CCP becomes effective only when the court has issued a relevant decision (a similar conclusion can be drawn from the verdict of the Supreme Court of 7 September 2007 (II KK 30/07, OSNwSK 2007/1/1983) which provides that "the obligatory defense requirement becomes effective only when the court finds that the defendant (applicant) has to have a defense counsel").

7) As for mandatory defense of a person suspected of being insane, according to the verdict of the Supreme Court of 13 April 2006 (V KK 123/06, OSNwSK 2006/1/848), a breach of art. 79 (1) (3) and art. 79 (3) of the CCP takes place only when the hearing is conducted without participation of the defense counsel, even though the court has had doubts regarding the defendant's sanity and when, given the materials gathered in the case, the court should have had such doubts. An allegation regarding a breach of this regulation and, consequently, the breach defined in art. 439 (1) (10) of the CCP, can be raised effectively in the event that the body conducting the process fails to respond to the presence of reasonable doubt (the same conclusion can be drawn from the verdict of the Supreme Court of 14 February 2005 (II KK 491/04, LEX no. 149603)).

– However, the Supreme Court is more often of the opinion that a breach of art. 79 (1) (3) and art. 79 (3) of the CCP takes place when a hearing is conducted without participation of the defense counsel, even though the court had doubts concerning the defendant's sanity (e.g. verdicts of the Supreme Court of 11 January 2012 (III KK 176/11, LEX no. 1119508), of 29 June 2010 (I KZP 6/10, OSNKW 2010/8/65), and of 2 March 2009 (LEX no. 495313)).

II. As for the ground for appeal under art. 439 (1) (11) of the CCP, it can also be concluded that the courts' interpretations of the regulation are different and, as a rule, restrictive.

1) As the Supreme Court stated in the substantiation of its verdict

of 6 April 2011 (III KK 216/10, OSNKW 2011/8/71), "[t]he breach defined in art. 439 (1) (11) of the CCP is of individual nature and does not have process consequences to other defendants in cases where many defendants are involved. Such breach should be subject to similar interpretations in objectively complex cases and lead to the consequence provided for in art. 439 (1) of the CCP only with reference to this objective part of the process to which the part of the hearing conducted in the absence of the defendant applied, provided that the circumstances of the specific process enable such a distinction."

2) On the other hand, in its verdict of 3 March 2011 (III KK 294/10, LEX no. 785588), the Supreme Court indicated that "[t]he sense of the provision of art. 439 (1) (11) of the CCP which, due to its nature and the associated consequences, should be interpreted strictly, is unequivocal: only in the event of existence of the defendant's duty to be present, his absence during adjudication of a case is considered as an absolute ground for appeal."

3) The Supreme Court assumes in principle that initiation of process activities during a hearing where the defendant is absent, if none of the exceptional situations that enable continuation of the hearing in the absence of the defendant have taken place, constitutes an absolute ground for appeal defined in art. 439 (1) (11) of the CCP (verdict of the Supreme Court of 4 February 2009 (V KK 331/08, LEX no. 495323); verdict of the Supreme Court of 26 May 2004 (V KK 15/04, LEX no. 109510)). This rule applies also in situations where, due to a change from a summary trial to a regular trial, the presence of the defendant at the hearing becomes obligatory (see the verdicts of the Supreme Court of 5 June 2007 (IV KK 113/07, OSNwSK 2007/1/1231) and of 27 September 2004 (III KK 216/04, LEX no. 126701)).

4) In accordance with the above strict interpretation, the Supreme Court concluded that the ground for appeal under art. 439 (1) (11) of the CCP does not take place in situations where:

– an appeal hearing is conducted during the absence of a defendant participating in the trial on his own recognizance who has properly justified his absence and requested that the hearing be postponed (art. 117 (2) of the CCP) but whose presence is not mandatory because neither the appeals court nor the president of this court considered it to be necessary (art. 450 (2) of the CCP) (verdict of the Supreme Court of 3 March 2011 (III KK 294/10, Biul. PK 2011/5/50)).

– the main hearing is conducted during the absence of a defendant serving a prison sentence who has not informed the court about this fact

(verdict of the Supreme Court of 3 November 2010 (II KK 119/10, LEX no. 638477);

– the defendant has not been informed about the date of pronouncement of the verdict and, as a result, he is absent during the hearing when the verdict is pronounced (verdict of the Supreme Court of 1 August 2007 (IV KK 203/07, OSNwSK 2007/1/1773)).

To conclude the deliberations concerning the different (relative) interpretations of absolute violations of the right provided for in art. 439 (1) (10) and (11) of the CCP, let me make reference to the maxim whereby courts must adjudicate on the basis of laws and not on earlier cases, which is the motto of this article. As T. Stawecki was right in observing, courts often follow the principle of *clara non sunt interpretanda* (what is clear does not require interpretation), but they just as often ignore it without substantiating their decisions regarding interpretation. In his opinion, the rules regarding strict interpretation among others in substantive criminal law, and in particular the prohibition to perform extensive interpretation, "are usually officially declared but actually forgotten or ignored in cases pertaining to difficult legal and social matters."[18] In the case of interpretation of criminal procedure law, the reasons for tolerating violations of procedure may be opinions regarding the leniency of the penalties for violating the procedure and, in particular, for disciplinary misdemeanors, and even the personal attitudes of the judges towards the cases. In a disciplinary case adjudicated by the Supreme Court (SDI 33/11), a legal counsel was found guilty of offending the judges of the Supreme Court in his written statement by using the following phrases:

– "I submitted this appeal motion but one of the Supreme Court judges, during an in camera session, refused to accept it for consideration without any substantiation. This is a truly unconstitutional scandal,"

– "(...) give the boot to get rid of (...),"

– "(...) independence from reason in this case is as ubiquitous as in the other one."

The legal counsel did not exercise restraint and tact towards the Supreme Court, thus committing the offenses defined in art. 64 (1) (2) of the Act on Legal Counsels in connection with art. 30 of the Legal Counsel's Code of Ethics, and pursuant to art. 65 (1) (1) of the Act on Legal Counsels,

[18] T. Stawecki, "O praktycznym stosowaniu hermeneutyki w wykładni prawa" [On the practical application of hermeneutics in legal interpretations], in: *Wykładnia prawa, Materiały z konferencji na WPiA UW z 27 lutego 2004 r.* [Interpretation of law. Materials from the conference held at the Faculty of Law and Administration of the Warsaw University on 27 February 2004, Warsaw 2004, p. 13.

the disciplinary court adjudicated the penalty of admonition. In its decision of 10 January 2012, the Supreme Court rejected the accused legal counsel's cassation motion and found that adjudication of the appeal motion by the Supreme Disciplinary Court in the absence of the accused person cannot constitute an absolute ground for appeal defined in art. 439 (1) (10) of the CCP or in art. 439 (1) (11) of the CCP (SDI 33/11, LEX no. 1129167).

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THE RIGHTS OF A SUSPECTED PERSON GRANTED IMMUNITY IN THE INTERPRETATION OF THE SUPREME COURT – A CRITICAL REVIEW

'Laws are spider webs through which the big flies pass and the little ones get caught.'
Honoré de Balzac

In the jurisprudence, an interpretation of law is generally a set of actions aimed to determine the meaning of a legal provision (the so-called interpretation of law in the strict sense) or the content of a legal norm contained in a specific legal provision (the so-called interpretation of law in the broad sense). In the application of the law by legal authorities, as well as in everyday life, doubts sometimes arise about the meaning of a particular provision of law or a legal norm. Most often the problems are related to language errors, faulty editing during the lawmaking process, socio-economic or political changes non-congruent to existing legal norms, or the too general or vague nature of these legal standards, allowing contrary interpretations.[1] Interpretation of law should be employed in order to remove such doubts. In the Polish criminal process, a so-called legal question addressed to the Supreme Court is vital. In accordance with article 441 of the Code of Criminal Procedure, if the diagnosis of a legal remedy results in raising an issue requiring substantial interpretation of an act, the appellate court may postpone the proceedings and refer the issue to the Supreme Court for adjudication (§ 1). Resolution of the Supreme Court is binding in the matter (§ 3). Therefore the primary function of the so-called legal question in a criminal

[1] Order of the Supreme Court – 16–06–1993, I KZP 14/93, Wokanda 11/1993, s. 8 and following; Resolution of the Supreme Court – 18–11–1998, I KZP 16/98, OSNKW 11–12/1998, pos. 48.

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proceedings is to eliminate divergent legal interpretations present in the law application process, which is extremely detrimental to justice authority as a whole. On the other hand, this does not mean that a provision reviewed by the Supreme Court has been clearly and permanently modified. The idea is that if after the Supreme Court presents a particular interpretation of a provision of law and previously not included arguments arise, possibly leading to different conclusions or requiring detailed critical analysis because they may lead to different interpretations in practice, there is a possibility of fundamental re-interpretation of an act made by the Supreme Court. It is not always the case that the Supreme Court's resolution of a particular issue is adopted by the doctrine and jurisprudence with approval. Negative views and comments following an unaccepted resolution of the Supreme Court are then presented in so-called critical voices. The case of an unacceptable interpretation of law is presented in the following deliberation.[2]

Common knowledge of an instrument of 'disciplining the justice system' by means of a so-called complaint against the excessive length of the criminal proceedings forces one to acquaint the Act of 17 June 2004 on the complaint against infringement of the right of a party to have the case examined in legal proceedings performed or supervised by a prosecutor and court proceedings without undue delay.[3] The Act on complaint against delay is a surprisingly concise and clear piece of legislation and, as it seems, constructed of precise provisions of law. Unfortunately, reading the two orders of the Supreme Court on the said act in regard to the right of entitled parties to file a complaint against an undue delay of pre-trial proceedings introduces the reader to confusion. These are namely the order of the Supreme Court of 21 July 2009, WSP 1/09 and the order of the Supreme Court of 18 August 2009, WSP 4/09.[4] The fundamental issue in the outlined context is the right of the suspected person, who has been granted an immunity, to file a complaint against excessive length of pre-trial proceedings. This leads to the need of answering the question of whether article 3 of the Act on complaint against delay provides a complete and closed list of parties entitled to filing the complaint against excessive length of proceedings car-

[2] See the critical gloss of M. Jędruszczak, Gloss to the Supreme Court ruling – 21–07–2009, WSP 1/09, Prokurator, 2010/1–2/154 and B. Janusz-Pohl, Gloss to the Supreme Court order – 21–07–2009, WSP 1/09. WPP, 2011/1/127.

[3] Dz. U. 2004 No 179, pos. 1843 with later changes, referenced further as the Act on complaint against delay.

[4] The order of the Supreme Court – 21–07–2009, WSP 1/09, OSNKW 2009, No 9, pos. 79 and the order of the Supreme Court – 18–08–2009, WSP 4/09, Prok. i Pr. – wkł. 2010 No 4, pos. 13.

ried in various procedures. Another question that arises after analysis of the above-mentioned resolutions of the Supreme Court concerns the nature of the decisions of the Court. One has to seriously analyze whether in these cases the role of the Supreme Court as an interpreter of law has not become the role of the lawmaker, creating case law. Therefore one has to express hope that the search for answers to the doubts raised will help to understand the reasons and correctly read the intentions that guided the Supreme Court issuing the resolutions in question. It should also be noted that due to the scope of the subject of this review, although the area of the orders of the Supreme Court that have caused confusion is broader, the following analysis will only concentrate on parties authorized to file a complaint against excessive length of the criminal proceedings.

At the outset it should be noted that, based on literal interpretation of article 3 of the Act on complaint against delay, one can argue that the law contains a closed catalog of parties entitled to filing the complaint in specific types of cases. This stance is supported by the fact that the legal standard not only lists specific types of procedures but also separately and specifically indicates the parties entitled to filing the claim.

In accordance with article 3 point 4 of the Act on complaint against delay in the case of criminal proceedings, the right to file the complaint accrues to the party and the victim, even if the victim is not the party. Legal definition of a victim and entities who are entitled to victim rights in specific cases can be found in article 49 of the Code of Criminal Procedure. According to § 1 of this article, a victim is a person or entity whose legal interests have been directly affected or threatened by an offense. Victims can also be state, local or social government institutions, even if they do not have a legal personality (§ 2). In turn an insurance company is a victim in regard to covered damages of a crime victim or damages it is obliged to cover (§ 3). In cases of crimes against the rights of people performing paid labor, referred to in articles 218–22 and article 225 § 2 of the Code of Criminal Procedure, the authorities of the National Labor Inspectorate may exercise victim rights, if their activities revealed a crime or they initiated proceedings (§ 3a). In cases where harm has been done to the property of state, local or social institutions, if an organ of the institution does not function, victim rights can be exercised by state control authorities who revealed the crime or initiated proceedings (§ 4).

The Act of complaint against delay also contains no legal definition of a party; therefore, in order to determine the entities entitled to file a complaint against delay in various types of procedures, one must use the definitions found in the codes that regulate the procedures in particu-

lar areas of law.[5] Therefore, in the discussed subject, article 299 § 1 of the Code of Criminal Procedure should be consulted, which defines the term of a party of a criminal procedure in pre-trial proceedings. According to that provision, the parties of proceedings are the victim and the suspect. Pursuant to the provisions of article 71 § 1 of the Code of Criminal Procedure, a person is considered a suspect if an order has been made about presenting the charges to the person, or the charges have been presented to the person directly (without an order) in relation to interrogating him as a suspect. The analysis of article 3 point 4 of the complaint against delay in regard to article 299 § 1 of the Code of Criminal Procedure shows that the entities entitled to filing the complaint are only the suspect and the victim. One must keep in mind that article 3 point 4 of the Act on complaint against delay refers to the excessive length of the whole criminal proceedings, and therefore also to the stage of judicial proceedings in which the victim, in principle, is not a party, unless in the role of an auxiliary prosecutor, private prosecutor, or civil plaintiff. For this reason, perhaps, in order to avoid any doubt whether a victim is entitled to filing a complaint during judicial proceedings, the text of this provision indicates that a victim has the right to file the claim, even if the victim is not a party.

As mentioned earlier, the list of entities entitled to file the complaint against excessive length of pre-trial proceedings in accordance to article 3 point 4 of the Act on complaint against delay, interpreted alongside article 299 § 1 of the Code of Criminal Procedure, seems quite clear and not casting doubts; however, that is, until one becomes acquainted with the order of the Supreme Court of 21 July 2009 and the Supreme Court ruling of 18 August 2009. Both decisions were ordered regarding essentially the same matter; that is, the admissibility of filing a complaint against delay in cases occurring before the amendment to the Act on complaint of delay had been introduced,[6] as well as the right of a suspect granted immunity to file the complaint.[7] The matter of the rulings was also similar, because the subject

[5] In accordance to § 9 of the Regulation of the Prime Minister, 20–06–2002, "Rules of Legislative Technics" (Dz. U. 2002 No 100 pos. 908).

[6] The Act of 20 February 2009 on amendment of the Act on complaint against breach of a party's right to hearing a case in court without undue delay (Dz. U. 2009 No 61 pos. 498); effective as of 1 May 2009.

[7] Although the brought rulings of the Supreme Court were related to a military court judge, in our opinion the decisions may also apply by analogy to other persons granted immunity, in respect to which it is impossible to prosecute without the permission of the relevant authority.

of both pre-trial proceedings were acts of which a judge of a military court was suspected.[8] It should be emphasized that regardless of the differences in the adjudicated facts, both cases had an important element in common, namely the fact that in none of these investigations had the judges been accused of crimes, and the pre-trial proceedings were discontinued in the phase of *in rem*. Therefore, the judge occurred in these proceedings only as a person of interest (possible suspect), not as an actual suspect, and thus did not become a pre-trial proceedings party according to article 299 § 1 of the Code of Criminal Procedure.

According to the scope of the analysis outlined in the introduction, the most important and primary thesis of the Supreme Court that should be taken into consideration is the one according to which individuals granted immunity in specific cases are entitled to file a complaint against delay of pre-trial proceedings, even when they are formally not a party. For the sake of clearness of the deliberations, the signaled theses of the Supreme Court's rulings that cause justified confusion should be cited. In its ruling of 21 July 2009, the Supreme Court stated that 'a judge, against whom a prosecutor filed for permission to the disciplinary court to prosecute him for committing a specific crime, and then, not obtaining such permission, discontinued the *de facto* performed criminal proceedings based on article 17 § 1 point 10 of the Code of Criminal Procedure, is entitled at the very least to the rights of a suspect based on article 306 § 1 of the Code of Criminal Procedure, and therefore also the right of filing a complaint under article 3 point 4 of the Act of 17 June 2004 on the complaint against infringement of the right of a party to have the case examined in pre-trial proceedings performed or supervised by a prosecutor and court proceedings without undue delay'.[9] According to article 306 § 1 of the Code of Criminal Procedure, victims and institutions mentioned in article 305 § 4 of the Code of Criminal Procedure are entitled to filing a complaint against the decision to not initiate pre-trial proceedings, and the parties – against discontinuing it. Similarly, in the Supreme Court's decision of 18 August 2009, the same court, although considering a slightly different factual state, but also in the case of a judge of a military court, stated that 'a judge against whom a prosecutor – contrary to article 17 § 2 of the Code of Criminal Procedure – is running an actual

[8] It needs to be indicated that in the first case the prosecutor issued a claim to the disciplinary court asking for permission to subject the judge to criminal liability. Having not obtained the permission, the proceedings were discontinued (ruling of the Supreme Court of 21–07–2009). In the second case the prosecutor discontinued the investigation, not applying for waiver of the judge's immunity.

[9] Ruling of the Supreme Court – 21–07–2009, WSP 1/09, OSNKW 2009, No 9, pos. 79.

investigation, is entitled to the rights of a suspect, therefore also the right to file a complaint under article 3 point 4 of the Act of 17 June 2004 on the complaint against infringement of the right of a party to have the case examined in pre-trial proceedings performed or supervised by a prosecutor and court proceedings without undue delay (Dz. U. No 179, pos. 1843 with later changes)'.[10]

It should be noted that the statements of the Supreme Court 'the *de facto* performed criminal proceedings (against the judge)' and 'a judge against whom a prosecutor (...) is running an actual investigation' set a new and previously unrecognized form of pre-trial proceedings – the de facto proceedings (or the so-called actual investigation). These statements are obviously unacceptable, but still the reasoning of the Supreme Court is interesting; that is, the set of actions performed to determine the meaning of the content of the rule of law which led to forming such a surprising position that 'a judge, known by name and performed function, not covered by long-term criminal proceedings, is a party of these proceedings under article 3 point 4 of the Act on complaint[11]' even when there are no charges filed against him that would result in him becoming a suspect.

Justifying the above view in its order of 21 July 2009, the Supreme Court, among other things, stated that '...in the examined case the President of the Military Court (...) in Y., Colonel X., filed a complaint against the ruling of the Military District Attorney in Z. which refused to accept his complaint against the decision to discontinue the investigation. The Military District Court in Y. changed the challenged ruling and agreed to recognize Colonel X.'s complaint. In justification of the resolution it concluded that Colonel X., at least from the moment the prosecutor had filed a request to subject him to criminal liability, should have the rights of a suspected person, including the right to filing a complaint against the order of discontinuation of the investigation under article 306 § 1 of the Code of Criminal Procedure, because '...filing a request to subject a judge (...) to criminal justice by the prosecution, based on previously gathered facts which allow the judge suspected of offense to be identified by first and last names, results in the fact that the criminal proceedings are becoming *in personam* from this moment. (...) As a result, in the examined case, judge Colonel X. is

[10] Ruling of the Supreme Court – 18–08–2009, WSP 4/09, Prok. i Pr. – wkł. 2010 No 4 pos. 13.

[11] It should be noted that in the order of 18 August 2009, the Supreme Court repeatedly and explicitly refers to the order of 21 July 2009, in fact repeating it, albeit in a condensed form.

a party of pre-trial proceedings, having the right to challenge the decision to discontinue the proceedings in the case. Moreover, he must be considered a party under article 3 point 4 of the Act on complaint against delay, and have the legitimization to file a complaint against delay of the pre-trial proceedings carried against him.' One must admit that the reasoning found in the justification of the order of 21 July 2009 of the Supreme Court is even more surprising than the thesis it resulted in. It must be strongly emphasized that the Code of Criminal Procedure of 1997 does not contain an *in personam* pre-trial proceedings initiation procedure. Criminal proceedings in the *in personam* stage occur when a specific person is presented with charges. According to article 313 § 1 of the Code of Criminal Procedure, if the data existing at the time of initiation of pre-trial proceedings or gathered during those proceedings sufficiently justifies the suspicion that an act was committed by a specific person, a decision to present charges is made, which is immediately presented to the suspect, who is interrogated, unless the presentation of the decision is not possible due to the suspect's hiding or absence from the country. The decision to present charges includes suspect identification, accurate description of the alleged offense he is charged with and its legal characterization (§ 2). 'Mere suspicion that an offense was performed by a specified person and that it is a crime, when a suspect has been granted immunity, determines only the initiation and conduct of pre-trial proceedings in a case (article 303 of the Code of Criminal Procedure) and determines its form (article 309 point 2 of the Code of Criminal Procedure).'[12]

Absolutely surprising is the ruling of the Military District Court in Y., cited in the Supreme Court's justification, which conceded that from the moment the prosecution had filed a request for permission to subject the judge known by first and last names to criminal liability, judge X. – a person being actually only suspected – has the right specified in article 306 § 1 to file a complaint against the decision to discontinue the pre-trial proceedings. This thesis is surprising in that the legislator explicitly stated that only the parties – that is, the suspect and the victim – have the right to a complaint against discontinuation of legal proceedings (article 299 § 1 of the Code of Criminal Procedure). A person actually suspected does not have the status of a suspect, and thus does not meet the statutory requirement and cannot effectively file a complaint against the decision to discontinue the pre-trial proceedings.

[12] B. Janusz-Pohl, Gloss to the Supreme Court ruling – 21–07–2009, WSP 1/09. WPP, 2011/1/127.

Does this mean that the Military District Court, and also the Supreme Court, which shared this position (as evidenced by referencing the order in the Supreme Court's own justification), cannot distinguish between a suspect and a person being actually suspected? This seems unlikely, since even a student of law beginning his or her adventure with criminal proceedings, is taught the difference between those two categories of participants in criminal proceedings.

Article 71 § 1 of the Code of Criminal Procedure defines the concept of a 'suspect' indicating that it is a person against whom a decision about presenting charges has been issued or the charges have been presented to the person directly (without a decision) in relation to interrogating him as a suspect. Therefore it should be noted that it is the only possible way of obtaining the status of a suspect – a party of pre-trial proceedings. In view of the lack of a legal definition of a 'person (actually) suspected', the explanation of the definition should be derived from the views of the doctrine. This allows determining that a 'suspected person' is a person being in the range of interest of law enforcement, a person being suspected of committing a crime, who has not yet been presented with charges.[13] Basically, the person is not entitled to any procedural rights. However, the legislator has imposed specific procedural responsibilities on this person. As an example, article 74 § 3 of the Code of Criminal Procedure should be noted, under which examinations or actions can be performed against the suspected person under § 2 point 1; that is, external examination of his body and other examinations not involving any invasion of bodily integrity; in particular, the fingerprints of the accused may be taken; he may be photographed and presented to other persons, in order to establish his identity, while maintaining the requirements specified in § 2 point 2 (provided that they are effected by a person on the health-service staff, according to medical directions and do not constitute a challenge to the health of the accused; if such examinations are indispensable) and point 3 (if such examinations are indispensable, not constituting a challenge to the health of the accused or other people), take blood, hair, cheek mucus samples, and other body fluids. It is obvious that in the course of the criminal proceedings, the status of a suspected person is significantly different than the status of a suspect and, as a consequence, depending on the character they appear as, they have different duties and different privileges.

[13] See. T. Grzegorczyk: Code of Criminal Procedure, Commentary, Kraków 2003, p. 259. order of the Supreme Court of 22 July 2004, WZ 49/04.

Due to the fact that the negative consequences of pre-trial proceedings principally affect the suspected person to a minimal extent in regard to a suspect (often such a person is not even aware of criminal proceedings), therefore a suspected person has fewer responsibilities. At the same time, however, a suspected person has fewer privileges.

It should be emphasized that a suspected person is not a party in the pre-trial proceedings (sic!),[14] and can only be qualified as 'other people' present in the pre-trial proceedings. Thus, a suspected person not being a party – under article 229 § 2 of the Code of Criminal Procedure – is only entitled to certain rights stated *expressis verbis* in the Act. It can be undoubtedly noted that a suspected person does not have the right to file a complaint against a decision to discontinue pre-trial proceedings under article 306 § 1 of the Code of Criminal Procedure, as the cited provision does not grant him such rights.

Meanwhile, the regulation of article 8 paragraph 2 of the Act on complaint against delay should be taken into consideration, according to which 'in cases not regulated by this Act, to the proceedings being performed due to a complaint against delay, the court shall apply provisions of interlocutory proceedings applicable to the proceedings the complaint is about.' Treating the above regulation as an interpretative provision, in the Code of Criminal Procedure, one should begin seeking a legal provision, which could possibly provide means to challenge a decision to discontinue proceedings by a person (actually) suspected, while counting on the fact that such a provision could become a basis for granting a suspected person the right to file a complaint against delay of pre-trial proceedings and therefore confirm the thesis found in the order of the Supreme Court of 21 July 2009.

Analyzing the statutory provisions regarding complaints, one can point out the regulation found in article 302 § 1 of the Code of Criminal Procedure, which states that 'persons who are not parties to the preparatory proceedings shall have the right to lodge an interlocutory appeal against the orders and rulings which violate their rights.' Therefore, there is indeed a legal basis for appealing an order of discontinuation of pre-trial proceedings by a person who is not a party. One must remember, however, the contents of article 425 § 3 sentence 1, according to which 'the appealing party may appeal against the resolutions or findings only if they are prejudicial to his rights or benefits'. Simply put, the appealing person must have an interest in challenging the legal decision, a so-called *gravamen*.

[14] This stance was taken by the Supreme Court in its decision of 22 July 2001, WZ 49/04.

With this in mind, a conclusion can be drawn that in the case of discontinuation of pre-trial proceedings in the *in rem* stage, the suspected person does not have a *gravamen*, since such a legal decision is prejudicial to neither his rights nor benefits. On the contrary – it is a favorable decision. Issuing an order to discontinue legal proceedings in the *in rem* stage occurs, generally speaking, when evidence gathered in the course of an investigation did not provide basis to presenting charges to any person, or there was a prerequisite (so-called legal obstacle) preventing issuing an order of presenting charges against a particular person. This leads to the conclusion that under article 302 § 1 of the Code of Criminal Procedure a suspected person cannot challenge an order to discontinue pre-trial proceedings. He is not entitled to the rights of a party in this respect. As a result, he cannot be regarded as a person entitled to filing a complaint against delay of pre-trial proceedings under the Act on complaint against delay of the proceedings.

Additionally, in the passage of the justification of the Military District Court in Y., quoted by the Supreme Court, there are also other statements that must be thought through. On one hand, the Supreme Court stated that 'judge Colonel X., at least from the time the prosecutor applied for subjecting to criminal liability, should be entitled to the rights of a suspected person', while surprisingly expressing in the further part of the justification that 'filing a request to subject a judge (...) to criminal justice by the prosecution, based on previously gathered facts which allow the judge suspected of offense to be identified by first and last names, results in the fact that the criminal proceedings are becoming *in personam* from this moment. (...) As a result, in the examined case, judge Colonel X. is a party of pre-trial proceedings,...'. It is difficult to decide whether the Supreme Court's statements quoted above are a lack of consistency, indecisiveness of the Supreme Court regarding the status of judge X. in the course of the investigation into the determined factual situation, or maybe simply the lack of distinction between a 'suspected person' and a 'suspect' and assuming that these two terms are synonyms, which should not happen to judges of the Supreme Court. Although the second term was not present in the quoted passage of the justification, from the statement of the Supreme Court that as of the moment of filing the application for subjecting the judge to criminal liability, the investigation enters an *in personam* stage, one can draw a justified conclusion that, according to this Court, an application for revoking the immunity of a judge substitutes an order of presenting charges, and once it is filed in the Disciplinary Court, the judge becomes a suspect.

Criticism of the arguments of the Supreme Court is derived from the undeniable fact that criminal proceedings enter the *in personam* stage only upon issuing an order of subjection to criminal liability of a specified person, or at least interrogating him as a suspect.

This lack of consistency is unfortunately evidenced in the next part of the reasoning of the Supreme Court expressed in the order of 21 July 2009, where it was stated that '...in a situation where criminal proceedings are conducted in a specified act of committing which an individualized judge is suspected, it is permissible to carry out activities listed in article 14 § 2 of the Code of Criminal Procedure.[15] But when the prosecutor conducting or supervising the proceedings, contrary to existing law, does not file an application to subject the judge to criminal liability, and continues to perform investigative actions, the judge in these proceedings is entitled to the rights of a suspect, regardless of further actions of the person conducting or supervising the proceedings. It may not be the case that a judge, against whom criminal proceedings are *de facto* carried, is in a worse procedural situation than a suspect only because the person conducting or supervising the proceedings flagrantly infringes the applicable law.' After the analysis of the complete justification of the Supreme Court, one cannot clearly determine in what capacity, according to the Supreme Court, judge X. appeared in the course of the pre-trial proceedings. The Court, to determine his status, basically interchangeably uses the terms 'suspected person', 'suspect', and 'a person entitled to the rights of a suspect'. In addition, it is reasonable to notice the fact, which is seemingly obvious, that even a violation of law by the prosecutor does not result in judge X. obtaining the status of a suspect.

In light of the above, justification of the thesis about the right to filing a complaint against delay presented by the Supreme Court in the order of 18 August 2009 is not surprising, but probably should be. In this case the Supreme Court, basing the order on the norms under article 5[16], article 7[17],

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[15] According to article 17 § 2 of the Code of Criminal Procedure, until a motion is filed or permission from an authority is obtained which has been prescribed by law as a prerequisite to prosecution, the agencies conducting the trial shall conduct only actions not amenable to delay, in order to secure traces or material evidence, and actions aimed at clarifying whether the motion is to be filed or permission obtained.

[16] Under article 5 of the Constitution of Poland, Republic of Poland safeguards the independence and integrity of its territory and ensures the freedoms and rights of persons and citizens, the security of the citizens, safeguards the national heritage and ensures the protection of the natural environment pursuant to the principles of sustainable development.

[17] Under article 7 of the Constitution of Poland, the organs of public authority function on the basis of, and within the limits of, the law.

and article 181 sentence 1[18] of the Constitution of the Republic of Poland,[19] being an implementation of a rule laid down in article 2[20] – the democratic country of law – declared that "'The Republic of Poland shall (...) ensure the freedoms and rights of persons and citizens, the security of the citizens', and 'the organs of public authority shall function on the basis of, and within the limits of, the law'." Further into the justification the Court states that "...the provision under article 181 sentence 1 constitutes that, 'a judge cannot, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty'." In light of these norms, the range of entitlements of a prosecutor carrying out or supervising a criminal investigation – *in concreto* – in the case of a judge, more broadly – a person who has been granted immunity, is described under article 17 § 2 of the Code of Criminal Procedure, which allows only the performing (emphasized by the Supreme Court) of prompt activities in order to protect tracks and evidence, and activities aimed to clarify whether a permit will be issued. The article also states that the methods of performing investigative activities of a prosecutor are limited until 'permission from an authority is obtained', which is the basis of criminal prosecution. Conducting large-scale and long-term means of investigation is not within the limits of rights granted to process authorities and flagrantly violates article 17 § 2 of the Code of Criminal Procedure, and therefore falls outside the remits designated in general, but narrowly and clearly, to the public authority by the article of the Constitution of the Republic of Poland. In such a situation, it is clear that a citizen, against whom there are in fact criminal proceedings carried in a manner that does not comply with applicable regulations, may not suffer negative consequences. As in the cases described in article 16 of the Code of Criminal Procedure, according to which omission of the obligation or need by an authority conducting the proceedings cannot impose negative legal consequences on the participant or any other person concerned. Next, the Supreme Court states that although 'in a situation present in the case being recognized there is no norm even close to the one specified in article 16 of the Code of Criminal Procedure, but it is difficult to require a rational legislator to predict such a – seemingly legal – manner of conducting criminal proceedings by the processing organ and shall post an

[18] Under article 181 sentence 1 of the Constitution of Poland, a judge cannot, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty.

