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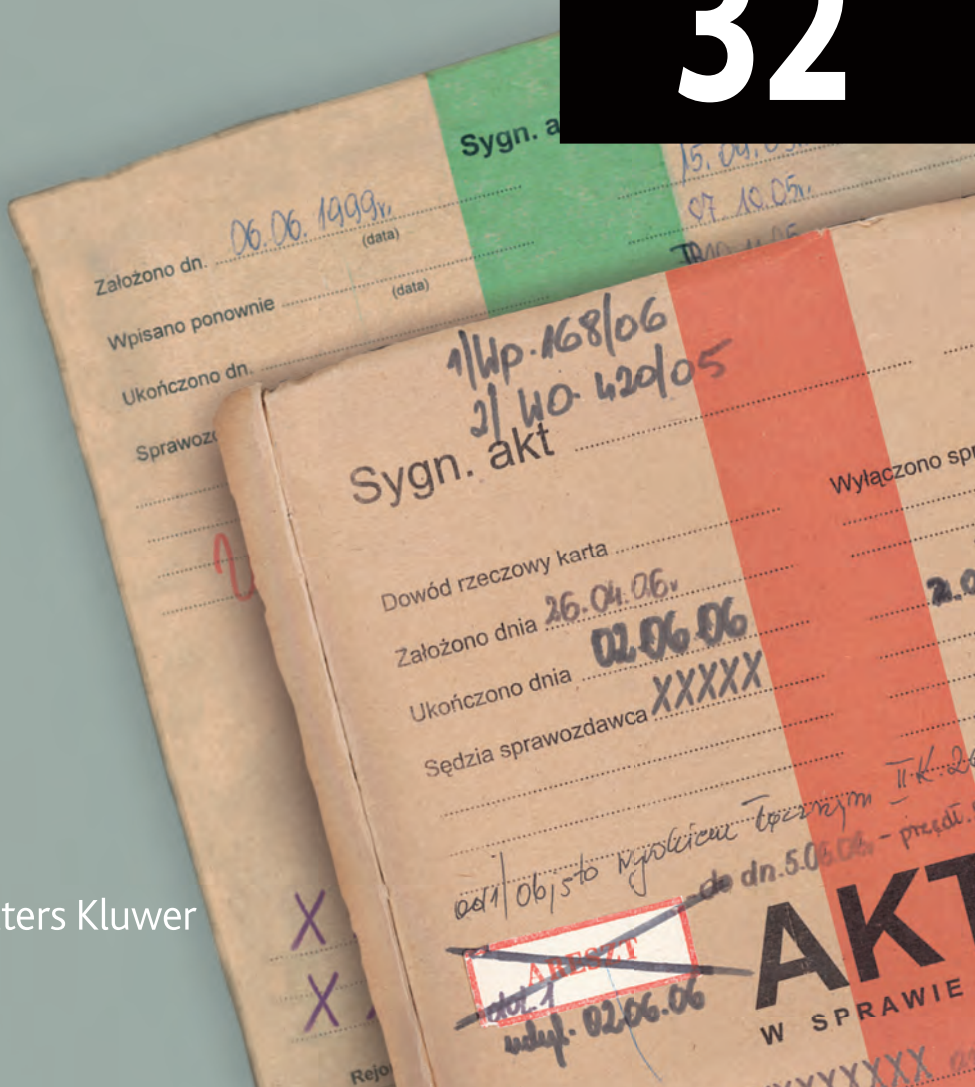

Wolters Kluwer

LAW IN ACTION

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1. REPRESSIONS OF OPPONENTS TO SYSTEMIC CHANGES IN POLAND IN THE YEARS 1944–1956

In consequence of World War II Poland found itself in the sphere of influence of the Soviet Union and this empire significantly reduced the sovereignty of the Polish state as well as imposed systemic changes which were not accepted by the majority of the population. To enforce their implementation various methods were used to break any kind of resistance towards the authorities, most violent and acute in the years 1944–1956. State terror was applied in that period.

Victims to the repression included approximately 8 600 killed, 25 000 murdered, 50 000 deported to the Soviet Union, 240 000 arrested (even children over 13 years old could be arrested) and approximately 25 000 executed or tragically dead in prisons[1]. It cannot be excluded that some of the figures given above are underestimated. According to Maria Turlejska, in the years 1944–45 approximately 50 000 Home Army[2] soldiers and in 1945 approximately 50 000 Poles from Pomerania, Upper Silesia and Great Poland regions were deported to the Soviet Union. Approximately 10 thousand were murdered without a court sentence – in the course of investigation, in the streets or fields, buried in the gardens surrounding county security offices or cemeteries (often in secret). The number of political prisoners sentenced for anti-state offenses for long-term imprisonment reached approximately 100 000 or even 150 000[3].

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1 *Bijące serce partii. Dzienniki personalne Ministerstwa Bezpieczeństwa 1945–47,* A.K. Kunert, R. Stolarski (eds.), Vol. I, Warszawa 2001, p. 11.

2 Home Army – an underground independence military organization, part of the Armed Forces of The Republic of Poland operating during World War II in the country, reporting to the Commander-in-Chief and the Government of the Republic of Poland in exile. Created in result of the re-organization of the Service for Poland's Victory (established on 27 September 1939) into the Union for Armed Struggle (13 November 1939) which was renamed Home Army on 14 February 1942. Home Army is believed to be the largest and best organized underground army operating in the occupied Europe. The order to dissolve the Home Army was given by the Chief Commander on 19 January 1945. On the structures of the Polish Underground State viz. Jan Karski [in:] *Tajne państwo: opowieść o polskim podziemiu* (1st edition of the book *Story of a secret state*, appeared in the USA in the second half of 1944).

3 M. Turlejska, *Te pokolenia żałobami czarne... Skazani na śmierć i ich sędziowie,* Warszawa 1990, pp. 26 and 106–107.

Unknown remains also the number of people sentenced to death as it can only been estimated. According to M. Turlejska, in the years 1944–1948 alone, over 2 500 people were sentenced for political offenses[4]. My own calculations point to a figure of no less than 3 000 people[5]. Jerzy Poksiński estimates that in the years in question some 4 400 people received a death sentence[6]. Penal repressions were extended also to farmers for failure to satisfy the compulsory delivery of grain, livestock and milk requirements. 518 000 farmers were punished for the above in the years 1952–1955[7]. A large number of people were also detained and tortured in the detention wards of public security offices even though no formal penal proceedings against them were in progress.

In spite of the existence of good normative acts in the field of substantive and procedural law from the interwar period, hurried steps were taken to adopt new ones, more adequate to cracking down the nation[8]. For this purpose, the Home National Council[9], performing the function of a temporary parliament, equipped the executive power with the authority to pass decrees with the power of a law[10]. The Polish National Liberation Committee adopted a large number of acts used to repress people undertaking independence-oriented activity and, in particular, the decree of 23 September 1944 Criminal Code of the Polish Army[11] (hereinafter referred to as c.c.PA), the decree of 30 October 1944 on the protection of the State[12], including the sanction of capital punishment in every provision.

The Council of Ministers issued decrees: of 16 November 1945 on crimes particularly dangerous at the time of the reconstruction of the state[13], replaced with the decree of 13 June 1946 of the same name[14] (the so-called small criminal code, hereinafter referred to as s.c.c.), decree of 22 January 1946 on responsibility for the September defeat and for letting fascist influences invade state life[15] and the decree of 16 November 1945 on summary proceedings[16]. The latter (in force till 1 January 1970) caused that in cases in which summary proceedings were applicable, common courts could adjudicate capital punishment or life sentence as well as at least 3-year imprisonment irrespective of the penalties foreseen for a given crime in the law. Moreover, adjudications made in this course could not be appealed against[17].

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[4] M. Turlejska, *Te pokolenia...,* p. 26.
[5] M. Stanowska, *Sprawy polityczne z lat 1944–1956 w świetle orzeczeń rehabilitacyjnych Sądu Najwyższego w latach 1988–1991,* „Studia Iuridica" 1995, Vol. 27, pp. 68–69.
[6] J. Poksiński, *'My, sędziowie, nie od Boga...'. Z Dziejów Sądownictwa Wojskowego 1944–1956*. Materials and documents, Warszawa 1996, p. 14.
[7] Cz. Kozłowski, *Namiestnik Stalina,* Warszawa 1993, p. 123.
[8] Z.A. Ziemba calls the criminal law of the years 1944–56 an anti-society law making the latter the title of his book on the subject – Z.A. Ziemba, *Prawo przeciwko społeczeństwu,* Warszawa 1997.
[9] An underground body established in a private flat in Warsaw on the night of 31 December 1943/1January 1944 by representatives of the Polish Workers' Party, K. Kersten, *Narodziny Systemu Władzy. Polska 1943–1948,* Warszawa 1989, p. 41.
[10] The Home National Council gave this power by the law of 15 August 1944 (Journal of Laws No. 1, Item 3) first to the Polish National Liberation Committee, established by the law of 21 July 1944 (Journal of Laws No. 1, Item 1), and subsequently passed this power over by virtue of the law of 3 January 1945 (Journal of Laws No. 1, Item 1) to the Interim Government of the Republic of Poland established by virtue of the law of 31 December 1944 (Journal of Laws No. 19, Item 99).
[11] Journal of Laws No. 6, Item 27 with amendments.
[12] Journal of Laws No. 10, Item 50.
[13] Journal of Laws No. 53, Item 300.
[14] Journal of Laws No. 30, Item 192.
[15] Journal of Laws No. 5, Item 46.
[16] Journal of Laws No. 53, Item 301.
[17] Summary proceedings were not applicable to crimes committed by people liable before military courts (Article 1, Sect. 4 of the decree on summary proceedings).

Preparatory proceedings, though formally subordinated to the prosecutor, were in fact subordinated to the public security bodies. It was also these bodies that decided about the application of temporary detention[18]. This allowed for violation of basic principles of the rule of law in the criminal proceedings conducted. It was everyday practice for public security officers to apply sophisticated tortures in proceedings, even proceedings not always formally initiated against real or alleged political opponents.

The enormous scale of the violation of the rule of law by the investigation officers of the public security bodies are evidenced by the criminal proceedings instituted against, among others, Roman Romkowski – vice-minister in the Ministry of Public Security, Anatol Fejgin – head of the 10th Department of the Ministry of Public Security and Józef Różański – head of the Investigation Department of the Ministry of Public Security, all terminated with a conviction[19].

Following an agreement between the Minister of Justice, the Minister of National Defense and the General Prosecutor, in 1956, the so-called Mazur (J. Wasilewski) Commission[20] was established to investigate the activity of military investigation and judicial bodies[21] and also the General Prosecutor's Office and the Prosecutor's Office for the capital city of Warsaw. The results of the work of the Mazur Commission were particularly valuable as regards the activity of military investigation and judicial bodies. The Commission had at its disposal the results of court trials in which all those convicted in the cases related to the so-called conspiracy in the army[22] were rehabilitated. The proceedings revealed that the conspiracy accusations had been as a whole doctored and the convicting adjudications based on testimonies and statements extorted through torture. The commission brought charges of the applications of inadmissible methods of investigation, against some people even a charge of murder or heavy body injury in result of the application of criminal investigation methods, motioning for instituting criminal proceedings against the people concerned. However, as indicated by J. Poksiński's findings, the General Prosecutor's Office initiated investigations only against some of the perpetrators using inadmissible investigation methods. In spite of the confirmation of the use of criminal investigation methods only Władysław Kochan and Mieczysław Notkowski were sentenced by the Supreme Military Court to 5 years of imprisonment[23]. Proceedings against many other Military Information officers charged with

[18] In practice, the role of the coroner was gradually eliminated to be finally abolished in the fundamental amendment to the criminal code of 1928 made in the years 1949–1950.

[19] On 11 November 1957 the Voivodeship Court in Warsaw sentenced R. Romkowski and J. Różański to 15 years imprisonment and A. Fejgin to 12 years of imprisonment. The Supreme Court mitigated the punishment of Różański to 14 years. Investigations were also instituted against other public security offices – more about it [in:] M. Stankowska, *Próby rozliczenia z przeszłością w wymiarze sprawiedliwości* [in:] *Ius et Lex. Księga Jubileuszowa in honour of Professor Adam Strzembosz,* Lublin 2002, pp. 305–309.

[20] The Head of the Commission was Marian Mazur, Deputy Prosecutor General who was replaced by Jan Wasilewski, also Deputy Prosecutor General, when the former became Prosecutor General.

[21] The investigation covered only Military Information, Chief Military Prosecutor's Office and the Supreme Military Court. Military courts and Military Prosecutor's Office of lower ranks where violation of the rule of law also occurred, were not investigated.

[22] Dozens of people convicted for the so-called conspiracy in the army, including 37 officers with capital punishment (twenty of which were executed) were rehabilitated in the second half of the 50s following the resumption of proceedings viz. J. Poksiński, *'Spisek w armii'. Victis honos,* Warszawa 1994.

[23] Sentence of 1959. Both defendants were also degraded in 1960 to private – information after J. Poksiński, '*My, sędziowie*..., pp. 54 and 70.

the application of inadmissible investigation methods were discontinued under the amnesty laws of 22 November 1952[24] and of 27 April 1956[25]. The motions put forward by the Commission for disciplinary dismissal of a few officers as well as degradation to a lower military rank of almost forty other officers (including people against whom an investigation was initiated)[26].

The failure to enforce the motions for holding both the people guilty of creating a system of extorting testimonies through physical violence and direct executioners of these criminal methods criminally liable was a consequence of the necessity to liberalize the severity of the prosecution of the Security and Information officers recommended by the Polish United Workers' Party. It was Jan Wasilewski, the head of the commission investigating the manifestations of the violation of the rule of law, who had to justify his proceedings against security officers[27].

The motions of the Commission regarding people responsible for violating the rule of law in the General Military Prosecutor's Office were not enforced, either. Criminal proceedings against Stanisław Zarakowski and Henryk Ligięza were not initiated[28]. The same concerned the motion of the Commission for lowering the military ranks of eight prosecutors and the motion for prohibiting four of them to work in the system of justice[29].

Judges adjudicating in the cases of the so-called conspiracy in the army adjudicated capital punishment (of 37 officers) and always objected to reprieve. Hence, with respect to several judges: Feliks Aspis, Juliusz Krupski, Teofil Karczmarz and Mieczysław Widaj, who adjudicated in many cases and thus had an opportunity for a thorough and in-depth examination of the alleged military conspiracy, the Mazur (J. Wasilewski) Commission put forward a motion that an investigation be conducted to establish whether they had committed court murder or at least the crime of the abuse of power and failure to comply with the obligation[30]. The investigation was not instituted[31]. It is also doubtful whether they bore any consequences (apart from being transferred to the reserve yet before the commencement of the works of the Commission)[32]. Also, the motions of the Commission as regards the prohibition of work in the system of justice and the lowering of military ranks of a number of judges were not implemented[33].

[24] Journal of Laws No. 46, Item 309.
[25] Journal of Laws No. 15, Item 57.
[26] Information given after J. Poksiński, '*My sędziowie*..., pp. 280–282.
[27] The statement made by J. Wasilewski is presented by H. Dominiczak, *Organy bezpieczeństwa PRL 1944–1990. Rozwój i działalność w świetle dokumentów MSW,* Warszawa 1997, pp. 122–124.
[28] J. Poksiński, '*My, sędziowie*..., pp. 244–249, 282.
[29] The negatively assessed prosecutors included: Józef Feldman, Maksymilian Lityński, Marian Frenkiel, Stanisław Banaszek, Mieczysław Dytry, Zenon Rychlik, Mieczysław Mett and Helena Wolińska. The negative assessment of the Commission concerned also four prosecutors being Russian officers who returned to the Soviet Union: A. Skulbaszewski, A. Lachowicz, J. Amons and L. Azarkiewicz – information given after J. Poksiński, '*My, sędziowie*..., pp. 261 and 282.
[30] On the basis of the report of the Mazur (J. Wasilewski) Commission, published in the monograph by J. Poksiński, '*My, sędziowie*..., pp. 262–274.
[31] J. Poksiński, '*My, sędziowie*..., p. 283.
[32] On the basis of the archive materials of the Supreme Court I established that T. Karczmarz, not having law education, became judge of the Supreme Court in 1955 and remained in the position till 30 April 1957.
[33] The negative opinion of the Commission covered two Soviet officers: president of the Supreme Military Court – W. Świątkowski and his deputy – A. Tomaszewski, recalled to the Soviet Union as well as 7 judges: Oskar Karliner, Leo Hochberg, Aleksander Warecki, Piotr Parzeniecki, Stefan Michnik, Kryspin Mioduski and Zygmunt Krasuski. Only Col. O. Karliner was degraded to private by order of the Minister of National Defense of 1980. K. Mioduski and Z. Krasuski as well as L. Hochberg worked in the Military Chamber of the Supreme Court – information given after J. Poksiński, '*My, sędziowie*..., pp. 57, 80–81, 156, 276 and 283.

People in charge of the work of the so-called secret sections operating in the Ministry of Justice and the Court of Appeal and the Voivodeship Court in Warsaw in the years 1950–1954 were treated with even more leniency. The Minister of Justice, Zofia Wasilkowska, set up a commission to investigate the activity of the secret sections. Although, as the later rehabilitation proceedings revealed, these courts sentenced to death on no grounds a large number of people[34], the Commission (by the majority of votes) motioned only for initiating disciplinary proceedings against five judges most active in the secret sections[35]. Only I. Rubinow was found guilty of offending the office of the judge with infringement of the basic principles of the rule of law in connection with being the head of the so-called secret section in the period from September 1950 to September 1953 and sentenced to a disciplinary punishment of being retired without reduction of remuneration and simultaneously found not guilty of part of the charges. M. Stępczyński was acquitted of all the charges in spite of the fact that he sentenced B. Chajęcki, K. Moczarski, J. Rycelski and E. Krak to death without due grounds. He also took part in convicting to capital punishment Julian Czerniakowski and Zbigniew Ejme (the sentences were carried out)[36].

In my study[37], I discuss in detail the question of the violation of the rule of law by investigation and judicial bodies in the years 1944–1956 as well as the liability incurred by them for the related abuses.

II. REHABILITATION OF THE VICTIMS OF REPRESSING ADJUDICATIONS – GENERAL INFORMATION

Rehabilitation trials intended to repair the damage done by the system of justice in the years 1944–1956 were having place (although on a limited scale) already in the second half of the 50s, mainly in the course of resumed proceedings[38]. From 1988, the Supreme Court began to receive extraordinary appeals, more rarely petitions for the resumption of proceedings, starting rehabilitation proceedings. The proceedings were resumed because in the earlier proceedings a crime was committed or new facts or evidence emerged. In the extraordinary-revision appeals or cassation proceedings courts were accused of making an adjudication ridden with a serious infringement of substantive and procedural law.

[34] Bronisław Chajęcki (the sentence was executed, Chajęcki was rehabilitated posthumously in 1958), Kazimierz Moczarski, Eustachy Krak and Jan Rycelski were acquitted in 1956, August Emil Fieldorf (the sentence was executed, in 1958 the proceedings were discontinued due to lack of evidence and only in 1989 due to not having committed the crime). All the rehabilitation proceedings revealed that testimonies and explanations were extorted.

[35] Those were judges: Ilia Rubinow – responsible for the secret section in Warsaw courts, Emil Merz – responsible for the secret section in the Supreme Court and Marian Stępczyński, Kazimierz Czajkowski and Feliks Roszkowski.

[36] It is worth noting that from 16 December 1955 M. Stępczyński was delegated to perform the duties of a Supreme Court Judge and from 16 September 1958 became a Supreme Court Judge which he remained till his death in 1964 (on the basis of archive materials of the Supreme Court). Also E. Merz and J. Czajkowski were still Supreme Court Judges – Merz till his retirement in 1962 and Czajkowski till 1972.

[37] M. Stanowska, *Próby*..., pp. 305–317, 326–334.

[38] Till 1957 dozens of hundreds of the convicted were rehabilitated. Approximately 6 thousand political prisoners were released under the law of 27 April 1956 on amnesty (see: M. Turlejska, *Te pokolenia*..., pp. 60 and 108).

In the years 1988–1991, following the examination of extraordinary revisions[39], the Supreme Court rehabilitated 1274 people, out of which 693 people (that is over 54 percent were convicted in the years 1944–1956[40]. An analysis of 306 rehabilitation cases before the Supreme Court in the years 1988–1991 revealed that in the second half of the 50s adjudications were changed to the advantage of the defendant in the form of court supervision. It consisted primarily in mitigating very severe penalties. Occasionally, it was preceded by a change of the legal classification of the offense to a lighter one[41].

Since 1996 rehabilitation in political case proceeded with the use of extraordinary cassations. An analysis of extraordinary cassations in criminal cases which were brought to the Criminal Chamber of the Supreme Court in the years 1996–2002, covering all adjudications in cases of political character, indicates that as many as 743 people received full rehabilitation in this course, the majority of them, 392 people (52.8%) having been convicted in the years 1944–1956[42].

The extraordinary cassations in penal cases which were brought to the Military Chamber of the Supreme Court in the years 1996–2005 were also examined. The cassations appealed against adjudications concerning 177 people, including 124 people convicted in the years 1944–1956, made prior to 1989[43]. 103 people, including 99 people convicted for crimes of political character, the majority of them – 73 people (73.7%) convicted in the years 1944–1956, were fully rehabilitated[44].

After 1989, an effective way was sought to conduct the rehabilitation of people convicted for different forms of opposition to the totalitarian system so that the adjudications the validity of which was to be ruled null and void, would no longer be questioned.

The first attempt of this kind was made by the Senate of the Republic of Poland in its resolution of 1 December 1989. Pursuant to that resolution steps were to be taken, among others, to deem unlawful the legal acts from the years 1944–1948 which violate human rights. It was to lead to automatic reversal of judgments passed on their basis. The Senate also advocated declaring unlawful the judgments made in the so-called secret section of common and military courts. Finally, it also demanded that the stalinist crimes committed after World War II were declared genocide. The concept of automatically declaring all adjudications made after 31 December 1943 invalid was also presented in the draft law prepared by Prof. Tadeusz Zieliński[45].

[39] The annual reports of the Criminal Chamber and the Military Chamber of the Supreme Court show that extraordinary revisions in political cases were lodged also in the following years. In the years 1992–1995, the Criminal Chamber received 786 such revisions (it is not known how many people covered by the revisions were convicted in the years 1944–1956). In the years 1992–1996, the Military Chamber received revisions concerning 1 399 people but only 159 people were convicted in 1944–1956.

[40] M. Stanowska, *Orzecznictwo Sądu Najwyższego w sprawach rehabilitacyjnych 1988–1991,* „Archiwum Kryminologii" 1993, Vol. XIX, pp. 135 and 160.

[41] M. Stanowska, *Sprawy polityczne z lat 1944–1956 w świetle orzeczeń rehabilitacyjnych Sądu Najwyższego w latach 1988–1991,* „Studia Iuridica" 1995, Vol. 27, p. 69.

[42] M. Stanowska, *Rehabilitacja osób skazanych za przestępstwa i wykroczenia polityczne w wyniku uwzględnienia kasacji nadzwyczajnych (1996–2002),* „Przegląd Sądowy" 2008, No. 5, pp. 70 and 72.

[43] M. Stanowska, *Kasacje nadzwyczajne w Izbie Wojskowej Sądu Najwyższego (1996–2005),* „Studia i Analizy Sądu Najwyższego" 2010, Vol. IV, p. 310.

[44] M. Stanowska, *Pełna rehabilitacja w orzeczeniach Izby Wojskowej Sądu Najwyższego (1996–2005),* „Studia i Analizy Sądu Najwyższego" 2011, Vol. V, pp. 267–268 and 326.

[45] This draft law is referred to in the study of G. Rejman which contains a broad discussion of grounds for invalidating acts issued by the authorities – G. Rejman, *Prawo stanu wyjątkowego i odpowiedzialność karna za jego wprowadzenie a praktyka,* "Studia Iuridica" 1995, Vol. 27, p. 224 et seq.

Both the concept of declaring the legal acts unlawful and the automatic invalidation of adjudications were rejected. In result, the law of 23 February 1991 was passed on declaring invalid the adjudications made with respect to people repressed for working for the independence of the Polish State[46] (hereinafter referred to as the rehabilitation law), under which it is the court which rules an adjudication invalid after examining a particular case. Simultaneously, the scope of the application of the law was restricted in relation to different versions of the draft in two ways. Firstly, what was abandoned was the idea of declaring invalid adjudications convicting for activities consisting in exercising the human rights and freedoms (thus, for instance, people convicted for religious reasons or for opposing the authorities in any other ways were deprived of the chance). Secondly, time censorship was introduced, with 31 December 1956 indicated as the final date for independence-oriented activity. The solution was faulty but it was only the rehabilitation law that opened a new crucial stage in repairing the wrongs caused for political reasons under the communist rule. The law gave many people convicted in the years 1944–1956 a new possibility of verifying the judgment even where the judgment was lawful. Its importance cannot be underestimated as it was one of the first laws passed by the parliament in free Poland which restored honour to people who fought for free Poland.

III. METHODOLOGY OF EXAMINING REHABILITATION DECISIONS OF WARSAW COURTS AND STATISTICAL FINDINGS

The object of the present study covers the most important findings of the study of the adjudication practice of Warsaw courts in rehabilitation cases concerning people repressed for in the years 1944–1956 carried out in the Office for Studies and Analyses of the Supreme Court[47].

The analysis covered cases for the statement of invalidity of adjudications made with respect to people repressed in the years 1944–1956 for activity for the independence of Poland or for resistance to the collectivization in agriculture or for compulsory deliveries before the Voivodeship (later District) Court in Warsaw in the years 1991–2007. What was also studied were the decisions made by the Supreme Court both those closely connected to the enforcement of the rehabilitation law by Warsaw courts and those in cases of people with respect to whom Warsaw courts dismissed the petitions for declaring adjudications invalid.

The 'starting' point of the study was the date of the coming into force of the rehabilitation law[48]. The final date is 2007 because the amendment to the rehabilitation law of 19 September 2007[49] broadened significantly the time scope of the applicability of the law till 31 December 1989 and moreover declared invalid by virtue of law all decisions on internment made on the basis of the decree of 12 December 1981 on the state of war[50]. Consequently, since 2008 only single cases of petitions for declaring the invalidity of adjudications made in the years 1944–1956 appeared.

[46] Journal of Laws No. 34, Item 149.
[47] Report from study findings: Office for Studies and Analyses of the Supreme Court, M. Stanowska, *Rehabilitacja osób represjonowanych w latach 1944–1956 za działalność na rzecz niepodległości Polski w praktyce sądów warszawskich*, Warszawa 2017 (in print).
[48] 24 May 1991.
[49] Journal of Laws No. 191, Item 1372 came into effect on 18 November 2007.
[50] Journal of Laws No. 29, Item 154.

The first stage of the study focused on entries from Korepertories for the years 1991–2007 of the 8th Division of the District Court in Warsaw. What is recorded in the repertories are in the first place cases for the declaration of the invalidity of adjudications, for compensation and redress in cases of people killed or imprisoned, without proceedings closed with an adjudication as well as in cases for compensation and redress in connection with the action of Soviet prosecution bodies. By 1996, these repertories came to include also a number of other cases, among others, cases in the subject of temporary detention, placement in a psychiatric hospital, appointment of a counsel for the defence by the court. This is evidence of a very broad range of cases in the competence of the Division the adjudications of which were analysed.

From 1997, a separate repertory began to be kept solely for cases for the adjudication of the invalidity of judgments as well as for compensation and redress. The number of cases reported in the repertories in individual years presents as follows:

Table 1
Cases in the District Court in Warsaw in the years 1991–2007

Year	1991	1992	1993	1994	1995	1996	1997	1998	1999
Number of cases	2005	2618	3527	6378	1784	1048	350	592	475
Year	2000	2001	2002	2003	2004	2005	2006	2007	
Number of cases	278	256	195	209	159	189	150	52	

Source: own study.

What draws attention is a high number of cases (always over a thousand) in the period up to 1996. A marked upward trend was witnessed in the years 1993–1994 which was a consequence of the amendment to the rehabilitation law of 20 February 1993[51], giving a possibility to lodge petitions for compensation and redress in connection with the activities of Soviet prosecution bodies.

Table 2
Cases for declaring invalidity of judgments brought under the rehabilitation law received and settled in district courts in the years 1991–2007

Year	**Receipt**	**Settlement**	**Year**	**Receipt**	**Settlement**
1991	8 332	5 369	2000	617	966
1992	10 940	8 670	2001	480	962
1993	8 519	9 020	2002	288	636
1994	5 439	5 586	2003	230	446
1995	2 740	3 368	2004	220	276
1996	4 176	2 522	2005	182	324
1997	1 378	2 168	2006	122	160
1998	1 659	2 040	2007	125	118
1999	1 083	1 608	Received in the years: 1991–2007 – 46.530 cases, settlements 44.239 cases		

Source: own study on the basis of the statistical information of the Ministry of Justice.

[51] Journal of Laws No. 36, Item 159 – the law became effective as of 21 May 1993.

In 1994 alone, 4792 petitions of this kind were received (in total ca. 6 000). Such a high number of petitions resulted from the fact that the Voivodeship Court in Warsaw was the only one entrusted with the competence of adjudicating in cases of this kind.

Only the change of the competence of the court examining such petitions introduced in a subsequent amendment to the rehabilitation law of 3 February 1995[52] allowed to transfer the majority of the petitions to courts throughout the country. From 1997, the number of cases entered into repertories did not exceed 600 and since 2000 a marked downward trend has been observed.

The second stage of the study involved a survey of statistical data of the Statistical Managerial Information Division of the Ministry of Justice on the receipt and settlement of cases for declaring the invalidity of judgments made with respect to people repressed for activity for the independence of the Polish State in district courts in Poland in the years 1991–2007. The statistical data of the Ministry of Justice does not include the manner in which a petition for declaring invalidity was settled but only informs about compensations and redresses lawfully adjudicated following the declaration of invalidity.

The data concerning a lawfully adjudicated compensation and redress following a declaration of invalidity by district courts in Poland show in how many cases district courts in Poland granted the petitions for declaring the invalidity of a judgment fully or in part. In the analysis carried out in the District Court in Warsaw, concerning the rehabilitation proceedings themselves, I limited myself to checking whether the rehabilitated people lodged compensation claims.

The data referred to reveal that only a small number of people repressed in the years 1944–1956 made use of the rehabilitation law. As it was already pointed out in the preliminary remarks, only the number of people convicted for anti-state crimes to long-term imprisonment and capital punishment is estimated at over 100 000 while at least another 518 000 are estimated to have been punished for resistance to collectivization in agriculture and compulsory deliveries.

The mean level of amounts adjudicated in virtue of compensations and redress for painful repressions of the years 1944–1956 was rather low as illustrated by the information presented in Table 3.

In addition, not all the rehabilitated people (or their spouse, children or parents) lodged compensation or redress claims. In the District Court in Warsaw there were 2 242 cases of compensation and redress claims which made up 86.7% of cases closed with the whole or part of the petition for declaring invalidity of an adjudication being granted. Thus, the reservations concerning the adoption of the rehabilitation law referring to the financial capacity (read – difficulties) of the state were largely exaggerated[53].

[52] Journal of Laws No. 28, Item 143 – the law took effect as of 1 April 1995. Pursuant to it the court competent for examining cases for compensation and redress in connection with the activities of Soviet prosecution bodies, became the Voivodeship Court in the district of which a petition-lodging person resides.

[53] The reservations were made during the debates of the Parliament of the 10th term over the draft rehabilitation law. See: Stenographic report from the 49th session of the Parliament of the 10th term on 12 January 1991.

Table 3
Legally valid compensations and redresses adjudicated in consequence of the adjudication of invalidity in the years 1991–2007

Year	Number of people	Total value of adjudicated amounts (in PLN)	mean value of adjudicated amounts (in PLN)
1991	No data	4 570 397	No data
1992	3 923	43 951 878	11 204
1993	6 614	88 195 610	13 335
1994	7 538	88 481 588	11 738
1995	7 546	87 039 191	11 534
1996	7 269	89 714 833	12 342
1997	6 453	93 310 625	14 460
1998	6 270	112 914 844	18 009
1999	6 800	151 505 642	22 280
2000	5 060	100 552 911	19 872
2001	3 625	67 262 712	18 555
2002	1 992	50 805 193	25 505
2003	1 522	38 076 477	25 017
2004	1 596	37 952 091	23 780
2005	1 001	24 950 364	24 925
2006	511	12 959 833	25 362
2007	340	9 341 712	27 476
Total	**68 060**	**1 101 585 901**	**16 186**

Source: own study.

On the basis of repertories, it is possible to establish what courts passed repressing adjudications being objects of rehabilitation proceedings. Of course, the number of repressing judgments appealed against in the District Court in Warsaw was the highest and included 2 701 (90.7%) judgments made by military courts. 217 petitions for declaring invalidity concerned common courts judgments while 60 – judgments made by the Special Commission for Fight with Economic Abuses and Sabotage. Such a large number of military courts judgments being objects of rehabilitation proceedings results from the fact that judgments concerning pro-independence activities fell primarily within the substantive competence of military courts.

Since 1944, that is in the period of intensified repression activity of the state, the competences of military courts were increased significantly and were extended to cover civilians accused of a number of crimes of political character. The scope of the competence of military courts was significantly reduced only as of the 1 May 1955[54]. Since that moment only criminal cases of people accused of espionage were left in their competence.

[54] On 1 May 1955, the law of 5 April 1955 on transferring to common courts the hitherto competence of military courts in criminal cases of civilians, public security officers, Citizen Militia and Prison Service took effect (Journal of Laws No. 15, Item 83).

The next stage of the study consisted in mining from the repertories all the cases which involved presentation of petitions for declaring the invalidity of a judgment in the years 1991–2007. This allowed to establish what formal and substantive adjudications were made by the District Court in Warsaw in proceedings for the declaration of the invalidity of an adjudication, who appealed against substantive adjudications and what legally binding adjudications were made with respect to rehabilitation.

Table 4
Petitions for the declaration of invalidity of adjudications on the basis of the rehabilitation in the District Court in Warsaw in the years 1991–2007

Year	Petitions for the declaration of the invalidity of judgments				
	Received	Passed to other courts	Discontinued	Petitions left unexamined	Substantive settlements
1991	1028	343	11	6	668
1992	1265	323	20	29	893
1993	616	102	38	10	466
1994	467	105	42	8	312
1995	247	50	27	1	169
1996	142	26	20	5	91
1997	113	26	18	--	69
1998	148	22	16	5	105
1999	81	22	11	--	48
2000	61	15	12	2	32
2001	41	7	4	--	30
2002	32	5	5	--	22
2003	31	3	10	1	17
2004	27	2	4	--	21
2005	23	---	5	--	18
2006	19	2	6	--	11
2007	9	2	3	--	4
Total	**4 350**	**1 055**	**252**	**67**	**2 976**

Source: own study.

Table 4 presents the petitions for the declaration of the invalidity of judgments passed in the years 1944–1958 concerning people repressed, primarily for pro-independence activity, received by the District Court in Warsaw as well as the way they were settled. The table gives substantive solutions (without indication whether the petition was granted or dismissed) as well as decisions: to pass the case to other courts, to discontinue the proceedings as well as to leave a petition for the declaration of the invalidity of the judgment without examination.

On this basis it was found out that the inflow of petitions for the declaration of the invalidity of a judgment to the District Court in Warsaw constituted 9.4% of cases of this kind handled by district courts in Poland (i.e. a fairly high percentage).

Table 5 shows substantive solutions adopted by the District Court of the 1st instance in Warsaw and includes the way the case was resolved. Judgments providing

for fully granting the petition for the declaration of the invalidity of a judgment constitute 82.8% of substantive adjudications. In addition, the District Court in Warsaw partially granted the petition for the declaration of the invalidity of a judgment in 3.7% of cases. In total, 86.5% of substantive judgments closed with full or partial rehabilitation and only 13.5% of the petitions were dismissed.

What draws attention is the fact that the majority of the cases, as many as 2 509 (84.3%), were received and resolved in a substantive way in the years 1991–1995, that is at the beginning of the period in which the rehabilitation law was in force. Also, in that period the percentage of petitions dismissed was slightly lower than throughout the period and amounted to 11.6% of substantive adjudications.

Table 5
Substantive judgments of the District Court in Warsaw

Year	Full invalidation	Partial invalidation	Dismissal	Year	Full invalidation	Partial invalidation	Dismissal
1991	581	31	56	2000	21	1	10
1992	759	36	99	2001	22	---	8
1993	389	16	61	2002	14	---	8
1994	262	13	37	2003	9	1	7
1995	130	2	37	2004	18	1	2
1996	74	1	16	2005	15	---	3
1997	55	5	9	2006	8	1	2
1998	76	2	27	2007	2		---
1999	31	-	17				

Source: own study.

The substantive adjudications made in the proceedings for the declaration of the invalidity of a judgment were appealed against to the Court of Appeal in Warsaw. The majority of the appeals (as many as 175) were made by the petitioner against only 46 made by the prosecutor.

The complaints by the prosecutor concerned 1.9% of the judgments granting the repressed full rehabilitation. Following the examination of the complaint the Court of Appeal maintained in force 26 judgments fully granting the petition for the declaration of the invalidity of a judgment, dismissed the petition for rehabilitation in 3 cases and in 17 cases passed them on for re-examination to the District Court while in 5 cases the proceedings were discontinued.

The petitioner appealed against 152 (37.9%) of judgments dismissing the petition for the declaration of invalidity as well as 23 (20.9%) of judgments granting the petition only partly, demanding that it be fully granted.

Following the examination of appeals against judgments partially granting the petition for declaring invalidity, the Court maintained 11, declared 2 repressing judgments fully invalid and passed 10 cases on to the court of the first instance for re-examination. After re-examination the petition was fully granted in 8 cases and in 2 cases the petitions were dismissed.

Appeals against judgments dismissing a petition for declaring judgments invalid resulted in the maintenance of 107 judgments. The Court of Appeal itself declared invalid repressing judgments in 9 cases, partly invalid in one case, passing 35 cases to the court of the first instance for re-examination. After re-examination, full petition was granted in 17 cases, partial in one, 9 petitions were dismissed and in 8 cases the proceedings were discontinued.

In the course of appeal, proceedings in a total of 13 cases were discontinued. This number included 5 cases in which the court of the first instance declared repressing judgments fully invalid and 8 cases in which the court of the first instance dismissed petitions.

Table 6
Legally valid judgments in proceedings for the declaration of the invalidity of a judgment before the District Court in Warsaw*

Year	Judgment declared invalid		Dismissal	Dicontinuation
	Fully	Partly		
1991	587	22	40	2
1992	757	35	91	5
1993	383	16	54	2
1994	259	12	33	1
1995	128	2	35	--
1996	74	1	15	--
1997	55	5	9	--
1998	76	2	26	--
1999	31	--	16	--
2000	21	1	10	--
2001	21	---	7	1
2002	14	---	7	--
2003	8	1	7	--
2004	18	1	2	1
2005	14	---	3	1
2006	8	1	2	--
2007	2	---	2	--
Total	**2456**	**99**	**359**	**13**

Source: own study.

* The result of the appellate proceedings does not find full confirmation in Table 6 giving legally valid judgments issued in proceedings under the rehabilitation law. This results from the fact that once a case is sent for re-examination, it is entered into the repertory as a new one.

Ultimately, following appeal proceedings, the number of adjudications fully granting the petition for the declaration of the invalidity of a judgment increased by 30, the number of adjudications dismissing the petition for rehabilitation decreased by 20 and the number of adjudications partially granting the petition by 10. However, the percentage of judgments granting full petition for the declaration of the invalidity of repressing judgment increased and constitutes 84.3% of substantive

judgments. Similarly, the percentage of substantive adjudications closed with full or partial rehabilitation and consequently the percentage of adjudications in which the petition was dismissed decreased to 12.3%.

The analysis of the records of the District Court in Warsaw was carried out according to uniform criteria, on the basis of a detailed questionnaire prepared in advance. The study focused primarily on the following issues: 1) type of the cases in which petitions for the declaration of the invalidity of the adjudication are made as well as the type and form of repressing adjudications made in courts of the first or second instance; 2) who addressed the petition; 3) indication of whether: a) the offense was related to pro-independence activity, b) the adjudication was made due to pro-independence activity, c) the adjudication was made for resistance against collectivization of agriculture or compulsory deliveries; 4) whether and to what extent the petitions were justified and also whether proceedings were necessary to reconstruct records; 5) position and participation of the parties in the rehabilitation proceedings; 6) scope of the recognition of the case, type and form of solutions as well as whether the decision was made public; 7) who made an appeal against the adjudication by the court of the first instance with respect to rehabilitation and how extensive it was; 8) adjudication of the court of appeal; 9) efficiency of the proceedings; 10) whether the appeal was an extraordinary appeal: a) adjudication concerning rehabilitation, b) repressing adjudication; 11) Supreme Court judgment.

The analysis covered cases under proceedings for the declaration of the invalidity of judgments closed with substantive judgments. There are three categories of cases closed with substantive judgments adjudicating full or partial invalidity of the adjudications as well as dismissing the petition for the declaration of invalidity.

Cases in which partial invalidity was declared were least numerous so the analysis covered all the cases which were available at the time when the study was carried out (82 cases against 84 people). The same applied to cases closed with a dismissal of the petition and consequently, in principal, all these cases were included in the analysis (320 cases against 328 people).

The principal reason of such a broad selection of cases closed with dismissal was the need to investigate the causes of the dismissal of petitions by courts. The coming into force of the rehabilitation law triggered a massive flow of petitions for the declaration of invalidity. It could have been expected because the petitions were lodged not only by people conducting pro-independence activities but also people who perceived the law as a chance to compensate for the damage done by unjust judgments. In particular as the scale of departure from law in the system of justice in the years 1944–56 was known to be enormous.

The analysis of cases in which petitions were dismissed allows to establish whether the repressed, in relation to whom the petitions were dismissed because they had not conducted pro-independence activity, were rehabilitated under another procedure. In addition, it should be kept in mind that the rehabilitation law provided for subjective limitations of the scope of admissibility of declaring the invalidity of adjudications in spite of the conduct of pro-independence activity. Consequently, it was of interest to investigate how courts assessed whether in a particular case a stark disproportion had place between the good sacrificed and the good gained or intended to be gained, or possibly whether the way of

operating or the applied instrument were not unduly disproportionate in relation to the intended or obtained effect.

From the most numerous group made up by cases closed with full invalidation, I randomly selected every eighth case, that is 280 cases against 318 people. The point was to maintain certain balance between the number of cases closed with the dismissal of the petition and the number of cases closed with the declaration of full invalidity.

IV. MOST IMPORTANT FINDINGS OF THE DOSSIER EXAMINATION

1. The examination confirmed the extreme severity of punishments by courts in the years 1944–1956, first of all for pro-independence activity. 49 people (7%) were given capital punishment or life sentence, 502 people (71.8% of the convicted) imprisonment penalties ranging from 3 to 15 years and only 21.2% of the convicted were treated in a fairly mild way (prison sentences of below 3 years and suspended prison sentences).

2. The statistical data of the Ministry of Justice reveal that in the years 1991 –2007 the district courts in Poland received 46 530 petitions for the declaration of the invalidity of judgments, the District Court in Warsaw receiving 9.4% of all 'rehabilitation' cases. This court issued 2 977 substantive adjudications, 82.8% of them fully granting the petition, 3.7% partly granting the petition and 13.55 dismissing the petition.

