

YEARBOOK

of the Institute of Justice in Warsaw

2025

PRIVATE LAW

Piotr Mostowik • Incapacitation of an Adult or Similar Protection Measure, Guardianship and Curatorship in Cross-Border Situations: Current Polish Law with Reference to EU Commission Proposals of 2023 (Main Thesis)

Witold Borysiak • Privileged Oral Wills in Comparative Perspective

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FAMILY LAW

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35 YEARS
1990–2025
IWS

YEARBOOK

of the Institute of Justice in Warsaw

2025

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FOREWORD

Dear Readers,

This Yearbook inaugurates a new publication series of the Institute of Justice, entitled *Yearbook of the Institute of Justice in Warsaw*. Its purpose is to present to a broader audience selected reports prepared by the Institute in a given year.

The Institute of Justice is a research and scientific institution supervised by the Polish Ministry of Justice. Its statutory mission is to conduct research in, among other fields, civil law and civil procedure, criminal law and criminal procedure, criminology, comparative law, and analyses of the justice system. A particular and unique feature of the Institute's work is the study of judicial practice through the analysis of court and prosecutorial case files. These efforts result in numerous reports, always available online on the Institute's website (www.iws.gov.pl) and published in the quarterly *Prawo w Działaniu* ("Law in Action"). These reports are primarily made available in Polish.

In order to disseminate the Institute's research results more widely and to make them more accessible internationally, it has been deemed necessary to publish them in English. Selected reports – especially those with potentially universal relevance – will be published in the Yearbook, which will be available in an open-access format. This initiative coincides with the 35th Anniversary of the Institute of Justice, formally established on 1 July 1990 through the merger of two previously existing units: the Institute for the Study of Crime and the Institute for the Study of Judicial Law.

This year's edition of the Yearbook includes texts in the fields of civil law, family law, criminal law, justice system analysis, and fundamental rights. I particularly recommend the article by E. Holewińska-Łapińska, M. Domański and J. Słyk, entitled „The Family Judiciary System in Poland and the Proposed Assumptions for Its Reform”, which discusses systemic issues concerning the organisation of family courts in Poland, as well as the article by P. Mostowik, “Incapacitation of an Adult or Similar Protection Measure, Guardianship and Curatorship in Cross-Border Situations: Current Polish Law with Reference to EU Commission Proposals of 2023”. The author of this study addresses the fundamental issue of care for adults with disabilities and the forms of their protection in the international context. This volume also contains a report on the second nationwide victimisation survey.

I wish you a pleasant reading experience.

Piotr Ryłski
Director of the Institute of Justice
Editor-in-Chief of the *Yearbook of the Institute of Justice*
Warsaw, December 2025

YEARBOOK

of the Institute of Justice in Warsaw

2025

dr hab. Piotr Mostowik

Incapacitation of an Adult or Similar
Protection Measure, Guardianship
and Curatorship in Cross-Border
Situations: Current Polish Law
with Reference to EU Commission
Proposals of 2023
(Main Thesis)

PRIVATE LAW

I. 2023 Proposals of EU Commission

In its documents of 31 May 2023, EU Commission announced two legislative initiatives on “adult protection measures”, i.e. guardianship and curatorship in the case of incapacitation or diminished legal capacity and other similar legal institutions. They include the following linked documents: Proposal¹ for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults (COM(280) 2023) and Proposal² for a Council Decision authorising Member States to become or remain parties, in the interest of the European Union, to the Convention of 13 January 2000 on the International Protection of Adults³ (COM(281) 2023). Firstly, they presuppose making the 2000 Hague Convention on the Protection of Adults⁴ applicable in all EU Member States. So far, it has entered into force in 14 countries, mainly in Europe. The second objective of these legislative initiatives is to issue a supplementary EU regulation which, within the material scope of “adult protection,” introduces a regional modification of convention rules (i.a., regarding to domestic jurisdiction and the recognition and enforcement of foreign judgments) and supplements them (mainly in the area of judicial assistance and interstate cooperation) in those convention

¹ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults, COM(2023) 280 final, available at: <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52023PC0280> [accessed on: 8 December 2023], hereinafter: COM(280) 2023 or Draft EU Regulation.

² Proposal for a Council Decision authorising Member States to become or remain parties, in the interest of the European Union, to the Convention of 13 January 2000 on the International Protection of Adults, COM(2023) 281 final, available at: [https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52023PC0281R\(01\)](https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52023PC0281R(01)) [accessed on: 08.12.2023], hereinafter: COM(281) 2023.

³ Convention on the International Protection of Adults concluded on 13 January 2000, available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=71> [accessed on: 08.12.2023], hereinafter: the Hague Convention of 2000. Introductory remarks to the Convention after its adoption and its translation were published by: P. Mostowik, P. Symolon, *Ochrona dorosłych*, “Kwartalnik Prawa Prywatnego” 2002, Issue 2, pp. 469 et seq. A general characterisation was provided by: A. Juryk, *The Protection of Adults in Private International Law*, “Silesian Journal of Legal Studies” 2016, Issue 8, pp. 27 et seq. The objectives of the Convention and its normative content, from a time perspective prior to the announcement of the draft regulations in question, are discussed by: P. Mostowik, *Geneza i obszary regulacji Konwencji haskiej z 2000 r. o ochronie osób dorosłych z uwzględnieniem kontekstu międzynarodowego*, Warszawa 2023, p. 179. Regarding the development of the convention area in recent years, see: R. Frimston, *The 2000 Adult Protection Convention – sleeping beauty or too complex to implement?*, [in:] *The Elgar Companion to the Hague Conference on Private International Law*, T. John, R. Gulati, B. Köhler (eds.), Cheltenham–Northampton 2020, pp. 226 et seq.

⁴ See: P. Mostowik, P. Symolon, *Ochrona dorosłych. Wprowadzenie*, “Kwartalnik Prawa Prywatnego” 2002, Issue 2, pp. 463 et seq.

states which are EU Member States.⁵ Hence, it is necessary to discuss and evaluate them, in particular, from the perspective of Part Four of the Code of Civil Procedure (CCP) after the 2009 amendment, as well as to indicate the currently applicable international agreements (i.e. the 1905 Hague Convention and numerous bilateral conventions) as well as the Private International Law (PIL) of 2011.⁶

In terms of EU treaties' nomenclature, these are areas of judicial cooperation in civil matters. In this respect, before discussing individual provisions of national law (mainly CCP and PIL) and proposals of future EU regulations, which in turn are linked to the Hague Convention of 2000, it is necessary to provide a closer overview of the key issues of domestic jurisdiction, designation of the applicable law, the effectiveness of foreign judgments and international cooperation of courts in civil matters. The discussion of guardianship and curatorship in the event of incapacitation or diminished legal capacity and similar measures aimed at the protection of an adult in legal transactions with foreign countries, which forms further essential part of this paper, is based on the national and international law, precisely from the perspective of the EU Commission Proposals of 2023.

It should also be noted that the scope of cases in question has been subject to developments in the substantive law (in particular, civil and family codes) of individual countries in recent years, as well as beyond the private law,⁷ and, furthermore, at the international level.⁸ Further *de lege ferenda* proposals and legislative initiatives should be expected, which will stem from new social needs related to the increase in the number of elderly people and the intensification of their needs and protection in trade, including in civil-law transactions.⁹

More generally, the proposals can be perceived as successive steps in the inter-state unification of law, which has been intensive in recent decades in the area of foreign legal transactions in civil matters and has resulted in an increasing complexity and expansion of sources of law.¹⁰

⁵ Key practical information on EU legislation in cross-border civil cases is streamlined and updated by: J. Ciszewski, *Obrót prawny z zagranicą w sprawach cywilnych i karnych*, Warszawa 2020, pp. 243 et seq.

⁶ See: Private International Law of 4 February 2011 (Journal of Laws of 2023, Item 503), hereinafter: PIL. See: M. Pazdan, *Nowa polska ustawa o prawie prywatnym międzynarodowym*, "Państwo i Prawo" 2011, Issue 6, pp. 18 et seq.

⁷ Legal areas where support for the elderly seems to be necessary as a priority are accurately identified by: J. Plaňavová-Latanowicz, *Ochrona osób chorych i starszych przed nadużyciami prawnymi*, Warszawa 2019, pp. 5 et seq.; and P. Błędowski (ed.), B. Szatur-Jaworska (ed.) et al., *System wsparcia osób starszych w środowisku zamieszkania – przegląd sytuacji, propozycja modelu. Synteza*, Warszawa 2017, pp. 10 et seq. Numerous materials on the amendments to German law that have been introduced and proposed in this area are available on the Betreuungsgerichtstag website: https://www.bgt-ev.de/ueber_den_bgt.html [accessed on: 12.03.2024].

⁸ Regarding the international institutionalisation of measures to protect the rights of the elderly – see: B. Mikołajczyk, *Międzynarodowa ochrona praw osób starszych*, Warszawa 2012, pp. 55 et seq.

⁹ See: Urząd Statystyczny w Białymstoku, Główny Urząd Statystyczny, *Sytuacja osób starszych w Polsce w 2020 r. Analizy statystyczne*, Warszawa–Białystok 2021, available at: https://stat.gov.pl/files/gfx/portalin-formacyjny/pl/defaultaktualnosci/6002/2/3/1/sytuacja_osob_starszych_w_polsce_w_2020_r.pdf [accessed on: 12.03.2024].

¹⁰ Regarding contemporary trends in legal sources, see: K. Weitz, *Europejskie prawo procesowe cywilne – stan obecny i perspektywy rozwoju*, "Przegląd Sądowy" 2007, Issue 2, pp. 7 et seq.; P. Mostowik, *Międzynarodowe prawo prywatne i postępowanie cywilne w dekadę po wejściu w życie Traktatu Amsterdamskiego*, "Przegląd Sądowy"

II. Current Solutions of Polish Law

1. Articles 1106(1) and 1107 of the Code of Civil Procedure (CCP) as Grounds of Domestic Jurisdiction for Incapacitation as Well as Guardianship and Curatorship of an Adult

With the current procedural normative status in Poland (i.e., where the 2000 Convention is not in force), Article 1106(1) CCP is of key importance for determining national jurisdiction (international jurisdiction of courts) in incapacitation cases.¹¹ This rule of jurisdiction covers the establishment or revocation of (partial or total) incapacitation, as well as the change of incapacitation from total to partial or *vice versa* (Article 559 CCP). The decisive moment for determining the grounds of jurisdiction in the light of Article 1097(1) CCP is the moment when the proceedings are initiated. The competence of the Polish courts is established based on the circumstances (i.e. Polish citizenship or the foreigner's residence in Poland) relating to the person affected by incapacitation rather than to the applicant. The latter may be a foreigner or a resident abroad. Unlike in custody cases, national jurisdiction does not extend to cases of persons residing in Poland temporarily (temporary residence, the so-called simple residence). In exceptional situations, the *forum necessitates* may be considered (Article 1099(1) CCP) despite the absence of the above grounds of jurisdiction if the case shows a connection with Poland.¹²

Following the 2009 CCP amendment, the scope of exclusive jurisdiction in the cases in question has been reduced in domestic law, which means that the effectiveness of foreign

2010, Issue 2, pp. 33 et seq.; M. Czepelak, *Would We Like to Have a European Code of Private International Law?*, "European Review of Private Law" 2010, Issue 4, pp. 705 et seq.; P. Mostowik, M. Niedźwiedź, *International Conventions Concluded by the European Union after the ECJ "Lugano II Opinion" of 2006. An Alternative or Complementary to EU Regulations Path to Unification of Private International Law*, "Polish Review of International and European Law" 2012, Vol. 1, Issue 1–2, pp. 9 et seq.; M. Szpunar, [in:] *System Prawa Prywatnego*. Vol. 20A. *Prawo prywatne międzynarodowe*, M. Pazdan (ed.), Warszawa 2015, pp. 136 et seq.; H. Muir Watt, *The work of the HCCH and the path of the law: the politics of difference in unified private international law*, [in:] *The Elgar Companion to the Hague...*, T. John, R. Gulati, B. Köhler (eds.), pp. 79 et seq.; J. von Hein, *The role of the HCCH in shaping private international law*, [in:] *The Elgar Companion to the Hague...*, T. John, R. Gulati, B. Köhler (eds.), pp. 112 et seq.

¹¹ See more: K. Lubiński, *Jurysdykcja krajowa w sprawach o ubezwłasnowolnienie*, "Państwo i Prawo" 1978, Issue 11, pp. 98 et seq.; J. Ciszewski, [in:] *Kodeks postępowania cywilnego. Komentarz*. Vol. VI. *Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)*, T. Ereciński (ed.), 5th Edition, Warszawa 2017, pp. 166 et seq.; A. Hrycaj, [in:] *Kodeks postępowania cywilnego. Komentarz*. Vol. V. *Artykuły 1096–1217*, T. Wiśniewski (ed.), Warszawa 2021, p. 132.

¹² J. Ciszewski, *ibid.*, p. 168, provides an example of the revocation or modification of incapacitation decided by a Polish court for a foreigner who currently has neither a place of residence nor a habitual stay in Poland.

judgments referred to in Article 1146(1)(2) CCP has been extended. Previously, Article 1106(1) stipulated the exclusive national jurisdiction in cases of incapacitation of Polish citizens. This applied not only to persons residing in Poland but also – which could be questionable – to the incapacitation of Polish citizens residing abroad.¹³ Under the previous normative status, another type of doubt was raised due to the absence of domestic jurisdiction in cases of incapacitation of foreign nationals residing in Poland, which not only could be in the interest of these individuals., Such solution also violated the interests of Polish citizens who had civil-law relations with them and – more broadly – violated the security of transactions.

On the other hand, for the establishment of national jurisdiction (international jurisdiction of the courts) in cases for curatorship and other guardianship decisions concerning adults, Article 1107 CCP is of key importance.¹⁴ It refers to the examination of cases of guardianship and curatorship (Articles 590 et seq. and 599 et seq. CCP) that arise in situations specified in substantive law, including curatorship for a partially legally incapacitated person (Article 16(2) of the Civil Code (CC)) and guardianship for a totally legally incapacitated person (Article 13 (2) CC), as well as curatorship for a person with a disability. A curator in the latter case is appointed if a person needs assistance to manage all matters or matters of a particular type or to deal with a particular matter (Article 183 of the Family and Guardianship Code (FGC)), as well as to protect the rights of a person who, due to absence, cannot manage their affairs and has no attorney or the attorney is not able to perform their activities or performs them improperly (Article 184 FGC). Adult guardianship/curatorship also covers a number of other material situations. It is not a homogeneous institution in Polish law and is provided for by many provisions of CC, FGC, and CCP, as well as statutes. For example, according to Article 44 of the Mental Health Protection Act of 19 August 1994, a curator may be appointed for a person admitted to a psychiatric hospital, or for a person with mental illness or disability in a social welfare home if such a person needs assistance to manage all of their affairs or affairs of a certain type at that time.¹⁵

However, some guardianship situations fall within the scope of other jurisdictional and procedural norms covering specific categories of civil cases. The second sentence of Article 1107(1) CCP provides that the guardianship to deal with a particular matter – in line with the principle of *lex specialis derogat legi generali* and as in the construction of derived

¹³ See: Decision of the Supreme Court of 6 November 1978, IV CZ 127/78, OSNCP 1979, Issue 7–8, Item 155.

¹⁴ See more: J. Ciszewski, [in:] *Kodeks postępowania cywilnego. Komentarz*, pp. 222 et seq. See more: K. Piasecki, *Kodeks postępowania cywilnego. Vol. IV. Przepisy z zakresu międzynarodowego postępowania cywilnego. Sąd polubowny (arbitrażowy). Regulacje prawne Unii Europejskiej w sprawach transgranicznych. Komentarz*, Warszawa 2013, p. 122; M.P. Wójcik, [in:] *Komentarz aktualizowany do ustawy z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego*, A. Jakubecki, J. Bodio, T. Demendecki, O. Marcewicz, P. Telenga, M.P. Wójcik (eds.), the commentary updated to Article 1107 of the Code of Civil Procedure, LEX/el. 2020; A. Hrycaj, [in:] *Kodeks postępowania cywilnego. Komentarz. Vol. V. Artykuły 1096–1217*, T. Wiśniewski (ed.), Warszawa 2021, p. 156.

¹⁵ Consolidated text in Journal of Laws of 2022, Item 2123.

jurisdiction – is subject to the jurisdictional norms authoritative for those cases.¹⁶ The curatorship (curator) for the purpose of dealing with a case is referred to, for example, in Article 183 of FGC (“individual case” versus “the scope of the curator’s duties and powers shall be determined by the court”) and Article 44(1) of the Mental Health Protection Act (“cases of a specific type”). At the same time, these provisions provide for the possibility of appointing a curator to handle all cases under the conditions specified therein, which means taking into account the general, non-derivative, jurisdictional norm of Article 1107 CCP. On the other hand, the appointment of an administrator of the estate falls within the provisions of the Regulation (EU) No. 650/2012. a separate issue is the appointment of a guardian ad litem by the adjudicating court (e.g. a curator for a party without legal capacity who has no legal representative under Article 69 CCP; a curator to serve a pleading on a party under the circumstances giving rise to the need to defend their rights, whose place of stay is unknown, until the party or their representative or attorney appears, in the context of Article 143 CCP; and a curator for a person unknown as regards their place of residence under the circumstances).

The jurisdiction defined in Article 1007 CCP is not solely based on the Polish citizenship or the place of residence in Poland of a ward or a person under curatorship. It is much broader than the jurisdiction concerning incapacitation, and distinguishes between subsets of guardianship and curatorship cases (e.g. limited, in terms of subject matter, to real estate or in situational terms – to urgent need for protection). A more elaborate regulation applies here, incorporating also the grounds of jurisdiction such as the residence of the person concerned (simple residence). The jurisdiction has to be considered in the context of various factual situations requiring the guardianship court’s actions, as well as the flexibility of these actions. In light of Article 570 CCP, the guardianship court may initiate proceedings *ex officio*. Pursuant to Article 569(2) CCP, all necessary decisions may be issued *ex officio* in cases of urgency. Furthermore, in accordance with Article 577 CCP, the guardianship court may modify its decision, even a final one, if the welfare of the person concerned so requires.

The location of the property, i.e. factual circumstances indirectly related to the adult, determines the national jurisdiction over the matters relating to that property. In fact, this separate rule is relevant (as it goes beyond the fundamental jurisdictional rule in Article 1107(1) of the CCP) when a foreigner does not have their domicile or habitual residence in Poland, but their assets are located there, and there is a need to issue a decision concerning these assets in the foreigner’s interest. This competence is not limited to real estate. In fact, this jurisdictional rule is also relevant for participants of civil-law transactions in the given territory and for its improvement. The doctrine emphasises the need for a court to issue such a decision when the foreigner’s home state or the state of their domicile or habitual residence neglects guardianship or the law of that state does not provide for adequate guardianship

¹⁶ A similar non-independent solution is provided for in Article 62 PIL, stipulating that the guardianship for the settlement of a particular case is governed by the law of the jurisdiction to which the case is subject.

(e.g. competent authorities of that state, such as a consular office or courts, remain passive and do not make such decisions despite notification of the need for guardianship or curatorship).¹⁷ Moreover, it is worth highlighting that a similar approach to international cooperation is evident in the context of the Hague Conventions of 1905 and 2000.

With the legal status after the CCP amendment of 2009, additional jurisdiction (in cases of Polish citizens, foreigners residing in Poland, and property located here) is broadly included in Article 1107(3) CCP for urgent cases. The first jurisdictional ground, i.e. “sufficient connection of the case with the Polish legal order” is a general expression to be clarified in the case law. To provide an example, a decision revoking guardianship or curatorship is to be passed in a situation where the Polish court had previously established guardianship or curatorship over a foreigner who subsequently changed their place of domicile or habitual residence by moving abroad. Another example is the appointment of a curator for a person with a disability who is a foreigner not having their place of domicile or habitual residence in Poland if they need assistance to manage their affairs in Poland (Article 183(1) FGC and Article 600 CCP).¹⁸ The second ground is a non-permanent stay (residence) in Poland.

As in the case of the regulation concerning incapacitation, national jurisdiction extends to a Polish citizen who resides abroad. In the doctrine, against the background of such a solution even before the CCP, it has been noted that sometimes the exercise of guardianship authority by Polish courts in cases of Polish citizens living abroad is unrealistic and may also be inexpedient.¹⁹ In some situations, guardianship proceedings should be an expression of a quick and effective action, such as in emergency cases. However, ensuring such prompt and effective action will not be possible if the person for whom the guardianship or curatorship is to be established resides abroad. Further, it is legitimately noted that the Polish court may consider a court of another state to be more competent to hear the case, but this court may refuse to do so (along the lines of the Anglo-Saxon doctrine of *forum non conveniens*).²⁰ Still, it is to be noted that in the countries where the 2000 Hague Convention is in force, a similar issue does not arise. Indeed, the Convention contains provisions which, in both countries, regulate the possibility of referral and acceptance as well as other forms of inter-state cooperation.

With regard to the guardianship of an absent person (e.g. Article 184(1) FGC, also in the situation of an application by a state administration body under Article 34(1) of the Code of Administrative Procedure), it has to be assumed that the grounds of jurisdiction (Polish

¹⁷ See: J. Ciszewski, [in:] *Kodeks postępowania cywilnego. Komentarz. Vol. VI. Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)*, T. Ereciński (ed.), 5th Edition, Warszawa 2017, p. 226, Item 70.

¹⁸ See: J. Ciszewski, [in:] *Kodeks postępowania cywilnego. Komentarz. Vol. VI. Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)*, T. Ereciński (ed.), 5th Edition, Warszawa 2017, p. 226, Item 75.

¹⁹ K. Lipiński, *Kompetencja władzy opiekuńczej...*, p. 72.

²⁰ A. Hrycaj, [in:] *Kodeks postępowania cywilnego. Komentarz. Vol V. Artykuły 1096–1217*, T. Wiśniewski (ed.), Warszawa 2021, p. 158.

citizenship or the foreigner's place of domicile or habitual residence) have to be established for the moment when these circumstances concerning the adult were last known.

2. Articles 13 and 60 of the Private International Law (PIL) as an Indication of the Law Applicable to Guardianship and Curatorship or Similar Measures

In the current conflict-of-law situation in Poland (i.e., without the 2000 Convention in force), Article 13 PIL,²¹ and with regard to guardianship, Article 60 PIL are crucial for determining the applicable law in guardianship cases.²²

In the initial draft PIL of 2011, the distinction between child and adult care was apparent. The plan was to abandon the solutions included in the PIL of 1965, relying on a citizenship in child matters as in adult custody matters. However, it seems that the intention was not to abandon the jurisdiction of home law altogether, in particular with regard to adult custody. The bill²³ included a separate provision on incapacitation, which was included in the capacity statute early on in the doctrine, as discussed further below. What was not included was a provision for the establishment of guardianship that is relevant not only to a child's case but also to an adult's one.²⁴ The guardianship provision (as well as the absence of such a provision) was also relevant to adult cases. The absence of such a provision created more difficulties for adults than for children, to whom provisions for possible appropriate application (e.g. "the use of other measures for the protection of the child") apply. In the final version of the Act, this deficiency is supplemented precisely by Article 60 PIL cited above.

In the current normative status, incapacitation as referred to in Article 13(1) PIL provides for a citizenship link, which continues the solutions of previous acts of law.²⁵ However, Article 13(2) refers to the Polish court applying Polish law. This second solution (jurisdiction

²¹ See more: M. Pilich, [in:] *Prawo prywatne międzynarodowe. Komentarz*, J. Poczobut (ed.), Warszawa 2017, pp. 295 et seq.; and A. Kozioł, K. Sznajder-Peroń, [in:] *Prawo prywatne międzynarodowe. Komentarz*, M. Pazdan (ed.), Warszawa 2018, pp. 190 et seq.

²² See more: N. Rycko, [in:] *Prawo prywatne międzynarodowe. Komentarz*, J. Poczobut (ed.), Warszawa 2017, pp. 921 et seq.; A. Kozioł, P. Twardoch, [in:] *Prawo prywatne międzynarodowe. Komentarz*, M. Pazdan (ed.), Warszawa 2018, pp. 525 et seq.

²³ See: Government Bill – Private International Law, Sejm Print No. 1277 (6th term of office), available at: www.orka.sejm.gov.pl.

²⁴ See: A. Mączyński, *Stosunki rodzinne w projekcie nowej ustawy o prawie prywatnym międzynarodowym*, [in:] H. Cioch, P. Kasprzyk (eds.), *Z zagadnień prawa rodzinnego i rejestracji stanu cywilnego*, Lublin 2007, p. 95; A. Mączyński, *Przeciwko potrzebie uchwalenia nowej ustawy – Prawo prywatne międzynarodowe*, "Zeszyty Prawnicze Biura Analiz Sejmowych" 2009, Issue 1, p. 20.

²⁵ However, M. Pazdan, *Zdolność do czynności prawnych osób fizycznych w polskim prawie prywatnym międzynarodowym*, Kraków 1967, p. 88, advocated, against the background of the 1965 Law, in favour of classifying incapacitation under the Guardianship Act rather than the Capacity Act ("By its very nature, incapacitation is a measure of a guardianship nature, its conditions should therefore be governed by the law applicable to guardianship (if nothing else is expressly stated in the law); furthermore, the meaning of incapacitation goes well beyond capacity. (...) On the other hand, according to the law applicable to capacity, we will determine the effect of incapacitation on capacity, most often in connection with a specific legal transaction that has already been performed or is to be performed by an incapacitated person.").

legis fori), in fact implying an indirect role of the rules of jurisdiction for determining the applicable law (not only based on nationality), will in practice eliminate the use of the solution described as the first one.²⁶ A. Mączyński emphasises, among other things, that since Polish courts in an incapacitation case should always decide on the basis of Polish law, Article 13(1) has no practical significance.²⁷ It should be noted in this regard that the author, as it seems, in criticising the bill did not intend to omit paragraph 1, which would mean that the Polish court would apply Polish law (*lex fori*), but to remove the entire provision on incapacitation (and a similar one on declaration of death and recognition as dead), which would mean that the general provision on capacity, providing for the nationality of the person concerned, would apply to these cases.²⁸ M. Pilich emphasises that “the unilateral conflict rule of paragraph 2 prevails against the background of the regulation as a whole”.²⁹

A. Kozioł and K. Sznajder-Peroń argue that the claim that there is no practical significance of Article 13(1) PIL “seems justified only *prima facie*”.³⁰ However, for the needs of another view, they provide an example of the application by a foreign court rather than by the Polish court to which this comment relates. Further, the foreign court’s application of Polish conflict-of-laws (e.g., for the possible consideration of reference) somehow “escapes” from the problem of the application of the national law and the perspective of the Polish court, and moreover – given the current trends in private conflict of laws aimed at disregarding the *renvoi* – will occur rarely. The authors state that “this provision then prevents a reflexive reference, counteracting the exclusion of the jurisdiction of Polish law in a case concerning a Polish citizen examined by a foreign court,” and refer to the view of M. Pazdan expressed – following the voices from the time of the discussions on the 1926 and 1965 PIL – with regard to the similarly structured Article 14 PIL, which concerns presumption of death and recording the death, and duplicates a similar solution for this scope of cases provided for in Article 11 PIL of 1965.³¹ The assertion of the meaning of Article 13(1) PIL of 2011 in

²⁶ M. Pazdan, *Zdolność do czynności prawnych osób fizycznych w polskim prawie prywatnym międzynarodowym*, Kraków 1967, pp. 97–102, presents in detail the qualification problems arising when several conflict-of-laws rules are in force for particular elements of the life situation, i.e. the statute of capacity (*lex patriae*) and the statute of defects in declarations of will (*lex causae*). Due to a separate provision in the 2011 Law, the statute of incapacitation could also be such an example in the current normative status as the rule related to the conflict of laws does not exclusively use the link of nationality but usually provides for the jurisdiction of its own law (*lex fori*).

²⁷ See: A. Mączyński, *Prawo właściwe dla ubezwłasnowolnienia i uznania za zmarłego*, [in:] *Rozprawy cywilistyczne. Księga pamiątkowa dedykowana Profesorowi Edwardowi Drozdowi*, M. Pecyna, J. Pisulinski, M. Podrecka (eds.), Warszawa 2013, pp. 729, 736.

²⁸ Such a demand results from the opinion expressed during the legislative work – see: M. Pazdan, *Perypetie projektu ustawy o prawie prywatnym międzynarodowym na końcowym etapie procesu legislacyjnego*, “Problemy Prawa Prywatnego Międzynarodowego” 2011, Vol. 8, pp. 93–94; A. Mączyński, *Prawo właściwe dla ubezwłasnowolnienia i uznania za zmarłego*, [in:] *Rozprawy cywilistyczne. Księga pamiątkowa dedykowana Profesorowi Edwardowi Drozdowi*, M. Pecyna, J. Pisulinski, M. Podrecka (eds.), Warszawa 2013, p. 736, makes an allegation that paragraph 2 of the solution is “asymmetrical”, excessively favouring Polish law.

²⁹ M. Pilich, [in:] *Prawo prywatne międzynarodowe. Komentarz*, J. Poczobut (ed.), Warszawa 2017, p. 295.

³⁰ A. Kozioł, K. Sznajder-Peroń, [in:] *Prawo prywatne międzynarodowe. Komentarz*, M. Pazdan (ed.), Warszawa 2018, nb 12.

³¹ M. Pazdan, *Prawo prywatne międzynarodowe*, Warszawa 2017, p. 129.

the context of paragraph 2 is not convincing (also with regard to the similarly structured Article 14 PIL) for theoretical and practical reasons. The issue of the examination of foreign conflict-of-law rules (e.g. Polish) by a foreign court, which decides on the basis of the jurisdiction and conflict-of-law rules in force in the country concerned, is an issue that the national legislator cannot, in fact, assume and thus even indirectly “regulate”. If a foreign court adjudicates in the case (i.e. has jurisdiction, e.g. on the basis of foreign nationality or residence of an adult in the relevant country), it will apply its own conflict-of-laws rules. Even if the condition was fulfilled that in the general part they presuppose, firstly, an examination of foreign (here: Polish) conflict-of-law rules in order to verify the referral and, secondly, that they provide for the effect of a *renvoi* (i.e., somehow, a return to the jurisdiction of the law of the court), this objective of “preventing a *renvoi*” seems questionable. This could be the case if the foreign conflict-of-law rules expressed a reflexive reference in the general part and used, for example, a nationality link in the specific part, which, given the Polish nationality of an adult, would lead to Polish rules which in turn would use a residence link, precisely *in concreto* located in that country. However, this is not the case, as Polish conflict-of-law rules do not provide for a residence connecting factor in the scope concerned. On the other hand, in the opposite factual situation, where the foreign conflict rules, by way of a residence connecting factor, lead to Poland, and the adult is a citizen of a foreign state, it is paragraph 1 of Article 13 PIL in conjunction with the foreign solutions of the general part that will lead to the back-referral rather than prevent it. Furthermore, in the absence of paragraph 1 of Article 13 PIL of 2011, a reflexive reference would not exist either, since paragraph 2 of Article 13 PIL of 2011 refers to the adjudication by a Polish court and – unilaterally – to the application of Polish law, and does not express an abstract connecting factor that could theoretically be located in that foreign state, nor does it provide for the multilateral formula of jurisdiction *legis fori* permissible under international law.

Summing up, the above explanation of the meaning of paragraph 1 of Article 13 PIL where paragraph 2 is in force is not convincing for both practical and theoretical reasons (as in matters of presumption and recording of death, is a similar explanation of the meaning of Article 11 of 1965 PIL and its successor, Article 14 PIL). A separate issue is which of these paragraphs the legislator should “stop at”. The solution of the court applying its own law (which may or may not be its native law) is closer to the solution of the 2000 Convention, as discussed further below.³²

On the other hand, Article 60 PIL, which refers to “guardianship or curatorship or other protective measures”, is not a “novelty” in national legislation similar to Article 13 PIL. It is an expanded version of the previous PIL provisions of 1926 and 1965, except that its application – given the priority of the 1996 Hague Convention on Children – is limited to adult cases.

³² However, there is no need to start the provision by stating that they apply where a Polish court is adjudicating, as in such a case, the conflict-of-laws rules of PIL generally apply.

This article regulates several conflicts of law rules, providing different ways of determining the applicable law for subsets of cases, including a connecting factor. *Prima facie*, the connecting factor of an adult nationality, i.e. circumstances also provided as a determinant of the law applicable to capacity (Article 11 PIL) and incapacitation (Article 13 PIL), is crucial. However – against the background of Article 60(2) PIL – in the event of adjudication by a Polish court, which is an essential point of reference for the application of the conflict-of-law rules of the country concerned, “Polish law shall be applied to a foreigner who has their place of domicile or habitual residence in the Republic of Poland.” Moreover, against the background of Article 60(4) PIL, “in the cases referred to in Article 1107(2) and (3) CCP, Polish law shall apply.”

This elaborate and stylistically unwieldy wording means, as opposed to the shorter Article 13 PIL, that if “(...) a Polish court decides, Polish law shall apply.” In fact, pursuant to Article 60 PIL, the *lex fori* is, therefore, applicable to guardianship or curatorship or other protective measures, as it follows from the rules of procedure (Article 1107(1) CCP) that a Polish court will, as a general rule, adjudicate on the case of an adult who is a Polish citizen (in relation to whom Polish law is designated as native under Article 60(1) PIL), or who has just “domicile or habitual residence in Poland”, as referred to in Article 60(2) PIL. On the other hand, the other situations of adjudication by a Polish court, which are provided for in Article 1107(2) and (3) CCP and which exhaust the cases of Polish jurisdiction, are referred to in Article 60(4) PIL, also indicating Polish law as applicable (*lex fori*). It appears that this unnecessarily elaborate structure of Article 60 PIL results from the fact that, at the drafting stage, the provision was framed in a manner referring to the current wording of Article 1107 CCP. It would be far clearer and more consistent with the other PIL provisions if paragraphs 2 and 4 were taken together and had wording similar to Articles 13(2) and 14(2) PIL.³³

In the context of the expansive treatment of Article 60 PIL, additional problems arise when a Polish court anchors its jurisdiction in the provisions of the bilateral agreements referred to above instead of Article 1107 CCP. A literal interpretation of Article 60(4) PIL, which refers to Article 1107 CCP, could lead to the conclusion that Polish law is not applicable in the event of their application and the occurrence of a jurisdictional situation other than that described in paragraph 2. However, such a statement does not seem substantively justified as it would lead to an unjustified differentiation of the situation of adults and, moreover, impede the

³³ N. Rycko, [in:] *Prawo prywatne międzynarodowe. Komentarz*, J. Poczobut (ed.), Warszawa 2017, pp. 921 et seq. item 9, notes that the juxtaposition of Article 60(1) and (2) PIL and Article 1107(1) CCP implies that a Polish court has jurisdiction to establish guardianship or curatorship for a foreigner only in situations subject to the specific conflict-of-laws rule which provides for the application of Polish law. He emphasises that in the case of a foreigner residing in Poland, the basis for determining the applicable law is Article 60(2) PIL. On the other hand, with regard to other foreigners, Article 60(1) PIL applies *prima facie*. Still, according to the provisions of Article 1107 CCP, it will never be applied due to the absence of domestic jurisdiction of Polish courts. In this respect, he raises doubts regarding the advisability of the wording of paragraphs 1 and 2 of Article 60 PIL instead of a unilateral conflict-of-law rule under which Polish law would apply.

functioning of courts and other authorities. It seems that by supplementing the bill with paragraph 4, the legislator aimed at a complete “closing” of the application of Polish law to the situations additionally described in Article 1107 CCP after the 2009 amendment – which was unfortunate from the perspective of the validity of bilateral agreements. Although this was not stated, the CCP solutions were, in fact, also kept in mind when drafting paragraph 2.

Returning to the issue of the complex structure of Article 60 PIL and the sub-areas of matters covered by it, it should be noted that the “enforcement of guardianship measures” is regulated differently in terms of conflict-of-laws as it is governed by the law of the state of the territory where a person affected by the measures has their habitual residence (paragraph 3). Since it is a universal rule, it theoretically leads to every law worldwide. Situations related to the enforcement of measures in Poland, which are subject to Polish law in this solution, are important in practice for national judicial authorities. Exclusively, such unilaterally specified jurisdiction of the law for enforcement is provided for in paragraph 4 in fine of Article 60 PIL in situations where the Polish court adjudicates, if necessary, on the property located in Poland and belonging to a foreigner living abroad, and in any event where the case shows sufficient connection with the Polish legal order or where there is an urgent need to grant protection to a foreigner residing in Poland (Article 1107(2) and (3) CCP). Such a solution is not consistent with the cases of Polish citizens or residents of Poland which are more closely linked to the territory of Poland and in which the enforcement of guardianship decisions is covered by the “multidirectional” conflict rule resulting from Article 60(3) PIL.

Notwithstanding the foregoing, pursuant to Article 62 PIL, the curatorship to deal with a particular case (*ad casum*) is governed by the law of the state to which the case is subject (*lex causae*). Such a solution, actually implying an accessory relationship between curatorship and the law applicable to the particular act on the occasion of which the curatorship is established, is similar to the conflict-of-laws solutions concerning specific additional capacity requirements (Article 11(3) PIL) and the form of a legal transaction (Article 24 PIL). It is, undoubtedly, convenient from the perspective of civil-law transactions (also if third parties are involved). Practical difficulties may arise in distinguishing the application of Article 62 PIL in cases of *ad hoc* curatorship from cases of permanent curatorship as both types of curatorship may have the same substantive legal basis (e.g. stating the circumstances justifying both the establishment of a curator *ad casum* and a curator for several similar cases) and be similarly regulated in procedural provisions.

It is worth noting at this point that in the 2000 Hague Convention – unlike in the PIL – a single, broader concept of “measures of protection” is used. However, a distinction is made (similar in Article 60 PIL and the 1996 Hague Convention) of the sub-scope of the “execution” of the protection measure (e.g. action of a curator). Considering the substantive right of the court, as well as the scope of application of the 1996 Hague Convention, it should be

assumed that this applies to cases of persons who have reached the age of 18.³⁴ At the same time, paragraphs 3 and 4 of Article 60 PIL distinguish the “execution” of protection measures in a broad sense.³⁵ This is relevant to the specific conflict resolution, as well as from an intertemporal perspective.³⁶

3. The Issue of Separating the Designation of the Law Applicable to Incapacitation from the Perspective of the Combined Coverage of “Protection Measures” in the 2000 Convention and the 2023 EU Proposal

From the perspective of the scope of application of the 2000 Hague Convention and the 2023 EU Proposal, including the issues of guardianship, curatorship, and other adult protection measures, several conflict-of-law provisions are of key importance in the current normative status in Poland. This includes Article 13 PIL and Articles 60 and 62 PIL, with the latter actually providing for several conflict-of-laws rules (the basic guardianship and curatorship statute and special rules for the execution of guardianship measures and curatorship *ad casum*). The capacity statute set out in Article 10 PIL is also closely linked to their outcome, as discussed below. This detailed nature of the conflict-of-laws rules results in the need to delimit the scopes of application and, thus, the applicable law of both provisions. It is of practical importance in those cases where the rules provide for different conflict-of-laws solutions, including connecting factors, for example, against the background of Articles 11 and 13 PIL and Articles 60 and 62 PIL. If the legislator had limited itself to the adult citizenship connection, the problem would be purely theoretical.

For example, the doctrine qualifies differently the necessity (obligation) to appoint a legal guardian in the case of a diminished legal capacity. According to some statements, it is included in the incapacitation statute, while according to others – in the guardianship statute.³⁷ Such a difference in the approach is most evident in the creation of guardianship or a similar guardianship institution by operation of law (e.g. as a consequence of a diminished capacity in the specific life situation). In the doctrine, this effect is not categorised under the incapacitation statute but under the guardianship statute, which, however, raises doubts. For example, A. Koziol and P. Twardoch present the view that Article 60 PIL covers

³⁴ See: N. Rycko, [in:] *Prawo prywatne międzynarodowe. Komentarz*, J. Poczobut (ed.), Warszawa 2017, pp. 921 et seq.