[19] Constitution of the Republic of Poland, 1997.

[20] Under article 2 of the Constitution of Poland, Republic of Poland is a democratic state ruled by law and implementing the principles of social justice.

appropriate regulation giving the person, against whom the proceedings are carried, and who is not accused or an application for permission to subject him to criminal liability, a means to defend his rights. Although there is an order provided in the criminal procedure not to initiate proceedings or to discontinue those actively carried in such a case (article 17 of the Code of Criminal Procedure), the implementation of this requirement is also subject to the will of conducting the proceedings, and for the lack of one of the mentioned decisions, no way of appealing has been prescribed. (...) Use of an analogous solution to article 16 of the Code of Criminal Procedure in the described case, given the direction of extensive case law of the Supreme Court – sensitive to respecting the rights of an individual and uniform Polish legal system from the beginning of this institution in the Polish legal system, that is from 1 January 1970 and due to an identical regulation in article 10 of the Former Code of Criminal Procedure[21] (which was lacking only a regulation found in sentence 2 of article 16 § 2 of the present Code of Criminal Procedure), which remains current, is fully justifiable, since granting the right allowing the defense the rights of a person involved in criminal proceedings fits within the existing system of procedural safeguards and is beneficial for a person to whom it is – *in concreto* – applicable. Just as importantly, it allows triggering a control mechanism forcing the authorities to respect the binding law by the process organs.'

Analysis of the grounds of the decision of the Supreme Court of 18 August 2009 leads to frustration, which can be expressed by quoting Socrates: 'scio me nihil scire'[22] but with a difference in that in this case, this statement should be taken literally and treated as an expression of despair, and not as the result of deep philosophical thought.

The above deliberations based on the grounds of the order of the Supreme Court of 18 August 2009 lead to the inevitable conclusion that the Supreme Court only seemingly performed a system interpretation, along with only seemingly using methods of deductive reasoning. In the analyzed justification of the Supreme Court only *de facto* recalled a few regulations from various acts, including – to strengthen its position – the constitutional norms, which are in no manner logically related to the subject of the case or its resolution. In fact, the Supreme Court invoked a set of general principles of the Constitution of the Republic of Poland and laws that should clarify them. In-depth analysis of the justification leads to the conclusion

[21] The no longer binding Act of 19 April 1969, Code of Criminal Procedure.

[22] Lat. I know that I know nothing.

that between the various rules there is no conditional relationship, and some of the provisions referred to are not related to the case whatsoever (i.e. article 181 sentence 1 of the Constitution or article 7 of the Constitution of Poland related to activities of organs of public authority), or at least such a relationship is difficult to see in the reasoning cited by the Supreme Court.

Also completely incomprehensible is the method of reasoning which resulted in the Supreme Court stating that the right of a person actually suspected, who had been granted immunity, to file a complaint against the delay of pre-trial proceedings carried in violation of article 17 § 2 of the Code of Criminal Procedure can be interpreted from the contents of article 16 of the Code of Criminal Procedure. It should be said, however, that, even with the aid of the deduction of the Supreme Court, it is not possible to understand how an obligation of the authorities performing proceedings to inform the participants of the proceedings about their duties and rights, creates a right for the suspected person granted immunity to file a complaint against delay of the pre-trial proceedings. In view of the above, it is impossible not to notice that endorsement of the stance of the Supreme Court would give a suspected person granted immunity more rights than a 'regular citizen', that is one that has not been granted an immunity. This in turn could give rise to legitimate allegations of violation of constitutional principals of equality and social justice.[23]

According to the jurisprudence of the Constitutional Tribunal, the rule of equality enacts an order to equal treatment of legal entities in a particular class. The above results in the fact that each legal entity having a particular significant characteristic (such as the status of a suspected person) should be treated equally before law, that is by the same measure, without differences neither discriminatory, nor favoring. Interdiction to introduce unfair disparities among legal entities is also one of the elements of social justice.[24] It should be emphasized that 'equality in human dignity and the resulting equality of rights and responsibilities is a requirement, without which we would go downhill to barbarism. (...) Belief in this equality not only protects our civilization, but also makes us human.'[25]

The so far raised criticism about the statements made by the Supreme Court and their justification make the arguments cited by the Supreme Court not convincing. The wording of article 3 point 4 of the Act against

[23] Article 2 and article 32 of the Constitution of the Republic of Poland.

[24] i.e. sentence of the Constitutional Tribunal of 7 April 2009, P 7/08. Interdiction of discrimination has been made explicit in article 32 § 2 of the Constitution.

[25] Leszek Kołakowski, Mini wykłady o maxi sprawach, Wydawnictwo Znak, 2003.

delay and other appropriate provisions of the Code of Criminal Procedure cited above evidently and clearly show that existing law does not provide a basis for granting a person actually suspected (regardless of whether he has been granted an immunity or not) the right to file a complaint against delay of the pre-trial proceedings. This comes from the assumption, based on article 3 point 4 of the Code of Criminal Procedure, that the catalog of entities entitled to filing a complaint against delay of criminal proceedings in its every phase, including the stage of pre-trial proceedings, is a closed list. The argument above leads to the conclusion that the only parties entitled to filing a complaint against excessive length of an investigation or inquiry are the victim and the suspect.

Analysis of the arguments found in in the orders of the Supreme Court of 21 July 2009 and 18 August 2009 supports the belief that issuing the aforementioned orders, the Supreme Court, instead of only interpreting the binding law, assumed the role of lawmaker and actually created a case law. Apart from the analysis of the presented provisions, which led to questioning the existence of a legal basis to entitle a person (actually) suspected, who has been granted immunity, to file a complaint against the excessive length of criminal proceedings, one forms a belief that granting privileged people such a right undermines a basic human sense of justice. This seems to confirm an increasingly prevailing opinion that the biblical principle 'who has been given much, much will be demanded; and from the one who has been entrusted with much, much more will be asked'[26] is more and more often replaced with 'who has been given much, will demand more; and the one who has been entrusted with much, will ask for much more'.

To conclude, one must agree with Ch. Perelman in that 'as the operation of justice ceases to be purely formalistic, and seeks the approval of parties and the public opinion, it is not sufficient to indicate that a decision was made under the guise of the authority of a rule of law; one must prove that it is right, proper and socially useful'.[27]

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[26] The Gospel According to Luke, 12:48; Holy Bible, New International Version®, NIV® Copyright © 1973, 1978, 1984, 2011 by Biblica, Inc.®

[27] Ch. Perelman, Logika Prawnicza, Nowa retoryka, PWN, Warsaw 1984, page 208.

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THE INTERNATIONAL EVOLUTION OF THE NOTION OF DISABILITY AND ITS INTERPRETATION FROM THE EUROPEAN UNION LAW PERSPECTIVE

1. Introduction

The Paralympic Games – the ultimate international competition for world class athletes with a disability – and the movement surrounding them have played an important role in bringing attention to persons with disabilities and fighting discriminatory stereotypes regarding disabled persons. Undoubtedly, this year the London 2012 Summer Paralympics, being the largest Paralympic Games ever,[1] proved to be a great success in terms of attracting capacity crowds to each one of the sporting venues, in TV audiences and coverage, as well as in terms of giving the competing athletes an opportunity to challenge the notion of a disability. The discussion and controversies which arose around the subject of disability and its social, political and – consequently – legal implications across Europe (e.g.: the United Kingdom government's controversial welfare reforms,[2] the lively public debate on perceptions of disability held in Poland[3] accompanied by the long-awaited ratification of the United Nations Convention on the Rights of Persons with Disabilities[4]) showed that the manner of understanding "disability" is con-

[1] B. Wilson, *London 2012: Olympic and Paralympic sponsors count benefits*, http://www.bbc.co.uk/news/business-19800583 (access date 01.10.2012).

[2] See: http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0114/2012114.pdf (access date 01.10.2012).

[3] T. Lis, *Jedni z nas*, Newsweek Polska 37/12 10.09.2012.

[4] United Nations Convention on the Rights of Persons with Disabilities, 13 December 2006, G.A. Res. 61/106. Available online at: http://www2.ohchr.org/english/law/disabilities-convention.htm

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tinually evolving and some of the accessible instruments of disability policies still are based on traditional ways of perceiving persons with disabilities.

The process of globalization has broadened the legal perspective and legal concepts originating from national or international systems continually clash. Thus, it is not only desirable, but also reasonable to adopt the broader look while analyzing the concepts. In the era of "continuous global interactions" the achievements of the UN, other international organizations and influential countries cannot be ignored. They affect both EU law and national laws. At the same time, from a Polish researcher's position, the issue should be substantially viewed from the perspective of EU law and that is the reason for applying the perspective in this paper.

The legal frameworks currently applied in the European Union and in Member States with respect to disability adopt a multiplicity of approaches and definitions. This paper outlines some of the key conceptual approaches to disability, and how they have evolved. It examines definitions of disability found in key international documents,[5] influencing EU and Member States' policy and legal frameworks. Due to the broad subject the paper provides highlights of some aspects of these concepts and debates, insofar as they are relevant to the development and understanding of legal definitions of disability.

2. Legal Approaches to Disability: from "Personal Tragedy" to Interaction Model

For most of the 20th century, there was a broad consensus among the general populace, academics, legislators and policy communities about the nature of disability – that it was a bio-medical issue, rooted in individual tragedies, and best addressed through charity and, where possible, treatment and rehabilitation. Definitions of disability were therefore not controversial: the issue was one of "common sense" and its meaning seemed obvious.[6] "Disability" has been commonly understood as the opposite of

[5] A thorough overview of regulations considering "disability issues" in international law is provided by M. Jankowska in *Prawa osób niepełnosprawnych w międzynarodowych aktach prawnych*, Niepełnosprawność – zagadnienia, problemy, rozwiązania, I/2011(1).

[6] However, a historical review demonstrates that disability has been understood from a variety of perspectives over time and across cultures. For example, until fairly recently in European history, disability was understood from a predominantly religious perspective. Disability was seen as a sign of divine judgment, a punishment for sins or wrongdoing, as well as a result of the action of supernatural powers. See, for example, the discussion in: C. Barnes, G. Mercer, T. Shakespeare, *Exploring Disability: A Sociological Introduction*, Polity Press, Cambridge 1999, pp. 17–18.

"ability" and the word evoked the most obvious types of disabilities (mobility impairments that require a person to use a wheelchair to move around, or perhaps visual or hearing impairments) – while disabilities may be physical or cognitive, readily observed or "hidden" (such as epilepsy, arthritis, diabetes), and may result from a variety of causes.

Not infrequently, statutes and regulations referencing the term "disability" provide no definition of the term: the determination of who is and is not disabled for the purpose of an act is left to the decision-maker's interpretation, and is generally decided on a case by case basis. When considering legal approaches to defining "disability", it should be kept in mind that most statutes dealing with disability fall into the category of acts providing benefits, supports and accommodation for groups of people; maintaining the scope and integrity of the program is a main concern. Definitions of disability in such statutes generally operate as determinants of eligibility for programs and services, and there is therefore a perceived need to ensure that definitions provide a clear and easily administered mechanism for allocating services and determining eligibility. The requirement influences both the legislative definition and the case law – that develops around the terms also and contributes to revealing a fragmented approach to the terms.

Individuals seek the label of "disability" in order to access benefits and supports, while institutions restrain access to the label in order to maintain program standards. A similar dynamic is often at play in human rights case law, where the label of "disability" is essential to obtain the opportunity to obtain redress for the loss of employment or access to important services.

Not surprisingly, in states' law there is considerable case law interpreting "disability", "handicap" and related terms. A review of case law and legal commentary relating to the definition of disability reveals the ongoing dispute and evolution.[7] The circumstances giving rise to case law are not necessarily representative of the full spectrum of circumstances under which persons with impairments and/or disabilities may be affected by the law.[8] Human rights cases most frequently arise in the context of employment and access to instruments of vocational rehabilitation.

[7] For example, conditions such as obesity, addictions, infertility and temporary medical conditions are in some cases considered disabilities and in others not.

[8] Decisions regarding "mental competency" and "capacity" arise in complex circumstances, frequently from situations where family members are in conflict with each other and seek declarations which may be contested by the person alleged to be incapable or incompetent, concerning acts of will.

Generally, the axis of differentiation has revolved around the role of "impairment" in the experience of disability. Many scholars categorize conceptual approaches to disability into two broad groupings: one focused on impairment and the other on the social construction of disability. However, based on a review of concepts of disability as they are revealed in statutory definitions of disability and the accompanying case law, legal definitions of disability can be categorized into four conceptual approaches:

A. Bio-medical approach

The bio-medical conception of disability was the dominant policy model for understanding disability until the last few decades of the 20th century, and remains ascendant in the popular understanding of disability. Common understandings of the nature of disability, as well as many policy and legal frameworks, centre on the notion of disability as resulting from physical, sensory, psychiatric, cognitive or intellectual impairment.[9] That is, disability is intrinsic to the individual who experiences it.[10] In this model, impairments are dysfunctions that have the effect of excluding persons with disabilities from important social roles and obligations, leaving them dependent on family members and society. As such, disability is an individual tragedy, and a burden on family and society.

Under this approach, the most appropriate policy response to disability is medical and rehabilitative. The aim is to overcome, or at least minimize, the negative consequences of individual disability. Individuals with disabilities may, therefore, become the focus of intensive and sometimes coercive expert attention focused on accurately identifying and "fixing" the impairment causing the disability, which may lead to assumptions that persons with disabilities are defective and abnormal, and therefore in some way inferior to, and less worthy of consideration than fully-abled persons.

B. Functional limitations approach

The functional limitations approach takes into account some aspects of how the experience of impairment is affected by the environment and identifies disability not so much in terms of an underlying medical condition, but by considering the functional limitations caused by impairments. Functional

[9] The bio-medical model of disability has been exhaustively described and critiqued by disability theorists. A thorough and readable overview of the discussion may be found in: C. Barnes, G. Mercer, *Disability*, Polity Press, Cambridge 2003.

[10] For this reason, this model has sometimes been described as the "personal tragedy" model.

limitations are associated with the person's ability to appropriately engage in key social roles, such as employment or caring for family members.

Thus, the approach, while firmly maintaining the role of impairment in causing disability, recognizes that disability may be influenced by social factors, such as the roles that the individual inhabits, how they respond to impairment, and whether the environment is designed in a way that magnifies or minimizes the effects of the impairment. The functional limitations approach has been, and continues to be, immensely influential in both law and public policy.

C. Human rights model

This modified social model underlines the impact of impairment on the experience of disability and recognizes persons with disabilities as an oppressed group. The approach is primarily located in human rights legislation and was adopted at some point *inter alia* by the World Health Organization (WHO) which has had an important role in shaping approaches to disability.

The WHO has produced two important classification systems related to impairment and disability – the 1980 International Classification of Impairments, Disabilities and Handicaps,[11] and the 2001 International Classification of Functioning, Disability and Health.[12] WHO's 1980 International Classification of Impairments, Disabilities and Handicaps (ICIDH) was the first major classification system to focus specifically on disability and was extremely influential in the development of policy approaches to disability worldwide. The ICIDH adopted a three-pronged definition of disability as consisting of:

1. Impairment: any loss or abnormality of psychological, physiological, or anatomical structure or function.
2. Disability: a restriction or lack (resulting from an impairment) of ability to perform an activity in a manner or within the range considered normal for a human being.
3. Handicap: a disadvantage for a given individual, resulting from an impairment or a disability that limits or prevents the fulfillment of a role that is normal (depending on age, sex and social and cultural factors) for that individual.

[11] *Literature Review of the WHO International Classification of Impairments, Disabilities and Handicaps (ICIDH) and Rehabilitation of People with Disabilities*, Council of Europe 1998.

[12] Available online at: http://www.who.int/classifications/icf/en/.

The ICIDH was widely criticized by disability activists and others for its reliance on medical definitions and the ableist assumptions underlying the use of a standard of "normalcy". As well, the assumption that disability is always caused by some kind of impairment resulted in a focus on medical and rehabilitative responses to disability, ignoring the importance of legislative, policy, and environmental changes in removing disabling barriers.[13]

The functional limitations perspective is the most common statutory approach to defining disability and can be found in the Polish legal system which is reviewed in the following paragraph of the paper. Functional definitions of disability are appealing in the legal sphere as they provide clear, easily applied criteria for policy eligibility and the distribution of benefits. However, the emphasis on disability as arising from individual impairment rather than societal barriers reinforces the idea that individuals with disabilities require individual remediation rather than inclusion through the removal of physical, attitudinal, or policy-based barriers.

In the context it is worth mentioning that there is no agreement or unanimous legislative practice regarding temporary medical conditions, whether grave (such as cancer) or relatively minor (such as a broken limb). Generally, the functional limitations approach excludes persons with temporary conditions, on the basis that such conditions do not create ongoing limitations in life's crucial activities. Thus, many statutes do not consider persons with temporary or episodic disabilities as persons with disabilities, by requiring the disability to be "continuous" or "prolonged" or to have lasted for a certain period of time.

D. Social model

The bio-medical approach to disability and the functional limitations model have been widely critiqued for failing to take into account the effect of social attitudes and structures in disabling individuals.[14] From this perspective of the social or interactive model, disability is, as a neutral feature, less an individual issue than it is a societal one.[15]

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[13] For an overview of the criticisms of the ICIDH see: C. Barnes, G. Mercer, T. Shakespeare, op. cit., at pages 22–27.

[14] A person with a mobility impairment is not prevented from fully participating in society by the impairment, but by the failure of policy makers, planners and builders to take into account the existence of such persons and to create accessible buildings and services. Persons with epilepsy are not excluded from employment as much by their medical condition as by the fears, myths and lack of information that lead potential employers to refuse their applications.

[15] This model is generally traced back to the 1976 manifesto of the British Union of the Physically Impaired Against Segregation (UPIAS) *Fundamental Principles of Disability.*

In the social model, the negative consequences associated in the biomedical model with disability, and hence with the persons with disabilities themselves, are understood to result from the interaction of a person with a disability with the environment. It is prevalent in countries where civil rights are particularly well established, such as the United States or the United Kingdom. Under the approach, a person with a disability ceases to be merely a recipient of social benefits or charity assistance and becomes an independent "actor" on the social stage, having the same civil rights and responsibilities as other citizens.

This perspective has had a profound impact on disability theory and public policy over past years, and is now the dominant approach among scholars and activists. Under the social approach, disability is best addressed by a concerted effort to remove the socially constructed barriers that disable individuals, and to develop a society that is inclusive and respectful of persons across a wide spectrum of differences – as disability is no longer regarded as anomaly, but as a difference. Then persons with disabilities can be considered members of an oppressed group, similar to women, racialized persons, older persons, or members of the LGBT community.[16]

Some commentators have argued that the social model takes insufficient account of the actual experience of impairment and the way that impairment itself, apart from societal reactions, can have a profound impact on lived experience.[17] The social approach has also been criticized for failing to sufficiently incorporate the experiences of persons with non-physical disabilities, particularly persons with psychiatric, developmental and cognitive disabilities.[18] It has also been pointed out that the social approach has been slower to benefit persons with cognitive and developmental disabilities and

[16] It is worth mentioning that, for example, in the deaf community there has been a strong movement towards considering deaf people not as persons with a disability, but as a language and cultural minority. See: H. Lane, *The Mask of Benevolence: Disabling the Deaf Community*, DawnSignPress 1999.

[17] Different types of impairments have different implications for health and individual capacity, much as stereotypes, social attitudes and barriers also differ depending on the type of impairment. The experiences of a person who is, for example, Deaf, deafened or hard of hearing differ considerably from those of persons with a learning disability, or cerebral palsy or bipolar disorder. Due to that the writers emphasize the importance of an "embodied" understanding of the experience of disability. For an overview of this critique see: T. Siebers, *Disability in Theory: From Social Constructionism to the New Realism of the Body*, in: L. Davis, ed., *The Disability Studies Reader*, Routledge, New York 2007, p. 173 and following.

[18] The historical practice of labelling certain types of refusal to conform to social norms (such as homosexuality, or refusal to comply with gender norms) as mental illness makes "barrier removal" an inadequate response to such conditions.

to confront the profound devaluation of their worth in a society focused on production and profit.[19]

Recently, it has been argued that the dichotomy between impairment and social construction can be misleading, as illness, frailty and impairment are a part of the human condition and all people are in some way impaired, just as the aging process is likely to result in increased impairments for most people. However, not everyone with an impairment experiences oppression because of it, only some are additionally disabled by societal processes.[20] Any single model of the experience of disability runs the risk of obscuring the profound variations in the experiences of persons with disabilities, depending not only on the kind of impairment they have, but also on gender, socio-economic status, racialization, sexual orientation, age and other characteristics.[21]

E. The Human Rights Approach

The human rights approach to disability is a variant on the social approach and stems from the protection of equality and dignity of persons with disabilities. The human rights approach recognizes persons with disabilities as a disadvantaged group and emphasizes the role of social attitudes and falsely neutral systems in creating and perpetuating that disadvantage. The role of impairment in disability is recognized insofar as it is necessary to design accommodations to permit persons with disabilities to achieve equality. The aim of the human rights approach is to achieve equality and inclusion for persons with disabilities through the removal of barriers and the creation of an environment of respect and understanding.[22]

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[19] C. Barnes and G. Mercer, op. cit., pp. 69–70.

[20] See, for example: T. Shakespeare, N. Watson, *The Social Model of Disability: An Outdated Ideology?*, Research in Social Science and Disability, Vol. 2/2001.

[21] An overview of the issues of gender and disability is provided by A. Vernon, *Multiple Oppression and the Disabled People's Movement*, in: T. Shakespeare, ed., *The Disability Reader: Social Science Perspectives*, Continuum, London 1998, p. 201. At this point it is also worth pointing at the legal concept of multiple discrimination which is widely discussed across Europe as well as in the EU; see: S. Burri, D. Schiek, eds., *Multiple Discrimination in EU Law. Opportunities for legal responses to intersectional gender discrimination?*, European Network of Legal Experts in the Field of Gender Equality for the European Commission DG Employment, Social Affairs and Equal Opportunities, 2009; K. Monaghan, *Multiple and intersectional discrimination in EU law*, European Anti-Discrimination Law Review 13/2011; J. Maliszewska-Nienartowicz, *Zwalczanie dyskryminacji wielokrotnej (na przykładzie działań Unii Europejskiej)*, Państwo i Prawo 2/2012.

[22] G. L. Albrecht, K. D. Seelman, M. Bur, *Handbook of Disability Studies*, SAGE 2001, p. 565 and following.

In 2006 the United Nations adopted the International Convention on the Rights of Persons with Disabilities (ICRPD). The ICRPD is likely to have a significant impact on policy makers in the EU and its Member States, and on approaches to domestic human rights statutes as it is the first legally-binding international human rights instrument to which the EU is a party.

The purpose of the ICRPD is to promote, protect and ensure the equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent worth and dignity. A key principle of the ICRPD is respect for difference and acceptance of persons with disabilities as part of human diversity and humanity. The ICRPD adopts an expansive approach to disability, recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others. It recognizes the diversity among persons with disabilities. In Article 1 of the ICRPD it is stated that: *"persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others"*.

F. Multi-Dimensional Models

In recent years, there has been a movement towards a multi-dimensional approach to disability, aimed at incorporating the insights of both impairment based models and those that adopt the social approach. The most prominent and influential of these is the WHO's International Classification of Functioning, Disability and Health, which replaces the International Classification of Impairments, Disability and Handicaps.

The WHO made a significant shift in approach to disability with the 2001 International Classification of Functioning, Disability and Health (ICF). The ICF is intended to provide a standard framework for the description of health and health-related states and to provide a tool for measuring function in society, regardless of the reason for a person's impairments. It approaches the notion of disability in a manner considerably more nuanced than its predecessor, attempting to synthesize the biomedical and social models of disability. The WHO describes the conceptual approach putting the notions of "health" and "disability" in a new light. It acknowledges that every human being can experience a decrement in health and, thereby, experience some degree of disability. The ICF thus mainstreams the experience of disability and recognizes it as a universal human experi-

ence. By shifting the focus from cause to impact it places all health conditions on an equal footing allowing them to be compared using a common metric – the ruler of health and disability. Furthermore ICF takes into account the social aspects of disability. By including Contextual Factors, in which environmental factors are listed, ICF allows recording the impact of the environment on the person's functioning,[23] calling it a "biopsychosocial model" of disability.

However, its retention of individualistic medical notions of disability and its causes have been criticized as unnecessarily limiting the scope of disability and perpetuating the biomedical culture.[24] Concerns have also been raised regarding the attempt to integrate the medical and social models, on the basis that the social model is a paradigm, the application of which shifts the entire framework for social policy, and therefore cannot be implemented on a piecemeal basis. Due to these concerns, despite some movement towards the development of a mixed model, it has not yet been reflected in legal structures.

3. Defining Disability in European Union Law

The European Union has adopted and implemented instruments of disability policy since the mid-1970s; it only acquired the power to address disability discrimination in 1999 with the coming into force of the Amsterdam Treaty.[25] The potential of the Article 13 EC[26] was quickly acted upon, and the Employment Equality Directive (henceforth: Directive),[27] which prohibits employment related discrimination with regard to *inter alia*

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[23] *Towards a Common Language for Functioning, Disability and Health*, World Health Organization, Geneva 2002), p. 3.

[24] M. A. McColl, *Disability Policy Making: Evaluating the Evidence Base*, in: D. Pothier, R. Devlin, eds., *Critical Disability Theory, Essays in Philosophy, Politics, Policy and Law*, UBC Press 2006, pp. 27–28, and C. Barnes, G. Mercer, T. Shakespeare, op. cit., p. 27.

[25] The Treaty Establishing the European Community of 1997 (the Amsterdam Treaty) Official Journal C 340 of 10 November 1997. It put great emphasis *inter alia* on the rights of individuals.

[26] *"Without prejudice to the other provisions of this Treaty, and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."*

[27] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML.

disability, was adopted in 2000. The major Community institutions – the Commission,[28] Council[29] and the Parliament, have all recognised the need to base policy on the social model of disability, and have committed themselves thereto. Indeed, the Directive is, in some ways, a manifestation of this approach.

In line with the general approach found in EU non-discrimination directives, the Directive does not include a definition of disability or guidance on the personal scope of the legislation with regard to disability. The question of who is protected from discrimination on the grounds of disability by the Directive has proven to be problematic for national courts, which *have* been called upon to interpret the national implementation legislation, and has led, thus far, to the only two references to the European Court of Justice (henceforth: ECJ) relating to disability under the Directive.

The term of disability in EU law has been interpreted for the purposes of the Directive in two judgments of the ECJ which both concern a dismissal. In the first case *Chacón Navas v. Eurest Colectividades SA*[30] the ECJ examined the relation between sickness and disability, answering the question whether the term sickness falls within the scope of protection provided by the Directive. With regard to the definition of disability, the ECJ noted that the Directive is designed to combat employment discrimination and defined disability, in that context as, *"a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"*.[31] For any limitation to be regarded as a "disability", *"it must be probable that it will last for a long time"*.[32]

According to the opinion of the ECJ the concept of disability is different from the concept of sickness. The ECJ interpreted the concept of disability in relation to the concept of reasonable accommodation which demonstrates that it is envisaged for situations in which participation in professional life

[28] See e.g.: Communication of the Commission on Equality of Opportunity for People with Disabilities of 30 July 1996, COM (96) 406 and EU Disability Action Plan (Equal opportunities for people with disabilities: a European Action Plan), COM (2003) 650.

[29] See e.g.: Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities, Official Journal C 12, 13 January 1997.

[30] Chacón Navas v. Eurest Colectividades SA (Case C-13/05) [2006] ECR 1-6467. For further commentary on this case see: L Waddington, *Case C-13/05, Chacón Navas v. Eurest Colectividades SA, Judgment of the Grand Chamber of 11 July 2006*, Common Market Law Review 44 (2007), pp. 487–499.

[31] Op. cit., para 43.

[32] Op. cit., para 45.

is hindered over a long period of time. There is nothing in the Directive to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness.[33]

The ECJ's interpretation has limited the definition of disability as well as "medicalising" it,[34] which stands in contrast to EU policy makers' attempts to introduce the social model, which is entrenched, *inter alia*, in the Convention on the Rights of Persons with Disabilities. The ECJ may have left itself some room to reach a different conclusion in the future. Its wording excludes *"a person who has been dismissed solely on account of illness"*,[35] and it may allow the ECJ to argue that adverse treatment in response to sicknesses which lead to long-term or permanent limitations which hinder professional activity does fall within the Directive's scope, because such treatment is not based "solely" on sickness. It is unfortunate that the ECJ did not clarify if this was its intention, as its judgment can only lead to speculation and doubt on this point and, with its reliance on the medical approach, may reinforce the model in the EU Member States, and perhaps other international jurisdictions.

In the second case *Coleman v. Attridge Law and Steve Law*[36] the ECJ dealt with the question whether the Directive only protects from direct discrimination and harassment person who is disabled, or whether the principle of equal treatment and the prohibition of direct discrimination apply equally to an employee who is not themself disabled but who is treated less favourably by reason of the disability of their child, for whom they are the primary care provider required by virtue of the child's disability.

Following its Advocate General, the ECJ noted that the *"principle of equal treatment ... applies not to a particular category of person but by reference to the grounds mentioned in Article 1."*[37] Directly targeting a person who has a particular characteristic is not the only way of discriminating against him or her; there are also other, more subtle and less obvious ways of doing so. One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong

[33] Op. cit., para 46.

[34] See: M. Oliver, *Understanding Disability: from theory to practice*, Macmillan Press Ltd., Basingstoke 1996.

[35] Judgment of the ECJ in Chacón Navas v. Eurest Colectividades SA, para 47.

[36] Coleman v. Attridge Law and Steve Law (C-303/06).

[37] Judgement of the ECJ of 17 July in Case S. Coleman v. Attridge Law and Steve Law (C-303/06), para 38 and 51.

to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they too affect the persons belonging to suspect classifications. Indeed, the dignity of the person with a suspect characteristic is affected as much by being directly discriminated against as it is by seeing someone else suffer discrimination merely by virtue of being associated with him. In this way, the person who is the immediate victim of discrimination not only suffers a wrong himself, but also becomes the means through which the dignity of the person belonging to a suspect classification is undermined.[38]

In its judgment the ECJ gave the notion of disability an extensive interpretation. It agreed with the opinion of the Advocate General. In the opinion of the ECJ, it does not follow from those provisions of the Directive that the principle of equal treatment which it is designed to safeguard is limited to people who themselves have a disability within the meaning of the directive. On the contrary, the purpose of the directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the Directive applies not to a particular category of person but by reference to the grounds mentioned in Article 1. The ECJ concluded that, when an employee suffers direct discrimination on the grounds of disability, an interpretation of the Directive which limited its application only to people who had a disability themselves *"is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee."*[39] An interpretation of the Directive limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.[40]

In spite of the fact that various international or non-governmental organizations have been trying to provide unified and standard language in this field, no universal definition of disability in EU law exists. Such a situation is especially unsatisfactory in relation to such an extremely vague and open-ended term as disability.[41] National laws of Member States provide

[38] See the Opinion of Advocate General Poiares Maduro in Case Coleman v. Attridge Law and Steve Law (C-303/06) para 12, 13.

[39] See Judgement of the ECJ of 17 July in Case S. Coleman v. Attridge Law and Steve Law (C-303/06), para 38.

[40] Op. cit., para 51.

[41] E. Ellis, *EU Anti-Discrimination Law*, Oxford University Press, Oxford 2005, p. 35.

various notions of disability.[42] Moreover, a lot of national laws of Member States contain more definitions of disability with respect to the area in which this group of persons are to be protected (e.g. education, employment, social security or social protection). Some national laws protect against discrimination not only persons with disabilities but also persons who are not themselves disabled but are in certain relation to a person with disability.[43]

However, it should be emphasized that with respect to the notion of disability the Directive does not state that it should be provided for in the national laws of the Member States. It follows from the need for uniform application of EU law and the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU, having regard to the context of the provision and the objective pursued by the legislation in question.