3. The subject lodging the petition in the above cases was usually the repressed himself, acting along (429 people) or with the help of a defense counsel (20 people).

The death of the repressed caused that his interests were defended by: representatives of the repressed (for 256 people) or a spokesman for social interest (for 25 people). In as many as 99% of cases (that is for 723 people), the subjects based their demands on having conducted pro-independence activity and only for 7 people (1.0%) the petition was justified in terms of standing up against collectivization in agriculture or compulsory deliveries.

4. Pro-independence activity constituted the principal ground for declaring the invalidity of a judgment, appearing as independent grounds in as many as 353 cases. In 34 cases a judgment was declared null and void because the offense for which a given person was convicted was committed to avoid repressions for pro-independence activity against themselves or others. Only in 3 cases invalidity was declared due to pro-independence activity while in 5 cases rehabilitation was possible after the application of a variety of grounds for pro-independence activity and conviction for pro-independence activity. Finally, in solely 5 cases a judgment convicting for resistance against obligatory deliveries or collectivization of agriculture was found null and void.

5. Declaration of the invalidity of a judgment is most common in cases for crimes described as membership in an illegal union – in as many as 318 cases. Dismissal in cases for crimes thus qualified occurred in 55 cases. This happened when the repressed did not conduct pro-independence activity or when they were not convicted for pro-independence activity.

The petition for the declaration of the invalidity of a judgment convicting for the crime of a criminal possession of weapons, armed robbery or hostile propaganda

was equally frequently closed with a declaration of validity or invalidity. What was of primary importance was to prove whether the conviction for the commitment of the crimes was related or unrelated to pro-independence activity.

6. Attention should be given to cases in which a judgment convicting for pro-independence activity was found null and void and the dismissal concerned only offenses the commitment of which was associated, according to the court evaluation, with the emergence of a drastic disproportion of goods. In the analyzed materials there were twelve cases of this kind. The dismissal concerned offenses qualified as murder (Article 225 of the criminal code of 1932) or as a violent attack either at a Polish armed forces unit or at people occupying state or self-government functions (Article1 of the small criminal code). Some of these judgments arouse doubts. In two cases a question arises whether the person the task of which was to indicate the place of residence of a Security Office agent or a snitch can be charged for an offense of overstepping a superior's order by direct executors of the sentence.

7. Courts adjudicating in rehabilitation cases had at their disposal, as a rule, the procedural acts of the organ which issued the adjudication to be invalidated. Occasionally, it was necessary to reconstruct the records. The conducted arduous search for materials in numerous archives was not always effective. In result, 6 cases were closed with a dismissal of the petition for absence of the repressing judgment. The evidence proceedings conducted by courts were limited in scope, usually restricted to a hearing of the repressed, his representative or witnesses. In complex cases often requiring extensive historical knowledge experts were appointed.

8. The court of the first instance passed adjudications closed with a declaration of full invalidity with respect to 310 people, dismissing the petition for invalidation with respect to 335 people, declaring partial invalidity with respect to 82 people. In respect to 55 people the petition was dismissed in the remaining part and with respect to 27 people – the case was left unexamined in the remaining part. In addition, with respect to 2 people the proceedings were discontinued and with respect to one – the proceedings were suspended.

From the substantive side, the adjudications of the court of the first instance did not arouse any objections. That is why they were rarely referred to. Yet, occasionally, the court of the first instance did not conduct evidence proceedings on an adequate level and only the orders of the court of appeal, properly implemented by the court re-examining the case allowed to pass a just decision in a very difficult, complex case. The reasons for the adjudications of the court of the first instance were often very scanty but there were also reasons which were well and adequately justified.

9. In the cases studied only 18.6% of the adjudications were appealed against. In 128 complaints full invalidation of the adjudication was sought while in 8 – dismissal of the petition. The appeals lodged resulted in full rehabilitation for 342 people (314 full invalidations and 28 decisions declaring the invalidity of a part of the convicting sentence with the petition being left unexamined in the acquitting part), with respect to 56 people a part of the convicting sentence was declared null and void, with dismissal of the remaining part while with respect to 329 people

the petition was dismissed. The reasons for the adjudications made by the court of appeal can be approved of as a whole.

10. In dozens of cases proceedings were initiated by extraordinary remedies at law. 4 adjudications were appealed against with regard to rehabilitation: two to the disadvantage (with respect to two people) which resulted in a dismissal of the petition and two to the advantage (with respect to two people) which led to a declaration of the invalidity of the judgment as a whole.

11. Dismissal of a petition for the declaration of the invalidity of an adjudication did not close the road to rehabilitation under another procedure to repressed people. Courts often pointed to such a possibility in the reasons for their petition-dismissing adjudications. Unfortunately, in spite of the existence of grounds for appealing against repressing adjudications, this possibility was rarely made use of.

Repressing adjudications were appealed against with the use of extraordinary remedies at law only in cases concerning 31 people whose petitions were dismissed, two people with respect to whom the petitions were dismissed, two people with respect to whom the convicting sentence was declared partly invalid, with the remaining part dismissed, and in the case of one person with respect to whom proceedings were suspended.

12. Finally, the proceedings on the declaration of the invalidity of the adjudication resulted in full rehabilitation for 345 people (317 decisions declaring the whole convicting sentence invalid and 28 decisions declaring the invalidity of part of the convicting sentence, with a decision to have it examined in the remaining part), with respect to 50 people decisions declaring the invalidity of a part of the convicting sentence, with dismissal of the remaining part and with respect to 299 people the petition was dismissed. In addition, 30 people whose cases were in progress earlier under the rehabilitation law and also 10 people covered by repressing adjudications who did not apply for the declaration of invalidity, were found non-guilty. With respect to two people, decisions declaring the invalidity of part of the convicting sentence were made, with non-guilty adjudication in the remaining part, and with respect to two other people – the proceedings were discontinued following an appeal with the use of extraordinary remedies at law.

13. The very large inflow of cases, difficulties in finding relevant documentation in numerous archives, the duty to have their examination conducted up to 28 July 2007 by 3 professional judges, contributed to the long duration of proceedings, in particular in the courts of the first instance. It was unfortunate as the rehabilitation law was passed as late as in 1991 and many of the repressed had died yet before it became effective. Due the enormous number of cases received to be examined by the District Court in Warsaw, the date of the first hearing was set for as many as 143 people after a lapse of 5 years from the submission of the petition.

The causes of the delay were numerous: competence disputes, necessity to suspend proceedings, adjournment of hearings. The failure of the repressed or his representative or even the court-appointed attorney, to present in court was the most common cause of the adjournment of hearings, extended evidence proceedings being only a secondary cause. Hearings were also adjourned because of the need to reconstruct records, conduct numerous activities to establish whether the conviction or detainment had actually taken place. Moreover, the

extended duration of the proceedings was also related to long intervals between hearings.

The courts of the first instance adjourned hearings at least once in 120 cases, twice in 39 cases, three times in 20 cases. Unfortunately, adjournments were even more common: 4 times (in 8 cases), 5 times (in 2 cases), 6 times (in 5 cases), 7-times (in one case) and even 11 times (in 2 cases). When the long intervals between hearings – over 6 to 12 months in 53 cases, over 2 years – in 35 cases, over 2 to 3 years – in 4 cases, and in individual cases even 4 to 7 years – are added, a frightening picture of the sluggishness of proceedings emerges.

The final closure in cases in appealed against extended indefinitely, in particular when a case was passed on to be re-examined. Even though the appeal proceedings were conducted efficiently and the Court of Appeal acted without undue delay in the prevailing majority of cases, the final adjudication was made within up to two years (counted from the receipt of the petition by the court of the first instance) in 384 cases, that is with respect to 52.6% of the repressed. The ultimate closure of the case followed even much later, within over 2–3 years in 67 cases, over 3–5 tears in 107 case, over 5–7 years in 120 cases, over 7–10 years in 42 cases, over 10–14 years in 10 cases. It was caused by the fact that on setting the dates of hearings the court which re-examined the case often took into account the fact that the proceedings before it were a continuation and not completely new proceedings. What might be the only consolation is the fact that proceedings concerning the declaration of the invalidity of convicting adjudications resulted in the rehabilitation of many of the repressed.

V. SUMMARY

The proceedings conducted under the rehabilitation law opened a possibility to compensate damages done to a lot of people repressed in the years 1944–1956 and a dismissal of a petition for the declaration of the invalidity of an adjudication did not close the road to rehabilitation under another procedure.

The procedures of obtaining rehabilitation prior to the coming into force of the law of 23 February 1991 on the declaration of the invalidity of adjudications passed with respect to people repressed for pro-independence activity for the Polish State referred to questioning the adjudications made in the years 1944–1956. Resumption of the proceedings was a way to repair the adjudications in proceedings in which a crime was committed or because new facts or evidence emerged. In the extraordinary-revision or cassation proceedings courts were charged with serious infringement of substantive or procedural law.

The new course of rehabilitation actions with respect to the repressed (including those from the years 1944–1956) for activity for the independence of the Polish State does not consist in questioning the adjudications the invalidity of which is to be declared. On the contrary, the declaration of the invalidity of the adjudications is possible when the repressed actually committed the acts they were convicted for. The only thing of importance was that the acts were committed for the sake of independence. It is for this reason that the role of the law of 1991 can hardly be overestimated.

Abstract

Maria Stanowska, *Rehabilitation of people repressed for activity for the independence of Poland in the years 1944–1956 in the practice of the Warsaw Court*

The article provides the most important information resulting from the findings of the study of the decisions of Warsaw courts in the years 1991–2007 in cases conducted under the law of 23 February 1991 on declaring invalid adjudications with respect to the people repressed for activity for the independence of the Polish State in the years 1944–56. The data obtained from the research carried out confirmed the severity of penalties given by courts in the period in question. In the years 1991–2007 district courts in Poland received 46 530 petitions for the declaration of the invalidity of adjudications. Less than 10 % of the people convicted for pro-independence activities and for resistance to collectivization in agriculture or compulsory deliveries petitioned for rehabilitation.

Keywords: *activity for the independence of the Polish State, the repressed, invalidity of the judgment, rehabilitation, extraordinary revision, extraordinary cassation, convicting sentence, resumption of proceedings*

Streszczenie

Maria Stanowska, *Rehabilitacja osób represjonowanych w latach 1944–1956 za działalność na rzecz niepodległości Polski w praktyce sądu warszawskiego*

W artykule zostały przedstawione najistotniejsze informacje o wynikach badania orzecznictwa sądów warszawskich z lat 1991–2007 w sprawach toczących się na podstawie ustawy z 23.02.1991 r. o uznaniu za nieważne orzeczeń wobec osób represjonowanych za działalność na rzecz niepodległego bytu Państwa Polskiego w latach 1944–1956. Dane uzyskane z przeprowadzonych badań potwierdziły bardzo dużą surowość kar wymierzanych we wskazanym okresie przez sądy przede wszystkim za działalność niepodległościową. Do sądów okręgowych w Polsce w latach 1991–2007 wpłynęło 46 530 wniosków o stwierdzenie nieważności orzeczenia. O rehabilitację ubiegało się więc mniej niż 10% osób skazanych za działania niepodległościowe oraz za opór przeciw kolektywizacji wsi lub obowiązkowym dostawom.

Słowa kluczowe: *działalność na rzecz niepodległego bytu państwa polskiego, represjonowani, nieważność wyroku, rehabilitacja, rewizja nadzwyczajna, kasacja nadzwyczajna, wyrok skazujący, wznowienie postępowania*

PRAWO W DZIAŁANIU
LAW IN ACTION
32/2017

Łukasz Pohl*

On the inapt attempt against the resolution of the Polish Supreme Court of 19 January 2017, I KZP 16/16

The resolution of the bench of seven judges of the Supreme Court[1] referred to in the title is no doubt, irrespective of the assessment of the appropriateness of individual opinions contained therein, an important voice in the discussion on the shape of the inapt attempt adopted in the criminal code of 6 June 1997[2] in force in Poland. Its adoption, let us recall, was a consequence of the initiative of the First President of the Supreme Court who appealed to the Supreme Court, in his motion presented on the basis of Article 60 para 1 of the law of 23 November 2016 on the Supreme Court[3] with a request to resolve with its decision the questions of the divergence in the interpretation of law with respect to the legal issue presented in the motion referred to in the following way: 'Does the absence of an object fit to be committed a prohibited act on, referred to in Article 13 para 2 of the criminal code, signifies absence of all and any referents of features of the object of the performed act on which the prohibited act committed could at least potentially be committed on in a given factual situation or solely absence of referents at which the intent of the perpetrator is oriented?'[4]. The Supreme Court decided to remove the objective divergence with a two-point, naturally justified resolution, which reads as follows:

'1. The expression contained in Article 13 para 2 of the criminal code: 'absence of an object fit to commit a prohibited act on' signified absence of an object which belongs to a set of referents of the feature of the object of the performed act of the type of the forbidden act which the perpetrator intends to commit.
2. A perpetrator of an inapt attempt can be made liable to criminal proceedings (Article 13 para 2 of the criminal code) *in concreto* dependent on

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1 The resolution is available on http://www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20kzp%2016–16.pdf.
2 Journal of Laws 1997, No. 88, Item 533 with amendments. Let us also add that the uniform text of the criminal code of 6 June 1997 is available in the Internet System of Legal Acts administered by the Secretariat of the Parliament of the Republic of Poland.
3 Journal of Laws 2002, No. 240, Item 2052 with amendments. The uniform text of the law referred to can be found in the Internet System of Legal Acts already referred to above.
4 Resolution..., p. 1.

> the establishment of facts as regards the intent of the perpetrator to commit the prohibited act on a specific object'[5].

Before we move to the analysis and evaluation of the resolution voted on, we will point out that its adoption was really necessary and thus fully justified because court decisions, of both the Supreme Court and common courts, lacked uniformity with respect to the interpretation of the component of Article 13 para 2 of the criminal code analyzed in the resolution.

To present the situation but briefly, on the one hand, courts assumed that the expression 'absence of an object fit to be committed a prohibited act on' signifies a situation characterized by absence of all and any referents of the feature describing the object of the performed act of a given type of a prohibited act and thus a situation characterized by complete absence of objects denoted by the indicated feature. Following the survey of court decisions made in the resolution voted on, we will point out that we have be able to find such an interpretation of the expression in question, among others, in the decision of the Supreme Court of 16 February 2010[6], in the judgment of the Supreme Court of 28 April 2011[7], in the judgment of the Court of Appeal in Katowice of 28 February 2002[8], in the judgment of the Court of Appeal in Łódź of 4 June 2013[9], in the judgment of the Court of Appeal in Lublin of 24 September 2013[10], or in the adjudication of the Court of Appeal in Białystok of 18 June 2015[11].

On the other hand, courts acknowledged that what is decisive for the assumption of an inapt attempt is whether a referent of the feature describing the object of the performed act existed in the actual situation examined. This point of view characterizes in particular the resolution of the Supreme Court of 20 November 2000[12]. It was also adopted in numerous adjudications of courts of appeal, in particular in the judgment of the Court of Appeal in Katowice of 24 May 2005[13], in the judgment of the Court of Appeal in Łódź of 28 March 2006[14], in the judgments of the Court of Appeal in Wrocław of 25 January 2013[15] and of 13 August 2015[16], or in the judgments of the Court of Appeal in Lublin of 4 April 2006[17] and of 26 February 2013[18].

The difference between the points of view referred to above which are, let us add, deeply confronted both in the resolution voted on and in the motion of the First President of the Supreme Court initiating its adoption comes down to the fact that according to the first of them an inapt attempt characterized by absence

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[5] Resolution..., p. 2.
[6] V Criminal Code 354/09, R-OSNKW 2010, Item 340.
[7] V K.K. 33/11, LEX No. 817558.
[8] II AKa 549/01, LEX No. 56778.
[9] II AKa 97/12, LEX No. 1409183.
[10] II AKa 131/13, LEX No. 1439168.
[11] II AKa 73/15, LEX No. 1439168.
[12] I KZP 36/00, OSNKW 2001, Notebooks 1–2, Item 1.
[13] II AKa 155/05, OSA/Kat. 2005, No. 3, Item 16.
[14] II AKa 45/06, KZS 2007, No. 7–8, Item 92.
[15] II AKa 400/12, LEX No. 1289607.
[16] II AKa 171/15, LEX No. 1798770.
[17] II AKa 66/06, LEX No. 183573.
[18] II AKa 18/13, LEX No. 1294721.

of an object fit to be committed a prohibited act on will take place only when in the factual situation being subject of assessment there is no referent of the object of the performed action of the prohibited act covered by the perpetrator's intent while according to the second of them absence in this factual situation of solely the referent of the object of the performed action which was covered by the perpetrator's intent was sufficient to assume the existence of an inapt attempt of the indicated type. Thus, where, for instance, we were to examine a situation in which a Smith intended to steal a specific bicycle for professional cyclists from a place in which there was no bicycle of this kind but there were other objects which could be willfully taken in the meaning of Article 278 para 1 of the criminal code which the perpetrator, having the opportunity to thus willfully take it did not steal, then according to the first of the characterized interpretation positions an apt attempt would have taken place while according to the second, an inapt attempt.

As it has already been pointed out, the Supreme Court adopted the stance that the expression 'absence of an object fit to be committed a prohibited act on' appearing in Article 13 para 2 of the criminal code signifies absence of all and any referents of the feature describing the object of the performed action (see: Item 1 of the resolution voted on). The stance is entirely accurate.

However, let us point out that it was subjected to criticism in another gloss to the resolution of the Supreme Court discussed here[19]. To avoid being accused of any deformation of the contents of the criticism, we will quote it *in extenso*. And thus, in the opinion of the author of the gloss, Andrzej Jezusek: '(...) the Supreme Court should be accused of failing to include in their considerations the structure of Article 13 of the criminal code and the link between its para 2 (giving a definition of an inapt attempt) and para 1 (constructing the institution of an attempt). Simultaneously, literature reveals a fairly common belief that Article 13 para 2 of the criminal code stipulating that «an attempt takes place also when the perpetrator is not aware of the fact that the act cannot be committed because of the absence of an object fit to be committed a prohibited act on or due to the use of an instrument not fit to commit a prohibited act» should be read together with Article 13 para 1 of the criminal code which points out that «responsible for an attempt is the person who with an intent to commit a prohibited act directly strives, with his behaviour, to commit the prohibited act, even when the act is not committed». Both doctrine and decisions express the opinion that Article 13 para 2 of the criminal code does not decree all the features of an inapt attempt: the content of this provision must be supplemented with features provided for in Article 13 para 2 of the criminal code. This means that a prohibited act referred to in Article 13 para 2 of the criminal code is a prohibited act the commission of which the perpetrator directly heads for, with the regulation contained in Article 13 para 1 of the criminal code stipulating that a behaviour constituting direct heading refers to a prohibited act which the perpetrator intends to commit. And, as a result, Article 13 para 2 of the criminal code does not refer to absence of an object fit to be

[19] See: A. Jezusek, *Glosa do uchwały Sądu Najwyższego z dnia 19 stycznia 2017,* sygn. I KZP 16/16, „Prokuratura i Prawo" 2017, No. 4, p. 154 et seq.

committed any prohibited act on by the perpetrator but absence of an object fit to be committed the prohibited act intended by the perpetrator'[20]. In other words, in the opinion of the author of the statement quoted above, the interpretation of the expression 'absence of an object fit to be committed a prohibited act on' given by the Supreme Court was made in a fragmentary, that is incorrect way, as it did not take into account the information contained in Article 13 para 1 of the criminal code and at the same time – in the opinion of Andrzej Jezusek – indicated that the term 'prohibited act' co-creating the expression interpreted by the Supreme Court is to refer solely to the prohibited act that the perpetrator deliberately and directly strives to commit which can consequently lead to a conclusion that, in the opinion of the author, it is the content of the perpetrator's intent that is to decide whether an object on which a prohibited act can be committed is absent in the factual situation because it is from this content that we learn on what object the perpetrator intended to commit the prohibited act. What we must immediately add is that, according to Andrzej Jezusek, the intent to commit a prohibited act is: '(...) relativized to the object of the act specified *in specie* and is, in consequence, related to a specific carrier of a legal interest'[21], because – as the author referred to argues – 'Though legal provisions give an abstract notion of legal interest, it is individualized interests that are subject to criminal law protection: what is subject to criminal law protection is not life as an abstract notion but the life of a specific person. Specific human behaviour is always a realization of a specific type of a prohibited act, also within the scope of the object of an act performed. Thus, it is not every object being a referent of the feature but a specific thing or person. In consequence, the perpetrator always individualizes the object which is to become the object of the attempt to a greater or lesser extent. In result, it is impossible to simultaneously claim that attacking a specific object the perpetrator wants to or agrees to cause an effect on other objects'[22].

The indicated attempt at questioning the analyzed stance of the Supreme Court on the interpretation of the expression 'absence of an object fit to be committed a prohibited act on' is hard to be considered fully accurate because for no good reason the aspect of the offence as to the doer of the attempt was mixed with the aspect of the offense as to the deed. Undertaking the attempt to answer the request for interpretation (in a non-pragmatic meaning) of the discussed expression, the Supreme Court assumed, and this is fully justified, that it describes an undoubtedly objective circumstance, in other words, that it refers – in the assessment of the Supreme Court – to the area of facts totally independent of the intellectual and volitional approach of the perpetrator, in consequence correctly concluding that absence of an object fit to be committed a prohibited act on is a set characterized by all and any objects denoted by the feature describing the object of the performed act of such an act. If then in the examined situation there was at least one of the objects denoted by the indicated feature, it should be concluded that from the objective side the situation would not present as a set with an absence of an object

[20] A. Jezusek, *Glosa...*, pp. 156–157.
[21] A. Jezusek, *Glosa...*, p. 162.
[22] A. Jezusek, *Glosa...*, p. 162.

fit to be committed a prohibited act on. That is, in such a situation, objectively speaking, the perpetrator could aptly attempt and commit the prohibited act covered by the intent to commit it which he had. To sum up, the considerations of the Supreme Court, resulting in the formulation of the thesis of Item 1 of the discussed resolution, were orientated solely at answering the question when, exclusively on the objective side, and thus the aspect not taking into account the content of the perpetrator's intent, absence of an object fit to be committed a prohibited act on will take place[23]. On the other hand, there is no doubt that from this side it will have place only when the perpetrator undertakes action in a situation characterized by absence of all and any objects being referents of the feature describing the object of the performed act.

It is quite another question whether a thus specified absence of an object fit to be committed a prohibited act on will decide about satisfying the features of an inapt attempt. It is so since everything depends on the content of the perpetrator's intent, indispensible for the existence of any criminal-law relevant attempt. Reverting to the theft example, the perpetrator may have the intent to willfully seize any particular mobile object being within the scope of his action but may also – as in the case of our Smith – have the intent to make such a seizure only with respect to a mobile object strictly specified by him being within the scope of his action[24]. What will ultimately decide whether an inapt attempt characterized by absence of an object fit to be committed a prohibited act on will have place in an examined situation will be the absence of solely and exclusively this object – being the referent of the feature describing the object of the performed act – on which the perpetrator intends to commit the prohibited act. The intellectual and volitional attitude of the perpetrator committing an inapt attempt characterized by absence of an object fit to be committed a prohibited act on is thus characterized by a belief he holds, inconsistent with the actual state of things and thus false, that a prohibited act on a specific referent describing the object of the act can be committed and thus a belief being the result of another belief of the perpetrator being false, namely, a belief in the existence of the object within the scope of his action[25].

[23] They were not aimed at studying the meaning of the expression 'absence of an object fit to be committed a prohibited act on' within the content of the sanctioned standard responsible for precise characteristics of the content elements of an inapt attempt. Briefly speaking, the Supreme Court, making an attempt at decoding the meaning of the indicated expression, did not do it within the framework of the procedure of recreating the sanctioned standard defining the scope of an inapt attempt. It is also for this reason, first of all for methodological reasons, that the accusation made by Andrzej Jezusek that the drawback of the discussed considerations of the Supreme Court was that they did not include the limiting effect of the scope of the discussed expression of the provision of Article 13 para 1 of the criminal code, had no grounds.

[24] In this point we should fully agree with Andrzej Jezusek that in the case of prohibited acts characterized by the object of the performed act, the intent is each time the intent to perform these acts on a referent of the feature describing the object of the act (specified by the perpetrator) which results from the fact that the behaviour of every individual perpetrator is always and exclusively a single example from the class of behaviours composing the notion specified – and presented by nature in an abstract way – type of a prohibited act. In short, the perpetrator, while satisfying with his behaviour the features of a specific type of a prohibited act, never commits a prohibited act of this kind because the latter, i.e. the type of the prohibited act, is nothing else but a collective description of a class – often widely diversified – of behaviours causing the same state of events, e.g. causing a man's death or producing an illocutionary effect in the form of its profanation.

[25] Basing on the information coming from Wojciech Patryas (see: W. Patryas, *Uznawanie zadań,* Warszawa–Poznań 1987, p. 18 et seq.) falling within the scope of epistemic logics. Let me recall that conviction is a strong belief of the subject that reality is such as the subject imagines it to be. Let us add

In other words, in the case of an inapt attempt characterized by absence of an object fit to be committed the prohibited act on, its doer-related aspect presents as an intent to satisfy the deed-related features of a specific type of a prohibited act on a particular referent of the feature describing the object of the performed act of this type of the performed act specified by the doer of this attempt. At the same time – which is of particular importance – the prediction of a possibility to satisfy the indicated features on a particular referent of a feature describing the object of the performed act of the examined type of a prohibited act is accompanied by the perpetrator's false conviction of a possibility of their fulfillment on this particular referent which is in turn a consequence of the perpetrator's failure to realize the non-existence of the referent within the scope of his action[26].

It is because of the above conclusions that the opinion expressed by the Supreme Court in pt. 2 of the resolution voted on deserves to be negatively assessed[27]. Let us recall that according to the Supreme Court: 'A perpetrator of an inapt attempt can be made liable to criminal proceedings (Article 13 para 2 of the criminal code) *in concreto* conditioned by the establishment of facts as regards the intention of the perpetrator to commit the prohibited act on a specific object'. The thus formulated opinion of the Supreme Court clearly seems to suggest that the establishments made as regards the object on which the perpetrator intended to commit a prohibited act solely can, and thus need not, determine the attribution of the commission of an inapt attempt of the discussed type. Meanwhile – as indicated above – the identification of the content of the perpetrator's intent is crucial in the context of attributing to him the commission of an inapt attempt characterized by absence of an object fit to be committed a prohibited act on. Without this identification, there can be no question of institutionally stating the commission of the indicated,

right away that apart from beliefs and thus sentences recognized by the subject and thus belonging to the knowledge determining his behaviour, we also distinguish, among others, objective suppositions which differ from beliefs, that their structure is devoid of a strong belief that reality presents as the representation presents it. Briefly speaking, in the case of object suppositions the subject is not strongly convinced of the correctness of the representation. On these questions see: W. Paryas, *Uznawanie*..., p. 18 et seq.

[26] Thus, the opinions which emphasize that a characterized inapt attempt is a mistake of its subject are in fact correct. Although Article 17 para 2 of the criminal code itself presents it in another way because it limits itself solely to the acceptance of the unawareness on the part of the doer of the inapt attempt of the impossibility of committing the prohibited act and thus a state which could hardly be described as an error (on this subject see in particular: J. Giezek, *Funkcja błędu co do ustawowych znamion w nowym kodeksie karnym* [in:] *Rozważania o prawie karnym. Księga pamiątkowa z okazji siedemdziesięciolecia urodzin Profesora Aleksandra Ratajczaka*, A.J. Szwarc (ed.), Poznań 1999, p. 111 and also Ł. Pohl, *Błąd co do okoliczności stanowiącej znamię czynu zabronionego w polskim prawie karnym (zagadnienia ogólne)*, Poznań 2013, p. 15 et seq., as well as the literature quoted in these studies, then – as the above discussion shows – it is obvious that what pushes the perpetrator of an inapt attempt to act is his wrong conviction of a possibility to perform the prohibited act generated by the unawareness referred to above. It must be emphasized that the error of its doer characterizing an inapt attempt is not an error as to a circumstance constituting a feature of a prohibited act in the meaning of Article 28 para 1 of the criminal code. The latter of the mistakes causes that the perpetrator in error – precisely due to the error in question – implements the deed aspect related features of a specific type of a prohibited act in conditions of non-predicting their implementation. Meanwhile, in the case of an inapt attempt its doer fully predicts the possibility that the indicated features will be fulfilled but this prediction – as it has already been said – is accompanied by a wrong belief in an objective possibility of their fulfillment. For more on the function of the error as to the circumstance constituting a feature of a prohibited act and in particular a function limiting the doer aspect related side of a prohibited act committed in conditions of this error to solely and exclusively unaware inadvertence see: Ł. Pohl, *Mistake*..., p. 151 et seq.

[27] Comp. a different in this respect assessment by Andrzej Jezusek – see: A. Jezusek, *Glosa*..., p. 163, in which the Author expressed an opinion that the indicated opinion of the Supreme Court is in principle correct.

gradual form of the commission of a prohibited act. In other words, it is impossible to state the fact that the features of its commission were satisfied without first establishing the content of the perpetrator's intent because – let us repeat once again – it is the content of the intent, and in particular on what object the perpetrator intended to satisfy with his behaviour the deed aspect related features of a specific type of a prohibited act that determine whether his behaviour will be recognized as an inapt attempt characterized by absence of an object fit to be committed a prohibited act on[28]. Briefly speaking, the Supreme Court thesis contained in pt. 2 of the resolution voted on is utterly incorrect because it does not take into account the elementary information from the scope of substantive criminal law that the existence of an inapt attempt characterized by absence of an object fit to be committed a prohibited act on is in every case obligatorily co-decided[29] by the content of the perpetrator's intent, and to be exact the component of which that tells us on what referent of the feature describing the object of the performed act of a specific type of a prohibited act the perpetrator intended to satisfy with his behaviour the deed aspect related features of the indicated type of a prohibited act. In other words, and simultaneously using the language of the commented resolution, establishments as to the intent of the commission of a prohibited act on a specific object decide that the perpetrator is criminally liable for satisfying the features of an inapt attempt threatened with punishment characterized by absence of an object fit to be committed a prohibited act on.

The resolution voted on – ultimately – is thus difficult to be assessed as a whole. Although it is also characterized by other weaknesses[30], not strictly linked to the central issue, it can nevertheless be deemed an interesting attempt at resolving the principal problem from the field of the criminal law in force as well as from the field of the science of the crime attempt, an attempt the principal drawback of which is lack of an optional explanation – in the opinion of the Supreme Court – of the meaning of establishments concerning the intent to commit a prohibited act on a specific object in deciding a question of fundamental importance expressed in the question when in essence – in the opinion of the Supreme Court – an inapt attempt characterized by absence of an object fit to be committed a prohibited act on has place. Hence, the commented resolution can be described, without the risk of making a mistake, described as a voice which provides only a fragmentary solution to the legal problem analyzed in it.

[28] On this subject of this issue see more in Ł. Pohl, *Indywidualne właściwości desygnatu przedmiotu czynności wykonawczej jako problemu strony podmiotowej czynu zabronionego*, „Acta Iuris Stetinensis" 2018 (in print) a study in which the correctness of this opinion was attempted to be proved by reference to logics and the set theory (multiplicity).

[29] Recognition of a given behaviour as an example of an inapt attempt characterized by absence of an object fit to be committed a prohibited act on is after all – which is obvious – dependent also on absence of the referent of the feature describing an object of the performed act on which the perpetrator intended with his behaviour to satisfy the objective features of a prohibited act and also – what we also emphasize – dependent on the establishment of the wrong belief of the perpetrator that the commission of the prohibited act intended by him is possible on the referent of the feature describing the object of the performed act of this act which he assumes.

[30] One of them, pointedly and effectively, so to say, indicated already by Andrzej Jezusek (see: A. Jezusek, *Glosa...*, p. 155) – is the absolutely inadequate use by the legislator of the term 'imaginary crime'.

Abstract

Łukasz Pohl, *On the inapt attempt against the resolution of the Polish Supreme Court of 19 January 2017, I KZP 16/16*

The article is an assessment of the resolution of the bench of seven judges of the Supreme Court of 19 January 2017 (I KZP 16/16) with the wording: „1. Included in art. 13 § 2 k.k. the phrase: „no item suitable for committing a prohibited act on it" means the lack of such an object, which belongs to the set of designators of the mark of the subject of execution activity of the offense type committed by the perpetrator. 2. The penal liability of the perpetrator of an attempted inept attempt (Article 13 § 2 of the Code of Penal Procedure) may be in accordance with the decisions made as to the intention to commit an offense on a particular subject". The article expressed the opinion that the voted resolution of the Supreme Court is difficult to assess unequivocally. Its main drawback is that it does not explain the meaning of the arrangements for intent to commit a prohibited act on a particular item. Therefore, it was finally concluded that the position presented in the commented resolution does not fully resolve the legal problem analyzed in it.

Keywords: *attempt to commit an offence, inefficient attempt to commit an offence, intent to commit a prohibited act*

Streszczenie

Łukasz Pohl, *O usiłowaniu nieudolnym na tle uchwały polskiego Sądu Najwyższego z 19.01.2017 r., I KZP 16/16*

Przedmiotem artykułu jest ocena uchwały składu siedmiu Sędziów SN z 19.01.2017 r., I KZP 16/16 (OSNKW 2017/3, poz. 12) o brzmieniu: „1. Zawarte w art. 13 § 2 k.k. wyrażenie: „brak przedmiotu nadającego się do popełnienia na nim czynu zabronionego" oznacza brak takiego przedmiotu, który należy do zbioru desygnatów znamienia przedmiotu czynności wykonawczej typu czynu zabronionego, do którego popełnienia zmierza sprawca. 2. Pociągnięcie do odpowiedzialności karnej sprawcy usiłowania nieudolnego (art. 13 § 2 k.k.) może być in concreto uwarunkowane poczynionymi ustaleniami co do zamiaru popełnienia czynu zabronionego na określonym przedmiocie".
W artykule wyrażono opinię, że głosowaną uchwałę Sądu Najwyższego trudno ocenić jednoznacznie. Jej głównym mankamentem jest to, iż nie wyjaśniono w niej znaczenia (wagi) ustaleń dotyczących zamiaru popełnienia czynu zabronionego na określonym przedmiocie czynności wykonawczej przy rozstrzyganiu kwestii najzupełniej fundamentalnej, bowiem wyrażającej się w pytaniu o to, kiedy ma miejsce usiłowanie nieudolne znamienne brakiem przedmiotu nadającego się do popełnienia na nim czynu zabronionego. Stąd też ostatecznie uznano, że stanowisko przedstawione w komentowanej uchwale nie rozwiązuje w pełni analizowanego w niej problemu prawnego.

Słowa kluczowe: *usiłowanie, usiłowanie nieudolne, zamiar popełnienia czynu zabronionego*

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Standardization of disciplinary responsibility in legal professions in the system of Polish law – conclusions *de lege ferenda*

1. INTRODUCTORY REMARKS

Disciplinary law and proceedings are areas of law of specific character. Their character makes it very difficult to position this area within the already existing standard framework of legal regulations as it is the case with criminal law, substantive law or procedural criminal law[1].

In general, what can be noticed when defining disciplinary law is the large diversity of elements co-creating this area. On the one hand, this indicates that disciplinary law and proceedings constitute a set of legal provisions regulating responsibility for acts which infringe the professional duties of a given profession or social group and types of penalties for these acts as well as principles and course of proceedings in the case of the violation of professional duties being confirmed[2]. On the other hand, it is pointed out that the formula of disciplinary responsibility joins in a straight line two contact points in the form of the diligence pattern /professionalism pattern in the performance of professional duties and the pattern of manifesting an exemplary ethical and moral attitude of individuals operating professionally in a specific group, which apart from substantive accuracy proper to this group, is also bound by values considered by it to be of primary importance. A view can also be encountered that the rules of disciplinary law are aimed at raising and guaranteeing the prestige and ethos distinguishing a given social group. This is done, among others, by guaranteeing jurisdictional independence of members within the institutions or corporations operating in accordance with specific rules[3]. On the other hand, it is commonly believed that the violation of the principles of ethics and dignity constitutes a universal ground for disciplinary responsibility[4].

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1 Z. Leoński, *Odpowiedzialność dyscyplinarna w Prawie Polski Ludowej,* Poznań 1959, p. 233–235.

2 J. Paśnik, *Prawo dyscyplinarne w Polsce*, Warszawa 2000, p. 8.

3 M. Zubik, M. Wiącek, *O spornych zagadnieniach z zakresu odpowiedzialności dyscyplinarnej sędziów Trybunału Konstytucyjnego – polemika*, „Przegląd Sądowy" 2007, No. 3, p. 70.

4 C. Kulesza, *Ewolucja wybranych procedur dyscyplinarnych w świetle konwencyjnego i konstytucyjnego standardu prawa do sądu*, „Białostockie Studia Prawnicze" 2017, No. 1, Vol. 22, p. 12.

As it has been indicated above, opinions as to the definition and aims underpinning the creation of disciplinary proceedings by the legislator vary. It is worth emphasizing that an ever more common opinion is that disciplinary proceedings are repressive in character[5]. This results not only from the fact that this law is closely linked to criminal proceedings and criminal law[6] (also through clauses on the appropriate application of this law[7]) but also from the fact that this law applies sanctions, including sanctions of very drastic consequences to the accused (e.g. a ban on practising the profession included). Yet, in spite of their character, these sanctions cannot be identified with strictly criminal sanctions because criminal responsibility constitutes an entirely different kind of legal responsibility[8].

What distinguishes disciplinary law is also absence of common effectiveness which means that it is addressed solely to a narrow group of people. Hence broadly understood disciplinary law is not of universal character but a strongly particular law[9]. There are many groups with their own disciplinary legislation composed of substantive disciplinary law and procedural disciplinary law and even norms of disciplinary law of executive character. The law is exercised by internal bodies of a given group. These bodies never supersede state bodies[10]. The Constitutional Tribunal accepts fully the fact of the functioning of the outlined model of disciplinary law seeing in it the provision to members of individual corporations the due independence and sovereignty in practising the profession[11].

The arguments presented above show that it is worthwhile to consider whether the diversity of disciplinary models functioning mainly in the area selected here, i.e. legal regulations concerning legal professions, should not be changed through their standardization in a way which would generate a single efficient model of disciplinary proceedings for legal professions. Selected for the analysis of the principles of bearing disciplinary responsibility were the models of relevant legal regulations effective for barristers, legal advisers, common court judges, notaries, court executive officers, prosecutors, court curators and court clerks. Obviously, these are only a few legal professions selected as examples but the social importance and the frequency of their performance make them an adequate study sample on which to assess the title idea of standardizing the disciplinary responsibility in terms of the feasibility of the process.

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[5] P. Skuczyński, *Aktualne problemy odpowiedzialności dyscyplinarnej w zawodach prawniczych* [in:] *Postępowanie dyscyplinarne w zawodach prawniczych. Model ustrojowy i praktyka*, A. Bodnar, P. Kubaszewski (eds.), Warszawa 2013, pp. 65–67; K. Dudka, *Stosowanie przepisów k.p.k. w postępowaniu dyscyplinarnym w stosunku do nauczycieli akademickich* [in:] *Węzłowe problemy procesu karnego*, P. Hofmański (ed.), Warszawa 2010, pp. 354–355.

[6] P. Kuczyński points out that viewing disciplinary proceedings through the prism of criminal law and criminal proceedings is the perspective most commonly found in literature – comp. P. Kuczyński, *Nierepresyjne funkcje odpowiedzialności dyscyplinarnej a model postępowania w sprawach dyscyplinarnych*, „Przegląd legislacyjny" 2017, No. 3, pp. 354–355.

[7] The Supreme Court explained how to properly understand the indicated provisions – comp. Resolution of the Supreme Court of 30 September 2003, I KZP 23/03, „Orzecznictwo Sądów Polskich" 2003, No. 12, Item 40.

[8] P. Czarnecki, *Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego,* Warszawa 2013, pp. 23–24.

[9] W. Świda, *Prawo karne*, Warszawa 1986, p. 17.

[10] Comp. A. Korzeniewska-Lasota, *Jawność postępowań dyscyplinarnych*, „Studia Ełckie" 2012, No. 14, p. 512.

[11] See: judgment of the Constitutional Tribunal of 8 December 1998, K 41/97, OTK 1998, No. 7, Item 117, similarly the Constitutional Tribunal in the judgment of 27 February 2001, K 22/00, OTK ZU 2001, No. 3, pp. 271–272.

2. SIMILARITIES AND DIFFERENCES IN DISCIPLINARY RESPONSIBILITY OF SELECTED LEGAL PROFESSIONS

Under the present legal status, each of the professions listed (in principle apart from the court clerk) has a separately regulated course of disciplinary proceedings which is included in the pragmatic law concerning the practising of a given profession, that is respectively for:

1) barristers – act law on the Bar of 26 May 1982[12];
2) legal advisers – act of 6 July 1982 on legal advisers[13] (hereinafter referred to as Urpr);
3) prosecutors – act law on the Prosecutor's Office of 18 January 2016[14] (hereinafter referred to as (UoPR);
4) judges and court clerks – act of 27 July 2001 on the system of common courts[15] (hereinafter referred to as UoSP);
5) notaries – act law on the institution of a public notary of 14 February 1991[16] (hereinafter referred to as UproN);
6) court executive officers – act of 29 August 1997 on court executive officers and court execution[17];
7) court curators – act of 27 July 2001 on court curators[18].

The scope of the regulation concerning disciplinary proceedings in the acts referred to above covers each time provisions of both substantive-legal and procedural character.

The analysis of the indicated legal acts leads to a number of conclusions:

First, regulations concerning substantive law contained in individual legal professions are very similar in their construction and regulate the same elements (e.g. shape the definition of a disciplinary tort, specify a catalogue of penalties, regulate the question of the limitation of liability to punishment for a disciplinary tort or the question of the way and the time limit for the erasion of the penalty from the register of convictions). Indeed, it can be noticed that these are construction elements (or institutions) relevant for criminal law. Referring to the already mentioned criminal law, it should additionally be pointed out that the provisions of substantive law concerning all the analyzed legal professions are not absolutely autonomic because they always contain reference to appropriate application of the criminal code (CC)[19], though to a different extent and of a different scope[20].

Second, referring to the construction of the regulations concerning discipli-nary proceedings of procedural character, it should be observed that in each of the analyzed

[12] Act law on the Bar of 26 May 1982 (i.e. Journal of Laws Item 1999 with amendments).
[13] Act of 6th July 1982 on legal advisers (i.e. Journal of Laws 2016, Item 233 with amendments).
[14] Act law on the Prosecutor's Office of 18 January 2016 (Journal of Laws 2016, Item 177 with amendments).,
[15] Act of 27 July 2001 on the system of common courts (i.e. Journal of Laws 2016, Item 2062 with amendments).
[16] Act law on the institution of a public notary of 14 February 1991 (i.e. Journal of Laws 2017, Item 2291 with amendments).
[17] Act of 29 August 1997 on court executive officers and court execution (i.e. Journal of Laws 2017, Item 1277 with amendments).
[18] Act of 27 July 2001 on court curators (i.e. Journal of Laws 2014, Item 795 with amendments).
[19] Act of 6 June 1997 Criminal Code (i.e. Journal of Laws 2017, Item 2204 with amendments).
[20] For instance, in the case of advocates, the scope of reference covers Chapters I–III of the criminal code (see: Article 95 nPoA) while in the case of legal advisers, the scope of reference concerns the whole general part of the criminal code (see: Article 171 of the act on legal advisers).

legal professions the legislator applied the same legislative scheme: individual solutions appropriate for given professions were established, with a simultaneous reference to appropriate application of the code of criminal procedure (CCP)[21] in the scope not regulated otherwise[22]. In fact, the scope of these references is so large that it is the CCP provisions that provide the basic construction ('legislative base') of the proceedings.