³⁵ See more: A. Koziol, P. Twardoch, [in:] *Prawo prywatne międzynarodowe. Komentarz*, M. Pazdan (ed.), Warszawa 2018, pp. 527 et seq.

³⁶ It is assumed that the 2011 PIL regulation on the enforcement of protection measures will also apply, once the new legislation enters into force, to protective measures previously established. See: M. Kłoda, [in:] *System Prawa Prywatnego. Vol. 20C. Prawo prywatne międzynarodowe*, p. 803.

³⁷ See: A. Mączyński, *Statut personalny...*, pp. 736–737.

the establishment of guardianship or applying another protection measure *ex lege*.³⁸ In favour of this view, they argue that the opposite solution would imply that there is a gap with regard to the issue above and, moreover, that it is also supported by historical interpretation, since these matters were covered by the hypothesis of the “predecessor”, i.e. Article 23 of 1965 PIL. This argumentation, however, is not convincing: the opposite position would not imply a gap, and historical interpretation leads to a different conclusion since, in comparison to 1965 PIL, Article 11 in question was added to 2011 PIL to refer to autonomously qualified incapacitation.

A separate issue is the distinction between the application of conflict-of-laws rules (and thus the application of relevant substantive law, including foreign law) and the effects of the principle of *lex fori processualis*, i.e. courts and authorities incorporating their own procedural law. In doing so, the doctrine, for example, distinguishes between the substantive right to apply for incapacitation, which is governed by the statute (substantive law) designated by the authoritative conflict-of-laws rule, and the issue of mandatory participants, which is procedural in nature and, as such, governed by the court’s procedural law (*lex fori*).³⁹ This distinction is also noticeable in the context of curatorship under substantive law and procedural curatorship, with examples provided earlier. The doctrine’s approaches to appointing an interim guardian in the course of guardianship proceedings under Articles 548–551 CCP tend to vary. It can be argued that this institution is subject to the principle of *lex fori processualis* because of the relationship of this measure with the judicial proceedings, whose correct outcome this measure is intended to secure.⁴⁰ It is emphasised in the doctrine that curatorship under the procedural law did not fall within the scope of Article 23 PIL of 1965 (which should now be referred to Article 60 PIL) since the appointment of a curator in civil proceedings and their procedural rights and obligations are governed by the procedural rules in force in a court seat.⁴¹ An argument can also be raised for including this institution in the statute designated by the PIL rules (e.g. the guardianship statute), claiming that the appointment of such a guardian has strictly defined substantive legal effects, serving to protect an incapacitated person in dealings with third parties.⁴²

The scope of application of Article 13 PIL includes conditions for establishing partial or total legal incapacitation or any other similar measures linked to each other, resulting in a diminished legal capacity and the introduction of an individual whose function is to

³⁸ E.g. A. Koziół, P. Twardoch, [in:] *Prawo prywatne międzynarodowe. Komentarz*, M. Pazdan (ed.), Warszawa 2018, pp. 525 et seq.

³⁹ See: M. Pazdan, [in:] *System Prawa Prywatnego. Vol. 20A. Prawo prywatne międzynarodowe*, p. 614.

⁴⁰ N. Rycko, [in:] *Prawo prywatne...*, Item 15, sees the conclusion on the applicability of the national rules on the interim guardian, as in the case of the prosecutor’s standing in family cases, in the construction of the rules of necessary application. However, it seems that there is no need to refer to this institution in the general part. However, similarities could be sought regarding the prosecutor’s participation in adult proceedings.

⁴¹ See: W. Ludwiczak, *Międzynarodowe prawo prywatne*, Warszawa 1996, p. 221.

⁴² See: M. Pilich, [in:] *Komentarz...*, p. 297.

support the adult in functioning in civil-law transactions. It may be problematic to specify the effects of this measure since, in line with a systemic interpretation, it is also necessary to consider the application scope of the rules on capacity and guardianship or curatorship. It is assumed that the principal effect of guardianship, which is the partial or total diminished legal capacity, is governed by the incapacitation statute. On the other hand, the capacity statute, as discussed below, is subject to the consequences of diminished or no legal capacity. It seems that it is also necessary to consider the statute of the specific legal transaction, e.g. the statute of contract, to which the statute of wrongful performance (e.g. settlements of an invalid contract) may lead by accession.

As Article 13(1) PIL theoretically leads to every law worldwide, its hypothesis also includes other legal institutions than those provided for in Polish law, which are institutions fulfilling a similar protective function for the adult and transaction participants (e.g. parties to legal transactions or a non-contractual relationship, e.g. a tort). As Article 13(2) leads to the application of Polish law structures in the judicial practice of Polish courts, the scope includes the institutions provided for in CC and FGC.⁴³

Theoretically, the scope of application of Article 60 PIL has to be considered broadly as this is what the qualification of each conflict provision requires and, moreover, the legislator has used the broad formula “other [than guardianship and curatorship] protection measures”. Polish law and numerous foreign normative systems provide for guardianship for a totally incapacitated person (dependant); curatorship for an adult if the guardian suffers a temporary impediment to the exercise of guardianship; curatorship for a partially incapacitated person; permanent (i.e., not just for the purpose of dealing with a particular case) curatorship or another form of assistance or support for a person with a disability in civil-law transactions; similar permanent legal institutions for a person staying in hospital or care facility or an absent person. They may arise by operation of law, by a decision of a court or other authority and, in some legal systems, also as a result of a legal transaction (e.g. a power of attorney or a legal transaction under the condition precedent of a situation

⁴³ A. Koziół, K. Sznajder-Peroń, [in:] *Prawo prywatne międzynarodowe. Komentarz*, M. Pazdan (ed.), Warszawa 2018, pp. 92 et seq., emphasise that Article 13(1) PIL has to be interpreted somewhat differently, i.e. it should be considered broadly due to its nature of demarcating the legal systems of different countries. On the other hand, the scope of paragraph 2 should be determined according to *legis fori* as this provision expresses a unilateral rule indicating only Polish law. It appears that this observation may relate not so much to the scope of application of the conflict-of-laws rules provided for in paragraphs 1 and 2, which are the same, but – the other aspect of the scope – i.e. the scope of the indication, which refers either to foreign law or to national law. Thus, what occurs is not so much a different interpretation of the hypothesis, which takes place before the indication and applicable law are known, but a different effect on the background of the indicated law, i.e. the instruction. Regarding the two levels of description of the scope of the conflict rule and qualification, see: P. Mostowik, *Bezpodstawne wzbogacenie w prawie prywatnym międzynarodowym*, Warszawa 2006, pp. 17 et seq.

requiring protection⁴⁴). An example of the “establishment of a protection measure” is the authorisation to perform a transaction on behalf of an adult under curatorship.⁴⁵

Still, it must be borne in mind that the instructions of paragraphs 2 and 4 of Article 60 PIL lead to the jurisdiction of Polish law if the case is heard by a Polish court or authority. This jurisprudential perspective is crucial for assessing the application of conflict-of-law rules, which, in principle, are applicable – like procedural rules – precisely in the country of their issuance (and possibly in a country participating in the given international instrument). Hence, the instruction of the aforementioned conflict-of-law rules (scope of designation) generally leads to the application of the legal institutions provided for in CC and FGC.

The scope of the guardianship statute (the applicable law designated by the rule of Article 60 PIL) includes issues concerning the conditions for establishing these institutions,⁴⁶ the manner of appointing a guardian, a curator, an assistant, including their qualifications and the obligation to take up such a function, as well as the scope of their powers and duties, including the scope of representation of an adult (dependant), remuneration, and the supervision of the competent judicial or administrative authorities over their performance.⁴⁷ It also covers the modification and termination of the protection measure in a broad sense, including the rationale for changing the person of the guardian or the curator and for abolishing, revoking or terminating guardianship or curatorship or other similar decisions (protection measure).

In this regard, there is a doubt in the doctrine as to whether the cessation of guardianship should be included not in the scope of paragraph 1 of Article 60, which refers only to the establishment of guardianship, but in the scope of paragraph 3 thereof, which refers to the exercise of the guardianship.⁴⁸ This problem does not seem to arise as the establishment in paragraph 1 typically also means a negative decision, i.e. the termination of the guardianship, curatorship or a similar arrangement due to the absence of grounds (e.g. change of facts) for its continuation. On the other hand, paragraph 3 refers to the exercise of measures and not to their non-exercise, e.g. due to termination of the guardianship or curatorship. With regard to the termination of the guardianship or curatorship, however, a similar question arises, in relation to the legal incapacitation, to the one signalled about its establishment, i.e. whether the effect of revoking the incapacitation or a similar protection measure

⁴⁴ For example, the legal solution of an adult granting a mandate of representation if they are no longer able to manage their own affairs (*mandat d’incapacité*) by virtue of a unilateral legal transaction or contract concluded with the mandate holder, as referred to in the Explanatory Report, pp. 72 et seq.

⁴⁵ A. Kozioł, P. Twardoch, [in:] *Prawo prywatne międzynarodowe. Komentarz*, M. Pazdan (ed.), Warszawa 2018, pp. 525 et seq.

⁴⁶ Regarding the qualification of the necessity (specific obligation within a given legal order) to establish legal guardianship to the incapacitation statute – see: A. Mączyński, *Statut...*, pp. 736 et seq.

⁴⁷ See: B. Walaszek, [in:] B. Walaszek, M. Sośniak, *Zarys...*, p. 264.

⁴⁸ The view that the termination of custody does not fall within the scope of its establishment or exercise is presented by: N. Rycko, [in:] *Prawo prywatne międzynarodowe. Komentarz*, J. Poczobut (ed.), Warszawa 2017, pp. 921 et seq., Item 17.

covering the termination of the guardianship or the curatorship (e.g. *ex lege*) is subject to the statute designated by Article 13 PIL or Article 60 PIL. This question should be answered in a manner consistent with the answer to the earlier question concerning the creation of the guardianship or the curatorship in connection with the establishment of the incapacitation or a similar measure diminishing legal capacity.

Among the specific solutions of Polish law that will most often be appropriate, there are also examples of granting permission in more important cases of a person under guardianship or curatorship (e.g. admission of an adult to a psychiatric hospital) and committing an alcohol-dependent person to undergo treatment in an inpatient or outpatient drug treatment facility.⁴⁹

A separate conflict-of-laws solution arises from Article 60(3) PIL with regard to the exercise of guardianship or curatorship or similar custodial measure. It seems that the legislator was inspired by the wording of the Hague Conventions, including those of 1996 and 2000, where such a statute separate from the core statute (parental responsibility and adult protection) is provided for. Hence, for the purpose of distinguishing, which is sometimes not easy in practice, the situation of the “execution” of measures and against the background of PIL, the following detailed comments on Article of the 2000 Convention are useful.⁵⁰

In turn, Article 62 PIL provides a special solution for curatorship to deal with a particular case, which represents *lex specialis* to Article 60 PIL. The curatorship *ad actum* is not subject to the guardianship statute, but is somehow added to the case in which the curator is to act because of the close relationship between the case and the authority that has established such curatorship and the adult concerned. N. Rycko accurately points out that instead of a typical conflict-of-laws rule, the legislator has prescribed the application of a different law, which must be determined on the basis of a separate conflict-of-laws rule, authoritative in the specific case.⁵¹

⁴⁹ See more: A. Koziół, P. Twardoch, [in:] *Prawo prywatne międzynarodowe. Komentarz*, M. Pazdan (ed.), Warszawa 2018, pp. 525 et seq.

⁵⁰ A. Koziół, P. Twardoch, [in:] *Prawo prywatne międzynarodowe. Komentarz*, M. Pazdan (ed.), Warszawa 2018, pp. 525 et seq. assume that in the context of Article 60(3) PIL, a problem referred to as a movable conflict may occur. The authors conclude that linking the jurisdiction of the law for the enforcement of protection measures to each habitual residence of a person affected by the measures may lead to such a movable conflict. They give an example in which an adult changes their habitual residence after a protection measure has been established but before the possibility of enforcing the measure has been exhausted, which is supposed to create a risk that the measure cannot be enforced after the change of statute. They subsequently propose a procedure of adaptation and a search in the law of the place of current residence of the adult for the protection measure which comes closest so that the protection established can be exercised, or alternatively that a new protection measure be established by a Polish court. It seems that this example does not entirely correspond to the 2011 PIL, which added – in relation to the 1965 PIL – paragraph 3 (which was assumed in this example), i.e. the connecting factor of the place of current execution of the protection measure, and furthermore, a statute which does not use the connecting factor of the habitual residence of the adult. In the light of the 1996 Hague Convention, such a solution in the Polish normative status refers to cases of children. With regard to adults, on the other hand, the meaning of current habitual residence derives from the 2000 Hague Convention, which, however, is not applicable in Poland.

⁵¹ See: N. Rycko, [in:] *Prawo prywatne międzynarodowe. Komentarz*, J. Poczobut (ed.), Warszawa 2017, pp. 921 et seq., Item 22. It may be questionable to conclude that this is not equivalent to classifying the curatorship

A different, broader and cumulative, treatment of the scope (hypothesis) of the conflict rule was adopted in the 1905 and 2000 the Hague Conventions and the 2023 EU Proposal, as discussed later. At this point, it should be noted that, against the background of these international instruments, the concept of “protection measure” is used to describe the hypotheses (scopes) of the jurisdictional and conflict-of-law rules, and this concept comprehensively covers both legal incapacitation (possibly other similar legal solutions diminishing legal capacity) and legal guardianship (or other similar institutions, e.g. curatorship, power of attorney or assistance, as well as court approval). Unlike in national laws (PIL and CCP), in the above normative acts, there is no separate regulation of these matters, mostly occurring in practice jointly.

4. Article 1145 ET Seq. CCP as Conditions for the Effectiveness of Foreign Judgments

In the current normative status, a foreign court’s decision is subject to recognition in Poland by operation of law (*ex lege*) unless stated otherwise on the basis of a list of negative conditions (grounds for refusal). If a judgment is enforceable, this may occur (i.e. it constitutes an instrument permitting enforcement) after the declaration of enforceability, as simplified in the 2009 amendment⁵² (Article 1150 CCP). In the course of these proceedings, similar circumstances to those hindering recognition may have an inhibiting effect (Article 1146 CCP). The key circumstances justifying the refusal of recognition or declaration of enforceability are covered by the exclusive jurisdiction of Polish courts (Article 1106(1)(2) CCP): the lack of proper service of the letter initiating the proceedings; the lack of the possibility to defend oneself; the previous proceedings in the same case before a domestic court; the contradiction with an earlier final judgment of a Polish court; another recognised foreign judgment in the case; and the public order clause (i.e. if recognition would contradict the fundamental principles of the Polish legal order).

After the CCP amendment in 2009, the practical significance, in Poland, of the fact that a foreign judgment has been issued in a case has increased due to several circumstances in the current version of CCP. First and foremost, it results from introducing the principle

in the scope of the statute governing the issue in question and that the curatorship to deal with a particular matter is subject to its own “separate statute, but indicated indirectly by the instruction to apply *legis causae*”. Indeed, there seems to be no need for a theoretical proliferation of statutes. In his view, the author does not accept the effect that the permissibility of the choice of law applicable to the main case should result in the possibility of choosing the statute of the related curatorship. This approach is to be agreed with, except that it will result from the fact that curatorship is added, for example, to the law that has already been chosen. On the other hand, a partial choice would not be justified since the provision concerned refers to the addition of curatorship to the law governing the legal transaction (and not to a secondary disconnection of the scope in question).

⁵² Act of 5 December 2008 Amending the Code of Civil Procedure and Certain Other Acts, Journal of Laws of 2008, No. 234, Item 1571; hereinafter: 2009 CCP amendment.

of automatic recognition, streamlining the enforcement of foreign judgments, and reducing the grounds that may block these principles, as discussed below. It is also worth bearing in mind that in the previous normative status, the area of exclusive jurisdiction of Polish courts was broader, creating a barrier to the effectiveness of a foreign judgment, i.e. *res judicata*. For example, pursuant to Article 1107(1), such a character is ascribed to the guardianship and curatorship of a Polish citizen. However, a Polish court may waive the establishment of guardianship or curatorship over a Polish citizen residing or owning assets abroad if they have sufficient custody there. In addition, the lack of reciprocity in the country of origin of the judgment was also an important obstacle to the effectiveness of the foreign judgment. Pursuant to Article 1146(1) CCP, a judgment was subject to recognition on the condition of reciprocity.⁵³ Currently, the recognition and enforcement of foreign judgments in Poland are not dependent on whether Polish judgments in civil matters are effective in the foreign state in question. Further, the effectiveness of the foreign judgment was also impaired by the foreign court's failure to apply Polish (or identical) law as the applicable law to adjudicate in situations where Polish law was applicable under Poland's conflict-of-laws rules (conflict-of-laws review of the foreign judgment). Due to this solution, there was a partial harmony (limited to situations governed by Polish law) between decisions issued in similar cases by a Polish court and foreign decisions that were effective in Poland. Pursuant to Article 1146(1)(6) CCP, a judgment was subject to recognition if, in a case in which Polish law should have been applied, that law was applied when the judgment was passed (unless the foreign law applied in the case does not differ materially from Polish law). The legislature's focus on substantive legal results, rather than the formal properties of Polish law, was evident in the equivalence rule as adopted. According to this rule, the condition for recognition was also fulfilled if a foreign law applied was not materially different from Polish law.⁵⁴

It should also be noted that the number of cross-border cases substantively adjudicated by Polish courts was higher under the previous legal status as a Polish court was not dependent on the fact that a case was pending before a foreign court (i.e. it did not take into account the foreign course of the case). Pursuant to Article 1098 CCP prior to its amendment in 2009, Polish courts were awarded the jurisdiction provided for therein even if proceedings were pending before a foreign state's court in the same case between the same parties. Currently, according to Article 1098(1) and (2) CCP, if a case for the same claim between the same parties has been brought before a foreign court earlier than before a Polish court, the Polish court has to suspend its proceedings. Then, due to the recognition of the foreign judgment

⁵³ In the light of Article 1150(2) CCP, this condition is also referred to as the declaration of enforceability of a foreign judgment.

⁵⁴ See: J. Jodłowski, *Zastosowanie prawa polskiego...*, pp. 135–140.

in Poland, the court discontinues such proceedings. As such, a case pending before a foreign court inhibits the substantive adjudication of this case in Poland.⁵⁵

In CCP as amended, there is no requirement for reciprocity between Poland and the country that has issued the judgment.⁵⁶ Moreover, CCP narrows the scope of exclusive jurisdiction, and thus, this condition blocking the effectiveness of a foreign judgment would occur less frequently (Article 1146(1)(2) CCP). By simplifying the mechanisms of recognition and enforcement and by reducing the list of grounds for refusal and the scope of exclusive jurisdiction, the 2009 CCP amendment opened the doors for the effects of foreign judgments, including those concerning adult personal and guardianship matters.⁵⁷ The normative situation in other EU Member States may be different, i.e. foreign judgments, including those from EU Member States, may be subject to closer scrutiny or their recognition may be additionally determined (e.g. by the condition of reciprocity or the convergence of conflict-of-law rules applied abroad).⁵⁸ Hence, they will have a different assessment of the proposed 2023 solutions aimed at introducing efficient mutual recognition and enforcement of judgments within the EU.

⁵⁵ Pursuant to Article 1098(1) CCP, the court may also suspend the proceedings if the case outcome depends on the outcome of foreign proceedings in a related civil case.

⁵⁶ See: K. Weitz, *Spełnienie warunku wzajemności przy uznawaniu i stwierdzaniu wykonalności orzeczeń zagranicznych*, "Palestra" 2005, Vol. 50/9-10, pp. 176 et seq.

⁵⁷ See: J. Ciszewski, [in:] *Kodeks...*, T. Ereciński (ed.), p. 222; M.P. Wójcik, *Komentarz do art. 1146*, [in:] *Komentarz aktualizowany Kodeksu postępowania cywilnego*, A. Jakubecki (ed.), LEX 2020; and P. Ryłski, *Komentarz do art. 1145*, [in:] *Kodeks postępowania cywilnego. Komentarz. Vol. 5. Artykuły 1096–1217*, T. Wiśniewski (ed.), LEX 2020.

⁵⁸ See: J. Jodłowski, *Zastosowanie prawa polskiego jako przesłanka uznania orzeczenia sądu zagranicznego i zasada ekwiwalentności prawa*, [in:] *Studia z prawa postępowania cywilnego. Księga pamiątkowa ku czci Zbigniewa Resicha*, M. Jędrzejewska, T. Ereciński (eds.), Warszawa 1985, pp. 119–129.

III. The 2000 Hague Convention and the Resulting Potential Amendments to National Law

1. Genesis of the 2000 Hague Convention

The issues of legal incapacitation, as well as guardianship, curatorship and similar legal institutions for adults were one of the first scopes of work of the Hague PIL Conference at the beginning of the 1920s. This resulted in the drafting of the Hague Convention of 17 July 1905 concerning legal incapacitation and similar guardianship decisions,⁵⁹ which will be explained in the following section. Several decades later, in 1979, between the Thirteenth and Fourteenth Sessions of the HCCH (Hague Conference on Private International Law), these issues were raised in a questionnaire circulated to the Member States. The responses did not identify common practical problems regarding the protection of adults in international transactions. The special committee meeting in February 1980 did not include this topic in the Conference agenda, and no work was undertaken on a potential subsequent convention.⁶⁰ The idea of revisiting the personal and property affairs of adults subject to guardianship or similar decisions returned in the work of this international organisation in the last decade of the 20th century.

Under the decision of 29 May 1993, the Seventeenth Session of the HCCH decided that the agenda of the Eighteenth Session should include the revision of the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants and, importantly from the perspective under discussion, the potential extension of the scope of the new convention to cover the protection of incapacitated adults. However, this second subject area could not be developed in the following session (as the convention on children's affairs was considered) and was moved to the work of subsequent sessions.⁶¹

The HCCH Permanent Office established a special committee, whose meeting was preceded by the working group in 1997, chaired by A.V.M. Struycken. The working group prepared

⁵⁹ Government Declaration of 14 September 1929 on Accession of the Republic of Poland to the Convention concerning legal incapacitation and similar guardianship decisions, signed at The Hague, 17 July 1905, Journal of Laws of 1929, No. 80, Item 598.

⁶⁰ See: Acts and Documents of the Fourteenth Session (1980), Volume I, Miscellaneous matters, The Hague, pp. 114–147.

⁶¹ See: *Akt końcowy Siedemnastej Sesji*, Part B, points 1 and 2.

a draft for discussion by a special diplomatic committee from 20 September 1999 to 2 October 1999, chaired by E. Clive.⁶²

The text of the Convention was adopted unanimously by the Member States of the HCCH present at the plenary session on 2 October 1999. The authentic languages are English and French. The work drew on a note on the protection of incapacitated adults prepared by Adair Dyer in September 1996; a study by M. Revillard entitled *Les majeurs protégés en droit international privé et la pratique notariale*; Report of the Council of Europe's Group of Specialists on Incapable and Other Vulnerable Adults, prepared by Mr Eric Clive at the request of the Council of Europe of 21 January 1997; and a proposal by the Swiss delegation, submitted at the close of the Eighteenth Session, transposing the provisions of the 1996 Hague Convention almost literally to the cases of adults.⁶³

The drafting of the 2000 Hague Convention made use of the legal solutions of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, adopted a few years earlier.⁶⁴ The 2000 international agreement governs a wide range of foreign legal transaction issues, including domestic jurisdiction, applicable law, recognition and enforcement of judgments, and international cooperation.⁶⁵ However, the title is captured differently – instead of listing these areas of private international law and civil procedure, which is the case in the 1996 Convention, the title of the 2000 Convention uses the very general phrase of the “protection of adults”.⁶⁶

The 2000 Hague Convention is thus another international agreement drafted under the auspices of the HCCH that deals with foreign transactions in civil matters (i.e. private international law and international civil procedure or, in the EU nomenclature, “judicial cooperation in civil matters”). A part of the application scope of the Convention overlaps with that of its predecessor, the Hague Convention of 17 July 1905 concerning incapacitation and analogical

⁶² Eric Clive was a Delegate of the United Kingdom. Andreas Bucher, delegate of Switzerland; Gloria F. DeGart, delegate of the United States of America; Kurt Siehr, delegate of Germany; Antonio Boggiano, delegate of Argentina; and Huang Hua, delegate of the People's Republic of China, were elected as vice-chairpersons. Paul Lagarde, the French delegate, was appointed as a rapporteur. A drafting committee chaired by Kurt Siehr, delegate of Germany; a group to examine federal clauses chaired by Alegría Borrás, delegate of Spain; and a group for the preparation of model forms chaired by Marie-Odile Baur, delegate of France, were also appointed.

⁶³ See: *Sprawozdanie wyjaśniające*, pp. 41–42; and Prel. Doc. No 14 for the Eighteenth Session.

⁶⁴ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, done at The Hague on 19 October 1996, Journal of Laws of 2010, No. 172, Item 1158; OJ L 151, 11.06.2008, p. 39; hereinafter: the 1996 Hague Convention.

⁶⁵ See: R. Frimston, *Overview: Key concepts in Private International Law*, [in:] *The international protection of adults*, R. Frimston, A. Ruck Keene, C. v. Overdijk, A.D. Ward (eds.), Oxford 2005, p. 8.

⁶⁶ The Explanatory Report, p. 45, emphasises that the title adopted “was found preferable to the much longer one of the Convention on the Protection of Children.” Regarding the genesis of the 2000 Hague Convention, including the link to the work on child protection and the 1996 Convention, and the activities of the 1997 Working Group chaired by Professor T. Struycken, see more: P. Lagarde, *Sprawozdanie wyjaśniające*, p. 35.

guardianship decisions (hereinafter: the 1905 Hague Convention).⁶⁷ In the remaining scope, the cases regulated by the 2000 Hague Convention are now subject to the solutions of the Poland's Code (Part IV CCP⁶⁸) and law (Private International Law⁶⁹), as presented below.⁷⁰

2. The Issue of Ratification of the 2000 Convention by Poland and Other EU Member States

Poland signed the Convention on 18 September 2008 but has not ratified it yet. The plan to ratify the 2000 Hague Convention has appeared in some statements over the recent years (including when comprehensively considering changes to the substantive legal constructions for diminished capacity, incapacitation and guardianship that would result from the ratification of the 2006 UN Convention), but this step has not been completed and the 2000 Hague Convention has not entered into force.

The current normative status in Poland has been shaped since the 1920s by conventions created under the auspices of the Hague Conference on Private International Law, and in the 21st century, it has also been co-created by the EU "Brussels" and "Rome" regulations.⁷¹ The proposed measures, including the accession of the EU Member States to the 2000 Hague Convention, represent a further step in the process of replacing national solutions (in the full or limited situational scope) with standards derived from international agreements and EU regulations.

⁶⁷ Government Declaration of 14 September 1929 on Accession of the Republic of Poland to the Convention concerning incapacitation and similar guardianship decisions signed at The Hague, 17 July 1905, Journal of Laws of 1929, No. 80, Item 598.

⁶⁸ Code of Civil Procedure of 17 November 1964, consolidated text in Journal of Laws of 2021, Item 1805 as amended; hereinafter: CCP.

⁶⁹ International Private Law of 4 February 2011, consolidated text in Journal of Laws of 2023, Item 503; hereinafter: PIL.

⁷⁰ Article 1 of the Convention provides that it applies "in international situations", i.e. where more than one State is involved. It seems that this should be regarded as a description of a situation rather than as a formal requirement (the need to establish the existence of such a condition) for applying jurisdictional and conflict-of-law rules. See: P. Mostowik, *Kwestia wymagania międzynarodowego charakteru sytuacji dla stosowania norm jurysdykcyjnych i kolizyjnych*, [in:] *Verba volant, scripta manent. Księga jubileuszowa dedykowana Profesor Bogusławowi Gnoli*, Warszawa 2023, pp. 693–702. A separate issue is that, in accordance with Article 44, its provisions can be applied to purely internal conflicts of laws (i.e. as private inter-district law).

⁷¹ Regarding contemporary trends in legal sources, see: M. Szpunar, [in:] *System Prawa Prywatnego*. Vol. 20A. *Prawo prywatne międzynarodowe*, M. Pazdan (ed.), Warszawa 2015, pp. 136 et seq.; K. Weitz, *Europejskie prawo procesowe cywilne – stan obecny i perspektywy rozwoju*, "Przegląd Sądowy" 2007, Issue 2, pp. 7 et seq.; P. Mostowik, *Międzynarodowe prawo prywatne i postępowanie cywilne w dekadę po wejściu w życie Traktatu Amsterdamskiego*, "Przegląd Sądowy" 2010, Issue 2, pp. 33 et seq.; M. Czepelak, *Would We Like to Have a European Code of Private International Law?*, "European Review of Private Law" 2010, Issue 4, pp. 705 et seq.; P. Mostowik, M. Niedźwiedź, *International Conventions Concluded by the European Union after the ECJ "Lugano II Opinion" of 2006. An Alternative or Complementary to EU Regulations Path to Unification of Private International Law*, "Polish Review of International and European Law" 2012, Vol. 1, Issue 1–2, pp. 9 et seq.; H. Muir Watt, *The work of the HCCH and the path of the law: the politics of difference in unified private international law*, [in:] *The Elgar Companion to the Hague...*, pp. 79 et seq.; J. von Hein, *The role of the HCCH in shaping private international law*, [in:] *The Elgar Companion to the Hague...*, pp. 112 et seq.

Following the adoption of the 2000 Hague Convention and in the course of accession by more countries, including those from the EU, in the early 21st century, a suggestion appeared in the EU that all Member States should join it. The 2010 Stockholm Programme⁷² states that:

The need for additional proposals as regards vulnerable adults should be assessed in the light of the experience acquired from the application of the 2000 Hague Convention on the International Protection of Adults by the Member States which are parties or which will become parties in the future. The Member States are encouraged to join the Convention as soon as possible.

Subsequently, in recent years, the academic and public debate has seen the idea of covering the material scope of what has been called – not quite accurately – the “protection of adults” with an additional EU regulation, as it turned out, quite elaborated in COM(280) 2023.⁷³

With regard to the EU’s external competence to conclude international agreements, which is adopted in this respect after the CJEU’s opinion in Case 1/03,⁷⁴ it should be noted that against the background of the second proposal mentioned at the beginning (COM(281) 2023), the Union somehow “returns it” to the Member States (i.e. authorises them to ratify an international agreement). Indeed, the 2000 Hague Convention did not include, as it does in subsequent agreements, a clause for participation by a regional economic integration organisation, and the EU was not an HCCH member at that time. On the other hand, with regard to the combined application of the EU regulation and the international agreement, there is a similarity in the relationship of the Brussels IIb Regulation (and earlier Brussels IIa) with the 1996 Hague Convention and the 1980 Hague Convention, as discussed above. Also, in terms of this legislative and competence aspect, there is a similarity to the 1996 Hague Convention. Member States were authorised by the Council Decision of 5 June 2008 to ratify the latter in the interest of the European Community.⁷⁵

⁷² The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens, OJ C 115, 16.03.2010, p. 1.

⁷³ For example, the European Parliament’s document entitled *Protection of Vulnerable Adults European Added Value Assessment. Study*, PE 581.388, September 2016, pp. 14–16, and the public consultation from 21 December 2021 to 29 March 2022, entitled *EU-Wide Protection of Vulnerable Adults*, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults_en [accessed on: 12.03.2024]. See more: P. Mostowik, *Geneza i obszary regulacji konwencji haskiej z 2000 r. o ochronie osób dorosłych z uwzględnieniem kontekstu międzynarodowego*, Warszawa 2023, pp. 16 et seq.

⁷⁴ See: M. Czepelak, *Między Hagą a Brukselą – w poszukiwaniu współczesnej wizji unifikacji prawa prywatnego międzynarodowego*, “Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej” 2006, Vol. 96, pp. 299 et seq.; M. Niedźwiedź, P. Mostowik, *Wspólnota Europejska jako strona umów międzynarodowych w dziedzinie prawa prywatnego międzynarodowego. Uwagi na tle opinii Trybunału Sprawiedliwości WE w sprawie 1/03*, “Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego” 2009, Issue 1, pp. 71 et seq.

⁷⁵ See: Council Decision of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law, 2008/431/EC, OJ L 151, 11.06.2008, p. 36.

The proposed arrangement of the sources of law is an extension of this “mosaic” to include elements from an international agreement. As the specific material scope (adult “protection measures”) is covered by two normative instruments (as well as the Hague Convention and the EU Regulation), it is intended to be similar to the current complex treatment of legal sources in the scope of child custody cases, including international child abduction. In this subject area, the 1980 Hague Convention⁷⁶ (setting out a specific procedure for the return of a child to their state of residence before their place of residence was illegally changed) and another one, the 1996 Hague Convention⁷⁷ (containing rules on jurisdiction, applicable law, and the recognition and enforcement of decisions concerning, among other things, contact with a child and parental authority or custody), are of relevance worldwide. These conventions were subsequently partly transposed to EU regulations and their amendments (“Brussels IIa”,⁷⁸ “Brussels IIb”).⁷⁹ The Hague Conventions have been partially modified and supplemented in these regulations for the purposes of regional transactions. This practice of the EU legislature may be questionable from the theoretical perspective of international law and from the perspective of the law application practice, which it does not facilitate.⁸⁰

⁷⁶ Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980 (Journal of Laws of 1995, No. 108, Item 528).

⁷⁷ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, done at The Hague on 19 October 1996 (Journal of Laws of 2010, No. 172, Item 1158), hereinafter: the 1996 Hague Convention.

⁷⁸ 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 160, 30.06.2000, p. 1 as amended), hereinafter: Regulation 2201/2003 or Brussels IIa.

⁷⁹ Council Regulation (EC) No. 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ L 178, 02.07.2019, p. 1, as amended), hereinafter: Regulation 2019/1111 or Brussels IIb.

⁸⁰ This includes the problems stemming from the need to distinguish between the international application of two regimes arising from such an arrangement of sources of law (the so-called conflict of conventions) concerning the same subject matter, i.e. the international agreement and the EU regulation. The demarcation rules in Regulation 2201/2003 were not well-developed, giving rise to the need for amendments to the subsequent Brussels IIb Regulation. See: O. Bobrzyńska, *Brussels II ter Regulation and the 1996 Hague Convention on Child Protection – the interplay of the European and Hague regimes in the matters of parental responsibility*, “Polski Proces Cywilny” 2021, Issue 4, p. 593.

IV. Proposal for EU Regulation of 2023 from the National Law Perspective

1. The Issue of the Link to the 2006 UN Convention

The operation of the 2000 Hague Convention is accompanied by a phenomenon whereby instruments of public international law, including the 2006 UN Convention, are also linked in the debate on its application in civil matters abroad. Such a phenomenon can be observed with regard to the 1996 Hague Convention, the operation of which is related to the 1989 UN Convention, but the scale of the link between both areas is incomparably more extensive. However, one may have the impression that sometimes the debate on private international law or international civil procedure arises from public international law conventions without further examination of the actual links with private international law and international civil procedure rules. Indeed, such links occur only to a narrow extent when substantive law (including that harmonised in individual states following, for example, the accession to the 2006 UN Convention) is relevant for conflict of laws or procedural solutions, i.e. with regard to the protection of the forum state's fundamental principles of public policy or the inclusion of its substantive law as rules of necessary application (enforcing its jurisdiction).

In the context of national law likewise, there are links to the “protection measures” (including legal guardianship concerning children). Both personal scopes (regarding adults and children) are sometimes governed by the same conflict-of-laws provision (e.g. in the light of certain bilateral agreements). Such a phenomenon, i.e. common formal regulations (including common rules) sometimes projecting a common perception in substantive terms (as well as a kind of search for common instructions), is also visible in the context of substantive law (according to Article 175 FGC, the provisions on the guardianship of a minor apply to the guardianship of a totally incapacitated person accordingly) and “non-international” civil proceedings (application of the same procedural rules arising from Article 590 et seq. CCP). The difference is more relevant, also for determining the applicable law and national jurisdiction, as well as rights and obligations, in relation to a dependant and parents (mother or father of a child) than a legal guardian of an adult.

2. Implications of Conceptual Changes and the Broad Scope of the “Protection Measure”

The concept of the “protection measure” is of key importance for determining the scope of application of the 2000 Hague Convention and the proposed EU Regulation (consequently, by extension, the scope of any potential changes to the national legal order should they enter into force). As intended by the Convention drafters, this concept is to encompass a range of national legal institutions (constructions), sometimes widely diversified. Such an approach is transferred to the application scope of the proposed EU regulation. It should be borne in mind that in addition to the institutions of full or partial incapacitation, as well as guardianship and curatorship (or their functional equivalents), which are closer to civil law, the Convention is also intended to apply to situations at the interface with public law (e.g. placement in an institution, functioning of a representative in an area broader than civil law), and the delimitation of certain situations of application and non-application (e.g. health or safety measures) will need to be clarified in judicial practice.

The broad interpretation of the “protection measure” is innovative from the national perspective, as incapacitation and guardianship/curatorship are sometimes perceived separately (both substantively and procedurally). However, from a practical perspective and the welfare of an adult, it can collectively capture the point well. A mere incapacitation decision or similar judgment (from a domestic perspective, associated with a civil court) does not fully settle an adult’s life issue (needs). The “reverse” (a related element, necessary in civil-law transactions), is the assistance provided to the adult concerned so that they can “return” to participating in the transaction and be protected (e.g. with the help of or through a guardian, curator or assistant). This includes the operation of guardianship and curatorship institutions (associated with the family court). In modern private law, there is no “civil death” of a person, and the restriction or deprivation of legal capacity is not intended to exclude a person (and their assets) from civil-law transactions involving third parties. Such exclusion would have negative consequences also for these parties, as they would not be able, for example, to enforce a contract or claim damages or take care of their own economic affairs, which would *in concreto* conflict with those of the incapacitated person’s assets.

In addition, specific problems may arise in those legal systems where, as in Poland, the two legal institutions are subject to separate adjudication processes, i.e. incapacitation or other restriction of legal capacity and the establishment of guardianship or curatorship are adjudicated separately; and, moreover, both legal areas are subject to separate conflict-of-laws rules – as in the context of PIL but unlike in the 2000 Hague Convention. Firstly, there is a concern that the restriction of capacity (e.g. by way of incapacitation) will not be followed in practice by the appointment of a guardian or a curator to operate in legal transactions as this is a separate issue of substantive and procedural law. Secondly, a need then arises to separate the scope of application of the distinct conflict-of-laws rules referring to incapacitation

or a similar decision and those referring to guardianship or curatorship or similar adult support institutions.⁸¹ Needless to say, this problem has practical consequences when each conflict-of-law solution indicates a different applicable law, and thus, the substantive law of a different country may apply to each of the aforementioned stages. Such differences occur between Article 13 PIL and Articles 60 and 62 PIL, but are not present in the 2000 Hague Convention, which provides for a single broader notion of the “protection measure”.

The 2023 Proposals refer not only to the legal status of a person (e.g. partial incapacitation or similar foreign-law institutions) and their guardian, curator or attorney but also to the consequences for civil-law transactions with third parties (including the rights and obligations of the parties to legal transactions). “Protection measures” for adults refer to specific solutions in Polish law, as well as to institutions unknown to this law, such as the modification of partial or assisted incapacitation. The material scope of the 2000 Hague Convention and the proposed Regulation is broad and, from the perspective of national terminology, may be somewhat “hidden” for practice under the concept of a “protection measure” for adults, which is of key importance in the proposed normative status. Relating the foregoing to the national codes, it must be pointed out that the material scope of the Proposals includes the establishment or revocation of partial or total incapacitation, as well as the change of total to partial and partial to total incapacitation (Article 559 CCP). A separate reference is made to guardianship and curatorship cases (Articles 590 et seq. and 599 et seq. CC), including curatorship for a partially incapacitated person (Article 16(2) CC) and guardianship for a fully incapacitated person (Article 13(2) CC), as well as curatorship for a person with a disability if that person needs assistance to manage all matters or matters of a certain type or to deal with a particular matter (Article 183 FGC) and curatorship to protect the rights of a person who, due to absence, cannot manage their affairs and does not have an attorney or the attorney is not able perform their activities or performs them improperly (Article 184 of FGC). This also covers a number of other material situations of adult curatorship, which is not a homogeneous institution in Polish law and is provided for by many provisions of CC, FGC and CCP, as well as by statutes. For example, according to Article 44 of the Mental Health Act,⁸² a curator may be appointed for a person admitted to a psychiatric hospital, or for a person with mental illness or disability in a social welfare home if such a person needs assistance to manage all of their affairs or affairs of a certain type at that time. At this point, it must be borne in mind that some of these institutions – as well as similar ones provided

⁸¹ Regarding various solutions related to the impact of a mental condition other than that giving rise to incapacitation on capacity and the performance of civil-law acts, see: M. Pazdan, *Zdolność do czynności prawnych osób fizycznych w polskim prawie prywatnym międzynarodowym*, Kraków 1967, pp. 90 et seq.