The need seems be of a great importance also from the Polish law perspective. The rights of people with disabilities in Poland are protected by various international[44] and domestic laws and official documents.[45] The legal definitions of disability provided by Polish acts interpret the notion exclusively in order to establish the group of beneficiaries of disability pensions[46]

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[42] A comprehensive study which analysed definitions of disability in the social policies and anti-discrimination laws of Member States of the European Union and Norway as of 2002 may be found in: *Definitions of Disability in Europe. A Comparative Analysis*, European Commission, Directorate-General for Employment and Social Affairs, Unit E. 4, September 2002.

[43] A review of Member State legislation reveals four different approaches to the issue of how and whether to define disability. For details see: *Disability and non-discrimination law in the European Union. An analysis of disability discrimination law within and beyond the employment field*, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, July 2009.

[44] In September 2012 Poland ratified the UN Convention on the Rights of Persons with Disabilities.

[45] The Polish Constitution guarantees equal or preferential treatment to people with disabilities. In 1997, the Polish government adopted the Charter of Rights of Disabled People which embodies the official policy and may serve as guidance for the interpretation of rights and obligations referred to in other legislation applicable to people with disabilities defining disability in terms of functionality. Accordingly, persons *"whose physical, psychological, or mental capacity, permanently or temporarily, hinders, limits, or disables their everyday life, study, work, or fulfillment of social roles, according to legal or customary rules"* are considered disabled and entitled to special protection or treatment under the constitution. However, these policies have not led to special legislation.

[46] Law of 17 December 1998 on pensions from the Social Insurance Fund – Journal of Laws (Dz.U.) of 2009, No. 153, Text 1227 as amended.

or the State's support in employment,[47] who are to be officially certified as disabled persons to benefit from the State's policies. The Republic of Poland also implemented the EU nondiscrimination directives – however, not including a definition of disability in the transposition legislation.

On the one hand, the situation should leave the way open for national courts to follow the definition of disability developed by the ECJ in *Chacón Navas* or subsequent judgments. There also exists the risk that courts will draw on definitions of disability found in other national legislation, specially social security legislation defining eligibility for a disability pension, when interpreting the concept of disability within the non-discrimination context. Such an approach would be wholly inappropriate as social security and nondiscrimination legislation serve very different purposes. In the case of the former, the establishment of a limited definition of disability is needed since the definition is the gateway to financial support and other benefits funded by the state, whilst in the case of the latter, it is important to spread a broad net to protect against discrimination, prejudice, and stereotypes which does not imply similar financial commitment on the part of the state. Thus, should the courts interpret protection from disability discrimination as only applying to individuals who are officially recognised as disabled by the social security system, this would result in an excessively limited personal scope of the national legislation, and, it is submitted, amount to a breach of the EU Directive. However, there is insufficient Polish case law to determine if this constitutes a problem as yet.

4. Closing Remarks

The pointed shift among theorists, activists and policymakers away from the bio-medical and functional approach to disability, towards the social and human rights approach has not yet been fully mirrored in legislative definitions of disability in the EU and domestic legal systems of Member States. The continued dominance of biomedical and functional definitions in legislation affecting persons with disabilities is due to the power of the biomedical

[47] Among them the most important legal act concerning the disabled is the Act of 27 August 1997 on Occupational and Social Rehabilitation and Employment of the Disabled – Journal of Laws (Dz.U.) of 1997, No. 123, Text 776 as amended. The act defines the disabled as persons whose physical, psychological or mental condition permanently or temporarily impedes, limits or makes it impossible to fulfill social roles and, in particular, impairs capabilities to carry out a professional activity, provided that they have obtained an appropriate certificate.

mindset, which remains the "common-sense" in popular understanding. The disjunction between current international and domestic policy frameworks and the legal approach embodied in statutes may be ameliorated by the use of flexible interpretative approaches to statutory definitions, as is evidenced by the evolution in the interpretation and application of the definition of "disability" in human rights law.

Many definitions of disability effectively operate as eligibility criteria for access to government programs and benefits and in this case functional definitions of disability are easier to administer. They allow policy developers and program administrators to focus scarce public resources on the most "deserving" persons with disabilities, those with the most substantial needs or disadvantages. Functional criteria allow benefits providers to manage their caseloads and allocate their resources.

It is difficult to find models of legislation that have thoroughly operationalized the social model of disability. A legislative shift from a functional definition to a social one requires a thorough re-imagining of assumptions and procedures. Programs and policies should take as their starting point the development of a barrier-free society, not the amelioration of the disadvantage experienced by persons with disabilities. In the human rights context, the shift from a functional to a social definition of disability required that fewer questions be asked regarding the nature of an individual's condition, and more asked about the nature and extent of the disadvantage experienced by persons with disabilities. Similarly, the provisions of the ICRPD regarding decision-making, envision less focus on determining the "capacity" of individuals and more on the supports that individuals can be provided in order to maximize their autonomy. The direction should be perceived and applied in the EU legal system – especially through ECJ case law which can be shaped in a more flexible and adequate manner. No definition of disability might be a solution to the possible tension between discrimination and other social disability laws. Nonetheless, the effective protection of rights of persons with disabilities requires the limitation, suitable to a situation, of its personal scope which may be reached by the right interpretation of the term of "disability.

Abstract

Recently, the concept of disability has been in rapid flux. Beginning in the late 1960s, consensus concerning the common understandings of disability has fragmented, and since then activists and academics have introduced

new approaches to disability and challenged them. The area is now one of complex and ongoing debate and developments in public policy and law on many levels, with multiple competing perspectives.

Despite the efforts of the World Health Organization which resulted in the classification systems for disability developed in 1980 and again in 2001, there is no international universal legal definition of disability, neither is there one in European Union law. A study of definitions of disability in various EU Member States shows that disability definitions vary from state to state but also inside each state and they differ in relation to different legal purposes.

This debate has had a large impact on European disability policy and it has led to a paradigm shift from charity-based to rights-based disability policy and it has helped to understand disability as a social construct, which is reflected in the United Nations Convention on the Rights of Persons with Disabilities. The major EU institutions have all recognised the need to base policy on the social model of disability. Nevertheless, the European Court of Justice case law does not seem to be fully consistent with it. The situation implies the need of developing an autonomous and uniform interpretation of the notion throughout the EU, which also is to be emphasized from the Polish law perspective.

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INTERPRETATION OF THE RIGHT TO PRIVACY IN THE 21th CENTURY. INTRODUCTORY REMARKS

"A free society should not have to choose between more national use of authority and personal privacy"
Alan Westin 1971[1]

1. Surveillanced/disciplinary society. Privacy and Digital Technologies

After Foucault and Agamben's analysis of biopower and biopolitics it can be said: Leviathan exists and it is greatly fine, we live in a disciplinary and normalized society, a society of ongoing surveillance where human rights are defined arbitrarily and everyone can be regarded as a Stanger about whom not only the state or its officials but also others want to know as much as possible. Life in modern society is life in the new "splendid" – a new Panopticon. Everyone can see everyone, but simultaneously a few (non-visible to others) might see the others.

Michel Foucault devoted his works entitled *Discipline and Punish: The Birth of the Prison* (1975) and *Society Must Be Defended* (1976) to the issue of disciplinary power. Discipline creates four types of individuality through: cellular (spatial distributions), organic (codes activities), genetic (accumulates time), combinatory (composition of forces). Disciplinary power elaborated techniques of special parcelization of the bodies based on the division, order, arrangement, placement and, as a result, the increase of control. These techniques were: 1) drawing up tables – hierarchical observation; 2) imposing exercises – normalization; 3) prescribing movements – normalizing

[1] A. Westin, Civil Liberties Issues in Public Databanks, (in:) Information Technology in a Democracy, ed. by A. Westin, p. 310.

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judgement; 4) forging new collective identities – disciplinary institution.[2] Those bodies were to be visible at the same time.

In what situation, as individuals and society nowadays, do we find ourselves? What is the contemporary Panopticon? What are the technological measures of vision/hearing/recording/ observation/monitoring/controlling/supervising an individual? The answers to these questions are at least partly universally known.

Placed in the iPhone and iPad, running with i0S4 system, a file called "consolidated.db" gathers user's geolocation data, in other words "tracks" his/her movement along with the date and time. If the programme "iPhone Tracker" is installed on one's iPhone or iPad (free access), one can depict on a map data which has been saved on that file – a court order is not needed anymore. Previous models of the iPhone also collected such data in an h-cells.plist file. Accepting the regulations, the user agreed to such a "track". The question is: how many users had read the regulations and knew about such a possibility? It should be assumed only a few of them. Most smartphones have a built-in GPS chip, which allows tracking a device and its user. Due to the fact that GPS works slowly, Apple and Google combine with each other data from flagpoles and wireless networks that are available nearby. Such databases had already been formed in 2008 by a company called Skyhook Wireless – with neither legal basis nor control. Currently, such data is collected by Chrome (Google) and Safari 5 (Apple). Also, this allows localizing a computer or a laptop. Additionally, browsers use programmes aggregating a user's online activity, creating his/her identity profile knowing a user's online history. There are applications such as Foursquare, Gowalla, that inform our acquaintances about our whereabouts. After publication of this information in the media in 2011, Apple ensured that it was a software error and from then on, those files would be encrypted and not be kept on the iPhone for more than a week. Have they kept their word? For many years, YouTube has reserved the right to use, duplicate, distribute, and work out or display contents that are placed on their website.

Facebook aggregates the data placed on its user profiles, and allows other people to track their acquaintances' identity profiles. One can only suspect that Facebook sells the collected data to insurance and advertising

[2] M. Foucault, Discipline and Punish: the Birth of the Prison, trans. Alan Sherdan, Vintage/Random House, New York 1979, pp. 136–170. See also: A. Schwan, S. Shapiro, How to Read: Foucault's Discipline and Punish, PlutoPress, London 2011, pp. 97–139; S. Oliwniak, Biopolitics and the rule of law, (in:) Axiology of the Modern State Under the Rule of Law. Selected Issues, ed. by S. Oliwniak, H. Święczkowska, Studies in Logic, Grammar and Rhetoric 19 (32), University of Bialystok 2009, pp. 33–48.

companies, simultaneously refusing to give back the information that had been placed by a user even after deletion of a profile. At the beginning of 2012, without users' consent, Facebook amended the profiles' privacy settings to the commonly available – and from then on users must change their privacy settings by themselves. How many users actually do this?

Since March 1st, 2012, Google has changed its privacy policy. Data concerning users of their products has been gathering beforehand, but ... Currently, data from all Google services are used to create a user's profile, the browser should identify a user's preferences and suggest appropriate or personalized advertisements and information. There are serious doubts regarding data protection and the way it is being used. Such a situation has drawn the Polish Inspector General for the Protection of Personal Data and the French CNIL's attention, also the attention of their counterparts from Canada, Germany, Israel, Italy, Ireland, the Netherlands, New Zealand, Spain, the UK, and the EU Commissioner for Justice Viviane Reding. Google does not see a problem, and claims that "in the privacy policy we have managed to find a reasonable balance" – Peter Fleisher, general counsel for Goggle privacy. However, not all data that is integrated can be controlled.

One may cancel their account on Google websites (80% of browsers on the market in Europe); how many users will do this, valuing highly the right to privacy rather than one's own convenience? A phone user with an operating Google Android system (52.5% of phones on the market according to the data from January 1st, 2012) practically can not log out of it. Another example: Intelius application for iPhone, a "dirt detector" sleaze detector – one puts down the name and surname or phone number of a newly acquainted person or pastes their "digital photo" and gets access to his/her tweets, information on criminal records, people living at the same address, the surface of his/her residential property and its status, his/her activity on Facebook and websites that he/she looks through. Google Street View records fragments of data that are being transmitted from wireless networks from houses being passed at that particular moment.

Also we have biometric technologies. They include a number of measures of human physiography as well as DNA: descriptions used in passports, such as height, weight, colour of skin, hair, eyes, visible physical markings, gender, race, facial hair, wearing of glasses; natural physiography e.g. skull measurements, teeth and skeletal injuries, thumbprint, fingerprint sets, handprints, iris and retinal scans, earlobe capillary patterns, hand geometry; biodynamics e.g. the manner in which one's signature is written, statistically analyzed voice characteristics, keystroke dynamics – particularly

login-ID and password; social behaviour, supported by video-film e.g. habituated body signals, general voice characteristics, style of speech, visible handicaps and god-tags, collars, bracelets and anklets, bar-codes, embedded microchips and transponders. Raymond Wacks writes: *"the biometric may then be used either to identify the subject by matching his or her data against that of a number of other individuals' biometrics, or to validate the identity of a single subject".*[3]

Next: identity cards and identity smart cards with a chip containing the holder's particulars of birth, nationality, address, marital status, occupation, details of any spouse or children. These cards may have multi-application, such as e-certificate, library card functions, quality service. But as Simon Davies has written in 1996 *"a card will imperil the privacy of personal information".*[4] And also DNA databases, technology of radio frequency identification (RFID) has emerged as a means of inventory control to replace barcodes. Combining RFID and wireless fidelity networks or CCTV cameras could facilitate realtime tracking of objects or people inside a wireless network, such as hospital. There are likely to be calls for sex offenders, prisoners, illegal immigrants, and other "undesirables" to be tagged.[5] As Foucault defines in "Discipline and Punish": *"the mechanisms of the disciplinary establishments have a certain tendency to become 'de-institutionalized', to emerge from the closed fortresses in which they once functioned and to circulate in a 'free' state; the massive, compact disciplines are broken down into flexible methods of control, which may be transferred and adapted."*[6]

Jack Schmidt, Google, spoke: "Privacy does not exist", as did Scott McNealy, CEO of Sun Microsystems: "Privacy is dead. Get over it". Is this really true?

Abandon the hope of privacy, those who log in in here – should such a warning be placed on Facebook, Google, Twitter, Bliper, Our Class websites, etc.?

Deliberations on the nature of the right to privacy in today's world, in cyberspace, are an old issue in a new format. It's about setting the limits of politics, designation of areas of private/public behaviors. After analyzing Baudrillard's concepts we may state a question: does reality exist? Following Manuel Castells we wonder: do we still cope with virtual reality, or rather do

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[3] R. Wacks, *PRIVACY. A Very Short Introduction*, Oxford University Press, New York 2010, p. 10.

[4] S. Davies, Big Brother, Pan Books, 1996, p. 139.

[5] R. Wacks, PRIVACY, op. cit., p. 28.

[6] M. Foucault, *Discipline and Punish*, op. cit., p. 181–182; 211.

more and more people live in virtual reality? The answer to these questions requires a re-interpretation of current understandings of privacy, intimacy, solitude. Also, it requires re-pondering the freedom and autonomy of a human being in a network society, in cyberspace. It requires re-defining the borderline of individual freedom in the context of other individuals' freedom and the necessity to fix, once again, the limits between the freedom and the privacy of an individual and the common weal/public safety. Can we still use the concepts of John Stuart Mill, who in his essay "On Liberty" wrote: *"the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant"*.[7]

What is privacy?

The value of privacy as a general moral, social, psychological or political value is undeniable, but the more the notion is stretched, the greater its ambiguity. An acceptable definition of privacy remains elusive.

Privacy can be defined on the philosophical plane as such an element of the freedom and the autonomy of an individual, which we may call solitude, or the state in which one decides about themselves, without the participation and influence of others. Privacy is a human property.[8] Simultaneously, it can be understood as a mental state, as intimacy, necessary also in relationships with other people, including marriages. It is also capable of deciding who and what possesses information about ourselves and to what extent this information is accessible to the public. It is also a space of our personal creation, artistic creativity, a space also in the purely physical dimension, free of presence, manipulation, domination, and the supervision of other people and state authorities. All the elements of privacy are listed by Alan Westin, who claims that "privacy gives individuals a chance to lay their masks aside for rest. To be always *"on" would destroy the human organism"*.[9]

Is privacy today, in cyberspace, where everyone, to a lesser or greater extent has fallen into the trap of network systems (everyone is "networked"), still of great value? Do young people, cyber natives, for whom cyberspace is

[7] J. S. Mill, *On Liberty*, Longman, Roberts & Green, London 1869, p. 9.

[8] About the philosophical and anthropological aspects please see. M. Chrabonszczewski, Privacy. Theory and practice, Oficyna Wydawnicza ASPRA-JR, Warsaw 2012, pp. 19–80.

[9] A. F. Westin, *Privacy and Freedom*, Atheneum, New York 1967, p. 34–35.

no longer a virtual reality – not virtual reality, but simply the reality which they occupy – need privacy? After all, for many their appearance in the network is an essential condition of their existence. They sell their privacy and intimacy voluntarily, because it is the only way to become known. They do not analyze the risks, even do not understand them, unthinkingly providing information about themselves and their personal photographs.

Samantha Miller writes *"In the digital world of online social networks users have grown accustomed to the free flow of information and expansive opportunities for self-expression".*[10]

According to Helen Nissenbaum *"we have a right to privacy, but it is neither a right to control personal information nor a right to have access to this information restricted. Instead, it is a right to live in a world in which our expectations about the flow of personal information, are, for the most part, met."* She called this right *"contextual integrity, achieved through the harmonious balance of social rules, or norms, with both local and general values, ends, and purposes. The framework of contextual integrity rejects the private/public dichotomy as a sound basis for a right to privacy and along with it the attempt to define* a category of sensitive information deserving special consideration".[11]

Are we dealing simultaneously with new forms of exhibitionism and voyeurism as usual attitudes online? It might not be important to them, in a state of apathy about their privacy, as the society is used to the omnipresence of CCTV (closed-circuit television) cameras and have accepted the rules of being kept under surveillance and being overseen.

Wolfgang Sofsky writes: *"People have long since gotten used to video cameras, discount cards, and advertising messages... Although it occasionally annoys him, the transparent citizen appreciates how much easier life is in the computer age. He unhesitatingly forgoes being unobserved, anonymous, unavailable. He has no sense of having less personal freedom. He does not even see that there is something to defend. He attaches too little importance to his private sphere to want to protect it at the expense of other advantages. Privacy is not a political program that can win votes... People leave more traces behind than they realize. No longer is one allowed to withdraw from society and live without being pestered.... The individual cannot secretly change masks and become someone else. He can neither dis-*

[10] S. Miller, The Facebook Frontier: Responding to the Changing Face of Privacy on the Internet, Kentucky Law Review 2008–2009, vol. 97, p. 541.

[11] H. Nissenbaum, Privacy In Context. Technology, Policy and the Integrity of Social Life, Stanford Law Books 2010, pp. 231–232.

guise himself nor temporarily disappear. His body is regularly X-rayed, his journey through life recorded, and his life changes documented... Nothing is overlooked, ignored, thrown away... When every careless act, every error, every fleeting trifle is recorded, there can no longer be any spontaneous action. Everything one does is evaluated and judged. Nothing escapes surveillance. The past suffocates present. If data were not erased at regular intervals, people would be imprisoned in the dungeons of their own history. However, this outlook seems to frighten hardly anyone".[12]

A legal right to privacy

Amitai Etzioni, in his *The Limits of Privacy* discusses three stages of development on the right to privacy: 1) pre-1890: utilizing principles derived from property rights to protect privacy; 2) 1890 to 1965: the right to privacy became a part of tort law; 3) post-1965: a major expansion of the right to privacy, particularly with regard to its constitutional rights.[13] The marker in the legal history of privacy is an 1890 essay by Samuel D. Warren and Louis D. Brandeis "The Right to Privacy". They framed their argument in terms of "the right to be let alone". The right to be let alone stands supreme and apart from other considerations; it presumes that all people can be left alone as much as they desire – completely if they so prefer – without restricting other persons' abilities to exercise their own right to be left alone to the fullest contest.[14]

At the start of the 20th century the Fourth Amendment was useless as a protection against subtler and more far-reaching means of invading privacy. In Katz v. United States (1967) the Supreme Court established a new standard for characterizing the Fourth Amendment also establishing *"a reasonable expectation of privacy"* standard for determining whether a Fourth Amendment violation had occurred. This "reasonable expectation of privacy" arises from the property right "to exclude others". "If surveillance does not invade the individuals' right to exclude others, the surveillance generally does not violate his reasonable expectation of privacy".[15] Today Jack

[12] W. Sofsky, *Privacy: A Manifesto*, Princeton University Press 2008, pp. 7–8.

[13] A. Etzioni, *The Limits of Privacy*, Basic Books, New York 1999, p. 189.

[14] S. D. Warren, L. D. Brandeis, "The Right to Privacy", *Harvard Law Review* 1890, vol. 4, pp. 289–320. See also: J. Sieńczyło-Chlabicz, Legal Discourse Surronding the Institution of the Right to Privacy – a comparative approach, (in:), Language, Law, Discours, ed. by M. Alksandrowicz, H. Święczkowska, Studie in Logic, Grammar and Rhetoric 26 (39), University of Bialystok 2011, pp. 197–214;

[15] O. Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, *Michigan Law Review 2003–2004*, vol. 102, p. 812.

Balkin claims that, *"the government aims to obtain any and as much information to possible, and, as a result, Fourth Amendment protections often are inadequate. ... Electronic surveillance is not its only tool. ..Government can also get information out of human bodies. Bodies are not simply objects of governance, they are rich sources of information that governments can mine through a multitude of different technologies and techniques"*.[16] One of the most significant components of the surveillance today is data mining. The government has the ability to obtain and analyze recorded information about citizens. Jeffrey Rosen describes *"Before September 11th, the idea that Americans would voluntarily agree to live their lives under the gaze of a network of biometric surveillance cameras, peering at them in government buildings, shopping malls, subways and stadiums, would have seemed unthinkable, a dystopian fantasy of a society that had surrendered privacy and anonymity"*.[17] Technology allows governments to deploy modern panopticism as a form of "subtle coercion" and the Fourth Amendment may be no longer an adequate safeguard.[18]

Daniel J. Solove indicates two models for the Protection of Privacy:

1) The Invasion Conception: from S. Warren and L. Brandeis. The primary remedy for privacy invasions should be a tort action for damages, and to a limited extent, injunctions and criminal penalties. Under this concept, privacy is understood as a series of discrete wrongs-invasions – to specific individuals. Solove notes that *"the invasion conception's focus on privacy invasions as harms to specific individuals often overlooks the fact that certain privacy problems are structural – they affect not only particular individual but society as a whole. Privacy cannot merely be enforced at the initiative of particular individuals. Privacy should be viewed as a constitutive value"*.[19]

2) Architecture – the protection of privacy depends upon an architecture that structures power, a regulatory framework that governs how information is disseminated, collected and networked.[20]

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[16] J. Balkin, The Constitution in the National Surveillance State, *Minnesota Law Review 2008–2009*, vol. 93, p. 1–6.

[17] J. Rosen, A Watchful State, *New York Times Magazine*, October 7th, 2001.

[18] A. Sarat, L. Douglas, M. M. Umphrey, Itroduction: Change and Continuity – Privacy and Its Prospects in the 21st Century, (in:) *Imagining New legalities. Privacy and Its possibilities in the 21st Century*, ed. by Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey, Stanford Law Books 2012, p. 8.

[19] D. J. Solove, *The Digital Person. Technology and Privacy in the Information Age*, New York University Press 2004, p. 97.

[20] Ibid, pp. 97–101.

Recently, in human rights' philosophy, growing acknowledgement is given for the thesis that it is not dignity, but freedom which is the objective basis of all rights and freedoms.[21] Freedom is expressed primarily in having the possibility of self-determination. In an ontological meaning self-determination of ourselves equals bearing the hallmark of being a person.[22] Self-determination constitutes the opportunity to decide about one's future, to wield one's existence and its dimensions: life and relationships with other people (the right to solitude, freedom to choose a way of one's life).

The legal definition of rights to self-realization of a human being, one's autonomy and privacy, is a consequence of a particular political philosophy, taken as an axiological basis of definite political order. The definition of freedom and privacy differs depending on if it is adopted by liberals or by communitarists. This is due to the fact that they define differently the right (principles of freedom or entitlement).[23] Also, privacy is not one of the notions which the semantic denotation is easy to define.[24]

The analysis of the concepts formulated in US doctrine results in the recognition of privacy as: 1) one's right to be let alone; 2) the limited access of others to an individual, eg. protection from the unwanted interference by the third parties; 3) control over private information; 4) respect for a private secret; 5) respect for intimacy.[25]

But in the digital age new communities are established and new identities formed, and the threat of intrusion into the private domain no longer originates primarily or exclusively with the state.[26] Robin Feldman argues

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[21] For example W. Sadurski, A status of an individual in the eyes of the law: legal and philosophical thoughts on the legitimacy of procedural democracy and T. Kozłowski's opinion expressed in discussion, (in:) M. Wyrzykowski, Rights become law. A status of an individual and a developmental tendency for law, Liber, Warsaw 2006, p. 20–24.

[22] J. Hervada, A. Dorabialska, The natural law. Introduction, a crowd, PETRUS Publishing, Cracow 2011, p. 53–56.

[23] See broader: M. Paździora, Spór o prawa człowieka – jednostka, wspólnota, społeczeństwo, (w:) A. Sulikowski, (red.), Z zagadnień teorii i filozofii prawa. W poszukiwaniu podstaw prawa, Wrocław 2006, s. 85–100.

[24] See for example J. Braciak, Prawo do prywatności, Wydawnictwo Sejmowe, Warszawa 2004, pp. 21–28.

[25] D. J. Solove, Conceptualizing privacy, California Law Review 2002, vol. 90, p. 1094.; idem, Understanding Privacy, Harvard University Press 2009, pp. 14–38. In Polish literature: K. Motyka, Prawo do prywatności i dylematy współczesnej ochrony praw człowieka, Oficyna Wydawnicza Verba, Lublin 2006, pp. 19–136 writes broadly about the evolution of the understanding the right to privacy in the doctrine and jurisprudence of the U.S. Supreme Court.

[26] J. Cohen, Privacy, Visibility, Transparency, and Exposure, University of Chicago Law Review 2008, vol. 75, p. 181.

"It is *the fluidity of our interactions in modern society that makes us particularly vulnerable and requires special attention to the protection of the individual. The battered doctrine of public and private spheres is inadequate for such purposes, and our attempts to apply that doctrine in modern context is producing strange and unsatisfying results"*.[27] And adds *"modern communication and information issues do not map well onto traditional notions of the public and private spheres. Our instinct to address those issues by stuffing them into public/private boxes is already leading to strange, almost schizophrenic results. Consider our approaches to cyberspace. In some circumstances, we treat cyberspace as if it was analogous to a public domain, and in other circumstances, we treat it as if it was analogous to a private domain"*.[28]

Feldman argues that technological advancements have blurred the boundaries between the individual and society and confused the relationship between sovereign and citizen. The conceptualization of public and private spheres may no longer be adequate to address those challenge. It demands reconceptualizing the issues of control embedded in any discussion of privacy in the information age. We should view Internet interactions as consensual agreements, in which individuals will negotiate for those protections they desire, which reflects an outdated mode of thinking in which dangers are conceptualized as coming from single points, and the goal is to mitigate the danger by controlling those points.[29]

Julie E. Cohen presents civil libertarian arguments about privacy. Many such arguments privilege freedom of choice, including choices to surrender personal information in ways that may commodify the self. The notice-and-consent model, which facially appears to privilege liberty, concentrates all of the costs of controlling disclosures of personal information on the affected individuals. Some have criticized the liberty/efficiency binary that dominates debates about responsibility and accountability precisely because it avoids the problem of ethical responsibility toward others. Cohen writes: *"the current evolution of networked digital technologies is reconfiguring technology users to be passive consumers of media content and eager participants in the semantic web and the surveillance processes that feed it"*.[30] And she

[27] R. Feldman, Coming to the Community, (in:) Imagining New Legalities, op. cit., p. 86.

[28] Ibid, at p. 95.

[29] Ibid, p. 99.

[30] J. E. Cohen, Configuring the Networked society, (in:) Imagining New Legalities, op. cit., p. 139..

adds that *"government plays an important role in validating private technology processes, and not only because legal rules determine the 'public' and 'private' labels. Government actors are customers for technology products and services, and also are interested in advancing policy agendas of their own"*.[31] Jody Freeman proposes embracing the public role in privatized governance by reconceptualizing governance through the lens of contract, as an extended process of public/private negotiation because the traditional tools of government are neither the only nor the most useful tools for pursuing the implementation of public values.[32]

With regard to the legal regulation of cyberspace and protection of the right to privacy, it should be distinguished:

1) cyber-paternalism (statism) – it is only the state as a political organization which is authorized to issue the law and regulations regarding users' online activity, because the activity has its effects on the state territory.
2) cyber-libertarianism (separatism) – given the nature of the network, its users should form their own normative orders that are independent of the state.[33]
3) indirect stand – regulations of the network should combine both the users' and the state activity. Relations among network participants are the relations among anonymous entities, often short and unstable. These are not the multilateral legal relations based on civil law doctrine, but the network structures which are not normalized by any of the juridical theory.[34]

A different approach to network regulations is a consequence of the differences between American and European legal culture. Also, the understanding of the public and private spheres differs. In European legal consciousness formal arguments play an important role along with the search for the source of law, which have been previously established by the public authorities.[35] In the US the public/private distinction has to be under-

[31] Ibid, p. 141.

[32] J. Freeman, The Private Role in Public Governance, *New York University Law Review 2000*, vol. 74 (3), pp. 543–675.

[33] A. Murray, *Information Technology Law: the law and society*, Oxford University Press, New York, 2010, p. 56.

[34] K. Dobrzeniecki, Lex informatica, Wydawnictwo Adam Marszałek Toruń 2008, pp. 124–125; ibid, Prawo i etos cyberprzestrzeni, Wydawnictwo Adam Marszałek, Toruń 2004.

[35] See: A. Sebok, L. Trägård, Adversial Legalism and the Emergence of a New European Legality: A Comparative Perspective, (in:) *Imagining New Legalities*, op. cit., pp. 154–187.

stood as a series of commitments and contestations along multiple dimensions: state/society, individual/group, right/power, property/sovereignty, contract/tort, law/policy, legislature/judiciary, objective/subjective, reason/fiat, freedom/coercion.[36]

Since the beginning of the 1990s there has been a discussion if cyberlaw is an autonomous or separate normative order in relation with national law among the branches of domestic law. The prevailing position emphasizes the specificity of the network and the lack of adequate rules clarifying methods of its regulation. Justine Hofmokl remarks that so-called institutions managing a common pool of goods are a mixture of quasi-private or quasi-private institutions that are beyond the classical dichotomy.[37] It should be underlined that "the development of technology consistently overtakes the authors' idea of draft regulations. In such conditions interpretation of the law seems to be a difficult task.[38]"

According to the preamble to the European Community's Privacy Directive of 1995 "Whereas the difference in levels of protection or the right and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member State may prevent the transmission of such data ... whereas this difference may therefore constitute an obstacle to the pursuit of a member of economic activities ... distort competition and impede authorities in the discharge of their responsibilities".[39]

The European Union has put a lot of effort into the legal protection of Internet users since 1996. In January 1999, the European Parliament and the European Council adopted a resolution on illegal and harmful content on the Internet. Based on the above-mentioned fact, the program: Safer Internet Action Plus (1999–2004) and its subsequent editions from 2005 to 2008 and from 2009 to 2013 have been worked out.[40]

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[36] D. Kennedy, The Stages of the Decline of the Public/Private Distinction, *University of Pennsylvania Law Review, 1982*, vol. 130.

[37] J. Hofmokl, Internet jako dobro wspólne, Wydawnictwa Akademickie i Profesjonalne, Warszawa 2009, p. 77–87. See also: J. Kulesza, Ius internet. Między prawem a etyką, Wydawnictwa Akademickie i Profesjonalne, Warszawa 2010, pp. 218–264.

[38] K. Dobrzeniecki, Lex informatica, op. cit, p. 52. See also: J. Janowski, Cyberkultura prawa. Współczesne problemy filozofii prawa i informatyki prawa, Difin, Warszawa 2012, pp. 304–328.

[39] Directive 95/46/EC of the European Parliament and the Council of October 24th, 1995.

[40] In greater detail these issues are discussed by M. Grabowska, The protection of Internet users in the European Union member states, KUL Publishing, Lublin 2012, pp. 193–266.