Third, referring yet to questions related to penal proceedings it should be observed that the model of disciplinary proceedings is based on the construction of essential stages of penal proceedings which can be described as 'preliminary' (of different scope of development) and then two stages appropriate for stages of court criminal proceedings (of the first and the second instance). Possible legally valid punishment of a given person terminates with enforcement proceedings (the same as in criminal proceedings).

The legal consequence of the situation described above is the fact that also the structure of the organs and determination of the parties to the proceedings which are very similar (or sometimes identical) as in criminal proceedings (for instance: a disciplinary spokesman as an accuser is an equivalent of a prosecutor as an accuser in court, the roles of counsels of defense are the same in both proceedings, etc.)

Fourth, as regards the procedural proceedings of individual legal professions analyzed, contained separately in each of subject acts, it should be observed that they are, in principal, very similar, in spite of certain natural and fairly well justified difference (e.g. in the nomenclature of disciplinary organs[23], definition of the defendant as a representative of a given legal profession[24], etc.). This statement does not contradict the fact that in individual professions certain individual 'original' procedural institutions can also be found, institutions which cannot be found in other professions (e.g. a procedure of determining obvious groundlessness of the motion for punishment in the case of prosecutors).

3. CHARACTERISTICS OF SUBSTANTIVE PROVISIONS CONCERNING DISCIPLINARY RESPONSIBILITY

Provisions of substantive law for each of the analyzed legal professions contain the following elements: definition of what a disciplinary tort is[25], specification of

[21] Act of 6 June 1997 Code of Criminal Proceedings (i.e. Journal of Laws 2017, Item 1904 with amendments).

[22] In literature, the scope of this 'appropriate application of the regulations is discussed broadly with respect to individual professions – comp. A. Korzeniewska-Lasota [in:] *Odpowiednie stosowanie przepisów kodeksu postępowania karnego w postępowaniu w sprawach odpowiedzialności dyscyplinarnej adwokatów. Część I: Zagadnienia ogólne*, „Palestra" 2013, No. 9–10, pp. 73–82 and A. Korzeniewska-Lasota [in:] *Odpowiednie stosowanie przepisów kodeksu postępowania karnego w postępowaniu w sprawach odpowiedzialności dyscyplinarnej adwokatów. Część II: Sporządzanie uzasadnień i postanowień kończących postępowanie dyscyplinarne w pierwszej instancji. Z urzędu czy na wniosek? Uwagi na tle Art. 88a ustawy Prawo o adwokaturze*, „Palestra" 2013, No. 11–12, pp. 177–194, comp. C. Kulesza, *Ewolucja*…, p. 18.

[23] For instance, the disciplinary organ of the 1st instance for advocates, legal advisers, notaries and prosecutors is called Disciplinary Court (and in the 2nd instance – Higher Disciplinary Court), and for prosecutors they are Disciplinary Court and Disciplinary Court of Appeal. In turn, for court executioners and court clerks, the organs of the 1st instance are disciplinary commission and disciplinary commission of the 1st instance, respectively.

[24] For instance, for barristers the defendant is an advocate (or, respectively, advocate's trainee) who was presented, in the course of proceedings, a charge of committing a disciplinary tort (see: Article 93 sect. 3 PoA). In turn, for notaries the defendant is the person against whom authorized entities formulated a motion addressed to the court to initiate disciplinary proceedings – comp. A. Oleszko, *Prawo o notariacie. Komentarz. Vol. 1. Ustrój notariatu*, Warszawa 2016, p. 852.

[25] For instance, a prosecutor is responsible for a professional offence, including an obvious and stark infringement of legal regulations and impeachment, with the exception of a situation in which the prosecutor's action or

a catalogue of penalties, specification of directives for the measure of penalty and the way in which it is to be carried out (in the case of a legally valid punishment of the defendant), determination of the limitation and liability to punishment of the disciplinary tort, determination of provisions concerning the possibility of temporary suspension of the defendant in practising a given profession.

The catalogues of penalties foreseen for disciplinary offences formulated by the legislator are also similar in each of the legal professions. Starting from the construction element consisting in listing penalties from the most lenient to the most severe and finishing with their types. The most severe penalty is expulsion from the profession and the mildest – an admonition[26].

The common construction denominator of the analyzed penalties is also the fact that they are not attributed to a specific offense which means that each of the law specified penalties can be theoretically applied to any disciplinary offense[27].

On the level of the specification of the limitation of liability to punishment, there are certain objective differences consisting in the fact that regulations concerning certain professions (e.g. barristers, legal advisers[28]) contain the specification of both limitation as regards instituting disciplinary proceedings and determination of limitation of liability to punishment for a given disciplinary tort while some only the limitation of liability to punishment. However, this is not a significant procedural difference in the sense that it can be leveled, without major difficulties by amending and standardizing this institution in every legal profession without influence on the essence or character of the proceedings as a whole. A remark should here be made that in the case of the standardization of the procedures it would be worthwhile for the legislator to specifically describe both types of limitation in writing.

What needs to be emphasized separately is the fact that in spite of the fact that the legislator included in the acts referred to individual provisions of the character of substantive law, they still fail to be absolutely autonomic (independent) due to the fact that they always contain an entry speaking about relevant application of the provisions of the criminal code within the scope not regulated in the act. From an objective point of view, the scope of the application of this criminal code varies. However, what needs to be emphasized is that the 'minimum' of the application

failure to act was motivated solely and exclusively in social interest (Article 137 para 1 and 2 of the act law on the prosecutor's office). Advocates and advocate's trainees are subject to disciplinary responsibility for acting against the law, ethical principles or professional dignity or for infringement of professional duties while advocates also for failure to perform the duty of concluding an insurance agreement referred to in Article 8a sect. 1, pursuant to the provisions issued on the basis of Article 8b of the law PoA. A notary bears disciplinary responsibility for a professional offense, including an obvious and stark infringement of legal regulations, impairment to the authority and dignity of the profession as well as failure to perform the duty of concluding an insurance agreement referred to in Article 19a, pursuant to the provisions issued on the basis of Article 19b as well as failure to perform the duty referred to in Article 71 para 8 and failure to perform the duty referred to in Article 71a para 5 and also for the failure to perform the duty referred to in Article 8a Sect. 1 of the law of 24 March 1920 on the acquisition of real estate by foreigners (Journal of Laws of 2016, Items 1061 and 2175) – comp. Article 50 of the law on the institution of a notary public.

[26] Such a penalty is for example inflicted in the case of advocates, legal advisers, notaries or court executioners.

[27] For instance, about the catalogue of penalties for prosecutors – A. Kiełtyka, W. Kotowski, A. Ważny, *Prawo o prokuraturze. Komentarz*, Warszawa 2017, commentary to Article 142, available in the LEX 2017 programme, about the catalogue of penalties for legal advisers K. Kwapisz, *Ustawa o radcach prawnych. Komentarz*, commentary to Article 65 of the law, commentary available in the LEX 2016 programme.

[28] What should be understood under this term is the determination by the legislator of the time after the lapse of which proceedings cannot be instituted. Such provisions can be found, for instance, with barristers (Article 8 sect. 1 PoA) and legal advisers (Article 70 sect. 1 of the law on legal advisers).

of the provisions contained therein comes down, in practice, to the application of the institutions specified in Chapters I–III of the code. In essence, these provisions specify concepts of crucial importance to criminal law such as, for example, the determination of the time and place of the commission of an act, determination of the type of guilt (intentional, unintentional), the principle of the legal certainty, inter-temporal rules in the case of changes to legal provisions, determination of the forms of the commission of an offence (perpetration, attempt, abetment, etc.) as well as circumstances barring prosecution. It can thus be definitely said that the criminal code (next to the code of criminal procedure) also plays a significant role in shaping substantive criminal law in disciplinary proceedings concerning the legal professions analyzed. It is a serious argument for specifying disciplinary proceedings as repressive proceedings of quasi-criminal character.

4. CHARACTERISTICS OF PROCEDURAL PROVISIONS CONCERNING DISCIPLINARY RESPONSIBILITY

As regards the question of the construction of the regulations concerning the analyzed legal professions of procedural character, it should be noted that in each of the analyzed legal professions the legislator placed a provision stipulating clearly that provisions of the code of criminal proceedings apply, respectively, within the non-regulated scope[29].

Here, it should be clearly pointed out that in spite of the appearances which may arise, this reference is not the legislator's legal 'insurance' of sorts for a possibility of a given regulation being incomplete nor is it a carrier of a certain narrow group of procedural acts described in the criminal procedure (e.g. as regards the way of the delivery of summons or the way of counting procedural time limits) but this concerns key procedural elements and is extremely broad.

What should be stressed, in the first place, is the fact that provisions concerning evidence, procedures of their admissibility, way of carrying them out or evaluating apply here, respectively, as a whole. This means that the course of the evidence proceedings as a whole is regulated by the provisions of the code of criminal procedure which is very important.

Secondly, there is another no less important element which should be emphasized and, namely, the fact that the broad scope of the application of the provisions of the code of criminal proceedings means, in practice, appropriate application of the provisions of over 30 chapters of the code of criminal procedure, including provisions concerning the powers and the procedural position of counsels for defence and proxies, rights and duties of the defendant (including his right to defence) as well as the definition of the wronged person (if such a person appears in the given proceedings) and specification of the latter's rights and duties.

The scope of reference concerns also the procedure to be followed by the disciplinary body of the first instance (including the course of the proceedings, the way

[29] As, for example, Article 78b of the act on court executive officers, Article 69 of the act law on the institution of notary public, Article 153 sect. 3 of the act law on the prosecutor's office, Article 95 pt. 1 of the law on the structure of the Bar.

of discussing the adjudication, the rules of issuing and announcing the adjudications), the way of drawing up and lodging an appeal, the way of its processing by the body of the second instance (including the scope of monitoring the appeal, the way of its examination, types of adjudications that can be made), the application of extraordinary remedies in the form of cassation (if it can be lodged[30]) as well as the resumption of proceedings.

In the analyzed disciplinary proceedings, provisions concerning legal-proceedings-related actions (including time-limits, deliveries, proceedings-related written statements, adjudications, decrees, instructions, etc.) are applied as appropriate which is also important from the point of view of the rank and significance of these provisions for criminal proceedings.

Another point that should be made is that appropriate application in the analyzed disciplinary proceedings of Article 17 para 1 of the CCP specifying the so-called negative prerequisites for court proceedings, that is prerequisites the occurrence of which creates the inability to institute proceedings or the necessity of discontinuing proceedings already in progress[31]. It is the duty of disciplinary bodies conducting the case (at all its stages individually) to analyze whether any of the negative procedural prerequisites did not occur and to make appropriate procedural decisions in the case of their occurrence[32].

The scope of the application of the code of criminal proceedings described above fully confirms the thesis put forward above that the provisions of the code of criminal procedure constitute a procedural 'matrix' of sorts for the analyzed disciplinary proceedings and that it is these provisions that largely create (and co-create) the procedure of carrying disciplinary proceedings.

5. ATTEMPT AT RECREATING A STANDARDIZED MODEL OF DISCIPLINARY PROCEEDINGS IN SELECTED LEGAL PROFESSIONS

The analysis of regulations concerning disciplinary proceedings in selected legal professions allows to conclude that their construction consists in fact of three separate stages: the proceedings which can be described as 'preliminary' (of varying, profession-related character), two-tier proceedings before (differently called) disciplinary bodies and enforcement proceedings (in the case of a legally valid adjudication of the defendant's guilt). It is obvious that this resembles criminal proceedings the standard model of which, as already pointed out, consists of preparatory proceedings, (two-instance) court proceedings and enforcement proceedings.

[30] Cassation cannot be lodged by court executive officers and judges while court curators and court clerks lodge, instead of cassation, an appeal to a competent court of appeal – the court of labour and social insurance, with the application of the provisions of the code of civil proceedings (CCP) concerning appeals.

[31] Such is the nomenclature of prerequisites from Article 17 para 1 of the CCP – comp. R. Poniowski, W. Posnow, Z. Świda, *Postępowanie karne. Część ogólna*, J. Skorupka (ed.), Warszawa 2012, p. 65.

[32] There is one exception to the rule of discontinuing proceedings in the case of negative procedural prerequisites coinciding, namely, a situation where a limitation prerequisite appears simultaneously with one of the prerequisites from Article 17 para 1 of the CCP (the act was not committed or there are no sufficient grounds to confirm it) or the prerequisite from Article 17 para 1 pt. 2 of the CCP (absence of features of a prohibited act or where an act stipulates that the perpetrator does not commit the act). Determination of these prerequisites coinciding after all the necessary evidence procedures have been carried out and all factual circumstances clarified obliges the court to give an acquittal sentence – comp. Supreme Court judgments of 3 April 2002, V KKN 484/00, LEX No. 53336, and of 2 July 2002, IV KKN 264/99, LEX No. 54407; Supreme Court judgment of 15 April 2004, SDI 21/04, OSNKW 2004, No. 6, Item 64.

There are three models of 'preliminary' proceedings to be distinguished, the point of reference being their similarity to the construction of preparatory proceedings from the criminal proceedings.

In the first model, the 'preliminary' proceedings are similar in their essence to the so-called confirmatory proceedings from Article 307 of the CCP, that is the proceedings preceding the institution of preparatory proceedings in criminal proceedings. In principle, evidence proceedings are not carried out but certain circumstances (e.g. the character of the act, its legal qualification, exact date of the act, etc.) are established and then a motion for instituting disciplinary proceedings (called differently) is lodged with a relevant body. This model is applied by notaries and court executive officers.

The procedural effect of the described model of proceedings is that the accused, as a party to the proceedings (an equivalent of the defendant) 'appears' (begins to be formally present) only after a spokesman (or possibly another act-specified entity) has placed a motion to institute disciplinary proceedings (an indictment act). Prior to it the person concerned does not have such a status (they have not been presented with charges) and consequently is not a party to the proceedings though the person has the right to present explanations (as a form of response to the case)[33].

The second model of 'preliminary' proceedings is close in its essence to prosecution or investigation. This means that in these proceedings there are evidence proceedings carried out as in the preparatory proceedings in the criminal proceedings. Evidence is collected and secured towards the disciplinary proceedings proper (similar to court proceedings). This model can be found in the case of barristers, legal advisers, court curators and court clerks[34].

It should be indicated that in spite of evidence proceedings carried out in disciplinary proceedings in the above professions, there are differences as to whether a given person is presented with charges (causing that the accused becomes a party to the proceedings) or whether the charges are not presented and the presentation of a motion for punishment is the moment in the proceedings when a party in the form of the accused beings to appear.

In the disciplinary proceedings of legal advisers and barristers, proceedings are carried out which (as in the preparatory proceedings in the criminal proceedings) are divided into two stages: the stage of the *'ad rem'* proceedings, i.e. proceedings in the case, and the stage of the *'ad personam'* proceedings, i.e. proceedings against a person. Once evidence material making the perpetration sufficiently plausible has been collected, the person concerned is presented with the charges and acquires the procedural status of the accused. This is important because from that moment the accused has the right to defence and, as a party, can actively participate in the

[33] In this way about the status of notaries – A. Oleszko, *Prawo*…, p. 852, similarly about the status of court executive officers – G. Kuczyński – comp. G. Kuczyński, *Ustawa o komornikach sądowych i egzekucji. Komentarz*, commentary to Article 75(f) of the act on court executive officers and execution available in the LEX 2012 programme.

[34] For instance, with reference to court clerks, literature points out that explanatory proceedings involve extensive evidence-collecting proceedings. It is possible to hear witnesses and experts as well as to carry out other evidence-collecting proceedings which are necessary to provide a comprehensive explanation of the case – comp. P. Zuzankiewicz [in:] *Ustawa o pracownikach urzędów państwowych*, W. Drobny, M. Mazuryk, P. Zuzankiewicz (eds.), Warszawa 2012, p. 167.

proceedings (e.g. submit evidence-related motions, participate in evidence-related actions, etc.[35]).

In the proceedings concerning curators, the person concerned becomes the accused the moment a motion for instituting disciplinary proceedings is lodged against them. The stage preceding the submission of the motion can thus be compared to the preparatory proceedings of the '*ad rem*' stage at which evidence proceedings are carried out. At this stage of the process, the accused does not appear which means that in fact he has no right to defend himself though he is informed of the fact that proceedings are conducted against him and has the right to present his comment on the case (called the explanations of the accused by the legislator). It is much the same with court clerks, though, in spite of the lack of the status of the party, they have a much broader right to defence (including the right to submit motions for evidence, the right to get acquainted with the files of the completed proceedings and the written results of the proceedings, etc.).

In the third model of the 'preliminary proceedings', explanatory proceedings are first carried out (as in the first model), and where they reveal a possibility of a given disciplinary tort to have been committed, then proceedings such as in the second model are instituted (an equivalent of preparatory proceedings). They are conducted by the disciplinary spokesman and their commencement is related to the presentation of the charges against the accused in writing. The proceedings can terminate with a decision to discontinue the disciplinary proceedings (and this may happen even where charges have been presented) or a motion for the examination of the disciplinary case lodged with a disciplinary court. This model is applied by judges and prosecutors.

It should be emphasized that in the case of an occurrence of a potential disciplinary tort, all the above models of 'preliminary' proceedings terminate in the same way – the empowered body (as a rule, a disciplinary spokesman and, occasionally, also another authorized entity[36]) lodges a motion for punishment with a competent disciplinary court[37]. This motion is an equivalent of an indictment act and the prerequisites are to satisfy its requirements[38].

The motion for punishment pointed to above sets off, as it has been indicated, the stage of proceedings before disciplinary courts (called differently)[39]. These are always two-tier proceedings as the adjudication made in the first instance can be appealed against by the parties (and frequently also by entities entitled by law)[40].

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[35] In this way about the status of advocates – K. Ceglarska-Piłat, M. Zbrojewska, *Prawo o adwokaturze. Komentarz*, commentary to Article 93 of the act – Law on the Bar available in the LEX 2016 programme, in this way about the status of legal advisers – W. Kozielewicz – comp. W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy,* edit. 2, Warszawa 2016, p. 317.

[36] In court executors, the entities entitled to present a motion for punishment specified in the act include: presidents of courts, visiting judges, bodies of the court executors' self-government as well as visiting court.

[37] In the case of court clerks and court execution officers with the disciplinary commission.

[38] This results from proper application of the CCP and applies to disciplinary proceedings in the case of each of the analyzed legal professions, for instance, so as in (about the motion with notaries). A. Oleszko, *Prawo*…, p. 853, and also about the same notion applicable to court execution officers G. Kuczyński, *Ustawa*…, commentary to Article 75(f) of the act on court execution officers and execution available in the LEX 2012 programme.

[39] As with the description of the disciplinary proceedings for legal advisers K. Kwapisz, *Ustawa*…, commentary to Article 68(1) of the act on legal advisers, the commentary is available in the LEX 2011 programme, in relation to prosecutors; A. Herzog, *Zmiany w postępowaniu dyscyplinarnym prokuratorów w ustawie o prokuraturze*, "Prokuratura i Prawo" 2016, No. 7–8, p. 190.

[40] As in the description of the disciplinary proceedings concerning advocates – J. Trela, *Prawo o adwokaturze*, commentary to Article 63 – Act on the Bar available in the LEX 2016 programme.

It should be emphasized that at the 'court' level all proceedings are characterized by the fact that the procedure of proceeding before the relevant bodies is generally based on the provisions of criminal procedure – as regards evidence proceedings, carrying out of hearings (e.g. with respect to the procedure of counting the final votes of the parties), making adjudications and their examination. Importantly, at this stage, the adjudicating organs have the status of independent bodies which is meant to guarantee objectivity of jurisdiction[41].

Two other elements that should additionally and necessarily be stressed involve the openness of disciplinary proceedings and the guarantee of the right to defense to the accused. In terms of the former, all the analyzed disciplinary proceedings are open[42].

Simultaneously, referring to the question of the right to defense, it should be emphasized that in all the analyzed proceedings the accused are guaranteed a broadly understood right to defense (both in the formal and in the substantive meaning of the word) throughout the process. It is extremely important because this right is a basic and fundamental procedural guarantee and also tends to be treated as one of the subjective fundamental human rights[43].

From the formal point of view, the right of the accused to defense manifests itself in the right of the latter to have a defense counsel[44]. The defense counsel can be a legal adviser, a barrister or a representative of a given profession. Due to the absence of specific entries as to the number of defense counsels, it should be deemed that the accused can have up to three defense counsels simultaneously[45] (as in criminal proceedings), with a possibility of counsels for defense constituting a 'mixed composition', i.e. for the accused being simultaneously represented by legal advisers and barristers.

In a substantive sense, the right to defense of the accused manifests in his right to undertake procedural acts (compliant with law) in order to obtain the possibly most favourable result of the trial[46]. These rights include: the right to present explanations (with respect for their specific legal character, i.e. the fact that explanations non-compliant with objective reality are not punishable), right to a refusal to present explanations and answers to individual questions, right to take the floor in any case in which the court hears the positions of the parties, right to express a stance on any evidence taken, right to deliver the final speech as the final entity taking the floor (the so-called *favor defensionis)*.

In connection with the above presented brief outline of the course of proceedings before pertinent disciplinary courts, one can point out that they resemble the proceedings before courts in criminal cases (they are an equivalent of this stage).

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[41] In this way about the independence of disciplinary courts in judges – W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów w świetle ustawy z 27.07.2001 – Prawo o ustroju sądów powszechnych – kwestie procesowe i materialne*, "Krajowa Rada Sądownictwa" 2017, No. 2(35), p. 65, also, in W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów*, *Komentarz*, Warszawa 2005, p. 23. Thus, for instance, about disciplinary courts of court executioners – K. Gromek, *Ustawa o kuratorach sądowych. Komentarz*, edit. II, commentary to Article 54 avaiable in the LEX 2005 programme.

[42] This satisfies the conclusions and remarks to be found in literature – comp. A. Korzeniewska-Lasota, *Jawność*..., p. 522, also in K. Kremens, *Jawność postępowań dyscyplinarnych prokuratorów,* „Prokuratora i Prawo" 2015, No. 5, pp.141–142.

[43] Comp. C. Kulesza, *Efektywność udziału obrońcy w procesie karnym w perspektywie prawno-porównawcze*j, Kraków 2005, p. 333.

[44] Comp. K. Marszał, S. Stachowiak, K. Zgryzek, *Proces karny,* Katowice 2003, p. 119.

[45] The only exception here is a disciplinary proceeding where the accused can have up to 2 counsels of defense at the same time (see: Article 75 g sect. 2 of the act on court executioners and court execution).

[46] Comp. P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym,* Kraków 2006, p. 213–214.

It should be pointed out that the provisions of the analyzed disciplinary proceedings contain regulations concerning costs of proceedings as well as enforcement proceedings, in the case the accused is convicted in a legally binding way. To give an example, in the case of legal advisers such an organ is the Dean of the District Chamber of Legal Advisers[47] and in the case of notaries the relevant council of notaries (or the Minister of Justice in the case expulsion from the profession is adjudicated)[48]. Enforcement proceedings are the third and final stage of criminal proceedings.

What also requires to be underlined separately is the fact that the legislator foresaw a possibility of applying extraordinary remedies of suability (submission of cassation, motion for resumption of proceedings) with the purpose of changing a legally valid judgment to which the provisions of the code of criminal proceedings apply, respectively.

Referring to the convergence of parties in disciplinary proceedings and in criminal proceedings, it should be pointed out that at the stage of proceedings before disciplinary courts, the accuser (being a disciplinary spokesman) is an equivalent of the prosecutor in criminal proceedings while the accused is an equivalent of the suspect (in 'preliminary' proceedings)[49] and the accused (at the stage of proceedings before disciplinary courts and commissions).

In turn, the party in the form of the wronged person appears only in some proceedings in the analyzed legal professions (in the case of barristers, legal advisers and court executive officers), not being present in the remaining analyzed professions. The wronged person does not have their own definition in any of the acts which means that it is the provision of Article 49 of the code of criminal proceedings (containing the definition of the wronged person[50]) that applies to him. It should thus be pointed out that the wronged person is the person whose legal good was directly infringed by the action of a barrister (or trainee barrister), legal adviser or court executive officer[51].

In addition, it should also be indicated that in the disciplinary proceedings in the professions where the wronged person does not appear as a party in the trial, he can play the role of a personal source of evidence (witness)[52].

The described above legal status as regards the absence of the appearance of the wronged person as a party in the majority of disciplinary proceedings in the

[47] K. Kwapisz, *Ustawa*…, commentary to Article 71 of the act on legal advisers, commentary available in the LEX 2016 programme.

[48] Comp. K. Ceglarska-Piłat, M. Zdrojewska, *Prawo*…, commentary to Article 95(ł) of the act, available in the LEX 2016 programme.

[49] A situation of this kind occur only in the proceedings by advocates and legal advisers where the accused is presented with charges at the stage of preliminary proceedings

[50] Pursuant to Article 49 of the code of criminal proceedings, Article 49 para 1 of the code of criminal proceedings stipulates that the wronged person is a physical person whose legal good was directly infringed or threatened by the offense. Pursuant to para 2 of the analyzed provision the wronged person can also be a state or self-government institution or any other organizational institution not having the status of a legal person to whom legal capacity is given by separate provisions.

[51] In this way about attorneys M. Gawryluk, *Prawo o adwokaturze. Komentarz*, edit. 1, Warszawa 2012, p. 93, about court executive officer – G. Kuczyński, *Ustawa*…, commentary to Article 75(f) of the act on court executive officers, available in the LEX programme, and about legal advisers W. Kozielewicz – W. Kozielewicz, *Odpowiedzialność*…, Warszawa 2016, p. 316.

[52] And thus with reference to disciplinary proceedings against prosecutors P. Czarnecki [in:] P. Czarnecki, *Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego*, Warszawa 2013, pp. 213–214.

analyzed legal professions should be changed in the future. The changes should involve giving the wronged person the rights and status of a party in all analyzed disciplinary proceedings. An obvious remark to be made here is that with thus potentially changed regulations, the wronged person will not appear in all cases anyway due to the definition of the wronged person specified in the appropriately applied Article 49 of the code of criminal proceedings (i.e. the directness of victimization requirement).

Referring to the considerations discussed above, it should also be added that only in the proceedings concerning court executive officers, other entities (other than those described above) can appear in the role of a party, namely: Minister of Justice, court presidents, judges-inspectors, bodies of the court executive officers. The indicated entities will acquire the status of a party only when they lodge with a disciplinary commission a motion for instituting proceedings.

Speaking in more detail about the procedural provisions regulating disciplinary proceedings in the analyzed legal professions it is worthwhile to point out that they are on the whole very similar in spite of certain objectively present differences.

First, as it has already been indicated above, all disciplinary proceedings consist of 'preliminary' proceedings (with the above described varied construction) and exceptionally in the case of court executive officers there is a possibility of a situation in which they can be abandoned and a motion for instituting the proceedings lodged right away. The motion for immediate institution of disciplinary proceedings before a disciplinary commission (with the omission of the investigation stage) can be lodged by the Minister of Justice, court presidents, judges-inspectors, court executive officers self-government bodies and court executive officers-inspectors[53]. In this place, it is worth pointing out that the proceedings in question are always conducted by disciplinary spokesman who can undertake their actions *ex oficio* (with the exception of court curators and court clerks) or in response to a motion by pertinent bodies[54]. Conclusions reached by these bodies oblige disciplinary spokesmen to institute proceedings but they do not affect their substantive decisions as to the way of terminating the proceedings (with the exception of court curators and court clerks[55]). This in fact means decision-making independence of disciplinary spokesmen as regards the termination of the preliminary proceedings[56].

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[53] Comp. A. Durda, *Act on court executioners and execution. Commentary*, Warsaw 2016, pp. 416–417. The listing of the entities indicated is enumerative – comp. M. Bieżuński, P. Bieżuński, *Ustawa o komornikach sądowych i egzekucji. Komentarz*, edit. 2, Warszawa 2011, p. 205.

[54] For instance, such a body is the Minister of Justice (for legal advisers and attorneys) though there are also other additional authorized bodies (e.g. court executors self-government bodies for court executioners, the board of relevant chamber of notaries for notaries).

[55] In the case of court clerks, the institution of the explanatory proceedings by a spokesman is initiated by the president of the district court. It is also his sole decision that the motion for instituting disciplinary proceedings is lodged with a disciplinary commission – comp. P. Zuzankiewicz [in:] W. Drobny, M. Mazuryk, P. Zuzankiewicz, *Ustawa…*, p. 166. In the case of Court curators, it is the disciplinary spokesman with initiates proceedings solely on the motion of the district court president – comp. T. Jedynak, K. Stasiak, *Ustawa o kuratorach sądowych, Komentarz*, edit. II, Warszawa 2014, p. 281.

[56] In this way about the disciplinary spokesman for barristers – W. Kozielewicz, *Odpowiedzialność…*, Warszawa 2016, p. 249, Kozielewicz wrote the same about disciplinary spokesmen for judges – comp. W. Kozielewicz, *Odpowiedzialność dyscyplinarna…*, p. 65. In general, this is an expression of the independence of disciplinary proceedings conducting bodies, more on this subject (on the example of legal advisers) see: T. Niedziński, *Nadzór sądów i Ministra Sprawiedliwości nad postępowaniem wobec radców prawnych*, "Radca Prawny. Zeszyty Naukowe" 2015, No. 2(3), pp. 84–96.

Second, in all analyzed disciplinary proceedings for legal professions, the procedural action initiating the 'main' (similar to the court stage) stage of the proceedings is the lodging, by a disciplinary spokesman (mainly) or by other authorized entities, a motion with a relevant body (called differently). This motion is an equivalent of the indictment act in criminal proceedings and performs all its functions[57].

The motion in question is called in the majority of legal professions, with the exception of proceedings concerning prosecutors and court executive officers, a motion for the institution of disciplinary proceedings. In the case of prosecutors, the motion is called 'a motion for examining a case in disciplinary proceedings'. In turn, in disciplinary proceedings concerning court executive officers the legal status is such that where the motion proceeds from a disciplinary spokesman, than the legislator used the expression 'motion for punishment' and where it proceeds from other law-authorized entities (e.g. Minister of Justice) it is called by the legislator a motion for the institution of disciplinary proceedings.

It should be added that due to the appropriate application of the CCP provisions, all the above mentioned motions for punishment are subjected to formal control by disciplinary courts[58].

Third, the accuser in two-instance procedures is always a disciplinary spokesman who performs the function of the accuser. In exceptional cases, regulations allow for another (additional entity) to appear as an accuser next to the spokesman. This situation occurs only as regards court executive officers in a situation when the motion for punishment (without preliminary proceedings) is lodged by court presidents, judges-inspectors, court executive officers self-government bodies and court executive officers-inspectors. These entities can then appear as accusers next to the spokesman as a party[59].

Fourth, in all the analyzed proceedings, cases are examined before relevant disciplinary bodies at hearings[60]. As for the attendance of the parties, all the analyzed proceedings contain entries stipulating that an unaccounted for failure of the accused or his defense counsel to present at a hearing does not prevent the examination of the case. In disciplinary proceedings for prosecutors, there is a clause that this rule does not apply where the disciplinary court finds the presence of these parties unnecessary. As regards legal advisers and barristers, the legislator writes that such a decision of a disciplinary court (concerning an obligatory presence of the parties) is possible for 'serious reasons'. What should in fact be pointed out is that

[57] And thus, for instance, about the motion for punishment in relation to court executioners, A. Marciniak [in:] A. Marciniack, *Ustawa o komornikach sądowych i egzekucji. Komentarz*, edit. 6, Warszawa 2014, p. 411.

[58] Such a procedure of motion control is universal in all disciplinary proceedings for analyzed legal professions, also in notaries – comp. R. Greszta, *Kontrola wniosku o wszczęcie postępowania dyscyplinarnego przed sądem dyscyplinarnym rady izby notarialnej* [in:] *Rozprawy z prawa prywatnego. Księga pamiątkowa dedykowana Profesorowi Aleksandrowi Oleszce*, red. A. Dańko-Roesler, Warszawa 2012, pp. 155–157. It is worthwhile to note that such a solution was also in force under earlier acts, for instance, the act on prosecutors of 1985 – comp. M. Mitera, M. Rojewski, E. Rojowska, *Ustawa o prokuraturze. Komentarz*, Warszawa 2011, pp. 199–200.

[59] See: Article 75 f sect. 1 UKiES.

[60] Literature points out that the disciplinary body should in principle strive to close the proceedings as fast as possible and thus, for instance, in relation to court executioners – A. Marciniak [in:] A. Marciniak, *Ustawa…*, p. 418. It is emphasized in literature that in order to quickly examine the case it is necessary to have it adequately prepared by, for instance, preparing evidence, a list of witnesses and questions to be addressed to them – comp. Z. Knypl, Z. Merchel, *Ustawa o komornikach sądowych i egzekucji*, Warszawa 2015, p. 635.

the rule is effective also in other proceedings as long as the provisions of the code of criminal procedure are applied. As for other elements concerning the analyzed subject, it is worth adding that in the disciplinary proceedings for prosecutors the legislator included a separate and special clause saying that the establishment or change of a defense counsel cannot become a reason for interrupting or adjourning a hearing.

Fifth, the legislator established the rule of openness of the disciplinary proceedings carried out (as it has already been signaled), with a simultaneous inclusion (in different legislative ways) of exceptions which actually refer to an appropriate application of Article 360 of the code of criminal proceedings which regulates the question of departures from the principle of the openness of the hearing (expressed in Article 355 of the code of criminal proceedings)[61]. Thus, in disciplinary proceedings the court (or a relevant disciplinary commission) can exclude the openness of the hearing as a whole or in its part if this openness could:

a) cause disturbance of public peace,
b) insult good manners,
c) reveal circumstances which should be kept secret due important state interest,
d) infringe important private interest.

Openness can also be excluded for the duration of the hearing of a witness who is below 15 years of age. It should also be added that in Article 360 para 2 of the code of criminal proceedings the legislator included the rule that where the prosecutor objects to the exclusion of the openness, the hearing is open. Applying this rule to disciplinary proceedings, it should be pointed out that the subject entitled to lodge the indicated objection to the exclusion of openness will be a disciplinary spokesman (as an accuser before disciplinary courts/commissions.

Sixth, the course of the proceedings before courts (or disciplinary commissions) is very similar. This results from the fact that the course of the whole evidence proceedings (and thus, for example, the procedure of summoning and hearing a witness or an expert, deriving evidence from documents) are a reflection of the appropriate application of the code of criminal proceedings, i.e. after collecting and taking evidence in a case the court procedure is closed, the parties take the floor and the procedure of the discussion of the adjudication takes place and then the adjudication is announced. In a complex case or for other important reasons, the court can adjourn the issuance of a judgment for a period not longer than 14 days and a different regulation can be found only in the provisions concerning court curators (namely, 3 days) as well as court clerks (7 days).

Seventh, it should be pointed out that while the procedure of delivering the adjudication with reasons for it varies among the analyzed professions (there are three models of delivery), the legal requirements concerning the reasons of judgment prepared are identical in all the procedures due to the appropriate application of the provision of Article 424 of the code of criminal proceedings. This means that the reasons for judgment should include concise:

[61] W. Kozielewicz, *Odpowiedzialność*..., Warszawa 2016, p. 253.

1) indication of what facts the court found proved or not proved, on what evidence the court based in this respect on evidence and why it did not accept evidence to the contrary;
2) explanation of the legal grounds for the adjudication.

Moreover, the reasons for judgment should include the circumstances which the court had in mind when adjudicating the punishment and when making other judgment-related decisions.

The three models of delivery referred to above include:

– The rule of the absolute preparation and delivery of the reasons for the judgment of the disciplinary court of the first instance and simultaneous delivery of its reasons *ex officio*[62], with a simultaneous inclusion of exceptions from this rule referring to the way of terminating the case (where the case ended with reprimand or where the adjudication was made in course of consensual case termination[63]). This model was adopted by the legislator for barristers, legal advisers and court executive officers.
– The rule of delivery by the disciplinary court of solely the sentence of the adjudication made in the first instance with an assumption of the reasons for the adjudication being prepared and delivered to the entitled subject who will apply for it within a law-specified period (calculated from the date of the receipt of the sentence of the adjudication). This model is effective solely as regards prosecutors.

Eighth, in each of the analyzed disciplinary proceedings appeal is the legal remedy to be used against the first instance adjudication. The appeal can be lodged in principle within 14 days (with the exception of court executive officers where it is 30 days) counted from the date of the delivery of the reasons of the adjudication. The procedural requirements with respect to the appeal are the same as in the case of a written statement of claim. The provisions applicable here are the same as in the case of an appeal in criminal proceedings (including, for example, provisions concerning the formulation of possible demurrers from Article 438 or 439 of the code of criminal procedure).

As for the formal possibility of lodging appeals, it should be pointed out that entitled to lodge them are always parties to proceedings (as well as their possible representatives) and in addition other entities indicated by law (with the exception of proceedings against court curators and court clerks). The entities, most frequently indicated as entitled to lodge an appeal include the Minister of Justice[64] and the General Prosecutor (for prosecutors). In exceptional cases, other entities can also be entitled: for judges (National Council of the Judiciary) and for court executive officers (presidents of the court, judges-inspectors, court executive officers'

[62] This is the case with judges, notaries, court curators and court clerks.
[63] The point is that the motion of the disciplinary spokesman for making and adjudication, and inflicting the disciplinary punishment agreed on with the accused without conducting a trial or cases which took into account the motion of the accused to issue an adjudication and inflicting a specific disciplinary punishment. Such a situation is possible, for instance, in the case of advocates – comp. W. Kozielewicz, O*dpowiedzialność*…, Warszawa 2016, p. 253.
[64] This applies to advocates, legal advisers, judges, notaries, court executioners.

self-government bodies as well as court executive officers-inspectors). The last indicated numerous group of entities in the case of court executive officers has the right to lodge an appeal only provided that it is these entities that have lodged a motion for instituting disciplinary proceedings (because these entities are then treated as a party to the proceedings).

Ninth, the way of proceeding of the disciplinary bodies of the second instance is based on an appropriate application of the provisions of the code of criminal proceedings. This means, among others, that these organs examine a case at a hearing (and in exceptional cases at a session) as well as that the formula of potential adjudications is the same as for the criminal court in appeal proceedings (i.e. apart from maintaining in force the adjudication of the first instance there is a possibility to change both the judgment and the cassation adjudication: to overrule the adjudication and to pass the case for re-examination).

What requires to be emphasized separately is the fact that appropriate application of the code of criminal procedure in the appeal proceedings of the analyzed legal professions causes that the same *reformationis in peius* rules and the related with them *ne peius* rules apply[65]. The application of the first of the rules referred to means that the disciplinary body of the 2nd instance can rule against the accused only when an appeal is lodged against him as well as within the limits of the appeal against the judgment and only in the case the transgressions raised in the appeal are confirmed (unless the appeal does not come from the accuser or a proxy and does not raise pleas or where the law prescribes that an adjudication be made irrespective of the pleas raised[66]).

In turn the application of the *ne peius* rule means that the organ of the 2nd instance cannot convict an accused who was found not guilty in the 1st instance or the proceedings against whom were discontinued in the 1st instance[67]. Moreover, where the adjudication appealed against is overruled and the case is referred for re-examination, an adjudication more severe than the overruled can be made only where the adjudication referred to was appealed against to the disfavour of the accused.

Tenth, all the analyzed disciplinary proceedings regarding legal professions have regulated provisions concerning the enforcement procedure set in motion once a legally valid adjudication is made declaring the accused guilty. The common procedural element of these regulation is the fact that:

1) they specify what entities shall be delivered a copy of the legally valid disciplinary adjudication *ex oficio* and indicate the placement of the copy;
2) they contain the indication of the entity (or entities) entitled to inflict the penalties. Obviously, the entities are specific to the proceedings though it is worth emphasizing that the Minister of Justice takes part, among others, in proceedings concerning judges, notaries and court executive officers;
3) they specify the period for some kind of an erasion of the entry in the register of convictions, that is removal from personal records of the entry

[65] More on the subject of the rules referred to in, for instance, M.J. Szewczyk, *Reformationis in peius ban in the Polish criminal proceedings*, Warszawa 2015.
[66] In the criminal procedure this ban is formulated in Article 434 of the code of criminal proceedings.
[67] In the criminal procedure this ban is formulated in Article 454 of the code of criminal proceedings.

regarding the conviction (or a copy of the adjudication). These regulations specify individual (generally similar) periods simultaneously indicating that they apply to a situation of the absence of liability to punishment for other disciplinary torts or absence of the initiation of new disciplinary proceedings (because in the latter case the time necessary for the 'erasion' is extended).

Eleventh, in the analyzed legal professions the legislator provided for a possibility to institute extraordinary measures of appeal against adjudications by disciplinary bodies of the 2nd instance in the form of cassation[68] and a motion for the resumption of the proceedings.

Legal regulations concerning the right to lodge a cassation vary which should be criticized. Barristers, legal advisers, prosecutors and notaries also have the right to lodge a cassation. Judges and court executive officers do not have this right at all. In turn, as regards court curators and court clerks, instead of a possibility to lodge a cassation, the legislator created a possibility to place an appeal with a relevant court of appeal – a court of labour and social security with the application of relevant provisions on appeal from the code of civil procedures (CCP)[69]. This solution should be definitely criticized and in particular the application of the provisions of the civil procedure which, after all, have not been applied at all and which have nothing in common with the penal (and also quasi penal) character of the disciplinary proceedings carried out.

It should be emphasized that the procedure of lodging a cassation in the professions in which it is admissible is based to a large extent on the code of criminal procedure[70] and is, in effect, very similar, for instance:

- Cassation is lodged within 30 days from the delivery of the adjudication of the disciplinary organ of the 2nd instance (through the mediation of this organ). The only exception here is the General Prosecutor who has three months to lodge a cassation in the disciplinary proceedings against prosecutors.
- Cassation is examined by the Supreme Court composed of three judges.
- Cassation is lodged free of charge and results in a suspension of the performance of punishment (prosecutors being the only exception).
- Legal ground for lodging a cassation can be a glaring infringement of law or glaring incommensurability of the disciplinary penalty.

In addition, in each of the above four analyzed disciplinary procedures, apart from the parties entitled to lodge a cassation there are also other entities, such as

[68] The great importance of the regulation referred to (the right to lodge a cassation) is emphasized by C. Kulesza [in:] C. Kulesza, *Ewolucja*…, p. 18.

[69] In the reasons of judgment of the Court of Appeal in Warsaw of 21 August 2000 (III Apo 10/00, OSA 2001, No. 2, Item 7) this Court pointed out that the possibility of placing an appeal against the adjudication of the commission of the 2nd instance is aimed at ensuring the governance of jurisdiction of the court over disciplinary decisions, not at replacing the proceedings before disciplinary commissions with court proceedings.

