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35-959 Rzeszów, ul. prof. S. Pigonia 6, tel. 17 872 13 69, tel./faks 17 872 14 26
e-mail: wydaw@ur.edu.pl; http://wydawnictwo.ur.edu.pl
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Agata Barczewska-Dziobek

University of Rzeszow
ORCID: 0000-0002-7514-9219

INFLUENCE OF THE PRINCIPLE OF PARTNERSHIP ON CHANGES IN THE OPERATION OF PUBLIC ADMINISTRATION BODIES

Introduction

It is unquestionable that the shape of law, and consequently the way a state and its administration operate, is inevitably affected by axiological factors determining the current catalogue of values adopted by the legislator and other entities applying law. Factors of axiological nature (here including those which lead to changes in the catalogue of values and emergence of new values), as well as factors of political nature (such as political and economic doctrines, general world views) in theory are recognised among the most important determinants of public administration, regarding it structural system, as well as ways and methods of operation[1]. Research in public administration, from the viewpoint of its general system or its fragment, suggests there may be tendencies for changes in administration, initiated by axiological factors. In fact, although it is mostly representatives of philosophy, legal theory and jurisprudence[2] that focus on issues related to legislator's axiological system, this subject matter is also of interest to sciences of administrative law precisely because these issues cannot be separated[3].

[1] This was discussed e.g. by: J. Łukasiewicz, *Zarys nauki administracji*, Warszawa 2005; H. Izdebski, *Fundamenty współczesnych państw*, Warszawa 2007; Z. Leoński, *Nauka administracji*, Warszawa 2010; Z. Cieślak, *Nauka administracji*, Warszawa 2012.

[2] T. Czeżowski, *Czym są wartości* [in:] T. Czeżowski, *Filozofia na rozdrożu*, Warszawa 1965; *idem*, *O przedmiocie aksjologii* [in:] T. Czeżowski, *Pisma z etyki i teorii wartości*, ed. P.J. Smoczyński, Wrocław 1989, as well as M. Kordela, *Wstęp metodologiczny do wykładni aksjologicznej* [in:] *Wielowymiarowość prawa*, eds. J. Czapska, M. Dudek, M. Stępień, Toruń 2014.

[3] J. Zimmermann, *Aksjomaty w prawie administracyjnym*, Warszawa 2013, as well as *Antywartości w prawie administracyjnym*, ed. A. Błaś, Warszawa 2016.

Such factors, significantly determining changes, may include the vision, currently applying to operation of administration, and favouring implementation of specific values which have been defined in a normative form in the principles of the state's system and the principles of law pertaining to public administration. The catalogue of such principles and the related values is reflected by the provisions of the current Constitution as well as legal norms contained in ordinary legislation, and particularly in constitutional, material and procedural administrative law. Examples of the above include the principle of common good[4] and the principle of democratic state ruled by law[5] as well as the related principle of the rule of law in administrative operations[6], and the principle of increasing citizens' trust in the State bodies[7], and other[8]. The catalogue of values and principles, stipulated in the basic legal acts, is affected by the values and principles derived from legal acts originating outside the internal system. Hence the legislator's axiological catalogue is subject to change; this can be observed in many areas of administrative law, significantly affected by the laws of the European Union which are implemented domestically and transfer values shared by the whole Community or recognised as important at a given stage of its development.

One of the affected domains is the area of the performance of authority. The changes emerging in this sphere are associated with concepts originating from outside of the internal order, i.e. the idea of *good governance*, or the theory of deliberative governance. These focus on issues related to creating a new model and innovative mechanisms in the operation of administration which is to give up bureaucratic methods and replace these with participatory methods.

Obviously, the change will not be achieved as long as the values defined in the concepts are not adopted in the legal norms pertaining to administration. The latter are transformed in such a way that amended administrative laws gradually incorporate changes resulting from specific regulations adopted at the level of EU law.

One of the manifestations of this transformation is linked with the newly emerging forms of cooperation between administration and its environment, resulting from the new principle adopted by administration – the principle of partnership. The purpose of the current study is to identify the basis for the

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[4] Constitution of the Republic of Poland of 2 April 1997, Dz.U. 1997, No. 78, Item 483 as amended, Art. 1.

[5] *Ibidem*, Art. 2.

[6] *Ibidem*, Art. 7.

[7] Act of 14 June 1960 – Code of Administrative Procedure, uniform text: Dz.U. 2018, Item 2096, Art. 8.

[8] This is discussed by authors of university textbooks in administrative law; a review and classification of theoretical principles in administrative law can be found in the monograph: by *Prawo administracyjne, pojęcia, instytucje, zasady w teorii i orzecznictwie*, ed. M. Stahl, Warszawa 2000, p. 83–133.

change which took place following the adoption of the principle of partnership in the EU legal framework. The change is realised in the frames of development policy designated for implementation by units of territorial government.

Partnership as a substrate of the principle of partnership

The term "partnership" in the above narrow sense is a concept which has not been defined in the literature related to administrative law. The reason for this may lie in the very essence of administrative law, as a branch of public law, which stipulates that its legal relations are based on inequality of the parties. One of the parties is an organ of the state, which is superior to the other party, a citizen or another entity subject to administration. The relationship itself is one-sided, resulting from the power of authority, and the right to make unilateral decisions regarding the contents of the relationship[9].

Notwithstanding, a concept of public-private partnership is known in norms of administrative law. Its normative definition is determined by the regulations about public-private partnership[10]. However, the term is reserved for specific relationships and cannot be generalised.

Therefore, the concept of partnership should be defined by reference to the etymology of the word, which is consistent with the general principles for identifying the meaning of specific terms based on the rules of linguistic interpretation.

Encyclopaedia Britannica, in a general sense, defines partnership as: "voluntary association of two or more persons for the purpose of managing a business enterprise and sharing its profits or losses". In a narrower definition, adequate in the context of governance, partnership means: "governance politics and power patterns of rule or practices of governing"[11]. According to Polish Language Dictionary, *partnerstwo* (partnership) means "współuczestniczenie w czymś" (joint involvement in something), including equal treatment of each

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[9] R. Hauser, *Stosunek administracyjnoprawny* [in:] *System prawa administracyjnego*, vol. 1: *Instytucje prawa administracyjnego*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2010, p. 195–198.

[10] The definition is comprised in Act of 19 December 2008 on public-private partnership, uniform text: Dz.U. 2017.1834 as amended, Art. 1, clause 2. In accordance with the currently valid definition, public-private partnership is understood as joint implementation of a project based on division of tasks and risks between the public entity and the private partner. Notably, the earlier version of the act, i.e. Act of 28 July 2005 on public-private partnership, also introduced a concept of this type of partnership, but adopted a different definition. The change was related to a narrower catalogue of private partner entities and different specification of its object. More in: N. Leśniak-Niedbalec, *Prawna definicja partnerstwa publiczno-prywatnego w Polsce*, „Rocznik Lubuski" 2017, vol. 43, part 2, p. 191–201.

[11] http://www.britannica.com/search?query=partnership.

other[12]. This shows that if the concept of partnership, based on this type of definition of partnership, is considered in the context of administrative law, the conventional way of accounting for the relationships between bodies of public administration and citizens or other clients would have to change. This change is noticeable in connection with the fact that administrative law is infused with civil law whose consensual forms are transferred to regulations related to legal forms of administrative operations. The phenomenon is seen as highly controversial, and there are opinions claiming that it adversely affects the inherent nature of administrative law[13].

The principle of partnership, which in this study is analysed in detail, comprises an assumption that a partnership is constructed in such a way that both parties to relationships implemented based on administrative law are on equal footing, and the relationship itself assumes elimination of power.

Partnership, defined jointly with norms setting forth the principle of partnership, is an example of a situation where relations between public administration and other entities are based on the concept of cooperation. The relations may take different forms and be implemented at various levels of territorial jurisdiction of administrative bodies, including the level of territorial government units.

Subjective and objective substrate of partnership is to be identified in the regulations of the European Union related to development and implementation of cohesion policy. Starting from 1988, when subsequent regulations related to the way Structural Funds were to be implemented were introduced under Community legislation, the principle of partnership was defined as the principle of operation; this was followed with definitions of the concept of "partnership" itself[14].

In accordance with Council Regulation (EC) No. 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds partnership was understood as "joint pursuit of goals through close coordination between the Commission and a member state as well as with regional and local bodies and institutions – economic and social partners on the basis of equality and full respect for the separateness of the partners"[15]. Notably, an obligation was introduced for the member states to organise partnerships, which in accordance with the applicable laws and practice should engage relevant regional, local and municipal authorities and other public authorities; business and socials partners and other relevant

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[12] http://sjp.pl/partnerstwo oraz http://sjp.pwn.pl/sjp/partnerstwo;257079.

[13] J. Jagielski, P. Gołaszewski, *Kryzys prawa administracyjnego a zmiana jego paradygmatu* [in:] *Jakość prawa administracyjnego*, eds. D.R. Kijowski, A. Miruć, A. Sływawko-Karetko, Warszawa 2012, p. 27–44. See also: K. Chochowski, *Kryzys prawa administracyjnego w administracji publicznej – rzeczywistość czy fikcja?* [in:] *Wypieranie prawa administracyjnego przez prawo cywilne*, eds. A. Doliwa, S. Prutis, Warszawa 2012, p. 58–75.

[14] A. Barczewska-Dziobek, *Partnerstwo publiczno-społeczne jako zasada w prawie administracyjnym*, Rzeszów 2019, p. 152 et seq.

[15] OJ L 161 from 26.6.1999, p.1, Art. 8.

partners representing the civil society, partners involved in issues related to the natural environment, non-governmental organisations and entities responsible for supporting equal rights of men and women[16].

Successively adopted regulations set out the obligation for the member states to implement the principle of partnership and to organise partnerships if they were planning to implement development projects co-financed by European Social Fund (ESF), European Regional Development Fund (ERDF), Cohesion Fund (CF), and European Agricultural Fund for Rural Development (EAFRD)[17], which was to reflect the assumption that the form of partnership and cooperation conducted in its framework can improve effectiveness of operations and is a tool for using financial resources in compliance with adequately identified public needs. Such assumption was reflected in a report developed by a working group of EU Member States on Partnership, according to which: "partnership is based on the experience that multi-dimensional problems can only be successfully tackled when organisations, with profiles and competencies that complement and reinforce each other, co-operate actively by developing synergies, and by sharing visions and objectives, opportunities, risks, commitments and tasks, competences and resources"[18].

The currently recognised subjective and objective scope of partnership is in line with the priority of inclusive growth defined by Europe 2020 Strategy[19]. According to this approach partnership contributes to implementation of social inclusion, which is understood as cooperation of public authorities with social partners in programming, implementation and evaluation of all aspects of cohesion policy[20]. By adopting the principle of partnership expressed in such a way, it is possible to intensify the mechanisms of cooperation, particularly in the form of consultations, and to develop new cooperation models that realise social inclusion.

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[16] D. Kucharski, *Diagnoza regulacji i realizacji zasady partnerstwa w Polsce i krajach UE*, Warszawa 2014, p. 17.

[17] Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999, OJ L 210/12 from 31.7.2006; Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ L 210/25; Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999, OJ L 210/12 from 31.7.2006; Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), OJ L 277/2005.

[18] *The principle of Partnership in the new ESF programmes (2007–2013)*, http://ec.europa.eu/employment_social/equal_consolidated/data/document/200606-reflection-note-partner_pl.pdf, p. 4.

[19] *Europe 2020: A strategy for smart, sustainable and inclusive growth*, Brussels 2010, p. 5, http://ec.europa.eu/eu2020/pdf/1_PL_ACT_part1_v1.pdf.

[20] The concept of social inclusion is discussed by M. Tusińska, *Włączenie społeczne w krajach Unii europejskiej – refleksja na półmetku realizacja Strategii Europa 2020*, „Nierówności Społeczne a Wzrost Gospodarczy" 2016, no. 47(3), p. 217–226.

The principle of partnership in EU and domestic regulations, and its impact

The objective scope of measures associated with implementation of the principle of partnership includes public administration related matters subject to regulations pertaining to development policies. In connection with the fact that the EU adopted the model of partnership-based cooperation promoting social inclusion, Polish legislation also introduces the mechanisms of partnership to be applied in planning and implementation of development policies; this is reflected in the provisions set forth in Act of 6 December 2006 on the rules of supporting regional development[21] and Act of 11 July 2014 on the principles of implementation of the cohesion policy programmes, financed under the 2014–2020 financial perspective[22] (referred to as "implementation act").

The legal norms set forth in the above acts specify obligations in accordance with which bodies of public administration are required to implement the model objectives and methods for conducting development policy complying with the EU cohesion policy. The model stipulates the principle of equivalence in cooperation between public authorities and other entities, and the principle of the indisputable entitlement of the latter to make efforts for socially useful purposes[23]. Furthermore, the model envisages collaboration in the processes of designing development policies and programmes (regional, operational), their implementation (e.g. using funds from the EU budget) and their supervision (monitoring).

As it was pointed out earlier, there is greater emphasis to mechanisms of cooperation in the form of consultations. Pursuant to the regulations of the provisions on the principles for supporting regional development, mandatory consultations and discussions are carried out in connection to drafts of the following:

- partnership agreement which sets forth terms, and conditions, goals and purposes for allocating funds originating from the European Union budget, and which is prepared jointly with social partners and business partners, and approved by the European Commission[24],
- the country's long-term and medium-term development strategy[25],
- regional development strategy[26],
- operational programmes and development programmes[27].

[21] Uniform text: Dz.U. 2019, Item 1295.

[22] Uniform text: Dz.U. 2018, Item 1431.

[23] A. Barczewska-Dziobek, *Zasada partnerstwa w relacjach administracji z obywatelami. Zarys problematyki* [in:] *Zastosowanie idei governance w prawie administracyjnym*, ed. I. Niżnik-Dobosz, Warszawa 2014, p. 108–109.

[24] Uniform text: Dz.U. 2019, Item 1295, Art. 5, clause 9a in connection to Art. 6 and 14e.

[25] *Ibidem*, Art. 9–21a.

[26] *Ibidem*, Art. 14, 14a, 14b, 14ba, 14c.

[27] *Ibidem*, Art. 19a.

The mechanism for implementing the adopted strategies and programmes is defined by the provisions of the implementation act in accordance with which the said mechanism is based on a system of entities referred to as implementing and monitoring institutions. Partnership based cooperation of the relevant organs during implementation processes involves ongoing monitoring by the so-called monitoring committees. These are collegial bodies with competences defined in the Act and comprising representatives of public administration bodies and social partners. Pursuant to these detailed regulations, social partners represented in the committees include:

– trade unions and employer organisations, in compliance with the Act of 24 July 2015 on Social Dialogue Council; they are represented in the Social Dialogue Council (in the case of national operational program) or in Regional Social Dialogue Councils (in the case of regional operational program),
– General Council for Science and Higher Education or Conference of Rectors of Polish Academic Schools,
– non-governmental organisations selected in a procedure carried out by the Council for Public Benefit Operations (in the case of national operational program) or by Regional Council for Public Benefit Operations (in the case of regional operational program) whose activity is based on Act of 24 April 2003 on public benefit operations and voluntary work[28].

Partnership, which by its essence involves cooperation of individuals representing various entities in a body performing advisory and consultative functions, is related to engagement of various bodies and entities in works carried out by one entity seeking to jointly achieve the goal defined as the task of a committee[29].

From the viewpoint of these considerations, initially the most important legal act implementing the principle of partnership and introducing specifically defined partnership-based cooperation was the Act of 7 March 2007 on supporting rural development through co-financing by the European Agricultural Fund for Rural Development[30]. It was changed during the subsequent planning period, and today is in force under a new name: Act of 20 February 2015 on supporting

[28] Uniform text: Dz.U. 2018, Item 1431, Art. 14.

[29] Tasks are defined for monitoring committees in acts establishing the said committees. Monitoring committee for national operational program is established by a decree of the managing authority while a monitoring committee for a regional program is established by a resolution. For example, the Monitoring Committee for National Operational Program – Knowledge, Education Development (OP KED) was appointed by the Minister of Investment and Economic Development acting as the managing authority. The committee's tasks include a systematic review of program implementation, with a focus to achievement of objectives, analysis of issues affecting program implementation, review and evaluation of changes in the program, presentation of comments on the implementation and evaluation of OP KED, as well as monitoring of follow-up actions and promotion of the principle of partnership, https://www.power.gov.pl/strony/o-programie/instytucje/komitet-monitorujacy/.

[30] Dz.U. 2007, No. 64, Item 427 as amended.

rural development through co-financing by the European Agricultural Fund for Rural Development during 2014–2020[31]. Passed at the same time, the Act of 20 February 2015 on local development through engagement of local community[32] was intended to implement provisions of Regulation (EU) No. 1305/2013 of the European Parliament and of the Council of 17 December on support for rural development by the EAFRD[33].

The issue of implementing the principle of partnership and its essential aspect, i.e. social inclusion, is approached by the two regulations in a specific way. These are partnerships established at a local level, and involving local government bodies: municipalities and poviats; these work jointly with other social partners including representatives of the local community seeking to carry out tasks related to local development.

As for its legal form defined by the aforementioned acts, a partnership is a public-social corporation, an association known as a local action group. It has a fixed structure, and a management board established based on a parity taking into account involvement of all the engaged partners. Its operations are based on a strategy defining its goals and methods of achieving these. Its activity is financed from the association's own budget and the operations designed to implement the local development strategy may be subsidised[34].

This type of association, i.e. a local action group, implements the model assumptions adopted in the European Union since 1991, the so-called LEADER method[35], which was based on the principles of territoriality, grassroots initiatives, integrity of approach and partnership, decentralization of management, innovation and networking.

Territoriality means that a strategy is developed and implemented for a given area (cohesive and inhabited by a population in the range from 5,000 to 150,000). Grassroot initiatives – it is the local population that decides on what is to be done and how, through their involvement in designing the local development policy and operations of the local action group. The third principle is related to the integrity of the approach and comprehensive understanding of issues relevant for a particular area, i.e. the determinants, resources, limitations, chances and opportunities. It is also associated with engaging various groups of stakeholders. The fourth principle, i.e. partnership, means that a local action group is created on equal terms by three categories of partners: public,

[31] Uniform text: Dz.U. 2018, Item 627.

[32] Uniform text: Dz.U. 2019, Item 1167.

[33] OJ L 347 from 20.12.2013, p. 487 as amended.

[34] B. Przywora, *Lokalne grupy działania jako nowa forma współdziałania jednostek samorządu terytorialnego* [in:] *Formy współdziałania jednostek samorządu terytorialnego*, ed. B. Dolnicki, Warszawa 2012, p. 99–110.

[35] http://www.fundusze-strukturalne.pl/leader.html.

private and social. The first category mainly includes municipalities, and sometimes poviat government. The second category of entities comprises local entrepreneurs and natural persons, and the third one includes local organisations, e.g. associations and foundations whose statutory goals are linked to local issues. The principle of partnership determines a necessity to open to new members of the local action group. The principle of self-management at the local level is related to the fact that the local action group is independent from other entities, in particular administration bodies of the local government unit which is part of it. Finally, the principle of innovation means that the Leader method is a way to look for new, innovative solutions for problems faced by the local community in a specific territory – the so-called innovativeness in a given place and time. These were supplemented with a principle adopted by LEADER program whereby national and international networks of local action groups are to be established in order to share good practices, to learn and to apply experiences gained by others[36].

Application of the LEADER method involves implementation of measures for the development of a given area. These measures are based on a development strategy, which is adopted through cooperation; their implementation involves a use of a monitoring mechanism intended to verify whether the specified objectives and results are being achieved. This monitoring allows to update the ways of operation, preferably to include innovative methods[37]. By its essence this approach allows to adopt new concepts or ideas, and to apply these effectively[38]. This is related to application of novel organisational solutions, unknown earlier, and to achievement of new benefits for the society. Innovative organisational approach lies in the new structure which closely links the sectors that previously functioned separately; this is reflected in the rules defined for establishing a local action group association[39]. Innovativeness is reflected in its unique organisation as a legal entity, involving a change of the legal status of the membership in relation to units of territori-

[36] W. Goszczyński, *Partnerstwo jako nowa forma aktywności obywatelskiej* [in:] *Działalność organizacji pozarządowych – 10 lat doświadczeń pod rządami ustawy o działalności pożytku publicznego i o wolontariacie*, eds. M. Falej, P. Falej, U. Szymańska, Olsztyn 2015, p. 36 et seq.; K. Janiak, M. Jakubowicz, B. Kucharska, *Leader w Unii Europejskiej. Pilotażowy program LEADER+ w Polsce* [in:] *LEADER szansą dla polskiej wsi*, Warszawa 2008, p. 9 et seq.

[37] U. Budzich-Szukała, *Program LEADER w Polsce – sposób na aktywizacje wsi*, Warszawa 2008, p. 120 et seq.

[38] http://enrd.ec.europa.eu/enrd-static/leader/leader/leader-tool-kit/the-strategy-design-and-implementation/the-strategy-design/pl/what-is-innovation_pl.html. More: K. Zajda, Ł. Sykała, K. Janas, M. Dej, *Metody i instrumenty rozwoju lokalnego, LEADER, RLKS, innowacje społeczne*, Łódź 2016.

[39] The rules are set forth in Regulation by Minister of Agriculture and Rural Development, dated 23 May 2008, on the specific criteria for and methods of choosing a local action group, to implement a local strategy for activities carried out in the framework of 2007–2013 Rural Development Program, uniform text: Dz.U. 2013, Item 861.

al government[40]. Finally, innovativeness is reflected by the ways local community is engaged in the decision-making processes, whereby the previously used traditional consultation mechanisms are replaced with a mechanism of joint decision making[41].

Conclusion

The principle of partnership is one of the basic principles in implementing EU cohesion policy. Constituting a normative form of the value referred to as social inclusion, the principle strengthens the obligation to apply mechanisms for consultation and consensual decision-making shared by public entities and social partners. Its impact in the Polish law can be seen ever since newly emerging domestic regulations started defining specific procedures for drawing up and implementing partnership agreements, development strategies and programs for their implementation. The model of partnership in the area of planning and in executing the above public policies is achieved through the jointly performed processes of designing the policies and managing financial resources[42]. At the central and regional level this is reflected by the operation of monitoring committees. On the other hand, at the local level this is achieved through establishment and operation of innovative partnerships, i.e. local action group. Involving public and non-public stakeholders, local action groups combine in their operations various areas of economic development in a bottom-up, territorially coherent and integrated way and engage various interest groups. Undoubtedly, the fact that they are widespread, which contributes to local communities' engagement in and commitment to local development tasks, as well as the scope of local development strategies and methods of their implementation, and the amounts of financial resources used[43] justify a conclusion that the principle of partnership introduced into the processes of designing and implementing cohesion policy has contributed to a significant change. In addition to the existing forms and methods of public administration, some of which were known to be of a non--authoritative nature, today there are also new and widely applied forms of partnership-based management of local development, which are of innovative nature.

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[40] A. Barczewska-Dziobek, *Instytucjonalne formy współdziałania jednostek samorządu terytorialnego z organizacjami pozarządowymi* [in:] *Formy współdziałania jednostek samorządu terytorialnego*, ed. B. Dolnicki, Warszawa 2012, p. 29.

[41] A. Barczewska-Dziobek, *Organizacje pozarządowe jako podmioty partycypacji społecznej* [in:] *Partycypacja społeczna w samorządzie terytorialnym*, ed. B. Dolnicki, Warszawa 2104, p.741.

[42] *Administracja i zarządzanie publiczne. Nauka o współczesnej administracji*, ed. D. Sześciło, Warszawa 2014, p. 272.

[43] Final report: Evaluation of local action groups implementing the local development strategy in the framework of 2007–2013 RDP, http://ksow.pl/fileadmin/user_upload/ksow.pl/pliki/ANA LIZY_ekspertyzy/LGD_raport_poprawiony_ost_bis_10_09_2012.pdf , p. 101–112.

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Summary

Changes in the organization and operation of the administrative apparatus may be caused by various factors, law being the most important factor because administration is significantly determined by law. Furthermore, law reflects the legislator's axiological catalogue which may include values derived from current ideological systems. One example of this is the concept of partnership, seen as a value realizing the postulate of social inclusion, as well as the norm-defining principle of partnership which refers to the processes of programming and implementation of the EU cohesion policy. EU law affects the Polish legal system and determines its changes, as a consequence of which normative constructions, unknown earlier, are introduced. The principle of partnership, one of the guiding principles of cohesion policy, results in shaping the domestic legal order related to public policies in such a way that it contains standards requiring competent public administration authorities to depart from traditionally applied organizational solutions and imposing an obligation to use innovative methods of operation. This impact is particularly evident for instance in local development policy stipulating involvement of the local community, which is a responsibility of the bodies of territorial self-government.

Keywords: partner ship, partnership principle, development policy

WPŁYW ZASADY PARTNERSTWA NA ZMIANY W DZIAŁANIACH ORGANÓW ADMINISTRACJI PUBLICZNEJ

Streszczenie

Zmiany w zakresie organizacji i działania aparatu administracyjnego spowodowane mogą być różnymi czynnikami, z których ze względu na silne zdeterminowanie administracji prawem najważniejszy jest właśnie czynnik prawa. Prawo z kolei stanowi odzwierciedlenie katalogu aksjologicznego prawodawcy, w którym znajdować się mogą wartości pochodzące z aktualnych systemów ideologicznych. Jednym z przykładów takiego odzwierciedlenia jest partnerstwo jako wartość urzeczywistniająca postulat włączenia społecznego i normatywizująca ją zasada partnerstwa, która odnosi się do procesów programowania i realizacji unijnej polityki spójności. Prawo unijne, oddziałując na polski system prawny, determinuje jego zmiany i w konsekwencji wprowadzenie nieznanych dotąd konstrukcji normatywnych. Zasada partnerstwa jako jedna z naczelnych zasad polityki spójności skutkuje takim ukształtowaniem rodzimego porządku prawnego w przedmiocie polityk publicznych, że zawiera on normy nakazujące właściwym organom administracji publicznej odejście od tradycyjnie stosowanych rozwiązań organizacyjnych oraz nakazujące stosowanie innowacyjnych metod działania. Oddziaływanie to jest najbardziej widoczne na przykładzie polityki rozwoju lokalnego z udziałem lokalnej społeczności, za prowadzenie której odpowiedzialne są organy jednostek samorządu terytorialnego.

Słowa kluczowe: partnerstwo, zasada partnerstwa, polityki rozwoju

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Anna Chochowska

State Higher Vocational School Memorial of Prof. Stanislaw Tarnowski in Tarnobrzeg
ORCID: 0000-0002-4146-9951

PUBLIC ADMINISTRATION AS THE SERVICE FOR THE COMMON GOOD

Introduction

In a modern state, public administration plays a very important role. It is difficult to imagine a state without the existence of its executive apparatus. What is more, the quality of the tasks it carries out, as well as the proper functioning of the state and its organs depend largely on the way public administration is organised. However, public administration should not appear as a soulless instrument in the hands of politicians or specific interest groups, but it should carry out tasks for the common good of the Republic of Poland. This means its operation should be linked with service to the entire community of the country.

It seems, therefore, that identification of administration with public service focused on satisfying the needs of all citizens is an approach which today is not only desirable, but indeed necessary to form a well-functioning state.

The purpose of the article is to show that public administration in a democratic country based on the rule of law should be equated with a public service aiming to achieve the common good and pursuing the interests of all citizens.

The concept of public administration

The term administration etymologically comes from the Latin word *ministrare* which means to serve (*minister* – a servant, an assistant, *ministare* – to serve, to perform, *administare* – to administrate). Hence, administration is to operate for the benefit of all those who use its services. Therefore, it can be concluded that in its essence administration is service-oriented. In opposition to the administration defined this way are actions carried out in an arbitrary manner, aimed at achieving individual interests or serving the needs of selected interest groups.

There are many different definitions of administration in the literature. Most often they focus on two aspects. Firstly, it is understood as a specific organization, and secondly as the activity of that organization which was created for the implementation of specific tasks[1]. These two meanings reflect the subjective and objective side of the concept, respectively. When analysing the concept of administration, it should definitely be assumed that it is a separate organization intended to implement tasks requiring joint action[2]. "When we refer to an organization and activities undertaken by state institutions – says M. Stahl – we are talking about state administration"[3]. However, it should be remembered that in addition to state authorities, a certain type of public tasks may be performed by other entities that also use administrative power of authority to a certain extent. That is why the concept of public administration was introduced. It should be understood as "all organizational structures in the state and the people employed in these structures and fulfilling public, collective and individual, regulatory, rendering and organisational tasks designated for managing and decision-making entities"[4]. Therefore, public administration is a concept broader than the concept of state administration, since it includes both state administration and local government administration, as well as other institutions that use public authority in order to perform specific public tasks[5].

The aim of public administration is to take care of the society's needs by performing public tasks for the common good. It is emphasised in the doctrine that "contemporary public administration should serve mainly its citizens"[6]. This service for citizens may therefore be considered as the mission of the public administration. It is ensured by people performing tasks of this organization. It is people who "are the core of the administrative apparatus. The quality of tasks performed by public administration depends on their standards[7], and human resources are the major asset of every organisation"[8]. However, one should agree with T. Górzyńska, who rightly claims that even the best theoretical assumptions, good law, well-thought-out structures and carefully prepared working

[1] J. Szreniawski, *Wstęp do nauki administracji*, Lublin 2003, p. 7.

[2] E. Ura [in:] *Prawo administracyjne. Część pierwsza*, ed. E. Ura, Rzeszów 1996, p. 17.

[3] M. Stahl [in:] *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*, ed. M. Stahl, Warszawa 2002, p. 11.

[4] E. Zieliński, *Administracja rządowa w Polsce*, Warszawa 2001, p. 12.

[5] E. Ochendowski defines public administration in similar way. He claims that public administration is supervised in the broadest sense, that is by public authorities, but also by public-law entities and other government entities. E. Ochendowski, *Prawo administracyjne. Część ogólna*, Toruń 2001, p. 18.

[6] *Nauka administracji*, eds. B. Kudrycka, B. Guj Peters, P.J. Suwaj, Warszawa 2009, p. 56.

[7] A. Chochowska, *Międzynarodowe standardy służby publicznej i ich wpływ na krajowe regulacje dotyczące statusu pracowników samorządowych* [in:] *Lokalny samorząd terytorialny w aspekcie międzynarodowym*, ed. S. Faliński, Siedlce 2018, p. 148.

[8] A. Jaxa-Dębicka, *Sprawne państwo*, Warszawa 2008, p. 22.

methods will not help to achieve desired effect if administrative personnel will not fully understand the nature and purpose of public service[9]. In view of the fact that public administration is to satisfy collective needs of citizens and its most important purpose is to perform public tasks, it can be concluded that the essence of administration is public service.

Administration and public service

If we identify the administration with public service it is necessary to clarify and discuss the latter term. The broadest meaning of service is the one proposed by M. Zdyb, who highlights the fact that "the term «public service» can be of a wide scope and, to some extent, it can be linked to all actions taken by a person aimed at the welfare of others (welfare of other people), regardless of the place in the social hierarchy or roles (functions) performed in the structures of the state. It is linked with responsibility towards others and a will to act for their benefit. That way it is a kind of challenge and task at the same time"[10]. In this sense public service is an activity aimed at the realisation of the common good. At the same time, the author emphasises that "prudent concern for the common good is sine qua non of public service. This approach means focusing on others, the ability and responsibility to make a commitment and to serve others"[11].

The essence of public service is understood as competent, impartial and apolitical performance of the tasks and functions of the state by the public administration and its officials. While performing tasks, the personnel should not be guided by the interest of the political side with which they sympathize, their own convenience or gain. They are obliged to work in the interest of the State – the Republic of Poland, which, as is stated in Art. 1. of the Constitution – is the common good of all citizens. A similar opinion in this case is expressed by the Constitutional Tribunal. It emphasises that the specific status of public (civil) service is linked with a necessity to provide a guarantee that its members will be guided by constitutional values providing the foundation of a democratic country, and will operate with a sense of dignity and honour resulting from the fact they serve the common good, which is the Republic of Poland[12]. Therefore, con-

[9] Cf. T. Górzyńska, J. Łętowski, *Urzędnicy administracji państwowej*, Warszawa 1986, p. 36.

[10] M. Zdyb, *Służba publiczna* [in:] *Prawość i Godność. Księga pamiątkowa w 70. rocznicę urodzin Profesora Wojciecha Łączkowskiego*, eds. S. Fundowicz, F. Rymarz, A. Gomułowicz, Lublin 2003, p. 349.

[11] *Ibidem*, p. 356.

[12] Cf. justification of the verdict of Constitutional Tribunal from 12 December 2002, K 9/02, OTG-A 2002, No. 7, Item 94.

cern for the common good is one of the basic tasks of public service. The good, not only of the state but also its citizens, depends on the degree of implementation of this obligation. It is therefore crucial that people involved in the public service perform the tasks in the spirit of respect for fundamental values so that the purpose of this service is not distorted.

Public service versus the common good

This association between public service and activities for the common good makes it necessary to define the concept of common good.

At the start it should be noticed that the germs of the concept of the common good appeared in works by Plato who created a term "the common interest". The common interest according to Plato is visible in the existence of the state whose aim is citizen's personal happiness. In Roman law there is a term *salus populi* (social prosperity). St. Thomas Aquinas understood common good as the order of the universe and its perfection. Father Jan Krucina indicates that St. Thomas understands the common good as the social order uniting the activities of individuals, which leads to people's happiness in the community. In parallel to the concept of *bonum commune* as a social order, common good reflecting a similar meaning is the perfection of human nature, which is most fully realised in an ideal community. As a result, participants of social life achieve, in their specific manner, a perfection measured in their own way[13].

Father A. Kość proposes a slightly different definition of the term common good. He claims that "common good is a collective quality with its roots in human nature and comprising perfection of many people, which they achieve by living together and sharing services of public institutions. The common good is also referred to as general good, public interest, public welfare, public good or general interest"[14]. Father S. Kowalczyk, on the other hand, claims that the common good "is a community of welfare that transcends the sphere of individual capacities, needs and values"[15].

Personalistic concept of the common good is also worth mentioning. This concept differentiates two components of the common good: internal and external[16]. The internal element has an ontological and axiological character, where the common good is the integral development of the human being and the set of

[13] J. Krucina, *Dobro wspólne, teoria i jej zastosowanie*, Wrocław 1972, p. 28.

[14] A. Kość, *Podstawy filozofii prawa,* Lublin 2001, p. 240, cf. J. Krucina, *Dobro wspólne*…, p. 166–169.

[15] S. Kowalczyk, *Człowiek a społeczność. Zarys filozofii społecznej*, Lublin 1994, p. 234.

[16] Cf. J. Krucina, *Dobro wspólne*…, p. 70.

values necessary for this. In turn, the external element has a socio-institutional form, including a set of structures, institutions, economic and social conditions necessary to implement the common good[17].

The concept of "common good" is contained in the Polish Constitution, which states that the Republic of Poland is a common good of all citizens. Therefore, public administration, as it was established to perform the tasks of the state, should perform them so as to serve the common good and all citizens. The supra-individual common good, which is the Republic of Poland, protects and helps to implement the good of the individual and minor communities[18]. However, in order for these goals to be achieved, public authorities in their actions must rely on socially accepted axiological foundations. If the country functions on the basis of the principle *everything for the state, nothing without a state*, then the state that should serve starts to govern by destroying those to whom it should serve, and it simultaneously destroys itself[19]. However, it is also dangerous when the state makes various ideas of freedom absolute. In order to implement the properly understood idea of the common good, the state must act jointly with citizens and smaller communities (local government units, professional self-governments, self-governments of entrepreneurs, etc.), taking into account moral values, as well. I agree with M. Zdyb who argues that "The common good is a synthesis in the operation of public authorities, to which all other social entities are to contribute"[20]. The common good, as emphasized by Father A. Kość, applies in all manifestations of social life, although the term is most often used with reference to the country. However, the common good is never a perfect state, but a constantly redefined goal and at the same time gradually enhanced multidimensional well-being of citizens resulting from social peace, order, freedom and internal security of every citizen and the external sovereignty of the state[21].

All the definitions presented above describe the common good in different ways. However, in these definitions one can find a common denominator – they all emphasize that the common good is not the good of the individual, but a supra-individual category, because it aims at the good of the whole society. It is worth noting that the common good has not only a legal or economic dimension, but first and foremost an ethical one. As M. Zdyb rightly observes – the common good cannot be separated from fundamental values, justice, truth and morality. These qualities are its essence[22].

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[17] See: S. Kowalczyk, *Człowiek a społeczność…*, p. 236.

[18] *Ibidem*, p. 200.

[19] J. Majka, *Etyka, społeczna i polityczna*, Warszawa 1993, p. 246.

[20] M. Zdyb, *Dobro wspólne w perspektywie art. 1 Konstytucji RP* [in:] *Trybunał Konstytucyjny. Księga XV lecia*, Warszawa 2001, p. 200.

[21] A. Kość, *Podstawy filozofii…*, p. 244.

[22] M. Zdyb, *Działalność gospodarcza i publiczne prawo gospodarcze*, Kraków 2003, p. 55.

The concept of common good is closely related to the notion of public interest, which should be understood as the interest of all people living within a politically organized community, implementing specific legitimate interests of the general public organized in a specific form, with respect for individual's liberties as an inalienable part of the public good. Notably the realization and protection of such general interests should be unconditionally required in order to ensure the existence and life in peace, shared by a society made of groups, entities and individuals with diverse interests and needs[23]. The jurisprudence of the Constitutional Tribunal also attempts to define the concept of common good (public interest, social interest). The Constitutional Tribunal emphasizes that "the common good of the Republic of Poland is the good of all citizens. It is a supra-individual value focused on the activities and goals of individuals. It is also a superior value in the sense that it integrates other values, including those that are a consequence of individual civil rights and freedoms"[24].

In order to realize the idea of the common good, understood as the welfare of all, it is possible to impose limitations on the use of rights and liberties by individual entities. The Constitutional Tribunal presented a similar opinion, saying that "the common good is also crystallised not only in the formally understood set of norms and principles – even constitutional – and in the procedural protection of rights and freedoms, but also in such understanding of those rights, where they are treated as the art of what is good and right. The Constitution is a complete entity. It is unacceptable to mix constitutional goals, means and values, in such ways that each of these live their own lives or rise above the others without a proper axiological justification. (…) The common good is secured primarily by the relevant state organs, including bodies authorized to institute laws. These bodies – in certain situations – if it is needed for protection of the common good, not only can but have to and are obliged to impose limitations on the exercise of one's liberties, if it is necessary for such protection"[25].

The common good should be considered not only in legal terms, but also in moral terms. I share the opinion presented on this matter by M. Zdyb, who states that "the common good cannot be separated from basic values, justice, truth and morality. These qualities are its essence. It has not only an economic, political or legal dimension but is also subject to ethical evaluations, which may significantly add to legal assessments, just as moral norms may complement the content of rights and obligations arising from normative provisions"[26]. Understanding the common good only in legal or economic terms poses a risk that any wrongdoing can be legitimised.

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[23] See: M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warszawa 1986, p. 36.

[24] Justification of the verdict of Constitutional Tribunal from 10 October 2001, K 28/01, OTG 2001, No. 7, Item 212.

[25] M. Zdyb, *Działalność gospodarcza*…, p. 55.

[26] M. Zdyb, *Dobro wspólne*…, p. 193.

The common good of citizens is the Republic of Poland. It is a supra-individual good. As M. Zdyb proposes, "the concept of the common good, which is the Republic of Poland, cannot be defined merely in mechanistic and quantitative categories. For its full-dimensional picture, it is necessary to consider all the interrelated aspects, including the moral sphere, determining the final content of the picture"[27].

Conclusion

The notion of common good belongs to the group of concepts which are indistinct (indefinite, indeterminate), but it is important if one wants to understand the essence of the operation of state institutions. It determines the area of admissible activity of public administration[28]. The common good is a criterion for the integrity of state institutions[29]. Attention to the common good is therefore the responsibility of the state and its administration. As it is often emphasized in the legal doctrine "the service-related function of public administration in a democratic state ruled by law is to contribute to the realization of the common good"[30]. Furthermore, it is pointed out that public administration is treated as a public service as well as a servant of law – in the sense that it has to comply with it[31]. Public administration is a servant of the political system and the executive apparatus of political power[32]. The service-related role of public administration not only involves operations for the state, but also activities intending to meet the needs of citizens and to stimulate individuals and groups to take action[33].

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[28] Cf. H. Izdebski, M. Kulesza, *Administracja publiczna – zagadnienia ogólne*, Warszawa 1999, p. 96–97.

[29] *Ibidem*, p. 53–54.

[30] K. Chochowski, *Administracja publiczna w służbie dobra wspólnego* [in:] *W służbie dobra wspólnego – ludzie, postawy i kompetencje w administracji publicznej*, Warszawa 2016, p. 15.

[31] Cf. H. Izdebski, M. Kulesza, *Administracja publiczna…*, p. 100–101.

[32] H. Izdebski, M. Kulesza, *Administracja publiczna – zagadnienia ogólne*, Warszawa 2004, p. 23.

[33] Cf. M. Kisała, *Administracja jako służba publiczna* [in:] *Teoria instytucji prawa administracyjnego*, ed. J. Niczyporuk, Paryż 2011, p. 139.

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Summary

In a modern state, public administration plays a very important role. It is difficult to imagine a state without the existence of its executive apparatus. What is more, the quality of the tasks it carries out, as well as the proper functioning of the state and its organs depend largely on the way public administration is organised. The purpose of the article is to show that public administration in a democratic country based on the rule of law should be equated with a public service aiming to achieve the common good and pursuing the interests of all citizens.

Keywords: public administration, common good, country

ADMINISTRACJA PUBLICZNA JAKO SŁUŻBA NA RZECZ DOBRA WSPÓLNEGO

Streszczenie

We współczesnym państwie administracja publiczna odgrywa bardzo istotną rolę. Trudno bowiem wyobrazić sobie państwo bez istnienia jego aparatu wykonawczego. Co więcej, od sposobu zorganizowania administracji publicznej zależy w dużej mierze jakość realizowanych przez nią zadań, a także prawidłowość funkcjonowania państwa i jego organów. Celem artykułu jest wykazanie, że administracja publiczna w demokratycznym państwie prawnym winna być utożsamiana ze służbą publiczną działającą na rzecz dobra wspólnego i realizować interes wszystkich obywateli.

Słowa kluczowe: administracja publiczna, dobro wspólne, państwo

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Gabriela Dobrovičová

Pavol Jozef Šafárik University in Košice
ORCID: 0000-0002-9312-4402

DECISION OF PRESIDENT TO GRANT AMNESTY – THEORETICAL AND PRACTICAL ISSUES IN SLOVAK REPUBLIC

The very first amnesty was granted in 403 BCE by the leader of democrats Thrasybulus after overthrowing the Thirty Tyrants[1]. It was aimed to restore harmony and unity in Athenian polis, as a mean to reconciliate adversaries in internal and external conflicts. It was introduced as an oath (*όρκος*), which was developed into agreement. The meaning of the word *αμνηστία* can be described with the notion of "forgetfulness", or "pardon"[2]. According to the one of the contemporary definitions, amnesty is a legal instrument, which authorizes a head of state to render a decision on pardon or mitigation of sentence or legal consequences for a certain generally defined class of people that satisfy conditions given in the amnesty decision[3]. Usually, an amnesty used to be granted on the notable state events, *e.g.* presidential inauguration. However, it may also serve to tone down the public after a situation of emergency.

Despite the trend to limit prerogatives of head of state, an amnesty and a clemency belong among the remaining regular presidential competence. The notions of "amnesty" and "clemency" have their significant place also in constitutional order of the Slovak republic. The original wording of the *Ústava Slovenskej republiky* (hereinafter "the Constitution") in Art. 102(1)(i) presupposed three forms of amnesty or clemency – abolition, agratiation, and rehabilitation. The abolition was intended to either prevent commencing, or to discontinue criminal prosecution; the agratiation means commutation of imposed penalty;

[1] This contribution is a part of the research project "New dimensions of legal argumentation methodology – The role of legal principles in a multi-level legal system" supported under grant VEGA n. 1/0386/19.

[2] *See* Odlišné stanovisko sudkyne Ľudmily Gajdošíkovej k odôvodneniu nálezu Ústavného súdu Slovenskej republiky sp. zn. PL. ÚS 7/2017, p. 5 .

[3] K. Klíma *et al.*, *Encyklopedie ústavního práva*, Praha 2007, p. 10.

and the rehabilitation resulted in pardon after which a rehabilitated person is treated as if the conviction had never happened. We maintain that original presidential prerogative of mercy was excessive. However, it was constitutionally permitted interference of president, the executive body, with the judiciary and interference with operation of the bodies involved in criminal proceedings. The possibility of granting amnesty in form of abolition was the most criticized, since such amnesty decision constituted legally binding order to not commence or to discontinue criminal proceeding. Thus, it was impossible to deliver a ruling on guilt and sentence. Moreover, the president was the sole constitutional body which was deciding on amnesty and only based on his own discretion[4].

Constitutional changes limited presidential competence to grant amnesty and clemency. As a check against abuse of the amnesty, the constitutional act of 1999 made validity of amnesty decision conditional on countersign of the prime minister or designed minister[5]. Subsequently, the constitutional act of 2001 limited further the amnesty competence by removing constitutional faculty to grant amnesty or clemency in form of abolition[6]. Amnesty competence was further elaborated in jurisprudence of the *Ústavný súd Slovenskej republiky* (hereinafter as "the Constitutional Court"). In the decision in the case file no. I. ÚS 30/99 the Constitutional Court established that it is not possible to legally annul or withdraw a decision on amnesty. It seemed that the Constitutional Court omitted the values, which are protected by the Constitution. Therefore, it was not generally accepted solution on the issue of amnesty derogation.

Surely, amnesty is a delicate instrument, therefore it is up to the president and the government to carefully consider reasons and consequences of their decision in order to avoid major legal issues. That was not always case in Slovakia. The abovementioned constitutional changes and jurisprudence were adopted in reaction to the government decision to grant amnesty after assuming presidential powers in March 1998 (so-called "Mečiar's amnesties")[7]. Even the president

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[4] See: M. Tóthová, *Hlava štátu v systéme deľby moci*, Košice 2015, p. 165.

[5] Čl. I., bod. 11 Ústavný zákon č. 9/1999 Z. z., ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení ústavného zákona č. 244/1998 Z. z.

[6] Čl. I, bod. 55 Ústavný zákon č. 90/2001 Z. z., ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov.

[7] The amnesty of 3 March 1998 was granted by the prime minister V. Mečiar after he legally took over some of the presidential competences because the term of office of the president Michal Kováč expired and new president was not elected yet. The wording of the Art. 5 of the amnesty decision of the 3 March 1998 read as follows, "I order, that the criminal prosecution for the offences committed in relation to preparation and process of referendum of 23 and 24 May 1997 shall not commence and if it already has, that it shall be terminated".

The decision was intended to amnesty offences related to the referendum announced by the president M. Kováč. The citizens should have been voting on the four referendum questions. First three referendum questions, which were initiated by parliament, were related to Slovak accession to the NATO. The fourth question initiated by public petition concerned direct presidential elec-

Michal Kováč used presidential power of mercy suspiciously; on 12 December 1997 by the decision no. 3573/96-72-2417 he granted clemency to his own son who was already accused in criminal case. However, I will not focus on the clemency granted by the president Kováč in this paper.

Slovak society perceived the amnesties of 1998 as an abuse of power. They were considered amoral and damned as a stain on democracy and rule of law. Although the public opinion ignited a vivid discussion and even lead to attempts to revoke amnesties, all efforts were in vain due to a fundamental lack of political will. Even the disunity of legal theory scholars was not helpful. However, we do understand problematic nature of amnesty annulment since revoking amnesty decision is not generally accepted by law, practice or prevailing legal opinion. Reserved position is preferred in this matter also in jurisprudence of the European Court of Human Rights; however, an amnesty might be annulled or revoked in extraordinary cases concerning war crimes, crimes against humanity, and the gravest violations of human rights[8].

The acts that were amnestied by Mečiar traumatized and outraged public for almost 20 years with ongoing manifestations of discontent. Finally, the *Národná rada Slovenskej republiky* (the National Council of the Slovak republic – hereinafter as "the parliament") adopted the constitutional act no. 71 of 2017[9]. The constitutional change established brand-new competence of the

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tion. However, in effort to prevent voting on the fourth question, the minister of interior ordered to print only first three referendum questions. The minister acted despite the ruling of the Constitutional Court, which held that, "Concerning announced referendum, it obliges the president and other state bodies, that the referendum has to take place. The Constitution does not allow the announced referendum to be aborted before announcing the results". The referendum was afterwards proclaimed foiled by the Central committee for referendum.

The wording of the Art. 6 of the amnesty decision of the 3 March 1998 read as follows, "I order, that the criminal prosecution for the offences committed in relation to an announcement of the abduction of Mr. Michal Kováč jr. to the outland shall not commence and if it already has, that it shall be terminated". The mentioned article prevented criminal prosecution of 12 agents of the Slovak Intelligence Agency, who had been participating on abduction of M. Kováč, jr., son of the president, to Austria.

In intend to mend his original amnesty decision, the prime minister V. Mečiar, acting as the president, granted another amnesty decision on the 7 July 1998 as follows, "Article 1. I order, that the criminal prosecution for the suspicion of offences that could have been committed in relation to preparation and process of referendum of 23 and 24 May 1997 shall not commence and if it already has, that it shall be terminated.

Article 2. I order, that the criminal prosecution for the suspicion of offences that could have been committed in relation to the announced abduction of Ing. Michal Kováč, born on 5 December 1961, to the outland, that allegedly happened on 31 August 1995, shall not commence and if it already has, that it shall be terminated".

[8] E.g. Judgment of 17 March 2009, ECtHR, Case Ould Dah v. France, App. n. 13113/03; Judgment of 13 November 2012, ECtHR, Case Marguš v. Croatia, App. n. 4455/10.

[9] Ústavný zákon č. 71/2017 Z .z., ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov.

parliament to decide by three-fifths majority on annulment of an amnesty or a clemency decision, where such decision of the president was in contrary with principles of democratic and rule-of-law state[10].

Thus, the parliament took itself the burden of revoking amnesties and clemency. It decided that this task should be accomplished in a form of generally binding resolution of parliament, which must be adopted by qualified majority and proclaimed in the same manner as the law. Although, the chosen solution was unusual and unexpected in the Slovak legislative procedure[11], the form of resolution was common form of decision-making of the parliament. Pursuit to § 12 of the act on lawmaking[12], a resolution of the parliament is categorized among "other acts" that are published in the *Zbierka zákonov Slovenskej republiky* (the official journal – the Collection of Laws of the Slovak republic, abbrev. *Z. z.*) only if the parliament decide so.

A resolution as the new form of legal act is characteristic for certain qualities of normative legal act, which are implied from the wording of the Constitution, as we already mentioned. The matter of the act is general (i.e. generally biding), and there is prescribed mean of publication – the proclamation in the *Zbierka zákonov*. It is worth mentioning that structure of resolution consists of a preamble, which is underlining exceptionality of the resolution since a preamble usually forms a part of legal acts and decisions of fundamental importance.

The change of the Constitution established in the Art. 129a the competence of the Constitutional Court to decide *ex offo* on constitutionality of a parliament resolution on annulment of an amnesty or a clemency decision. It set a constitutional decision period of 60 days[13]. The proceedings on constitutionality of the parliament resolution of 5 April 2017 n. 570 regarding Mečiar's amnesties commenced on own motion and ended with delivery of the finding of the Constitutional Court of 31 May 2017 case file n. PL. ÚS 7/2017. It was held that the examined resolution of parliament is constitutional.

In the process of decision-making, the Constitutional Court faced uneasy task. It is typical for a constitution in the continental Europe to be enacted by the constituent assembly or legislative body; the same body might even change or amend the Constitution. However, the constitutional change in question, which

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[10] Čl.86 písm. i) Ústavy Slovenskej republiky.

[11] See: Odlišné stanovisko sudkyne Ľudmily Gajdošíkovej k odôvodneniu nálezu Ústavného súdu Slovenskej republiky sp. zn. PL. ÚS 7/2017, p. 5.

[12] Zákon č. 400/2015 Z. z. o tvorbe právnych predpisov a o Zbierke zákonov Slovenskej republiky a o zmene a doplnení niektorých zákonov.

[13] Pursuit to cited constitutional provisions, the Constitutional Court may in the period of 60 days rule on constitutionality. Such ruling would be in form of *nález* – "the finding of the court". If the Constitutional Court does not rule within the decision period, the proceedings will be terminated by the *uznesenie* – "the order of the court". The proceedings would be terminated even when majority of all constitutional judges was not reached.

extended competence of the parliament had the vast implication to the principle of separation of powers. The novel law transferred a competence to review executive acts from the judiciary to hands of legislative power, and the Constitutional Court was confided with a review of the new unusual legal act of the legislator.

It should be noted, that due to the specific legal character of amnesty decision, legal theory does not provide unison opinion on its classification. However, it is generally concluded that amnesty decision is legal act *sui generis*. An amnesty is addressed to indeterminate number of persons, who are specified by the type of the offence committed, fault, form of the sentence, or any other applicable criteria[14]. Afterwards, the general courts assess the applicability of the amnesty decision on specific person[15]. K. Klíma contends that amnesty is the act of application of law, which shows some normative aspects. On the other hand, other scholars classify amnesty decision among the normative legal act or legal act *sui generis* that has characteristics of the generally binding legal act[16]. The Constitutional Court considered that the amnesty decision should be treated as the act of application of law *sui generis* that contains certain elements characteristic for the normative legal act. This probably explains classification of a parliament resolution on annulment of an amnesty that was used by the Constitutional Court. Despite characteristics provided in the Constitution, it was held that the parliament resolution annulling an amnesty is in fact individual legal act *sui generis*, which was issued pursuit to the Constitution. The Constitutional Court contended that the constitutional basis of the parliament resolution in Art. 86(i) should provide high degree of legitimacy and legal authority. However, we find it difficult to subscribe to the classification of parliament resolution in the category of individual legal acts.

The principle of legal certainty enshrined in Art. 50(6) of the Constitution provides relative prohibit of retroactivity, except for the *lex mitior* principle. Analyzed constitutional change by its interim and final provision in Art. 154f(1) enabled retroactive use of parliamentary competence to annul amnesties[17]. Pursuit to the cited article the amnesty annulment also results in

- annulment of all decisions that were based on the annulled amnesty or clemency and

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[14] See: K. Klíma *et al.*, *Komentař k Ustavě a Listině*, Plzeň 2005, s. 324.

[15] A. Bröstl *et al.*, *Teória práva*, Plzeň 2013, s. 55.

[16] *Ibidem*, s. 55; V. Pavlíček *et al.*, *Ústavni pravo a statověda. II. dil.: Ustavni pravo Česke republiky*, Praha 2011, s. 851; Odlišné stanovisko predsedu Ústavného súdu ČR Pavla Rychetského k uzneseniu Ústavného súdu Českej republiky sp.zn. Pl. ÚS 4/13 z 5. marca 2013.

[17] See: I. Macejková, *Ešte raz k nálezu Ústavného súdu Slovenskej republiky sp. zn. PL. ÚS 7/2017 o súlade uznesenia Národnej rady Slovenskej republiky o zrušení tzv. „Mečiarových amnestií" s Ústavou Slovenskej republiky* [in:] *ÚSTAVNÉ DNI, Tretie funkčné obdobie Ústavného súdu Slovenskej republiky – VII. Ústavné dni*, eds. L. Orosz, S. Grabowska, T. Majerčák, Košice 2019, s. 15–16.

– termination of all impediments in criminal prosecution that were based on the annulled amnesty or clemency; a period during which impediments lasted shall not count into the limitation period for the acts that were included in the annulled amnesty or clemency.

Plenum of the Constitutional Court certainly realized that the constitutional change was purpose-built and that there would be major critical appraisal, however it considered the reaction of legislative body to be legitimate and justified in its foundation[18].

D. Šváby aptly depicts the issue of the Mečiar's amnesties as the gravest undemocratic deed of young Slovak republic. Since one of the definitions describes the democracy as a mean to resolving the issues in a dialogue without use of violence, thus the amnesties were deemed undemocratic, since behind their core was violent act committed for political purposes. Secondary, these amnesties demonstrated a willful arbitrary act of state power that aimed to foil prosecution of political perpetrators[19]. Therefore, the generally accepted presumption that arbitrary and unlimited exercise of state power is in sheer breach of democratic and rule of law state formed one of the pillars of the Constitutional Court decision PL. ÚS 7/2017. Even the European Court of Human Rights asserts that "the authorities in question should not underestimate the importance of the message they convey to all those concerned as well as the general public when deciding whether or not to institute criminal proceedings against officials suspected of treatment contrary to Art. 3 of the Convention"[20]. The Strasbourg court specifically noted that "Under no circumstances should they give the impression that they are prepared to allow such treatment to go unpunished"[21].

The Constitutional Court in decision on constitutionality of the parliament resolution examined the potential breach of democratic and rule of law principles by annulment of amnesties. However, in relation to annulled amnesty for 1997's referendum preparation and process, the court held that while granting amnesties the prime minister acted in breach of constitutional principle of prohibition of arbitrariness, which founds categorical imperative for carrying out public function. Moreover, his action constituted inadmissible interference with popular sovereignty, which is immanent component of democratic state; therefore, the prime minister violated constitutional rights of at least those citizens who peti-

[18] J. Mazák, L. Orosz, *Quashing the decision on amnesty in the constitutional system of the Slovak Republic: Opening or closing Pandora´s box?*, „The Lawyer Quarterly" 2018, vol. 8, no. 1, p. 7.

[19] D. Šváby, *Z perspektívy zodpovednosti za výber sudcov Ústavného súdu Slovenskej republiky je rozdiel medzi Národnou radou SR a Prezidentom SR vecou odlišnosti v stupni, nie druhu* [in:] *Ústavné súdnictvo – výzvy a perspektívy: zborník príspevkov z medzinárodnej konferencie pri príležitosti 25. výročia Ústavného súdu Slovenskej republiky konanej 11. apríla 2018 v Košiciach*, ed. A. Nagyová, Košice 2018, p. 165–171.

[20] Judgment of 21 December 2000, ECtHR, Case Egmez v Cyprus, App. n. 30873/96, § 71.

[21] *Ibidem*.

tioned for referendum on direct presidential elections. It is apparent that others constitutional principles were violated as well, *i.a.* separation of powers, transparency and public control, democratic legitimacy, legal certainty and protection of trust in legal order. On the other hand, the Constitutional Court noted that there was violation of the right to legal certainty of the amnestied persons.

In the examination of the amnesty annulment in relation to the abduction of Michal Kováč jr., the Constitutional Court stated that multiple principles of democratic and rule of law state were violated by granting the amnesties, i.a. principle of prohibition of arbitrariness, legality, human rights protection, respect for international obligations, separation of powers, transparency and public control, legal certainty and protection of trust in legal order. Similarly, as in previous case, the court held that there was violation of the right to legal certainty of the amnestied persons. However, after deliberate balancing of constitutional principles the Constitutional Court concluded that legal certainty of the suspects of serious crimes should recede.

The ruling of the Constitutional Court on constitutionality of parliament resolution on Mečiar's amnesties confirmed substantive approach of the court to the protection of constitutionality. It was one of the final steps in complicated rectification process of legal status, which was direct result of abuse of power. In general, abuse of power means an action of an official, who pretends to be acting in official capacity and in accordance with law; however, in fact he is not acting in compliance with the purpose of the law or its values. Even the introductory paragraph of the Mečiar's amnesties, which justifies amnesties as a mean to reach civic reconciliation, could not conceal the fact that it was abuse of power. After all, even the Constitutional Court in the final part of the finding held that the matter at stake in this proceeding was "primarily (apparently more than ever before) deciding on question of values, that usually compose the common part of decision-making since the crucial function of the Constitutional Court is to protect constitutional values of democracy and rule of law state".

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Summary

The author deals with the regular presidential competence to grant amnesty and its constitutional regulation in the law of Slovak republic. Since revoking amnesty decision is problematic and it is not generally accepted by law, practice or prevailing legal opinion, she focuses on analysis of the "Mečiar's amnesties" annulment in Slovak republic.

Keyword: Slovak republic, presidential competence, amnesty, constitutional regulation

DECYZJE PREZYDENTA DOTYCZĄCE AMNESTII W REPUBLIKI SŁOWACKIEJ – KWESTIE TEORETYCZNE I PRAKTYCZNE

Streszczenie

Autorka zajmuje się regularnymi kompetencjami prezydenckimi do udzielania amnestii i jej konstytucyjnymi przepisami w prawie Republiki Słowackiej. Ponieważ cofnięcie decyzji o amnestii jest problematyczne i nie jest ogólnie akceptowane przez prawo, praktykę lub obowiązującą opinię prawną, skupia się na analizie stwierdzenia nieważności „amnestii Mečiara" w Republice Słowackiej.

Słowa kluczowe: Republika Słowacka, kompetencje prezydenta, amnesta, prawo konstytucyjne

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Rafał Dowgier

Białystok University
ORCID: 0000-0003-1583-086X

SOME REFLECTIONS ON *IN DUBIO PRO TRIBUTARIO* PRINCIPLE

Introduction

A catalogue of general tax principles was formulated in the doctrine of tax law, understood as the rules expressing absolute values or highlighting certain values always constituting the rationale for a given action[1]. They are essential especially in the process of interpreting the tax law provisions. The following are listed among those principles, inter alia: the principle of deciding for the benefit of the taxpayer (*in dubio pro tributario*), the principle of limited application of analogy in tax law, the principle of durability of the entitlements of taxpayers benefiting from tax reliefs and exemptions, the principle of respecting the concepts adopted from other fields of law, the principle of non-retroactivity. It should be noticed that a part of the indicated rules may be derived directly from the constitutional norms, to which the Constitutional Tribunal made great contributions[2]. And others are products of the tax law. The principle of resolving doubts for the benefit of a taxpayer (*in dubio pro tributario*) stands out against this background. This principle, which is inherently of postulative character[3], has become a normative principle, expressed directly as of the beginning of 2016 in Art. 2a of the Act of 29 August 1997 – The Tax Ordinance Act[4]. Pursuant to the provision quoted, "Irremovable doubts as to the contents of the provisions of tax law shall be resolved for the benefit of a taxpayer".

[1] A. Gomułowicz, *Zasady podatkowe* [in:] *System prawa finansowego*, vol. 3: *Prawo daninowe*, ed. L. Etel, Warsaw 2010, p. 99 and *idem*, *Zasady podatkowe wczoraj i dziś*, Warsaw 2001. See also: B. Brzeziński, W. Nykiel, *Zasady ogólne prawa podatkowego*, „Przegląd Podatkowy" 2002, no. 3.

[2] See: J. Oniszczuk, *Podatki i inne daniny w orzecznictwie Trybunału Konstytucyjnego*, Warsaw 2001.

[3] See: A. Mariański, *Rozstrzyganie wątpliwości na korzyść podatnika. Zasada prawa podatkowego*, Warsaw 2009.

[4] Consolidated text: Dz.U. 2019, Item 900 as amended – hereinafter abbreviated to o.p.

The introduction of the indicated principle to the legal order was accompanied by high hopes of taxpayers, and its indispensability was commonly perceived. So much that the issue became the subject of the nationwide referendum of 6 September 2015, in which one of the questions was: "Are you for the introduction of the general principle of resolving any tax law interpretation doubts for the benefit of a taxpayer?" It was not difficult to predict answers to that question – almost 95% of those who took part in the referendum opted for the introduction of this principle. More interestingly, however, even before the referendum, on 10 July 2015 the Polish Sejm adopted the amended tax ordinance, including this principle. After signing the amending act[5] by the President of the Republic of Poland on 5 August 2015, as of the beginning of 2016 the principle *in dubio pro tributario* became a part of the binding legal order. From the very beginning, however, some concerns were indicated, regarding the extent of its practical application, emphasising that one should watch and monitor whether the principle does not end up being diluted in the reality of our fisc[6]. After the period of over 3 years from the introduction of the said principle to the Polish legal order, one may be tempted to say that those concerns have been confirmed to some extent. The principle of resolving doubts for the benefit of a taxpayer has a low impact on the application of tax law. The purpose of this study is to present, first of all, against the background of the case law of the administrative courts and the Constitutional Tribunal, both the very essence of *in dubio pro tributario* principle and the extent of its application. Eventually, this is to serve to verify the presented argument about the very limited impact of the rule expressed in Art. 2a o.p.

The meaning of *in dubio pro tributario* principle

While introducing the principle of resolving doubts for the benefit of a taxpayer to the legal order, its purpose was clearly defined in the justification to the draft amendment[7]. It was about increasing the protection of taxpayer's rights, especially within the interpretation of tax law, by reducing the negative effects of the provisions being imprecisely formulated by the legislator. It was shown that "the purpose of including in the Tax Ordinance the provision providing *expressis verbis* this principle is to introduce an interpretation rule that shall allow to interpret the tax law provisions without prejudice to legitimate interest of a taxpayer"[8]. This direction of interpretation is

[5] The Act of 5 August 2015 on amending the Act – The Tax Ordinance and some other acts (Dz.U. 2015, Item 1197).