In the judgment of July 27th, 2004, the case Sidabras and Dziautas v. Lietuva the European Court of Human Rights adopted a broader understanding of the right to privacy than the Anglo-Saxon notion of "privacy". The right to a life in privacy means a life free from unwanted external interest. In its judgment of April 10th, 2007, the case of Evans v. United Kingdom the Court adjudicated that the state has an obligation to take action in order to create a framework for ensuring an individual the respect of their autonomy not only by public authorities but also by other private entities.

There is a need not only to regulate cyberspace, but also the digital data processing, artificial intelligence, intelligent agents, the processing of data generated by CCTV cameras, drones, and the scope of surveillance by public authorities or by host providers and other network users.

A surveillance camera has the capability to zoom in and read the pages of a book you have opened while waiting for the train in the subway. It can tilt, pan, and rotate – making it increasingly easy to track you as you move through your day. Facial recognition software is able to capture your image from the faces in the crowd, and then compare the image or your face against the facial images stored in law enforcement database. But also video cameras help protect the Public from Police Abuse.[41] In Poland, the European CCTV Indect system is being tested. It can not only recognize passers-by faces, but also record their conversations and analyze their atypical behaviors. Wojciech Rafał Wiewiórowski, the Inspector General for the Protection of Personal Data, observes that there are no regulations in this field, and it is necessary to supervise monitoring, as in Spain, Belgium, the Czech Republic and Italy.[42] Similarly, in Poland there are no legal provisions governing the monitoring of municipalities. In Polish legal order, only trade regulations apply that allow the application of monitoring, including simultaneous video and audio recording. According to the Ministry of Internal Affairs and Administration, the legal basis is the Act on Local Government.

According to the Council of Ministers' Directive of December 16th, 2009 on observation and registration with the usage of video technical means by

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[41] See: The New York Civil Liberties Union, The Right of Privacy Is Destroyed by Video Cameras in Public Places and K. Mangu – Ward, Video Cameras Help Protect the Public from Police Abuse (in:) *Are Privacy Rights Being Violated*, ed. by R. D. Lankford, Greenhaven Press 2010, pp. 10–22.

[42] S. Jedynak, Video cameras track people without any control, "Rzeczpospolita" of September 27th, 2011, p. C3.

municipal police,[43] the municipal police are entitled to observe and record events that take place in public areas with the usage of technical means. However, this must be in regard with the protection of municipal facilities and the protection of public order. Also according to the Act of April 6th, 1990 concerning Police, art. 15 paragraph 1 point 5a,[44] it is entitled to use monitoring in public areas. Wojciech R. Wiewiórowski, Polish Inspector General for the Protection of Personal Data, again emphasizes that "According to the Article 29 Working Group the usage of video surveillance should respect the principle of proportionality. It means that, when other preventive and protection measures not requiring video recording are insufficient or impossible to implement, all tools used for such supervision should only be used as auxiliary measures. The authorities that are responsible for the collection and preservation of camera records must comply with the law on the protection of personal data, which might be difficult. It is not always clear how to apply properly the rules governing security vested with special administrative powers or people who are actually involved. Therefore, monitoring requires regulation."[45].

In 2000, the UK enacted the Regulation of Investigatory Powers Act (RIPA). Pursuant to the Act public authorities may ask Internet service providers for access to certain data that has been collected, if such information is acknowledged necessary for the protection of national security. The competence of public authorities is broad and indefinable.

The nature of threats to privacy posed online is defined as Privacy 2.0.[46] For example, using face recognition software, the program Picasso allows checking one's identity on a photo submitted. Similarly, web portals such as Polar Rose and MyHeritage combine images with data gathered on Facebook, Our Class and other websites. Protection of personal data such as cookies, e-mail addresses, IP addresses.

There is a widespread belief about the necessity to develop effective mechanisms for the protection of privacy online. Since domestic cyberlaw created by the state is difficult because of the above-mentioned specificity of the network (autonomy and users' multiplicity, the possibility of fast multiplication and duplication of information gathered on servers that are beyond state jurisdiction – the Internet deterritorialization), the legal basis might

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43 Journal of Laws from 2009, No. 220, item 1720.

44 Journal od Laws from 1990, No. 30, item 179 with the following changes.

45 "Rzeczpospolita" of August 17th, 2011, p. C 6.

46 J. Zitrain, The Future of the Internet – And How to Stop It, Yale University Press 2008, p. 200.

be the rules and regulations adopted by the users themselves (netiquette, Creative Commons, Platform for Privacy Preferences – P3P Project). The possibility of digital reputation bankruptcy[47] or in other words the "right to forget" has been raised.

The European Commission is drawing up a bill that will replace Directive 95/46/EC. It will enter into force in 2014 or 2015. Pursuant to new provisions the administrator will be obliged to remove a user's data completely, such as name and surname, Social Security number, and address, and to check if data has not been transferred to other sources. If this has happened, the administrator will have to take action in order to remove it completely. Data processing will be possible only for a limited period of time (3 or 5 years). After this period, if the consent to data processing will not be extended, it will be deleted. Indefinite processing will be prohibited. The Inspector General for the Protection of Personal Data will be entitled to impose a penalty of up to one million Euros or 5% of the annual turnover on an entity which fails to comply with the new regulations.

We mustn't forget that every Internet user, regardless of the development of the legal framework for the protection of privacy online, should themselves control the information that they place online. Care of the self (in the sense laid out by Foucault) is inherently a mode of letting oneself be observed by others, and this observation can be coupled to systems of control. As Boris Traue writes: *"the qualitative difference between 'caring control' and 'cybernetic control' is that care (in the sense of cura sui) is retroactive... cybernetic control is pro-active"*.[48]

James B. Rule in his 1973 book titled Private Lives and Public Surveillance proposed the idea of a "total surveillance society". In 2007 he wrote *"the world clearly traveled well along the road toward total surveillance. The proportion of populations covered by systems of mass surveillance; the number and variety of points in life where such systems take in data; the subtlety of the judgments they afford and the effectiveness of the action taken on the bases of these judgments – all these things continue of rise"*.[49] And adds *"Without an unsentimental vision of the pressures on privacy, and the political will to confront them, the most ingenious legislation and policy-making*

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[47] J. Kulesza, Ius internet, op. cit., pp. 111–112.

[48] B. Traue, The Cybernetic Self and its Discontents: Care and Self-Care in the Information Society, (in:) *Care or Control of the Self.* Norbert Elias, Michel Foucault and the Subject in the 21st Century, ed. by A. D. Bührmann, St. Ernst, Cambridge Scholars Publishing 2010, p. 173.

[49] J. B. Rule, *Privacy and Peril. How we are sacrificing a fundamental right in exchange for security and convenience*, Oxford University Press 2007, p. 163.

will avail little. It is not easy to opt for a messier, less efficient, more dangerous and unpredictable world as the price of authentic privacy. But the alternative is infinitely worse".[50]

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[50] Ibid, p. 201.

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THE "POLISH MODEL" OF LEGAL INTERPRETATION OF LAW[1] AND THE SOLUTIONS IN EASTERN EUROPE

The "Polish model", or the lack of an institution authorised by the state to make an interpretation of the law, has been in operation for the last fifteen years. As it seems the persons interested in the issue are satisfied by the situation, the decision made in the course of work over the new Constitution appears to be justified. It emerges that the reasons which were its basis still hold. However, it seems that they have not always been observed, and in other countries of our region the decisions to adopt such a radical solution have not been made. Therefore, it is worth considering whether the Polish constitution-maker was too precipitate in making a decision of depriving a state body of the right to make a legal interpretation or whether the risks which appeared in Poland also emerged in other countries, or perhaps they were ignored.

One of the manifestations of the systematic transformation was granting the Polish Constitutional Tribunal the function of establishing the commonly binding interpretation of statutes in 1989.[2] The Constitutional Act of 17 October, 1992 on the mutual relations between the legislative and executive power of the Republic of Poland and the local government, or the so-called Small Constitution from 1992 in its Art. 77 held in force part of the currently binding provisions of the Constitution from 1952, including

[1] In Polish law the term 'legal interpretation' is used for the specific category of interpretation exercised by the organs which did not issue the law but are legally authorised to interpret it.

[2] Art. 1 section 10 of the Act of 7 April, 1989 on Amendments to the Constitution of the People Republic's of Poland amending Art. 33a section 1 of this Constitution, J. of Laws 1989 no. 19 item 101. Another competence of the Constitutional Tribunal which appeared in 1989 was issuing decisions on the non-constitutional character of goals and activities of political parties.

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those concerning the Constitutional Tribunal. Thus, it maintained the powers of the Tribunal to make a binding interpretation of statutes and, which proved to be important, embedded it outside the legislature as the body of control over the constitutional character of law with specific features of its own, using jurisdiction methods.

Given the fact that the *sine qua non* condition for the existence of a constitutional court is granting it the competence to examine the constitutional character of statutes, it is interesting to observe that some resolutions passed by the Tribunal and containing the interpretation were of a law-making character, and were final and commonly binding, as opposed to the judgments related to its fundamental activity; that is, the constitutional character of statutes which were not final and could be overruled by Parliament.

During the initial period of political transformation, the tribunal could skilfully use this side competence. Examples of independent attempts to define its own position on the basis of interpretative resolutions are the interpretative resolutions of 20 October 1993 and 5 September 1995.[3] and extending the criteria of control by models taken from human rights in the international order.[4]

This was the vision of the Polish constitutional court until a full version of the constitution was passed in 1997. From the outset this vision did not suit the representatives of judicial power. The Supreme Court held that the commonly binding interpretation of statutes established by the constitutional court limited the independence of the judiciary, subjecting the interpretation made in the course of court proceedings to the interpretation imposed by the Constitutional Tribunal.[5]

These disputes intensified, as if a result of subsequent interpretive resolutions. They are well illustrated by questions, appearing in the science of law in the context of the Act of 7 March 1995, about the creativity of the Tribunal's interpretation as well as determination of their limits or the starting and final moment of the validity of the legal interpretation.[6]

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[3] Respectively stating that if the Sejm does not consider the decision within 6 months, it remains in force and causes lifting the provision of the law recognised as unconstitutional and certifying that unconstitutionality of the law contested under the preventive control is final.

[4] See: M. Granat, Trybunał Konstytucyjny. Osiągnięcie czy zadanie? [in:] A. Szmyt (ed.) Trzecia władza. Sądy i trybunały w Polsce. Gdańsk 2008, s. 27.

[5] See J. Sobczak, Sądy i trybunały [in:] W. Skrzydło (ed.) Polskie Prawo Konstytucyjne, Lublin 1998, p. 380.

[6] Resolution of 7 March 1995, File ref. W 9/94 on establishing a generally valid interpretation of Article 13 para. 1 of the Act of 29 April 1985 on the Constitutional Tribunal (Dz. U. of 1991, No. 109, item 470 with subsequent amendments).

The criticism became more audible after the Small Constitution came into force. In view of the separation of powers principle, in the case of conflict of interpretations made by the Constitutional Tribunal and Supreme Court, the latter would have to apply the construction of provisions adopted by the constitutional court. According to the Supreme Court this state is not compliant with the principle of separation of powers and legal democratic state. This position was presented by the Supreme Court to the Constitutional Commission of the National Assembly which, in the resolution of the General Assembly of the Supreme Court, petitioned to deprive the Constitutional Tribunal of the competence in the matter of making a commonly binding interpretation of statutes. The Supreme Court was firm and confirmed its position in judicial practice. In the resolution of the Labour Law, Social Security and Public Affairs Chamber of 26 May, 1995 in Rzeszów it overtly opposed the interpretation of the Constitutional Tribunal and established a completely different interpretation based on which a common court of law gave an adequate ruling.[7]

Therefore, there was an open conflict between the Supreme Court and Constitutional Tribunal – a conflict the resolving of which was to be proposed by the Constitutional Committee, and which in consequence was resolved in the Constitution of 2 April, 1997. This solution took the opposite direction to those proposed by the representatives of the doctrine of law, who inclined to support the position of the Tribunal. As M. Granat aptly observes, this was of no serious importance for cancelling this entitlement of the Tribunal but it is worth remembering in the context of reflections or proposals of its restoring and possible discussion on the division of power within the whole judiciary.[8] Freeing the judicial system from the binding interpretation of the Tribunal, about which the mainstream of the debate was, would be a certain solution.

Evoking the stormy doctrinal debate it is worth remembering the very balanced approach of the Tribunal itself to the matter of argument. The Tribunal emphasised the declarative nature of its interpretations, recommended moderation in taking legal interpretative resolutions, restricting itself to cases "particularly flagrant and important for praxis, which require, because of the public good, swift solutions and cannot wait for the establishment of interpretation, which is formed in the course of normal adjudicating of the organs applying law (the so-called 'operative interpretation'). (...) each interpretation performed by the Constitutional Tribunal (...) petrifies

[7] Resolution of the Supreme Court of 26 May, 1995, file ref. I PZP 13/95.

[8] See: M. Granat, Trybunał..., op. cit., p. 27 as well as the discussion, ibidem, p. 79+.

to a great degree the law, which also supports the opinion that this form of interpretation not be overused.[9] Indeed, it was difficult to find any "usurping" will in the position of the Tribunal.

The current constitution deprived the Constitutional Tribunal of competence to establish the commonly binding interpretation of laws, granted to it within the framework of previously binding constitutional norms.[10] The constitution-maker in the articles devoted to the Tribunal ignored the competence in question. The intentions of the lawmaker do not raise doubts about radical provisions of Art. 239 of the Constitution placed in the transitional and final Provisions. Section 2 of this article says that the proceedings in the case of commonly binding interpretation of laws instituted before the Constitution came into force are subject to termination.[11]

Another, even more important consequence at the date the Constitution came into force was the loss of force of the commonly binding resolutions of the Constitutional Tribunal pertaining to the establishment of statute interpretation.[12] Art. 239 section 3 of the Constitution did not envisage the general abrogation of these resolutions but the loss of their binding force. The abrogation concerned the position of interpretive resolutions in the system of law in force and leaving their informative or persuasive merit.[13] The loss of binding force did not mean the loss of validity of the decisions made based on the resolutions of the Tribunal. The judgments of courts and other valid decisions of institutions of public authority, made in consideration of the meaning of the provisions made by the Tribunal by way of the commonly binding interpretation of the statutes, remained in force.[14]

The above solution was met with approval by the judiciary. It was argued that in the light of separation of powers principles, the independence of courts and judges who are only subject to the Constitution and statutes, other decisions would be difficult to justify.

However, by the annulment of the commonly binding, legal interpretation of statutes made by the Constitutional Tribunal, the Constitution of

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[9] See: Justification for the Resolution of 7 March 1995, op. cit.

[10] See also Z. Czeszejko-Sochacki, Trybunał Konstytucyjny w świetle projektów konstytucji RP, Państwo i Prawo 1995, no. 2, p. 5 and next.

[11] By decisions of 12 November, 1997, the Supreme Court discontinued three proceedings pending at the moment the Constitution came into force.

[12] In the years 1989–1997 the Constitutional Tribunal took cognizance of approximately 100 cases pertaining to the establishment of statute interpretation.

[13] Compare L. Garlicki, Omówienie art. 239, [in:] L. Garlicki (ed.), Konstytucja i B. Banaszak, Konstytucja Rzeczypospolitej Polskiej, Komentarz, Art. 239, p. 1011–13.

[14] More in B. Banaszak, Konstytucja Rzeczypospolitej Polskiej, Komentarz, Art. 239, p. 1011–13.

2 April, 1997 did not authorise the Supreme Court or any other body to make this kind of interpretation. Currently, there is no legal institution in Poland which could make a legal interpretation. The Supreme Court was only equipped in the right to resolve the discrepancies in the interpretation of law revealed in the judgments of common courts of law, military courts, and the very Supreme Court. This competence was granted not by virtue of the constitutional provisions, but based on art. 60 of the law.[15] The petition for a resolving of these kinds of discrepancies may be presented to the Supreme Court by the First President, Ombudsman, Public Prosecutor General, and within their jurisdiction the President of the Insured and the President of the Polish Financial Supervision Authority. These cases are considered by a panel of seven judges. Moreover, if the Supreme Court considering cassation or another appeal measure will have doubts about the interpretation of law, they may adjourn the case and present the legal issue for consideration by the panel of seven judges. When, however, the panel of Supreme Court judges decides that the presented issue needs explanation and the discrepancies in the law interpretation need resolving, they adopt a proper resolution (Art. 61 §1 of the Law). If it is of key significance for judicial practice or serious doubts justify it, the panel of seven judges may present the petition for resolution to the relevant chamber and the chamber to another two chambers or the full panel of the Supreme Court. The resolutions of the Supreme Court, chamber or a few chambers become enforceable at the moment they are made. Also, the panel of seven judges may give the force of legal principle to the resolution.[16]

Resolving discrepancies is not tantamount to the legal binding interpretation. Legal principles are not currently binding on other adjudicating panels of the Supreme Court or common courts of law, unless they were made in order to resolve a certain legal issue – they are binding on the court if it turned to the Supreme Court for a resolution of this kind. This means that non-compliance of the court judgment with the legal principles of the Supreme Court does not constitute the reason to appeal.[17]

When writing about legal interpretation in Poland, the amendment to the Voting System from 2006 should be remembered which included

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[15] Act of 23 November 2002 on the Supreme Court (J. Of Laws No. 240, item 2052 with amendments).

[16] It is possible to derogate from the legal principle by way of chamber resolution, and in the case of derogating from the chamber resolution by way of decision of the relevant chamber, combined chambers or the full panel.

[17] See resolution of the Supreme Court of 5 May, 1992, OSNC 1993, No. 1–2, item 1.

Art. 14A-p[18] in the law. This amendment introduced the instrument of individual tax interpretations. Each person may turn to the Minister of Finance with a request to make an interpretation of a specific tax provision, and also the statutory one. The interpretation given by the Minister of Finance is binding on the tax authority, but not on the citizen who may not adhere to it. The interpretation is not binding on courts, either so despite the fact that "it contains elements of doctrinal or even legal interpretation when juxtaposed with the operative interpretation" it does not constitute legal interpretation but only official help.[19]

To conclude this part of the article I would like to return to the Constitutional Tribunal itself as well as the so-called interpretative judicial decisions affirming the conformity or inconformity of the provisions of a law ("regulation X is/is not in conformity with regulation Y of the Constitution in understanding Z") and signalising decisions on statutes and judgments on part of a claim determining conformity or inconformity of the regulation of a law ("regulation X is/is not in conformity with regulation Y of the Constitution within scope Z"). The traditional, dichotomous (in conformity/not in conformity with) division of the judgments of the Tribunal appeared with time insufficient. Professor Czeszejko-Sochacki's proposal, subsequently confirmed in the doctrine, was to extend this classical model by another, complex classification with those affirming constitutionality conditionally (interpretative judgments) and those affirming unconstitutionality "in the scope of..."[20] Although their connections with earlier interpretative judgments of the Tribunal are of a definitely more nomenclatural nature than substantial (the basic difference between these two types of judgments is that in interpretative resolutions the solution of the interpretative problem made the essence of this type of judgment whereas interpretative judgments decide on, foremost, a derogation problem if the legal regulation subject to the Tribunal's control is constitutional), discussions on these expressions that emerge (objection of judicial circles) are a vivid exemplification of the difficulties which the already mentioned desire to restore the interpretative competence of the Polish Constitutional Tribunal, appearing in the doctrine, may face.

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[18] Resolution of 16 November, 2006 on amendment to the statute – Tax Ordinance and on the amendment of some other statutes (J. Of Laws No. 217, item 1590).

[19] Commentary to Art. 14(a) of the Law from 29 August, 1997 Tax Ordinance (J. of Laws 05.8.60), [in:] C. Kosikowski, L. Etel, R. Dowgier, P. Pietrasz, S. Presnarowicz, M. Popławski, Ordynacja podatkowa. Komentarz, LEX, 2009, edition III.

[20] For more see: D. Nowicki, Miejsce orzeczeń interpretacyjnych w orzecznictwie Trybunału Konstytucyjnego. Państwo i Prawo 2012, no. 10, p. 48+.

It is time to take a closer look at the solutions adopted in other countries of our region. The size of this paper does not allow for a specific presentation of the proposed solutions but only options possible to select on particular examples. In the majority of countries Kelsen's model of control over the constitutional character of the law has been adopted. It means that when deciding about the establishment of legal interpretation of law, the constitution-giver could also elect the constitutional court, apart from the bodies of the traditional separation of powers. In practice, just like in the Poland of the 1990's the selection was limited to two bodies: the Supreme Court and constitutional court.

The continental model of constitutional control is not an obstacle to entrusting the constitutional court with other, specific competences rather than examining the compliance of law with the Constitution. Part of "other" competences seems to be natural and overlaps with the constitutional judicature, such as for instance resolving competence disputes.[21] They are a kind of "offset" from the constitutional control, or another competence leads to the judicial control over the constitutional control of law.[22] It seems that making an interpretation of constitutional provisions and statutes may be included in this group of competences. It may be argued that this kind of activity of the Tribunal, which is not examining the constitutional character of law in the form of preventive or consecutive control, serves the protection of superiority of constitutional provisions.[23] However, the situation with making interpretations of ordinary statutes does not appear to be so clear. It does not obviously mean that it is unacceptable. We may allow for a number of reasons for this competence of the Constitutional Court, including: guarantee of adherence to constitutional principles, including the functioning of the separation of powers; or an institution of public trust, creating special conditions for making impartial and reliable decisions. Also, there is a certain consistency in the competences granted. Since the constitutional court makes the governmental interpretation of constitutional provisions, its interpretation of the statutes, made from the point of view of the Constitution is all the more acceptable. The legal system that emerges is unambiguous, orderly and hierarchical.

This kind of burden on the constitutional court may pose a threat defined by L. Favoreu as "downgrading control over the constitutional char-

[21] Compare L. Garlicki, Sądownictwo konstytucyjne w Europie Zachodniej, Warszawa 1987, p. 173 and next.

[22] See M. Granat, Sądowa kontrola konstytucyjności prawa w państwach Europy Środkowej i Wschodniej, Warszawa 2003, p. 245.

[23] Ibidem, p. 246.

acter of law", where constitutional courts deal with resolving all possible disputes as the highest instance court.[24] In this situation it is the decision of the constitution-maker whether full protection of the constitution is worth bearing this risk. In the literature on the subject we can find, as it seems, the justified view that this kind of burden on the tribunals in young democracies confirms the development of constitutional judicature and what is more "the will to build democratic traditions".[25] Hence, the official power to make an interpretation by the constitutional courts turns out to be a popular solution in the discussed countries of Central and Eastern Europe.

According to Art. 147 of the Constitution of Ukraine of 28 June, 1996 the Constitutional Court of Ukraine decides about the compliance of statutes and other legislation with the Constitution of Ukraine which, based on Art. 150 of the Constitution, are judgments subject to enforcement in the whole territory of Ukraine, final and not subject to appeal.[26] The decisions about the official interpretation are made at the request of: the President, at least forty-five deputies, the Supreme Court, the Human Rights representative of the Supreme Council of Ukraine, the Supreme Council of the Autonomous Republic of Crimea (Art. 150 of the Constitution) as well as a citizen of Ukraine, a foreigner, a stateless person and a legal person. It should be noted that the constitutional court is not an institution of the judicature, but an independent, separate body of constitutional judicature in Ukraine. In the earlier legal status the interpretation was made by the Supreme Council of Ukraine, often accused of ambiguity.[27] What is emphasized in the commentaries is the congruent line of the constitutional judgments.

Also, the Albanian constitution-maker decided to grant the right of making an interpretation to the constitutional court, restricting it, by virtue of Art. 124 of the Constitution, to the interpretation of constitutional provisions.[28] The Constitutional Court of Albania gained another competence at the moment of appointment, that is in 1991, so by virtue of the previous legal order. The judgments concerning the interpretation of the Constitution

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[24] M. Granat, Zakres kompetencji sądów konstytucyjnych państw Europy Środkowej i Wschodniej w „innych sprawach", Przegląd Sejmowy 2001, no. 4(45), p. 127.

[25] Ibidem.

[26] Konstytucja Ukrainy, wstęp i tłumaczenie E. Toczek, Warszawa 1999, p. 84.

[27] P. A. Czeberjak, Stattija 148, (in:) Komentar do Konstytuciji Ukrajiny, (ed.) M. T. Krawczuk, Kyjiw 1998, p. 360.

[28] Konstytucja Republiki Albanii z 21 października 1998 r., Tłum. D. Horodyska, E. Lloha, Wstęp W. Milanowski, Warszawa 2001, p. 69.

have a commonly binding and final character (Art. 132 of the Constitution) The right to file a petition for the interpretation is vested in the President, the Prime Minister, 1/5 of the deputies, the President of the Supreme State Control, common courts of law, bodies of local government, bodies of religious communities, political parties, and other organisations and private individuals. The Tribunal is situated outside the structure of the judicature.

The amended Art. 128 of the Constitution grants *expressis verbis* the right to make an interpretation of the Constitution or a Constitutional Act to the Constitutional Court (the first version of the Constitution did not provide for these powers).[29] Judgments passed by the full panel, pronounced in the mode reserved for statutes, are binding on all bodies of public authority, natural, and legal persons from the date of their publication. The petition on the interpretation may be submitted by 1/5 of the deputies, the President, government, court and general prosecutor (Art. 130 of the Constitution). In this way the Czechoslovakian solution was not continued, where the interpretation was made by the Supreme Court, but the provisions of 1991 were copied granting these powers to the Federal Constitutional Tribunal, just at the end of Czechoslovakia.[30] Besides, the Czech Republic did not also copy the system from the times of Czechoslovakia, currently not indicating any institution entitled to make an official interpretation of the law.

It is also the Constitutional Court of the Russian Federation that has the right to make an interpretation.[31] It does so exclusively at the request of the President, Federation Council, State Duma, government and bodies of the legislature of the Russian Federation. This interpretation is commonly binding, legislation passed based on the provisions interpreted contrary to the interpretation of the Tribunal are subject to review, and the very interpretation may be the reason for abrogating decisions earlier made. The powers of the Russian Supreme Court are much smaller. Its task is merely to explain issues related to judicial practice.

Based on Art. 149 section 1 point 1 of the Constitution it is also the Constitutional Court of Bulgaria that decides about the commonly binding interpretation of the Constitution.[32] It is performed "taking into consideration the context of the constitutional state and the precedence of the

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[29] Konstytucja Republiki Słowackiej, Tłum. I wstęp K. Skotnicki, Warszawa 2003, p. 89.

[30] See. M. Granat, Sądowa.. (op. cit.), p. 203.

[31] See Art. 125 section 5 of the Constitution of Russian Federation of 12 December 1993, transl. by A. Kubik, introduction by A. Bosiacki, Warszawa 2000, p. 79.

[32] See. J. Karp, M. Grzybowski, System Konstytucyjny Bułgarii, Warszawa 2002, p. 73. more on judgments of the Bulgarian Tribunal in M. Granat, Sądowa.. (op. cit.), p. 201.

Constitution" as well as determining the limits of this right "not containing creating rules of a political or political-moral nature". Moreover, the tribunal does not create rules whose sources are in the political practice, the political tradition, and the culture of society, making a reservation that its interpretation is independent from the laws in a particular matter passed by the parliament.[33]

The Hungarian Constitutional Tribunal remained entitled to make an interpretation of the Constitution. Just like before the current Constitution came into force in 2011 this competence is to be found in the provisions of the organic law on constitutional tribunal passed based on Art. 25 section 5 of the Constitution.[34] The Tribunal makes an official interpretation of the provisions of the Constitution at the request of parliament, parliamentary commission, president or government. The Supreme Court guarantees the cohesion of the law administration by courts, by giving decisions in the matter binding on courts.[35]

Another group are countries which, despite the existence of a constitutional court, have not been granted the competence of official interpretation of the law whose beneficiary, to a varied extent, became the Supreme Court.

In the first place it is important to name the supreme court of Romania or the High Court of Cassation and Justice modelled on the French Court of Cassation, which is expected to secure uniform application of the provisions of law by other courts as well as coherent and uniform interpretation of the provisions of law.[36] The basic procedure to achieve this goal is a procedure including the so-called "means of challenge in the interest of law". Judgments in this case are taken in an extraordinary composition of the President of the Tribunal (or his deputy), presidents of chambers, 14 judges of the chamber subject to whose jurisdiction the particular case is, and two judges from each of the remaining chambers. The judgments published in the Official Journal of Romania are binding for all judges nationwide. These questions have been regulated, just like in Hungary, outside the text of the Constitution, in the Organic Law.[37]

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[33] As in: M.Granat, Sądowa... (op. cit.), p. 201.

[34] Art. 38 of the organic law on Constitutional Tribunal, (2011. évi CLI. Törvény az Alkotmánybíróságr/ol) za http://www.mkab.hu/rules/act-on-the-cc of 20 October, 2012.

[35] Art. 25 of the Constitution of Hungary from 25 April 2011, transl. by J. Snopek, introduction by W. Brodziński, Warszawa 2012, p. 86.

[36] W. Brodziński, System Konstytucyjny Rumunii, Warszawa 2006, p. 56

[37] Law no. 304 2004 of 28 June 2004, on Judicial Organisation. As in: http://pl.scribd.com/doc/68736384/LAW-304-2004 of 23 October 2012.

However, it is important to note the historical circumstances of this system. The Court of Cassation and Justice, working before the war, by force of the Constitution of 28 March 1923 had also the competences of a limited constitutional court – issuing judgments with a binding force *inter partes*. After the war constitutional control was exercised by the Constitutional Commission of the National Assembly, the composition of which included also specialists from outside the circle of deputies. The Constitutional Court launched in 1992 was granted with the competence formerly exercised by both judicial and legislative systems. The constitution-maker did not decide to the cession of another entitlement of the High Tribunal (then working as the Supreme Court of Justice) which was providing interpretation of law and securing the application of uniform regulations.

The government of Romania, or the High Court of Cassation and Justice, which is to ensure the cohesive administration of legal provisions, should be mentioned here in the first place.[38] These issues have been regulated, just like in Hungary, outside the body of Constitution, in the organic law.[39]

The Macedonian lawmaker did not decide to grant the right to make an official interpretation to the Constitutional Tribunal, and awarded the function of ensuring cohesion in the application of statutes by courts (Art. 101), which should be understood as a competence of making a cohesive interpretation of the statutes.[40] Likewise, the task of Lithuanian high courts – that is, the Supreme Court and the Supreme Administrative Court – is to create a coherent judicial practice with respect to the application of the statutes (Art. 23 and 31 of the Law on Courts respectively).[41] The interpretation of provisions published in the Bulletin of the Supreme Court has a binding force on state bodies, including courts and private individuals.

Also, the Supreme Court of Croatia strives to ensure a cohesive application of statutes and ensures equal treatment of citizens in court proceedings.[42]

A similar, although not identical solution has been adopted in the Republic of Slovenia. Slovenia has an individual, specific model of legal interpretation. With its Constitutional Court, it is the Supreme Court that is

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[38] W. Brodziński, System Konstytucyjny Rumunii, Warszawa 2006, p. 56.

[39] Law from 28 June, 2004 on the organisation of courts, No. 304/2004. http://pl.scribd.com/doc/68736384/LAW-304-2004, of 23 October 2012.

[40] Konstytucja Republiki Macedonii, Tłum. T. Wójcik, Wstep. J. Jackowicz, Warszawa 1999, p. 16.

[41] Compare http://www.lat.lt/en/ of 17 October, 2012.

[42] J. Karp, M. Grzybowski, System Konstytucyjny Chorwacji, Warszawa 2007, p. 66.

supposed to take care of the cohesion of law application, which also means a competence to make an official interpretation of statutes. On the other hand, the Constitutional Court may make a binding interpretation of the provisions in accordance with the Constitution, which will allow for confirming its compliance with it in the procedure of constitutional control.[43] These judgments are binding *erga omnes*, so they also bind other courts, including the Supreme Court. The Constitutional Court, in turn, may also make an interpretation of the provisions in the course of procedure of scrutinizing the constitutional character of law. This interpretation also has a binding force, but the non-compliance with it by common courts of law or other bodies of public authority does not entail any formal sanctions.[44]

In this way we can summarise the existence of a few solutions in the countries of our region. The first one is granting the Constitutional Tribunal the right to make an interpretation of the Constitution, constitutional statutes and ordinary statutes. An example of this regulation is Ukraine, but it should be remembered that this is a rare model. Another solution, probably the most popular one, is granting the tribunal the right to make an interpretation of the constitution and constitutional laws. Guaranteeing the right to make an interpretation to constitutional courts is connected with a detailed regulation already at the level of the Constitution.