[70] In their decisions the Supreme Court directly pointed out that in the scope not regulated otherwise, cassation proceedings are governed by the code of criminal procedure – comp. judgment of the Supreme Court of 27 July 2016, SDI 28/16, LEX No. 2087127; adjudication of the Supreme Court of 10 April 2014, VI KZ 2/14, LEX No. 1444635.

the Minister of Justice or the Ombudsman (in the case of barristers, legal advisers and notaries), the General Prosecutor (in the case of prosecutors) as well as entities representing professional self-governments (for a given profession): the National Council of Notaries, President of the Supreme Bar Council, President of the Nation Council of Legal Advisers. In the case of notaries, in addition, also the disciplinary spokesman has the right to lodge a cassation (other spokesmen do not have this right).

In turn, as regards the right to lodge a motion for the resumption of disciplinary proceedings, it should be pointed out that it is possible in all the analyzed disciplinary proceedings. In some professions this possibility is clearly provided for in the act regulating their performance[71] while in others it results from the appropriate application of the code of criminal procedure.

Twelfth, in all the analyzed legal professions, the regulations contain solutions concerning the impact of the abandonment of the performance of a given profession on the possibility of initiating or continuing disciplinary proceedings.

The principle is that a change of the profession prior to the commencement of disciplinary proceedings results in the absence of a possibility to effectively institute new disciplinary proceedings against a given person.

As regards the proceedings already in progress, the analyzed regulations provide, in principle, for two possibilities: the proceedings become inadmissible or continue irrespective of the cessation of practising the profession (it is so in the case of judges, prosecutors and notaries[72]). In addition, the legislator provided for a possibility of notifying specific corporate bodies or government offices about the disciplinary punishment of the accused.

It should be pointed out in this place that while in principle the cessation of the performance of the profession of a barrister or a legal adviser constitutes a procedural obstacle to further disciplinary proceedings, the provisions concerning the performance of these professions provide for a possibility of refusing to cross a given person out from the list of people practising the profession (till the termination of the proceedings[73]). What is at stake is giving the professional self-government bodies a possibility to stigmatize the reprehensible behaviours of the accused[74].

It seems that the legislator should definitely consider the adoption of the principle that a change of profession does not constitute an obstacle to the continuation of disciplinary proceedings due to the character of the analyzed legal professions

[71] This applies to common court judges, prosecutors, court clerks. The provisions in question regulate in these cases the procedure of lodging a motion but do it holistically as they contain also reference to appropriate application of the provisions of the Code of Criminal Procedure.

[72] In the case of notaries, such a situation has place also where the Minister of Justice declares loss of the effectiveness of a given notary's appointment – comp. A. Oleszko, *Prawo*…, p. 871.

[73] Pursuant to Article 30 of the Act on Legal Advisers, where disciplinary proceedings are in progress against a legal adviser, his removal from the list of legal advisers can be denied in spite of the motion of the legal adviser referred to in Article 29 pt. 1 of the Act on Legal Advisers – more on this subject in K. Kwapisz, *Act on legal advisers. Commentary*, edit. 1, Warsaw 2013, pp. 81–82. In turn, in the case of advocates, the room of maneuver for the self-government of the Bar (the district bar council) to refuse to cross a given person out from the list of advocates is narrower. Pursuant to Article 72 sect. 2 Law on Barristers the district bar council can refuse to cross somebody out from the list of advocates for reasons specified in Article 72 sect. 1 pt. 2 or 3 (stepping down from the Bar, transfer of the professional seat to another bar chamber) if there are disciplinary proceedings in progress against a given barrister.

[74] The refusal to cross a person out from the list of legal advisers is discussed by W. Kozielewicz [in:] W. Kozielewicz, *Odpowiedzialność*…, Warszawa 2016, p. 314.

which have the feature of a profession of public trust. Abuses (disciplinary torts) committed by lawyers of the analyzed professions should be stigmatized and pointed out if only due to the fact that disciplinary punishments should perform both the preventive and the educational function.

Thirteenth, all the analyzed provisions foresee a possibility of suspending the accused in the performance of professional activities. The regulations referred to have a few essential common features:

a) the decision about the suspension in the performance of professional activities is always enforceable forthwith,
b) the sentenced decision about the suspension in the performance of professional activities (or possible extension of the decision) can always be appealed against within 7 days in the form of a complaint. Naturally, at the level of individual legal professions there are differences consisting in specifying the entity which will examine a given complaint. The prevailing feature of the analyzed disciplinary proceedings is the fact that the suspension in the performance of professional activities is adjudicated by a disciplinary court (or a disciplinary commission)[75].

As regards the initiation of the proceedings resulting in the suspension of a given person in the performance of professional activities (an organ acting *ex oficio,* action on the motion of an entitled entity), the legislator seems to have, in principle, diversified the question evenly: it is either an action exclusively *ex oficio* (as it is in the case of court clerks, notaries, judges) or an action alternatively: *ex oficio* or on the motion of an entitled entity (e.g. in the case of legal advisers, barristers and court curators.

In principle, the decision about a possible suspension of a given person in the performance of a specific legal profession is optional (i.e. it depends on the analysis of a particular and individual case). Provisions on disciplinary proceedings for barristers and legal advisers as well as judges are the only exception as in specific situations they include a legal order to suspend a given person in the performance of professional activities[76].

As regards the duration of the suspension in the performance of professional activities, the legislator did not actually specify the time for which it is to apply which leads to the allegation that the upper time limit of the suspension is a legally valid termination of the disciplinary proceedings[77]. However, this suspension can be cancelled earlier[78].

[75] Such a situation occurs in 5 of the analyzed legal professions: advocates, legal advisers, judges, notaries and court executioners (in the case of the latter it is a disciplinary commission which adjudicates).

[76] In the case of legal advisers and advocates the legislator foresaw an obligatory suspension of a person in relation to whom the court applied temporary detention. In turn, in the case of judges, the disciplinary court adopts a resolution allowing to bring a judge to criminal justice for a deliberate crime subject to public prosecution, the judge being suspended in professional activities *ex oficio*.

[77] In the case of prosecutors the decision about the duration of the suspension belongs to disciplinary superiors and the legislator specified the maximum period of the suspension as 6 months. The suspension of a prosecutor can, in justified cases be extended by the disciplinary court for another, necessary period.

[78] Provisions concerning prosecutors are the only exception as the decision concerning the duration of the suspension belongs to disciplinary superiors and the legislator specified the maximum duration of the suspension as 6 months. The suspension of a prosecutor in his duties can, in justified cases, be extended by a disciplinary court for another necessary period.

To sum up this thread, it should be noted that in each of the analyzed legal professions there is a legal possibility of suspending a given person in the performed professional duties. There are several differences as regards the determination of specific solutions in the application of this institution in individual legal professions but these differences are not of a character that their possible changes (particularly in the direction of standardizing the rules of applying these institutions) could distort the analyzed legal institution. In the case of possible standardization of the provisions referred to, the legislator should consider, as the principle of adjudication the suspension by a relevant disciplinary court, the establishment as the principle of adjudicating the suspension *ex oficio* or on the motion by authorized parties as well as decide that the suspension should last at most till the legally valid termination of the disciplinary proceedings, with a possibility of its earlier reversal at the request of the parties (or the entitled entities) as well as *ex oficio* (where absence of grounds for further duration of the suspension is established).

Fourteenth, all the analyzed legal professions have regulations concerning the question of the costs of the trial in which two functioning variants can in principle be distinguished.

In the first variant the costs of the proceedings are fully covered by the State Treasury and this principle concerns the disciplinary proceedings in the case of judges, court executive officers and court clerks. These are legal professions performing official duties on behalf of the Republic of Poland. It should be added that these costs are incurred by the State Treasury irrespective of the type of adjudication made.

In the second variant, the costs of the proceedings are incurred by individual professional self-governments which determine the level and method of their calculation. Where the motion for punishment proves effective and the accused is found guilty, the accused returns the costs of the proceedings. In turn, where the accused is acquitted or where the proceedings against him are discontinued, these costs will be incurred by a given professional self-government.

The described variants are a natural reflection of the specific position of individual legal professions with respect to whether they have their own professional self-government (which they are subordinated to) or whether they are directly subordinated to state bodies.

6. UNIQUE SOLUTIONS IN LEGAL REGULATIONS CONCERNING DISCIPLINARY RESPONSIBILITY

It has already been signaled earlier that apart from obvious differences resulting from the specificity of professions (manifesting itself, for instance, in the names of individual disciplinary bodies), in individual professions there are solutions which are unique in character as well as solution which operate only in a narrow group of particular professions. They will be given a brief presentation hereinafter.

As regards the institutions which appear only in certain disciplinary proceedings, it is worth pointing to a possibility of extending the motion for punishment (as in the extension of the indictment act from Article 398 of the Code of Criminal

Procedure regulating 'the accident trial'[79]) as a possibility of giving a combined punishment.

The extension of the scope of the motion for punishment concerns judges and prosecutors. In relation to these two professions the legislator introduced a rule that where another offense is revealed in the course of a trial then, apart from the offense covered by the motion for the examination of the disciplinary case, the court can pass a judgment with respect to this offense only with the consent of the disciplinary spokesman and the accused or the latter's counsel of defense. In the case of lack of consent by the entities referred to above, the disciplinary spokesman shall conduct separate disciplinary proceedings in this respect[80].

In turn, with respect to a possibility of giving a combined punishment, the legislator provided for such a possibility in relation to judges, prosecutors and court clerks, specifying, in each case, (similar) conditions for combining punishments.

Simultaneously, as regards unique procedural solutions contained in individual legal professions analyzed, it is worthwhile to indicate the regulations for 3 professions:

1) In the disciplinary procedure for judges, the legislator provides for a possibility of a combined adjudication (a combined judgment of sorts). According to this regulation, where the accused has committed two or more disciplinary offenses before the first, even legally valid adjudication is given with respect to any of them, then a combined adjudication is issued on the motion by the accused provided the adjudicated penalties can be combined according to the rules appropriate for the adjudication of a combined punishment for several offenses in one judgment.
2) In the disciplinary proceedings against prosecutors two legal peculiarities can be found: a possibility to make use of a piece of evidence in the form of technical devices aimed at controlling unconscious reactions of the organism as well as a possibility of placing in the sentence of the adjudication of the disciplinary court of a mention of an obvious groundlessness of the lodged motion for punishment or a mention of an obviously undeserved discontinuation of the proceedings.

As for the first of the procedural peculiarities, it should be pointed out that pursuant to Article 154 para 5 of the Act Law on Prosecutors, in order to reduce the range of people suspected of having committed a disciplinary offense containing features of a crime of disclosing information from criminal proceedings containing secret information of confidentiality clause 'secret' or 'top secret', the disciplinary spokesman, can, in the course of the proceedings carried out,

[79] Here, it should be indicated that the Supreme Court ruled that the provisions of the law referred to above constitute independent grounds for extending the limits of the accusation which constitute *lex specialis* in relation to Article 398 para 1 of the Code of Criminal Procedure – comp. decision of the Supreme Court of 15 November 2002, SDI 31/12, LEX No. 1515153. This does not change the fact that there are similarities between the institutions. More on the subject of the 'incident trial' in, for instance, P. Rogoziński, *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, commentary to Article 398 of the Code of Criminal Procedure, available in the LEX 2016 programme; S. Stachowiak, *Przedmiotowe rozszerzenie oskarżenia w toku rozprawy głównej w polskim procesie karnym*, „Prokuratura i Prawo" 2002, No. 6, p. 7–15.

[80] Comp. the provision of Article 117 of the act law on the system of common courts and the provision of Article 158 of the act law on the prosecutor's office.

appoint an expert to apply towards the prosecutor having access to the information, with his consent, technical devices aimed at controlling the unconscious reactions of the organism. The application of the above mentioned technical devices requires also the consent of the General Prosecutor. This is a unique solution because no other disciplinary procedure provides for a possibility of taking such evidence.

On the other hand, the second unique procedural regulation consists in the fact that the disciplinary court adjudicating in the case of an appeal against the discontinuation of disciplinary proceedings by the disciplinary spokesman can, dismissing the decision appealed against, simultaneously adjudicate in the sentence of the decision that it was really undeserved. This procedure is identical where the court gives the accused a sentence of acquittal or discontinues the proceedings – the disciplinary court has the right to place in the sentence of the judgment a mention of the fact that the motion for punishment in a given case was lodged on obviously wrong grounds. This is a very interesting institution and it should be pointed out that the legislator should consider transferring it to criminal proceedings.

3) in the disciplinary proceedings for court clerks, a procedural peculiarity of sorts is a possibility to initiate disciplinary proceedings, not terminated in substance due to a decision on the discontinuation of the proceedings after the death of the accused. Proceedings can be initiated in this way at the request of a spouse, relation or relative in direct line or siblings. This is possible pursuant to para 3 of the Decree of the President of the Council of Ministers of 5 December 2011 on explanatory and disciplinary proceedings concerning government officials and disciplinary commissions and disciplinary spokesmen. The accused is then represented by the counsel of defense established by applicants or established *ex oficio*, where the accused has not appointed one.

The legal solution referred to should be definitely criticized as it does not comply with the essence of disciplinary proceedings where bodies adjudicate whether a given person is guilty with a real possibility of this person being punished (which is, obviously, impossible in this situation). The death of the accused or the suspect is a basic negative prerequisite in criminal proceedings as well as in other disciplinary proceedings concerning the analyzed legal professions. There was no other rational reason to depart from this negative prerequisite in the case of disciplinary proceedings concerning court clerks.

Summing up, the above considerations, it should be pointed out that the character of the above procedural solutions allows the legislator to resign from them, 'without damage', in the case of possible standardization of procedures or, conversely, expand the scope of the application of these institutions. It seems that the said extension of the application of the institutions would be desirable in relation to the introduction of a procedure of marking obviously wrong discontinuations as well as motions for punishment (as in the case of prosecutors) as well as introduction of an institution of a 'combined judgment' of sorts.

7. CONCLUSIONS *DE LEGE FERENDA*

The analysis carried out above shows that the present models of disciplinary proceedings for the analyzed legal professions which are now functioning separately are very similar both in terms of substantive-legal and formal-legal solutions. Individual procedural regulations are very similar due to the very broad scope of relevant application of the provisions of the code of criminal procedure.

Simultaneously, the general conclusion which should now be drawn is that the title idea of the standardization of the disciplinary law and disciplinary procedure in legal professions makes sense and is entirely possible in the future. The degree of construction- and meaning-related similarities in individual disciplinary regulations for legal professions is considerable which will no doubt favour the proposed standardization. Obviously, apart from numerous similarities, there are also certain differences but their character is not likely to make them constitute an obstacle to the proposed standardization. Some of the existing differences anyway seem totally redundant and hard to account for, just as for example, why a legal adviser or a barrister can harm a client with their action and he will then have the status of the wronged person while this status will never be given to person affected by a harmful action of a notary or a prosecutor. What is more, as it has been shown above, such a standardization cannot have any adverse affect on procedural standards or adjudication standards (in general on the guarantees of a fair trial) because at present these standards are actually the same and simultaneously very high in the analyzed proceedings.

What should be indicated among the details of a possible standardization process is, for instance, the fact that it is difficult to justify the currently diversified stance of the Minister of Justice in the analyzed disciplinary proceedings who has the status of a party in some proceedings while in others the right to lodge an appeal (without the status of a party) and in yet others has significantly limited competences.

The key problems which will appear in the course of standardization attempts will also involve, among others, the fact that trying to make changes and perform a standardization of disciplinary procedures of sorts, the legislator will have to adopt, first and foremost, decisions as to the legal character and shape of the 'preliminary' proceedings, or make a decision as to determining the role and position of the wronged person as well as the competences of the Minister of Justice referred to above. These are the key differences which appear in the analyzed proceedings. These possible decisions of the legislator will have a significant impact on the final model of standardized disciplinary proceedings. What will be needed in addition to the effective implementation of the standardization process are substantive changes but they will be much less complex and involve, for instance, the naming of disciplinary bodies of both instances and the shape of the adjudication benches, the naming of the motion initiating the court proceedings, the period for the adjournment of the announcement of the judgment, etc.

As regards the potential direction of the above changes, it seems that it would be appropriate to shape the 'preliminary' proceedings following the example of the disciplinary proceedings for, for instance, legal advisers and barristers. The proceedings are substantive proceedings in which evidence proceedings are carried

out and the case is first conducted at an *ad rem* stage and then (after the collection of relevant evidence material) at an *in peronam* stage (i.e. the accused is presented with charges). In its essence, these proceedings are extremely close to the investigation known from criminal proceedings. The advantage of this model is potential reduction of the number of cases that come on for the trial by disciplinary bodies thanks to reliable and accurate examination of cases (thanks to the evidence proceedings carried out) already at the stage of investigation. This remark is made because at present, in many legal professions, appropriate substantive examination of the case is made as late as at the court stage.

The direction of changes regarding the position of the wronged person in disciplinary proceedings concerning legal professions seems obvious because it should aim at such a change of provisions that the wronged person (satisfying the directive of Article 49 of the Code of Criminal Procedure) be a party and could take part in disciplinary proceedings for all legal professions. This is demanded by justice and social considerations.

In turn the position of the Minister of Justice should be regulated in a uniform way and we should opt for his broad competences, that is for the right to take part in any proceedings, the right to look into the files of the case at every stage (irrespective of whether he takes part in a given case), the right to lodge appeals against substantive adjudications and other adjudications terminating proceedings.

Leaving aside the above remarks, it should be pointed out that at present the legislator has a choice between several legal solutions as regards possible standardization (unification) of analyzed disciplinary proceedings. Their type and selection depend on the choice of the general model of the organization of disciplinary proceedings of which there can be in principle four.

The first model is characterized by the fact that the total of the disciplinary proceeding is carried out before relevant bodies established by relevant bodies representing legal professions. What is maintained is the full competence of professional self-governments in this respect. If the legislator wanted to preserve this model of proceedings, he has the choice of two different construction variants.

First, the legislator can make an amendment of all the individual acts concerning all legal professions, by way of one large act in such a way as to include in them the same general and uniform procedural provisions, with additional specificities of individual professions being taken into account (e.g. individual determination of the role of professional self-governments). This will lead to the emergence of a legal situation in which disciplinary proceedings for given professions will be regulated later in individual acts concerning these professions and will proceed on the level of bodies appointed by representatives of this profession. What will be crucial is the fact that every profession will have in principle the same regulated procedure of disciplinary proceedings, specified in 'their' act, regulating the principles of the performance of a given profession.

Second, instead of passing an act regulating a number of acts, the legislator can simply pass one 'large' act which will regulate the matter as a whole, i.e. introduce uniform procedural regulations, respecting simultaneously the specificities of given professions (e.g. individual determination of the role of professional self-governments). It will then be an act regulating disciplinary proceedings for legal

professions and will constitute, in its scope, a complement and at the same time *lex specialis* for specific acts (from which clauses concerning disciplinary proceedings will be erased). The act referred to above can have a solely procedural character (i.e. contain regulations concerning only provisions of procedural character) or it can have a mixed character, i.e. contain provisions procedural as well as substantive in character (irrespective of whether they would be standardized or not).

In the second potential model the legislator can standardize procedural provisions with a simultaneous legislative 'transfer' of the equivalent of 'court proceedings' from the level of pertinent bodies of the legal professions to the level of selected state bodies. This refers, first of all, to common courts, the Supreme Court or possibly another, specially established new body. Against the background of the indicated entities, the legislator should consider in particular, the choice of the Supreme Court and this not only because of its particular legal rank and position, but also due to the fact that a new chamber is created there, that is the Disciplinary Chamber of the Supreme Court. Thus, in this model the 'preliminary' proceedings would remain the domain of pertinent bodies of the legal professions (including individual professional self-governments, the role of which would terminate with the presentation of an equivalent of an indictment act or with the discontinuation of the proceedings (subject possibly to control by indicated external court bodies, e.g. by the Disciplinary Chamber of the Supreme Court). Disciplinary spokesmen for given professions would act as prosecutors before the court.

It should be pointed out that with the present diversity of legal regulations concerning 'preliminary' proceedings, the indicated variant could in fact signify marked diversification of the role of individual bodies of legal professions and in effect frequent transfer of the whole burden of the proceedings (transfer of the proper substantive examination of the case) to a stage of court proceedings before external government bodies. The point is that in some proceedings evidence-related procedures would be carried out (e.g. in investigations concerning barristers or legal advisers) while in others the role of the bodies would be limited to an initial recognition of the case or only to the formulation of a motion for punishment (e.g. in the case of court executive officers).

What could act as a panacea for the above described drawbacks is introduction of uniform regulations concerning the 'preliminary' proceedings and shaping them as in the investigation concerning barristers and legal advisers. These proceedings would then be substantive in character and the decision-making as regards the object of the relevant presentation of the indictment act would remain on the level of relevant bodies of legal professions (including relevant professional self-governments), after they have completed evidence proceedings. This means that professional self-government would still be responsible for determining whether a given disciplinary tort was committed and for taking legal steps adequate to these findings, that is discontinuation of proceedings in the case of establishing absence of the said tort (or establishment of the occurrence of other negative prerequisites for court proceedings. It will be for the legislator to decide whether he will leave to professional self-government bodies the legal remedy in the form of quasi--punishment for 'minor' matters (of an insignificant degree of guilt/injuriousness) like a dean's admonition given by the dean of the district bar council. There are no

contraindications why the legislator should not establish such powers for a body of individual self-governments. On the other hand, the question of the final determination of the scope of disciplinary responsibility would already remain in the hands of the judicial body, for instance, of the Disciplinary Chamber of the Supreme Court. It would examine not only cases activated by the submission of a motion for punishment (an equivalent of an indictment act in criminal proceedings) but would also constitute an instance of appeal against decisions made in the course of 'preliminary' proceedings carried out by the self-government bodies of a given legal profession.

It seems that the legislator can achieve the indicated model of proceedings by creating a special act separately regulating the matter.

The potential third model is in principle similar to the second model described above, the possible difference being that the legislator could decide that at the stage of 'court' proceedings before pertinent state bodies an already specified external entity (not connected with any legal profession) would appear in the role of the prosecutor. This prosecutor would join the case already after it has been initiated by relevant legal professions bodies (that is already after the submission by them of an indictment act) and would be procedurally independent and sovereign in the course of further proceedings. His position as well as the construction of the office remains to be considered. It seems that the most appropriate legislative path to the implementation of the possible model referred to above would be a new special act. Yet, this model seems to be the least convincing. The point is that it seems to be deprived of much substantive sense to establish a special external body to act as a prosecutor in a situation when this body would join proceedings already initiated with an equivalent of an indictment act or legal action. Such a prosecutor would in a way double the work (including procedural actions) of the complaint-lodging entity and, moreover, it would be in principle bound by its scope and content.

In the potential fourth model, the legislator could decide to 'transfer' all the stages of the disciplinary proceedings for legal professions outside of the bodies of individual legal professions, that is entrust both the 'preliminary' proceedings to a separate entity (e.g. establishing a public body of a disciplinary spokesman for legal professions) and the conduct of the 'court' proceedings to relevant state bodies (pertinent common courts, Supreme Court or another, specially established body). An alternative variant of the described model would also be a solution in which the 'preliminary' proceedings as well as the equivalent of court proceedings would be conducted by one 'external' entity (within its different internal organizational units). This could be any new or specially created entity (body) or an already existing body (for instance, the Ministry of Justice).

The indicated solutions from the category of the 'fourth model', though theoretically possible, could arouse numerous legal queries as to the scope of interference in the autonomy of individual legal professions by the legislator as well as to give rise to numerous problems of practical nature.

In light of the above it can be seen that standardization of procedural provisions concerning disciplinary proceedings for selected legal professions is highly possible due to their present statutory construction largely based, anyway, on the principles of criminal procedure and incorporating all the principal criminal and procedural rules.

The legislator has broad room for maneuver within the scope of potential changes to disciplinary proceedings for legal professions, including the determination of their organizational model. It seems that such changes are desirable while their scope and direction will depend to a larger extent on the decision of the legislator as regards one of the four (above described) 'principal' models, that is determination of the organization of disciplinary proceedings and then possibly on the choice of variants of the implementation of a given model.

After the choice of a given organizational model, the legislator has at his disposal an almost ready 'set' of procedural provisions (from among those presently applied) with a reservation for the necessity of adopting an essential decision to the establishment of the role of the wronged person, the character of the 'preliminary' proceedings, the role and powers of the Minister of Justice as well as a reservation for the necessity of standardizing the individual detailed provisions (e.g. standardization of the maximum possible period for the postponement of the trial).

Abstract

Marcin Wielec, Roland Szymczykiewicz, *Standardization of disciplinary responsibility in legal professions in the system of Polish law – conclusions de lege ferenda*

The present study presents an analysis of normative patterns of bearing disciplinary responsibility in selected legal professions such as barristers, legal advisers, common court judges, notaries, court executive officers, prosecutors, court curators and court clerks. These are basic legal professions functioning within the system of Polish law. The special aim of the analysis was to present arguments in favour of a possibility to standardize the provisions regulating disciplinary responsibility questions in broadly understood legal professions.

Keywords: *disciplinary proceedings, disciplinary law, legal professions, disciplinary responsibility, criminal proceedings, criminal law*

Streszczenie

Marcin Wielec, Roland Szymczykiewicz, *Unifikacja odpowiedzialności dyscyplinarnej w zawodach prawniczych w systemie prawa polskiego – wnioski de lege ferenda*

Prawo i postępowanie dyscyplinarne są szczególnego rodzaju obszarami prawa. Mają taki charakter, że bardzo trudno jest uszeregować ten obszar w istniejące już standardowo ramy regulacji prawnych, tak jak to ma miejsce chociażby z prawem karnym materialnym czy prawem karnym proceduralnym. Warto się zastanowić, czy ta różnorodność modeli dyscyplinarnych funkcjonujących głównie na wybranym tu obszarze, tj. regulacji prawnych zawodów prawniczych, nie powinna być zmieniona poprzez jej zunifikowanie w ten sposób, aby powstał jeden sprawny model postępowania dyscyplinarnego dla zawodów prawniczych. Do analizy możliwości unifikacji zasad ponoszenia odpowiedzialności dyscyplinarnej wybrano poszczególne modele tych regulacji prawnych, które obowiązują u adwokatów, radców prawnych, sędziów sądów powszechnych, notariuszy, komorników, prokuratorów, kuratorów sądowych oraz referendarzy sądowych.

Słowa kluczowe: *postępowanie karne, prawo i postępowanie dyscyplinarne, zawody prawnicze, odpowiedzialność dyscyplinarna*

PRAWO W DZIAŁANIU
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Marta Kowalczyk-Ludzia*

Evaluating Emotional Factors in the Criminal Procedure

The minor role of emotional factors in the criminal procedure is wrongly taken for granted. Emotional behaviour, usually perceived as a manifestation of weakness, is juxtaposed with the rational behaviour desired in the criminal procedure. Meanwhile, non-verbal communication often provides a lot of important information that supplements the evidence collected in a given case. The impulse for the following deliberations was an analysis of court files of cases in which proper evaluation of the level of emotional engagement of the parties helped the judges make the right decisions. The object and purpose of this paper is to find an answer to the question of the actual value of emotional cognitive processes and their impact on proceedings.

1. INTRODUCTION

The analysis of the evidence gathered is determined by the statutory directives (Article 7 of the Code of Criminal Procedure), which indicate the scope and manner of conducting the verification. It is also correctly emphasized in the jurisprudence that "the court's conviction of the reliability of some evidence and the unreliability of others is protected by Article 7 of the Code of Criminal Procedure if: it is preceded by the disclosure of the entirety of circumstances of the case during the main trial (Article 410 of the Code of Criminal Procedure), in a manner dictated by the obligation to investigate the truth (Article 2(2) of the Code of Criminal Procedure), is an expression of consideration of all these circumstances that speak in favour of and against the defendant (Article 4 of the Code of Criminal Procedure), is exhaustive and logical – taking into account the indications of personal knowledge and experience – supported in the justification of the judgment (Article 424, item 1 of the Code of Criminal Procedure)"[1]. Taking into account those guidelines, it is also difficult to deny that the emotional reactions of the parties to the proceedings during the taking of evidence are not irrelevant to the final decision of the court. In conclusion, emotionality is an integral part of the scope of evidentiary activities conducted in relation to the parties.

Moreover, it is worth mentioning that external observers of the course of the criminal trial cannot be spared the emotional factors, either. Therefore, it is rightly

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[1] Judgment of the Court of Appeal in Wrocław of 27 April 2017, II AKa 78/17, LEX No. 2317700.

emphasised in jurisprudence that the social sense of justice expressed in sociological terms is usually characterised by an emotional attitude, which often influences the premature social perception of guilt/innocence at a criminal trial[2].

Mutual emotional reactions of the parties in the proceedings as well as those focused on the circumstances of the incident are factors integral to the course of every criminal trial. Furthermore, it should be noted that emotional reactions of the participants in the proceedings often shape the course of proceedings even at an early stage (e.g. shaping a sense of trust when choosing a defence counsel /proxy of choice – Article 83 para 1 of the Code of Criminal Procedure).

Against the background of the presented considerations, a difficult attempt has been made to demonstrate the importance of evaluation of emotional factors in the criminal trial and their influence on the course of the proceedings. The subject of this paper is to demonstrate also the importance of emotional cognitive processes in relation to the effectively conducted evidentiary proceedings. Emotions manifested by the parties to the proceedings and demonstrated in the course of evidentiary proceedings often make it possible to accurately assess many of the components of an event significant for the assessment of a prohibited act (Article 53 of the Polish Penal Code), including the motivation of the perpetrator, the manner in which he acted, the sincerity of showing active regret, the emotional attitude of the victim towards the perpetrator, etc. The analysis of selected criminal files has become an impulse to formulate the observations included in this paper.

2. THE ROLE OF COMMUNICATION IN TAKING OF EVIDENCE IN CRIMINAL PROCEEDINGS

The evaluation of the emotional behaviour of the parties to proceedings plays a minor role. Very specific legal regulations have a priority in interpreting certain factual states, and determine the orientation of proceedings. The principle of objectivity (Article 4 of the Polish Code of Criminal Procedure) imposes certain conduct on the judges reviewing a given case, thus eliminating the subjective factor of the evaluation of the factual state presented.

However, in practice, an emotionless attitude to real criminal cases seems highly doubtful. Moreover, it should be emphasised that by determining the emotional state of a party involved in proceedings, representatives of criminal authorities acquire important, though expressed non-verbally, information on the criminal incident concerned, and are able to fully evaluate, in terms of the criminal law, the perpetrator's conduct and the prohibited act committed (Article 53 para 2 and Article 54 of the Polish Criminal Code).

According to the definitions acknowledged in the literature on the subject, "Emotions are complex processes of coping in the world that enable reaction to challenges that the world creates. Quick recognition, assessment and preparation to act in a way that is adequate to the significance of an event is the basic role of emotions strengthened by evolution"[3].

[2] Cf. Judgment of the Court of Appeals in Katowice of 20 March 2008, II AKa 61/08, LEX No. 410425.
[3] J.K. Gierowski, T. Jaśkiewicz-Obydzińska, M. Najda, *Psychologia w postępowaniu karnym*, Warszawa 2008, p. 37.

Also, the importance of non-verbal gestures accompanying the expression of emotions is worth noting.

Anna Suchańska observes that "gestures and mimicry have communicative functions. An example of this concerns gestures that have a popular cultural meaning, so-called emblems. [...] Intended or unintended gestures serve as a commentary on and illustration of the words said. These gestures are called illustrators, and they accompany accounting an event or communicating emotional states: joy, grief or uncertainty"[4].

Even though non-verbal communication is not reflected in legal standards, it seems to play an indispensable role. The literature on the subject emphasises the fact that in the course of procedural activities (e.g. interrogation), attention is paid, among other things, to the perpetrator's appearance, his or her attitude to the persons performing the activity, mimicry, gestures made when speaking, way of looking (keeping eye contact), proxemics (physical distance), paralanguage (the way of speaking, e.g. how utterances are made, are there any lapses of speech, is the form of speaking correct etc.), self-presentation, clothing, etc.[5]

The role of cognitive emotional factors is increasingly often accentuated in the literature on the subject. It is emphasised that "[...] there exist two forms of communication: verbal and non-verbal. The first uses words and constitutes, according to different sources, between 7% and 35% of the entire communication process. Albert Mehrabian, the non-verbal communication psychologist, concluded that 93% of the emotional impact of communication comes from non-verbal sources and only 7% from verbal sources. On the other hand, Ray Birdwhistell claims that the ratio between words and the accompanying behaviour is 35–65%"[6].

In view of the above, the functions of emotions in cognitive processes may be classified into:

- Indicative – providing information about events, persons and objects, which makes it possible to determine the most important issues concerning the needs and goals of an individual;
- Activating – emotions supply the energy required to activate cognitive processes;
- Modulating – energy supplied via emotions is necessary for proper functioning of cognitive processes;
- Meta cognitive – associated with such behaviour of an individual that seems the most proper in a given moment[7].

By properly naming the emotions of a witness or defendant and correctly defining the role of emotional factors, it is possible to determine both the relations between parties to proceedings and their attitude to the criminal case concerned.

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[4] A. Suchańska, *Rozmowa i obserwacja w diagnozie psychologicznej*, Warszawa 2007, p. 223. See also: E. Radomska, *Przesłuchanie jako szczególny rodzaj poznania społecznego* [in:] *Psychologia i Prawo. Między teorią a praktyką*, E. Habzda-Siwek, J. Kabzińska (eds.), Sopot 2014, pp. 243–262.

[5] A.K. Cecot, *Wybrane zagadnienia komunikacji niewerbalnej w procesie karnym i kryminalistyce. Komunikacja niewerbalna w opinii policjantów* [in:] *Prawo. Kryminalistyka, Policja. Księga pamiątkowa ofiarowana Profesorowi Bronisławowi Młodziejowskiemu,* J. Kasprzak, J. Bryk (eds.), Szczytno 2008, pp. 169–177.

[6] A.K. Cecot, *Wybrane*…, p. 170, quotation after: R.B. Adler, L.B. Rosenfeld, R.F. Proctor, II, *Relacje inter-personalne. Proces porozumiewania się*, Poznań 2007, p. 143.

[7] See: E. Gruza, *Psychologia sądowa dla prawników*, Warszawa 2009, p. 74, quotation after: T. Maruszewski, *Psychologia poznania*, Gdańsk 2002, p. 393.

3. EVALUATION OF EMOTIONAL FACTORS IN THE LIGHT OF THE APPLICATION OF THE PROCEDURAL RULES

Assessing the facts of a case favours the implementation of the principle of direct examination of evidence by the judge. The scope of this principle is defined in terms of "[...] order (directive) for the judicial authority to have personal contact with the source and means of evidence and to draw conclusions on the basis of the original means of evidence (primary evidence)"[8]. The implication of the proper application of the said principle is the proper verification of the facts of a case (Article 2 of the Code of Criminal Procedure in conjunction with Article 424 para 1 of the Code of Criminal Procedure), which ultimately results in a fair ruling. In order to make an accurate assessment of the statements of a participant in the proceedings, it is necessary to verify not only the verbally expressed messages, but also the manner in which they are presented. It is therefore rightly postulated in the case law that "The use of primary sources of evidence by a court directly at a trial gives the parties the opportunity to actively participate in the taking of evidence by questioning the persons interviewed in their presence, raising objections and comments as to the evidence or other activities carried out. Allowing each party to be involved in taking evidence and to take part in evidentiary activities shapes a situation in which it becomes possible to make true factual findings"[9]. Therefore, careful observation of the participants' behaviour enables a better understanding of the situational context and allows for defining mutual relations, thus providing additional, although non-verbal, information that allows for a more accurate interpretation of the actual situation in the ongoing trials. Therefore it seems appropriate to postulate that "the outcome of the application of the principle of direct examination of evidence by the judge is of paramount importance here. Observation of the witness's reaction constitutes significant information for the court, assisting in choosing one of the versions. In this sense, the court of first instance is the leading beneficiary of this procedural rule"[10].

The witness's emotional reactions provide the court with a lot of additional information. The criminal cases presented below illustrate the role of the factors discussed. Statements of reason in convicting judgements, as well as assessment of situations taking place during a trial, may both refer to the emotional state of the parties to proceedings, and try to correlate the collected evidence with additional information based on the evaluation of emotional behaviour.

In order to show the practical aspects of the problems discussed in the paper, the file examination method was used[11]. Due to the limited size of the paper, it presents seven cases relevant to the problem concerned. File examination was conducted at the 2nd Division of the Criminal Regional Court in Olsztyn in the period from 2015 to 2016. All the cases ended in a conviction.

The research problem was formulated as follows: "To what extent do emotional factors in a criminal procedure contribute to making the right judgement?".

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[8] P. Hofmański (ed.), P. Wiliński, *Zasady procesu karnego* [in:] *System prawa karnego procesowego*, Warszawa 2014, Vol. III, pp. 2, 1012.

[9] Judgment of the Court of Appeal in Warsaw of 14 December 2012, II AKa 360/12, LEX No. 1254538.

[10] Judgment of the Court of Appeal in Łódź of 24 April 2014, II AKa 19/14, LEX No. 1474378.

[11] See: J. Kasprzak, *Wybrane problemy metodologiczne badań w zakresie procesu karnego i kryminalistyki* [in:] *Wybrane problemy procesu karnego i kryminalistyki*, J. Kasprzak, B. Młodziejowski (eds.), Olsztyn 2010, p. 13.

Also, it was assumed that: The cognitive value of emotional factors in correlation with other evidence helps make the right judgement in a procedure.

Cases from court files:

Case no. 1

The first case concerned the offence of abuse and making realistic threats by the defendant to his family (Article 207 para 1 and Article 190 para 1 of the Polish Criminal Code). During the trial, the Court repeatedly asked the defendant not to laugh at his wife's and son's testimony.

Case no. 2

Case under Articles 197 para 2 and 157 para 2 of the Polish Criminal Code. The defendant did not admit to committing the acts he was accused of, either in pre-trial proceedings or during the trial. He claimed that his sister-in-law had persuaded his daughter to testify against him; he believed that she wanted to adopt her so as to have access to her money, because the defendant's daughter received disability allowance. The aggrieved party attended a Rehabilitation and Education Centre. During therapy, the personnel noticed that she showed signs of harassment. During a conversation, the woman claimed that she had been touched by her intoxicated father in intimate body parts. The aggrieved party was a person of age, moderately intellectually disabled, and had been hard of sight and hearing from birth.

In the statement of reason, the Court stated, among other things, that:

- The defendant's guilt is beyond any doubt;
- The intoxicated father came to her room at night, woke her up with jerks, pulled the top of her pyjamas off, touched her intimate body parts, abused her verbally, beat her with a belt and clenched her wrist;
- The aggrieved party's emotions observed by the expert were commensurate with the events she recounted;
- The Court took into consideration the behaviour of the aggrieved party when she was testifying, and her characteristic way of speaking, which led to the conclusion that her testimony was honest, spontaneous and not affected by persuasion, and followed a certain pattern.

Case no. 3

The defendant conducted economic activity that involved agency in executing loan agreements. He was accused of an offence under Articles 286 para 1 and 270 para 1 of the Polish Criminal Code.

The statement of reason in the judgement stated, among other things, that:

- The Court does not believe the defendant's explanations;
- According to witness testimony, the defendant was not only present when the witness' wife's signature was being forged, but it was also his idea to do so;
- The expert's opinion on the examination of the documentation is duly justified and credible;
- It was not in the witness' interest to falsely testify about the defendant's participation in the event, "since she was not in conflict with him and would not profit from his conviction";

– "Of no little significance, especially during witness testimony, were probably the emotions associated with the situation, a feeling of injustice, and the person's temperament, which she could not control at the hearing, even when she was only watching the case".

Case no. 4

One of the defendants admitted that he wanted "only" to beat up the aggrieved party, but he did not order him to give money for abusing a girl verbally (Article 280 para 1 of the Polish Criminal Code).

The statement of reason in the judgment stated that:

– The explanations of the defendants are credible in the part where they admit to being at the site of the event and to kicking and hitting the aggrieved party, and taking his mobile phone;
– The testimony of the aggrieved party is fully credible;
– The Court did not believe the defendants' explanations concerning their joint role in the offence. "The argument of the defendants that there was no understanding between them cannot be sustained in the light of the principles of logic and life experience";
– "The fact that the witness raises this cause (mental abuse by the aggrieved party) may be, in the Court's judgement, the effect of emotional attitude to the event and a desire to help the defendants, whom the witness knows very well".

Case no. 5

After the judgment had been announcement, the defendant threw a 1.5 litre bottle of natural water, 1/5th drunk, at a news photographer, probably damaging the camera, and he used offensive words addressed to the audience.

Case no. 6

According to the indictment, on 17 March 2014, [...] jointly and in communication, using violence that involved repeatedly punching the aggrieved party with fists over her whole body, pulling and twisting her leg, they forced her against her will into sexual intercourse that involved vaginal intercourse, threatening to kill her by drowning in a lake in order to force her to remain silent while the defendants were asleep, and they forced the aggrieved party to refrain from requesting them to return her mobile phone, which they had misappropriated, and prevented her from leaving the room in the uninhabited house by removing the door handle (Articles 197 § 3, 197 § 1, 191 §1, 158 § 1 of the Polish Criminal Code)".

The statement of reason in the convicting judgement emphasised, among other things, the credible opinion of the expert psychologist, who stated that "the emotional reactions of the aggrieved party revealed large psycho-motor agitation and post-incident trauma: she spoke fast, tried to provide details, gesticulated with her hands (often with her fist), especially when speaking about being punched by the defendants".

Considering the review of the above criminal cases, it should be noted that the evaluation of the emotions of the parties to proceedings enabled the Court to properly evaluate: the behaviour of the defendants (cases 1 and 5), the behaviour

of the aggrieved parties (cases 2 and 6), additional confirmation of the perpetration by the defendant (cases 2 and 6), and the behaviour of witnesses and their emotional engagement in the trial (cases 3 and 4). Thus, it can be concluded that the emotional engagement of parties to proceedings helps determine the level of credibility of the representations made (testimony or explanations). It is rightly claimed in the literature on the subject that "Whether a testimony is true and whether it corresponds to an actual experience of the testifying party is often revealed by the emotional engagement of the witness. If a testimony is based on experiences, then their reproduction may often reveal the emotional sensitivity of the witness, which is a strong argument for his or her credibility"[12].

On the other hand, evaluation of non-verbal behaviour requires prudent interpretation on the part of the criminal authorities, especially because when qualifying the emotional behaviour of the parties to proceedings (in particular defendants) their statutory rights must not be violated (especially the principles of the presumption of innocence (Article 5 para 1 of the Polish Code of Criminal Procedure) and *in dubio pro reo* (Article 5 para 2 of the Polish Code of Criminal Procedure), and the right of defence (Article 6 of the Polish Code of Criminal Procedure)). Interesting arguments on this issue are raised, among others, by Zdzisław Muras, who observes that: "The doctrine also takes notice of problems associated with non-verbal form of suggestion. Assuming that all forms of prompting the interrogated person are inadmissible, then the provision in question should be interpreted in such a way that prompting questions must not be asked, not only in the verbal dimension but also in the manner of asking. However, since it is only possible to dismiss a question expressed verbally, how should the interrogating authority behave if the verbal dimension of the question is not prompting, but the gesture accompanying the question is (e.g. a nod)?"[13].