[6] http://tvn24bis.pl/z-kraju,74/rzecznik-praw-obywatelskich-bierze-pod-lupe-fiskusa,589404.html.

[7] 7th term Sejm, Print No. 3018.

[8] *Ibidem*.

addressed to entities applying tax law, so primarily to tax authorities and taxpayers, and further also to the administrative courts which control the legality of decisions made by those authorities.

The analysed principle remains closely related to the legality principle expressed in Art. 7 of the Constitution of the Republic of Poland and Art. 120 o.p. (the tax authorities operate based on the provisions of law). It cannot go unnoticed that it is a simple consequence of *nullum tributum sine lege* principle resulting from Art. 84 and Art. 217 of the Constitution of the Republic of Poland. Since because both the subjective and objective scope of taxation must be precisely defined by means of statute, then, to this end, it is impermissible to derive any fiscal obligations by means of non-literal interpretation. With such an approach, one may wonder about the sense of formulating *in dubio pro tributario* principle in the tax law provisions, if, in fact, it is nothing more than the expression of the principle of definiteness when creating regulations in this field of law. Apart from the informational effect, which results not only from the very introduction of the principle in the general tax law, which was included in the Tax Ordinance, but also the place in which it was done (Art. 2a), in my opinion the analysed principle should also act in a preventive way. Paradoxically, such an effect shall not relate to the sphere of tax law application, but to its making. One would like to say that the entities responsible for creating tax law should act with awareness that their mistakes cannot be shifted to taxpayers. Such, in my opinion, justified assumption is not, unfortunately, fulfilled, because it is difficult to acknowledge that the quality of legal regulations in the area of law has improved recently. It may be quite the opposite, which results, first of all, from the "legislation diarrhea", the effect of which is the expansion of solution in this regard, which results largely from the undertaken actions connected with tax system tightening. As a consequence, the assumption of the influence of *in dubio pro tributario* principle also on the process of law-making has not been reflected in practice. It should be remembered, however, that such a situation may translate into the extent of applying the said principle in the process of tax law application, which shall be directly proportional to the quality of the tax law provisions. This is because complicated and unclear provisions constitute the basis for applying *in dubio pro tributario* principle.

The contents and principle of applying *in dubio pro tributario* principle

The way of formulating *in dubio pro tributario* principle accepted by the legislator gave rise to concerns even at the stage of the parliamentary work. Especially, the doubts as to the correctness of the introduced solution, indicating at the same time the correct wording of the analysed principle, were expressed by the Tax Law

Advisory Board in their Opinion No. 2/2015 of 19 February 2015[9]. According to one of the proposals indicated by the Board, the *in dubio pro tributario* principle could take the following form: "In the case, in which the application of the available methods of tax law interpretation does not give an unambiguous result, the interpretation result which leads to the slightest interference in the rights and freedoms expressed in the Constitution of the Republic of Poland shall be considered as the correct one". With such a normative approach, firstly, it would clearly have a form of an interpretation rule, secondly, its application would be wider, because the lack of an unambiguous interpretation result is something different than the irremovable doubts as to the contents of the provision, and thirdly, the concept of benefit used in Art. 2a o.p. would become understandable. Eventually, though, the postulates formulated by the indicated body were not fulfilled.

The very general way of formulating the *in dubio pro tributario* principle gave rise to interpretation doubts from the very beginning, which caused that this interpretation principle has become itself the subject of General Interpretation No. PK4.8022.44.2015 of the Minister of Finances dated 29 December 2015[10]. It was emphasised in the Interpretation that the analysed principle does not relate to the doubts as to the facts and its addressees are tax authorities, and indirectly also taxpayers or other obliged entities (withholding agents, tax collectors, third parties, legal successors). Three basic rules of applying Art. 2a o.p. were also indicated. Firstly, it was emphasised that the placement of Art. 2a in the general provisions of the Tax Regulation indicates that its application is not, admittedly, limited to tax proceedings, but in fact the rule included in it will be applied when issuing administrative acts (decisions, rulings). Secondly, "a taxpayer's benefit" should be understood as a legal solution optimal for a taxpayer out of those which appeared during the interpretation of this provision. And finally thirdly, if on the tax authority's side doubts arise as to the meaning of a provision in a given case, and it will not be possible to remove them during the correct interpretation, then applying Art. 2a o.p. the tax authority should accept the meaning of the provisions beneficial for the taxpayer.

An attempt to decode the analysed principle was also made in the literature on the subject, indicating that the resolving of doubts for the benefit of a taxpayer constitutes a second-degree interpretation rule, applied when the application of literal interpretation, systematic interpretation or teleological interpretation does not lead an interpreter to unambiguous results. Thus, it should be understood in such a way that it is an order to choose out of two or more relatively equivalent interpretation alternatives, the one which is the most beneficial for a taxpayer[11].

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[9] http://www.mf.gov.pl/c/document_library/get_file?uuid=7d777ab7-0a4f-4a3b-9ec8-f2f5b149fa0c&groupId=764034.

[10] Dz.U. 2016, Item 4.

[11] B. Brzeziński, *Rozstrzyganie wątpliwości na korzyść podatnika jako zasada wykładni prawa podatkowego. Próba analizy* [in] *Ex iniuria non ontur ius. Księga ku czci Profesora Wojciecha Łączkowskiego*, eds. A. Gomułowicz, J. Małecki, Poznań 2003, p. 257.

It shall apply when three conditions are fulfilled collectively[12]. Firstly, there must be doubts as to the contents of tax law provisions, but this concept should be defined pursuant to Art. 3(2) o.p. Tax law provisions mean the provisions of tax acts, provisions of double tax agreements ratified by the Republic of Poland and other international agreements ratified by the Republic of Poland relating to tax issues, as well as the provisions of implementing acts published on the basis of tax acts. Secondly, the doubts as to the contents of tax law provisions must be significant. So it is not about any doubts, but only such doubts which cannot be eliminated by means of interpretation. And finally thirdly, the elimination of doubts must be accompanied by a possibility of accepting such a solution the effect of which will be the existence of a benefit for a taxpayer[13].

In the binding wording, as emphasised in the General Interpretation of the Minister of Finance, the *in dubio pro tributario* principle was limited solely to the contents of the legal provisions, whereas it would be possible to extend it also to the facts. In this respect it would be convergent with the *in dubio pro reo* principle indicated in the Code of Criminal Procedure[14] (Art. 5 § 2), expressed in resolving irresolvable doubts in favour of the accused. It is not, however, as if doubts as to the facts are excluded from the influence of the order to resolve doubts for the benefit of a taxpayer, because such a rule may be derived and it is derived (as discussed hereinafter) from Art. 122 o.p. stipulating the principle of objective truth and Art. 121 § 1 o.p. expressing the principle of confidence. Thus, the tax authority conducting the proceedings is obliged to undertake all and any necessary actions in order to explain the facts thoroughly, and omissions in this regard have a direct effect on the correctness of the decision issued and in such meaning they cannot be to the detriment of a party. In my opinion, the extension of the *in dubio pro tributario* principle to the facts would be for information only, emphasising its meaning in this area. If the legislator, as indicated above, in spite of the rules resulting from Art. 84 and 217 of the Constitution, considered appropriate to normatively define the principle of resolving interpretation doubts for the benefit of a taxpayer, then consequently, in spite of the norms of Art. 121 § 1 and Art. 122 o.p., the legislator should also include the facts.

Thus, against these considerations a thought appears that the interpretation rule which was to contribute towards the solution of doubts connected with the interpretation of tax law, has itself become a subject of such interpretation, which, in addition, is not homogenous.

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[12] See: M. Popławski, *Komentarz do art. 2a* [in:] *Ordynacja podatkowa. Komentarz*, ed. L. Etel, Warsaw 2017, p. 50–51.

[13] *Ibidem*.

[14] Act of 6 June 1997 – Kodeks postępowania karnego [*Code of Criminal Procedure*] (Consolidated text: Dz.U. 2018, Item 1987 as amended).

Application of *in dubio pro trubutario* principle in the light of the Judgement of the Constitutional Tribunal of 13 December 2017 (SK 48/15)

In view of the doubts connected with the proper interpretation of the *in dubio pro tributario* principle, and, as a consequence, very limited scope of its application in practice[15], this issue was referred to by the Constitutional Tribunal when deciding in Case File No. SK 48/15. In the Statement of Reasons to this Judgement it was emphasized that the subjective interpretation of the *in dubio pro tributario* principle, whereby the fact of the occurrence of doubts on the side of a given subject (a taxpayer or, which is much more frequent, a tax authority) decides about its application, is totally groundless constitutionally. The Tribunal opted for the objective understanding of the *in dubio pro tributario* principle, according to which its application remains relativized to those doubts which in relation to a given tax regulation arise on the ground of the interpretation rules accepted in the legal culture. Emphasising the complex character of the legal interpretation, the Constitutional Tribunal indicated that by assumption it would result in the elimination of any ambiguities burdening the legal text, therefore it would be possible to recreate the legal norm as an unambiguous statement. In this context, the position, according to which the analysed principle can be applied only after taking into consideration all the types of interpretation directives, leads to the obvious absurd, excluding the performance of any real function by this principle, and especially, the role assigned to it by the basic law. So the analysed should be understood in such a way that it is a rule of functional interpretation which excludes in the process of the tax law interpretation any other reasons referring to the values or objectives attributed to employers. Thus, an irremovable doubt concerning the interpretation of the discussed regulation mean only such a doubt that remains relevant after the application of the rules of literal and systematic interpretation. Such an assumption, in the opinion of the Constitutional Tribunal, leads to the conclusion that when after scrupulous literal interpretation and any rejection of those interpretation variants that do not meet the systematic requirements, the interpreter:

- obtained the explicitness of the given interpretation of the levy regulation, he would not be allowed to modify the received interpretation result based on the functional argumentation, including the teleological argumentation, if it resulted in the worsening of the legal situation of a taxpayer or another entity obliged to pay public levies,

[15] According to the Reply of the Minister of Finance dated 18 September 2018 to Interpellation No. 25459 (DPP10.054.7.2018.1), http://orka2.sejm.gov.pl/INT8.nsf/klucz/ATTB4SHUK/%24FILE/i25459-o1.pdf, in the period from the entry into force of Art. 2a o.p. to 31 July 2018 the *in dubio pro tributario* principle was applied in favour of entrepreneurs in 38 decisions and in 3 individual interpretations.

– did not obtain the explicitness of the given interpretation of the levy regulation, he would have to choose, out of the possible interpretation results, the most beneficial result for the legal situation of a taxpayer or another entity obliged to pay public levies.

Thus, the way of understanding Art. 2a o.p. presented by the Constitutional Tribunal differs in fact both from the one indicated by the Minister Finance and the one presented by some of the representatives of the tax law[16]. The assumption that the principle is applied only in a situation when it is not possible to determine the unambiguous contents of a tax law regulation using all the available methods of interpretation, leads to its marginalisation, because, as duly emphasized in the above-cited ruling, the complex interpretation of a provision in principle always leads to obtaining the explicitness of the legal text. Therefore, it should be assumed that the *in dubio pro trubutario* principle serves to eliminate doubts that arise after the application of the literal interpretation rules, and the functional argumentation, including the teleological argumentation, should not serve to increase the liabilities of the obliged entities.

It is to be hoped that the presented ruling of the Constitutional Tribunal closed the period of ignoring the *in dubio pro trubutario* principle by the tax authorities based on the argument that the application of all types of law interpretation causes the lack of doubts as to the contents of the provisions, and therefore there is no point in referring to Art. 2a o.p.

Resolving doubts for the benefit of a taxpayer in the case law of administrative courts

The application of the *in dubio pro tributario* principle in practice is reflected in the settlements of the tax authorities, both in the situations in which (very rarely, as shown earlier) they apply this principle and when in spite of the fact that a taxpayer raises the relevance of the application of this interpretation principle, they do not do that. Administrative acts issued by tax authorities are subject to control by administrative courts, and the latter ones refer to the principle of resolving any doubts for the benefit of a taxpayer quite often[17].

The analysis of the case law of administrative courts from the period after the introduction of Art. 2a to the Tax Ordinance allows to formulate certain general remarks. Firstly, the courts notice that the codification as of 1 January 2016 of the

[16] M. Popławski, komentarz do art. 2a.

[17] Detailed analysis in this respect with regard to the period before and after 1 January 2016 was presented by A. Bielska-Brodziak. See: A. Bielska-Brodziak, *In dubio pro tributario – przeszłość i teraźniejszość* [in:] *Współczesne problemy prawa podatkowego. Teoria i praktyka*, vol. 1: *Księga jubileuszowa dedykowana Profesorowi Bogumiłowi Brzezińskiemu*, ed. J. Głuchowski, Warsaw 2019, p. 65–75.

in dubio pro tributario principle does not mean that this principle could not be applied in the earlier period, because it was a principle developed in the case law of the courts[18]. Secondly, the research on the representative sample of the rulings of the administrative courts from the years 2012, 2013 and 2017 leads to the conclusion that the percentage of the rulings in which the courts passed over the argument *in dubio pro tributario* raised by a taxpayer is higher in 2017 than in 2012 (in 2012 there were 25 cases, and in 2017 – 36)[19]. This means that contrary to expectations the normativisation of the *in dubio pro tributario* principle did not make the courts feel obliged to refer to this objection. What's more, as results from this research the number of cases in which the courts acknowledged that there were no grounds to apply the principle quoted, because in the lawsuit there were no doubts as to the contents of a given tax law provision (year 2012 – 3 cases, year 2017 – 39 cases)[20]. It seems that the main cause of this state of affairs was a different way of understanding the *in dubio pro tributario* from the way indicated in the Judgement of the Constitutional Tribunal of 13 December 2017. That was because the courts assumed that resolving any doubts for the benefit of a taxpayer would take place only when all the applicable methods of interpretation did not lead the unambiguous determination of the contents of the legal norm[21].

In spite of the tendencies presented above, one may indicate such rulings of the administrative courts in which Art. 2a o.p. was referred to directly[22]. For the most part, they are from 2018, so from the period after the publication of the above-quoted Judgement of the Constitutional Tribunal containing interpretation guidelines as to the understanding of Art. 2a o.p. Especially, this principle was used in the Resolutions adopted by Naczelny Sąd Administracyjny [NSA; the Supreme Administrative Court] in the lawsuits of the following file reference numbers: II FPS 4/16[23] and II FPS 2/17[24] and in the Judgements in the lawsuits of the following file reference numbers: II FSK 3588/16[25], II FSK 1153/16[26], II FSK 1627/16[27], II FSK 1126/16[28].

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[18] Uchwała NSA z dnia 6 listopada 2017 r. (II FPS 3/17).

[19] A. Bielska-Brodziak, *In dubio*…, p. 72.

[20] *Ibidem*, p. 73.

[21] See e.g. the Resolution of NSA of 19 December 2016 (II FPS 4/16).

[22] The review of the case law in this respect was presented by J. Rudowski in his paper titled: *Zasada „in dubio pro tributario" w orzeczeniach sądów administracyjnych – doświadczenia w stosowaniu*, presented during the 4th Toruń Overview of Tax Case Law, Toruń 1–2 March 2019, https://www.law.umk.pl/panel/wp-content/uploads/1_1_rudowski.pdf.

[23] NSA Resolution of 19 December 2016 (II FPS 4/16).

[24] NSA Resolution of 15 May 2017 (II FPS 2/17).

[25] NSA Judgement of 20 December 2018 (II FSK 3588/16).

[26] NSA Judgement of 24 January 2018 (II FSK 1153/16).

[27] NSA Judgement of 8 June 2018 (II FSK 1627/16).

[28] NSA Judgement of 11 May 2018 (II FSK 1126/16).

It is also clearly seen against the background of the case law of the administrative courts that in spite of overlooking in the contents of Art. 2a o.p. the issue of resolving for the benefit of a taxpayer also doubts as to the facts of the case, the *in dubio pro tributario* principle may also be applied to this respect. Here, the representative legal view is the one expressed in the NSA Judgement of 19 December 2018 (I GSK 1093/16) in which it was indicated that "the authority must keep in mind that inadequate explanation of the facts cannot be the grounds for findings that are negative for the party. The authority should base their findings on convincing evidence, and any irremovable doubts should be resolved for the benefit of a taxpayer – pursuant to the *in dubio pro tributario* principle"[29].

The above incline us to conclude that when introducing Art. 2a o.p. it was assumed that tax authorities are its addressee, but also, indirectly, taxpayers and other obliged entities that may refer to the principle resulting from this provision in case of disputes. In practice, however, the decisions of the administrative courts as well as of the Constitutional Tribunal largely shape the scope of applying this rule. Those court rulings, which indicate both the way of understanding the analysed principle and the scope of its application, shape in a direct way the judicial practice of tax authorities. In my opinion there is no better way to increase the scope of the effect of the *in dubio pro tributario* principle than its consolidation in the judicial practice of the administrative courts.

Conclusions

In conclusion it should be stated that the analysis of the judicial practice of tax authorities and administrative courts after 1 January 2016, i.e. the date of introducing the *in dubio pro tributario* principle to the Polish legal order in a normative form, leads to the conclusion that so far it has been difficult to consider this time turning point as crucial. Essentially, the opinion expressed by the Tax Law Advisory Board still remains valid. They stated that the implementation of the provision including the principle of interpreting unclear law for the benefit of a taxpayer (*in dubio pro tributario*) shall not cause any significant, far-reaching consequences for the functioning of the tax system, both in terms of the tax law cohesion and financial effects[30]. In my opinion, however, the situation evolves in the right direction, the reason of which is, first of all, the Judgement of the Constitutional Tribunal of 13 December 2017. The way of understanding Art. 2a, as indicated in it, may bring the effect of "unblocking" of this principle,

[29] NSA expressed an analogous view in Judgements dated: 18 December 2018 (II FSK 3500/16) and 28 February 2018 (I FSK 2338/15).

[30] Opinion No. 1/2015 of the Tax Law Advisory Board of 30 January 2015, http://www.mf.gov.pl/c/document_library/get_file?uuid=4cecec4d-8045-4a1a-9e3f-f1ce5ab73c7f&groupId =764034.

which results primarily from the presented way of understanding the notion of "irremovable doubts as to the contents of the provisions of tax law". Since the view dominating in practice was that the law interpretation rules applied comprehensively will in principle lead in each case to the unambiguous understanding of a given provision, and hence there is no space in this case to apply the *in dubio pro tributario* principle.

Notwithstanding the above, the undoubted effect of the normativisation of the quoted principle is that it raises the awareness of taxpayers and makes it necessary to analyse it when settling tax matters by tax authorities. However, its placement in the current structure of the Tax Ordinance provisions is not the most fortunate. Because it should be emphasised that its placement in Art. 2a, completely out of the catalogue of the general principles of tax proceedings (Art. 120–129) is not justified. The *in dubio pro trinutario* principle should be placed next to other general principles separated within the codification process of the general tax law, including: legality, balancing a taxpayer's interest and a public interest, trust or prohibition of abuse of law[31].

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[31] Such conception was presented by the General Tax Law Codification Commission in the draft of the new tax ordinance. See L. Etel *et al.*, *Nowa Ordynacja Podatkowa. Z prac Komisji Kodyfikacyjnej Ogólnego Prawa Podatkowego*, Białystok 2017, p. 72 et seq.

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Rudowski J., *Zasada „in dubio pro tributario" w orzeczeniach sądów administracyjnych – doświadczenia w stosowaniu*, presented during the 4th Toruń Overview of Tax Case Law, Toruń 1–2 March 2019, https://www.law.umk.pl/panel/wp-content/uploads/1_1_rudowski.pdf.

Summary

As of the beginning of 2016 the principle of resolving possible interpretation doubts for the benefit of a taxpayer (*in dubio pro tributario*) was introduced to the Polish legal order. This rule was upgraded to the tax law principle expressed directly in Art. 2a of the Act of 27 August 1997 – Tax Ordinance. Such a decision of the legislator resulted from a prior referendum, wherein nearly 95% of voters supported the introduction of this principle, perceiving it, apparently, as an instrument that would enhance the practice of tax law application by tax authorities. After several years, it can be assumed that these hopes have not been fulfilled since this principle has not been applied more widely in the practice so far. The purpose of this study is to present both the very essence of *in dubio pro tributario* principle and experiences concerning its application in recent years, with a particular focus on the rulings issued thereon by administrative courts and Constitutional Tribunal.

Keywords: tax, tax law, interpretation of law, tax law principles

KILKA REFLEKSJI NA TEMAT ZASADY *IN DUBIO PRO TRIBUTARIO*

Streszczenie

Z początkiem 2016 r. do polskiego porządku prawnego wprowadzono zasadę rozstrzygania wątpliwości na korzyść podatnika (*in dubio pro tributario*). Regułę tę podniesiono do rangi zasady prawa podatkowego wyartykułowanej wprost w art. 2a ustawy z dnia 27 sierpnia 1997 r. – Ordynacja podatkowa. Ten ruch ustawodawcy był wynikiem uprzedniego referendum, w którym prawie 95% głosujących opowiedziało się za wprowadzeniem tej zasady, dostrzegając w niej zapewne narzędzie, które przyczyni się do polepszenia praktyki stosowania prawa podatkowego przez organy podatkowe. Po kilku latach można stwierdzić, iż nadzieje te nie zostały zrealizowane. W praktyce bowiem przedmiotowa zasada jak na razie nie znajduje szerszego zastosowania. Celem opracowania jest przedstawienie zarówno samej istoty zasady *in dubio pro tributario*, jak i doświadczeń na tle jej stosowania na przestrzeni ostatnich lat, ze szczególnym uwzględnieniem wydanych w tym zakresie orzeczeń sądów administracyjnych oraz Trybunału Konstytucyjnego.

Słowa kluczowe: podatki, prawo podatkowe, wykładnia prawa, zasady prawa podatkowego

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Elżbieta Ejankowska

University of Rzeszow
ORCID: 0000-0001-5129-8853

THE LEGAL REGULATION OF BUSINESS ACTIVITY OF *FILIAE FAMILIAS* IN THE PRINCIPATE PERIOD (*ACTIO DE PECULIO*)

The current article is the continuation of my research concerning the legal regulation of conducting business by *filiae familias*[1].

According to the fact that most sources, which are to be analyzed originate from the Digests of Justinian, I feel that it is right to presume their authenticity which was formulated by W. Bojarski[2]. However, it does not mean that I pass over with silence the views concerning interpolations of some source texts formulated by remarkable Romanists.

In the beginning, it is necessary to place some remarks referring to the judicial remedy of *actio de peculio*. Gaius mentions this claim the following way:

G.4.69: *Quia tamen superius mentionem habuimus de actione, qua in peculium filiorum familias servorumque ageretur, opus est, ut de hac actione et de caeteris, quae eorundem nomine in parentes dominosve dari solent, diligentius admoneamus.*

In the above quoted extract of his *Institutiones*, the jurist claims that it is an action granted in accordance with estate entrusted to manage by sons under power and slaves against their ascendants of owners. Gaius also adds that about this claim and also other, which are given according to a similar title against power keepers, he will inform in detail which he actually does in further parts of his lecture (G.4,70–74). Claims, about which the jurist speaks in words *de hac actione et caeteris* were jointly called actions *adiecticiae quali-*

[1] See: E. Ejankowska, *Regulacja prawna działalności gospodarczej filiae familias (actio institoria i actio exercitoria) w prawie rzymskim*, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego, Seria prawnicza" 2006, no. 37, Prawo 4, p. 100–108.

[2] W. Bojarski, *Remarks on Textual Reconstruction in Roman Law* [in:] *Le droit romain et le monde contemporain. Melanges a la memoire de Henryk Kupiszewski*, eds. W. Wołodkiewicz, M. Zabłocka, Varsovie 1996, p. 83–89.

tatis (meaning additional claims) by glossarists in the Middle Ages. This term had its justification in sources due to the fact that praetors added a new *actio* to the already existing one in the civil law[3]. The aim of those legal remedies was the extension of responsibility onto family superiors and owners of slaves for contractual obligations of their dependents. As it is already known, *ius civile* did not provide such a liability[4]. Placing formulas of such claims in the preatorial edict guaranteed legal security to contractors towards slaves and *alieni iuris* persons in some fields of economic activity. They could place theirs claims against possessors of power if they experienced damage due to transactions conducted with their dependents. One of such claims was *actio de peculio*, which was performed by a praetor in accordance with contracts conducted by *alieni iuris* persons and slaves conducting economic activity based on *peculium*[5].

In order to consider premises of usage and the character of this claim, it is neccessary to perform an analysis of this formula:

Formula actionis depositi de peculio; Quod Aulus Agerius apud Stichum, qui in Numerii Negidii potestate est, mensam argenteam deposuit, qua de re agitur, quidquid ob eam rem Stichum, si liber esset ex iure Quiritum Aulo Agerio dare facere oporteret ex fide bona iudex Numerium Negidium Aulo Agerio dum taxat de peculio (…) *condemnato si non paret absolvito*[6].

The above presented formula is based in the civil claim of deposit (*action depositi*) which could be utilized if a safekeeping agreement was conducted between two Roman citizens having full financial capacity. However, *actio depositi directa* could not be made if a slave was the safe keeper because he did not have capacity to act in court proceedings in the light of civil law. That is why the praetor *in intentio* of the claim mentioned the name of the slave and authorized the judge to investigate that in case the slave was a free person (*si liber esset ex iure Quiritium*), he was obliged to perform to the benefit of the claimant (*Aulo*

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[3] This term was based on sources because praetors actually added a new action to the already existing in the principle of protection of civil law. (Ulp.D.14, 1,5,1: …*hoc enim edicto non transfertur actio, sed addicitur)*.

[4] D.50,17,133: *Melior condicio nostra per servos fieri potest, deterior fieri non potest*. See: G.3,104.

[5] The term *peculium* was used in sources to describe distinguished masses of estate, which regardless of their origin – formed an ownership of the one performing power and even laws of estate if he passed them to the administering person. About the institution of peculium see: G. Micoliė, *Pècule et capacitè patrimoniale – Etude sur le pècule profectice, depuis l'èdit de peculio jusqu'la fin de l'èpoce classique*, Lyon 1932; M. Kaser, *Das Römische Privatrecht*, I (hereinafter RPR I), München 1971, p. 55–59; A. Kirschenbaum, *Sons, Slaves,and Freedmen in Roman Commerce*, Jerusalem 1987, p. 33–62. In Polish literature: I. Żeber, *A Study of the 'Peculium' of a Slave in Pre-Classical Roman Law*, Wrocław 1981.

[6] O. Lenel, *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung* (3 ed.) (hereinafter EP), Leipzig 1927, p. 282.

Agerio dare facere oporteret ex fide bona). Next, if he declared that the claim of the claimant is justified, he should sentence the owner of the slave to pay the *peculium* (*dumtaxat de peculio condemnato*)[7].

The same way of development refers to other claims which were utilized to sue the owner of a slave, to whom *peculium* was assigned for contracts conducted by the last one[8]. Each civil claim, on which *actio de peculio* was based, was a sort of framework of the formula of the praetor (*actio utilis*) and the limitation of liability of the possessor to the amount of the *peculium* was placed in the *condemnatio* clause.

The fact that the claim was used to secure liabilities contracted by dependents is determined by its character:

D.15,1,21,3 (Ulp.29 ad ed.): *Si dominus vel pater recuset de peculio actionem non est audiendus, sed cogendus est quasi aliam quamvis personalem actionem suscipere.*

From the above cited source it directly arises that *actio de peculio* did not belong to *actiones in rem*, although the premise of its utilization was the existence of *peculio* estate. So, that is an *actio in personam*, which was utilized against the possessor of power (*dominus vel pater*) as the owner of *peculium*[9]. It meant that the claims of the petitioner could be covered by whichever part of the familial estate, and not limited to the objects forming a *peculium*. However, the *peculium* – as it is fairly stated by A. Kirschenbaum[10] – was only the basis of liability and a determinant of liability limits of the owner of a slave or a familial superior[11].

It needs to be kept in mind that the above mentioned obligations really existed in the economic sphere but in the pre – classical period did not have any security in the provisions of civil law. In the classical period they were part of the so called *obligationes naturales*. Thanks to the praetor, who agreed to include debts

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[7] About the condemnation clause (called *condemnatio cum taxatione*) see: G.4,72a; A. Berger, *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, *s.v. peculium*, p. 624; J. Sondel, *Słownik łacińsko-polski dla prawnikow i historyków*, Krakow 1997, *s.v. condemnatio cum taxatione*, p. 193.

[8] The formulas of these claims are presented in: W. Buckland, *The Roman Law of Slavery*, Cambridge 1908, p. 211–213.

[9] See: *ibidem*, p. 207.

[10] A. Kirschenbaum, *Sons, Slaves*…, p. 50.

[11] G.4,73: *Cum autem quaeritur, quantum in peculio sit, ante deducitur, quod patri dominove, quique in eius potestate sit a filio servove debetur, et quod superest, hoc solum peculium esse intellegitur. Aliquando tamen id quod ei debet filius servusve, qui in potestate patris dominive sit, non deducitur ex peculio, velut si is, cui debet, in huius ipsius peculio sit.* According to Gaius, in order to determine the value of the *peculio* estate (*quantum in peculio sit*) debts, which were made by the son or slave by his superior and everyone under the power of the last one, should be deducted from the whole of assets (*in eius potestate sit*). What remained (*quod superset*) after the deduction of assets, which were at the possessor of power or his subordinates towards the administrator of *peculium* (*a filio servove debetur*). See: Ulp.D.15,1,5,4; Ulp. D.15,1,9,3–4; Ulp.D.15,1,7,6; Ulp.D.15,1,9,4; Ulp. D.15,2,1 pr.

and receivables while estimating the value of *peculium.* He also considered arisen sorts of obligations among people within joint power and among them and the possessor of power, they had a legal value[12].

As it is already known, *actio de peculio* could be utilized as a consequence of translations which were conducted by persons being in charge of the *peculium* and contractors from outside the family circle[13]. So, was it necessary for these actions to be accompanied by the knowledge and consent of the possessor of the power? Certainly no, because the sole granting of a concession for conducting economic activity based on *peculium* (*concessio administrationis*) was the authorization to perform actions which did not require a special consent of the possessor of power. What is more, obligations of slaves and *alieni iuris* persons did not have to remain in accordance with *peculium*[14]. Moreover, the owner of a slave could not prevent to sue him by means of *actio de peculio* even if he clearly prohibited conducting agreements with his slaves, which is mentioned by Gaius in the extract of his comment to the provincial edict.

D.15,1,29,1 (Gai.lib.9 ad ed. provin.): *Etiamsi prohibuerit contrahi cum servo dominus, erit in eum de peculio actio.*

The jurist talks only about the slave (*servo*) but, while using *argumentum a minori ad maius* – we can assume that this provision also refers to a son dependent of *patria potestas*.

Actio de peculio was a claim which had no time limit but the condition of its utilization was the existence of *peculium* (Paul.D.21,1,57,1 and Gai.D.15,1,27,8). If *peculium* expired, regardless of the cause, the legal basis for this claim would be dismissed. The maintenance of such a state would threaten the security of trade and it would also be contradictory to the equity rule of the praetor (*aequitas*). That is why the praetor established a reasonable solution, which is mentioned by Ulpian:

D.15,2,1,pr. (Ulp.lib.29 ad ed): *Post mortem eius qui in alterius potestate fuerit, posteave quam is emancipatus, manumissus alienatusve fuerit, dumtaxat de peculio et si quid dolo malo eius in cuius potestate est factum erit, quo minus peculii esset, in anno, quo primum de ea re experiundi potestas erit, iudicium dabo*.

As it arises from the statement of the jurist, the praetor issued a one year deadline to submit *actio de peculio* due to reasons which have been successively estimated in the edict. They were the following: death or liberation (in reference to the son) and death, liberation and alienation (in reference to the slave) and also

[12] According to this matter see: A. Kirschenbaum, *Sons, Slaves…*, p. 51; R. Sohm, *Instytucje, historia i system rzymskiego prawa prywatnego*, Warszawa 1945, p. 462; R. Taubenschlag, *Rzymskie prawo prywatne*, Warszawa 1969, p. 215.

[13] O. Lenel, EP, p. 276: *Quod cum eo, qui in alterius potestate esset negotium gestum erit, dumtaxat de peculio et si quid dolo malo eius in cuius potestate erit factum erit, quo minus peculii esset* (…) *in cuius potestate erit, iudicium dabo*.

[14] Ulp.D.3,5,8 and D.15,1,27,8.

devious acting by the possessor of power (*si quid dolo malo eius in cuius potestate est factum erit*), which would lead to the decrease of peculium (*quo minus peculii esset*). The result of such a decision of the praetor was the change of character of the claim which became *actio temporalis* that is *actio de peculio annalis* in case one of the above mentioned circumstances occured[15].

In case of the settlement towards creditors by *peculio* estate, it was performed in the order of applications (C.4,26,7,3), and the rule *occupantis melior est condicio* (Gai.D.15,1,10) was current.

Additionally, it must be pointed out that administratively, actions performed by slaves as administrators of *peculium* did not raise the same legal results which were connected to analogical actions of sons under the power of a father. Obligations of slaves in the light of *ius civile* of the classical period were only *obligationes naturales*, but the sons of the family generally remained obliged civilly[16]. That is why in case of conducting a transaction with a son provided with *peculium*, the contractor gained two debtors, which is clearly explained by Ulpian:

D.15,1,44 (Ulp.lib.63 ad ed.): *Si cum filio familias contraxerit, duos habet debitores filium in solidum et patrem dumtaxat de peculio*.

In this place the jurist also determines the scope of liability of each of the debtors; *filius familias* is liable to the full of the obligation due (*in solidum*) but the *pater familias* only to the amount of *peculium* (*dumtaxat de peculio*). The creditor could with the help of *actio civilis* sue the son or – predicting the voidness of a possible property foreclosure – utilize *actio de peculio* against the father. In case of submission of a claim against one of two debtors there was no consumption of a procedural claim due to *litis contestatio*, because the ongoing

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[15] See: O. Lenel, EP, p. 277; S. Perozzi, *Istituzioni di diritto Romano*, I, Milano 1947, p. 218; S. Solazzi, *Studi sul "actio de peculio", Scritti di diritto Romano*, I, Napoli 1955, p. 184–186.

[16] About the ability to be obliged of the *filia familias* and the capacity to act in court proceedings see: V. Arangio-Ruiz, *Istituzioni di diritto romano*, Napoli 1957, p. 58–411; D. Daube, *Roman Law-Linguistic, Social and Philosophical Aspects*, Edinburgh 1969, p. 89; P. Bonfante, *Corso di diritto romano, Diritto di famiglia*, I, Roma 1925, p. 93; J.F. Gardner, *Being a Roman Citizen*, London 1993, p. 72; A. Kirschenbaum, *Sons, Slaves…*, p. 58; R. Monier, *Manuel elementaire de droit romain*, II, Paris 1948, p. 260 & I, p. 254; G. Scherillo, *Corso di istituzioni di diritto romano*, Milano 1984, p. 206; S. Solazzi, *Sulla capacita del filius familias di stare in giudicio, Scritti di diritto romano*, I, Napoli 1955, p. 113–115. Generally, the son of the family could not be sued (until the passing of Senatus Consultum Macedonianum) only in case when he was granted a financial loan; about the subject extensively M. Zabłocka, *Granice stosowania „Senatus Consultum Macedonianum"*, „Czasopismo Prawno-Historyczne" 1981, vol. 33, no. 2, p. 11–29. According to F. Schulz (*Classicasl Roman Law*, p. 267) the possibility to contract obligations by *filius familias* was an exception from the rule current in the pre – classical and classical law, according to which a child dependent of *patria potestas* could not be a party of obligations. Also compare with R. Sohm, *Instytucje…*, p. 179; and R. Taubenschlag, *Rzymskie prawo…*, p. 107; A. Watson, *Slavery and Development of Roman Private Law*, BIDR 1987, no. 90/190, p. 110.

proceedings were based on administrative power (*iudicium imperio continens*). And so, one of three conditions necessary for the consumption of the proceedings *ipso iure*, did not occur[17].

It is hard to predict that a claim submitted against the second one of the debtors becomes void due to *exceptio rei iudicatae* or *exceptio rei in iudicium deductae,* because that will not be proceedings among the same parties (*inter easdem personas*)[18].

That is why it cannot be justified that according to A. Kirschenbaum, in case of suing *pater familias*, it would not be possible to perform an action later against *filius familias* because during the first process the consumption of the claim had occurred[19].

As it can be noticed, in the Institutions of Gaius (G.4,69; 4,73), and in the formula of the claim placed in the reconstruction of the edict of the praetor, no female persons are mentioned. The practice of establishment of administration of the *peculio* assets for the daughter of the family cannot raise any doubts, because an amount of sources remains. This amount is not plentiful but we do gain information about the existence of *peculium filiae familias* in the principate period[20]. In this place a question arises whether in Roman law, *actio de peculio* was applicable due to business activity of dependent daughters, which was performed on the basis of the estate administrated by them.

The main point leading to the analysis of this matter is the statement of Ulpian concerning the clause of the edict referring to three claims: *actio de peculio*, *actio de in rem verso* and *actio quod iussu*[21]:

D.15,1,1,1–3 (Ulp.lib.29 ad ed.): *Est autem triplex hoc edictum aut enim de peculio aut de in rem verso aut quod iussu hinc oritur actio. 2. Verba autem edicti talia sunt: „Quod cum eo, qui in alterius potestate esset, negotium gestum erit". 3. De eo loquitur, non de ea: sed tamen et ob eam quae est et feminini sexus dabitur ex hoc edicto actio.*

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[17] G.4,106: *Et si quidem imperio continenti iudicio actum fuerit, sive in rem, sive in personam, sive ea formula, quae in factum concepta est, sive ea, quae in ius habet intentionem, postea nihilo minus ipso iure de eadem re agi potest et ideo necessaria est exeptio rei iudicate vel in iudicium deductae*. Also compare G.3,181; G.4,103–109 and remarks of W. Osuchowski about this subject (*Zarys rzymskiego prawa prywatnego*, Warszawa 1966, p. 183).

[18] Ulp.D.44,2,3: *Iulianus libro tertio digestorum respondit exceptionem rei iudicate obstare, quotiens eadem quaestio inter easdem personas revocatur: et ideo et si singulis rebus petitis hereditatem petat vel contra exceptione summovebitur*. Also compare Ulp.D.44,2,7,4.

[19] A. Kirschenbaum, *Sons, Slaves…*, p. 65.

[20] About the subject of *peculium filiae familias* see: M. Garcia-Garrido, *Ius uxorium. El regimen patrmonial de la mujer casada en derecho Romano*, Roma–Madrid 1958, p. 7–31; P.E. Corbett, *The Roman Law of Marriage*, Oxford 1934 (reprint 1979), p. 111; E. Cuq, *Manuel institutions juridiques des Romain*s, Paris 1928, p. 143; E. Ejankowska, *Peculium filiae familias w okresie późnej republiki rzymskiej i pryncypatu*, „Czasopismo Prawno-Historyczne" 2005, vol. 57, no. 2, p. 239–249.

[21] See: O. Lenel, EP, p. 275: *Quod cum eo qui in aliena est potestate negotium gestum esse dicitur vel de peculio seu quod iussu aut de in rem verso*.

The jurist cites a part of a clause of the edict of the praetor about actions performed with the one who remains under control and admits that it applies to male, a not female sex. However, he states that each of these claims can be applied also due to actions of females.

The above mentioned statement of Ulpian should be treated as a general rule and the sources which will be analyzed below are its specification.

The text of Gaius states about the possibility of utilization of the claims of praetors due to business activity of daughters under power or female slaves. His extract referring to *actio de peculio* sounds as follows:

D.15,1,27pr. (Gai.lib.9 ad ed provin.): *Et ancillarum nomine et filiarum familias in peculio actio datur: maxime si qua sarcinatrix aut textrix erit aut aliquod artificium vulgare exerceat, datur propter eam actio: depositi quoque et comodati actionem dandam earum nomine Iulianus ait:* (…).

The text generally is treated as an altered one but this does not refer to the extract (*Et ancillarum ... datur*), which concerns the extension of *actio de peculio* on *filia familias* and *ancilla*[22]. The second part of the sentence can be a result of actions of compilers, but it is not totally sure[23]. M. Garcia-Garrido points that words such as *sarcinatrix* and *textrix* were present in the original text of Gaius. For such an opinion – according to the Romanist – is the fact that the word *sarcinator*, a male equivalent of *sarcinatrix* is repeated in the Institutions of Gaius (G.3,143; 3,162; 3,205; 3,206). The settlement of this doubt is not necessary in this point because engagement in business activity mentioned in this source (*…si qua sarcinatrix aut textrix erit aut aliquod artificium vulgare exerceat…*) was not a necessary condition to grant *actio de peculio*[24].

Gaius also cites the opinion of Julian, who expressed his consent towards the admission of *actio de peculio*, if a female slave or daughter under power performed a safekeeping or bailment contract[25].

The confirmation of the opinion of Julian is the statement of Ulpian contained in a part of his commentary to the edict of the praetor:

D.13,6,3,4 (Ulp.lib.29 ad ed.): *Si filio familias servove commodatum sit, dumtaxat de peculio agendum erit: cum filio autem familias ipso et directo quis poterit, sed et si ancillae vel filiae familias commodaverit, dumtaxat de peculio erit agendum*[26].

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[22] About the subject of alteration see: M. Garcia-Garrido, *Ius uxorium…*, p. 15–16. The author cites remarks of Romanists pointing the changed performed by compilers. They regard the following phrases: 1) *in peculio actio datu*r (S. Solazzi, *Sulla capacitá…*, p. 158); 2) *depositi vel quoque et commodati* (E. De Ruggiero, *Depositum vel comodatum*, BIDR 1907, no. 19, p. 29) and the extract: *maxime...propter eam actio* (G. Heck, *Die fiducia cum amico contracta*, ZSS 1899, no. 10, p. 126).

[23] See: M. Garcia-Garrido, *Ius uxorium…*, p. 16.

[24] M. Garcia-Garrido, *Ius uxorium…*, p. 16 (no.41).

[25] About this subject: *ibidem*, p. 17; S. Solazzi, *Sulla capacitá…*, p. 158.

[26] About this source see S. Solazzi (*Sulla capacitá…*, p. 157), according to whom the text of Ulpian could be altered. The author supposes that in the original statement of the jurist, the responsibility of *patris familias* due to a contract conducted by a daughter was more limited as in reference to the son.

The jurist believes that in case conducting a bailment contract with a *filius familias*, *actio de peculio* should be performed, that is a claim against the possessor of power on the basis of which it was possible to sue him only to the amount of *peculium* (*dumtaxat de peculio agendum erit*). Next, he adds that in such a situation it was possible to directly sue the son (*cum filio autem familias ipso et directo quis poterit*). However, if a female slave or daughter under power was one of the parties of *commodatum* agreement, then – according to Ulpian – only a *peculio* claim would be possible (*dumtaxat de peculio erit agendum*). From the above cited text, it directly arises that *filius familias* – on the contrary to filia familias – could contract an obligation and also be sued. The daughter remaining under *patria potestas* was in this case treated just like a female slave (*ancilla*). Agreements conducted by her and also by other persons mentioned by Gaius (G.3,104) actually existed and they were treated as natural obligations in the classical period of law[27].

The possibility of utilization of a claim against *pater familias* due to actions performed by the daughter administering *peculium* can be deduced from another statement of the jurist:

D.3,5,13(14) (Ulp.lib.10 ad ed.): *Si filius familias negotia gessisse proponatur, aequissimum erit in patrem quoque actionem dari, sive peculium habet sive in rem patris sui vertit: et si ancilla simili modo*.

Ulpian states that in case of conducting a legal act (*negotia gessisse*) by a son who has *peculium* (*peculium habet*) or if he increased benefits of his familial superior (*sive in rem patris sui vertit*), a claim should be placed also against the father (*in patrem quoque actionem dari*). According to the jurist such a solution in case of the son can be utilized if the subject performing was a female slave (*et si ancilla simili modo*)[28]. Despite the fact that Ulpian does not use the word *filia familias* but *ancilla* in this case – according to *argumentum a minori ad maius* – it can be assumed that this claim could also be utilized by the contractor of the daughter who administered *peculium.*

The texts of Paulus and Ulpian deserve special attention. It arises from them that *actio de peculio* could be filed against *pater familias,* if a married *filia familias* – due to divorce (*divortii causa*) – would take some belongings from the household of the husband. As it is known, if in such case occurred *uxor sui iuris* – the husband would be entitled to file an *actio rerum amotarum* (claim to return

[27] About natural obligations of *filiae familias* see: E. Ejankowska, *Położenie prawne 'filiae familias' i jej udział w obrocie prawno-gospodarczym państwa rzymskiego w okresie późnej republiki i pryncypatu* (a non-published doctoral thesis), Rzeszów 2003, chapter 2 at 4, p. 66 and following, with sources and literature indicated therein.

[28] Using the word *ancilla* by Upian raises doubts of S. Solazzi (*Sulla capacitá…*, p. 157–158), who believes that in reference to this matter it would be more relevant to compare the situation of *filius familias* and *servus* or *filia familias.*

taken things)[29] against her. A question arises concerning the security of praetor law for the husband if appropriation of belongings was performed by a wife under the power of his *patris familias*. The answer can be found in of the texts of Paulus:

D.25,2,3,4 (Paul.lib.7 ad Sab.): *Si filia familias res amoverit, Mela Fulcinius aiunt de peculio dandam actionem, quia displicuit eam furti obligari; vel in ipsam ob res amotas dari actionem*[30]*, sed si pater adiuncta filia de dote agat, non aliter ei dandam actionem, quam si filiam rerum amotarum iudicio in solidum et cum satisdatione defendat, sed mortua filia in patrem rerum amotarum actionem dari non oportere Proculus ait, nisi quatenus ex ed re pater locupletior*.

The jurist cites the view of Mela and Fulcinius, who believe that in such a situation *actio de peculio* against the superior of the family can be granted because it seems appropriate to acknowledge *filiae familias* as responsible for the theft or an action against her can be placed[31]. Next, the same jurists add that if the father with the consent of the daughter (*pater adiuncta filia*) placed a claim to return dowry, then a claim *in solium* should be granted against him without any limits to the amount of *peculium*. And in case of death of *filiae familias* – according to the opinion of the cited Proculus – the familial superior should not be sued. Unless, as the jurist adds, the father benefitted from it (*nisi quatenus ex ea re pater locupletior sit*), that is – the enrichment would be a consequence of the fact that *filia familias* had taken some belongings from the household of the husband.

The possibility to sue *patris familias* due to the above mentioned cause is discussed by Paulus in accordance with the words of Julian:

D.13,1,19 (Paul.lib.3 ad Nerat.): *Iulianus ex persona filiae, quae res amovit, dandam in patrem condictionem in peculium respondit*[32].

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[29] Paul.D.25,2,1: *Rerum amotarum iudicium singulare introductum est adversus eam quae uxor fuit, quia non placuit cum ea furti agere posse: quibusdam existimantibus ne quidem furtum eam facere, ut Nerva Cassio, quia societas vitae quodammodo dominam eam faceret: aliis ut Sabino et Proculo, furto quidem eam facere, sicuti filia patri faciat, sed furti non esse actionem constituto iure, in qua sententia et Iulianus rectissime est*. A thorough analysis of this source is performed by A. Wacke (*Actio rerum amotarum*, Graz 1963, p. 86–87), who points out that for Sabinius and Proculus *res amovere* was a construction closest to a delict , whereas Nerva and Cassius were for the idea to treat this action in the category of *negotium*. Also see: P. Bonfante, *Corso di diritto*, I, p. 209; R. Sohm, *Instytucje*…, p. 517. See: D.25,1,2: *Nam in honorem matrimonii turpis actio adversus uxorem negatur*.

[30] About difficulties related to the interpretation of the phrase "*vel in ipsam ob res amotas dari actionem*" writes A.Wacke (*Actio rerum*…, pp. 130, no. 9) and he points literature regarding this matter.

[31] A different interpretation of this extract – considering the conclusions arisen from its comparison to other text of Paulus (D.25,2,6,2) – presents S. Solazzi (*Sulla capacitá*…, p. 140–141) and in the last phrase of deliberations he concludes that these sources should be treated as being altered. This view is not shared by: P. Huvelin, *Études sur le furtum dans le tres droit romaine*, Paris 192, p. 599 at M. Garcia-Garrido, *Ius uxorium*…, p. 18.

[32] According to S. Solazzi (*Sulla capacitá*…, p. 142) here it concerns a claim being a substitution of *condictio furtiva*, thanks to which it was possible to claim return of the value of belongings taken by *filia familias* from the household of the husband. Also see A. Kirschenbaum, *Sons,*

A. Wacke – while analyzing the text – comes to the conclusion that Julianus cited by Paulus agrees to grant *condictio de peculio* probably because in reference to the current state in which a wife *alieni iuris* had taken some belongings, which were included in her *peculium*[33].

Another source which is necessary for the discussed matter is the extract of Ulpian:

D.15,1,13,12 (Ulp.lib.29 ad ed.): *Ex furtiva causa filio quidem familias condici posse constat. An vero in patrem vel in dominum de peculio danda est, quaeritur: et est verius, in quantum locupletior dominus factus esset ex furto facto, actionem de peculio dandam: idem Labeo probat, quia iniquissimum est ex furto servi dominum locupletari impune. Nam et circa rerum amotarum actionem filiae familias nomine in id quod ad patrem pervenit competit actio de peculio*[34].

The jurist considers to grant not only *conditio furtiva* but also *actio rerum amotarum* due to theft (*furtum*). Ulpian states that in case such a delict was committed by a son, it was possible to utilize *condictio furtiva* (*actio rei persequendae* claim) against him. Later, he states that it would be more justified (*verius*) to sue the possessor of power on the basis of *actio de peculio* with the limits to the amount of enrichment, which would raise on his side due to theft (*in quantum locupletior dominus factus esset ex furto facto*). In order to support his statement, Ulpian cites the opinion of Labeon, according to whom it is "highly unjust" for an owner of a slave to remain unpunishedly enriched due to a theft performed by him (*ex furto servi*). As – adds the jurist – also due to taking away belongings of the household of the husband by *filia familias, action de peculio* can be granted. It is limited to the amount of the enrichment, which has become a share of the father (*in id quod ad patrem pervenit*)[35].

As it arises from the above performed analysis of sources concerning *actio de peculio*, it was granted – both to a slave and son – because of business activity of *filiae familias*, to whom *peculium* was entrusted. It means that in the princi-

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Slaves…, p. 52; M. Kaser, *Das Römische*…, I, p. 517; H. Insadowski, *Rzymskie prawo małżeńskie a chrześcijaństwo*, Lublin 1935, p. 242.

[33] A. Wacke, *Actio rerum*…, p. 138–139.

[34] P. Huvelin, *Études sur le furtum*…, p. 599 believes that the last sentence (*Nam… de peculio*) was not written by Labeon but compilers because it refers to *filia familias* and not *servus* to whom the jurist clearly refers his reasoning. Moreover, the utilization of the expression *nam et* seems suspicious to him. P. Zanzucchi has a different point of view (*Il divieto delle azioni famose e la reverentia tra coniugi in diritto romano*, RISG 1906, no. 42, p. 19), which proves that *nam et* also occurs in other texts of Ulpian. A. Wacke (*Actio rerum*…, p. 136–137) suggests that in the text there are some discrepancies but – according to him – they can be explained by the fact that the jurist was for the possibility of performing one and the other claim or (in a wrongly formulated phrase of the final extract) only pointed some similarities between these two claims.

[35] See: Pap.D.25,2,3,5: *Viva quoque filia, quod ad patrem ex rebus amotis pervenit, utili iudicio petendum est.*

pate period there was a legal rule which enabled the daughter to participate in legal and business treading. However, this action was also used as an equivalent of *actio rerum amotarum* in a situation, when the wife was subordinated to the power of a family leader in agnation family of her origin.

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Summary

The application of *actio de peculio* due to *filiae familias* – in the principate period – is not an often discussed topic in literature. This claim was one of additional actions, the aim of which was 35 to include the family superiors and owners of slaves in the responsibility for contractual obligations. Not only in Gaius Institutions (G.4,69–4,77), but also in the formula of the claim of the reconstruction of the praetorian edict written by. O Lenel, no feminine persons are included. However, it arises from other sources that this action could have been applied due to business activity of daughters, which was performed on the basis of *peculium*. *Actio de peculio* – in reference to a married daughter being a subordinate of the father – also had another function; it was the equivalent of *actio rerum amotarum*.

Keywords: actio de peculio, daugther under *patria potestas*, peculio property, *actio rerum amotarum*, principate, complaint, praetorian law

ZASTOSOWANIE *ACTIO DE PECULIO* Z POWODU *FILIAE FAMILIAS* W OKRESIE PRYNCYPATU

Streszczenie

Zastosowanie *actio de peculio* z powodu *filiae familias* w okresie pryncypatu nie jest zagadnieniem często poruszanym w literaturze przedmiotu. Skarga ta należała do powództw o charakterze dodatkowym, których celem było rozciągnięcie odpowiedzialności na zwierzchników familijnych i właścicieli niewolników za zobowiązania kontraktowe osób im podległych. Jakkolwiek zarówno w Instytucjach Gaiusa (G.4,69–4,77), jak i w formule skargi zamieszczonej w rekonstrukcji edyktu pretorskiego zredagowanego przez O. Lenela nie są wymienione osoby płci żeńskiej, z innych tekstów źródłowych wynika, że powództwo to mogło być stosowane ze względu na działalność gospodarczą, którą córki rodziny prowadziły w oparciu o *peculium*. *Actio de peculio* w odniesieniu do zamężnej córki podległej władzy ojcowskiej spełniała też inną rolę – była odpowiednikiem *actio rerum amotarum*.

Słowa kluczowe: actio de peculio, córka podległa *patria potestas*, majątek pekuliarny, *actio rerum amotarum*, pryncypat, powództwo, prawo pretorskie

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Renata Kamińska

The Cardinal Wyszyński University in Warsaw
ORCID: 0000-0003-3357-1734

PROCURATORES – IMPERIAL AGENTS OR CURATORS' ASSISTANTS?

The period of the Principate was characterised by a number of changes in nearly all areas of public life, i.e. in the political, economic, social and religious sphere. These occurred as an unavoidable, and in some cases absolutely natural result of systemic transformations. The new model of government, initiated by Augustus, where power was in the hands of the ruler with little involvement of other state authorities, required appropriate principles to be introduced for the functioning of both the office of Princeps and other co-governing centres. Although Augustus sought to abandon the republican order, he was well aware of the fact that he would only succeed if his power was secured within the frames of this system[1]. Hence, he maintained Plebeian Assemblies and the Senate, as well as most of the clerical positions, although he divested all of those bodies of many of their previous powers. This was particularly clear in the case of the magistrates whose functions he assumed himself or delegated to offices which he established[2]. The principles in accordance with which these were exercised differed in almost every respect from the models existing in the Republic. This applied in the same way to rotation in office, collegiality, gratuitousness and eligibility. Different rules were also followed in selecting candidates for the specific positions. Seeking to limit the power of the Senate, Augustus decided to establish a counter-measure for this body by filling imperial offices mainly with representatives of *Ordo Equester*[3]. Hence, prefectures were reserved for *equites* (except for urban prefect, a posi-

[1] R. Syme, *The Roman Revolution*, Oxford 2002, Polish translation: A.M. Baziór, *Rewolucja rzymska*, Poznań 2009, p. 318.

[2] Suet., *Aug*. 37; M. Beard, *SPQR. A History of Ancient Rome*, New York 2015, Polish translation: *SPQR. Historia starożytnego Rzymu*, Poznań 2016, p. 339.

[3] H.H. Scullard, *From the Gracchi to Nero. A History of Rome from 133 B.C. to A.D. 68*, London–New York 2007, p. 219.

tion to which senators were appointed[4]), while representatives of *ordo senatorius* were designated for offices of *curatores*. Given the essence of the functions exercised by them, prefects were more like officers of central bodies, while the tasks performed by curators reflected a local nature of these offices. Their responsibilities were basically linked with ensuring proper functioning of the specific components of the urban infrastructures, i.e. *cura urbis*[5]. There were rather large disproportions in the scope of duties delegated to prefects and curators, which leads to the question about the reasons for this division of powers. One of these may possibly be linked with the Emperor's desire to limit senators' influence in the governance of the state. Notably, however, today the role and position of prefects is viewed in a different way compared to how it was perceived by Romans, who most possibly did not regard them as high-ranking officials. Indeed, it may have been just the opposite. This opinion was expressed e.g. by Adam Ziółkowski, a historian of Antiquity, who pointed out that prefects' role was mainly linked with maintenance of public order. On the other hand, even if we assume, in line with the theory prevailing today, that they actually were highly influential, it is obvious that this did not happen at the beginning of the Principate, but much later[6]. Meanwhile, the curators' role and scope of duties from the start were impressive, which inevitably contributed to the increased importance of this office in the political scene. The first to emerge were curators in charge of temples and public buildings (*curatores aedium sacrarum et operum locorumque publicorum*[7]) and those responsible for matters related to public water (*curatores aquarum*[8]). These collegial bodies were established in Augustus' times. Another commission, designated to manage the Tiber and its banks, i.e. *curatores riparum et alvei Tiberis*, was created by Tiberius[9]. Beyond the limits of Rome, there were also *curatores viarum*[10], whose responsibilities were linked with construction and management of suburban roads.

[4] S. Ruciński, *Praefectus Urbi. Strażnik porządku publicznego w Rzymie w okresie wczesnego Cesarstwa*, Poznań 2008, p. 48 et seq.

[5] T.R. Martin, *Ancient Rome – From Romulus to Justinian*, Yale 2012, Polish translation: *Starożytny Rzym od Romulusa do Justyniana*, Poznań 2014, p. 168.

[6] A. Ziółkowski, *Historia Rzymu*, Poznań 2004, p. 378, 426.

[7] Historical sources contain conflicting information regarding the origins of this collegiate body. It emerged either during the reign of Augustus, as suggested by Suetonius (Suet., *Aug*. 37) or in the early period of the reign of Tiberius (CIL IX 3305/6 (=ILS 932).

[8] Suet., *Aug*. 37.

[9] Tac., *Ann*. 1,76; G.S. Aldrete, *Floods of the Tiber in Ancient Rome*, Baltimore 2007, p. 163, 201.

[10] This collegiate body probably existed in the Republic, but it grew in importance during the times of Augustus and then Tiberius. See: R. Kamińska, *Ochrona dróg publicznych przez urzędników rzymskich*, „Zeszyty Prawnicze" 2008, vol. 8, no. 2, p. 90; *idem*, *Ochrona dróg i rzek publicznych w prawie rzymskim w okresie republiki i pryncypatu*, Warszawa 2010, p. 96–97; *idem*, *'Augustus nova officia excogitavit' (Suet. Aug. 37). Oktawian August twórcą 'cura urbis'?*, „Miscellanea Historico-Iuridica" 2013, no. 12, p. 21.

As a rule, commissions of *curatores* did not comprise many members; they usually consisted of a few officers appointed and dismissed by the Princeps. Initially they operated independently. The earliest source information about assisting services designated to work with them are related to the late forties and early fifties of the first century A.D. This is when *procuratores aquarum* appeared in the political scene, to be followed by *procuratores operum publicorum* introduced one hundred years later[11]. They were recruited among imperial freedmen and were designated to assist curators. Some information related to them is provided by the treaty *De aquaeductu urbis Romae* by Sextus Julius Frontinus.

Front., *De aq*. 105,2: *Procuratores autem primus Ti. Claudius videtur admovisse*, *postquam Anionem Novum et Claudiam induxit*.

The above passage suggests that *procuratores aquarum* were appointed by Emperor Claudius after Anio Novus and Aqua Claudia aqueducts were built[12]. Unfortunately, the work by Frontinus does not mention the purpose for which these offices were created. From the broader context of the above quotation, one may only presume they were intended to provide support for curators. In this case procurators were to aid *curatores aquarum*, who had significantly more duties after the two new water supply systems were built. However, a more puzzling issue here is related to the selection of individuals designated as candidates for procurators. As mentioned earlier, they were selected among imperial freedmen, which definitely was not by coincidence. After all these individuals had no expertise in management of the infrastructures. Hence, it can be assumed that the actual reason for Claudius to appoint *procuratores aquarum* was different than the one reported officially, i.e. to ensure support for curators in their duties. One of the Emperor's major political objectives was to weaken the position of the Senate. Starting from the time the first Princeps was in power, the role of this body was being diminished, but the Senate still held an important role as a centre of authority, and members of *ordo senatorius*, by decision of Augustus, held some offices, such as curator's office[13]. It was Emperor Claudius who decided to put an end to this. One of the measures adopted by him involved assignment of assisting functionaries for curators; these were recruited among imperial freedmen who were fully dependent on and controlled by the ruler. In fact, this approach was perfectly

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[11] J.E. Sandys, *Latin Epigraphy*: *An Introduction to the Study of Latin Inscriptions*, Cambridge 1927, p. 226.

[12] Front., *De aq*. 13. The aqueducts were launched on 1 August of year 52, i.e. on Claudius' birthday. See: M. Hainzmann, *Untersuchungen zur Geschichte und Verwaltung der stadtrömischen Wasserleitungen*, Wien 1975, p. 121; H.B. Evans, *Water Distribution in Ancient Rome*. *The Evidence of Frontinus*, Michigan 1994, p. 115.

[13] Ch. Bruun, *Imperial Power Legislation, and Water Management in the Roman Empire*, „Insights" 2010, vol. 3, no. 10, p. 11; *idem*, *The Water Supply of Ancient Rome. A Study of Roman Imperial Administration* (*Commentationes Humanarum Litterarum 93*), Helsinki 1991, p. 219; R. Kamińska, *Cura aquarum w prawie rzymskim*, „Zeszyty Prawnicze" 2010, vol. 10, no. 2, p. 102.

in line with Claudius's policy aimed towards strengthening the position of the imperial court as the main centre of power, and at minimising the role of the Senate[14]. The means enabling Claudius to achieve that included the office of *procuratores*, as in accordance with the Emperor's intentions, formally, they were to provide support to curators, but actually they were to monitor their operations[15]. As a result, a relation of a specific nature developed between curators and procurators; a critical comment regarding that was made by Frontinus.

Front., *De aq*. 2,1: *Neque enim ullum omnis actus certius fundamentum crediderim*, *aut aliter quae facienda quaeque vitanda sint posse decerni*, *aliudve tam indecorum tolerabili viro*, *quam delegatum officium ex adiutorum agere praeceptis*, *quod fieri necesse est*, *quotiens imperitia praepositi ad illorum decurrit usum*; *quorum etsi necessariae partes sunt ad ministerium*, *tamen ut manus quaedam et instrumentum agentis*.

He insisted there was nothing more inappropriate for a dignified man than to exercise the office entrusted to him by following instructions of his subordinates. The latter is unavoidable whenever, due to his ignorance, the superior calls for the services of people who, although their involvement in the performance of the function is necessary, are seemingly the hand and tool of the person performing the function.

Hence, Frontinus clearly criticised the relation existing between curators and their assistants, i.e. procurators. The severity of this criticism seems to be even more emphasised by the fact that the above words were placed by the author of the treaty at the very beginning. This may most of all reflect the gravity of the problem and show how important this issue was for Frontinus. This is not surprising; after all, Frontinus himself held the office of *curator aquarum* during the reign of Emperor Nerva so he experienced these problems personally[16]. At first glance one might get the impression that the criticism expressed by him related to procurators who were merely auxiliary functionaries, yet they elbowed their superiors down into this position[17]. However, one could blame both sides, and therefore also the curators, who partly caused this situation because of their lack

[14] J. Ramón Robles, *Magistrados*, *Jueces y Árbitros en Roma*. *Competencia civil y evolución*, Madrid 2009, p. 90.

[15] This way, according to C. Kunderewicz, *O akweduktach miasta Rzymu*. *Frontinus*, Warszawa 1961, p. 57–58 (Prace Zakładu Archeologii Antycznej IHKM PAN, vol. 19), p. 104, the Princeps managed to delegate the actual performance of the function to his freedmen, without a necessity to eliminate the position of *curator aquarum*.

[16] D.R.Blackman, A.T. Hodge, *Frontinus' Legacy. Essays on Frontinus' de aquis urbis Romae*, Michigan 2001, p. 142, 144.

[17] C. Kunderewicz, *O akweduktach*…, p. 77, note 7. According to L. Homo, *Rome impériale et l'urbanisme dans l'antiquité*, Paris 1951, p. 193 the rationale for subordinating curators to procurators may have been linked with the fact that the latter had more expertise, because generally they were constantly in touch with the practical side of aqueduct operation, therefore they had far more experience than curators.

of knowledge and adequate skills. Otherwise, they would not have needed services of subordinate officers, or at least not to the extent as it occurred in reality. This relationship of apparent subordination to procurators must have been even more disagreeable for curators, or perhaps even humiliating and hard to accept, because they came from the community of senators, while procurators represented imperial freedmen (at least in the period in question). This, however, did not happen by coincidence; it was a result of a planned and deliberately conducted political game of the imperial court which aimed to minimize the role of the senate in the state. This was reflected by the fact that more and more members of equestrian order were appointed to offices previously reserved for *ordo senatorius*[18]. In fact, during the period in question this happened occasionally, nevertheless it clearly showed there were attempts to build official apparatus based on representatives of *ordo equester*.