The third group is composed of the countries which, despite the existence of a constitutional court, have granted it to the Supreme Court. This model is not very popular, either. The fourth possibility are the countries which, like Poland, do not envisage the existence of a body making a legal interpretation of the law. The Czech Republic is one of them as there is no such organ there, either. However, quite a frequent solution is the one between the third and the fourth; that is, granting courts a certain, limited scope of interpretation, serving the purpose of ensuring a cohesive law application and a coherent line of judgments.

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[43] Report of the Constitutional Court of the Republic of Slovenia, The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts, Conference of European Constitutional Courts XIIth Congress, 14–16 May 2002, s. 24, za http://www.confcoconsteu.org/reports/rep-xii/Slovenia-EN.pdf of 17 October 2012.

[44] Ibidem, p. 25.

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 31 (44) 2012

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THE PRINCIPLES OF UNITARISM, SUBSIDIARITY AND DECENTRALIZATION AS A CONSTITUTIONAL BASIS OF REGIONAL SELF-GOVERNMENT OF THE REPUBLIC OF POLAND

1. The article considers three main principles determining the territorial organization of the Republic of Poland – the principle of unitarism and decentralization based on the standard definition of the principle of subsidiarity. Another objective of the article is to demonstrate how these three principles influence the structure of Poland's territorial system of government and, in particular, the regional government model.

The Constitution,[1] adopted on 2 April 1997 by the National Assembly, approved in a nation-wide referendum on 25 May 1997, and effective as of 17 October 1997 is the basic law defining, among other things, the system of central, regional, and local authorities in the Republic of Poland. However, the transformation of Polish politics and administration after 1989 was a years-long process which included almost all aspects of social and political life. One of the most important ideas was to restore regional and local government, which was absent under communism.

The most important constitutional principles that determine the system of government of the Republic of Poland, *communis opinio*, are: Poland's existence as a democratic state ruled by law, the sovereignty of the nation, division of the government into branches and balance between the branches, the existence of civil society, political pluralism, and – most important to our discussion – the principle of unitarism and decentralization based on the standard definition of the principle of subsidiarity, declared in the Preamble to the Constitution. The latter three principles (unitarism, decentralization, and subsidiarity) are the key determinants of the territorial system of government of the Republic of Poland and, consequently, of the legal status

[1] Journal of laws of 1997, no. 78, item 483, as amended.

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of its regions; they impose a certain framework within which the legislator must act, and serve as the interpretation directives for deliberations on specific constitutional and statutory solutions.

2. The definition of a unitary state found in the *Encyclopaedia Britannica* focuses on comparing the two forms of territorial organization of states: a unitary state and a federal state. According to *Encyclopaedia Britannica*, a unitary system is a system of political organization in which most or all of the governing power resides in a centralized government. It contrasts with a federal system. In a unitary system the central government commonly delegates authority to subnational units and channels policy decisions down to them for implementation. A majority of nation-states are unitary systems. They vary greatly. Great Britain, for example, decentralizes power in practice though not in constitutional principle. Others grant varying degrees of autonomy to subnational units. In France, the classic example of a centralized administrative system, some members of local government are appointed by the central government, whereas others are elected.[2]

The above definition of a unitary state, being an encyclopedic one, focuses on only one aspect of unitary states, namely the decision-making center. The Polish doctrine of constitutional law provides a more precise definition of a unitary state. One of the most systematic definitions of a unitary state has been proposed by P. Sarnecki who defines the following characteristics of a unitary state: 1) uniformity of organization of the government, which means that there is only one government in the state, that the government serves the purpose of preserving and developing the state, and that no other public authorities that are not a part of the uniform government exist in the state; 2) uniformity of the legal status of the state's population, due to the fact that only one citizenship is in place, which is an expression of the public law bonds between the population and the integrated state structure; 3) integrity of the state's territory, which means that there are no divisions in its territory (which is possible in only very small states) or that the divisions only serve the purpose of enhancing the functioning of the only government present in the state.[3]

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[2] "unitary system." Encyclopaedia Britannica. Encyclopaedia Britannica Online. Encyclopaedia Britannica, 2011. Web. 17 May 2011. http://www.britannica.com/EBchecked/topic/615371/unitary-system.

[3] Sarnecki, P., Uwagi do art. 164 Konstytucji RP [A commentary to art. 164 of the Constitution of the Republic of Poland], in: Garlicki L., ed., Komentarz do Konstytucji Rzeczypospolitej Polskiej [A commentary to the constitution of the Republic of Poland], vol. IV, Wydawnictwo Sejmowe, Warsaw 2007, p. 1.

The Polish version of the principle of unitarism of the state is based most of all on art. 3 of the Constitution which provides that: "The Republic of Poland shall be a unitary State." Given the above definition of a unitary state, the above provision of the Constitution means that the foundation of the existence of all public authority agencies (or even all public authorities themselves) in regulations adopted by the central institutions of the state, which define the political system of the state, in a process where the Nation as the sovereign may participate directly. This also means that none of the territorial divisions of the state enjoys state-like autonomy, i.e. sovereignty.[4]

What is characteristic of unitary states is the lack of a vertical division of the legislative branch of the government between the different territorial units of the states. This is due to the definition of the subject of sovereign power in the state; in the Republic of Poland, under art. 4 of the Constitution, it is the Nation who is the sovereign – the aforementioned article provides that "Supreme power in the Republic of Poland shall be vested in the Nation." However, what is permissible – albeit not required – in a unitary state is a vertical division of the executive branch of the government, which is the foundation of the institution of territorial self-government. If such a division of the executive branch of the government is present and meets certain requirements (to be discussed later), the state is considered to be decentralized in the understanding of art. 15 of the Constitution. The fact that the Republic of Poland is a unitary state leads to certain restrictions on the legal status of regions, consisting in limited ability to give Poland's regions an autonomic status in the sense of giving them some attributes of sovereignty.

3. Article 3 of the Constitution defines the Republic of Poland as a unitary state; however, this principle cannot be used as the only basis for conclusions regarding the structure of the state's territorial system of government and does not impose a single solution regarding regional government. Only a systemic analysis of the Constitution leads to the conclusion that it allows a relatively open and flexible territorial organization of the state and does not impose on the legislator the requirement to define a comprehensive and rigid form of territorial self-government or administrative division of the state. This, however, does not lead to complete freedom, as the Constitution comprises a number of provisions on this matter. One of the most important provisions is comprised in art. 15 which defines the principle of decentral-

[4] About term decentralization see more in Jackiewicz, A., *Territorial Organization of European States. Federalism, Regionalism, Unitarism*, *Temida2*, Bialystok 2011, p. 13–14.

ization of the government. Its first passage says: "The territorial system of the Republic of Poland shall ensure decentralization of public power."

This principle of decentralization of the government involves a transfer of some important tasks and competences of the state government to lower-level units (mostly to the local self-government) and assurance of their autonomy in the performance of such tasks. Such a transfer should be followed by a transfer of adequate funds to perform such tasks and exercise such competences. The state government interferes with the activities of territorial self-government units only within the boundaries defined in the law. Also, there is a hierarchy where territorial self-government is subordinate to higher-level entities.[5]

Article 15 of the Constitution of the Republic of Poland defines, in passage 1, the general principle of decentralization of the government and states, in passage 2, a very important directive which requires of the legislator to pay, in defining the territorial structure of Poland, the greatest attention to the needs of decentralization of the system of government, by way of empowering the territorial self-government. This is of particular importance to the position of the units of territorial self-government, especially in their relations with the central government administration. The aforementioned art. 15 (2) provides that "The basic territorial division of the State shall be determined by statute, allowing for the social, economic and cultural ties which ensure to the territorial units the capacity to perform their public duties."

This provision imposes two important requirements on the legislator. First, the authors of the Constitution have decided that the territorial division of the state must ensure that the territorial units have the capacity to perform their public duties; consequently, the division should first take into account the needs of the territorial self-government and only then the needs of the central government administration.

Secondly, the provision defines the factors to be taken into account when determining the territorial divisions, namely the bonds existing in a given territory, which can be of the following nature:

- social (e.g. certain employment or ethnic characteristics);
- economic (e.g. predominance of the mining industry or agriculture with large area farms);
- cultural (a unique dialect or customs).

[5] Winczorek, P., Komentarz do Konstytucji Rzeczypospolitej Polskiej z 1997 r. [A commentary to the 1997 Constitution of the Republic of Poland]. Liber, Warsaw 2008, p. 21.

Such wording of the provision, where the "or" conjunction expresses an alternative, means that the bonds of a given type do not necessarily need to occur simultaneously and the presence of only one of the types suffices to meet the requirement set forth in art. 15 of the Constitution. Of course the presence of such a bond is not a sufficient condition for establishing a territorial division – it is only a *conditio sine qua non*. Other factors that can be referred to are: *raison d'état*, economic reasons, or historical traditions.[6]

As J. Jaskiernia rightly notes, the territorial division of the state, especially the territorial system of the Republic of Poland, must implement the principle of decentralization of the government as the basic idea of such a system (art. 15 of the Constitution), but it must also comply with the principle of a "unitary state." Thus, decentralization may not go so far as to turn Poland into a federal state or to form within Poland's territory units of a special status which do not conform to the unitary nature of the state. The requirement to decentralize the government defined in the constitution translates into the need to break up the monopolies which existed in Poland's previous system of government, namely the political monopoly, the uniform government, the state ownership, the financial monopoly, and the monopoly of the state administration. Rejection of such monopolies is a condition for forming other entities which may exist in parallel with the central government administration and autonomously perform functions of public administration. Decentralization of the government means not only a transfer of tasks by central state bodies to lower-level units of central government administration (vertical deconcentration), but also broadening the competences of such units with regard to their autonomous decision-making.[7]

4. The constitutional provisions concerning the principle of decentralization of the public authorities and the territorial self-government are a manifestation of the principle of subsidiarity, which is an important part of the doctrine and laws of democratic states. The principle of subsidiarity is

[6] Jackiewicz, A., Status prawny regionu w świetle konstytucji RP z 2 kwietnia 1997 r. – wybrane uwagi konstytucyjnoprawne [Legal status of region according to the 1997 Constitution of the Republic of Poland – some constitutional remarks], in: Plawgo B. ed., Polska Wchodnia – zarządzanie rozwojem [Eastern Poland – development management]. Wyższa Szkoła Administracji Publicznej, Białystok 2008, p. 142.

[7] Jaskiernia, J., Wprowadzenie do systemu państw federalnych [Introduction to the federal states system], in: Jaskiernia J. ed., Problemy rozwoju federalizmu we współczesnym świecie [Development of federalism issues in contemporary world]. Wydawnictwo Uniwersytetu Humanistyczno-Przyrodniczego Jana Kochanowskiego, Kielce 2010, p. 18.

considered to be an implicit rule of constitutional law; therefore, it is stated expressly in only a few constitutions.

The Constitution of the Republic of Poland mentions the principle of subsidiarity in its Preamble: "...We, the Polish Nation – all citizens of the Republic, [...] hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities." Such principle of subsidiarity determines the directions for law-making and the application of laws.

The essence of the principle of subsidiarity is its emphasis on the secondary and auxiliary role of the state. The state's interference in the business of individual citizens and self-governing communities is permissible only when it is necessary. The most important consequence of the principle of subsidiarity is the requirement that decisions are to be made "as close to the citizens as possible".[8]

The principle of subsidiarity is the next example of how constitutional principles can greatly affect the structure of a territorial self-government. The commune, being the basic unit of territorial self-government, and one that is the closest to the citizens, must be burdened with the broadest possible scope of duties, as long as it is able to perform these duties effectively. Only the duties that cannot be performed by the commune can be transferred to higher-level entities of the local or regional self-government or, as an exception, to the central government.

5. The constitutional principles mentioned in this article refer to one of the most important characteristics of the system of government, namely its form. From this point of view, states can be divided into unitary and federal.[9] What sets the two types apart is not the presence or absence of territorial divisions, which are in place in both types of states. In unitary states, territorial divisions serve solely administrative purposes and can be changed freely by the central government (the parliament). In federal states,[10] on the other hand, the internal territorial divisions are usually protected by the consti-

[8] About subsidiarity principle see more in Jackiewicz, A., Territorial Organization of European States. Federalism, Regionalism, Unitarism, Bialystok 2011, p. 14–16.

[9] See Jackiewicz, A., op. cit., pp. 16–21 and literature cited there.

[10] The matter of federal states is broadly discussed in: W. Suchecki, Teoria federalizmu [The theory of federalism], Warsaw 1968. One of the systematic definitions of a federation is given by A. K. Wojtaszczyk in: K. A. Wojtaszczyk, "Państwo współczesne" [The contemporary state], in: K. A. Wojtaszczyk, W. Jakubowski W., eds., Społeczeństwo i polityka. Podstawy nauk politycznych [Society and politics. Tenets of political sciences]; Aspra, Warsaw 2003, pp. 263–264.

tution and the individual units not only are elements of the administrative structure of the state but are members of the federation (confederacy) and have some characteristics of states, i.e. some powers of their government are parallel to those of the federal government.[11]

In reference to the aforementioned vertical division of power, while in a unitary state it is only possible with regard to the executive branch of the government, in a federal state this issue is resolved in a different manner: the legislative, the executive, and often the judicial branch of the government are separated in accordance with the division of sovereignty between the federation and its parts. Thus, federal states can be described as non-centralized.[12]

It must be emphasized that Poland's Constitution relatively broadly defines the organization of the territorial division of the state, most of all by defining Poland as a unitary state which is decentralized by introducing the institutions of territorial self-government. Territorial self-government has become a very important part of the structure. Nevertheless, the Constitution does not exhaustively define the territorial division of the Republic of Poland and allows the legislator to decide on its form. Thus, it is the legislator who decides on both the territory governed by the territorial self-government and on the extent of its autonomy. However, the legislator does not enjoy unrestrained freedom in making its decisions, because

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[11] Jaskiernia, J., op. cit., p. 17.

[12] An intermediate form of the territorial organization of a state is a regional state, which is also referred to as a state based on the autonomy of regions. Standard examples of such states are Spain and Italy. This form of statehood is characterized by the fact that regions as parts of the state have their own parliaments and executive branch, but their competences are limited and often very different, compared to those of members of a federation. This does not mean that a federalist or regionalist concept of the territorial organization of a state precludes further territorial decentralization. Most often, both the constituent parts of a federation and the regions are divided into lower, self-governing levels of public authorities. A specific form of territorial organization of a state is devolution which in Europe is present mostly in the United Kingdom. About devolution as a form of regionalism see Smith, G., Życie polityczne w Europie Zachodniej [Political life in Western Europe], Puls, London 1992, p. 73, Bogdanor, V., Devolution in the United Kingdom, Oxford Paperbacks, Oxford 1999, Jackiewicz, A., op. cit., pp. 27–28, Sarnecki, P., Ustroje konstytucyjne państw współczesnych [Constitutional systems of government in contemporary states], Zakamycze, Kraków 2003, p. 80, Pietrzyk, I., Polityka regionalna Unii Europejskiej i regiony w państwach członkowskich [Regional policy of the European Union and regions in the member states], Wydawnictwo Naukowe PWN, Warsaw 2006, p. 253, Jackiewicz, A., op. cit., pp. 27–28. The situation in the United Kingdom is also discussed in: M. Kaczorowska, Dewolucja systemu politycznego: istota, wpływ i znaczenie – casus Zjednoczonego Królestwa Wielkiej Brytanii i Irlandii Północnej [Devolution of the political system: the essence, the impact, and the importance – the case of the United Kingdom], in: Ewolucja. Dewolucja. Emergencja w systemach politycznych [Evolution. Devolution. Emergency in political systems], J. Szymanek, M. Kaczorowska, A. Rothert, eds., Wydawnictwo Elipsa, Warsaw 2007.

the Constitution (as well as international laws) includes provisions which define the limits of such freedom, such as the aforementioned principles of a unitary state, subsidiarity, and decentralization.[13]

6. The term "region" is used in the Constitution in art. 164 (2) which provides that "other units of regional and/or local government shall be specified by statute." This is the first occurrence of the term "regional government" in Polish law; its introduction was due, perhaps mostly, to European standards.[14]

However, the Constitution does not define the term "regional government" and, instead, only provides a general principle of self-governing communities. One must remember that different states use different definitions of regions – with regard to their names, their position in the system of government, and the public duties they are charged with. Thus, it is impossible to develop one precise and detailed definition of a region. To find a common denominator which will facilitate the process of determining what regions are in Europe, one should refer to the definition of regional self-government that can be found in the European Charter of Regional Self-Government, which is the source of European standards in this field and should be taken into account when defining the term. Article 3 (1) of this act provides that "regional self-government denotes the right and the ability of the largest territorial authorities within each State, having elected bodies, being administratively placed between central government and local authorities and enjoying prerogatives either of self-organisation or of a type normally associated with the central authority, to manage, on their own responsibility and in the interests of their populations, a substantial share of public affairs, in accordance with the principle of subsidiarity."

In Polish legal doctrine, the term is usually associated with "the highest-level unit of the state's territorial division which most often constitutes a geographically separate area with strong historical, cultural, economic, social, and often ethnic ties, within which an autonomous, from the point of view of the region's population, economic, social, and cultural policy is conducted to further the common interests of the area's population."[15]

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[13] About constitutional and statutory status of Polish regions see also Jackiewicz, A., op. cit., pp. 233–238.

[14] Banaszak, B., Prawo konstytucyjne [Constitutional law], C.H.Beck, Warsaw 2008, p. 728.

[15] This is how B. Banaszak defines regions in a unitary state (and differentiates between the nature of regions in unitary and federal states); Banaszak B., Porównawcze prawo konstytucyjne współczesnych państw demokratycznych [Comparative constitutional law of contemporary democratic states], Wolters Kluwers Polska, Kraków 2007, p. 500.

Another important aspect of the current constitutional provisions is the assumption that the regional self-government bodies do not need to be identical, with regard to either the name or the territory, as the units of the state's administrative division implemented to facilitate the operation of the government. This is of particular importance in the context of art. 152 (1)[16] which defines the voivodship (*województwo*) as the area of operation of a government administration body, the voivod (*wojewoda*). Two matters must be considered here. On the one hand, the administrative division must take into account the needs of the territorial self-government, as provided for in art. 15 and art. 16 of the Constitution which define the principles of decentralization and local self-government. On the other hand, this matter influences the way the supervisory[17] power over the local self-government, provided for in art. 171 of the Constitution, is formed.[18]

Article 171 (2) of the Constitution enumerates the voivod as one of the supervisory bodies.[19] As a result, and due to the need to make such supervisory power effective, the territorial division into regions, with the related division into voivodships (defined as the territorial units where voivods exercise their powers), has been implemented. Nevertheless, this does not mean that regions and the so-defined voivodships are identical entities, but rather, as H. Izdebski states, it means that the regions and the voivodships are coordinated, i.e. "the boundaries of regions (...) may not cut across voivodships; consequently, a voivodship may comprise one, two, or more regions."[20] Nevertheless, in accordance with the principle of decentralization, in the process of coordination, the territory of the regions must be defined first. Only then can the "map of regions" be used to define the territories of the voivodship.

In the light of the aforementioned constitutional principles and especially art. 163 and 164 of the Constitution, which provide that the commune (*gmina*) shall be the basic unit of local government and other units

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[16] Art. 152 (1) of the Constitution of the Republic of Poland: "The voivod shall be the representative of the Council of Ministers in a voivodship."

[17] The English translation found on the website of the Sejm contains the word "review" (The organs exercising review...); however, it appears that the word "supervisory" would be more appropriate here.

[18] Banaszak, B., Prawo konstytucyjne [Constitutional law], op. cit., p. 729.

[19] Art. 171 (2) of the Constitution of the Republic of Poland: "The organs exercising review over the activity of units of local government shall be: the Prime Minister and voivods and regarding financial matters – regional audit chambers." See also supranote 17.

[20] Izdebski, H. Samorząd terytorialny. Podstawy ustroju i działalności [Territorial self-government. The tenets of organization and activity], Wydawnictwo Prawnicze LexisNexis, Warsaw 2006, p. 68.

of regional and/or local government shall be specified by statute, it can be concluded that the authors of the Constitution have decided to introduce a model of territorial self-government with several levels,[21] whose final form was defined in a statute. Nevertheless, regardless of which model is chosen, one level of territorial self-government is required on the local level, and one on the regional level.[22]

This requirement was implemented in 1998 in a number of statutes which reformed the territorial structure of the state. Of special importance from the point of view of this paper are the Act of 5 June 1998 on voivodship self-government,[23] the Act of 5 June 1998 on the district self-government,[24] and the Act of 24 July 1998 on the introduction of a three-level territorial division of the state.[25] In these acts (which raised many controversies), the legislator decided to establish, in addition to the commune-level territorial self-government which had been in place since 1990,[26] two additional levels of territorial self-government, namely the district (*powiat*) (a local-level structure) and the voivodship (*województwo*) (a regional-level structure). One should keep in mind, however, that the constitution formally allows also for more than one level of regional self-government. Thus, it would formally be possible to "add" another level of regional (or local) self-government.[27] Considering the experiences with the functioning of the current model of territorial self-government, this appears to be impossible; more likely is the elimination of district self-government.

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[21] Article 164 of the Constitution is commented this way among others by Sarnecki, P., Uwagi do art. 164 Konstytucji RP [A commentary to art. 164 of the Constitution of the Republic of Poland], in: Garlicki L., ed., Komentarz do Konstytucji Rzeczypospolitej Polskiej [A commentary to the constitution of the Republic of Poland], vol. IV, Wydawnictwo Sejmowe, Warsaw 2007; and Winczorek P., Komentarz do Konstytucji Rzeczypospolitej Polskiej z 1997 r. [A commentary to the 1997 Constitution of the Republic of Poland], Liber, Warsaw 2000, p. 216.

[22] A completely different potential problem which may occur in the case of constitutional provisions which require the legislator to regulate a given matter – as is the case here – is the issue of potential responsibility in the case of failure to observe such a duty. Poland's legal system does not have any provisions which would impose sanctions in the case of failure to take action by the legislative bodies, such as shortening the term of the parliament. It is also impossible to hold liable the persons elected to the legislative bodies.

[23] Consolidated text: Journal of laws of 2001, no. 142, item 1590, as amended.

[24] Consolidated text: Journal of laws of 2001, no. 142, item 1592, as amended.

[25] Journal of laws of 1998, no. 96, item 603, as amended.

[26] Commune-level self-government was reestablished by the Act of 8 March 1990 on territorial self-government (consolidated text: Journal of Laws of 1990, no. 16, item 95) – this statute, after the higher levels of the territorial self-government were introduced, was called the Act on commune-level self-government.

[27] Izdebski H., Samorząd terytorialny... [Territorial self-government...], op. cit., p. 68.

In the course of the government administration reform of 1998, a decision was made to make regions, defined as units of territorial self-government, identical with regard to the territory, as the voivodships, defined as the areas where the voivods exercise their powers. Consequently, regions currently have a dual nature: they are both self-government and government administration entities.

As mentioned before, the Constitution refers to statutes in many matters concerning territorial self-government. This is also true with regard to the bodies of the units of territorial self-government. Art. 169 of the Constitution provides for a general model which is applicable on all levels of self-government. According to this regulation, units of local government shall perform their duties through constitutive and executive organs. Because the Constitution does not define any other units of territorial self-government other than the commune (*gmina*), the names of such organs are not defined in the Constitution and are left to be defined in relevant statutes. The aforementioned act on the voivodship self-government provides that the constitutive organ is the voivodship parliament (*sejmik*) and the executive organ is the voivodship government (*zarząd*) headed by the voivodship marshal (*marszałek*).

The Constitution does provide that elections to the constitutive organs shall be universal, direct, equal and shall be conducted by secret ballot. With regard to other matters, such as principles and procedures for submitting candidates and for the conduct of elections, as well as the requirements for the validity of elections, the Constitution refers to a statute; currently it is the new Election Code adopted on 31 January 2011.[28] The Constitution does not define, however, how the executive organ is to be elected and dismissed and only provides that the principles and procedures for the election and dismissal of executive organs of units of local government shall be specified by statute.[29]

The Constitution does not regulate the structure of the regional self-government and refers to statutes, but it does provide that the internal organizational structure of units of local government shall be specified, within statutory limits, by their constitutive organs.

Of key importance to defining the position of Poland's regions in the system of government is, besides the aforementioned constitutional prin-

[28] Journal of laws of 2011, no. 21, item 112.

[29] Art. 169 (3) and (4) of the Constitutions mentions local self-government bodies but this appears to be the result of an oversight of the legislator and, consequently, this provision should also apply to regional self-government bodies.

ciples, the principle of the self-governing nature of the units of territorial self-government set forth in art. 165 (2) of the Constitution.[30] The principle is often referred to in verdicts of the Supreme Administrative Court and the Constitutional Tribunal which regard it as the essential characteristic of self-government as a separate public entity. The verdicts allow a rather precise decision of the aforementioned self-governing nature.

The self-governing nature of the self-government is regarded most importantly as freedom of action within the limits defined in the relevant statute, which is of particular importance with regard to performance of public duties. The Supreme Administrative Court has defined the essence of the self-governing nature (of a commune) in the following manner: "the self-governing nature of a commune means that within limits set forth in relevant statutes a commune is not subordinated to anyone's will and that within such limits it takes legal and factual actions, following solely its own will expressed by its elected bodies. Thus, the self-governing nature is circumscribed by the borders defined in relevant statutes which precisely identify the field where the self-governing nature can be exercised."[31] Consequently, if the limits (boundaries) defined in the relevant statutes determine the scope of a region's self-governing nature (as well as that of other units of territorial self-government), the statutes, according to the Constitutional Tribunal, need to "establish the legal framework in which the self-governing nature can be exercised in a unitary state."[32]

This leads to the conclusion that the self-governing nature of a region – regarded as an objective area – cannot be fully or partly (to an extent that affects the very essence of it) abolished, but at the same time it is not absolute and may be restricted. Such restrictions, however, must meet some formal, procedural, and material criteria so as to not violate the essence of the self-governing nature established by the Constitution. The formal criteria are met when the restrictions concerning matters related to the organization, scope of duties, and ways of functioning of the region are regulated in a statute – in observance with the principle of exclusivity of a statute as the instrument to implement restrictions on self-governing nature. The material criterion allowing for restricting self-governing nature is the requirement that the need for such restrictions be justified by "the

[30] Art. 165 (2) of the Constitution of the Republic of Poland: "The self-governing nature of units of local government shall be protected by the courts."

[31] Verdict of 4 February 1999, II SA/Wr 1302/97, Decisions Pertaining to Self-Government 2000, no. 3, item 97.

[32] See: verdict of the Constitutional Tribunal of 4 April 1998, K 38/97, OTK ZU 1998, item 31.

purposes defined in the constitution and the protected values; the priority of protection of such values over the protection of self-governing nature of territorial self-government shall be determined by the legislator."[33] In the event of such a conflict between self-governing nature and other purposes and values defined in the constitution, when determining whether and to what extent restrictions on self-governing nature are reasonable, one must take into account the principle of adequacy of the objective justifying such restrictions to the measure to be used by the legislator and the principle of proportionality which means that the legislator's interference should not be excessive, i.e. should not exceed the boundaries necessary for the protection of the values justifying such interference (the Constitutional Tribunal refers to this principle as prohibition of excessive interference). Restrictions on the self-governing nature of a region may be legally imposed only if the aforementioned formal and material criteria are fully met.

Protection of the self-governing nature of regions and other units of territorial self-government is based most of all on judicial control of the government administration, which is assured by the Polish system of administrative courts, with regard to the acts of law adopted by the review bodies. However, as B. Banaszak states, the constitutional provision that guarantees judicial protection of the self-governing nature of territorial self-government stands on its own and can constitute a basis for the self-government's claims to be enforced in common courts of law, administrative courts, or the Constitutional Tribunal.[34]

Given the above, we should focus on the means to protect this constitutional principle "aimed" against the legislator and guaranteed by the Constitutional Tribunal.

Being a part of the judiciary branch of the government and charged most of all with assuring conformance of laws to the constitution, the Constitutional Tribunal responds to complaints claiming lack of conformance to the Constitution (or a ratified international treaty whose ratification required prior acceptance expressed by way of a statute) of acts of law enumerated in art. 188 of the Constitution, namely statutes, international treaties, and laws adopted by central government bodies.[35] According to art. 191 of the

[33] See: verdict of the Constitutional Tribunal of 8 May 2002, K 29/00, OTK-A 2002, item 30.

[34] Banaszak, B., Prawo konstytucyjne [Constitutional law], op. cit., pp. 734–735.

[35] This catalogue does not include acts of local law; their legality is considered by administrative courts and art. 191 does not apply to them.

Constitution, the entities enjoying the right to initiate such a procedure can be divided into two categories:

- so-called general legitimacy entities (in accordance with the terminology recommended by Z. Czeszejko-Sochacki[36]) which may question any act (norm) regardless of its content (unlimited objective scope), such as the President of the Republic of Poland, a group of 50 members of parliament, and the Ombudsman;[37]
- so-called special legitimacy entities which may question only those acts or norms that pertain to the scope of their activities; in addition to three other groups of entities, the legislator enumerated the constituting entities of the territorial self-government as belonging to this category.[38]

Consequently, regions, through voivodship parliaments, may follow this procedure, which is an excellent instrument to protect the regions' self-governing nature in the law, especially that the decisions of the Constitutional Tribunal are universally applicable and final (art. 190 (1) of the Constitution). The practice shows, however, that this institution is used rather rarely.[39]

The detailed constitutional and statutory provisions discussed above demonstrate that Poland's territorial system of government does implement the constitutional principles of unitarism, subsidiarity, and decentralization. However, the material content of the principles is fairly broad: defined as a framework related to the system of government, they are quite attractive

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[36] Czeszejko-Sochacki, Z., Trybunał Konstytucyjny PRL [The Constitutional Tribunal of the People's Republic of Poland], Książka i Wiedza, Warsaw 1986, p. 102 ff; the author uses the term "general legitimacy" and "limited legitimacy and then recommends the terms "comprehensive legitimacy" and "special legitimacy;" see: Czeszejko-Sochacki, Z., Garlicki, L., Trzciński, J., Komentarz do ustawy o Trybunale Konstytucyjnym z dnia 1 sierpnia 1997 (Dz.U. nr 102 poz. 643) [A commentary to the Act on the Constitutional Tribunal of 1 August 1997 (Journal of Laws no. 102, item 643)], Wydawnictwo Sejmowe, Warsaw 1999, p. 104. The most commonly used terms in the doctrine are "general legitimacy" and "special legitimacy", see, e.g. Garlicki, L., Polskie prawo konstytucyjne [Polish constitutional law], Liber, Warsaw 2004, p. 383, Kryszeń, G., Trybunał Konstytucyjny [Constitutional Tribunal], in: Grzybowski, M., ed., Prawo konstytucyjne [Constitutional law], Temida2, Białystok 2008, p. 336.

[37] Other entities in this group are: Speaker of the Sejm, Speaker of the Senate, Prime Minister, 30 senators, First President of the Supreme Court, President of the Supreme Administrative Court, Prosecutor General, President of the Supreme Chamber of Control.

[38] Other entities in this group are: National Judicial Council, national labor union bodies, national bodies of organizations of employers and professional organizations, churches and other religious associations. The term "matters covered by the scope of their activities" is discussed in: Garlicki, L.: Uwagi do art. 191 Konstytucji RP [Comments to art. 191 of the Constitution of the Republic of Poland, in: Garlicki L., ed., Komentarz do Konstytucji Rzeczypospolitej Polskiej [Commentary to the Constitution of the Republic of Poland], vol. V, Wydawnictwo Sejmowe, Warsaw 2007.