⁸² Mental Health Protection Act of 19 August 1994 (Journal of Laws of 2022 r., Item 2123).

by foreign rights – may be subject to assessment from the broader perspective of human dignity, proportionality, and restrictions of capacity and deprivation of liberty.⁸³

3. Key regulatory developments in Poland

The entry into force of the 2000 Hague Convention and the 2023 Proposal will mean that the national rules on conflict of laws and jurisdiction and on the effectiveness of foreign judgments will no longer apply in the adult cases under discussion. Current domestic jurisdiction rules demonstrate a broad approach to the international jurisdiction of Polish courts, as it may be determined not only by the nationality of an adult but also by their domicile or habitual residence, and sometimes even by their mere stay, location of property or other connection. National conflict-of-law rules lead to the application of Polish law for incapacitation, as well as guardianship and curatorship when adjudicated by a Polish court (also when jurisdiction is based on grounds other than nationality, e.g. domicile or habitual residence) as, in fact, it will not be an exception but a principle to override the universal conflict rule based on the nationality of an adult by a one-way indication of Polish law. The current domestic normative status following the 2009 amendments to CCP is also characterised by a wide openness to (recognition or enforcement of) foreign judgments (including protection measures within the meaning of the Convention). This, in turn, means that in such circumstances, the case will not be considered in substantive terms by Polish courts, and thus, the jurisdictional or conflict-of-law solutions applicable in Poland (including the priority of citizenship or residence as a conflict-of-law connecting factor or a jurisdiction ground) will not be relevant in practice.

The impact of the 2023 Proposals on current private international law and international civil procedure in Poland is therefore potentially broad. Its holistic presentation requires a comprehensive approach, not only from the perspective of the current national regulations of CCP (i.e. non-procedural proceedings and international civil proceedings), private international law and special laws but also from the perspective of CC (i.e. mainly personal law, taking into account, for example, the impact of the lack or restriction of an individual's capacity on matters of property, bonds and succession).

Substantive effects (due to the presumptions arising from entries) may be generated by the proposed registers of protection measures in the practice of transactions. In practice, the proposed European Certificate of Representation and the implications of its submission

⁸³ For example, in the judgment of the European Court of Human Rights of 16 October 2012, Application No. 45026/07, *Kędzior v. Poland*, HUDOC, paragraphs 54–60 of the reasoning, the placement of a fully incapacitated person in a social care home was compared to a deprivation of liberty within the meaning of Article 5(1)(e) of the Convention for the Protection of Human Rights and Fundamental Freedoms, done in Rome on 4 November 1950, as amended by Protocols Nos. 3, 5 and 8, and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, Item 284, as amended and supplemented), hereinafter: ECHR.

when performing legal transactions on behalf of an adult with a third party will also impact the substantive legal relationship.

A preliminary assessment of the specific solutions provided in the 2000 Hague Convention in the context of the current normative status in Poland, leads to the conclusion that, in fact, should Poland participate in the Convention, there will be no fundamental change in the normative status when cases concerning adults are adjudicated by a Polish court, i.e. in the field of jurisdiction and conflict-of-law rules. More significant differences occur between national and Convention rules on the recognition and enforcement of foreign judgments and on judicial cooperation (assistance). The confirmation of this preliminary conclusion requires detailed further research into the possible implementation of the Convention into the Polish legal order; however, at this point, issues to be highlighted include key terminological matters and evaluation of the changes in the area of jurisdictional and conflict-of-law connecting factors from the perspective of the practical effect of the application of the Convention conflict-of-law rules and jurisdiction (i.e. the competence of Polish courts and the application of Polish law).

On the basis of the above considerations, it can be noted that currently, domestic law demonstrates a broad scope of Polish courts' jurisdiction under CCP (nationality, domicile and habitual residence, merely staying, location of assets, and other connections). This, in turn, in view of the principle of application of domestic law, which actually stems from PIL, implies a broad scope of application (jurisdiction) of Polish law in cases concerning adults. At the same time, domestic law provides for the far-reaching principle of recognition of foreign judgment effects (protection measures) by operation of law, and this principle is reinforced in practice by the narrow scope of exclusive jurisdiction against the background of CCP after the 2009 amendment.

Domestic jurisdictional and conflict-of-law rules distinguish between partial/full incapacitation and legal guardianship/curatorship (more precisely, several legal institutions under this name), with the grounds for the jurisdiction of Polish courts and authorities being broader for the latter category of cases. In addition to CCP and PIL, separate regulations may apply to measures taken in relation to, for example, mental health, alcohol or drug addiction. In the context of the Convention, both incapacitation and guardianship/curatorship are covered by the more general concept of the "protection measure", to which uniform rules of jurisdiction and conflict of laws apply, in addition to the rule concerning the recognition of foreign judgments and international cooperation.

The resulting application of Polish law by the court, in fact, override the universal conflict-of-law rule based on an adult's nationality (paragraphs 1 of Articles 13 and 60 PIL) by unidirectionally designating Polish law for incapacitation as well as guardianship and curatorship when a Polish court adjudicates, including when the jurisdiction is based on the grounds other than nationality (paragraphs 2 of Articles 13 and 60 PIL).

V. Conclusions

The foregoing comments justify the preliminary position of a generally neutral or positive impact of Poland's accession to the 2000 Hague Convention, which Member States are authorised to do under the Proposal in COM(281) 2023. On the other hand, the additionally drafted Proposal in COM(280) 2023 for a regulation supplementing and modifying the Convention raises comments that are both positive (in particular with regard to the intensification of judicial assistance and international cooperation) and critical (e.g. with regard to the proposed modification of the Convention rules of jurisdiction and the manner of drafting the provisions on recognition and enforcement of foreign judgments).

The entry into force of 2023 Proposals in Poland would not, in practice, mean a fundamental change of the normative status with regard to jurisdictional and conflict-of-law rules in situations where a case concerning an adult is adjudicated by a Polish court.⁸⁴ Further, the validity of an international agreement in a group of states would have some positive effects that the interstate unification of jurisdictional and conflict-of-law rules inherently entails. The significant differences occur under the proposed UE Regulation between national and proposed rules on the recognition and enforcement of foreign judgments and result from strengthening of international judicial cooperation (assistance).

A general assessment of the solutions provided in the 2000 Hague Convention in the context of the current legal status in Poland leads to the conclusion that, in fact, Poland could participate in the Convention. However, the concept of an additional EU regulation (in relation to the Convention) may give rise to various comments, both positive and critical. Undoubtedly, the assumption that it complements and modifies the Convention for the needs of the regional economic integration organisation (including the European Union) deserves a positive assessment. Such a need may be particularly justified in the area of mutual recognition and enforcement of judgments, which has initiated and is the driving machine of EU judicial cooperation in civil cases. Among the European Union, whose Member States are known to each other and which is based, among other things, on trust in the functioning of

⁸⁴ See more: P. Mostowik, *Skuteczność zagranicznego ubezpieczeniowego oraz zarządzeń opiekuńczych i innych środków ochrony dorosłych na tle projektowanej koegzystencji konwencji haskiej z 2000 r. oraz rozporządzenia UE (KOM 280 i 281 z 2023 r.)*, "Polski Proces Cywilny" 2023, Issue 4, pp. 579 et seq.; P. Mostowik, *Jurysdykcja krajowa i prawo właściwe na tle konwencji haskiej o ochronie dorosłych z 2000 r. oraz projektu uzupełniającego rozporządzenia unijnego z 2023 r.*, "Problemy Prawa Prywatnego Międzynarodowego" 2024, Vol. 34, pp. 1 et seq.

the judiciary, it is theoretically possible to regulate more than in the 2000 Hague Convention. Indeed, the Convention with potential global effect may involve regulations with states with significantly different judiciary systems or features of substantive or procedural law, and sometimes, such dissimilarity may be even difficult to predict. In principle, what also should be assessed positively is the aim of the Proposal in COM(281) 2023 to increase the number of Convention States to include more EU Member States, which also means Poland's participation in the 2000 Hague Convention.

There are also some general doubts about the desire to simultaneously modify the Convention by means of the EU regulation. Its disproportionate volume in relation to its complementary nature raises doubts which must be seen as a *signum temporis* of legislation in the third decade of the 21st century. The Proposal needs redrafting as it contains both solutions that are desirable for judicial cooperation between Member States and solutions that are unnecessary or questionable.

The idea of modifying the 2000 Hague Convention and issuing an additional regulation “for internal purposes” of the European Union (i.e. relations between EU Member States) seems more justified in the area of mutual recognition and enforcement of judgments, as well as in the area of mutual judicial assistance and interstate cooperation, which has only been mentioned above. Among EU Member States, which know each other and form a group based, *inter alia*, on trust in the functioning of the judiciary, it is possible to foresee, and thus, regulate a little more than in the potential global group of the participants to the 2000 Hague Convention. Certainly, the proposed European Certificate of Representation and national registers of protection measures require careful consideration, including from the perspective of a wide range of cases they are intended to refer to, as well as in terms of the organisational challenges. The chapters on judicial assistance and interstate cooperation constitute generally the most valuable part of the Proposal as it is essentially in these areas that value can be added to relations between the Member States. However, as with the recognition and enforcement provisions, these chapters may give the impression that sometimes, the solutions provided in the 2000 Hague Convention have been unnecessarily transposed. As such, this part of the Proposal appears to require some editorial refinement and the reduction of provisions (i.e. leaving those parts of the Regulation that supplement or modify the 2000 Hague Convention).

In view of the options of legislative actions, as described in the Impact Assessment Report on 2023 Proposals (document 10108/23ADD), it is reasonable to call for a change in the EU Commission's chosen course of action. It seems more rational to temporally distinguish both planned actions (proposals) under Option 4. From the perspective of functioning of the judiciary and the certainty of circulation, it would seem to be more beneficial to first take steps to accede to the 2000 Hague Convention and to gather several years of experience of its operation, also between Member States. Subsequently, in the longer term, it would be

recommended to take into account the experience of the Convention application on the EU territory, and to take steps to supplement or modify the Convention rules for the needs of intra-EU judicial cooperation in civil matters. Indeed, the experience of the 2000 Hague Convention application may, firstly, verify the thesis of the need to “improve” its operation and, secondly, identify precisely the areas where this would be desirable for the benefit of adults and their guardians, as well as the cross-border civil law transactions.⁸⁵

⁸⁵ Hence, the position of the Council of Ministers, represented by the Minister of Justice, presented in the course of the work of the parliamentary committee in August 2023, that the government has an entirely positive stance on the “adult protection” proposals, does not seem fully justified; available at: [https://orka.sejm.gov.pl/zapisy9.nsf/o/DCDoF2599A83F6BAC1258A14003D5C4B/\\$File/o415309.pdf](https://orka.sejm.gov.pl/zapisy9.nsf/o/DCDoF2599A83F6BAC1258A14003D5C4B/$File/o415309.pdf) [accessed on: 12.03.2024].

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YEARBOOK

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**Privileged Oral Wills
in Comparative Perspective**

PRIVATE LAW

I. Introduction

1. Polish Perspective of the Privileged Will Future

Not much discussion was held in Poland for many years on potential changes to the forms of privileged wills regulated by the Polish Civil Code. Even at the beginning of the 21st century, the opinions in this regard, although occurring, were quite isolated¹ and were often journalistic in nature.² However, over recent years, the issue of will forms, including privileged wills, has become the subject of broader interest in the doctrine.³ This applies not only to the most common form of a privileged will found in practice, i.e. the oral will,⁴ but also to

¹ See: K. Osajda, *Wpływ rozwoju techniki na uregulowanie formy testamentu – rozważania de lege ferenda*, “Rejent” 2010, Issue 5, pp. 55–67; M. Załucki, *Współczesne tendencje rozwoju dziedziczenia testamentowego – czyli nie tylko o potrzebie wprowadzenia wideotestamentu do nowego Kodeksu cywilnego*, “Roczniki Nauk Prawnych” 2012, Vol. 22, Issue 2, pp. 39–52. See also the remarks made by: F. Zoll (F. Zoll, *Testamentary Formalities in Poland*, [in:] *Comparative Succession Law: Volume I: Testamentary Formalities*, K.G.C. Reid, M.J. de Waal, R. Zimmermann (eds.), Oxford 2011, p. 281).

² See: K. Osajda, *Testamenty XXI wieku: mistyczny, elektroniczny, cyfrowy na CD lub DVD*, supplement “Prawo co Dnia” to “Rzeczpospolita”, 31 October 2005, Issue 2552.

³ See: J. Rudnicki, *Rola formy testamentu. Uwagi na tle porównawczym*, “Forum Prawnicze” 2013, Issue 2, pp. 35–44; A. Pabin, *Testament jako akt sformalizowany – uwagi w sprawie przyszłego kształtu regulacji dotyczących formy rozrządzeń testamentowych*, “Studia Prawnicze” 2016, Issue 1, pp. 91–125; M. Załucki, *Forma testamentu w perspektywie rekodyfikacji polskiego prawa spadkowego. Czas na rewolucję?*, “Państwo i Prawo” 2017, Issue 3, pp. 31–49; M. Załucki, *Uwagi w sprawie wykorzystania nowych technologii dla rozrządzeń na wypadek śmierci w trakcie zagrożenia życia w podróży*, [in:] *Prawne aspekty podróży i turystyki – historia i współczesność. Prace poświęcone pamięci profesora Janusza Sondla*, P. Cybula (ed.), Kraków 2018, pp. 639–646; K.W. Rozum, *Testamenty szczególnie pięćdziesiąt lat po ich wprowadzeniu – pytanie o konieczność rewizji norm*, [in:] *Testament w prawie polskim – wybrane problemy*, E. Kabza, K. Krupa-Lipińska (eds.), Toruń 2018, pp. 269–289. See also the remarks by: A. Pytel, *Testament w formie elektronicznego dokumentu opatrzonego kwalifikowanym podpisem elektronicznym*, “Monitor Prawniczy” 2018, Issue 14, pp. 761–773; K. Sikora, *Technologie biometryczne sposobem uwspółcześnienia przepisów o formie testamentu holograficznego*, “Studia Prawnicze. Rozprawy i Materiały” 2020, Issue 2, pp. 213–221.

⁴ See: W. Borysiak, *Testament ustny de lege ferenda w świetle badań empirycznych i prawnoporównawczych*, [in:] *Testament w prawie polskim – wybrane problemy*, E. Kabza, K. Krupa-Lipińska (eds.), Toruń 2018, pp. 21–44, and the references cited therein. See also: B. Kucia, *Przesłanka „istnienia obawy rychłej śmierci spadkodawcy” – uwagi de lege lata i de lege ferenda*, “Rejent” 2012, Issue 12, pp. 107–109; and K. Pol, *O przyszłości testamentu ustnego*, [in:] *Europeizacja prawa spadkowego – aktualne tendencje*, K.A. Dadańska (ed.), Szczecin 2016, pp. 44–47.

the will executed during a voyage⁵ and the military will.⁶ Issues concerning the introduction of a will in the form of an audio-video recording into Polish law are also considered.⁷

2. Polish Perspective of the Oral Will Future

The oral will (Article 952 of the Polish Civil Code) is the most common form of the privileged will occurring in practice in Poland. Further, the doctrine tends to emphasise that it is simultaneously the only form of the privileged will that plays a relatively significant role in practice.⁸ However, this form raises numerous doubts in case law and has been the subject of many divergent contributions of the doctrine.⁹ Based on observations of judicial practice, it is often argued that cases of forgery of oral wills are much more frequent than in the case of other wills.¹⁰ Thus, in Polish doctrine, arguments in favour of repealing or substantially amending the wording of Article 952 of the Polish Civil Code (*kodeks cywilny*; KC) have also appeared quite frequently over recent years.¹¹

⁵ See: P. Cybula, *Testament podróży de lege lata i de lege ferenda (zagadnienia wybrane)*, [in:] 50 lat kodeksu cywilnego. Perspektywy rekodyfikacji, P. Stec, M. Załucki (eds.), Warszawa 2015, pp. 385–399; and K.W. Rozum, *Testamenty...*, pp. 277–281; and M. Załucki, *Uwagi...*, pp. 644–646.

⁶ See: J. Rudnicki, *Testament żołnierski i testamenty wojskowe w europejskiej tradycji prawnej*, Kraków 2015; P. Budner, *Ewolucja testamentu wojskowego w prawie polskim*, [in:] *Testament w prawie polskim – wybrane problemy*, E. Kabza, K. Krupa-Lipińska (eds.), Toruń 2018, pp. 45–57; K. Jankowa, N. Tomczyk, *Testament wojskowy*, [in:] *Testament w prawie polskim – wybrane problemy*, E. Kabza, K. Krupa-Lipińska (eds.), Toruń 2018, pp. 135–145.

⁷ See: M. Załucki, *Współczesne tendencje...*, pp. 44–46; M. Załucki, *Kierunek zmian przepisów o formie testamentu w dobie nowych technologii na przykładzie Szwajcarii*, “Białostockie Studia Prawnicze” 2017, Issue 4, pp. 16–25; M. Załucki, *Uwagi...*, pp. 644–646; M. Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii*, Warszawa 2018, pp. 233–248. See also K.W. Rozum, *Testamenty...*, pp. 286 and 289. Indeed, in view of the extremely rapid technological developments and the widespread availability of mobile phones with integrated cameras, it is conceivable that a will could be made precisely in “electronic form” consisting of the recording of the testator’s oral declaration of will, prepared using methods developed in the course of technological changes, e.g. in the form of a video recording or the recording of the testator’s voice. See: K. Osajda, *Wpływ...*, pp. 55–56; M. Załucki, *Współczesne tendencje...*, pp. 44–46; A. Pabin, *Testament...*, pp. 123–125; K. Pol, *O przyszłości...*, pp. 45–46. In the context of ascertaining the content of an oral will *de lege ferenda*, see also B. Kucia, *Skutki niedopełnienia wymagań dotyczących stwierdzenia treści testamentu ustnego (art. 952 § 2–3 k.c.)*, “Transformacje Prawa Prywatnego” 2013, Issue 2, p. 29, footnote 75.

⁸ See: J. Gwiazdomorski, *Formy testamentu*, “Nowe Prawo” 1966, Issue 6, p. 719; J. Gwiazdomorski, *Glosa do postanowienia Sądu Najwyższego z 6 marca 1975 r., III CRN 450/74*, “Orzecznictwo Sądów Polskich i Komisji Arbitrażowych” 1976, Issue 7–8, Item 146, pp. 334–335; S. Wójcik, *Glosa do postanowienia Sądu Najwyższego z 10 października 2000 r., V CKN 970/00*, “Orzecznictwo Sądów Polskich” 2001, Issue 11, Item 161, p. 550; E. Skowrońska-Bocian, *Testament w prawie polskim*, Warszawa 2004, p. 105.

⁹ As aptly noted by: B. Kucia, [in:] *Kodeks cywilny. Komentarz. Tom VI. Spadki (art. 922–1088)*, M. Habdas, M. Fras (eds.), Warszawa 2019, Art. 952, nb 2: “Oral wills enjoy considerable popularity, although the standardisation applicable to them gives rise to numerous interpretation disputes”.

¹⁰ See: J. Czerwiakowski, *Testament ustny w świetle praktyki*, “Palestra” 1987, Issue 10–11, pp. 46–51. See also: E. Skowrońska-Bocian, *Testament w prawie polskim...*, p. 105; and A. Feluś, *Testamenty. Popularno-naukowe studium kryminalistyczne*, Katowice 1996, pp. 125–128. See also examples observed in the course of the empirical study – W. Borysiak, *Funkcjonowanie w praktyce testamentu sporządzanego w formie ustnej (art. 952 k.c.)*, Warszawa 2014, pp. 132–136.

¹¹ See, among others: J. Czerwiakowski, *Testament...*, pp. 46 et seq.; B. Kucia, *Przesłanka...*, pp. 107–109; K.W. Rozum, *Testamenty...*, p. 289; A. Gałakan-Halicka, *Stwierdzenie treści testamentu ustnego*, “Monitor Prawniczy” 2004, Issue 16, pp. 744–745; B. Pręda, *W sprawie przyszłości testamentu ustnego*, “Rejent” 2009, Issue 5, pp. 93–96; K. Osajda, [in:] *Komentarze Prawa Prywatnego. Tom IVA. Kodeks cywilny. Komentarz. Spadki*,

This caused the oral will preservation to be a controversial topic when the Succession Law Group of the Civil Law Codification Commission worked on the preliminary draft provisions of the new Civil Code relating to will forms. With a majority of one vote, it was decided that this form of will should not be adopted in the future codification. The relevance of such a potential *de lege ferenda* solution should be considered. Regardless of the positive or negative resolution of this issue, it is also legitimate to discuss potential modification of the conditions under which such a will may be made and the means of its ascertaining. In fact, it has already been started in Polish doctrine by several authors.¹²

3. The Relevance of the Comparative Analysis for the Oral Will Form Future

Proposals to repeal or amend specific legal institutions should be based on a comprehensive analysis, including an assessment of how they are regulated and operate in other legal systems, as this often allows for balanced evaluations of certain proposals made in the doctrine. Solutions of foreign legal systems can also serve as a valuable source of inspiration for such changes.¹³ Moreover, it may be worthwhile to refer to empirical research (conducted at the Institute of Justice in 2014) on how the institution of the oral will functions in practice.¹⁴

The following analysis attempts to describe the legal systems of countries whose legal solutions have had the greatest influence on Polish law for historical reasons, i.e. German, French, and Austrian laws. Moreover, it was decided to discuss extensively two countries

K. Osajda (ed.), Warszawa 2019, Art. 952, nb 4–6.2, pp. 479–480. Regarding the *de lege ferenda* remarks, see also: M. Pazdan, *Prawo spadkowe*, [in:] *Zielona Księga. Optymalna wizja Kodeksu cywilnego Rzeczypospolitej Polskiej*, Z. Radwański (ed.), Warszawa 2006, pp. 193–194, as well as M. Wróbel, *Główne założenia projektu Kodeksu cywilnego*, “Monitor Prawniczy” 2007, Issue 13, p. 737.

¹² As regards the *de lege ferenda* postulates relating to the oral will, as regards both its modification and its abolition, see: J. Czerwiakowski, *Testament...*, pp. 46–51; A. Gałakan-Halicka, *Stwierdzenie...*, p. 745; B. Kucia, *Przesłanka...*, pp. 107–109; M. Pazdan, *Prawo spadkowe...*, pp. 193–194; A. Pabin, *Testament...*, p. 108; K. Pol, *O przyszłości...*, pp. 31–47; B. Pręda, *W sprawie przyszłości...*, pp. 87 et seq., in particular, pp. 93–96; K.W. Rozum, *Testamenty...*, pp. 287–289; E. Skowrońska-Bocian, *Testament w prawie polskim...*, pp. 103 et seq.; F. Zoll, *Testamentary Formalities in Poland...*, pp. 279–280; I. Kleniewska, *Testament ustny*, “Jurysta” 1993, Issue 2, p. 30; J. Pietrzykowski, *Wybrane zagadnienia reformy prawa spadkowego*, [in:] *Z zagadnień współczesnego prawa cywilnego. Księga pamiątkowa ku czci Profesora Tomasza Dybowskiego*, “Studia Iuridica” 1994, vol. 21, pp. 254–255; E. Skowrońska, *Testament ustny „de lege ferenda”*, [in:] *Z zagadnień współczesnego prawa cywilnego. Księga pamiątkowa ku czci Profesora Tomasza Dybowskiego*, “Studia Iuridica” 1994, vol. 21, pp. 259–266; P. Księżak, *Przebaczenie w polskim prawie cywilnym*, “Państwo i Prawo” 2006, Issue 11, p. 66, footnote 61; J. Turłukowski, *Sporządzenie testamentu w praktyce*, Warszawa 2009, pp. 178–179; F. Zoll, *Das polnische Erbrecht im Wandel: die geplanten Reformen*, [in:] *Erbrechtsentwicklung in Zentral- und Osteuropa*, R. Welser (ed.), Wien 2009, p. 36; M. Załucki, *Perspektywy rekodyfikacji polskiego prawa spadkowego*, [in:] *50 lat kodeksu cywilnego. Perspektywy rekodyfikacji*, P. Stec, M. Załucki (eds.), Warszawa 2015, p. 361; M. Obrzut, *Testament ustny w świetle orzecznictwa Sądu Najwyższego*, “Rejent” 2015, Issue 2, pp. 84–85; K. Osajda, *Komentarze...*, Art. 952, nb 4–6.2, pp. 479–480. As regards potential statutory changes, see also: M. Wróbel, *Główne...*, p. 737.

¹³ See: W. Borysiak, *Testamenty szczególne w formie ustnej w perspektywie porównawczej*, “Prawo w Działaniu” 2016, Issue 27, pp. 108–121. See also: J. Rudnicki, *Rola formy testamentu...*, pp. 38–41.

¹⁴ W. Borysiak, *Funkcjonowanie...*, pp. 1–175. This study is available on the Institute of Justice’s website at <https://iws.gov.pl/analizy-i-raporty/raporty/> [accessed on: 12.02.2024]. The study analyses a file sample of 298 cases.

of well-established positions in the European legal tradition that (like Polish law) combine elements of the so-called Germanic and Romanic legal systems, i.e. Swiss and Dutch laws. Further, for comparison, two countries from the Romanic legal systems are also discussed, i.e. Italian and Spanish laws, since these countries represent the largest continental legal systems within the European Union (apart from the aforementioned systems, obviously excluding Switzerland).

The scope and depth of the comparative study are also related to the fact that German, Austrian¹⁵ and Swiss laws,¹⁶ and, to a lesser extent, French law,¹⁷ had the greatest influence on the existing regulations of Polish law in this field. A more extensive discussion is dedicated, in particular, to the Austrian regulation, which seems to have had the strongest influence on Polish legislation when it comes to the forms of privileged wills. Including this discussion was remarkably advisable as this Austrian regulation was subject to a significant transformation in the first decade of the 21st century. To understand the purpose of the modification, a brief overview of the legal situation in Austria before the statutory changes is also provided. However, the solutions of other European legal orders which may serve as a model for future changes in Polish law (e.g. Dutch law, as having a relatively new code regulation) also deserved a broader discussion. These considerations should be preceded by a legal and historical analysis presenting the roots of privileged oral wills.

The comparative study addresses only privileged oral wills as understood in Polish law. Only those forms of wills whose drafting is somewhat dependent on the existence of extraordinary circumstances (usually when the testator's life is threatened or it is impossible or difficult to draft a will in ordinary form) will, therefore, be regarded as privileged oral wills.¹⁸ They are usually subsidiary to the ordinary forms of wills (in terms of the possibility of drafting them if a testator, as a result of such extraordinary circumstances, is deprived of the ability to testify in one of the ordinary forms).

¹⁵ The significant impact of the Austrian regulation on Polish legislation in the scope of oral wills is indicated, among others, by J. Gwiazdomorski; see J. Gwiazdomorski, *Wykładnia przepisów o testamencie na tle uchwały składu siedmiu sędziów Sądu Najwyższego*, "Nowe Prawo" 1973, Issue 6, p. 831.

¹⁶ For example, references to the Swiss regulation when discussing the regulation of an oral will are made by B. Kordasiewicz (*Glosa do uchwały 7 sędziów Sądu Najwyższego z 13 lutego 1980 r., II CZP 69/79*, "Państwo i Prawo" 1981, Issue 8, p. 147) and E. Skowrońska (*Forma testamentu w prawie polskim*, Warszawa 1991, pp. 97–98).

¹⁷ It should be mentioned that due to the archaic nature of privileged will forms in French law, they do not seem to have an impact on the current Polish regulation.

¹⁸ It may be noted, however, that not all legal systems automatically classify the oral form of a will as a privileged will. Indeed, foreign legal systems also contain ordinary wills in oral form, which are usually similar to the allographic will found in Polish law. They are, therefore, generally omitted in further considerations.

II. Historical and Legal Considerations

In post-classical law, among privileged wills, the Roman law provided for a form of a will made during pestilence (the so-called *testamentum tempore pestis* or *testamentum pestis tempore conditum*). This will was authorised in 290 by the constitution of the emperors, Diocletian and Maximilian (see: *Codex Iustinianus* 6,23,8¹), and could be made orally before seven witnesses, who then had to affix their seal and signature to a document attesting to the contents of such a will, but – unlike ordinary forms of wills – their simultaneous presence was not necessary (possibly there was a requirement of their simultaneous affixing their seal and signature to the document).² A potential illness of the testator or one (or more) of the witnesses is provided as the reason for such a solution.³ Still, the meaning of the wording of the aforementioned constitution – due to its laconic nature – causes disputes in the doctrine.⁴ This form of will was present in Roman law throughout the post-classical law period and was subsequently recognised in Justinian law. Then, it also occurred throughout Europe

¹ The Constitution provided that:

Casus maioris ac novi contingentis ratione adversus timorem contagionis, quae testes deterret, aliquid de iure laxatum est: non tamen prorsus reliqua etiam testamentorum sollemnitas perempta est. 1. Testes enim huiusmodi morbo oppresso eo tempore iungi atque sociari remissum est, non etiam conveniendi numeri eorum observatio sublate.

[“The strictness of the law is relaxed when the testator, by reason of force majeure, is infected with a contagious disease which creates a fear of contagion on the part of the witnesses; but the other formal requirements for making a will are not to be waived. 1. Witnesses are relieved of the obligation to accompany each other during this period; however, the number of witnesses [to the will] prescribed by law must be observed”].

² However, the question of the essence of the relaxation of formal requirements in the case of this will form is sometimes disputed in literature – see: F. Longchamps de Bérrier, *Law of Succession. Roman Legal Framework and Comparative Law Perspective*, Warszawa 2011, p. 168, and M. Vinci, *Il testamento redatto in tempo di malattia contagiosa: radici romanistiche e letture attualizzanti*, *Bulletino dell’Istituto di Diritto Romano “Vittorio Scialoja”* 2020, Vol. 114, pp. 289 and 297.

³ See: M. Vinci, *Il testamento...*, pp. 290–295, and S.P. Kursá, *Circumstances determining the preparation of a will in the event of a plague in Roman law*, [in:] *Crisis as a Challenge for Human Rights*, I. Florek, A. Koroncziová, J.L. Zamora Manzano (eds.), Bratislava 2020, p. 211.

⁴ See: M. Kaser et al., *Das römische Privatrecht. Zweiter Abschnitt. Die Nachklassische Entwicklungen*, München 1975, p. 482, footnote 40; T. Rűfner, *Testamentary Formalities in Roman Law*, [in:] *Comparative Succession Law: Volume I: Testamentary Formalities*, K.G.C. Reid, M.J. de Waal, R. Zimmermann (eds.), Oxford 2011, p. 23; S.P. Kursá, *Circumstances...*, pp. 209–215; M. Vinci, *Il testamento...*, pp. 283–300; and C. Willems, *Zwischen Infektionsschutz und Schutz des Erblasserwillens: Das sogenannte testamentis tempore pestis conditum*, “*Zeitschrift der Savigny Stiftung*” 2021, Issue 1, pp. 616–634.

in the Middle Ages.⁵ However, formal requirements that had to be observed for its validity (e.g. the number of witnesses required) are disputed in the doctrine.⁶ A similar form of will was also known in Polish pre-partition municipal and land law.⁷

⁵ See: R. Zimmermann, *Testamentsformen: «Willkur» oder Ausdruck einer Rechtskultur?*, “*Rabels Zeitschrift für ausländisches und internationales Privatrecht*” 2012, Issue 3, p. 489.

⁶ See more: N. Jensen, *Testamentary Formalities in Early Modern Europe*, [in:] *Comparative Succession Law: Volume I: Testamentary Formalities*, K.G.C. Reid, M.J. de Waal, R. Zimmermann (eds.), Oxford 2011, p. 41 and pp. 47–48.

⁷ See more: J. Koredczuk, *Uprzywilejowane rozporządzenia ostatniej woli sporządzane podczas zarazy w prawie i orzecznictwie sądów byłego zaboru austriackiego w okresie międzywojennym*, “*Krakowskie Studia z Historii Państwa i Prawa*” 2021, Issue 2, pp. 191–192, and the references cited therein.

III. Comparative Legal Considerations

1. Germany

German law provides for two forms of oral privileged wills, which may be regarded as similar to the Polish oral will under Article 952 KC. The first form is referred to as a privileged will before a mayor (*Nottestament vor dem Bürgermeister* – Section 2249 of the German Civil Code [*Bürgerliches Gesetzbuch*; BGB]) and the latter – as a privileged will in the presence of three witnesses (*Nottestament vor drei Zeugen* – Section 2250 BGB).

The condition for the first of these two will forms is a concern that the testator will die sooner than it is possible to make a will before a notary (Section 2249(1) BGB).¹ The fear of the testator's death in the near future must, at least, be the mayor's subjective feeling or be justified objectively.² The validity of a will is not affected if this fear of death objectively proved unfounded (second sentence of Section 2249(2) BGB). The absence of the fear of the testator's death justified both objectively and subjectively renders the will invalid.³

¹ In the initial version of this provision, the impossibility of making a will also applied to a will in the presence of a judge. For various modifications of the wording of this provision in the development of German law, see: H. Lange, K. Kuchinke, *Erbrecht. Ein Lehrbuch*, München 2001, pp. 387–389; R. Zimmermann, *Testamentary Formalities in Germany*, [in:] *Comparative Succession Law: Volume I: Testamentary Formalities*, K.G.C. Reid, M.J. de Waal, R. Zimmermann (eds.), Oxford 2011, pp. 212–216; W. Baumann, [in:] *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 5. Erbrecht. §§ 2229–2264 (Errichtung und Aufhebung eines Testaments)*, Ch. Baldus (ed.), Berlin 2018, § 2249, nb 1–9, pp. 210–211.

² See more: C.T. Ebenroth, *Erbrecht*, München 1992, p. 129; E.I. Obergfell, [in:] *Handbuch des Erbrechts*, R. Hausmann, G. Hohloch (eds.), Berlin 2008, pp. 535–536; K. Muscheler, *Erbrecht, Band I*, Tübingen 2010, p. 892 (further, the author gives an example of a situation where the fear of the testator's death could exist in the subjective perception of the mayor at the time of making the will, but did not subsequently prove to be objectively justified in the light of the medical opinion); K.W. Lange, *Erbrecht*, München 2017, p. 92; H. Brox, W.-D. Walker, *Erbrecht*, München 2018, p. 82; L. Michalski, J. Schmidt, *BGB-Erbrecht*, Heidelberg 2019, p. 61; W. Hagen, [in:] *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 9. Erbrecht. §§ 1922–2385, §§ 27–35 BeurkG*, S. Kessal-Wulf (ed.), München 2013, § 2249, nb 2, p. 1376; S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch. Handkommentar mit AGG, EGBGB (Auszug), ErbbauRG, LPartG, ProdHaftG, VbVG, VersAusglG und WEG. Band II*, H.P. Westermann, B. Grunewald, G. Maier-Reimer (eds.), Köln 2017, § 2249, nb 2, p. 6119; W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2249, nb 16, pp. 213–214; and P. Sticherling, [in:] *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 11. Erbrecht. §§ 1922–2385, §§ 27–35 BeurkG*, S. Kessal-Wulf (ed.), München 2020, § 2249, nb 2. As emphasised in the German doctrine, the mere subjective conviction of the testator or witnesses is not sufficient in this respect – see: J. Mayer, [in:] *Soergel Kommentar zum Bürgerlichen Gesetzbuch. Band 22. Erbrecht 2, §§ 2064–2273, §§ 1–35 BeurkG*, J. Damrau (ed.), Stuttgart 2003, § 2249, nb 4, p. 530; and S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2249, nb 2, p. 6119.

³ S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2249, nb 7, p. 6120.

The inability to access a notary is understood narrowly in German doctrine (e.g. no notary's office in a particular locality is not sufficient).⁴ However, there is no obligation to attempt to contact the notary (e.g. by telephone) after the closing hours of the notary's office.⁵

A will in the form as described above must be made in the presence of the mayor of the municipality (*Bürgermeisters der Gemeinde*)⁶ in which the testator resides and two witnesses. The witnesses should be present simultaneously throughout the testator's declaration of will.⁷ The absence of one of them, even when hearing one of several parts of the testator's declaration, shall render the will invalid.⁸

The content of the testator's declaration of will must be included in the record drawn up by the mayor, which should state that it was not possible to make a will before a notary (first sentence of Section 2249(2) BGB). The record must be signed by the testator and the witnesses (see: Section 2249(1) BGB), and the absence of the signature of either of them causes the invalidity of the will.⁹ Furthermore, following the amendment of this provision in 1968, when drawing up the will, the mayor should provide the testator with information when such a will ceases to be valid (see: Section 2252(1) BGB), and the confirmation that this notification has been given should be included in the signed record (Section 2249(3) BGB).¹⁰

An interesting regulation is Section 2249(6) BGB,¹¹ according to which formal errors made when drafting the record do not affect the validity of the will if there is no doubt that

⁴ See: E.I. Obergfell, [in:] *Handbuch...*, p. 537; H. Brox, W.-D. Walker, *Erbrecht...*, p. 82, and W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2249, nb 17, p. 214. As W. Hagen notes, [in:] *Münchener Kommentar...*, § 2249, nb 5, p. 1376: *Nicht genügend ist, dass der Notar seinen Amtssitz nicht am Aufenthaltsort des Erblassers hat oder verhindert ist; Voraussetzung ist die – an sich wohl nur ausnahmsweise – nicht vorhandene Erreichbarkeit eines Notars*. On the other hand, P. Sticherling, [in:] *Münchener Kommentar...*, § 2249, nb 5, notes that, as a rule, it can be assumed that a notary is also available to perform notarial activities in the afternoon on a working day.

⁵ This regulation was adopted in the context of the regulation of Section 2250 BGB in the statement of reasons of the judgement of the OLG in München of 12 May 2015, 31 Wx 81/15, NJW-RR 2015, Issue 17, pp. 1034–1037. In the doctrine, see also: S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2249, nb 2, p. 6119.

⁶ It is also possible to make a will before a person who is authorised to replace the mayor; see Section 2249(5) BGB. In the German doctrine, it is pointed out that in such cases, both the mayor and the person authorised to replace the mayor act somehow “in place of the notary” (*an die Stelle des Notars*) – see: C.T. Ebenroth, *Erbrecht...*, p. 128.

⁷ It is thus indicated that they should be aware of their “co-responsibility” for the correct communication of the content of the testator's will in the record – P. Sticherling, [in:] *Münchener Kommentar...*, § 2249, nb 22.

⁸ See: H. Brox, W.-D. Walker, *Erbrecht...*, p. 83; J. Mayer, [in:] *Soergel Kommentar...*, § 2249, nb 10, p. 531; W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2249, nb 45, p. 220; P. Sticherling, [in:] *Münchener Kommentar...*, § 2249, nb 22.

⁹ Extensively on this point, see: W. Hagen, [in:] *Münchener Kommentar...*, § 2249, nb 23–30, pp. 1380–1382, and W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2249, nb 40, p. 219. It is stressed unanimously that this signature may be affixed after the death of the testator – see: E.I. Obergfell, [in:] *Handbuch...*, p. 542, and W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2249, nb 46, pp. 220–221.

¹⁰ On this regulation, see: H. Lange, K. Kuchinke, *Erbrecht...*, p. 397. Failure to comply with this obligation may render the public body liable for damages – P. Sticherling, [in:] *Münchener Kommentar...*, § 2249, nb 18.