The process of these changes, initiated by Vespasian, was systematically continued by Domitian, however the final shape of public administration based on equestrian order was instituted by Trajan and his successors Hadrian and Antoninus Pius[19]. These changes were also gradually introduced in the administration sector in charge of public water management, although that may have taken place a bit later. This may be presumed, based in the available sources; indeed, the first references to equites holding the office of *procurator aquarum* come from the times of Trajan (98–117)[20]. On the other hand, it seems puzzling that although generally this office was entrusted to equites, sometimes imperial freedmen were also appointed. Traces of their activity are preserved for instance in inscriptions dating from Hadrian's times; these can be seen on measuring nozzles (*fistulae*) which they supervised[21]. Hence, there are grounds to assume that from the second half of the second century equites also monopolised this office[22]. Interestingly, the fact that the office of curator generally was delegated to equites did not mean that imperial freedmen could no longer hold the position[23]. This led to an extraordinary, or really perplexing situation where equivalent positions were held at the same time by citizens of higher social rank and individuals with a status of *libertini*. This immediately raises a question how that could have happened, or whether the fact that an equite's colleague in office was an imperial freedman was in accord with the *dignitas* of the former? These issues, for a long time, have been seen

[18] L. Homo, *Rome impériale*…, p. 193; Ch. Bruun, *The Water Supply*…, p. 219.

[19] E. De Ruggiero, *Lo stato e le opere pubbliche in Roma antica*, Torino 1925, p. 136.

[20] K. Geißler, *Die öffentliche Wasserversorgung im römischen Recht*, Berlin 1998, p. 69; Ch. Bruun, *Il funzionamento degli acquedotti romani* [in:] *Roma imperiale. Una metropoli antica*, ed. E. Lo Cascio, Roma 2000, p. 148.

[21] CIL XV 7308; XV, 7310.

[22] CIL XV, 7299; T. Ashby, *The Aqueducts of Ancient Rome*, Oxford 1935, p. 23.

[23] More about collaboration between libert Augusti and Equite procurators, See: K. Kłodziński, *Officium a rationibus*, Toruń 2017, p. 108 et seq.

in the literature as controversial, and the phenomenon is, in fact, referred to with specific terms, i.e. "dual procuratorship", "Pseudokollegialität" and "collegialité inégale"[24]. Two issues seem to be particularly interesting, and also most problematic. Firstly, what was the purpose for creating this model for the office of *procurator aquarum*, and secondly what was a reasonable justification for this duality of the office and the glaring disproportion of the social ranks?

In the doctrine, there is a belief that this disproportion may seem smaller if one assumes that the procurator-freedman was only an assistant to the procurator--equite. This explanation however is not fully satisfying because it does not provide sufficient rationale for designating *libertum Caesaris* for the office of *procurator aquarum*. This issue was investigated by Ch. Bruun[25], and the results of his research allow to hypothesise that for the Princeps this approach was linked with two goals. The first and foremost, from the standpoint of the policy adopted by the imperial court, was a possibility to ensure continuous control over equites' operations. Another reason was connected with efforts to increase effectiveness of the work performed by equestrian procurator, who for this purpose was assigned with an imperial freedman as an assistant[26]. This explanation is additionally supported by the fact that, as a rule, imperial offices were performed by single individuals.

It is equally difficult to determine the duration of the term of *procurator aquarum* office. According to Ch. Bruun[27] it was two years long at the most. The scholar reached this conclusion as a result of calculations based on inscriptions. He counted all the procurators whose names were immortalised on waterpipes, and compared that number with the time period they were in office. His findings show that during the reign of Domitian, in years 83–96, there were at least seven procurators, which means that the term in office in each case did not exceed two years. This indeed seems puzzling. There appear to be at least two explanations for that. Firstly, it is likely that the emperor wanted to increase the control over the curators. The rotation of the procurators supervising them did not allow for closer cooperation to be started; that would have at times posed a disadvantage from the standpoint of the emperor's policy. By making it impossible for the officers to start closer relations in the performance of their duties, greater objectivism was ensured in the assessment of curator's operations by procurators; after all, evaluation and supervision of the former presumably were the unofficial reason why *procuratores aquarum* were appointed. The second probable reason

[24] H.G. Pflaum, s.v. *Procurator*, RE 23, 1957, kol. 1278; Ch. Bruun, *The Water Supply*…, p. 220.

[25] Ch. Bruun, *The Water Supply*…, p. 220.

[26] *Ibidem*, p. 217, calling this an "unhear of" concept ("The existence of colleagues in administrative sectors led by imperial freedmen and equestrian procurators is almost unheard of").

[27] Ch. Bruun, *The Water Supply*…, p. 216. According to K. Geißler, *Die öffentliche*…, p. 72, as a rule the term of *procurator aquarum* office was to continue for one year, however in reality it happened that it was even 20-year long, as shown by the example of Alypius who remained in office from year 83/84 until year 102 AD. Cf. Iulianus, *Epistulae et leges* 404B.

why Domitian shortened the term of office for these functionaries to two years may have been connected with this emperor's assessment of the operations performed by procurators from the time the office was established until his time. Seeing how frequently and severely they abused their authority, the ruler may have decided to end this by reducing the duration of their term in office. This way he may have wanted to prevent collusion and offensive cooperation between them and private individuals, and perhaps curators, as well.

Hence, it is necessary to ask another question, of key importance for these considerations; did Claudius and his successors manage to achieve the goals associated with *procuratores aquarum*, and consequently did this office fulfil its role? It is worthwhile to precede the response with a brief reflection on the competences of these functionaries, which is possible owing to Frontinus' records.

Front., *De aq*. 105, 4–5: *Procurator calicem eius moduli*, *qui fuerit impetratus*, *adhibitis libratoribus signari cogitet*, *diligenter intendat mensurarum quas supra diximus modum et positionis notitiam habeat*, *ne sit in arbitrio libratorum*, *interdum maioris luminis*, *interdum minoris pro gratia personarum calicem probare*. *Sed nec statim ab hoc liberum subiciendi qualemcumque plumbeam fistulam permittatur arbitrium*, *verum eiusdem luminis quo calix signatus est per pedes quinquaginta*, *sicut senatus consulto quod subiectum est cavetur*.

The passage from his treaty describes the role played in the process of awarding water related concessions by *procuratores*, i.e. functionaries responsible for overseeing the technical side of using public water. Their role started when the interested person reported to the curator (*curator aquarum*) with a letter from the emperor, confirming a concession awarded to them. The curator designated a procurator who was to connect the property of the concession holder to the water supply system. The officer was to stamp the public installations supplying water, and then to oversee the way the person exercises their rights[28]. Hence, each time someone was granted a concession, a procurator was to mark the *fistula* of a size matching the volume of water awarded, and then to supervise the sizes and locations of the specific nozzles.

The scope and substance of the duties performed by *procuratores aquarum* created many opportunities for them to commit various offenses. What is more, the tone of the comment made by Frontinus suggests that these occurred frequently. Therefore, it is hardly surprising that he had a negative attitude towards these functionaries. In fact, whenever *De aquaeductu urbis Romae* mentions procurators they are criticised and rebuked, although, as pointed out earlier, the author of the treaty did not spare the curators, either. However, generally he blamed the latter for a lack of expertise and experience, while procurators were accused of numerous fraudulent acts which they committed during and in connection to their work. The essence of these offences is described in the following passage.

[28] K. Geißler, *Die öffentliche*…, p. 74.

Front., *De aq.* 112,2–3: *Ampliores quosdam calices quam impetrati errant positos in plerisque castellis inveni et ex iis aliquos ne signatos quidem. Quotiens autem signatus calix excedit legitimam mensuram ambitio procuratoris qui eum signavit detegitur.*

According to Frontinus, the most common misdeeds included installation of alternative connecting elements to waterpipes. Unlawfulness of such an activity was linked with the fact that outgoing bronze pipes (*calices*) installed in distribution tanks (*castella*) were larger in diameter than allowed under the concession granted to a given entity[29]. Such insidious acts, as they were described by Frontinus, were carried out by supervisors of aqueducts, i.e. *aquarii*, and their superiors, that is procurators. Indeed, it was their duty to stamp each new *fistula*, then why would it have posed any problem to them to mount nozzles of a different size than prescribed? Since they directly handled the water-conveying installations, they could mount larger *fistulae* and mark them as matching in diameter defined in the concession. What is more, there were cases when no marking was applied. As a result, the volume of water received unlawfully for private use increased along with the number of recipients. Therefore, it is not surprising that Frontinus mainly blamed both *aquarii* and procurators of insidiousness and negligence.

There may also be other reasons for the harsh criticism of *procuratores aquarum* conveyed by Frontinus. It should be remembered that the author of the treaty, as mentioned before, held the office of *curator aquarum* during the reign of Emperor Nerva, that is in the times when equites were already often appointed for the position of procurators in charge of water. Meanwhile, his criticism is aimed at procurators-freedmen. By appraising them in such negative terms, Frontinus may have wanted to show more explicitly how big a mistake it was to appoint people from this social group to this position. By pointing out all their misdeeds he wanted to publicly demonstrate his disapproval for the functioning of *procurator aquarum's* office in such a form.

Procuratores aquarum definitely were not the only officers playing an auxiliary role in management and supervision of urban infrastructures in the period of Principate. Claudius is credited for appointing the first *procurator Augusti ad ripam Tiberis*, who was responsible for coordinating and supervising works ordered by the Princeps related to the construction of an artificial harbour in Ostia[30]. However, it is likely that this office no longer existed after the Emperor died. This may be reflected mainly by the lack of any source information dating from the later times.

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[29] The essence of illicit operations of *aquarii* was the fact they established *calices* which were 13.5% larger or 20% smaller than they should have been. As a result the volume of water in the tank was higher, and aqueduct keepers could illegally supply water to additional unauthorised people. For that the latter were required to pay tax, however the money ended up in the pocket of the *aquarius* rather than in the state treasury.

[30] CIL XI, 6337 = ILS 1422; CIGr. X, 797; Plin., *Nat. hist*. 9,14; 16,202; Seut., *Claud*. 20; L. Homo, *Rome impériale*…, p. 242; E. De Ruggiero, *Lo stato*…, p. 139.

Hence, it is possible that the motivations underlying Claudius's efforts to establish the offices of *procuratores aquarum,* in fact, were primarily political in nature. With their help he wanted to assume control over the operations of officers from senatorial order, and later to further reduce their involvement, small as it already was, in the exercise of authority in the state. Yet, as it turned out, neither this emperor nor his successors managed to achieve this goal. This is because freedmen appointed to the office of imperial procurators quickly got the gist of their role and were able to skillfully use it for their gain. Due to this, before long the ruler lost control over their actions, which, to make things worse, were more and more in conflict rather than in conformity with the interest of the state and its population. As a result, in history *procuratores aquarum* are remembered as dishonest and negligent officers who abused their position for quick and easy profit. Therefore, seeking an answer to the initial question whether these officers met the emperor's expectations and fulfilled their mission as supervisors of curators, it can be concluded that to some extent it indeed was so. Unfortunately, the stealth and desire for gains that dominated their work cast a shadow over the entire activity of procurators, whether as assistants to curators or even as their unofficial inspectors.

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Summary

For the first time *procuratores aquarum* were nominated by Emperor Claudius. Their main task was to help curators to perform their duties. Together with them, prosecutors supervised the distribution of public water in Rome. In fact, the real purpose of establishing the office of *procuratores aquarum* was to exercise control over the activities of *curatores aquarum*. This was due to Claudius' attempt to limit the role of the Senate whose representatives held the *procuratores* offices. However, Frontinus in his treatise *De aquaeductu urbis Romae* as a rule accused them of fraud and various abuses they committed during the mandate. This shows that Claudius' aim for this office was not fully realized. *Procuratores* were more likely to be remembered as public water thieves than curators.

Keywords: procuratores aquarum, *curatores aquarum*, public water

PROCURATORES – CESARSCY AGENCI CZY POMOCNICY KURATORÓW?

Streszczenie

Po raz pierwszy *procuratores aquarum* zostali powołani przez cesarza Klaudiusza. Ich głównym zadaniem było pomaganie kuratorom w wypełnianiu przez nich ich obowiązków. Wraz z nimi prokuratorzy nadzorowali dystrybucję wody publicznej na terenie Rzymu. Jednak prawdziwym celem utworzenia urzędu *procuratores aquarum* było sprawowanie przez nich kontroli nad działalnością *curatores aquarum*. Wynikało to z dążenia Klaudiusza do ograniczenia roli senatu, którego przedstawiciele sprawowali urzędy prokuratorskie. Jednak Frontinus w swoim traktacie *De aquaeductu urbis Romae* oskarżał ich o kradzieże i różne inne nadużycia, które pełnili w czasie kadencji. To pokazuje, że cel, jaki nadał temu urzędowi Klaudiusz, nie do końca został zrealizowany. Prokuratorzy bowiem dali się raczej zapamiętać jako złodzieje wody publicznej niż pomocnicy kuratorów.

Słowa kluczowe: procuratores aquarum, *curatores aquarum*, woda publiczna

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Sylwester Kasprzak

The John Paul Catholic University of Lublin
ORCID: 0000-0002-1007-0454

STRENGTHS AND WEAKNESSES IN THE OPERATION OF ADMINISTRATIVE LAW

Introduction

Administration equipped with adequate instruments should define directions for effective and efficient operation in a given human population. Its construct comprises organisational structures, statutory operations, tasks, competencies and people. Good administration relies on robust knowledge and the ability to make the right decisions. Generally, the theory of organisation and management (TOM) emphasises the importance of team work, and specific operations are possible only if that results from decisions made by the team, and reflects interests of the whole. Seemingly it should be the same when it comes to performance of executive tasks by central agencies, national and local governments. Law is not built by one person but by a group of people, or experts, so it is necessary to focus on dependable cooperation and common interest, for the good of the country and its citizens[1].

Administrator must have their own vision of the administration process, and follow the vision in their work, operations, decisions, and orders, they should effectively manage and organise the life of the community, and most importantly, regularly organise trainings. Hard work and efforts of administrative bodies must be accompanied by honesty and reliability. Efficient management and administration of people most of all requires an organised top-down structure of authority. Governance of a state is divided into legislative, executive and judiciary powers[2]. The theory of administration comprises four major groups of prob-

[1] Cf. S. Wrzosek, *Wpływ teorii organizacji i zarzadzania na rozwój nauki administracji* [in:] *Gaudium in litteris. Księga Jubileuszowa ku czci księdza Arcybiskupa Profesora Stanisława Wielgusa*, eds. S. Janeczek, W. Bajor, M. Maciołek, Lublin 2009, p. 603–609.

[2] Cf. J. Starościak, *Zarys nauki administracji*, Warszawa 1971, p. 262–273.

lems: 1) issues related to organisation of the administrative apparatus; 2) issues related to the personnel performing operations of the so-called public authority; 3) issues of the broadly defined methods of administrative work; 4) technical issues related to the functioning of state administration and other public organisations. Characteristics of state administration include its unity and congruity. No administrative body defines its basic purpose independently and separately.

It is possible to distinguish a few characteristics of administration. These include: 1) **the purpose** – in this case administration of people's affairs subject to public management; 2) **means of operation** of the state administration, at the central and territorial level – this comprises a political and social objective in accordance with a conviction that each community must have authorities and administrative order; 3) **specificity of state administration**, i.e. its orientation towards the adopted strategy of operation and handling of citizens' affairs. The entire public administration of a country is characterised by hierarchical structure, which means there is an orientation from higher ranks downward, and the lower ranks of authority are subordinate to the higher or central instances. One could talk here about decentralisation of power and delegation of authority to lower ranks. This is in accordance with the principle of subsidiarity which says that if something can be done at a lower level, it does not have to be executed by those in higher ranks. Administrative power in a country is executed by organs of authority comprising one person or a group of people, in the case of collective bodies. The organs are comprised in the organisational structure of the state or the local government, and operate in the territory stipulated by the law defining the the competencies. Notably, all the administrative structures consist of two categories of entities, i.e. organs and officers[3]. We can distinguish organs of state administration, national and territorial governments as well as professional self--government. There may be decision-making and advisory bodies, as well as first and second instance organs[4]. Public tasks performed by the state include those intended to ensure security for the citizens, safety and integrity of national borders, assistance to Poles living abroad, aid for citizens during their visits abroad, aid to veterans of independence struggles, and policies related to employment, supervision of working conditions, provision of specialised healthcare to children, pregnant women, disabled people and senior citizens, combatting of epidemics and many more. This suggests a broad horizon of impact made by public administration. The weakness does not lie in the administration itself or administrative law, but in those who institute the law and, most importantly, those who apply it in real life to solve problems of the society and individuals[5]. This statement suggests that the entity instituting the law, and the entity applying legal

[3] A. Błaś, J. Boć, J. Jeżewski, *Administracja publiczna*, ed. J. Boć, Wrocław 2004, p. 156–157.
[4] *Ibidem*, p. 158–165.
[5] *Ibidem*, p. 141–142.

regulations may be strong or weak and this directly affects the quality of law. It is wise people who determine happiness of others. Talented and wise people should be given a voice and allowed to design laws; they should not by excluded from such tasks of key importance. Adam Habuda claims that codified law most importantly includes the generally applicable acts and regulations issued thereunder, as well as regulations of local law, and even instructions or internal regulations issued under various names. There are many opinions related to laws, glossaries are published, theoreticians provide legal interpretations of regulations, by reference to verdicts passed by Regional Administrative Courts (WSA), Supreme Administrative Court (NSA) and the Supreme Court (SN); all these endeavours give shape to the contemporary law, in its various disciplines. The task defined for interpreters of law is to interpret a legal norm for its applicability in a given case. The collection of legal regulations comes with the public administration, with its practice and style of operation. All of the above factors create the law in its ultimate manifestations. Law is inevitably imposed onto the organs of the state at the different levels, since it is also an instrument of exercising the power, and the authoritative functioning of administration and its law. Legal regulations also impose restrictions on the entities applying it in practice; law itself is also limited as it does not anticipate everything, particularly unforeseen yet plausible cases[6]. The weakness does not lie in expertise or professional abilities of individuals because there may be errors, but the thing is about the characteristics of the organisation, its structure, to what extent it abides by the law, and generally whether the management method is taken into account. This seems to be most important. Negative features of law include excessive formalisation, excessive legalisation, excessive instruction, and most of all multiplication of regulations which appear, again and again[7].

As for the concept of administration, the term comes from the Latin word *administratio* – meaning management and direction, defining a way of operation. Administration may be discussed in subjective and objective terms. Public administration is a prerogative of a state, implemented by its subordinate organs as well as by bodies of territorial government, and it is intended to satisfy collective and individual needs of citizens, resulting from their co-existence in a society[8].

One could ask about the premises, i.e. conditions and objectives, which accompany development of the state's organisational status. These premises include:

1) the state's material potential (resources in the state treasury),
2) organisational standing of the state (state administration),
3) contents of socioeconomic policy (political strategy).

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[6] A. Habuda, *Prawo jako instrument ograniczenia patologii w demokratycznym państwie prawnym* [in:] *Patologie w administracji publicznej*, eds. P.J. Suwaj, D.J. Kijowski, Warszawa 2009, p. 59.

[7] *Ibidem*, p. 61.

[8] *Prawo administracyjne*, ed. J. Boć, Wrocław 2000, p. 16.

Ad. a) The state's material potential – this is a rationale for administrative interference, hence according to a dynamic approach, it is not defined directly by the nation's affluence. This depends on the design of the economic system. The interference of the administration, as a law-making and executive activity, raises the need to determine the significance of the above premises. The strength of the material potential of the state and local governments and its effect in the range and contents of the interference, should be considered with respect to the fair division of administrative operations into those which involve shaping and transfer of services and material goods, and those without similar connotations;

Ad. b) Organisational standing of the state is a collective group of suppositions reflecting important elements connected with the organisational structure of administration, seen in particular in the context of its effectiveness and efficiency[9].

Ad. c) The basic issue is related to the object of the policy. Policy to an extent means a system, approved by bodies of the national and local government, comprising extra-legal statements and postulates with regard to where, when and how the potential of the state and the territorial governments is to be used. Here we can distinguish two approaches: **firstly** *politics towards administration* – it may affect the objective range of its interference wherever, as a result of respecting it, administrative organs institute law; **secondly** – *politics in administration* – this is either politics towards administration, processed horizontally or vertically, in compliance with the system of organizational subordination, or policy created in administration itself, hence constituting no direct elaboration of the contents of external policy[10]. The above seems to suggests that the quality of law and its applicability depend mainly on the efficiency of the state in which given law is in force, and is respected or not.

The objectives of administrative policy obviously include: "legitimate interest of citizens", "social welfare", "common good", "general national interest", "interest of the state", "social interest", and "public usefulness"[11].

Characteristics of administrative law in public administration

Administrative law is a collection of norms regulating administrative operations (this is related to administration in the objective sense), or administrative law is that which sets forth norms for public administration. Another definition

[9] *Ibidem*, p.19.
[10] *Ibidem*, p. 20.
[11] *Ibidem*, p. 21; see: A. Błaś, J. Boć, J. Jeżewski, *Administracja publiczna*, p. 32–39.

of administrative law accounts for its specific characteristics, i.e. "power of authority" reflecting the capacity to unilaterally resolve individual situations, to make permanent and applicable resolutions binding for all legal entities in the organism of the state, and enforced by the state, in a situation when such resolution is linked with a necessity to impose an obligation. Administrative law is the type of law which comprises the element of "the power of authority", realised by competent bodies of central and local authority. According to F. Longchamps: administrative law relates to public administration understood as a certain area of social culture, and is specific to it, in other words it comprises that which is created specifically for the organisation and operation of public administration rather than for other areas of social culture[12]. It should be emphasised that in a state ruled by law, public administration is understood as a systemic function of the state and of territorial government, and it involves performance of public tasks described by law[13]. Public administration embedded in a state must follow the basic principles:

1) *The principle that generally applicable law is binding* in all operations of any statutory institutions. It is the legal and moral standards that limit the excessive freedoms of administrative bodies.
2) *The principle of executive nature* of all the operations performed by public administration agencies. It is rooted in the constitutional separation of power (into legislative, executive and judiciary bodies of public authority)[14].
3) *The principle of subjecting all the operations* of public administration to supervision by independent Courts of Law. Today it can be observed that public administration employs all possible system-related, legal, political and economic means to distribute the powers and expand its place in the three-fold functions of governance.
4) *The principle of legal accountability*, it is necessary for normal and dependable functioning of state institutions. This is related to the sense of responsibility when decisions are taken by public administration bodies[15]. Here are some other principles: Tasks performed by public administration are set forth by legal acts. Existence of organisational structures is justified if these contribute to effective and efficient performance of duties and tasks designated for the public governance. It is not public administration that creates the generally binding laws; it can only review legal texts of normative acts. Administration does not constitute an internal structure, exempt from any public control, or from supervision by the judiciary. Public tasks are performed in order to protect citizens' interests, particularly as regards homeland security and social

[12] *Prawo administracyjne*, ed. J. Boć, Wrocław 2000, p. 35–36.
[13] A. Błaś, J. Boć, J. Jeżewski, *Administracja publiczna*, p. 32.
[14] *Ibidem*, p. 33.
[15] *Ibidem*, p. 34–37.

welfare. Tasks executed by public administration bodies are always treated as mandatory, which means they cannot be dispensed with. Public administration bodies execute public tasks related to legal provisions, and they clearly regulate the process of performing the tasks and obligations[16].

Critical opinions can be heard claiming that administrative law is in crisis. It is similar to any crises which are announced. The institution of family or marriage may be in crisis. There may be an economic or political crisis in a given country. If we want to discuss a crisis, or rather symptoms of crisis, and inefficiency of administrative law, it is necessary to point out that the foundations of this type of law are weak due to the lack of a code of administrative material[17] or systemic[18] law. Most importantly lack of efficiency must be acknowledged in people, as an entity instituting the law and its structure.

On the other hand, a lot of good manuals or books related to this area of administration studies or to administrative law are published, emphasising its power of authority in public administration. Indeed, one could talk about certain weaknesses of this legal order, which nevertheless continues to function, for better or worse. There may be excessive expectations. One should mention the entities instituting administrative law, and the entities applying this legal mechanism practically at all the levels of public governance. Deliberations focusing on the weakness of administrative law should take into account the conflict of interest in its relation with the broadly understood order of civil law with its increasing internal aggressiveness and unjustified conceit, together with the provisions of the Code of Civil Law[19] and Code of Civil Procedure[20]. Many civil law specialists, representing various opinions and approaches as practitioners in private law – present an attitude of disregard for the existence of and the public nature of administrative law, which to a degree follows its own rules[21]. These considerations show that administrative law is an order instituted by the legislator, in order to secure public interests by way of administrative decisions operating from the superior ranks of power down to the lower levels of governance, and finally with respect to specific individuals, citizens of a given country. Where administrative law is applied, there may occur procedural defects or erroneous

[16] *Ibidem*, p. 38–39.

[17] Cf. Z. Leoński, *Materialne prawo administracyjne*, Warszawa 2009, p. 1–246.

[18] *Prawo administracyjne*, ed. M. Wierzbowski, Warszawa 2009, p. 17–331.

[19] Code of Civil Law, dated 23 April 1964 as amended.

[20] Code of Civil Procedure, dated 17 November 1964 (Dz.U. No. 43, Item 296 as amended).

[21] Cf. W. Łączkowski, *Kierunki rozwoju źródeł prawa w czasach współczesnych* [in:] *Starożytne kodyfikacje prawa*, ed. A. Dębiński, Lublin 2000, p. 117–129; see: *idem*, *Czy państwo i prawo mogą być aksjologicznie neutralne?*, „Prawo – Administracja – Kościół" 2000, no. 1, p. 57–66. This opinion is based on activities of professors specialising in civil law, and e.g. reviewing doctoral or habilitation dissertations in administrative law. On those occasions one can notice the dislike or excessively negative criticisms.

decisions, and justice in a peculiar way is lost in administration. The decision is issued, and that is a citizen's concern, but there is a question what happened to justice[22]. An authority executing law in a democratic country ruled by law is always limited, even if it is legitimised by the citizens, particularly during elections or by support for the people in power. A nation is sovereign if there is political democracy[23], because one can always ask who actually rules the country.

Administrative law is unilateral, it is authoritative by its nature and, simply speaking operates in situations when various administrative deeds are issued; these include decisions, permits, concessions, licences, etc. The lower rank of administration or an ordinary citizen is seemingly limited by top-down oriented decisions; it may also happen that a client is unfairly treated by a decision-making body equipped with specific competences and appointed with statutory tasks[24].

The eternal conflict between private civil law and public administration

It is evidently possible to see differences between the concept of civil law and the direction in which administrative law operates. In civil law its interpreters emphasise a specific type of effect arising from this law, resulting from nearly any activity of an entity subject to that law, and reflected in a relation of a legal entity to another legal entity. This is manifested in regulations on commercial companies[25]. It is obvious that every citizen of a country is subject to the relevant civil law, even if they do not know legal regulations. The sources of law include Directives of the European Union, International Law Conventions, the Constitution of the Republic of Poland from 1997, Code of Civil Law, Code of Civil Procedure, Code of Administrative Procedure, Labour Code, judicial decisions, the doctrine, Polish laws in legal acts and ordinances, as well as local law which should be taken into account in systemic interpretations of law. Here it is

[22] See: J. Oniszczuk, *Filozofia i teoria prawa*, Warszawa 2008, p. 359–375.

[23] H. Izdebski, M. Kulesza, *Administracja publiczna – zagadnienia ogólne*, Warszawa 1998, p. 19–20.

[24] See: W. Łączkowski, *Wartości chrześcijańskie a budowa systemu prawnego*, „Chrześcijanin w Świecie" 1993, Year XXIII, no. 3(194), p. 44–51.

[25] A limited liability company, pursuant to Art. 151 et. seq. of the Code of Commerce, is a commercial capital company, established for any legitimate purpose, and representing certain qualities of a civil partnership, founded by individually defined shareholders, and such participation is connected with marketable shares corresponding to a fraction part of the initial capital of the company. These shares cannot be incorporated in documents subject to trade; Code of Commercial dated 27 June 1934 (Dz.U. 1934, No. 57, Item 502 and Act of 15 September 2000 on Commercial Companies Code (Dz.U. 2000, No. 94, Item 1037 as amended; see: *Prawo handlowe spółki handlowe, umowy gospodarcze*, eds. A. Koch, J. Napierała, Kraków 2002, p. 279–280.

necessary to reflect upon the attitude of specialists in civil law to those focusing on public administration and administrative law; indeed they do not always present an attitude of understanding, however one must remember that administrative law has developed over the years, has its history, and has contributed to the functioning and management of the state institutions and agencies, country's administration at the national, regional and local level, i.e. in voivodships, poviats, municipalities, residential areas, and housing estates. Administration, in a simplified sense, stands for decision-making, it is a unilateral relation between the authorities and the citizen – the client, in the exercise of public authority at the levels of the administrative structure. Indeed, a specialist in administrative law must be familiar with both the Code of Civil Law, and Code of Civil Procedure, to know the domain in which they work, and in what way they are subject to the norms of law instituted in all of its areas. The point is there should be a greater gentlemanly understanding between these two types of legal constructs which should not compete; rather than that they should supplement each other and establish agreeable coexistence for their applicability and enforcement in practice, with respect to their distinctive competences and specificity. Each branch of law has its specific features, its purpose, object, methods, applicable norms, sources, doctrine, and most importantly human capital, i.e. professionals. It is necessary to stick to this stipulation and to the respective competences, and in the interpretation recognise the norms of the Civil Code in an area in which one is located and operates, being subject to legal regulations.

Here one can refer to J. Łętowski who said: "In the sphere of individual relations one can say that a substitution of administrative relation with a relation under private law results in ineffectiveness of administrative control (including by court of law) which is replaced by judiciary control under private law, based on other principles and implementing entirely different purpose. This is because whatever is done by administration, must comply with the public interest, while a private entrepreneur pursues their own profits, and that motivates their efforts"[26].

Strong features and functions of law

We will point out the strengths and functions of law; these in fact are quite important, provided that they see the light of day and that everyone realises what law means in public administration of a democratic state. We are constantly opting for governance of a sovereign and democratic state, where the authorities tightly abide by the law, do it in accordance with social ethics and everyone lives in affluence. Meanwhile, one might ask whether any state in the world meets these criteria?

[26] J. Łętowski, *Prawo administracyjne dla każdego*, Warszawa 1995, p. 16 et seq.

Evaluation of modern administrative law

There is a code of administrative procedure, but we do not have a code of material administrative law, or a code of systemic administrative law, and this is a serious difficulty and a cause of the weakness of this legal system. Certainly, administrative law is needed at the various levels of public administration, in the execution of power by the central authority, as well as the national and local governments[27]. In the current considerations it is necessary to emphasise the importance of the system of administrative law, in its characteristics showing weaknesses and strengths of this area of law; it is necessary to point out the large body of literature focusing on material and systemic administrative law as it is constantly published, following scientific and legal updates. No matter what we invoke to weaken the system of administrative law, we must pay attention to the wide package of administrative provisions in laws and ordinances which have rendered and will continue to do a great service in the exercise of power by institutions of national and local governments. I want to emphasize that, despite the weaknesses, such as the lack of uniformity of provisions in administrative law, as there are certain segments in this system (material, systemic, procedural, and related to enforcement and administrative courts), the diversity and the multitude of aspects covered by the law is not conducive to its development, and most importantly to public awareness related to it.

Features of law

Everything in the universe is governed by laws. Today one cannot imagine communities, and people living there, who are not subject to legal norms. From the smallest particles of matter on the earth, to the largest celestial bodies, galaxies and their systems in the outer space, everything is governed by the laws of nature. A man in a community is subject to human-made law, or positive law. Laws do not only apply in the natural world - physical, biological, chemical, and other laws, but also between individuals in the human community. It would be difficult to imagine a political community or a state without moral and legal norms that guard public order and peace. Norms of human-made law to an extent protect individual people. It is easy to envisage the chaos which would dominate in a place where people would refuse to comply with the moral norms and legal regulations in force and where there would be no entities guarding the public law and order[28]. Administrative law is rather strongly rooted and constituted in the history of administrative ideas from times immemorial up to the present times[29].

[27] See: W. Wytrążek, *Samorząd terytorialny w XX wieku w Polsce*, Lublin 2009, p. 149–167.

[28] Cf. Z. Łyko, *Socjopatologie w aspektach chrześcijańskiej etyki*, Warszawa 1987, p. 65.

[29] See: T. Maciejewski, *Historia polskiej myśli administracyjnej do 1918 roku*, Warszawa 2008, p. 1–107.

One might try to answer the question: what is the essence of law? The response would be that the essence of law is its regulatory power. Law instituted by the legislator regulates various areas of life for members of the society, introducing common values, and defined order complying with the law. Another characteristic of human-made law is its **enforceability**. If it is to fulfill its *regulatory functions*, law must be in force, and its application may be enforced by the authorities. The point is that state authorities must be able to enforce punishment for a crime, and consequently to safeguard "the common good". According to R. Sarkowicz and J. Stelmach: "Legal order may be understood as a system of institutions, bodies, and procedures stipulated by applicable legal norms for resolving specific issues, as well as behaviours of legal entities, defined by these norms and considered in relation to behaviours of other entities and institutions"[30]. Universal values protected by law are often treated instrumentally by authorities and political groups, which often have a decisive influence on the legislative process and legislation[31].

Quite a significant feature of law is its **interpersonal nature**. In order to be effective, legal norms adopted in a given country should take into account relations between entities and between individuals. Wherever people live within communities, they are subject to legal transactions, or they are addressees of administrative or enforcement decisions, hence it must be emphasised that law should be known to the public and it should be applied to reinstate the public order. The last feature of law which we want to mention is its **fairness**. Each and every legal and moral regulation not only aims to define specific order, but first and foremost is designed to implement the beautiful principle of fairness, i.e. justice, which is expressed in accordance with the Old Roman formula – the principle of giving everyone what is due to them. Notably, although it is not everywhere in the world that these noble ideas are realized, they nevertheless belong to the essence of the legal system in an absolute, irrevocable and existential meaning[32].

Functions of law

Proper design of public life defined for the society of a given country assumes appropriate relations between a specific citizen and the state. Such relations are regulated by the legal norms in the organism and within the territory of the state, delineated by its borders. Legal acts have always been created for the sake of people, their freedom and growth; they have always been constituted as the law designed to regulate human relations in the community. This is expressed by the sentence: *hominum causa omne ius constitutum est*[33].

[30] R. Sarkowicz, J. Stelmach, *Teoria prawa*, Kraków 2001, p. 109.

[31] A. Kojder, *Socjologia prawa* [in:] *Socjologia w Polsce*, eds. Z. Krawczyk, K.Z. Sowa, Rzeszów 1998, p. 411.

[32] Z. Łyko, *Socjopatologie*…, p. 65–66.

[33] R. Sobański, *Człowiek i środowisko w polityce dla rozwoju*, „Prawo Kanoniczne" 1995, vol. 38, no. 3–4, p. 12.

In accordance with philosophy of law it is possible to distinguish a number of functions of law:

1. *Repressive,* involving punishment of criminals for offences committed.
2. *Promotional,* involving appreciation of a variety of important issues from the point of view of man as a relational subject with respect to legal requirements, as a citizen in relation to the state and administrative authority[34].
3. *Educational*, involving instruction of citizens pointing to the fact that if something is guarded by legal norms, it must be respected and protected. A citizen and the authority should equally respect legal regulations and follow the law which has been instituted and implemented. Anyone can understand that if something is mandatory, one must follow the obligation and if something is forbidden, one must not do it[35].

It is possible to distinguish other functions of law, such as:

1. *Integrating* – law is an instrument of authoritative action by the legislator towards the citizens, aimed at preserving social order.
2. *Stabilising* – law provides legal grounds for stabilisation of the political and social situation in a given country.
3. *Innovative* – means that law may be used, as a fundamental instrument of community pressure in a process of introducing social transformations in a country. New legal acts generally should make life easier for citizens, and give them a sense of social security. They are also intended to cause change in important and urgent situations. Introduction of new institutions is to improve functioning and organisation of a growing and secure civic society[36].
4. *Protective* – means that law should safeguard elementary ethical and moral values and define responsibilities, rights and privileges[37].
5. *Organisational* – law establishes certain rules of superiority, authority and subjection in various types of formal structures, as well as relationships between specific levels of governance and those subject to the legal order.
6. *Reformatory* – this function should be highlighted, since it involves sanctions and penalties used by the legislative body to foster conformity with regard to rules and normative regulations. Sanctions may act as a warning, a reprimand or a reformatory measure; most of all they are to punish offenders violating social order. Law penalises and should penalise offences and various types of crimes[38].

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[34] S. Kasprzak, *Normatywny wymiar ekologicznych i sozologicznych idei w systemie prawa państwowego i kościelnego*, Lublin 2003, p. 591

[35] *Ibidem*, p. 591.

[36] *Ibidem*, p. 583.

[37] A. Kojder, *Socjologia pra*wa, p. 409.

[38] *Ibidem*, p. 398–409.

7. *Compensatory* – law is to provide remedy for damages, or to compensate for public or individual losses caused by criminals, by bringing them to justice. A victim may seek to regain any violated rights and may claim remedy for any damages[39].

Weaknesses and defects of administrative law

Efforts to characterise administrative law should take into account basic drawbacks of Polish law. We can say quite openly that it is inflationary law, because in a way it is similar to a production line programmed to achieve "quantity" rather than "quality". This comment is not only related to administrative law but to the entire system of Polish law. One might be tempted to assess the law of the *European Union*, but nobody has the courage to criticize this or that directive which has a priority over the law of a given country. In the literature we can encounter many comments addressing contemporary man-made law. Weaknesses of law include: multiplication of regulations; excessive formalisation; excessive legalism, excessive prescribed instructions; blank rules which may regulate anything; irrationally construed legal institutions present in regulations which are ineffective; laws violating the Constitution of Poland are passed; law which is designed as an instrument to silence mass media and limits their freedom; finally, a negative feature of law is particularism in the application and legal interpretation[40].

Law making by its nature is a long-lasting process and should proceed slowly, as it is impossible to create effective legal norms in a short time only because a given sphere is not sufficiently regulated. The *legislative process* in our Polish parliament is extremely fast-paced as a result of which the laws are imperfect. If the time allocated to creating legal regulations is too short, too many ill-considered provisions are passed, and to be honest, ordinary citizens have no idea about law-making, and it is impossible to reliably draw up even a general index of legal provisions that are announced and enforced by specific regulations. There is a risk that the national legislator, as well as Polish citizens and any newcomers (immigrants) will no longer take them seriously. Although the phenomenon of inflation is related to money, this economic factor may in a way be, by reference, used with respect to the domain of legislation, where the excessive number of legal acts which are long, elaborate and descriptive rather than concise and effective, does not translate into *quality of legislation*. Law is not intended to describe social and political life of the country, but to define norms and sanctions for it. In the acts one may encounter too much of the so-called

[39] S. Kasprzak, *Normatywny wymiar…*, p. 583–584.

[40] A. Habuda, *Prawo jako instrument…*, p. 58–71.

vulgarity, illegibility, ambiguity, lack of sanction, and no brevity like in acts of the Roman law. A Roman jurist would create and underwrite an act, today a group of people does the former but no one signs the bill; only there can be scuffles as to the confirmation or rejection or possible amendment of the law[41].

A serious drawback of Polish law in its various branches is its complexity, ambiguity and the fact that it is incomprehensible to ordinary citizens; this e.g. applies to tax laws. Laws are often contradictory and, above all, difficult to understand by the addressees. After new regulations are published, contradictory interpretations are formulated. Bolder opinions are considered to be correct. Another defect harmful for the society is the fact that applicable law is not always consistent with the human rights and universal human values, e.g. when families are deprived of housing by the so-called eviction[42]. A unique defect of Polish law is the fact it may be described as "playful", which means that existing provisions of legal norms are not applied by bodies of public authority; indeed, they are not even taken into account by the national law makers in their further legislative work, and are not enforced in the country's public life[43]. One example is Art. 2 of the Constitution, providing that Poland "shall be a democratic state ruled by law and implementing the principles of social justice"[44]. Law, and particularly the Constitution of the Republic of Poland, should not be declarative only; it should be stable and real, it should be approached with respect and interpreted with all solemnity[45]. There should be no place for pathologies, such as corruption, exemplified by officials seeking personal gains while performing public duties[46].

It is often found that law, in a camouflaged manner, is not ethical, it is also "imitative" – imported from abroad, especially from the United States[47] and the European Union. From this comes a lesson that great attention should be paid to man-made law, and to the development of its regulations; this is to be done by *government experts*, reliably and to the point rather than at request.

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[41] Cf. B. Kunicka-Michalska, *Podstawowe wady naszego prawa* [in:] *Jakość prawa*, ed. A. Wasilkowski, Lublin 1996, p. 161.

[42] *Ibidem*, p. 162–163.

[43] S. Kasprzak, *Normatywny wymiar…*, p. 592.

[44] Constitution of the Republic of Poland, Art. 2 (Dz.U. 1997, No. 78, Item 483).

[45] See: B. Kunicka-Michalska, *Podstawowe wady…*, p. 163.

[46] See: T. Barankiewicz, *Służba publiczna – patologie* [in:] *Encyklopedia prawa administracyjnego*, eds. M. Domagała, A. Haładyj, S. Wrzosek, Warszawa 2010, p. 286; *idem*, *Etyka urzędnicza – źródła* [in:] *Encyklopedia prawa administracyjnego*, eds. M. Domagała, A. Haładyj, S. Wrzosek, Warszawa 2010, p. 284–285; *idem*, *Urzędnika etyczne obowiązki* [in:] *Encyklopedia prawa administracyjnego*, eds. M. Domagała, A. Haładyj, S. Wrzosek, Warszawa 2010, p. 286–287; *idem*, *Urzędnika odpowiedzialność dyscyplinarna i społeczna* [in:] *Encyklopedia prawa administracyjnego*, eds. M. Domagała, A. Haładyj, S. Wrzosek, Warszawa 2010, p. 288–289.

[47] B. Kunicka-Michalska, *Podstawowe wady…*, p. 164–165.

Subjective public rights

The concept of subjective public rights today is perceived as one of the most controversial matters in the study of administrative law, and it should be emphasised that the discussion focuses on the essence of the concept and its usefulness as a research tool. The concept of subjective public rights was created to describe the relations between the specific citizens and bodies of public administration operating with a power of authority, and the term is rooted in an assumption that law is binding not only for an individual within a country, but also for the state itself; what is more an individual may apply certain rights against the authoritative administration, as a result of which they gain a degree of freedom from administrative interference[48].

According to Marcin Janik: „Autonomy of administration, as a process opposed to bureaucratic pathology, leads to a change in the structures and methods of operation, which brings some public administration closer to solutions that have long been used in the private sector. (…) Institutions of public sector have less autonomy and flexibility than private institutions"[49].

According to Barbara Jaworska-Dębska "administrative bodies at both central and local levels define executive acts, while rules of order as well as systemic organisational regulations are also adopted at the local level (…). The specificity of its law-making operations is reflected by the fact that administration executes the regulations which it has enacted"[50]. They can be created as needed, at a request or as required by this or that legal provision. Bodies of executive authority are entitled to institute acts of lower rank, or lower-order acts which are issued mainly based on statutory rights[51]. One can say, referring to Józef Strzelecki, that the problem of specific pathological behaviours in administration, aiming for material gains, is a phenomenon resulting from personal characteristics of the officials who perform their functions, as well as from imperfections of legal regulations[52].

Specificity of administrative law

The specific quality of the law applied in administration is its power of authority. No specialist in administrative law has a problem with it, however lawyers representing other branches of law have some ungrounded doubts regarding the structure of administrative law.

[48] *Prawo administracyjne*, ed. M. Wierzbowski, Warszawa 2009, p. 182–183.

[49] M. Janik, *Patologie w administracji publicznej (wybrane zagadnienia)* [in:] *Patologie w administracji publicznej*, ed. P.J. Suwaj, D.R. Kijowski, Warszawa 2009, p. 72–79.

[50] B. Jaworska-Dębska, *Kilka uwag o patologii w działalności prawotwórczej administracji publicznej* [in:] *Patologie w administracji publicznej*, ed. P.J. Suwaj, D.R. Kijowski, Warszawa 2009, p. 80–97.

[51] *Ibidem*, p. 81.

[52] J. Strzelecki, *Niedoskonałość rozwiązań prawnych a sytuacje patologiczne w administracji publicznej* [in:] *Patologie w administracji publicznej*, ed. P.J. Suwaj, D.R. Kijowski, Warszawa 2009, p. 170–178.

While characterising material administrative law, even briefly, one must emphasise that its special and unique feature – and a difference compared to judiciary law – is the *fact* that its substantive (material) scope is not strictly defined due to the lack of codification of this legal system, however its sufficient provisions exist in many areas of life. A matter of fundamental importance is a need to ensure cohesion of the broad range of legal regulations[53].

This chaos, or the lack of precision in instituting laws, certainly results from the facts that there are a number of entities involved in designing material law, e.g. at a ministerial or local level, and material law is created at various periods of time[54]. It seems that, in accordance with this characteristic, the strengths and weaknesses of (systemic and material) administrative law are also, or mainly, rooted in the political transformation of the country, or transition from socialism to capitalism. In fact, the process has not been completed yet. This phenomenon largely contributes to frequent changes in material administrative law, and that in turn leads to disorientation because new provisions must be studied, examined and interpreted. It also must be pointed out that the greatest weakness is linked with defective *legislative techniques* used in drafting, instituting and then implementing the law.

In the system of material law, the issues of material administrative-legal relation come first. The point is that it is necessary to distinguish such regulations which define specific obligations, tasks and administrative-legal rights in connection to specific actual states or legal cases. The forms of securing social, collective or individual good, and protection of freedoms and property are closely related to this thematic area. It is also necessary to take into account such assets as: well-being, environment conservation, as well as internal and external safety of citizens. Problems which are also worth considering include the Code of administrative procedure, tax ordinance, and procedural law which secure implementation of material law, via administrative decisions and administrative enforcement actions[55].

Where is the strength

If an act contains a specific provision, it is binding for a citizen, and whether or not one likes that, it should be applied by bodies of authority and respected by citizens. If there is a specific act, it should be applied without doubt in the public life and by the state administration, in compliance with the relevant ordinance. Law may be criticised, but it must be respected nonetheless. Compliance with the law, and its criticism are two separate matters.

[53] Z. Leoński, *Materialne prawo…*, p. 8.
[54] *Ibidem*, p. 8–9.
[55] *Ibidem*, p. 8–9.

An obligation to respect provisions of law, whether civil, criminal, administrative, EU Directives, International Law Conventions, or local law, means that entities of central or local governance, at various levels and in various offices must comply with the law and apply it in everyday service to society, regardless of the substantive content of the legal provisions[56]. To follow written laws: this is also a solution to a crisis situation.

Where is the weakness

Weakness of administrative law and administration can be seen in various symptoms of pathologies in the performance of administrative tasks by competent bodies of public authority.

We must be aware that administrative law comprises legal regulations set forth in acts and ordinances, but it is also represented by the entire structure of the administration and, above all, by people performing their tasks and duties, and applying legal provisions to specific events of life. The problem lies in the fact that not all people perform their duties well, they may be sluggish, or fail to update their knowledge of law, and perform their professional duties poorly, by simply neglecting them. This element of human capital largely determines the effectiveness of the administrative law system, in the functioning of central and local administration. This means that the human factor is the foundation determining the effectiveness of administrative decisions. We should acknowledge that the entire system of administrative law does not have its own code, which results in a rather lenient approach to the effectiveness of broadly defined administrative law. Weaknesses of law also include incorrect legal texts in acts, but this is linked with errors in the legislative process which has its own course, however here everything depends on human imperfections. This should be improved. It is the human being, the law-maker, that fails to notice everything while drawing up laws; other people see something different, some others equipped with greater experience see a specific regulation in a different way. This leads of a conflict or misunderstanding, because everyone has their own interests which they want to take into account at all costs in the legal regulation. It seems that a very important weakness in the exercise of administrative law and generally in the application of legal norms lies in the fact that the system of the state is subject to politics. The reality of the modern state makes it impossible to neutralise party-oriented politics, therefore I believe that any reform of administrative law can only be based on professionalism and intelligent administration.

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[56] See: J. Wegner, *Cienie legalizmu* [in:] *Patologie w administracji publicznej*, eds. P.J. Suwaj, D.R. Kijowski, Warszawa 2009, p. 179–193.

Ways to improve the quality of administrative law (defects of law)

By reference to Joanna Wegner[57] it is possible to point to certain signs of dysfunction in the state's public administration:

- actual violation of the rule of law, especially in drafted laws and application of law by public administration bodies,
- deliberate implementation of regulations violating the rule of law,
- instrumental approach to legal provisions, in order to achieve short-term goals at all costs; it can be seen in activities of this or that party,
- negative effect of the process in the operation of public institutions which bear the consequences of their own ineptitude, based on application of law incorrectly structured by law designers,
- law is applied with the conviction of infringing and violating universal values, such as truth, good, beauty, and morality,
- introducing individual and specific legal provisions into the system that remain in conflict with the rule of law[58].

Admittedly, law without doubt is an instrument of policy making, but law cannot be at the service of politics, because in such case we face a phenomenon which adversely affects the legal order itself. One has an impression that some legal acts are promulgated without any consideration to the fact whether or not they comply with the rule of law. Law-making requires a good idea from the legislator, as well as many discussions and efficient counselling. A legislative process must be accompanied with a kind of anticipation and sound calculation to determine whether or not a given legal act is necessary. Here are some important elements of good law: a good idea, necessary professional knowledge, government experts, advisers, life experience, reflection and public discussion. Everyone knows that legal defects are eliminated owing to the efficient work performed by the Constitutional Tribunal[59], is it really so?

If the authority issues an administrative decision based on legal provisions instituted with a violation of law, the authority itself also breaches the rule of law at the time of signing this legal act[60]. Legislative errors of the law-maker can be repaired, provided there is good will and consensual action. It would be important to monitor the legislative process of establishing administrative laws, to be applied as a specific internal whistleblowing device for detecting defects, whereby these would be corrected with a help of an expert committee. It would also be useful to assess effects of regulations in selected areas of life[61]. Notably,

[57] *Ibidem*.

[58] *Ibidem*, p. 188–189.

[59] *Ibidem*.

[60] *Ibidem*.

[61] *Ibidem*, p. 191.

events of life are not produced by a legal norm. It is just the opposite – indeed, it is life that drives development of new laws. It is necessary to make use of suggestions provided by legislators and experts who have their opinions; it is necessary to listen to them and improve legal provisions in regulatory acts. Finally, it is of fundamental importance that the process of constructing a legal system must be based on universal and ethical values[62].

Conclusion

Law, as an instrument of ensuring public order in a democratic state ruled by law, also reinforces social relations between citizens; it is promulgated so that a country may promote culture and become citizen-friendly state. The role of law may not be limited to the functions associated with protection of citizens' liberties and regulation of collision-free social relations. Legislation pertaining to the social and economic domain is to support citizens' involvement in economic operations and to stimulate economic growth of the country. The political writer Jan Ostroróg maintained that customs significantly impact the content of legal norms, the way they are established and enforced. Customs should be understood here as the entirety of social, political, economic, developmental, moral, religious, and cultural relations in a given national or state community[63]. It has been pointed out that: „Negative, pathological phenomena associated with the functioning of public administration to a degree are an integral part of the functioning of any organization, as well as any type of organized human activity"[64].

The above remarks show that a state should protect and safeguard its citizens. However, within its territory, it should interfere as little as possible in its citizens' private affairs, leaving them as much space as possible to use their liberties freely, in building the common welfare and prosperity, however abiding by ethical standards[65]. The system of law is eroding, which is particularly caused by the lack of respect for the values carried by democracy and the rule of law; this reflects a serious damage of law and generally its quality. One should know that administrative entities apply legal regulations with the knowledge they destroy or disregard these values, whenever they make a decision based on invalid legal provisions. Respect for the law is treated with in-

[62] *Ibidem*, p. 192; see: T. Barankiewicz, *Urzędnika etyczne obowiązki*, p. 286–287.

[63] A. Kojder, *Socjologia prawa*, p. 398.

[64] J. Izdebski, S. Wrzosek, *Rola nauki administracji w identyfikowaniu patologii w organizacji i funkcjonowaniu administracji publicznej* [in:] *Patologie w administracji publicznej*, eds. P.J. Suwaj, D.R. Kijowski, Warszawa 2009, p. 813 and 806–814.

[65] A. Kojder, *Socjologia prawa*, p. 408–409.

creasing carelessness. This is not a good approach if we want to improve the quality and effectiveness of law. Quality of and respect for law are strongly affected by the political orientation; members of this or that party want to apply legal regulations selectively, for their own advantage. The statutory control of legal aspects cannot eliminate its own defects identified[66]. It should be emphasized that "the quality of the administration's operation is not determined by possible inspections or by compliance with the law. Above all, it depends on the officers themselves, their awareness and responsibility for carrying out public tasks"[67]. Before they start their work, officers should know the catalogue of ethical rules[68] related to the performance of tasks and duties of an institution or the office.

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[66] J. Wegner, *Cienie legalizmu*, p. 191.

[67] A. Ziółkowska, *Patologie w administracji publicznej – przyczyny i próby przeciwdziałania* [in:] *Patologie w administracji publicznej*, eds. P.J. Suwaj, D.R. Kijowski, Warszawa 2009, p. 194–203.

[68] Integrity, reliability, efficiency, legality, rule of law, honesty, responsibility, subsidiarity, honesty, helpfulness to the client and more.

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Summary

The specific quality of the law applied in administration is its power of authority. No specialist in administrative law has a problem with it, however lawyers representing other branches of law have some ungrounded doubts regarding the structure of administrative law. It should be emphasized that the quality of the administration's operation is not determined by possible inspections or by compliance with the law. Above all, it depends on the officers themselves, their awareness and responsibility for carrying out public tasks. Before they start their work, officers should know the catalogue of ethical rules related to the performance of tasks and duties of an institution or the office. Law-making by its nature is a long-lasting process and should proceed slowly, as it is impossible to create effective legal norms in a short time only because a given sphere is not sufficiently regulated. The *legislative process* in our Polish parliament is extremely fast-paced as a result of which the law is imperfect. On the one hand, administrative law is weak because there is no code of material and systemic law, on the other hand, the strength of the legal system lies in its character, i.e. its power of authority.

Keywords: administration, administrative rights, power, legislative errors

MOC I SŁABOŚCI W DZIAŁANIU PRAWA ADMINISTRACYJNEGO

Streszczenie

Cechą specyficzną prawa, które służy funkcjonowaniu administracji, jest władztwo. Żaden administratywista nie ma z tym problemu, za to z kolei inni prawnicy, którzy są reprezentantami innych gałęzi prawa, mają jakieś nieuzasadnione wątpliwości co do konstrukcji prawa administracyjnego. Należy podkreślić, że o jakości działania administracji nie decyduje możliwość przeprowadzenia kontroli czy przestrzeganie prawa. Nade wszystko zależy to od samych urzędników, ich świadomości i odpowiedzialności za realizację zadań publicznych. Urzędnik, zanim przystąpi do pracy, powinien znać katalog zasad etycznych wykonywania zadań i obowiązków organu lub urzędnika. Stanowienie prawa jest z natury długofalowym procesem i powinno dokonywać się powoli. Nie można w krótkim czasie tworzyć norm prawnych jedynie dlatego, że dana dziedzina nie jest dostatecznie uregulowana. W naszym polskim parlamencie *proces legislacyjny* tworzenia prawa jest tak błyskawiczny, a to powoduje, że prawo jest niedoskonałe. Z jednej strony prawo administracyjne jest w swym systemie słabe, gdyż nie ma kodeksu prawa materialnego i ustrojowego, a z drugiej strony siła tego systemu prawa leży w tym, że jest ono o charakterze władczym.

Słowa kluczowe: administracja, prawa administracyjne, władztwo, błędy legislacyjne

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Aneta Kowalczyk

University of Rzeszow
ORCID: 0000-0002-5029-863X

EVOLUTION OF THE RIGHT OF COALITION. INTERNATIONAL STANDARDS VERSUS POLISH LAW

Introduction

One of the basic human rights is the freedom of association in a broad sense, which is understood as a right to establish frames for various types of human activity conducted for a specific purpose, and is recognised among first-generation human rights, or freedoms which do not originate from positive law but from the fact of belonging to the species of *homo sapiens*. It is assumed that man as an intelligent being has rights and obligations that stem from his own nature, and because they are universal and inviolable, they cannot be renounced[1]. Hence, the role of the state in relation to the freedoms involves a duty to guarantee and secure these freedoms and to limit them to an extent necessary to protect the values shared by the whole society[2].

Freedom of association is manifested e.g. in the right of coalition, i.e. a right to establish trade unions and employer organisations. Understood this way, the right of association contrary to the freedom of association in a broad sense, is recognised among second-generation human rights, or social, economic and cultural rights based on the principle of equality. According to this approach, the right of coalition is one of the elements constituting the freedom of trade unions, which is considered not only by reference to the definition of the term in legal regulations but also as the whole functionally combined collection of provisions describing this legal institution[3].

[1] See: Pope John XXIII, The Encyclical *Mater et magistra* (MM), par. 31 [in:] *Dokumenty nauki społecznej Kościoła*, Rzym–Lublin 1987, p. 272; P. Czachorowski, *Międzynarodowa Organizacja Pracy. Geneza – struktura – funkcjonowanie. Casus wolności związkowej*, Gdańsk 2002, p. 32; A. Kowalczyk, *Pojęcie sporu zbiorowego oraz pokojowe metody jego rozwiązywania w prawie polskim*, Rzeszów 2017, p. 25.

[2] P. Czachorowski, *Międzynarodowa Organizacja Pracy…*, p. 32.

[3] A. Ziembiński, *Szkice z metodologii szczególnych nauk prawnych*, Warszawa 1989, p. 95; M. Tomaszewska, *Pojęcie wolności związkowej* [in:] *System prawa pracy*, vol. 5: *Zbiorowe prawo pracy. Komentarz*, ed. K.W. Baran, Warszawa 2014, p. 223.

Freedom of trade unions *sensu stricto* is the right of coalition understood as a right to establish trade unions, to joint existing trade unions, to leave and to dissolve trade unions[4]. The related guarantees have been stipulated in many international legal acts, including ILO conventions, constituting a universal (common) and regional system designed to protect human rights.

Right of coalition in international legal acts

The common framework for the protection of human rights was established by the United Nations. It includes legal documents of fundamental importance, such as: The Charter of the United Nations, International Covenants on Human Rights, conventions and resolutions adopted by the UN, and specialised organisations, such as ILO. The first international treaty with universal impact was The Charter of the United Nations (further referred to as UN Charter) of 26 June 1945[5] which introduced the general principle of respect for human rights. The Charter does not define the term "human rights" and does not specify a catalogue of these rights. Nevertheless, it laid the foundations for the international system of human rights, providing the legal basis for further initiatives. As a result, The Universal Declaration of Human Rights (further referred to as The Declaration of Human Rights) was passed on 10 December 1948. The Declaration of Human Rights regulates the rights and freedoms which can be classified as first and second-generation human rights. According to its regulations (Art. 23 clause 4), everyone has the right to form and to join trade unions for the protection of his interests. The Declaration of Human Rights also guarantees the right to freedom of association in the general sense, right of coalition being one of its elements (Art. 20)[6].

The provisions of the Declaration of Human Rights, presented in broader and more detailed terms, were included in The International Covenant on Civil and Political Rights (further referred to as Political Covenant) dated 19 December 1966[7]. The right of coalition is guaranteed in Art. 22 of the Political Covenant, according to which everyone shall have the right to freedom of association, including the right to form and join trade unions for the protection of his interests. Hence, the provision regulates the right of association in broader terms, in

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[4] See: T. Zieliński, *Prawo pracy. Zarys systemu*, part III, Warszawa–Kraków, 1986 p. 277; M. Seweryński, *Problemy statusu prawnego związków zawodowych* [in:] *Zbiorowe prawo pracy w społecznej gospodarce rynkowej*, ed. G. Goździewicz, Toruń 2000, p. 110 et seq.

[5] Dz.U. 1947, No. 23, Item 90.

[6] Polish text of the Universal Declaration of Human Rights [in:] B. Gronkowska, T. Jasudowicz, C. Mik, *Prawa człowieka. Dokumenty międzynarodowe,* Toruń 1996, p. 15 et seq.; cf. P. Czachorowski, *Międzynarodowa Organizacja Pracy*…, p. 51–52.

[7] Dz.U. 1977, No. 38, Item 167.

a narrower sense understood as the right of coalition. Restrictions to this right are permissible within limits prescribed by law as required to ensure national security and public order[8].

The right of coalition is also subject to provisions of the International Covenant on Economic, Social and Cultural Rights (further referred to as the Economic Covenant) of 19 December 1966[9], which, unlike the aforementioned instruments of protection, covers second-generation human rights only. Hence the Economic Covenant regulates the right of coalition, while disregarding the broader concept of freedom of association, covered by the Political Covenant. Article 8 of the Economic Covenant stipulates that everyone has a right to form trade unions and join the trade union of his choice, hence the guarantee does not only relate to the right to establish a trade union, but also to the right to choose membership in existing trade unions. Consequently, this regulation prevents enforced membership in trade unions and results in the freedom to decide to leave the trade union (so-called negative freedom of trade union).

Like the Political Covenant, the Economic Covenant stipulates that the right of coalition may be restricted as required by the need to ensure security and public order or to protect the rights and freedoms of others. Such restrictions may take forms of intervention by a relevant authority or suspension of trade union operation[10].

Freedom of association is also guaranteed in documents issued by the International Labour Organisation, whereby it is recognised among the three basic human rights in the social sphere, alongside the right to work and the right to equal opportunities and to non-discrimination. Protection of freedom of association, as stipulated by ILO documents, is based on the assumption that the existence of independent trade unions is necessary for the effective protection of employees' interests, which in turn is the primary mission of ILO[11].

Freedom of association was already guaranteed by the Treaty of Versailles of 28 June 1919, which also established the International Labour Organisation[12]. Freedom of association was awarded to both employees and employers. The right of coalition is also regulated in the ILO Constitution of 10 September 1946[13]. Article 1 of the Constitution provides that ILO is to carry out operations for the promotion of the objects set forth in the Preamble, which include freedom of trade unions. On the other hand, the first part of the Declaration says that freedom of association is an indispensable precondition for progress. The right of coalition

[8] Cf. P. Czachorowski, *Międzynarodowa Organizacja Pracy…*, p. 54.

[9] Dz.U. 1977, No. 38, Item 169.

[10] Cf. P. Czachorowski, *Międzynarodowa Organizacja Pracy…*, p. 61.

[11] See: L. Florek, M. Seweryński, *Międzynarodowe prawo pracy*, Warszawa 1988, p. 120; J. Wratny, *Prawo pracy…*, p. 161.

[12] Dz.U. 1920, No. 35, Item 200.

[13] Dz.U. No. 43, Item 308 as amended.

is also regulated by ILO conventions. The first convention related to the right to establish trade unions was Convention No. 11 from 1921 on the freedom of association and right of coalition in agriculture[14]. In the light of its provisions, people employed in agriculture had the same rights to establish unions as industrial workers. Hence it introduced equal rights of the two groups, however it did not resolve on the form of specific regulations to which the principle of equal rights relates. Therefore, it was necessary to regulate all employees' trade union rights set forth in Convention No. 11. This took place in 1948, when ILO adopted Convention No. 87 on the freedom to establish organisations and on trade union rights[15]. It stipulates workers' right to establish trade unions of their choosing and to join existing organisations (Art. 2), thereby defining the full and restricted right of coalition. The right was awarded to all workers, regardless of the type of work performed, including civil servants. With regard to the latter, an Expert Committee decided that they are entitled to the right of coalition regardless of their rank and place of employment. A failure to award the right of coalition to them was deemed to violate the general principle saying that workers may establish organisations to defend their rights and interests[16]. The only subjective restrictions apply to armed forces and security agencies, because pursuant to Art. 9 national laws and regulations may specify if the right of coalition may be applicable to them and based on what principles. Apart from that the right of coalition applies without limitations, however it must be executed in compliance with the contents of the trade union's statute (Art. 2). Convention No. 87 does not only regulate personal right of coalition, but also collective rights, by awarding trade unions, in Art. 5, with the right to establish or join federations and confederations[17]. The guarantees for the freedom to establish unions, provided for in the Convention, should comply with by the laws of the states which have ratified the document (Art. 8 clause 2).

In addition to the universal system of human rights protection, there are regional systems, including the one developed in Europe. The fundamental document of this system is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) dated 4 November 1950, introducing a broader catalogue of human rights, compared to that defined in the Declaration of Human Rights.

ECHR contains regulations which guarantee the freedom of association, including the right to establish trade unions (Art. 11). In this case the right of coalition is also treated as part of a broader concept of the freedom of association,

[14] Ratified by Poland in 1924 (Dz.U. 1925, No 54, Item 378).