Nonetheless, despite numerous uncertainties associated with the issue, it should be noted that reading and interpreting emotional behaviour in adults helps judges make the right decisions in proceedings. It is similar in the case of interpreting the testimonies of juvenile witnesses. When interrogating such persons it is necessary to apply special prescribed measures (Articles 185a and 185b of the Polish Code of Criminal Procedure), because compliance with statutory guidelines (such as the presence of an expert psychologist) may indicate the effectiveness of interrogation. It should be noted here that a child's behaviour is often an imitation of the behaviour of the adults who are close to the child, so careful observation in this area may provide a lot of extra information about relationships in the family where the child is raised. The literature on the subject rightly emphasises the fact that "a child is prompted by the behaviour he or she observes in adults, and feels and experiences what they experience"[14].

Also, it is justly claimed that "a child's poor criticism and his or her conviction of the superiority of older persons make children strongly susceptible to adults' persuasion. Things can be easily persuaded into a child, whether intentionally or not, to such a degree that the child will not be able to recognise the truth"[15].

[12] F. Arntzen, *Psychologia zeznań świadków*, Warszawa 1989, p. 146.
[13] Z. Muras, *Wyjaśnienia oskarżonego w procesie karnym i prawie karnym materialnym*, Warszawa 2005, p. 200.
[14] V. Kwiatkowska-Darul, *Przesłuchanie małoletniego świadka w polskim procesie karnym*, Toruń 2007, p. 99.
[15] B. Hołyst, *Psychologiczne i społeczne determinanty zeznań świadków*, Warszawa 1989, p. 194, quotation after: M. Debesse (ed.), *Psychologia dziecka*, Warszawa 1963, p. 21.

A thorough and correct analysis of the behaviour of a juvenile witness also makes it possible to judge the guilt (or lack of it) of the defendant. The following case is an illustration of such a situation:

Case no. 7

Case under Articles 197 para 2, 200 para 1 and 197 para 3 of the Polish Criminal Code. The defendant performed sexual acts on a juvenile girl below 15 years of age (9 years). The girl has mild mental retardation.

A notice of the offence was submitted by the girl's grandmother.

The statement of reason in the judgment stated that:

– The Court fully agreed with the aggrieved party's grandmother: "The aggrieved party's grandmother testified that after the event she noticed, when watching her granddaughter, that she was drawing worrying pictures and 'piercing' the defendant's image with a pen. The girl told her grandmother that she had nightmares with the defendant holding a knife".

When analysing the above, it was concluded that, assuming that the emotions of the parties to proceedings, e.g. witnesses giving their testimonies, are in a way a measure of the reliability of statements (e.g., testimonies), then the hypothesis is right in that the correct interpretation of emotional behaviour helps make the right judgement.

A contrario, it should be noted that the irrelevance of emotions to the events described puts into question the truthfulness of the statements made. The literature on the topic highlights the fact that "'the irrelevance of emotions' [...] relates to whether or not the emotions shown by a witness (usually by non-verbal behaviour) are probable, given his or her experience and the circumstances of the interview. For example, if a girl describes in detail how she was abused without showing any emotions whatsoever, her account is less probable than if she strongly expresses her emotions"[16].

The emotional factor is also usually used when interrogating a suspect (defendant). It should be noted that the emotional states of a suspect may be stimulated and used in order to "induce his positive sensations (feelings), which can be caused, for example, by showing him a picture of the victim, taking him to the scene of the crime, or his wife or children visiting him, if he is in temporary detention"[17].

This method, if used expertly, may help determine numerous additional motives when reconstructing the events of an offence. Thus, the literature on the subject highlights that "By demonstrating sympathy to the suspect, the interrogator may obtain many precious details"[18].

Emotional factors are an inherent element of all criminal proceedings. Although the fundamental role of criminal authorities is to judge facts and reconstruct the probable events, to verify evidence and judge on its basis, undoubtedly proper

[16] A. Memon, A. Vrij, R. Bull, *Prawo i Psychologia. Wiarygodność zeznań i materiału dowodowego*, Gdańsk 2003, p. 22.
[17] K. Otłowski, *Podejrzany w postępowaniu karnym. Studium kryminalistyczne*, Warszawa 1979, p. 89.
[18] K. Otłowski, *Podejrzany*..., p. 88.

interpretation of non-verbal signals is usually helpful both in procedural activities (such as, for example, interrogation) and in making the right decisions affecting defendants.

Thus, it is right to claim that "when formulating questions, one should remember that they are means of communication dependent on the content of experience and the attitude of both the interrogator and the interrogated, and that the answer is an intellectual and emotional resonance of the question. Sensing and discovering the psychological experiences of the respondent and his or her feelings, moods, passions and affects is a necessary element of the interrogation method and the question-making technique"[19].

The effectiveness of the assessment of credibility of statements made by parties to proceedings depends to a large extent on the manner in which evidentiary proceedings are conducted during the trial. It can therefore be concluded that the emotions displayed by the parties in the course of carrying out statutory procedures (e.g. during a hearing) often have a direct impact on the perception of their statements. One should bear in mind that "the verdict usually follows the conclusion of open session, as the information obtained by the judges during the evidentiary proceedings will be usually memorized and they will constitute the basis for decisions taken by the court (as opposed to imperfect records in the minutes)"[20]. It is difficult to argue with this reasonable remark.

4. SUMMARY

To sum up the above deliberations, it should be concluded that the evaluation of emotional factors in criminal procedures, although it requires prudent consideration by judges, should not be omitted when assessing the facts, the more so that defining the motivations of the perpetrator to commit the prohibited act is important, especially in terms of imposing an adequate punishment (Article 53 of the Polish Criminal Code). Thus, it is emphasised that "what is commonly called human conscience, and is in fact a set of principles and ethical senses, is, in every individual, the supreme intention that resounds when certain inclinations (emotions) drive one in a direction that is contrary to one's legal and moral standards"[21].

Actions contrary to specific standards should be adequately sanctioned, but the identification and proper verification of the emotional states of the parties to proceedings make each criminal procedure different. For example, identifying the emotional factors that drive a perpetrator into a prohibited act helps understand the reasons why criminal intentions are carried out. It is rightly emphasised, also in the case law, that "in order to verify whether the defendant's accusations against another individual are sufficient evidence in the case, not only is what the accuser says important, but also his character, intellectual and emotional level, and emotional state at the moment of perception, and the ability to perceive, remember and recreate"[22].

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[19] M. Lipczyńska, Z. Czeszejko-Sochacki, *Technika i taktyka zadawania pytań w procesie a rola adwokata*, Warszawa 1980, pp. 75–76.
[20] A. Murzynowski, *Istota i zasady procesu karnego*, Warszawa 1994, p. 312.
[21] S. Batawia, *Wstęp do nauki o przestępcy, Zagadnienie skłonności przestępczych*, Wrocław–Warszawa –Kraków–Gdańsk–Łódź 1984, p. 107.
[22] Judgement of the Supreme Court of 15 April 2004, WA 6/04, OSNwSK 2004, No. 1, Item 715.

To conclude, it is emphasised that the evaluation of emotional aspects in criminal proceedings obliges representatives of criminal authorities to prudently formulate the conclusions of their evaluation. Premature interpretation of non-verbal behaviour may prove wrong and contrary to the principle of material truth (Article 2 para 2 of the Polish Code of Criminal Procedure). The relationships that a defendant creates with the other parties to proceedings may lead to unjust interpretation of the personal attitude of witnesses to the defendant and distort the content of testimonies on the basis of which the court reconstructs the events. It should be remembered that "[...] relations like relationship by blood or affinity, friendship, being neighbours or coming from the same environment, like class at school or the same area, may cause a certain, although not true attitude to one of the parties to proceedings"[23]. Thus, emotional factors should be considered, but at the same time they should be evaluated in a prudent and careful way.

Abstract

Marta Kowalczyk-Ludzia, *Evaluating Emotional Factors in the Criminal Procedure*

The minor role of emotional factors in the criminal procedure is wrongly taken for granted. Emotional behaviour, usually perceived as a manifestation of weakness, is juxtaposed with the rational behaviour desired in the criminal procedure. Meanwhile, non-verbal communication often provides a lot of important information that supplements the evidence collected in a given case. The impulse for the deliberations was an analysis of court files of cases in which proper evaluation of the level of emotional engagement of the parties helped the judges make the right decisions. The object and purpose of this paper is to find an answer to the question of the actual value of emotional cognitive processes and their impact on proceedings.

Keywords: *emotions, cognitive processes, non-verbal communication, stimulating and using the emotional states of a suspect, procedural rules*

Streszczenie

Marta Kowalczyk-Ludzia, *Ocena czynnika emocji w procesie karnym*

Drugoplanowa rola emocji w procesach karnych mylnie zdaje się być oczywista. Działania emocjonalne, pojmowane zwykle jako przejaw słabości, przeciwstawiane są działaniom racjonalnym, których obecność w procesie karnym jest pożądana. Tymczasem, komunikacja pozawerbalna dostarcza często wielu istotnych informacji, które uzupełniają zgromadzony w sprawie materiał dowodowy. Asumpt do rozważań dała analiza akt spraw sądowych, w których poprawne określenie stopnia emocjonalnego zaangażowania uczestników, pozwoliło sędziom podjąć trafne decyzje procesowe. Przedmiotem i celem niniejszego opracowania jest próba znalezienia odpowiedzi na pytanie o rzeczywistą wartość emocjonalnych procesów poznawczych i ich wpływie na przebieg postępowania.

Słowa kluczowe: *emocje, procesy poznawcze, komunikacja pozawerbalna, metoda stymulowania i wykorzystywania stanów emocjonalnych podejrzanego, zasady procesowe*

[23] M. Lipczyńska, Z. Czeszejko-Sochacki, *Technika*…, p. 74.

PRAWO W DZIAŁANIU
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Maciej Domański*

Religious Marriage with Civil Effects in Polish Family Law

In the inter-war period, the Polish marriage law consisted of a mosaic of solutions inherited from the partitioning states[1]. Civil marriage was the only possible form of marriage in the German civil code (*Bürgerliches Gesetzbuch*), which was in force in the Western provinces, i.e. in the area of the former Prussian partition. In the Southern provinces (in the former Austrian partition apart from Spiš and Orava), where the Austrian civil code (*Allgemeines bürgerliches Gesetzbuch*) was binding, the fundamental form of marriage was by religious ceremony. In addition, the civil form of marriage was available, yet only for persons who did not belong to any acknowledged religious organisation or group and, by way of exception, for people who did belong to acknowledged religious organisations in the event that church authorities denied them the right to marry. In Spiš and Orava, Hungarian matrimonial law was in effect parallel to the regulations of the Austrian civil code, thus allowing civil ceremonies. In the remaining provinces (in the central part of the country with matrimonial law of 1836 and in the East, where Volume X Part I of the Digest of Laws of the Russian Empire of 1832 was in effect), only religious marriages were permitted[2].

The legal form of marriage became the subject of works of the Codification Commission[3]. Pursuant to Article 24 of the draft matrimonial law of 1929[4], marriage was to be contracted either in the civil form before a registrar or before a priest, yet only after preliminary actions had been completed before the competent registrar. This interesting solution, which gave the engaged couple the liberty to choose the type of marriage, and did not impose the civil type, was justified with the constitutional principles of freedom of conscience and religion (Articles 111 and 112 of the Polish Constitution of 1921)[5].

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1 Poland lost its independence in 1795 and its lands were annexed by three surrounding empires: Russia, Austria and Prussia. It returned as an independent state 123 years later, in 1918.

2 Cf. the synthetic analysis of solutions effective in the Polish lands by K. Lutostański, *Zasady projektu prawa małżeńskiego uchwalonego przez Komisję Kodyfikacyjną w dniu 28 maja 1929 r.*, Warszawa 1931. Cf. A. Stawecka-Firlej, *Małżeńskie prawo osobowe ustawodawstw porozbiorowych obowiązujących w Rzeczypospolitej Polskiej w dwudziestoleciu międzywojennym*, „Acta Universitatis Wratislaviensis", Prawo CCCXV/2, 2013, p. 75.

3 Appointed under the Act of 3 June 1919 (Journal of Laws of 1919, No. 44, Item 315).

4 Draft of matrimonial law adopted by the Codification Commission on 28 May 1929 (Codification Commission. Subsection I of Civil Law, Vol. I, No. 1, Warszawa 1931), which never became binding law.

5 K. Lutostański, *Zasady*…, p. 39 et seq.

The model proposed by the Codification Commission in 1929 was not adopted in the course of the unification of family law after World War II. Pursuant to Article 11 of the Family Law Decree of 1945, a marriage could be conducted only by a registrar. This solution was determined by the communist political ideology of the time, in particular including the radical secularisation of marital law[6]. It is worth noting that this solution, too, was substantiated by references to Articles 111 and 112 of the Polish Constitution of 1921. The exclusivity of civil marriage was sustained by Article 1 of the Family Code of 1950, and by Article 1 of the Family and Guardianship Code of 1964.

During the communist rule, the legislative body did not only repeal the possibility for a marriage conducted before a priest to obtain civil effects. In addition, the Act of 2 December 1958[7] introduced Article 50(1) to the Register Office Records Act[8], pursuant to which a religious marriage could be signed and finalized only after it was solemnised by a registrar, and the priest had obtained an excerpt of the marriage certificate. Pursuant to the newly introduced Article 78(1) of the Family Law Decree, the priest who conducted the religious marriage ceremony prior to receiving the excerpt of the marriage certificate was punishable by detention of up to four months, or by a fine of up to 5 000 PLN. The new solution was explained as "practical", especially due to the attachment of the majority of society to the religious ceremony and to said ceremony being essentially limited to making a declaration before a clergyman[9]. The discussed solutions were subsequently moved to the Register Office Records Act of 1986 (Articles 63 and 84) and remained in force until 23 May 1989[10].

The possibility to marry by religious ceremony with civil effects was provided for by the Act of 24 July 1998[11], which was enforced as of 15 November 1998. It was related to the ratification of the Concordat between the Holy See and the Republic of Poland[12]. Pursuant to Article 1(1) of the Family and Guardianship Code (FGC), marriage still can be contracted by making relevant declarations to the head of the register office (or, alternatively, if abroad, to the Polish consul – Article 1(4)). According to Article 1(2) FGC, a man and a woman who are subject to the internal law of a church or any other religious organisation can also marry if they confirm in the presence of a priest their wish to be married that will be simultaneously subject to Polish law, and if subsequently the head of the register office will issue the marriage certificate. When the above conditions are met, the marriage is deemed concluded and binding, as at the time of making the declaration of will before the priest.

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[6] Cf. *Tezy polityczne do prawa małżeńskiego z 1945 r.* [in:] *Prawo małżeńskie. Komentarz*, I. Różański, S.M. Grzybowski (eds.), Kraków 1946, p. 21 et seq.

[7] Act amending the Register Office Records Act (Journal of Laws of 1958, No. 72, Item 358), which entered into force on 10 December 1958.

[8] Decree of 8 June 1955 Register Office Records Act (Journal of Laws of 1955, No. 25, Item 151).

[9] J. Winiarz [in:] *System prawa rodzinnego i opiekuńczego*, J.S. Piątowski (ed.), Wrocław 1985, p. 152.

[10] They were repealed under the Act of 17 May 1989 on the relation of the State to the Catholic Church in the Republic of Poland (Journal of Laws of 1989, No. 29, Item 154).

[11] The Act amending the Family and Guardianship Code, the Code of Civil Procedure, the Register Office Records Act, the Act on the relation of the State to the Catholic Church in the Republic of Poland and various other acts (Journal of Laws No. 117, Item 757).

[12] Signed in Warsaw on 28 July 1993 (Journal of Laws of 1998, No. 51, Item 318), ratified on 23 February 1998, effective as of 25 April 1998.

This solution is applied when a ratified international agreement or a legislative act governing the relations between the state and a church or another religious organisation provides for the possibility that a marriage subject to the internal law of that church or other religious organisation has the same effects as a marriage conducted by the head of the register office (Article 1(3) FGC). *De lege lata*, such possibility applies to eleven churches and religious organisations in Poland[13].

The regulations of Article 1(1) and Article 1(2) FGC provide for two separate (albeit based on legally identical declarations of the bride and groom[14]) legal events that have the same effect – the establishment of the legal relationship of marriage subject to the provisions of the Family and Guardianship Code. An analysis of Article 1(2) FGC leads to the conclusion that entering into marriage in the form it provides for establishes (in typical circumstances) two legal relationships. One relationship is religious and subject to religious norms, and the other is secular and governed in particular by the provisions of the Family and Guardianship Code[15]. The regulation clearly differentiates between marriage under the internal law of a church or another religious organisation and marriage under Polish law. As accurately pointed out in subject literature, stipulating that only one legal relationship is established pursuant to Article 1(2) FGC, namely a religious marriage, which would additionally have effects under Polish law and cause a significant conflict with regard to the common courts' competence to adjudicate on the deficiency of marriage governed by the internal provisions of a church or religious organisation[16]. At the same time, it would cause a problem of effectiveness of ecclesiastical court

[13] The Catholic Church (Article 15a of the Act of 17 May 1989 on the relation of the State to the Catholic Church in the Republic of Poland, consolidated text, Journal of Laws of 2013, Item 1169 with amendments, and Article 10 of the Concordat), the Polish Autocephalous Orthodox Church (Article 12a of the Act of 4 July 1991 on the relation of the State to the Polish Autocephalous Orthodox Church in the Republic of Poland, Journal of Laws of 2014, Item 1726), the Evangelical Church of the Augsburg Confession (Article 12a of the Act of 13 May 1994 on the relation of the State to the Evangelical Church of the Augsburg Confession in the Republic of Poland, Journal of Laws of 2015, Item 43), the Evangelical Reformed Church (Article 8a of the Act of 13 May 1994 on the relation of the State to the Evangelical Reformed Church in the Republic of Poland, consolidated text, Journal of Laws of 2015, Item 483), the Evangelical Methodist Church (Article 11a of the Act of 30 June 1995 on the relation of the State to the Evangelical Methodist Church in the Republic of Poland, consolidated text, Journal of Laws of 2014, Item 1712), the Baptist Union (Article 10a of the Act of 30 June 1995 on the relation of the State to the Baptist Union in the Republic of Poland, consolidated text, Journal of Laws of 2015, Item 169 with amendments), the Seventh-day Adventist Church (Article 10a of the Act of 30 June 1995 on the relation of the State to the Seventh-day Adventist Church in the Republic of Poland, consolidated text, Journal of Laws of 2014, Item 1889), the Polish Catholic Church (Article 9a of the Act of 30 June 1995 on the relation of the State to the Polish Catholic Church in the Republic of Poland, consolidated text, Journal of Laws of 2014, Item 1599), the Union of Jewish Religious Communities (Article 9a of the Act of 20 February 1997 on the relation of the State to the Union of Jewish Religious Communities in the Republic of Poland, consolidated text, Journal of Laws of 2014, Item 1798), the Old Catholic Church of the Mariavites (cf. Article 8a of the Act of 20 February 1997 on the relation of the State to the Old Catholic Church of the Mariavites in the Republic of Poland, consolidated text, Journal of Laws of 2015, Item 14), and the Pentecostal Church in Poland (Article 11a of the Act of 20 February 1997 on the relation of the State to the Pentecostal Church in the Republic of Poland, consolidated text, Journal of Laws of 2015, Item 13).

[14] On the scope of the legal character of the declarations, see: M. Domański [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, K. Osajda (ed.), Warszawa 2017, p. 9 et seq.

[15] This view is represented by i.a. A. Mączyński, *Konkordatowa forma zawarcia małżeństwa*, „Rejent" 2003, No. 10, p. 139; J. Gajda [in:] *System Prawa Prywatnego. Vol. 11. Prawo rodzinne i opiekuńcze*, T. Smyczyński (ed.), Warszawa 2014, p. 118; T. Smyczyński, *Prawo rodzinne*, Warszawa 2016, p. 33; M. Nazar [in:] *Prawo rodzinne*, J. Ignatowicz, M. Nazar (eds.), Warszawa 2016, p. 193; a different view is represented by K. Pietrzykowski [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, K. Pietrzykowski (ed.), Warszawa 2018, p. 118.

[16] W. Góralski, *Konstrukcja prawna małżeństwa zawieranego w trybie art. 1 § 2 k.r.o.* [in:] *Prawo rodzinne w dobie przemian*, P. Kasprzyk, P. Wiśniewski (eds.), Lublin 2009, p. 114.

decisions on the deficiency of religious marriages from the perspective of state law[17]. In light of the Polish civil law provisions as well as those of Article 10(3) and (4) of the Concordat, it would be hard to accept the conclusion that decisions of the courts or authorities of churches and religious organisations should have a direct effect on marriage under state law, or that state courts could have analogous power when deciding on the legal existence of religious marriages. Furthermore, it ought to be noted that Article 1(2) pertains not only to the canonical form of marriage, but also to ten other relationships under the respective provisions of various churches and religious organisations. These solutions form a mosaic of divergent notions of marriage, with various degrees of regulation and differing approaches to e.g. the possibility of divorce. If we accepted that only one marriage (religious marriage) is contracted pursuant to Article 1(2) FGC, it would mean that there is not one, but twelve different legal relationships of marriage under Polish law (one governed by the provisions of the Family and Guardianship Code and eleven governed by various regulations adopted by churches and religious organisations). Such a conclusion must be rejected.

Pursuant to the already quoted Article 1(2) FGC, marriage is concluded when the man and the woman who are marrying under the internal law of a church or another religious organisation in the presence of a priest, declare the will to simultaneously marry under Polish law[18]. The regulation of the legal event of contracting marriage pursuant to Article 1(2) FGC includes elements of entering into a religious marriage. Entering into marriage under Polish law cannot be separated from entering into religious marriage, for instance in the course of performing other activities or religious ceremonies. Certainly, the manner of marrying under the internal law of a church or another religious organisation, the substantive conditions of its validity or the ceremony are governed by the internal law of the relevant church or other religious organisation[19].

Another crucial issue is the impact of the potential deficiency of marriage under the internal law of a church on the legal event of contracting a civil marriage in a manner set forth in Article 1(2) FGC. The subject literature is clearly dominated by a view following the grammatical interpretation of the analysed provision, which stipulates "entering" into religious marriage and not its "conclusion". It has to be acknowledged that what matters from the perspective of concluding a civil marriage is declaring the submission to the solemnisation of the religious marriage, regardless of the event's effects in the area of the internal law of the church or religious organisation. The nullity or other deficiency of a religious marriage does not affect the existence of the marriage under Polish law (of course provided that the conditions set forth in Article 1(2) FGC are met). Therefore it is possible

[17] A. Mączyński, *Oświadczenia małżonków jako element zawarcia małżeństwa w formie konkordatowej* [in:] *Prawo rodzinne w Polsce i w Europie*, P. Kasprzyk (ed.), Lublin 2005, p. 81.

[18] The below analysis omits issues common for both civil and religious marriage, i.e. the issue of the difference of sex of the persons to be married (cf. M. Domański, *Rozdzielność płci nupturientów jako przesłanka istnienia małżeństwa (art. 1 k.r.o.)*, „Kwartalnik Prawa Prywatnego" 2013, No. 4, p. 829 et seq.; M. Domański [in:] *Kodeks…*, p. 19 et seq., and the publications cited therein) as well as the problem of the legal character of the declarations made by the persons entering into marriage.

[19] J. Strzebińczyk, *Zawarcie małżeństwa wyznaniowego podlegającego prawu polskiemu*", „Rejent" 1999, No. 4, p. 18.

that the discussed procedure results in the creation of only one legal relationship: marriage under state law. Moreover, the annulment or termination of a religious marriage has no impact on the existence of a marriage governed by the provisions of the Family and Guardianship Code[20].

The position presented above is strongly supported not only by the grammatical, but also by the systematic interpretation. Article 10(3) of the Concordat specifically provides for the exclusive jurisdiction of ecclesiastical courts in matters concerning the validity of the canonical form of marriage[21]. Admitting the assessment of the validity of a religious marriage in a procedure to declare the non-existence of marriage (even if only in a so-called preliminary matter) raises fundamental doubts in light of the provision of the Concordat mentioned above and of the principle of the autonomy of churches and religious organisations (Article 25(3) of the Polish Constitution). The conclusion that the validity of a marriage under Polish law would be dependent on meeting the highly differing requirements specified in the internal regulations *de lege lata* of eleven churches and other religious organisations would be most problematic.

The key element of the legal event provided for in Article 1(2) FGC are the declarations of will to simultaneously marry under Polish law. They cannot be reduced to e.g. only a request to the head of the register office to make out the marriage certificate, or to the clergyman to present the documents required for issuing the marriage certificate to the register office[22]. The person to be married must declare his or her will to produce the effect of entering into marriage under state law with the person with whom he or she "has pursued" (or rather is pursuing) the procedure of contracting marriage governed by the internal law of the relevant church or religious organisation. Therefore, the content of the declaration is similar to the content of the declaration made pursuant to Article 1(1) FGC[23].

Pursuant to Article 1(2), declarations of will to enter into marriage under Polish law should be made "when entering into" religious marriage. The moment of making the declarations has raised doubts ever since the regulation became effective[24]. The expression referred to above involves a precise temporal coincidence of making declarations of will to enter into marriage under Polish law and into religious marriage. Yet the provision does not give details on the schedule of the

[20] This view is represented by: M. Nazar, *Zawarcie małżeństwa według prawa polskiego z uwzględnieniem postanowień podpisanego 28 lipca 1993 r. konkordatu między Stolicą Apostolską i Rzecząpospolitą Polską*, „Kwartalnik Prawa Prywatnego" 1996, No. 3, p. 478 et seq.; A. Mączyński, *Konkordatowa*…, p. 138; K. Piasecki [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, K. Piasecki (ed.), Warszawa 2011, p. 68; W. Góralski, *Konstrukcja*…, p. 113 et seq.; T. Sokołowski, *Zastosowanie przepisów regulujących zawieranie małżeństw 'konkordatowych'* [in:] *Prawo rodzinne w Polsce i w Europie: zagadnienia wybrane*, P. Kasprzyk (ed.), Lublin 2005, p. 89; J. Gajda [in:] *System*…, p. 128.

[21] See: G. Jędrejek, *Regulacja instytucji małżeństwa w prawie kanonicznym i świeckim*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2008, No. 2, p. 55 et seq.

[22] A. Mączyński, *Oświadczenia*…, p. 78.

[23] Family law scholars have expressed the view that the possibility to make a declaration pursuant to Article 1 (2) FGC (simultaneously entering into marriage under state law) may be qualified as subjective right; the opinion was voiced by: H. Haak, *Zawarcie małżeństwa. Komentarz*, Toruń 1999, p. 18. It was supported by K. Pietrzykowski [in:] *Kodeks*…, p. 118 and onwards. This stance may be subject to doubts if we consider the classical civil law definitions of rights (entitlements) to alter a legal relationship as subjective rights. It seems that the analysed provision is rather a special competence regulation that confirms the fundamental area of an individual's autonomy under private law. See: M. Domański and the publications cited therein.

[24] See: J. Gajda [in:] *System*…, p. 125 et seq.; A. Mezglewski, A. Tunia, *Wyznaniowa forma zawarcia małżeństwa cywilnego*, Warszawa 2007, p. 159 et seq.

actions. Therefore, it ought to be assumed that the declarations may be made directly before, in the course of or directly after the finalization of the religious marriage[25]. However, the connection between entering into religious marriage and making declarations of will to enter into civil marriage may not be broken. In the event that e.g. the declarations are made on a different day than the solemnisation of religious marriage, it has to be assumed that no marriage under Polish law is then concluded, even if the head of the register office makes out the marriage certificate (*matrimonium non existens*).

The declarations must be made in person by means of any action that sufficiently reveals the will (Article 60 in conjunction with Article 65(1) of the Civil Code). By way of exception, the declaration may be made by a legal representative (Article 6 FGC)[26]. No "preferred" manner of making declarations pursuant to Article 1(2) FGC has been specified, not even in detailed provisions (Article 8 FGC concerns solely civil marriages). The manner and the specific moment of making the declarations depend on the ceremony of the individual churches and religious organisations (obviously, the regulations may not be contrary to state law provisions)[27]. Due to the significance of the declarations and the public character of entering into marriage, oral declarations are most suitable. However, it is admissible (under the principle of freedom of form) to make declarations by signing a certificate pursuant to Article 8(2) FGC. Although the provision distinguishes between making the declaration, and signing the certificate (which is supposed to certify that the declarations have been made), it is of purely organisational character. If the certificate is signed by both bride and groom when entering into religious marriage, it has to be assumed that the declarations were made and that it is impossible to effectively request that the marriage be declared non-existent.

The declarations of will to enter into marriage under Polish law must be made to a "clergyman", who acts as an officiator and plays a similar role to the head of the register office in the case of civil marriages. Neither the Family and Guardianship Code nor other state provisions define the concept of clergyman or priest. It requires a reference to the internal law of the individual churches and religious organisations. A direct reference to the internal regulations with regard to the definition of the priest (uniformly structured) is also present in all legislative acts that govern the relations between the state and churches (religious organisations) and that provide for the possibility of religious marriage to have civil effects[28]. Due to the complexity and ambiguity of the internal regulations of churches (other religious organisations), in Article 91 of the Register Office Records Act, the legislative body empowered the minister competent for internal affairs to announce in the Official Journal of the Republic of Poland "Monitor Polski" the list of positions invested with the right to accept declarations of will to enter into marriage and to issue certificates based on which the certificate of marriage

[25] The view was expressed by: M. Nazar [in:] *Prawo rodzinne*, J. Ignatowicz, M. Nazar (eds.), Warszawa 2016, p. 198.
[26] On that subject see M. Domański [in:] *Kodeks*…, p. 71 and following and the publications cited therein.
[27] See for instance the Instruction of the Polish Episcopal Conference for Priests with Regard to Religious Marriage of 1998, www.archpoznan.pl/pdf/synod/t207.pdf.
[28] Cf. footnote 16.

contracted pursuant to Article 1(2) and (3) FGC can be made out. The register relies on information received from the competent representatives of churches and other religious organisations[29]. According to the latest announcement[30], the positions invested with the right to accept declarations of will to enter into marriage are: in the Catholic Church – a local ordinary (diocesan bishop, apostolic administrator, diocesan administrator, vicar general, episcopal vicar), military ordinary, parish priest, parish administrator, properly delegated priest; in the Polish Autocephalous Orthodox Church: bishop, parish priest, vicar authorised by the parish priest; in the Evangelical Church of the Augsburg Confession: any ordained cleric (bishop, priest, deacon); in the Evangelical Reformed Church: any cleric; in the Evangelical Methodist Church: pastor; in the Baptist Union: pastor; in the Seventh-day Adventist Church: elders; in the Polish Catholic Church: diocesan bishop, diocesan administrator, parish priest, parish administrator; in the Union of Jewish Religious Communities: rabbi, sub-rabbi; in the Old Catholic Church of the Mariavites: bishop, parish priest, administrator; in the Pentecostal Church in Poland: pastor, deacon, presbyter.

The method of specifying the positions invested with the authority to accept declarations pursuant to Article 1(2) FGC does not, however, dispel numerous doubts. For instance in the case of the Catholic Church, stipulating that a "properly delegated priest" is a "priest" hardly explains the concept. Moreover, the expression fails to ensure legal certainty and to properly protect the bride and groom from making declarations to an unauthorised person. The list published by the Minister of Internal Affairs is additionally imprecise from the perspective of the internal regulations of e.g. the Catholic Church[31]. A better solution would be to compile a public (e.g. maintained by the Minister of Internal Affairs) and open register with the names of the clergymen authorised to accept declarations pursuant to Article 1(2) FGC. The data recorded in the register would be obtained from churches and other religious organisations and the bride and groom could directly verify whether the person to whom they intend to make their declarations is recorded in the register.

The legal situation with regard to specifying the notion of the clergyman is fairly complex. First, the Family and Guardianship Code offers no definition. Second, the individual acts on the relation to churches (religious organisations) directly refer to their internal regulations. Finally, the public register of positions does not entirely comply with the regulations of individual churches and other religious organisations. According to the legislative acts governing the state's relation with various churches and religious organisations, there is no doubt that the priest to whom the persons to be married make their declarations pursuant to Article 1(2) FGC requires authorisation under the internal regulations of the church or another

[29] A separate register of positions invested with the authority to accept declarations of will to enter into marriage and a different register of positions invested with the authority to issue certificates that are the basis for issuing marriage certificates has been stipulated *de lege lata*.

[30] Announcement of the Minister of Internal Affairs of 5 February 2015 publishing the register of positions invested with the authority to accept declarations of will to enter into marriage and to issue certificates that are the basis for issuing marriage certificates pursuant to Article 1(2) and (3) FGC, Official Journal of the Republic of Poland "Monitor Polski" of 2015, Item 230.

[31] Cf. A. Mezglewski, *Udział świadka urzędowego w procedurze zawarcia małżeństwa w formie wyznaniowej pod reżimem nowej ustawy o aktach stanu cywilnego*, „Przegląd Prawa Wyznaniowego" 2016, No. 8, p. 107 et seq.

religious organisation. In that context, the data in the cited register remains purely informational. Such a position does not, however, determine the result of an insufficient authorisation of a priest to conduct marriage under Polish law.

A view has been voiced in subject literature that a lack of relevant competence of the cleric under the internal regulations of the church or other religious organisation to accept declarations pursuant to Article 1(2) FGC results in the marriage not being formalized (*matrimonium non existens*)[32]. This theory is highly disputable. Article 2 FGC unambiguously connects the sanction of the non-existence of marriage solely with a breach of the provisions of Article 1 FGC. The conditions (from the perspective of the sanction) of the non-existence of marriage must be subject to precise interpretation. Extending them to cover circumstances not listed in Article 1 FGC would be unfounded. Article 1(2) FGC does not stipulate a requirement that the priest to whom the relevant declarations are made must be competent to accept such declarations under the internal regulations of the church or other religious organisation. The only condition included in the provision is that the person has to be an ordained priest. Similarly, sentence 2 of Article 1(2) clearly indicates that marriage is deemed binding if the conditions listed in sentence 1 are met. Obviously, determining whether the person is a priest (within the meaning of Article 1 FGC) necessarily involves verification based on the internal regulations of the relevant religious organisation. According to the discussed interpretation, a marriage under Polish law is not binding (*matrimonium non existens*) only if the relevant declarations are made to a person who is not a priest within the meaning of the internal regulations of the church (religious organisation) in whose ceremony the religious marriage is being contracted. If the declarations are made to a priest who is not competent to accept them, however, the marriage is deemed binding (provided that the remaining conditions are met). This thesis is also a consequence of acknowledging that the deficiency of a religious marriage does not affect the formation of a civil marriage. Apart from the argument offered by the grammatical interpretation, the above theory is furthermore supported by systematic arguments – predominantly by the principle of legal certainty. Making the existence of marriage under Polish law conditional upon the internal regulations of churches and other religious organisations, which are often difficult to ascertain, would result in legal uncertainty. The bride and groom would often have very limited possibilities of finding out (even if exercising the highest standard of due diligence) whether the priest at a given time and place is authorised to accept their declarations. The head of the register office would be frequently completely deprived of such a possibility. Let us assume that this would entail serious difficulties even in a procedure to declare a marriage non-existent (which may, after all, take place many years after the marriage certificate was issued).

Fundamental doubts in the family law doctrine have been raised with regard to the character of issuing the marriage certificate when the marriage is contracted pursuant to Article 1(2) FGC. According to the prevailing view, the marriage certificate being issued by the head of the register office is a condition of a civil

[32] A. Mezglewski, A. Tunia, *Wyznaniowa*…, p. 133; A. Tunia, *Realizacja przesłanki koniecznej dotyczącej udziału czynnika oficjalnego przy zawieraniu małżeństw w trybie art. 1 § 2 k.r.o.* [in:] *Prawo rodzinne w dobie przemian*, P. Kasprzyk, P. Wiśniewski (eds.), Lublin 2009, p. 133.

marriage being contracted pursuant to Article 1(2) FGC[33]. The Supreme Court, too, adopted the stance that making out the marriage certificate is constitutive[34].

Evidently, the view of the majority has to be adopted in this context. The content of Article 1(2) FGC is clear: "marriage is binding when (…) subsequently the head of the register office issues the marriage certificate. If the conditions listed above are met, the marriage is deemed finalized and effective at the moment when the declaration of will was made in the presence of the clergyman". Article 2 FGC directly connects the failure to comply with the provisions of Article 1 with the possibility to request the marriage be declared non-existent. It is difficult to say how the effect of contracting marriage pursuant to Article 1(2) FGC could have been made more evidently conditional on the marriage certificate being issued. The element is necessary for the effect in the form of marriage to occur. Yet the requirement of the marriage certificate being made out itself may be variously classified. According to subject literature on acts in law, the character of requirements on which the effectiveness of a legal act is conditional, such as the constitutive entry in the register or the consent of a public body, is subject to various interpretations. According to one theory, they are deemed conditions of effectiveness external with regard to the legal act itself[35]. Other authors state that these elements, together with the declaration of will, are parts of the "state of reality" that constitute the legal act[36]. These differences are significant not only in terms of theory. If we assume that e.g. the entry in the relevant register constitutes a part of the legal act itself, consequently the act cannot be deemed performed prior to the registration, and thus – it does not exist. According to the other view, an act is deemed performed (at the moment when the declaration of will is made), yet ineffective until the condition of its effectiveness, e.g. the entry into the register, is met[37]. If we perceive the fundamental difference between a legal act and a legal event of contracting marriage pursuant to Article 1(2) FGC[38], it seems that the "state of reality"[39] of the act of marriage in the analysed case consists of declarations made

[33] H. Haak, *Zawarcie*…, p. 20 et seq.; A. Mezglewski, A. Tunia, *Wyznaniowa*…; W. Borysiak [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, J. Wierciński (ed.), Warszawa 2014, p. 28; M. Nazar [in:] *Prawo*…, p. 199 et seq.; J. Strzebinczyk, *Prawo rodzinne*, Warszawa 2016, p. 80; T. Smyczyński, *Konstytutywny charakter sporządzenia aktu małżeństwa konkordatowego*, „Państwo i Prawo" 2006, No. 3, p. 100; T. Smyczyński, *Prawo*…, p. 35 et seq.; G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Małżeństwo. Komentarz do art. 1–61(6)*", LEX 2013, Komentarz do art. 1 k.r.o., section 3; T. Sokołowski, *Zastosowanie* …, p. 90; K. Gromek, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2016. A differing view has been expressed in subject literature, as well, according to which issuing the marriage certificate is of declarative nature only. It is represented by: A. Mączyński, *Znaczenie*…, p. 312; R.A. Domański, *Konstytutywny czy deklaratywny charakter. Rozważania na tle wyroku SN z 3.3.2004 r., III CK 346/02*, „Orzecznictwo Sądów Polskich" 2005, No. 2, Item 23, p. 98; K. Pietrzykowski [in:] *Kodeks*…, p. 119 et seq.; A. Zielonacki [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, H. Dolecki, T. Sokołowski (eds.), Warszawa 2013, p. 25; J. Wójcik, *Charakter prawny sporządzenia aktu małżeństwa z art. 1 § 2 k.r.o. w perspektywie prawnoporównawczej*, „Przegląd Sądowy" 2016, No. 7–8, p. 126.

[34] In the judgment of 3 March 2004, III CK 346/02, „Orzecznictwo Sądów Polskich" 2005, No. 2, Item 23.

[35] J. Preussner-Zamorska, *Nieważność czynności prawnej w prawie cywilnym*, Warszawa 1983, p. 47.

[36] A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 2001, p. 254; J. Gwiazdomorski, *Próba korektury pojęcia czynności prawnej*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z wynalazczości i ochrony własności intelektualnej" 1974, No. 1, p. 58; Z. Radwański [in:] *System Prawa Prywatnego. Vol 2. Prawo cywilne – część ogólna*, Z. Radwański (ed.), Warszawa 2008, p. 33 et seq.

[37] R. Trzaskowski [in:] *Kodeks cywilny. Komentarz. Część ogólna*, Vol. I, J. Gudowski (ed.), Warszawa 2014, p. 332.

[38] On this subject see: M. Domański [in:] *Kodeks*…, p. 13 et seq.

[39] The expression "material facts" in the context of a legal act is sometimes questioned, cf. J. Preussner-Zamorska, *Nieważność*…, p. 69.

by the woman and the man to a priest in the event of a religious marriage. The specific act of entering into marriage is deemed performed at that moment, only its effectiveness was made conditional on an additional element – the marriage certificate being issued. The content of Article 1(2) FGC likewise indicates such interpretation (according to which the issued marriage certificate is an external condition of the effectiveness of the legal act of marriage). Marriage is formalized when two elements connected with the conjunction "and" occur ("and subsequently the head of the register office issues the marriage certificate").

If relevant declarations were made but the marriage certificate was not issued, the situation can be compared to a legal act performed under a conditional precedent[40]. According to one of the views presented in subject literature, from the moment of the declaration (of will) being made and prior to the condition being met, a unique and mutually legally binding relationship between the parties is formed[41]. Irrespective of the interpretation, the parties are bound by their declarations. If we apply this view to the situation of entering into marriage, it has to be acknowledged that during the period of this special *pendente conditione*, the bride and the groom are bound by their declarations of will to commit to marriage. It is true that the marriage is not effective until one more condition is met. However, the two persons cannot be treated as persons who have made no declarations. Therefore, it is impossible to state that the act of marriage was not performed. It has only failed to bring the legal effect of the legal relationship of marriage. That is why the head of the register office should refuse to accept the declarations of will to formalize marriage with other persons or to issue a certificate stating the lack of circumstance precluding marriage (Article 8(1) FGC).

Some scholars represent the view that contracting a marriage is dependent not only on the issued marriage certificate, but also on the five-day limit for the priest to forward the certificate as the basis for issuing the marriage certificate (Article 8(3) FGC). Even if the marriage certificate was issued, yet on the basis of a certificate delivered after the relevant deadline, the marriage may be declared as legally non-existent[42]. This view appears rather controversial. Article 1(2) FGC does not provide for a condition of entering into marriage within the time limit specified in Article 8 FGC. The provision stipulates solely that the marriage certificate has to be issued. The possibility to declare a marriage non-existent is related only to a failure to meet the requirements specified in Article 1 FGC. The time limit for forwarding the certificates is set forth in Article 8 FGC, which is but an administrative (processing) regulation. Treating administrative requirements as conditions of the existence of marriage not only is contrary to the content of Articles 1 and 2 FGC, but also may upset the entire system of conditions of the legal act of marriage. If forwarding the certificates within the relevant time limit is deemed such a condition, then nothing obstructs e.g. the required presence of witnesses (Article 7(1) FGC) from being acknowledged as another condition confirming marriage.