¹¹ In the original, this provision reads as follows:
Sind bei Abfassung der Niederschrift über die Errichtung des in den vorstehenden Absätzen vorgesehenen Testaments Formfehler unterlaufen, ist aber dennoch mit Sicherheit anzunehmen, dass das Testament eine zuverlässige Weitergabe der Erklärung des Erblassers enthält, so steht der Formverstoß der Wirksamkeit der Beurkundung nicht entgegen.

the record contains the content of the testator's last will.¹² Otherwise, the defective action of the mayor leads to the invalidity of the will and the liability of the competent public authority (municipality) for the actions of its officials (on the basis of Section 839 BGB in conjunction with Article 34 of the German Constitution of 1949).¹³

As commonly emphasised in the doctrine, this will form does not play a significant role in practice.¹⁴ This is because, in the era of developing electronic communications and means of transport, accessibility to a public official such as a notary should not be any problem for the testator.¹⁵ It is even highlighted that the availability of a notary is much better than that of a mayor.¹⁶

Pursuant to Section 2250(1) BGB, whoever stays at a place that is "isolated from others" ("blocked off") – due to an outbreak of illness or due to other extraordinary circumstances, in such a way that it is impossible or extremely difficult to make a will before a notary – may make the will either before a mayor (Section 2250(1) in conjunction with Section 2249(1) BGB) or by oral declaration before three witnesses.¹⁷ Circumstances justifying the application of this will form, i.e. "being blocked off" (*Absperrung*), must be objectively justified.¹⁸ Mere subjective beliefs of the testator are therefore insufficient.¹⁹ Situations applicable in this case include flooding, an avalanche, quarantine due to epidemics or staying in the area of military or police operations.²⁰

¹² For the broader interpretation of this provision, see: E.I. Obergfell, [in:] *Handbuch...*, pp. 542–543; K. Muscheler, *Erbrecht...*, pp. 895–896; H. Brox, W.-D. Walker, *Erbrecht...*, p. 83; J. Mayer, [in:] *Soergel Kommentar...*, § 2249, nb 15–16, pp. 533–534; W. Hagen, [in:] *Münchener Kommentar...*, § 2249, nb 32, p. 1383; S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2249, nb 5–7, p. 6120; D. Weidlich, [in:] *Palandt Bürgerliches Gesetzbuch*, München 2017, § 2249, nb 11, p. 2497; W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2249, nb 35–38, pp. 218–219; and P. Sticherling, [in:] *Münchener Kommentar...*, § 2249, nb 34.

¹³ See more: J. Mayer, [in:] *Soergel Kommentar...*, § 2249, nb 18, pp. 534–535; S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2249, nb 8, p. 6120; D. Weidlich, [in:] *Palandt Bürgerliches Gesetzbuch...*, § 2249, nb 6, p. 2496; and W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2249, nb 54, p. 223.

¹⁴ See, among others: K.W. Lange, *Erbrecht...*, p. 91; D. Olzen, D. Looschelders, *Erbrecht*, Berlin–Boston 2017, pp. 63 and 88; J. Mayer, [in:] *Soergel Kommentar...*, § 2249, nb 2, pp. 529; and S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2249, nb 1, p. 6119.

¹⁵ K.W. Lange, *Erbrecht...*, p. 91; J. Mayer, [in:] *Soergel Kommentar...*, § 2249, nb 2, p. 529; S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2249, nb 1, p. 6119; and W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2249, nb 9d, p. 212.

¹⁶ A. Röthel, *Ist unser Erbrecht noch zeitgemäß? Gutachten a zu 68. Deutschen Juristentag*, München 2010, p. A66; K. Muscheler, *Erbrecht...*, p. 901; K.W. Lange, *Erbrecht...*, p. 91 and W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2249, nb 9d, p. 212.

¹⁷ Such a declaration cannot, therefore, be made in writing and then only submitted to witnesses – see: E.I. Obergfell, [in:] *Handbuch...*, p. 546; H. Brox, W.-D. Walker, *Erbrecht...*, p. 84; and W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2250, nb 26, p. 231.

¹⁸ K. Muscheler, *Erbrecht...*, p. 894; W. Hagen, [in:] *Münchener Kommentar...*, § 2250, nb 4, p. 1385; S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2250, nb 2, p. 6121; and P. Sticherling, [in:] *Münchener Kommentar...*, § 2250, nb 5. These circumstances also must be causally linked to the impossibility or extreme difficulty of making a will before a notary (see: J. Mayer, [in:] *Soergel Kommentar...*, § 2250, nb 3, p. 536).

¹⁹ K. Muscheler, *Erbrecht...*, p. 93; W. Hagen, [in:] *Münchener Kommentar...*, § 2250, nb 4, p. 1385; S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2250, nb 2, p. 6121, and D. Weidlich, [in:] *Palandt Bürgerliches Gesetzbuch...*, § 2250, nb 1, p. 2497.

²⁰ See: C.T. Ebenroth, *Erbrecht...*, p. 128; L. Michalski, J. Schmidt, *BGB-Erbrecht...*, p. 61; J. Mayer, [in:] *Soergel Kommentar...*, § 2250, nb 3, p. 536; W. Hagen, [in:] *Münchener Kommentar...*, § 2250, nb 4, p. 1385; S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2250, nb 2, p. 6121; W. Baumann, [in:] *J. von Staudingers*

A will before three witnesses can also be made by a person exposed to imminent mortal danger (*Nahe Todesgefahr* – Section 2250(2) BGB) so that it is not possible for them to make a will even in the form before the mayor. Such a danger must either be justified by objective circumstances or exist in the subjective belief of each witness, based on their life experience and objective circumstances.²¹ The witnesses must also be convinced (assuming exercising due diligence) of the existence of the danger and the impossibility of making a will before a notary or a mayor.²² Such a danger may also exist due to a long-term illness condition.²³ The absence of the imminent danger of the testator's death, justified both objectively and subjectively, renders the will invalid.²⁴

In the case of the above will form, three witnesses must be present simultaneously during the entire testamentary act.²⁵ They must also have the intention and awareness of joint participation in the act of making the will by the testator.²⁶ A person present only incidentally at the place of testifying is not a witness, even if they can subsequently testify as to the testator's statements.²⁷ A record of the testator's declaration should be prepared,²⁸ and

Kommentar..., § 2250, nb 17, p. 229, and P. Sticherling, [in:] *Münchener Kommentar...*, § 2250, nb 5. Moreover, the doctrine emphasises that finding three persons capable of acting as witnesses in such situations may be difficult – see: E.I. Obergfell, *Handbuch...*, p. 544.

²¹ C.T. Ebenroth, *Erbrecht...*, p. 129; E.I. Obergfell, [in:] *Handbuch...*, pp. 544–545; K.W. Lange, *Erbrecht...*, p. 93; H. Brox, W.-D. Walker, *Erbrecht...*, p. 84; L. Michalski, J. Schmidt, *BGB-Erbrecht...*, p. 61; J. Mayer, [in:] *Soergel Kommentar...*, § 2250, nb 3, p. 536; W. Hagen, [in:] *Münchener Kommentar...*, § 2250, nb 7, p. 1386; W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2250, nb 19, pp. 229–230; and P. Sticherling, [in:] *Münchener Kommentar...*, § 2250, nb 8.

²² See: C.T. Ebenroth, *Erbrecht...*, p. 129; W. Hagen, [in:] *Münchener Kommentar...*, § 2250, nb 7–8, p. 1386; and P. Sticherling, [in:] *Münchener Kommentar...*, § 2250, nb 8. The German doctrine emphasises that it results from the fact that they usually lack the relevant medical knowledge to assess the situation objectively – see: W. Bauman, [in:] *J. von Staudingers Kommentar...*, § 2250, nb 20, p. 230.

²³ See: J. Mayer, [in:] *Soergel Kommentar...*, § 2250, nb 6, p. 536 (indicating, moreover, the risk that the testator will then lose their testamentary capacity); W. Hagen, [in:] *Münchener Kommentar...*, § 2250, nb 7, p. 1386, and W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2250, nb 21–22, pp. 230–231.

²⁴ See: the statement of reasons for the judgement of the OLG Düsseldorf of 25 June 2015, I-3 Wx 224/14, FamRZ 2016, Issue 2, pp. 166–167.

²⁵ C.T. Ebenroth, *Erbrecht...*, p. 129; H. Lange, K. Kuchinke, *Erbrecht...*, p. 395; K.W. Lange, *Erbrecht...*, p. 93; J. Mayer, [in:] *Soergel Kommentar...*, § 2250, nb 10, p. 538; W. Hagen, [in:] *Münchener Kommentar...*, § 2250, nb 10, p. 1387; S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2250, nb 3, p. 6121; W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2250, nb 30, p. 233; P. Sticherling, [in:] *Münchener Kommentar...*, § 2250, nb 11.

²⁶ C.T. Ebenroth, *Erbrecht...*, p. 129 (...) *die Absicht und das Bewußtsein haben, gemeinsam an der Errichtung eines Testaments mitzuwirken* [“have the intention and the awareness of joint participation in the act of creating the will”]. See also: K.W. Lange, *Erbrecht...*, p. 93; and S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2250, nb 3, p. 6121.

²⁷ See also: the statement of reasons for the judgement of the OLG Düsseldorf of 25 June 2015, I-3 Wx 224/14, FamRZ 2016, Issue 2, pp. 166–167. See also in the doctrine: S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2250, nb 3, p. 6121; and D. Weidlich, [in:] *Palandt Bürgerliches Gesetzbuch...*, § 2250, nb 4, p. 2497.

²⁸ With regard to its mandatory elements, which include the signatures of the testator and the witnesses, see: W. Hagen, [in:] *Münchener Kommentar...*, § 2250, nb 14–16, pp. 1388–1389; and P. Sticherling, [in:] *Münchener Kommentar...*, § 2250, nb 15–17. The German doctrine emphasises that this record can also be drawn up by a third party – see: J. Mayer, [in:] *Soergel Kommentar...*, § 2250, nb 11, p. 538; and W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2250, nb 27, p. 232 (*Der Text der Niederschrift muss nicht von den Zeugen selbst, sondern kann von einem beliebigen Dritten geschrieben werden* [“The text of the record does not have to be written by the witnesses themselves, but can be written by any third party”]).

it may be made in a language other than German if it is known to the testator and the witnesses (Section 2250(3) BGB).²⁹

Section 2249(6) BGB presented above applies to this will form accordingly, based on the reference contained in the second sentence of Section 2250(3) BGB.³⁰ Further, the doctrine emphasises the noticeable desire of German courts to uphold such a will – even at the expense of its formal requirements.³¹ This may result from the “normative complexity” of the regulation of Section 2250(2) BGB in connection with the reference in Section 2250(3) BGB, which may seem difficult to understand for potential witnesses (who do not usually have a legal background).³²

The doctrine further emphasises that nowadays a will made before three witnesses is not applicable in the textbook example of a mountaineer who – unable to get out of the cave – shouts out the contents of their will to their fellow climbers; however, it is primarily found in practice in hospitals and hospices, in situations where the elderly or seriously (chronically) ill people die there.³³

Both types of oral wills discussed above remain in force for three months from the time they were made unless the testator dies before that time (Section 2252(1) BGB), and such a time limit is suspended for the period during which the testator is incapable of going to a notary (Section 2252(2) BGB).³⁴ The time limit is also suspended if the testator is able to make a will in the form of their own handwriting during this period.³⁵

²⁹ P. Sticherling, [in:] *Münchener Kommentar...*, § 2250, nb 14. However, it cannot be drawn up by a translator; see (for example): W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2250, nb 26, p. 231 and nb 38, p. 236.

³⁰ For many different aspects of this issue, see: C.T. Ebenroth, *Erbrecht...*, p. 129 (who indicates, for example, the situation where the record was signed by only one or two witnesses to the will, but it can be assumed without any doubt that the record correctly reflects the testator's declaration); E.I. Obergfell, [in:] *Handbuch...*, pp. 547–548; K.W. Lange, *Erbrecht...*, p. 93; J. Mayer, [in:] *Soergel Kommentar...*, § 2250, nb 14, p. 538; S. Kappler, T. Kappler, [in:] *Erman Bürgerliches Gesetzbuch...*, § 2250, nb 6–8, p. 6122; and W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2250, nb 23–25, p. 231.

³¹ See: W. Hagen, [in:] *Münchener Kommentar...*, § 2250, nb 1, p. 1385. Nevertheless, it is pointed out that a will must remain ineffective if certain minimum requirements prescribed by law are not met – see P. Sticherling, [in:] *Münchener Kommentar...*, § 2250, nb 1.

³² See also some critical remarks by: K. Muscheler, *Erbrecht...*, p. 901. The complexity of the normative regulation of this will form is also noticed by K.W. Lange, *Erbrecht...*, p. 92. For *de lege ferenda* remarks, see: A. Röthel, *Ist unser Erbrecht...*, p. A66.

³³ See: E.I. Obergfell, [in:] *Handbuch...*, p. 544; K. Muscheler, *Erbrecht...*, p. 896; and R. Zimmermann, *Testamentary...*, p. 216, footnote 346. See also the factual background in the OLG München judgment of 12 May 2015, 31 Wx 1/15, NJW-RR 2015, Issue 17, pp. 1034–1037. Moreover, the doctrine points out that these establishments should enable their patients to make wills in a privileged form as far as organisational aspects are concerned (under the risk of civil liability) – see: D. Weidlich, [in:] *Palandt Bürgerliches Gesetzbuch...*, § 2249, nb 6, p. 2496.

³⁴ Regarding this regulation, see more: C.T. Ebenroth, *Erbrecht...*, p. 128; K. Muscheler, *Erbrecht...*, p. 892 (providing the *ratio legis* of this regulation); K.W. Lange, *Erbrecht...*, p. 91; J. Mayer, [in:] *Soergel Kommentar...*, § 2252, nb 3–4, pp. 541–542; W. Hagen, [in:] *Münchener Kommentar...*, § 2252, nb 4, pp. 1393–1394; W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2252, nb 5–6, pp. 242–243; and P. Sticherling, [in:] *Münchener Kommentar...*, § 2252, nb 4. It is sometimes noted in the doctrine that this time limit is too long (see: R. Zimmermann, *Testamentary...*, p. 217, footnote 352).

³⁵ C.T. Ebenroth, *Erbrecht...*, p. 128.

2. France

Among special wills, French law provides for a form modelled on a will made during pestilence (the so-called *testamentum tempore pestis*) found in Roman post-classical law. Article 985 of the French Civil Code (*Code civil des Français*; CCF) allows a person who stays at a place where communication has been interrupted due to contagion (*maladie contagieuse*) or who is ill to make a will orally before a judge (*le juge du tribunal judiciaire*)³⁶ or a municipality official in the presence of two witnesses.³⁷

The document confirming the content of the testator's last will (after it has been written down) should be signed by the testator,³⁸ the official (a judge or a municipality official) to whom the declaration was made, and witnesses³⁹ (Article 997 CCF).⁴⁰ The official must certify therein the fact of the communication interruption (second sentence of Article 986 CCF). Further, the provisions of Articles 984, 987 and 994 CCF should be read to the testator in the presence of witnesses when the will is made, which should also be confirmed in the said document (Article 996 CCF).

This will ceases to have effect six months after the communication is either restored at the place concerned or the testator stays at a place where there is no interference (*interrompues*) of the communication (Article 987 CCF). Failure to comply with the formal requirements renders such a will invalid (see: Article 1001 CCF).

The solutions of the French legal system relating to privileged wills in oral form may be considered outdated today. The aforementioned forms have ceased to be used in practice,⁴¹ as confirmed by the absence of related case law and the fact that some authors pay practically no attention to them at all when discussing other forms of wills in detail,⁴² or even omit them in their considerations.⁴³

³⁶ The provisions of Article 985 CCF specifying a judge before whom it is possible to make a will were modified by Article 36 of the Ordonnance No. 2019-964 of 18 September 2019, which came into force on 1 January 2020.

³⁷ Regarding the interpretation of these conditions in the French doctrine before they were modified by the Act No. 2006-728 of 23 June 2006, see: F. Terré, Y. Lequette, *Les successions, les libéralités*, Paris 1997, p. 318. As Ch. Jubault notes (*Droit civil. Les successions. Les libéralités*, Paris 2010, p. 514, nb 548), these amendments were minor.

³⁸ If the testator declares that they are unable or incapable of affixing their signature, this fact should also be confirmed in the document, stating the reason preventing the testator from affixing their signature (first sentence of Article 998 CCF).

³⁹ However, it is sufficient if one of the witnesses signs the document and specifies therein why the other witness was unable to do so (second sentence of Article 998 CCF).

⁴⁰ See: G. Marty, P. Raynaud, *Droit civil. Les successions, les libéralités*, Paris 1983, p. 429.

⁴¹ For the attempts to apply them to situations arising during World Wars I and II, see: F. Terré, Y. Lequette, S. Gaudemet, *Droit civil. Les successions, les libéralités*, Paris 2014, p. 402. Since then, this will form has not been a subject of broader consideration in the French doctrine.

⁴² See, for example, H. Mazeaud, L. Mazeaud, J. Mazeaud, F. Chabas, L. Leveneur, S. Mazeaud-Leveneur, *Leçons de droit civil. Volume IV, Part 2*, Paris 1999, p. 310, and Ch. Jubault, *Droit civil...*, p. 514, nb 548. Foreign authors describing the solutions of French law do the same; see: M. Ferid, H.J. Sonnenberger, *Das Französische Zivilrecht, Band 3: Familienrecht, Erbrecht*, Heidelberg 1987, p. 529.

⁴³ See, for example, P. Malaurie, C. Brenner, *Les successions. Les libéralités*, Paris 2014, pp. 268–269; after discussing the ordinary forms of wills and the forms under the Washington Convention of 26 October 1973

3. Austria

As indicated above in section I.3, Austrian regulation has strongly influenced Polish legislation regarding the forms of wills. An in-depth discussion of the Austrian solutions is also desirable because the regulation of the oral will in Austrian law underwent a significant transformation in the first decade of the 21st century, involving, among other things, a change in its classification from an ordinary will to a privileged will. In order to understand the purpose of these changes, it is advisable to provide a brief overview of the legal status existing in Austria before the amendments.⁴⁴

According to the original wording of Section 584 of the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*, ABGB), a testator who either could not or did not wish to observe the formalities required for drawing up a will in writing could make an oral will.⁴⁵ Pursuant to Section 585 ABGB, a person wishing to make an oral will should have stated their will before three simultaneously present persons capable of acting as witnesses who could certify that there was no deceit or mistake regarding the person of the testator.⁴⁶ This provision did not oblige witnesses to draw up a will. It pointed out, however, that “precautionary principles” required all the witnesses together or each of them individually to write down the content of the testator’s declaration to make the testator’s last will easier to remember or, alternatively, to have the declaration of will written down by another person as soon as possible. According to Section 586 ABGB, an oral disposition of the last will had to be, at the request of anyone with a legal interest therein, established by the unanimous and sworn testimony of three witnesses or, if one of them could not be heard under the oath, of at least two other witnesses.⁴⁷ Otherwise, the declaration of the testator’s last will was considered ineffective (Section 601 ABGB).

providing a Uniform Law on the Form of an International Will (*Convention portant loi uniforme sur la forme d’un testament international*), the authors do not refer to other will forms at all.

⁴⁴ As to the overall development of Austrian legislation in this respect and the influence it had on interwar Polish law, see also: J. Koredczuk, *Uprzywilejowane rozporządzenia...*, pp. 192–196 and 198–199.

⁴⁵ Regarding the regulation before amendments, see: E. Weiß, [in:] *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*. III Band. §§ 531–858, H. Klang (ed.), Wien 1952, pp. 322–328; W. Kralik, *Ehrenzweig System des österreichischen allgemeinen Privatrechts*. 4. Buch. *Das Erbrecht*, Wien 1983, pp. 136–138; R. Dittrich, H. Tades, G. Hopf, G. Kathrein, J. Stabentheiner, *Das Allgemeine bürgerliche Gesetzbuch – ABGB*, Wien 1999, pp. 712–714; and R. Welser, [in:] *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*. 1. Band. §§ 1–1174 ABGB, P. Rummel (ed.), Wien 2000, pp. 861–863.

⁴⁶ However, according to the former Section 597 ABGB, in the event of contagion, a will could be made before two witnesses, and the witnesses did not even have to be present simultaneously in the case of a contagion threat.

⁴⁷ A document stating the contents of an oral will was treated merely as evidence of the fact of the testator declared his will (see: E. Weiß, [in:] *Kommentar...*, pp. 327–328), and the only way to ascertain the contents of such a will was through witness statements to the court (see, among others, E. Weiß, [in:] *Kommentar...*, pp. 327–328; W. Kralik, *Ehrenzweig System...*, pp. 137–138).

Considering the problems posed in practice by the regulation of the oral will⁴⁸ and due to the cases of its frequent forgery,⁴⁹ the Austrian legislator decided – by the Law of 27 May 2004 Amending the Family and Inheritance Law (*Familien- und Erbrechts-Änderungsgesetz*)⁵⁰ – to significantly change the provisions concerning this institution. The amendments included the deletion of Sections 584 to 586 ABGB (which, before the reform, regulated oral wills among ordinary wills); as of 1 January 2005, oral wills were moved from the catalogue of ordinary wills to the catalogue of privileged wills. Further, the conditions for making oral wills were tightened. Oral wills were initially regulated in Section 597 ABGB and limited only to cases where there was an imminent (*unmittelbar*) threat that the testator would die or lose the capacity to make (certify – *zu erklären vermag*) a will in another form.⁵¹ The circumstances justifying making such a will had to exist objectively.⁵² The testator's mere subjective feeling that such a situation existed was therefore insufficient.⁵³ Nevertheless, an exception was made to this rule when the subjective existence of that situation in the testator's mind was justified by objective circumstances (*durch objektive Umstände begründeten Eindruck*).⁵⁴ As such, the possibility of making a will in this form was no longer dependent on the testator's intention, regardless of whether other statutory conditions had been met.⁵⁵ It was also

⁴⁸ As noted by R. Welser (*Grundriss des bürgerlichen Rechts, Band II, Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht*, Wien 2007, p. 506): Als ordentliche Testamentsform sind mündliche Verfügungen nicht mehr zulässig. Mündliche Testamente begegneten großem Mißtrauen, weil es bei Zusammenwirken von drei Personen relativ einfach war, dem Erblasser einen letzten Willen unterzuschreiben, weshalb sie das FamErbRÄG 2004 abgeschafft hat [“Oral form of the will is no longer a form of an ordinary wills. Oral wills were treated with great mistrust because it was relatively easy for three people to counterfeit a last will on the testator, which is why the 2004 Act Amending the Family and Inheritance Law abolished them”].

⁴⁹ See: R. Welser, B. Zöchling-Jud, *Grundriss des bürgerlichen Rechts, Band II, Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht*, Wien 2015, p. 574; B. Eccher, [in:] *Praxiskommentar zum Allgemeinen Bürgerlichen Gesetzbuch. Band 3. §§ 531–858*, H. Schwimann, G. Kodek (eds.), Wien 2013, § 597, nb 2, p. 74; and C.C. Wendehorst, *Testamentary Formalities in Austria*, [in:] *Comparative Succession Law: Volume I: Testamentary Formalities*, K.G.C. Reid, M.J. de Waal, R. Zimmermann (eds.), Oxford 2011, p. 236, indicating the ease of persuading three witnesses to give false testimony (which is an issue raised by practitioners). See also the contemporary work by: R. Welser, *Erbrechts-Kommentar: §§ 531–824 ABGB*, Wien 2019, § 584, nb 2, p. 114.

⁵⁰ *Familien- und Erbrechts-Änderungsgesetz – FamErbRÄG 2004*, Bundesgesetzblatt of 2004, Part I, Item 58.

⁵¹ Regarding this regulation and the condition of threat to life contained therein, see: C.C. Wendehorst, *Testamentary...*, p. 246; G. Knechtel, [in:] *ABGB-ON. Kommentar*, A. Kletečka, M. Schauer (eds.), Wien 2010, § 597, nb 4, p. 1114; B. Eccher, [in:] *Praxiskommentar...*, § 597, nb 3, p. 74; and P. Apathy, [in:] *Kurzkommentar zum ABGB*, H. Koziol, P. Bydliński, R. Bollenberger (eds.), Wien 2014, § 597, nb 3, p. 585. Regarding the condition of legal incapacity, see: R. Welser, B. Zöchling-Jud, *Grundriss...*, p. 573.

⁵² See: R. Welser, B. Zöchling-Jud, *Grundriss...*, p. 573; G. Knechtel, [in:] *ABGB-ON. Kommentar...*, § 597, nb 4, p. 1114; and B. Eccher, [in:] *Praxiskommentar...*, § 597, nb 3, p. 74. In the case law, see: the judgments of the Austrian OGH of 23 April 2007, 4 Ob 27/07k, and of 26 July 2011, 1Ob102/11y.

⁵³ As stated clearly in: C.C. Wendehorst, *Testamentary...*, p. 246.

⁵⁴ See: the judgments of the Austrian OGH of 26 July 2011, 1Ob102/11y, and of 8 November 2011, 3Ob174/11a. This view was generally accepted by B. Eccher, [in:] *Praxiskommentar...*, § 597, nb 3, p. 74; C.C. Wendehorst, *Testamentary...*, p. 246, and G. Knechtel, [in:] *ABGB-ON. Kommentar...*, § 597, nb 4, p. 1114, indicating that a testator may have committed an objectively reasonable error as to the existence of such circumstances.

⁵⁵ This issue is discussed further in another publication, see: W. Borysiak, *Testamenty szczególne...*, pp. 113–115.

emphasised that the testator's old age or poor health alone was not a reason to recognise that the testator could make their will in oral form.⁵⁶

Later – as a result of the Austrian succession law reform introduced by the Act of 16 June 2015 Amending the Law of Succession (*Erbrechts-Änderungsgesetz 2015*)⁵⁷ – Section 597 ABGB, as referred to above, was deleted when the Act entered into force (1 January 2017) while its content was transferred to Section 584 ABGB (entitled *Nottestament*).⁵⁸ With this amendment, the Austrian legislator did not modify the already amended conditions for making such a will but chose only to emphasise explicitly in the wording of the provision that the threat of the testator's death or the testator's incapacity to make a will in another form must be objectively justified (*die begründete Gefahr*).⁵⁹ However, as explicitly stated in the explanatory memorandum of the Act of 16 June 2015 (*Erbrechts-Änderungsgesetz 2015*), the interpretation that it is sufficient that the testator's subjective feeling as to the existence of the required circumstances is justified objectively remains valid.⁶⁰ Hence, it is noted that although the existence of a “real” threat to the testator's life, demonstrable beyond any reasonable doubt, cannot be required, the emergency justifying making a will in this form must, nevertheless, be somehow discernible to third parties.⁶¹ The testator's old age alone is not sufficient in this regard.⁶²

⁵⁶ G. Knechtel, [in:] *ABGB-ON. Kommentar...*, § 597, nb 3, p. 1114; and C.C. Wendehorst, *Testamentary...*, p. 246. This was also the case after the 2015 amendment, C. Mondel, G. Knechtel, [in:] *ABGB-ON. Kommentar*, A. Kletečka, M. Schauer (eds.), available at: rdb.manz.at, edition 1.04 (as of 1 February 2020), § 584, nb 3.

⁵⁷ *Erbrechts-Änderungsgesetz 2015 – ErbRÄG 2015*, Bundesgesetzblatt of 2015, Part I, Item 87.

⁵⁸ In the original, this provision now reads as follows: (1) *Droht aus Sicht des letztwillig Verfügenden unmittelbar die begründete Gefahr, dass er stirbt oder die Testierfähigkeit verliert, bevor er seinen letzten Willen auf andere Weise zu erklären vermag, so kann er seinen letzten Willen in Gegenwart von zwei Zeugen fremdhändig (§ 579) oder mündlich erklären. Eine solche mündliche letztwillige Verfügung muss durch die übereinstimmenden Aussagen der Zeugen bestätigt werden, widrigenfalls diese Erklärung des letzten Willens ungültig ist.* (2) *Ein so erklärter letzter Wille verliert drei Monate nach Wegfall der Gefahr seine Gültigkeit und gilt als nicht errichtet. Im Zweifel ist damit auch der durch das Nottestament erfolgte Widerruf einer früheren letztwilligen Verfügung (§§ 713 und 714) aufgehoben.*

⁵⁹ See: the regulation of Section 584 ABGB as amended; U. Pesendorfer, *Die Erbrechtsreform im Überblick. Allgemeiner Teil – gewillkürte Erbfolge – gesetzliches Erbrecht – Erbschaftserwerb – Verjährung*, “iFamZ – Interdisziplinäre Zeitschrift für Familienrecht” 2015, Issue 5, p. 232; M. Gruber, H. Sprohar-Heimlich, E. Scheuba, [in:] *Erbrecht und Vermögensnachfolge*, M. Gruber, S. Kalss, K. Müller, M. Schauer (eds.), Wien 2018, pp. 619–620; B. Eccher, *Die österreichische Erbrechtsreform. Alle Neuerungen auf einen Blick und praxisrelevante Kommentare*, Wien 2017, pp. 59–60; A. Tschugguel, [in:] *Klang Kommentar. ABGB §§ 552 bis 646*, A. Fenyves, F. Kerschner, A. Vonkilch (eds.), Wien 2017, pp. 270–271; K. Nemeth, [in:] *ABGB Praxiskommentar. Band 4. §§ 531–858 ABGB, AnerbG, Kärntner ErbhöfeG, Tiroler HöfeG*, H. Schwimann, G. Kodek (eds.), Wien 2018, § 584, nb 5, pp. 120–121; R. Welser, *Erbrechts-Kommentar...*, § 584, nb 4, p. 115; P. Apathy, M. Neumayr, [in:] *Kurzkomentar zum ABGB*, H. Koziol, P. Bydlinski, R. Bollenberger (eds.), Wien 2020, § 584, nb 3, p. 638; C. Mondel, G. Knechtel, [in:] *ABGB-ON. Kommentar...*, § 584, nb 4–5.

⁶⁰ See: M. Gruber, H. Sprohar-Heimlich, E. Scheuba, [in:] *Erbrecht...*, pp. 619–620; A. Tschugguel, [in:] *Klang Kommentar...*, pp. 270–271; K. Nemeth, [in:] *ABGB Praxiskommentar...*, § 584, nb 5, pp. 120–121; R. Welser, *Erbrechts-Kommentar...*, § 584, nb 4, p. 115; and C. Mondel, G. Knechtel, [in:] *ABGB-ON. Kommentar...*, § 584, nb 4 (*Es ist also auf einen durch objektive Umstände begründeten subjektiven Maßstab abzustellen* [“It is therefore necessary to focus on a subjective criterium based on objective circumstances”]).

⁶¹ R. Welser, *Erbrechts-Kommentar...*, § 584, nb 4, p. 115. See also M. Gruber, H. Sprohar-Heimlich, E. Scheuba, [in:] *Erbrecht...*, p. 619, indicating that, in practice, the starting point for assessing whether the conditions of Section 584 ABGB have been met will always be the testator's subjective belief in their existence.

⁶² K. Nemeth, [in:] *ABGB Praxiskommentar...*, § 584, nb 5, p. 121. See also M. Gruber, H. Sprohar-Heimlich, E. Scheuba, [in:] *Erbrecht...*, p. 619, who further notes that this is the case even if the advanced age of the testator is accompanied by infirmity.

Currently, an oral will should be made before two witnesses who are simultaneously present and have the capacity to act as witnesses.⁶³ After the 2015 amendment, it is explicitly stated that these could be minors (see: second sentence of Section 587 ABGB).⁶⁴ According to the views expressed in the Austrian doctrine, a witness to a will does not have to be a person who has been requested expressly to act as a witness by the testator themselves or on their instructions.⁶⁵ As such, this may be a person staying at a particular place incidentally.⁶⁶ However, they must be aware of their role and be ready to fulfil it, and finally, they must understand the content of the testator's declaration of intent.⁶⁷ Indeed, they must present then the content of such a declaration to the court (as, in this regard, it is not sufficient to confirm the testimony of another witness).⁶⁸ Thus, a person who at the time the will is being made, does not realise that a will is being made before them and that they are a witness to it may not be a witness.⁶⁹

Ascertaining the content of an oral will, i.e. the necessity of consensual witness testimony⁷⁰ before the court, is left unchanged (second sentence of Section 584(1) ABGB).⁷¹ Moreover, the legislator removed from the wording of the provision that this should be done at the request of a person who has a legal interest in it. Such a will ceases to have effect three months after the cessation of the threat status and is treated as unmade (first sentence

⁶³ Regarding the capacity to be a witness under Austrian law, see: R. Welser, [in:] *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch mit wichtigen Nebengesetzen und EU-Verordnungen. Teilband §§ 531–824 ABGB (Erbrecht)*, P. Rummel, M. Lukas (eds.), Wien 2014, §§ 591–596, nb 1–4, pp. 69–70. See also the changes introduced as of 1 January 2017 – A. Tschugguel, [in:] *Klang Kommentar...*, p. 270.

⁶⁴ These are now the so-called *mündige Minderjährige*, i.e. people between the age of 14 and 18 (see: Section 21(2) ABGB). In the doctrine, see: U. Pesendorfer, *Die Erbrechtsreform...*, p. 232; P. Apathy, M. Neumayr, [in:] *Kurzkomentar...*, § 587, nb 1, p. 640. With regard to the earlier discussion in the Austrian law as to who can be a witness to a will (e.g. with regard to persons under the age of 18), see, in Polish literature, W. Borysiak, *Recenzja: R. Welser, Die Reform des österreichischen Erbrechts: Gutachten, Bd II/1, 2009*, "Kwartalnik Prawa Prywatnego" 2011, Issue 2, p. 579.

⁶⁵ B. Eccher, [in:] *Praxiskomentar...*, § 597, nb 7, p. 75; R. Welser, [in:] *Kommentar...*, 2014, § 591–596, nb 1, p. 69; K. Nemeth, [in:] *ABGB Praxiskomentar...*, § 584, nb 8, p. 121; P. Apathy, M. Neumayr, [in:] *Kurzkomentar...*, § 584, nb 2, p. 637. Before the statutory changes, see also: R. Welser, [in:] *Kommentar...*, 2000, p. 862.

⁶⁶ See: B. Eccher, [in:] *Praxiskomentar...*, § 597, nb 7, p. 75; K. Nemeth, [in:] *ABGB Praxiskomentar...*, § 584, nb 8, p. 121; P. Apathy, M. Neumayr, [in:] *Kurzkomentar...*, § 584, nb 2, p. 637.

⁶⁷ See: B. Eccher, [in:] *Praxiskomentar...*, § 597, nb 7, p. 75; R. Welser, [in:] *Kommentar...*, 2014, § 591–596, nb 1, p. 69; K. Nemeth, [in:] *ABGB Praxiskomentar...*, § 584, nb 8, p. 121; P. Apathy, M. Neumayr, [in:] *Kurzkomentar...*, § 584, nb 2, p. 637. Also before the amendment, see, among others, R. Welser, [in:] *Kommentar...*, 2000, p. 862.

⁶⁸ P. Apathy, M. Neumayr, [in:] *Kurzkomentar...*, § 584, nb 1, p. 637.

⁶⁹ See: B. Eccher, [in:] *Praxiskomentar...*, § 597, nb 7, p. 75; and P. Apathy, M. Neumayr, [in:] *Kurzkomentar...*, § 584, nb 2, p. 637; regarding the awareness of witnesses that they will be obliged to reproduce the content of the testator's last will in the future: R. Welser, [in:] *Kommentar...*, 2014, § 591–596, nb 1, p. 69; and K. Nemeth, [in:] *ABGB Praxiskomentar...*, § 584, nb 8, p. 122. See also: C.C. Wendehorst, *Testamentary...*, p. 246, who points out that it is not entirely certain to what extent the earlier case law of the Austrian OGH concerning witnesses remains relevant.

⁷⁰ However, a discrepancy in the testimonies of witnesses does not automatically invalidate the will unless it relates to material issues, e.g. the establishment of an heir (see: the judgment of the Austrian OGH of 10 July 1996, 3Ob2191/96v). In the doctrine, see: P. Apathy, M. Neumayr, [in:] *Kurzkomentar...*, § 584, nb 6, p. 638.

⁷¹ See more: B. Eccher, [in:] *Praxiskomentar...*, § 597, nb 10, p. 75; P. Apathy, M. Neumayr, [in:] *Kurzkomentar...*, § 584, nb 5–6, p. 638.

of Section 584(2) ABGB).⁷² The circumstances of the “cessation of the threat status” should be assessed objectively.⁷³ In addition, following the 2015 amendment, it is expressly noted that in the case of doubt, the revocation of an earlier will contained in this will also loses its validity (second sentence of Section 584(2) ABGB).⁷⁴

The doctrine indicates the absence of data as to how many people use this will form after the amendments and how it works in practice.⁷⁵ However, it emphasises that the necessity of such a regulation is undoubtedly supported by the objective of enabling as many people as possible to testify in life-threatening situations.⁷⁶

4. Switzerland

According to Swiss law, if the testator is unable to make a will in another form due to extraordinary external circumstances, such as the imminent threat of death,⁷⁷ interruption of communication (German *Verkehrssperre*, French *de communications interceptées*, Italien *comunicazione interrotta*),⁷⁸ epidemic, or war, may make a will orally (Article 506 of the Swiss Civil Code [*Schweizerisches Zivilgesetzbuch*, ZGB]).⁷⁹ The list contained in this article is generally considered as illustrative.⁸⁰ When assessing whether the condition of the testator’s inability to draw up a will in the ordinary form is fulfilled, the testator’s subjective belief in this regard

⁷² For the running of this time limit, see: C. Mondel, G. Knechtel, [in:] *ABGB-ON. Kommentar...*, § 584, nb 7; and P. Apathy, M. Neumayr, [in:] *Kurzkomentar...*, § 584, nb 4, p. 638.

⁷³ See: C. Mondel, G. Knechtel, [in:] *ABGB-ON. Kommentar...*, § 584, nb 7. These authors point out, for example, that the testator’s subjective fear of a potential relapse or their persistent subjective feeling that their life is in danger do not affect the running of the time limit under the first sentence of Section 584(2) ABGB. For the same perspective, see: K. Nemeth, [in:] *ABGB Praxiskommentar...*, § 584, nb 9, p. 122. A greater “subjectivism” of these circumstances is advocated by M. Gruber, H. Sprohar-Heimlich, E. Scheuba, [in:] *Erbrecht...*, p. 620.

⁷⁴ See: U. Pesendorfer, *Die Erbrechtsreform...*, p. 232; M. Gruber, H. Sprohar-Heimlich, E. Scheuba, [in:] *Erbrecht...*, p. 620; K. Nemeth, [in:] *ABGB Praxiskommentar...*, § 584, nb 10, p. 122; and R. Welsch, *Erbrechts-Kommentar...*, § 584, nb 6, p. 115. The revocation of a will is regulated in the Austrian law by Sections 713 and 714 ABGB, which now are explicitly referred to in the second sentence of Section 584(2) ABGB. Regarding the regulation after the amendment, see: A. Tschugguel, [in:] *Klang Kommentar...*, pp. 271–273; and C. Mondel, G. Knechtel, [in:] *ABGB-ON. Kommentar...*, Section 584, nb 8.1.

⁷⁵ C.C. Wendehorst, *Testamentary...*, p. 226.

⁷⁶ See: C.C. Wendehorst, *Testamentary...*, p. 248.

⁷⁷ As emphasised in the Swiss doctrine, it is only this case, as specified in ZGB, that is relevant in practice – see: J. Guinand, M. Stettler, A. Leuba, *Droit des successions (Articles 457–640 CC)*, Genève–Zürich–Bâle 2005, p. 142; A. Dorjee-Good, [in:] *Handkommentar zum Schweizer Privatrecht Art. 457–640 ZGB*, P. Breitschmid, A. Jungo (eds.), Zürich–Basel–Genf 2016, Art. 506–508, nb 3, p. 132; and P. Breitschmid, [in:] *Basler Kommentar. Zivilgesetzbuch II (Art. 457–977 und Art. 1–61 SchIT ZGB)*, T. Geiser, S. Wolf (eds.), Basel 2019, Art. 506–508, nb 1, p. 327. See, for example, the factual background of the Swiss TFS judgment of 18 October 1951, BGE, Vol. 77, Part II, pp. 216–224; and the judgment of the Swiss TFS of 11 December 2017, 5A_236/2017.