[15] Before it was passed, there were attempts to introduce related regulations elsewhere; the first step towards regulations with regard to the rights to establish trade unions was reflected by Convention No. 84 from 1947 on the right of association in dependent territories. Cf. L. Florek, M. Seweryński, *Międzynarodowe prawo*..., p. 121.

[16] See: P. Czachorowski, *Międzynarodowa Organizacja Pracy*..., p. 141.

[17] These rights are also applicable to employers; See Art. 2 et seq. of Convention No. 87.

however, just like in the other acts of international law, the importance of the right of coalition was emphasised by the fact it was named in Art. 11 ECHR. Furthermore, by placing the right of coalition in the catalogue of human rights, ECHR provides a guarantee for the right to establish trade unions and freedom to join existing organisations. Exercise of this right may be subject to statutory limitations resulting from conditions such as those provided for in the acts of the universal system for the protection of human rights, i.e. internal security and the need to protect the rights and freedoms of others[18].

The right of coalition is also guaranteed by the European Social Charter (ESC), dated 18 October 1961[19], which is another document establishing the regional system for the protection of human rights. The charter contains guarantees related to twenty-three basic social rights, including the right of coalition[20]. Article 5 ECS provides a guarantee for establishing trade unions and for joining existing organisations. These guarantees relate to individuals' rights to establish trade unions, and to the collective right to organise in trade unions for more effective protection of their members' rights and interests. Furthermore, in ECS the right of coalition is defined in a positive and negative sense. In the former case, this means a freedom to establish trade unions and to join existing organisations, and the consequences of this guarantee include the state's obligations to undertake measures to make exercise of the right of coalition possible. According to the latter approach, the right of coalition means that no restrictions may apply to the right to establish, join and withdraw from trade unions, and to dissolve or suspend their activities, except for those provided for in the Charter. Such restrictions of the right of coalition may only be applicable to members of armed forces, hence a prohibition to establish trade unions by employees of state organs as well as "closed shop" agreements are a violation of Art. 5 of the Charter[21].

The European system for human rights protection, in addition to the Council of Europe, is also being created by the European Union, which has developed several related documents. These include the Declaration of Fundamental Rights and Freedoms (further referred to as Declaration of Freedoms) dated 12 April 12 1989[22] which is also related to the freedom of association. Like in many aforementioned documents of international law, here the right of coalition appears in the context of the freedom of association, recognised among the first-generation human

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[18] Text of ECHR [in:] *Europejska Konwencja Praw Człowieka. Międzynarodowy Pakt Praw Obywatelskich i Politycznych*, Katowice 1992, p. 9 et seq.

[19] Dz.U. 1999, No. 8, Item 67.

[20] The basic text of ESC contains a catalogue of nineteen fundamental social rights; it was expanded by the 1988 Protocol to include three more rights.

[21] J. Wratny, *Prawo pracy Rady Europy* [in:] *Europejskie prawo pracy i ubezpieczeń społecznych*, ed. L. Florek, Warszawa 1996, p. 160 et seq.

[22] Text of the Declaration of Freedoms [in:] *Prawa człowieka. Dokumenty międzynarodowe*, translated and elaborated by B. Gronowska, T. Jasudowicz, C. Milk, Toruń 1996, p. 298–303.

rights. The Declaration of Freedoms was adopted by the European Parliament, which did not have competences to independently institute laws, hence the document did not have a status of a binding legal act. However, it was used as a model for the regulations on human rights and freedoms, set forth in the Treaty of European Union (further referred to as The Treaty).

On 9 December 1991, a resolution of the European Council adopted the Community Charter of the Fundamental Social Rights of Workers (further referred to as The Charter), defining employers' and employees' freedom of association (points 11–14). Pursuant to these provisions, they have the right to establish trade organizations and trade unions of their choice, to represent their economic and social interests. This freedom also includes the right to join and withdraw from trade unions[23].

In 1991, Member States of the European Community adopted the Protocol on Social Policy, an integral part of the Maastricht Treaty. Based on its provisions, the freedom of association, the right to strike and lockout were excluded from Community regulations (Art. 2 § 6). This does not mean the most important principles of collective labour laws were waived, however the relevant competences related to their legal regulation were transferred to the Member States[24].

Evolution of regulations related to the right of coalition in Polish legislation

In Polish collective labour law, during the post-war period, the structure of trade union movement and the right of coalition were subject to a number of changes. The principle of monism was introduced by the Trade Union Act of 1 July 1949[25], and later transformations were initiated as a result of the events which occurred in August 1980; these involved relaxation of the monism principle and the breakdown of the centralized union movement into separate currents, as a result of which a temporary legal regulation was introduced by a resolution of the Council of State on 13 September 1980[26] on newly established trade unions (registration of a trade union by a Regional Court of Law), and amendment of the Trade Union Act (confirmation of the rules of registration, which made it possible to register Solidarity Trade Union). Further changes in the right of coalition were to be adopted as stipulated in the Trade

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[23] My discussion of the Charter is based on: P. Czachorowski, *Międzynarodowa Organizacja Pracy…*, p. 83.

[24] Cf. L. Florek, *Prawo pracy Unii Europejskiej* [in:] *Europejskie prawo pracy i ubezpieczeń społecznych*, ed. L. Florek, Warszawa 1996, p. 81.

[25] Dz.U. No. 41, Item 293.

[26] M.P. No. 22, Item 104.

Union Act of 8 October 1982[27]. However, it was only following the Round Table Agreement that the act was actually changed whereby the legal regulations permitting only one trade union were abolished[28].

As for the right of coalition according to the 1949 Trade Union Act, those entitled included blue-collar workers, white-collar workers and other individuals employed under employment contract, apprenticeship contract and nomination contract; the act did not differentiate between complete and limited right of coalition. Hence there is a question whether the subjective scope of the right of coalition correlated with the labour market. Even if we consider the realities of economy at that time, it does not seem so, because the law did not cover e.g. representatives of liberal professions. It should be remembered, however, that the structure of trade union movement based on the principle of monism and the way the economy was organised did not permit such broad scope of the right of coalition. Compared to the situation in democratic countries permitting autonomy of the relations between employees and employers, there was a change in the system resulting from nationalisation of economic operations. Due to the political and economic transformations the state apparently became a party to employment relationships, both individual and collective. Furthermore, socialist economy was significantly centralised, as a result of which the decision-making process was moved from enterprises to the bodies on national authority. This affected the functioning of trade union structures which typically also adopted decisions made at a higher level, away from the relevant enterprise[29].

The consequences of the ideology attributed to trade unions, and the broad competences delegated to them, included the systemic principle of monism in the structure of trade union movement[30]. It was in force in Poland and in other European countries in the Soviet zone of influence. In accordance with the principle of monism there could only be one trade union organisation in a workplace, and only one head office at the national level. Furthermore, trade unions were established based on a production-related criterion. This meant that employees of all entities operating within the same industry could belong to only one specialised trade union. The latter principle excluded the possibility to establish trade unions based on other criteria than affiliation with one specif-

[27] Dz.U. No. 32, Item 216.

[28] Act of 7 April 1989 on amendment of the Trade Union Act (Dz.U. No. 20, Item 105).

[29] M. Grzybowski, A. Świątkowski, *Wolność związków zawodowych. Aspekt prawny i ustrojowy* [in:] *Kompetencje związków zawodowych*, ed. A. Świątkowski, Warszawa 1984, p. 58, 59.

[30] Cf. L. Machol-Zajada, B. Skulimowska, J. Tulski, A. Woźniakowski, W. Załęski, *Związki zawodowe w Polsce w latach 1989–1993. Struktura – programy – problemy*, Raport IPiSS 1993, z. 4, p. 8; J. Wratny, *Związki zawodowe w prawodawswie polskim w latach1980–1991*, Lublin 1994; A. Kowalczyk, *Pojęcie i skutki prawne zasady reprezentatywności związków zawodowych w prawie polskim*, Rzeszów 2014, p. 21 et seq.

ic industry (type of operation)[31]. This structure of the trade union movement was in conflict with the standards defined by ILO Convention No. 87. Nevertheless, the situation introduced by the 1949 Trade Unions Act was maintained until the early 1980s. The changes to the act proposed by Solidarity envisaged that the right to establish trade unions were to be awarded to employees and individuals who, pursuant to the provisions of labour law, were treated in the same way as employees. The draft allowed for trade unions to be established by social and professional groups with a status different than that of employees, i.e. individual farmers, artists, liberal professions, taxi drivers and students. However, the 1982 Trade Union Act restricted the subjective scope of the right of coalition to people working under employment contract, and conditionally to retirees, pensioners, and temporarily unemployed individuals. Subsequently, the amendment of 6 April 1984 awarded a limited right of coalition to individuals involved in cottage industries or to agents. The above act revoked the right to establish trade unions, previously awarded to individual farmers and other non-employee groups.

The political and economic transformations of the late 1980s and early 1990s, inevitably led to changes in legal regulations pertaining to various spheres of social relationships, including collective labour laws. Consequently, a new act on trade unions was also adopted[32]. Pursuant to its provisions, complete right of coalition was awarded to working people, irrespective of the basis for their employment relationship, members of workers' production cooperatives, individuals performing work under agency contracts, if they are not employees, and persons doing alternative military service. Those with limited right of coalition included individuals performing home-based work, retirees, pensioners and the unemployed. The catalogue of those entitled to it was not restricted to employees, as they are defined in Art. 2 of Labour Code[33]. Notably, in accordance with the above legal regulations, those entitled to belong to trade unions included individuals performing work based on selected types of civil law agreements. The right however was not awarded to those working under contracts of mandate or contracts for specific work. It seems that such varied approach reflected the realities of the labour market in 1991. Rapid increase in employment based on

[31] The principle of monism, as a model for the structure of trade union movement in post-war Poland, was highlighted in a policy document of the underground movement initiated by the Polish Workers' Party. The program of the new trade union movement was presented in the article entitled "On revival of trade unions" („O odbudowie związków zawodowych") published in Trybuna Wolności. The article pointed out it was necessary to establish a uniform trade union movement, based on factory committees, and organized according to the principle: a single trade union in one workplace. See: A. Łopatka, *Państwo socjalistyczne a związki zawodowe*, Poznań 1962, p. 28, 29.

[32] Act of 23 May 1991 (Dz.U. 2015, Item 2029).

[33] Act of 26 June 1974 (Dz.U. 2014, Item 1502 as amended).

the above types of contracts has been observed only in the 21st century, particularly during its second decade. One might argue however that, irrespective of the realities of the labour market in the 1990s, the legislator should not have adopted a different approach to contractors.

This opinion was presented by the Constitutional Tribunal which decided that the above regulations were in conflict with the Polish Constitution[34]. The Tribunal adjudicated that the definition of the rights to establish and join trade unions is too narrow with respect to the constitutional guarantees resulting from Art. 59 clause 1, in connection to Art. 12 of the Polish Constitution[35]. According to the Tribunal, type of employment should not be applied as a criterion in awarding the right of coalition. It is important that the relevant individuals perform paid work for another entity and they have work-related interests which should be protected. Furthermore, the Constitutional Tribunal decided that the regulations of the 1991 Trade Union Act were in conflict with ILO Convention No. 87. The Polish translation of the document uses the term "pracownicy" [employees] with reference to individuals awarded with the right of coalition, while the terms used in both English and French language versions, according to the Tribunal, do not match the Polish definition of the term "pracownik" contained in the Labour Code, and related to individuals subject to employment contracts.

Notably, the broader meaning of the term "workers", which is not limited to people working under employment contracts, had in fact been pointed out by ILO bodies. The Committee on Freedom of Association, set up by the Governing Body of the International Labour Office, presented an opinion that freedom of association in the light of the above Convention does not depend on any existing employment contracts, and is also applicable to individuals in other contractual relationships with employees.

In view of the above, the Polish legislative authority undertook to extend the subjective scope of the right to establish and join trade unions in order to enforce the decision issued by the Constitutional Tribunal. The works were completed only in 2018, as a result of which the subjective scope of the right of coalition was changed[36]. Hence, in the light of the regulations currently in force, complete right of coalition is applicable to individuals performing paid work, individuals designated to work for a given employer in order to perform alternative forms of service, individuals employed under agency contract, provided they are not employers, as well as members of agricultural production cooperatives. Limited

[34] Adjudication of the Constitutional Tribunal dated 2 June 2015 (www.sejm.gov.pl).

[35] Art. 12 introduces guarantees related to freedom of association, while Art. 59 clause 1 covers the right of coalition, understood as second-generation right.

[36] Act of 5 July 2018 on amendment of Trade Union Act and certain other acts (Dz.U. 2018, Item 1608).

right of coalition is applicable to unemployed individuals, volunteers, interns and other individuals who personally perform work for no pay, in accordance with terms and conditions stipulated in a statute, as well as retirees and pensioners, because in their case the right to belong to trade unions is not revoked by retirement or by a title to pension benefits.

In accordance with the statutory definition, "individual performing paid work" should be understood as an employee or a person working for remuneration under different terms than employment contract.

As for the term employee the Trade Union Act refers to Art. 2 of the Labour Code. Hence, the complete right of coalition is guaranteed to individuals employed under an employment contract, or based on appointment, designation or election, or under cooperative employment contract. Therefore, acquisition of the status of employee depends on the terms of employment, while working hours, employee's leave of absence or limited-duration of employment are irrelevant[37]. As for the second category of individuals with complete right of coalition, the basic condition which must be met is defined as work for remuneration under different terms than employment contract. It is however, necessary to meet additional statutory conditions, that is perform the work in person (rather than by employing other people for this purpose) and have rights and interests related to the performance of work, which can be protected by a trade union. The legislator does not specify the rights and interests in detail; however, it should be assumed that this relates to all the rights and interests which, in accordance with statutory regulations, may be protected and represented by trade unions. Therefore, the criteria formulated this way award the right of coalition to a wide range of individuals, starting with those hired to work based on civil law contracts, such as contracts of mandate or contracts for specific work, and ending with self--employed individuals.

Conclusion

The broader subjective scope of the right of coalition results in far-reaching legal effects because it allows non-employees to benefit from a wide range of rights which were previously unavailable to them or were available to a limited extent only. One of the essential rights under collective labour law (or perhaps collective employment law?) is the right of collective bargaining, which is the basic instrument enabling trade unions to implement their rightful objectives. Most importantly it provides a possibility to conclude collective labour agreements. In the light of the legal regulations in force before the right

[37] See: K.W. Baran, *Ustawa o związkach zawodowych* [in:] *Zbiorowe prawo zatrudnienia. Komentarz*, ed. K.W. Baran, Warszawa 2019, p. 34 and references therein.

of coalition was expanded, collective bargaining provisions could be extended to contractors hired based on civil-law contracts of mandate or for specific work, however such contractors were not entitled to conduct related negotiations. As a consequence of the more broadly defined right of coalition, these individuals may conclude collective labour agreements, to define their rights exclusively. The right of collective bargaining is also linked with a possibility to initiate and conduct collective disputes, related to a far greater group of employees than previously.

Consequences of the expanded right of coalition also include changes in regulations permitting protection of trade union activists who are not employees; changes in the regulations defining who can be represented by trade unions; changes in the number of members necessary for company trade union organisations to realise their rights; changes making it possible to inspect the numbers of trade union members, and to increase representativeness threshold.

Importantly, by adopting the above regulations, the legislator equipped many of those involved in our labour market, and performing paid work, with instruments designed to secure their rights and interests. Yet, to what extent they will benefit from the changes is up to those newly awarded with the rights. Those working under contracts of mandate or for specific work constitute a majority among non-employee subjects awarded with the complete right of coalition. Notably, however that there are many reasons why some decide to work under these types of contracts. One of such reasons, although not dominant, is a lack of lasting relationship with the employing entity. This will be a legitimate argument for civil law contracts in the case of those who, owing to their qualifications and a large demand in the market, do not have problems with finding jobs and the specificity of the work performed provides legal justification for this type of employment. It does not seem that these people are interested in trade unions and in using the instruments that are designed to guarantee their protection. In the other end of the spectrum there are people working under civil-law contracts due to a lack of other opportunities. Theoretically they should be interested in securing their rights and interests, and consequently in trade union membership. Yet, they also may be discouraged from establishing trade unions by the lack of stable relationship with the employer and the "temporary" nature of their employment.

To sum up, these changes may prove to be insufficient for ensuring protection of the aforementioned groups of workers and we will face a dilemma related to further changes in these regulations; as it seems these will have to cover individual labour laws. This is highly likely, given the low union membership rates among employees, which may justify the supposition that the problem may also apply to non-employee workers.

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Summary

The right of coalition, understood as a second-generation human right, is related to equality, and is one of the manifestations of the freedom of association. The latter is recognised among the first-generation human rights, or those which do not originate from positive law but from the fact of belonging to the species of *homo sapiens*. The role of the state with respect to freedoms is to guarantee and secure them, while implementation of equality rights requires a legal framework and financial outlays. The current publication presents the evolution of the right to establish trade unions, as stipulated by Polish law, starting from the post-war period and ending with the latest changes which came in force on 1 January 2019; these are shown in the context of international regulations.

Keywords: the right of coalition, trade unions, Polish law, international regulations

EWOLUCJA PRAWA KOALICJI.
STANDARDY MIĘDZYNARODOWE A PRAWO POLSKIE

Streszczenie

Prawo koalicji, rozumiane jako prawo człowieka drugiej generacji, czyli prawo równościowe, jest jednym z przejawów wolności zrzeszania się. Ta ostatnia jest zaliczana do praw człowieka pierwszej generacji, których źródłem nie jest prawo stanowione, a sama przynależność do gatunku *homo sapiens*. Rolą państwa w odniesieniu do praw wolnościowych jest ich poręczanie i zabezpieczanie, w przeciwieństwie do praw równościowych, do których zagwarantowania konieczne są ramy prawne i nakłady finansowe. W niniejszej publikacji autorka przedstawia ewolucję prawa koalicji związków zawodowych w prawie polskim, począwszy od okresu powojennego aż po ostatnie zmiany, które weszły w życie 1 stycznia 2019 r., na tle regulacji międzynarodowych.

Słowa kluczowe: prawo koalicji, związki zawodowe, prawo polskie, regulacje międzynarodowe

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Małgorzata Łuszczyńska

Maria Curie-Skłodowska University in Lublin
ORCID: 0000-0002-4387-8820

POLISH CRITICISM OF HANS KELSEN'S NORMATIVISM

Normativism, referred to as the pure theory of law, or Vienna School, is recognised as one of the most formalistic trends in the history of political law doctrines[1]. Hans Kelsen (1881–1973), the founder of the school, postulated controversial ideas related to the theory of the state and law. His radical approach to the traditional science of law was, for instance, reflected in his identification of law and state, negation of the commonly accepted distinction between public and private law, and elimination of the idea of purpose from the subject matter covered by jurisprudence. Kelsen also opted for strict separation of the spheres of being and obligation. This separation was to constitute a criterion for distinguishing normative and explicative sciences. The thesis about disconnecting the law from reality and separating it from politics, psychology and sociology, as well as the theory granting the primacy of international law over state law brought heated response from representatives of legal sciences.

The new theory enjoyed significant popularity, particularly during the two interwar decades, and like every novelty it gained many supporters and a host of opponents and critics. Critical comments were mainly to be found in writings by Antoni Peretiatkowicz, Andrzej Mycielski, and Czesław Znamierowski. The most original polemics in the Polish literature related to this subject matter, include the critique by Jerzy Lande representing juridical psychologism, the Thomistic negation of the assumptions presented by the Vienna School authored by Czesław Martyniak, as well as Marxism-based criticism by Jerzy Wróblewski.

The Thomistic, as well as psychological and Marxist critique of Normativism aimed to demonstrate inaccuracies or gaps in Hans Kelsen's doctrine. The elements covered by all of these critical opinions include the basic norm and the separation of being and obligation. Each approach uses its specific argumentation

[1] Normativism was considered to be the most formalistic trend in the history of political law doctrines by G.L. Seidler, *Doktryny prawne imperializmu*, Lublin 1979, p. 108.

in the critical evaluation of the specific assumptions of Hans Kelsen's juridical normativism. Notably, the critical opinions concerning normativism formulated by Jerzy Lande and Czesław Martyniak did not seek to discredit the doctrine from an academic standpoint, contrary to the concept presented by Jerzy Wróblewski.

Analysis of the "pure" theory of law from the viewpoint of Thomism and psychologism made it possible to highlight Kelsen's achievements in the area of methodology[2]. Nevertheless, Jerzy Lande's study entitled *Norm versus juridical phenomenon. Considerations on the foundation of legal theory in the context of Kelsen's system critique* (published in Czasopismo Prawne i Ekonomiczne vol. XXIV from 1925) emphasised that, although apparently coherent and logical, the general methodological assumptions upon close examination reveal "a serious deficiency in traditional juridical thinking. His work, so integral in its assumptions and upon review at times producing such beautiful results, in its own structures turns out vacant or erroneous"[3]. Detailed and meticulous analysis of the Vienna School assumptions led Czesław Martyniak to similar conclusions; he points out that Kelsen's theory contains "errors, *petitiones principii*, contradictions, and – disguised in modern presentation – a return to old theories recognising strength as the basis for the authority of law; finally [it contains] a certain dose of ignorance"[4].

As a common feature, the criticism of normativism published during the two interwar decades applies a narrowed down area of exploration. The author of the psychological criticism of normativism narrows down the scope of investigation: "only to the basic question of [Kelsen's] approach to law"[5]. Jerzy Lande treats normativism as "an intersection of certain philosophical and ethical aspirations", and its detailed analysis makes it possible to show deficiencies of this doctrine and the conclusions which should be reached by it.

Jerzy Lande accuses Kelsen of "a continuous tendency to identify ideality with obligation"[6]. He recognises correct logic in a statement that each normative sentence inherently contains ideal cognition, however the reversed construction is erroneous. In connection with that Kelsen and his disciples cannot assume an ideal position with regard to a legal norm, i.e. a position which, as emphasised by Lande, would also be theoretical rather than only normative. Explicative sentences, according to Jerzy Lande, are a certain variation of theoretical sentences ("objectively cognitive") "about that which is real". In addition to these, there are theoretical sentences about that which is ideal. At the opposite end, in relation to theoretical sentences, there are sentences expressing assessment. Varia-

[2] J. Lande, *Norma a zjawisko prawne. Rozważania nad podstawami teorii prawa na tle krytyki Kelsena* [in:] *Studia z filozofii prawa*, Warszawa 1959, p. 140–141.

[3] The current study has used the reprinted version, included in the collection „Studia z filozofii prawa", Warszawa 1959. *Ibidem*, p. 141.

[4] C. Martyniak, *Moc obowiązująca prawa a teoria Kelsena*, Lublin 1938, p. 245.

[5] J. Lande, *Norma a zjawisko prawne*…, p. 142.

[6] *Ibidem*, p. 144.

tions of the latter include sentences containing evaluation of conduct, and their subgroup of normative sentences, "containing basic regulations as opposed to teleological rules"[7].

Although Lande considers it appropriate to refer to the normative science, as defined by Kelsen, with such terms as dogmatic jurisprudence or legal dogmatics, he disagrees with the claim that a philosophy or a "pure theory of law" can be built based on and within the boundaries outlined by this science. He believes that accurate theory of law may be developed only based on findings of explorations focused on a legal phenomenon, and provided by psychology and sociology[8].

Kelsen, seeking to achieve methodological purity, moves the "entire social phenomenon of law", or the "actuality of law", from the sphere of *Sein* to the domain of *Sollen*. As a result, he passes the sphere of being to explicative sciences, i.e. sociology and psychology. According to Lande, it is difficult to clearly understand whether, in Kelsen's opinion, law is a social or mental phenomenon[9]. On the other hand, a normative experience itself, approached by normativism from psychological standpoint, is characterized by "chaos". In this context "experiencing" a norm is equivalent to thinking, feeling and wanting. Lande admits that in accordance with the approach of normativism, one can agree that "a real-life counterpart of a legal norm is not a social phenomenon (…) but a mental phenomenon of experiencing a norm" as objectively described by its specific characteristics, however one cannot disregard the attempts to "smuggle in normative qualities inherently containing evaluation"[10].

Psychological critique of normativism also touches upon the relationship of law and morality. According to Jerzy Lande, normative regulation recognized as a mental process is always a real phenomenon, whether it is autonomous (intuitive) or heteronomous (positive), or takes a form of "legal, moral or aesthetic normalisation"[11]. On the other hand Hans Kelsen attributes autonomous motives with traits of real existence only, failing to notice elements of *Sein* realised in heteronomous norms. From the standpoint of juridical psychologism, antagonistic approach to autonomy and heteronomy leads to numerous defects, inaccuracies, lack of precision, "numerous ambiguities and contradictions" in Kelsen's doctrine.

Analysis of Kelsen's model of positive law system leads Lande to the following conclusion: the ultimate foundation of each system is a fact predicted by no norm ("with a peak point in the constitution, a monarch's order, etc."). Indeed, the ultimate foundation of a legal system cannot be reduced to a legal norm, because a search for the basis for that specific norm would commence.

[7] *Ibidem*, p. 145.

[8] *Ibidem*.

[9] *Ibidem*, p. 150.

[10] *Ibidem*, p. 152–153.

[11] *Ibidem*, p. 199.

Obviously, it is necessary to define, which Kelsen fails to do, a specific criterion allowing to distinguish a legal fact from other facts, e.g. related to ethics. Analysis of normativism leads Lande to a conclusion that such distinction is "enabled by application of a norm"[12]. Hence, strength and means of enforcement guarantee respect for a norm, as they impose an obligation "on a subject, "independently or even against his will", to apply the sanctions"[13]. Lande concludes: "enforceability again distinguishes legal norms from moral, logical, and grammatical norms (…) a state becomes a system of enforcement"[14].

The structure of the basic norm was also met with criticism. Dynamic legal system is "the most classic case of *definitio per idem*: to ensure legal nature of a sanctioned norm, the related sanctioning norm must be a legal norm, otherwise we would be dealing only with «actual enforcement», however the sanctioning norm may be lawful only if it has legal sanction … and so into the infinity. If the chain is broken at any point, all the preceding links, including the first one, become legally invalid"[15]. A remedy is provided by the hypothetical sentence "with the following structure: when someone does so and so, the state will apply a penalty or execution"[16].

The basic norm, according to Lande, is not "a positive norm, it is not even a legal norm, unless it is derived from a legal system of a higher order, e.g. from international law; in such case, however, it is no longer the basic norm. And in this way, the very concept of the basic norm, selected to be a criterion and a guarantee for positivity and lawfulness of a system of norms, opens the doors for the absolute and extra-legal domain"[17]. Thus, Kelsen appears to be stepping down from the pedestal of positivity, and edging away towards the idea of natural law. Moreover, Lande notices that the concept of the basic norm contains the "specific" feature of law, and in normativism this seems to be compulsion.

Lande points out that identification of each and every concept with the idea of norm, i.e. duty is a norm, subject of law is a norm, and the state is a norm, leads to an absurd situation. If the state is a synonym of law, and law means strength, while the terms "strength", and "authority" are "actual" elements contained in the set named "being", it transpires that "Kelsen denies it is possible to describe authority in normative terms"[18]. Kelsen considers the state to be an ideal

[12] *Ibidem*, p. 259. "Fear of the sanction is recognised as the only motive specific to legal proceeding; ultimately it is assumed that in view of the exclusive importance of sanction in the law, the very nature of obligation in a legal norm is redundant, and it is enough to inform that in specific conditions there will be a sanction". *Ibidem*, p. 267–268. Cf. *ibidem*, p. 302, 310, 313.

[13] *Ibidem*, p. 267.

[14] *Ibidem*, p. 277.

[15] *Ibidem*, p. 266.

[16] *Ibidem*, p. 276.

[17] *Ibidem*, p. 296–296.

[18] *Ibidem*, p. 185.

structure, as seen by legal dogmatics, but at the same time he rejects the feasibility of sociological research of the state approached as a real being, which contradicts his own classification of sciences[19].

Lande argues that one of the major drawbacks of Kelsen's approach lies in the fact that in his considerations he combined issues related to dogmatics with those pertaining to the theory of law[20]. Like Czesław Martyniak, he objects to Kelsen's errors using the very assumptions which were adopted by the latter[21]. Identification of the state and law leads to a conclusion that law is the will of the state, i.e. what is willed by the state becomes law. Hence the author's conclusion: in this case, if Kelsen's criteria, evaluations and terms are adopted, we are dealing with a concept of "moral autonomy". Lande demonstrates the "shakiness" of the concepts of autonomy and heteronomy. "And law «in a broader sense» remains the law, while constituting no sanctioned, or even «heteronomous» norm"[22].

As a conclusion for the criticism of normativism from the standpoint of juridical psychologism let us cite words penned by its author: "In law he focused all his efforts on purification of normative thinking by eliminating false realism: and here to a certain extent, as long as the thing was about negation, he achieved his best results. However, he was then carried away: one by one, all the concepts are stripped of their specific meaning, and reduced to their identity with a norm; obligation, right, person, state drown in a norm, a normative fact disappears, and the applicable law, forcefully extracted from its consecutive layers, loses its own form, and dissolves in the pure yet completely empty «applicability». Strenuous «purification» and the ugly stain destroyed the purified object itself"[23].

The second constructive criticism of the assumptions proposed by the "pure" theory of law, formulated during the two interwar decades, is to be found in a dissertation by Czesław Martyniak, entitled *The binding force of law versus Kelsen's theory*[24]. The foundation for the discussion with the views presented by Hans Helsen was provided by Thomistic concept of natural law[25].

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[19] Cf. H. Kelsen, *Der soziologische und der juristische Staatsbegriff*, Tübingen 1922, p. 91, 190–191.

[20] His position is presented in the context of normativism: "These two areas must be separated; this is a sine qua non condition for the due development of legal sciences". J. Lande, *Norma a zjawisko prawne…*, p. 325.

[21] "Indeed, to point out and refute Kelsen's errors in the distinction of morality and law, sufficient means in the above deliberations were provided to us by the cognitive principles of Kelsen himself". *Ibidem*, p. 227.

[22] *Ibidem*, p. 276.

[23] *Ibidem*, p. 319.

[24] C. Martyniak, *Moc obowiązująca prawa…*, p. 256.

[25] In his critical review Czesław Martyniak took into account all the scientific works published by Hans Kelsen by that time; the author also proved he was well-acquainted with the literature discussing normativism, both in the Polish and in foreign languages. The most frequently cited works by Hans Kelsen include: *Hauptprobleme der Staatsrechtslehre*; *Das Problem der Souverä-*

Since a comprehensive analysis of juridical normativism combined with constructive criticism of that doctrine would have exceeded the scope of a single-volume monograph, and would have required many years of study, Martyniak decided to narrow down the subject matter and focused exclusively on the issues of the binding force of law. Owing to this approach, the publication gained in accuracy and insight.

Like Jerzy Lande, the author of the psychologism-based critique of normativism, Martyniak also points to Hans Kelsen's philosophical inspirations. Both scholars emphasise that the philosophical assumptions of the "pure theory of law" are underestimated and frequently overlooked in studies by the supporters and opponents of the Vienna school. Exploration of its foundations related to philosophy of law makes it possible to get better insight into the doctrine of normativism. Notably, however, the related transcendent critique conducted by Martyniak does not constitute a summary of Kelsen's ideas, but rather it provides a synthesis of the fundamental assumptions of the doctrine showing inaccuracies in its theoretical and philosophical assumptions and negating the logical coherence and uniformity of the doctrine.

Czesław Martyniak in his research on "pure" theory of law sought to demonstrate that Kelsen not only successfully dealt with the problem of the binding force of law, but he went much further, because he included in his doctrine the view on the discussed issues[26].

The critique of the Vienna school was performed in two stages. The preface was followed with general characteristics of the "pure" theory of law, which provided the background for internal critique, by the author referred to as "immanent critique".

Czesław Martyniak consistently places normativism within legal positivism. This way he addresses the contentious issue related to the classification of this political and legal doctrine[27]. Furthermore, he emphasises that Hans Kelsen, in his

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nität und die teorie des Völkerrechts. Beitrag zu einer reiner Rechtslehre"; *Der soziologische und derjuristische Staatsbegriff, Allgemeine Staatslehre*; *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, Reine Rechtslehre*.

[26] C. Martyniak *Moc obowiązująca prawa*…, p. 46. Makes reference to studies by J. Maritain, *Philosophie et science expèrimentale, in Cahiers de Pfilosophie de la natue*, Paris 1929, p. 192; E. Kaufmann, *Kritik der neukantischen Rechtsphilosophie*, Tübingen 1921, p. 27.

[27] According to Czesław Martyniak, Kelsen represents "a certain persistent type of mentality occurring regularly for centuries. Kelsenism may be the most logical and precise formulation of positivist approach, for years affecting the minds of jurists, but predominantly seen as fascinating in the 19th and early 20th century". C. Martyniak, *Moc obowiązująca prawa*…, p. 2–3. The author points out that in the literature one may encounter numerous concepts: for example K. Lorenz (*Rechts – und Staatsphilosophie der Gegenwart*, Berlin 1935, p. 39) believed Kelsenism represented pure form of positivism, and legal nominalism, whereas E. Kaufmann (*Kritik*…, Tübingen 1931, p. 27–29) referred to this school as metaphysical rationalism or metaphysical logicism, and R. Treves (*Il diritto come relazione. Saggio coritico sul neokantosmo contemporaneo*, Torino 1934) applied the term "critical idealism" while talking about the school. Furthermore, one

pursuit of methodological purity, goes so far that negation of existence as a basis for obligation is insufficient; indeed "even an entity subject to an obligation «is purified» to eliminate any elements of the reality: the state becomes a norm, subjective law is a norm, and even man is a norm"[28]. This way Kelsen ends up with the so-called principle of immanence, according to which everything is a norm. A jurist does not know other norms than norms of man-made law, hence one should not even ask what is the difference between a legal norm and other norms.

A thorough analysis of Hans Kelsen's works allowed Martyniak to point out a number of ambiguities, doubts and logical errors.

In his opinion Kelsen is inconsistent, and he "trespasses the limits of the pure theory of law" when he uses the term law exclusively with reference to positive law, and he refuses to acknowledge existence of any higher legal order which *lex humana* could draw on. "Pure theory of law can only say: *ignoramus et ignorabimus,* which means it must admit that it cannot resolve the issues lying beyond its limits, and it can by no means do what Kelsen did, that is provide a negative answer"[29]. Another example of "a leap beyond the outlined limits and an instance of a fanatical methodological doctrinairism" is the thesis on the identity of the state and law. Martyniak points out that sociological research based on causality cannot be refuted in the name of strictly scientific laws. Such negation, in his opinion, is unscientific[30].

According to the assumptions of Hans Kelsen's doctrine, law must be endowed with objective binding force[31]. Objective obligation is to distinguish law from ordinary compulsion. For this purpose, a legal norm should draw its binding force from the binding force of another norm, which already has such force. Consequently, there is an equality sign between the manner law is made and the way the basis for its binding force is determined[32].

The theory of basic norm, as Czesław Martyniak emphasised correctly, without doubt, is the crowning achievement of Kelsen's system and also its Achilles' heel. This is because it is extremely difficult to define the binding force

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can encounter statements that the Vienna school is nothing more than a revival of scholastic way of thinking (F. Brobmann, *Was ist Recht und wo ist es*, Berlin 1935, p. 17). Hans Kelsen referred to his system as "legal positivism and even more so critical positivism, aware of its assumptions and limitations" in the following publications: *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus*, Charlottenburg 1928, p. 67; *Reine Rechtslehre*, p. 19, 20, 25, 38.

[28] C. Martyniak, *Moc obowiązująca prawa…*, p. 65. The author compares jurist to the mythological King Midas; unlike the latter who turns everything to gold, the former puts everything into norms.

[29] *Ibidem*.

[30] *Ibidem*, p. 84.

[31] H. Kelsen, *Hauptprobleme der Staatsrechtslehre*, Tübingen 1911, p. 531. Kelsen writes that the issue of the essence of law is tantamount to the question of the basis for applicability of a legal norm (hence, the basis for applicability of a legal order).

[32] Cf. H. Kelsen, *Allgemeine Staatslehre*, Berlin 1925, p. 17.

of the basic norm, which reflects the internal contradiction of Hans Kelsen's doctrine. The binding force of the norm cannot be derived from morality, from an absolute value, because, according to Kelsen, it does not exist; it cannot be based on phenomena of the world of being, since reality is separate from obligation. Hence, being a phenomenon from the sphere of obligation, as assumed in the "pure theory of law", the basic norm may only be rooted in another obligation. Czesław Martyniak claims that this clearly reflects Kelsen's relativism and his positivist conviction about a lack of permanent and absolute values. The existence of the fundamental norm is up to us; it can be any single norm we recognize as such. This structure of obligation would be of absolute nature and would violate the adopted approach. Hence, the norm constituting a foundation for the whole legal order is hypothetical (it relates to law as an object of knowledge, and to the problem of the existence of legal science), and relative (as the author wrote, it does not claim to hold any absolute value).

This way the basic norm goes beyond the limits of the system of positive law, because its binding force breaks off with the dynamic principle. This in turn is in conflict with one of the principal assumptions of the "pure theory of law", that is with the narrowing of the research area only to man-made law. The basic norm, as pointed out by Martyniak, is of "non-positive nature", because "the foundation of the whole system providing the basis for its uniformity and binding force, *is situated* outside the system of positive law"[33].

The author of the critique aptly points out the erroneous assumption of the whole doctrine of the Vienna school, where the cornerstone of the legal order, the principle generally unchallenged, remains in question: "that which should have been justified, i.e. the binding force of the basic norm, is raised to the rank of the highest authority"[34]. Consequently, the separation of obligation and reality, and the binding force of the legal order, is based on an unproven postulate. It is a "normative and metaphysical" concept, and "a kind of imperative in itself, analogous to a thing itself"[35]. Hence the conclusion of the Thomist from Lublin: *Grundnorm* is in force as long as one believes in it. This approach is the only one that is justified, otherwise we would have to agree that law is based on strength and compulsion. Kelsen's critic is definitely right when he insists that this foundation is too fragile for the imposing edifice of the system of law.

In simple terms one could say that *Grundnorm* loses its binding force "when the reality no longer matches it, and a norm which is in line with the reality becomes binding"[36]. Deliberations of this type lead directly to the following con-

[33] C. Martyniak, *Moc obowiązująca prawa*…, p. 108.

[34] *Ibidem*, p. 109.

[35] *Ibidem*, p. 110. C. Martyniak compares the basic norm to I. Kant's categorical imperative. "One may argue that this simply is a juridical version of categorical imperative which is transferred from the sphere of autonomic morality to the heteronomous domain of law". *Ibidem*, p. 109–110.

[36] *Ibidem*, s. 130. Cf. Kelsen, *General Theory of Law and State*, Harvard 1949, p. 115.

clusion: "To be recognised as the basic one, the norm must always be supported by strength; what is more it is deemed to be binding as long as it can get such support"[37]. Hence, an entity attributed with real strength determines the shape of the basic norm, which is clearly manifested by the legal orders introduced by leaders of winning revolutions. Briefly and generally speaking: strength is law[38]. Law is made by those who command obedience. Respect for norms is equivalent to their effectiveness. By assumption, the basic norm was to be the highest authority, ultimately however it is a creation of the highest authority, that by Martyniak is identified with the law-maker. Therefore, as consistently emphasised by Martyniak, "the problem of its binding force is reduced to the question who has sufficient power to institute law"[39]. Hence, an obligation is to abide by orders issued by those in power. This way law is based on "actuality" which was so ostentatiously repudiated by Kelsen.

The theory of the basic norm, according to Czesław Martyniak, leads to the inevitable observation that obligation is shaped based on the reality, and the contents of the basic norm must match the actual behaviour of people[40]. The discussion presented by Martyniak shows that the basic norm is a response to the law-maker's actions conforming with the public expectations. Hence, there is a relationship between changes occurring in the reality and transformations in the legal obligation. This way the duality of being and obligation is invalidated by Hans Kelsen himself.

Similar comments as those related to the distinction of *Sein* and *Sollen* are offered by Czesław Martyniak with regard to the strict separation of form and content. In this case the methodology-related differentiation is transformed into an ontic opposition. The form and contents are inseparably linked, one complements the other, and together they make up a whole. "Science of law is feasible only if it is assumed that a legal norm has a certain content"[41].

Czesław Martyniak argues that normativism should have stayed true to its methodological assumptions. As a result, it would have avoided many errors, ambiguities and inconsistencies. The suggestion voiced by Czesław Martyniak seems to convey a noteworthy way to maintain the unity of Kelsen's doctrine and its methodological purity. Furthermore, the doctrine of normativism at times provides a reference point for presentation of the critic's own position and for suggesting solutions in line with the spirit of the doctrine by St. Thomas Aquinas[42].

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[37] C. Martyniak, *Moc obowiązująca prawa*…, p. 130.

[38] This idea, brought up by Martyniak, was inspired by G. Husserl. *Ibidem*, p. 141.

[39] *Ibidem*, p. 142.

[40] *Ibidem*, p. 134–135.

[41] *Ibidem*, p. 126.

[42] In his conclusion to the discussion on the relationship between positive law and natural law, Czesław Martyniak presents his own opinion with regard to that relation. He describes it as: "delegation limited by contents" which shows "association of formal nature".

Polish critique of normativism in the interwar period was characterised by matter-of-factness, and a constructive approach to the subject. The polemic with Kelsen was not an art for art's sake, nor was it intended to discredit the doctrine or to ridicule its author by showing logical errors or design flaws. In their related studies the scholars, as a rule, focused on one specific issue or a group of problems. This would generally have been linked with editorial requirements and the willingness to perform a detailed and accurate analysis of a given "fragment". Notably, most authors acknowledged the value of Kelsen's scientific work, and the critique voiced by them provided a background for the presentation of their own conceptions.

The most noteworthy critical analysis of the doctrine of normativism published during the post-war period was carried out from the standpoint of Marxism, by Jerzy Wróblewski[43].

Contrary to the discussions in the Polish literature related to normativism, based on Thomism and psychology, the Marxist criticism fails to identify any positive value in Kelsen's doctrine. It offers exclusively negative opinion about the "bourgeois science of law". The position presented by Jerzy Wróblewski is connected with the basic assumption of Marxism: the state and law are inseparably linked to class warfare. According to Marxist approach, the state seeks to achieve the domination of the ruling class, and law represents interests of that class. These two institutions, being manifestations of social life, may be studied exclusively "using the only scientific method enabling research of social phenomena, i.e. historical materialism"[44]. If an author takes a different approach, their doctrine is devoid of a scientific value and must be negatively evaluated from the standpoint of Marxism. Hence, given the fact that Kelsen chooses to apply the formal-dogmatic approach, elevating it "to the status of a general juridical theory", he is described as a promoter of "imperialist ideology". The essence of the doctrine of normativism, Wróblewski wrote, is "theoretically defective and politically antagonistic", hence its scientific value is renounced. By abandoning the formal-dogmatic approach, Marxist critique of normativism can demonstrate logical contradictions. This way it is possible to show "the superiority of the Marxist theory of the state and law over the pure theory of law"[45]. Pursuit of methodological purity is perceived as hostility towards Marxism. In accordance with the Marxist approach, normativism represents interests of "bourgeoisie" exclusively, and by defending "the capitalist state and law" it becomes enmeshed with politics. "Hence, the theoretical and legal formalism, promoted as apolitical, scientific, pure, etc., is a political methodology designed

[43] J. Wróblewski, *Krytyka normatywistycznej teorii prawa i państwa Hansa Kelsena*, Warszawa 1955.

[44] *Ibidem*, p. 5.

[45] *Ibidem*, p. 7.

and oriented against historical materialism"[46]. Normativism, by itself described as a successor of juridical positivism, applies the formal-dogmatic approach thereby separating science from reality, and turning it into "speculations where the tone is mainly set by phenomenology"[47].

Like Jerzy Lande and Czesław Martyniak, Jerzy Wróblewski criticises the absolute distinction of the sphere of being and obligation. However, he does that in an entirely different way. The Marxist rhetoric aims to discredit Kelsen's doctrine, also seeking to reflect a strongly negative approach to the interwar reviews of normativism. The wording used to describe normativism, psychological school in jurisprudence, or Thomistic point of reference in assessment of social reality, clearly reflects a lack of objectivity in the opinions expressed. According to the Marxist approach, this is a doctrine defending "the rotting capitalist society"[48]. Wróblewski claims that by "extracting" issues related to the life of the society, in particular linked to the state and law, Kelsen uses "metaphysical speculation"[49]. He makes reference to doctrines "trying to combat Marxism on the grounds of vulgar sociologism and psychologism"[50]. He also uses the term "bourgeois" when referring to the Thomist critique of normativism[51].

Marxist critique of normativism is enmeshed in politics. It makes reference to the situation in international politics at the time (the monograph by Wróblewski was published in 1955). This is particularly clear when the discussion focuses on international law. The normativist concepts of international law and its relationship to the legal order in the specific states are believed to be at the service of imperialism. "The cloak of pacifism, and hostility towards the concept of sovereignty on behalf of the future *civitatis maximae* under American rule are an excellent illustration of the political and class-related meaning of the pure theory"[52].

At each stage of the Marxist critique of normativism it is emphasised that warfare is conducted by "bourgeois humanism" against Marxism in order to "eliminate scientific foundations of the proletariat's class struggle"[53]. "Pure theory of law is not pure as far as its purity from politics is concerned, or as regards the purity of methods of fighting with its opponents"[54].

Kelsen's separation of the spheres of being and obligation is in conflict with Marxist approach, since it suggests there is no relation between law and the base of the life of society. "Conceptual speculations" separating the state and law from

[46] *Ibidem*, p. 68.
[47] *Ibidem*, p. 294.
[48] *Ibidem,* p. 245.
[49] *Ibidem*, p. 11.
[50] *Ibidem*.
[51] *Ibidem*, p. 168.
[52] *Ibidem*, p. 210.
[53] *Ibidem*, p. 35.
[54] *Ibidem*, p. 227.

the sphere of *Sein* exclusively in favour of *Sollen* deprive social beings of superstructure which is due to them. The method of cognition cannot create the object of knowledge[55]. Given the broad spectrum of social phenomena, the only legitimate method for researching the social reality, according to Jerzy Wróblewski, is the method of dialectical and historical materialism. It also enables analysis of "the anatomy of a capitalist society"[56]. The arguments supporting criticism and showing a lack of logical consequence in the juxtaposition of ontology and epistemology are cited directly from works by Joseph Stalin: "science cannot live and make progress without recognising objective regularities, without studying those regularities"[57].

According to Marxists, law is a product of a society which is at a given stage of development. It is an element of the superstructure to the base, subject to objective rules of social development. These objective laws of development are defined by historical materialism. "It was Marxism that first discovered these laws of social progress, while investigating the laws governing the capitalist economy, and it identified the important causes and origins of social patterns"[58].

Law is seen by Marxism as both a goal for and a tool of the ruling class. Hence, like the state, law is also a "political category"[59]. Normativism, "ignoring the purpose of the state and law", conducts "an assault on the materialist discovery of the class nature of the state and law"[60]. Only in a socialist community can law be equated with morality, because of "the unity of law and morality, resulting from the lack of antagonistic classes, and from the fact that law is a manifestation of the will of the whole society, just like morality"[61]. Analysis of Kelsen's doctrine leads Marxists to a conclusion that law means strength, most of all political strength. On the other hand, the basic norm provides a "blanket" authorisation for issuing "legal regulations of any kind", i.e. conforming with the goals of the ruling class[62]. Identification of law with the state leads to anthropomorphisation of the legal norm: law is instituted by obligation rather than by man; the state is a system of norms rather than an institutionalised form of social life[63].

Quintessential for the critique of normativism with regard to the basic norm and formalism of the "pure theory of law" are the following words:

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[55] *Ibidem*, p. 40. Cf. J. Wróblewski, *Niektóre zagadnienia teorii państwa i prawa w świetle pracy J. Stalina*, *Ekonomiczne problemy socjalizmu w ZSRR*, „Państwo i Prawo" 1953, no. 7.

[56] J. Wróblewski, *Krytyka normatywistycznej teorii…*, p. 41. With regard to that J. Wróblewski refers to: J. Stalin, *O materializmie dialektycznym i historycznym. Zagadnienia leninizmu*, Warszawa 1954; W. Lenin, *Materializm a empirokrytycyzm* [in:] *Dzieła*, vol. 14, Warszawa 1949.

[57] J. Stalin, *Ekonomiczne problemy socjalizmu w ZSRR*, Warszawa 1953, p. 139.

[58] B. Bierut, *Przemówienie na naradzie aktywu PZPR w Warszawie dnia 4.11.1952*, „Nowe Drogi" 1952, no. 11, p. 4.

[59] A.J. Wyszyński, *Zagadnienia teorii państwa i prawa*, Warszawa 1952, p. 108.

[60] J. Wróblewski, *Krytyka normatywistycznej teorii…*, p. 153.

[61] *Ibidem*, p. 158.

[62] *Ibidem*, p. 184, 222.

[63] *Ibidem*, p. 236–237.

„The concept of the basic norm and the dynamic system of law is a construction in which comes to light the final bourgeois theory of the period of imperialism, built on the formal-dogmatic method; this is an evidence of the fact that formalist speculation based on metaphysical separation of the content and form of law, on separation of law from the phenomena which it serves, and whose product it is, ultimately must lead to the issue of the binding force of a legal system, to a question which remains a question although it is removed into the meta-legal domain"[64].

The type and form of the state met with particular criticism from the Marxist standpoint. In critique, Jerzy Wróblewski also presents assumptions of Marxism in a way typical for propaganda: "We fight for socialism because it is a better system than capitalism, because it is not based on abuse of others, contrary to all the earlier systems involving exploitation"[65].

The presented critiques addressing the assumptions of juridical normativism are characterised by originality resulting from the point of reference adopted by each author. All the critics use a similar approach where they point out inaccuracies of Hans Kelsen's assumptions, however they present different arguments to support the proposed theses.

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Summary

The article introduces the reader to the main theses voiced by opponents of Hans Kelsen's theory. Notably, the review focuses on the most original achievements which can be found in the related Polish literature; these include the critical comments by Jerzy Lande drawing on the prem-

[64] *Ibidem*, p. 183.

[65] *Ibidem*, p. 247.

ises of juridical psychologism, the Thomistic critique of the Vienna School's assumptions authored by Czesław Martyniak, as well as Marxism-based criticism by Jerzy Wróblewski. All of the critical reviews address the basic norm and the separation of being and obligation. Each concept uses its own argumentation when critically evaluating specific assumptions of Hans Kelsen's legal normativism. Notably, the critical comments formulated by Jerzy Lande and Czesław Martyniak, by no means aimed to discredit the doctrine, contrary to the approach adopted by Jerzy Wróblewski.

Keywords: legal normativism, Jerzy Wróblewski, Czesław Martyniak, Jerzy Lande, Hans Kelsen, pure theory of law, Vienna School

POLSKA KRYTYKA NORMATYWIZMU HANSA KELSENA

Streszczenie

Artykuł przybliża czytelnikowi główne tezy głoszone przez oponentów teorii Hansa Kelsena. Należy podkreślić, że wybrano najbardziej oryginalne dokonania, na jakie zdobyła się polska literatura przedmiotu: wychodzącą z założeń psychologizmu prawniczego krytykę autorstwa Jerzego Landego, tomistyczną negację założeń szkoły wiedeńskiej w ujęciu Czesława Martyniaka oraz marksistowską krytykę Jerzego Wróblewskiego. Elementami wspólnymi każdego krytycznego stanowiska staje się norma podstawowa oraz rozdział bytu i powinności. Każda z koncepcji przy krytycznej ocenie poszczególnych założeń normatywizmu prawniczego Hansa Kelsena posługuje się właściwą sobie argumentacją. Podkreślić należy, że krytyka normatywizmu sformułowana przez Jerzego Landego oraz Czesława Martyniaka w żaden sposób nie zmierzała do naukowej dyskredytacji tej doktryny, w przeciwieństwie do koncepcji Jerzego Wróblewskiego.

Słowa kluczowe: normatywizm prawniczy, Jerzy Wróblewski, Czesław Martyniak, Jerzy Lande, Hans Kelsen, czysta teoria prawa, „szkoła wiedeńska”

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Zdzisław Majkut

University of Warmia and Mazury
ORCID: 0000-0001-9766-8514

ECONOMIC ANALYSIS OF LAW AS A GOOD QUALITY OF THE LEGISLATIVE PROCESS

Economic conditions both internal and external in every country of the world are subject to constant change, which are associated with the implementation of necessary changes in the existing policies of various operators as well as the mutual relations of influence.

Regulations and legal norms are institutions, that are created by the state to ensure the smooth functioning of the entire national economic process. Institutional structures affect the behavior of people and businesses. Regulations and legal norms in turn create a legal system.

The legal system is a specific set of standards of conduct, which must be sufficiently proficient to solve a number of potential problems. The legal system must also be able to make allocation as well as loads, solve actual conflicts, control and regulate human behavior. Legal systems around the world, from the very beginning of its existence tended to develop, so there were new methods and approaches to the above mentioned problems. The traditional approach to regulation should be extended through the use of tools and methods, that are used in economic sciences, such as transaction costs, game theory or analysis of costs and benefits. Today, the economic analysis of law is a very important area of interest of the new institutional economics and new political economy[1].

Legal norms, as formal institutions, provide a framework to ensure stability as well as transparency of solutions and relations in various areas of life, particularly in the economic sphere. The economy of a country can not function efficiently without an effective legal system, because there is a strong correlation between the quality of law and achieved economic results.

[1] J. Pomaskow, *Ekonomiczna analiza prawa – alternatywa dla głównego nurtu ekonomii*, „Zeszyty Naukowe Uniwersytetu Szczcinskiego” 2015, no. 858, „Współczesne Problemy Ekonomiczne” no. 11, p. 1.

Created law can have a negative impact on economic development or, on the contrary, create very favorable conditions for its development through the elimination of unnecessary and hampering economic development rules and legal procedures.

At this stage it is very important to describe the issues of economic analysis of law (Law & Economics). This discipline is the study of law with the use of economic tools. Currently, the economic analysis of law is developing very rapidly compared to other interdisciplinary social sciences. This analysis uses the relation between law and social norms. Whereas the New Haven school believes, that all the negatively functioning aspects of the economy must be removed or repaired using regulations based on the analysis of the potential benefits and costs, so-called economic models.

Currently, the economic analysis is used not only for research purposes, but also for other social sciences. It is possible to effectively evaluate the effectiveness of the new regulations by detailed analysis and interpretation in terms of economic feasibility before its implementation (ex ante analysis). Sometimes, however, it is impossible to use the tools of economic analysis for this type of research[2].

The quality of new laws, as well as its impact on the economy, is assessed in most countries in the world. Generally analyzed are only selected topics or specific laws, the importance of which is particularly important for the economy of the country. This article will discuss two examples of research from Germany and Slovakia.

In Poland, a number of quantitative and qualitative research of law was implemented, but it focused exclusively on a few specific issues – for example on the administrative burden or costs of economic activity resulting from the applicable legal regulations in Poland.

The purpose of this article is to discuss the legal factors, that affect economic processes. From this point of view, it is essential to identify the areas of the economy that in greatest point affect its smooth functioning and accelerate economic growth. Basically, there are three main areas of interaction, such as the labour market, institutional environment and business competitiveness and economic development[3].

Studies on the lawmaking process, in vast majority, discuss issues of the process of legislation, because every country in the world uses other practices in the law-making process. In many countries in the world, before they start legislative work on a new legal act, first analysis of the baseline scenario is carried out,

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[2] M. Jerzak, M. Kitala, *Prawo w gospodarce. Metodyka oceny oddziaływania prawa na gospodarkę*, „Materiały i Studia” 2012, no. 276, p. 4.

[3] W. Walczak, A*naliza czynników wpływających na konkurencyjność przedsiębiorstw*, „e-Mentor” 2010, no. 5(37), http://www.e-mentor.edu.pl/artykul/index/numer/37/id/784 (10.11.2016).

which contains the basic variables that are very important because of the matter of the Act. The consideration of several variants of the planned changes to the legal regulation is implemented, together with its potential future consequences, taking into account external conditions. It is also necessary to estimate the potential costs of the introduction of new legislation as well as the possible benefits. Though some countries carry out assessment of the economic impact of the introduction of new regulations, they still do not take them into account when adopting the final version of the Act.

More and more countries understand the economic importance of improving the process of lawmaking. Importance of this process for the functioning of the economy, was confirmed by the Organisation for Economic Cooperation and Development (OECD), which has developed specific recommendations for the process of creating new legal norms, which are used by a growing number of countries[4].

According to the Polish procedure, proposal of Acts, that are submitted by the government, should be preceded by a thorough analysis and evaluation of the economic results of the proposed regulation. First, guidelines for the Act are developed by the government, which are then forwarded to the interdepartment and public consultations, which are the basis for the preparation of the Act. A proposal of the Act should be accompanied by a justification of legal change, as well as the regulatory impact assessment (RIA). If the project is approved by the government, the work on this Act will begin in the parliament. A disadvantage of the RIA is often a lack of or poor quality of the analysis of the potential economic costs or benefits. Basically, the designers focus exclusively on identifying the economic impact of the new Act on public finances.

Many countries around the world understand the great importance of the legislative process as well as its impact on the national economy. Below two examples of analyzes are presented, that have been developed in Germany and Slovakia[5].

In Germany, in the years 2005–2007 special project "Gesetz-Check" was carried out by the Initiative New Social Market Economy, and in 2007 its results were published. In this study, a group of experts has analyzed about 700 Acts, that were passed by the Bundestag in 2005–2007. Several aspects of these laws were analyzed, i.e.: the key characteristics of the proposed solutions, durability, clarity of language, the economic impact on the national economy. Since 2005, the Institute

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[4] *Recommendation of the Council on Improving the Quality of Government Regulation*, 9.03.1995 r., C(95)21/FINAL, Organisation for Economic Co-operation and Development, *Regulatory Impact Analysis. Best practices in OECD Countries*, Organisation for Economic Co-operation and Development, Paris 1997; *OECD Guiding Principles for Regulatory Quality and Performance, Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for PolicyMakers*, Organisation for Economic Co-operation and Development, 2005, http://www.oecd.org/dataoecd/24/6/34976533.pdf; *Regulatory Impact Analysis: A Tool for PolicyCoherence*, OECD Reviews of Regulatory Reform, Organisation for Economic Co-operation and Development, Paris 2009.

[5] M. Jerzak, M. Kitala, *Prawo w gospodarce*…, p. 7.

of the German Economy in Cologne (IW Köln) with Wirtschafts Woche (Economic magazine) created monthly evaluation of selected decisions of the Federal Government of Germany. The analysis was to determine the effect of new legal solutions to the socio-economic development of the country. The basic criterion in this study was the level of impact on the economic situation. Regulation, which was analyzed, could receive from 0 to 5 points, in addition to evaluation, justification was also necessary. This study has also been expanded to include additional materials, such as surveys of citizens, teachers and entrepreneurs on current economic issues, which were discussed at that time on the international arena.

Table 1. Exemplary assessment regulations, which were conducted by IW Köln

Activity	IW Kölnassesement (0–5)	Justification of assessment
1	*2*	*3*
In 2011, the Bundestag approved the extension of the European Financial Stability Facility (European Financial Stability Facility – EFSF, the activity was evaluated in October 2011)	5	The high rating was due to the fact, that the strengthening of the EFSF reduces the risk to the stability of the financial market
In 2012 the draft of the Act was prepared, which provided the deduction of income tax expenses or the use of accelerated depreciation in the area of thermal isolationof buildings (the activity was evaluated in February 2012)	4	IW Köln estimated, that it was the appropriate instrument to introduce incentives to invest in order to reduce energy consumption. As the housing in Germany is, as well as in other countries, the economic sector with great potential to reduce carbon dioxide emissions. The introduction of tax changes could affect the reduction of external costs, which are linked to global warming. IW Köln proposed extending thegroup of potential beneficiaries because tax relief was provided only for citizens financing investments from own funds. The federal states were reluctant to this Act, because it feared a reduction in budget revenues.
The Act draft, which assumed the indexation of tax thresholds (the activity was evaluated in November 2011).	3	The decision of the Federal Government of Germany was positively assessed, however, it did not provide a permanent mechanism of indexation of tax thresholds. Since its introduction it was not announced, then its score was 3.

1	*2*	*3*
Draft of the Act on measures supporting economic growth (the activity was evaluated in February 2010). The most important proposals of the Act concerned the increase in child tax credit, child benefits and facilitations in the tax law (i.e. reduction in the VAT rate on accommodation services from 19% to 7%).	2	The vast majority of proposed activities in the draft of the Act was not related to stimulation of economic growth and social policy. Many doubts aroused about the extent, to which these expenses would be transformed into increased consumption. IW Köln decided, that the reduction of VAT on accommodation services represent a new form of grants. In the survey, which was carried out among 700 companies, only 7% considered that the proposed new regulations in a positive manner will affect their business, 49% considered it neutral and 36% said, that the effects of these regulations are difficult to predict. The proposed measures could delay the introduction of the reform of the tax system.
The decision, which was issued by the federal government for hastened, than originally planned, closure of a nuclear power plant as a result of failure of the power plant in Fukushima, the activity was evaluated in June 2011.	1	It was marked only one point because of the lack of an analysis of the costs and benefits of the proposals. Withdrawal from nuclear energy is a very expensive solution, because in such a situation the production of conventional or renewable energy or increase import from abroad should be increased. This is due to rising prices, reduced competitiveness of energy-intensive industries as well as the deterioration of the financial position of energy companies and a reduction in tax revenues.
The decision of the federal government concerning the withdrawal of elements of e-government: payroll documentation in electronic form – ELENA, the effect was evaluated in August 2011. The aim of the ELENA system was to replace the document in a paper form from 2012, which was sent by the German employers to the Federal Employment Agency and the social security system. There were a lot of doubts concerning the safety of the system, so the federal government has decided to abandon this project.	0	The decision to withdraw from the ELENA system hampered the development of e-government and widespread use of electronic signatures, as well as negatively affected the burden of public administration. The employers also suffered significant costs to adapt their systems to ELENA.

Source: M. Jerzak, M. Kitala, *Prawo w gospodarce. Metodyka oceny oddziaływania prawa na gospodarkę*, „Materiały i Studia” 2012, no. 276, p. 29.

Institute of Economic and Social Reforms (INEKO) is an institution, that assesses new legal regulations in Slovakia. This Institute in the period from 2000 to 2008 within the framework of the project HESO published quarterly brief development as well as the annual shared summary, which contained a detailed assessment of the enacted legal measures, that essentially influenced the social-economic processes in Slovakia. Such an assessment was carried out by a professional team, which included: experts and economic journalists, academics, entrepreneurs, trade unions and non-governmental organizations[6].

The assessment carried out by the above-mentioned experts was based on two main criteria: the acceptance of the measures by an expert, adopted as an effective solution to the problem (–3 as an overwhelming disapproval, 3+ means overwhelming acceptance) as well as the importance, that the new legal regulation can have an impact on the of socio economic conditions in Slovakia (the importance and need for changes in a given area). The indicator of significance of socio-economic conditions of Slovakia could be marked from 0% to 100%. The overall assessment INEKO is the product of these two indicators (scale from –300 to +300). This product was formed as the basis of periodical and annual rankings of individual actions. In some cases, the mechanisms and the expected effects with experts' opinion were also described. The analysis has included, apart from the legal regulations, also the decisions of the Slovak government (eg. government strategies, policy papers, decisions of privatization, regulation) and the decisions of state institutions, moreover, the decisions of the European Commission.

Table 2. Exemplary evaluation of the activities of socio-economic character, that have been implemented by INEKO

Activity	Total score (–300, +300)	Quality of activity (–3, 3)	Importance of action (0%, 100%)	Comment/justification of the assessment
1	*2*	*3*	*4*	*5*
1	2 = 3 * 4	3	4	5
Slovakia's accession to the European Union (ratification in the third quarter of 2003)	219,3	2,31	94,9	Joining the European Union has had a positive impact on the economic development of Slovakia, although in some areas the most favorable conditions for Slovakiahad not been acquired.

[6] D. Zachar, *Economic and Social Measures in Slovakia*, The HESO Project, Institute for Economic and Social Reforms, Bratislava 2008, www.ineko.sk/file_download/464/Slovakia-2008--web.pdf (10.11.2016).

1	2	3	4	5
In the second half of 2007, Slovakia joined the Schengen zone	213,9	2,74	78,0	The changes have been very beneficial for Slovak citizens and businesses, thanks to the principle of free movement of persons. Unfavorable was the loss of part of tourists from the former Soviet Union territory due to the introduction of mandatory visas.
Activities were adopted related to the privatization of state gas company SPP in I quarter of 2002	173,1	2,02	85,6	With the privatization of this company, the influence of politicians on its activitieswas limited, the whole process had a transparent nature and the price was at a very satisfactory level.
In 2009, the euro currency was introduced in Slovakia.	165,6	1,91	86,9	Key benefits identified by the experts include: the elimination of exchange rate risk and transaction costs. Furthermore, the introduction of the euro abolished the ability to conduct own monetary policy by Slovakia. Adoption of the euro could negatively affect the growth of inflation.
In the fourth quarter of 2003 linear personal income tax – 19% was introduced	142,6	1,69	84,4	The introduction of a linear income tax was a flagship economic reform, which simplified the tax system and reduced the burden in income taxes, by which investment attractiveness of Slovakia has increased, as well as the purchasing power of citizens.
In the third quarter of 2004, reform of public finances was carried out.	137,1	2,09	65,5	The aim of this action was to increase the public finance discipline, tighter borrowing conditions and guarantees. Long-term and performance-oriented budgeting was introduced.