[39] The regional assemblies exercise this right a few times a year.

to the legislator because they enable him to use them as a foundation for system of government models that are quite different from one another with regard to such elements as, for example, the administrative division of the state, the structure (the number of levels of local and regional government), the competences of the different entities, and the ways to protect their autonomy. Because the Constitution does not define many detailed solutions, the "skeleton" formed by the three aforementioned constitutional principle is *de iure* fairly flexible and the concept of territorial system of government in this regard is open and susceptible to statutory modeling. Thus, the existence of the Polish model of regional government is guaranteed in the constitution and protected by it mostly based on those three principles; nevertheless, as the above discussion indicates, the legislator has been given extensive possibilities to shape the legal status of Poland's regions.

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ACCORDING APPLICATION OF THE PROVISIONS OF THE CODE OF ADMINISTRATIVE PROCEDURE AND THE CODE OF CRIMINAL PROCEDURE ON THE BASIS OF THE LAW ON HIGHER EDUCATION – SELECTED ISSUES

1. General remarks

According to Article 156 para. 1 of the "Rules of Legislative Technique" in the normative act references can be applied if it appears to be necessary to achieve the brevity of the text or to ensure consistency of the regulated legal institutions. The provision of section 4 of this paragraph provides that if the legal institution is regulated as a whole entity and the complete list of the provisions which it refers to is not accessible, exceptional reference is possible to the provisions which were substantially defined, on the condition that these provisions can be unquestionably distinguished from others; a referential provision is formulated as: "To ... (specify institution), the provisions of ... (substantial definition of the provisions) are applied.[1]

The warrant to apply certain provisions "accordingly" means that in their application one should consider the specific characteristics of the cases to which such a reference is made.[2] In the Resolution of 6 December 2001 The Supreme Court (SC) stated that "It is generally accepted – briefly speaking – that while applying accordingly a provision it can be applied directly, or with some modifications, justified by the difference of the state 'undergoing' the applied provision or the inadmissibility of its application to the state in question. This inadmissibility can thereby result either directly

[1] Regulation of the Prime Minister of 20 June 2002 on the "Rules of Legislative Technique" (Dz. U. No. 100, item 908).

[2] G. Wierczyński, *Redagowanie i ogłaszanie aktów normatywnych. Komentarz*, Warszawa 2009, pp. 769–770.

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from the content included in the legal regulation in question or from the fact that the application of this particular standard may not be reconciled with the specificity and the unique nature of the state in question".[3]

In its resolution of 30 January 2001, the Supreme Court held that if the provision that is referred to regulates another legal institution, the provision of reference commonly uses the statement of the according application.[4] This, ie. using the provision in the area of standardization of different legal institutions, expresses the basic meaning of the "according" application of legal provisions. The standards subsequently derived from the two provisions (the provision that is referred to and the referring provision) are thus different due to the elements associated with only one of these institutions.[5]

Our subject of consideration was the "according" application of the Code of Administrative Procedure (CAP),[6] provisions on the procedure at the administrative courts[7] as well as the Code of Criminal Procedure (CCP)[8] in matters determined by the Academic Teaching Act (2005).[9] While considering both academic writings and case law (including judgment by the Constitutional Tribunal (CT)) serious doubts occur as to the proper meaning of the notion of "according" application of law. The doubts appear to be particularly serious in the field of administrative and administrative court procedures, when applied to decisions by university authorities. The same applies to the according application of the provisions of the Code of Criminal Procedure as applicable accordingly in the disciplinary proceedings.

2. According application of the provisions of the Code of Administrative Procedure and the Law on proceedings at administrative courts

The right to appeal against decisions made by a higher education body is guaranteed to a student by the provision of Article 207 para. 1 of the LHE, according to which the Code of Administrative procedure and provisions on

[3] Resolution of SC dated 6 December 2001 r., III CZP 41/00, LEX no. 44281.

[4] Resolution of SC dated 30 January 2001 r., I KZP 50/00, LEX no. 45016.

[5] See J. Nowacki, *"Odpowiednie" stosowanie przepisów prawa*, PiP 1964, z. 3, pp. 367–376.

[6] Act of 14 June 1960 the Code of Administrative Procedure (consolidated text Dz. U. 2000 No. 98, item 1071 with later amendments).

[7] Act of 30 August 2002 – Law on Proceedings before administrative courts (consolidated text Dz. U. 2012, item 270).

[8] Act of 6 June 1997 (Dz. U. No. 89, item 555 with later amendments).

[9] Act of 27 July 2005 (consolidated text Dz. U. 2012, item 572).

the appeal against the administrative court decisions are applied to decisions on admission to university or admission to doctoral studies as well as individual decisions issued by the university authorities in individual cases of undergraduate students or doctoral students (post-graduate students) and in matters of supervision of university student organizations' activity and student government activity. Moreover, under Article 207 para. 4, the provision of Article 207 para. 1 should be applied accordingly to decisions made by the scholarship committee and the appeals scholarship committee [...].

It is thus necessary to consider what decisions, made in individual cases of Polish university students, will undergo administrative appeal proceedings. This question is really of great importance due to the discrepancy between viewpoints in this matter.

On the basis of both case law of administrative courts as well as the view of the doctrine, before the provisions of LHE went into force, there was established a viewpoint according to which the legal regime of the Code of Administrative Procedure is applied to external acts issued by higher education bodies, thus excluding internal acts issued by universities out of administrative control.[10]

In case law it has been established that external nature thus characterizes decisions concerning enrolment and exclusion from the list of students, and in the matter of scholarship (both for students with high academic achievements and those of poor material status) the party has the right to appeal.[11] It was believed that the assessment of a candidate's knowledge or the assessment of the kind of questions asked during the entrance exam were not of an administrative nature.[12] In another case, prolonging a student's exam session, and thus changing the decision to exclude the student from the list of students, is a decision that can be appealed at the administrative court of law. Similarly, it was thought that a decision made by a higher education institution which concerns an individual user of an administrative body, such as a school, stating the transformation or dissolution of the contract (professional relation) is also a case of

[10] Resolution of SAC dated 12 June 1990, SA/Kr 368/90, ONSA 1990, no. 2–3, pos. 48.

[11] See J. Borkowski, *Zarządzanie...*, op. cit., p. 95; resolution of SAC dated 29 June 1982 r., II SA 532/82, OSPiKA 1983, no. 1, pos. 20; resolution of SC dated 26 September 2002 r., II CKN 466/00, LEX no. 74408; resolution of SC dated 27 September 1983 r., III AZP 3/83, LEX no. 11715.

[12] J. Homplewicz, Gloss to the resolution of SAC dated 22 February 1994, SA/Wr 2073/93, OSP 1995, no. 11, pos. 223; resolution of SAC dated 2 December 1994 r., I SA 1636/94, ONSA 1995, no. 4, pos. 176.

an external administrative act.[13] Referring to the internal nature of an institution's acts, in one of its provisions the Supreme Administrative Court stated that denial of a student's conditional admission to the exam session is not an administrative decision.[14] The Supreme Administrative Court also stated that refusal of the Dean's leave grant is not an external administrative decision which can be appealed against at the administrative court, where such refusal does not pre-empt the further course of study of such a student.[15] In 1987 the Supreme Administrative Court stated that the decision on social scholarship is an internal act, which was strongly criticised by J. Homplewicz in his right to express an opinion about the ruling of the Court.[16] As such were also taken the Rector of the University's decisions to exempt or his refusal to exempt some students from fee paying for classes of weekend studies.[17]

The opinion that only external acts can be subject to administrative appeal has not changed on the grounds of the provision amended in 2001 of Article 161 of 12 Sept. 1990 on higher education.[18] Originally, this provision specifically indicated against which decisions one could appeal at the Supreme Administrative Court. After the amendment, Article 161 para. 1 stated generally that to the decisions made by the university in individual cases as well as in matters of student organizations control and student government control one should accordingly apply provisions of the Code of Administrative Procedure as well as provisions of the appeal against decisions at the administrative court. The decisions made by the Rector in the first instance were final. The second paragraph of this article, however, stated that the provisions of para. 1 sentence 1 should be also applied to the decisions made by the scholarship committee and the appeals scholarship committee [...], and after the amendment it introduced a possibility to appeal against any decision taken by the university bodies in an individual student's cases.

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[13] Resolution of SAC dated 25 September 1986 r., SA/Gd 513/86, OSP 1988, no. 4, pos. 88.

[14] Resolution of SAC dated 31 August 1984 r., SA/Wr 357/84, PIP 1985, z. 5, pp. 134–136.

[15] Resolution of SAC dated 12 June 1990 r., SA/Kr 368/90, ONSA 1990, no. 2–3, pos. 48.

[16] J. Homplewicz, Gloss to the resolution of SAC dated 16 April 1987 r., I SA 448/87, OSP 1988, no. 10, pos. 223.

[17] Resolution of SAC dated 12 January 2000, II SA/Wr 499/99, OSP 2000, no. 12, pos. 182.

[18] Act of 20 July 2001 amendment of the Act on higher education, vocational higher education institutions and some other laws (Dz. U. No. 85, item 924).

Still, on the basis of the amended Article 161 para. 1 of the LHE the prevailing opinion was that this provision applies only to external decisions, disposing acts stating creation, transformation, duration, or termination of the institutional relationship.[19] Based on earlier Administrative Courts' rulings, according to which as towards bodies such as universities, it did mean that an individual decision made by the university authorities was necessary for the acts of institutional authority such as a decision stating the MA exam submission and the decision to award the MA title,[20] as well as the decision to exempt or refusal to exempt some students from fee paying for classes of weekend studies.[21]

Notwithstandingly, unilateral legal action of the institutional body directed at specific individually marked legal consequences within the institutional relationship, which does not affect the very existence of this relationship, would not demand issuing an individual decision (so called internal acts).[22]

In the doctrine the approval of the so-far used case-law was given particularly by Z. R. Kmiecik, who stated that the substantive amendment of Article 161 of the LHE is therefore at best merely of a "quantative" nature, not "qualitative" at all. The same as before, Article 161 of the LHE in its current form does not allow for questioning decisions that are not administrative decisions made by higher education institutions before any court.[23] Next, he claims that it is not enough to assume that the Act is an administrative decision within the meaning of the Code of Administrative Procedure, as a prerequisite for the decision of the administrative act is also the external nature of the act.[24] In his opinion, the wording used in the provision 'decisions taken by the university bodies' to denote acts subject to the procedure laid down in the CAP, should be interpreted as decisions within the meaning of the Code; that is, external university institutional acts and not as any decision of a higher education body.

The provisions of Article 207 para. 1 of the LHE is almost a repetition of the inapplicable Article 161 para. 1. Although there are still court decisions in which it is assumed that the appeal is granted only to individual

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[19] Resolution of CT dated 5 October 2005, SK 39/05, OTK-A 2005, no. 9, pos. 104.

[20] Resolution of SAC dated 12 June 1992 r., SAB/Po 41/91, OSP 1994, no. 4, pos. 69.

[21] Resolution of SAC dated 12 January 2000 r., II SA/Wr 499/99, OSP 2000, no. 12, pos. 182.

[22] See resolution of CT dated 5 October 2005, SK 39/05, OTK-A 2005, no. 9, pos. 104.

[23] Z. R. Kmiecik, *Prawo studenta do sądu a autonomia szkół wyższych*, "Przegląd Sądowy" 2003, no. 3, p. 54.

[24] Ibidem, p. 55.

external acts, it can be noticed that some courts change approach to the interpretation of Article 207 of the LHE and recognize that an appeal is rightful against any decisions taken by the university.

An example of a decision in which the opportunity to appeal only against an individual external decision was granted is an administrative court decision in which the court stated that the Dean's decision to refuse agreement on changing the thesis supervisor is not subject to control.[25] In the justification of this decision one can read that: "In the case under question it was necessary to consider whether the fact that the proceedings before bodies of the autonomous entity, such as a higher education institution, apply the provisions of the CAP, and that the proceedings are in certain cases divided into two instances and that some rulings made by these bodies are called decisions, results in recognizing these rulings as administrative decisions within the meaning of Article 104 para. 1 and para. 2 of the Code of Administrative Procedure. The CAP does not define the notion "administrative decision". It is necessary in such a situation to refer to the achievements of the doctrine, which recognizes an administrative decision as a unilateral administrative act, stating in an authoritative way about an individual administrative case. In this sense, university authorities handle the case by an administrative decision if there is a need to establish, dissolve, or format a legal relationship between the university and the addressee of the decision (in this case – a student) which have external legal consequences." In its decision, the court also relied on E. Ochedowski, who claims that the unilateral legal activity of institutional bodies targeted at achieving certain individually marked legal consequences within the institutional relationship which do not affect the existence of this relationship (so called internal acts), does not demand issuing individual decisions and consequently is not subject to the regime of the Code of Administrative Procedure.[26] According to the court, "[...] internal acts also include the decision about the refusal to change the thesis supervisor. This act does not create a new legal relationship between the student and the higher education institution, nor does it transform it in a way which results in external legal consequences outside the university. In no way does it affect the rights and the obligations of a student".

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[25] Decision of Provincial Administrative Court of 16 February 2010 r., II SA/Ol 26/10, available in Central Database of Decisions of Administrative Courts, www.orzeczenia.nsa.gov.pl.

[26] E. Ochendowski, *Zakład administracyjny jako podmiot administracji państwowej*, Poznań 1969, p. 214.

A similar interpretation of Article 207 para. 1 of the LHE was accepted on 15 July, 2008 in the judgment of the Provincial Administrative Court.[27] According to this court, "Internal institutional acts are not subject to the regime of the Code of Administrative Procedure. However, one can appeal against external institutional acts i.e. rulings which are of high importance as to the rights and obligations of a student, deciding whether to establish, refuse to establish, transform or terminate the institutional relationship".

However, it is difficult to agree with the above presented viewpoints. It seems that the meaning of Article 207 para. 1 of the LHE introduces the possibility to apply the rulings of the Code of Administrative Procedure not only to the external decisions, but also the internal decisions made by the university authorities. If it concerned only external decisions, thus administrative decisions made in Article 207 para. 1, the reference to the CAP would be redundant as it is applicable to such acts according to Article 1 para. 1 of the CAP. Similarly, it would be unnecessary and unreasonable to restrict in this provision that the CAP and LPAC should be applied "accordingly".

Referring to the provisions which supplement the matters governed by a particular case law should only apply when necessary. Therefore, it should not be introduced when the obligation to apply certain provisions is already expressed in the legal system (it is a consequence of other provisions or general principles of the legal system). Thus, for example, it is rarely necessary to refer a specific case to the Code.

The role of codes in a legal system results in the fact that their provisions will be applied any way, even if the provisions of an act belong to a certain legal branch.[28]

According to B. Adamiak and J. Borkowski, according application means that when assessing the possibility of applying the provisions of the CAP one has to take into consideration the character of the proceedings before the university authorities as well as the core issues of the cases under procedure by these authorities. Taking into consideration these circumstances may lead to applying the provisions of the Code of Administrative Procedure directly or to applying them with the necessary changes, or to the decision not to apply them at all in a certain case. B. Adamiak and J. Borkowski believe that in the case of proceedings concerning students,

[27] II SA/Bk 320/08, available in Central Database of Decisions of Administrative Courts.

[28] G. Wierczyński, *Redagowanie i ogłaszanie aktów normatywnych. Komentarz*, Warszawa 2009, p. 768.

it is necessary to apply, inter alia, provisions for decisions and their verification in the resumption mode or stating their annulment.[29]

The term "a decision taken by the university" used in Article 207 para. 1 of the LHE should be understood as all decisions including those which were taken on the university forum and which are not of an "external nature". This is confirmed by the Constitutional Tribunal's judgment of 8 November 2000.[30] It refers to the inapplicable Article 161 para. 1 but, due to the fact that the current Article 207 para. 1 is almost identical to its meaning, the provision is still up to date. The Constitutional Tribunal (CT) stated that "The legislature in the Law on Higher Education through Article 161 introduced the principle that all 'decisions taken by the university authorities in individual student cases' are subject to the provisions of the Code of Administrative Procedure". According to the CT "the obligation to use The Code of Administrative Procedure should be understood as the fact that everything that is guaranteed to the addressee of the administrative decision under the CAP should also be applied to the addressee of the 'decision' by the Rector of the university unless the specific character of the case makes it inapplicable".

It seems that some courts have also started to reject the opinion that the division between the external and the internal decisions taken by the university authorities does not apply under Article 207 para. 1 of the LHE.

An example of such ruling is the judgment of the Provisional Administrative Court (PAC) in Olsztyn of 12 December, 2010,[31] which ruled the case of refusal to exempt from payment for educational services. The court stated that the university bodies are obliged to apply accordingly the provisions of the CAP and found that the university authorities violated its provisions, which could have a significant impact on the outcome of the case. According to the court, the infringement was due to the fact that the resolution included in the university Senate's provision stating that an application for exemption from payment after the appointed date which results in leaving the application without adjudication, is not consistent with the provisions of the CAP, which in Article 64 para. 1 and 2 indicates other conditions on leaving a case without adjudication.

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[29] B. Adamiak, J. Borkowski, *Zakład administracyjny w postępowaniu administracyjnym*, [w:] *Współczesne problemy administracji Publicznej*, "Studia Iuridica" 1996, no. 32, p. 27.

[30] SK 18/99, OTK ZU 2000, no. 7, pos. 258.

[31] II SA/Ol 779/10, available in Central Database of Decisions of Administrative Courts.

Moreover, according to the court, admission of lateness of an application infringes the principle of deepening citizens' trust in public authorities included in Article 8 of the CAP as well as the obligation to accurately clarify the factual state of matters and settle the case, taking into account the public interest and the legitimate interest of citizens (Article 7, Article 77 para. 1 and Article 80 CAP). The administration authorities did not reply to the plaintiff's arguments concerning the actual submission of the application and made no decision in this regard.

The above cited latest ruling confirms the thesis that Article 207 para. 1 of the LHE does not apply only and exclusively to external universities' acts but to all decisions made by their bodies and that they are obliged to accord application of the principles of administrative procedure stated in the CAP. This means that universities have been deprived of the right to self-regulate the principles and procedures for appealing against individual decisions on a student's issues.

The implementation of judicial decisions taken by the university is ensured by the above discussed Article 207 para. 1 of the LHE, according to which the university authorities' decisions mentioned in Article 169 para. 7 and 8 of the LHE (ie. recruitment committees), on individual issues concerning students and doctoral students and issues concerning the control of student organizations' activity as well as student government, may be appealed against under the provisions of appeal to the administrative court. This provision is also applied to decisions taken by the scholarship committee and appeal scholarship committee (Article 207 para. 4 of the LHE).

The provisions on the possibility to appeal against the decisions made by university bodies have evolved. Firstly, the law did not predict any provision concerning universities' decisions and the right to appeal to the SAC was based on the Article 169 para. 2 of the CAP in the version of 1980. Next, the provisions stated clearly against which acts one can appeal to the administrative court. Nowadays, the wording of Article 207 para. 1 of the LHE provides a general common right to appeal against decisions made by universities.

A complaint to the administrative court, as well as appeal against a decision, under the current law is independent of the fact whether the decision is external or not. Article 207 of the LHE does not provide for either administrative decisions or institutional authority acts.

The basis to appeal against universities' administrative acts and judgments is Article 3 para. 2 (1) or (2) of the LPAC. Under these provisions, controlling the activity of public administration bodies by administrative courts includes adjudication in cases of complaints about administrative

decisions – decisions issued in administrative proceedings – which can be appealed or terminate the proceedings, as well as against adjudication ruling the case as to its core. In other cases, the ruling will be based on Article 3 para. 3 of the LPAC, according to which administrative courts adjudicate on cases in which the provisions of special laws provide for judicial control and apply the measures referred to in these provisions. According to Article 1 para. 2 of the Act of 25 July 2002 – Law on System of Administrative Courts,[32] the criterion of judicial control will be compliance with the law, unless the Acts provide otherwise. Administrative courts will thus review the university bodies and their proceedings in terms of their application of the principles of the CAP, provisions of the LHE, and European Union Law.

There can be other possibilities to appeal against the university bodies' decisions to the administrative court, apart from the ones discussed when pointing to the right to appeal in administrative proceedings. In the judgment of 16 Sept 2010 of the PAC in Cracow[33] the court upheld a student's complaint against the decision of the Rector of her university, in which he refused to allow transfer to a different course of study. The court found that the university proceedings violated the provisions of Article 7 and Article 77 of the CAP; therefore the duty to sufficiently clarify the actual state in order to settle the matter, to collect sufficient evidence as well as to investigate it, should be based on defining ex officio what facts are necessary in order to settle the case and what evidence is substantial.

Administrative courts will not have the right to adjudicate on cases of a clearly academic character such as e.g. grades obtained in entrance examinations to the university, or grades obtained during the course of studying. In the thesis of the adjudication of the PAC in Warsaw we can read: "Evaluation of the examination papers is exclusively up to the people appointed to this duty by the university and the number of points scored, reflecting that assessment, is not part of an administrative decision".[34] Moreover, it is worth paying attention to the fact that decisions of a strictly academic nature are not a manifestation of the examiner's will, but a reflection of knowledge. Administrative courts are not competent to examine this aspect of the assessors' proceedings. Evaluation is not equal to deciding.

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[32] Dz. U. No. 153, item 1269 with later amendments.

[33] III SA/Kr 1209/09, available at Central Database of Decisions of Administrative Courts.

[34] Decision of PAC dated 8 August 2008 r., I SA/Wa 133/08, LEX no. 566530.

3. According application of the provisions of the Code of Criminal Procedure

The law on Higher Education in three cases refers to the according application of the provisions of the Code of Criminal Procedure. The first one concerns disciplinary proceedings against university teachers (Article 150 of the LHE). The next one relates to the investigation and disciplinary action against students (Article 223 of the LHE). The last one is the case which takes place during investigation and disciplinary proceedings against doctoral students at a university and in a research unit (Article 226 sec. 1 of the LHE), for doctoral students' disciplinary liability is regulated analogically to disciplinary proceedings against students.

Due to the framework of this elaboration, we focused on the issue of the proper application of the provisions of the CCP to university teachers. Disciplinary procedure against academics in addition to these rules is governed by the Regulation of the Minister of Science and Higher Education on the detailed procedure of the investigation and disciplinary action against university teachers.[35]

Secretion of the disciplinary liability is grounded in the autonomy of higher education institutions referred to in Article 70 sec. 5 of the Constitution of the Republic of Poland.[36]

The doctrine lacks consistency with respect to the character of the disciplinary liability. On the one hand, it is deprived of its status of criminal liability;[37] on the other hand, it is considered as a broad sense of criminal liability adjusted to individual professional groups[38] or even as a branch of criminal law.[39]

In the case of disciplinary tort the nature of reprehensible deeds differs from the nature of deeds liable to criminal proceedings. Actions that cause it are of a diverse nature following violation of employee discipline, including constituent elements of criminal behaviour. Only in the latter case is criminal liability possible. Moreover, disciplinary delict has to be judged not only

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[35] Regulation of the Minister of Science and Higher Education dated 14 March 2007 on the detailed procedure of the investigation and disciplinary action against academic teachers (Dz. U. No. 58, item 391).

[36] Sentence of CT dated 8 December 1998, K. 41/97, OTK ZU 1998, no. 7, p. 656.

[37] K. Dudka, *Stosowanie przepisów k.p.k. w postępowaniu dyscyplinarnym w stosunku do nauczycieli akademickich* [w:] *Węzłowe problemy procesu karnego*, (red.) P. Hofmański, Warszawa 2010, p. 354.

[38] See K. Buchała, A. Zoll, *Polskie prawo karne*, Warszawa 1995, p. 6.

[39] W. Świda, *Prawo karne*, Warszawa 1986, p. 17.

in the normative perspective, but also from a professional, ethical one.[40]

Disciplinary procedure, which provides for proper application of the provisions of criminal procedure is similar to regulation of criminal procedure, but it cannot be equated with criminal proceedings.[41] The Constitutional Tribunal has stated that disciplinary action is a specific procedure which should be applied according to rules provided by a certain constitutional law. The provisions of the CCP may be applied subsidiarily.[42]

Discussion of the proper application of the rules, as was stressed earlier, is the subject of many scientific studies[43] and adjudicates.

An example of the latter is the Supreme Court judgment of 27 August 2007, in which the Supreme Court identified three categories of "proper" application of provisions. The first refers to the situation when a certain provision without altering its content may be applied on the grounds of the Act to which it refers. The second one covers those provisions which, in general, cannot be applied to the referential system, mainly due to their superfluous nature or total contradiction to the rules governing these relations, on the grounds of their according applicability. The third one includes incidents where the rules can be and should be applied after certain modifications. This is the category which is a classic example of the "right" rather than "direct" application of the provision implemented to another range of reference.

It is worth emphasizing that the provisions of the CCP can be applied to disciplinary proceedings provided for by the LHE if they comply with the specific character of disciplinary procedure.

The purpose of such regulation is not to state that the disciplinary procedure is similar to criminal proceedings, but to ensure that the person who is charged has full rights and a guarantee that their rights and good will not be breached in the disciplinary procedure.[44]

It is therefore necessary to agree with the opinion expressed in the doctrine[45] that the disciplinary procedure is not only dissimilar to the criminal procedure, but also does not have the attribute of justice under Article 175 sec. 1 of the Constitution of the RP.[46]

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[40] Judgement of CT 27 February 2001, K 22/00, OTK 2003, no. 3, pos. 48.

[41] See judgment of CT dated 27 February 2001, K 22/00, OTK 2001, no. 3, pos. 48, judgment of CT dated 11 September 2001, SK 17/00, OTK 2001, no. 6, pos. 165.

[42] Judgment of CT dated 27 February 2001, K 22/00, OTK 2001, no. 3, pos. 48.

[43] See J. Nowacki, *"Odpowiednie..."*, op. cit., p. 370–371, M. Hauser, *Przepisy odsyłające. Zagadnienia ogólne*, "Przegląd Legislacyjny" 2003, no 4, p. 88 and following.

[44] Judgment of CT dated 27 February 2001, K 22/00, OTK 2001, no 3, pos. 48.

[45] K. Dudka, *"Stosowanie..."*, op. cit., p. 356.

[46] The Constitution of the Republic of Poland dated 2 April 1997, (Dz. U. No. 78, item 483 with later amendments).

Accordingly, a disciplinary authority is required to assess whether suitable application of the provisions depends on applying them directly or with suitable modifications or even state that they are inapplicable.[47]

According to Article 150 of the LHE to disciplinary procedures against university teachers in cases unregulated by the Act, one should apply the provisions of the CCP except for Article 82 of the CCP.

The wording of the above mentioned provision makes an assumption that the goal is to accordingly apply the provisions of the CCP in so far as it is not regulated, obviously without the legislature of the Article 82 CCP.

The consequence of such an approach is the fact that there will be provisions of the CCP applied, which will provide for general norms concerning the whole process of the procedure of an institution in disciplinary proceedings, and particular norms – only when they concern only the institution appointed in the proceedings.[48]

In practice, according application of the provisions of CCP in disciplinary procedure evokes a lot of doubt due to lack of definite criteria which would clarify how to apply a certain provision of the CCP. This means the above mentioned direct application of the provisions of CCP, modified application, or lack of a possibility to apply them at all.

As to the last ones, it is clearly visible in the inability to apply coercive measures by the disciplinary committee, such as an ordinal penalty. Despite the fact that Article 146 sec. 2 of the LHE provides for running a procedure while the defendant is absent, in the case when the defendant is refraining from participating in the proceedings, the legislator did not predict any possibility to execute the presence of the witnesses.

Under Article 285 CCP, a witness who, without a justifiable reason did not come to the subpoena of the institution running the proceedings, or who, without a permit issued by this institution, abandoned the place of the proceedings before its termination, is liable to a fine up to 10,000 PLN. Moreover, the witness can be arrested and brought to court.

In the doctrine, it is emphasized that the disciplinary committee's lack of such licence results from the fact that these provisions interfere with the sphere of rights and freedom of a human being, which can be limited, but

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[47] See also K. Kurzępa-Dedo, *Odpowiedzialność dyscyplinarna nauczycieli akademickich* [w:] *Szkolnictwo wyższe w Polsce. Ustrój – prawo – organizacja*, (red.) S. Waltoś, A. Rozmus, Rzeszów 2008, p. 263.

[48] D. Kaczorkiewicz, *Instytucje prawa karnego procesowego w postępowaniach dyscyplinarnych*, [w:] *Węzłowe problemy procesu karnego*, (red.) P. Hofmański, Warszawa 2010, p. 364.

only when there are special provisions. Moreover, when limiting the rights, the rule of proportion should be respected.[49]

In the literature, it is claimed that personal freedoms can be limited only if otherwise there was a risk of more serious damage than the one that can emerge from limitations. Interference should be done in such a way so that the person under consideration bears minimal health, wealth or personal situation side effects.[50] Moreover, applying restrictions must undergo a specific kind of control procedure. Therefore, it is to be verified whether:

- the evidence to prove achievement of the intended goals of the introduced regulations is sufficient,
- there is a necessity of the application of a norm limiting the rights and freedoms,
- the effects which arise as a result of the introduced legislation will be proportional to the burden imposed on citizens.[51]

Consequently, disciplinary proceedings apply such procedures as search or controlling and recording conversations.

Many provisions of the CCP cannot be applied to disciplinary procedure due to the previously mentioned distinction between criminal and disciplinary proceedings – the CCP regulates institutions which have no reference to disciplinary procedure, e.g. international relations proceedings.

It should also be noted that failure in applying the provisions of the CCP may be a result of the fact that the power under a certain regulation is connected with a specific entity, e.g. the court can direct to psychiatric observation or appoint a professional psychiatrist to assess the mental condition of the accused. In consequence, the disciplinary committee has no power to appoint such an expert, although it can appoint other experts of different specializations.[52]

According application of the provisions of CCP may lead to lengthening disciplinary procedures. An example of such can be a delivery institution (Article 131-133 CCP).[53] On the other hand, it is worth remembering that

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[49] See further K. Dudka, *Odpowiedzialność dyscyplinarna i zakres stosowania przepisów kodeksu postępowania karnego w postępowaniu dyscyplinarnym wobec nauczycieli akademickich*, Studia Iuridica Lublinensia 2007, t. IX.

[50] S. Waltoś, *Proces karny, Zarys systemu*, Warszawa 2002, p. 402–403.

[51] See M. Wyrzykowski, *Granice praw i wolności – granice władzy*, Biuletyn RPO, No. 38, Warszawa 2000, p. 24; M. Safian, *Ochrona prawa do prywatności w prawie polskim*, Szkoła Praw Człowieka, Zeszyt 4, Warszawa 1998, p. 81 and following.

[52] See also K. Dudka, *"Stosowanie..."*, op. cit., p. 359.

[53] Summons, notices and other documents from the date of service, run dates, shall be served by mail or other authorized entity engaged in the service of correspondence by the consignor or the employee, if strictly necessary – by the police. If, on the set of so

the provisions of CCP provide certain frames within which organs running a disciplinary procedure must operate. That means procedural guarantees and principles as well as standards characterizing a thorough fair trial which, as we know, every citizen is entitled to in a democratic lawful country. Fairness of the proceedings is in fact a guarantee of lawfulness of the state and all the rights and freedoms of an individual.

In justification of the above quoted judgment of the CT we read that application of the institutions deriving from criminal law and criminal procedure to disciplinary procedure will serve the purpose of security. The legislator, taking into account the repressive nature of the disciplinary procedure, decided that application of such institutions and legal principles, which would give opportunities to provide the accused with optimal rights and freedoms, was justifiable.

It is of vital importance in terms of disciplinary procedures because of the possibility of, inter alia, a judgment providing for permanent or temporary depravation of the right to practice as an academic teacher.

It is worth paying attention to the SC resolution of 27 Sept 2012, sig. III CZP 48/12, in which the SC held that a member of the university disciplinary committee may be held liable under Article 415 of the Civil Code for damage caused by a breach of the disciplinary procedure.