⁷⁸ The differences in the wording of the provision in different language versions are pointed out by P.-H. Steinauer, *Le droit des successions*, Berne 2006, p. 349, nb 701.

⁷⁹ Regarding the legislative work on the list in Article 506 ZGB, see: the statement of reasons for the Swiss TFS judgment of 18 October 1951, BGE, Vol. 77, Part II, pp. 218–220.

⁸⁰ See: the statement of reasons for the Swiss TFS judgement of 11 December 2017, 5A_236/2017; P. Piotet, *Schweizerisches Privatrecht. Band IV. Das Erbrecht. Erster Halbband*, Basel–Stuttgart 1978, p. 240; J. Guinand, M. Stettler, A. Leuba, *Droit des successions...*, p. 142; P.-H. Steinauer, *Le droit des successions...*, p. 349, nb 701; S. Wolf, G.S. Genna, *Schweizerisches Privatrecht. IV/1. Erbrecht. Band 1*, S. Wolf (ed.), Basel 2012, p. 205; P. Tuor,

is taken into account first and foremost.⁸¹ However, it is required to be based on objective circumstances, i.e. it is only to be considered in cases where “good faith” exists on the part of the testator as to the actual existence of such an impossibility.⁸² Naturally, the inability to draw up a will in ordinary form may also be due to objective circumstances, e.g., an accident in the mountains,⁸³ being intubated in hospital,⁸⁴ the fact of the testator’s physical infirmity or illiteracy.⁸⁵ It is questionable whether the concept of extraordinary external circumstances also applies to a testator in hospital, as it is emphasised that in such a situation, it is practically always possible to call a notary to the testator.⁸⁶ On the other hand, it is noted that in the case of terminally ill patients in hospitals, although it would be possible to draw up a will in the ordinary form, the threat of death might be so imminent that the testator has no other form of will than the oral one.⁸⁷

The testator should declare their will orally before two witnesses present simultaneously,⁸⁸ who should be instructed to write it down in a document.⁸⁹ Writing down this will electronically (e.g., writing in a notebook application) or recording it on a telephone or dictaphone⁹⁰ is considered to be effective. The same regulations apply to witnesses to a will in public

B. Schnyder, J. Schmid, A. Rumo-Jungo, *Das Schweizerische Zivilgesetzbuch*, Zürich-Genf-Basel 2015, p. 854; S. Wolf, S. Hrubesch-Millauer, *Grundriss des schweizerischen Erbrechts*, Bern 2017, p. 130, nb 454.

⁸¹ See: S. Wolf, S. Hrubesch-Millauer, *Grundriss...*, p. 130, nb 454. In the case law, see: the statement of reasons for the Swiss TFS judgment of 18 October 1951, BGE, Vol. 77, Part II, p. 221.

⁸² In the case law, see: the statement of reasons for the Swiss TFS judgment of 18 October 1951, BGE, Vol. 77, Part II, p. 221, and in the doctrine, see: P. Piotet, *Schweizerisches Privatrecht...*, p. 240, ((...)) *das Testator mit gutem Glauben der Überzeugung war, es bestehe eine solche Unmöglichkeit* [“The testator was convinced in good faith that such an impossibility existed”]); and P.-H. Steinauer, *Le droit des successions...*, p. 349, nb 701a. See also: P. Breitschmid, [in:] *Basler Kommentar...*, 2019, Art. 506–508, nb 1, p. 327. On the other hand, the concept is interpreted more broadly by A. Dorjee-Good, [in:] *Handkommentar...*, Art. 506–508, nb 3, p. 132, whose view is that it is sufficient if the testator feels that they are unable to write or seems to have no proper material on which the will could be recorded.

⁸³ See: the example provided by: S. Wolf, S. Hrubesch-Millauer, *Grundriss...*, p. 130, nb 455.

⁸⁴ See: the factual background in the judgment of the Swiss TFS of 11 December 2017, 5A_236/2017.

⁸⁵ See P.-H. Steinauer, *Le droit des successions...*, p. 349, nb 701; and J.N. Druey, *Grundriss...*, p. 120.

⁸⁶ P. Breitschmid, [in:] *Basler Kommentar...*, 2019, Art. 506–508, nb 2, p. 328.

⁸⁷ See: S. Wolf, G.S. Genna, *Schweizerisches Privatrecht...*, p. 205, footnote 816. See, for example, the factual background in the Swiss TFS judgement of 11 December 2017, 5A_236/2017, where due to the rapid deterioration of the testator’s health in hospital and the fact that the notary contacted for this purpose was unable to arrive at the hospital during the day, the TFS assumed the existence of an impossibility to make a will in another form. A similar factual background provided the basis for the Swiss TFS judgment of 15 June 1978, BGE, Vol. 104, Part II, pp. 68–75 (nurses unsuccessfully attempted to summon a notary to the testator, who was in hospital and whose health deteriorated).

⁸⁸ The simultaneous presence of witnesses is intended to guarantee that any discrepancies which could arise as a result of the testator making two different declarations to two witnesses separately are avoided – see: the judgment of the Swiss TFS of 15 June 1978, BGE, Vol. 104, part II, pp. 68–75; judgment of the Swiss TFS of 11 December 2017, 5A_236/2017; and S. Wolf, G.S. Genna, *Schweizerisches Privatrecht...*, p. 206.

⁸⁹ See more: P.-H. Steinauer, *Le droit des successions...*, p. 350, nb 704; and P. Breitschmid, [in:] *Basler Kommentar...*, 2019, Art. 506–508, nb 3, p. 328.

⁹⁰ See: P. Breitschmid, [in:] *Basler Kommentar ZGB II (Art. 457–977 und Art. 1–61 SchIT ZGB)*, H. Honsell, N.P. Vogt, T. Geiser (eds.), Basel 2015, Art. 506–508, nb 3, p. 310; and subsequently, P. Breitschmid, [in:] *Basler Kommentar...*, 2019, Art. 506–508, nb 3, p. 328 (additionally, citing the *ratio legis* for the adoption of the audiovisual will form proposed to be introduced in the Swiss law). Similarly, with regard to the absence of handwritten text, see: P.-H. Steinauer, *Le droit des successions...*, p. 350, nb 704.

form (the so-called *öffentliche letztwillige Verfügung*⁹¹ – Article 499 ZGB), which implies, for example, that they must have full legal capacity (see: Article 503 in conjunction with Article 506(2) ZGB).⁹²

The content of the testator's declaration of intent should be written down immediately by one of the witnesses, stating the date and place where this document was drawn up, and immediately delivered to the court officer (Article 507(1) ZGB).⁹³ The concept of immediacy (German: *ohne Verzug*, French: *immédiatement*, Italian: *immediatamente*), in relation to writing down the contents of an oral will, is understood restrictively,⁹⁴ although the circumstances of the facts in question and the situation of the witnesses (e.g., their psycho-intellectual characteristics or being shocked by the event in question) are taken into account.⁹⁵ In fact, the period of time that can be considered "immediate" is determined by the court in its discretionary power, considering all the circumstances of the particular case.⁹⁶ It is emphasised that the document does not need to include a description of the exceptional situation of the testator at the time of the testifying.⁹⁷ Witnesses who do not wish to draw up a document stating the content of the testator's declaration may (at their choice) also immediately provide the testimony before the court, stating its content (Article 507(2) ZGB).⁹⁸ If the testator made an oral disposition during military service, an officer of the rank of captain or higher may replace the court (Article 507(3) ZGB).

⁹¹ The allographic form may be perceived as its equivalent in Polish law.

⁹² Regarding the notion of "witness" in Swiss case law, see more: the Swiss TFS judgment of 15 June 1978, BGE, Vol. 104, Part II, pp. 68–75 (with an extensive description of the legislative work in this area on pp. 71–72). In the doctrine, see: P. Piotet, *Schweizerisches Privatrecht...*, p. 241; J.N. Druey, *Grundriss des Erbrechts*, Bern 2002, pp. 119–120; J. Guinand, M. Stettler, A. Leuba, *Droit des successions...*, p. 143; P. Tuor, B. Schnyder, A. Rumo-Jungo, *Das Schweizerische Zivilgesetzbuch...*, p. 853.

⁹³ The case law recognises even that it is insufficient to send the content of a declaration of intent using postal transport – see: judgment of the Swiss TFS of 22 March 1922, BGE, Vol. 48, Part II, pp. 31–37. For a broader discussion on the regulation of Article 507(1) ZGB, see also: P. Piotet, *Schweizerisches Privatrecht...*, pp. 241–242; and S. Wolf, G.S. Genna, *Schweizerisches Privatrecht...*, p. 206.

⁹⁴ The case law recognises even that a three-day time limit is already too long (see: the judgment of the Swiss TFS of 4 December 1919, BGE, Vol. 45, Part II, pp. 527–531), although courts in this case take into account the circumstances of the particular case (see: the judgment of the Swiss TFS of 31 March 1939, BGE, Vol. 65, Part II, pp. 49–52). See more in the doctrine: J.N. Druey, *Grundriss...*, p. 120; P.-H. Steinauer, *Le droit des successions...*, p. 350, nb 706; P. Tuor, B. Schnyder, A. Rumo-Jungo, *Das Schweizerische Zivilgesetzbuch...*, p. 854; S. Wolf, G.S. Genna, *Schweizerisches Privatrecht...*, p. 206; S. Wolf, S. Hrubesch-Millauer, *Grundriss...*, pp. 130–131, nb 457; and A. Dorjee-Good, [in:] *Handkommentar...*, Art. 506–508, nb 5, p. 133.

⁹⁵ See the factual background and the statement of reasons for the Swiss TFS judgment of 31 March 1939, BGE, Vol. 65, Part II, pp. 49–52; in the doctrine, see: P. Breitschmid, [in:] *Basler Kommentar...*, 2019, Art. 506–508, nb 6, p. 329. See also: S. Wolf, G.S. Genna, *Schweizerisches Privatrecht...*, p. 206; and S. Wolf, S. Hrubesch-Millauer, *Grundriss...*, pp. 130–131, nb 457 (whose opinion is that *den Notwendigkeiten des praktischen Lebens* ["the necessities of practical life"] should be taken into account). See also the more restrictive interpretation by: A. Dorjee-Good, [in:] *Handkommentar...*, Art. 506–508, nb 5, p. 133.

⁹⁶ S. Wolf, G.S. Genna, *Schweizerisches Privatrecht...*, p. 206.

⁹⁷ See also: A. Dorjee-Good, [in:] *Handkommentar...*, Art. 506–508, nb 6, p. 133. For the same perspective, see: J.N. Druey, *Grundriss...*, p. 120; other statement of reasons of the Swiss TFS judgment of 11 December 2017; P. Tuor, B. Schnyder, A. Rumo-Jungo, *Das Schweizerische Zivilgesetzbuch...*, p. 854, and P. Breitschmid, [in:] *Basler Kommentar...*, 2019, Art. 506–508, nb 5, p. 329.

⁹⁸ Regarding the procedure in this regard, see: P.-H. Steinauer, *Le droit des successions...*, pp. 350–351, nb 705–706a; and P. Breitschmid, [in:] *Basler Kommentar...*, 2019, Art. 506–508, nb 6, p. 329.

A privileged will cease to have effect 14 days after the testator regains the ability to draw up a will in ordinary form (Article 508 ZGB).⁹⁹ The doctrine emphasises that since the possibility of making an oral will is only provided for in special situations,¹⁰⁰ its practical significance is minor.¹⁰¹

5. The Netherlands

An oral will in Dutch law is one of three types of privileged wills regulated in Article 4:98–4:110 BW.¹⁰² The circumstances that allow wills to be testified orally are staying in areas where it is impossible to draw up a will in ordinary form, i.e. before a notary or a consul (Article 4:102 of the Dutch Civil Code [*Burgerlijk Wetboek*; BW]).¹⁰³ Further, the legislation provides examples of reasons for such extraordinary circumstances (e.g., calamities, operations of war, contagious diseases).¹⁰⁴

The Civil Code details the entities before which an oral will may be made. “The official” before whom a will is made may even be a lawyer, a person awaiting appointment as a notary public, an army officer, the head of a fire brigade, or an official authorised accordingly by the Minister of Justice. Such a will should be drawn up in the presence of two witnesses (first sentence of Article 4:103(1) BW).¹⁰⁵

The will should be written down and signed by the testator, the person in front of whom the deed containing the last will is executed, and the witnesses (second sentence of Article 4:103(1) BW). The absence of the testator’s or the official person’s signature renders the will null and void (Article 4:109(1) and Article 4:109(3) in conjunction with Article 4:109(2) BW).¹⁰⁶

⁹⁹ It is disputed in the Swiss literature whether it is then ineffective or unconditionally invalid – see: S. Wolf, S. Hrubesch-Millauer, *Grundriss...*, p. 131, nb 460; A. Dorjee-Good, [in:] *Handkommentar...*, Art. 506–508, nb 7, p. 134; and P. Breitschmid, [in:] *Basler Kommentar...*, 2019, Art. 506–508, nb 10, p. 330, as well as the references cited therein. The latter view is expressed in the case law – see: the statement of reasons for the Swiss TFS judgment of 11 December 2017, 5A_236/2017.

¹⁰⁰ For this reason, it is only “subsidiary in nature” – J. Guinand, M. Stettler, A. Leuba, *Droit des successions...*, p. 143.

¹⁰¹ S. Wolf, G.S. Genna, *Schweizerisches Privatrecht...*, p. 205; A. Dorjee-Good, [in:] *Handkommentar...*, Art. 506–508, nb 1, p. 132.

¹⁰² Still, it is pointed out in the doctrine that the regulation of privileged wills is based on the rules in force in the Netherlands during the applicability of the Dutch Civil Code of 1838 – see: W.D. Kolkman, *Testamentary Formalities in Netherlands*, [in:] *Comparative Succession Law: Volume I: Testamentary Formalities*, K.G.C. Reid, M.J. de Waal, R. Zimmermann (eds.), Oxford 2011, p. 159.

¹⁰³ In such cases, it is also possible to make privileged wills in the so-called secret form (Article 4:104(1) in conjunction with Article 4:102 BW), which, in Dutch law, is an equivalent of a holographic will submitted to the relevant official body for safekeeping.

¹⁰⁴ Hence, W.D. Kolkman (*Testamentary...*, p. 159) defines these wills as “disaster wills”.

¹⁰⁵ In this regard, an interesting solution is provided for in Article 4:103(2) BW, which – although containing the requirement that the witness must understand the language in which the testator made their last will and be of legal age – excludes the latter requirement in the case of soldiers taking part in hostilities or persons taking part in combating an epidemic or crisis.

¹⁰⁶ A breach of the other formal requirements (other than the need to affix the signatures of the testator or official person under the content of the will) does not render the will invalid by operation of law but only allows it to be invalidated (see: Article 4:109(4) BW).

However, if the testator or one of the witnesses has declared that they are unable to sign the document due to ignorance¹⁰⁷ or another specific cause, their declaration in this respect should be included in the deed confirming the content of the testator's will, thus replacing the signature (Article 4:103(3) BW). Furthermore, such a deed should be sent in a sealed envelope to the Central Register for Testaments in The Hague (Article 4:106(1) BW) as soon as possible.¹⁰⁸

If it turns out that the formal requirements for making such a will in a privileged form have been met, but the substantive conditions have not, the will is not null and void, but voidable¹⁰⁹ – however, this is applicable only if the testator dies within six months of making such a will (Article 4:108 BW). Furthermore, a will made in this form is voidable if the testator dies six months after the circumstances referred to in Article 4:102 BW (see: Article 4:107(1) BW) cease to exist.¹¹⁰ However, the time limit is extended by one month if the testator was reasonably not in a position to make a last will in the last month of the running time limit (see: Article 4:107(2) BW).

In the Dutch doctrine, the question is asked whether even the limited formalities associated with privileged wills still constitute an unduly high threshold for their drafting when there is a real threat to the life and health of the testator.¹¹¹ Due to the rather detailed regulations of Article 4:98 et seq. BW, it is pointed out that it is quite likely in practice that a situation may arise in which the court rejects the possibility of declaring an inheritance on the basis of a “will” made in a special situation, as it fails to meet all the formal requirements set out in the above-mentioned articles.¹¹² Hence, it is postulated that consideration should be given to granting the court a general power to declare the validity of a will, whether made orally or in writing, in extraordinary cases, along the lines of the common law.¹¹³

¹⁰⁷ The phrase *ignorance* is used in the English translation of this provision; however, the more literal translation would be the “lack of education”.

¹⁰⁸ Regarding the functions and advantages of this register, in Dutch law, see: S. Perrick, *Law of Inheritance*, [in:] *Introduction to Dutch Law*, J. Chorus, E. Hondius, W. Voermans (eds.), Alphen aan den Rijn 2016, p. 165. See also: R. Süß, *Niederlande*, [in:] *AnwaltKommentar BGB. Band 5. Erbrecht*, L. Kroiß, Ch. Ann, J. Mayer (eds.), Bonn 2007, p. 1596; and A.R. van Maas de Bie, H.G.N. Slegt-Moens, *Niederlande*, [in:] *Erbrecht in Europa*, R. Süß (ed.), Bonn 2020, p. 1021.

¹⁰⁹ In the available English translations of the Dutch text, the phrases “may be nullified” or “is voidable” are used in this context – see, for example: H. Warendorf, R. Thomas, I. Curry-Summer, *The Civil Code of the Netherlands*, Alphen aan den Rijn 2013, p. 557.

¹¹⁰ This solution is justified on the grounds that the testator should be aware of the privileged nature of a will in this form and, therefore, should replace it, as soon as it becomes possible, with a will in ordinary form – see: W.D. Kolkman, *Testamentary...*, p. 160.

¹¹¹ W.D. Kolkman, *Testamentary...*, p. 160.

¹¹² See: W.D. Kolkman, *Testamentary...*, p. 160, who refers in this regard to the Latin maxim, *inclusio est exclusio*, which means that when a law, a contract or other legal document contains a list of situations belonging to a given category, the inclusion of certain situations therein should mean that any excluded situations are deliberately outside the scope of the definition of the term in question.

¹¹³ W.D. Kolkman, *Testamentary...*, p. 160.

6. Italy

In Italian law, the possibility of making a special will in oral form¹¹⁴ (Article 609(1) of the Italian Civil Code [*Codice civile*; CCI]) exists if the testator cannot draw up a will in ordinary form because of an infectious disease (*la malattia reputata contagiosa*),¹¹⁵ a widespread natural disaster (*pubblica calamità*)¹¹⁶ or an accident (*infortunio*).¹¹⁷

It is emphasised that the specific psycho-physical conditions of the testator alone do not *per se* enable them to make a will on this basis.¹¹⁸ However, the confirmation of the existence of a condition described in this provision, obtained, for example, from a health or administrative institution,¹¹⁹ is not required to demonstrate the impossibility of drawing up a will in ordinary form. Similarly, an objective impossibility of drawing up a will in ordinary form is not necessary – a situation where this would be extremely difficult is sufficient.¹²⁰

This will form may be made before a notary, a judge, a mayor or their representative, or even a clergyman (*ministro di culto*)¹²¹ in the presence of two witnesses (Article 609(1) CCI).¹²² The statutory requirement is that these witnesses must be at least 16 years old (Article 609(1) *in fine* CCI).

The aforementioned persons collecting the testator's declaration should write down the content of the testator's last will in a document, which they should sign themselves, as should the testator and the witnesses (first sentence of Article 609(2) CCI). If the testator or the witnesses are unable to sign the document, this should be indicated therein, together

¹¹⁴ In Polish literature, this issue is also discussed in greater detail by: J. Waszczuk, *Szczególne formy testamentu w prawie włoskim*, "Zeszyty Prawnicze UKSW" 2007, Issue 1, pp. 257–260.

¹¹⁵ This is independent of whether the testator themself is infected; see: G. Branca, [in:] *Commentario del Codice Civile, Libro Secondo. Delle Successioni. Dei testamenti speciali. Della pubblicazione dei testamenti olografi e dei testamenti segreti: Art. 609–62*, A. Scialoja, G. Branca (eds.), Bologna–Roma 1988, p. 19; E. Fonte, [in:] *Codice Civile. Tomo I (Artt. 1–1702)*, P. Rescigno (ed.), Milano 2021, p. 1159; and A. Braun, *Testamentary Formalities in Italy*, [in:] *Comparative Succession Law: Volume I: Testamentary Formalities*, K.G.C. Reid, M.J. de Waal, R. Zimmermann (eds.), Oxford 2011, p. 135.

¹¹⁶ Examples of such situations include an earthquake, flood, bombing or cutting off of a testator's residence in the mountains during a severe winter as a result of an avalanche or snowstorm (see: A. Braun, *Testamentary...*, p. 135; G. Branca, [in:] *Commentario...*, p. 23; and G. Capozzi, *Successioni e donazioni*, Vol. I, compiled by A. Ferucci, C. Ferrentino, Milano 2009, p. 864; for the Polish doctrine, see: J. Waszczuk, *Szczególne...*, p. 258).

¹¹⁷ At the same time, it is commonly emphasised that such an accident should threaten the testator's life. Regarding the understanding of this concept in Italian doctrine, see more: G. Branca, [in:] *Commentario...*, p. 24; G. Capozzi, *Successioni...*, p. 865; M. Sesta, *Codice delle successioni e donazioni – Vol. 1 – Costituzione e Quattro Codici*, Milano 2011, p. 1231; M. Vascellari, [in:] *Commentario breve al codice civile*, G. Cian, A. Trabucchi (eds.), Milano 2016, p. 638; and E. Fonte, [in:] *Codice Civile...*, p. 1159. Some authors point out that such an accident should, but does not need to, have characteristics similar to force majeure (see: G. Branca, [in:] *Commentario...*, p. 24; and M. Sesta, *Codice...*, p. 1231).

¹¹⁸ E. Fonte, [in:] *Codice Civile...*, p. 1158.

¹¹⁹ G. Branca, [in:] *Commentario...*, p. 19; and E. Fonte, [in:] *Codice Civile...*, p. 1158.

¹²⁰ M. Sesta, *Codice...*, p. 1230.

¹²¹ It is emphasised that it is irrelevant of which church or religious association such a clergyman is a member (see: G. Capozzi, *Successioni...*, p. 865; M. Sesta, *Codice...*, p. 1231; and M. Vascellari, [in:] *Commentario breve...*, p. 638).

¹²² In terms of entities before which such a declaration may be made, in the Polish literature, see: J. Waszczuk, *Szczególne...*, p. 259.

with the reasons preventing such persons from signing the document (second sentence of Article 609(2) CCI). The failure to draw up such a document or the failure of the testator or the witnesses to sign it renders the will invalid (Article 619(1) CCI). Other formal defects in such a will give rise to the possibility of its invalidation at the request of persons who have a legal interest in it (Article 606(2) in conjunction with Article 619(2) CCI).

A will in this form ceases to have effect three months after the cessation of the circumstances listed above that prevented the testator from drawing up a will in ordinary form (Article 610(1) CCI). However, if the testator dies before that moment, the persons involved in the act of testifying should deposit the will, as soon as possible (*appena è possibile*), in the notarial archive of the locality where it was made (Article 610(2) CCI). Then, the will is sent to the Common Register of Wills operating within the Central Notarial Archive Office.¹²³ Still, the Italian doctrine emphasises that the failure to file or a delay in filing a document attesting to the contents of a will with the archives does not affect the will's validity.¹²⁴

7. Spain

In Spanish law,¹²⁵ it is possible to make an open will (a will made in ordinary cases before a notary) orally before five witnesses when an imminent danger to the testator's life occurs (Article 700 of the Spanish Civil Code [*Código Civil de España*; CCE]), or before three witnesses¹²⁶ in the event of an epidemic (Article 701 CCE).¹²⁷ Witnesses must know the testator and be certain of their testamentary capacity (see: Article 685(2) CCE).

Such a will is qualified in Spanish law as one of the ordinary will forms (see: Articles 676–677 CCE), distinguishing it from the Polish regulation. Despite this qualification, attention should be drawn to the solution that is classic for privileged wills: the will is no

¹²³ In the Polish literature, this issue is described in more detail by J. Waszczuk, *Szczegółne...*, p. 260, footnote 20.

¹²⁴ G. Branca, [in:] *Commentario...*, p. 37; and M. Sesta, *Codice...*, p. 1233. See also the observations made in this regard by: M. Vascellari, [in:] *Commentario breve...*, p. 639.

¹²⁵ The legislation in force in Spanish autonomous communities (e.g. Catalonia or the Balearic Islands) is omitted from further consideration. For a general discussion of these, see: A. Steinmetz, E. Huzel, R.G. Alcázar, *Spanien: Gemeinsspanisches Recht*, [in:] *Erbrecht in Europa*, R. Süß (ed.), Bonn 2020, pp. 1417–1421; regarding the specific will forms in force in these autonomous communities (e.g. made before a clergyman) see more in: O.M. Hierneis, *Spanien*, [in:] *Internationales Erbrecht*, M. Ferid, K. Firsching, H. Döner, R. Hausmann (eds.), München (loose-leaf publication, as of September 2011), nb 202–203 and 233–236.

¹²⁶ Under the circumstances set out in this Article, the Spanish legislator has also lowered the age required for witnesses to the will to 16 – see: O.M. Hierneis, *Spanien...*, nb 229; and A. Steinmetz, E. Huzel, R.G. Alcázar, *Spanien...*, p. 1404.

¹²⁷ These provisions are located in Book III (“On different ways of acquiring ownership”), Title III (“On successions”), Chapter 1 (“On wills”), Section 5 on the open will. For the discussion of the situation involving making an open will in front of witnesses, see more in: E. Huzel, B. Löber, *Spanien*, [in:] *Erbrecht in Europa*, R. Süß (ed.), Bonn 2008, p. 1431; O.M. Hierneis, *Spanien...*, nb 228–229; and S.C. Lapuente, *Testamentary Formalities in Spain*, [in:] *Comparative Succession Law: Volume I: Testamentary Formalities*, K.G.C. Reid, M.J. de Waal, R. Zimmermann (eds.), Oxford 2011, pp. 81–82.

longer effective two months after the danger of death or the epidemic has ceased unless the testator died before that time (first sentence of Article 703 CCE). If the latter situation has occurred, in order for the content of such a will to be effectively ascertained, a document stating the will content must be written down (Article 702 CCE) or the testimony of witnesses must be made before the competent court within three months thereafter (Article 703 CCE).¹²⁸

Furthermore, such a will may become ineffective if it is not subsequently recorded by a notary in the form provided for by the laws relating to notaries (Article 704 CCE).¹²⁹ This procedure confirms the existence of the will and its precise content, making the drafted will a public deed and ensuring that it is archived.¹³⁰

In the Spanish Supreme Court's case law, cases of imminent danger of death, as defined in Article 700 CCE, are assessed taking into account the nature of the testator's illness.¹³¹ However, excessive severity in assessing such situations is avoided.¹³² The will will, therefore, remain effective even if it turns out *ex post* that the testator's life was not exposed to immediate danger.¹³³

The epidemic within the meaning of Article 701 CCE is regarded as a disease with a high mortality rate and contagiousness, as well as difficult prevention.¹³⁴ The prevailing view in the Spanish doctrine is that the state of an epidemic should be formally (officially) declared.¹³⁵ In this case, it is sufficient for the testator to reside in an area formally covered by the epidemic; thus, they do not have to be infected.¹³⁶

The form of a will that can be made during an epidemic is criticised in the Spanish doctrine as anachronistic and having too narrow a scope of application (not covering, for example, various emergencies or natural disasters). Hence, it is sometimes extended, by means of interpretation, to cover nuclear disasters or bacteriological warfare.¹³⁷

¹²⁸ Regarding the purpose of this regulation, see: S.C. Lapuente, *Testamentary...*, p. 81.

¹²⁹ See: O.M. Hierneis, *Spanien...*, nb 230.

¹³⁰ S.C. Lapuente, *Testamentary...*, p. 81.

¹³¹ As indicated in the doctrine, the assessment in each case is based on the facts of a particular case – O.M. Hierneis, *Spanien...*, nb 228.

¹³² See: O.M. Hierneis, *Spanien...*, nb 228; and S.C. Lapuente, *Testamentary...*, p. 81.

¹³³ See: O.M. Hierneis, *Spanien...*, nb 228.

¹³⁴ *Ibidem*, nb 229.

¹³⁵ *Ibidem*.

¹³⁶ *Ibidem*.

¹³⁷ See: S.C. Lapuente, *Testamentary...*, p. 82; however, the author indicates that the Spanish Supreme Court's decision dated 10 July 1944 still argues against such a liberal interpretation.

8. Summary

Despite its rare application in practice, the privileged will in oral form continues to attract interest in the doctrine of comparative law.¹³⁸ It should be emphasised that, as shown by a comparative legal analysis, making a will in this form is never determined by the testator's intention alone, regardless of the fulfilment of other statutory conditions. These conditions tend to be objectively defined by the legislator and refer not only to violent events (e.g., interruption of communications, epidemics) but also to the impossibility of drawing up a will in ordinary form (see, for example, German, Austrian, Swiss, Dutch, and Italian laws). Further, foreign provisions of law usually set out formal conditions for making these wills, the means of ascertaining their content, and the duration of their validity much more strictly than the Polish provision found in Article 952 KC (see, for example, Austrian and Swiss laws). They sometimes require the participation of a specific official person (for example, the mayor – see: German and Dutch laws), in addition to witnesses.

Finally, it should be emphasised that in many legal systems described above, the construction of privileged wills similar to the Polish oral will raises doubts similar to those in Poland and indicates the need for changes in the existing statutory regulation.¹³⁹ Potential changes in Polish law could be modelled on those introduced in Austria (see: Section III.3 above).

¹³⁸ See: K.G.C. Reid, M.J. de Waal, R. Zimmermann, *Testamentary Formalities in Historical and Comparative Perspective*, [in:] *Comparative Succession Law: Volume I: Testamentary Formalities*, K.G.C. Reid, M.J. de Waal, R. Zimmermann (eds.), Oxford 2011, pp. 451–453. See also: H. Lange, K. Kuchinke, *Erbrecht...*, pp. 387–388.

¹³⁹ For German law, see, in particular: L. Michalski, *BGB – Erbrecht*, Heidelberg 2006, nb 228, p. 71; K. Muscheler, *Erbrecht...*, pp. 901–902; R. Zimmermann, *Testamentary...*, pp. 217–218, and the literature cited there. For Dutch law, see: W.D. Kolkman, *Testamentary...*, p. 160.

IV. Oral Will *de lege ferenda*

1. Introduction

It is a truism to say that the oral will is the most common form of the privileged will in practice. This is widely emphasised in the doctrine, which also points out that it is the only privileged will form that plays any role in practice (in comparison, a will executed during a voyage and a military will do not play any role in practice in Poland).¹ The observation of practice – especially in the light of the 2014 file research as already mentioned above – indicates that the reasons for this include the apparent reluctance of testators to draw up their wills in ordinary forms (notarised and holographic) and postponing the act of testifying “until the last moment of life”.² The aforementioned file analysis also shows that, despite its special nature, cases of making an oral will are more frequent than occasional. In this respect, it can be assumed that several hundred such wills are probably drawn up or “created” unlawfully each year across the country after the testator’s death. Hence, as already mentioned, the main reason for amending the regulation on oral wills is to prevent possible forgery.

At the outset, it is necessary to argue in favour of maintaining the oral will form as one of the privileged wills in Polish law. The possibility of making it (see the comments below) should be limited only to extraordinary circumstances, i.e. situations which completely exclude drawing up a will in ordinary form or make it significantly more difficult.³ Such a solution is supported by the following arguments.

Firstly, there is a reluctance among testators to draw up a will in any ordinary form, with the result that they often decide to make it actually in the last moments of their lives.⁴

¹ See: J. Gwiazdomorski, *Glosa...*, pp. 334–335; S. Wójcik, *Glosa...*, p. 550; E. Skowrońska-Bocian, *Testament w prawie polskim...*, p. 105; J.St. Piątowski, B. Kordasiewicz, *Prawo spadkowe. Zarys wykładu*, Warszawa 2011, nb 215, pp. 112–113; B. Kucia, *Przesłanka...*, p. 87; K. Kamińska, *Problemy powstające przy sporządzaniu testamentu ustnego*, “Przegląd Prawniczy Uniwersytetu Warszawskiego” 2015, Issue 1, pp. 34 and 42; B. Kucia, [in:] *Kodeks...*, Art. 952, nb 2; and S. Wójcik, F. Zoll, [in:] *System Prawa Prywatnego. Tom 10. Prawo spadkowe*, B. Kordasiewicz (ed.), Warsaw 2015, p. 377, nb 51.

² W. Borysiak, *Testament ustny...*, pp. 24 and 28.

³ See also, among others, E. Skowrońska, *Testament ustny...*, p. 265; A. Gałakan-Halicka, *Stwierdzenie...*, p. 745; F. Zoll, *Testamentary...*, p. 280; and K. Osajda, Świadek testamentu, [in:] *Sine ira et studio. Księga jubileuszowa dedykowana Sędziemu Jackowi Gudowskiemu*, T. Ereciński, P. Grzegorzczak, K. Weitz (eds.), Warszawa 2016, pp. 1038–1039.

⁴ This fact is also noted by K. Osajda, [in:] *Komentarze...*, Art. 952, point I, p. 477.

In this case, it is difficult to refuse them having their last will drawn up in this particular “simplified form” if other forms are completely impossible.

Secondly, the legislator should enable a person in an emergency and life-threatening situation (e.g. injured in a car accident or experiencing a heart attack) to make a will. This is because the usual forms of will are then not available. Nevertheless, it should be emphasised that no such “textbook examples” of testators were observed in the empirical study, but this does not mean that such situations cannot occur. However, perhaps the recent pandemic period has significantly impacted their number.⁵

The mere existence of ordinary forms, especially the holographic and notarial forms, does not support the abolition of oral wills. In fact, there may be situations where drawing up a will in holographic form is impossible due to the testator’s illness⁶ or to the aforementioned urgency of the actual circumstances (e.g., a car accident, a pre-heart attack state before the arrival of an ambulance). There may be also situations where it is impossible to draw up a will in the form of a notarial deed (e.g., the absence of a notary in a particular locality, the absence of a notary’s consent to go to a seriously ill testator who is in hospital or the testator’s withdrawal from making a will in this form).⁷

As mentioned above (see section III.3), despite the abuses that had occurred before the succession law reform in Austria, it was decided not to eliminate the oral will form altogether. Although the doctrine points to the lack of data on how many people currently use this will form and how it works in practice, it is emphasised that the necessity of such a regulation is unquestionable, as it is supported by the fact of enabling as many people as possible to testify in a life-threatening situation.⁸

2. Conditions for Making the Oral Will

In particular, the conditions for making an oral will need to be corrected. Since this is a privileged will, whose authenticity is at greater risk than in the case of ordinary wills, the possibility of making an oral will should be conditional on the existence of such extraordinary

⁵ Moreover, the recent pandemic argues against eliminating will forms that can be made in emergencies. See also the comments by: D.J. Walczak, *Sporządzenie testamentu ustnego przy pomocy środków porozumiewania się na odległość*, “Monitor Prawniczy” 2021, Issue 19, p. 1020.

⁶ Such situations were observed in the file research, and included, for example, arthritis, Parkinson’s disease, paresis of the hand, paralysis of the upper part of the body – see more: W. Borysiak, *Testament ustny...*, pp. 28–29.

⁷ Indeed, the file research showed, with regard to the will to be drawn up in this form, that in individual cases, a notary either did not arrive at the agreed appointment or refused to go to the hospital to see the seriously ill testator. It was also apparent from the file research that these situations usually occurred during the weekend or holiday period. As a rule, however, this coincided with the fact that the “persons sent” to notaries were provided with information on making a will orally: see W. Borysiak, *Funkcjonowanie...*, pp. 141.

⁸ C.C. Wendehorst, *Testamentary...*, p. 248.

circumstances which make the application of the ordinary will form very difficult or completely impossible.⁹ These circumstances should include a fear of the testator's imminent death (e.g., as a result of their injury in an accident and inability to make a will in ordinary written form or call on a notary).¹⁰ In the wording of the provision, the legislator should specify that the existence of such a fear should be determined objectively¹¹ (as usually adopted in the doctrine and case law of other legal systems, e.g., in the context of Section 2250 BGB in the German doctrine, Section 584 ABGB in the Austrian doctrine or Article 506 ZGB in the Swiss doctrine) or resign from enumerating the examples of the extraordinary circumstances that allow for making an oral will.¹² The proposed solution would reduce the scope of making an oral will (and thus potentially fabricating one) compared to the current legal status. In fact, such a solution was already present in the Polish legal system in its historical development.¹³

Even a potential amendment to the provision and conditioning the oral will on the impossibility of drawing it up in the ordinary written form, the allographic form or in the form of a notarial deed, may not entirely resolve the problem of wills that are made in hospitals, hospices or nursing homes. Indeed, in the light of the file research, they are, undoubtedly, the most common places where wills are made orally.¹⁴ As also emphasised in the German,¹⁵ Austrian,¹⁶ and Swiss¹⁷ literature – on the basis of empirical observations – making special wills in these places is the most common in practice, even though it is then almost always theoretically possible to summon a notary to the testator. This type of situation will have to

⁹ It can also be assumed *de lege ferenda* that the legislator could even limit itself to adopting only the second of these conditions. K. Osajda, on the other hand, proposes that the fact that such a circumstance arose “suddenly and unexpectedly for the testator” should be regarded as an additional condition for making a will in this form (in addition to the impossibility or considerable difficulty of drawing up a will in the ordinary form) – K. Osajda, *Świadek testamentu...*, p. 1039, footnote 112.

¹⁰ Regarding the interpretation of this phrase *de lege lata* – see: E. Skowrońska-Bocian, *Obawa rychłej śmierci jako przesłanka sporządzenia testamentu ustnego*, [in:] *Ars et usus. Księga pamiątkowa ku czci Sędziego Stanisława Rudnickiego*, T. Ereciński, J. Gudowski (eds.), Warszawa 2005, pp. 239–244.

¹¹ J. Pietrzykowski has already proposed that regulations determining the objective nature of the fear of imminent death should be directly introduced into the Civil Code – see: J. Pietrzykowski, *Wybrane...*, p. 255. See also A. Gałakan-Halicka, *Stwierdzenie...*, p. 745; and B. Kucia, *Przesłanka...*, p. 107–109. See also the remarks by: J. Kosik, *Przesłanki sporządzenia testamentu ustnego*, “*Studia Cywilistyczne*” 1969, Vol. 13–14, pp. 205–206.

¹² At this point, it is irrelevant to consider whether the invalidity of an allographic will caused by non-compliance with its formal requirements could be regarded as such extraordinary circumstances since, ultimately, this form of an ordinary will should be removed from the future codification.

¹³ The first sentence of Article 82 of the Decree of 8 October 1946 – Inheritance Law (Journal of Law of 1946 No. 60, Item 328 as amended) provided that: “If, as a result of extraordinary circumstances, such as interruption of communications, epidemics, acts of war, the testator's illness or accident, justifying the fear of their imminent death, it is impossible or very difficult to draw up an ordinary will, the testator may make an oral will by having their will known to three simultaneously present witnesses.”

¹⁴ See: W. Borysiak, *Funkcjonowanie...*, p. 119. See also the facts presented in the Decision of the Supreme Court of 21 March 2018, V CSK 254/17, OSNC 2019, Issue 3, Item 32, with the commentaries of: P. Sobański, “*Rejent*” 2019, Issue 2, pp. 114–124; and G. Wolak, “*Rejent*” 2019, Issue 10, pp. 108–126.

¹⁵ E.I. Obergfell, [in:] *Handbuch...*, p. 544; K. Muscheler, *Erbrecht...*, p. 896; and R. Zimmermann, *Testamentary...*, p. 216, footnote 346. See also: R. Zimmermann, *Testamentsformen...*, p. 488.