1	*2*	*3*	*4*	*5*
In I quarter of 2003 25 railway lines for passenger traffic were closed.				These activities had rationalistic character because of the need for a comprehensive reform of public railway transport.

Source: M. Jerzak, M. Kitala, *Prawo w gospodarce. Metodyka oceny oddziaływania prawa na gospodarkę*, „Materiały i Studia" 2012, no. 276, p. 29.

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Summary

The article attempts to discuss the economic analysis of law as a quality, that affects the legislative process. Regulations and legal standards are institutions, created by the state, to ensure efficient functioning of the entire national economic process. Institutional structures affect the behavior of people and businesses. The introduced changes in the law may negatively affect economic development or, on the contrary, create very favorable conditions for its development through the elimination of unnecessary and hampering economic development regulations and legal procedures. The article presents the most important issues of economic analysis of law on two examples: Germany and Slovakia. This discipline is the study of law with the use of economic tools. Currently, the economic analysis of law is developing at a rapid pace in comparison to other interdisciplinary social sciences. This analysis uses the relation between law and social norms. Furthermore, the objective of this article is to discuss the legal factors, that affect economic processes.

Keywords: the legislative process, economic analysis of law, economic development

ANALIZA EKONOMICZNA PRAWA JAKO DOBRA JAKOŚĆ PROCESU LEGISLACYJNEGO

Streszczenie

W artykule podjęto próbę omówienia ekonomicznej analizy prawa jako jakości, która wpływa na proces legislacyjny. Regulacje i standardy prawne to instytucje tworzone przez państwo w celu zapewnienia sprawnego funkcjonowania całego krajowego procesu gospodarczego. Struktury instytucjonalne wpływają na zachowanie ludzi i przedsiębiorstw. Wprowadzone zmiany w prawie mogą negatywnie wpłynąć na rozwój gospodarczy lub wręcz przeciwnie – stworzyć bardzo korzystne warunki dla jego rozwoju poprzez zniesienie zbędnych i utrudniających regulacji i procedur prawnych dotyczących rozwoju gospodarczego. Artykuł przedstawia najważniejsze zagadnienia analizy ekonomicznej prawa na dwóch przykładach: w Niemczech i na Słowacji. Ta dyscyplina to nauka prawa z wykorzystaniem narzędzi ekonomicznych. Obecnie analiza ekonomiczna prawa rozwija się w szybkim tempie w porównaniu z innymi interdyscyplinarnymi naukami społecznymi. Ta analiza wykorzystuje związek między prawem a normami społecznymi. Ponadto celem tego artykułu jest omówienie czynników prawnych, które wpływają na procesy gospodarcze.

Słowa kluczowe: proces legislacyjny, ekonomiczna analiza prawa, rozwój gospodarczy

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Radosław Olszewski

University of Lodz
ORCID: 0000-0001-8119-1635

THE GUARANTEES OF THE SUSPECT AND THE AGGRIEVED PARTY RELATING TO THE ACCESS TO THE CASE FILES OF PREPARATORY PROCEEDINGS IN THE LIGHT OF LEGISLATIVE CHANGES

One of the fundamental functions of the law of criminal procedure is its guarantee function. Its form, as well as the way of its implementation in the operation of the judicial authorities significantly affects the determination of the model of criminal procedure. Because it includes both the principles and methods of achieving procedural aims and the sphere of rights and obligations of the participants of the proceedings. Hence, the guarantee function means that "the norms of the law of criminal procedure provide the protection of human rights and constitutional rights and freedoms of criminal trial participants against the arbitrary, i.e. undue and unlawful, interference of the judicial authorities in these rights, and at the same time they set the boundaries of the acceptable actions of the judicial authorities interfering in the human rights"[1]. It should also be emphasised that "the protection of the superior values, such as human dignity, rights to privacy, family ties, property" remain within the guarantee function[2].

The procedural guarantees are the measures prescribed by law aiming at the protection of certain rights and interests in the criminal procedure[3]. Therefore, the judicial guarantees are distinguished which are widely recognised as the procedural measures laid down in order to protect the proper implementation of the substantive criminal law. They are intended to ensure the effectiveness of criminal prosecution and relevance of penal reaction, and on the other hand to guarantee adequate protection to the participants of the proceedings, especially to the

[1] K. Dudka, H. Paluszkiewicz, *Postępowanie karne*, Warszawa 2017, p. 25.

[2] S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2018, p. 22.

[3] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warszawa 2014, p. 55 and literature referred to therein.

accused. The system of procedural guarantees brings us to the notion of the collision of interests which is based on the need for the protection of superior goods, even to the detriment of the system of justice[4]. They are extremely important determinants, connected with the necessity of balancing the actions to achieve aims of criminal procedure, and on the other hand relating to the procedural situation of its participants. This is particularly apparent to in relation to coercive measures. The following issues also remain within the sphere of procedural guarantees, inter alia: legal representation, inadmissibility of evidence, procedural information, including access to case files, participation in procedural acts, extent of tests on a person. The issue of illegal evidence – its nature, possibility of introducing into criminal trial and using – also appear as extremely important and more and more topical in recent years[5].

When speaking about judicial guarantees it should also be indicated that pursuant to Art. 7 of the Constitution of the Republic of Poland, public authorities operate on the grounds and within the law. The constitutional perspective appears as extremely important because the Basic Law is the highest law of the Republic of Poland, and its provisions are applied directly, unless the Constitution provides otherwise (Art. 8 of the Constitution of the Republic of Poland). It should be agreed that the application of the provisions of the Code of Criminal Procedure [k.p.k.] is, first of all, the obligation of their proper interpretation and meticulous implementation of the norms decoded from them. The Court is the final and at the same time most important authority responsible for the implementation of the constitutional standards in criminal trial[6]. At the same time it is worth emphasising that pursuant to Art. 2 of the RP Constitution, the Republic of Poland is a democratic state ruled by law and implementing the principles of social justice.

The importance of Art. 16 § 1 k.p.k.[7] should be indicated in the sphere of the guarantee function of the law of criminal procedure. Pursuant to this Article, if the authority in charge is obliged to instruct the parties to the proceedings of their duties and rights, the lack of such an instruction or an incorrect instruction may not result in any adverse consequences either to the participant or any other person concerned. One example of this is the obligation of a judicial authority to instruct the suspect, on the grounds of Art. 300 § 1 k.p.k., and the aggrieved party, on the grounds of Art. 300 § 2 k.p.k., of the right of access to case files during the preparatory proceedings.

[4] *Ibidem*.

[5] See complex approach to the issues [in:] W. Jasiński, *Nielegalnie uzyskane dowody w procesie karnym*, Warszawa 2019.

[6] P. Wiliński, *Konstytucyjny standard legalności dowodu w procesie karnym* [in:] *Proces karny w dobie przemian. Zagadnienia ogólne*, eds. S. Steinborn, K. Woźniewski, Gdańsk 2018, p. 320–321 and literature referred to therein.

[7] Kodeks postępowania karnego [*The Code of Criminal Procedure*], Act of 6 June 1997, Consol. text: Dz.U. 2018, Item 1987 as amended.

Moreover, the entity conducting the proceedings, if the need occurs, should inform the parties to the proceedings of their rights and duties, even if it is not explicitly required by the law (Art. 16 § 2 k.p.k.)[8].

This institution is based on the obligation of the judicial authorities to provide information relevant to the situation of a given participant of the proceedings. This should be acknowledged as an extremely important manifestation of the reliability of criminal trial, relevant to its democratic character. Because the point is that some specific solutions, important for the rights and duties of the parties to the proceedings, should not remain within the sphere of normative declarations only, but they should find their reflection in the actual actions of the judicial authorities. After all, this is a wider problem consisting in the fact that criminal procedure cannot be analysed only in the context of legal arrangements, but in the context of their implementation by the judicial authorities in such a way that not only allows to achieve the aims set, but also that it is done taking into consideration the rights of the parties to the proceedings. And such an activity should take into account the constitutional context, as well as the standards of the European law and international law. Only in such an arrangement one may talk about real and complete implementation of the guarantee function by the judicial authorities in relation to other participants of criminal procedure, both those against whom the proceedings are conducted, and those whose legal interests were directly threatened or infringed by an offence.

The accused is the main entity with regard to whom the procedural guarantees should be mentioned, because he is the essential party to criminal procedure, and the issue of his liability for the charges brought against him constitutes the subject of the process[9]. He is the so-called passive party, i.e. the one to whose liability the procedure relates and this status is maintained throughout the course of criminal procedure. The notion of the accused *sensu largo* also includes a suspect, i.e. a person with regard to whom a decision was issued to present charges or who, without the issuance of such a decision, was informed about the charges in connection with his interrogation in the capacity of a suspect (Art. 71 § 1 k.p.k.)[10]. The situation is different with regard to the aggrieved party, because

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[8] If, in view of the circumstances, the instruction was indispensable and the authority failed to give such an instruction or gave an incorrect instruction, the provisions in Art. 16 § 1 k.p.k. apply accordingly. In the literature, this institution is referred to, inter alia, as the principle of procedural information, e.g. T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, vol. 1, Warsaw 2014, p. 104; *Kodeks postępowania karnego. Komentarz*, vol. 1, eds. P. Hofmański, E. Sadzik, K. Zgryzek, Warsaw 2011, p. 165. J. Grajewski wrote about the principle of information, principle of procedural loyalty, principle of fair play. In: J. Grajewski, L.K. Paprzycki, M. Płachta, *Kodeks postępowania karnego. Komentarz*, vol. 1, Warsaw 2003, p. 92.

[9] T. Grzegorczyk, J. Tylman, *Polskie postępowanie*…, p. 48.

[10] See for example: R. Olszewski, *Kumulacja procesowych ról uczestników polskiego postępowania karnego*, Łódź 2013, p. 25–26 and 76.

by operation of law he is a party to preparatory proceedings (Art. 299 § 1 k.p.k.), while at the judicial stage of the criminal trial he is a quasi-party, which means that he has only some of the rights appertaining to the parties in litigation[11]. If he wants to gain the status a fully-fledged party in litigation, in case of offences prosecuted *ex officio* he must act in the capacity of the auxiliary prosecutor, or he may bring an indictment through his attorney, gaining the position of the subsidiary auxiliary prosecutor. Even in the original Code of Criminal Procedure of 1997 it was clearly indicated that one of the aims of criminal procedure is to shape it in such a way that the aggrieved party's interests protected by law would be accomplished. In 2014 it was added that it should be done with respect to his dignity[12]. And the fact of taking into consideration the rights of this party can be seen not only in the Code of Criminal Procedure but also in the normative acts introduced to the legal system, aiming at the protection of his broadly understood interests. This takes place, e.g., in the Act on the protection and assistance to aggrieved parties and witnesses[13], introducing instruments ensuring the safety of this party to criminal procedure. This tendency should be acknowledged as appropriate and necessary, in compliance with the directions of the development of the EU law.

The problem of the access to the case files of preparatory proceedings is an extremely important issue in the guarantee perspective relating to the suspect and the aggrieved party. We should agree with the opinion that the implementation of internal disclosure with regard to the aggrieved party should be examined on three levels: getting acquainted with evidence, informing about procedural actions and participating in such actions[14]. This is also true with regard to a suspect, taking into account the division of the regulations into the access to the basic part of the case files of preparatory proceedings and relating to pre-trial detention. The right to procedural information constitutes an integral element of the criminal trial model. It has a special value for the parties to criminal proceedings shaping their knowledge about the course of the proceedings, creating the basis for undertaking procedural activity. From the perspective of the authorities of preparatory proceedings, these issues are especially important due to the investigative character of this stage. This is connected with the limiting of the access to case files, but the thing is that it happened also with the consideration to the needs and interests of the parties to criminal trial.

[11] *Ibidem*, p. 25–26.

[12] Art. 20(1) of the Act of 28 November 2014 on the protection and assistance to aggrieved parties and witnesses (Dz.U. 2015, Item 21). The new version of the provision has been in force since 8 April 2015.

[13] Act of 28 November 2014 (Dz.U. 2015, Item 21).

[14] R.A. Stefański, *Jawność wewnętrzna wobec pokrzywdzonego w polskim procesie karnym* [in:] *Jawność jako wymóg rzetelnego procesu karnego. Zagadnienia prawa polskiego i obcego*, eds. W. Jasiński, K. Nowicki, Warszawa 2013, p. 179.

The access to case files of investigation is regulated in Art. 156 § 5 k.p.k. Originally, this provision stipulated that, if the Act did not provide otherwise, in the course of preparatory proceedings the parties, defence councils, attorneys and statutory representatives were allowed to have an access to the files, they were allowed to make copies and photocopies or they were allowed to have certified copies issued only with the consent of the entity conducting preparatory proceedings. In exceptional cases, with the consent of the public prosecutor, access to the files of preparatory proceedings could be granted to other persons. The Constitutional Tribunal expressed their opinion about this provisions indicating the imperfection of the regulation which does not stipulate clear, statutory criteria of refusal to make files available in the course of preparatory proceedings. First, in the Judgement of 3 June 2008 the Tribunal decided that Art. 156 § 5 k.p.k. was incompatible with Art. 2 and Art. 42(2) in conjunction with Art. 31(3) of the Constitution of the Republic of Poland to the extent in which this provision made it possible to arbitrarily exclude the openness of the materials of preparatory proceedings which justified the prosecutor's request for pre-trial detention[15]. As a consequence, Art. 156 § 5a was added stipulating in the original version that in the course of preparatory proceedings, the suspect and his defence counsel are granted access to case files in the part containing evidence indicated in the request for applying or extending pre-trial detention or in the decision applying or extending pre-trial detention. The public prosecutor could deny access to the files in this part only in the case of a justified fear that such access might endanger the life or wellbeing of the aggrieved party or another participant to the proceedings, or that it might result in the destruction, hiding or the creation of false evidence or in the impossibility of identifying or capturing an accomplice to the offence with which the suspect is charged or perpetrators of other offences revealed in the course of the proceedings, or that it might disclose operational or investigative activities or would in some other way obstruct preparatory proceedings[16].

Then, in the Judgement of 20 May 2014 the Constitutional Tribunal ruled that Art. 156 § 5 in conjunction with Art. 156 § 5a in conjunction with Art. 159 is admittedly in line with the principle of definiteness of law derived from Art. 2

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[15] K 42/07, Dz.U. 2008, No. 100, Item 648.

[16] Ustawa z dnia 16 lipca 2009 r. o zmianie ustawy – Kodeks postępowania karnego (Dz.U. 2009, No. 127, Item 1051). About defects and contradictions to the constitutional and convention requirements of its original version see wider: P. Kardas, *Jawność wewnętrzna i zewnętrzna postępowania przygotowawczego* [in:] *Jawność jako wymóg rzetelnego procesu karnego. Zagadnienia prawa polskiego i obcego*, eds. W. Jasiński, K. Nowicki, Warszawa 2013, p. 28–29 and 40–60. See also: R. Ponikowski, *Granice jawności wewnętrznej i zewnętrznej przygotowawczego stadium postępowania karnego* [in:] *Jawność procesu karnego*, ed. J. Skorupka, Warszawa 2012, p. 178–188. The provision was amended several times. Now it reads as follows: If in the course of preparatory proceedings, the request for applying or extending pre-trial detention has been filed, the suspect and his defence counsel are immediately granted access to case files in the part containing evidence indicated in the request, excluding evidence by witness referred to in Art. 250 § 2b.

of the Constitution of the Republic of Poland, but to the extent in which it made it possible for the entity conducting preparatory proceedings to make arbitrary, not dependent on the occurrence of any statutory conditions, decision to refuse the suspect and his defence counsel to have access to case files and to make copies or photocopies, including a part of the files constituting the grounds for applying preventive measures with regard to the suspect, with the simultaneous lack of the possibility to have this decision controlled by the court, was recognised as incompatible with Art. 42(2) in conjunction with Art. 31(3) of the RP Constitution[17]. This provision was amended by the Act of 11 March 2016, which came into force as of 15 April 2016[18].

So the rulings of the Constitutional Tribunal resulted on the one hand in defining a separate way of procedure with regard to the access to case files in connection with the application of pre-trial detention, and on the other hand, in defining the criteria of the access to the case files of preparatory proceedings, so as to minimalize the risk of limiting this right of the participants of the proceedings by arbitrary decisions of judicial authorities[19]. Such a direction of legislative changes should be recognised as justified and required. The regulations relating to such important issues as the parties' access to case files may not be left only to discretionary decisions of the judicial authorities. Because this involves the risk of unrestrained narrowing down the individual rights at the first stage of criminal procedure, which is difficult to reconcile with the guarantee function of the law of criminal procedure.

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[17] Dz.U. 2014, Item 694.

[18] Dz.U. 2016, Item 437. Now Art. 156 § 5 k.p.k. reads as follows: If there is no need for ensuring the correct course of proceedings or protecting an important state interest, in the course of preparatory proceedings the parties, defence councils, attorneys and statutory representatives were allowed to have an access to the files, they were allowed to review case files, make certified copies or photocopies; this right is also vested in the parties after the conclusion of preparatory proceedings. The entity conducting preparatory proceedings issues orders with respect to granting access to case files, making copies or photocopies or issuing certified copies. In case of refusing to grant the aggrieved party access to case files as requested by him, he should be informed about the possibility of granting him access to case files at a later date. Upon informing the suspect or his defence counsel about the deadline for getting acquainted with the materials of preparatory proceedings, the aggrieved party, his attorney or statutory representative cannot be refused to have access to case files, make copies or photocopies or to have copies or photocopies issued. In exceptional cases, with the consent of the public prosecutor, access to the files of preparatory proceedings could be granted to other persons. The public prosecutor may make the files available in electronic form. This provision was amended several times.

[19] It is worth noticing only on this occasion that as far as making the files of preparatory proceedings available in the traditional form is acceptable based on a decision also of the entity conducting the proceedings, then in relation to electronic version a decision of the public prosecutor is necessary, see more broadly M. Kurowski [in:] *Kodeks postępowania karnego. Komentarz*, vol. 1, eds. D. Świecki, B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, Warszawa 2017, p. 595.

It should be added that apart from the normative recognition of the criteria, the present contents of Art. 159 k.p.k. also deserve approval, as they stipulate that the parties who were denied access to the files of preparatory proceedings may appeal against this decision. It was also necessary to improve the legal situation here, because the original version of this provision mentioned only interlocutory appeal, whereas as a result of the amendment of 29 March 2007 it was added that this remedy could be submitted to the direct superior of a public prosecutor[20]. It means that in effect this decision was submitted to verification within the subordination line in the organisational structure of the public prosecutor's office. This calls into question the reality of the instance process formulated in such a way. This solution was changed within the so-called great reform of criminal procedure, prepared by the Criminal Law Codification Commission[21]. The indication of the independent court as the appeal body should be considered as appropriate, creating the conditions of real control of negative decisions as to the access to case files.

Access to files in the course of preparatory proceedings truly influences the possibility of exercising the rights by the parties to preparatory proceedings. For the suspect, it is important for the defence against the charge brought, undertaking activities aiming at discontinuation of an investigation, as well as for developing a future line of defence in the perspective of bringing the case before the court. And the situation of the aggrieved party is connected with the exercising of his rights as an active part of the first stage of criminal trial, formulating requests important for conducting and concluding the proceedings, including making decisions relating to possible consensual solutions or future appearances in court[22].

A separate regulation, autonomous with regard to access to case files, is contained in Art. 306 § 1b k.p.k. stipulating that those entitled to file an interlocutory appeal against a decision to decline to initiate an investigation or decision to discontinue an investigation have the right to review the case files. In order to review the files, the public prosecutor may grant access to the files in electronic form. So this provision constitutes *lex specialis* in relation to Art. 156 § 5 k.p.k.[23]

The situation relating to the final revision of the files of preparatory proceedings is presented differently in relation to the regulations shaping the course of investigation. They are then made available at the request of the suspect, about

[20] Act of 29 March 2007 on amending the Act on the public prosecutor's office, the Act – Kodeks postępowania karnego and some other acts (Dz.U. 2007, No. 64, Item 432).

[21] Act of 27 September 2013 on amending the Act – Kodeks postępowania karnego and some other acts (Dz.U. 2013, Item 1247 as amended).

[22] In this perspective the parties' rights to be granted access to case files in connection with the conclusion of preparatory proceedings should not be considered as sufficient.

[23] R.A. Stefański, *Jawność wewnętrzna*…, p. 183.

which he should be informed prior to the first interrogation (art. 300 § 1 k.p.k.). When on 1 July 2015 the so-called great reform of criminal procedure came into force, assuming an adversarial model of criminal procedure and, connected with it, a different extent in relation to the previous solutions of the materials handed over to the court, the institution of final revision of the files of preparatory proceedings was replaced by the final revision to which the aggrieved party and his attorney were also entitled[24]. However, this solution was amended by the Act of 11 March 2016, withdrawing not only the main directions of the changes of criminal procedure, but also particular components of this reform, i.a. the described institution included in Art. 321 § 1 k.p.k. Thus, the institution of final revision of case files was reinstated, at the same time deleting the aggrieved party from this provision. On the other hand, it was accepted by the same amendment that upon informing the suspect or his defence counsel about the deadline for getting acquainted with the materials of preparatory proceedings, the aggrieved party, his attorney or statutory representative cannot be refused to have access to case files, make copies or photocopies or to have copies or photocopies issued (Art. 156 § 5 sentence four k.p.k.). At the same time, Art. 321 § 5 k.p.k., stating that within three days of reviewing the material of the investigation, the parties may submit requests for the investigation to be supplemented, applies without any amendments. The parties – so not only the suspect, but also the aggrieved party. The categorical contents of this provision mean that from the moment stated it is necessary to grant access to the material of the investigation to the aggrieved party, except, the deadline from Art. 321 § 5 k.p.k. does not refer to him, and thus the judicial authority may close the investigation without waiting for any supplementary requests. Therefore, the aggrieved party may formulate motions as to evidence on general principles[25]. Such inconsistency is a sign of unclear and inconsistent legislative solutions, undermining the legal certainty and citizens' trust in the state.

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[24] Act of 27 September 2013 on amending the Act – Kodeks postępowania karnego and some other acts (Dz.U. 2013, Item 1247 as amended). If there are grounds to close an investigation, at the request of the suspect, aggrieved party, defence counsel or attorney to be allowed to review the material of the proceedings, the entity conducting the proceedings informs the applicant of the possibility of reviewing the files and of the date on which the files may be reviewed, ensuring that he is given access to the case files together with the information which materials from these files, pursuant to the requirements set in Art. 334 § 1, will be handed over to the court with the indictment, and the instruction about the right referred to in § 5. The mention of the instruction must be made in the transcript of the final revision of the material of the proceedings by the party, defence counsel or attorney. In order to review the files, the public prosecutor may grant access to the files in electronic form.

[25] See, more broadly: M. Kurowski [in:] *Kodeks postępowania karnego. Komentarz*, vol. 1, eds. D. Świecki, B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, Warszawa 2017, p. 1152–1153, 1154–1155 and literature referred to therein.

Summing up the considerations, it should be emphasised that the system of guarantees constitutes an extremely important sphere of criminal procedure. Its form constitutes one of the significant characteristics of the criminal procedure model, both by defining the rights and duties of its participants and by outlining the acceptable extent of the state's interference in the legal situation of the participants of criminal procedure. Yet, the guarantee function is not a function specific for preparatory proceedings, but a general function of criminal trial. The fundamental grounds for its placing among the functions of preparatory proceedings is the fact that at this stage of the procedure the guarantees of the individual rights may be especially threatened by law enforcement authorities[26]. As regards the suspect and aggrieved party, within the context of access to the files of preparatory proceedings the thing is based on rationing such access and, what follows, limiting the possibility of free activity of those participants due to decisions of judicial authorities limiting the access to case materials. The appropriate direction of the legislative changes in this sphere should be emphasised, as it consists in introducing the criteria of refusing to grant access to the files of investigation. Undoubtedly, this has a guarantee dimension in the normative sphere, although the question about the practice of judicial authorities and the actual granting of access to the materials to the parties in the course of the first stage of criminal procedure remains still open. Each decision must take into account the circumstances of a given case, which requires experience and abilities of the persons acting as judicial authorities to assess the influence of the access to the files on the course of criminal trial.

This opinion is not a postulate of wider access to the files of preparatory proceedings, but of basing decisions in this regard on reasonable grounds, resulting from the circumstances of a given case and taking into account also the interests of the parties. Of course, the risk of undertaking by them activities undesirable from the perspective of the judicial authorities cannot be excluded, but this cannot mean automatic refusal to grant access to the files. In view of the above, one should consider as justified the opinion expressed in the literature that preparatory proceedings can be neither fully confidential, excluding any form of the parties' participation and the right to procedural information, nor adversarial, assuming wide participation of the parties in all the activities in which they want to participate. Owing to this, a rational compromise becomes necessary, assuming reconciliation of the arguments relating to the interests of the judicial authorities and the guarantees of achieving the aims of the first stage of criminal procedure, with the arguments of the parties to criminal procedure, including, first of all, the suspect, and creating for him conditions for defence against the

[26] C. Kulesza, *Model postępowania przygotowawczego – perspektywa obrony* [in:] *Proces karny w dobie przemian. Przebieg postępowania*, eds. S. Steinborn, K. Woźniewski, Gdańsk 2018, p. 132–133 and literature referred to therein.

charge brought[27]. Decisions of the investigative bodies regarding the access to case files, in line with these assumptions, should be viewed as a manifestation of the implementation of the guarantee function of the law of criminal procedure with regard to the parties to preparatory proceedings.

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Summary

The system of guarantees constitutes an extremely important sphere of criminal procedure. Its form constitutes one of the significant characteristics of the criminal procedure model, both by defining the rights and duties of its participants and by outlining the acceptable extent of the state's interference in the legal situation of the participants of criminal procedure. Yet, the guarantee function is not a function specific for preparatory proceedings, but a general function of criminal trial. The article will be devoted to these issues.

Keywords: injured party, suspect, guarantees, preparatory proceedings file, penal code

[27] R. Ponikowski, *Granice jawności*…, p. 138.

GWARANCJE PODEJRZANEGO I POKRZYWDZONEGO DOTYCZĄCE DOSTĘPU DO AKT POSTĘPOWANIA PRZYGOTOWAWCZEGO W ŚWIETLE ZMIAN LEGISLACYJNYCH

Streszczenie

System gwarancji stanowi niezwykle istotną sferę postępowania karnego. Sposób jego ukształtowania to jedna z istotnych cech modelu postępowania karnego, tak poprzez wskazanie praw i obowiązków jego uczestników, jak i zakreślenie dopuszczalnego zakresu ingerencji państwa w sytuację prawną uczestników postępowania karnego. Funkcja gwarancyjna nie jest przy tym funkcją specyficzną dla postępowania przygotowawczego, lecz ogólną funkcją procesu karnego. Tym zagadnieniom poświecony został artykuł.

Słowa kluczowe: pokrzywdzony, podejrzany, gwarancje, akta postępowania przygotowawczego, kodeks karny

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Mariusz Popławski

Białystok University
ORCID: 0000-0003-1403-3033

THE IMPACT OF GENERAL TAX LAW PRINCIPLES CONTAINED IN THE NEW TAX ORDINANCE ACT ON THE INTERPRETATION OF TAX LAW

Introduction

Works on the New Tax Ordinance Act began in 2014 when the General Tax Law Codification Commission was established[1]. This entity prepared in 2018 a draft of the act, which, after some modifications introduced by the Minister of Finance, was adopted by the Council of Ministers in May 2019 and forwarded to further works in the lower house of Polish parliament in early June this year[2].

The New Tax Ordinance Act (hereinafter referred to as NTO) is to enter into force on 1 January 2021. It will replace the effective from 1998 Tax Ordinance Act of 29 August 1997[3]. It will be an act significantly different from the current law as it contains almost twenty new ideas that currently do not function in the Polish legal order[4]. Among the newly introduced solutions, one should note, inter alia: general principles of tax law[5], restoration of the substantive deadline, information and support for the taxpayer, tax cancellation, correction of declarations in the context of tax proceedings, mediation, tax agreement, measures to combat the length of proceedings, simplified proceedings, proceedings regarding

[1] Regulation of the Council of Ministers of 21 October 2014, regarding the establishment, organization, and operation of the General Tax Law Codification Commission (Dz.U. Item 1471 as amended).

[2] https://legislacja.rcl.gov.pl/docs//2/12314054/12523424/dokument399176.pdf (10.06.2019).

[3] Tax Ordinance Act, Dz.U. 2015, Item 613 as amended.

[4] See: Justification for the draft Tax Code, p. 11 et seq, https://legislacja.rcl.gov.pl/docs//2/12314054/12523424/dokument399176.pdf (10.06.2019).

[5] A. Mariański draws attention to the importance of these principles: *Zasady ogólne prawa podatkowego – teoria i praktyka* [in:] *Współczesne problemy prawa podatkowego. Teoria i praktyka*, vol. 1, *Księga Jubileuszowa dedykowana Profesorowi Bogumiłowi Brzezińskiemu*, ed. J. Głuchowski, Warszawa 2019, p. 283 et seq.

trivial amounts of tax, suspension of proceedings due to "representative case", possibility of resigning from an appeal against a decision, prohibition of adjudicating against the taxpayer by the first instance authority, consultation procedure, cooperation agreement, official general information about significant changes in tax law, determination of the value of things, and procedure for restoring files. Among the newly introduced solutions that can be found in the New Tax Ordinance Act, the general principles of tax law play a special role. These rules are regulated in Section I "General provisions", Chapter 2 "General principles of tax law", which consists of nineteen articles.

General principles of tax law contained in the New Tax Ordinance can be divided into the following types: principles regarding the interpretation of provisions of tax law, principles resulting in increasing the efficiency of tax authorities, principles regarding support for the taxpayer and those improving the level of respect for taxpayer's rights. The purpose of this study is to provide a general presentation of tax law principles that relate to the interpretation of tax law provisions, as well as an attempt to indicate their significance for the interpretation of the law. This paper points out the following research hypotheses. First of all, these rules will have a significant impact on the interpretation of the tax law provisions contained in the acts shaping the structure of individual taxes, e.g. value-added tax, excise tax, income taxes or property taxes. Secondly, these principles will also apply to other tax law provisions, including those contained in the New Tax Ordinance Act. Thirdly, these rules will affect the interpretation of the provisions contained in non-tax provisions, the application of which has an impact on the functioning of tax law provisions. To fulfill the abovementioned aim of this paper and to verify the hypotheses, the work will be divided into parts to enable specified grouping of general principles of tax law and proper presentation of their meaning.

The principle of determining the content of tax law provisions, including the structure of the tax to which those provisions relate

Following Art. 15 of the NTO draft, the content of tax law provisions is determined after taking into account the structure of the tax to which those provisions relate. It is pointed out that this rule imposes an obligation to take into account the structure of the tax when determining the content of the provisions of tax law, and that it is an interpretative directive, requiring the need to issue tax rulings in accordance with the basic structural assumptions of a given tax[6]. It is also argued that this rule will be able to apply to the inter-

[6] See: Justification for the draft Tax Code, p. 64 et seq.

pretation of regulations in many taxes, including value-added tax, which assumes a mechanism for calculating the tax by the entity supplying the goods or services and its deduction by the buyer, which means that in the absence of an explicit legal basis, the right to deduct should not be questioned (the nature of the value-added tax creates a presumption of deduction of input tax)[7]. However, in the case of income taxes, it is indicated that the rule is to impose an income tax, i.e. the excess of revenues over the costs of obtaining them. This means that if revenue is recognized in the tax account, the taxpayer is also entitled to include the cost of obtaining the income since, due to the structure of income tax, it should be assumed that each income is accompanied by the cost of obtaining the income[8]. It is also added that the income tax structure indicates that the same income of the same taxpayer should not be taxed more than once, and also, that if the tax authority determines a tax liability greater than the tax declaration, stating that the taxpayer has underestimated the income tax in a transaction with a related entity, this entity should be entitled to increase the tax-deductible costs accordingly[9].

By complementing the abovementioned explanations contained in the justification to the NTO draft, it should be indicated that the structure of property, agricultural or forestry taxes indicates that those are the property ownership taxes. Therefore, doubts about the provisions relating to the taxpayer should be clarified in such a way that the entity, which will be subject to tax liability, is the one who uses those properties. Doubts about this issue still exist, among others in cases where the permanent manager of the property owned by the State Treasury or local government unit transfers ownership based on an appropriate lease or rental agreement[10]. The principle contained in the NTO draft may also apply in the case of the assessment of who will be the taxpayer in a situation where the real estate is jointly owned by a public (State Treasury or local government unit) and private entity, and at the same time when an agreement transferring the ownership of such real estate is concluded[11].

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[7] *Ibidem.*

[8] *Ibidem.*

[9] *Ibidem.*

[10] See: Supreme Administrative Court judgment of 29 November 2018 (II FSK 3229/16), according to which in the context of Art. 3 clause 1 point 4 subparagraph a, Act on Taxes and Local Fees, in the event of renting items that are under permanent management, the property taxpayer is the lessee (tenant) as a dependent owner of the property under a contract concluded with the owner within the meaning of this provision.

[11] See: Supreme Administrative Court judgment of 17 January 2019 (II FSK 2742/18) in which the court indicated that since in Art. 3 clause 1 point 4 subparagraph a, Act on Taxes and Local Fees says about ownership – and there is no provision that would exclude the situation where the State Treasury is a co-owner – it is impossible to differentiate the situation of being a co-owner from being the owner.

The principle of settling doubts as to the content of a legal norm in favor of the taxpayer

Following Art. 18 of the NTO draft, the unresolvable doubts as to the content of the legal norm shall be resolved in favor of the obligated party. This rule reflects the provision resulting from the currently applicable Art. 2a of the Act of Tax Ordinance. According to this provision, unresolvable doubts as to the content of tax law provisions shall be in favor of the taxpayer. From the combination of both of the above regulations, included in the draft of the New Tax Ordinance Act and The Act of Tax Ordinance, two differences arise. The first concerns the issue of what may be the subject of resolving doubts by using this principle. In the process of interpreting the law, doubts that should be resolved in favor of the taxpayer may refer to a legal norm (Art. 18 of the NTO draft) rather than a legal provision (Art. 2a of the Act of Tax Ordinance), which should rather be treated as an editorial unit of a legal act.

When analyzing the subject regulation, one can notice the extension of the subjective and objective scope of the analyzed principle. It will apply not only to the provisions of tax law but also to other legal provisions that will shape or refer to the taxpayer's situation. Therefore, doubts regarding e.g. regulations of the construction law, to which the provisions of the Act of 12 January 1991 on local taxes and charges[12] (part relating to real estate tax) refer, should be settled in favor of the taxpayer. Based on Art. 18 of the NTO draft, there is also no doubt that the analyzed principle will apply not only to taxpayers but also to other passive entities related to the tax law. In Art. 18 of the NTO draft, it is indicated that this regulation applies to the obligated person, who, according to Art. 13 point 23 of this project is not only the taxpayer but also payers, collectors, third parties and legal successors.

For maintaining in the NTO the principle (introduced in Art. 2a of the Act of Tax Ordinance) of settling doubts in favor of a taxpayer speaks the fact that in a democratic state a taxpayer cannot bear the negative consequences of the imprecise definition of his/her obligations stated in the Tax Act[13]. It is also argued that if a different understanding of the provisions in a given situation is possible and each of the interpretative "versions" is justified, the existing doubt should be resolved in such a way that, when assessing the legal consequences of the taxpayer's behavior, the understanding of the provisions is the most favorable for the entity liable for tax[14].

[12] Dz.U. 2018, Item 1445 as amended.

[13] Compare: A. Mariański, *Rozstrzyganie wątpliwości na korzyść podatnika. Zasada prawa podatkowego*, Warszawa 2009, p. 234.

[14] However, the literature raises doubts as to how this principle is formulated. See: Z. Tobor, *Interpretacja „na korzyść podatnika"* [in:] *Doradca podatkowy obrońcą praw podatnika*, ed. J. Glumińska-Pawlic, Katowice 2007, p. 136–137; A. Gomułowicz, *Złudny mit in dubio pro tributario w prawie podatkowym*, „Gazeta Prawna", 2.02.2015.

It should be emphasized that this principle will be applied only when other methods of interpretation do not give the appropriate result. Entities applying tax law, i.e. tax authorities and courts, when applying this principle, should always first apply the principle of interpreting legal provisions developed in legal science and take into account the priority of language interpretation[15]. One should agree with the statement expressed in the literature, according to which the principle of settling doubts in favor of the taxpayer will apply only when the methods of interpretation of the law used, including the Union-wide interpretation, will not give a relatively clear result[16]. It should be added that in the case of harmonized taxes in the process of interpreting tax law provisions, one cannot omit the pro-EU interpretation. It is also important that, when interpreting the tax law provisions, one should take into account the jurisprudence of the Court of Justice of the European Union and the Constitutional Court[17].

It is argued that this rule is mandatory, which means that the authorities applying the provisions of tax law (tax authorities, including self-government administrative courts) based on the law of the Act of Tax Ordinance will be obliged under the NTO project to apply it ex officio, and therefore the entities applying the abovementioned regulations should always verify if there are no premises for application of the above-discussed rule[18].

The literature on the subject draws attention to the issue of the form in which the tax authority will decide on the application of the principle of resolving doubts in favor of the taxpayer[19]. It is argued that the provision shaping the principle in question has no specific regulation in this respect. However, there should be no doubt that the tax authority will decide on the application of this principle positively (when the principle of resolving doubts applies in a given taxpayer's case) or negatively (when the taxpayer makes a request and the authority finds that there are no premises to apply this regulation in the taxpayer's case)[20].

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[15] See: Justification of the draft act amending the act – Tax Code, Parliamentary Print No. 3018, Polish Parliament (VII term of office).

[16] B. Brzeziński, *O wątpliwościach wokół zasady rozstrzygania wątpliwości na korzyść podatnika*, „Przegląd Podatkowy" 2015, no. 4, p. 17 et seq.

[17] See: General interpretation No. PK4.8022.44.2015 of the Minister of Finance regarding the application of Art. 2a of the Act of Tax Ordinance.

[18] See: M. Popławski, *Stosowanie przez gminne organy podatkowe zasady rozstrzygania wątpliwości prawa podatkowego*, „Przegląd Podatków Lokalnych i Finansów Samorządowych" 2016, no. 10, p. 24 et seq.

[19] See: M. Popławski, *Komentarz do art. 2a* [in:] *Ordynacja podatkowa. Komentarz*, ed. L. Etel, Warsaw 2017.

[20] *Ibidem*.

The principle of balancing the legitimate interest of the obligated and public interest

According to Art. 26 of the NTO draft, the tax authorities balance the legitimate interest of the taxpayer and the public interest. A similar principle has been articulated in Art. 7 of the Code of Administrative Procedure[21], according to which public administration authorities safeguard the rule of law (ex officio or at the request of the parties), take all necessary steps to thoroughly clarify the facts and settle the matter by taking into account the social interest and the legitimate interest of citizens[22].

In the context of the principle of balancing interests in the justification to the NTO draft, it is argued that the principle of balancing interests results in a directive, which orders to take into account the "interests" of both parties[23]. It is rightly pointed out that this is not entirely a novelty, because this way of interpreting the law results from the Act of April 2, 1997, the Constitution of the Republic of Poland[24]. As a consequence, entities interpreting the provisions of tax law should take into account (as one of the elements of interpretation) also the fact that the determined meanings of a given tax law provision should allow balancing of both the abovementioned interests[25]. The interpreting tax regulations through the prism of the principle of balancing interests, i.e. taking into account and balancing both of the above interests, should be considered as part of the systemic interpretation process[26]. The order to interpret regulations in accordance with legal principles is one of the most fundamental directives of systemic interpretation of the law[27]. The literature points out that issues related to the role of legal principles are discussed as part of the systemic interpretation[28]. Also as part of the systemic interpretation, there is a directive that takes into account the structure of a legal act, and the content of this directive draws interpretative argumentation from the structure of a legal act[29].

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[21] See: Act of 14 June 1960 Code of Administrative Procedure (i.e., Dz.U. 2017, Item 1257 as amended).

[22] See: L. Etel, M. Popławski, *Weighing the interest of the obliged and the public interest in the polish tax law* [in:] *Optimization of organization and legal solutions concerning public revenues and expenditures in public interest (conference proceedings)*, eds. E. Lotko, U.K. Zawadzka-Pąk, M. Radvan, Białystok 2018, http://hdl.handle.net/11320/6951.

[23] See: Directional assumptions of the new tax code prepared by the General Tax Law Codification Commission, Warsaw of May 6, 2015, http://legislacja.rcl.gov.pl/docs//1/12274851/12300341/12300342/dokument175319.pdf (14.08.2017), p. 6.

[24] *Ibidem*.

[25] See: L. Etel, M. Popławski, *Weighing the interest…*

[26] *Ibidem*.

[27] See: L. Morawski, *Zasady wykładni prawa*, Toruń 2010, p. 130 et seq.

[28] See: J. Nowacki, Z. Tobor, *Wstęp do prawoznawstwa*, Warszawa 2007, p. 199.

[29] See: B. Brzeziński, *Podstawy wykładni prawa podatkowego*, Gdańsk 2008, p. 104.

The principle of balancing the legitimate interest of the obligated person and the public interest will undoubtedly affect the interpretation and, consequently, the determination of the meaning of various provisions of tax law, including other principles contained in the NTO[30]. This situation will undoubtedly take place, among others in relation to the provision expressing the principle of proportionality[31]. According to Art. 21 § 1 of the NTO draft, tax authorities undertake only actions imposing obligations on the obligated person or limiting his/her rights. Such actions: enable achieving the statutory goal; are necessary to achieve the goal; bring results commensurate with the imposed obligations on the obligated person or limit his/her rights. When determining the meaning of the concept of "actions bringing results commensurate with obligations imposed on the obligated", the authority should balance the interest of the obligated person (actions undertaken by the authority should not create additional obligations of a similar or greater intensity for the obligated than obligations arising from the provisions of tax law) and the public interest (actions undertaken by the authority should be sufficiently used to fulfill the obligations arising from the provisions of tax law)[32].

The principle of balancing interests at the stage of interpreting regulations should also be taken into account, e.g. in the case of interpreting the principle of the speed of conduct[33]. According to Art. 24 § 1 of the NTO draft, the tax authorities act thoroughly and quickly, using the simplest possible means to deal with a given case. When assessing what should be understood as the simplest measure of action, the tax authority should balance both the taxpayer's interest (the measure should minimize conflicts in current affairs and should not impede the functioning of the taxpayer) but also the public interest (the measure should not generate too high costs for the tax authority).

The application of the principle of balancing interests, in the context of the interpretation of the provision, will also apply in the case of the regulation regarding the general clause on tax avoidance[34]. According to Art. 35 § 1 of the NTO draft, the act performed primarily to achieve a tax benefit, which is incompatible in the circumstances with the subject and purpose of the Tax Act, does not result in a tax benefit if the course of action was artificial (tax avoidance). The tax authority, which decides what should be understood as a performance of a given activity in circumstances contrary to the subject and purpose of the Tax Act, should, on the one hand, take into account the private interest (the purpose of the Tax Act may be to stimulate specific taxpayer behavior by introducing exemptions or tax reliefs) but also the public interest (the subject of the tax law is the realization of the largest possible tax revenue).

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[30] See: L. Etel, M. Popławski, *Weighing the interest…*

[31] *Ibidem.*

[32] *Ibidem.*

[33] *Ibidem.*

[34] *Ibidem.*

Conclusions

Based on the research, all the hypotheses indicated in the introduction were positively verified.

In the context of the first hypothesis, according to which the general principles of the NTO tax law will have a significant impact on the interpretation of the provisions of tax law contained in the acts shaping the construction of individual taxes, it should be noted that this will lead to the need to interpret these provisions through the prism of the essence, assumptions, mechanisms or goals of particular taxes. Sources of information in this regard should include, apart from the literature on the subject or case law, the materials prepared and published from the legislative process in the course of governmental and parliamentary works, in particular, the justification of draft laws and other legal acts. In addition, due to the abovementioned rule, the interpretation of the provisions on value-added tax should include e.g. the presumption of deduction of input tax; when it comes to income taxes e.g. the presumption that each income is accompanied by the taxable cost of obtaining the income; in case of property taxes (property tax, agricultural and forestry tax) what should be taken into account is the presumption that the taxpayer is the entity that uses the property.

With regard to the second research hypothesis, according to which these principles will also apply to other provisions of tax law, including those contained in the New Tax Ordinance Act, it should be noted that this claim primarily concerns the principle of settling doubts in favor of the obligated person and the principles of balancing the interest of the obligated and the public interest. In this regard, the following points should be mentioned. The principle of resolving doubts in favor of the obligor will apply (which will no longer raise doubts) not only to taxpayers but also to payers, collectors, third parties and legal successors. This principle will be applied only if other methods of interpretation will not give the appropriate result. As opposed, the application of the principle of balancing the legitimate interest of the obligated and the public interest should be regarded as part of the systemic interpretation process. Notwithstanding this, the interpretation of the rules developed in legal science should continue to apply, first and foremost taking into account the language interpretation which is of fundamental importance in tax law.

In the context of the third research hypothesis, the NTO principles will affect the interpretation of the provisions contained in non-tax provisions, the application of which has an impact on the functioning of tax law provisions. It should be indicated that this will apply to the principle of resolving in favor of the taxpayer those doubts that relate to such non-tax provisions, to which the provisions contained in tax laws refer, or those which application is necessary when interpreting the provisions of tax law.

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Summary

The study aims to present the meaning of general tax law principles resulting from the draft of the New Tax Ordinance Act on the process of tax law interpretation. A detailed analysis covers three principles: the principle of determining the content of tax law provisions, including the structure of the tax to which these provisions apply, the principle of resolving doubts in favor of the obliged, as well as the principle of balancing the legitimate interest of the obliged and the public interest. As part of the work, the following research hypotheses regarding these principles have been positively verified: the principles will have a significant impact on the interpretation of tax law provisions contained in the laws shaping the construction of individual taxes, they will also apply to other tax law provisions, additionally they will affect non-tax provisions, the application of which affects the operation of tax law provisions.

Keywords: tax law, general principles, tax law principles, interpretation of tax law, tax ordinance

WPŁYW OGÓLNYCH ZASAD PRAWA PODATKOWEGO ZAWARTYCH W NOWEJ ORDYNACJI PODATKOWEJ NA INTERPRETACJĘ PRZEPISÓW PRAWA PODATKOWEGO

Streszczenie

Celem opracowanie jest przedstawienie wpływu zasad ogólnych prawa podatkowego wynikających z projektu nowej ordynacji podatkowej na proces interpretacji prawa podatkowego. Szczegółową analizą objęto trzy zasady: zasadę ustalenia treści przepisów prawa podatkowego z uwzględnieniem konstrukcji podatku, którego przepisy te dotyczą, zasadę rozstrzygania wątpliwości na korzyść zobowiązanego, a także zasadę wyważania słusznego interesu zobowiązanego oraz interesu publicznego. W ramach artykułu pozytywnie zweryfikowano hipotezy badawcze dotyczące tych zasad, a w konsekwencji uznano, że zasady te będą miały istotny wpływ na interpretację przepisów prawa podatkowego zawartych w ustawach kształtujących konstrukcję poszczególnych podatków, a także że będą one miały zastosowanie w odniesieniu do innych przepisów prawa podatkowego, a ponadto będą one miały wpływ na interpretacje przepisów niepodatkowych, których stosowanie ma wpływ na funkcjonowanie przepisów prawa podatkowego.

Słowa kluczowe: prawo podatkowe, zasady ogólne, zasady prawa podatkowego, interpretacja prawa podatkowego, ordynacja podatkowa

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Piotr Ruczkowski

The Jan Kochanowski University in Kielce
ORCID: 0000-0003-4344-9417

TWO OR THREE PILLARS OF ADMINISTRATIVE SCIENCES AND THE CONCEPT OF INCLUSIVE ADMINISTRATION

Introduction

According to a conventional approach, the three pillars of administrative sciences comprise science of administration discussing the condition of public administration and the related processes, science of administrative policy designed to formulate programmes, strategies and objectives for the operation of administration and to anticipate social consequences of the proposed solutions, and finally science of administrative law which aims to examine provisions of administrative law, to determine the rules for interpreting a legal text, and to investigate links and relationships between legal norms. At present, there are more and more postulates suggesting a departure from the aforementioned conventional approach in favour of a dualistic concept of two sciences, namely science of administrative law and science of administration, which integrates two functions, i.e. descriptive that may be considered equivalent to the conventional science of administration and normative (prescriptive) – characteristic to science of administrative policy which focuses on proposals, strategies, objectives, and guidelines for efficient operation[1].

The key research assumption of this study is expressed by the statement that development of inclusive public administration is facilitated by the approach, according to which the science of public administration is viewed not only as

[1] E. Knosala, *Zarys nauki administracji*, Kraków 2005, p. 24; K. Dąbrowski, *Nauka administracji*, Ryki 2012, p. 20; B. Majchrzak, *Nauka administracji jako samoistna dyscyplina naukowa* [in:] *Nauka administracji*, ed. Z. Cieślaka, Warszawa 2017, p. 36–37. See also: J. Łukasiewicz, *Zarys nauki administracji*, Warszawa 2005, p. 54 et seq.; J. Jeżewski, *Administracja publiczna jako przedmiot badań* [in:] *Nauka administracji*, ed. J. Boć, Wrocław 2013, p. 354 et seq.; Z. Leoński, *Nauka administracji*, Warszawa 2010, p. 15 et seq.

a discipline related to the existing reality but, primarily as a discipline formulating synthetic evaluations and making proposals initiating changes beneficial from the point of view of citizens and public interest.

Two or three pillars of administrative sciences

Before we get to more detailed issues, we should look at the meaning of the word "administration" which is used in various contexts by the disciplines constituting the three pillars of administrative sciences. In the Polish language administration is understood as an act of managing, directing; a totality of operations performed by executive bodies of national or local government; organs of government; management of an institution[2]. As we can see, in an ethnic language the word administration carries a number of meanings, which results from the complexity of the phenomenon of administration itself, and the process of administering. Administration may be understood as a specific organisational structure or as a process (set of activities) involving performance of public tasks.

Similar connotations are referred to by authors of studies discussing administration[3]. Notably, even the earliest scientific works investigating administration or administrative law pointed out that, because of the complexity of the administration process, attempts to formulate a clear-cut definition of administration, although undertaken many times, were generally doomed to failure[4]. In connection to this fact a pertinent remark was made by an outstanding German specialist in administrative law, Ernst Forsthoff, who said that administration cannot be defined, indeed it can only be described[5]. Today these opinions are still valid[6]. Due to the currently observed phenomenon of various overlapping legal systems and ad-

[2] *Mały słownik języka polskiego PWN*, eds. S. Skorupka, H. Auderska, Z. Łempicka, Warszawa 1969, p. 2–3.

[3] See: P.J. Suwaj, *Pojęcie administracji publicznej* [in:] *Nauka administracji*, eds. B. Kudrycka, B. Guy Perets, P.J. Suwaj, Warszawa 2009, p. 31 et seq.; Z. Niewiadomski, *Pojęcie administracji publicznej* [in:] *System Prawa Administracyjnego. Instytucje prawa administracyjnego*, vol. 1, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2014, p. 1 et seq.

[4] O. Mayer, *Deutsches Verwaltungsrecht*, Leipzig 1895, p. 3 et seq.; G. Meyer, F. Dochow, *Lehrbuch des Deutschen Verwaltungsrechts*, München–Leipzig 1913, p. 1 et seq.; R. Herrnritt, *Oesterreichisches Verwaltungsrecht. Ein Grundriß der Rechtstheorie und Gesetzgebung der inneren Verwaltung*, Tübingen 1925, p. 1 et seq.; A. Merkl, *Allgemeines Verwaltungsrecht*, Wien–Berlin 1927, p. 1 et seq.; E. Ruck, *Schweizerisches Verwaltungsrecht. Erster Band Allgemeiner Teil*, Zürich 1934, p. 13 et seq.; W. Jellinek, *Verwaltungsrecht*, Offenburg 1948, p. 2 et seq.; H. Landmann, W. Giers, E. Proksch, *Allgemeines Verwaltungsrecht*, Düsseldorf 1969, p. 1 et seq.

[5] E. Forsthoff, *Lehrbuch des Verwaltungsrecht. Allgemeiner Teil*, München–Berlin 1951, p. 1.

[6] Difficulties in formulating definition of administration in German sciences have been pointed out e.g. by S. Detterbeck, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht*, München 2018, p. 1.

ministrative structures, not only domestic but also international and supranational (institutions of the European Union), it is particularly difficult to define the basic concepts related to the theory of administrative sciences. Without getting into details, for which readers may refer to the related literature, it should be pointed out that majority of definitions of the term administration make reference to a variety of criteria. With respect to this, we may recall the definition proposed by Jerzy Starościak who suggested that the term “administration” should be used to designate either a specific function of the state or a certain system of institutions comprising specific groups of employees[7]. Likewise, Hubert Izdebski and Michał Kulesza understand administration as a set of activities, operations and undertakings of organisational and executive nature, conducted in legally defined forms by various entities, organs and institutions, as stipulated by the relevant act, and aimed at realisation of the public interest[8]. French scholars also apply a combined definition of administration. Jean Rivero and Jean Waline emphasise that administration is not only a certain type of activity but also the bodies which perform such activity[9]. Similar definitions of administration are applied by scholars in Slovakia[10], Germany[11], Austria[12] and English-speaking countries[13].

Owing to this complex nature of administration, it is of interest for various scientific disciplines. At present administration is researched not only by the disciplines recognised as the three pillars of administrative sciences, i.e. science of administration, science of administrative policy and science of administrative law, but also by such academic disciplines as theory of organisation and management, political sciences, sociology, psychology, economics, etc. As for the three pillars of administrative sciences, we should remember that science of administrative law examines legal norms, mainly applying the dogmatic, historical as well as comparative law method. The dogmatic method focuses on explana-

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[7] J. Starościak, *Prawo administracyjne*, Warszawa 1977, p. 11.

[8] H. Izdebski, M. Kulesza, *Administracja publiczna – zagadnienia ogólne*, Warszawa 2004, p. 93.

[9] J. Rivero, J. Waline, *Droit administratif*, Paris 2000, p. 9.

[10] J. Machajová *et al.*, *Všeobecné správne právo*, Bratislava 2009, p. 11 et seq.

[11] S. Detterbeck, *Allgemeines Verwaltungsrecht…*, p. 1 et seq.; J. Ipsen, *Allgemeines Verwaltungsrecht*, München 2017, p. 58 et seq.; W. Erbguth, A. Guckelberger, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht und Staatshaftungsrecht*, Baden-Baden 2018, p. 40 et seq.; R. Stober, *Der Begriff der öffentlichen Verwaltung* [in:] R. Stober, W. Kluth, S. Korte, S. Eisenmenger, *Verwaltungsrecht I*, München 2017, p. 43 et seq.; H. Maurer, Ch. Waldhoff, *Allgemeines Verwaltungsrecht*, München 2017, p. 1–12.

[12] A. Kahl, K. Weber, *Allgemeines Verwaltungsrecht*, Wien 2011, p. 29 et seq.

[13] W.J. Novak, *The Administrative State in America* [in:] *The Max Planck Handbooks in European Public Law. The Administrative State*, eds. A. von Bogdandy, P.M. Huber, S. Cassese, Oxford University Press UK 2017, p. 98–124; M. Loughlin, *Evolution and Gestalt of the State in the United Kingdom* [in:] *The Max Planck Handbooks in European Public Law. The Administrative State*, eds. A. von Bogdandy, P.M. Huber, S. Cassese, Oxford 2017, p. 451–492. See also: *The Oxford Handbook of Governance*, ed. D. Levi-Faur, Oxford University Press UK 2012.

tion of legal text, which involves decoding of legal norms from regulations, with the use of various rules of interpretation. Science of administrative law as a rule does not investigate the actual administration process, or administration operating over time. This aspect is explored by science of administration[14], classified as a social science and focusing on actual administration. It investigates the process of administration, i.e. a specific fragment of social reality, and only to a limited extent it also examines norms of administrative law. It formulates proposals addressed to entities instituting and applying law and seeking to rationalise administrative structures, improve effectiveness of administration process and generally enhance the economics and efficiency of administration. Science of administrative policy, also classified as a social science, formulates programs, policies and objectives faced by administration. It defines ways and methods of operation and proposes means enabling administration to achieve its goals. Administration policy is closely linked to the basic assumptions of social policy[15]. Notably, the same applies to the economic policy of the state. As it was rightly pointed out, expertise in administrative law alone will not ensure full understanding of administration process[16]. Indeed, for that one needs knowledge of the very phenomenon of administration, which can be provided by science of administration and science of administrative policy. It seems that one might even risk a claim about the priority of the disciplines focusing on real-life administration over science of administrative law. This is because one can imagine administration without administrative law, and an administration process based on different normative systems. In fact, administration existed before administrative law emerged in the form known today. Certainly, in a contemporary democratic state ruled by law this kind of situation seems to be purely theoretical.

As it was suggested earlier, at present there are more and more postulates suggesting a departure from the aforementioned conventional approach in favour of a dualistic concept of two sciences, namely science of administrative law and science of administration, which integrates two functions, i.e. descriptive that may be considered equivalent to the conventional science of administration and normative (prescriptive) – characteristic to science of administrative policy which focuses on postulates, strategies and objectives for administration. It seems that this approach – in addition to the premises of inclusive democracy, inclusive economy and the concept of inclusive administrative law (inclusive concept of administrative law) – may be a component of inclusive public administration understood as a new organizational and functional model of public administration.

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[14] More about relations between science of administration and science of administrative law, see: P. Škultéty *et al.*, *Správne právo hmotné. Všeobecná časť'*, Heuréka 2009, p. 129 et seq.

[15] J. Starościak, *Prawo administracyjne*, Warszawa 1977, p. 26.

[16] *Ibidem*, p. 28.

Seemingly, if we agree with certain assumptions, e.g. related to the incorporation of public policies into the scope of the relevant discipline, this dualistic concept is in line with the new classification of academic disciplines, introduced by the Regulation of the Minister of Science and Higher Education dated 20 September 2018 on areas of academic study, academic disciplines and artistic disciplines[17], according to which the academic area of social studies comprises a newly distinguished academic discipline *political and administration studies* [Polish: *nauki o polityce i administracji*]; this way the legislator gave up the old practice where an independent discipline *study of administration* [Polish: *nauki o administracji*] was specified in the academic area of social studies and the area of legal studies. Irrespective of this author's critical opinion regarding the above, in a way the decision is in line with the postulated separation of the proscriptive function of administration science, characteristic for science of administrative policy. Unquestionably, administration is closely linked to politics, because – as it was rightly pointed out in the literature, political decisions are executed by the administrative apparatus, and the most important positions in this apparatus are entrusted to politicians[18].

Concept of inclusive administration and its components

In addition to the above approach according to which dualism of administrative sciences is more in line with the process of developing inclusive administration, the components of this concept include inclusive democracy, inclusive economy and the concept of inclusive administrative law. Let us start from the concept of inclusive democracy, which is not just an economic model but it is a "broader political project, which aims to remake society at all levels, at the political level, the economic level, the social level, and, of course, in the ecological sphere. The overall aim of the inclusive democracy project is to create a society determined by the people themselves; in which, in other words, (…) the people have overall control over the political sphere, the economic sphere and, the social sphere in general. So the inclusive democracy project, in a sense, is a synthesis of the two major historical traditions, the socialist tradition and the democratic tradition, and also of the currents that developed in the last 30 or 40 years, the new social movements, i.e. the feminist movement, the ecological movement, the identity movements of various sorts, and so on. In this sense, we can

[17] Dz.U. 2018, Item 1818.

[18] R. Szczepankowski, *Administracja i polityka w ujęciu Woodrowa Wilsona* [in:] *Nauka administracji*, eds. B. Kudrycka, B. Guy Peters, P.J. Suwaj, Warszawa 2009, p. 162; M. Stahl, *Cechy administracji* [in:] *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*, ed. M. Stahl, Warszawa 2016, p. 22.

say that the inclusive democracy project is neither a theoretical construct, as it is the product of all those historical experiences, nor is it a utopia – and it is not a utopia because there are already trends all around us leading to a society which in various aspects resembles experiments going on with alternative institutions"[19]. Takis Fotopoulos in this case uses the concept of *Inclusive Democracy*[20]. As it is emphasised by the author, *the new liberatory project* proposed by him, cannot only be an inclusive democracy project which will spread the public domain beyond the traditional sphere of politics, to include economic and broader social domains. His assumption is that inclusive democracy should eliminate such phenomena as the unfair distribution of political and economic power, as well as the associated commodity and property relations, and the hierarchical structures in the household, the workplace, the education place and the broader social environment[21]. He emphasises that inclusive democracy has nothing in common with that which today passes as liberal democracy or with the democracy proposed by (civil societarian) Left[22]. The author rightly notices that the traditional approach to civil society, liberal or leftist, does not sufficiently take into account the structural changes that have led to the internationalization of the market economy and to the impotence of state-independent institutions, associations, urban movements, etc.[23] On the other hand, inclusive economy, according to Elżbieta Mączyńska, assumes symbiosis between economic growth and social progress. This model may be an antidote to the lack of correspondence between economic progress, measured by the increase in the gross domestic product (GDP), and social progress, a problem reflected by existing areas of poverty, unfavourable demographic changes, high unemployment persisting in some regions, imbalance in public finances, etc.[24] In other words, if it is adopted, this economic model is to counteract the asymmetry between economic growth and development of the society[25]. The last component of inclusive administration, as mentioned above, is the concept of inclusive administrative law. The term has first been proposed by the author of the present study. In this case the author has in mind a multifaceted approach to this branch of law; treating administrative

[19] T. Fotopoulos, *transcription of a video by O. Ressler, recorded in London in 2003*, Polish translation: http://www.inclusivedemocracy.org/ID_POLISH.htm (3.12.2018); idem, *Towards an Inclusive Democracy. The crisis of the growth economy and the need for a new liberatory project*, London–New York 1997, https://www.inclusivedemocracy.org/fotopoulos/english/brbooks/brtid/contents.htm (3.12.2018).

[20] T. Fotopoulos, *Towards an Inclusive Democracy*…, p. IX et seq.

[21] *Ibidem*, p. X.

[22] *Ibidem*.

[23] *Ibidem*.

[24] E. Mączyńska, *Gospodarka inkluzywna – wymiar samorządowy*, https://www.bgk.pl/files/public/Pliki/news/Konferencje_BGK/XII_Konferencja_BGK_dla_JST/Materialy_konferencyjne/Elzbieta_Maczynska_Gospodarka_inkluzywna_-_wymiar_samorzadowy.pdf (3.12.2018), p. 1 et seq.

[25] *Ibidem*, p. 1–2.

law and legal institutions characteristic for this branch of law as feasible instruments for counteracting adverse political, economic, ecological and social phenomena. The concept takes into account historical determinants of administrative law and law in general, and such characteristics as the common, directive (obligatory), repressive, axiological, ordering and instructional dimension of administrative law, or those norms, which by providing examples, regulate the system and functioning of administration entities and relations between those entities and their clients, particularly citizens[26]. Implementation of the concept of inclusive administrative law is linked with a necessity to maintain proper balance between the aforementioned determinants and dimensions of law, this way making a reference to this author's concept of inclusive law[27].

Undoubtedly, regulations of administrative law are among those which in a broad sense interfere with individuals' rights and liberties. This far-reaching intrusion in this sphere and the broad material scope of the regulation, affecting nearly all areas of the individual's life, mean that it is precisely in this branch of law that the necessity to ensure the highest possible standards in establishing and application of law becomes particularly important. In other words, this is about ensuring adequate standards for the performance of public tasks and for implementing the public interest, while ensuring adequate protection of individual rights. In accordance with the key objectives, inclusive administrative law should ensure satisfying correlation between achievement of the common good and protection of values of fundamental importance for each individual.

Unquestionably, this concept of administrative law should be the basic component of inclusive administration. It should be reminded that, in a democratic state following the cardinal assumptions of the idea of *Rechtsstaat* or the *rule of law,* all administrative activity should be subject to law. It is law that defines the system of administration and the limits of its operations with respect to external entities. In other words, no area of administration, whether organisational or functional, is exempt from legal regulations. Obviously, the extent to which it is bound by law depends on the external or internal sphere of administration or the authoritative or non-authoritative nature of the actions taken. In any case, the concept of discretionary operation in administration has been discarded for a long time.

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[26] P. Ruczkowski, *Pojęcie prawa administracyjnego, jego cechy i podziały* [in:] *Prawo administracyjne*, eds. M. Zdyb, J. Stelmasiak, Warszawa 2016, p. 34 et seq.; S. Detterbeck, *Allgemeines Verwaltungsrecht…*, p. 7 et seq.; R. Chapus, *Droit administratif général*, Paris 2000, p. 1; A. Kahl, K. Weber, *Allgemeines Verwaltungsrecht,* p. 29–39; J. Rivero, J. Waline, *Droit administratif*, p. 13 et seq.