The theory of the constitutive character of the time limit set forth in Article 8(3) FGC has been justified with the content of Article 10 of the Concordat[43]. According

[40] This view with regard to acts in law which require e.g. entry in the register for their effectiveness expressed by R. Trzaskowski [in:] *Kodeks*…, p. 333.
[41] B. Swaczyna, *Warunkowe czynności prawne*, Warszawa 2013, p. 213.
[42] M. Nazar [in:] *Prawo*…, p. 199 et seq.; K. Piasecki [in:] *Kodeks*…, p. 100.
[43] M. Nazar [in:] *Prawo*…, p. 200.

to Article 10(1)(3) of the Concordat, the canonical form of marriage has the same effects as contracting marriage under Polish law, i.a. provided that the marriage was recorded in the register upon request filed with the registrar within five days of the marriage being concluded. It ought to be noted, however, that the content of the entire Article 10 does not adhere with the structure of marriage under Polish law. In particular, it was literally determined that the lack of "impediments" under Polish law (a term unknown to the Family and Guardianship Code) is a condition of entering into marriage. Yet the crucial argument in favour of rejecting the grammatical interpretation of Article 10 of the Concordat is the content of section 6 of the same. The provision evidently stipulates that the article is not a self-executing regulation[44] and that its application is conditional on the adoption of a legislative act (Article 91(1) *in fine* of the Polish Constitution). In order to perform the obligations under the Concordat, the legislature incorporated its solutions into and adapted them to the national legal system. Article 10 of the Concordat is not directly applicable, and any attempts to the contrary would lead to bizarre and hardly acceptable solutions (lack of martial "impediments" as a condition to contract marriage).

Taking into account the above argumentation, obviously the clergyman is obliged to forward the relevant certificates to the register office within five days of the marriage being contracted (Article 8(3) FGC) and the head of the register office should refuse to issue the marriage certificate if the time limit has not been met (Article 87(5) of the Register Office Records Act). However, despite the breach of the regulations mentioned, the marriage certificate will be issued, the marriage will be binding, and no requests for declaring its non-existence can be made[45].

Issuing the marriage certificate results in the condition of the effectiveness of the legal event described in Article 1(2)(1) FGC being met. Marriage is deemed contracted *ex tunc* at the moment when the declarations of will to enter into marriage under Polish law are made (as unambiguously stipulated in Article 1(2)(2) *in fine* FGC, according to which marriage is contracted when the declarations of will to enter into marriage under Polish law are made before the priest, and not when the religious marriage is contracted)[46]. According to this structure, the precise moment of entering into religious marriage may not be identical with the moment of entering into marriage under Polish law. Depending on the time when the declarations are made, the civil marriage may begin to exist directly before as well as directly after the religious marriage.

It should be noted that there is a discrepancy between the provisions of Article 1(2)(1) FGC and those of Article 1(2)(2) FGC in terms of specifying the exact moment of the act of marriage. Sentence 1 refers to the declaration of will to "simultaneously" enter into religious and civil marriage. Sentence 2 specifies the moment as described above. It ought to be assumed, however, that while sentence 1 determines the mechanism of entering into marriage as such (by specifying the elements of the legal event), sentence 2 indicates specifically and precisely the

[44] Cf. A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka*, Warszawa 2006, p. 566 et seq.
[45] The view is supported by W. Borysiak [in:] *Kodeks*…, p. 29.
[46] The view is clearly expressed by M. Nazar [in:] *Prawo*…, p. 201.

moment when the effects of that event occur. Insofar, sentence 2 ought to be seen as *lex specialis*. Yet the problem discussed above is chiefly of theoretical concern. It ought to be noted that both the certificate confirming that the declarations of will to enter into marriage were made before the priest[47] and the marriage certificate, pursuant to Article 88(1)(2) of the Register Office Records Act, only specify the date and place of the declarations, but not their exact hour (as is done, for example, when specifying the moment of death in the death certificate – Article 95(1)(4) of the Register Office Records Act).

Article 1(2) FGC does not repeat the requirement that the persons to be married must be simultaneously present when the declarations are made, while Article 1(1) FGC stipulates that explicitly. The evidently prevailing view in the doctrine is that the requirement of simultaneous presence is obvious and that Article 1(1) FGC should be applied in this respect[48]. Yet finding the right answer to that problem is not that simple. The legislature did not include the requirement that the persons to be married must be simultaneously present when the declarations are made in the content of Article 1(2) FGC, but it did repeat the requirement of the difference of sex. If the conditions set forth in Article 1(1) FGC were to be automatically applied when entering into marriage pursuant to Article 1(2) FGC, the repeated requirement of the difference of sex would be superfluous and breach the principle of legislative rationality. The grammatical interpretation indicates clearly that sections 1 and 2 provide for two autonomous legal events that lead to the act of marriage, and that they cannot be treated as one. Moreover, the content of Article 2 FGC and the character of the particularly acute sanction of the non-existence of marriage demand that the conditions set forth in both Article 1(1) and (2) FGC be interpreted most precisely. In addition, it is hard to treat the requirement of simultaneous presence as obvious if no such condition was present in the Family Code of 1950 – it was introduced only to Article 1 FGC (and later to Article 1(1) FGC).

It seems acceptable to interpret Article 1(2) FGC in the following manner: the question of the simultaneous presence of the persons to be married depends on the internal regulations of the relevant church or other religious organisation. In the event that such regulations admit that the bride and groom are not simultaneously present during the solemnisation of religious marriage, while the remaining conditions of contracting marriage under Polish law are met, civil marriage ought to be deemed valid and binding. It would only be crucial that the declarations of will to enter into marriage under Polish law be made in the course of contracting religious marriage and not at any other time. If, however, the internal law of the relevant church or other religious organisation does not provide for the possibility that the persons to be married are not present simultaneously (at the same time and place), the conditions of entering into marriage under the internal law of the church (religious organisation) or of making declarations when contracting

[47] Annex 27 to the Regulation of the Minister of Internal Affairs of 29 January 2015 on model documents concerning civil registration, Journal of Laws of 2015, Item 194.

[48] A. Zielonacki [in:] *Kodeks*…, p. 23; W. Borysiak [in:] *Kodeks*…, p. 28; J. Gajda [in:] *System*…, p. 119; H. Haak, *Zawarcie*…, p. 17; J. Strzebińczyk, *Zawarcie*…, p. 24; different view was expressed by K. Pietrzykowski [in:] *Kodeks*…, p. 118. Doubts as to the requirement of simultaneous presence were raised by T. Sokołowski. Ultimately, however, he expressed the view that it ought to be extended to cover Article 1(2) FGC, as well: T. Sokołowski, *Zastosowanie*…, p. 87.

religious marriage are not met. Such marriage would be void. An analogous principle (which makes the conditions depend on the internal regulations of a church or another religious organisation) cannot obviously apply to the requirement of the difference of sex of the persons to be married (as results directly from Article 1(2)(1) FGC).

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Almost twenty years have passed since the possibility to enter into marriage by religious ceremony with civil effects was introduced into the Polish legal system. It has become a most significant element of the legal reality over time. It ought to be noted that as many as 121 884 out of 193 455 marriages concluded in Poland in 2016 were contracted by religious ceremony (63%)[49]. If we considered only the first marriages of both bride and groom, the rate would be even higher[50]. The indicated shortcomings and interpretative doubts have not affected marital stability. According to the data of the Ministry of Justice, only seven cases concerning validity of marriage were filed with Polish courts in 2016. Nine such cases were examined and only three petition requests were granted. The stability of the legal situation as well as the social attachment to the existing regulation should be taken into account in the course of any potential works on amending personal marriage law.

Abstract

Maciej Domański, *Religious Marriage with Civil Effects in Polish Family Law*

The article presents and analyses the issue of religious marriage with civil effects (Article 1(2) FGC), introduced into Polish law by the Act of 24 July 1998. Ever since the Act became effective (on 15 November 1998), people who wish to marry have been able to enter into civil marriage (Article 1(1) FGC), or to marry under state law in the course of contracting marriage under the internal law of a church or another religious organisation (currently such possibility exists for eleven churches and religious organisations). The article analyses the individual conditions of entering into marriage pursuant to Article 1(2) FGC. It discusses the following issues: the moment when the declarations of will to simultaneously contract marriage under Polish law should be made, the concept of the priest and the impact of the deficiency of religious marriage on marriage under state law. Particular doubts have been raised in family law doctrine with regard to the legal nature of the marriage certificate being issued by the head of the register office. The article lists arguments in favour of the prevailing view, according to which issuing the marriage certificate is of constitutive nature and its absence results in the invalidity of marriage under Polish law. In addition, the text presents the view that the simultaneous presence of the bride and groom when making the required declarations for entering into religious marriage is not a condition stipulated in Article 1 FGC, but may possibly result from the internal regulations of the church or other religious organisation.

Keywords: *marriage, religious marriage, head of the register office, marriage certificate*

[49] Data according to the Demographic Yearbook 2017 of the Central Statistical Office.

[50] A great majority of those marriages were contracted pursuant to the provisions of the Code of Canon Law (99%). Only 1 163 marriages were formed by ceremony of churches and religious organisations other than the Catholic Church. The majority of those (500) followed the rite of the Polish Autocephalous Orthodox Church and the least (7) – of the Evangelical Methodist Church.

Streszczenie

Maciej Domański, *Zawarcie małżeństwa w formie wyznaniowej ze skutkiem cywilnym w polskim prawie rodzinnym*

W artykule przedstawiona została problematyka zawarcia małżeństwa w formie wyznaniowej ze skutkiem cywilnym (art. 1 § 2 k.r.o.). Możliwość taka została wprowadzona do polskiego prawa ustawą z 24.07.1998 r. Od chwili jej wejścia w życie (15.11.1998 r.) poza formą cywilną (art. 1 § 1 k.r.o.) nupturienci mogą zawrzeć związek małżeński regulowany przepisami państwowymi przy zawieraniu związku małżeńskiego podlegającego prawu wewnętrznemu kościoła albo innego związku wyznaniowego (obecnie możliwość taka została przewidziana dla jedenastu kościołów i związków wyznaniowych). W artykule zostały przeanalizowane poszczególne przesłanki zawarcia małżeństwa zgodnie z art. 1 § 2 k.r.o. Przedstawiono zagadnienia: chwili w której powinny zostać złożone oświadczenia jednoczesnego zawarcia małżeństwa podlegającego prawu polskiemu, pojęcia duchownego, jak również wpływu wadliwości małżeństwa wyznaniowego na małżeństwo podlegające regulacjom prawa państwowego. Szczególne wątpliwości doktryny prawa rodzinnego dotyczą charakteru prawnego sporządzenia aktu małżeństwa przez kierownika USC przy analizowanej formie zawarcia małżeństwa. W artykule wskazano argumenty przemawiające na rzecz dominującego poglądu zakładającego, że sporządzenie aktu małżeństwa ma charakter konstytutywny a jego brak powoduje, iż małżeństwo podlegające prawu polskiemu nie zostaje zawarte. W tekście zaprezentowano również pogląd zgodnie z którym jednoczesna obecność nupturientów przy składaniu oświadczeń koniecznych do zawarcia małżeństwa w formie wyznaniowej nie jest wymaganiem ustanowionym w art. 1 k.r.o., ale ewentualnie może wynikać z regulacji wewnętrznych kościoła albo innego związku wyznaniowego.

Słowa kluczowe: *zawarcie małżeństwa, forma wyznaniowa, kierownik urzędu stanu cywilnego, akt małżeństwa*

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The Legal Content of Parental Authority in Polish Family Law

1. INTRODUCTORY REMARKS

The questions raised, regarding the definition and structure of parental authority constitutes one of the fundamental reasons for debate in family law. Various concepts have been presented in the Polish doctrine for years. The reasons for that state of affairs are numerous. First of all, the Polish Parliament omitted writing a legal definition of the concept of parental authority in the Family and Guardianship Code[1]. At the same time, the provisions of the Code that refer to parental authority often tend to employ general clauses and vague expressions. They include above all the clause of the best interests of the child and of social interest (Article 95(3) FGC), the concept of custody (Article 95(1) FGC), the upbringing of the child (Article 95(1) and 96(1) FGC), the guidance and management of the child (Article 96(1) FGC), the dignity of the child (Article 95(1) FGC), the child's obedience (Article 95(2) FGC) or the degree of its maturity (Article 95(2) FGC). The use of such expressions in legal regulations for the purpose of determining the meaning of parental authority may lead to creating a definition of *ignotum per ignotius*. Additional difficulties in adopting a uniform concept of parental authority arise from the Parliament's inconsistency in using various terms. Furthermore, the Code was subject to amendments in recent years, which considerably expanded the norms defining parental authority, adding a number of new, vague concepts[2]. Finally, it ought to be noted that attempts at differentiating between parental authority and other parents' and children's rights and duties, such as the right of access, or even the maintenance obligation, may cause numerous doubts.

For the above reasons, it is worth summarising the findings of the family law doctrine to date, with regard to defining the concept of parental authority and to assess the relevant amendments of the recent years.

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[1] The Family and Guardianship Code of 25 February 1964, Journal of Laws of 2017, Item 682, hereinafter referred to as FGC.

[2] Among other things the concept of "the dignity of the child" – Article 95(1) FGC *in fine*. They will be further analysed in this article.

2. THE DEFINITION AND SCOPE OF PARENTAL AUTHORITY

According to one of the most frequently cited definitions, an analysis of the entire regulatory structure of the Family and Guardianship Code, and in particular Articles 95(1), 96 and 98(1) FGC, leads to the conclusion that **parental authority is the entirety of rights and duties of parents with regard to their child, whose purpose is to ensure the child due care and to protect its interests**[3]. T. Smyczyński defines parental authority very similarly: he calls it the **entirety of parents' rights and duties with regard to their minor child, whose purpose is to ensure care over its person and property**[4]. According to J. Strzebińczyk, on the other hand, **parental authority is a legal instrument that predominantly allows the parents to affect the child's ultimate physical and mental shape**[5]. The definitions referred to above clearly emphasise the function of parental authority, which is to secure that the principle of the best interests of the child is fulfilled. It should be noted, however, that such wording only partly explains the meaning of the concept in question. It refers to the area of parental rights and duties, and fails to indicate the boundaries between parental authority and other rights and duties of parents and children.

In this context, the jurisprudence and doctrine defining parental authority in the category of a legal relationship should be noted. The resolution of the Supreme Court of 26 January 1973 points out that parental authority encompasses the entirety of parents' rights and duties with regard to their child and means the legal relationship to which parents and children are the parties; it is a special type of relationship, where the children are dependanton the parents[6]. An extensive theory that distinguishes as many as three types of legal relationship covered by parental authority was proposed by T. Sokołowski. According to this author, parental authority is a complex legal relationship of authority between the parents and the child, a subjective right of the parents in relation to third parties and a relationship of administrative nature between the parents and the state[7].

Differing opinions have been expressed in relavant literature as to the possibility of applying the concept of subjective right when defining parental authority[8]. The notion was countered with arguments referring to the duty to exercise parental authority in the best interests of the child, and not of the entitled person[9]. A detailed

[3] J. Ignatowicz [in:] *System prawa rodzinnego i opiekuńczego*, J.St. Piątowski (ed.), Wrocław–Warszawa –Kraków–Gdańsk–Łódź 1985, p. 804; K. Jagielski, *Istota i treść władzy rodzicielskiej*, „Studia Cywilistyczne" 1963, Vol. III, pp. 100–102; B. Dobrzański [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, M. Grudziński and J. Ignatowicz (eds.), Warszawa 1966, p. 590; J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 340; cf. also the discussion of definitions and opinions in: J. Słyk [in:] *Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające FGC*, K. Osajda (ed.), Warszawa 2017, p. 1198 et seq.; the author of this article repeats some of his opinions and interpretations expressed in that text.

[4] T. Smyczyński, *Prawo rodzinne i opiekuńcze. Analiza i wykładnia*, Warszawa 2001, p. 288.

[5] J. Strzebińczyk [in:] *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, Vol. 12, Warszawa 2011, p. 235.

[6] Resolution of the Supreme Court of 26 January 1973, II CZP 101/71, OSNCP 1973, No. 7–8, Item 118.

[7] T. Sokołowski, *Władza rodzicielska nad dorastającym dzieckiem*, Poznań 1987, p. 93; cf. T. Sokołowski [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, H. Dolecki, T. Sokołowski (eds.), Warszawa 2013, p. 646.

[8] Cf. the list and classification of views in: H. Dolecki, *Ingerencja sądu opiekuńczego w wykonywanie władzy rodzicielskiej*, Warszawa 1983, pp. 24–25; cf. also A.N. Schulz, T. Smyczyński, *Rodzinne prawa podmiotowe i ich ochrona na obszarze stosunków między rodzicami i dzieckiem* [in:] *Prawo XXI wieku. Księga pamiątkowa 50-lecia Instytutu Nauk Prawnych Polskiej Akademii Nauk*, W. Czapliński (ed.), Warszawa 2006.

[9] A. Łapiński, *Ograniczenia władzy rodzicielskiej*, Warszawa 1975, pp. 22–23.

analysis of the issue noted here exceeds the scope of this article. It ought to be remarked, however, that the dispute seems to be of significance chiefly in terms of theory and research. However, it does not determine the scope and manner of exercising parental authority in practice, since even the authors who supported the concept of parental authority as a subjective right indicate that its individual elements constitute the parents' duty[10].

As has been mentioned above, developing the definitions of parental authority and specifying its nature render it possible to indicate its function, and thus to determine the direction of interpretation of the individual provisions which use general clauses and vague expressions. It seems that this is what the Supreme Court had in mind, when it emphasised in the Recommendations on increasing the protection of the family of 9 June 1976, that the concept of parental authority, according to the Polish Parliament was of fundamental importance to the assessment how guardianship courts should adjudicate in related matters. According to the Supreme Court, parental authority **is above all, the entirety of parents' duties with respect to their child, while the parents' rights with regard to the child are in a way a secondary element of that authority**[11]. It appears that, despite the divergences visible in the theories present in the doctrine, it is not in dispute that parental authority must be perceived as the parents' duty, which is fulfilled to the extent determined by the components (content) of parental authority and serves the purpose of ensuring that the principle of the child's best interest is fulfilled. The element of authority in the institution in question guarantees the effectiveness of the actions undertaken by the parents, as confirmed by the child's duty of obedience provided for in Article 95(2) FGC[12].

From the perspective of the application of the law, i.e. when indicating the particular rights and duties of the parents and children, and the extent of intervention of the guardianship court, it is crucial to define parental authority by specifying its structure (content, components). The subject literature and the judicial pronouncements of the Supreme Court generally adopt the theory of three elements, where parental authority encompasses care of the person of the child, care of the child's property and representation of the child (statutory representation by the parents)[13]. This division is based on the entirety of the regulations of the Family and Guardianship Code. The phrasing of individual provisions, however, does not unambiguously justify adopting such a structure of parental authority. Thus, Article 95 (1) FGC uses the expression "in particular", which indicates that the elements of parental authority are listed only as an example. Moreover, the provision lists the following components: care of the person of the child, care of the child's property and its upbringing. Thus the grammatical interpretation leads to the differentiation between the notions of care and upbringing. Article 96 FGC, on the other hand, lists the upbringing of the child among such attributes of parental

[10] Cf. K. Jagielski, *Istota*…, pp. 102 and 104.
[11] Resolution of the Supreme Court of 9 June 1976, III CZP 46/75, OSNCP 1976, No. 9, Item 184.
[12] Cf. also J. Słyk [in:] *Kodeks*…, pp. 1199–1200.
[13] Cf. e.g. resolution of the Supreme Court of 9 June 1976, III CZP 46/75, OSNCP 1976, No. 9, Item 184; K. Jagielski, *Istota*…, pp. 122–123; J. Ignatowicz [in:] *System*…, pp. 804–805; T. Sokołowski, *Władza*…, p. 21; J. Strzebińczyk [in:] *System*…, p. 267; J. Słyk [in:] *Kodeks*…, p. 1210.

authority as *directing* the child, caring for its physical and mental development, and preparing it for socially beneficial work in accordance with its abilities. Scholars have accurately pointed out the Parliament's inconsistency, as the notion of upbringing the child is meant now as an element of the content of parental authority (Article 95 FGC), now as a manifestation of the exercise of said authority (Article 96 FGC)[14]. Therefore it is difficult to specify the mutual semantic relations between the imprecise concepts used by the Parliament that are covered by the so called personal element of parental authority.

The controversy in Poland's family law doctrine results from the divergent ways of interpreting regulations that refer to such notions that have been adopted over time. Such interpretations may involve reconstructing the complex relations between them, while assuming their logical coherence, or it may be functional and allow for interpretative liberty that corresponds to the specific problems of parental authority, which by its very nature is difficult to define in legal categories.

The first approach may lead to conclusions that can hardly be reconciled with life experiences, and the commonly accepted meaning of words in everyday language. In particular, it would be necessary to adopt different definitions of the concepts of care, *directing* the child and its *upbringing*[15].

Accepting the interconnections of the concepts listed above renders it possible to avoid logical problems, yet is difficult to justify on the basis of grammatical interpretation. The problems discussed above definitely show the need for an amendment that would bring order to the relevant regulations.

Adopting a specific model of content (structure) of parental authority allows for further interpretation of the concepts it encompasses. According to K. Jagielski, custody of the child involves care, to provide the child with appropriate living conditions, to protect it from dangers, and to ensure its correct development[16]. J. Ignatowicz, on the other hand, construes the personal element of parental authority as including the duty to bring the **child** up (and distinguishes between physical and mental upbringing), the duty to direct **it,** and the care to provide the **child** with appropriate living conditions and safety. At the same time, the author admits the possibility of the semantic scopes of those components to intertwine[17].

The subject literature proposes also a more extensive typology of components of parental authority's personal element. Assuming that the semantic scopes of the individual elements are conjuctive, T. Sokołowski lists: 1) upbringing, i.e. the personal shaping of the child's personality, its emotional attitudes and intellectual predispositions; 2) directing, construed as determining where the child stays, supervising its lifestyle, deciding on the child's participation in non-family groups, choosing and verifying information; 3) caring for the child's physical surroundings; 4) caring for the physical aspect of the child; 5) coordinating the child's physical and mental abilities[18].

[14] J. Strzebińczyk [in:] *System*…, p. 266.
[15] A detailed analysis of the discussed notions in subject literature concerning family law was carried out by T. Sokołowski, *Władza*…, *passim*.
[16] K. Jagielski, *Istota*…, pp. 124, 126, 128.
[17] J. Ignatowicz [in:] *System*…, p. 813.
[18] T. Sokołowski, *Władza*…, pp. 32–33; T. Sokołowski [in:] *Kodeks*…, pp. 650–652 and 656–664.

The notions discussed above visibly manifest an attempt to specify the most possible, precise, conceptual framework that defines parental authority as far as the care of the child is concerned. It seems that an advantage of the analytical representations of the personal element of parental authority is that they exemplify the components of care of the child. This exemplification expands and specifies the vague concepts referred to in the discussed provisions of the Family and Guardianship Code. It explains their meaning and determines the scope of parental authority. Nevertheless, due to the inevitable interconnection of the individual elements, these propositions do not constitute classifications in the logical sense. Therefore, their usefulness in the practical application of family law regulations is limited. By way of example, a court decision to limit one parent's authority to care for the mental aspects of the child's development would be imprecise and unfit for its application due to the possibility of various interpretations.

In this context, a different proposition of conceptualising the personal element of parental authority is worth noting – one, which takes into account the character of the parents' rights and duties. According to J. Strzebińczyk, the care of the child entails: 1) purely factual actions that are required by the best interests of the child, and are not clearly covered by the content of other family law relationships between parents and children; 2) formal decisions that are made by the parents chiefly in the child's best interests, and significantly affect his or her non-financial legal status[19]. The author accurately distinguished between purely factual actions, whose diversity practically precludes developing their typology, and actions aiming at shaping the child's legal situation.

Equally accurate and corresponding to the definitions of parental authority as the entirety of the parents' rights and duties proposed in subject literature is the negative specification of the personal element, namely as any parents' actions taken with regard to the child, except for actions arising from legal relationships beyond the extent of parental authority.

Further problems with interpretation are related to the element of the care of the child's legal possessions referred to in Article 95. The legislator omitted to specify in this provision what the exercise of this type of care involves. More extensive regulations with regard to those issues are comprised in Articles 101–105. What draws attention, in this context, is the terminological difference in comparison to Article 95.

Article 95 of the FGC uses the expression "care of the child's property", while the remaining provisions employ the term "management of the child's property". Some authors do not draw any conclusions with regard to interpretation on account of this differentiation, and use the concepts of care and management of the property interchangeably[20]. Another idea has been proposed, as well, according to which the relation between the concepts of care of the property, and the management of the property corresponds to the relation between the concepts of parental authority and its exercise. In addition, management is only one form of exercising

[19] J. Strzebińczyk [in:] *System*…, p. 283.
[20] Cf. eg. K. Jagielski, *Istota*…, p. 139; J. Ignatowicz [in:] *System*…, p. 820 et seq.; T. Smyczyński, *Prawo*…, p. 303.

care of the property[21]. T. Sokołowski unequivocally supports the differentiation between the two concepts and the interpretation of the concept of care of property as a broader category which comprises management[22].

Functional considerations offer a more favorable use of the concept of management in the broad sense, which includes components that some authors exclude from its scope[23]. This approach makes it possible to avoid interpretative complications arising from attributing different meanings to the concepts of care of the child's property and its management. However, the use of the expression "care" by the Parliament in Article 95 indicates a special nature of management of the child's property, which ought to serve not only economic purposes (increasing the assets or maintaining their value), but also the best interests of the child and the family in which it is raised[24].

3. THE MANNER OF EXERCISING PARENTAL AUTHORITY

From the perspective of the characteristics of parental authority, no less relevant than determining its structure, is indicating the statutory directives of its exercise by the child's parents. Among the provisions which regulate the matter, in particular, Article 95 of the FGC deserves attention. It has been subject to significant amendments in the recent years. The provision entails:

1) the definition of the care exercised by the parents and of the upbringing of the child as a right and duty;
2) the directive of exercising parental authority in accordance with the best interests of the child, as well as social interests (Article 95(3));
3) the duty to respect the child's dignity and rights (Article 95(1));
4) the child's duty to obey its parents (Article 95(2));
5) the child's duty to hear the parents' opinion and recommendations in the best interests of the child in matters in which he or she can make independent decisions and declarations of will (Article 95(2));
6) the parents' duty to hear the child's view in significant matters concerning his or her person and property (Article 95(4));
7) the parents' duty to take into account the child's reasonable wishes in significant matters concerning his or her person and property (Article 95(4)).

It should be emphasised in the first place that the Parliament defined the exercise of care by the parents and the upbringing of the child predominantly as their duty, and only secondarily as a right. Such an approach leaves no doubt as to the fundamental principles of the statutory model of parental authority, which ought to be exercised in the spirit of responsibility for managing the child's affairs. The parents' rights are secondary, and serve the purpose of fulfilling their duties.

[21] J. Strzebińczyk [in:] *System*..., p. 284.
[22] T. Sokołowski [in:] *Kodeks*..., pp. 652–653.
[23] According to T. Sokołowski, managing the net income from the child's property or supervising the child's financial situation are outside the scope of care of the child's property, cf. T. Sokołowski [in:] *Kodeks*..., pp. 652–653.
[24] J. Słyk [in:] *Kodeks*..., p. 1212.

Undoubtedly, the most important factor that determines the manner of exercising parental authority is the clause referring to the best interests of the child. This value constitutes the chief (general) principle of the entire family law and refers to all family law relationships[25]. Attempts have been made in subject literature to define the concept of the best interests of the child by means of indicating concrete values it includes, such as for instance physical development or preparation for work for the benefit of society.

On the basis of a detailed analysis of the provisions of the Family and Guardianship Code, W. Stojanowska presented a definition of the concept in question. According to her, "the term 'best interests of the child' within the meaning of family law provisions means a set of intangible and tangible values, necessary to ensure the normal physical and mental development of a child, and to work corresponding to his or her abilities; these values are determined by many various factors, whose structure depends on the content of the applied legal norm and the particular, current situation of the child; so construed best interests of the child concurs with social interest"[26]. According to this approach, the concept of the best interests of the child is characterised by elasticity typical for general clauses, which allows it to be adapted to particular situations (actual facts). Moreover, the definition specifies the relation between the best interests of the child, as well as the social interests mentioned in Article 95(3). These two values may not stand in contradiction to each other, and are naturally coincidental.

The definition cited above was perfectly concurrent with the view expressed in the decision of the Supreme Court of 24 November 2016[27], according to which "there is no statutory definition of the expression 'best interests of the child'. It should be given meaning in particular factual circumstances, especially if they indicate that the child has found himself or herself in a situation that requires interference from other entities, including the court. In particular, it entails the right to the protection of life and health, and to any actions from others that should ensure conditions for peaceful, normal and undisturbed development, respect and dignity, and participation in the process of decision-making with regard to the child's situation; importantly, the list is not closed". The Supreme Court applies here the principle of the precedence of the best interests of the child over other values protected by family law. The ruling of 25 August 1981[28] includes the opinion that "the court deciding on parental authority ought to be guided above all by the best interests of the child or the social interest and not by the interest of one or both parents"[29].

The amendment of the Family and Guardianship Code of 2008[30] added another criterion to Article 95(1) of the FGC determining the manner of exercising parental authority. It introduced the requirement of respect for the child's dignity and rights. According to the explanatory memorandum to the governmental draft,

[25] So: J. Ignatowicz [in:] *Prawo*..., p. 43.
[26] W. Stojanowska, *Rozwód a dobro dziecka*, Warszawa 1979, p. 27.
[27] Decision of the Supreme Court of 24 November 2016, II CA 1/16, unpublished.
[28] Ruling of the Supreme Court of 25 August 1981, III CRN 155/81, unpublished.
[29] Cf. also decision of the Supreme Court of 5 January 1999, III CKN 979/98, unpublished.
[30] Act of 6 November 2008 amending the Family and Guardianship Code and some other acts, Journal of Laws 2008, No. 220, Item 1431.

the alteration had a pedagogical, persuasive and normative character. It was also said that the new duties were not directly applicable[31].

It can be doubted whether the "pedagogical" and "persuasive" regulation in its amended form would be effective, therefore, whether adopting such an amendment was advisable. The Parliament's expectation that a code provision lacking a direct sanction, and employing an imprecise concept could have a social impact that would shape the citizens' awareness seems unfounded.

The inalienable dignity of the child and its rights are derived from overriding legislation[32]. The place of those normative acts in the system of law, and the language they use give them a greater chance to serve the purposes indicated in the explanatory memorandum cited above. However, even in this case, serious doubt is justified. As for the normative character, it ought to be particularly emphasised that, in the light of the doctrine and jurisprudence to date, the respect for the child's dignity and rights undoubtedly falls into the standard of exercising parental authority discussed above as determined by the principle of the protection of the best interests of the child. Moreover, the said standard by far exceeds the requirement to respect the child's dignity and rights. Respect for dignity that concerns all persons alone could turn out to be insufficient in family relationships.

Similarly, no legal significance can be attributed to the obligation to observe the law (respect the child's rights) proclaimed in the Family and Guardianship Code. Consequently, the amendment in question definitely deserves a negative evaluation: it is an example of bad legislation, which breaks up the conceptual network of family law without serving any purpose[33].

The child's duty of obedience to its parents corresponds to the element of authority in parental authority, which allows the parents to bring the child up and to direct it. It is accurately indicated in the subject literature that the duty of obedience further constitutes a factor which renders it possible to ensure the child's safety[34]. The provisions of the Family and Guardianship Code do not instruct how the parents may enforce their children's obedience. The Parliament introduced an evident limitation in that respect in Article 96^1 of the FGC, which prohibits corporeal punishments. Any measures applied by the parents should be assessed by the court in light of the principle of the best interests of the child, commonly accepted social norms and the findings of science, in particular of developmental and educational child psychology.

In addition, the 2008 amendment expanded the content of Article 95 (2). The duty of obedience of the child was supplemented by the duty to hear the parents' advice and opinion expressed in the child's best interests in matters in which he or she can make independent decisions and declarations of will. According to the explanatory memorandum to the government draft, the expansion of the provision follows the principle of a "rational partnership of the parents and the adolescent children", which entails the obligation to hear the view of the other party within the family law relationship.

[31] Bill on the amendment of the Family and Guardianship Code and various other acts, Sejm paper of the 6th term of office No. 888, p. 11.
[32] Cf. e.g. the statements in the preamble of the Convention on the Rights of the Child and in Articles 30 and 48 of the Polish Constitution.
[33] Cf. J. Słyk [in:] *Kodeks*..., pp. 1214–1215.
[34] T. Sokołowski [in:] *Kodeks*..., p. 649.

Yet some doubts as to the interpretation of this regulation may arise. A literal reading of the amended content of Article 95(2) could lead to the conclusion that in the cases when the child may make independent decisions and declarations of will[35], he or she is not obliged to obey his or her parents, but merely to hear their opinion and advice. Such interpretation, however, would be contrary to the principle of the best interests of the child, and difficult to reconcile with the construction of parental authority, which is exercised until the child reaches adulthood. The idea that a thirteen-year-old who regularly engages in minor legal transactions contradictory to his or her best interests, e.g. purchases junk food, is not obliged to obey his or her parents in that regard, would be hardly acceptable. According to the functional and systematic interpretation, then, the child is obliged to obey his or her parents for the entire period of their parental authority. This duty is complemented by the duty to hear their opinion and advice in matters in which the child can make independent decisions and declarations of will.

The indicated interpretation problems mean that the discussed amendment should be assessed as definitely failed and ineffective, and even contrary to the principle of the best interests of the child.

The principle of "rational partnership" is additionally fulfilled by Article 95 (4), which was added in 2008, and which provides for the parents' duty to hear the child's view prior to making any decisions in major matters concerning both the child's person and his or her property, and for the duty to take the child's reasonable wishes into account, if possible. The regulation does not render the principle it expresses dependent on the child having reached a specific age. The legislator used the criteria of mental development, medical condition and degree of maturity, which are subjective. That in turn may cause that the regulation will be applied to younger children, as well.

The explanatory memorandum to the government draft law mentioned above refers to Article 72(3) of the Polish Constitution. Importantly, the regulation stipulates that, in the course of establishing the rights of a child, public authority bodies and persons responsible for children are obliged to hear the child's views. The material scope of Article 95(4) is much more extensive and covers all major matters related to the child. In comparison to Article 12 of the Convention on the Rights of the Child, which guarantees the child the right to express his or her views freely in **all** matters affecting him or her, Article 95(4) FGC limits the right of the child to being heard.

The phrasing of Article 12 of the Convention on the Rights of the Child should be perceived as more fitting. The treatment of the child as a subject and respect for the child's dignity correspond with hearing him or her in all matters in which he or she is capable of expressing his or her views, the more so that hearing itself does not give rise to the unconditional obligation to act according to the child's demands, as indicated by the expressions "if possible" and "reasonable wishes"[36].

[35] For example, according to the provisions of the Civil Code, a contract of the type that is generally concluded in minor everyday matters becomes valid upon its performance, unless it results in a gross detriment to the party without legal capacity (Article 14(2) of the Civil Code).

[36] J. Słyk [in:] *Kodeks*..., pp. 1216–1217; J. Słyk [in:] *Meritum. Prawo rodzinne*, red. G. Jędrejek, Warszawa 2017, pp. 775–776.

Another doubt may appear with regard to Article 95(5), which distinguishes the category of the child's major matters, and Article 97(2), where the expression "'significant matters of the child' is used" The principles of grammatical and logical interpretation require that different legal terms be attributed to different meanings[37]. However, the general nature of these concepts, and the function of both regulations are no basis for a precise differentiation between them. "Major" matters are therefore also "significant" matters, such as the choice of the field of study at the university level, medical treatment, a summer camp, i.e. matters exceeding current everyday issues.

The divergence among the regulations of the Family and Guardianship Code, the Polish Constitution and the Convention on the Rights of the Child mentioned above does not, as it seems, have far reaching practical consequences due to the lack of a direct sanction in Article 95, its general, guiding character and the duty to follow the principle of the best interests of the child in each case. Still, even in this event, critical remarks with regard to the amendment may be made. The modification contains strikingly imprecise expressions and – if we follow the systematic and functional interpretation – fails to introduce any vital change to the legislation.

4. PARENTAL AUTHORITY – TERMINOLOGICAL ISSUES

The remarks made in the previous sections let us move on to one more issue of fundamental nature, which is related to assessing the accuracy of the term "parental authority" used in Polish law with regard to the content of the legal relationship in determines.

The debate on the choice of the right term that would specify the discussed area of legal relationships between parents and children continued even during the drafting of the currently effective Family and Guardianship Code.

It was pointed out that introducing the term "parental care" would be justified ideologically, as it would draw a border between socialist law on the one hand, and feudal and bourgeois law on the other, as well as better reflect the primacy of the best interests of the child[38].

Likewise, some authors at present – albeit using different arguments – find it necessary to change the Code's terminology with regard to parental authority. They suggest that the expressions "parental care" or "parental responsibility" be used.

The need for modification is justified with the necessity to put greater emphasis on the child's qualities as a subject in its relationship with its parents. Moreover, the "educational advantage" of the proposed new terms is brought up[39]. The term "parental responsibility" could stress the nature of parental authority, while the currently used expression "emphasises what is secondary", namely the parents' rights. Another argument that supports the use of the term "parental responsibility" is the use of that expression in international legislation[40]. The concept of parental

[37] T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 1995, p. 124.
[38] K. Jagielski, *Istota*…, pp. 98–99.
[39] J. Strzebińczyk [in:] *System*…, p. 242; the author supports the concept of parental custody.
[40] J. Ignaczewski [in:] *Władza rodzicielska i kontakty z dzieckiem*, J. Ignaczewski (ed.), Warszawa 2010, pp. 27 and 29; cf. also the analysis of acts of international law in: M. Michalak, P. Jaros, *Prawo dziecka do obojga rodziców*, „Dziecko Krzywdzone" 2014, Vol. 13, No. 3, p. 32 et seq.

authority is claimed to present the child as a "subordinate" and the parents as "usurpers of that power". Consequently, it allegedly causes a "dissonance between the natural rights of the child and those of the parents"[41].

When it comes to the first idea, i.e. the term "parental care", it ought to be pointed out that in fact, its use would not result in any significant change of the current legal situation. The word "care" is related predominantly to the area of parental rights, as well. The concept of parental authority is rooted in public awareness. A potential change would rather cause confusion with regard to the citizens' legal understanding. At the same time, is seems doubtful whether it could in any way affect the stance taken by parents.

The term "parental responsibility" is supported by arguments referring to international law. For instance, according to Article 2(7) of the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (OJ L 338 of 2003, p. 1), parental responsibility means all rights and duties relating to the person or the property of a child, in particular rights of custody and rights of access. Thus, the scope pf parental responsibility in the cited legal act is much more extensive than that of the concept of parental authority in the current Polish legislation. An automatic exchange of these notions would cause an inconsistency in the legal system. Certainly, a radical change of the system of family and guardianship law could be considered, where one concept would unify all rights and duties arising from kinship[42]. Yet the advisability of such a radical reform is doubtful, and in any event, propositions of terminological changes should be preceded by presenting a consistent system of regulations that would redefine the relations between parents and children.

One of the requirements of correct legislation is using – where possible – expressions whose meaning is commonly accepted. It should be noted that the term "parental responsibility" is ordinarily construed as bearing responsibility – including liability – for the child's actions (the damage he or she causes). Using this term in a different meaning would be unintelligible to the addressees of the regulation. It is also doubtful whether a change of terminology used in the code would result in the correct functioning of institutions such as the limitation or withdrawal of "parental responsibility". Parents against whom such measures would be taken could in fact even feel rewarded (freed from responsibility).

As has been pointed out, in the light of the unambiguous statutory wording and of the findings of the doctrine and the jurisprudence, the concept of parental authority involves both duties and rights of the parents. Moreover, the Parliament consistently emphasises the area of duties, and lists them in the first place. The expression "parental responsibility", on the other hand, can hardly refer to rights, which undoubtedly constitute a component of the legal relationship between parents and children.

It appears that the criticism of the current regulations is caused by an overestimation of the impact of terminological changes on the application of law, and

[41] M. Michalak, P. Jaros, *Prawo*…, p. 37.
[42] J. Ignaczewski seems to express such need [in:] *Władza*…, p. 29.

by a misinterpretation of the word "power", which is associated with power that is unconditional, categorical, absolute. Yet in the circumstances of a modern democracy following the rule of law, the notion may and should be associated with duty and responsibility, as well as with actions deprived of arbitrariness. Undoubtedly, parents who bear responsibility for their child are equipped with rights that show traits of authority with regard to the child – and these rights allow the parents to bear this responsibility. Thus, there is no competition between parents' rights (authority) and their duties with respect to the child. The former serves the purpose of ensuring the fulfilment of the latter[43]. The view that the protective function of parental authority is crucial and that the essence of the problem is not whether "the child should be subordinated to the parents, but whether parental authority is construed and exercised according to the best interests of the child"[44] deserves full support.

5. CONCLUSION

The limitations of this paper preclude a more extensive analysis of all structural problems of parental authority. Nonetheless, the above considerations support an amendment of the provisions of the Family and Guardianship Code. Contrary to the 2008 amendment, however, the new modification should bring order to the legal regulation of parental authority, eliminate inconsistencies among individual provisions, and increase the precision of the legal language. It could go towards adopting the theory present in the doctrine which distinguishes care of the child and its property, as elements of parental authority. That would require deleting the words "in particular" used in Article 95 (1) as well as the expression "and to bring up the child". The deletion of the latter would not alter the legal situation, since the parents' duty to bring up their child arises currently from Article 96(1) of the FGC.

Removing expressions introduced by the 2008 amendment seems complex. Such change is justified by the arguments listed above, in particular by the inaccuracies and contradictions, and the need for precise language in the provisions of the Family and Guardianship Code. However, deleting these passages could be perceived as withdrawing from the values they proclaim, which as such raise no controversy. That will probably be the reason why the regulations will remain unaltered for a long time.

In addition, the reservations presented above provoke a more general reflection on amending the Family and Guardianship Code. Family law regulates an exceedingly vital area of human life, where the adoption of specific axiological premises plays a tremendous role. That is why the code includes numerous vague concepts and general clauses. Yet this manner of regulation, which makes family law so specific, or even unique, does not allow for latitude in shaping the legal language of the act. Quite contrarily, it is necessary to determine a precise conceptual network that will render it possible to develop a uniform interpretation of legal norms in court practice. The introduction of new, vague concepts must

[43] J. Słyk [in:] *Kodeks*..., p. 1201.
[44] H. Haak, *Władza rodzicielska. Komentarz*, Toruń 1995, p. 34.

always be subject to deep scrutiny and detailed analysis with regard to their impact on the already existing regulations. It seems that no such analysis and reflection accompanied the introduction of the amended provisions on parental authority discussed in this article.

Abstract

Jerzy Słyk, *The Legal Content of Parental Authority in Polish Family Law*

The article constitutes a synthetic analysis of the legal content and the definition of parental authority in the Polish legal system. In the first section, the author discusses the relevant scholarly findings, and quotes and comments on the existing definitions of parental authority, and the theories of its structure (content). The second section outlines and analyses the principles of exercising parental authority provided for by Polish family law. The considerations are centred around the recent amendments of the regulations that determine the manner of exercising parental authority, which are subjected to critical assessment. In the final section, the author takes into account the previous considerations, and refers to the propositions of terminological changes concerning the institution of parental authority, in particular the notions of replacing the aforementioned term with the expression "parental responsibility". The author also offers arguments against such a modification.