Taking into consideration the fact that the function of the committee's members and their guaranteed independence makes their status similar to that of a judge, doubtful is the fact that they are liable in torts for the damage caused by the judgment under Article 415 of the Civil Code. For the judge participating in the tort that caused damage and was against the law is not responsible for the damage but the Treasury, under the condition

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many victims that their personal notice of their rights would cause serious impediment to the investigation, they shall be by advertisement in newspapers, radio or television. If there is an obligation of service provision, provisions of § 2 shall apply accordingly. Should always served it to that victim, who in the mandatory period of 7 days from the date of this notice to pay. Letter personally delivered to the addressee. In the event of temporary absence of the addressee in his apartment, the letter should be delivered to an adult member of the household, and if not – the administration at home, caretaker home, or sołtys should undertake to deliver the letter to the addressee. Letter can also be delivered via fax or email. In this case, the proof of service is to confirm the data. If delivery can not be done in the manner indicated in Article. 132, letter sent by mail is left in the local post office near the public operator, and sent in another way – in the nearest police unit or the appropriate municipal office. About leaving the magazine in accordance with § 1 serving a notice placed in a box to mail service or on the door of the apartment, the recipient or other visible indication of where and when the letter was left, and that they should be received within 7 days, in the event of an ineffective lapse of the deadline, action notice must be repeated once, the same rationale applies in the event of service administration letter home, caretaker home or sołtys. The letter can also be left to a person authorized to receive mail at the permanent place of employment of the recipient.

that the provisions of Article 417 §1 and 417[1] §2 of the CC were met. This in turn raises the question whether the university disciplinary committee imposing the penalty of dismissal is a public authority.[54]

Summary

Summing up, it has to be stated clearly that on the grounds of the LHE there exists a problematic issue of the according application of the administrative procedure, proceedings before the administrative courts, and the Code of Criminal Procedure. In the case of administrative procedure and judicial-administrative procedure, the problem may be caused by an incorrect understanding of the meaning of reference in law. As a result, both in doctrine and case law there is still doubt as to which university acts – internal or external – these provisions can be applied to. As to the Code of Criminal Procedure, the most serious problems concern lack of definite guidance on the use of disciplinary procedure the provisions of which it includes. This may lead to obstruction of the legal procedure e.g. in the case of inability to use institutions enforcing certain behaviour.

Moreover, it is worth noting another important issue, according to Art 146 sec. 4 of the LHE, parties may appeal against the final judgment of the disciplinary committee referred to in Article 142 sec. 1 (2) of the LHE to the Court of Appeal in Warsaw – the court of Labour and Social Security. This evokes a question whether this court will be able to assess whether the disciplinary committee accordingly applied the provision of the Code of Criminal Procedure, especially when the issue provokes so much interpretative doubt.

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[54] These consideration are beyond the scope of this paper so we suggest reading resolution of SC available in: http://www.sn.pl/orzecznictwo/SitePages/Najnowsze%20orzeczenia.aspx?ItemID=45&ListID=411c5dda-68cb-4ad8-b865-2705079f8593&el=Izba%20Cywilna and judgment of TC dated 4 December 2001, SK 18/2000, (Dz. U. No 145, item 1638).

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A CRITIQUE OF LAW & ECONOMICS – AN AUSTRIAN SCHOOL PERSPECTIVE

Introduction

The main assumption in economics is that the World is one of limited resources, yet people possess unlimited wants. It seems counterintuitive to view the law as based upon market principles, but undoubtedly one of its main goals is to prevent the emergence of conflict and enable societies to function peacefully. Conflict, however, is inevitable when resources are scarce.[1]

Most legal scholars profess that law is concerned primarily with questions of rights, justice and fairness. These concepts, however, are difficult to define with precision[2] and many legal schools of thought remain under the influence of legal pragmatism. These schools include the school of neopragmatism, critical legal studies, and – above all, emerging from the University of Chicago in the 1960s – the Law & Economics (L&E, also known as the economic analysis of law) movement,[3] which applies economic theory and method to the practice of law. As an academic discipline, L&E became popular starting with the works of the Nobel Prize winner Ronald Coase, who created the analytical model for assigning property rights and liability in economic terms. His followers continued the work by scrutinizing legal doctrines through economic analysis. The most famous proponent of L&E, Richard Posner, became known for his many books and articles on law and economics. The L&E school evidently revolutionized first, the American,

[1] J. Šima, *The Logic of Social Action: Austrian Law and Economics, Austrian Scholars Conference, Ludwig von Mises Institute* 2004, www.mises.org, p. 3.

[2] F. S. Coop (ed.), *The Legal Foundation of Free Markets*, The Institute of Economic Affairs 2008, p. 19.

[3] J. Šima, M. Fronèk, *Against Standard Law&Economics* [at] J. G. Hülsmann, S. Kinsella (ed.), *Property, Freedom, Society*, Ludwik von Mises Institute 2009, p. 122.

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then West European legal education. Nowadays, economic principles are commonly used in legal analysis to gain valuable insights.

The purpose of the article is not to explore the relationships between law and economics or to identify the reasons why positivism was especially successful in the social sciences. Further, the purpose is not to organise critic's claims and L&E's counterclaims, but to cast some light on the criticism of L&E by the so-called Austrian School, which is perhaps most famous for its economic analysis.

L&E literature is vast, and for this article the relevant component of the literature deals with the following concept: an economic *efficiency* criterion identifies the desirable content of the law (but – does it?).

The concept of Law & Economics

Instead of looking for unique features of law, L&E looks at it as a convenient social tool, and then tries to evaluate it functionally. In other words, L&E emphasizes the place of the institution of law within the general and common economic structure of society. A normative theory of adjudication was among the earliest claims advanced in the L&E. First of all, the theoretical L&E analysis focuses on the *efficiency* concept. R. Posner interpreted efficiency as *wealth maximization*, and also later interpreted this concept as *willingness to pay.*

The methodological foundations of the L&E school are based on the concept of law as an optimal outcome of a judicial balancing of socio-economical costs and benefits. An efficient system is one that increases the net value of resources. In particular, cost-benefit analysis attempts to implement the so-called Kaldor-Hicks evaluative criterion. According to this criterion, the distribution of goods X is superior to the distribution of goods Y, if and only if there exists a third distribution of goods Z such that (a) Z is a redistribution of X; and (b) Z is Pareto preferred to Y.[4]

When people value some goods higher than others, then economic efficiency can usually be attained through voluntary transfer of these goods (free contractual relationship). In other words, if exchange of goods is allowed, the efficiency of the initial allocation is of secondary importance, because each single resource probably will end up in the hands of the person that values it the most. The Coase Theorem, the most fundamental result

[4] K. Lewis, *The Economic Analysis of Law*, *"The Stanford Encyclopedia of Philosophy" (Fall 2011 Edition)*, E. N. Zalta (ed.), www.plato.stanford.edu.

in the economic study of law, states that if there are no transaction costs (there are no costs of finding anyone with whom a bargain can be struck, there is no artificial barrier to commercial transactions, etc.), the assignment of entitlements will be irrelevant to the goal of allocative efficiency. In such a situation, of course, there will be no need for law to internalize costs, because people will bargain to the most efficient possible allocation of goods.

L&E stresses, quite rightly, that free markets are more efficient than courts. In market economies, property rights are defined efficiently in many circumstances. So, whenever possible, the legal system should *force* a transaction into the market. Sometimes though, it is not possible and it is the role of a judge to *mimic a market* and guess at what the parties would have desired if markets had been feasible.[5] In many circumstances, however, who initially owns the right will matter. Transactions costs are seldom zero, and so if rights are imperfectly allocated, a costly transaction will be needed to change this misallocation. Therefore, the enforcement and allocation of legal entitlements are important factors in ensuring economically efficient exchanges. This means that law can be used to encourage economic efficiency[6] and that economic analysis models the results of legal proceedings better than any other theory. In other words, the law is best seen as a tool to optimize contractual arrangements and, first of all, it can help in situations where transaction costs are so high as to prohibit efficient contractual relationships. Outside of conceptually ideal markets there are always transaction costs, such as the cost of information, opportunity, and administrative costs. Here the law can encourage economic efficiency by assigning property rights to those parties who would have secured them through market exchange if transaction costs had been lower. In other words, law should bring about allocations that imitate the results of an ideally functioning market.[7]

Nevertheless, a question arises – might not law be better used to consider issues related to justice, duty and the like? L&E claims that the meanings of words such as justice or duty are so vague that the use of such concepts as a basis of judicial decisions offers no guidance whatsoever. It is argued that while such concepts are unhelpfully complex, the tools of economic analysis and the concept of economic efficiency are sufficiently clear to provide the judge with a solid and predictable basis for decision-making.

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[5] P. H. Rubin, *Law and Economics*, "The Concise Encyclopedia of Economics", www.econlib.org.

[6] B. E. Butler, *Law and Economics*, "Internet Encyclopedia of Philosophy", www.iep.utm.edu.

[7] Ibidem.

Decisions in law can be made more easily according to efficiency rather than justice or duty due to the limitations of institutional competence. In particular, this might be so if issues of justice are so complex as to involve information that courts are structurally unable to process.

The L&E concept of economic efficiency seems to offer an integral solution in this respect. Specifically, a fair legal system is one that deliberately promotes gains in social welfare.[8] R. Posner considers economics to be a source of insight regarding the cost-benefit properties of alternative legal instruments. These instruments then can be used primarily to lead to higher social efficiency. In other words, the main assumption of L&E is that jurisprudence should transform the limits of traditional property rights in order to get an optimal degree of economic efficiency.[9] The general theory is that law is best viewed as a social tool that promotes economic efficiency and economic analysis, and economic efficiency as an ideal that can guide legal practice.

Iusestarsboni et aequi

Undoubtedly, it was the historical role of the L&E movement to articulate some very interesting assumptions in respect to the concept of interpretation of law. Nevertheless, it seems now that there can be no genuine progress of this school of legal thought unless it proceeds to a fundamental inversion of its logic.

A growing number of scholars have tried to prove that what seems to be the logical consequence of the L&E's underlying methodology is contradiction of its own terms.[10] In other words, the L&E efficiency theory of rights can be seen not only as flawed, but even *nihilistic*.[11] The basis of such a critique is rejection of the assumption essential for L&E that an economic criterion is considered as a worthy goal for the functioning of legal institutions.[12]

Until recently, L&E analysis focused primarily on exploring and developing the descriptive aspects of the theory. In other words, this school was interested in the law *as a* concept. So, the main approach of the L&E was to use standard microeconomic tools in order to explain the logic of

[8] E. Krecké, *The Nihilism of the Economic Analysis of Law, Austrian Scholars Conference, Ludwig von Mises Institute* 2001, p. 7.

[9] J. Šima, M. Fronèk, op. cit., p. 123.

[10] J. Šima, *The Logic of Social Action*, op. cit., p. 1.

[11] E. Krecké, op. cit., p. 2.

[12] Ibidem, p. 6.

jurisprudence. Using sophisticated models, this school sought to show the mechanisms by which the law encourages economically efficient social behavior.[13] Not surprisingly, difficulties emerged. Problems with empirically verifying the descriptive theory of efficiency finally brought about a gradual shift from an explanatory to a normative theory of L&E. In other words, if it is not possible to prove empirically that the system of law is efficient, one can state that this system ought to be efficient. Then, the L&E's efficiency theory became a normative principle for guiding legal policy.[14]

The concept of scarcity is a good example. This concept implies – of course – the inevitability of conflict. Somebody wants to use somebody's else property as one pleases. Who is to be the owner? Is there any rule of law in this respect? Should we really resort to cost-benefit analysis to assign ownership title?[15]

The L&E theories operate, out of necessity, at a relatively high level of abstraction, including the use of quite sophisticated mathematical models to derive precise quantitative predictions for overall normative assessments. However, such simplifying assumptions seem to create a substantial risk of overlooking essential aspects of the analyzed area of inquiry and may generate predictions of little relevance to the actual circumstances.[16] Finally, such assumptions leave many important questions unanswered. There's no need to emphasize that the social sciences have to deal with structures of essential complexity, whose characteristic properties can be exhibited only by models made up of relatively great numbers of variables. As Alan Morrison, Professor of Finance at the Said Business School of the University of Oxford emphasises – mathematics, in excess, blurs our perception of economic and legal institutions.[17] The emphasis on mathematics is a symptom of a deeper change in the discipline: the robust adoption of what may broadly called *positivism* as a guide for research and the criterion for successful construction of economic and legal theory.[18] Already in the early

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[13] E. Krecké, op. cit., p. 3.

[14] E. Krecké, op. cit., p. 6.

[15] J. Šima, *The Logic of Social Action*, op. cit., p. 8.

[16] G. S. Crespi, *Exploring the Complicationist Gambit: an Austrian Approach to the Economic Analysis of Law*, "Notre-Dame Law Review" 1998, 73 (2), 315, p. 68.

[17] A. D. Morrison, *Rating agencies, regulation and financial market stability* [in:] P. Booth (ed.) *Verdict on the Crash: Causes and Policy Implications*, The Institute of Economic Affairs 2009, s. 120.

[18] M. N. Rothbard, *Praxeology as the Method of the Social Sciences*, originally from *Phenomenology and the Social Sciences*, Maurice Natanson, ed. (Evanston, U.: Northwestern University Press, 1973), 2; Murray Rothbard, *The Logic Of Action One* (Cheltenham, UK: Edward Elgar, 1977), www.mises.org, p. 1.

nineteenth-century, the French economist Jean-Baptiste Say lamented in his magnum opus *A Treatise on Political Economy* that people are too apt to suppose that absolute truth is confined to mathematics and to the results of careful observation and experiment in the physical sciences.[19] Besides, it is crucial to keep in mind that there are many varieties of social analysis. An approach with direct relevance to a particular problem can be often irrelevant to other problems.

Undoubtedly, the Austrian theory provides tools to critically evaluate the basis of the *wealth maximization* approach to law. In particular, this theory is able to prove that the L&E approach finally leads to the conclusion that private property rights are subsidiary to supposed economic efficiency.[20] In other words, in the L&E perspective, the concept of economic efficiency is the normative criterion that reflects best in an ideal legal system.[21] Contrary to this perspective, the modern Austrian school approach includes primarily an assumption that a society states a rather complex and dynamic process that is subject to an institutional order that is in continuous evolution. Taking this assumption under consideration, legal rules should be evaluated not through a comparison of equilibrium end-state outcomes, but in accordance with their impact on the process by which individual members of the society can coordinate efforts to achieve their objectives.[22] Whatever the details of a case, some theory of justice is needed through which to interpret them. From this perspective,[23] the focus of L&E on the econometric estimation of the various structural parameters seems to be a misdirection of effort.[24]

Thus, the concept of applying the wealth maximization principle cannot be seriously taken into consideration in a real world context. One cannot expect jurisprudence to precisely weigh and compare any potential efficiency results of its decisions, particularly in the absence of any actual transaction itself. Such a task is plainly impossible.[25] The legal practitioner must tackle specific cases involving real people who operate in particular times and places. People live in social and cultural contexts with differing sets

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[19] Ibidem, p. 10.

[20] W. Block, *O.J.'s Defense: A Reductio ad Absurdum of the Economics of Ronald Coase and Richard Posner*, Loyola University New Orleans 2011, p. 3.

[21] E. Krecké, op. cit., p. 7.

[22] G. S. Crespi, op. cit., p. 71.

[23] More: M. Eabrasu, *A Praxeological Assessment of Subjective Value*, "The Quarterly Journal of Austrian Economics" 2011, Vol. 14, No. 2.

[24] G. S. Crespi, op. cit., p. 15.

[25] M. J. Rizzo, *Law amid Flux: The Economics of Negligence and Strict Liability in Tort*, "The Journal of Legal Studies" 1980, Vol. 9, No. 2, p. 292.

of assumptions, expectations, and patterns of communicative action as embodied in linguistic and other cultural conventions.[26] If a justice provider, such as a judge, is to take a fair look at any real case, a complex of possibly messy or apparently contradictory accounts of details may need to be collected and evaluated.[27]

Even if jurisprudence were in fact attempting to generate pure economic efficiency, it cannot be done since judges must act on the basis of very incomplete knowledge.[28] Specifically, if a judge is to succeed in attaining the goal of maximization of wealth, he must possess some means for such calculation. Yet the only information he has are existing market prices and this is clearly not sufficient.[29] Naturally, the complexity of our World is such that to make an attempt to base judicial ruling on economic efficiency data wouldn't seem serious, let alone just. In the most general sense, there is, indeed, no such thing as an economic future. There is only the future in which economic factors are bound together, inextricably, and quite without hope of separate identification, with the whole universe of forces determining the course of events.[30]

Herein lies another problem of L&E's incoherency. L&E analysis is confined to applications of static models that lack some essential features of the real world.[31] R. Coase established two propositions that have come to define the L&E paradigm. According to his theory, there are two states of analytical circumstances. The first one is characterized by zero transaction costs, which implies that any transaction among society members can be easily and cheaply concluded. The problem is, this state of the world doesn't seem to exist. The second state is characterized, first of all, by positive transaction costs – and this does resemble reality. Under these circumstances, it is, of course, not easy to rearrange titles to property, particularly when there are numerous buyers or sellers potentially involved. So, finally, transaction costs make commercial activity inefficient in comparison to a world without transaction costs.[32] That assumption leads the L&E school to accept

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[26] K. Graf, Action-Based Jurisprudence: Praxeological Legal Theory in Relation to Economic Theory, Ethics, and Legal Practice, "Libertarian Papers" 3, 19 (2011), www.libertarianpapers.org, p. 42.

[27] Ibidem, p. 40.

[28] G. S. Crespi, op. cit., p. 27.

[29] H. Demsetz, *Some Aspects of Property Rights*, "Journal of Law and Economics" 1966, Vol. 9, p. 69.

[30] M. N. Rothbard, op. cit., p. 8.

[31] E. Krecké, op. cit., p. 7.

[32] J. G. Hülsmann, *The A Priori Foundations of Property Economics*, "The Quarterly Journal of Austrian Economics" 2004, Vol. 7, No. 4, p. 45.

that there should be no property rights established prior to consideration of *wealth maximization*. On the contrary, the accurate function of property rights is to maximize wealth, and the law should be construed so as to bring about this goal.[33]

In addition, the validity of the L&E model seems to be limited to an unrealistically stationary world. If the claims are of exhaustive descriptive accuracy then it is more than likely a failure. In particular, when L&E scholars emphasize the need of prices for the application of the famous Kaldor-Hicks test, they stress the importance of fixed relative prices.[34] On the other hand, Austrian theorists are aware that the concept of economic efficiency is in fact meaningless, since it is based upon the theoretical assumption of stable human preferences and social structures that are unaffected by the decision of a legal ruling.[35] The background of the Austrian theory is a world of continuous change in which plans have to be conceived and continually revised.

Clearly, there is no way that jurisprudence can help to decide cases while following the doctrine of *wealth maximization*.[36] Furthermore, the reliance on this principle has some more unwelcome implications. L&E's principle states that resources should be assigned to those who value them most, i.e., to those who are willing and able to pay for them.[37] To assess the individual willingness to pay, cost-benefit analysis simply sums the individual willingness to pay. Second, this analysis has to use a method of interpersonal comparisons of well-being, which require identification of appropriate representation of each individual's preference, ordering and comparing those representations. Cost-benefit analysis however does not identify representations on moral or political grounds; rather it chooses the representations that contingently arise from the actual distribution of wealth and income in the society.

In simple terms, a legal situation would be economically efficient if a right was given to the party who would be willing to pay the most for it. If the granting of rights is to be based on ability to pay, a problem arises for those who cannot pay. It seems that for L&E theory they simply do not count. As Anthony T. Kronman, a former dean of the Yale Law School, put it: *The principle of wealth maximization necessarily favors those who*

[33] W. Block, op. cit., p. 1.

[34] J. L. Coleman, *Efficiency, Utility, and Wealth Maximization*, "Oxford University Press" 2002, p. 524.

[35] G. S. Crespi, op. cit., p. 26.

[36] J. Šima, *The The Logic of Social Action*, op. cit., p. 25.

[37] J. Šima, M. Fronèk, op. cit., p. 125.

already have money, or the resources with which to earn it, and are therefore able to pay more than others to have a new legal rule defined in the way that is favorable to them.[38]

The central problem seems to lie in the interdependence of law and the ethical dimensions of law. For L&E what is right and what is wrong are merely contingent.[39] A just legal system can hardly be based on the contingent notions of right and wrong. Consequently, efficiency in the L&E meaning is an empty concept.[40] The concept of economic efficiency leads inevitably to internal incoherence of the L&E methodology and its contradictory conclusions.

An Austrian concept of efficiency in law

The Austrian school also tried to offer a normative assessment of a policy, but this endeavor was not based upon the *efficiency* characteristics of the resource allocation. Even if efficiency precept considerations implicitly emerge in the Austrian framework, it is far from being a central value in this context. Nevertheless, Austrian reliance on personal and private property rights seems to create a much more robust thesis than the L&E concept of wealth maximization.[41] The Austrian outlook is based on a traditional understanding of law, so the main assessments focus here on the impact of the policy measure at issue upon the processes through which individual learning and behavioral changes take place over time.[42] Besides, *efficiency* has a very different meaning than in the L&E concept. For Austrians, effectiveness grows to the extent that one focuses one's activities within one's *circle of influence*, rather than in the *circle of concern*, meaning areas one may have an interest in, but over which one is not able to have a direct impact through action.[43] Thus, the concept of efficiency is not viewed by Austrians as a goal, but rather as an attribute of a just legal system. In the Austrian legal perspective efficiency is a purely relative concept. In other words, this concept *per se* does not mean anything. There are no intrinsic values; every single value is to be considered as adherent.[44]

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[38] From: W. Block, *Alienability, Inalienability, Paternalism, and the Law: Reply to Kronman*, "American Journal of Criminal Law" 2001, Vol. 28, no. 3

[39] J. Šima, M. Fronèk, op. cit., p. 129.

[40] E. Krecké, op. cit., p. 9.

[41] W. Block, *O.J.'s Defense:*, op. cit., p. 1.

[42] G. S. Crespi, op. cit., p. 16.

[43] K. Graf, op. cit., p. 49.

[44] E. Krecké, op. cit., p. 14.

The Austrian school's methodology deals with necessary, abstract principles. It can be described in this respect as a process of deducing universal rules from axiomatic propositions.[45] Its focus on the need for actual people's choices is the source of requirements for jurisprudence to base its rulings upon. Instead of trying to calculate an optimal economic outcome, the Austrian school approach urges judges to try to find a way to resolution by relying more on social norms or the traditional logic of private property and contracts.[46] Finally, the Austrian school contends that there are social laws that cannot be verified or refuted merely by reference to observed data; that such laws should significantly determine the impact of positive law and jurisdiction on the economy. The Austrian scholars claim that the description of these laws should be the subject of *a priori* legal and economic praxeological theory.[47]

In the Austrian tradition, the law is seen as a social institution, a form of spontaneous order that comes out as public and private individuals interact in their attempts to develop adapted responses to the problems posed by their ignorance and uncertainty. In this perspective, a society's legal system has no existence apart from the subjective preferences and the conduct of the individuals who constitute that society. In this respect the evolution of such a system is open-ended and unpredictable. As a consequence, the law could not be perfectly efficient. In contrast to L&E, the Austrian school concept of law openly accounts for the imperfections in the legal system without considering the presence of such flaws as a misfortune. In this line of thinking, no ultimate value is advanced whose achievement becomes a central goal for legal institutions.[48]

Austrians hold that social science deals with human action rather than with the objects of human action, such as quantities of goods and services.[49] This approach enunciates the abstract principles of human action and includes the assumption, that those principles are sufficiently general to be usefully applied to a wider range of human interests.[50] Theory and practice are discrete, complementary realms, which must interact and communicate

[45] L. J. Sechrest, *Praxeology, Economics, and Law: Issues and Implications*, "The Quarterly Journal of Austrian Economics" 2004, Vol. 7, No. 4, p. 19–20.

[46] J. Šima, *The The Logic of Social Action*, op. cit., p. 49.

[47] J. G. Hülsmann, Editorial, "The Quarterly Journal of Austrian Economics" 2004, Vol. 7, No. 4, p. 3.

[48] E. Krecké, op. cit., p. 13.

[49] J. G. Hülsmann, Editorial, op. cit., p. 3.

[50] L. J. Sechrest, *Praxeology*, op. cit., p. 21.

if justice is to be achieved in any real case. The principles often described as useful in legal theorizing are not so much those of the Austrian school, but rather a core of praxeological methodology and content that also underpins economics in the Austrian tradition.[51] What seems to be most important in respect to the methodology of the Austrian school, the consistent application of praxeological reasoning, seems to lead to the same general social system, regardless of whether it is economics or law.[52] Besides, its methodology allows for a considerate economic understanding of legal phenomena in general.[53] Indeed, praxeology constitutes methodology that can serve as well as an analytical framework for economics as for legal theory.[54] Thus, in the Austrian view, justice rather lies within a deductive legal-theory domain, not the "ought" domain of static economic *efficiency*. Huerta de Soto, Professor of applied economics at Rey Juan Carlos University of Madrid, an Austrian School economist writes of justice that: *What is just cannot be inefficient, nor can what is efficient be unjust. The fact is that, under the perspective of dynamic analysis, equity or justice and efficiency are simply two sides of the same coin... This... not only allows efficiency to be appropriately redefined in dynamic terms, but also throws a great deal of light on the criterion of justice which should prevail in social relations. This criterion is based on the traditional principles of morality which allow individual in accordance with behavior to be judged as just or unjust in general and abstract juridical rules regulating, basically... property rights...*[55]

Summary

Despite its influence, the L&E movement has been criticized from a number of directions. The most vivid debates on the place of economics in legal reasoning have to do with the notion that justice and equity can never be set against the standard of efficiency. The present article features the concept of economic analyses of law from an Austrian school perspective. Although those two schools bear some resemblance, there are clear-cut differences between them as far as epistemological and methodological questions are concerned.

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[51] K. Graf, op. cit., p. 6.
[52] L. J. Sechrest, op. cit.„ p. 21.
[53] E. Krecké, op. cit., p. 15.
[54] L. J. Sechrest, op. cit., p. 21.
[55] K. Graf, op. cit., p. 56.

The Austrian legal theory tries to provide different foundations for an economic analysis of law. The Austrian school describes the law rather as a coordination procedure built on abstract rules of just conduct. The L&E recommends that judges and the law itself should play a principal role in the *efficient* allocation of property rights. From the Austrian perspective, it is sound legal theory that can serve as the best tool to the legal practitioner. Sound legal theory can provide categorical distinctions and formal sets of descriptive relationships that can then be subjected to moral evaluation for action purposes. In particular, it is praxeological legal theory that supplies some of the underlying questions to which case-specific details shape answers. Legal principles guide inquiry into specifics while emerging details suggest the most relevant set of legal principles to apply.[56] In other words, action-based jurisprudence produces internally consistent formulations of the requirements of justice.

The Austrians contend that there are legal objects and laws that exist and can be studied independent of positive legal codes, so there's specific Austrian *a priori* foundations of analysis. In addition, as to the their analytical praxeological method, the Austrian school stresses the importance of *human action* approach in respect to explaining rights and obligations. Austrian school authors are concerned more with rules of social behavior, which are not the result of positive lawmaking.

Considering law as an efficiency providing mechanism, L&E analysis deliberately proceeds to a reduction of law to this economic goal and to the conviction that ethics is a just arbitrary matter and there is no room for it in legal and economic analysis.[57] Challenging the traditional legal concept of causation and then assuming, that economic efficiency remains the only adequate criterion of just law, undoubtedly leads to a final premise, that there is no justice apart from economic efficiency.[58]

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[56] K. Graf, op. cit., p. 46.

[57] E. Krecké, op. cit., p. 6.

[58] Ibidem, p. 7.

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ECHOES OF SOVIET LAW IN THE LEGAL LITERATURE OF THE SECOND REPUBLIC OF POLAND – OUTLINE OF ISSUES

World War I brought about far-reaching ideological and constitutional changes in the whole of Europe. Social revolutions, the rebirth of states, and the notions of victory and defeat felt by the nations were the springing force of these changes. With the benefit of hindsight, the phenomenon of creating totalitarian states can be perceived as a series of unusual experiments carried out on a living body. Its aim was to form new societies functioning in new legal systems. The key factor of all these transformations was the negation of the status quo that was either previous and traditional or the one long in force. The Russian Revolution of 1917 together with the formation of the Soviet system were the elements of these changes.

It can be stated that the changes in Soviet law from a comparative perspective – the law's theoretical grounds, penal and civil law, as well as constitutional order – were a fascinating issue for the lawyers of the Second Republic of Poland. The 1920s have brought about an entire stream of individual and institutional research.[1] Among the institutions, the most important was the Research Institute on Eastern Europe, whose founders (among others were Stefan Ehrenkreutz, Wiktor Sukiennicki, Stanisław Swianiewicz, Witold Staniewicz, Marian Zdziechowski) coming from the Stefan Batory University are considered the progenitors of the Polish school of Sovietology.

[1] See Kornat M., *Bolszewizm. Totalitaryzm. Rewolucja. Rosja. Początki sowietologii studiów nad systemami totalitarnymi w Polsce (1918–1939)*, Kraków 2004 and there further literature on this issue; Mohyluk M., *'Prawo radzieckie w nauce i publicystyce prawniczej II Rzeczypospolitej – stan badań i problemy badawcze'* in *Miscellanea historico-iuridica*, vol. II, Białystok 2004, pp. 67–81.

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The first typically legal publication dealing with the constitutional law of the Soviet Union during the Second Republic was I. Czuma's commentary entitled *Konstytucja Rosji Sowieckiej* from 1923.[2] The author was quite cautious while describing some of the constitutional decisions of the Soviet state. The approach he applied was, firstly, to translate the articles of the constitution and then either to quote the theorists' opinions or the founders of the Russian Republic or to cite excerpts from other states' constitutions. Therefore he quoted, among others, K. Marx, G. Jellinek, Zinoviev, Bucharin, and Lenin, as well as the laws of German, Polish, Swiss, French, or even Japanese constitutions. Having presented such an introduction, he himself tried to interpret and sometimes to confront the given problems. Although there are many oversimplifications, inaccuracies, and wrong conclusions there, the work itself was a pioneering undertaking. The author himself conceded that "bolshevism is a stage of a great process whose forms change, develop and finally lead to quite unpredictable results."[3] I. Czuma's work should be treated as the starting point of Soviet research in the Second Republic. It is worth stating that this professor from Lublin quite willingly and systematically worked on this matter during the time of the Second Republic. The interesting publications entitled *Dzisiejsza filozofia sowieckiego prawa a romantyzm prawniczy.*[4] *Filozoficzne punkty styczne zachodu z bolszewizmem*[5] (both from 1930) prove this point.

Chronologically, the next legal analysis of the Soviet legal system was Konstanty Grzybowski's work entitled *Ustrój Związku Socjalistycznych Sowieckich Republik. Doktryna i konstytucja* from 1928.[6] Not only did this professor of Jagiellonian University (Cracow) interpret the Soviet concept of state and law as a lawyer but also he also analysed it in terms of psychology and sociology.[7] K. Grzybowski made great use of Western achievements of science. Doing his research, he used the German lawyers' findings (Carl Schmitt, Max Weber just to name only a few). In the first part of his

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[2] Read more about I. Czuma in *Ignacy Czuma. Absolutyzm ustrojowy. Wybór pism* with the introduction by M. Marszał, Kraków 2003. Marszał M., 'Państwo i prawo w poglądach Ignacego Czumy' in *Wybitni prawnicy na przestrzeni wieków*, ed. by Marszał M. and Przygodzki J., Wrocław 2006.

[3] Ibid., p. 3.

[4] Czuma I., *Dzisiejsza filozofia sowieckiego prawa a romantyzm prawniczy*, Lublin 1930.

[5] Czuma I., *Filozoficzne punkty styczne zachodu z bolszewizmem*, Lublin 1930.

[6] Grzybowski K., *Ustrój Związku Socjalistycznych Sowieckich Republik. Doktryna i konstytucja*, Kraków 1929.