[27] P. Ruczkowski, *Inkluzywna koncepcja prawa jako dyrektywa w procesach stanowienia i stosowania prawa przez administrację publiczną* [in:] *Stulecie polskiej administracji. Doświadczenia i perspektywy*, ed. W. Federczyk, Warszawa 2018, p. 177–196; *idem*, *Inkluzywna koncepcja prawa*, „Palestra Świętokrzyska" 2018, no. 43–44, p. 63–66; *idem*, *Inkluzywna polityka (koncepcja) prawa a zarządzanie aglomeracjami (metropoliami)* [in:] *Organizacja i funkcjonowanie aglomeracji miejskich*, ed. B. Dolnicki, Warszawa 2018, p. 297.

Notably, axiology of law is of particular importance in the law providing the basis for the operation of administration. In order to build inclusive administration, it is necessary to ensure that the law determining operations of administration implements the aforementioned axiological assumptions of the concepts of inclusive law, inclusive democracy and inclusive economy. It seems that, owing to a widespread use of instruments characteristic for the normative function of administration science, or traditionally speaking science of administrative policy, such as plan, programme, strategy, proposals, synthetic assessments etc. which define objectives, tasks and implementation schedules, it will be possible to realise the concept of inclusive administration.

Undoubtedly, if the assumptions of inclusive administration are adopted it will be necessary to ensure involvement of citizens and their associations in the administration process at all levels, i.e. central, regional and local. In this context it should be reminded that the English terms *inclusion*, *inclusive*, synonymous to incorporation, engagement or involving, can be translated into Polish as *włączenie*, *łączny*, *globalny*[28]. Engagement in the process of administration may be achieved through various forms of direct or indirect democracy, such as referendum, and public consultations, or by increasing people's involvement through administration's public and organisational operations; meetings with local communities may provide a forum for sharing of opinions and views, and for discussions, effectively contributing to implementation of objectives adopted by administration.

Definitely, inclusive administration, by its nature, should seek to ensure optimal correlation between achievement of the common good and protection of values of fundamental importance for each individual. Seemingly, from the standpoint of the above concept, it is particularly important to look at administration not only as a system of entities executing law, but most importantly as a system of institutions which, by their operations, implement the desired values, determined e.g. by the provisions of the Constitution, and resulting from extra-legal normative systems, e.g. moral, ethical, religious, or aesthetic norms.

Inclusive administration is also an organisation whose operations are subject to directives for good work. Efficiency, effectiveness and economic value are natural components of inclusive administration. Organisation and functioning of administration must be subordinate to efficiency, as a praxeological category. This is because administration is designed to perform public tasks, therefore, effectiveness, efficiency and economics are the indispensable criteria for appraising operations of inclusive administration. As suggested by Mariusz Maciejewski, "Contemporary administration faces many challenges, most importantly including the growing range of tasks/objectives, the increasing expectations

[28] *Wielki słownik angielsko-polski PWN–Oxford*, ed. J. Linde-Usiekniewicz, Warszawa 2004, p. 599.

of the public, and the limited financial resources. In view of the above it is necessary to continuously look for improved methods of administrative regulation and ways to apply administrative law, which will facilitate implementation of public tasks in increasingly cost-effective manner"[29].

Key objectives related to inclusive administration also include decentralisation of nationwide offices. Location of nationwide offices in reginal capitals or other cities with adequate technical infrastructures and human resources, will definitely contribute to implementation of the principles of the country's sustainable development. By establishing nationwide offices away from the national capital may affect economic, social and cultural growth, and as a consequence may prevent negative phenomena, such as adverse demographic changes. This is because economic and social development is frequently stimulated by a newly created administrative centre.

Finally, it will be worthwhile to point to the so-called soft competences of administration, which by the author of this study are understood as equivalent to "humanism of administration". In this case, we also deal with a reference to a system of values, such as friendliness and kindness in the official's relation to the citizen. Undoubtedly the frequently underestimated quality of empathy in the way administration approaches citizens' problems is as important as the strict compliance with the law, and it constitutes one of the basic assumptions of inclusive administration.

Conclusion

By departing from the aforementioned conventional approach to three pillars of administrative sciences towards a dualistic concept of two sciences, namely science of administrative law and science of administration, which integrates two functions, i.e. descriptive, aiming to characterise and analyse administration and the related process, and roughly equivalent to the conventional science of administration as well as normative (prescriptive) function – characteristic to science of administrative policy and focusing on formulation of obligations, proposals, strategies, objectives, it may be possible to – in addition to the premises of inclusive democracy, inclusive economy and the concept of inclusive administrative law – establish a component of inclusive public administration understood as a new organizational and functional model of administration.

The essence of inclusive administration lies in the holistic approach to the science of administration and administrative law, which defines the organisational and functional basis for the operations of administration.

[29] M. Maciejewski, *Skuteczność i efektywność administracji w prawie administracyjnym. W kierunku recepcji zarządzania publicznego w polskim prawie administracyjnym*, Warszawa 2019, p. 11.

The main goal of inclusive administration is to effectively counteract negative social, political, economic, demographic or ecological phenomena.

The model should be characterised by the broadest possible involvement of citizen groups in the organizational and decision-making processes of the public administration and by an approach to the administration organizational structure and decision-making processes from the standpoint of values and goals recognised as fair by majority of the society. Undoubtedly, factors of key importance for the concept include widespread participation of the public, as well as the axioms and values underlying the approach to administration.

Notably, inclusive administration is an organisation which perceives a will of majority as a source of authority, in accordance with the rules of democracy, however at the same time it recognises and protects the rights of minorities. Protection of the right of minorities should be one of the objectives of inclusive administration.

The essential objective of inclusive administration is to ensure adequate standards for the performance of public tasks and to implement the public interest, while ensuring adequate protection of individual rights. In accordance with the key assumptions, it should also ensure satisfying correlation between achievement of the common good and protection of values of fundamental importance for each individual.

In the final conclusion it should be pointed out that development of inclusive public administration is undoubtedly facilitated by the approach, according to which the science of public administration, currently referred to as political and administration studies, is viewed not only as a discipline related to the existing administrative reality and focusing on administration and the process of administration but, primarily, as a discipline formulating synthetic evaluations, postulates, plans, programs, and strategies initiating changes beneficial from the point of view of citizens and public interest.

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Summary

Development of inclusive public administration is facilitated by the approach, according to which the science of public administration is viewed not only as a discipline related to the existing reality but, primarily, as a discipline formulating synthetic evaluations and making proposals initiating changes beneficial from the point of view of citizens and public interest. In other words, the departure from the aforementioned conventional concept of three pillars of administrative sciences in favour of a dualistic concept of these sciences, namely administrative law and science of administration, which integrates two functions, i.e. a descriptive one that may be considered equivalent to the classical science of administration and a normative one, characteristic to administrative policy studies with a focus on proposals, strategies and goals. It seems that besides the premises of inclusive democracy, inclusive economy and the concept of inclusive administrative law, such an attitude may be a component of the inclusive public administration interpreted as a kind of a new organizational and functional model of administration. The model should have such features as the widest possible involvement of citizen groups and their organizations into the decision-making and organizational processes of public administration, and a focus to the administration organizational structure and decision-making processes from the perspective of values and goals serving public interest and particular individuals' interests.

Keywords: inclusive administration, the concept of inclusive administrative law, three pillars of administrative sciences, science of administration

DUALIZM CZY TRIADA NAUK ADMINISTRACYJNYCH A KONCEPCJA INKLUZYWNEJ ADMINISTRACJI

Streszczenie

Budowaniu inkluzywnej administracji sprzyja podejście, zgodnie z którym na naukę administracji należy spojrzeć nie tylko jako na dyscyplinę odnoszącą się do zastanej rzeczywistości administracyjnej, lecz przede wszystkim na dyscyplinę formułującą syntetyczne oceny i postulaty inicjujące korzystne zmiany z punktu widzenia interesów obywateli oraz interesu publicznego. Innymi słowy, odejście od wspomnianego klasycznego ujęcia triady nauk administracyjnych na rzecz dualistycznej koncepcji wyodrębnienia dwóch nauk, a mianowicie nauki prawa administracyjnego oraz nauki administracji, integrującej dwie funkcje, tj. opisową, która może być utożsamiana z klasyczną nauką administracji, oraz funkcję normatywną –

charakterystyczną dla nauki polityki administracyjnej, której istotą jest formułowanie postulatów, strategii, celów. Jak się wydaje, takie podejście może stanowić – obok założeń inkluzywnej demokracji, inkluzywnej gospodarki oraz inkluzywnej koncepcji prawa administracyjnego – komponent inkluzywnej administracji jako pewnego nowego modelu organizacyjnego i funkcjonalnego administracji. Model ten powinien charakteryzować się możliwie najszerszym włączeniem w procesy organizacyjne i decyzyjne administracji różnych grup obywateli i ich organizacji tudzież spojrzeniem na strukturę administracji i procesy decyzyjne administrowania poprzez pryzmat wartości i celów służących urzeczywistnianiu interesu publicznego oraz interesów jednostek.

Słowa kluczowe: inkluzywna administracja, koncepcja inkluzywnego prawa administracyjnego, triada nauk administracyjnych, nauki o administracji

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Tibor Seman

Pavol Jozef Šafárik University in Košice
ORCID: 0000-0002-4172-1184

TRANSTERRITORIAL ADMINISTRATIVE ACTS IN SLOVAK ADMINISTRATIVE – LAW SCIENCE

Introduction

Every state, of course, protects its exclusivity, sovereignty. This also applies to the operation of decisions, as the results of the activities of the authorities of that State. Obviously, decisions that are issued by the authorities of a particular state bind the entities in the territory of that State, because the exclusivity of the State is bound to the borders of that State. On the other hand, the state must be legally regulated, whether and under what conditions decisions of the authorities of foreign states may operate in its territory[1].

Where an individual legal act is issued by a State-owned entity, it is principally active in that State's territory. There are such acts between individual administrative acts whose scope or effects extend beyond the territory of their own State. In Slovakia, there may be effects, that is, extraterritorial effects of acts of authorities of foreign states, either directly, without examining, assessing, approving or recognizing enforceability, or these extraterritorial effects of acts of foreign state authorities can only occur after the conditions of enforceability have been examined.

The Slovak Republic takes into account in its own legislation the fact that it is a member of the European Union and thus the extraterritorial effects of certain decisions of foreign public authorities may occur directly in our territory without recognition of enforceability. The effects of other decisions of foreign public authorities in the territory of the Slovak Republic can only occur after reviewing the conditions of their enforceability by administrative courts in administrative justice.

[1] The paper was created within the framework of the project "Transterritorial Administrative Acts of the Member States of the European Union", registration number of the project VEGA 1/0203/18.

The Slovak Republic takes into account the fact that it is a Member State of the European Union and that the extraterritorial effects of certain decisions of foreign public authorities may occur directly in our territory, without recognition of enforceability, and the effects of other decisions of foreign public authorities in the territory of the Slovak Republic may arise only after examining the conditions of their enforceability by the administrative courts in the courts.

The Slovak administrative science must respond promptly to changing conditions of law, and to provide legally significant theoretical conclusions that will lead to the improvement of the legal regulation of enforceability of decisions of foreign public authorities in the territory of the Slovak Republic. As well as it must maintenance of the permanent nature of the established system relevant legislation in particular taking into account the requirement of protection of sovereignty, the exclusivity of the state and also respect for the subjective rights of citizens as persons affected by administrative decisions of foreign public authorities whose extraterritorial effects are directed to performance in the Slovak Republic.

The aim of the paper is to analyze the concept of a transterritorial decision, to investigate its effects with extraterritorial character, as well as to examine the conditions of a decision of the administrative court on the enforceability of foreign administrative decisions in administrative justice. Consequently, draw conclusions from the findings in the sense of evaluation of positives and negatives of transterritorial administrative decisions with effects in the Slovak Republic.

Analysis of the terminus "transterritorial administrative act"

The origin of the term "transterritorial administrative act" from the aspect of linguistics

In administrative law science we must devote adequate attention to terms (content and importance), so that no term can be ambiguous and cause problems in legal interpretation. This requirement also applies to the term transterritorial administrative act (decision). In principle, the science of administrative law has resolved the issue of administrative decisions in terms of content, meaning and classification. In the phrase "transterritorial administrative act", the foreign origin has a transterritorial adjective, so it is important to establish the meaning of the additional transterritorial, that is to say semantically, because of the exact wording.

Linguistics and law are scientific disciplines and we shall use linguistics to determine the linguistic significance of the term under examination as an auxiliary science. The exact interpretation of the legislature, as well as the clarity of the legal language used by the legal leadership, depends on the practical interpretation of the terms in the practical activity of the power holders applied to any adresats of the legal norms.

At this point, I will only marginally point out the meaning of the phrase "administrative act" or "administrative decision" as it is a term that is fundamentally defined both in the theory of law and in administrative science. Administrative Law textbooks point to the theoretical-scientific basis of the term "administrative acts". For example: "Legislation does not define the concept of a legal act; it is a category of legal science"[2]. Administrative decisions are only one of several forms of public administration activity, for example the following definition of the content of the administrative decision is appropriate from the point of view of scientific definitions: "The administrative decision is a unilateral administrative act (decision) by which the administrative authority in a specific case resolves the legal relations of specifically designated persons"[3]. For the purpose of the contribution, this definition is most appropriate because I draw attention to the individual administrative acts where the addressee is concretized, that is to say, an act in which rights or obligations are specified against a particular entity.

Linguistic analysis of the term "transterritorial administrative act" will consist in identifying the origin of the term, ie, the language it is based on, and then defining the meaning of the term so as to correspond as closely as possible to the legal context because it is a juristic term.

The expression "administrative act", pointing to the previous treatise, will not be subject to linguistic analysis. It will be important to flawlessly analyze the "transterritorial" adjective and transfer its meaning to the definition of the content of the entire "transterritorial administrative act". The word "transterritorial" is made up of two terms combined in one word. It is "trans" and "territorial". At this point it is necessary to state that both expressions have a foreign origin, these are not Slovak words. Therefore, the meaning of foreign words is determined first and foremost in the dictionary of foreign words and subsequently in the vocabulary of the language from which the term originates. The term "trans-" originates in the Latin language and is the first part of compound words with the meaning "over-, for-, pre-"[4]. The Latin dictionary interprets the term "trans" as follows: "trans – preposition with accusative over, through"[5]. The term "territorial" also originates in the Latin language and means *territorial*[6] or "specific territory"[7]. The original translation of the term "territory" from the Latin language reads: "territorium – land"[8]. Well, the term "territory" has its basis in the Latin word "terra", which means earth.

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[2] P. Škultéty, P. Andorová, J. Tóth, *Správne právo hmotné. Všeobecná časť*, Šamorín 2012, p. 105.

[3] D. Hendrych *et al.*, *Správní právo. Obecná část*, Praha 2006, p. 219.

[4] Compare: S. Šaling, M. Šalingová, O. Peter, *Slovník cudzích slov*, Bratislava 1965, p. 1073.

[5] J. Špaňár, L. Hrabovský, *Latinsko-slovenský, slovensko-latinský slovník*, Bratislava 1983, p. 613.

[6] Compare: S. Šaling, M. Šalingová, O. Peter, *Slovník cudzích slov*, p. 1060.

[7] Compare: P. Tvrdý, *Slovník inojazyčný*, Žilina 1932, p. 205.

[8] J. Špaňár, J. Hrabovský, *Latinsko-slovenský, slovensko-latinský slovník*, p. 602.

In the Slovak language we do not find the Slovak equivalent of the term "transterritorial" administrative decision, but would most accurately sound as a "cross-border" administrative decision. Thus, in the literal translation, the term "transterritorial administrative decision" means "cross-border administrative decision". Since the territory of the State is bounded by borders, the term "cross-border" is also applicable, which further accentuates the effects of a trans-territorial legal act which are to occur outside the territory beyond the State whose authorities have issued such an act. So much of linguistic interpretation.

In spite of the fact that we do not find in Slovak legislation the phrase "transterritorial administrative acts" and there is no definition of a transterritorial administrative decision, for theory and administrative law, this term is not unknown. In another place of the paper, we will focus on specifying the Slovak legislation that implies the trans-territoriality of administrative acts. Foreign law knows transterritorial administrative decisions. If we tried to summarize the conceptual definitions of foreign legal scholars[9], they agree that the transterritorial administrative acts are decisions of the executive authorities whose purpose is to exert effects outside the territory, that is, beyond the state whose executive power it has issued.

Transterritorial decisions and sovereignty of the state

Let us ask ourselves whether it is in accordance with the exclusivity, sovereignty of the state, if it is to respect or even carry out decisions of foreign public authorities in its territory. It means decisions that were not issued by the authorities of that state. Sovereignty is an important element of every state. The boundaries of the state delimited space constitutes "sovereign state territory which controls it with its exclusive (sovereign) power"[10]. Answering this question is of key importance for understanding the content of the trans-territorial decision. "Legal acts with transterritorial effects represent a more significant interference with the sovereignty of the state (s) concerned than they are normally accepted in interna-

[9] See more: J. Handrlica, *Vybrané problémy spojené s aplikací modelu transteritoriálních správních aktů*, *Studia* „Iuridica Cassoviensia" 2017, no. 2, p. 50. For example, prof. dr. Matthias Ruffert deals with the concept of a transsteritarian administrative act. See: M. Ruffert, *Der transnationale Verwaltungsakt*, „Die Verwaltung" 2001, p. 453–470. The transsteritorial act is also discussed by prof. dr. Volker Böhme-Neßler. See: V. Böhme-Neßler, *Der transnationale Verwaltungsakt – zur Dogmatik eines neuen Rechtsinstituts*, „Neue Zeitschrift für Verwaltungsrecht" 1995, p. 863–873, and also the transsteritorial act is discussed by Angelos S. Gerontas. See: A.S. Gerontas, *Deterritorialization in Administrative Law. Exploring Transnational Administrative Decisions*, „Columbia Journal of European Law" 2013, p. 423–468.

[10] V. David, P. Sladký, F. Zbořil, *Mezinárodní právo veřejné. 3. přepracované a doplněné vydání*, Praha 2006, p. 75.

tional law”[11]. In particular it is important the Slovak Republic’s membership in the European Union and in in these contexts, the existence of transterritorial acts in conjunction with their effects.

Classification of transterritorial administrative acts according to the intended effects

For the purpose of creating the basic classification we choose the purpose of transterritorial acts. Two types of transterritorial acts can be defined for purpose.

The first group consists of transterritorial acts as individual decisions of executive authorities whose purpose is to produce effects outside the territory of the country of origin of the decision. Such acts are issued in order to bring about effects beyond the borders of the State whose executives have issued a transterritorial administrative act. While in theory and science, this kind of administrative act may exist, but in reality it would represent an immense interference with the sovereignty of another state, that is, the state in which the effects of the act are to occur. In fact, the effects pursued by any act are to occur in the territory of the State whose authorities have issued the act. It is only secondary to triggering effects in another state.

The second group may include transterritorial administrative acts whose purpose is not to produce effects outside the territory of the State of origin of the act but possess a specific effect. This effect is a transterritoriality that allows the execution of an administrative act outside the State of origin. In other words, these transterritorial administrative decisions have the property of bringing about legal effects outside the territory of the State whose power authority has issued the administrative act. The purpose of this group of trans-territorial acts is not to bring about effects abroad, it is only an option if enforcement does not occur in the country of origin of the decision.

Extraterritorial effects of administrative acts

Extraterritoriality in linguistic – legal sense

The most accurate translation of the term “extraterritorial” means “operating outside the territory”. From this meaning we then derive the meaning of the term “extraterritorial effects of an administrative act” as effects outside the territory of the State whose authority the administrative act issued. In the phrase “extraterritorial effects”, the adjective “extraterritorial” foreign origin, it comes from the Latin language. According to the dictionary of foreign words, the meaning is as

[11] R. Jakab, *Extrateritorialita a transteritorialita v podmienkach EÚ a jej členských štátoch* [in:] *Extrateritoriálne účinky činnosti orgánov verejnej moci*, ed. R. Jakab, Košice 2018, p. 14.

follows: “extra” – (lat.) is the first part of compound words with meaning *outside*, *separately*, *extra*, *separate*, and so on[12]. The older linguistic literature contains such a translation: “extra, lat., except, extra, especially”[13]. It is translated into Slovak from Latin as follows: “extra – (…) 2nd preposition with an accusative on the outside, out of, out for”[14].

As the adjective “extraterritorial” consists of two words (the territory is explained elsewhere in the paper), its meaning is “operating outside the territory”. The extraterritorial effects of administrative acts will therefore mean “effects outside the territory of the State whose authority issued the administrative act”. This interpretation, also from the perspective of linguistics and law, fully corresponds to the meaning of both words of foreign origin from which it is composed.

Reason for the extraterritorial effects of transterritorial acts

Referring to previous sentences on sovereignty of states, we will be interested in the possibility of acts of public authorities outside the territory of the State whose authorities have issued the act. The principle of non-interference with the sovereignty of another state is not contradicted by the need to execute a decision of the authority of one state in the territory of another state if there is a legal basis for such a procedure. Taking into account geopolitical reality, states cannot function in isolation. Managed entities move within the territories of many states where they must, of course, submit to the national rules of that particular state. Therefore, it is not possible to exclude the need for the act of the authorities of one state in another state. An example is the imposition of a fine for traffic violations that occurred in one state, with the responsible entity being a citizen of another state, who not paying the fine and it is necessary having to enforce the decision of fine. In these cases, the extraterritorial effects of transterritorial acts should actually occur, it means thus the decision of the authority of the State to be enforced in another State. The State whose authority has imposed a fine has an interest in executing the imposed monetary obligation if it has not been voluntarily fulfilled. However, no state authority has an immediate, immediate direct legal command to impose a fine on a financial institution in a foreign country where the citizen concerned is liable to pay equivalent to the amount of the fine.

A decision with a trans-territorial nature acquires extraterritorial effects, in this case enforceability, in a foreign country only on the basis of a legal procedure which is essentially either an agreement between States on the reciprocal resolution of the enforceability of decisions of their authorities, or it is on the base of

[12] S. Šaling, M. Šalingová, O. Peter, *Slovník cudzích slov*, p. 327.

[13] P. Tvrdý, *Slovník inojazyčný*, p. 69.

[14] J. Špaňár, J. Hrabovský, *Latinsko-slovenský, slovensko-latinský slovník*, p. 229.

a national law that stipulates the conditions of enforceability of foreign public authorities deciosions. As a matter of principle, it will be possible to execute a decision of one State's authority in the territory of another only by the competent authority of that other State. The fundament legal title for the execution of the foreign authority decision in another state will be a transterritorial decision.

The execution of a foreign decision may be twofold. Either without any further examination of the decision of the authority of the foreign state, or with the recognition of the enforceability of the decision of the foreign authority on the basis of the lawful procedure and by competent authority of the state in whose territory enforcement is to take place. In the Slovak Republic, this recognition authority is an administrative court. It should be emphasized that the administrative courts in Slovakia, in the proceedings for enforceability of decisions of foreign public authorities, merely express enforceability, but they are not the authorities that would make executive the decisions of foreign authorities.

Relationships, as a rule mutual recognition of decisions, are generally based on an agreement of at least two states among themselves. Also, each state may, within its own national legislation, resolve the possibility of enforcing foreign decisions in its territory. At the same time, it can legitimately expect reciprocal legislation in the foreign country concerned.

Legal process of slovak administrative courts about the enforceability of foreign administrative acts

Importance of judicial proceedings on enforceability of decisions of foreign public authorities

There are since 1 July 2016, Act no. 162/2015 Coll. Administrative Judicial Process Act in the Slovak Republic. This governs the process of judicial proceedings on the enforceability of decisions of foreign public authorities. Public authorities abroad issue decisions whose effects are expected to occur in the Slovak Republic. We divide such decisions into two groups. The first group is decisions enforceable in Slovakia without the need for a special procedure on their correctness or legality, and the second group are decisions enforceable in Slovakia only after the process of judicial proceedings on the enforceability of decisions of foreign public authorities.

The proceedings of the administrative court on the enforceability of decisions of foreign public authorities are included in the proceedings carried out by authorities of the general judicial authority, which independently and objectively assess the conditions of the decision execution of a foreign public authority in the Slovak Republic. However, the proceedings of an administrative court on the enforceability of decisions of foreign public authorities are possible only for

those decisions whose enforceability in Slovakia requires "further recognition". In addition to such decisions there are decisions that are enforceable in Slovakia without exequatur[15].

The court proceedings before the administrative court on the enforceability of decisions of foreign public authorities have rules laid down by law. However, the provisions on this trial will only be used in legal contact with the Member States of the European Union to the extent that the special regulation does not provide otherwise. This special legislation also includes Act No. 183/2011 Coll. on Recognition and Enforcement of Decisions on Financial Penalties in the European Union and on Amendments and Supplements to Certain Acts, Act no. 466/2009 Coll. on International Assistance in Recovery of Certain Financial Claims and on Amendments to Certain Acts. However, it is necessary to distinguish strictly between the Member States and the Contracting States, since the enforceability of administrative acts in the Slovak Republic without judicial enforcement proceedings concerns the Member States and also depends on the type of claim or the type of obligation.

The procedural aspect of judicial proceedings on the enforceability of decisions of foreign public authorities under the Administrative Judicious Procedure Code

The court proceedings on the enforceability of decisions of foreign public authorities concern that the plaintiff may plaint seek a decision on the enforceability of a decision of a foreign public authority in matters decided by public administration authorities, if the international treaty is The Slovak Republic bound or legally binding act of the European Union obliges the Slovak Republic to implement decisions of foreign public authorities. The parties to the proceedings are the plaintiff and the defendant. The plaintiff must indicate, in addition to the general formalities, the specification of the petition, the specification of the

[15] For example the decisions included in Act no. 466/2009 Coll. on International Assistance in Recovery of Certain Financial Claims and on Amendments to Certain Acts. The effects of these administrative acts of the Member States in the Slovak Republic result directly from the law and no further recognition is necessary for their enforceability. However, in order to have effects in Slovakia, the type of claim is also important. These are claims relating to all taxes, charges of any kind, import or export duty levied by a Member State, its territorial unit or its administrative unit, including local authorities, or levied on behalf of a Member State or on behalf of the European Union, except for compulsory levies social security and contractual charges. And the competent authority of the Slovak Republic will ensure the recovery of the Member State's claim upon the request of the competent authority of the Member State for its recovery, while the Member State's claim is enforced in the same way as the Slovak Republic's claim and its enforcement does not take precedence over the recovery of the Slovak Republic's claim. However, for enforcement purposes, a single enforcement order is deemed to be an enforceable title issued under a special regulation of the Slovak Republic and is not subject to recognition under a special regulation, which is the Administrative Judicial Code.

defendant, the specification of the decision and the foreign public authority issuing it, and the date of its issue, the decisive facts and its official translation of decision into the state language.

Four conditions must be cumulatively fulfilled in order to obtain the required judicial decision, which the administrative court reviews in accordance with the Code of Administrative Procedure.

First, the administrative court must examine whether the decision of the foreign public authority is enforceable in the State in which it was issued. If the decision of a public authority is not enforceable abroad, it cannot be enforced in Slovakia. It is the duty of the administrative court to examine whether the foreign decision under consideration is still enforceable at the time of the judicial decision. It will be in the form of a declaration of enforceability, the enforceability clause that the competent authority places on the decision, or, where the decision does not contain an enforceability clause, can be confirmed separately by the competent authority.

The second area of examination of the administrative court in court proceedings on the enforceability of a decision of a foreign public authority is the question of the competence of public administration authorities. The Administrative Court must examine whether the decision-making in the matter was within the competence of the public authorities of the Slovak Republic. If the administrative court finds that the decision-making in the matter was within the competence of the public administration of the Slovak Republic, the court shall not issue a decision on the enforceability of the decision of the foreign public administration body.

Third, the administrative court is required to examine whether the defendant was not deprived of the possibility of a foreign public authority to participate properly, in particular whether he was duly informed of the opening of the proceedings and summoned for questioning. Verifying that this condition is met is an important prerequisite for success. Here it is important to consider the extent to which the administrative court is actually capable of examining the procedural practice of a foreign administration body. Indeed, the decision of a foreign public authority can externally declare compliance with the lawful procedure. However, the Administrative Court will be required to ascertain whether, in fact, the person had or did not have the opportunity to take part in the proceedings. The requirement to allow proper participation in the procedure is imposed on every procedural procedure if it is to meet the requirement of a fair trial. The right to a fair trial is one of the rights established by the Convention for the Protection of Human Rights and Fundamental Freedoms[16]. There is also the possibility of acting without the presence of the person concerned. However, in such cases, the re-

[16] The Convention for the Protection of Human Rights and Fundamental Freedoms was published in Czechoslovakia, No. 209/1992 Coll. as an international treaty.

quirements for allowing participation in the proceedings must be met. It is possible the person to whom the proceeding relates, refuse to participate, for example, by failing to appear in the proceedings despite the timely and proper notification, exercising his rights voluntarily, not raising objections or remedies. The competent authority as the holder of the power is the obligation to allow the person to take part in the proceedings, in particular the right to speak, to comment on and to duly defend himself. In court proceedings on the enforceability of decisions of foreign public authorities, the administrative court will become acquainted with the decision of a foreign public authority, which should have prescribed particulars, including due justification[17]. Although, from a formal point of view, power holders may act lawfully and have a convincing justification, in fact, the process prior to issuing a decision may not correspond to the rules imposed on it.

The finding of the Slovak administrative court may be different from the content of the justification of the assessed administrative decision of a foreign public authority, which merely declares that the condition of proper participation in the proceedings has been fulfilled, while the actual course of proceedings before the foreign authority could have been different. The Slovak Administrative Court may ascertain the withdrawal of the person's right to participate properly in proceedings from the file material of a foreign administrative body whose submission to the Slovak administrative court in proceedings for enforceability of a foreign administrative decision is sufficiently substantiated. For example, according to the file of a foreign public authority, the party before the foreign public authority waived the remedies, but he did not even understand what he actually gave up.

From the Resolution of the Constitutional Court of the Slovak Republic, file no. III. ÚS 163/2011, it follows that *general courts in the Slovak Republic are not correctional authorities of foreign administrative authorities*. The Constitutional Court of the Slovak Republic dealt with the question of the reviewability of the procedure of a foreign administrative body by a general court in proceedings on recognition of enforceability of a foreign administrative decision and judged: "The purpose of the assessment of a condition (…) of withdrawn the opportunity to participate properly in the proceedings, it is not a review of the entire proceedings of foreign administrative authorities, including the identification of individual procedural errors, because the general courts in the Slovak Republic are not authorities of remediation of foreign administrative authorities decision. It is important to assess whether the proceedings before the foreign administration were in line with the basic criteria of a fair trial, ie in particular whether the person against whom the proceedings took place had the opportunity to comment, to oppose the defense of its rights and whether or not its objections

[17] About the right to reasoning reasonably enough see more: T. Seman, *Verejná správa v správnom súdnictve*, Košice 2016, p. 69–76.

have been resolved; the Constitutional Court, in connection with the proceedings on the enforceability of decisions of foreign public authorities, pointed to a fair trial. Therefore, it is necessary that the Slovak administrative court, in proceedings on enforceability of a decision of a foreign public authority, duly attention to the defense of the data subject and to examine the possible or affected person's discrepancy in the decision of the declared process with its actual course".

Finally, as the fourth, the administrative court will examine whether a decision of a foreign public authority imposes a performance that is permissible or enforceable under the law of the Slovak Republic or if it is otherwise contrary to public policy. In this regard, the Administrative Court will have to assess these criteria cumulatively. Public order in Slovak law is one of the undefined legal terms, it occurs eight times in the Constitution of the Slovak Republic[18] and in a number of other generally binding legal regulations.

The trial is further characterized by ruling on the petition without hearing the defendant.

The court can decide on the petition in two ways, so the petition can be successful or unsuccessful. If, after examination, the administrative court finds that all the conditions subject to review in this court have not been met at the same time, it will reject the motion by order. If, after examination, the administrative court finds that all the conditions have been fulfilled, decides that the decision of the foreign public authority is enforceable. Thus, a decision of a foreign public authority becomes equivalent to any other decision of a public administration body of the Slovak Republic. The only difference is that the enforceability clause is not placed on the foreign decision, but this decision will be executed in conjunction with the adminsitrative court's ruling on enforceability.

Conclusion

The Slovak legislation does not define a transterritorial administrative act, but it refers to administrative acts corresponding to the transterritorial administrative acts, which are understood as decisions of the executive authorities whose purpose is to produce effects outside the territory, ie beyond the state whose executive power it has issued.

Transterritorial decisions of foreign administrative authorities, enforceable in the Slovak Republic, are divided into two groups. First, which are directly enforceable in the Slovak Republic, without the need for a court ruling on their enforceability. For these acts to produce effects in Slovakia, a court decision in the administrative judiciary is not necessary because the enforceability of these transterritorial acts in the territory of the Slovak Republic results from special

[18] The Constitution of the Slovak Republic, published, No. 460/1992 Coll.

laws. It can be stated that these administrative acts represent a state of compulsory confidence in the legal conduct of administrative proceedings before a foreign administration, thus preventing access to judicial protection from a possible illegal act of a foreign public authority. The disadvantage of these, a priori already legally enforceable acts, is the risk that if a foreign public authority does mistakes, this fact cannot be reversed in the state of enforcement. In this way, the power of a foreign state authority is directly applied in Slovakia.

Since state power is bounded by the territory of the state, so-called The "automatic" enforceability of decisions of foreign authorities on the territory of other states should always be an exception to the exclusivity of power. In my opinion, it is more appropriate to minimize the range of decisions of foreign public authorities that are enforceable in the Slovak Republic without prior judicial proceedings on their enforceability.

The second group are acts enforceable in the Slovak Republic only on the basis of a court ruling on their enforceability, which occurs in the administrative judiciary. With regard to the separation of the judicial power from the executive, the administrative court in the administrative judiciary has the possibility to objectively examine the assumptions of enforceability of foreign administrative acts in Slovakia.

Decisions issued by the authorities of foreign states may be only formally act and have a convincing reasoning, but the real process prior to issuing them may be not fully comply with the rules of a fair trial, so the finding of a Slovak administrative court may be different as the justification of the administrative decision of foreign public authority.

Thus, in proceedings on the enforceability of a decision of a foreign public administration body, the administrative court implements the judicial protection of the person, concerned by the decision of the foreign public authority. And, if the administrative court finds that only one of the four legal conditions is not fulfilled, the foreign decision will not enforceable in Slovakia.

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Summary

The author deals with the concept and effect of transterritorial acts of public administration authorities, he interprets the term transteritorial administrative act, he examines its effects with an extraterritorial character and subsequently he deals with the conditions of the decision of the administrative court about enforceability of transterritorial administrative acts in administrative judiciary. The findings from the research are reflected in the positive and negative aspects of the transterritorial administrative acts with effects in the Slovak Republic and he offers relevant *de lege ferenda* matter.

Keywords: administrative act, enforceability of the decision, transterritoriality, extraterritorially effects, administrative judiciary

TRANSTERYTORIALNE AKTY ADMINISTRACYJNE W SŁOWACKIEJ ADMINISTRACJI – NAUKA PRAWNA

Streszczenie

Autor zajmuje się pojęciem i skutkiem transterytorialnych aktów organów administracji publicznej, interpretuje pojęcie transterytorialnego aktu administracyjnego, bada jego skutki o charakterze eksterytorialnym, a następnie zajmuje się warunkami decyzji sądu administracyjnego o wykonalności transterytorialnej akty administracyjne w sądownictwie administracyjnym. Ustalenia z badań znajdują odzwierciedlenie w pozytywnych i negatywnych aspektach ponadregionalnych aktów administracyjnych ze skutkiem w Republice Słowackiej i dostarczają istotnej kwestii *de lege ferenda*.

Słowa kluczowe: administarcja publiczna, transterytorialne akty, sądownictwo administracyjne, Republika Słowacka

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Agnieszka Skóra

University of Warmia And Mazury
ORCID: 0000-0003-2169-5326

SELECTED ASPECTS OF ELECTRONIC ADMINISTRATION. COMMENTS ON MEANS OF COMMUNICATION BETWEEN PARTIES TO GENERAL ADMINISTRATIVE PROCEEDINGS AND PUBLIC AUTHORITIES

Introduction

The term "communication" was introduced in science in the late 19th century by F. Tonnies, a German proponent of the system of general sociology[1]. The word "to communicate" means to convey a message, to pass information, to notify about something[2]. They are derived from the Latin words: *communicare* ("make common", "connect", "share opinions", "inform") and *communis* (which can be translated as "community", and "sense of being connected")[3]. The so-called electronic communication is the latest type of communication between an individual and an administrative body. Services of this type are regulated by normative acts, which often contain conflicting provisions. Undoubtedly, today one of the objectives for the state is to facilitate ways of electronic communication between bodies of public administration and parties to as well as other participants of general administrative proceeding, regulated by the Act of 14 June 1960 on the Code of Administrative Procedure[4]. This increased efficiency of the process is reflected e.g. by the more and more advanced ways of filing applications in administrative proceedings as a result of which it is possible to contact the relevant body from any place in the world, at any time, with a speed previously unheard of, and at a lower expense than in the past.

[1] M. Targaszewska, P. Zając, *Technologie przekazywania informacji na odległość*, http://kwasnicki.prawo.uni.wroc.pl/pliki/Targaszewska%20Zajac%20informacjie%20na%20odlegsc.pdf (5.07.2019), p. 2.

[2] *Słownik wyrazów obcych*, eds. B. Pakosz, E. Sobol, C. Szkiłądź, H. Szkiłądź, M. Zagrodzka, Warszawa 1993, p. 445.

[3] M. Targaszewska, P. Zając, *Technologie przekazywania*…, p. 2. Cf. *Słownik wyrazów obcych*, eds. B. Pakosz, E. Sobol, C. Szkiłądź, H. Szkiłądź, M. Zagrodzka, Warszawa 1993, p. 445.

[4] Dz.U. 2018, Item 2096 as amended.

The present study, because of its limited scope, focuses on a few selected problems. First of all, it briefly presents advancements in means of communication which have been available to clients (or other parties) since 1928, allowing them to file applications in general administrative proceeding. These include telegraph, teletypewriter (or telex), facsimile and broadly defined "means of electronic communication", which correspond to the rapid changes and technological progress in public administration in Poland. Furthermore, statistical data published by the Statistics Poland (GUS) presented here show what percentage of Polish population used electronic means of communication in 2018. The author also discusses a few important problems which emerge in connection with the use of electronic means of communication in administrative proceedings. As a result, it is necessary for instance to ask a question if currently it is still valid to assume, in accordance with the doctrine, that the catalogue of the ways to file a request, as defined in Art. 63 § 1 of the Code of Administrative Procedure (CAP), is indeed closed. Issues related to filing of a request by means of an electronic data carrier are also discussed.

Outline of the methods of filing applications to public administration bodies with the use of modern technologies

Pursuant to Art. 15 clause 1 of the Ordinance issued by the President of the Republic of Poland on 22 March 1928 on general administrative proceeding[5] (further herein: OAP), requests could be "lodged with authorities in writing or via telegraph, or communicated orally for the record, unless special regulations and type of case" stipulate otherwise. In the case of requests filed via a telegraph "without signature authentication, the authority, if doubts arise, shall be entitled to have the relevant person confirm the telegram in writing" (Art. 15 clause 2 OAP). In interwar Poland telegraph was the most advanced communication tool used by administration bodies, and enabling transmission of brief messages with the use of symbolic codes[6]. Notably, it was only in 1921 that uniform models were implemented in offices as well as postal, telegraph and telephone communications agencies. In addition to uniform regulations related to the relevant facilities, it was also determined which of these were to provide only postal or only telegraph services, and which were to provide both[7]. However, in 1928 telegraphy was an important means of telecommunication in Poland; the service was carried out via overhead steel-wire lines and various types of telegraphs (in total slightly more than 2,500 devices)[8].

[5] Dz.U. 1928, No. 36, Item 341.

[6] M. Targaszewska, P. Zając, *Technologie przekazywania*…, p. 6.

[7] K. Sobień, *Państwowe Przedsiębiorstwo Pocztowe, Telegraficzne i Telefoniczne w II Rzeczypospolitej*, „Kwartalnik Kolegium Ekonomiczno-Społecznego. Studia i Prace" 2017, no. 3, p. 170.

[8] *Ibidem*.

Likewise, the CAP in its original form dating from 1960 contained Art. 58 § 1 which stipulated that requests may be lodged in writing or via telegraph, or communicated orally for the record. It was only in the early 1980s that rapid and multidimensional changes took place as a result of the astounding advancements in information and communication technologies (ICT)[9]. As a result of the changes introduced by the Act of 31 January 1980 on the Supreme Administrative Court and amending the act on Code of Administrative Procedure[10], the available options for filing requests, defined in Art. 63 § 1 (the formerly Art. 58 § 1) were expanded to include the means of teletypewriter. The device, otherwise known as telex, can be described as a type of telegraph. At the receiver facility it was controlled by punched tape rather than an operator; the former was created by the perforator in accordance with the signals from the sender[11]. Later, from 1 January 1999, filing of requests via telefax and electronic mail was permitted by the Code *expressis verbis*. It was only from the early 21st century, resulting from the rapid expansion of the Internet and after the relevant legal regulations were "refined", that those involved in administrative proceeding started to file requests in an electronic form. This became possible mainly owing to the changes introduced from 21 November 2005 by the Act of 17 February 2005 concerning informatization of activities carried out by public entities[12]. According to the new wording of Art. 63 § 1 CAP, applications can be made in writing, by telegraphic means, teleprinter, fax or e-mail, or by means of a form posted on the website of the relevant public administration body that enables data to be entered into the computer system of that authority, or orally for the record. It should be noted, by the way, that this change was slightly surprising since both telegraphy and teletypewriters at that point were only used in administrative practice exceptionally as they had been replaced by facsimile and e-mail. Formally speaking, telecommunications companies stopped using teletypewriters on 9 February 2007[13]. On the other hand, postal telegram service for individual customers was discontinued by Polish Post from 1 October 2018. The service is still available for business customers cooperating with Polish Post under agreements concluded in writing for a specified or unspecified duration of

[9] S. Wilk, *E-administracja w społeczeństwie informacyjnym. Model a rzeczywistość na przykładzie województwa podkarpackiego*, Rzeszów 2014, p. 9.

[10] Dz.U. 1980, No. 4, Item 8.

[11] T. Goban-Klas, P. Sienkiewicz, *Społeczeństwo informacyjne: Szanse, zagrożenia, wyzwania*, Kraków 1999, p. 17.

[12] Dz.U. 2005, No. 64, Item 565. Current uniform text: Dz.U. 2019, Item 700.

[13] M. Płociński, *Dalekopis – historia teleksu*, „Rzeczpospolita", 8.02.2012, https://www.rp.pl/artykul/809032-Dalekopis---historia-teleksu.html; *Kodeks postępowania administracyjnego. Komentarz*, el/LEX 2019, commentary to Art. 63, thesis 3 (5.07.2019).

time, and it will be provided until these expire or are terminated[14]. Notably, however, such request is sent to a final post office via the national WAN network of Polish Post[15], and then printed and delivered in this form to the addressee; therefore, it has nothing to do with traditional telegraphy.

Currently applicable provision of Art. 63 § 1 CAP stipulates that "applications (…) can be lodged with public entities in writing, by telegraphic means, via facsimile or orally for the record, and by other means of electronic communication via electronic in-box of the public administration body, established pursuant to the Act of 17 February 2005 concerning informatization of activities carried out by public entities".

The Code does not define the term "means of electronic communication". Their definition should be derived from the combined contents of Art. 3 point 4 of the Act of 17 February 2005 concerning informatization of activities carried out by public entities (further herein: AIPE)[16] and the provisions contained in Art. 2 point 5 of the Act of 18 July 2002 on provision of services via electronic means (further herein: ASEM)[17]. These are "technical solutions, including ICT devices and software tools cooperating with them, enabling long-distance communication between individuals, by using data transmission between ICT systems". It is emphasised in the doctrine that we can speak about "means of electronic communication" only if all of the above requirements are met jointly[18]. The definition of "means of electronic communication" by assumption was to be universal and possibly most general. The legislator aimed to guarantee compliance with the principle of technological neutrality and to extend the definition to include the largest possible number of existing and upcoming technological solutions related to communication[19].

The act on provision of services via electronic means, refers only to electronic mail. This means that the legislator has not provided an exhaustive list of all the means which make it possible to effectively file an application in a form of an electronic document. Hence, there is a question if it should be recognised

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[14] W. Ziomek, *Ta ostatnia niedziela. Telegram odchodzi do lamusa, nadaliśmy pożegnalne depesze*, „wp.finanse", 30.09.2018, https://finanse.wp.pl/ta-ostatnia-niedziela-telegram-odchodzi--do-lamusa-nadalismy-pozegnalne-depesze-6300947523155585a (5.07.2019); P. Przybysz [in:] *Kodeks postępowania administracyjnego. Komentarz*, el/LEX 2019, commentary to Art. 63, thesis 3 (5.07.2019).

[15] P. Przybysz [in:] *Kodeks postępowania administracyjnego. Komentarz*, el/LEX 2019, Commentary to Art. 63, thesis 3 (5.07.2019).

[16] Dz.U. 2019, Item 700 as amended.

[17] Dz.U. 2019, Item 123 as amended.

[18] D. Lubasz, W. Chomiczewski [in:] *Komentarz do ustawy o świadczeniu usług drogą elektroniczną*, eds. D. Lubasz, M. Namysłowska, Warszawa 2011, el/LEX 2019, Commentary to Art. 2, theses 27–29 (5.07.2019).

[19] M. Świerczyński [in:] *Ustawa o świadczeniu usług drogą elektroniczną. Komentarz*, ed. J. Gołaczyński, Warszawa 2009, el/LEX 2019, Commentary to Art. 2, thesis 45 (5.07.2019).

that the catalogue of such means is open. In the doctrine it is suggested that the requirements characteristic for these means are also met by: electronic platform for public administration services (ePUAP), regional electronic platform for public services, Electronic In-Box apart from ePUAP[20], mobile phones (even 3G phones may be used to carry out most of the activities enabled by computers, e.g. sending text messages and picture messages)[21], online communicators (e.g. Skype, Telegram[22], Yahoo Messenger e.g. 0.8.288 version, FB Messenger, Google talk e.g. 1.0.0.104 version, or IRC rather rarely used in Poland today), mobile apps, operational systems (e.g. WhatsApp, Signal, Wire, Viber), latest generation fax devices[23], and other unnamed technical means, those which are now being created or those to come in the future. Theoretically such means also include pagers[24] (devices for sending short text messages to be seen on the display), however POLPAGER network no longer exists and the last nationwide calling network (Metro-Bip) in Poland was closed at the end of 2013.

Hence, there is a question whether the open catalogue of means of electronic communication which can be used in Poland to file an application, entails a breakthrough – both in science and in jurisprudence – related to the well-established view that there is a *numerus clausus* of the ways to lodge applications[25]. To provide a response to the above question it is necessary to define the terms "application" and "application in a form of an electronic document".

Submission of applications in a form of electronic document to public administration bodies via means of electronic communication

The possibility for individuals to submit applications via means of electronic communication to public administration bodies is only related to applications in a form of an electronic document and it is one of the important achievements of

[20] See: K. Wojsyk, *E-podręcznik, e-usługi publiczne*, https://epodrecznik.mc.gov.pl/mediawiki/index.php?title=%C5%9Arodki_komunikacji_elektronicznej (5.07.2019).

[21] J. Rzucidło, *Telefon komórkowy jako narzędzie elektronicznej administracji*, „CBKE e-Biuletyn" 2009, no. 2, p. 1; M. Świerczyński [in:] *Ustawa o świadczeniu usług drogą elektroniczną. Komentarz*, ed. J. Gołaczyński, Warszawa 2009, el/LEX 2019, Commentary to Art. 2, thesis 46 (5.07.2019).

[22] See: Telegram.org.

[23] See: K. Wojsyk, *E-podręcznik…*

[24] M. Świerczyński [in:] *Ustawa o świadczeniu usług drogą elektroniczną. Komentarz*, ed. J. Gołaczyński, Warszawa 2009, el/LEX 2019, Commentary to Art. 2, thesis 45 (5.07.2019). Although pagers are nearly forgotten now, it should be mentioned that in some situations it was more effective that mobile phones or Wi-Fi networks. They used lower frequencies that these devices as a result of which the waves penetrated various engineering structures.

[25] P. Przybysz [in:] *Kodeks postępowania administracyjnego. Komentarz*, el/LEX 2019, Commentary to Art. 63, thesis 3.

modern administration. The regulation contained in Art. 63 § 1 CAP does not provide a normative definition of application; it only specifies that this broad group of declarations of will and/or knowledge most of all includes "demands, explanations, appeals and objections", containing a minimum of elements stipulated by CAP or by specific regulations. These are submitted to initiate a proceeding (e.g. a request to start a procedure), as well as during the proceeding (e.g. a request to suspend a procedure), and sometimes after it is concluded (e.g. a request for access to files related to the proceeding – Art. 73 CAP), and they make it possible for the party to (and other participants of) the proceeding to communicate with an administrative body during all the stages of the procedure[26]. The types of applications listed in Art. 63 § 1 CAP do not constitute *numerus clausus*. According to science of administrative proceeding and to court rulings, applications also include: reminders (Art. 37 CAP), requests to reinstate a time-limit (Art. 58 CAP)[27], prosecutor's objections (Art. 184 CAP)[28], requests to review the case again (Art. 127 § 3 CAP)[29], requests to withdraw an appeal (Art. 137 CAP), requests to forego an appeal (Art. 127a § 1 CAP), as well as the party's consent for a change or for revoking the final decision pursuant to Art 155 CAP[30]. In line with judicature, applications do not include requests for information pursuant to the Act of 6 September 2001 on access to public information[31]. The differences between requirements defined for applications filed in a form of electronic document and those submitted in writing or orally mainly lie in the range of formal conditions[32], stipulated by CAP or by specific regulations. Applications in a form of electronic document are in fact understood as declarations of will and/or knowledge made by parties to (and other participants of) a proceeding and lodged with public administration bodies, containing a minimum of elements stipulated by CAP (or by specific regulations)[33], and submitted using means of electronic communication via an electron-

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[26] A. Skóra, *Ogólne postępowanie administracyjne. Zarys wykładu*, Elbląg 2015, p. 51; A. Skóra [in:] *Postępowanie administracyjne. Podręcznik*, eds. A. Skóra, P. Krzykowski (in print).

[27] A. Skóra, *Ogólne postępowanie*…, p. 51; P. Przybysz [in:] *Kodeks postępowania administracyjnego. Komentarz*, el/LEX 2019, Commentary to Art. 63, thesis 3; J. Wegner [in:] *Kodeks postępowania administracyjnego. Komentarz*, eds. W. Chróścielewski, Z. Kmieciak, el/LEX 2019, Commentary to Art. 63, thesis 1.

[28] A. Skóra, *Ogólne postępowanie*…, p. 51; J. Wegner [in:] *Kodeks postępowania administracyjnego. Komentarz,* eds. W. Chróścielewski, Z. Kmieciak, el/LEX 2019, Commentary to Art. 63, thesis 1.

[29] *Ibidem*.

[30] A. Skóra, *Ogólne postępowanie*…, p. 51 and references therein.

[31] See: e.g. judgment of the Regional Administrative Court (WSA) in Opole dated 13 June 2016, II SAB/Op 35/16; judgment of WSA in Warsaw, dated 6 Oct. 2017, II SA/Wa 422/17; judgment of WSA in Gdańsk, dated 16 November 2017, II SA/Gd 540/17.

[32] P. Gacek, *Istota podpisu na podaniu – wybrane zagadnienia*, PPP 2019, No. 6, p. 49.

[33] The legislator defined specific requirements to be met by applications and annexes submitted via electronic in-box (§ 17 clause 1 DSED) in a different way than in the case of applications submitted in writing or orally. Applications prepared in a form of electronic document should be made in XML data format, based on the templates of electronic documents available in the central

ic in-box (EIB) of the administrative body. Specific requirements with regard to electronic in-box are defined in the Decree of the President of the Council of Ministers of 14 September 2011 on the preparation and service of electronic documents and on providing access to application forms, templates, and copies of electronic documents (further herein "DSED")[34]. It is not inconsequential for the administrative body, and the party filing an application in an administrative procedure what hardware and software is used. Furthermore, the use of advanced technologies in communication with public administration should take place only if adequate security is provided to the participants in the proceedings.

Pursuant to § 3 clause 1 DSED, the public entity in its subpage at Biuletyn Informacji Publicznej (Public Information Bulletin) provides information, inter alia, related to the address of its electronic in-box, and the maximum size of electronic document sent including attachments, expressed in megabytes[35]. This is linked with the fact that, in accordance with opinions issued by administrative courts consistently since the late 1980s[36], "application (Art. 63 § 1 CAP) related to a specific matter does not only comprise a letter with a request but also relevant documents issued in official forms".

As it was already mentioned, in accordance with the interpretation of Art. 63 § 1 CAP, previously prevailing in the literature, the catalogue of permissible ways to submit applications was closed[37]. A different opinion was consistently presented by A. Wróbel[38]. An application was considered to be legally effective only if one of the forms indicated *expressis verbis* in the relevant regulation was maintained. In the context of the existing legal framework it can justifiably be assumed that there is an open catalogue of means of electronic communication to be used to submit an application in a form of an electronic document.

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or local repository. Annexes attached to letters are to be saved in data formats and in ways complying with regulations issued based on Art. 18 of the Act on informatization of activities carried out by public entities. In accordance with § 18 DSED, the template of the electronic document sent to the central repository should contain – in the XML data format – a definition of the structure of applications created on the basis of this template, defined in the XSD data format; determined method for visualisation of applications created based on this formula, defined in the XSL data format; and meta data describing the template of electronic document. These metadata should in particular specify: designer of the template (an entity responsible for the template), legal framework (if there is a legal regulation defining a requirement for the application to be filed in a specific form or in accordance with a specific template); title of the template briefly indicating the use of the documents which are to be created based on the template, and a description (range of potential uses for the template).

[34] Dz.U. 2018, Item 180.

[35] B. Kwiatek, *Istota i funkcje dokumentu elektronicznego w ogólnym postępowaniu administracyjnym*, unpublished doctoral disertation, Warszawa 2019, typescript owned by the author, p. 178.

[36] Judment of the Supreme Administrative Court of 9 June 1987, SAB/Wr 1/87 (not published).

[37] G. Łaszczyca, C. Martysz, A. Matan, *Kodeks postępowania administracyjnego. Komentarz*, vol. 1, Warszawa 2010, p. 530–531.

[38] *Ibidem*. Cf. Also: A. Skóra, *Ogólne postępowanie*…, p. 52 and references therein.

This conclusion is mainly supported by the argument claiming that it is impossible to predict the speed and the range of technological changes which may be reflected in the advancement of electronic communication. A valid point can also be made by referring to the principle of minimum formalism applicable to procedural activities (in other words: reduced formalism)[39]. This principle, in my opinion, is one of the basic rules determining the difference between administrative procedure and the formalised litigation in court[40]. Therefore, it should provide a standard for the most extensive protection of the rights applicable to parties to (other participants of) proceedings, in their relation to public administration bodies with a power of authority[41].

This rule has not been stipulated *expressis verbis* in CAP Part 1, Chapter 2 "General principles", but its contents are derived from the provisions of Art. 63–66 CAP[42]. In this light, first of all, although activities performed by an administrative body are formalised and should be executed in a specific manner, complying with the order and timelines stipulated in the regulations, declarations of will and knowledge lodged by parties to proceedings (mainly those expressed in the form of application) may (unless specific regulations do not stipulate otherwise) comprise only a minimum of formal requirements defined by law[43]. Most importantly the principle assumes that the scope of the claim raised by a party to (or another participant of) a proceeding should be examined and processed by the administrative body in accordance with the purpose of the declaration containing the said request rather than based on the name applied to it by the party (or another participant). In such a case the administrative body should provide the applicant with explanations and instructions to determine the actual will of the client, because ultimately the nature of such declaration must be specified by the client him/herself. Hence, if interpretation of an application raises any doubts, an administrative body should ask the relevant client for explanations, also advising them on possible consequences if such defects of the application are not corrected[44]. As rightly pointed out by M. Karpiuk, another important purpose of the principle of deformalisation is to create such options for parties (other participants) whereby the process of filing an application with a public administration

[39] A. Skóra, *Ogólne postępowanie…*, p. 52; M. Karpiuk, *Obowiązywanie zasady ograniczonego formalizmu w postępowaniu administracyjnym*, „Rocznik Nauk Prawnych" 2012, no. 3, p. 254; A. Skóra [in:] *Postępowanie administracyjne. Podręcznik*, eds. A. Skóra, P. Krzykowski (in print).

[40] A. Skóra, *Ogólne postępowanie…*, p. 26.

[41] M. Karpiuk, *Obowiązywanie zasady…*, p. 253.

[42] A. Skóra, *Ogólne postępowanie…*, p. 26, 52.

[43] *Ibidem*.

[44] Administrative body is bound by the essence of the client's claim and cannot independently define it in more precise terms, without „cooperation" with the client. *Ibidem*, p. 26, 52; M. Karpiuk, *Obowiązywanie zasady…*, p. 253. Cf. wyrok WSA w Łodzi z dnia 19 czerwca 2015 r., II SA/Łd 122/15 CBOSA.

body will as trouble-free as possible[45]. It is well known that it is the client who should always decide on the method of submitting the application, unless specific provisions stipulate otherwise[46]. Certainly, freedom in this respect should be within the limits set forth by legal regulations specifying the minimum formal requirements for applications[47]. Undoubtedly, given the continuous advancements in the methods enabling electronic communication between clients and administration bodies, the use of such means of communication will be more and more common. Hence, development of optimum legal solutions, construction of adequate technical infrastructures, as well as a change in the mentality of the Polish society and elimination of digital exclusion should, in the coming years, lead to increased number of applications submitted this way. However, the current statistical findings, presented below, clearly show that in Poland the rate with which individuals communicate with administrative bodies via electronic means is one of the lowest in the EU.

Use of electronic communication between individuals and public administration bodies in the light of statistical data

In the light of statistical data for 2018 published by GUS, in Poland people using the Internet accounted for 77.5%, while this technology was regularly (i.e. at least once a week) used by 74.8% of the Polish population. A minimum of one computer was owned by 82.7% households consisting of at least one person aged 16–74 years. As shown by GUS data, the rate has been systematically increasing year by year[48]. Notably, in 2018 as many as 84.2% of households had Internet access[49].

In 2017 nearly two in three business enterprises were parties to administrative procedures (including administrative proceedings) conducted exclusively via electronic means, without the use of hard copy (paper) documents. Services of e-administration were independently used by 71.3% of enterprises while 46.0% did that through another entity (e.g. accounting office)[50]. As for natural persons, those using public administration services via electronic means, in 2018, accounted for 35.5% of the population aged 16–74 years. According to GUS, in the last five years there has been an increase in the number of people

[45] M. Karpiuk, *Obowiązywanie zasady*…, p. 254.

[46] A. Skóra, *Ogólne postępowanie*…, p. 26, 52; M. Karpiuk, *Obowiązywanie zasady*…, p. 254

[47] P. Gacek, *Istota podpisu*…, p. 59.

[48] *100 lat GUS. Społeczeństwo informacyjne w Polsce w 2018 r.*, https://stat.gov.pl/…/pl/…/spoleczenstwo_informacyjne_w_polsce_w_2018_roku.pdf, p. 2.

[49] *Ibidem*, p. 1–2.

[50] *Ibidem*, p. 2.

downloading official forms, and sending completed forms, mainly to the electronic in-box of public administration bodies[51]. However, the progress is not overwhelming, as in 2018 the rate of those downloading official forms increased by 5.3% and those sending completed electronic documents by 8.9% in comparison to 2015[52]. Importantly, GUS does not specify whether these data relate to administrative proceedings, other administrative procedures or generally to any types of communication between individuals and administration bodies. Another interesting category reported by GUS for year 2018 is related to access to online information about e-services in administration. For instance, 24.4% of those using online services of public administration searched for the required information on the websites of these administrative bodies. However, electronic versions of official forms were downloaded from these websites by only 22.1%, and completed forms were sent by 24.6% of clients[53] (the data from GUS do not specify whether the communication was executed via the relevant electronic in-box).

Information storage device as a tool for submitting an application in a form of an electronic document

An interesting practical issue, sometimes also encountered in scientific discussion[54], is whether it is acceptable to submit applications in general administrative proceedings to public administration authorities using an information storage device and whether submitting an application in this way can be qualified as an electronic method of submitting an application. It should be pointed out that in the light of **Art. 16 clause 1** AIPE public entities which organise processing of data in ICT systems are to allow for submission of data in an electronic form. This may be executed by exchange of electronic documents related to matters handled by a given administrative body, for which information storage devices may be used in addition to means of electronic communication and electronic in-boxes provided[55]. The above is not merely a theoretical issue. The possibility to submit an application on an information storage device is particularly important if there are disturbances in electronic communication with an administrative body and it is difficult or impossible to submit an application using means of electronic communica-

[51] *Ibidem*, p. 2–3.

[52] *Ibidem*, p. 2.

[53] *Ibidem*, p. 4.

[54] J. Wegner [in:] *Kodeks postępowania administracyjnego. Komentarz*, eds. W. Chróścielewski, Z. Kmieciak, Commentary to Art. 63, thesis 3.

[55] *Ibidem*.

tion. It is assumed that such disturbances must not pose an obstacle for filing a letter in an electronic form[56].

To answer the above questions, first of all it is necessary to explain the term "information storage device". Pursuant to Art. 3 point 1 AIPE this is "a material or equipment used for saving, storing and displaying digital data". The above definition to an extent is clarified by Art. 61 point 1(1) AIPE, in accordance with which, in the event of doubts that may arise in connection to interpretation of legal regulations, "information storage device" should be understood, inter alia, as "an electronic storage device, electronic data carrier, data storage medium, computer data storage device, digital data carrier, electronic carrier, magnetic carrier, digital storage device", or "portable storage device". Like the definition of means of electronic communication, the general definition in Art. 3 point 1 AIPE is based on the assumption that it is necessary to account for ongoing technological developments[57].

Hence, "information storage devices" include such "materials" as e.g. disks: CD (or audio disk), DVD, BD (Blu-ray); USB memory (or flash drive), SIM cards (e.g. micro and mini SIM), SD and other[58]. The role of information storage devices may also be played by "equipment", in particular including computer, tablet, smartphone, MP3/MP4 player.

The question whether submission of an application saved in an information storage device complies with the requirements defined for electronic method of lodging applications, pursuant to Art. 63 § 1 CAP, is linked to the problem whether an information storage device can be viewed as a means of electronic communication as stipulated in Art. 2 point 5 ASEM in connection to Art. 63 § 1 CAP. As mentioned before, in order to be recognised as a means of electronic communication, an information storage device must meet four conditions defined earlier. Undoubtedly, an information storage device is a technology enabling individual communication between participants of a proceeding. Furthermore, specific information is saved in such devices in a form of electronic document. However, a storage device and the electronic document saved therein do not meet the condition requiring "individual distance communication by using data transmission between ICT systems" (Art. 2 point 5 *in fine* ASEM). Hence the lack of one of the essential characteristics defined for means of electronic communication, i.e. the lack of the

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[56] G. Szpor, K. Wojsyk [in:] C. Martysz, G. Szpor, K. Wojsyk, *Ustawa o informatyzacji działalności podmiotów realizujących zadania publiczne. Komentarz*, Warszawa 2015, p. 263 et seq.; J. Wegner [in:] *Kodeks postępowania administracyjnego. Komentarz*, eds. W. Chróścielewski, Z. Kmieciak, Commentary to Art. 63, thesis 3.

[57] G. Szpor, K. Wojsyk [in:] C. Martysz, G. Szpor, K. Wojsyk, *Ustawa o informatyzacji działalności podmiotów realizujących zadania publiczne. Komentarz*, Warszawa 2015, p. 49.

[58] J. Janowski, *Administracja elektroniczna. Kształtowanie się informatycznego prawa administracyjnego i elektronicznego postępowania administracyjnego w Polsce*, Warszawa 2009, p. 237.

process of communication by using data transmission between ICT systems, makes it impossible to recognise that an application submitted on an electronic data carrier is lodged via electronic means. Information storage devices, like applications submitted in writing, require a physical transfer of the information carrier between participants of the proceeding.

This, however, does not mean that an application saved in an information storage device is not acceptable[59]. Because an application submitted on an information storage device, as it has already been explained, cannot be considered as submitted in an electronic form, it seems that in this case we can say that (some or all) requirements defined for a form in writing are met. More specifically, if an application in writing is submitted (e.g. in person or via a postal operator) to an administrative body with an information storage device attached, in accordance with the CAP provisions the requirements defined for a written application are met. Likewise, an application submitted exclusively on an information storage device may meet requirements defined for a written application.