Keywords: *parental authority, care of the child, parental responsibility, best interests of the child*

Streszczenie

Jerzy Słyk, *Konstrukcja prawna władzy rodzicielskiej w polskim prawie rodzinnym*

Artykuł stanowi syntetyczne ujęcie problematyki konstrukcji prawnej i definicji władzy rodzicielskiej w polskim systemie prawnym. W pierwszej części autor analizuje dorobek doktryny w tym zakresie przytaczając i omawiając sformułowane dotychczas definicje władzy rodzicielskiej, a także koncepcje jej struktury (treści). W drugiej części omówione zostały przewidziane w polskim prawie rodzinnym zasady dotyczące wykonywania władzy rodzicielskiej. Uwagi zostały skoncentrowane na dokonanych w ostatnich latach zmianach przepisów determinujących sposób wykonywania władzy rodzicielskiej, które poddane zostały krytycznej ocenie przez autora. W ostatniej części, uwzględniając poczynione wcześniej ustalenia, autor odnosi się do propozycji zmian terminologicznych dotyczących instytucji władzy rodzicielskiej, w szczególności zastąpienia tego pojęcia terminem „odpowiedzialność rodzicielska", opowiadając się przeciwko takiej zmianie.

Słowa kluczowe: *władza rodzicielska, piecza nad dzieckiem, odpowiedzialność rodzicielska, dobro dziecka*

PRAWO W DZIAŁANIU
LAW IN ACTION
32/2017

Joanna Zajączkowska*

Legal aspects of parent – child contact problems in Poland

INTRODUCTION

Moving out of the house by one of the parents, resulting in lack of contact, is the most painful consequence of the end of adult's love for the child. All of this ultimately leads to depriving the child not only of the appropriate family model, but above all the correct image of the role of man and woman, since from that moment usually the child is raised only by one of them. It would seem obvious that a child needs contact with both parents or that this contact is a child's right guaranteed not only by Polish law, but also by international law – especially Convention on Contact concerning Children (2003)[1], Convention on the rights of the child (1989)[2] or Convention on Human Rights and Fundamental Freedoms (1950)[3].

The aim of this article is to indicate the role of the contact, its main features as well as problems, which occur while enforcing it[4].

I. CONTACT UNDER POLISH PROVISIONS

All rights and responsibilities of parents are regulated in the Act of 25 February 1964 Family and Guardianship Code (hereinafter referred to as FGC)[5]. Although the legal concept of contact was formulated before, the rule itself was introduced by an amendment to the Family and Guardianship Code of 6 November 2008[6].

To begin with, it is worth mentioning that in general both legal parents acquire parental authority unless it has been restricted, limited, suspended or deprived. In those cases as well as in the situation when both parents have full parental authority,

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1 Convention on Contact concerning Children, Treaty No. 192, Strasbourg, 15/05/2003, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/192.

2 Convention on the Rights of the Child, Resolution 44/25 of 20 November 1989, http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf.

3 Convention for the Protection of Human Rights and Fundamental Freedoms, Treaty No.005, Rome, 04/11/1950, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005.

4 The study is an attempt to synthetically discuss the most important problems of the doctoral thesis entitled: *Right and obligation of contact with a child*, J. Zajączkowska (ed.), Poznań 2018.

5 Ustawa z 25.02.1964 r. – Kodeks rodzinny i opiekuńczy (Dz.U. z 2017 r. poz. 682).

6 Ustawa z 6.11.2008 r. o zmianie ustawy – Kodeks rodzinny i opiekuńczy oraz niektórych innych ustaw (Dz.U. z 2008 r. Nr 220, poz. 1431 ze zm.).

but the child is residing permanently with one of them – contact guarantees that the relationship with the other continues. In accordance with Article 113 FGC: "Regardless of parental authority the parents and the child have the right and duty to stay in contact with each other".

Next provisions show that the priority is given to general rule, which is the mutual consent between both parents who live apart. Only if they are not able to reach such an agreement the court will determine the way of maintaining the contact. In both situations the child's best interest and child's reasonable wishes are taken into account. This means that the court should hear the child in a separate room to have regard to the wishes and feelings of the child, considering the child's maturity, mentality and understanding[7] (Article 216[1], Article 586 of the Civil Procedure Code, hereinafter referred to as CPC)[8]. The source of this rule can be found in Polish Constitution, where according to Article 72 in the course of establishing the rights of a child the authorities shall consider and, insofar as possible, give priority to the views of the child[9].

One of the essential elements of a parent and child relations are: parental authority, contact with a child and maintenance. According to Polish family law these rights and duties are separate and therefore – regulated in different branches of FGC. Branch 3 in the Chapter II (oddział 3, rozdział II) is devoted to contact with a child. According to Article 113 of this Code contact refers to face-to-face visits or other forms of indirect communication. The direct contact includes visiting the child, meeting with a child, taking the child outside its place of residence and direct communication (i.e. contact in prison). On the other hand the indirect contact includes correspondence and distance communication, but as the provision is written in the form of an open catalogue it only lists the most significant forms, so that all other means of maintaining contact could be awarded.

The natural and expected forms are the direct ones, the indirect contact should be ordered only if direct contact is not in the child's best interests or as an adjunct to direct one[10]. The diversity of the forms is important also bearing in mind that the child needs time for his passions and hobbies as much as for meeting with friends, especially while growing older. The form of contact should differ depending on the age of the child, but also on the day of the week – for instance meetings after school should not disrupt in homework. One of the most delicate issues is whether a court should prohibit spending time with a parent and his or her new partner if this upsets a child (or more commonly – mother, which effects the child's feelings, in many cases making this child feel guilty of having contact with the father and his new partner). It seems that in those situations the behaviour of the non-resident parent should be balanced, which usually should mean avoiding third person to be a part of the parent-child meeting. The child's welfare is undoubtedly paramount. On the other hand, it may be indicated that the right to contact also includes the

[7] J. Zajączkowska, *Głos dziecka na wokandzie – o instytucji wysłuchania dziecka*, „Palestra" 2013, No. 58(7–8), p. 56 et seq.
[8] Ustawa z 17.11.1964 r. – Kodeks postępowania cywilnego (Dz.U. z 2018 r. poz. 155 ze zm.).
[9] The Constitution of the Republic of Poland of 2nd April 1997, published in: Dziennik Ustaw No. 78, Item 483 with amendments.
[10] J. Mitchell, *Children act private law proceedings: a handbook*, Bristol 2012, p. 418.

power to decide what third parties may be present when exercising this right, but even then the child's welfare is the limit of this authorisation. Undoubtedly, the new relationship should be strengthened so, that the child does not have constantly contact with new partners[11].

This is also the reason that whenever it is necessary for the best interests of the child, the court will limit the contact between parent and a child with different intensity. In particular the court may prohibit meeting with a child or taking the child outside his or her place of permanent residence. It is also possible that the contact will be limited by allowing the parent to meet the child only in the presence of the other parent guardian, probation officer or other person designated by the court. Commonly it is the other parent (usually the mother) who is observing such a meeting, which in my opinion negatively affects on maintaining relationship. When it is necessary for the child's welfare, the court can restrict contacts to specific ways to communicate at a distance or even prohibit the distance communication completely. Therefore, if maintaining contact seriously threatens well–being of the child or violates it, the court prohibits it obligatory (Article 113^3 FGC).

What is very important, the court can change a decision on contacts if required by the best interests of the child. This regulation allows the court to vary an order involving children almost at any time. Despite this it should be proven that there has been a change in circumstances also if this means a change in child's needs for example when the child is older and wants to spend some more time with friends this will lead to reducing the time of contact. On the other hand, it can also be increased – the court can change contact arrangements also when one of the parents is deliberately limiting the time provided in a court's decision. Naturally this will be adjusted only when such an increase is in child's best interests as this is always the paramount premise.

Moreover, the court may impose some obligations on parents while ruling on the contacts i.e. by directing them to the family therapy professionals or providing family assistance. The aim of Article 113^4 FGC is to help parents to maintain contact with a child. Such help includes consultations, counselling, but also assistance at improving the living and working conditions of family members. It is argued in Polish doctrine whether this assistance is a form of limitation of contact especially when there is a courts control established[12]. The educative function aims at helping parents to understand their duties, which in effect allows a child to grow up with regard to his best interests.

The provisions of the section devoted to contact with a child are applied accordingly to the contacts with siblings, grandparents, kin in the direct line as well as other persons, if they had custody for a longer period of time. According to Article 113^6 FGC the right and obligation of contact with other than parent relatives shall be treated respectively, in other meaning with less intensity. The doctrine distinguishes the division of those entitled to three groups, the first of which includes persons connected to the child with kinship, the second concerns the relation of

[11] A. Zempel, *Sorge- und Umgangsrecht nichtehelicher Kinder einschliesslich des Umgangsrechtes des biologischen Vaters*, München 2013, p. 118.

[12] T. Sokołowski, *Prawo rodzinne. Zarys wykładu*, Poznań 2010, p. 165; E. Trybulska-Skoczelas [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, J. Wierciński (ed.), Warszawa 2014, p. 773.

affinity, the third – the actual nature – exercising custody of the child for a long time[13]. The last group raised the most doubts in the literature of the subject. Already in the opinion of the amendment, it was proposed to add the criterion of the welfare of the child, because it did not specify the group of people and because of the expression indicating a longer period of custody[14]. It is important to say that if the rights of other people, as in the case of parents are the duty of the child, it would be too heavy load for the child to enforce it, therefore the court should adjudicate on such matters with caution[15]. In turn, helpful in determining the period of custody of persons mentioned in Article 113[6] FGC *in fine* is to compare the child's age with the time of care – then a year may be a longer period for example if the child is several months old[16]. In the doctrine, as examples of other people indicated in the catalogue, a babysitter is indicated, who for the first few years of the child's life was co-educating him[17], genetic parents[18], uncles, aunts and cousins[19], in particular the siblings of parents of the child and godparents[20]. The right holder will also include a long-term parent's life partner, parent's relatives or neighbours[21]. The great-grandparents as they are not mentioned in the catalogue could also belong to the abovementioned group if they were in custody for some period of time[22]. By comparing, in Minnesota, great-grandparents are listed next to grandparents as entitled to contact the child if they lived with him for a period of at least 12 months, but also if the deceased parent of the child is their grandson[23]. There, it was also indicated that one of the conditions for other persons to have contact with a child is living together for a period of at least two years[24]. Leaving aside the issue of the omission of the great-grandparents by the Polish legislator, it seems that the lack of an indication of the exact or approximate period for qualifying those entitled to contact with the child should be assessed positively with the special protection that is the premise of the good of the child[25].

The legislator using the abovementioned concept refers to the provisions regulating the child's contact with parents. It should be noted, however, that he granted protection in the sphere of these contacts rather than a right and obligation similar to that from Article 113 FGC. This is reflected in the location of the discussed provision at the end of Branch 3. Therefore, it is essential to define the intensity of the right and obligation in particular relations to describe the intent of the legislator.

[13] J. Gajda [in:] *Kodeks rodzinny i opiekuńczy*, K. Pietrzykowski (ed.), Warszawa 2015, p. 701.
[14] W. Stojanowska, *Opinia dotycząca rządowego projektu ustawy – o zmianie ustawy – Kodeks rodzinny i opiekuńczy oraz niektórych innych ustaw*, druk nr 1166 z 15.03.2007 r., Biuro Analiz Sejmowych, p. 3.
[15] W. Stojanowska, *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 i 10 czerwca 2010. Analiza. Wykładnia. Komentarz* [in:] W. Stojanowska, M. Kosek (eds.), Warszawa 2011, p. 292.
[16] J. Gajda [in:] *Kodeks*…, p. 701.
[17] M. Andrzejewski, *Prawo rodzinne,* Warszawa 2014, p. 188.
[18] J. Gajda [in:] *Kodeks*…, p. 701.
[19] T. Justyński, *Prawo do kontaktów z dzieckiem w prawie polskim i obcym*, Warszawa 2011, p. 100.
[20] T. Sokołowski [in:] *Kodeks rodzinny i opiekuńczy*. *Komentarz*, H. Dolecki, T. Sokołowski (eds.), Warszawa 2010, p. 676.
[21] T. Sokołowski [in:] *Kodeks*…, p. 676.
[22] T. Justyński, Who proposes an interpretation of Article 113[6] FGC in such a way that grandparents can also be located within the broadly understood category of "grandparents" in: *Prawo*…, p. 98.
[23] Section 257C.08 pkt 1 i 3 in 2016 Minnesota Statutes, on Internet: www.revisor.leg.state.mn.us.
[24] Section 257C.08 pkt 4 in 2016 Minnesota Statutes, on Internet: www.revisor.leg.state.mn.us.
[25] W. Stojanowska, *Nowelizacja*…, pp. 292–293; T. Justyński, *Prawo*…, p. 122.

Regarding other relatives, due to the importance of their relationship with a child – the assumption of a different strength of right and obligation of contact should be made. There is an undeniable hierarchy determined by the legislator in Article 113[6] FGC. Following this path the rights siblings enjoy are derivative of their parents' rights. Consequently, it is even possible to assume that this is the secondary natural character of this relationship because of its source – the parental bond.

Similar conclusions should be drawn with regard to grandparents, who, by decision of the legislator are in the third consecutive group of persons after parents and siblings. Their right, despite the undeniably socially established role, does not seem to be a sufficient basis for deriving natural-legal character from this relationship. The legislator seems to have created in Article 113[6] FGC a hierarchy of people entitled to contact with the child, indicating the order and thus the intensity of rights and obligations, which are weakened successively after parents. Accordingly, the lower intensification concerns the assessment of the degree granted by the legal provision, which also indicates the proper way of adjudication by the court. This conclusion is in line with the previous one, which emphasizes the priority importance for the child's development of contact with the parent, then with the siblings, then the grandparents and then with other persons.

II. LEGAL POSTULATES

The provision that could be introduced refers to a substantive legal basis for suspension of contacts; paying attention to the fact that such a suspension is based on the procedural legal principle, which in my opinion, should lead to considering the introduction of a material legal basis. This suspension would indicate the temporality of not maintaining contacts with the momentary obstacle and the automatic return to unchanged relations. In practice, this would mean that the right to take the child away from parent's residence every other weekend would automatically be restored without having to be re-examined by the court. Naturally, the restoration of the former type of contact should be dictated by the compliance with the statutory prerequisites, and hence the best interests of the child.

In addition, it would be a neutral concept that does not endanger the child's good. In this context, there is a lack of a neutral institution associated with an obstacle of a more "technical" than emotional nature. In the field of family law, which affects disputes between parents, it is worth striving to neutralize the conflict, and the proposed suspension of contact could certainly serve this purpose. From a psychological point of view, the parent should not feel discomfort or embarrassment by a court ruling prohibiting him or her to contact the child. The restriction dictated by a nonculpable obstacle on the parent's side may cause irreversible effects. A decision limiting the right to mutual contact may both discourage a parent and a child from returning and maintaining an earlier relationship. In other words, the consequence of such a solution also on the psychological level may be weakening child's interest. The prospect of temporariness, together with the objectivity of the suspension would allow to avoid inherently simple, and possibly final, court decisions.

For this reason, it is also important to postulate the introduction of obligatory mediation preceding court proceedings in matters of contacts. It seems the best

solution to establish the forms of contact with a child as a content of the settlement. It is pointed out that obligatory referral to mediation could be another chance, along with the parental agreement, to develop a common position before the parents' conflict-based attitudes are strengthened[26]. In the USA (i.e. in California or North Carolina) mediation is obligatory in matters of parental authority and contact (*custody and parenting time*)[27]. This means that the parties must attend a mediation meeting prior to participating in court proceedings, and failure to comply with this obligation may be considered an insult to the court. It is worth adding that in the state of California the model of obligatory mediation was introduced already in 1981[28]. It seems that the identical nature of contacts matters under Polish law also justifies such a postulate.

The right to information is also unexpressed in the Polish law – especially information about the child, but also about the parent. Providing mutual information, especially to the parent about the child, serves to maintain the bond even when the two people share a long distance. The right to information is one of the three forms of contact in the Convention on contact concerning children[29], on which Polish regulations were modeled. In her understanding, contact defined as any form of communication between a child and other people also means providing information about the child to those entitled to contact. The lack of distinction of a separate regulation of the right to information does not mean that such a right does not exist.

Firstly, due to the validity of the Convention on contact being an international act, and therefore pursuant to Article 87 para 1 of the Polish Constitution in connection with Article 91 para 1 and 2 it is a source of universally binding law, and after being published in the Journal of Laws it is part of the national legal order and is directly applicable.

Secondly, it is necessary to pay attention to the open catalogue of contact forms in Article 113 para 2 FGC. The problem is in a way crucial for the bond – both for its creation and maintenance. This applies to contact, for example, with a small and shy child, when it is much easier to have knowledge from the parent who is staying with him every day. Also in relation to the older child, adolescent, passing the period of the so-called youthful rebellion or biased to the non-resident parent – the information this parent has (e.g. about problems with learning or with peers at school) will help to alleviate the conflict or re-bond, despite separate living. Moreover, there is no threat of interference in resident parent's right, become the right to information does not entail the right to co-decide on important matters of the child[30].

In summary, the right to information is a non-intrusive way to help maintain a closer relationship. By getting information on a regular basis, the parent knows

[26] A. Czerderecka, *Rozwód a rywalizacja o opiekę nad dziećmi*, Warszawa 2010, p. 50.
[27] M. Deis, *California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes*, "Journal on dispute resolution" Ohio 1985, pp. 149–179.
[28] L. Edwards, *Comments on the Miller Commission Report: A California Perspective,* "Pace Law Review" 2007, No. 4, Vol. 27, pp. 627–676.
[29] Convention on Contact concerning Children, Strasbourg, 15/05/2003, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/192.
[30] E. Trybulska-Skoczelas [in:] *Kodeks*…, p. 769.

the needs, worries and successes of his child and has current knowledge about the child's progress and scientific achievements, as well as his current state of health. Thanks to this, he is not "isolated" from upbringing and influence on the child.

III. LEGAL NATURE OF THE CONTACT

Fundamental importance in the matter of the nature of contact is the relationship between contact and parental authority and the recognition that mutual contact is absolutely necessary for the proper exercise of parental authority. Not only these two spheres are intertwined and are permanently connected with each other, but above all it is impossible to exercise parental authority without contact (i.e. including education or help). In the case of a parent who exercises parental authority, it is not only artificial, but it is virtually unnecessary to separate an independent right to contact. Hence, one of the issues concerns the right and obligation to contact in a full family (that is the one where there has not yet been a breakdown). Putting aside abovementioned problem, it should be acknowledged that the right to contact exists in the form that is given by an Article 113 FGC.

1. Contact as a right and obligation

Historically, contact was treated as a right of the parent. The previous idea of contact was rather about a child that was passively visited by a parent who was realizing his or her right to contact. Therefore, literally expressing the child's right in the provision confirms and emphasizes its subjectivity. The most important consequence of the discussed approach is the fact that the child can demand his contact (with the possibility of expressing and demanding to be heard).

Imposing the obligation with regard to parent is widely accepted, but in the case of a child, however, there was a fear that it would be forced, which in consequence may have the opposite effect being incompatible with the child's welfare[31]. As a result the best interest of the parent could be put above the best interest of a child, while the court shall take child welfare into account and give it priority over the parent welfare[32]. Due to the limited ability to meet its own needs a child must remain under the care of parents. Hence the requirement to implement the obligation of contact, even if it entails the risk of initially forcing the child, must be assumed as done in accordance with the best interests of this child. Therefore, it should be highlighted that keeping contact is both the right and obligation of parents and also children.

It suffices to justify by pointing to an example of compulsory schooling, which is associated with the necessity of forcing the child to fulfil it. Similarly in the case of the obligation to learn or to function in a society or peer group. The aforementioned examples are on the one hand the duties of the child, but on the other also the duties of the parents resulting from their parental authority such as directing the child to school, despite the reluctance he or she expresses for their colleagues

[31] W. Stojanowska, *Nowelizacja*..., p. 267.
[32] Wyrok Sądu Najwyższego z 25.08.1981 r., III CRN 155/81 (Supreme Court as of 25 August 1981, III CRN 155/81), LEX No. 503248.

or teachers – so even if this entails the necessity of forcing the child. The same conclusion comes from the analysis of the existence of the duty to protect the health of the child, with whom parents intervene in the freedom of the child, perhaps contrary to his will or decision, but consistent with his good.

Despite the polemic concerning the formulation of the obligation on the child's side, it is not the essence. The real sense of the obligation is not only in the formulation of a warrant, but also in making both parties aware of the fact that maintaining it is not a voluntary decision that can be renounced.

It seems that by introducing the obligation of contact by the legislator, the right of the child not to maintain it may not exist at the same time. If a child had no obligation, one would suppose that he had such a right. Meanwhile, just as the duty of obedience to parents has a protective function – it serves to ensure the child's safety, the obligation of contact imposed on the child is also regulated for his own good. Despite the fact that the child is able to articulate his needs and wants, he may not be fully aware of their long-term consequences: in this case weakening of the relationship with one of the parents.

The most important consequence of the discussed approach is the fact that the child can demand his contact. Strengthening for him will be the knowledge about his own right, in accordance with the possibility of expressing and demanding to be heard. A minor may not want to exercise his right of contact (for example under the influence of the other parent), however, granting this right literally may also help the child to ignore this type of pressure, remaining aware that it is a subjective right enjoyed by him independently from the opinion of a parent living with him[33]. At the same time, there is a reflection about the inability of the child to claim.

As was noted, although the existence of the child's right to contact does not raise doubts, in practice it is actually the parent who has the right to enforce it. In other words, the child's right to contact becomes in effect the right to contact of that parent[34]. Therefore, it is also easier for the other parent to defend his or her interests in demanding a child's right to contact.

The abovementioned remarks emphasize the specificity of the rights and obligations, taking into account above all the fact that the child has the right to contact, but rather reaches it within the family structure. Thus, the actual existence of the child's claim should be recognized, but it is peculiar, because it has a family–law nature. It should be assumed that the postulate to allow the child to raise his own claim in the proceedings concerning him, in particular to maintain contact – still remains valid[35]. This applies especially to the parent-child relationship, but also to the contact with siblings, and to a lesser extent to other persons indicated in Article 113^6 FGC.

Moreover, the right to contact implies a duty to allow it. It should be clearly formulated that there is an obligation to nurture a child's relationship with a parent who lives apart. This means that such parent's claim should correspond with the duty of the parent who lives with a child not to interfere with contact. If the

[33] T. Justyński, *Prawo*…, p. 80.
[34] F. Kelly, *Enforcing a parent-child relathionship at all costs? Supervised access orders in the canadian courts*, „Osgoode Hall Law Journal" 2011, No. 49(2), pp. 305–306.
[35] M. Grudzińska, *Kontakty z dzieckiem. Sądowe ustalenie. Orzecznictwo. Wzory*, Warszawa 2000, pp. 15–16.

Polish legislator aims at shaping a certain model of behaviour that can be considered a model of the relationship to which one should strive after the break-up of the family, it is necessary to formulate corresponding duties. This view justifies one of the foremost educational and legal functions fulfilled by legal norms that gradually influence and change the behaviour of family members. This is related to the phenomenon of internalization of standards, and thus the process of persuading a norm that is its own standard of conduct[36]. Such axiological association (and thus compliance of protected external standards with internal values) results in permanent readiness to comply with the norms, and establish a pro-normative attitude[37]. It is only in its effect that norms are socialized, which does not apply to all of the applicable legal norms. Therefore persuasive actions are more important than the control repressive actions. Also provisions devoted to enabling the parent to contact a child should fulfil the propagating role instead of establishing the system of sanctions. Its task should be to spread the idea of a free, and not difficult, right to contact.

Therefore, this postulate should be put forward, so that the parent's claim corresponds also with the obligation of the other parent not to disrupt contact.

2. Contact as a natural right

Contact is a form and expression of closeness and it has a natural character resulting from the parental bond. It is available to parents and the child by nature itself, obtaining – in the model approach – a wide, almost unlimited shape. It means that by nature this contact is not limited. In this sense, the contact from Article 113 FGC is a provision that regulates the natural bond and parental relationship, not the one that establishes and grants this right.

The consequence of defining such character as natural is in my opinion the existence of a presumption of the right to contact as compatible with best interests of the child. I believe that it would be reasonable to conclude that the presumption of contact as a child's inherent right is in principle consistent with child's welfare. This results in the assumption that the parent who wants to limit this right should prove the reasons for it, not the parent who asked for granting it. This would prevent the litigation being spread on this background. However, the presumption does not apply to persons other than parents, for the sake of the protection of parental authority. In this aspect, the legislator has, moreover, formulated a provision referring to these people in an "appropriate" manner, and on this basis it should be concluded that the right and obligation assume minimum intensity in relation to other than parents people – according to Article 113^6 FGC.

If the law is natural, it is impossible to determine the moment of its completion, nor can it be said that it expires on the basis of a certain norm of family law. In this sense, it is an inalienable, innate right.

As E. Holewińska-Łapińska points out, as well as referring to the existence of the natural right rules – "irrespective of appealing to the law of nature, the right

[36] K. Pałecki, *Prawoznawstwo – prawo w porządku społecznym*, Warszawa 2003, p. 58.
[37] K. Pałecki, *Prawoznawstwo*…, p. 70.

of the child to meet parents, raise them and not separate from them (against their will), except in special circumstances, when it best serves the well-being of children, it is described in the Convention on the Rights of the Child"[38]. Therefore, if one also accepts that the right to contact has a natural character, the possibility of limiting it is in effect very limited.

In principle, the prospect of finding a normative basis for a norm of the natural character under Polish law is to refer to Article 30 of the Constitution. It has been assumed that dignity is an inalienable, natural right and in turn, from the well-established idea of dignity comes the right to learn about its origin. As it is emphasized, the biological identity of a human being and its dignity constitute an inseparable unity. The right to information about one's roots as part of the right to identity has long been recognized as an international human right. Article 8 of the Convention of the Rights of the Child protects the right to preserve identity, including family relations, apart from unlawful interference, while Article 7 of this Convention establishes the right to know and to be raised by parents. This could be conclude as follows: "It can be now claimed with some confidence from the available evidence that there is a psychological need in all people, manifest principally among those who grow up away from their original families, to know about their background, their genealogy, and their personal history if they are grow up feeling complete and whole"[39].

Therefore, it can be assumed that since contact serves mutual knowledge, it is also possible to derive the right to this contact from the right to know one's identity. In such a shape it would be a natural law, however, also having its normative source found in the Constitution.

Then, because of the legal nature mentioned above, it can also be assumed that the right and obligation of contact do not end because, since it results from the parental bond, it lasts as long as this bond. At the same time, as the legislator did not determine the ending moment of the right and obligation of contact, it is justified to adopt its continuation throughout the whole life. Similarly to Article 87 FGC according to which parents and children are required to mutual respect and support. In Polish doctrine it was found that those duties last as long as parental bond[40]. The idea that the contact could have no ending moment is analogical to the lasting obligation of support and it is also a consequence of a different shaping of related to contact – parental authority. Article 92 FGC states that the child remains until the age of majority under parental authority. This means that the parental authority expires (usually at the age of 18 or 16 in case of married women – according to Article 10 of Civil Code[41] and Article 10 para 1 FGC) by the power of law regardless of the will of both sides to continue it. However, the claim for the right to contact ends when the child reaches the age of majority, from that moment the child can decide on contact with parents and other people on its own. This does not mean the expiry of the obligation and consequences in the form of

[38] E. Holewińska-Łapińska, *Orzekanie o umieszczeniu małoletniego w rodzinie zastępczej*, „Prawo w Działaniu. Sprawy cywilne" 2008, No. 4, p. 18.
[39] J. Triseliotis, *Obtaining birth certicicates* [in:] *Adoption,* P. Bean (ed.), London 1984, p. 38.
[40] A. Sylwestrzak, *Obowiązki dziecka wobec rodziców*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2001, No. 3, p. 61 and following; J. Gajda [in:] *Kodeks*..., p. 693.
[41] Ustawa z 23.04.1964 r. – Kodeks cywilny (Dz.U. z 2017 r. poz. 459 ze zm.).

family law sanctions (i.e. disinheritance – Article 1008 pt. 3 of Civil Code – in the case of non-engagement with a parent's life by an adult child, especially the lack of contact)[42]. The mere unenforceability of rights and obligations after the age of 18 does not mean that they should not be exercised.

The right and obligation of contact occur with varying intensity according to parents and children. Firstly, on the parents' side it is more their obligation, then – the right. On the other hand, on the child's side it is to a greater extent the right, and with the aging of parents – the child's duty. Therefore, the existence of a specific "variable relation" (rotational) of the parents' and children's right and duty could be considered, according to which it is usually more a right at first, and later a duty; this relationship "rotates" over the years.

Applying the age category of the parties, in the initial phase of the minor's growth above all the principal is the parents' obligation to contact. However, in the further phase of parents' life, together with a decrease in duty on their side, it increases on the side of an adult child and grows proportionally to the aging of parents.

As elderly people, parents have the right to expect not only help but also the physical presence of offspring. It is not an equivalent in any way, which means that for the child's obligation, the way in which the parents themselves complied with the obligation to contact him is irrelevant.

It can be assumed that this change of the right and duty takes place when the child reaches the age of majority. It is an age that is not tantamount to becoming independent (even though the legislator, without assuming this, maintains the parents' maintenance obligation towards children), but it constitutes a certain boundary of entering into adulthood. For most parents, this age means parting with a child for the period of further education, which is why, especially during this stage, the child's turnover may be noted with the entitlement to a stronger visit to his parents than before. This obligation will naturally become more intense with the age and state of health of the parents, which failure to perform constitutes a serious violation in accordance with the inheritance law.

IV. FEATURES OF THE PROCEDURE FOR THE ENFORCEMENT OF CONTACT

There is no doubt that the exercise of the right and obligation of contact, even after a final judgment of a court, must be difficult if there is a conflict between the parent with whom the child lives and the one authorized to meet. The trouble with such a situation can be understood, but not when the child's contact with the other parent is absolutely impossible. Statistically in Poland the father is still the one who usually has to "fight" to see his child. Because it is common to think that the mother knows what is best for the child, she also often expects the father to show that such contact should be granted to him. It is even worse when she agrees for sufficient – in her opinion – number of meetings or completely prevents them. Some of the judgments establishing contact with a child after divorce will

[42] T. Sokołowski [in:] *Kodeks*..., p. 660.

not be obeyed at all or it will not be possible to enforce them. The problem of how to make such contact work is discussed since the amendment of CPC from 13 August 2011[43]. Unfortunately until now the problem of interfering (usually by mothers) has not been solved.

One of the reasons is manipulating the view of the child by the parent who lives with a child, but on the other hand it is also the fault of allowing such resident parent to ignore the judgment. Since the amendment of 2011 the law guarantees solely financial sanctions for not obeying an order of the court. Earlier, the person who interfered in contact could have been punished with a fine even with possible change to arrest. Currently, such person is obliged to pay a sum of money to a person entitled to contact. What is important also a person who is entitled to contact could be required to pay this sum of money, because improper fulfilment of the obligation is the premise. In other words the financial penalty is addressed both to the parent who did not open the door of his house about the time set in the court ruling (or even did not open it), and to the one who did arrive too late or not at all.

However, improper enforcement of judgments by persons entitled to contact is statistically insignificant. Therefore, although the financial sums forcing to act in accordance with the court decision are directed to both parents, in practice they should ensure primarily the effectiveness of father's meetings with the child, and not the possibility of penalizing his lateness at the mother's request[44].

Article 598^{15} para 1 CPC indicates that if the person under whose custody the child remains does not perform or improperly performs duties arising from the decision or from a settlement concluded before the court or before the mediator in contact with the child, the court, considering the financial situation of that person, will endanger by ordering the payment of a sum of money to the person authorized to contact the child for each breach of duty. This procedure is called the first stage. If the threat of an order to pay a sum of money does not result in compliance with the court decision (or settlement) and the person is still not complying with it, the court will order payment for each breach of duty – which is the second stage of enforcing contact. According to Article 598^{16} para 1 CPC the court orders payment of the sum of money, setting its amount due to the number of violations. Article 598^{17} para 1 CPC provides the reimbursement of expenses incurred in connection with the preparation of contact with the child, including reimbursement of travel and subsistence expenses of a child or person accompanying a child, and costs of returning to a permanent residence. The reason for reimbursement is failure to perform or improper performance of obligations arising from the decision or from a settlement concluded before the court or before a mediator regarding contact with the child. The provision does not make the reimbursement of expenses solely dependent on the culpable condition, which suggests that the reimbursement request can also be justified in the case of non-culpable breach of duty.

Those proceedings relating to contact with a child can be initiated only on request as the provision excludes the possibility of court proceedings to act *ex officio*. The

[43] Ustawa z 26.05.2011 r. o zmianie ustawy – Kodeks postępowania cywilnego (Dz.U. z 2011 r. poz. 854).
[44] J. Zajączkowska, *Nietrudno pozbawić rodzica (ojca) kontaktów z dzieckiem,* „Rzeczpospolita" z 12.08.2017 r., http://www.rp.pl/Rodzina/308129994-Nietrudno-pozbawic-ojca-kontaktow-z-dzieckiem.html.

commencement of both the first and the second stage of the proceedings requires submitting the application. Before the order is issued at any stage, as regards the threat of payment of the sum of money, ordering payment of the sum of money and reimbursement of expenses, the court is obliged to listen to the participants.

Summarizing, enforcement proceedings in its amended form are not more efficient than in the previous one and penalties for noncompliance have not toughened over the years, which is the reason of the resumption of work on this problem by the Ministry of Justice[45]. The report of the Institute of Justice in 2016 showed that in about every fifth case the threat of monetary sanctions do not affect parents refusing permission to meet with minors[46]. This inefficiency might be due to the fact that it usually requires at least two hearings and at least two decisions, each of which is subject to appeal – which undoubtedly affects the duration of the proceedings until it becomes final. Bearing in mind that it commonly concerns a small child, time works to the detriment of the relationship.

Indicating the illness of a child has became one of the problems as such contact is unenforceable and it is not possible to punish for its refusal. Instead it is necessary to consider why this disease would in principle preclude the execution of court decisions on contacts.

In the case of a child who is often ill, it means that it could be necessary to regularly refuse meetings, e.g. in each subsequent month, if not more often. Meanwhile there is no obstacle for the parent to have a short meeting with the child, even sitting and holding a child's hand while he is asleep or even has a fever[47]. A child's illness or the mother's unproven assertion about it, just on the day of the contact – it is one of the ways to consistently eliminate the parent from the child's life.

In order to ensure greater exercising the right to contact one of the ideas is to make an overdue meeting. It should be considered already at the stage of establishing contacts through a clear indication that in the event of a failure of a meeting with a child on the indicated date, the entitled person will have the right to have a substitute contact on the other date. These substitute contacts are usually ordered by the courts, when there are problems with frequent cancellations of the meetings by the parent who lives with a child.

Persistent refusal by a resident parent to comply with an order resulting from the court's decision should not be neglected. It seems that the judges are reluctant to use restrictive methods other than severe financial penalty. One of the possible solutions is changing a child's residence if that is also in the child's best interest, but not solely to enforce meetings with the other parent. Other possible means to prevent the damage of relationship between parent and child is to limit the parental authority and transfer the child to foster care or related foster family. The aim is to change the way of thinking of both or one of the parents as well as to ensure the child to maintain the contact with each parent without an atmosphere of hostility.

[45] E. Świętochowska, *Ministerstwo pracuje nad problemem alienacji rodzicielskiej. Będą kary za utrudniania kontaktów z dziećmi?,* http://prawo.gazetaprawna.pl/artykuly/1105815,kara-za-utrudnianie-kontaktow-z-potomstwem.html.

[46] E. Holewińska-Łapińska, *Postępowania w sprawach o wykonywanie kontaktów z dzieckiem umorzone na podstawie art. 598[20] k.p.c.,* https://www.iws.org.pl/pliki/files/Holewińska-Łapińska%20E._Postępowania%20w%20sprawach%20o%20wykonywanie%20kontaktów%281%29.pdf.

[47] J. Zajączkowska, *Nietrudno…*

There is a possibility to initiate *ex officio* such proceedings by the judge, especially in the case of the parent's arguments about the child's unwillingness to meet. Instead such residing parent should not only not discourage a child, but even encourage him to have contact with the other parent. This is part of the proper exercise of parental authority.

This kind of sanction, especially after unsuccessful attempts to punish with a compulsory sum, seems to be a much more effective solution protecting the child's welfare. It is justified by indicating that preventing the child from conta-cting the closest ones obviously fulfils the premise of the threat to the child's welfare (Article 109 FGC). The behaviour of a parent who does not allow creation, and even worse, the continuation of the relationship between the other parent and a child is in itself a failure to exercise parental authority. Therefore, the persistent obstruction of contact, for example, with father and child by deliberately thwar-ting meetings is nothing other than fulfilling the statutory premise of endangering the child's welfare by the mother. Sometimes the doctrine goes further proposing consideration in extreme cases of the premise of Article 111 para 1 FGC, which is the abuse of parental authority allowing to change the child's place of residence by establishing it with the other parent[48].

It should be pointed out that the child's best interests should be understood as a situation that assumes that this child is brought up in a family in an atmosphere of love, in conditions that ensure his needs and personal development. It does not require in-depth deduction to say that the intentional hindering of parental contacts such a child's welfare violates.

Abstract

Joanna Zajączkowska, ***Legal aspects of parent – child contact problems in Poland***

The article presents an analysis of provisions concerning contacts with children, which are relatively new regulation in Polish family law. The first part of article describes the most important legal aspects. The theoretical considerations are an attempt to determine the legal nature of contacts, showing that they are primarily of a family law nature, despite the right and obligation introduced by the legislator. This construction, despite the fact that it may seem as approaching the contractual nature, is essentially a family-legal relationship; the sanction and the claim related to the right of contact are also of this nature. Moreover, the parent-child contact has a natural legal character, resulting from the parental and personal relationship. In addition, the most important postulates indicate the introduction to the Polish family law the missing suspension of contacts, which have a neutral character. The third part of the article presents the most important problems related to exercising the right to contact and proposals to overcome them on the basis of existing provisions, which makes the considerations also practical for maintaining contact with the child.

Keywords: *parent-child contact, divorce, the right to contact, the duty of contact, contact obligation, parental responsibility, parental authority, enforcement of contact, exercise of right and obligation of contact, interfering in contact*

[48] M. Andrzejewski, *Relacja rodzice i inne osoby dorosłe a dzieci w świetle nowych przepisów kodeksu rodzinnego i opiekuńczego i niektórych innych ustaw (wybrane problemy)*, „Acta Iuris Stetinensis" 2014, No. 821, p. 391.

Streszczenie

Joanna Zajączkowska, *Kontakty rodziców i dzieci w polskim prawie*

Artykuł przedstawia analizę instytucji kontaktów z dzieckiem, będącą stosunkowo nową regulacją w prawie rodzinnym. W pierwszej części następuje prezentacja najważniejszych aspektów prawnych instytucji. Rozważania teoretycznoprawne stanowią próbę określenia charakteru prawnego kontaktów, wykazując, że mają one przede wszystkim charakter rodzinnoprawny, pomimo nadanego przez ustawodawcę kształtu prawa i obowiązku. Konstrukcja ta pomimo, że wydawać by się mogło, iż zbliża się do stosunku zobowiązaniowego pozostaje w gruncie rzeczy stosunkiem o charakterze rodzinnoprawnym, taki też charakter ma sankcja oraz roszczenie związane z prawem do kontaktu. Instytucja ta ma ponadto charakter naturalnoprawny, wynikający z więzi rodzicielskiej, a także osobisty. Ponadto wśród najistotniejszych postulatów wskazano na słuszność przyjęcia w polskim prawie rodzinnym brakującej instytucji zawieszenia kontaktów, mającej charakter neutralny. W trzeciej części artykułu przedstawione zostały najistotniejsze problemy dotyczące wykonywania kontaktów z dziećmi oraz propozycje ich przezwyciężenia na gruncie istniejących przepisów, co sprawia, że rozważania mają również znaczenie praktyczne dla utrzymywania kontaktów z dzieckiem.

Słowa kluczowe: *kontakty z dzieckiem, rozwód, prawo do kontaktu, obowiązek kontaktu, władza rodzicielska, utrudnianie kontaktów, wykonywanie kontaktów, egzekucja kontaktów*

PRAWO W DZIAŁANIU
LAW IN ACTION
32/2017

Justyna Włodarczyk-Madejska*

Efficiency of consultative teams of court experts

1. INTRODUCTION

This article constitutes a summary of analyses carried out by the Institute of Justice under the project entitled 'The effectiveness of consultative teams of court experts'. The aim of the project was to compare the work of diagnostic teams (consultative teams of court experts and family diagnostic-consultative centres further referred to as: CTCE and FDCC) in the year 2016 with their work in the preceding years, in terms, among others, of the number of opinions made, the category of cases in which opinions were made as well as the time taken to prepare the opinions. A number of research methods were used: historic and theoretical analysis, analysis of provisions regulating the functioning of family diagnostic-consultative centres and consultative teams of court experts, statistical analysis, court files studies and discussion of the results of the qualitative studies.

2. IMPORTANCE OF DIAGNOSTIC EXAMINATIONS IN JUVENILES AND FAMILIES CASES

The importance of the diagnostic process as well as the opinion prepared on its basis for court cases and adjudications made has been repeatedly referred to in literature[1]. What seems to be essential were the actions the implementation of which would affect a particular person, especially a juvenile. It has been emphasized that it is the educational needs of the juvenile to whom the measure is applied, along with educational and psycho-social considerations, that should be the sole determinant of the choice of an adequate educational measure. Consequently, particular attention has been given to the individualization of decisions in this regard[2]. The diagnostic data of the juvenile, including mainly the opinion of the family diagnostic-consultative centre, have been deemed

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1 Comp. *in. al.* A. Sokołowska, *Psychologiczna ekspertyza sądowa w sprawach dzieci i młodzieży,* Warszawa 1977, p. 16; S. Nieuciński, *Psychologiczna diagnoza a ekspertyza psychologiczna dla potrzeb sądu. Analiza makrostrukturalna* [in:] *Diagnoza psychologiczna rozpoznawana przez sądy rodzinne. Materiały na sympozjum*, Kraków 1985, p. 139; M. Kalinowski, *Europejskie systemy resocjalizacji nieletnich*, Warszawa, p. 11; Report of the Department of Juvenile Affairs of the Ministry of Justice entitled: *Kierunki działalności sądownictwa dla nieletnich* of April 1975, after: M. Lipka *Zjawiska patologii społecznej wśród młodzieży. Studium prawno-kryminologiczne*, Warszawa 1977, p. 291.