[7] Read more about Grzybowski K. in *Konstanty Grzybowski – myśliciel sceptyczny*, Kraków 2000; Kornat M., *Bolszewizm. Totalitaryzm...*, vol. I, pp. 353–373.

work he described the doctrinal basis of the Soviet system; in the other, he thoroughly examined Soviet constitutional law, including the constitutions of 1918 and 1923. An outstanding achievement of K. Grzybowski was the observation that the Soviet perception of the role and importance of the constitution in the state was different from the Western one. "Here, in the West, we are used to treating a constitution as a manifestation, as an embodiment of a programme, as an expression of putting ideas into practice and of enforcing them, as a stable point in a changeable social life. Here, to the contrary, there is no stable point. What exists is constant change, constant new creation.[8] As K. Grzybowski puts it, the Soviet constitution lays down the preliminary budget for the interim period to win the confrontation with the hostile world.[9] The constitution is, therefore, a response to the need of the moment, the changeable means of motivating the society, the way of getting by at the time when the world splits into two enemy camps: the capitalist and the socialist one.[10] While analysing the dictatorship of the proletariat from a legal perspective as a system doctrine, he stated that the final voice in Soviet law had class interest, and legal norms were to keep and protect this interest. That is how this subjectively-biased law was to comply with 'the revolutionary aim'.[11] That is why revolutionary conscience, which took a leading position, could ruin any hierarchy of norms to make it possible to achieve specified aims of party and state bodies. "The concept of a general norm as binding also those who put it into practice, is nonexistent in Soviet law", K. Grzybowski wrote.[12] "In this system, overruling a lower-level body decision by a higher-level body takes place as a result of the aim's and not the binding rule's discrepancy."[13] In the USSR each body had legislative, executive, and judicial powers. K. Grzybowski specified a number of features typical of and distinguishing the Soviet political system from the European and American ones in force then. These were as follows:

– the simultaneous existence of the state powers system together with one legal communist party system,

[8] Grzybowski K., *Ustrój Związku...*, p. 5.

[9] Kornat M., *Bolszewizm. Totalitaryzm...*, vol. I, pp. 358–357.

[10] Grzybowski, *Ustrój Związku...*, p. 23 and the following; *Konstanty Grzybowski – myśliciel sceptyczny*, Kraków 2000; Kornat M., *Bolszewizm. Totalitaryzm...*, vol. I, pp. 353–373.

[11] Ibid., p. 13.

[12] Ibid.

[13] Ibid.

- the Soviet system was a political manifestation of the doctrine of the proletariat dictatorship,
- the Soviet state **was not a a state of law**; objective binding legal norms that were previously published and subject to amendments only in strictly defined circumstances were not the basis of the state authority code of action. The norms of written law were, in the Soviet system, only general guidelines, "technical instructions",
- the Soviet state was a class state,
- the Soviet state did not accept the separation of powers.

K. Grzybowski's work was the first "Polish" attempt at a scientific and objective analysis of the Soviet legal system. He did not create a comprehensive synthesis of the USSR system, as he stated himself that those studies could only be an introduction to further discussion. He returned to these studies in 1947 by publishing a work entitled *Ustrój Związku Radzieckiego*.[14]

When it comes to discussing the interpretation of Soviet constitutional law, the monographs of the Vilnius scientists are definitely worth mentioning. This is due to their cognitive and scientific values and also due to their objectivity. Among them the most outstanding are W. Sukiennicki's *Ewolucja ustroju Związku Socjalistycznych Republik Radzieckich* (part I) from 1938,[15] Franciszek Ancewicz's[16] *Stalinowska koncepcja państwa*, and Wacław Komarnicki's[17] *Nowy ustrój Związku Sowietów*. These publications should be treated as the most representative of the period of the Second Republic. What do they have in common? The authors – all of them lawyers – and the time period – the time after the publication of Stalin's constitution of 1936 – which is important when we take into consideration the dynamics of the changes in the Soviet Russia from 1917 till 1939.

Wacław Komarnicki, a professor of constitutional law and civics at the University of Stefan Batory, when interpreting the Soviet constitutions paid a lot of attention to the fact that real power in the Soviet system was in the hands of a bureaucratic oligarchy. After the revolution of 1917, Russia was taken over by an "organised and armed minority, which, taking over power by force, keeps it by resorting to terror implemented by the state authority."[18] He wrote that the Soviet state, by denouncing the separation of powers and parliamentary ideas and by employing the only one political or-

[14] Grzybowski K., *Ustrój Związku Radzieckiego*, Kraków 1947.

[15] Sukiennicki W., *Ewolucja ustroju Związku Socjalistycznych Republik Radzieckich* (part 1), Wilno 1938.

[16] Ancewicz F., *Stalinowska koncepcja państwa*, Wilno 1939.

[17] Komarnicki W., *Nowy ustrój Związku Sowietów*, Wilno 1938.

[18] Komarnicki W., *Nowy ustrój...*, p. 184.

ganization, made itself the dictatorship of the proletariat, the dictatorship of the communist party. In his opinion this dictatorship was the practice of the rule of the minority over the majority. Stalin's constitution did not change the regime. The government was still the "party oligarchy". The introduction of forms of "developed democracy" was only to serve decorative and propaganda aims, and this oligarchy transformed into Stalin's single-authority government. Summing up his deliberations, W. Komarnicki called the system of government in the Soviet Russia "ideocratic oligarchy."[19] According to this Vilnius professor, "ideocratic oligarchy" was characterised by its universalist aims (namely to encompass both all future and already existing social republics) springing from the revolutionary belief in the possibility of making a 'new order', which endowed bolshevism with characteristics different from fascism and national socialism. Obviously, you can argue here with W. Komarnicki and begin to ponder the role of ideology in totalitarian systems. Was it not instrumentally used so as to control the masses (Oswald Spengler)? Was it not a replacement of religion? Or maybe it was something inherent, a kind of "spiritual" emanation of materialism? W. Komarnicki was definitely right while stating there is no point in understanding totalitarian states if this is not preceded by an understanding of their ideologies. This Polish lawyer aptly stated that that concept of communism is in direct opposition to constitutionalism because constitutionalism by nature limits state authority and such a limitation was non-existent in the USSR.[20]

These profound conclusions of W. Komarnicki are definitely worth noticing and bearing in mind. The scientist had an influence on the entire Vilnius legal profession (he was also dean of the Department of Law and Social Sciences of the USB). His student was Franciszek Ancewicz, who also reviewed the postdoctoral dissertation of Wiktor Sukiennicki. And these people were, in turn, the people who took an active part in the Vilnius Research Institute on Eastern Europe, an institution existing from 1930 to 1939, whose aim was (according to the Statute of the Higher School of this Institute) to propagate "knowledge and skills connected with the present state and the history of the land, the state structures situated between the Black and the Baltic Sea, as well as people inhabiting this land."[21]

Sukiennnicki's research aim was the wide-scale analysis of the transformation of the legal system of Soviet Russia from the October Revolution

[19] Ibid., pp. 184–185.

[20] Ibid., p. 206.

[21] Kornat M., *Polska szkoła sowietologiczna 1930–1939*, Kraków 2003, p. 610.

to the coming in force of new Stalin's constitution in 1936. In his work, W. Sukiennicki did not use archive material but, as he clearly explained in the title, based his work on the official publications of the Soviet government (which were to present not the existing reality but the "imaginary" one). He analysed the articles of Soviet laws, numerous propaganda newspapers, articles, dissertations of theorists, and the creators (direct and indirect) of the Soviet state. The legal system of Soviet Russia, in Sukiennicki's opinion, possessed a feature that had not been previously observed in other state systems, namely "the spirit of dynamics" – the ability to adjust to the constantly changing political and economic conditions of the country.[22] The USSR constitution made the union a dynamic body with no fixed, self-contained territorial boundary. The border line was open to every country so transformation into a World Soviet Socialist Republic was possible.[23] In the totalitarian state system everything remained unstable and temporary. The Soviet constitutions were to make the revolution come true, to protect its achievements. The main conclusion drawn by W. Sukiennicki in his work was the belief that the Soviet system implemented the rules of party and state bureaucracy "on behalf of the proletariat."[24] The USSR state system evolution started from the abandoning of Lenin's system of councils and went on to the limitless power of governing. The bureaucratic party-state body had in its power the means of production and decided about elections to councils on all levels. The scope of the power apparatus was not specified or limited in the constitution of 1936. Therefore, the evolution of revolution led to the creation of a system of power "isolated and independent of the masses."[25] While reading W. Sukiennicki's study, after having looked at the bibliography, careful reasoning, and objectivity, one can come to the conclusion that he is not an anticommunist publicist. W. Sukiennicki called his approach "a third way" of thinking about Soviet Russia. It was neither a compliment nor the ideological-didactic denouncement. The reality created for the sake of Soviet propaganda unveiled its secrets under the scientific eye of the Vilnius researcher. It was denounced by both the Second Republic and the People's Republic of Poland – was it pro- or anti-Soviet?

W. Sukiennicki's methodological approach was also applied by Franciszek Ancewicz in his dissertation *Stalinowska koncepcja państwa na tle*

[22] Sukiennicki W., *Ewolucja ustroju...*, p. 166.
[23] Ibid.
[24] Ibid., p. 284.
[25] Ibid., p. 103.

ewolucji ustrojowej Związku Socjalistycznych Republik Radzieckich (1939).[26] He analysed the changes in the Soviet legal system in the years 1917–1936. In this work not only did he present the evolutionary stages of the Soviet state, but he also analysed the texts from a dogmatic angle, and, what is more, often compared them to the doctrinal assumptions and to the ways of putting them in practice. F. Ancewicz acquainted Polish readers with the organizational structure of the communist party as the only ruling party and, what is more, presented the relations between the party authorities and the authorities of the state. He explained the meaning of the party's centralism, which, in turn, cast a real light on Soviet federalism and the rule of the party's bureaucracy. He described in great detail the doctrine of the making of socialism in one state (created by J. Stalin, flourishing in the USSR since 1929, and leading to the laying down of the constitution of 1936). Next, F. Ancewicz analysed the content of this constitution. Most important, however, are the conclusions that he came to. He stated that Stalin's constitution abandoned the system of councils based on the bottom-up construction of power and replaced it with the idea of a "workers and peasants socialist state."[27] At that time the Soviet creators of the socialist state used the language of parliamentary democracy but the USSR never became a democratic state because the one-party system remained in force. The communist party monopoly comprised everything – politics, social and cultural life, and the economy. That is why the USSR was undeniably a totalitarian state. The greatest achievement of F. Ancewicz's monograph was the identification and differentiation of Stalinism from Lenin's bolshevism. In this view, Stalin's system was characterised by the unlimited accumulation of power in the hands of the bureaucratic apparatus of party and state.[28] What he also noticed was the fact that at the time of Stalin's state, the role of Marxist-Leninist ideology had to give way to the "leader principle" which might have been a reference to fascism.

In the Second Republic a legal study of the **Soviet theory of law** was launched by W. Sukiennicki. In his article entitled *Marksowsko-Leninowska teoria prawa*[29] he gives quite a cursory coverage of the theoretical and legal

[26] See the reprint of the work with Czesław Miłosz's essay and F. Ancewicz' biography by R. Miknys and V. Sirutavičius – Ancewicz F., *Stalinowska koncepcja państwa na tle ewolucji ustrojowej Związku Socjalistycznych Republik Sowieckich*, Lublin 2001; Kornat M., *Polska szkoła...*, pp. 73–77.

[27] Ancewicz F., *Stalinowska koncepcja...*, pp. 19–21 (according to 2001 edition).

[28] Ibid., pp. 206–218.

[29] Sukiennicki W., *Marksowsko-Leninowska teoria prawa*, Y. VI, vol. 51, 1935, pp. 145–153 and 196–202.

concepts of P. Stuczka and E. Paszukanis. He skipped the entire stormy period of the formation of Bolshevik "revolutionary" concepts until 1922, which, in my opinion, significantly reduces their content value.

It is worth mentioning here, as if by adding to Sukiennicki's comments, that the Bolsheviks, after having taken power in 1917 in Petrograd, utterly rejected the Russian bourgeois law. They began to lay down a new Soviet one – virtually from scratch. Decree No. 1 on the organisation of common courts of December 1917 both repealed all pre-revolutionary laws and allowed the application of those which were not against revolutionary conscience and revolutionary legal awareness. Decree No. 3 of July 1918 absolutely precluded the application of pre-revolutionary law. Courts were solely to follow "the decrees of the worker-peasant government and socialist conscience."[30]

During war-time communism (1917–1921), Soviet law evolved spontaneously, with no theoretic background,[31] mainly on the basis of the decrees of the revolutionary government and the revolutionary conscience of people's judges. At first, the idea of codifying this law was rejected.[32]

It is obvious that the development of the Soviet doctrine was closely connected to the political and legal practice of revolutionary changes during the first years of the Soviet government. At first, the organisation that greatly influenced the new understanding of law was the Council of People's Commissars, gathering lawyers professing dialectical materialism. The springing point of their work was the opinions of the father of the Russian Revolution, W. I. Lenin. In fact, they were actually Lenin's interpretations of Marx and Engels's standpoints on state and law. Lenin was quite open about his aversion to law. He claimed that every state was the dictatorship of the class – it was the absolute ruler, not restricted by rules or regulations. He consciously developed Marxists' idea that state and law are the tools of class oppression. Law is the command of a sovereign; law should be the obedient servant, not the master. As a matter of fact, the lawmakers can live without law. If understood so, it comes as no surprise that the rules included in the first Soviet decrees entirely repeal the law of tsarist Russia. These decrees stressed the importance of "revolutionary conscience" as the

[30] Bosiacki A., *Utopia. Władza. Prawo. Doktryna i koncepcje prawne "bolszewickiej" Rosji 1917–1921*, Warszawa 1999, p. 163 and the following.

[31] Although K. Marx and W. I. Lenin were lawyers by education, they did not deal with the theory of law in their works devoted to economic and political issues.

[32] Lityński A., 'Historia prawa radzieckiego 1917–1991. Krótki kurs', *Miscellanea historico-iuridica*, vol. III, Białystok 2005, pp. 139–175; Sójka-Zielińska K., *Historia prawa*, Warszawa 2005, pp. 361–372; Filar M., *W służbie utopii. 73 lata radzieckiego prawa karnego*, Toruń 1992.

key feature of the judiciary and the fight for the socialist rule of law. One of Lenin's close comrades and fathers of the Soviet theory of law, P. I. Stuczka, described the binding law as the result of the revolution connected with the institutional superstructure of the society in a way that reflects the people's will. While talking about the socialist rule of law, he claimed that it should be a weapon to fight the nihilist attitudes in the law abided by the working class.

The negation of European theoretical and practical achievements by Soviet revolutionaries in the law led to the need for laying down a new theory of law, which would encompass the opinions of Engels, Lenin, and Marx in this field. It was also advisable to criticize the main bourgeois concepts of law using Marxist-Leninist dialectics as well as to recommend further ways of developing the Soviet study of the state and law. In 1919 Stuczka wrote that Soviet law would evolve in two stages: during the transitional period i.e. the state of the proletariat dictatorship, and during the state of the socialist society.[33] During the former a "special law" is in force as "the system itself does not transform in one moment because the previous order is ingrained in people's beliefs as the tradition of the past." Stuczka also proffered the drafting of a **Proletarian Law Code** consisting of the following parts: the Soviet constitution, civic rights and duties, social rights (family and labour law, property rights), the law of contract, and international law. It is clear that, contrary to Lenin's predictions, law was becoming an indispensable element of the Soviet state. Although this law's form and substance were distorted, at least it existed; it was at the government's service, reduced to the revolutionary conscience and people's courts, but, nevertheless, it existed. Soviet lawyers debated over it, came up with theoretical concepts, looked for its essence.

Yet, in the aforementioned article, Sukiennicki wrote that at the end of war-time communism (in 1922) and with the introduction of the New Economic Policy[34] a revival of economic life came into being and the publication of numerous codices took place; Soviet lawyers begun a serious debate on theoretical legal constructs adjusted to and stemming from the Soviet socio-political system. By doing this, the objective need of the existence of

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[33] Sylwestrzak A., 'P. I. Stuczka i jego miejsce w radzieckiej nauce prawa', *Zeszyty Naukowe Wydziału Prawa i Administracji Uniwersytetu Gdańskiego* No. 7, Gdańsk 1978, pp. 5–19.

[34] Translator's comment: "A policy allowing small ventures reopen for private profit, while keeping large industries, foreign trade and banks under control of state." Ellis E. G., Esler A., *"Revolution and Civil War in Russia". World History. The Modern Era*, Boston 2007, pp. 483.

a new type of legal system in the state was acknowledged.[35] According to W. Sukiennicki "the majority of authors writing in the USSR at that time was inclined to follow the most modern legal theories of Petrażycki (Rejsner, Engel, Iliński) or Duguit (Gojbarch, Woltson and others) in their works." However, these theories were denounced by theorists of the state and the law at the First All-Union Congress of Marxists in Moscow in 1931. It was agreed that L. Petrażycki's psychological theory would lead to subjective idealism, and L. Duguit's theory based on social solidarity ran contrary to the Marxist idea of class struggle. Only the works of two Soviet lawyers, P. Stuczka and E. Paszukanis, were in the mainstream of the general guidelines of Marxism-Leninism's philosophical view i.e. historical materialism, as the participants of the Congress concluded. Therefore, according to P. Stuczka, law is "the form of social relations i.e. the mode of production and of exchange that is in line with the benefit of the ruling class and that is protected by its organised authority."[36] According to E. Paszukanis, in turn, not all general social relations, the entire system or the organisation of social relations, constitute law, only selected, specified social relations existing in capitalist society between certain owners of commodities for exchange.[37] The aforementioned social relations lose their economic grounds and take on an ideologically concealed legal form. The owners of commodities appear here as "authorised entities", their contractors as "liable parties", and the relation of the exchange of commodities is a "legal relation". In a socialist society, without a free market, competition, or opposing legal interest, the entire legal ideology will vanish, all abstract constructs of legal norms and relations will disappear. Ideally, in the new classless socialist society, the validity of all legal norms will expire and the ones that will remain in force will be the purposive and technical rules and norms resulting from the conscious planning of the future. Irrespective of the content evaluation of Sukiennicki's work, it could be stated that he was right while claiming that in P. Stuczka's and E. Paszukanis' perspectives the domain of law was reduced to private law, or to put it more precisely, civil law. 'Stuczka, just like Paszukanis,' as

[35] Sukiennicki W., 'Marksowsko-leninowska teoria prawa' in *Polska szkoła sowietologiczna (1930–1939)* ed. by Kornat M., Kraków 2003. pp. 289–290.

[36] Ibid., pp. 296–297; Sylwestrzak, *'P. I. Stuczka i jego miejsce...'*, pp. 5–19.

[37] Sukiennicki W., 'Marksowsko-leninowska...', pp. 298–302. See also Paszukanis J. B., *Ogólna teoria prawa a marksizm*, Warszawa 1985 with the introduction of Kowalski J.; Walicki A., *Marksizm i skok do królestwa wolności*, Warszawa 1996, pp. 335–341; Staśkiewicz W., 'Koncepcja prawa J. B. Paszukanisa – dylematy teorii i praktyki', *Państwo i Prawo*, vol. 8, Warszawa 1982, pp. 41–53; Kozak A., 'Poglądy Jewgienija B. Paszukanisa na istotę prawa' in *Acta Universitatis Wratislaviensis* No. 983, *Przegląd Prawa i Administracji*, XXIV, Wrocław 1988, pp. 4–17.

Sukiennicki put it 'stress the special meaning of private law, as law that is so well-developed that it could give directions to all other branches of legal sciences.'[38]

One man who greatly helped to understand Soviet **law theory** was a lawyer, an expert on and negotiator of international treaties, a participant in the unification work in the League of Nations and in the Hague Academy of International Law, a judge of the Permanent Court of Arbitration in Hague, Szymon Rundstein. He published many works, among which the dissertations *Zasady teorii prawa* (1924) and *W poszukiwaniu prawa cywilnego* (1939)[39] were probably the most famous ones.

Particularly interesting and inspiring are the thoughts of Rundstein in the work *W poszukiwaniu...* on the theory of law in fascist countries such as Germany, Italy, and Soviet Russia. This is where he presents some similarities and differences between them, although the historical background is different. As the title of the dissertation suggests, the issue was not finally concluded. He commenced his work by recalling the theoretical and legal ideas of Carl Schmitt (*O pojęciu polityczności*) in which politics and law were granted equal rights, where the total state has no apolitical sphere of social interaction. Rundstein criticised these ideas and stated that the concept of law is constant and unchangeable, irrespective of the equilibrium or fluctuation of the social arrangement.[40] The tendency of isolation and independence of the concept of law are particularly visible during the former state, which in turn leads to the notion that this arrangement, due to its existence and stability, embodies this abstract concept in the best possible way. The loss of balance in this arrangement, according to Rundstein, in fact does not affect the concept of law, even though it can be replaced by approaches adopting the idea of power and the scheme of technical purpose. "Revolutionary risings are times of contempt for law," as Rundstein puts it, "warning comes because the concept of law has the feature of influencing the social psyche as it aims to stabilize the new arrangement (it is hard to get by in the heat of the upheaval)." Ironically, it was the "glorious revo-

[38] W. Sukiennicki, *Marksowsko-leninowska...*, p. 303.

[39] Sz. Rundstein was the author, among others, *Szkód wojennych a międzynarodowego prawo narodów* (1916); *Wykładni prawa i orzecznictwa* (1916); *Rejestracji traktatów* (1923); *Ćwiczeń praktycznych z prawa międzynarodowego* (1929). His most well known works in German are *Das Recht der Kartelle* (1904); *Die Tarifverträge im französischen Privatrecht* (1905) as part I and *Die Tarifverträge und die Moderne Rechtwissenschaften* (1906) as part II; and the most popular in French are *Arbitrage international en matière privée* (1928); *La justice international* (1929) *La cour permanante comme instance de recours* (1933). See more on Sz. Rundstein in Mohyluk M., 'Szymon Rundstein o prawie radzieckim', in *Miscellanea historico-iuridica*, vol. VI, Białystok 2008, pp. 67–77.

[40] *W poszukiwaniu..*, p. 28 and the following.

lutions that went back on this idea and voiced their demand to return to the independence of the concept of law,"[41] as if forgetting about the exclusive importance of the political function of law. Such a U-turn was visible particularly in Soviet Russia, as Rundstein noted. E. Paszukanis' doctrine, P. Stuczka's idea of the "independence of law sectors", and the theory of economic law, which were to replace the outdated study of civil law to fulfil preplanned and technical goals, at the end of the 1930s were treated as sabotage, anachronism, and a misunderstanding of Marx and Lenin's doctrines. Rundstein makes the point that current Soviet "official" theory of law states that the denial of the existence of independent functions of private law aiming at the protection of individual interests is just counter-revolutionary heresy. As a result, at the end of the 1930s, Soviet doctrine acknowledged the independence of the concept of law from politics, and, what is the most striking point of Rundstein's thoughts, "the Soviet formula is reflected in the national-socialist doctrine." The only exceptions are that instead of "the ruling class" there are "German people" and that what is beneficial for the nation is the law. Instead of the axiom of law as a function of politics, there is a comeback to the statement that it is politics that is the function of law because only the concept of law can give rise to a true revolution (with the belief that the concept of law excludes violence).[42]

Rundstein claims that the Soviet experience is a comeback to the pre-revolutionary civil law. Civil law ideas, although suppressed, distorted, and transformed, have come to power and this is the rule of reality. In the light of revolutionary theories, the essence of law is identical with the social substance – life itself, which either instinctively or on purpose arranges the relation in terms of duty to sanction. Society cannot be fully understood without the legal aspect. In the Soviet state, the independence of this idea was restored. The general concept of law was formulated by Lenin and was as follows: law is the application of even judgment to things which are not identical in reality. If justice is to be the ultimate test, it needs to eliminate inequalities. The Soviet theory claimed that social civil law was (contrary to bourgeois law) the embodiment of legal justice. Socialist law was to be a tool to eliminate the greatest social injustice – the exploitation of man by man.[43]

[41] Ibid., pp. 30–31.
[42] Ibid., p. 32.
[43] Ibid., pp. 45–47.

All in all, the Warsaw lawyer deprived totalitarian states of any values. "Historical experience teaches," as he wrote, "that each totalitarianism making an individual a very small cog in a machine leads to atomization. And from there [...] there is only one small step to the deep corruption of state life. Where "silence reverberates" – justice just shuns away there."[44]

Rundstein's deliberations concerning Soviet law are interesting mainly due to their comparative nature. They are rooted in and based on the deep philosophical and legal knowledge of the author. Sz. Rundstein draws controversial conclusions on the basis of his broad knowledge of legal doctrine of fascist Italy, Germany, and Soviet legal thinking. His view is scientific and objective. Rundstein's logical explanations represent a valuable contribution to the ongoing debate on totalitarianisms. His opinion of the fixed concept of law, its existence irrespective of the fluctuations of the "arrangements", and attempts to wither its essence, is one definitely worth noting. The fixed notion of law contrasted with totalitarian reality endures appalling ordeals. You can be absolutely sure that in these systems law is at politics' service, that law is politics' function. Rundstein, however, undermined this idea. And although it is difficult to accept Rundstein's idea of the revival of a pre-revolutionary understanding of civil law in the USSR in terms of the independent existence of fixed civil law concepts, it should be stated that, having observed the further course of Soviet law, its evolution (including penal and constitutional law) was, and probably still is, going this way.

Juliusz Makarewicz[45] and Rafał Lemkin[46] have familiarized us with Soviet **penal law**. These authors published the most extensive and most valuable in terms of content, in my opinion, works i.e. *Kodeks karny republik sowieckich*[47] and *Kodeks karny Rosji Sowieckiej 1927*.[48] It should be immediately stated that these publications concerned only the substantiative law (legislation) of 1917–1927 of Soviet penal law, and their deliberations were limited by the specific period and the penal matter.

Having analysed Makarewicz and Lemkin's opinions on Soviet penal law during the interwar period, one could sum up that they were highly criti-

[44] Ibid., p. 83.

[45] The co-author of the Polish penal code of 1932 is known in Europe as the author of *Einführung in die Philosophe des Straftrechts auf Entwicklungsgeschichlichche Grundwag*, Stuttgart 1906.

[46] Known among world scientists as the man who coined the term *genocide* and the author of *The Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington 1944.

[47] Makarewicz J., *Kodeks karny republik sowieckich*, Warszawa 1926.

[48] Lemkin R., *Kodeks karny Rosji Sowieckiej 1927*, Warszawa 1928.

cal. The introduction to the Soviet penal code from 1922 and 1927 easily proves it. J. Makarewicz's views on penal law constitute a great contribution to legal science. He was a representative of the sociological approach.[49] This criminal law expert from Lviv was widely acclaimed as one of the best representatives of this school. "Penal code," he wrote "is the corpus of laws and regulations in force in a given social group which specifies the administration of punishment (or other types of social response) on the authors of the punishable acts."[50] The starting point for deliberations on penal law is always a certain social group and its interests. A legal act is a photographic negative of this group "clearly depicting for the historian or the sociologist the state of current civilisation, social architecture, the needs and ideals of a given society."[51] The penal law concept created by J. Makarewicz was based on a coherent scientific system, applying the legal-comparative method and referring to the "modern philosophy of law" aiming at finding the desired ideal in law. J. Makarewicz was remarkably consistent in expressing his point of view. He called the Soviet penal code of 1927 the code of measures protecting society against the criminal because punishment was replaced there by social protective measures.

J. Makarewicz and R. Lemkin's typically juristic works were the first elaborations of Soviet penal law in Polish legal science. They can be perceived as the forerunners of studies on Soviet penal substantiative law. The introduction to the penal code of 1922 and of 1927 followed the principles of scientific presentation of the law's rules and each code provision.

The most extensive work on **civil law** in Soviet Russia was *Kodeks cywilny Rosji sowieckiej z 11 listopada 1922 r.* written by Kazimierz Przybyłowski – a civil law expert, a professor of the Jan Kazimierz University in Lviv.[52] It contained similar ideas to the ones presented in the lecture given in Polish Legal Society in Lviv on 24 June and 4 July 1924 and then published in "Przegląd Prawa i Administracji" (1925).

The author analyzed this code quite thoroughly, often referring to a German lawyer's work, Heinrich Freund, and his book *Das Zivilrecht Sovietruslands* (1920, ex. 1924) as well as B. Nolde's article *Le Code civil de la Republices de Soviets* (1923). While characterising the "pre-code" stage

[49] Wąsowicz M., *Nurt socjologiczny w polskiej myśli prawnokarnej*, Warszawa 1989, pp. 79–95.

[50] Makarewicz M., *Prawo karne. Wykład porównawczy*, Lwów–Warszawa 1924, p. 1.

[51] Ibid.

[52] *Przegląd Prawa i Administracji*, vol. 50, 1925, pp. 1–31. See also Kornat M., *Bolszewizm. Totalitaryzm...*, vol. II, pp. 114–115.

K. Przybyłowski listed, just like H. Freund had, two periods in the era of Soviet law. The first, 1917–1921, when the destructive moment was the key factor, when the law order of the 'ancien regime' was destroyed, when numerous references to revolutionary conscience and to legal awareness were made, when people lived in a state of legal insecurity, and when individual freedom was only an illusion. At this time an individual with its rights ceased to exist for the state, K. Przybyłowski wrote. He aptly characterised this period by writing that "bolshevism with full brutal force implemented the rule that an individual is in the service of state" (and not the liberal state in the service of an individual), and that a citizen is allowed to do whatever is clearly specified.[53] The other period, after 1921, was called the realism period, when a partial return to a capitalist economy, as well as a tendency to formalise legal order is visible. He also called this period the period of "state capitalism."[54] The Soviet civil code was then a compromise between the communist rules and the needs posed by life. According to Gojchbarg, quoted by K. Przybyłowski, they tried both to strike a balance between two types of ownership: the communist and the bourgeois, and to protect the public interest against the private one.

Leopold Caro, one of the best experts on bolshevism in the Polish Second Republic, in the article *Idee przewodnie ustawodawstwa sowieckiego*[55] devoted much attention to Soviet civil law. In his work he mainly focused on an analysis of the content of Article 1 of the civil code of November 1922.[56] He rejected the idea that this Article is based on the ideas of the famous French lawyer, L. Duguit, who professed that law plays a social role. According to L. Duguit, the law's role is not to protect the individual's rights but to make it possible for all citizens to fulfil their social duties in the service of the state. Property, in the light of his opinions, is closely and constantly connected with the duty of being kept for the benefit of the society. Public (social) interest, which was presented in this Article as the source of ultimate law, was, as L. Caro claimed, a vague concept because "what was the exact benefit of the society was hard to establish and the door to lawlessness was wide ajar." He was right then when he noticed that the social targets in the Soviet state are in "such a state of fluctuation" that is nowhere else to be found. During war-time communism social targets

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53 Przybyłowski K., *Kodeks cywilny...*, p. 1.

54 Ibid.

55 *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, year IX, 1929, pp. 205–223.

56 "Private rights are legally protected with the exception of these situations when their realisation would be against their socioeconomic goal."

were different from i.e. the ones during the NEP era. Unsurprisingly, legal security was hard to establish in such conditions because i.e. all contracts, licenses and rights granted to foreign entrepreneurs could be, according to this rule, annulled.

Having even cursorily analysed the achievements of Polish Second Republic commentators on the Soviet law (over 100 publications including monographs and articles), one can decidedly state that these works are remarkably diverse, profound and extremely valuable in terms of content-related matters.

A kind of evolution was visible here – from non-institutionalised publications, independent and cautious, to institution-driven studies (Vilnius Research Institute on Eastern Europe).

The scope of interest of these works was relatively wide, as it concerned law theory, constitutional law, penal law, and civil law. Their detailed study within the following categories would be beneficial:

- the lawyers dealing with Soviet law, by their schools, by their views (including political ones), by their achievements and objectivity,
- the depth of the survey, including the sources that were used, the independence and the innovativeness,
- the input into Sovietology or, if it is possible, to call the achievement a contribution to Sovietology.

Having said all this, it is stated that the analysis carried out in this field was done by distinguished Polish lawyers who, in great part, were widely recognised in the international arena. Sometimes their interpretations were irrelevant, skin-deep, but sometimes they were valuable, accurate and original. Probably these discrepancies stemmed from the fact that Soviet law was described *in statu nascendi*, at the moment of transformation, from a very special perspective. Unfortunately, due to the fact that these works have not been translated yet, they are unavailable to the wider circle of people interested in Soviet law and its interpretations. The achievements of Polish lawyers have made, in my opinion, a still underestimated yet immense contribution to the accomplishments of world Sovietology.

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