Conclusion

Developments in new technologies enabling long-distance communication between clients and bodies of public administration in general administrative proceedings have continued since the time Poland regained its independence in 1918. In 1928, the first Polish regulations pertaining to administrative proceeding, OAP, confirmed *expressis verbis* that an application may be filed via telegraph. In 1980 a more modern version of telegraph, i.e. teletypewriter (telex) was used in administrative practice, and telefaxes came in use from 1999, as well. Theoretically, the first means of electronic communication (e-mail) could be used by administration bodies from 1999. In practice, however, the available statistical data show that it is only in recent years that we can speak about a noticeable tendency for individuals to communicate with public administration bodies be these means.

The use of means of electronic communication is clearly in line with the basic principles of administrative proceedings. This is mainly linked with the principles of its limited formalism with respect to parties (and participants of the proceeding other than the administrative body) as well as transparency and simplicity of the proceeding whereby the administrative body should perform procedural actions by using the simplest means in the process of handling an administrative matter.

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[59] G. Szpor, K. Wojsyk [in:] C. Martysz, G. Szpor, K. Wojsyk, *Ustawa o informatyzacji działalności podmiotów realizujących zadania publiczne. Komentarz*, Warszawa 2015, p. 263.

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Summary

This article is an attempt to present the essence of electronic communication between clients (other parties to the proceeding) and administrative authorities in general administrative proceedings. It also presents advancements in the modern technologies of the 20th and 21st century (such as telegram, telex, fax) and especially means of electronic communication, which took place in recent

years in Poland. In its essence, electronic administration enables communication through strictly electronic means, eliminating the need for physical contact, as a result of which it is not necessary for parties to the proceeding and a body of public administration, to be present at the same time in the same place. Objectives of electronic administration are among the main factors allowing to overcome the problem of time and space in this modern organizational concept of state.

Keywords: electronic communication, electronic administration, means of electronic communication, administrative proceedings, IT data carrier

WYBRANE ZAGADNIENIA ADMINISTRACJI ELEKTRONICZNEJ. UWAGI NA TLE ŚRODKÓW KOMUNIKOWANIA SIĘ STRON Z ORGANAMI ADMINISTRACJI PUBLICZNEJ W OGÓLNYM POSTĘPOWANIU ADMINISTRACYJNYM

Streszczenie

W artykule podjęto próbę przedstawienia istoty komunikacji elektronicznej między stroną (innymi uczestnikami ogólnego postępowania) a organem administracji publicznej w ogólnym postępowaniu administracyjnym. Zaprezentowano także rozwój nowoczesnych technologii XX i XXI w. (jak telegram, teleks, telefaks) i szczególnie środki komunikacji elektronicznej, które rozwinęły się w ostatnich latach w Polsce. Istotne cechą administracji elektronicznej jest zdolność do komunikowania się za pomocą środków *stricte* elektronicznych, eliminując potrzebę kontaktu fizycznego, co pozwala na możliwość braku jednoczesnej obecności uczestników postępowania, takich jak strona i organ administracji publicznej. Założenia administracji elektronicznej są głównym czynnikiem przyczyniającym się do pokonania problemu czasu i przestrzeni w nowoczesnej koncepcji organizacyjnej państwa.

Słowa kluczowe: komunikacja elektroniczna, administracja elektroniczna, środki komunikacji elektronicznej, postępowanie administracyjne, informatyczny nośnik danych

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Piotr K. Sowiński

University of Rzeszów
ORCID: 0000-0003-2210-5877

THE RIGHT OF A PRE-TRIAL DETAINED PERSON TO LEGAL AID (ARTICLE 245 § 1 OF THE CODE OF CRIMINAL PROCEDURE)

According to the doctrine, the term pre-trial detention means, in principle, only an act carried out pursuant to Art. 244 § 1, § 1a and § 1b CCP[1], i.e. an action directed against a suspected person, if there is a reasonable suspicion that he or she has committed an offense, and there is an apprehension of flight or hiding, blurring traces of the crime, or the person's identity cannot be determined, or there are premises to conduct expedited procedure against that person (§ 1), or if there is a reasonable suspicion that a suspected person has committed a violent crime to the detriment of a co-resident, and there is a fear that he or she will commit a violent crime against that person again, especially when a suspected person is threatening to commit such an offense (§ 1a), or against a person suspected of committing an offense mentioned in § 1a with using a firearm, knife, or other dangerous object, and there is a fear that he or she will commit a violent crime against a co-resident again, especially when a suspected person is threatening to commit such an offense (§ 1b). This understanding of the institution of the pre-trial detention does not exhaust doctrinal views in this regard, as there are claims in favor of including the detention and compulsory bringing under Art. 247 § 1 CCP[2] as the pre-trial detention, though R.A. Stefański and S. Zabłocki consider the detention and compulsory bringing only in terms "close to the pre-trial detention"[3]. Simi-

[1] The Act of 6 June 1997, Code of Criminal Procedure (Dz.U. 2018, Item 1987 as amended).

[2] A. Zahuta, *Wybrane relacje pomiędzy KPW i KPK w zakresie procesowych zatrzymań uczestników postępowania karnego i postępowania w sprawach o wykroczenia*, „Monitor Prawniczy" 2004, no. 1, p. 2–27.

[3] Similarly, the detention and compulsory bringing pursuant to Art. 74 § 3a, Art. 75 § 2, Art. 285 § 2, Art. 376 § 1, Art. 377 § 3 and Art. 382, R.A. Stefański, S. Zabłocki, Code of Criminal Procedure. Volume II Commentary on Art. 167–296, LEX 2019, thesis 2 to Art. 244, https://sip.lex.pl/#/commentary/587781760/579200 915.05.2019).

larly, J. Skorupka seems to consider the pre-trial detention as only the one that is made pursuant to Art. 244 CCP, treating the pre-trial detention in the category of "the proper detention"[4]. Without going into a closer analysis of this issue, bearing in mind the subject of this paper and solely for its use – the pre-trial detention will be understood narrowly, i.e. as the detention carried out pursuant to Art. 244 CCP.

The separation of the detention regulation and its inclusion in a separate 50th chapter of Section VI of the Code of Criminal Procedure makes it an independent coercive measure, but also shows features that make it similar to preventive measures for which it plays a subsidiary role[5].

The pre-trial detention is reduced to short term imprisonment, however, limited functionally and temporarily by Art. 248 § 1 CCP. The detained person should be released when the reason for detention ceases, and also if, within 48 hours of the arrest made by the authorized body, he or she is not put at the disposal of the court together with the application for detention on remand. The same regulation requires a detainee to be released per order of the court and the prosecutor. Concerning those decisions, the act does not specify their grounds. It seems that in the first place the order will be given to the Police due to the cessation of the reason for the detention and the expiry of the maximum period of application of this measure, but also due to the fact that the detention was carried out without a sufficient reason. The order issued to the Police may be the result of some kind of self-control on the part of the authority conducting the criminal proceedings, but it may also be a consequence of the examination of the complaint about the detention by the court (Art. 246 § 1 first sentence CCP) and the finding that the measure was used in violation of the law ("illegality") or for no reason ("lack of legal basis"). In the last two cases, the court orders "the immediate release" of a detainee (Art. 246 § 3 CCP). The release of a detained person may be a derivative of the prosecutor's decision to apply a preventive measure other than detention on remand (Art. 247 § 5 *in principio* CCP). Finally, a detainee should be released if, within 24 hours of being put at the disposal of court, he or she has not been served with a decision of detention on remand (Art. 248 § 2 CCP).

Until the release, a detainee remains at the disposal of the Police or the authority conducting the criminal proceedings, which ordered the detention. Detention is a form of coercion[6], resulting for the detained person in isolation, deprivation of the right to move freely and to communicate with other people, it also

[4] J. Skorupka, *Zatrzymanie procesowe osoby podejrzanej*, „Prokuratura i Prawo" 2007, no. 11, p. 16.

[5] M. Cieślak, *Postępowanie karne. Zarys instytucji*, Warszawa 1982, p. 45.

[6] A. Kordik, *Wyjątki od konstytucyjnej zasady nietykalności osobistej*, „Acta Universitatis Wratislaviensis – Prawo" 1990, no. 73, p. 59.

includes prohibition to accept and transfer any items without the permission of an authorized body, as well as the obligation to comply with the instructions of the authority[7].

Both R.A. Stefański and B. Hołyst agree that, besides the deprivation of liberty, limitation of communication of a detained person with other people should be classified as the most serious of the inconveniences that affect detainees[8]. For the sake of the negative impact of detention on the sphere of personal freedom, J. Skorupek[9] postulates that individual prerequisites for detention should be interpreted in a manner consistent with Art. 41 section 1 in connection with Art. 31 section 3 Constitution and Art. 5 section 1 subparagraph c in connection with Art. 8 section 2 ECHR[10].

The aforementioned limitation of the detainee's ability to communicate with other people is a natural consequence of placing a detained person in an isolation, but it is also a derivative of the need to maintain confidentiality as to the information that relates to pre-trial proceedings or preliminary proceedings, in which application of the measure, referred to in Art. 244 CCP, occurred. Limitation of communication with other people is not absolute because a detainee retains the right to seek the assistance of an attorney or legal advisor. A detainee is notified at the start of detention about that right (Art. 244 § 2 CCP) and also about the right to use the free assistance of an interpreter if he or she does not speak Polish sufficiently. Although the legislator in Art. 244 § 2 CCP uses the verb "to inform", and the statement is defined as "information" (Art. 244 § 3 second sentence CCP), still it is undoubtedly an act that meets all the criteria of the instruction referred to in Art. 16 § 1 CCP, with all the consequences if the instruction is omitted or carried out incorrectly. The guarantee of contact of a detainee with an attorney, and obtaining legal advice in this way was provided to a detainee only by the current codification. The previous Code of Criminal Procedure of 1969 (Art. 205–208) did not provide a detainee such a possibility. This state of affairs was, however, a component of a broader and oppressive legal system.

A detainee is informed about the right to legal aid, but the obligation to provide such instruction was only precisely articulated in 2009[11]. Earlier, the instruction was covered by a collective and quite vague order to instruct a detainee

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[7] E. Skrętowicz, *Zatrzymanie jako środek przymusu*, „Problemy Praworządności" 1970, no. 9–10, p. 5; A. Kordik, *Wyjątki*…, p. 59; S. Waltoś, *Problemy niektórych wolności osobistych w świetle art. 74 Konstytucji*, „Państwo i Prawo" 1967, no. 8–9, p. 270.

[8] R.A. Stefański, *Zatrzymanie według nowego kodeksu postępowania karnego*, „Prokuratura i Prawo" 1997, no. 10, p. 33; B. Hołyst, *Kryminalistyka*, Warszawa 1996, p. 305.

[9] J. Skorupka, *Zatrzymanie procesowe*…, p. 23.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms drafted in Rome on 4 November 1950., subsequently amended by Protocols No. 3, 5 and 8 supplemented by Protocol No. 2 (Dz.U. 1993 No. 61, Item 284 as amended).

[11] Art. 1 point 1 of the Act of 24 October 2008 amending the Act – Code of Criminal Procedure (Dz.U. No. 225, Item 1485), amending this code on January 22, 2009.

"of his/her rights", which gave the possibility of any abuse in this respect. The current solution is more precise. And the extracting the right to use the assistance of an attorney or legal advisor from the "instruction about the rights [of a detainee]" raises this regulation to the rank of fundamental rights, equating it with other literally mentioned rights, i.e. to use free help of an interpreter if he or she does not speak Polish sufficiently, to refuse or to make a statement, to receive a copy of the detention report, to access first aid, as well as to exercise of the rights referred to in Art. 245, Art. 246 § 1 and Art. 612 § 2.

The legislator seemingly does not regulate the form of instruction under Art. 244 § 2 CCP, which could lead to an attempt to perform this activity orally. However, oral instruction, when a detainee is in a stressful situation, would be hardly guaranteed, especially given that, a detainee is provided with extensive information. In addition to the instruction on the aforementioned rights, a detainee is also informed about the content of Art. 248 § 1 and 2 CCP, i.e. circumstances justifying his/her release, as well as the reasons for detention. The above could lead to a hasty conclusion *de lege ferenda* to apply the written form of instruction even in the case of a detainee, as provided for in Art. 300 § 1 CCP concerning a suspect and Art. 300 § 2 CCP concerning a victim. However, there is no such need because Art. 244 § 5 CCP grants the Minister of Justice a delegation to develop a template of instruction on the rights of a detainee in criminal proceedings, which the Minister fulfilled by issuing a regulation dated 3 June 2015[12]. Thus, although the legislator does not direct to the detaining authority an explicit order to make this instruction in writing, however, the existence of such an order can be inferred from the fact that such a model was developed. So it seems that, even with the absence of Art. 244 § 5 CCP, the need to preserve a written form of instruction could be inferred from the fact that an arrest report is compulsory (Article 244 § 3 CCP). Such form of documentation of the detention is an obligatory and exclusive form. It is also the case advised by Art. 143 § 2 CCP, as a situation in which the preparation of a protocol requires a special provision. The protocol cannot be replaced by another form, since both Art. 143 § 2 first sentence CCP, and 244 § 3 CCP categorically instruct in this regard ("to write down" and "to write out"). The situation discussed in Art. 244 § 3 CCP is not "a different case" (Art. 143 § 2 second sentence CCP), in which it would be possible to replace the protocol with a less formalized form of consolidation, i.e. an official note, the content of which depends on the discretion of the authority preparing the note. Having determined that a report is the only form documenting the detention, one can return to the issue of the guarantee of the instruction mentioned in Art. 244 § 2 CCP. The protocol, the content of which is mentioned in Art. 244 § 3 first and second sentence, shall be served to a detain-

[12] Ordinance of the Minister of Justice of 3 June 2015 on specifying a template of instruction on the rights of a detainee in criminal proceedings (Dz.U. Item 835).

ee, as stated in the third sentence of the same provision. The copy provided to a detainee, besides the data known to a detained person like his or her name, includes personal data and the function of the person performing the activity of detention, and in case of the impossibility of establishing the identity of the detained person – his/her description, as well as the day, time, place, reason for detention, and the information what crime he or she is suspected of. Statements made by a detained person shall be added to the same report. It shall also be "marked" that a detainee was provided with the information about his/her rights.

In the current legal status, the phrase "to mention/to mark" used in Art. 244 § 3 second sentence CCP should be decoded as an indication that the instruction was given. It is unnecessary to extend the protocol with information about the content of the instruction, as the scope of this instruction is indicated by a detainee's signature below the information, prepared in accordance with the ministerial template. However, the situation would look different if the content of the Code lacked the provision of Art. 244 § 5 CCP, in this case, it seems that in fear of an allegation of incomplete instruction, the authority making the detention would understand the "mentioning/marking" as the basis for listing in the protocol those rights, which the detained person had been informed.

The legislator maintains the principle of professionalization in regard to legal assistance provided to a detainee within the criminal trial, i.e. the assistance can be provided only by representatives of one of two legal professional corporations, i.e. an attorney or a legal adviser. Legal assistance to a detained person may be provided only by an attorney or a legal adviser, which results directly from Art. 244 § 2, Art. 245 § 1 and Art. 178 point 1 CCP and harmonizes with the analogous solution applied by Art. 82 in connection with Art. 6 CCP in regard to a suspect (accused), as well as by Art. 87 § 1 in connection with Art. 88 CCP in regard to other parties of proceedings and by Art. 87 § 2 in connection with Art. 88 CCP in regard to those listed there. In all those cases, the legislator emphasizes the need for the defenders/attorneys to identify themselves with appropriate professional documents. A defender may be only a person authorized to defend according to the provisions of the constitution of the bar or the act on legal advisers (Art. 82 CCP), while the defender may be an attorney, legal adviser or counsel of the General Prosecutor's Office of the Republic of Poland (Art. 88 § 1 first sentence CCP), which is dictated not so much by the desire to impede the access to entities providing legal assistance, but by the determination of the legislator to provide such assistance at a sufficiently high substantive level[13]. However, while a defender can be only a legal adviser who is not in an employment relationship, with the exception of the employment of scientific re-

[13] See also: P.K. Sowiński, *Uzawodowienie podmiotów świadczących w procesie karnym pomoc prawną na rzecz stron tego procesu* [in:] *Role uczestników postępowań sądowych – wczoraj, dziś i jutro*, eds. D. Gil, E. Kruk, Lublin 2015, p. 109–129.

searchers and teachers (Art. 8(6) of the Act on legal advisors[14]), this limitation does not affect in any way any legal adviser acting in the foreground of the defense pursuant to Art. 245 § 1 CCP. Among the activities carried out by a legal adviser acting pursuant to Art. 245 § 1 and within the limits of Art. 82 CCP, there are differences only in quantitative and not qualitative matter, hence this existing state of affairs seems to prove a certain deficiency of the solution adopted in Art. 8(6) of the Act on legal advisers.

A detained person has the right to legal assistance from an attorney or legal adviser. Initially, Art. 244 § 2 CCP only mentioned attorneys, which was based on the misconception that the criminal defense should be the domain of only one professional corporation. In 2013, the two professional corporations were equalized, which was the result of a broad reform of the criminal trial that aimed to its contradictory purposes[15]. Actions taken by attorneys or legal advisers on the detainee's initiative are within their tasks set out in Art. 1, clause 1 in connection with Art. 4, paragraphs 1 and 2 of the Act on the Bar[16] and Art. 2 in connection with Art. 4 of the Act on legal advisors; both of those normative acts refer to "legal aid".

The Act, regarding the right of a detainee under Art. 245 § 1 CCP in regard to persons whom he or she may contact to obtain legal aid, uses their professional titles. Therefore, this provision refers to "an attorney" and "a legal adviser", not to "a defender" or "a representative". On one hand, this solution harmonizes with the content of Art. 6 in connection with Art. 71 § 3 CCP and Art. 87 § 1 and 2 CCP, but on the other hand it seems to indicate certain helplessness of the legislator, who is unable to determine the procedural position of the legists without reference to corporate laws.

Linking the defense, in the penal law procedure stage, with a suspect and an accused means that a detainee, who has not yet acquired such status, is not entitled to the assistance of an attorney, and *eo ipso* an attorney granting him/her legal assistance cannot be a defender[17]. The same detainee, due to the content of Art. 299 § 1 CCP, cannot be classified as a party to the preparatory proceedings, as this provision quite narrowly outlines the group of entities to whom this status is granted. Apart from a suspected and an aggrieved party, no other entity is a party to such proceedings, which implies the impossibility of treating an attorney or legal adviser cooperating with a detained person as legal representatives, as they may be appointed for parties other than the accused (Art. 87 § 1 CCP). It does not seem that a detained person who is not a suspect could be clas-

[14] Act of 6 July 1982 on legal advisers (i.e., Dz.U. 2018, Item 2115 as amended).

[15] Art. 1 point 54 of the Act of 27 September 2013 amending the Act – Code of Criminal Procedure and some other acts (Dz.U. Item 1247 as amended).

[16] Act of May 26, 1982, Law on the Bar (i.e., Dz.U. 2018, Item 1184 as amended).

[17] J. Skorupka [in:] *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2015, p. 574.

sified according to Art. 87 § 2 CCP, which would allow him or her to appoint a legal representative, but also would make the relevant authorization conditional on the assessment of the procedural authority, as to whether this is required by the legal interest in the pending proceedings. If one looks at an attorney and legal adviser mentioned in Art. 245 § 1 CCP in the context of the situation and through the prism of the fate of a detainee, it must be said that both of the abovementioned legists act on the foreground of criminal defense proceedings, not the representation. The argument stated above authenticates Art. 178, point 1 CCP, which puts the secrecy of an attorney and legal adviser on a par with the defense secrecy. The extension of the absolute prohibition of evidence provided in this provision gave rise to the determination of the secrecy of an attorney and legal adviser acting pursuant to Art. 245 § 1 CCP called a quasi-defense secret. It should be assumed that this term is correct not only because of the formal equalization of both mentioned in Art. 178 point 1 CCP secrets, but due to the nature of the circumstances disclosed by a detained during the consultation with an attorney and the functional relationship with the defense case. The nature of those circumstances is similar to the circumstances disclosed in the course of consultations of a suspect (accused) with a defense counsel, but it does not resemble the circumstances entrusted to a representative.

To conclude this part of considerations, which concerns the entity with whom a detainee has the right to contact pursuant to Art. 245 § 1 CCP, one should consider the situation of a detainee who has previously acquired the status of a suspect (Art. 313 § 1 or Art. 308 § 2 CCP). Such a detainee, as a person who meets the criterion of Art. 6 in connection with Art. 83 § 1 *in principio* CCP, will have the opportunity to contact his/her attorney or, not yet having an attorney, a legist to whom during the contact, in accordance with Art. 245 § 1 CCP, he or she will grant the applicable defense authorization. However, it should be remembered that the provision of Art. 245 § 1 CCP, which uses the terms "an attorney" and "a legal advisor" in no way limits the right of a detainee, who is a suspect, to contact an attorney other than the one he has previously appointed as his/her defender[18].

According to P. Hofmański and other commentators, although a suspect has the right to use the assistance of three defenders, a person who has been detained pursuant to Art. 245 § 1 CCP cannot request to contact each of them individually, or even with three at a time because this provision guarantees contact with only one attorney, not three[19].

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[18] A. Ludwiczek, *Sytuacja prawna adwokata udzielającego pomocy prawnej w trybie art. 245 § 1 k.p.k.*, „Problemy Prawa Karnego" 2001, no. 24, p. 107; *Kodeks postępowania karnego. Komentarz do art. 1–196*, vol. I, ed. P. Hofmański, Warszawa 2007, p. 1096.

[19] *Kodeks postępowania karnego. Komentarz do art. 1–196*, vol. I, ed. P. Hofmański, Warszawa 2007, p. 1096.

Although the phrase "contact of a detained person with an attorney" used in Art. 245 § 1 CCP, from the linguistic point of view, means "direct contact"[20], the statutory requirement is also fulfilled by the communication of the entities via a telecommunications device, i.e. indirect contact. K. Eichstaedt even suggests a form of an email[21]. Allowing other than direct forms of "contact" is justified, given the fact that the legislature in Art. 245 § 1 CCP allows the contact to be established in a manner possible in a given situation, i.e. "in an available form". The Supreme Court considers that, indicated in Art. 245 § 1 CCP term, must be interpreted as "taking into account the realities of a particular case, and above all the technical possibilities and conditions arising from applicable legal regulations, including the appointment of a public defender"[22].

In order to counteract the unauthorized restrictions on the detainee's right to contact an attorney or legal advisor, which may lead to "shallowing" that contact, the legislator develops the law in order to ensure that a detainee – in regard to "contact" with any of the attorneys – also has the right to "direct conversation with them". As a result of the above, accidental or brief contact of a detained person with an attorney or a legal adviser, is seen as not fulfilling its role, and should be considered contrary to the instruction of Art. 245 § 1 CCP, which guarantees a detainee a situation to "exchange words or views"[23], i.e. taking part in a deepened and focused conversation.

Due to the fact that the phrase "in an available form" refers to the act referred to as "establishing (…) contact" with an attorney or legal adviser, and not to the subsequent "direct conversation with one of them", hence it can be concluded that in the latter case a detainee should be allowed to use the form of contact with the legists that he or she requests. For practical reasons, such categorical approach to the form of conversation is difficult to accept, hence it is believed that the conversation can also take place via telephone links[24]; so it does not have to be a face-to-face conversation.

According to Art. 245 § 1 CCP, a person who carries out the detention may stipulate his/her presence during the conversation with an attorney, which in the literature is considered a circumstance to counteract attempts to obstruct the preparatory proceedings[25]. In its original version, this provision did not contain any preconditions, which came across justified criticism from the Constitutional Tribunal, which in its judgment of 11 December 2012 found it incompatible with Art. 42 section 2 in connection with Art. 31 section 3 of the Constitution of the Republic

[20] Dictionary of the Polish language, available on https://sjp.pl/kontakt (1.08.2019).

[21] K. Eichstaedt [in:] *Kodeks postępowania karnego. Komentarz*, vol. 1, ed. D. Świecki, Warszawa 2013, p. 742.

[22] Order of the Supreme Court of 13 October 2011 (III K 64/11), OSNKW from 2012, No. 1, Item 9.

[23] Dictionary of the Polish language, available on https://sjp.pl/rozmowa (16.08.2019).

[24] S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2016, p. 426.

[25] R.A. Stefański, *Zatrzymanie*…, p. 58.

of Poland in the part, in which the provision does not indicate the existence of any premise that would entitle the authority to be present during the conversation of a detained person with an attorney[26]. The argument mentioned above prompted the legislator to amend Art. 245 § 1 CCP[27], which occurred by indicating that the presence of authority during a conversation between a detained person and an attorney may take place only "in exceptional cases, justified by special circumstances". Although both conditions are stated as a form of "uniqueness" of a given case (see, among others, in Art. 156 § 5, Art. 357 § 5 and Art. 618fa § 1 CCP), as well as "special circumstances" (Art. 263 § 2 and Art. 607l § 1a CCP)[28] and were written in the Act, yet they still only simulate the concretization of the circumstances to control a conversation of a detained person with an attorney or legal adviser (until 2013), than they actually secure it. For the sake of accuracy, it should be noted that the changes made under Art. 245 § 1 CCP bring this provision closer to the solution known from Art. 73 § 2 CCP, which entitles the prosecutor to make reservations in preparatory proceedings "in particularly justified cases, if the presence of the prosecutor or a person authorized by the prosecutor during meetings and conversations between a detained (accused) and a defender is required by the good of the preparatory proceedings".

The indication in Art. 245 § 1 CCP, that a person who carries out the detention may reserve his/her presence during a conversation with an attorney or legal adviser means that this reservation of the right is optional and does not have to take place[29]. On the other hand, the provision of Art. 245 § 1 CCP, giving a detainee the right to contact an attorney or legal adviser, depends on the application of an authorized person. In other words, the detaining authority does not have to make *ex officio* any effort to help a detainee to obtain such contact. However, if the request has been clearly formulated by a detainee, the person who carries out the detention is obliged to provide a detainee the opportunity to contact any of the indicated attorneys. However, the authority is not responsible for whether an attorney or legal adviser will provide such assistance.

The doctrine also states that a detainee may complain regarding the presence of the person who carried out the detention during the conversation between a detainee and an attorney[30]. Although this view was not sufficiently substantiat-

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[26] Judgment of the Constitutional Tribunal of 11 December 2012 (K 37/11), OTK-A of 2012, No. 11, Item 133.

[27] Compare with Art. 1 point 2 of the Act of 27 September 2013 (Dz.U. 2013, Item 1282) amending the nineteen acts from 20 November 2013.

[28] These conditions – beside Art. 245 § 1 – are applied jointly only in Art. 618fa § 1 of the Code of Criminal Procedure.

[29] T. Grzegorczyk, *Kodeks postępowania karnego*, vol. I: *Artykuły 1–467. Komentarz*, LEX 2014, vol. 2 to Art. 245, https://sip.lex.pl/#/commentary/587631363/428803 (16.08.2019).

[30] J. Skorupka [in:] *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2015, s. 574. Unlike: T. Grzegorczyk, *Kodeks postępowania*…, vol. 2 to Art. 245, https://sip.lex.pl/#/commentary/587631363/428803 (16.08.2019).

ed by the author proclaiming it, i.e. J. Skorupka, it seems that it is based on the provision of Art. 246 § 1 CCP, which gives the court the opportunity to review the legitimacy and legality of detention, as well as its correctness[31]. However, if one considers the detention as a functional whole, consisting of a series of related activities, then the stated above view should be considered. As a result of a complaint made pursuant to Art. 245 § 1 CCP, of course the court will not order a detainee to be released, but will signal to the prosecutor and the superior authority over the authority which made the detention about the complaint found in the course of the examination of irregularities, which will have a preventive mark and which in the long run may become the basis for separate disciplinary action against the officer, who committed an offense against the detainee's right.

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[31] Similarly to: M.G. Węglowski, *Zatrzymanie procesowe – uwagi polemiczne*, „Prokuratura i Prawo" 2008, no. 9, p. 38.

Summary

The aim of the paper is to discuss the issue of detainee's access to legal assistance provided by an attorney or legal adviser, i.e. representatives of two equivalent legal professions. The author analyzed the restrictions related to access to such assistance, as well as the conditions enabling the detaining authority to reserve its presence during a detained person's conversation with one of the abovementioned legists. The paper also points out the doubts regarding the legal status of the consultant, i.e. whether he or she should be treated as a *sui generis* defender or a legal representative.

Keywords: detention, detained person, legal aid, attorney, legal adviser, defender, reservation of presence, defense secrecy, *quasi*-defense secrecy

PRAWO OSOBY ZATRZYMANEJ PROCESOWO DO POMOCY PRAWNEJ (ART. 245 § 1 K.P.K.)

Streszczenie

Przedmiotem opracowania jest kwestia dostępu zatrzymanego do pomocy prawnej świadczonej przez adwokata lub radcę prawnego, tj. przedstawicieli dwóch równorzędnych zawodów prawniczych. Omówiono ograniczenia związane z dostępem do takiej pomocy oraz przesłanki umożliwiające zastrzeżenie przez organ zatrzymujący jego obecności w trakcie rozmowy zatrzymanego z którymś z ww. prawników. Wskazano na wątpliwości związane ze statusem prawnym prawnika udzielającego konsultacji, tj. czy należy traktować go jako *sui generis* obrońcę, czy też pełnomocnika procesowego.

Słowa kluczowe: zatrzymanie, zatrzymany, pomoc prawna, adwokat, radca prawny, obrońca, zastrzeżenie obecności, tajemnica obrończa, tajemnica quasi-obrończa.

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Piotr Szreniawski

Maria Curie-Skłodowska University in Lublin
ORCID: 0000-0002-3448-0298

METHODOLOGY OF ADMINISTRATIVE SCIENCES FROM THE STANDPOINT OF THE THEORY OF HIERARCHIES' RIVALRY

Methodology of science is an issue attracting philosophers' attention for centuries, it is also of great importance in teaching. There is a noticeable interconnectedness, at an abstract level, between the way school subjects are distinguished and the way science is organized, however, achievements of sociology suggest that it is the human factor that is decisive not only when we consider the problem of teaching in schools, but also in the way scientific activity is handled. Hence, there are attempts to adjust the typology of sciences to the interests of the scientists involved. Another case relates to the attention paid by a methodologist of science to theoretical issues and disregard for more detailed aspects. On the one hand such approach makes it possible to apply clear classification criteria, on the other hand it may lead to the departure of science from social needs.

Theory of hierarchies' rivalry shows regularities related to the competition among various entities and systems. In administrative sciences one should show the rivalry of methodological concepts and the rivalry among selected entities. It is also necessary to focus on the relations between administrative sciences and other sciences. Classification criteria applied to differentiate sciences may comprise issues related e.g. to the subject matter of studies, the methods used or attempts to comprise the selected domain of science in a form of a limited number of sets. Sciences change their names, but on the other hand we can notice a continuity of names accompanied with a simultaneous change in the issues covered by a given science. Obviously scientific advancements in a way stimulate transformation in the internal order of a science and lead to changes in the areas of its focus, however sometimes the changes in the way a name is perceived may, as an example, be linked with a loss of importance or significance by a given science or with a recognition that completely different

issues should gain researchers' attention. Alchemy, in the past recognised as a very important science, later became synonymous to pseudoscience. On the other hand, metaphysics, by philosophers seen as a serious area of study, outside the world of philosophy may be perceived as a synonym of incomprehensibility. The concept of higher maths is frequently evoked with reference to self-perceived lack of knowledge of difficult issues related to greatly varied domains, not only scientific. Likewise, recognition, in literal or metaphoric terms, of phenomena in some way associated with a given discipline may be manifested by the use of their names, e.g. "there is no chemistry between us", or "biology has decided". The multitude of terms describing various sciences does not reduce the multiple meanings of the term alone; e.g. in Polish the term *nauka* is used to describe a science, as well as the process of studying by a pupil and the process of advancing the body of knowledge by scholars. The scientific world comprises both people, working in laboratories or at universities, and the culture shared by them.

Significance of specific individuals/entities in development of science may also be recognised as an important issue for methodology of sciences. Great individuals sometimes symbolise specific domains, schools or theories. People who present views of founding representatives of specific sciences, schools or theories in a way use the authority of those individuals to add credibility to their own words, however the process of conveying other people's opinions may also be perceived e.g. as a way to refer to the community whose culture we cultivate. From the standpoint of the theory of hierarchies' rivalry, the important aspects include reference to and recognition of the greatness of specific individuals, e.g. authors of theories or founders of sciences, as well as links between science and the environment, among others by ignoring or recognising accomplishments of people representing other schools, countries or cultures. Methodology of sciences, from the viewpoint of the theory of hierarchies' rivalry, relates to competition between various concepts for organising sciences.

According to the theory of hierarchies' rivalry, social life means rivalry of hierarchies. Rivalry may take forms of physical combat, discussion or be seen e.g. in the sphere of respectful behaviours; it may involve small groups of people or large empires. The processes connected with rivalry of hierarchies include establishment of new hierarchies, absorption of weaker hierarchies by stronger ones, and changes at the top of hierarchies. Changes at the top of hierarchies may take a form of revolution or invasion. The term revolution here relates to a change executed by a lower hierarchy belonging to a given hierarchy, while the term invasion relates to an impact of another hierarchy on a change at the top of the hierarchy. This is similar to a situation where a choice is between promoting a staff member to a managing position or nominating a manager from outside the organisation.

Among various opinions related to administrative sciences there are views claiming it is a single science and on the other hand there are arguments showing multitude of administrative sciences. The concept of the three pillars of administrative sciences may be considered as a middle-of-the-road idea. A comparison of the dynamic advancements in the study of administrative law, and the more modest study of administration as well as the almost completely ignored discipline most commonly referred to as science of administrative policy shows a lack of balance in the development of the specific components of the above triad. The concept of a single study of administration, sometimes referred to as theory of administration, is consistent with the opinion claiming that each and every science can be recognised as philosophy, in line with the original meaning of this word. Arguments supporting the opinion about a multitude of administrative sciences refer to such facts as the development of such disciplines as history of administration[1] and the emergence of such subdisciplines as sociology of administration and psychology of administration[2]. Here one should point out that the good will of representatives of various sciences enables collaboration and sharing of information, despite the differences of opinions regarding methodology of sciences.

The dominance of the study of administrative law may provide an example for an analysis from the standpoint of the theory of hierarchies' rivalry. University "departments of law and administration" in actuality often are "departments of law", even though more students in these departments pursue other courses of study than law. Likewise, research in administration is not always adequately valued, and researchers many times are forced to add legal issues to their research in administration – otherwise such studies are not recognised as serious enough. In this context there is a noticeable conflict between the way administrative sciences are looked down at, and the willingness displayed by representatives of more theoretical or historical legal sciences to teach courses in administration or to hold positions in administrative courts. To avoid excessive controversy, one must point out that these phenomena alone do not have to impair e.g. the quality of teaching or adjudication if a given individual performs their duties with diligence; this however must be linked with disapproval for underestimation of administrative sciences. To be fair we must remember that certainly such reservations also apply the other way, e.g. with regard to administrative science specialists interested in the theory of law, sociology or psychology.

The decision related to the unity or multitude of administrative sciences does not have to be clear-cut and definitive, so one can sometimes look at administrative sciences as a whole, while permitting the specificity of selected sciences when conducting detailed research. This variable perspective may facilitate flow

[1] J. Malec, D. Malec, *Historia administracji i myśli administracyjnej*, Kraków 2000, p. 11.

[2] T. Skoczny, *Podstawowe dylematy naukowego poznania administracji państwowej*, Warszawa 1986, p. 47.

of information across administrative sciences, and make it possible to avoid duplication of studies focusing on specific problems, unless varied approach to one subject matter is required. Interdisciplinary knowledge of administrative sciences can be inspiring, provided that it does not limit development, e.g. by imposing views or terminology[3].

Hierarchies' rivalry among scientific centres relates to both fame and more prosaic aspects. Various dimensions of rivalry among hierarchies tend to be interconnected; hence we may see association e.g. between recognition for significance of a given scholar and the development of a hierarchy with which the said scholar is or was linked. On the other hand, underestimation of research or even specific sciences, most commonly results from attempts to limit a competing hierarchy.

The issue of rivalry in the sphere of language is not only related to the choice of a name for a given domain or a phenomenon, but is also linked with communication in a specific language. The noticeable difficulties in translating concepts e.g. related to self-governance or even names of sciences make it necessary to choose among various ways of presenting the relevant issues. One may seek to achieve compliance e.g. with sciences in German language or to independently develop a conceptual apparatus. These two tendencies as a rule should be combined in a specific way, hence it is necessary to acknowledge accomplishments of various European countries, and at the same to promote underrated scientific centres or communities.

Imperialist tendencies in science can also be seen in the domain of methodology of sciences, for instance in developing historical perspectives covering subject matter from the standpoint of a specific facility. Lies produced by historians, as a rule, are used by the authorities wishing to impose a vision of the past which justifies specific actions or the state of affairs; later however the subsequent generations of researchers, out of ignorance rather than ill-will, propagate the untrue picture of the events. A controversy regarding existence of objective opinions e.g. related to history, should not lead to careless approach to science, and activities in the field of methodology of science should also be associated with attempts to present events based on the best knowledge. Such naive approach may also be linked to a pursuit of pure knowledge, which many times obviously led to embarrassing results. Perhaps, however, attempts to judge phenomena related to methodology in a relatively detached way, make it possible to choose solutions based on scientific rather than e.g. personal or political criteria.

The theory of hierarchies' rivalry assumes that hierarchies include systems of norms and associations. In this context the term associations should be understood in a way similar to the concept of organisation, in the subjective sense, because if we use the concept of group, this will not be consistent with achievements of sociology. Notably, a distinction into community and society, as de-

[3] Z. Leoński, *Nauka administracji*, Warszawa 2004, p. 15.

scribed by Ferdinand Tönnies[4] is not used here. Hence, associations comprise individuals acting together. Even if there is emphasis to the importance of equality-related issues, and there are no formal structures, associations can be described as hierarchies since they are linked to systems of norms, also seen as hierarchies. Importantly, systems of norms and associations are usually interconnected, but these two types of hierarchy are distinguished because rivalry between hierarchies, as a rule, takes a form more linked with the rivalry of systems of norms, or related to rivalry between organisations in a subjective sense – seen as associations.

By analogy, just as the totality of legal norms may be divided into branches, the totality of scientific knowledge may be divided into sciences, however such distinction does not depend only on the subject matter linking norms of a given branch or research in a given science; it also relies on acceptance by the society[5]. Social approval in the area of methodology of sciences, regarding the terminology and the contents, both in scientific research and in education, comprises acceptance by scientists and by the political environment. Rivalry of hierarchies in this sphere may be linked with the relationship between progress in scientific research and expertise of political decision-makers. Most commonly this relation resembles Weber-type relationship between administration and politics, which means it is linked to existing specialist expertise in sciences and less academically oriented politics. Importantly, key decisions are made in politics – as much as in business - while administration or even the sphere of science must adapt.

The extent of freedom in scientific research may be associated, e.g. with the autonomy of a university or with political pressure faced by the sphere of science. Issues related to financing or employment commonly reflect to what degree science is independent from politics. A certain degree of autonomy awarded to entities involved in science may be seen to reflect a growing importance of these entities. By perceiving these entities as a hierarchy, it is possible not only to focus on their rivalry with other entities, but also to investigate the relevant phenomena as processes occurring within a larger hierarchy, comprising e.g. a specific country.

Rivalry of normative systems with respect to methodology of administrative sciences may be perceived in various planes. Apart from the academic rivalry between countries, for instance involving emphasis to both the significance of their own scholars and application of methodologies developed by these individuals, we can point to such phenomena as coexistence of administrative sciences with organisation studies or legal sciences. It is suggested the flow of information between administrative sciences and organisation sciences is insufficient.

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[4] F. Tönnies, *Wspólnota i stowarzyszenie*, Warszawa 2008, p. 67.

[5] S. Pilipiec, P. Szreniawski, *Akceptacja społeczna jako podstawa wyodrębniania się gałęzi prawa*, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza” 2010, Prawo 9, p. 121.

Students taking economics courses sometimes learn about similar issues, or profiles and achievements of the same classics that are discussed in administration courses. On the other hand, detailed research in organisation sciences in many cases investigates phenomena related to administration processes, however without focus to their specificity. Hence, we are dealing with effects of subjective approach to research in administration. From the standpoint of organisation sciences, administration is an example of an organisation, or it is an organisation with specific characteristics[6]. On the other hand, according to representatives of administrative sciences, specificity of administration (obviously perceived as an organisation, however of a specific kind) is so distinctive that many observations pertain to administration only[7]. A starting point here may involve concept analysis, therefore we will achieve different results, depending on how we understand the term administration. In many cases regularities related to administration apply to other organizations as well, however due to its strong links to the public sphere, administration is a characteristic entity. Here we can notice similarities between administration and administrative law. It is well known that Romagnosi's considerations related to public law also included constitutional law, criminal law and administrative law; the latter was actually distinguished by him. Because of its associations with the authority on the one hand, and with office work on the other, administration combines that which is general with that which is specific. Administration is a well-defined mediator between a citizen and the authority. It is sufficiently interesting, so that in many countries there are administrative courts and schools providing education to future administration personnel; besides that, research in administration is carried out.

From the standpoint of the theory of hierarchies' rivalry, ordering of administrative sciences may be perceived as implementation of specific individuals' ideas; it may also be an example of how solutions adopted in other countries may be copied. In Poland there are well-known examples of foreign models implemented in practice, and frequently it is the attitude to the relevant culture that seems to determine perception of the regulations or entities imitated based on foreign models. As an example, the solutions adopted in Poland, such as courts of justice based on Austrian models, or the institution of Ombudsman, known from Sweden, are not associated with complexes; on the other hand, the Russian origins of the Supreme Audit Office sometimes are ignored. A super interesting phenomenon was the fact that Japan applied western models during Meiji reforms. As Japan's industry was developing, the initial acknowledgement of its backwardness was replaced by a sense of the country's uniqueness, and by ef-

[6] J. Łukasiewicz, *Zasada organizacyjnej elastyczności aparatu administracji publicznej*, Warszawa 2006, p. 42.

[7] J. Borkowski, *Określenie administracji i prawa administracyjnego* [in:] *System prawa administracyjnego*, vol. 1, ed. J. Starościak, Wrocław–Warszawa–Kraków–Gdańsk 1977, p. 34.

forts to impose the adopted solutions on the neighbouring countries. Many historical examples of attempts to influence the entire world were associated not only with imposition of political power or with military action, but also with cultural influence, related e.g. to language and the area of science. Certainly, such issues may be linked to the relationship of the power of a country, the size of its cities or its financial capacities and development of culture, including science; however, it is also necessary to acknowledge the capacity of imperial powers to promote or even impose their worldviews and culture to other countries. An example of Ionian philosophy, which affects the way of thinking about the world in many different countries despite the insufficient political power of Greece, seems to contradict the association between the strength of a given hierarchy and its effect in other hierarchies; however, this example may relate not only to strength of a country, but also strength of a hierarchy of another kind, in promoting various solutions. Systems of norms, known from ethics, statutory law and in other areas, take effect not only in connection to military or trade contacts between countries. Entities at the same time belong to and represent a variety of hierarchies, although we can often point out which hierarchy affects an entity in a given situation.

The process of hierarchies' rivalry is manifested in methodology of administrative sciences at a level of authorisation, teaching and application of the results of these sciences. Education of officers, i.e. acquainting them with a specific culture, takes place both in offices, at universities and in many other places. An individual, as well as their behaviours and attitudes are affected by their affiliation to various organisations and contact with information from selected mass media. Such effects may be seen as examples connected with an individual's affiliation to specific hierarchies. The most visible dimension of rivalry between hierarchies comprises the examples when an individual must choose among various solutions suggested by the hierarchies. A conflict between a religious norm and a norm of statutory law, or a conflict between requests made by one's supervisor or family member are examples raising specific controversies, yet they are known from real life and from works of literature. Impact of the terminology and the subject matter covered by research, from administrative law to administration studies, is known and acknowledged. On the other hand, a potential for development in the numerous administrative sciences suggests one should reflect on the scope of the subject matter to be covered by the discipline referred to as study of administration.

In many cases research in administration combines approaches used in the traditionally understood study of administration and those applied by other sciences. A specific rivalry may result from deliberations e.g. related to the question whether history of administration should be recognised as part of historical studies or administrative sciences, or whether sociology of administration should be

recognised as part of sociology or as an area of research more closely linked to administrative sciences; this problem may be resolved in various ways, however it is the researcher's affiliation that is of essential importance for conclusions from such deliberations. The lack of its own research method is often brought up as an objection against administrative sciences. To resolve the problem, it is sometimes pointed out that the specificity of the subject matter covered by administrative sciences affects the design of such research, and that numerous methods, such as observation or review of documents, are in fact used in various sciences. According to the concept of general and specific administrative sciences, instead of the traditionally understood study of administration, philosophy of administration is distinguished as a science focusing on the most general and essential issues of administration, and additionally covering the issues of methodology of administrative sciences.

One might wonder if it would be justified to distinguish such disciplines as ethics of administration or aesthetics of administration, given the fact that traditionally aesthetics and ethics are recognised as parts of philosophy. Furthermore, many sciences came into being because of the progress in a specific area of philosophy. Of major importance here is the multi-dimensional independence actually achieved by such disciplines. Rather than top-down decisions establishing separate disciplines of science, here it is necessary to recognise the emerging communities of scholars mainly interested in a given area of the reality. Theory of hierarchies' rivalry suggests that the influence of the political sphere is also important for scientific life, but the political sphere usually to a certain degree takes into account the reality of scientific research. Here we encounter rivalry related to decisions made with regard to separateness of selected sciences, rather than only their autonomy or impact in the domain of politics. Philosophers' rule, envisaged by Plato, was linked with disregard for poets. It is sometimes proposed that administration emerged along with writing, hence a form in writing, rather than spoken word, is a guarantee of accuracy and expertise. The art of administration results from the process of governance, and its usefulness sets it apart from poetry and brings it closer to such disciplines as journalism or art of correspondence. Just like the principle of a written form, the principle of legalism results in the impersonal nature of administration, and its association with authority; thereby it is guaranteed that officials' operations are consistent with the ruling of a regulation or an authority in power. By explaining specific written terms to a client, administration enables communication between the authority and the citizen, as much as adequate interpretation of regulations makes it possible to realise public interest while respecting interest of an individual. From this standpoint administration is both an interpreter and a negotiator. Hence, it seems important to incorporate elements of ethics into teaching of administrative culture, both at the stage of university education and when introducing new em-

ployees to work in administration. The dilemma whether, and to what extent, administrative ethics should be taught at university or by other entities may also be perceived as an example of a rivalry of hierarchies; it may also be a starting point for a discussion about a separate discipline of pedagogy of administration[8].

Issues related to teaching of administration tend to be overlooked in academic discussions, however the quality of education largely depends on the competences of university teachers related to sharing the knowledge connected, for instance, with application of administrative law. Furthermore, it is necessary to recognise a variety of other issues linked to coexistence of hierarchies, and therefore constituting possible subject matter of research in rivalry of hierarchies and comprising the most important aspects related to the existence of hierarchies in general. By separating subdisciplines focusing on processes, e.g. study of planning, study of managing, study of coordination or control, it may be possible to identify a number of phenomena related not only to administration but also to the functioning of hierarchies. By recognising such disciplines as study of governance, study of self-governance, study of private administration, as well as comparative study of administration and study of diplomacy, we will point to possible research focusing on and comparing various administration-related entities.

From the standpoint of the theory of hierarchies' rivalry and its application in analyses of methodology of administrative sciences, it is extremely important to distinguish educational courses connected with sharing of knowledge related to administration. Selection of specific university courses is a combined result of preferences of the academic staff, requirements defined for the universities by the relevant ministry, as well as expected needs of those graduating from university courses in administration. Teaching of administration at universities may be understood as a process of preparing a future employee of administration for work within the administration hierarchy, operating in a specific environment[9].

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Summary

Social life is a rivalry of hierarchies. There are many different ideas about how to organize administrative sciences, and those ideas are contradictory to one another. On one side we have the view that one administrative science exists, and on the other hand we can show many administrative sciences. The administrative science triad can be seen as a compromise between those options. There are many factors affecting how administrative sciences are organised. One of the factors is how academic teaching at universities is divided. Another factor is how countries promote their scientists and their theories concerning administration and similar subjects.

Keywords: methodology, administrative sciences, the rivalry of hierarchies theory

METODOLOGIA NAUK ADMINISTRACYJNYCH W PERSPEKTYWIE TEORII RYWALIZACJI HIERARCHII

Streszczenie

Życie społeczne to rywalizacja hierarchii. Istnieje wiele różnych pomysłów na organizowanie nauk administracyjnych, a te pomysły są ze sobą sprzeczne. Z jednej strony mamy pogląd, że istnieje jedna nauka administracyjna, a z drugiej strony możemy pokazać wiele nauk administracyjnych. Administracyjna triada naukowa może być postrzegana jako kompromis między tymi opcjami. Istnieje wiele czynników wpływających na organizację nauk administracyjnych. Jednym z nich jest podział nauczania akademickiego na uniwersytetach. Kolejnym czynnikiem jest to, w jaki sposób kraje promują swoich naukowców i ich teorie dotyczące administracji i podobnych przedmiotów.

Słowa kluczowe: metodologia, nauka administracji, teoria rywalizacji hierarchii

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Renata Świrgoń-Skok

University of Rzeszow
ORCID: 0000-0003-2635-6462

HEREDITAS DAMNOSA – HEREDITAS SUSPECTA THE RISK OF INHERITANCE ACQUISITION IN ROMAN LAW

1. The article is an attempt to present the risk associated with inheritance acquisition in Roman law. Acquisition of inheritance by the appointed successor could lead to negative consequences for the heir, the testator's creditors as well as the heir's creditors.

Acquisition of inheritance could result in the heir's impoverishment, because he was liable with his entire property for the debts encumbering the inheritance even if these exceeded the assets of the inherited estate. This could happen particularly in the case of *hereditas damnosa*[1], or the so-called cursed inheritance where debts were greater than the value of the bequest.

Acquisition of an inheritance by a successor could lead to impoverishment of the testator's creditors. This happened in a situation when the heir's property was excessively in debt. In such case those participating in the foreclosure of the heir's property would include his personal creditors, as a result of which the heir's property would be insufficient to cover all the inherited debts. This was possible particularly in the case of the so-called *hereditas suspecta*[2], i.e. an inheritance overcharged with debts where it was suspected the heir deliberately encumbered his property so that he was unable to satisfy the inherited creditors.

Finally, acquisition of inheritance could be harmful to the heir's creditors. This happened in a situation where the heir's property was not overcharged with

[1] Hereditas damnosa – "cursed inheritance" or passive inheritance, where debts exceeded the value of the estate D.17,1,32 Julianus). See: W. Litewski, *Słownik encyklopedyczny prawa rzymskiego*, Kraków 1998, p. 109; J. Sondel, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 1997, p. 425. Widely: R. Świrgoń-Skok, *Hereditas damnosa – ryzyko nabycia spadku w prawie rzymskim* [in:] *Zbytek i ubóstwo w starożytności i średniowieczu*, eds. L. Kostuch, K. Ryszewska, Kielce 2010, p. 121–130.

[2] *Hereditas suspecta* is referred to in the following passages by Ulpian D.36,1,3pr; D.36,1,17,5 and D.36,1,57,2 Papinian.

debt while the inherited estate was significantly in debt and there was a risk that the heir's personal liabilities would not be fully satisfied, and that as a consequence, the heir's creditors would be impoverished.

All these negative consequences associated with acquisition of inheritance were linked with the merger of the testator's estate with the heir's property resulting from the acceptance of the inheritance, and the related liability for inherited debts.

2. In Roman law, following a testator's death, the heir only received the right to accept the inheritance (*delatio hereditatis*)[3]:

D.50,16,151: (*Clementius libro quinto ad legem Iuliam et Papiam*): *"Delata" hereditas intellegitur, quam quis possit adeundo consequi*.

Hence, nomination for inheritance only provided a legal option to obtain the estate. If the inheritance was to be actually transferred to the successors, it was to be acquired (*acquisitio* or *editio hereditatis*). Due to this Roman law distinguished two categories of inheritors:

G.2,152: *Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei*.

Two categories of successors include necessary inheritors (*heredes necessarii*), and voluntary inheritors (*heredes extranei*).

Necessary inheritors (*heredes necessarii*) were simply *heredes domestici*, i.e. all members of the deceased person's family who following his/her passing acquired status of persons *sui iuris* (G.2,156–157; I.2,19,2). They acquired the inheritance *ipso iure,* or at the time of nomination, without taking any action. The inheritance could be bequeathed to them without their knowledge or even against their will[4]. Necessary but not domestic inheritors included testator's slaves who were liberated in the testament and designated as heirs (G.2,153; I.2,19,1)[5].

Voluntary inheritors (*heredes extranei* or *voluntarii*) included individuals other than family of the deceased person (G.2,161–162; I.2,19,3)[6]. In order to

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[3] More about appointment for inheritance, see: C. Beduschi, *Hereditatis aditio*, Milano 1976, p. 1 et seq.; Y. Gonzalez Roldan, *Propuesta sobre la ventral de herencia en el derecho romano clasico*, Mexico 1997, p. 11 et seq.; A. Montanana Casani, *La veuve et la succession hereditaire dans le droit classique*, RIDA 2000, no. 47, p. 415 et seq.; J.W. Tellegen, *The Roman law of succession in the letters of Pliny the younger*, Zutphen 1982, p. 21 et seq.

[4] The term *Heredes necessarii* is referred to e.g. in the following passages: G.1,54; Epit. Gai. 2,3,6; I.2,19pr; I.2,19,2; I.1,6,1.

[5] Cf. also: A. Guarino, *Il beneficium separationis dell' heres necessarius*, ZSS 1940, no. 60, p. 185 et seq.; *idem*, *Gai.2,155 e il beneficium separationis dell' heres necessarius*, SDHI 1994, no. 10, p. 140; H. Levy-Bruhl, *Heres*, RIDA 1949, no. 3, p. 137 et seq.; G. Scherillo, *Successione ed Estinzione dei raporti giuridici. Studi in onore De Francisco*, vol. 2, Milano 1957, p. 610 et seq.; R. Świrgoń-Skok, *Ograniczenie odpowiedzialności dziedziców koniecznych (heredes necessarii) za długi spadkowe w rzymskim prawie klasycznym* [in:] *Quid leges sine moribus. Studia nad prawem rzymskim dedykowane Profesorowi Markowi Kuryłowiczowi w 65. rocznicę urodzin oraz 40-lecie pracy naukowej*, ed. K. Amielańczyk, Lublin 2009, p. 143–160.

[6] See also: I.2,19,5; C.2,2,2 Gordian; C.2,7,15,1 Leo.

obtain an inheritance they had to perform *aditio hereditatis,* that is a legal act by which *heredes voluntarii (extranei)* acquired the legacy[7].

By acquiring an inheritance, the person designated as a successor would become an heir (*heres*):

D.29,2,54 (*Florentinus libro octavo institutionum*): *Heres quandoque adeundo hereditatem iam tunc a morte successisse defuncto intellegitur.*

The inheritor assumed all the rights of the deceased person, from the moment of the testator's death irrespective of the time the estate was taken over. This however did not apply to strictly personal rights. The inheritance merged with the heir's own property:

D.50,17,62 (*Iulianus libro sexto digestorium*): *Hereditas nihil aliud est, quam seccessio in universum ius, quod defunctus habuerit.*

This is because inheritance acquisition resulted in a fusion of the testator's and the inheritor's property. Consequently, the heir owned the bequeathed assets, as well as the testator's liabilities and debts.

3. As a result of such fusion of the properties, liability for inherited debts could exceed the value of the inheritance and extend to the heir's personal property. Acquisition of inheritance could lead to impoverishment of the heir, because he was liable with his entire property for the debts encumbering the inheritance even if these exceeded the assets of the bequeathed estate.

This could particularly happen in the case of *hereditas damnosa,* or cursed inheritance, where debts exceeded the value of the estate[8]:

G.2,163: *Sed sive is, cui abstinendi potestas est, inmiscuerit se bonis hereditariis, sive is, cui de adeunda deliberare licet, adierit, postea relinquendae hereditatis facultatem non habet, nisi si minor sit annorum XXV: nam huius aetatis hominibus, sicut in ceteris omnibus causis deceptis, ita etiam si temere damnosam hereditatem susceperint, praetor succurrit. scio quidem divum Hadrianum etiam maiori XXV annorum veniam dedisse, cum post aditam hereditatem grande aes alienum, quod aditae hereditatis tempore latebat, apparuisset.*

According to Gaius, an underage person, being either a necessary inheritor in charge of the estate, or voluntary inheritor who received an inheritance, could be granted *restitutio in integrum* by the Praetor, if they had acquired a harmful inheritance (*damnosam hereditatem susceperint*). Additionally, the jurist reports

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[7] See: B. Biondi, *Istituti fundamentali di diritto ereditario romano*, Milano 1948, p. 23 et seq.; C. Fadda, *Concetti fondamentali del diritto ereditario romano*, vol. 2, Milano 1949, p. 31 et seq.; G. La Pira, *La successione ereditaria intestata e contro il testamento in diritto romano*, Firenze 1930; 17 et seq.; L. Pietak, *Prawo spadkowe rzymskie*, Lwów 1882, p. 82 et seq.; P. Voci, *Diritto ereditario romano*, Milano 1960, p. 376 et seq.; A. Watson, *The law of succession in the later Roman republic*, Oxford 1971, p. 50 et seq.

[8] More: R. Świrgoń-Skok, *Hereditas damnosa*…, p. 121 et seq.

that starting from Hadrian's times, individuals of legal age would also be entitled to benefit from this privilege if, upon inheritance acquisition, any debts that had previously been hidden came to light.

A reference to *hereditas damnosa* is also found in Fragmenta Augustodunsiana:

Frag. August. 2,30: *Ita dixit : "Ignorans, cum lateret aes alienum, adii hereditatem; postea emersit grande debitum, apparuit damnosa ea hereditas; ergo a te peto, ut liceat mihi discedere". Concessit ei imperator*.

In the above passage the Author says that if a cursed inheritance was acquired and the inheritor was not aware of the existing debts, they could request that their personal property be separated from the estate after hidden debts came to light.

Justinian also writes about the possibility of applying the rule of *restitutio in integrum* if harmful inheritance is acquired:

I.2,19,5: *Extraneis autem heredibus deliberandi potestas est de adeunda hereditate vel non adeunda. sed sive is cui abstinendi potestas est immiscuerit se bonis hereditariis, sive extraneus, cui de adeunda hereditate deliberare licet, adierit, postea relinquendae hereditatis facultatem non habet, nisi minor sit annis viginti quinque: nam huius aetatis hominibus sicut in ceteris omnibus causis deceptis, ita et si temere damnosam hereditatem susceperint, praetor succurrit*.

Hence, a necessary inheritor in charge of the estate or voluntary inheritor who received an inheritance would not be later entitled to give up the inheritance. As an exception, when an underage successor had accepted an excessively encumbered bequest (*damnosam hereditatem*), they could ask the Praetor for *restitutio in integrum.*

This way an heir who acquired inheritance excessively burdened with debt could be granted *restitutio in integrum*, i.e. restoration to original condition, by the Praetor or province magistrate, and could evade adverse consequences of the inheritance acquisition, provided there were legal grounds for applying this principle. *Restitutio in integrum* granted by the Praetor resulted in a waiver of the effects of an executed legal action related to both material and formal law. Such person was no longer an inheritor. *Restitutio in integrum,* however, was recognised as *beneficium extraordionarium*; the possibility to refrain from acquisition of the inheritance did not result from a legal regulation but from assertion of rights by a person entitled to do so[9].

The term *hereditas damnosa,* or cursed inheritance, also appears e.g. in a text by Julianus:

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[9] More about *restitutio in integrum* (D.4,1,6; D.4,4,18,5; D.4,4,3,1), its legal basis, nature of the proceeding for its issuance and its effects in: W. Bojarski, *In integrum restitutio w prawie rzymskim*, „Roczniki Teologiczno-Kanoniczne" 1963, vol. 10, p. 15 et seq.; M. Kaser, *Das römische Privatrecht*, vol. 1, p. 215 et seq.; *idem*, *Zur In integrum restitutio, besonders wegen metus und dolus*, ZSS 1977, no. 94, p. 101 et seq.

D.17,1,32 (*Iulianus libro tertio ad Urseium Ferocem*): *…hereditas interdum damnosa est (...) Praeterea volgo animadvertere licet mandatu creditorum hereditates suspectas adiri, quos mandati iudicio teneri procul dubio est*.

The passage presents a case of a cursed inheritance (*hereditas interdum damnosa est*). If, at a request of a creditor, an inheritor accepts such an inheritance burdened with debt, then he will be entitled to *actio mandati* against the principal.

Hence, if designated to acquire excessively indebted inheritance, the hair would be able to make a pact (*pactum de non petendo pro parte*) with inherited creditors:

D.2,14,7,17 (*Ulpianus libro quarto ad edictum*): *Si ante aditam hereditatem paciscatur quis cum creditoribus ut minus solvatur, pactum valiturum est*.

D.2,14,7,18 (*Ulpianus libro quarto ad edictum*): *Sed si servus sit, qui paciscitur, priusquam libertatem et hereditatem apiscatur, quia sub condicione heres scriptus fuerat, non profuturum pactum vindius scribit: Marcellus autem libro octavo decimo digestorum et suum heredem et servum necessarium pure scriptos, paciscentes priusquam se immisceant putat recte pacisci, quod verum est. Idem et in extraneo herede: qui si mandatu creditorum adierit, etiam mandati putat eum habere actionem*.

In the above passages, Ulpian writes that a valid agreement may be concluded by an heir with inherited creditors, whereby he undertakes to pay to the testator's creditors a certain amount of what is due to them. Only after that would he accept the inheritance. This right could be claimed by heirs designated unconditionally, i.e. domestic heirs (*herdes suus*) and by slaves designated as inheritors and liberated at the same time (*servus neccessarius*). Such right would also apply to *herdes extranei* if they accepted the inheritance at the request of creditors[10].

The above means (*restitutio in integrum* and *pactum de non petendo pro parte*), intended to protect successors against acquisition of cursed inheritance (*hereditas damnosa*) potentially leading to their excessive impoverishment, were however treated as extraordinary legal measures, to be granted at request if there were grounds for applying such measure.

On the other hand, legal measures, applicable generally, and intended to limit successors' liability for inherited debts included *beneficium abstinendi*, or the right to refrain from accepting insolvent estate which was granted by the Praetor or province magistrate to necessary inheritors:

G.2,158: *Sed his praetor permittit abstinere se ab hereditate, ut potius parentis bona veneant*.

According to Gaius, *heredes domestici* were entitled to abstain from acquiring the inheritance, as a result of which the testator's estate would be sold.

[10] More on this issue in: P. Voci, *Diritto ereditario romano*, vol. 1, Milano 1960, p. 617.

The privilege of *beneficium abstinendi*[11] was granted by the Praetor to a necessary heir (*heredes sui et necessarii*), whereby they could abstain from taking over an insolvent inheritance by refusing to handle the related affairs (D.29,2,87pr)[12]. For those wanting to benefit from this privilege, the Praetor could define a time limit for deliberation (*tempus ad deliberandum*); after this time, if no statement was submitted by the heir, the right was lost (D.25,8,8; D.28,8,1). The abstaining party continued to be an inheritor under civil law, however the Praetor treated them as if they were not (D.40,4,32). This means he refused the right of claims related to the inheritance to be lodged by or against the abstaining party (D.38,9,2). The Praetor would also grant *bonorum possessio* to the latter party's successors and if no one wanted to receive *bonorum possessio,* he would open a procedure for creditors' advantage (D.29,2,57pr).

A slave designated in the testament to be the heir (*servus cum libertate heres institutus*) and liberated thereunder, was not entitled to *beneficium abstinendi*; however the Praetor in such a case could grant *beneficium separationis*, i.e. a privilege of separating the estate from the heir's own property in order to limit their liability for inherited debts to the estate exclusively[13]. Slaves were most commonly designated by the testament to be heirs (*servus neccessarius*) in the case of successions which were excessively in debt, so that the infamy resulting from *venditio bonorum* would affect the slave rather than the testator's descendants (G.2,154).

G.2,155: *Pro hoc tamen incommodo illud ei commodum praestatur, ut ea, quae post mortem patroni sibi adquisierit, sive ante bonorum venditionem sive postea, ipsi reseruentur; et quamvis pro portione bona venierint, iterum ex hereditaria causa bona eius non venient, nisi si quid ei ex hereditaria causa fuerit*

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[11] Sources of Roman law contain only one reference to *beneficium abstinendi* in the text D.29,2,71,4 by Ulpian. Other terms to be encountered in sources of Roman law, and related to the benefit of abstaining from inheritence include: *facultas abstinendi* – D.29,2,85 Papinian; *ius abstinendi* – D.28,5,87,1 Maecianus; *potestas abstinendi* – D.4,2,21,5 Paulus; D.29,2,11 Pomponius; G.2,163; I.2,19,5; Epit.Ulp. 22,24. See: B. Biondi, *Istituti fundamentali*…, p. 23 et seq.; C. Fadda, *Concetti fondamentali del diritto ereditario romano*, vol. 2, Milano 1949; p. 36 et seq.; G. La Pira, *La successione ereditaria*…, p. 48 et seq.; P. Voci, *Diritto ereditario*…, p. 537 et seq.; R. Świrgoń-Skok, *Beneficja spadkowe w prawie rzymskim*, Rzeszów 2011.