2 Comp. *in. al.* M.H. Veillard-Cybulsky, *Nieletni przestępcy w świecie,* Warszawa 1968, pp. 140–141; J.M. Stanik, *Współpraca psychiatryczno-psychologiczna w ekspertyzach sądowych* [in:] *Problemy psychologiczno-psychiatryczne w procesie karnym*, J.M. Stanik (ed.), Katowice 1985, p. 16.

of utmost significance to the court[3]. The psychological diagnosis prepared has been identified with both the knowledge and the explanation of the undertaken actions[4]. This diagnosis is still used in the preparation of a programme of measures to be undertaken, the aim of which is to change the behaviour of the individual[5]. It constitutes the basis for social rehabilitation, that is for further work with a given person[6]. It is thus right to underline the dependence between the validity of the diagnosis made and adequate adjustment of the impact model. This dependence is positive which means that the likelihood of formulating adequate behaviour-modifying recommendations is higher in the case of a valid diagnostic process[7]. However, this is a difficult and responsible task. The examining person refers to the adopted norm and thus to an ideal standard. It is, however, questionable whether the ideal standard adopted by the diagnostician equates the actual ideal standard[8]. What is indicated as a criterion allowing to ensure a correct course of the diagnostic process is observance of an organizing principle setting the goal which the prepared opinion should serve[9]. Literature provides a variety of classifications of the goal of the diagnosis[10]. Experience and length of work of the examining person certainly affect the course of the diagnostic process. It is pointed out that the education of an expert is a long-term process[11]. In spite of the fact that diagnostic opinions have been used in juvenile cases much longer (since the 20s of the 20th century) than in family and care cases (1978)[12], the opinions prepared in the latter are also evaluated as helpful[13], extensive, well-organized[14] and reliable[15]. The conclusions they contain are considered essential for the decisions made by the court[16].

3. DEVELOPMENT OF DIAGNOSTIC CENTRES IN POLAND

The beginnings of the development of diagnostic centres in Poland go back to the 20s and 30s of the 20th century[17]. At that time, biological-criminal examinations[18] (prototypes

[3] A. Rosiak, *Sprawy karne nieletnich* [in:] *Polskie sądy rodzinne w świetle badań empirycznych*, A. Strzembosz (ed.), Warszawa 1983, p. 113.
[4] K. Ostrowska, E. Milewska, *Diagnozowanie psychologiczne w kryminologii. Przewodnik metodyczny*, Warszawa 1986, p. 10.
[5] K. Ostrowska, E. Milewska, *Diagnozowanie…*, comp. also: S. Gerstmann, *Użyteczność badań psychologicznych dla kryminologii* [in:] *Studia kryminologiczne, kryminalistyczne i penitencjarne*, Warszawa 1978, Vol. 8, pp. 97–98.
[6] K. Ostrowska, E. Milewska, *Diagnozowanie…*, p. 21.
[7] K. Ostrowska, E. Milewska, *Diagnozowanie...,* p. 10.
[8] K. Ostrowska, E. Milewska, *Diagnozowanie…*, p. 13.
[9] K. Ostrowska, E. Milewska, *Diagnozowanie…*, pp. 13–14.
[10] Comp. *in. al.* W. Sanocki, *Koncepcja normy psychologicznej w psychologii klinicznej,* Gdańsk 1978, pp. 84–85, after: K. Ostrowska, E. Milewska, *Diagnozowanie...*, p.14.
[11] A. Sokołowska, *Psychologiczna ekspertyza sądowa w sprawach dzieci i młodzieży,* Warszawa 1977, p. 42.
[12] Comp. *in. al.* A. Czerederecka, *Kompetencje biegłego psychologa w odniesieniu do spraw rodzinnych i opiekuńczych* [in:] *Standardy opiniowania psychologicznego w sprawach rodzinnych i opiekuńczych*, A. Czerederecka (ed.), Kraków 2016, p. 33.
[13] Comp. *in. al.* literature quoted in this study.
[14] W. Stojanowska, S. Nieciuński, *Analiza niektórych elementów psychologicznej ekspertyzy w sprawach rozwodowych* [in:] *Diagnoza*..., pp. 197–198; J. Słyk, *Opinia prawna dotycząca projektu ustawy o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw* (print No. 3058), pp. 3–4.
[15] P. Ostaszewski, *Opinia rodzinnego ośrodka diagnostyczno-konsultacyjnego w sprawach o ustalenie kontaktów dziecka z innymi osobami niż rodzice*, „Prawo w działaniu. Sprawy cywilne" 2008, No. 4, pp. 196, 209–210.
[16] P. Ostaszewski, *Opinie sporządzone przez rodzinne ośrodki diagnostyczno-konsultacyjne w sprawach opiekuńczych i rozwodowych,* „Prawo w działaniu. Sprawy cywilne" 2013, No. 14, pp. 20–21.
[17] Comp. also: L. Tyszkiewicz, *Badania osobopoznawcze w procesie karnym,* Warszawa 1975; K. Ostrowska, *Teoretyczne przesłanki diagnozowania psychologicznego w kryminologii* [w:] *Diagnoza*..., p. 170.
[18] The first individual examinations, performed within the framework of a sciences called 'criminal biology' (see: A. Sokołowska, *Psychologiczna...,* p. 18).

of later diagnostic examinations) were supposed to provide exhaustive data on the profile of the offender. The profile could not, however, be limited to merely pointing to features without attempting to determine their genesis. The features had to be studied in the context of the environment in which the offender was brought up. It can thus be said that apart from the psychological and medical aspect, biologic and criminal examinations were also supposed to include the sociological aspect[19]. The importance of the latter was recognized mainly in juvenile cases[20]. The first institutions involved in conducting and interpreting observations included: 'detention centres' and therapeutic-pedagogical wards established in psychiatric clinics. The former constituted a prototype of later emergency youth centres as well as juvenile detention centres[21]. It can thus be said that the diagnostic facilities available to the court were rather poorly developed. A change in this area was dictated by the fact that the development of individual studies of children being subject to legal proceedings coincided with the evolution of opinions on the causes of delinquency. The opinions can be divided into two main groups: constitutional-pathological and socio-educational. The former sought the source of the delinquent behaviour in the disturbances of the psyche of the offender while the latter focused on the neglect found in the environment where the up-bringing process had place. With the development of research, new institutions came to be established to take up the task. They were service-rendering medical-pedagogical outpatient clinics which cooperated with courts. The first of them – the Friends of Children Association Clinic – began to operate in Poland in 1924[22]. The Clinic rendered also counselling services in the field of educational problems. The following, Pedagogical Clinic was established in Warsaw in 1932. This clinic rendered services solely to the court for juvenile delinquents[23]. The outbreak of The Second World War had a clearly negative impact on the development of psychological research – in this context, the 40s are described as a period of stagnation. There is no doubt that the war conditions made it difficult to take up studies aimed at the development of general studies, modification of the method or the concept of service-oriented activities. The diagnostic work was limited to current educational and pedagogic actions. And though cooperation was still talked about, it should be said that it was continued whenever and wherever possible, only with some courts[24]. The situation had changed in mid-20th century. The initiated development of the juvenile diagnostics concerned both the substantive and the organizational level[25]. Due the high juvenile delinquency rate and threat of demoralization, the significance of psychological research for criminology became a subject of scientific discourse[26]. In the 60s of the 20th century, the first institutions dealing with diagnostic studies began to appear by youth corrective centres and juvenile detention centres[27]. In 1967, the first diagnostic-selection centres were

[19] S. Batawia, *Kwestionariusz biologiczno-kryminalny (draft outline),* „Archiwum Kryminologii" 1934, Vol. 1, p. 172.
[20] A. Sokołowska, *Psychologiczna...,* pp. 12, 19; S. Gerstmann, *Użyteczność...,* pp. 8–10; M.J. Stanik, *Asocjalność nieletnich przestępców jako przedmiot psychologicznej diagnozy klinicznej,* Warszawa 1980, pp. 3–5.
[21] A. Sokołowska, *Psychologiczna...,* p. 22.
[22] A. Sokołowska, *Psychologiczna...,* pp. 23–24.
[23] A. Sokołowska, *Psychologiczna...,* p. 24.
[24] A. Sokołowska, *Psychologiczna...,* p. 25.
[25] A. Sokołowska, *Psychologiczna...,* p. 26.
[26] S. Gerstmann, *Użyteczność...,* p. 7.
[27] Reasons of Judgment, Constitutional Tribunal, U 6/13, p. 5, comp. also: E. Holewińska-Łapińska, *Opinion on the need for a change to the legal state regulating Family Diagnostic-Consultative Centers,* Warszawa 2014, p. 2.

set up, in total 18 of them[28]. The centres were to conduct, commissioned by a court or a prosecutor, psychological, pedagogic, medical and environmental studies. The aim of the that centres was to collect detailed information about not only the juvenile and the juvenile's family but also about their immediate environment. The information was to facilitate not solely correct adjudication but the organization of the social rehabilitation work[29]. This was possible by examining the current situation and preparing a criminological prognosis. The last of them was deemed indispensible to the choice of appropriate measures of social rehabilitation[30]. The functioning and the organization of diagnostic-selection centres was specified in the ordinance of the Minister of Justice of 10 September 1974[31]. In accordance with the ordinance, the centres constituted an organization unit of a juvenile facility by which it was established[32]. The centres were closed by virtue of the ordinance of the Minister of Justice in 1978. In the same year, family diagnostic-consultative centres were created to replace them[33]. Apart from the change of the name, the competences of the centres were broadened. In addition to performing researches (which diagnostic-selection centres also dealt with) and preparing opinions on juvenile delinquents on their basis, they were entrusted with the task of preparing opinions in care and divorce cases, and thus cases which concerned not only juveniles but also their parents/legal guardians[34]. The tasks of the diagnostic-consultative centres included also: 1) providing family counselling, ensuring specialist care of the minor; 2) rendering assistance in the field of psychological and pedagogic care to juvenile detention centres and juvenile centres; 3) cooperating with institutions as well as social organizations which dealt with the protection and strengthening of the family, prevention of children and youth demoralization[35]. Only in 1978, 20 additional centres were established and thus at the end of 1978 there were already 40 family diagnostic-consultative centres operating in Poland[36]. The need to expand the diagnostic background facilities can be explained by development of family courts in Poland[37]. Since the moment of the establishment of family courts, family diagnostic-consultative centres were treated as subsidiary bodies[38]. Till 2016, their functioning was governed by the ordinance of the Minister of Justice of 26 April 2001. In accordance with it, the task of the diagnostic centres was to specify in the prepared opinions: the causes and degree of demoralization, the proposed

[28] M. Lipka, *Zjawiska patologii społecznej wśród młodzieży. Studium prawno-kryminologiczne,* Warszawa 1977, p. 288; A. Walczak-Zochowska, *Systemy postępowania z nieletnimi w państwach europejskich, Studium prawno-porównawcze,* Warszawa 1988, pp. 158–159.
[29] M. Lipka, *Zjawiska*..., p. 288; A. Walczak-Zochowska, *Systemy*…, pp. 158–159.
[30] A. Sokołowska, *Psychologiczna*..., p. 29.
[31] Ordinance of the Minister of Justice of 10 September 1974 on the organization and scope of action of diagnostic centers for juveniles (Journal of the Ministry of Justice No. 8, Item 44).
[32] E. Holewińska-Łapińska, *Opinia*..., p. 2.
[33] A. Walczak-Żochowska, *Systemy*..., p. 156; A. Strzembosz, *Wyniki analizy danych statystycznych* [in:] *Polskie sądy rodzinne w świetle badań empirycznych*, A. Strzembosz (ed.), Warszawa 1983, p. 17.
[34] P. Ostaszewski, *Opinia*..., p. 183.
[35] A. Walczak-Żochowska, *Systemy*..., pp. 158–159; comp. also: A. Grodzki, *Dwugłos w ośrodkach diagnostycznych,* „Gazeta Prawnicza" 1982, No. 4(430), p. 9, after: A. Walczak-Żochowska, *Systemy*..., p. 159.
[36] Introduction to: *Polskie sądy rodzinne w świetle badań empirycznych*, A. Strzembosz (ed.), Warszawa 1983, p. 5.
[37] H. Włodarczyk, M. Kościelniak, *Próba krytycznej analizy psychologicznych ekspertyz w sprawach opiekuńczych i karnych nieletnich* [in:] *Diagnoza*..., p. 215.
[38] E. Holewińska-Łapińska, *Opinia*..., p. 2.

measures to be applied and recommendations as to their implementation[39]. Where a diagnostic team found it justified to place a juvenile in an educational institution or in a youth corrective centre, they specified its type[40].

4. ORGANIZATIONAL AND LEGAL CHANGES TO THE FUNCTIONING OF DIAGNOSTIC CENTRES

As of 1st January 2016, by virtue of the law of 5th August 2015, family diagnostic-consultative centres were transformed into consultative teams of court experts. The law introduced numerous changes to the ordinance hitherto in force. Apart from the new name, also the conditions and form of work rendered by the institution changed. Employees of the consultative teams were placed within the court structures ('in district courts' and not as until then 'by district courts'). This means that as court employees they were excluded from the law – Teacher's Charter[41]. This entailed a decrease in the vacation time from 35 to 26 days as well as a creation of an institution called 'an expert on a full-time contract'. Also, the law abolished steps of professional promotion producing an adverse effect on the financial aspects of employment as well as introduced a new system of staff recruitment. The time of waiting for an opinion in family and care cases was shortened from 30 to 14 days, with a simultaneous abolishment of the annual limit of opinions issued. In accordance with the new regulation, specialists from the CTCEs could be asked to conduct mediation and an environmental enquiry. The scope of duties of consultative teams of court experts was specified in Article 1[42]. Their tasks include: 1) preparing opinions on family and care as well as juvenile cases; 2) conducting mediations; 3) conducting environmental enquiries in juvenile cases; 4) providing specialist counselling for minors and juveniles as well as their families. These tasks are performed following an instruction given by a court or a prosecutor. The opinions are based on psychological, pedagogic or medical examinations conducted. Unlike before, the team members were more precisely specified. They include specialists in the field of psychology, pedagogy, paediatrics, family medicine, internal diseases, psychiatry as well as paediatric and juvenile psychiatry[43].

The executive act to the law is the ordinance of 1st January 2016 on determining standards of the opinion-preparation methodology in consultative teams of court experts issued by the Minister of Justice[44]. The changes were justified in terms of a desire to ensure care for both the people covered by the examination (in a way which would ensure their more conscious participation) and the specialists responsible for their course[45]. The ordinance specified: 1) rules of procedure

[39] H. Włodarczyk, M. Kościelniak, *Próba*..., p. 218; comp. also: Official Journal of the Ministry of Justice No. 43, Item 14.
[40] M. Kalinowski, *Europejskie*..., p. 160.
[41] Law of 26 January 1982 Teacher's Charter (i.e. Journal of Laws of 2017, Item 1189 with amendments).
[42] Law of 5 August 2015 on consultative teams of court specialists (Journal of Laws Item 1418).
[43] Article 2 of the Law of 5 August 2015 on consultative teams of court specialists.
[44] Ordinance of the Minister of Justice of 1st February 2016 on determining standards of the opinion-preparation methodology in consultative teams of court experts (Official Journal of the Ministry of Justice of 2016, Item 76).
[45] H. Domagała, M. Zamiela-Kamińska, *Standardy opiniowania w opiniodawczych zespołach sądowych specjalistów* [in:] *Standardy*..., p. 305.

to be followed by the head of the team and the specialists; 2) the procedure of the examination and the opinion-preparation methodology (as the guarantee of the correct execution of the instructions, in particular, the protection of minors and juveniles as well as the compliance of the applied examination methods and techniques with current knowledge in the field of psychology, pedagogy and medical sciences); 3) stages of the diagnostic process; 4) rules of procedure in special cases; 5) requirements concerning the diagnostic process; 6) the template of an opinion in family, guardianship and juvenile cases[46].

5. EFFECTS OF THE ORGANIZATIONAL AND LEGAL CHANGES. CONCLUSIONS FROM THE CONDUCTED RESEARCH

Several research methods needed to be used to analyse whether the implemented changes had an impact on the actual functioning of diagnostic centres. This article required the application of statistical analysis, court files studies and discussion of the results of the qualitative studies.

Statistical analysis

The analysis was performed on the basis of the statistical data of the Ministry of Justice concerning the functioning of diagnostic centres (FDCC and CTCE) in the years 2007–2016. The following variables were included: 1) number of opinions made, including the annual load per one employee; 2) number of people employed; 3) duration of opinion-preparation; 4) category of cases in which the opinions were made.

Consultative teams of court experts

In 2016, there were 67 consultative teams of court experts. The teams employed 714 people who issued in 2016 a total of 19 708 opinions (which constitutes 59% of the opinion instructions received). The limits of full-time jobs were: 542.69 for specialists (including 344.88 for psychologists, 167.0 for pedagogues, 28.06 for psychiatrists, 2.75 for others) as well as 102.38 for court employees. A diagnostic team consists of at least two specialists, as a rule, two psychologists or a psychologist and a pedagogue[47]. Once the total number of opinions issued in 2016 and the full--time jobs limit for specialists in psychology and pedagogy were taken into account, it was possible to calculate the mean number of opinions issued per one full-time job. In 2016, it was 77. The centres provided a lot of information in writing, including: information addressed to commissioning-bodies or other units with respect to the results of the examination or the provided counselling (1 266), mediation (2 498) as well as supplementary opinions (303). In 1216 cases it was necessary to set more than one date for the examination (in 2015 this happened 719 times).

[46] Comp. para 2 of the ordinance of the Minister of Justice of 1st February 2016 on determining standards of opinion-making methodology in consultative teams of court experts.
[47] P. Ostaszewski, *Opinia*..., pp. 8–9.

The number of opinions issued varies between categories of cases. The highest, over 50% of the opinions, was issued in care cases. Opinions issued in juvenile cases accounted for 28.8% of the total while those in divorce cases – 19.7%. The teams issued 87 opinions in separation cases, 25 in other family (civil) cases and 6 in penal cases. In total, all the teams examined 59 938 people, adults accounting for 55% of them, minors for 35.5% and juveniles for 9.4%. A doctor participated in 3 612 examinations (i.e. 18.3% of opinions), 2 831 (14.3% of cases) of them being attended by a psychiatrist. The time which the commissioning body waited for an opinion, defined as the difference between the date of the receipt of a case by the centre and the date of the sending of the opinion, amounted, most frequently because for every third opinion, to over 120 days. In every fourth case, it oscillated between 31 and 60 days and in every fifth case: 61–90 days. 16.4% of the opinions were sent within 91 to 120 days counting from the moment of the receipt of the case by the centre. Entirely different conclusions can be drawn on the basis of the analysis of the time of waiting for the opinion by the commissioning body counted from the date of the termination of the examination to the date of dispatch of the opinion (definitely closer to the legal regulation). The majority of opinions (85.2%) were sent to the court within 14 days from the date of the termination of the examination while in 12% within 15 to 30 days. In total, the preparation of 448 opinions (i.e. 2.2%) exceeded the 30-day limit and only 69 (i.e. 0.3%) of them were sent more than 60 days from the termination of the examination. There were no cases in the 'over 120 days' category.

Family diagnostic-consultative centres

In 2007, family diagnostic-consultative centres employed 648 pedagogic staff. Already in the following year, there was a significant growth of them to 673. This level persisted, with slight changes, till 2014. In 2015, the number of employees dropped to 660. In 2015, the centres employed 60 psychiatrists. In the same year, the number of full-time positions amounted to 521.3 for pedagogic staff (pedagogues and psychologists) and doctors (psychiatrists and others). In the years 2007–2015 the number of cases lodged with family diagnostic-consultative centres increased (by 3 258, i.e. 12.5%). The growth remained steady till 2013. The two following years witnessed a decline by 888 cases in 2014 and 87 cases in 2015. In spite of a largely unchanged number of people employed the number of opinions issued increased by 1 446, i.e. by 6.6%, the growth in this respect concerning only guardianship and divorce cases (by 2 900 and 125 opinions, respectively). The number of opinions issued in the remaining categories of cases decreased (by 1 234 in juvenile cases, by 144 in separation cases, by 189 in other civil cases and by 12 in penal cases). The number of opinions issued per one full-time job remained practically steady: 95–97 in the years 2009–2013 and 92–93 in the years 2014–2015. Simultaneously, what increased over the analyzed 9 years was the number of cases examined (by 5 615, i.e. 6.6%), the increase concerning only minors and adults, not juveniles). Also, the number of doctors involved in preparing opinions went up by 2 824, i.e. almost 30%. In the years 2007–2015, the time of waiting for an opinion, defined as the difference between the date of receipt of a request

by a centre and the date of sending the opinion, usually exceeded 30 days. From 2009, an average of 65% of opinions were sent after more than 60 days. Only in rare cases were opinions prepared and sent within 14 days (2%) and 15 to 30 days (7.5%). The time of waiting for an opinion, calculated as the difference between the date of finishing an examination and the date of its being sent back to the ordering body, was definitely shorter. For almost 57% of cases it did not exceed 14 days while in 42% – 30 days. A waiting period of 30 to 60 days was recorded on average in 1.3% and of over 60 days in 0.1% of cases.

Differences in the functioning of diagnostic teams in 2015 and 2016

The year 2015 (the last year of the functioning of the FDCCs) and the year 2016 (the first year of the functioning of the CTCEs) were chosen to analyse the impact of the change of the legal regulation on the actual, statistics-revealed, functioning of the CTCEs. The following differences were observed:

1) While the full-time jobs limits did not change significantly (a decline of 0.99), the actual level of employment decreased – the difference between the numbers of full-time jobs amounted to 78. In 2016, diagnostic teams employed 37 psychologists, 20 pedagogues and 18 psychiatrist less.
2) The number of incoming cases increased by 4 002. At the same time the percentage of cases settled declined. In 2016, 889 (i.e. 5%) more cases than in the previous year remained to be settled. This seems to indicate a decline in efficiency. The decline can result from the very process of change or from a systemic deterioration in the functioning of the CTCEs due to the changes implemented. If the decrease in efficiency is dictated by the process of change as such, it can be supposed that the efficiency of work of the teams will increase in subsequent years. If, on the other hand, the change contributed to a deterioration in the work of the teams, it seems reasonable to assume that their efficiency will increase only in case the number of people employed in the CTCEs goes up.
3) In 2016, the CTCEs issued 3 779 opinions less, including 1 310 opinions less in juvenile cases, 1 461 in care cases, 910 in divorce cases, 37 in separation cases, 6 in other cases and 55 in penal cases.
4) The number of opinions per one full-time job decreased by 15.
5) In 2016, diagnostic teams examined 10 453 people less, in particular, adults (a difference of 5 778).
6) The number of opinions issued with the participation of doctors declined – a drop of 3 017, i.e. almost 45%. In 2016, a psychiatrist participated in the issuance of 2 831 opinions, i.e. 2 238 less than in the year 2015 (44 p.p.), a paediatrician in 780, i.e. 653 less (almost 46 p.p.) than the year before.
7) A comparison of the time needed to prepare an opinion (calculated from the end of the examination to the moment of the sending of the opinion) and the waiting time for an opinion (defined as the difference between the date of the receipt of a case by a centre and the date of the sending of the opinion to court) should be compared with the total number of opinions issued both in 2015 and 2016. While in 2015 opinions were

Table
Changes in the functioning of diagnostic teams in the years 2015–2016

		2015	2016	2016/2015
Limits of full-time jobs		543.68	542.69	-0.99
Full-time jobs staffed	total	521.3	443.3	-78
	psychologists	327	290.31	-36.69
	pedagogues	165.3	145.31	-19.99
	psychiatry	24.75	6,75	-18
	others	4.25	0.93	-3.32
inflow of cases		29 394	33 396	4 002
cases waiting for the preparation of an opinion		6 050	8 161	-889
cases (%)		20.6	15.5	-5.1
opinions issued		23 487	19 708	-3 779
number of opinions per one full-time job		92	77	-15
people examined		70 391	59 938	-10 453
participation of doctors		6 629	3 612	-3 017
time of preparing an opinion (from the completion of examinations to the sending of the opinion)	up to 14 days	11 819 50.3%	16 875 85.6%	5 056 35.3 pp
	15 to 30 days	11 345 48.3%	2 385 12.1%	-8960 -36.2 pp
	31 to 60 days	313 1.3%	379 1.9%	66 0.6 pp
	over 60 days	10 0.1%	69 0.4%	59 0.3 pp
Time of waiting by the court for an opinion (from the receipt of the request by the centre to the sending of the opinion)	up to 14 days	367 1.6%	322 1.6%	-45 0.1 pp
	15 to 30 days	1 138 4.8%	1 310 6.6%	172 1.8 pp
	31 to 60 days	5 747 24.5%	4 720 23.9%	-1 027 -0.5 pp
	over 60 days	5 984 25.5%	4 049 20.5%	-1 935 -4.9 pp
	over 90 days	4 653 19.8%	3 244 16.5%	-1 409 -3.4 pp
	over 120 days	5 598 23.8%	6 063 30.8%	465 6.9 pp

Source: own study.

prepared mainly within two time intervals: 'up to 14 days' and '15 to 30 days' (50.3% and 48.3%, respectively), in 2016, the teams sent opinions within 14 days from the completion of the examination (i.e. 85.6%), which might result from the change of the legal regulation consisting in the shortening of the time of issuing opinions in family and care cases (from 30 to 14 days). In the two compared years there were instances

when opinions took more time to be prepared – over 30 or even over 60 days. In the category of 'time of waiting for the preparation of an opinion' it is worthwhile to point to two differences. Firstly, the percentage of opinions in which this time amounted to 31 to 120 days (a total of 8.8 p.p.) decreased and secondly, the time of waiting increased in the category of 'over 120 days' (6.9 p.p.). Given the above, it can be said that the diagnostic teams implement the provisions of the law on the CTCEs as regards the time of preparing an opinion. At the same time, the number of cases in which the time of waiting for an opinion was longer than 120 days (465 cases more, a difference of 6.9 p.p. in relation to 2015). This can mean that in these cases the time of waiting for the examination was longer which, in view of an increased number of cases coming to the CTCEs, can result from a lower number of people actually employed.

8) Improvement of the speed of preparing opinions coincided with a drop in the total number of opinions prepared and the number of opinions per one employee.

Results of the examination of court files study

The examination of court files study covered 74 diagnostic opinions enclosed to 474 cases for establishing contacts between children and people other than their parents. The cases studied were initiated in the years 2012–2016 and completed before the court of the first instance in the years 2014–2017. The opinions were prepared only in 6.5%[48] of the cases studied, in only three of them there was more than one. The questions posed to the diagnostic team in the decision to admit this evidence emphasize the importance of this opinion to the court. The most frequently asked questions included a question about emotional ties between the applicant/applicants and minors (55 decisions, i.e. 74.3%) as well as a request for a suggestion what settlement might be best in a given case (46, i.e. 62.2%). Only in as few as 28 (37.8%) of decisions on admitting evidence from an opinion did the court appeal to the diagnostic team with a request to say whether contacts or their establishment would be advisable. 12 of them (i.e. 16%) contained a request for an evaluation of the educational capacity of the applicant/applicants, and 9 (12%) of the advisability of a specific (described) settlement. As rarely as in every tenth case, the adjudicating court was interested, among others, in the state of health (physical and mental) of the minor, evaluation of the educational capacity and characteristics of the family environment of the minor or the personality of the applicant/applicants.

An analysis of the elements comprised in the opinions made reveals a varying extent of the answers given by the diagnostic team to the questions posed by the court. What seemed to appear most frequently in the opinions were: information on the applied methods of examination (72 opinions, i.e. 97.3%), characteristic of the family environment of the minor (66, i.e. 89.2%), characteristic of the

[48] Comp. the findings of P. Ostaszewski, *Opinia*..., p. 180. In the studies carried out diagnostic opinions were prepared in 1/3 (i.e. 85) of cases.

personality of the minor (51, i.e. 68.9%), characteristic of the personality of the applicant/applicants (51, i.e. 68.9%). In spite of the fact that the interest of the court in the above was relatively low, the opinion template in force required that this information be included[49].

Nearly 80% of the opinions were found to provide complete answers to the court-posed questions (63% of them contained additional findings). 12 opinions (i.e. 16.3%) were incomplete, 11 of them containing additional information (extending beyond the court-asked questions). One opinion was deemed satisfactory given the imprecise questions asked by the court, one also as complete but not satisfying due to the limited set of examination tools used and more specific (instructive) court expectations[50]. An 'incomplete' opinion also appeared in the examined sample. Due to the failure to present by the father and the child, the opinion was prepared on the basis of the examination of the grandmother (the applicant)[51].

The opinions were prepared mainly with the use of two examination methods (83.8%). Five of them were based on one method (analysis of files[52]) while seven on three methods. The most frequently used methods included: an analysis of files (in all cases) and a psychological or psychological-pedagogical examination (89.2%). Sporadically, a psychiatric examination (5.4%) and an examination by another doctor (2.7%) were performed. In five cases, a consultation was held with another institution or other documents were used.

Most frequently, the diagnostic teams used from three to six examination techniques (in total 91.9% of all, 60% of them applied four to five techniques)[53]. In one opinion, the diagnostic team used only one technique – conversation/diagnostic conversation/clinical interview. This technique was applied in a total of 95.9% of the opinions. Observation was another technique most frequently found to constitute grounds for an opinion issued (87.8%)[54]. In over 60% of cases the team made use of tests of family relations/interpersonal relations/emotional ties as well as personality tests/questionnaires while in almost every second of projection tests.

As a rule, the total number of the persons examined ranged from three to five (31.1%, 40.5%, 23.0%, respectively). The most frequently examined people were: a child/children (98.6%), a mother or a woman being the child's guardian – 81.1% and the applicant – 94.6%. In approximately every second case, the examination also included the child's father or the man being the child's guardian as well as the applicant. In the majority of cases (86.5%), the opinion was prepared on the basis of a single examination. In 10 cases, two examinations were performed.

[49] Template No. 2 to the ordinance of the Minister of Justice of 1st February 2016 on the determination of methodology standards for opinions in consultative teams of court experts (Official Journal of the Ministry of Justice of 2016, Item 76).

[50] The examination used: diagnostic interview/clinical interview, observation and personality tests/questionnaires.

[51] Another opinion in the case was prepared on the basis of the examination of the father and the child (Opinion No. 66).

[52] In one case, an 'information talk' was conducted with a child's mother, the mother was not indicated as a person to be examined (Opinion No. 9).

[53] In P. Ostaszewski's study, the opinion-preparing team made use of 2 to 12 techniques, the mean and median were 5. (see: P. Ostaszewski, *Opinia*..., p. 204).

[54] P. Ostaszewski, *Opinia*…, pp. 202–204. The author explains that the fact that an opinion does not contain information on an interview and observation carried out does not mean that they were not used. On the contrary, in the opinion of the author, this conversation and observation in its course must have had place if an examination was performed.

Almost 95% of the opinions issued contained recommendations with respect to contacts. The majority of them, i.e. 80% concerned their determination (in 44.6% the contacts were specified in more detail). In seven cases, the team recommended that contacts not be established.

The average time of waiting for the date of the examination was over three months (98 days). A half of the examinations were performed not later than on the 84th day from the moment a decision was made in this respect. Only 9 examinations (i.e. 12.2%) were carried out within 30 days from the date of the decision. Most frequently, in every third case, the examination had place between the 61st and the 90th day. Equally frequently, i.e. in 23% of cases, the time exceeded 120 days. The time of the preparation of an opinion from the moment of the completion of the examination averaged 21.7 days, with half of the opinions having been prepared within 14 days. In the examined sample, there was a case when the opinion was prepared within one day as well as a case when the team needed for its preparation as many as 315 days. At least a half of the opinions was prepared within the tine specified in the law on the CTCEs. Every third opinion was made between the 15th and the 30th day from the completion of the examination. Only in sporadic cases, the opinion was delivered after a lapse of more than 30 days (in total, 10 cases, i.e. 13.6%). The mean real time of waiting for a diagnostic opinion amounted to 124.9 days (median – 108 days). This very high mean results no doubt from a fairly significant difference between the shortest (29 days) and the longest (500 days)[55] time of waiting for this piece of evidence. As a rule, the waiting time exceeds two (18.9%), three (24.3%) or even four (27.0%) months. In 10 cases, the court waited for the opinion-based evidence for over half a year while in one case – over a year.

It is worthwhile to compare the findings of the present study with the findings of the study of the FDCCs opinions in cases concerning the establishment of the child's contacts with people other than the parents closed in the years 2000–2006[56]. This will allow to compare the work of diagnostic teams in two periods: 2000–2006 (hereinafter referred to as Study I) and 2014–2017 (hereinafter referred to as Study II) with respect to: 1) the time of waiting for an opinion by the court; 2) the evidence theses of the court; 3) the form of the answer to the court posed questions; 4) the method of examination; 5) the type and number of examination techniques used.

The mean time of waiting for an opinion by the court, defined as the difference between the date of the decision to admit evidence from an opinion and the date of the receipt of the opinion by the court is identical for the two studies compared. In Study I, it ranged from 30 to 365 days, with a mean of 110 days and a median of 101 days while in Study II, from 29 to 500 days, with a mean of 124.9 days and a median of 108 days.

The questions most commonly addressed to the diagnostic team by the court included questions concerning emotional ties between the applicants and the children, a suggested settlement in the case as well as information whether the establishment of contacts is advisable/compliant with the child's good. While the first presents

[55] In a study carried out by P. Ostaszewski, the real time of waiting for an opinion ranged from 30 to 365 days, the average being 110 days (see: P. Ostaszewski, *Opinia*..., pp. 191–192).
[56] P. Ostaszewski, *Opinia*..., pp. 180–210.

much the same percentage in both studies (71.8% and 74.3%, respectively), the remaining two appeared much more frequently in the decisions issued by the court in the cases in the years 2000–2006 (a difference of 8.4 and 19.8 pp, respectively).

The majority of the opinions – 90% in Study I and 80% in Study II – gave complete answers to the court asked questions (in the latter, in spite of the fact that in 14.9% the team did not answer some of the questions but provided additional information in the opinion).

The most frequently used examination methods included the analysis of files and psychological-pedagogical examination while the techniques applied were, first of all, conversation/diagnostic conversation/clinical interview and observation (992.3% and 91% for Study I and 95.9% and 87.8% for Study II). In Study I the diagnostic teams availed themselves of 2 to 12 techniques while in Study II of 3 to 6 techniques.

Given the above it should be noted that in spite of significant similarities in the values obtained in individual categories for the two studies, the findings of Study I indicate more effective work on the part of the FDCC diagnostic teams. This is further confirmed by: 1) the shorter time of waiting for the preparation of an opinion (mean and median values); 2) the higher percentage of opinions containing a complete set of answers to the court posed questions (by 10 p.p.); 3) the higher number of examination techniques applied (maximum 12, i.e. 50% more than in Study II).

The author of Study I, P. Ostaszewski, emphasized that the time of waiting for the preparation of a diagnostic opinion was definitely too long. P. Ostaszewski made much the same conclusions as regards both the time of waiting for the date of the examination and the preparation of an opinion after its completion. The results of my own studies confirm the above findings to some extent. The time of waiting for the date of the examination, defined as the difference between the date of the issuance of the decision to admit evidence from an opinion and the date of the first examination, averaged 98.5 days (median 83.5). At the earliest, the examination was carried out six days from the issuance of the decision while the longest time of waiting for the examination amounted to 486 days (in 17 cases it was over 120 days). The analysis of the duration of the preparation of the opinion (as defined in the law) allows to state that the majority of the opinions are prepared in due time (55.4%) or infringes only slightly the provisions of the law on the CTCEs, i.e. they are prepared between the 15th and the 30th day (31.3%). The latter can be due to the fact that the sample studied contained cases in which the motion initiating the procedure was presented between 2012 and 2016, with cases instituted in the years 2012–2015 (in which opinions were made by the FDCCs) making up 47.3% of the total. This is important in so far that until 2016 the deadline for preparing an opinion was up to 30 days. Given the above, it should be concluded that the majority of the opinions issued in the cases referred to kept the law specified deadline. Moreover, summing up the comparison presented above, it can be seen that, in general, the change of the legal regulation for diagnostic teams did not affect the practice of admitting evidence from a diagnostic opinion (in particular, in the context of the questions posed) and the very process of its preparation (the examination methods and techniques applied, the form of answers given to the court as well as the time of waiting for the opinion).

Consequences of changes in the opinion of specialists

A question about the consequences of the entry into force of the law on the CTCEs was also addressed to specialists working in these institutions. Their opinions were gathered at one of the stages of the study (individual in-depths interviews with experts conducted by the author in 2016 in the Department of Criminology of the Institute of Law Studies of the Polish Academy of Science for the project entitled: 'Cooperation between the family court and other institutions in adjudicating educational and remedial means in relation to a juvenile'[57].

In the course of the study respondents emphasized that the real time of work (40 hours a week) is a very unfavourable factor. Yet, according to them, it was not so much the number of hours as the lack of elasticity that was a major source of inconvenience. The respondents also argued that every case, though apparently similar, is in fact different. The hitherto applicable 24-hour weekly time of work was a theoretical limit which was assumed to suffice for direct work with a client. In case of need it was extended. The FDCCs workers spent the additional time on court files as well as writing opinions. The shorter working hours did not translate into a lower number of opinions issued. However, it made it possible for them to do some things at home 'round with an open mind'. The task-adjusted working hours also had a positive effect on reconciling the work for a given FDCC with other works. Respondents stressed that the regulation placed in the law in force is the regulation of the legal situation and not a regulation of their situation. In their opinion, the new law put them on the same level as the court administration workers, their work having been treated by the legislator as similar to the work of an office clerk. Some of the respondents said that the status given them by the legislator was immaterial. The crucial was the existence of a possibility of performing their duties. The change providing for the reduction of the annual length of vacation from 35 to 26 days also received very negative comments. Specialists from the CTCEs considered their work burdening. The additional nine days of vacation allowed them, in their opinion, to fully regenerate and relax, thus contributing to more effective performance of work with maintenance of adequate distance.

The law also deprived workers of the possibility of getting incentive allowances or being promoted which additionally had an adverse impact on the financial conditions of their employment. The increase of the working hours from 24 to 40 was not linked to any financial benefits. The shortening of the time of the preparation of opinions in cases concerning family and minors from 30 to 14 days also generated additional difficulties for the functioning of diagnostic teams. The change referred to imposes that all organizational questions be taken into account, including vacations. The system of hiring workers was also changed. At present, they must be sought by means of a competition which does not seem to work well in the case of CTCEs. The requirements to be satisfied by candidates are very high and the competition procedure significantly lengthens the process. A positive change is

[57] The study sample included eight women and two men (including two pedagogues and eight psychologists), mean age 51.9 years, with a mean length of work of 20.7 years. A full description of the methodology of the study can be found in: J. Włodarczyk-Madejska, *Współpraca sądu dla nieletnich z instytucjami pomocniczymi w procesie orzekania,* „Archiwum kryminologii" 2018, No. XL (in print).

the abolishment of the annual limit of opinions issued. In spite of the fact that the requirement in this respect is no longer in force, the informal expectation as regards the number of opinions issued still persists according to the respondents. Simultaneously, the respondents have neither the authority nor competences to conduct mediations or environmental interview in cases concerning juveniles. The respondents emphasized the importance of maintaining adequate borderlines between diagnostics, opinion-making and mediation, simultaneously pointing out that they themselves are not prepared to keep these borderlines. The obvious consequence of the influence of the law on the functioning of the CTCEs were staff-related problems caused by understaffing as well as decline in the effectiveness of the work of the teams. The task-dependent working hours were thus a guarantee of the performance of the task (irrespective of the place and time of the preparation of an opinion). What should be emphasized is that in spite of difficulties in their work resulting from the changes referred to above, CTCE specialists strive to maintain the same care as regards the opinions they issue. This is confirmed by the findings of the court files study which did not reveal significant changes between the work of the diagnostic teams in the years 2000–2006 and 2012–2016.

6. SUMMARY

The most important conclusion arising from the study is a confirmation of the thesis that the work done by diagnostic teams is of essential importance for the administration of justice as a whole. Its justification can be found in the history of the development of diagnostic examinations in Poland and, as stressed by numerous authors, the importance of these examinations as well as opinions issued on their basis for the process of the adjudication and the undertaking of actions concerning the minor/the juvenile as well as their educational environment.

The changes to the legal regulation exerted a significant impact on the structure of employment in the CTCEs as well as the effectiveness of the work they perform. The real employment in 2016 declined. Meanwhile the inflow of cases to the teams increased with a simultaneous rise in the cases which remained to be issued an opinion on. This is evidence of a decline in the effectiveness of the teams' work which can be due to two causes: the very process of the change or a systemic deterioration in the functioning of the CTCEs following the changes made. As it has already been mentioned, the first of them should result in growth of the effectiveness of the work of the teams in subsequent years which justifies the need to conduct further analyses. As for the second cause, it should be assumed that growth of effectiveness will depend solely on an increase in real employment.

In 2016, the number of opinions issued decreased. Also, a medical doctor participated in their preparation less frequently. The diagnostic teams examined fewer people.

In the category of the 'time of waiting for an opinion by the court' no significant changes were observed. Differences can be seen with respect to the real time of the preparation of an opinion counted from the date of the completion of an examination to the date of the preparation of an opinion. Whereas in 2015 the majority of opinions took 14 or 15 to 30 days to be prepared, in 2016 the time

needed for the preparation of almost 90% of opinions was 14 days. This can be explained in terms of the change to the legal regulation which shortened the time for the preparation of an opinion in family and care cases from 30 to 14 days.

What should be pointed out is that the aim of the entry into force of the law was not to deteriorate the conditions of work of specialists employed in the CTCSs but only to increase their effectiveness, among others, by shortening the time of the vacation as well as extending the working hours. The changes referred to met with negative assessment. Quality studies reveal that it is not the working hours as such that constitute a problem but the absence of flexibility in this respect. This is of crucial importance when seen against the statements made by the respondents themselves that the work of the CTCEs requires an individualized approach to every case.

Abstract

Justyna Włodarczyk-Madejska, *Efficiency of consultative teams of court experts*

The article contains a comparison of the work of diagnostic teams providing opinions for the need of courts in cases concerning juveniles as well as in family and care cases in connection with changes with respect to the legal status concerning the professional status and organization of their work ('Consultative teams of court experts replaced 'family diagnostic-consulting centres'). The studies, the findings of which are presented, are based on a historic-theoretical analysis, analysis of the provisions regulating the functioning of the family diagnostic-consulting centres and consultative teams of court experts, statistical analysis, court files analysis and discussion of a qualitative study.

Keywords: *expert, issuance of psychological opinions, minor, juvenile, family case, care case, proceedings in juvenile cases, educational measures, family diagnostic-consultative centres, consultative team of court specialists*

Streszczenie

Justyna Włodarczyk-Madejska, *Efektywność opiniodawczych zespołów sądowych specjalistów*

Artykuł zawiera porównanie pracy zespołów diagnostycznych opiniujących na potrzeby sądów w sprawach nieletnich oraz w sprawach rodzinnych i opiekuńczych w związku ze zmianami w zakresie stanu prawnego dotyczącego statusu zawodowego i organizacji ich pracy („Opiniodawcze zespoły sądowych specjalistów" zastąpiły „rodzinne ośrodków diagnostyczno-konsultacyjne). W badaniach, których wyniki są prezentowane wykorzystano analizę historyczno-teoretyczną, analizę przepisów regulujących funkcjonowanie rodzinnych ośrodków diagnostyczno-konsultacyjnych i opiniodawczych zespołów sądowych specjalistów, analizę statystyczną, badanie aktowe oraz omówiono wyniki badania jakościowego.

Słowa kluczowe: *biegły, opiniowane psychologiczne, nieletni, małoletni, sprawa rodzinna, sprawa opiekuńcza, postępowanie w sprawach nieletnich, środki wychowawcze, rodzinny ośrodek diagnostyczno-konsultacyjny, opiniodawczy zespół sądowych specjalistów*

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