¹⁶ See: C. Mondel, G. Knechtel, [in:] *ABGB-ON. Kommentar...*, § 584, nb 4.

¹⁷ S. Wolf, G.S. Genna, *Schweizerisches Privatrecht...*, p. 205; and P. Breitschmid, [in:] *Basler Kommentar...*, 2019, Art. 506–508, nb 2, p. 328.

be assessed *ad casu*. There may be cases where, given the testator's health, it will be impossible both to draw up a will in the form of the testator's own handwriting and to call a notary before the testator dies. Furthermore, the means of protecting the testator's actual will should include a careful examination, by the court, of the testator's state of consciousness and freedom at the time of testifying.

3. Witnesses and the Secretary of the Oral Will

The catalogue of individuals excluded from being a witness under Article 957 of the Civil Code should be modified.¹⁸ Indeed, it seems reasonable to define a broader circle of persons who cannot be witnesses to an oral will.

It should be advocated that a person who is effectively in a relationship with the person receiving any benefit from the will (the cohabiting partner of the estate beneficiary) should be excluded from being a witness.¹⁹ Such cases were reported several times in the empirical study.²⁰ The question that remains to be considered is whether a person who cannot be explicitly described as a cohabiting partner receiving the benefit from the inheritance, but who, nevertheless, has a strong emotional bond with the beneficiary (e.g. a fiancé or fiancée) should be subject to the exemption in Article 957 KC. Still, such a far-reaching provision seems too vague to provide grounds for excluding a person from the circle of potential witnesses.

Moreover, the current group of persons excluded from being witnesses, not including the siblings of the parents of the estate beneficiary (the so-called aunts and uncles), their spouses, and their children (cousin siblings of the estate beneficiary), seems too narrow in light of the file research.²¹ This creates numerous doubts about their impartiality as witnesses to the will.

As part of the file research, it was noted in several cases that the witnesses to the will were persons with close family ties.²² Such situations – although expressly permitted by the legislator – require a careful assessment of the actual existence of the oral will and its content. However, it does not seem advisable *de lege ferenda* to exclude the possibility of persons closely related to each other (e.g. three brothers) being witnesses, given the multiplicity of actual situations that may arise in practice.

¹⁸ The catalogue of individuals covered by Article 956 KC does not, in principle, require major changes.

¹⁹ Such a proposal has already been made in the doctrine – see: E. Skowrońska, *Forma...*, p. 167.

²⁰ See: the situations described in W. Borysiak, *Funkcjonowanie...*, pp. 116, 136 and 142–143.

²¹ See: the examples provided in another publication – W. Borysiak, *Testament ustny...*, p. 35, footnote 40.

²² For example: (1) spouses (relatives of the testator) and their 20-year-old son living with them (case before the District Court in Ostróda, I Ns 899/09); (2) two sisters – aunts of the testator (case before the District Court in Nysa, I Ns 808/10); (3) a sister of the testator's grandmother, her close relative, and her fiancé (case before the District Court in Kartuzy, I Ns 310/12).

It would also seem acceptable *de lege ferenda* to amend the rules regulating the required age of the will witnesses. Doubts are raised, *inter alia*, as to whether such witnesses really need to be persons of legal age, since in the performance of this function, they do not make their declaration of will but accept taking the content of such a declaration from another person. As such, defining the lowest age of a will witness to be 14 or 15 years seems sufficient.²³ It does not seem that a different interpretation could be supported by the concern that such persons would not possibly incur criminal liability for false testimony due to their age (see: Article 10(1) in conjunction with Article 233 of the Criminal Code). Moreover, it is possible *de lege ferenda* to make, in this respect, an exception to the general rules under the Criminal Code.

De lege ferenda, particular problems arise from the attempt to identify who is excluded from being a witness to a will where a specific inheritance benefit would be received by a legal person: whether this would be individuals who are merely members of the bodies of such legal persons or, for example, their “high ranking” employees or sole shareholders. This issue is disputed *de lege lata* in the doctrine.²⁴ The legislator should at least specify that individuals who are members of the bodies of legal persons may not be witnesses to a drafted will in which such a legal person receives a benefit.²⁵

The legislator should stipulate (in the provisions corresponding to Article 952(2) KC or in the provisions on witnesses to a will) that the provisions on witnesses to a will shall apply *mutatis mutandis* to the secretary of an oral will. At present, it only results from the case law;²⁶ however, this may not be known to potential witnesses or the secretary, which may

²³ A model in this respect could be the solution adopted in Austrian law, where witnesses to the oral will can, exceptionally, be persons who have reached the age of 14 (the so-called *mündige Minderjährige* – see: the second sentence of § 587 ABGB in conjunction with § 21(2) ABGB). In the doctrine, see: U. Pesendorfer, *Die Erbrechtsreform...*, p. 232; P. Apathy, M. Neumayr, [in:] *Kurzkomentar...*, § 587, nb 1, p. 640.

²⁴ See: the Judgment of the Supreme Court of 7 May 1976, III CRN 9/76, LEX, No. 7825, and the Decision of the Supreme Court of 16 October 2014, III CSK 301/13, “Orzecznictwo Sądów Polskich” 2015 Issue 12, Item 117, with the following assumption: “A member of a body of a legal person may, in principle, be a witness to a will in which any benefit has been provided for that person. Similarly, in principle, a member of a corporate legal person for which a benefit has been provided in the will may be a witness to this will”, as well as critical commentaries to this ruling by: K. Duszyńska-Misarko and P. Księżak (“Orzecznictwo Sądów Polskich” 2015, Issue 12, Item 117, pp. 1730–1734), and M. Niedośpał (“Palestra” 2017, Issue 4, pp. 100–108). In the doctrine, see, among others, E. Skowrońska, *Forma testamentu w prawie polskim*, Warszawa 1991, p. 132; P. Księżak, *Prawo spadkowe*, Warszawa 2017, nb 248, pp. 226–227; E. Niezbecka, [in:] *Kodeks cywilny. Komentarz. Tom IV. Spadki*, A. Kidyba (ed.), Warszawa 2015, Art. 957, nb 3, p. 165; K. Osajda, [in:] *Komentarze...*, Art. 957, nb 10–17, pp. 540–541; B. Kucia, [in:] *Kodeks...*, Art. 957, nb 7; M. Pazdan, [in:] *Kodeks cywilny. Tom II. Komentarz do art. 450–1088. Przepisy wprowadzające*, K. Pietrzykowski (ed.), Warszawa 2021, Art. 957, nb 2; J. Kremis, [in:] *Kodeks cywilny. Komentarz*, E. Gniewek, P. Machnikowski (eds.), Warszawa 2016, Art. 957, nb 13, p. 1762; E. Skowrońska-Bocian, J. Wierciński, [in:] *Kodeks cywilny. Komentarz, Tom 6. Spadki*, J. Gudowski (ed.), Warszawa 2017, Art. 957, nb 21; and S. Wójcik, F. Zoll, [in:] *System...*, pp. 397–398, nb 80–81.

²⁵ See: M. Niedośpał, *Glosa do postanowienia Sądu Najwyższego z 16 października 2014 r., III CSK 301/13, “Palestra”* 2017, Issue 4, p. 104. In this context, the discussion in Austrian law as to who can witness a will if the will confers benefits to a legal person may be helpful – in this regard, in the Polish literature, see: W. Borysiak, *Recenzja...*, p. 579.

²⁶ This was adopted in the resolution of a panel of seven judges of the Supreme Court of 23 November 2001, III CZP 54/01, OSNC 2002, 7–8, Item 84, with a critical commentary by: M. Niedośpał, “Państwo i Prawo” 2003, Issue 9, pp. 126–130, and an approving commentary by W. Borysiak in “Przegląd Prawniczy Uniwersytetu

lead to the invalidity of the will.²⁷ Applying the provisions on the exclusion of will witnesses to the secretary would avoid doubts concerning their impartiality.

However, the very possibility of a third party writing down the contents of an oral will is, at least, a controversial solution.²⁸ Therefore, it should be postulated that a document stating the content of an oral will may not be written by a third party who did not in any way participate in the testamentary act. Two options are available here: either to exclude a third person who did not take part in such a testamentary act from drawing up a document stating the contents of the oral will, or to exclude all third persons from drawing up such a document. The latter solution is supported by the fact that the content of the testator's last will can simply be written down by one of the witnesses (who must be a person who is able to read and write – see: Article 956(3) KC).²⁹ Such a solution is stipulated, for example, in Swiss law (Article 507(1) ZGB).³⁰ In this regard, there is no rational reason for a document stating the content of an oral will to be written by a person who did not witness the will and did not participate in the act of testifying.

Warszawskiego” 2005, Issue 2, pp. 117–127. This resolution has been generally endorsed in the doctrine – see: A. Gałakan-Halicka, *Stwierdzenie...*, p. 743; J. Ignaczewski, *Prawo spadkowe. Art. 922–1088 KC Komentarz*, Warszawa 2004, pp. 148–149; E. Skowrońska-Bocian, *Testament w prawie polskim...*, pp. 115–116; P. Księżak, *Prawo spadkowe...*, p. 212, nb 230; E. Skowrońska-Bocian, *Prawo spadkowe*, Warszawa 2020, pp. 101–102, nb 154; M. Sychowicz, [in:] *Kodeks cywilny, Praktyczny komentarz z orzecznictwem. Tom 2. Art. 353–1088*, Warszawa 2005, pp. 848–849; E. Niezbecka, [in:] *Kodeks cywilny...*, Art. 952, nb 16, p. 154; J. Kremis, [in:] *Kodeks...*, Art. 952, nb 28–30, p. 1755; E. Skowrońska-Bocian, J. Wierciński, [in:] *Kodeks...*, Art. 952, nb 28; B. Kucia, [in:] *Kodeks...*, Art. 952, nb 37; M. Pazdan, [in:] *Kodeks...*, Art. 952, nb 22–23; J. Kuźmicka-Sulikowska, [in:] *Kodeks cywilny. Komentarz*, E. Gniewek, P. Machnikowski (eds.), Warszawa 2021, Art. 952, nb 13; S. Wójcik, F. Zoll, [in:] *System...*, pp. 384–385, nb 60. In contrast: M. Niedośpiał, *Glosa do uchwały składu 7 sędziów Sądu Najwyższego z 23 listopada 2001 r., III CZP 54/01*, “Państwo i Prawo” 2003, Issue 9, pp. 126–130; M. Niedośpiał, *Testament. Zagadnienia ogólne testamentu w polskim prawie cywilnym*, Kraków–Poznań 1993, p. 206; M. Niedośpiał, *Testament allograficzny (administracyjny)*, Bielsko-Biała 2004, pp. 235–253; and J. Turłukowski, *Sporządzenie...*, pp. 158–165. An unclear standpoint was issued by K. Osajda – see: K. Osajda, *Sposoby stwierdzenia treści testamentu ustnego*, “Monitor Prawniczy” 2013, Issue 9, p. 469; K. Osajda, [in:] *Komentarze...*, Art. 952, nb 123–133.1, pp. 499–501, and Art. 957, nb 20–24.1, pp. 542–543.

²⁷ As noted by B. Kucia, [in:] *Kodeks...*, Art. 952, nb 37, the considerable number of judicial decisions issued in this context confirms the practical importance of this matter.

²⁸ See: J. St. Piąkowski, B. Kordasiewicz, *Prawo spadkowe...*, p. 116, nb 220; B. Kordasiewicz, *Testamentowe dziedziczenie gospodarstw rolnych*, Ossolineum 1978, p. 74; and J. Haberko, [in:] *Kodeks cywilny. Tom 3. Komentarz. Art. 627–1088*, M. Gutowski (ed.), Warszawa 2019, Art. 952, nb 23. By way of example, it may be pointed out that if the secretary has a legal background, this poses the risk that they will make such changes to the content of the will that would invalidate the will or change the scope of the persons appointed to inheritance.

²⁹ See: L. Żyżyłewski, *Glosa do uchwały Sądu Najwyższego z 22 marca 1989 r., III CZP 22/89*, “Nowe Prawo” 1991, Issue 1–3, p. 172; and B. Kordasiewicz, *Testamentowe...*, p. 74. For the same perspective, see: J. Turłukowski, *Sporządzenie...*, p. 165.

³⁰ See: section III.4 above. Nevertheless, it should be emphasised that, for example, in German law, in the context of § 2250 BGB, the view is adopted that the record of an oral will may also be drawn up by a third party – see: section III.1 above.

4. Ascertaining the Contents of an Oral Will

Shortening the time limits for ascertaining the contents of an oral will should be postulated.³¹ A document ascertaining the content of the testator's declaration should be prepared as soon as possible³² or, in the case of rejection, no later than one month after such declaration. Swiss law can be considered a model in this respect (see: section III.4 above). Pursuant to Article 507(1) ZGB, the content of the testator's declaration of will should be written down immediately by one of the witnesses, stating the date and place where this document was drawn up, and immediately delivered to the court officer. Witnesses who do not wish to draw up a document ascertaining the content of the testator's declaration may (at their choice) also immediately provide testimony before the court, stating the will content (Article 507(2) ZGB). A similar solution in the context of Section 2250 BGB is adopted in German law.³³ Further, it should be considered whether it should be obligatory to include the witnesses' description of the testator's exceptional situation at the time of testifying, in the document stating the content of the oral will.³⁴

Data necessary for the examination of witnesses to an oral will should be submitted to the court no later than three months after the testator's death. However, adopting a shorter time limit than three months does not seem advisable, as potential claimants should have time to find out about the oral will and to prepare the documents necessary to ascertain the inheritance acquisition (e.g., determining the addresses of witnesses) during a period that may be difficult for them for emotional reasons (death and funeral of a person usually very close to them). For the avoidance of doubt, the provision should also confirm that it is sufficient for the time limit to be met if the witnesses' data enabling their examination is sent to the court within this time limit, and that the examination of the witnesses itself may take place after the time limit has lapsed. Indeed, currently, the judicature and the doctrine adopt a very liberal approach to the time limit set out in Article 952(3) KC, arguing that the requirements provided therein are observed even if the witnesses are not heard before the expiry of the time limit specified in this provision, but the court is notified of the need to ascertain the content of the oral will in this manner.³⁵ Such an interpretation – while

³¹ This has already been postulated in the doctrine; as noted by E. Skowrońska (*Forma...*, p. 166), the time limit provided for in Article 952(2) KC (for drafting a document ascertaining the contents of an oral will) should be reduced to six months, while the time limit stipulated in Article 952(3) KC (for the examination of witnesses to an oral will) – to three months. For the same perspective, see: J. Pietrzykowski, *Wybrane...*, p. 255, and J. Turłukowski, *Sporządzenie...*, p. 185. See also W. Żywicki, *Testamenty ustne w świetle orzecznictwa*, "Nowe Prawo" 1971, Issue 1, p. 115.

³² This is also suggested *de lege ferenda* by M. Obrzut, *Testament...*, p. 85.

³³ This is because such a document should be signed by the testator; in the German doctrine, see: J. Mayer, [in:] *Soergel Kommentar...*, § 2250, nb 11, p. 538; and W. Baumann, [in:] *J. von Staudingers Kommentar...*, § 2250, nb 27, p. 232.

³⁴ This is sometimes assumed to be the case in the Swiss doctrine – see section III.4 above.

³⁵ See: resolution of the Supreme Court of 27 June 1969, III CZP 31/69, OSNAPiUS 1970, Issue 2, Item 23, with the approving commentary by: B. Dobrzański, "Orzecznictwo Sądów Polskich i Komisji Arbitrażowych"

functionally reasonable – is contrary to the literal wording of the provision.³⁶ *De lege ferenda*, the provision may also expressly stipulate that if there were more than three witnesses to the will and it is not possible to hear more than one of them or there are insurmountable obstacles, the court may rely on the consistent testimonies of a minimum of two witnesses.³⁷

The possibility – accepted in the case law³⁸ – of ascertaining the content of an oral will by drawing up a document stating the content of the testator's declaration also after their death should be rejected.³⁹ In such situations, the hearing of witnesses in accordance with Article 952(3) KC is sufficient. The interpretation adopted in the case law means that persons wishing to falsify the content of an oral will have virtually no time limits to do so by drafting and backdating such a document. The empirical study shows that in approximately 85% of situations where a document stating the contents of an oral will was drawn up, this occurred after the testator's death.⁴⁰ In the remaining situations, in only six cases, it was signed by the testator themselves and all the witnesses. The file research further shows that if witnesses to a will failed to produce a document stating the contents of an oral will until several months after the testator had testified, or even several months after the testator's death, this may suggest that the will was forged.⁴¹ However, even if the testator's oral

1970, Issue 4, Item 87, pp. 180–183; resolution of the Supreme Court of 3 October 1969, III CZP 75/69, LEX No. 6574; decision of the Supreme Court of 14 December 2000, I CKN 668/00, OSNC 2001, Issue 10, Item 151, with the approving commentary by: M. Niedośpiał in "Państwo i Prawo" 2002, Issue 6, pp. 95–98; judgement of the Supreme Court of 13 May 2003, V CKN 186/01, OSNC 2004, Issue 7–8, Item 121; and in the doctrine, see: M. Niedośpiał, *Testament. Zagadnienia ogólne...*, p. 208; E. Skowrońska-Bocian, *Testament w prawie polskim...*, pp. 119–120; J. Turłukowski, *Sporządzenie...*, pp. 173–174; P. Księżak, *Prawo spadkowe...*, p. 215–216, nb 235; J. Kremis, [in:] *Kodeks...*, Art. 952, nb 37, p. 1757; E. Skowrońska-Bocian, J. Wierciński, [in:] *Kodeks...*, Art. 952, nb 47; B. Kucia, [in:] *Kodeks...*, Art. 952, nb 56; M. Pazdan, [in:] *Kodeks...*, Art. 952, nb 34; J. Kuźmicka-Sulikowska, [in:] *Kodeks...*, Art. 952, nb 17; K. Osajda, [in:] *Komentarze...*, Art. 952, nb 145–146, pp. 503–504; and S. Wójcik, F. Zoll, [in:] *System...*, pp. 385–386, nb 61.

³⁶ See also: J. Turłukowski, *Sporządzenie...*, p. 173.

³⁷ *De lege lata* this issue is disputed in the doctrine, see: B. Dobrzański, *Glosa do uchwały Sądu Najwyższego z 27 czerwca 1969 r., III CZP 31/69, "Orzecznictwo Sądów Polskich i Komisji Arbitrażowych"* 1970, Issue 4, Item 87, p. 183; A. Gałakan-Halicka, *Stwierdzenie...*, p. 741; E. Skowrońska-Bocian, *Prawo spadkowe...*, p. 102, nb 155; E. Skowrońska-Bocian, J. Wierciński, [in:] *Kodeks...*, Art. 952, nb 44; J. Haberko, [in:] *Kodeks...*, Art. 952, nb 32; B. Kucia, [in:] *Kodeks...*, Art. 952, nb 53; K. Osajda, *Komentarze...*, Art. 952, nb 142–143, p. 503; M. Pazdan, [in:] *Kodeks...*, Art. 952, nb 33; J. Kuźmicka-Sulikowska, [in:] *Kodeks...*, Art. 952, nb 19; S. Wójcik, F. Zoll, [in:] *System...*, pp. 385–386, nb 61. As regards *de lege ferenda* comments, see also: E. Skowrońska, *Forma...*, p. 166.

³⁸ See: resolution of a panel of seven judges of the Supreme Court of 13 February 1980, III CZP 69/79, OSNCP 1980, Issue 9, Item 154, with the commentary by B. Kordasiewicz, "Państwo i Prawo" 1981, Issue 8, pp. 144–147.

³⁹ *De lege ferenda*, see: E. Skowrońska, *Forma...*, p. 166; J. Pietrzykowski, *Wybrane zagadnienia...*, p. 255; A. Mączyński, *Nieważność testamentu sporządzonego pod wpływem wady oświadczenia woli*, [in:] *Problemy kodyfikacji prawa cywilnego. Księga pamiątkowa ku czci profesora Zbigniewa Radwańskiego*, S. Sołtysiński (ed.), Poznań 1990, p. 416, footnote 24; and M. Obrzut, *Testament...*, p. 85. *De lege lata* the interpretation prevailing in the case law is rejected by: F. Zoll, *Testamentary...*, p. 279; J. St. Piąkowski, B. Kordasiewicz, *Prawo spadkowe...*, p. 115, nb 218; and S. Wójcik, F. Zoll, [in:] *System...*, pp. 382–383, nb 57. See also A. Gałakan-Halicka, *Stwierdzenie...*, p. 740 and p. 745, and E. Skowrońska-Bocian, *Prawo spadkowe...*, p. 103, nb 156.

⁴⁰ W. Borysiak, *Testament ustny...*, p. 42.

⁴¹ For example, in the case before the District Court in Łańcut, I Ns 387/12, the statutory heir waited four years to report to the court with a document ascertaining the contents of an oral will, even though the document was drafted just over a week after the date on which the testator had made his will. The document was prepared using a computer. The court found that the estate had been acquired in favour of the heirs appointed to inherit in the oral will. The analysis of the case and the court's reasoning is hampered by the absence of a statement of reasons for the decision on the inheritance acquisition; see: W. Borysiak, *Funkcjonowanie...*, pp. 93.

declaration of will was actually made, the risk of miscommunication of the testator's true will also increases at that time.

The refusal to recognise a witnessed document ascertaining the contents of an oral will on the basis of Article 952(2) KC after the testator's death should not prevent the contents of the testator's last will to be ascertained on the basis of the hearing of witnesses (Article 952(3) KC). The latter solution is more secure, should be quicker *de lege ferenda* (see: earlier remarks) and will safeguard against attempts to forge oral wills, e.g. by drawing up a backdated document that does not bear the testator's signature. Thus, even if the testator dies shortly after communicating their last will to the witnesses and before signing the document, the witnesses will be able to apply to the court without any problem within a period of three months of the testator's death to have the content of the oral will ascertained by hearing them.

5. Summary – Content of the Potential Provision

Summing up the considerations presented so far, it should be noted that the target provision relating to the oral will form could, for example, read as follows:

- § 1. Where extraordinary and urgent circumstances make it impossible or excessively difficult to maintain the ordinary form of the will, the testator may testify their last will orally in the presence of at least three witnesses.
- § 2. The contents of the oral will shall be ascertained without delay in such a way that one of the witnesses writes down the testator's declaration, stating the place and date of the declaration, the place and date of the document, and specifying the circumstances referred to in § 1; such a document shall be signed by the testator and two witnesses or all the witnesses.
- § 3. Where the contents of the oral will have not been ascertained in the above manner prior to the opening of the succession, they may be ascertained within three months of that time by consistent testimonies of witnesses before a court. In order to comply with the aforementioned time limit, it shall be sufficient to submit a request for a hearing of witnesses, together with data enabling their hearing, to the court of succession before the expiry of the time limit. Where the hearing of one or more witnesses is impossible or faces insurmountable obstacles, the court may rely on consistent testimonies of two witnesses.

The new regulation of Article 952 of the Civil Code should prevent the society from treating an oral will as an ordinary will, and should counteract frequent attempts aimed at its falsification (as it is impossible to exclude such cases completely).

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YEARBOOK

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dr Mariusz Grabowski

Legal and Comparative Analysis Regarding
the Manner of Regulation and Introduction
into the Legal System of an Agreement
on the Transfer of Ownership as Security
for a Debt as a Nominate Contract,
with a Focus on the Agreement on the
Transfer of Immovable Property Ownership
as Security for a Debt

PRIVATE LAW

Preliminary Remarks

A transfer of ownership as security for a debt is a legal act aimed at securing the repayment of claims. The object of the transfer, intended to secure the repayment of claims and therefore protect the interests of the creditor, is the debtor's proprietary right.

The issue of the so-called "transfer of ownership" of property rights to secure a claim warrants consideration and analysis. That is because this issue pertains to the application of law, holding significant social and even civilisational implications regarding the culture of law as a whole. In addressing the latter aspect, the point raised is, unfortunately, not an exaggeration, insofar as the issue raised is pivotal to the very essence of private law.

This analysis focuses specifically on the transfer of immovable property ownership.

This paper does not seek to provide a comprehensive dogmatic and legal analysis of this civil law action, particularly all legal scholarship and case law on the matter. However, references to the positions established in both case law and legal scholarship are included to facilitate the drawing of conclusions, and their inclusion is necessary for this purpose.

The purpose of this paper is to address the question of where the transfer of ownership, particularly of immovable property, fits within the Polish legal system and the legal frameworks of several other selected European Union countries.

In examining the legal characteristics of the transfer of ownership as security for a debt across different countries, I will also refrain from offering an extensive dogmatic and legal analysis for the aforementioned reasons. The objective of the following analysis is to elucidate the position of the transfer of ownership as security for a debt within the comparative context of contractual frameworks. This entails addressing whether such a transfer constitutes a distinct, independent category of agreement or whether it functions as a specific contractual reservation or a set of provisions that are of a non-substantial nature in relation to the principal obligation, which is the claim intended to be secured. Although the transfer of ownership as security for a debt is not a new concept – having historical roots as a fiduciary act in Roman law – it has rightfully garnered heightened interest in contemporary discussions, reflecting its implications within the practical application of the law.

In practice, it is not uncommon in Poland for a situation to arise in which a debtor, who is also the owner of an asset, transfers ownership of that asset to a creditor as a result of a different obligation, typically stemming from a credit relationship. This unilateral legal

disadvantage experienced by the debtor involves a legal obligation that serves to sanction and reinforce (through the transfer of ownership agreement) the debtor's challenging financial circumstances. These circumstances serve as the actual rationale for the debtor's agreement to the transfer of ownership. The reprehensibility of such a phenomenon is particularly pronounced and significant when the transfer pertains to the immovable property ownership. There is a reason why the major controversy in the scholarship and in the case law concerns the transfer of immovable property ownership as security for a debt. Given the current practice in legal and economic transactions, along with the necessity for equitable protection of essential assets for all parties involved in such transactions, it is important to focus on the latter issue, which will be examined further in the following discussion.

The primary purpose of this analysis is to not only address the dogmatic and legal issues within the domain of contract theory but, first and foremost, to draw conclusions that are useful from the point of view of the protection of the assets of persons performing legal actions. Therefore, the practical application of the law is also discussed below.

Furthermore, the theoretical and legal conclusions themselves are formulated solely in terms of the above aspect of asset protection in practice. This is also the criterion underlying *de lege ferenda* considerations regarding the place of the transfer of ownership as security for a debt within the Polish legal system.

1. The Legal and Actual Situation Regarding the Transfer of Ownership as Security for a Debt in Poland. Characteristics and Terminological Issues

It is first necessary to accurately define the legal positions of the parties involved, particularly the terminology associated with the so-called “transfer of ownership” of assets as security for a debt. This is crucial to properly outline the subject matter at hand and to establish the scope of the legal analysis. Additionally, it allows for unambiguous references to the expressions utilised in both legal and economic transactions and, unfortunately, in the practice of applying the law, even at the level of Supreme Court case law. This includes expressions that “obscure” legal reality and create the impression of fiction, which is particularly detrimental to the accurate perception of this reality by the so-called average recipient of legal norms.

The term “transfer of ownership as security for a debt” may imply a different legal effect, which is the transfer of ownership of the asset. The distinction would involve a weaker effect, characterised by the purported temporary or conditional nature of this transfer.

The legal situation (relationship) of the parties involved in the so-called “transfer of ownership as security for a debt” takes place encompasses the following components: 1) a credit agreement or agreement on any other form of material consideration, 2) an agreement on the transfer of ownership of an asset owned by the debtor under a credit agreement (hereinafter referred to as the debtor) to the creditor under a credit agreement (hereinafter referred to as the creditor), 3) the creditor’s obligation to transfer the ownership of the asset back to the debtor after the expiry of the credit agreement, i.e. after the debtor has fulfilled its obligations to the creditor under said agreement, 4) as a rule, also the creditor’s obligation to leave the “transferred” asset at the disposal of the debtor, who is the limited right possessor of the asset in this situation. The fourth element is not essential for establishing the legal situation referred to as the “transfer of ownership as security for a debt”. However, it is typically present, as the legal situation under consideration is intentionally created by the parties involved precisely to allow the previous owner of the asset (the debtor) to continue using it under the existing terms. This arrangement remains in effect until ownership “reverts” back to the debtor or is “finally” and “definitively” retained by the creditor. The latter situation, defined as “final” and “definitive”, arises should the debtor default on their obligations under the credit agreement towards the creditor. The entire legal situation described above

is created by the parties in order to achieve an objective not anticipated by the legislator, or to circumvent the applicable law, as further elaborated below.

The transfer of ownership of assets is intended to secure the creditor's interest under the credit agreement.

The phrases which are highlighted above in inverted commas warrant particular emphasis. Their usage, which is prevalent in legal transactions, allegedly implies a different legal position for the debtor. This position entails the certainty of actually regaining ownership of the "transferred" asset after repayment of the credit amount, along with any additional pecuniary performances. Consequently, the situation appears to be centred around the alleged conditionality of the asset's ownership transfer to the creditor. The extent to which the debtor understands all the legal effects of the "transfer of ownership" is uncertain. Typically, the debtor is led to believe in the feasibility of reclaiming ownership of the immovable property, which, "after all", they continue to utilise as though it remains under their ownership. While they may have varying degrees of understanding of the legal effect involved in relinquishing property rights, the obligatory "framework" surrounding the ownership transfer to the creditor creates the impression of certainty regarding the actual recovery of the immovable property (or other assets). The debtor is reassured of the accessory nature – in relation to the credit agreement – of the transfer of immovable property ownership, and the circumstances accompanying the transfer, which consist in the creditor's obligations, are intended to inform the debtor that, in the event of compliance with the credit agreement, recovery of the immovable property is not at risk. Conversely, the complicated legal structure defining the overall legal situation of the parties, which consists of the above-mentioned elements, appears to stem from the shortcomings present in Polish legislation.

Yet, the actual legal position of the debtor is that upon entering into a consensual agreement on the transfer of asset ownership to the creditor (an agreement executed in the form required by law), the debtor effectively relinquishes ownership of the "transferred" asset at that moment. In essence, the transfer of asset ownership to the creditor occurs at the so-called "beginning" of the legal relationship known as a transfer of ownership as security for a debt. Therefore, there is no "final" or "definitive" acquisition of asset ownership by the creditor at a later date; they have possessed ownership since the very outset of the agreement. Polish law does not differentiate, i.e. distinguish asset ownership rights by degrees, as it recognises ownership as an absolute right. The terminology referenced above, which is enclosed in inverted commas, does not alter anything, regardless of its use by the Supreme Court. The practices of the Supreme Court in this context warrant criticism and reflection regarding the potential deference shown by bodies applying the law towards credit institutions, i.e. the party which, in fact, holds a position of strength and legal privilege in the legal situation under consideration.

The aforementioned "finality" or "definitiveness" regarding the creditor's assumption of ownership of the asset can only be perceived – under the current law – as a situation in which the debtor's claims against the creditor for the return transfer of ownership of the asset are extinguished.

Thus, the legal situation referred to as a transfer of asset ownership as security for a debt can be correctly and unambiguously described as a transfer of ownership of the asset to secure the interests of the creditor under the credit agreement.

Furthermore, to accurately and clearly name the factual and legal situation of the parties involved in the transfer of asset ownership as security for a debt, it is necessary to refer to the purpose underlying the invocation of the analysed legal situation of these parties.

The actual purpose behind a debtor deciding to relinquish ownership of an asset is to be able to obtain credit without "definitively" losing that right, which is to revert to them. Conversely, the creditor's objective is to secure the repayment of the debtor's liabilities under the credit agreement.

From a legal perspective, the purpose, or *causa*, in this instance is to secure the credit agreement. Accordingly, we are dealing with the *causa cavendi* of this legal act, which is the transfer of ownership of the asset from the debtor to the creditor.

The generally coercive and unequal position of the debtor who opts for a "transfer of ownership" due to a lack of alternative means to secure funding is also significant. Thus, this is a factual situation in which the debtor is unable to obtain credit through the "normal" procedure because they do not meet the creditworthiness standards applied by banks. The creditor, who chooses to extend funds to the debtor, is aware of the foregoing circumstances. Consequently, we are presented with a potentially pathogenic situation that may lead to exploitation by the more powerful party, which is clearly the creditor.

2. Legal Characteristics of the Transfer of Ownership as Security for a Debt in Polish Law, with a Focus on the Transfer of Immovable Property Ownership

The debate surrounding the legal nature of transferring ownership of assets as security for a debt is quite extensive within Polish legal scholarship.¹ This discourse has led to the emergence of two contrasting viewpoints: one advocating for the legal permissibility of such ownership transfers² and the other opposing it.³

Engaging with the arguments presented in this dialogue is crucial, not merely to align with one perspective or evaluate a specific argument. More importantly, it is essential for determining the legal validity of ownership transfers under current Polish law.

This situation arises from the practice of applying the law, which has developed and solidified independently of and even despite some of the relevant arguments presented in this discussion. The legal acceptability of the transfer in question has been embraced by this practice. The case law of the Supreme Court has played an important role in this process, approving such a practice and consolidating it. It can be safely said that there is an ongoing evolution of perspectives in Poland regarding this issue, reflecting a progressive acceptance of the admissibility of the transfer of ownership, rooted in the principle of not restricting the freedom to shape the legal situation under private law.

The argument suggesting that the debate surrounding the admissibility of ownership transfer is, at this point, solely of historical significance, given the consolidated practices in the application of law, is not one that can be endorsed. This is especially true as we touch upon important subjective rights and, as indicated in the introduction, the very essence of private law.

Referring to the arguments raised in the discussion is useful and expedient for identifying practical *de lege ferenda* conclusions concerning the current practice in the application of law.

¹ The views of scholars are discussed, among others, by J. Gołaczyński, *Przewłaszczenie na zabezpieczenie*, Warszawa 2004; see also: A. Szlęzak, *Przewłaszczenie na zabezpieczenie rzeczy przyszłych, rzeczy oznaczonych co do gatunku oraz nieruchomości*, "Rejent" 1995, Issue 2, pp. 111 et seq.

² See, among others: M. Strus, *Dwa sposoby powierniczego zabezpieczenia kredytu*, "Palestra" 1992, Issues 11–12, p. 36; M. Orlicki, *Przewłaszczenie na zabezpieczenie*, Warszawa 1996, pp. 18 et seq.

³ See, among others: J. Skąpski, *Przewłaszczenie na zabezpieczenie*, "Studia Cywilistyczne" 1969, Vol. 13–14, p. 312; W. Siedlecki, *Glosa do uchwały SN z 3.02.1960 r.*, 3 CO 27/57, "OSP i KA" 1961, No. 3, Item 75; A. Szpunar, *O powierniczych czynnościach prawnych*, "Rejent" 1993, Issue 11, p. 21; T. Sokołowski, *Niedopuszczalność „przewłaszczenia” nieruchomości na zabezpieczenie. Sprzeciw wobec „refeudalizacji” obrotu prawnego*, [in:] *Zabezpieczenia wierzytelności*, K. Szadkowski, K. Żok (eds.), Warszawa 2020, pp. 63–80.

The primary subject of legal controversy is the transfer of immovable property ownership. The arguments “for” and “against” the permissibility of the transfer of ownership as security for claims in the case of immovable property subsume the arguments pertaining to movable property. In addition, with regard to immovable property, the subject matter of the dispute is expanded to include the prohibition of transferring the ownership of immovable property subject to a condition or time limit (Article 157(1) of the Polish Civil Code⁴).

The legal nature of a “transfer of ownership” agreement, i.e. the conveyance of ownership of an asset, is not disputed in either scholarship or case law. Concurrently, argumentation is raised for the admissibility of the transfer of ownership based on the principle of freedom of contract (Article 353¹ KC, together with Article 354 KC), whereas in this case we are dealing with the institution of the contract law, which cannot be transferred to the sphere of substantive law. Above all, it cannot serve to undermine the principle of *numerus clausus* of rights *in rem*.

In the remaining part of this section, I will primarily address the issue of transferring ownership of immovable property as security for a debt. This topic is more extensive than the matter concerning movable property as mentioned, while also encompassing the latter.

In terms of the *sensu stricto* meaning of the term “transfer of immovable property ownership as security for a debt”, it consists of two of the above-mentioned elements, constituting the legal situation of the parties: the transfer of the ownership of the immovable property from the (credit) debtor⁵ to the creditor and the obligation of the (credit) creditor to return this ownership to the debtor. The function and rationale of the transfer of ownership to the creditor is to secure the repayment of the credit, a concept clearly articulated in the provisions of the transfer of ownership agreement.

The legal situation understood in this way is referred to by proponents of the legal permissibility of the “transfer of ownership” under consideration as an innominate agreement formulated within legal transactions, specifically the “agreement on the transfer of immovable property ownership as security for a debt”.⁶ It is at this juncture that the problem of the legal existence of such an “agreement” as an independent contractual relationship arises. Indeed, it cannot be denied that the transfer of ownership in this case serves as a security for the principal claim, referred to as the credit (loan) in these considerations. Moreover, a *sine qua non* condition, without which the transfer of the immovable property ownership would not take place, is both the conclusion of the credit agreement and the existence of an

⁴ Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws of 2022, Item 1360, as amended); hereinafter “KC”.

⁵ Or concerning another claim. Hereinafter, the expression of “credit/loan” replaces – for the sake of clarity of the discussion – the concept of principal claim, unless otherwise indicated.

⁶ See: J.M. Kondek, *Umowa przewłaszczenia nieruchomości na zabezpieczenie i jej praktyka w świetle wizytacji i lustracji kancelarii notarialnych w latach 2013–2017*, “Prawo w Działaniu” 2019, Issue 40, pp. 166–192; I. Heropolitańska, *Prawne zabezpieczenia zapłaty wierzytelności*, Warszawa 2018, pp. 665–667.

obligation on the part of the creditor to return this ownership to the debtor. In addition, such a condition is generally also the debtor's capacity to hold ownership of the immovable property, as previously mentioned.

In order to ascertain the legal nature of a particular agreement as an innominate contract operating in the legal system, it must represent a contractual structure consisting of certain elements constituting the agreement concerned, which are the minimum required for its existence. Such elements fulfil a role in the agreement under consideration similar to *essentialia negotii* in a nominate contract. At the same time, of course, the agreement under examination must demonstrate that novelty which precludes its legal classification as a type of one of the nominate contracts. In essence, the legal classification of the agreement concerned begins with the identification of these "essential" elements, followed by the determination that they form a functional whole sufficiently developed that we are dealing with an independent contractual type akin to a nominate contract. Should this evaluation yield a favourable outcome, potential *de lege ferenda* considerations can be proposed in light of the lack of a legal classification that meets important social or economic needs.

The correct legal classification of a particular agreement also requires an answer to the question of whether we are dealing with the so-called complex of contracts, i.e. a set of independent legal relations which together form a specific functional whole. In this analysis, the inquiry into the complex of contracts means the question of whether we are dealing with standalone agreements that are functionally connected in various constellations that can be considered. By using the term "constellations", I mean various procedures in the practice of the application of the law, as a result of which the above-mentioned four⁷ components of the legal situation of the parties to the "transfer of ownership" are arranged in formally separated "agreements". The number of such agreements may vary; however, it can be concluded – with reference to the practice of applying the law – that, in the legal situation being analysed, most often a division into at least two formally separate "agreements" occurs: a credit agreement and an agreement on the "transfer of ownership as security for a debt" containing the provisions of the other three elements of the parties' legal situation. The formal delineation of these elements into more "agreements", i.e. two or three, is irrelevant to the legal classification at hand. Obviously, a situation may also occur where all four components of the parties' legal situation are encapsulated within a single notarial deed.

⁷ In the case of transfer of immovable property ownership.

According to the view allowing for the agreement for the transfer of asset ownership as security for a debt, these “essential” elements include:⁸

1. the transfer of ownership of an asset from the debtor to the creditor,
2. a stipulation providing that the transfer of the ownership title takes place to secure a claim (a credit),
3. an obligation of the creditor to transfer this ownership of the item back to the debtor once the debt has been repaid in full.