[12] R. Świrgoń-Skok, *Zasady odpowiedzialności spadkobierców za długi spadkowe w prawie rzymskim*, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego" 2011, Seria Prawnicza, Prawo 10, p. 209–220.

[13] H. Ankum, *La classicite de la separatio bonorum de l' heres neccessarius en droit roman*, Studi Groso 2, Torino 1968, p. 365 et seq.; W. Bojarski, *Separatio bonorum* [in:] *Księga Pamiątkowa ku czci Profesora Leopolda Steckiego*, Toruń 1997, p. 603 et seq.; M. Bretone, *Gai. 2,187–189*, Labeo 4, 1958, p. 301 et seq.; A. Guarino, *Gai. 2,155 e il beneficjum separationis dell' heres necessarius*, SDHI 1944, no. 10, p. 240 et seq.; *idem*, *Il beneficjum separationis dell' heres necessarius*, ZSS 1940, no. 60, p. 185 et seq.; R. Świrgoń-Skok, *Ograniczenie odpowiedzialności dziedziców*…, p. 143 et seq.

adquisitum, velut si ex eo, quod Latinus adquisierit, locupletior factus sit; cum ceterorum hominum, quorum bona venierint pro portione, si quid postea adquirant, etiam saepius eorum bona venire soleant.

According to Gaius, *servus neccessarius* would benefit from the privilege based on which, whatever after the patron's death they acquire for themselves, by sale of the assets or following other lawful activities, would be owned by them. Even if only some of the inherited debts were to be paid back by way of *venditio bonorum*, the property of the liberated slave would not be subject to enforced seizure unless they acquired something due to the inheritance.

Apart from that, heirs to inheritance excessively burdened with endowments could be granted *beneficium legis falcidiae,* i.e. a privilege limiting the value of bequests to one quarter of the inheritance[14]:

G.2,227: *Lata est itaque lex Falcidia, qua cautum est, ne plus ei legare liceat quam dodrantem: itaque necesse est, ut heres quartam partem hereditatis habeat: et hoc nunc iure utimur*.

Based on *lex Falcidia* a general rule was introduced whereby, after all the bequests were deducted, the heir nominated in the testament was to retain at least one quarter of the inheritance *(quarta falcidia)*. If such bequests amounted to more than three quarters of the inheritance, they were to be decreased proportionately[15].

Being the last (and historically the latest) privilege granted to those receiving cursed inheritance, *beneficium inventarii* limited the heir's liability for inherited debts to the value of the inheritance. An heir who within a specified time

[14] Concerning *lex Falcidie* resolutions of the Plebeian Assembly from year 40 BC., See: H. Ankum, *La Femme Mariée et la loi Falcidia*, LABEO 1984, vol. 30, p. 28 et seq.; F. Bonifacio, *In tema di lex Falcidia*, IURA 1952, vol. 3, p. 229 et seq.; G. Franciosi, *Lex Falcidia, SC Pegasianum e disposizioni a scopo di culto. Studi Donatuti*, vol. 1, Milano 1973, p. 401 et seq.; V. Mannino, *Cervidio Scevola e l' applicazione della Falcidia ai legati fra loro connessi*, BIDR 1981, vol. 84, p. 125 et seq.; P. De La Rosa Diaz, *Algunos aspectos de la lex Falcidia* [in:] *Studios en homenaje al Prof. F. Hernandez-Tejero*, vol. 2, 1994, p. 111 et seq.; P. Stein, *Lex Falcidia*, „Ateneum" 1987, vol. 65, p. 453 et seq.; F. Schwarz, *Die Rechtswirkungen der lex Falcidia*, ZSS 1943, vol. 63, p. 314 et seq.; F. Schwarz, *War die lex Falcidia eine lex perfecta*, SDHI 1951, vol. 17, p. 225 et seq.; R. Świrgoń-Skok, *Ograniczenie odpowiedzialności spadkobiercy za nadmierne zapisy na tle historycznoprawnym* [in:] *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana prof. A. Zielińskiemu*, ed. M. Boratyńska, Warszawa 2016, pp. 421–432; A. Wacke, *Die Rechtswirkungen der lex Falcidia, Studien Kaser*, Berlin 1973, p. 209 et seq.

[15] These limitations were then adopted in fideicommissa. *Senatus consulta Pegasianum* from Vespasian's time (year 73 AD.) introduced changes in fideicommissa, particularly in *fideicommissum hereditatis* whereby the heir could retain 1/4 part of the bequest, the so-called *quarta ex S.C. Pegasiano.* An ordinance of Emperor Antonius Pius (Gai2,224–7; Gai.2,254; D.35,2,18pr) extended the application of *quarta Falcidia* to intestate heirs. In the times of Justinian, the provisions related to *lex Falcidia* were expanded to include *mortis causa capio* and particularly *donatio mortis causa*.

limit prepared a detailed inventory of the inherited assets was liable for the debts only up to the value of the estate. The institution of the benefit of inventory was introduced by Justinian in the constitution from year 531[16]:

I.2,19,6: *Sed nostra benevolentia commune omnibus subiectis imperio nostro hoc praestavit beneficium et constitutionem tam aequissimam quam nobilem scripsit, cuius tenorem si observaverint homines, licet eis adire hereditatem et in tantum teneri in quantum valere bona hereditatis contingit, ut ex hac causa neque deliberationis auxilium eis fiat necessarium, nisi omissa observatione nostrae constitutionis et deliberandum existimaverint et sese veteri gravamini aditionis supponere maluerint*.

The above passage says that, pursuant to Justinian's Constitution, a successor who compiled a detailed inventory of the inherited assets within specified time, was liable for debts only up to the value of the inheritance. The heir could also request time for deliberation.

Benefit of inventory was neither applicable *ex lege*, nor was it awarded *ex officio*. Furthermore, no separate statement of intent was required from the inheritor. If the heir did not request *tempus ad deliberandum,* they could start drawing a detailed inventory of the inherited assets within 30 days after the testament was opened or they learned about the nomination for the inheritance; the inventory was to be completed within 60 days. If the heir lived away from the location of the estate, he had one year from the date of the testator's passing to complete the inventory of the assets. The inventory was to be executed in the presence of a notary and witnesses, and it was to be signed by the inheritor. If the person nominated for the inheritance completed the inventory within the specified time limit, their liability for inherited debts was limited to the value of the inheritance (*intra vires hereditatis*). The heir should satisfy creditors of the estate and legatees in the order they come forth. He could also seek to get reimbursement for funeral expenses and to recover any debts owed to him be the deceased testator. The inventory also provided grounds for determining *quarta falcidia*[17].

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[16] Besides that, Justinian's C.6,30,22 reports information about the benefit awarded by Emperor Gordian to soldiers, based on which they were liable for debts limited by the inheritance. Justinian acknowledged that these privileges preceded his *beneficium inventarii.*

[17] More details about *beneficium inventarii* See: R. Reggi, *Ricerche interno al beneficium invenntarii*, Milano 1967, p. 3 et seq.; R. Świrgoń-Skok, *Przyjęcie spadku z dobrodziejstwem inwentarza. Od prawa justyniańskiego do kodeksu cywilnego*, „Zeszyty Prawnicze UKSW" 2011, vol. 11, no.1, p. 339–357; Dobrodziejstwo inwentarza (beneficium inventarii) i jego realizacja w prawie rzymskim [in:] *Egzekucja z majątku spadkowego. Ograniczona i nieograniczona odpowiedzialność za długi spadkowe*, ed. M. Załucki, Warszawa 2016, p. 24–50; *Beneficium inventarii in the Roman tradition of European private law*, „Constituição, Economia e Desenvolvimento: Revista da Academia Brasileira de Direito Constitucional" 2017, vol. 9, no. 17, p. 278–297, P. Voci, *Diritto ereditario*…, p. 618 et seq.

4. Likewise, the testator's creditors could incur losses possibly leading to their impoverishment. This happened when the heir's estate was excessively burdened with debts. In such case, the heir's creditors would participate in the foreclosure of the heir's property as a result of which the heir's property would not be sufficient to satisfy all the inherited debts. This was possible particularly in the case of the so-called *hereditas suspecta,* i.e. inheritance in debt where the heir was suspected to deliberately encumber his own property with debts, so that he was not able to satisfy inherited creditors. Purposeful encumbrance of property with debts was recognised in the cases where inheritance excessively burdened with bequests was accepted and the inherited estate was released by the nominated inheritor to a fideicommissary. The following texts refer to this issue:

D.36,1,3pr (*Ulpianus libro tertio fideicommissorum*): *Marcellus autem apud Iulianum in hac specie ita scribit: si ad heredis onus esse testator legata dixerit et heres sponte adiit hereditatem, ita debere computationem Falcidiae iniri, ac si quadringenta per fideicommissum essent relicta, trecenta vero legata, ut in septem partes trecenta dividantur et ferat quattuor partes fideicommissarius, tres partes legatarius. Quod si suspecta dicta sit hereditas et non sponte heres adiit et restituit, centum quidem de quadringentis, quae habiturus esset heres, resident apud fideicommissarium, in reliquis autem trecentis eadem distributio fiet, ut ex his quattuor partes habeat fideicommissarius, reliquas tres legatarius: nam iniquissimum est plus ferre legatarium ideo, quia suspecta dicta est hereditas, quam laturus esset, si sponte adita fuisset*.

In the above passage Ulpian, referring to a statement by Marcellus, ponders the questions how *quarta falcidia* should be calculated and what share of the inheritance will be received by legatees and fideicommissaries if an heir has voluntarily accepted inheritance excessively burdened with endowments which are part of the burden borne by the heir, and alternatively what the situation would look like if the inheritance were recognised as indebted and an heir were to accept it involuntarily and then to release it to a fideicommissary. In his response he claims that both the legatee and the fideicommissary would receive the same amount in both cases. The jurist adds that it would be inequitable if a legatee received more in the case of suspected indebtedness of the inheritance (*quia suspecta dicta est hereditas*) than in the case of an inheritance accepted voluntarily by the heir.

D.36,1,17,5 (*Ulpianus libro quarto fideicommissorum*): *Sed et si quis non hereditatis suae partem dimidiam rogavit heredem suum restituere, sed hereditatem Seiae, quae ad eum pervenerat, vel totam vel partem eius, heresque institutus suspectam dicat, cum placeat illud quod Papinianus ait ex Trebelliano transire actiones, dici poterit, si suspecta dicatur hereditas, cogendum heredem institutum adire et restituere hereditatem totamque hereditatem ad eum cui restituitur pertinere*.

This passage describes a case where the whole inheritance is released to a fideicommissary by the nominated heir who consequently is suspected of having deliberately encumbered the estate with debt in order to make it impossible to satisfy the inherited creditors (*heresque institutus suspectam*). Ulpian, referring to S.C. Trebellianum (55 AD), states that such person (fideicommissary) may lawfully be faced with complaints (*transire actiones*), because he has obtained the heir's position.

D.36,1,57,2 (*Papinianus libro vicensimo quaestionum*): *Qui fideicommissam hereditatem ex Trebelliano, cum suspecta diceretur, totam recepit, si ipse quoque rogatus sit alii restituere, totum restituere cogetur. Et erit in hac quoque restitutione Trebelliano locus: quartam enim Falcidiae iure fideicommissarius retinere non potuit. Nec ad rem pertinet, quod, nisi prior, ut adiretur hereditas, desiderasset, fideicommissum secundo loco datum intercidisset: cum enim semel adita est hereditas, omnis defuncti voluntas rata constituitur. Non est contrarium, quod legata cetera non ultra dodrantem praestat: aliud est enim ex persona heredis conveniri, aliud proprio nomine defuncti precibus adstringi. Secundum quae potest dici non esse priore tantum desiderante cogendum institutum adire, ubi nulla portio remansura sit apud eum, utique si confestim vel post tempus cum fructibus rogatus est reddere: sed et si sine fructibus rogatus est reddere, non erit idonea quantitas ad inferendam adeundi necessitatem. Nec ad rem pertinebit, si prior etiam libertatem accepit: ut enim pecuniam, ita nec libertatem ad cogendum institutum accepisse satis est. Quod si prior recusaverit, placuit, ut recta via secundus possit postulare, ut heres adeat et sibi restituat*.

Faced with such a situation where recovery of their debts was unlikely due to the excessive indebtedness of the heir's property, testator's creditors could demand a guarantee from the heir that he would not diminish the inherited estate at the expense of the creditors, in the form of stipulatory promise (*satisdatio suspecti heredis*). Such promise was received when it was suspected that the heir was deliberately encumbering his own property (*heres suspectus*). The Praetor imposed an obligation on a suspected heir to submit stipulatory *cautio* with guarantors. The heir's failure to fulfil his promise was followed by *missio in bona*, and then *venditio bonorum*. If the heir was too poor, or could not find guarantors, the guarantee contained proscription on the sale of assets[18].

D.42,5,31 (*Ulpianus libro secundo de omnibus tribunalibus*): *pr. Si creditores heredem suspectum putent, satisdationem exigere possunt pro suo debito reddendo. Cuius rei gratia cognoscere praetorem oportet nec statim eum satisdationis necessitati subicere debet, nisi causa cognita constiterit prospici debere his, qui suspectum eum postulaverunt. 1. Sed suspectus heres non isdem modis, quibus suspectus tutor aestimatur: siquidem tutorem non facultates, sed*

[18] As regards *satisdatio suspecti heredis* – or stipulatory guarantee of suspected heir, see: D.42,5,31 Ulpian. Cf. P. Voci, *Diritto ereditario*…, p. 627.

fraudulenta in rebus pupillaribus et callida conversatio suspectum commendet, heredem vero solae facultates. 2. Plane in recenti aditae hereditatis audiendi erunt, qui suspectum postulant: ceterum si probentur passi eum in hereditate morari nec quicquam possint obicere criminis quasi dolose versato eo, non debebit post multum temporis ad hanc necessitatem compelli. 3. Quod si suspectus satisdare iussus decreto praetoris non obtemperaverit, tunc bona hereditatis possideri venumque dari ex edicto suo permittere iubebit. 4. Plane si doceatur nihil ex bonis alienasse nec sit quod ei iuste praeter paupertatem obiciatur, contentus esse praetor debet, ut iubeat eum nihil minuere. 5. Quod si nec inopia laborantem eum creditores ostendere potuerint, iniuriarum actione ei tenebuntur.

D.26,5,18 (*Ulpianus libro 61 ad edictum*): *In dando tutore ex inquisitione et in eum inquiritur, qui senator est: et ita Severus rescripsit*.

D.26,10,8 (*Ulpianus libro 61 ad edictum*): *Suspectum tutorem eum putamus, qui moribus talis est, ut suspectus sit: enimvero tutor quamvis pauper est, fidelis tamen et diligens, removendus non est quasi suspectus*.

D.41,4,7,5 (*Iulianus libro 44 digestorum*): *Qui sciens emit ab eo, quem praetor ut suspectum heredem deminuere vetuit, usu non capiet*.

Another legal measure benefitting inherited creditors, *separatio bonorum*[19] was granted in order to separate the inherited estate from the heir's personal property, in order to limit his liability for inherited debts to the value of the inherited estate. The privilege was available for testator's creditors and legatees (D.42,6,6,pr Julian), these however could only receive what was due to them only after debts were recovered in full by the testator's creditors. The privilege was granted at a request (*postulatio*, *impetratio*), after the case was carefully examined by the Praetor or province magistrate[20]. Their decision to award *separatio* depended on a specific condition, i.e. the fact of the heir's insolvency[21]. As a result of *separatio bonorum* consequences of inheritance acquisition were partly revoked, i.e. only with respect to the testator's creditors. This, however, did not apply to the heir and his creditors. After the inherited estate was separated from the heir's personal property, the former was released to the testator's creditors so that they could recover their debts. This happened by way of *venditio bonorum.*

[19] More about *beneficium separationis bonorum* (in source texts referred to as: *commodatum*, *separationis commodum*, *ius separationis*, *separatio bonorum or bonorum separatio* or *separation*): D.42,6,1,10; D.42,6,1,3 – Ulpian; D.42,6,5 Paulus; C.7,72,2 Gordian; D.42,6,6,pr and 1 Julianus; C.7,72,7 Diocletianus and Maximian) see: B. Asftolfi, *Separazione dei beni del defunto da quelli dell' erede*, NDI 1970, no. 17, p. 1 et seq.; W. Bojarski, *Separatio bonorum*, p. 607 et seq.; H. Levy-Bruhl, *Heres*, p. 167 et seq.; G. Scherillo, *Separazione*, NDI 1963, vol. 9, p. 8 et seq.

[20] These issues are referred to in source texts by Ulpian D.42,6,1pr; D.42,6,1,14 and in the constitution C.7,72,2.

[21] D.42,6,6 Julian; D.42,6,1,1 Ulpian.

5. In summary, it may be concluded that in Roman law, acquisition of inheritance could not only entail improvement of the heir's financial status but also his impoverishment. A risk of damage to the heir's material status resulting from their liability for inherited debts occurred particularly in the case of *hereditas damnosa*, or cursed inheritance, excessively burdened with debt.

Wishing to protect their personal property, heirs would conclude agreements with inherited creditors, whereby they undertook to pay to the testator's creditors a certain amount of what was due to them. They could also be granted *restitutio in integrum*, i.e. restoration to original condition, by the Praetor or province magistrate, and this way avoid the adverse consequences of the inheritance acquisition. These, however, were extraordinary legal measures. The principal legal measures protecting heirs against excessive liability for inherited debts included *beneficium abstinendi*, or the benefit of refusing to accept inheritance burdened with debts; *beneficium separationis bonorum*, i.e. the benefit of separating the inherited estate from the heir's personal property, as well as *beneficium legis falcidiae* – privilege limiting the value of endowments to one quarter of the inheritance, and *beneficium inventarii*, or limitation of liability for inherited debts up to the value of the inheritance.

However, those affected by impoverishment, in addition to heirs also included testator's creditors. This situation could happen in the case of the so-called *hereditas suspecta*, i.e. indebted inheritance where the heir was suspected to deliberately encumber his property with debts so that they could not satisfy the inherited creditors.

Faced with such a situation where recovery of their debts was unlikely due to the excessive indebtedness of the heir's property, testator's creditors could demand a guarantee from the heir that he would not diminish the inherited estate at the expense of the creditors, in the form of stipulatory promise (*satisdatio suspecti heredis*). Besides that, inherited creditors and legatees could obtain *separatio bonorum* as a result of which the inherited estate was separated from the heir's personal property and his liability for inherited debts was limited to the value of the inheritance.

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Summary

The article presents risks associated with inheritance acquisition in Roman law. Indeed, in Roman law, acquisition of inheritance could not only entail improvement of the heir's financial status but also his impoverishment. Negative consequences associated with inheritance acquisition could affect the heir, as well as the testator's creditors and the heir's creditors. A risk of damage to the heir's material status resulting from their liability for inherited debts occurred particularly in the case of *hereditas damnosa*, or cursed inheritance, excessively burdened with debt. However, those affected by impoverishment, in addition to heirs also included testator's creditors. This situation could happen in the case of the so-called *hereditas suspecta*, i.e. indebted inheritance where the heir was suspected to deliberately encumber his property with debts so that they could not satisfy the inherited creditors.

Keywords: consequences of inheritance acquisition, heir, *hereditas damnosa*, *hereditas suspecta*, Roman law

HEREDITAS DAMNOSA – HEREDITAS SUSPECTA **RYZYKO NABYCIA SPADKU W PRAWIE RZYMSKIM**

Streszczenie

W niniejszym artykule zostało przedstawione ryzyko związane z nabyciem spadku w prawie rzymskim. Bowiem w prawie rzymskim nabycie spadku mogło nieść ze sobą nie tylko polepszenie sytuacji majątkowej spadkobiercy, ale także jego zubożenie. Negatywne konsekwencje związane z nabyciem spadku mogły występować zarówno dla samego spadkobiercy, jak i wierzycieli spadkodawcy, a także wierzycieli spadkobiercy. Ryzyko pogorszenia sytuacji majątkowej spadkobiercy będące wynikiem odpowiedzialności za długi spadkowe występowało zwłaszcza przy *hereditas damnosa*, czyli spadku szkodliwym nadmiernie obciążonym długami. Jednak zubożenie mogło nastąpić nie tylko po stronie spadkobierców, ale również wierzycieli spadkodawcy. Taka sytuacja miała miejsce przy tzw. *hereditas suspecta*, czyli spadku zadłużonym, przy którym dziedzic jest podejrzewany o celowe zadłużanie swojego majątku, aby nie być w stanie zaspokoić wierzycieli spadkowych.

Słowa kluczowe: skutki nabycia spadku, spadkobierca, *hereditas damnosa*, *hereditas suspecta*, prawo rzymskie

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Jozef Tekeli
Pavol Jozef Šafárik University in Košice
ORCID: 0000-0002-5000-8970

TRANSNATIONAL EFFECTS OF DECISIONS OF THE ANTIMONOPOLY OFFICE OF THE SLOVAK REPUBLIC

National jurisdiction, or the State, are terms inherently connected with the jurisdiction of the State to regulate social relations existing in their national "territory" through legal acts[1]. The above-mentioned regulating jurisdiction is thus a part of the sovereignty and autonomy of each State. As a result of this activity, social relations are regulated through national legal acts whose effects are limited by the extent of the national territory and are binding upon both the nationals and the authorities acting in national structures.

Nowadays, the development of the legal situation and the laws of the States is marked by the intention of cooperation and globalisation which, in the area of economic law, are reflected in the effort to create a uniformly applied and effective system which ensures undistorted competition[2].

These objectives are achieved in defined areas where cooperation is most needed by means of acts that have effects beyond the territory of a particular State and thus apply to the territory of other States, as well. The originator of transnationality is a transnational entity, or its international legislation. The difference between them consists, in particular, in the transposition of a decision with a transnational effect which does not need to be recognised within a special procedure under the laws of the State concerned. In case of the Slovak Republic, a uniform approach to defined issues is regulated by the EU law through directives and regulations. Transnationality of administrative acts causes that these acts produce legal effects, in addition to their State of origin, also towards foreign national authori-

[1] R. Jakab, *Exteritorialita a transteritorialita v podmienkach EÚ a jej členských štátov* [in:] *Extrateritoriálne účinky činností orgánov verejnej moci. Zborník vedeckých prác*, Košice 2018, p. 10.

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty

ties. At the same time, this type of acts is characterised by reciprocity, which means that when issuing a transnational act with effects on legal relations outside the territory of their State of origin the State-originator also envisages or expects equivalent effects of decisions of foreign authorities in its territory[3].

Decisions characterised by transnational effects inherently interfere with the jurisdiction of another State, contrary to the principle of autonomy (which constitutes a prohibition on interfering with the jurisdiction of another State within its territory). A violation of this principle of autonomy is in accordance with law if it is in accordance with the rules of the EU law and with the aim to fulfill the intention of this transnational legislation. The aim is to "supervise" the regulation of activities taking place abroad (outside the territory of the Sate concerned) that have an actual or at least potential effect on the territory of that State. The application of this principle is most perceptible especially in the area of financial market regulation within the European Union[4].

For example, the protection of the right to privacy and the protection of personal data under Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), is still a topical issue with a strong transnational impact in the European context. The effects of this European legal act are not limited by the national borders of the Member States of the European Union. In addition to controllers and processors processing personal data in the territory of a Member State of the European Union, controllers and processors established outside the EU Member States also fall within its scope if they process personal data of a person who is in an EU Member State. It is an explicit extension of the transnational scope of that Regulation beyond the Member States of the European Union[5].

A more apparent expression of transnationality is most often perceptible in criminal matters, for example, in the form of organised crime. Given the increasing trend of crime at the transnational level, the need of the European Union to simplify and speed up the exercise of criminal jurisdiction between the Member States has increased proportionally. In this area, transnationality can be seen in various forms of cooperation in criminal matters, e.g., through the European arrest warrant, under which the States are required to arrest and surrender suspects or convicted persons to other Member States for the purposes of conducting a criminal prosecution, executing a custodial sentence, and the like. Under Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures

[3] J. Handrlica, *Vybrané problémy spojené s aplikací modelu transteritoriálních správnych aktú*, „Studia Iuridica Cassoviensia" 2016, vol. 4, no. 2.

[4] R. Jakab, *Exteritorialita a transteritorialita…*, p. 12.

[5] Redakcia časopisu ZSP. Zo súdnej praxe č. 3, 2018, p. 97. Ochrana osobných údajov a ochrana súkromia v novej legislatívnej kvalite. 1.06.2018.

between Member States, implementing the European arrest warrant, the Member States of the European Union are obliged to execute all European arrest warrants in accordance with the principle of mutual recognition of criminal decisions[6].

In the context of the European Union, the substance of transnationality consists in an effort to achieve the fundamental objectives of the European Union, in particular, the free movement of goods, persons and capital. The aim of the effort for a uniform approach (achieved by the transnational effects of decisions) in defined areas with a transnational impact is to prevent the circumvention of the law of the European Union, whose Member States are committed to the common respect of the values and principles the European Union is founded on. One of these principles is the commitment to sustainable development based on a balanced economic growth and price stability, and a highly competitive market economy characterised by full employment and social progress and environmental protection. It is this principle that is the main pillar of the activities of the Antimonopoly Office of the Slovak Republic, whose role is to protect and promote competition, which is the basis of the good functioning of the market economy. It is the Antimonopoly Office of the Slovak Republic that ensures that competition law does not contain practices that restrict competition and that favourable competitive conditions are created and maintained.

The Slovak Republic, as a Member State of the European Union, is committed to enforcing competition rules together with the EU Commission and in cooperation with other national competition authorities. The purpose of this uniform procedure is to achieve an open, competitive and innovative internal market that is crucial for creating jobs and growth in important sectors of the economy, in particular, in the energy, telecommunications, digital and transport sectors[7]. Thus, as part of the European Community, the Antimonopoly Office of the Slovak Republic should also act in close compliance with the European Union law and enforce and supervise competition at both national and international level. One of its objectives is the coordinated participation in the development of the legislative framework for the protection of competition under the auspices of the European institutions enforcing the protection of competition in the context of the Member States of the European Union[8].

In relation to the activities of the Antimonopoly Office of the Slovak Republic, transnationality of the effects of its decisions is not clearly evident at first sight. The reason is that the Antimonopoly Office of the Slovak Republic

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[6] K. Búranová, *Európsky zatýkací rozkaz a praktické problémy jeho uplatňovania*, „Legal point" 2018, č. 1.

[7] Directive No. 2017/0063 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market of 22 March 2017.

[8] Plán úloh Protimonopolného úradu SR – Metodické usmernenie Protimonopolného úradu SR zo 16.05.2017.

supervises in a regulatory manner the competition taking place on the "domestic market". Based on the purpose and nature of the activity of this authority, transnationality of the effects of the Antimonopoly Office of the Slovak Republic arises from Section 2, in particular from its sub-sections (4) and (5), of Act No. 136/2001 on the protection of competition, amending Act of the Slovak National Council No. 347/1990 on the organization of ministries and other central state administration authorities of the Slovak Republic, as amended (*hereinafter referred to as the "Competition Act"*).

Under Section 2(4) and (5) of the Competition Act

"(4) This Act shall also apply to acts and conduct that have taken place abroad, provided that they lead, or may lead, to restriction of competition on the domestic market.

(5) This Act, except Part Five, shall not apply to restrictions of competition that only have effect on a foreign market, unless an international treaty by which the Slovak Republic is bound and which is published in the Collection of Laws of the Slovak Republic provided otherwise".

It follows from sub-section 4 that the activities of the Antimonopoly Office of the Slovak Republic focus primarily on the exercise of competition on the domestic market, but the Competition Act also applies to activities or conduct taking place abroad whose effects may restrict competition on the domestic market. This situation reflects *the principle of effects* arising from *activities carried out outside the territory* of a certain State (*effect-based principle*), but with a potential to influence/distort competition in the territory of the State concerned, too[9]. Thus, the above-mentioned Section 4 expressly envisages the transnational effects of decisions of the Antimonopoly Office of the Slovak Republic in relation to transnationally operating economic entities whose economic activities, however, have a certain impact on or an ability to influence the domestic market. As a manifestation of the regulating competence of the Antimonopoly Office of the Slovak Republic in the context of transnational activities we can mention the sanctioning of the "cartel" of foreign entities resulting in coordinated behaviour of the individual cartel members on the relevant market by fixing prices, allocating markets, mutual restrictions in entering into licence agreements, and so on. The Slovak Republic was not directly involved in that agreement, but was only one of the potential target entities whose market could be affected by the cartel.

This was namely the case in which the Antimonopoly Office of the Slovak Republic was deciding on the agreement between Japanese and European companies that coordinated their behaviour on the relevant market for the manufacture and sale of gas insulated switchgears by fixing prices, allocating markets, maintaining stable market shares based on quotas agreed in advance, mutual restrictions in entering into licence agreements with third parties, and so on. As

[9] R. Jakab, *Exteritorialita a transteritorialita…*, p. 12.

mentioned above, the Slovak Republic was not directly involved in that agreement. In that case, the Antimonopoly Office of the Slovak Republic commenced proceedings under the Competition Act.

The competence of the Antimonopoly Office of the Slovak Republic to deal with that matter was challenged by the parties to the proceedings on the grounds of the allegedly absent legal basis of its competence. One of the members of the agreement, Mitsubishi Electric Corporation, stated that it did not intend to import its products to Slovakia and thus to apply the effects of the cartel to Slovakia, because it was neither technically possible nor advantageous. According to that statement, any impact or effect of these agreements on the Slovak Republic was allegedly excluded. In this context, the commentary of Czech authors on the Czech Competition Act was pointed out as follows: "When assessing an example of the agreement of parties that are not present on the Czech market at the time of entering into the same but only intend to enter the market, such an agreement does not meet the conditions of Section 1(5), which are not met if there is no threat of distortion of competition on the market concerned. However, the provision will certainly not apply to situations where the concerned party to the agreement did not even intend to enter the market".

The basis of the competence of the Antimonopoly Office of the Slovak Republic to deal with this and similar cases of a threat to competition stems from Art. 81 and 82 of the Treaty establishing the European Community, whose Title VI establishes the common rules on competition, taxation and approximation of laws. Point 1 of Art. 81 contains a general prohibition on all agreements, decisions and concerted practices between undertakings which may affect trade between Member States and which have as their object or effect the restriction or distortion of competition within the common market.

Such a kind of conduct is incompatible with the common market. The above-mentioned basic platform of competence of the Antimonopoly Office of the Slovak Republic is also supported by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty (*hereinafter referred to as the "the Regulation on the implementation of competition rules"*). In the Slovak Republic, competition law is fully harmonised with the provisions of Art. 81 and 82 of the Treaty. The EU Member States are key partners of the European Commission in enforcing the EU competition rules. The transnational effect of the decisions of the Antimonopoly Office of the Slovak Republic arises from recital 8 of the Regulation on the implementation of competition rules. This point emphasizes the need for a uniform obligation of the competition authorities of the Member States to also apply Art. 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In addition, as regards the protection of competition on their own territory, the Regulation on the implementation of competition rules allows

Member States to adopt and apply stricter national competition laws. These stricter national laws may also include provisions which prohibit or impose sanctions on abusive behaviour towards economically dependent undertakings[10].

The relationship between national competition laws and Art. 81 and 82 of the Treaty is provided for in Art. 3 of the Regulation on the implementation of competition rules. Under that Art., "Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Art. 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Art. 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Art. 82 of the Treaty, they shall also apply Art. 82 of the Treaty".

The effort for a uniform competition law to ensure the good functioning of the common market is further enhanced by intensive cooperation between the Commission and the competition authorities of the Member States: "The Commission and the competent authorities of the Member States shall apply the Community competition rules in close cooperation"[11].

Due to the dual action of the authorities protecting common "European" competition, it is important to respect the principle *ne bis in idem* in relation to the initiation of proceedings for infringement of the competition rules and the administrative punishment of infringers. This means that, where proceedings under Art. 81 of the Treaty have been initiated by the European Commission, the national competition authority will be deprived of its competence to deal with that case by virtue of Art. 11(6) of the Regulation on the implementation of competition rules. In this case, the national competition authority – the Antimonopoly Office of the Slovak Republic – could only apply the national competition law if it would do so with regard to an objective different from the objective pursued by Art. 81 and 82 of the Treaty[12]. The principle *ne bis in idem* in the context of dualism in the protection of competition at both national and European levels has been the subject of several case analyses. In Case Aalborg Portlad[13] before the European Court of Justice it was established that the application of the principle *ne bis in idem* is sub-

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[10] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty.

[11] Art. 11(1) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty.

[12] Decision of the Antimonopoly Office of the Slovak Republic No. 2009/KH/R/2/035 of 14 August 2009.

[13] Judgment of the Court (Fifth Chamber) of 7 January 2004 in joined cases Aalborg Portland A/S (C-204/00 P), Italcementi – Fabbriche Riunite Cemento SpA (C-213/00 P) and other C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P (§ 338).

ject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. The presence of the principle *ne bis in idem* in parallel proceedings is not strictly confined to violation of the same legal act. This means that the application of this principle to the relationship between the Commission and the national competition authority – the Antimonopoly Office of the Slovak Republic – is not prevented by the fact that the EU competition laws protect competition within the whole common market, while the national authorities protect individual territorial parts of the common market. However, the substance of both laws is identical and consists in the protection of free competition, while a difference in the territorial scope of anti-competitive conduct is of secondary importance, because it does not change the substance of such anti-competitive conduct, but has an impact on its intensity[14].

The competence of the Antimonopoly Office of the Slovak Republic in case of protection of competition is given by Section 2(4) of the Competition Act. Consequently, the Competition Act also applies to activities and conduct that have taken place abroad, provided that they lead, or may lead, to restriction of competition on the domestic market. It follows from the above that a potential to restrict competition, expressed by the word "may", is sufficient. Therefore, the competence of the Antimonopoly Office of the Slovak Republic to deal with an agreement in which the Slovak Republic was neither a direct party nor a member is even given if this agreement might hypothetically lead to a restriction of competition on the Slovak market. The competence of the competition authority is not given where anti-competitive conduct has taken place abroad, but there is no threat of distortion of competition in relation to the domestic territory.

In the case of the agreement between the Japanese and European companies on the manufacture of gas insulated switchgears, it was clear from the very text of the agreement that there was targeted allocation of projects, the fixing of prices and market sharing between the European and Japanese parties. This conduct itself taking place in the territory of the European members had a potential to influence or restrict competition in the territory of the Slovak Republic. An agreement to restrict competition exists even when its parties follow a common plan that has a potential to restrict their individual business conduct by identifying the limits of their mutual action or abstaining from action.

The impact and effect on the market of the Slovak Republic, which established the competence of the Antimonopoly Office of the Slovak Republic to deal with the case, consisted in the proved negotiation of the parties of the restrictive agreement on projects planned in the Slovak Republic. Mitsubishi's allegation of the technical impossibility and economic disadvantage of importing their products to Slovakia was to prove a lack of an appropriate effect on compe-

[14] Decision of the Antimonopoly Office of the Slovak Republic No. 2009/KH/R/2/035 of 14 August 2009.

tition in the Slovak Republic. However, according to expert opinions prepared in that case, the entry of the Japanese products into the Slovak market was not hindered by any technical or economic barriers, since the Japanese companies had a real possibility to adjust the parameters of the supplied products to the Slovak market. The alleged impossibility to import the products to the Slovak market was not proven, although a greater amount of investment would have been associated with its implementation. The effect of anti-competitive conduct does not necessarily relate to its actual effect[15]. Even under the case-law of the European courts it is not necessary to specify in detail the effect of anti-competitive conduct, in particular, because of the presence of many external factors which make it impossible to objectify the actual extent of the effect on the market. Therefore, in order to assess the potential of a threat to competition, it is sufficient to prove with reasonable probability what effect of anti-competitive conduct on the economic market might be.

On this basis, the Antimonopoly Office of the Slovak Republic concluded that there was a threat of restriction of the domestic market, as a result of which a sanction was imposed on the Japanese and European companies under Section 38(1) of the Competition Act.

A similar undesirable conduct of participation in an agreement restricting competition is a breach of procedural obligations under the Competition Act. An example of a transnational reach of the Antimonopoly Office of the Slovak Republic is the decision to impose a fine under Section 38a(1) on Opel Southeast Europe, a Hungarian company operating in the Slovak Republic through its branch[16]. The Antimonopoly Office of the Slovak Republic initiated an investigation under Section 22(1)(b) in the area of providing after-sales services related to the sale of Opel motor vehicles in the Slovak Republic. These motor vehicles are sold in the Slovak Republic through authorised dealers. As a part of these proceedings, the Antimonopoly Office of the Slovak Republic requested the Opel branch, as an importer of Opel vehicles, for information and documents related to the provision of after-sales services. Opel provided the Antimonopoly Office of the Slovak Republic incomplete and untrue information and thus breached Section 22(2) of the Competition Act. The fine was imposed not on the Opel branch, but directly on the Hungarian company Opel.

“The fact that a branch of a foreign legal entity established in the Slovak Republic is registered in the Business Register does not imply that this branch is the holder of legal personality and has a capacity to be a party to proceedings”[17].

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[15] Judgment of the Court of First Instance (Third Chamber) in Case T-203/01 Michelin v Commission of the European Communities of 30 September 2003.

[16] Decision of the Antimonopoly Office of the Slovak Republic No.: 208/2017/OZDPaVD-2017/SP/2/1/002 of 26 January 2017.

[17] Resolution of the Supreme Court of the Slovak Republic 4 Obdo 54/2011 of 30.11.2011.

Therefore, a foreign legal entity has the capacity to be a party to proceedings. Undertakings have, under Section 22(2) of the Act, an obligation to submit to the Office complete and true information and documents required by the Office within the time limit specified by the Office, and in case of a breach of this statutory obligation the Office shall impose a fine on the undertaking under Section 38a(1)(a) a) of the Act. An administrative offense of a failure to submit true information and documents required by the Office within the time-limit set by the Office is committed at the moment when the obliged entity provides the Office with false information or does not provide the requested information and documents within the time limit specified by the Office. By failing to submit the required documents and information, Opel breached its obligation under Section 22(2) of the Competition Act. The existence of the statutory obligation declares the importance of detecting and proving an infringement of the competition rules. A breach of these obligations has a negative impact on the effectiveness of the exercise of the Antimonopoly Office's competence in the protection of competition. Therefore, the Antimonopoly Office of the Slovak Republic is obliged to impose a fine for such a kind of conduct, taking into account of its proportionality to the seriousness of the related conduct, as well as the need for its repressive and preventive nature. In determining the amount of the fine, the Antimonopoly Office of the Slovak Republic also takes into account of the proportionality of the amount of the fine and the consequences of the conduct of the party to the proceedings, which in this case consisted in the intentional hindering of the Office's activity. As regard the seriousness of the conduct, it is necessary to take into account of its impact on the proper and effective detection of possible anti-competitive behaviour and the procedural obstacles and the actions of the Antimonopoly Office of the Slovak Republic to remove them. After taking into account of and objectivising the above-mentioned facts, the Antimonopoly Office of the Slovak Republic imposed a fine on the Hungarian company Opel under Section 38a(1)(a) as a percentage of Opel's turnover in the Slovak Republic in 2015.

The potential for distortion of competition is negligible where there is a concentration of business entities whose impact on the Slovak market is negligible. The above-mentioned conduct occurred in case of proceedings on concentration, where the Antimonopoly Office of the Slovak Republic decided to agree with a concentration consisting in the gaining of a direct exclusive control by a Japanese undertaking over a Swedish undertaking. In this case, the notifier – a Japanese company – is the parent company of several entities involved in the manufacture and supply of steel and titanium products. The target territory of the Group of Entities of the notifier was, in the Merger Notification, defined as the territory of Asia, while its presence is minimum in the European area and negligible in the territory of the Slovak Republic. The group of the Swedish undertaking pursues its business activity mainly in the European area, especially in the Nordic countries. In the territory of the Slovak Republic, it is only present as a foreign supplier.

According to the information contained in the Notification, there is no horizontal overlap between the activities of the undertakings concerned in the territory of the Slovak Republic from the product or geographical points of view. Likewise, there is no vertical link between the activities of the undertakings concerned in the territory of the Slovak Republic. The absence of a horizontal overlap or a vertical link between the activities of the undertakings concerned means that it applies to all available alternatives within the product and geographic relevant markets that

- none of the undertakings concerned or its related undertaking operates on the same product relevant market and geographic relevant market, including the territory of the Slovak Republic, as another undertaking concerned and its related undertaking, and
- none of the undertakings concerned and its related undertaking operates on a market that is a market for supply or sale in relation to the product relevant market and the geographic relevant market in the territory of the Slovak Republic where another undertaking concerned and its related undertaking operates.

Such concentrations do not normally cause a risk of distortion of competition (except in certain specific cases). In these cases, it is the so-called conglomerate concentration in which undertakings expand their portfolio of activities, but without strengthening their position in the markets in which they operated before the concentration. The vertical link is the case where the undertaking concerned or its related undertaking operates on the relevant market which is the market of supply or sale in relation to the relevant market on which another undertaking concerned operates, and the geographic relevant market also includes the territory of the Slovak Republic. The supplier-customer relationship between the undertakings concerned is not decisive[18].

Conclusion

Despite a priority protection of the domestic economic market, the effects of decisions of the Antimonopoly Office of the Slovak Republic have a transnational impact. This fact is mainly due to the membership in the European Union (and has the origin in its documents), which seeks to achieve a good functioning of the common market with free competition. The decisions of the Antimonopoly Office of the Slovak Republic always affect the Slovak market, but the Slovak domestic market is a part of the European competition. Any fluctuations on the internal markets of the Member States may undermine the effort for the continuity of the European competition, and it is therefore necessary to have due regard

[18] Guidelines of the Antimonopoly Office of the Slovak Republic laying down the details of a simplified merger notification of 16.09.2014.

to its protection. The transnational effects of the decisions of the Antimonopoly Office of the Slovak Republic protect competition in the territory of the Slovak Republic even in cases where is a only potential threat to competition and, as a result, the European economic market is protected to a greater extent.

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Summary

In this paper the author deals with transnational effects of decisions of the Antimonopoly Office of the Slovak Republic as an authority for the protection of competition of the national nature, however, in the European law context. The author points out the application of national competition law in close association with legal provisions contained in the essential documents of the EU. The paper also mentions the European tendencies of unifying competition protection legislation. In the context of a threat to competition, the author also points out the importance of complying with obligations in detecting and proving the same. He also refers to situations where, despite the potential presence of competition concerns, competition distortions do not occur.

Keywords: of competition law, the Slovak Republic, the European law

TRANSNARODOWE SKUTKI DECYZJI URZĘDU ANTYMONOPOLOWEGO REPUBLIKI SŁOWACKIEJ

Streszczenie

W niniejszym artykule autor zajmuje się ponadnarodowymi skutkami decyzji Urzędu Antymonopolowego Republiki Słowackiej jako organu ochrony konkurencji o charakterze krajowym, jednak w kontekście prawa europejskiego. Zwraca on uwagę na stosowanie krajowego prawa konkurencji w ścisłym powiązaniu z przepisami prawa zawartymi w podstawowych dokumentach Unii Europejskiej. W tekście wspomniano również o europejskich tendencjach w ujednolicaniu przepisów dotyczących ochrony konkurencji.

Słowa kluczowe: prawo konkurencji, Republika Słowacka, prawo europejskie

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Krzysztof Woźniewski

University of Gdańsk
ORCID: 0000-0001-9502-8521

THE PROBLEM OF EFFECTIVENESS OF A PROCEDURAL ACT PERFORMED "PREMATURELY" – A FEW COMMENTS IN RELATION TO THE DECISION BY THE EUROPEAN COURT OF HUMAN RIGHTS ON 13 DECEMBER 2018, 21497/14 (WITKOWSKI)

Provisions of procedural criminal law, awarding participants of criminal proceedings with the right to perform specific procedural acts in order to elicit related procedural effects, often simultaneously specify a deadline for performing such acts. A failure to meet such a deadline as a rule leads to a negative consequence, i.e. ineffectiveness of the procedural act carried out in violation of the said deadline. The Code of Criminal Procedure (CCP) sets forth the basic standard in regard to this in Art. 122 § 1 CCP, according to which a procedural action effected after the final time-limit has lapsed shall be without legal effect[1].

According to the Code of Criminal Procedure, final time-limits defined for a party to the proceedings, or the victim in the case of a decision conditionally dismissed during a sitting, include the time limits for filing a written request to the court to have the statement of reason for the judgement prepared in writing and served (Art. 422 § 1 CCP). Submission of such request within the final time-limit of seven days from the date of passing the judgment is a prerequisite for an eligible participant of the litigation to initiate an appeal procedure. If the above

[1] Polish criminal procedure distinguishes three types of procedural time-limits, relative to their legal nature. Final time-limits, i.e. deadlines for filing appeals, as well as those deadlines which the act deems to be final,); final time-limits may be reinstated if certain conditions are met, b) preclusive time-limits, or deadlines following which a given action has no legal effect, and they cannot be reinstated; c) instructional time-limits are deadlines following which a given action has legal effect, however a failure to meet such time-limit may lead to disciplinary action or official proceeding against the individuals guilty of such violation. Cf. P. Hofmański, S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2018, p. 64; M. Cieslak, *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa 1984, p. 342.

action is not taken, the decision shall become final after seven days, and if a decision is passed by a court of first instance, the court shall be released from the obligation to issue a statement of reason. The obligation to submit a motion to have a statement of reason served also applies to decisions subject to *ex officio* delivery[2], and this obligation is not excluded by the act even in the case of decisions for which statement of reason is issued ex officio (Art. 422 § 1 second sentence CCP). Negative consequences of a failure to file the motion within the time limit include invalidity of such motion, whereby the president of the court shall refuse to accept it pursuant to Art. 422 § 3 CCP, however the negative ruling of the president of the court shall be subject to interlocutory appeal.

Despite the moderately complicated legal and structural nature of this provision, the practice of applying the provisions of Art. 422 § 1 CCP is associated with some problems; one of these is connected with premature submission of a relevant request, i.e. before the court delivers the judgment, whereby the promulgation of the judgment is a precondition for the lack of defects in the said judgment and for establishment of the condition of a matter judged (*res iudicata*), even if it is not legally binding[3]. The problem of a request filed by a legible entity for the reasons to be delivered with the judgment, if such request is submitted before the said judgment has been handed down, is not new in Polish jurisdiction[4]; it was also examined by the European Court of Human Rights, in the case Witkowski v. Poland, and in the decision dated 13 December 2018 (21497/14).

The legal problem in its essence is related to the assessment of the legal effect of a procedural act performed prior to another procedural act, where only completion of the latter makes it possible to perform other acts with respect to the original act. In other words, a justification for performing one procedural act lies in the previous completion of another procedural act. A postulatory declaration of intent by a party, comprising a request for a delivery of a judgment with reasons, becomes legally justified in connection with an existing imperative statement of intent by the court, i.e. the issued and announced judgment containing a resolution to the object of a criminal proceeding. The procedural act of

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[2] This requirement applies to decisions issued with respect to an accused person under detention, who has no defense counsel and was absent when the judgment was pronounced despite the fact they requested to be brought to the trial when the judgment was pronounced (Art. 422 § 2a CCP), and to the issuance of decision to the accused in a speedy proceeding (Art. 517h § 1 CCP)

[3] The act of promulgation consists in a number of other activities, such as public announcement of its content by the presiding judge, communication about a dissenting opinion, and oral presentation of the reasons for the judgment (Art. 418 § 1–3 CCP) as well as instruction of the participant of the litigation about their right of appeal, the time-limit and method thereof, or information that the decision or ruling may not be appealed (Art. 100 § 8 CCP)

[4] See e.g. decision by the Supreme Court dated 11 Oct 2002, WA 53/02, OSNKW 2003, No. 1–2, Item 15; decision by the SC dated 6 July 2005, IV KZ 18/05, OSNwSK 2005, No. 1, Item 1335; decision of the Administrative Court in Gdańsk dated 15 Nov. 2006, II AKa 330/06, POSAG 2008, No. 1, Item 159; decision by the SC dated 19 Feb.2013, II KZ 5/13, KZS 2013, No. 4, Item 41).

judgment promulgation is always marked with a specific date and hour when it was performed. Hence, there is a question whether the legible party may effectively lodge a request to have a written expression of the ruling delivered, if such request be filed prior to the time of its promulgation, conditionally in a way. The opposite situation whereby the said motion is lodged after the time-limit stipulated in Art. 422 § 1 CCP is directly regulated in § 3 of the same article, which provides that the court shall refuse to examine a motion filed after such time limit[5], on the other hand no provision regulates the proceeding in a reverse situation. Before the ECtHR issued the decision in the case Witkowski v. Poland, the prevailing opinion was that there is a seven-day time-limit for filing a request for a statement of reasons to be prepared in writing and served, and the relevant period starts only after the date the judgment is delivered, which is directly conveyed by Art. 422 § 1 CCP, which means that if a request for reasons to be given for a judgment is lodged before the start of that period, it is ineffective[6]. The related discussions, evoking *arg. ad absurdum*, claimed that a contrary opinion would lead to an absurd conclusion that this type of request may be filed at any time prior to delivery of judgment, even after a notification about the date of trial has been served[7]. The most substantial argument for the opinion about the inadmissibility was, however, derived from the wording of Art. 422 § 1 CCP as in accordance with the opinion presented by the Supreme Court (SC) in its decision dated 19 February 2013 (II KZ 5/13), which said that "since the disposition set forth in Art. 422 § 1 CCP stipulates that the request may be lodged by the party «within a final time-limit of seven days from the day on which the judgement is pronounced», this means that it can be done only during this period (…) therefore no doubts should be raised by the requirement that the action be performed after «the judgment is pronounced», because generally this is when, in accordance with the act, the time limit defined for this action starts to run, and it is only after this precondition is met that the action will (formally) be effective and valid". This opinion repeats the position presented by the SC in 2005 where the justification referred to the wording of the relevant provision, with particular

[5] The prevailing opinion in judicature and the doctrine says that if the time-limit specified in Art. 422 § 1 CCP (Art. 370 § 1 CCP from 1969) is exceeded, the request, being ineffective, does not produce legal effects (cf. resolution SN of 19 Dec. 1973, VI KZP 44/73, OSNKW 1974, vol. 4, Item 59; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, vol. 2, Warszawa 1999, p. 467 thesis 4 for Art. 422 § 1 CCP; D. Świecki, *Kodeks postępowania karnego*, vol. 1: *Komentarz aktualizowany*).

[6] See: decision by the SC dated 19 Feb. 2013, II KZ 5/13, KZS 2013, No. 4, Item 41; decision by the SC dated 1 June 2010, IV KZ 30/10, OSNwSK 2010/1/1142.

[7] Cf. decisions by the SC dated 11 Oct. 2002, WA 53/02, OSNKW 2003, Vol. 1–2, Item 15; 19 Aug. 2009, IV KZ 38/09; 1 June 2010, IV KZ 30/10, OSNwSK 2010/1/1142); it was also approved in the literature (cf. T. Grzegorczyk, *Komentarz do Kodeksu postępowania karnego*, Warszawa 2008, p. 886).

emphasis placed on the phrase seven days from the day on which the **judgement is pronounced** (emphasis added by KW). This formal approach is deemed by the SC to be reasonable since a decision about challenging a verdict can only be taken after one becomes aware of its content[8]. It seems, however, that in this adjudication the SC is aware of the risk that the interested parties may lose the opportunity to lodge the said request in an effective manner, and consequently it suggests that in such a situation, i.e. when a legible party files a request prior to the delivery of the judgment, they should be informed, in accordance with the provisions of Art. 16 § 2 CCP, about the duty related to this and about negative consequences resulting from a failure to comply, or more specifically in this case about the necessity to re-apply or to sustain the request within the time limit specified in Art. 422 § 1 CCP[9]. In other words, this would be convalidation of an ineffective procedural act by means of re-application.

In the light of the above, a notable Decision was issued by the European Court of Human Rights on 13 December 2018 (21497/14, SIPLex No. 2597619) in the case Witkowski v. Poland, where the applicant complained of a violation of Art. 6 clause 1 of the Convention on Human Rights, i.e. the right of access to a court, which is an important aspect of the right to a fair trial, the said violation resulting from the refusal of the competent court to accept a request for a statement of reasons to be prepared in writing and served with the judgment pronounced in the case in which the applicant was the defendant[10], the ground for the refusal was the fact that the said request had been lodged two hours before the judgment was pronounced. The regional court refused to accept the request, evoking Art. 422 § 1 CCP, and to an extent drawing on the prevailing opinions resulting from application of the said provisions in practice and implying legal invalidity of the so-called "premature" requests lodged thereunder, the said opinions to be encountered both in adjudications and in the

[8] Pronouncement of a judgment in this case is a procedural fact which constitutes a precondition for an action to be taken pursuant to Art. 422 § 1 CCP; without this fact, there are no grounds for taking the action.

[9] As implied by the justification to this decision, the SCo acknowledged that a request for reasons to be given for a judgment was lodged ineffectively, i.e. prematurely, due to lack of awareness about the relevant legal regulation, hence in such case the directives related to information on the proceeding should be applied along with the directive on loyalty towards parties and participants of a proceeding.

[10] Important element of the actual status of the proceeding includes the procedural act whereby the court closed the hearing on 12 March 2013 and postponed pronouncement of the decision until 19 March, at 10.45. The applicant, who had been unable to attend and hear the judgment, lodged the request for reasons to be given for the judgment on 19 March, at 9.00 o'clock, i.e. less than two hours before the judgment was pronounced. However, the decision on the refusal to accept the request for a statement of reasons to be served, even though it was issued on 25 March, was delivered to the defendant only on 15 April, while the deadline for filing the request was on 26 March.

science of criminal procedure law. Importantly, a refusal to accept a request for a statement of reasons to be delivered is made in a ruling, subject to appeal (Art. 422 § 3 second sentence CCP)[11]. During the proceedings in the ECtHR in Strasbourg, the opinion of the Polish government, based on adjudications of the Supreme Court, presented an argument that the applicant should have confirmed the relevant request or should have filed a new request of the same kind within the time limit set forth in Art. 422 § 1 CCP, in line with the way of proceeding in such situations suggested earlier in decisions of the SC (see the comments above). However, the ECtHR rightly observed that in the specific case the court had not asked the applicant whether he wished to confirm his request for the establishment of the reasons within the time limit defined for that. Hence the domestic court did not comply even with the related national standard set forth by the SC, and during the proceeding, the national authorities were unable to explain why the court failed to do that.

Hence, the ECtHR decided that the right of access to court had been violated, because by refusing to consider the request at issue, in a situation where the said request is filed prematurely and the applicant is not asked, in line with the principle of fair trial and the right to be informed (Art. 16 § 2 CCP), to confirm or file a new request, particularly given the fact that the defendant has no professional legal counsel, the relevant court may deprive the defendant of the right to challenge the decision on criminal liability in the case at issue. A convincing opinion was expressed by K. Warecka regarding the excessively formalistic interpretation of Art. 422 § 1 CCP adopted by the Polish court and creating a barrier for the applicant to challenge the decision of the court of first instance, as a consequence of which the applicant had lost the right to file an appeal[12].

This leads, however, to a question concerning applicability of the legal opinion based on the above decision of ECtHR on acceptability of requests filed pursuant to Art. 422 § 1 CCP, before a judgment is delivered, and whether it may effectively be applied as a general rule for assessing validity of a procedural statement filed by a party not only after the time limit defined by the regulations for a procedural action or before its end, but even before a specific procedural activity is completed, providing grounds for other related procedural actions, without which the latter are immaterial. In other words, does the decision of the ECtHR provide grounds for assuming procedural effectiveness if a request for a statement of reasons is lodged once the accused person

[11] The ground for lodging a complaint with regard to the ruling of the president of the court is provided by Art. 422 § 3 sentence 2 CCP, unless the said ruling is issued by the court referendary and is subject to interlocutory appeal (§ 3 Art. 422 CCP).

[12] K. Warecka, *Wniosek o doręczenie wyroku wraz z uzasadnieniem można złożyć przed ogłoszeniem wyroku. Omówienie wyroku ETPC z dnia 13 grudnia 2018 r., 21497/14 (Witkowski)*, System Informacji Prawnej LEX 2018.

has received a copy of the bill of indictment, served in accordance with the decision of the president of the court pursuant to Art. 338 § 1 CCP, whereby such request may be acted upon only after the relevant judgment is pronounced; likewise, is it possible to assume procedural effectiveness if such request is filed by a victim along with his/her statement on the intention to act as subsidiary prosecutor. Obviously, it is possible to point out many examples of specific situations where such request could be lodged before the verdict is pronounced, however analysis of acceptability and potential validity of requests for judgment to be delivered with reasons in the context of any possible procedural situation will contribute nothing more than a list of casuistic nature. The legal arguments contained in the decision of the ECtHR lead to one recommendation for the Polish judicial practice. Namely, a "premature" request lodged pursuant to Art. 422 § 1 CCP should be recognised as acceptable and effective if it is filed on the day set by the court for the delivery of the judgment, but before the specific hour of the verdict promulgation, and even – in my opinion – if such request is filed within a period of time after the hearing is closed and the decision is postponed, until the announcement of the verdict, as indicated in the decision on the postponement. It seems that these timelines of the procedure – and these indeed were considered by the ECtHR in its analysis of the complaint 21497/14 – are related to the very advanced stage of the main litigation, including the court trial, where such action, taken by the parties mainly as a precaution, does not violate the procedural law. On the other hand, expanding the scope to include a possibility to perform the relevant procedural act during earlier stages of the main litigation raises doubts also in view of the functions played by time-limits in a criminal proceeding. Science of criminal procedure law names functions related to the dynamics and order of the criminal proceeding and to assurance and stability of the procedural resolution[13]. From this viewpoint, the domestic court, through its decision, generally implemented the procedural functions of time limits, in particular the function stabilising the resolution, however by realising the other functions it ultimately deprived the defendant of the right of appeal, which was recognised as a behaviour violating the right to a fair trial. In this case *summum ius* proved to be *summa iniuria.*

To sum up our *de lege lata* considerations, requests lodged by parties pursuant to Art. 422 § 1 CCP should be deemed acceptable and effective at least in the case of the timelines indicated *implicite* in the decision of the ECtHR, while earlier submission of such requests should produce procedural effects resulting from Polish adjudications related to the directives defined in Art. 16 § 2 CCP securing the right to be adequately informed, in particular in situations when parties to the proceedings do not have professional legal counsel.

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[13] I. Nowikowski, *Terminy w kodeksie postępowania karnego*, Lublin 1988, p. 12 et seq.

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Summary

Provisions of procedural criminal law, awarding participants of criminal proceedings with the right to perform specific procedural acts in order to elicit related procedural effects, often simultaneously specify a deadline for performing such acts. A failure to meet such a deadline as a rule leads to a negative consequence, i.e. ineffectiveness of the procedural act carried out in violation of the said deadline. The problem also occurs when making a procedural action prematurely. The article will be devoted to these issues.

Keywords: effectiveness of procedural action, judgment, premature

PROBLEM SKUTECZNOŚCI CZYNNOŚCI PROCESOWEJ DOKONANEJ „PRZEDWCZEŚNIE” – KILKA UWAG NA TLE WYROKU EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA Z DNIA 13 GRUDNIA 2018 R., 21497/14 (WITKOWSKI)

Streszczenie

Przepisy prawa karnego procesowego, przyznając poszczególnym uczestnikom postępowania karnego uprawnienia do dokonywania określonych czynności procesowych w celu wywołania związanych z nimi skutków procesowych, często jednocześnie określają termin dla ich dokonania. Niedotrzymanie tego terminu zazwyczaj pociąga za sobą negatywną konsekwencję procesową w postaci bezskuteczności czynności procesowej dokonanej z naruszeniem terminu do jej dokonania. Problem wystepuje także przy dokonaniu czynności procesowej przedwcześnie. Tym właśnie zagadnieniom poswięcony został artykuł.

Słowa kluczowe: skuteczność czynności procesowej, wyrok, przedwcześnie

AFFILIATIONS

AGATA BARCZEWSKA-DZIOBEK, University of Rzeszow, ORCID: 0000-0002-7514-9219

ANNA CHOCHOWSKA, State Higher Vocational School Memorial of Prof. Stanislaw Tarnowski in Tarnobrzeg, ORCID: 0000-0002-4146-9951

GABRIELA DOBROVIČOVÁ, Pavol Jozef Šafárik University in Košice, ORCID: 0000-0002-9312-4402

RAFAŁ DOWGIER, Białystok University, ORCID:0000-0003-1583-086X

ELŻBIETA EJANKOWSKA, University of Rzeszow, ORCID: 0000-0001-5129-8853

RENATA KAMIŃSKA, The Cardinal Wyszynski University in Warsaw, ORCID: 0000-0003-3357-1734

SYLWESTER KASPRZAK, The John Paul Catholic University of Lublin, ORCID: 0000-0002-1007-0454

ANETA KOWALCZYK, University of Rzeszow, ORCID: 0000-0002-5029-863X

MAŁGORZATA ŁUSZCZYŃSKA, Maria Curie-Skłodowska University in Lublin, ORCID: 0000-0002-4387-8820

ZDZISŁAW MAJKUT, University of Warmia and Mazury, ORCID: 0000-0001-9766-8514

RADOSŁAW OLSZEWSKI, University of Lodz, ORCID: 0000-0001-8119-1635

MARIUSZ POPŁAWSKI, Białystok University, ORCID: 0000-0003-1403-3033

PIOTR RUCZKOWSKI, The Jan Kochanowski University in Kielce, ORCID: 0000-0003-4344-9417

TIBOR SEMAN, Pavol Jozef Šafárik University in Košice, ORCID:

AGNIESZKA SKÓRA, University of Warmia and Mazury, ORCID: 0000-0003-2169-5326

PIOTR K. SOWIŃSKI, University of Rzeszow, ORCID: 0000-0003-2210-5877

PIOTR SZRENIAWSKI, Maria Curie-Skłodowska University in Lublin, ORCID: 0000-0002-3448-0298

RENATA ŚWIRGOŃ-SKOK, University of Rzeszow, ORCID: 0000-0003-2635-6462

JOZEF TEKELI, Pavol Jozef Šafárik University in Košice, ORCID:

KRZYSZTOF WOŹNIEWSKI, University of Gdańsk, ORCID: 0000-0001-9502-8521

ZESZYTY NAUKOWE UNIWERSYTETU RZESZOWSKIEGO

SERIA PRAWNICZA

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AFILIACJE

AGATA BARCZEWSKA-DZIOBEK, Uniwersytet Rzeszowski, ORCID: 0000-0002-7514-9219

ANNA CHOCHOWSKA, Państwowa Uczelnia Zawodowa im. prof. Stanisława Tarnowskiego w Tarnobrzegu, ORCID: 0000-0002-4146-9951

GABRIELA DOBROVIČOVÁ, Pavol Jozef Šafárik University in Košice, ORCID: 0000-0002-9312-4402

RAFAŁ DOWGIER, Uniwersytet w Białymstoku, ORCID:0000-0003-1583-086X

ELŻBIETA EJANKOWSKA, Uniwersytet Rzeszowski, ORCID: 0000-0001-5129-8853

RENATA KAMIŃSKA, Uniwersytet Stefana Wyszyńskiego w Warszawie, ORCID: 0000-0003-3357-1734

SYLWESTER KASPRZAK, Katolicki Uniwersytet Lubelski im. Jana Pawła II, ORCID: 0000-0002-1007-0454

ANETA KOWALCZYK, Uniwersytet Rzeszowski, ORCID: 0000-0002-5029-863X

MAŁGORZATA ŁUSZCZYŃSKA, Uniwersytet Marii Curie-Skłodowskiej w Lublinie, ORCID: 0000-0002-4387-8820

ZDZISŁAW MAJKUT, Uniwersytet Warmińsko-Mazurski, ORCID: 0000-0001-9766-8514

RADOSŁAW OLSZEWSKI, Uniwersytet Łódzki, ORCID: 0000-0001-8119-1635

MARIUSZ POPŁAWSKI, Uniwersytet w Białymstoku, ORCID: 0000-0003-1403-3033

PIOTR RUCZKOWSKI, Uniwersytet Jana Kochanowskiego w Kielcach, ORCID: 0000-0003-4344-9417

TIBOR SEMAN, Pavol Jozef Šafárik University in Košice, ORCID:

AGNIESZKA SKÓRA, Uniwersytet Warmińsko-Mazurski, ORCID: 0000-0003-2169-5326

PIOTR K. SOWIŃSKI, Uniwersytet Rzeszowski, ORCID: 0000-0003-2210-5877

PIOTR SZRENIAWSKI, Uniwersytet Marii Curie-Skłodowskiej w Lublinie, ORCID: 0000-0002-3448-0298

RENATA ŚWIRGOŃ-SKOK, Uniwersytet Rzeszowski, ORCID: 0000-0003-2635-6462

JOZEF TEKELI, Pavol Jozef Šafárik University in Košice, ORCID:

KRZYSZTOF WOŹNIEWSKI, Uniwersytet Gdański, ORCID: 0000-0001-9502-8521