The first element implies the unconditional transfer of ownership of an asset. With regard to immovable property, there is no violation of the statutory prohibition (under Article 157(1) KC) on the transfer of the property right under a condition or term. The prohibition referring to the condition is not violated as there is no condition at all since the effects of this legal act are entirely dependent on the will of the parties.⁹ There is no issue of the term either, as the ownership of the immovable property passes to the creditor with immediate effect.

The second element pertains to the case of transfer of the ownership to the creditor, serving as security for the claim.¹⁰ We are therefore dealing with *causa cavendi*. This transfer is not intended to generate benefits for the creditor. Consequently, the transfer of ownership (first element) is accessory¹¹ to the debt (credit) agreement, meaning that the legal existence (validity) of the transfer of the ownership title to the immovable property is dependent upon the legal existence of the secured claim. Thus, the same considerations regarding the legal existence apply to the entire “agreement on the transfer of ownership as security for a debt”, i.e. also to the creditor’s obligation of return the ownership.

The third element is an obligation of the creditor to transfer the ownership title of the immovable property, so that the condition contained herein (repayment of the debt) or a potential term does not affect the validity of such an obligation as permitted by the provisions of the property law (Article 157(2) KC).¹²

⁸ See: judgement of the Supreme Court of 29 May 2000, III CKN 246/00, OSNC 2000, No. 11, Item 213; judgement of the Supreme Court of 8 March 2002, III CKN 748/00, OSNC 2003, No. 3, Item 33. I am omitting here the provisions of Polish banking law – Article 101(1) of the Act of 29 August 1997 on Banking Law (Journal of Laws of 2023, Item 2324, as amended) delineates the transfer of ownership of movable property and securities as methods of securing a bank’s claims. The provisions of the Banking Law in this case mean specific provisions that define what legal acts can be exercised in connection with banking activities. See also: I. Heropolitańska, *Prawne zabezpieczenia...*, pp. 271–321 (in relation to the transfer of movable property ownership) and pp. 665–667 (in relation to the transfer of immovable property ownership).

⁹ See: judgement of the Supreme Court of 29 May 2000, III CKN 246/00, and judgement of the Supreme Court of 8 March 2002, III CKN 748/00.

¹⁰ See: judgement of the Supreme Court of 13 May 2011, V CSK 360/10, “Legalis” Issue 440139.

¹¹ See: E. Gniewek, [in:] *System prawa prywatnego*, Z. Radwański (ed.), Tom 3. *Prawo rzeczowe*, E. Gniewek (ed.), Warszawa 2013, pp. 566–568.

¹² See: judgement of the Supreme Court of 19 November 1992, II CRN 87/92, OSNC 1993, No. 5, Item 89; judgement of the Supreme Court of 26 September 2007, IV CSK 118/07, OSP 2008 No. 12, Item 125.

The view presented above regarding the legal characteristics of the transfer of immovable property ownership as security for a debt poses a dilemma of logical contradiction.¹³ The reason is that, according to this view, the agreement on the transfer of ownership is accessory to the main obligation, i.e. the claim (credit). The effectiveness of the transfer of the immovable property is thus dependent on the legal existence of the principal claim. It is, therefore, not an independent agreement in its legal form. At the same time, this view presupposes a “definitive” and “final”, i.e. unconditional and effective transfer of ownership of the immovable property to the creditor already at the time of the conclusion of this agreement. The transfer of immovable property ownership is therefore intended to be “independent” in both its nature and effect as a legal relationship. It is important to note that, in this particular instance, the legal relationship, when considered independently, does not contain the required *essentialia negotii* – no mutual consideration, e.g. a price.¹⁴ On the other hand, recognising the relationship between the principal claim agreement and the agreement regarding the transfer of ownership to the creditor raises important questions. These questions, which are still debated by legal scholars and remain unresolved in the field of property law, pertain to the effects of the *causae finita* of the principal claim (credit).¹⁵ The inquiry at hand is whether we are effectively transferring the risk associated with an uncertain legal effect to such a significant legal action as the divestment of ownership of immovable property. How does the argument of “stabilisation” within the practice of law, which aids in recognising the transfer of immovable property ownership as security for a debt as an innominate contract, pertain to this matter? The question that has been raised earlier is unavoidable: do the efforts to “legalise” *de lege lata* the transfer of ownership of immovable property as security for a claim not consist in seeking to justify legal actions whose compatibility with mandatory provisions of property law and the essence of private law, which is the equality of parties, is at the very least questionable? After all, I am not addressing trivial matters; rather, I am referring to the protection of important subjective rights and the principle of this protection in the private law system. In this context, it is also inadequate to attempt a consequential, i.e. “rescue” search for an antidote to the unequal legal position of the parties in the form of additional contractual provisions or in institutions of contract law, such as unjust enrichment. This is evidenced by the experience resulting from the practice of the application of the law, as will be elaborated upon in the subsequent section of the considerations, which is in this case the evidence of the lack of the aforementioned “stabilisation” regarding the legal effects of an “innominate agreement on the transfer of ownership”.

¹³ See: T. Sokołowski, *Niedopuszczalność...*, p. 77.

¹⁴ It is not possible to recognise as such a consideration another consideration “taken out” of the underlying debt (credit) agreement – the provision of the credit sum – which is already fulfilled (as mutual) in the latter agreement, which has an independent and “fulfilled” legal character in the sense of *essentialia negotii*.

¹⁵ See: T. Sokołowski, [in:] *Kodeks cywilny. Komentarz. Tom 3. Zobowiązania. Część ogólna*, A. Kidyba (ed.), Warszawa 2014, pp. 828 et seq.

With regard to the legal situation of the parties referred to as a transfer of ownership as security for a debt, we are dealing with the indisputable fact that the debtor has divested themselves of ownership of the immovable property, while simultaneously being deprived of the guaranteed ability of obtaining the legal effect of recovering this ownership right. It is rightfully alleged that the principle of *numerus clausus* of rights *in rem* is being violated.¹⁶ The legal framework for a lien is omitted for movable property and a mortgage on immovable property has been disregarded.

The above principle and the provisions of the property law, let me add, *iuris cogentis*, including those concerning in particular mortgages,¹⁷ as well as the other legal provisions related to it, are intended to safeguard the equitable interests of the parties and the legal balance between them. Moreover, it is clear that deviating from the regime of these provisions, which is the case in the situation of transfer of ownership as security for a debt under analysis, is a straightforward way to infringe the aforementioned assets. On the other hand, the departure from the institution of the mortgage envisaged by the legislator for the circumstances under consideration, i.e. the need to secure the claim by immovable property, has the effect of “abandoning” the protective solutions associated with the mortgage and further exacerbates this inequality to the debtor’s disadvantage. In view of the legal balance of the parties so materially disturbed – in the manner described in the considerations presented so far – it is alleged “that a more unequal for the parties and thus *par excellence* ‘non-civil’ legal construction could hardly be found. At the same time, it constitutes a textbook example of circumvention of the law (Article 58(1) KC) [...]”.¹⁸ It is also a phenomenon of “re-feudalisation” of private law.¹⁹

¹⁶ T. Sokołowski, *Niedopuszczalność...*, pp. 64 et seq.

¹⁷ By virtue of the subject under consideration.

¹⁸ T. Sokołowski, *Niedopuszczalność...*, p. 70.

¹⁹ Ibidem, pp. 63 et seq.

3. Comments on Ancillary Contractual Provisions Used in Connection with the Transfer of Ownership as Security for a Debt in the Practice of Legal Transactions in Poland

In the practice of concluding agreements on the transfer of ownership as security for a debt, additional arrangements take place to secure the legal balance of the parties, particularly for the debtor, who holds a weaker position compared to the creditor from the outset. It is essential to pay attention to these additional contractual provisions that protect the debtor's interests, as they not only clarify the agreements on the transfer of ownership as security for a debt *de lege lata* but also appear necessary to explore potential scope and modalities of *de lege ferenda* solutions irrespective of the position adopted by the Polish legislator regarding the place of the transfer of ownership as security for a debt in the legal system. Whether the decision is made to regulate (introduce) a new type of agreement, adopt a middle-ground solution that enhances the debtor's protection, or "seal" the law to prevent the transfer of immovable property ownership as security for a debt, the need for legal reforms in this area seems unmistakable.

The major ways of securing or strengthening the debtor's legal position are listed below as examples.²⁰

1. The transfer of immovable property ownership requires maintaining the form of a notarial deed (Article 158 KC). The legal effect indicated in the preceding paragraph of unconditionally transferring ownership of the immovable property to the creditor, while at the same time lacking the inevitable legal effect of the return of the immovable property to the debtor, makes it necessary to adequately reinforce the possibility of successfully claiming such a "return". It is important to comply with the required form of the legal act. In the same notarial deed in which the ownership of the immovable property is transferred to the creditor, the *causa* of this transfer, i.e. the security of the designated claim, must be indicated (Article 158 *in fine*). This shall have the legal effect of rendering the transfer of ownership of the immovable property invalid if the underlying debt agreement is invalid.²¹ The creditor's obligation to transfer the ownership of immovable property back also takes place in the same notarial deed. The absence of such an obligation means that we are not dealing with the "transfer

²⁰ See more: J.M. Konddek, *Umowa...*, pp. 166 et seq.

²¹ See: J.M. Konddek, *Umowa...*, p. 170.

of ownership as security for a debt”.²² The comments in this section are relevant in terms of potential legislative changes and indicate the need to ensure the appropriate legal form of the legal transaction in these changes.

2. With reference to the preceding section, the legal position of the debtor with regard to the “recovery” of the immovable property is strengthened by the insertion in the aforementioned notarial deed of a clause of the creditor’s submission to enforcement pursuant to Article 777(1)(4) of the Code of Civil Procedure.²³ Of course, this does not guarantee the debtor the effectiveness of the recovery of the immovable property itself since, according to the comments contained in the above considerations, the creditor may, for example, effectively dispose of the assets. In order to counteract the latter possibility, an entry of a claim for a return transfer of immovable property ownership in the land and mortgage register of that immovable property is used (Articles 16(1) and 31(1) of the Act of 6 July 1982 on Land and Mortgage Register and the Mortgage).²⁴ Pre-emptive rights may also be reserved, which also further demonstrates a lack of adequate legal protection by circumventing the principle of *numerus clausus* of the rights *in rem*.
3. The issue of determining the value of the immovable property to be transferred in the transfer agreement is problematic. Whether there is a mere requirement for such a valuation is a matter of dispute among those approving the admissibility of such agreement.²⁵ The Supreme Court has found that the construction of a security right cannot serve to enrich the creditor at the expense of the debtor, which would be contrary to the principles of social co-existence and that the security itself can only serve to satisfy the creditor in the event that the debtor fails to perform its obligation under the underlying agreement.²⁶ Bearing in mind the situation of economic compulsion already mentioned for the debtor deciding to dispose of the immovable property, the above position of the Supreme Court has a wishful thinking value in practice. The accessory nature of the “transfer of ownership”, as raised by the supporters, is theoretically intended to ensure that the issue of valuation of the immovable property should not result in terms of the danger of overcollateralising in favour of the creditor. However, the debtor – by the very nature of the legal situation concerned – is a weaker party, both during the period of payment of the claim, as the creditor holds all the ownership rights and in the situation of settlement of the obligations arising from the claim. It is relatively easy for a creditor, which is generally an economically powerful institution,

²² See: J. Gołaczyński, *Przewłaszczenie...*, p. 201.

²³ Act of 17 November 1964 – Code of Civil Procedure (consolidated text, Journal of Laws of 2021, Item 1805, as amended); hereinafter: KPC. See more, J.M. Kondek, *Umowa...*, pp. 189–190.

²⁴ Consolidated text, Journal of Laws of 2022, Item 1728.

²⁵ See: J.M. Kondek, *Umowa...*, pp. 175–181.

²⁶ See: judgement of the Supreme Court of 31 March 2016, IV CSK 372/15, “Legalis” Issue 1460324.

to exploit a legal advantage. The scholarship indicates that, in the annual balance sheets of some banks, as much as one-third of the profit results from the seizure of immovable property from insolvent debtors, which may give rise to various suspicions.²⁷ Securing against overcollateralising and the consequent enrichment of the creditor is sought in the institution of unjust enrichment, which refers to objective circumstances. However, in practice, it is difficult to envisage the effectiveness of the debtor asserting its rights in a dispute with a stronger entity already “after the fact”, i.e. after the effective disposal of the immovable property.

4. The comments contained in the preceding paragraph in relation to the issue of settlement of the underlying claim, including the value of the immovable property, where the claim is due and the debtor’s claim for a return transfer of the immovable property has lapsed (insolvent debtor) remain valid. Also in this case, the only “rescue” against the creditor’s enrichment at the debtor’s expense under the generally applicable law is the institution of unjust enrichment. In the practice of concluding “transfer of ownership” agreements, various provisions are included. The position that the contractual provisions whereby the debtor waives – in the transfer agreement – their claim to the creditor for reimbursement of any surplus²⁸ are reprehensible and contrary to the principles of social co-existence is correct. The mere fact that such contractual provisions occur shows how far the disproportion of the factual and legal situation of the parties can proceed as a result of the debtor’s almost desperate economic need.

In view of the abuses associated with the transfer of immovable property ownership as security for a credit, in order to protect the legitimate rights of the securing debtor, the Polish legislator aptly decided to introduce significant restrictions on the “procedure” of transfer. The necessity and legitimacy of the prohibitions introduced at the statutory level is, unfortunately, the evidence of pathology stemming from the nature of the “transfer of immovable property ownership as security for a debt” and based on a liberally lenient jurisprudence towards the interests of lenders. I refer to the prohibition of agreements on the transfer of immovable property ownership for a debt used by the consumer, established by the provision of Article 387¹ KC. In accordance with this provision: “A contract in which a natural person undertakes to transfer the ownership of an immovable property used to satisfy their housing needs for the purpose of securing claims arising from this or any other contract not directly related to that person’s business or professional activity is invalid where: 1) the value of the immovable property is higher than the value of the monetary claims secured by this immovable property plus the amount of the maximum interest for delay on this value for a period of 24 months, or 2) the value of the monetary claims secured by this immovable

²⁷ Cf. T. Sokołowski, *Niedopuszczalność...*, p. 79.

²⁸ See: J.M. Kondek, *Umowa...*, p. 182.

property is not determined, or 3) the conclusion of this agreement was not preceded by an appraisal of the market value of the immovable property by an expert appraiser”.

The above-mentioned “need of the moment” prohibition is the first, and hopefully not the last, legislative step by the legislator to restore an essential principle of private law, which constitutes the identity of this law – the principle of equal rights of the parties.

The foregoing prohibition limited the usurious²⁹ behaviour of creditors with regard to the situation indicated therein.

Moreover, the new provision of Article 952¹ KPC provides that the date for the auction of a dwelling or land immovable property developed with a residential building that serves to satisfy the debtor’s housing needs will be set at the request of the owner, with such a request only possible if the amount of the principal claim to be enforced is at least equivalent to one-twentieth of the sum of the estimate.

The issue of admissibility under the Polish civil law of the transfer of immovable property ownership as security for a claim has remained unresolved. The most damaging practices for the debtor seem to have been limited. The above restrictions have obviously been received with a critical response from lenders. The effectiveness and scope of the cited restrictions assumed by the Polish legislator may be assessed by an analysis of the practice of law application after the appropriate period of operation of these restrictions. In the discussion of the above-mentioned amendments, it is argued by the supporters of the “transfer of ownership” that the legislative route of prohibitions, restrictions or, even more, a general ban on the transfer of ownership as security for a debt is not appropriate because, firstly, it is contrary to the needs of the subjects of the law, the interests of which are not followed by the rigid letter of statutory law. Secondly, “life will find a way to omit bans anyway”. This second argument, in terms of any legislative effort to restrict or prohibit the practice concerned, is commonly known. Thus, it should be taken into account when determining effective legal rationing, i.e. in the positive aspect. Possible “ways” to circumvent the above prohibition are verbalised, which shall include, for example:

- the establishment of business activities by future debtors, as the prohibition referred to does not apply to business activities. Literally speaking, such a “procedure” would result from the forced economic situation of the debtor becoming a trader against their true will, rather than from the alleged exercise of the civil law principle of the freedom of legal action;
- the sale of immovable property with a reservation of pre-emptive right contained either in the sale agreement or in the debt (credit) agreement or another “accompanying” agreement in order to conceal the true legal purpose of the transfer of ownership title to the creditor.

²⁹ To call this application of the law in practice by its name.

“Recipes” for circumventing legal rationing can vary. The issue of the clash with the practice of the bodies applying the law appears to be an important problem in the case concerned. The letter of the existing law is not a tool that can address all negative aspects of reality. After all, in the Roman maxim “what is law without customs”, we can also replace the expression “customs” with “the practical application of the law”. The case law line that is favourable to the interests of lenders can grow into a “squaring the circle” problem. In this case, I refer to the tolerance in the legal market of various practices, delicately described as unfavourable from the perspective of *the ratio legis* of civil law and public law provisions. It pertains to disguised lending in the form of so-called shadow banking, pawnshop “loans” or others, which in essence result in activity that circumvents the requirement for due (banking, financial) supervision, or measures that circumvent the restrictions in the Civil Code concerning the amount of interest permitted (prohibition of usury), or the “official” lending activity of some banks, referred to above, resulting in a relatively high share of repossessed immovable property values from insolvent debtors in the bank’s asset structure. The latter at least allows for reflection on the lending procedures adopted.

4. Legal Characteristics of the Transfer of Ownership as Security for a Debt in German Law, with a Focus on the Transfer of Immovable Property Ownership

In the countries of the German-speaking area in Europe (Austria, Germany, Switzerland), the agreement on the transfer of ownership of assets as security for a debt (*Sicherungsübereignung*) is not standardised, i.e. the relevant provisions of civil law in these countries neither provide for this type of contract, nor do they contain provisions regulating at least one of the so-called “essential elements” of the “transfer of ownership” agreement which, as indicated above, is to be the transfer of ownership of the assets to the creditor with the reservation that the transfer of ownership takes place in order to secure the claim (*causa*).

The common factor in the legislation of the countries mentioned above is the use of two institutions known in Polish law: the pledge and the mortgage, to secure debts. However, this does not imply that the legal frameworks governing pledges and mortgages in these countries are identical or almost identical to those in Poland. In these countries, the legislation provides for different forms of these safeguards. Their very essence remains consistent with that of Poland.

In relation to Germany and Austria, i.e. countries belonging to the European Union, there is a different approach by the legislators to the admissibility of the transfer of ownership as security for a debt.

The Austrian Civil Code provides for pledges and mortgages as forms of security for claims – to the legal extent that interests me – which apply to movable and immovable property, respectively. At the same time, under the Austrian Civil Code¹ we deal, *de facto* with a prohibition on the transfer of ownership of assets to secure a claim in the provisions concerning the pledge (movables). As discussed below, the limitations in these provisions mean that the institution of pledge will not be used for the transfer of ownership as security for a debt. It should be noted that in Austria (similarly in Switzerland), a pledge of a claim on a movable asset does not always require the transfer of possession of the pledged asset to the creditor. This provides scope for securing a claim with a movable item while leaving possession with the debtor. According to the provision of Section 447 ABGB, “a lien is a right *in rem* granted to the creditor to satisfy debt from the asset (lien) in the event of default”

¹ *Allgemeines Bürgerliches Gesetzbuch*, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622> [accessed on: 15.02.2023]; hereinafter: ABGB.

by the debtor. On the other hand, the provisions of Section 1371 ABGB contain a general clause stating that any ancillary (accompanying) terms and agreements that are contrary to the legal nature of the pledge and credit agreement are absolutely invalid. Thus, among others, the transfer of assets as security for a claim is not permissible as being contrary to the essence of a pledge. The provisions of Section 1371 ABGB specify, by way of example, prohibited contractual provisions – within the meaning of the foregoing general clause – such as:² 1) the so-called forfeiture clauses (*lex commissoria*) – contractual provisions specifying that the effect of failure to pay a matured debt is the forfeiture, i.e. the transfer of ownership of the asset to the creditor; 2) provisions transferring to the creditor the right to dispose of the pledged asset, e.g. to sell the asset or to repossess it; 3) waiver by the debtor of the right to redeem the subject of the pledge (item). With regard to immovable property, there is no prohibition on the transfer of ownership to the creditor in order to secure a claim – the rules on mortgage credit apply here, including making the legal effect of the security conditional on the disclosure of the entry in the land and mortgage register. The foreclosing creditor in this case is obliged to transfer the ownership back to the debtor upon payment of the mortgage obligations. The specific legal arrangements regarding the transfer of immovable property ownership as security for a debt are similar to those in Germany. A final comment also relates to the lending “action” in practice.

In German private law, an agreement on the transfer of ownership as security for a claim is not provided for in the provisions of the German Civil Code,³ contrary to such rights securing a claim as a pledge or mortgage. However, such an agreement operates in the legal market as an innominate contract and is admissible under civil law.

The agreement for the “transfer of assets” as security for a claim is a contractual agreement in German law, which is a legal relationship as such. It is not accessory in relation to debt, unlike a pledge or a mortgage (accessory rights). It is a legal relationship based on the fiduciary duty.

At the outset, it should be noted that the principle of the double effect of contracts, i.e. an obliging and dispositive effect in German law, does not operate as in Polish law. Therefore, the legal characteristics of the legal relationship referred to in the “Polish” sense as the “transfer of ownership as security for a debt”, as described below.

Pursuant to German law, a “transfer as security for a debt” is essentially the agreement that transfers ownership of an asset from the debtor to the creditor.⁴ The ownership of the asset shall pass unconditionally to the creditor. The legal basis for the transfer of the assets

² For example, to the extent that is relevant to this analysis.

³ *Bürgerliches Gesetzbuch*, <https://www.gesetze-im-internet.de/bgb/BJNR001950896.html> [accessed on: 15.02.2023]; hereinafter: BGB.

⁴ In terms of expressions: “debtor” and “creditor” meaning, as assumed at the beginning of these considerations, the debtor and the creditor of the underlying debt (credit) agreement secured by the transfer of title, unless a different meaning is indicated.

is the so-called “securing agreement”, which is the obligation of the debtor to transfer the ownership of assets. Such an obligation is assumed by the debtor in order to secure the claim. The transfer of ownership of an asset is a dispositive agreement which means the exercising of a “securing” obligation.

As the delivery of the movable is a prerequisite for the legal effect of the transfer of ownership of the movable (Section 929 BGB), the transfer of ownership of the movable to the creditor takes place on the basis of the provision of Section 930 BGB cited below. As far as the transfer of immovable property ownership is concerned, we refer to the rules of entry in the land and mortgage register in lieu of surrender of the immovable property (mortgage).

According to the wording of Section 930 BGB: “If the owner is in the possession of an asset, the surrender may be replaced by a legal relationship between the owner and the purchaser by which the purchaser takes indirect possession of the asset”. Such a “substitute surrender” of an item is an exception to the rule set out in the first sentence of Section 929 BGB, according to which “[t]he transfer of ownership of a movable item requires that the owner surrenders the asset to the purchaser and that both parties agree to the transfer”. The innominate “German” agreement for the transfer of assets as security for a claim contains an indication that the transfer of ownership is intended to secure the payment of the claim. As a rule, already in the wording of the “basic” debt agreement, the debtor commits to such a “transfer of ownership as security for a debt”, although theoretically, such an obligation of the debtor could be a separate “security agreement”. On the other hand, in the “transfer of ownership” agreement itself, which, as indicated above, is a dispositive agreement transferring ownership, there is an indication that the transfer of ownership takes place in the performance of an obligation (“security agreement”) contained in the “underlying” debt agreement. The expression of “basic” is used in inverted commas above, as under German private law no legal situation occurs – occurring under Polish law – of a legal link between both contracts, the agreement on receivables and the transfer of ownership. The term “basic” is invoked here for legibility reasons and by reference to the considerations presented so far. The debt agreement and the “transfer of ownership” agreement are independent agreements of an obligation type. Obviously, the transfer of ownership under Section 930 BGB, which is a provision of the property law, has effects *in rem*.

Such establishment of the ownership right in favour of another person can be performed for various purposes, including the securing of a debt. The condition related to the purpose is its compliance with the applicable law and “fairness” understood as in the Polish code clause of principles of social co-existence treated in the broad sense of the so-called good, socially accepted customs.

A peculiarity of German law is that there is a distinction between so-called “direct” and “indirect” ownership depending on the right of possession of the asset. The quoted Section 930 BGB mentions that the purchaser-creditor takes “indirect possession of the asset”.

Thus, the transfer of ownership under German law can be separated from the transfer of possession.

The legal standard referred to makes it possible, in practice, to conclude an agreement on the transfer of movable property as security for a debt. Indeed, it allows a move away from the institution of the pledge. The Code⁵ pledge here means, as in Poland, a relatively rigid legal relationship, which does not correspond to the need for the debtor to retain possession of the ownership of an asset. In these terms, the code pledge is as useless in Germany as it is in Poland.

A due understanding of the legal characteristics of the “transfer of ownership as security for a debt” under German civil law and avoiding misunderstandings arising from “getting used to” the rules of Polish civil law requires additional emphasis on the differences in the legal systems compared. Hence, the above comment on the effect of the agreement as a legal relationship and the distinction of such relationships making up the overall “transfer of ownership as security for a debt” in German law.

With reference to the above statement, it should be noted that, under Section 930 BGB, this “legal relationship” replacing the surrender of an asset is a “security agreement”, i.e. an obligation on the part of the debtor to transfer ownership of the asset as security for a claim. The claim to be secured is not such “legal relationship”. In this case, the debt agreement and the agreement for the transfer of ownership are independent legal relationships as such. Their legal existence is not interconnected.

Continuing: another “essential” element of the security transfer agreement, following the transfer of ownership element mentioned above, is the provision that the debtor is entitled to the possession of the asset.

Under the German Civil Code, the debtor is entitled to possession of an asset in a situation where the provision of Section 930 BGB applies, despite the fact that they are not the owner. On the other hand, the owner of the asset, i.e. the creditor, does not hold such a right of possession. Thus, we are not faced with a situation present in the law in force in Poland, where the debtor’s “right of possession” of the asset during the payment of the claim is essentially based only on the strength of the contractual provision, so that under the current property law, the debtor is dependent on the good will of the creditor-owner to comply with the obligations. The legal basis and the protection of the debtor’s right of possession in Germany is directly and directly embedded in the provisions of the Civil Code in the transfer of ownership situation under consideration. The right of the so-called “indirect ownership” or, in other words, “usufruct (possession) ownership” vested in the debtor occurs here. This is contrary to the right of “direct ownership”, which in the legal situation concerned is vested in the creditor. As already highlighted, the content of this right of “direct ownership” can be

⁵ It refers to the Civil Code.

distinguished. On the other hand, under Polish civil law, the “ownership” is not subject to gradation. One of the legal consequences of the foregoing is that the creditor cannot – despite being the owner of the asset – effectively demand possession of the asset from the debtor as long as the debtor pays the claim. The creditor can only claim possession of an asset in the event of the debtor’s default. The transfer of possession of the asset to the creditor (surrender of the asset) therefore practically takes place when there is a settlement of the secured debt agreement in connection with its termination. The creditor’s claim for delivery of the asset corresponds to the debtor’s obligation to return the asset, which becomes due in the absence of repayment of the debt, in accordance with Section 985 BGB.

With regard to the third “essential” element of the agreement on transfer of ownership as security for a debt, referred to in the discussion so far, i.e. the question of the return transfer of ownership from the creditor to the debtor, the legal situation of the parties is different under German law, compared to Polish law. This difference is of particular importance to the debtor.

Under German law, there is no such disproportion of the legal position of the parties as there is in the practice of the application of the law in Poland referred to above. This difference in favour of the debtor can already be seen in the above-mentioned legal possession status.

In the light of a well-established practice, the agreement on the transfer of ownership as security for a debt contains an obligation for the creditor to transfer the ownership of the asset back to the debtor immediately upon payment of the debt. This does not imply the automatic return transfer of the right. The debtor has the right to claim the return transfer of the ownership of an asset, which, incidentally, is in their possession at all times. Such a claim can, moreover, be derived from the principles of BGB. The transfer agreement may also contain a provision that ownership of the asset automatically reverts to the debtor upon payment of the debt. We may then be dealing with a termination condition within the meaning of Section 158(2) BGB.

Other specific terms and conditions regarding the rights and obligations of the parties are set out in additional contractual provisions. For example, the debtor is liable for insuring the asset (rule for e.g. cars), for taking care of it, etc. Acts of a dispositive nature or exceeding the ordinary management of the asset, such as the sale or processing of the asset, require the prior consent of the creditor, as owner of the asset (Section 185 BGB). Most agreements also contain a prohibition on the debtor making assets available to third parties, in accordance with Section 137 BGB. A breach of this prohibition gives rise to liability for damages.

Importantly, the security transfer agreement should contain not only the detailed designation of the item, but also its value. There is a noticeable difference in this case compared to the practice of applying the law in Poland. The cited obligation to designate the asset and determine its value derives from the principles of property law. Moreover, the obligation to determine the value of the asset in such a way that it corresponds to the real (market)

value is observed. This is to counteract the phenomenon of overcollateralising of claims. Noteworthy are the contractual templates used in the practice of banking activities that specify the percentage difference allowed between the value of the asset transferred and the amount of the outstanding debt throughout the repayment period. The effectiveness of banking supervision, which aims, among others, to counteract overcollateralising, is evident here. Contrary to the practice of the application of the law in Poland, a significant and apparent difference between the value of the asset and the secured claim resulting from the content of the agreement for the transfer of ownership and determined to the detriment of the debtor would result in an allegation of a breach of the “principles of fairness” (principles of social co-existence). In the case of “immoral” collateral, the result will be the invalidity of the agreement, in accordance with Section 138 BGB.

The provision of Section 138 BGB on “immoral” legal acts and usury states in paragraph 1 that a legal act violating good customs is invalid. In accordance with paragraph 2 of this provision, such a reprehensible legal act will be, among others, the one “by which someone, taking advantage of the situation, inexperience, lack of judgement or significant weakness of will of another person, allows themselves or a third person to promise or grant a financial benefit for a service that is noticeably disproportionate”.

Within the subject matter of our considerations, we are interested in the disproportion between the amount of the debt and the value of the asset transferred to the disadvantage of the debtor.

It should be noted that, on the basis of BGB, a legal defect in a “security agreement” under Section 138 BGB does not automatically render the transfer of ownership invalid. For the transfer of ownership to be invalid, it must also be established that such a defect exists in the agreement transferring the ownership. This is a logical consequence of the self-contained nature of the agreement transferring ownership. However, as indicated above, there is a reference to a “security agreement” in the transfer agreement. The transfer agreement customises the object of ownership and determines its “real” (market) value. It is therefore – as a result – possible to declare the transfer of ownership invalid.

The problem of “immoral” overcollateralisation under BGB is very interesting when juxtaposed with the analogical situation in the practice of law in Poland. Indeed, in Germany, the actual overcollateralising of a claim is treated as a risk of the creditor (!) owning the asset. If the amount of this overcollateralisation exceeds the value of the debt to an “immoral” (Section 138 BGB) extent, the transfer of ownership will either be declared ineffective or the debtor will have a claim against the creditor to be released from the security. The transfer of ownership of the asset will be invalid in the case of a so-called initial (primary) overcollateralising, i.e. when, at the time of conclusion of the “securing” agreement, the value of the asset to be transferred “immorally” exceeds the claim (credit). Such defective overcollateralising is assumed to occur when the value of the collateral exceeds the secured claim

by 30%. Depending on the type of asset, the amount of this percentage difference may be exceptionally increased – e.g. a hard-to-sell item or a collection of seasonal items (up to 200%).⁶ The debtor's claim to release the asset from the security interest arises in the situation of a subsequent (consequential) "immoral" overcollateralising. Subsequent overcollateralising occurs in the course of debt repayment as a result of reduction in the claim by past repayments or an increase in the value of the asset securing the claim. The amount of the outstanding debt is determined by adding up all receivables (principal debt plus interest) and a ten per cent surcharge for "artificial operating costs". The value of the securing asset is determined based on objective criteria, such as market price, purchase price, production price, etc. If the value of the claim (credit) exceeds the value of the asset by 50%, the creditor is obliged to transfer ownership of the asset back to the debtor. If possible, the creditor must allow the debtor to exchange the securing item for an item of lesser value.⁷

An agreement for the transfer of movable property by way of security does not require a specific form. In practice, the written form is used.

Summing up, from a jurisprudential point of view, a security transfer agreement under German civil law is constructed from the following three legal relationships:

1. claim (credit) agreement referred to as the "basic" agreement in these considerations;
2. agreements of a binding nature – contains an obligation on the debtor to transfer ownership of an asset as security for a debt – the rule⁸ is that such an obligation is included in the "underlying" debt agreement;
3. agreements of a dispositive nature – the transfer of ownership of an asset from the debtor to the creditor. In the wording of this agreement, there is an indication that the transfer of ownership takes place in the execution of the "security" obligation under paragraph 2).

From a legal point of view, there must be an economic justification – the basis for the obligation to transfer the ownership of the asset. Without a claim to secure the "underlying" debt arising from the contents of the debt agreement, the legal basis for the debtor's obligation to transfer ownership falls away. Consequently, the legal basis for the disposition consisting of a transfer of ownership in the performance of the obligation agreement (from paragraph 2).⁹

At the same time, as indicated above, the agreement transferring ownership of an asset as security for the "underlying" claim is an independent agreement in relation to the debt agreement. The legal existence of these contracts is mutually independent.

⁶ In any case, such an exceptional situation will not occur in the instances of overcollateralisation discussed above, particularly regarding the overcollateralisation of claims secured by immovable property within the framework of practical application of the law in Poland.

⁷ See: Ch. Günther, *Praktische Kreditsicherheit mit Tücken*, <https://www.ihk-nuernberg.de/de/IHK-Magazin-WiM/WiM-Archiv/WiM-Daten/2013-03/Special/finanzierung-controlling/praktische-kreditsicherheit-mit-tuecken> [accessed on: 15.02.2023].

⁸ In the practical application of the law.

⁹ See: decision of the Federal Court of Justice (BGH) of 14 July 1994, IX ZR 110/93.

With regard to the securing of claims by the ownership of immovable property, solutions specific to the institution of mortgage are permissible under German property law. At the same time, in German mortgage law we distinguish between two types of security titles assigned to the creditor in the area of interest: the immovable property mortgage and the so-called land charge. The mortgage entry and the land charge entry are entered in the land and mortgage register of the immovable property. They secure the right of the banking institution¹⁰ to the immovable property. A mortgage serves as security for a specific credit transaction. This is the situation of the familiar “classic” mortgage encumbering immovable property known in Polish law. A mortgage – as in Poland – is an accessory right to a debt. The security in the form of mortgage is always equal to the amount of the mortgage, and the value of the “mortgage” decreases automatically as the debt is repaid. Upon full repayment of the mortgage loan, the mortgage on the immovable property automatically expires. The institution of the mortgage is only referred to in this discussion because, together with the land fee, it is in the practice of law in Germany essentially the only form of “use” of immovable property to secure a claim.

A land charge is – unlike a mortgage – not tied to a specific credit. Its amount therefore does not have to correspond to the amount of the credit to be secured by the land fee. The land fee is an allowable amount of indebtedness encumbering the immovable property set¹¹ as if “in advance” by the immovable property owner. This is a convenient solution when the would-be debtor does not yet know what funds they will need.

The land fee is an independent property right, unlike the accessory mortgage. Its legal existence is therefore independent of the claim it secures. It does not expire if the debt is repaid. As a property right encumbering immovable property, it has a fixed “pre-determined” amount at all times. Within the limits of this amount, the land fee can be a legal title securing further claims. The owner of the immovable property can delete the land fee from the land and mortgage register with the consent of the creditor once the credit has been repaid.

The independent legal nature of the land fee exposed the debtors to the risk of adverse legal consequences as a result of the sale of the credit together with the land fee right securing it made by the lender. This was the case when the credit was partially repaid. Indeed, the repayment of the credit secured by the land fee is not reflected in the amount of the land fee which, as indicated, is fixed. This exposed the debtors to the seizure of the immovable property by the purchaser of the land fee who raised a claim up to the amount of the land fee. And this fee was generally equal to the initial credit amount increased by additional charges.

¹⁰ In contrast to the current practices in Poland, the lending business – particularly when it involves securing a loan with immovable property – can realistically only be conducted by banks. This approach mitigates any concerns related to the circumvention of authorisation by banking (financial) supervisory authorities.

¹¹ In a manner that corresponds to the estimated value of the immovable property, rather than making an arbitrary decision and ignoring the financial realities of the market.

The creditor's claim under the credit and the claim under the land fee are independent of each other, as independent property rights are their source. As a result, it is possible for a creditor to pursue both claims, independently of each other. Also when that creditor is the "original" creditor. To counteract this, the debtor and the creditor enter into an agreement requiring the debtor to secure the credit with a land fee. Such a "security agreement" is an economic link between the claim and the land charge securing that claim performing a function similar to the "security agreement" discussed above, obliging the debtor to transfer ownership of the movable property to secure the claim. In that case, the content of the debtor's obligation is to transfer the right from the land fee to secure the credit. As a consequence, the legal basis when it comes to determining the amount of the land fee claim is a security agreement relating this amount to the current debt. Thus, we are dealing with a similar legal structure to that of movable property, consisting of three legal relationships: a claim agreement, a "security" agreement and the transfer of the right from the land fee.

As the above three legal relationships or, in other words, rights: the claim to the security interest and to the land fee, are independent, a problem arose in the situation of a sale of the claim together with the right to the land fee, but without a "security agreement". As a consequence, a debtor defending against foreclosure up to an amount equal to the land fee securing the debt sold (credit), and therefore the sum of the initial debt, was forced to lodge a costly claim.

In 2008, with the Financial Investment Risk Reduction Act¹² the German legislator introduced the obligation for the owner of the debt (credit) to automatically take the "security agreement" into account and thus determine the amount of the land fee claim based on the current debt. With regard to agreements concluded before the above-mentioned legal changes came into force, the Federal Court of Justice (BGH) stated¹³ that the same obligation to automatically take into account the "security agreements" applies to earlier agreements.¹⁴

¹² Gesetz zur Begrenzung der mit Finanzinvestitionen verbundenen Risiken (Risikobegrenzungsgesetz – Act on "risk reduction").

¹³ See: judgment of the Federal Court of Justice (BGH) of 30 March 2010, XI ZR 200/09.

¹⁴ See: <https://www.augsburger-allgemeine.de/themenwelten/wirtschaft/Bundesgerichtshof-staerkt-Rechte-von-Immobilienbesitzern-id8445541.html> [accessed on: 15.02.2023].

5. Legal Characteristics of the Transfer of Ownership as Security for a Debt in French Law, with a Focus on the Transfer of Immovable Property Ownership

The French Civil Code¹ provides for a relatively long time for the possibility of assigning receivables as security for both movable property and immovable property. As in the other countries of the European Union, the basic civil law institutions for securing debts *in rem* have been and continue to be the pledge and the mortgage. In France, a mortgage is the property right securing a claim encumbering immovable property and having an accessory nature to the claim, which is known under Polish property law. A right that secures a claim while retaining ownership of the immovable property with the debtor. Although the institution of the mortgage, as such, in French civil law – as in Polish law – cannot be a solution “used” for the transfer of ownership as security for a debt, as its role is different, it is nevertheless referred to in these considerations not without a reason. The Civil Code in France explicitly provides for the possibility to transfer assets as a security under a pledge agreement. Moreover, a pledge can be created on both movable property and immovable property. In the latter case, the pledge provisions have been linked in the systematics of the Civil Code even more prominently to the mortgage provisions after the last major amendment of the Civil Code. It entered into force on 1 January 2022, pursuant to Act (Regulation) No. 2021-1192 of 15 September 2021.²

In addition, the transfer of ownership as security for a debt can also be performed in the context of a legal trust relationship. Pursuant to the aforementioned amendment, the provisions of the Civil Code relating to the agreement are applicable to a pledge, which is a transfer of ownership as security for a debt and which is established within the framework of an entrustment agreement, as discussed below.

Under the French Civil Code, therefore, we are dealing with a legal framework that not only allows (as in Germany) but also explicitly provides for and regulates by civil law

¹ *Code civil des Français* of 21 March 1804, available at: <https://www.legifrance.gouv.fr/codes/id/LEGI-TEXT000006070721/> [accessed on: 15.02.2023]; hereinafter the “CCF” or the “Code”. The CCF provisions referred to below are numbered and worded as at 1 January 2022 unless otherwise indicated. The author uses the Polish term “paragraph” (Polish: *ustęp, ust.*) below to designate the drafting unit in the text of a law within a single article (*art.*), following the example of the Polish legislative technique (the French legislator uses paragraphs which are not numbered).

² *Ordonnance n° 2021-1192 du 15 septembre 2021 portant réforme du droit des sûretés*, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000044044441> [accessed on: 15.02.2023].

provisions the legal relationship of transfer of ownership as security for a debt as one of the forms of pledge. In this regard, the model of French law is the main subject of reference in other countries of the so-called “French law zone” when considering the legislative enabling and introduction of regulated transfers of ownership as security for a debt.³

Pursuant to Article 2324 CCF, contained in Title II of the Code setting out the rules for security interests (Articles 2323 to 2488-5), a security interest *in rem* may be statutory, judicial or contractual, depending on the nature of its basis (paragraph 1), it may relate to movable or immovable property (paragraph 2), it may be general if it relates to all movable and immovable property (all assets) or to all of the movable property itself or the overall immovable property. A security interest is specific if it relates only to a specific, i.e. individualised, movable or immovable property (paragraph 3).

It should be noted at the outset that “immovable property” in the legal solutions discussed here means land or a building, according to the definition of an asset representing immovable property in Article 518 CCF.

The current provision of Article 2333 of the Code, concerning the pledge of movables, states that “A pledge is a contract by which the pledgee grants to the creditor the right to satisfy in preference to other creditors a movable or a set of movables, current or future” (paragraph 1), and “The secured claims may be current or future; in the latter case they must be identifiable” (paragraph 2).⁴ The provision of Article 2336 CCF requires that the pledge be expressed in writing and that the secured claim and asset be identified.

When the pledge relates to replaceable items, the creditor must separate them from items of the same kind that belong to the creditor. Otherwise, the pledgee may demand the return of the pledged goods, irrespective of the compensation to which they are entitled in this situation (Article 2341(1) in conjunction with Article 2344(1) CCF); he may also, if the contract so provides, dispose of the pledged goods, provided that he replaces them with the same amount of equivalent goods (Article 2341(3) CCF). If the agreement discharges the creditor of the above separation obligation, the creditor automatically acquires ownership of the pledged goods subject to the return of the same amount of equivalent goods (Article 2341(2) CCF).

I then discuss the general principles of pledges relating to movable and immovable property, focusing on the issue of the transfer of ownership as security. Subsequently, I turn my attention to the transfer of immovable property ownership as security for claims.

Pursuant to Article 2337 of the Code, the effectiveness of the pledge vis-à-vis third parties is subject to “making it public” (paragraph 1), which takes place by an appropriate entry, in the case of immovable property in the land and mortgage register under the rules

³ See: e.g. in Spain, as discussed below, at the end of this section.

⁴ A subsequent Article 2334 outlines the possibility of a lien on what is referred to as “furniture”. This term relates to the specific regulations in the French Code regarding assets that include furnishings or decorations of the encumbered building.

concerning mortgage entries (see below). With regard to vehicles, an entry in a register kept by the competent administrative authority is required for this effectiveness (newly added provision of paragraph 2 in Article 2338 CCF).

If the pledge is created with a simultaneous transfer of the pledged property, the pledgee may demand the return of the pledged property, irrespective of claims for damages, if the creditor or an agreed third party breaches the obligation to maintain the pledge (Article 2344(1) CCF).

Particularly noteworthy is the possibility of establishing a pledge with the stipulation of a condition according to which the ownership of the pledged asset passes to the creditor in the event of the debtor's failure to perform the secured liability (Article 2351(1) CCF).

As regards the issue of possession, leaving it with the pledgee requires a declaration to that effect (Article 2353 CCF).

As previously indicated, the pledge agreement must be concluded in writing; however, if we are dealing with the transfer of immovable property ownership, a notarial deed will be required. In any case, according to Article 2356(2) CCF, the secured claim must be identified. It is possible to secure future claims, however, on condition that they are designated in such a way that such a claim can be customised. The minimum elements for determining the future claim include the identification of the debtor, the place of repayment of the debt, the amount of the debt or its valuation and, in addition, if necessary, the maturity date of the secured claim (Article 2356(3) CCF).

The amendment to the Civil Code, referred to above, has clarified the legal structure of the pledge of immovable property in terms of the transfer of immovable property ownership as security for a debt that is of interest to us. According to the wording of the new Article 2379 CCF: "A pledge on immovable property is the transfer of ownership⁵ of a building to secure a liability with the expropriation of the person who constitutes it". At the same time, the provisions of the new Article 2375 of the Code provide in paragraph 1 that: "security rights ("sureties") on buildings are the so-called privileges, a pledge on immovable property and mortgages", while at the same time including paragraph 2 in the same Article 2375 CCF, pursuant to which: "Ownership of a building can also be retained or transferred as security". The systemic interpretation of such a legislative procedure, together with the explicit reference to the mortgage provisions as regards the above-mentioned lien on immovable property, results in the lien falling within the scope of an immovable property mortgage. It differs from the "classic" mortgage as it can transfer ownership of the immovable property to secure a claim.⁶ The definition of this "classic" mortgage has not changed in the Civil Code. According to the statutory definition in Article 2385 CCF, "a mortgage is an assignment

⁵ Assignment of ownership of the building.

⁶ P. Simler, P. Delebecque, *Droit civil. Les sûretés, la publicité foncière*, p. 385.

of a building to secure a liability without dispossessing the person assigning⁷ it". As a consequence, under the French Civil Code, this type of pledge, being a transfer of ownership as security for a debt, has – in its essence – the same legal character as the "classic" mortgage. It is therefore a right *in rem* and it is accessory to a claim. The same principles can apply only to building properties. At the same time, the "mortgage nature" of this pledge is the only way to benefit from a credit in the form of a transfer of immovable property ownership as security for a debt. Moreover, the interests of the parties to the secured credit agreement are protected by the mortgage provisions. The latter comment is particularly relevant to the debtor's interest in these considerations.

The other rules, intervening in the subject matter of the analysis, concerning the pledge on immovable property in the form of transfer of claims are as follows:

1. The creditor shall be entitled to the benefits yielded by the secured building, subject to deduction against any interest and in subsidiary to the principal amount of the debt. They are furthermore obliged, on pain of forfeiture of benefits, to ensure the maintenance and upkeep of the building. They may discharge the above obligation at any time by returning the immovable property to the owner (Article 2381 CCF).
2. With reference to clause 1, reference should be made to the provision of Article 2382 CCF, according to which the creditor may lease the building to the debtor themselves.
3. The debtor cannot claim the return of the building before their debt has been repaid in full (Article 2383 CCF). The pledgee may require the cancellation of the registration or the return of the pledged immovable property only after the guaranteed debt in terms of the principal amount, interest and costs has been paid in full (Article 2339 CCF).
4. The rights of the creditor holding a lien on the immovable property are extinguished in particular by the expiry of the principal liability or by the early return of the building to the owner (Article 2384 CCF).
5. Upon establishing the pledge or later, it may be agreed that in the event of failure to perform the guaranteed obligations, the creditor will become the owner of the pledged assets. In this case, the value of the immovable property is determined as at the date of transfer by an amicably or judicially appointed expert. Any contractual provisions to the contrary are unconditionally invalid. Where this value exceeds the amount of the secured debt, a sum equal to the difference is paid to the pledgee or, if there are other secured creditors, is deposited (Article 2348 CCF).
6. If payment is not made in full by the due date, the creditor may request the return of the immovable property in order to recover the right to dispose of it. The value of the seized assets is deducted as a reimbursement of the secured claim. When the value

⁷ That is establishing this security.

of the seized assets exceeds the amount of the secured debt still due, the creditor owes the debtor an amount equal to the difference (Article 2371 CCF).

7. If the immovable property is sold or lost, the debtor is vested with the enforcement claim against the purchaser or a claim for insurance receivable covering the immovable property, respectively (Article 2372(1) CCF).

Pursuant to Article 2380 CCF, the provisions relating to mortgages referred to in Articles 2390, 2409 to 2413, 2415 and 2450 to 2453 CCF apply to the pledge of immovable property. These provisions state, among others, that:

1. The mortgage covers interest and other receivables of the secured claim (first sentence of Article 2390 CCF).
2. The form of notarial deed is required. This requirement also applies to the consent for a mortgage (Article 2409 CCF).
3. The mortgage may be granted as security for one or more debts, current or future. If they are future, they must be identifiable (Article 2415 CCF).
4. A non-repaid mortgage creditor may enforce the sale of the mortgaged immovable property through the procedure provided for in the French Code of Civil Enforcement Procedure. The mortgage agreement cannot deviate from such a procedure (Article 2450(1) CCF), a solution that clearly protects the debtor.
5. An important principle protecting the debtor in this analysis is the prohibition of a clause in the mortgage contract stipulating that the creditor will become the owner of the encumbered immovable property when the building is the debtor's principal residence, as set out in Article 2452 CCF.

Moreover, the rules on mortgage entries apply to a pledge that represents a transfer of immovable property ownership as security for a debt.

As previously indicated, the ownership of an asset may be transferred as security for a liability under a fiduciary agreement concluded pursuant to Article 2011–2030 CCF (Article 1 CCF). However, the Civil Code only allows this possibility in relation to a movable asset in terms of the subject of consideration.⁸ On the subject of analysis in this case, in addition to the solutions protecting the parties, in particular the debtor, established along the lines of those mentioned above, there is an enumerative list of entities that can act as a fiduciary. According to this enumeration, the role of the fiduciary can only be played, in general terms, by banking and financial institutions (e.g. funds) subject to financial supervision and legal professionals (Article 2015 CCF).

Summing up, under the French Civil Code, there is a possibility of transfer of ownership as security for a claim. In terms of the transfer of immovable property ownership, it refers to a building. Such a transfer occurs under a nominate pledge agreement. The latter provides

⁸ Moreover, other property rights, except for property *in rem*.

for a wide range of legal options for the parties, contrary to the situation in Poland, the so-called German legal area or other EU states belonging to the “area” of French law.

A “French” pledge agreement allows for transfers with both suspensive and rescission effect. It is an accessory right to the principal claim. In the event of condition precedent, ownership and possession shall pass to the pledgee (creditor). This is a legal effect of a pledge when a maturing claim has not been satisfied. Under the circumstances of a “standard” pledge in the form of a transfer for security, ownership and possession are in principle transferred to the pledgee, but possession may remain with the debtor based on an additional agreement of limited rights *in rem* (lease).

There is an ongoing legal discussion in Spain, as in Poland, on the standardisation of the agreement on the transfer of ownership as security for a debt. The problem in this case is analogical to that in Poland, due to the “fixed” content of the pledge and mortgage law. The German and French “model” is considered in this discussion. Naturally,⁹ French solutions seem preferable.¹⁰ At the same time, it seems that in Spain the problem of transfer of immovable property ownership as security for a debt is not as urgent and “dramatic” in terms of debtor protection. The lending action seems to be “civilised” in practice – excuse the expression – in Spain, as in France or Germany, unlike the situation in Poland. It refers to the tightness of lending when secured on the debtor’s immovable property, i.e. the exclusive access for institutions subject to banking supervision. The civil law enumerative clause of limited rights *in rem*, or in this case pledge and mortgage, is not circumvented as it is in Poland. The case law in this area is not so liberal and “liberal” towards lenders.

⁹ French law area.

¹⁰ See: B.R.-R. Martínez-Echeverría, *La transmisión de propiedad en garantía en Alemania y los problemas para su aceptación en derecho español*, “Revista de Derecho Civil” 2017, Vol. IV, Issue 3, pp. 63–93, including the opinions of the scholars presented therein.

Conclusions

The analysis of the legal nature of the so-called “agreement on the transfer of ownership as security for claims” conducted in these considerations leads to the conclusion that, within the framework of Polish civil law, we are not dealing with a formulated “type”¹ of innominate agreement. This assertion is particularly valid for the transfer of ownership of immovable property.

For such an unambiguous legal characteristics of the “transfer of ownership”, the fact of the practice in the legal transactions, including the potential degree of prevalence of this practice, is irrelevant. On the contrary, the practice of the application of the law, in particular the legal consequences in the facts of these transactions proves that we are not dealing with the fulfilment of the essential requirements *sine qua non* for the recognition of a given legal act as a new contractual type.

Firstly, there is a lack of stabilisation of the essential legal characteristics of the legal relationship referred to as the “transfer of title” (the abbreviation used hereinafter) under analysis – both in practice and in the theory of the scholarship. This allegation refers to the essential elements of the required content of this “legal relationship” – or rather a set of legal relationships – which fulfil the role of *essentialia negotii* of a nominate contract.

Both the legal characteristics and the construction of the “transfer of ownership” itself represent a legal situation constituted somehow on an *ad hoc* basis, albeit recurrently, for the accomplishment of a specific purpose by the participants in this legal situation. Additionally, in the face of legitimate allegations of noncompliance with the applicable law. The allegations targeted both the entire construction of the legal situation of the parties to the “transfer of ownership” or its individual elements. The very elements that create the legal situation of the “transfer of ownership” are – even if the new type of innominate “transfer of ownership” contract is accepted – subject to controversy on such fundamental issues as the nature of their legal existence – whether they are independent or accessory, how they meet the minimum content requirements required for a legal relationship, and finally the legal relationship between these elements.

¹ The expression is used in inverted commas since, in terms of dogmatic and legal correctness, it is assigned to nominate contracts. Furthermore, the expression “type” is also used here to refer to an innominate contract, due to the lack of an adequate verbal equivalent and for the sake of brevity of the considerations.

Secondly, there is a lack of stability in terms of the legal effects of the “transfer of ownership” as undoubted, consolidated, recurrent, predictable – namely, “established”. I omit here the painful effect for the debtor of the loss of property, which, by the way, is also subject to legitimate contestation in the scholarship.

To sum up, without repeating the issue of the legal nature of the “agreement on the transfer of ownership”, the phenomenon of such an agreement, taking place in legal transactions, should be described as the legal situation of the parties, identical as to the person of the debtor and the creditor, consisting of legal relations, at least one of which can undoubtedly be considered as an independent legal relationship – such as the contract of debt, i.e. Credit agreement, as far as the subject of the analysis is concerned.

Resolving of issues that are the subject of doctrinal disputes, i.e. taking a position on a law-dogmatic basis, was not the primary objective of the study conducted. The issue of agreements is addressed in order to compare the legal situation in Poland and in selected European Union countries. However, the comparison itself, while it may be recognised as interesting, would be suspended in a vacuum if it did not serve to enable conclusions to be drawn in terms of the fundamental purpose of the analysis. This aim is to contribute to the possibility of formulating possible *de lege ferenda* conclusions with regard to the “transfer of ownership” in Poland.

First of all, due to the importance of the legal effects of the “transfer of ownership” in legal and economic transactions, it seems reasonable to state that we are dealing with a problem to which the Polish legislator should take a proactive stance. This is because we touch on important legally protected goods and subjective rights. We also face the threat of the maintenance and consolidation of the practice of the application of the law, i.e. the operation of legal, economic or social relations that violate the essence of private law, which is the legal equality of the parties. It is not without reason that the charge of re-feudalisation of private law, raised in Polish scholarship, was invoked.

It seems necessary for the Polish legislator, as a minimum *de lege ferenda* commitment, to make legislative decisions regarding this area of legal status which contributes to the actual possibility of functioning of the “transfer of ownership” in its current criticised form.

Unfortunately, it is unlikely that even a firm statement that, for example, the practice of the “transfer of ownership” as applied in the trade is incompatible with the legal system would contribute anything. Leaving aside the line of case law in Poland criticised here, it is apparent that this practice is possible both “owing to” a certain case law, not shared in this analysis and because of imperfections in both private and public law. Indeed, the legal provisions do not create an adequate obstacle to the practical possibilities of the legal actions criticised. This last remark is not just about “simple” prohibitions or restrictions, but about drawing attention to the fact that some areas of economic trading are not sufficiently regulated by law. This fact is highlighted in comparison with the situation in Germany, where

the abundance of legal rationing allows for the recognition of the operation of the “transfer of ownership” as an innominate contract, the legal nature of which, the “essential” elements of which, together with the corresponding safeguarding of the interests of the parties, can be derived from the applicable legal norms.

Although this analysis remains within the area of civil law, it seems necessary to postulate *de lege ferenda* solutions in public economic law as well. Indeed, it may be considered that the solution to the “transfer of ownership” problems identified in this paper requires complementary developments in various branches of the law. For example, possible changes concerning the safeguarding and “tightening” of the application of banking law principles, including lending rules and related procedures at debtor “financing” institutions, seem reasonable. This observation also applies to the tightening of the obligation to submit to appropriate public supervision of such financing, so as to prevent lending disguised under another name, such as so-called “credits”. The study performed shows that the “transfer of ownership” looks different in practice in countries where private and public law norms and judicial interpretation of the law even prevent certain reprehensible practices of exploiting the debtor’s dire situation by financial institutions. In Germany, for example, although there is an innominate “transfer of ownership” agreement that could theoretically also apply to consumer credits secured by immovable property – similar to the practices criticised in Poland – this situation does not actually occur in practice. Civil and banking laws uphold the use of mortgages, and their standardisation helps protect the equitable interests of the parties.

As regards the operation of the “transfer of ownership” in the contractual system in Poland, the following conclusions can be drawn.

It would seem inexpedient, above all in terms of effectiveness, for the legislator to decide to “simply” prohibit the “transfer of ownership” as a set of legal acts carried out in order to circumvent the norms and principles of property law, including the *numerus clausus* principle of limited rights *in rem*, i.e. the institutions of pledge and mortgage.

As a first step, it seems necessary for the Polish legislator to take a “directional” decision as to whether a new type of nominate contract will be established or, conversely, the legal provisions will be reformed without introducing a new type of contract.

In the event of a desire to introduce a new “transfer of ownership” agreement into the legal order, it will be necessary to regulate the “essential” elements of such a contract on the basis of such elements set out in the views endorsing the “transfer of ownership” specified in this paper. It will be necessary to resolve the legal nature of the transfer of ownership. The nature of the legal situation under consideration implies that the transfer of ownership must be incidental to the secured claim. What remains to be decided is the admissibility of conditionality and the type of transfer condition permitted, if any. To include more detail on the above postulates here would lead to a broad repetition of the observations and conclusions

presented in this paper. The solutions adopted in France appear to be helpful in the event of the above decision.

If a decision is made to “reform” the law, the selected model of either German or French solutions can be adopted as a target. A comparative analysis of these models has been conducted above precisely in terms of their suitability for such a decision.

A relatively safer and more convenient path of change *de lege ferenda*, seems to be a “reformist” decision based on the French model, i.e. amending the pledge and mortgage laws. This is supported by the fact that Polish contract law (KC) is based on the French civil law solutions. In the context of this study, the issue of the insufficient place of the legal relationship of trust in Polish civil law also recurs.

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YEARBOOK

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**The Family Judiciary System
in Poland and the Proposed
Assumptions for Its Reform**

FAMILY LAW

Introduction

The concept of family judiciary was originated in the early 20th century in the United States of America. It stemmed from the belief that handling of family cases required competence in addressing social problems, as family problems often had such a background.¹ It was recognised that there were organisational benefits to consolidating the handling of family cases in a single court. This approach can facilitate judge's access to a pool of social scientists, reduce conflicts of jurisdiction among courts handling different aspects of family cases, and expedite the handling of court cases by centralising court files.

It is assumed that the family judiciary system in Poland, which includes the family and juvenile departments of District Courts, started to operate on 1 January 1978. Although the concept of family judiciary was approved and thoroughly presented prior to this date, it has never been fully implemented.

Currently, its implementation – though incomplete – is facing various threats.

In the organisational layer, exceptions are made to the principle of uniformity within the family judiciary system. The Act of 18 August 2011 amending the Act on the Organisational Structure of Common Courts and certain other acts was enacted.² The obligation to establish family and juvenile departments in district courts was abolished. The reform of the judiciary, enacted by the Act of 20 July 2018,³ increased the flexibility of common court organisation by introducing the principle of optional creation of all departments.

One of the most essential conditions for the implementation of the concept of the family judiciary system is a cadre of judges with the highest qualifications. The founders of the family judiciary system assumed that adjudication in the family and juvenile department should be handled by the best judges, who have experience in other legal areas, possess life knowledge and exhibit certain personality traits. This aimed to ensure a strong selection of candidates for family judges, encouraging many judges to apply for positions in the family and juvenile department. However, this did not happen. Instead, a negative phenomenon

¹ Ch.W. Hoffman, *Social Aspects of the Family Court*, "Journal of the American Institute of Criminal Law and Criminology" 2019, Vol. 10, No. 3 (November), p. 416.

² Journal of Laws of 2011, No. 203, Item 1192.

³ Journal of Laws of 2018, Item 1443.

known as the ‘family judge complex’ was observed,⁴ attributed to the ‘closed path of promotion.’ The most experienced family judges with many years of judicial experience in the family and juvenile department have the option to either remain district judges for life or accept a promotion to regional (formerly voivodship) judges. However, this promotion requires them to make rulings in the civil or criminal department, given the lack of family departments in other courts such as district ones.

It should also be noted that while family law cases (considered as private law) in the Polish legal system are undoubtedly under the protection of the judiciary, the scope of powers held by administrative authorities, on which the situation of the family increasingly depends, is constantly expanding. As an example, it should be mentioned in this context that the Act of 9 June 2011 on supporting families and the foster care system⁵ introduced an extensive and specifically defined system of foster care institutions that are managed by local government entities.

There is a danger of limiting the tasks of the family court e.g., with respect to decisions concerning the placement of a child in foster care. This tendency was expressed by the practice of the courts deciding to place a child in a foster family or a foster-care centre without specifying the particular custodial entity in which the child shall be placed. It was only partially challenged, as it referred to foster families, in the Resolution of the Composition of the Seven Judges of the Supreme Court of 14 November 2014, III CZP 65/14⁶, issued in response to the legal issue presented by the Children’s Ombudsman. In turn, in its decision of 24 November 2016, II CA 1/16⁷, the Supreme Court clarified the linguistic interpretation of the provisions of the Act aimed at supporting the family and the foster care system, in favour of its flexible interpretation and the primacy of the principle of protecting the child’s welfare over administrative-legal regulations. This approach broadens the scope of the guardianship court’s decisions when it comes to selecting the form of foster care appropriate for the child.⁸ While approving the cited decisions of the Supreme Court, it should be emphasised at the same time that they constitute evidence of the process of broadening the scope of legal-administrative regulations in the area of family law presented above.

The aforementioned Act, in Chapter V entitled “Adoption Proceedings,” regulates the selection of parties involved in intended adoptions in a detailed manner. Subsequent studies of adoption case law show that the court “approves” the selection of parties made by

⁴ „Rodzinne znaczy gorsze?” (z Sędzią Ewą Waszkiewicz, przewodniczącą Stowarzyszenia Sędziów Sądów Rodzinnych w Polsce, rozmawia Mirosław Prandota), *“Gazeta Sądowa”* 1999, Issue 6, pp. 4–5; M. Arczewska, *Spółeczne role sędziów rodzinnych*, Warszawa 2009, pp. 173–175.

⁵ Consolidated text, *Journal of Laws* of 2023, Item 1426.

⁶ OSNC 2015, Issue 4, Item 48.

⁷ OSNC 2017, Issue 7–8, Item 90.

⁸ See: J. Słyk, [in:] *Komentarze prawa prywatnego. Vol. V. Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające KRO*, K. Osajda (ed.), Warszawa 2017, pp. 1317–1318.

the adoption centre rather than making a fully ‘sovereign’ decision on its own, resulting in the requested family-legal relationship.

Another example confirming the existence of the discussed tendency can also be found in the norms of the Act of 29 July 2005 on counteracting family violence,⁹ which in Article 12a granted a social worker the right to take the child away from his/her parents.

Empirical research on these norms has revealed significant dangers and even cases of abuse in applying the referred norm. They involve both failure to comply with procedural requirements and failure to fulfil the material-legal prerequisites for taking a child away.¹⁰

The presented dangers, related to the adoption of a specific system for the protection of family rights, are evident in the legislative solutions of other countries. These countries have, to a greater extent than Poland, allowed for interference by administrative bodies in this area.

A “flagship” example that illustrates this statement is the activity of the German Youth Welfare Offices (Jugendamt). The most questionable issue is the possibility of placing a child in foster care. The statutory prerequisites for this interference with the rights of family members (the child’s request, an urgent threat to the welfare of the child in the absence of an objection by the person entitled to custody or the impossibility of obtaining a court decision in due time, the arrival of the child into Germany without a guardian, Section 42 Book VIII of the Sozialgesetzbuch) are defined in such general terms that they create a significant risk of abuse.¹¹ It is worth noting that a complaint against the Jugendamt’s decision to place a child in foster care may be brought before an administrative court.¹² The practice of the Jugendamt has been criticised at the international level. These offices have been accused for e.g., several human rights violations as well as lack of control over their activities and non-observance of court decisions (the so-called Bamberg Declaration).¹³

Controversies also surround the activities of the Norwegian Child Welfare Services (Barnevernet). They are reflected e.g., in the Council of Europe Parliamentary Assembly’s draft resolution with Explanatory Memorandum of 6 June 2018 (doc. 14568). In this document, in the context of the findings on the Norwegian welfare system, it is clearly stated that a child’s right to protection from all kinds of violence, abuse and neglect must be accompanied by the right not to be separated from their parents against their will, and that exceptions to this principle must be subject to judicial review.

⁹ Consolidated text, Journal of Laws of 2021, Item 1249, as amended.

¹⁰ J. Słyk, *Odbieranie dzieci rodzicom na podstawie art. 12a ustawy z 29.07.2005 o przeciwdziałaniu przemocy w rodzinie*, “Prawo w Działaniu” 2015, Issue 24. See also: M. Szafranek, *Odbieranie dzieci rodzicom na podstawie art. 12a ustawy z 29 lipca 2005 r. o przeciwdziałaniu przemocy w rodzinie*, Warszawa 2023, available at: https://iws.gov.pl/wp-content/uploads/2023/11/2023_PrawoR_M_Szafranek_Odbieranie_dzieci_rodzicom_na_podstawie_art._12a_ustawy_z_29_lipca_2005_r.pdf [accessed on: 28.12.2023].

¹¹ K. Kryla-Cudna, *Niemiecki Urząd do spraw Dzieci i Młodzieży (Jugendamt)*, “Prawo w Działaniu” 2016, Issue 25, pp. 194 et seq.

¹² K. Kryla-Cudna, op. cit., p. 199.

¹³ Ibidem, p. 204.

Countering the tendencies described above requires not only a halt to the process of expanding the competences of administrative bodies in the field of family law but, above all, a significant strengthening of the system of judicial protection of family rights, i.e. the family judiciary system. Indeed, the aim of the reform should not be to completely prioritize the principle of family autonomy, but to ensure that the instruments of interference with this autonomy, which are necessary in certain situations, are guided by the principle of proportionality. This means respecting the rights of the child and the parents, while also providing maximum safeguards against the misuse of interference by public authorities in the life of the family. Judicial procedures seem optimal in this case, with the proviso that they must be adapted to the specificities of the protection of family rights.

Observation of the evolution of Polish legal norms concerning the family in recent years leads to the conclusion that in the issue of protection of family rights (duties and rights of family members towards each other and public authorities) it is necessary to take a strategic, directional decision: whether this protection shall be provided primarily on the grounds of private law and shall maintain its judicial character, or whether it shall be shifted into the area of administrative-legal institutions. The first option mentioned is clearly preferable for family protection. It provides greater safeguards against the arbitrariness of decisions taken, ensuring a high standard of procedural guarantees of a fair resolution of a family case.

This study, in the first part,¹⁴ is devoted to the presentation of the origins of family judiciary in Poland and synthesises its implementation (and deformation), indicating the demands for change formulated both in the literature on the subject and in the form of resolutions of the Association of Family Judges in Poland. The second part contains the author's concept of family judiciary reform.¹⁵ It is detailed in the draft of the relevant Act and an Explanatory Memorandum, included in the Annex.

¹⁴ The author of this part of the study is E. Holewińska-Łapińska.

¹⁵ The authors of the second part of the study and the related draft of the Act are M. Domański and J. Słyk.

I. Family Judiciary in Poland

1. The Family Court Concept

Family courts in the Polish justice system are referred to as family and juvenile departments in District Courts. In some acts, the name “guardianship court” was/is also used nowadays, which should indicate “the special social importance of cases heard in this department.”¹

The family and juvenile departments were created as a result of organisational changes. They only adjudicate in the first instance. Appeals are therefore not heard by a specialised family court of second instance. The demand for at least a two-instance family judiciary has never been realised. However, there were periods when family departments, or family appeal departments, functioned in some voivodship courts² and later in some regional courts. On the occasion of the twentieth anniversary of the family courts, it was reported that work is under way on the “systemic reform of the family judiciary,” which included consideration of the possibility of “the establishment of separate family appeal departments at the regional level.”³ This element of the reform has not been realised, although family appeal departments have been established in some regional courts.⁴

The family courts (family and juvenile departments of the district courts) began to operate on 1 January 1978, although there were already departments of first instance common courts treated as “family courts.” They were created as a result of the assignment of activities

¹ J. Gudowski, T. Ereciński, J. Iwulski, *Komentarz do art. 12 ustawy Prawo o ustroju sądów powszechnych*, [in:] *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz*, Edition II, Warszawa 2009. The current Law on the System of Common Courts, Act of 27 July 2001, consolidated text, Journal of Laws of 2023, Item 217, does not refer to family and juvenile departments as ‘family courts,’ and their establishment in a district court is not mandatory. However, according to Article 568 of the Code of Civil Procedure (hereinafter: c.c.p.), it stipulates that the family court is the guardianship court.

² The first Revisional Family Department in Poland was established in the Voivodship Court in Warszawa, by an Order of the Minister of Justice of 21 December 1985, Official Journal of the Ministry of Justice of 1985, Issue 8, Item 52, when all juvenile’ cases heard in the first instance by family courts were transferred to the civil departments of voivodship courts to be heard in the second instance. In 1999, first-instance and appeal family court departments operated in the voivodship courts in Gdańsk, Lublin, Olsztyn and Warszawa. See: M. Bańkowska, *Idea sądownictwa rodzinnego*, “Jurysta” 1999, Issues 2–3, p. 5.

³ Such information was presented in an article by Małgorzata Bańkowska, acting as Director of the Department of Family and Juvenile Affairs at the Ministry of Justice (*XX-lecie sądownictwa rodzinnego w Polsce*, “Przegląd Sądowy” 1999, Issue 4, p. 134).

⁴ As of 31 December 2007, there were 13 such departments in 12 regional courts (M. Arczewska, *Spółeczna rola sędziów rodzinnych*, Warszawa 2009, p. 86).

to court departments by “experimental” court presidents, so that the scope of cases assigned to such “family courts” (departments created in a given court) was not uniform.⁵

In the 1970s, legal literature presented the idea of family judiciary, postulated models for the scope of the material jurisdiction of the “family court” and the requirements to be met by family judges. Information on family courts operating abroad was also presented.⁶

According to these findings, in the most general terms, a “family court” (“a court for family affairs,” “a court for family matters”) is a court which should meet, at least, the following requirements regarding the subject of adjudication, the elements of organisation and the qualifications of the “staff” (adjudicatory and “auxiliary”).

1. Subject-matter jurisdiction (jurisdiction *ratione materiae*).

Hearing all matters of the family, or considered at a given place and time to be the most important matters of the family, the resolution of which falls within the jurisdiction of the courts (civil and criminal).

2. *Judicial staff*.

The family court should be staffed by judges who fulfil all the ethical, personal and judicial training requirements (higher legal education, judicial apprenticeship or a form of alternative legal qualification) for appointment to judicial office and who additionally have sufficiently documented (higher education or postgraduate studies, including those organised by the judiciary) non-legal knowledge (in particular psychological, educational, sociological and educational studies), as well as relevant professional experience (in particular five years of judicial training), including those organised by the judiciary ministry) non-legal knowledge (in particular psychological, pedagogical, sociological), relevant professional experience, which was deemed to be five years of adjudication⁸ in other courts, reaching an age which creates a presumption of having “life experience” in typical situations (Polish literature indicated reaching the age of at least 30). Individuals involved should possess skills that facilitate cooperation with entities responsible for the protection of children and families. This cooperation would enable the family court to not only resolve individual cases, but also fulfil the preventive, educational and rehabilitation function. Somewhat later, sociological literature

⁵ J.R. Kubiak, W. Kasprzycki, *Sądy rodzinne – idea i uregulowania prawne*, “Nowe Prawo” 1977, Issues 7–8, p. 1046, footnote 2.

⁶ The concept of the family judiciary system originated in the United States of America. The first family court is considered to be the Family Court in the city of Cincinnati, Ohio, established in 1914, on the initiative of Judge Charles W. Hoffmann, who also took over as its president. See: J.R. Kubiak, W. Kasprzycki, *op. cit.*, p. 1048 and the literature cited therein.

⁷ The term “family court” has been alleged to imply ‘some internal judgment of the family over its member.’ (J.R. Kubiak, *Sądy rodzinne w Polsce: Od eksperymentu do oryginalnego rozwiązania*, „Zeszyty Naukowe Instytutu Wymiaru Sprawiedliwości” 1977, Issue 7, p. 195).

⁸ J. Bafia, *Sądy rodzinne – idea, cel, zamierzenia*, “Państwo i Prawo” 1979, Issue 7, p. 2. (The author, a law professor, was the Minister of Justice from March 1976 to June 1981, i.e. during the period when the concept of family courts was “tested” and then implemented).

described the functions of the family judge as “expert,” “controller,” “coordinator” or “mediator” in the resolution of family problems and “family partner” in the process of “reaching [the family] to a state of equilibrium.”⁹ It was considered desirable to entrust, as far as possible, the cases of a given family (insofar as many of them would fall under the subject-matter jurisdiction of the family court) to the same judge.

3. Auxiliary bodies.

The specific nature of the cases falling within the subject-matter jurisdiction of the family court requires, in addition to obtaining expert opinions on individual cases on a general basis, highly qualified auxiliary staff to enable them to discern the environmental conditions in which the participants in the proceedings operate, to execute judgments, and to diagnose.

The reasons justifying the advisability of the family court concept have been pointed out. Their citation is important because (at least in part) they are still valid and probably determined the organisational changes made, which led to the creation of family and juvenile departments.¹⁰

1. The division of family cases, including those involving juveniles who have violated criminal laws, across different courts and procedures has created a gap between “*life and judicial procedure*.” The solution to address this discrepancy is to entrust the family court with all matters relating to the functioning of the family, “*regardless of the nature of these matters: personal, property or criminal*.”
2. Numerous conflicts and other negatively assessed phenomena in social life can be rooted in family dysfunctionality.¹¹ Research within various social sciences has shown

⁹ See: M. Arczewska, *Spółeczne role sędziów rodzinnych*, Warszawa 2009, in particular pp. 98–112, and in synthetic form, M. Arczewska, *Spółeczne role sędziów rodzinnych*; text published on 1 March 2014 on the website of the Association of Family Judges in Poland, available at: <http://www.sssrwp.pl/aktualnosci.php?ty-p=pu&art=1&start=8&irek=9> [accessed on: 15.11.2023].

¹⁰ Two pioneering studies from the Judicial Law Research Institute (formerly: the Justice Institute) have explored these reasons through comparative research: J.R. Kubiak, *Sądy rodzinne w Polsce: Od eksperymentu do oryginalnego rozwiązania*, “Zeszyty Naukowe Instytutu Wymiaru Sprawiedliwości” 1977, Issue 7; J.R. Kubiak, W. Kasprzycki, *Sądy rodzinne – idea i uregulowania prawne*, “Nowe Prawo” 1977, Issues 7–8. The comments presented on this subject have been made taking into account the referenced items. The wording in inverted commas, written in italics, comes from these studies.

¹¹ A dysfunctional family according to the definition by Arkadiusz Przybyłko (I am quoting after Henryk Cudak the definition cited in the article, *Dysfunkcje rodziny i jej zagrożenia opiekuńczo-wychowawcze*, “Pedagogika Rodziny” 2011, Issue 1(2), p. 80, is the one: “*in which social life is regulated by a set of commonly rejected values, norms and patterns of behaviour, which are the object of intergenerational transmission in the course of socialisation processes, thus contributing to the deepening of social maladaptation of the children involved, and the disruption of all group relations and communication*” (A. Przybyłko, *Dysfunkcja rodziny w okresie transformacji ustrojowej*, [in:] *Polityka społeczna wobec reform*, Katowice 1999)). See also: S. Kawula, *Rodzina o skumulowanych czynnikach patologicznych*, [in:] S. Kawula, J. Brągiel, A.W. Janke, *Pedagogika rodziny. Obszary i panorama problematyki*, Toruń 2006, pp. 135–172 and the referenced literature; H. Cudak, *Dysfunkcje rodziny i jej zagrożenia opiekuńczo-wychowawcze*, “Pedagogika Rodziny” 2011, Issue 1(2), pp. 7–14; H. Cudak, *Rola kultury pedagogicznej rodziców w eliminowaniu dysfunkcji rodziny*, “Pedagogika Rodziny” 2012, Issue 2(3), pp. 15–22; D. Becker-Pestka, M. Dubis, S. Różyńska, *Rodzina dysfunkcyjna i patologiczna w przestrzeni życiowej młodych dorastających*, Wrocław 2018 (in particular Chapter I. “Dysfunkcje i patologie w rodzinie”, pp. 7–42).

that a malformed family environment can be a criminogenic factor.¹² The influence of the value system transmitted in the upbringing process on the way a person behaves in various life situations was considered indisputable in the light of these studies. Consequently, it was assumed that influencing the family environment could lead to counteracting “*social pathology in general and family pathology in particular*.” The position that the family court should be a body not only resolving conflicts of interest (also with the use of state coercive measures) but also organising the prevention of unfavourable social phenomena was adopted.

3. The family judge was considered a “family doctor,” who knows the patient’s problems and their causes, so he/she can apply the most appropriate and effective treatment (e.g., make appropriate guardianship orders) as quickly as possible. It was, therefore, advocated that the cases of a particular family (“*from the cradle to the grave*”) should be heard by the same court and within it by the same family judge.

2. Judiciary for Juvenile as the First Stage of the Family Judiciary System in Poland (Note)

The family judiciary system was created “on the basis” of the juvenile court. It was considered to be a higher organisational form of juvenile court.¹³ Also in Poland, the “first step” to the establishment of the family judiciary system was the creation of juvenile judiciary, which justifies its mention.

The legal basis for the creation of a juvenile court in Poland¹⁴ was established in 1919, but in the earlier period, there had been attempts to do so, and drafts devoted to the operation of such courts had been developed.¹⁵

¹² See for example: Z. Tyska, *Rodzinne uwarunkowania przestępczości młodzieży*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1974, Issue 4, pp. 65–76. The author presented the results of sociological studies conducted in 1972–1973 in Poznań. They determined that more negative phenomena were detected in the families of juvenile offenders than in the families of the control sample. Most negative phenomena were found in the families of repeat offenders. In the families of delinquent adolescents, family disorganisation, disturbed interpersonal relations and educational deficiencies were more frequent than average. The external bond of the families of delinquent youth, especially in the families of repeat offenders, was somewhat more limited compared to the analogous bond of average families. It was also more common for these families (especially families of repeat offenders) to come into conflict with their external environment.

¹³ See: J.R.K. Kubiak, *Sądy rodzinne w Polsce: Od eksperymentu do oryginalnego rozwiązania*, “Zeszyty Naukowe Instytutu Wymiaru Sprawiedliwości” 1977, Issue 7, p. 197; J. Bafia, *Sądy rodzinne – idea, cel, zamierzenia*, “Państwo i Prawo” 1979, Issue 7, p. 8; J. Mojak, *Z problematyki sądownictwa rodzinnego*, “Nowe Prawo” 1981, Issue 1, p. 14.

¹⁴ It is assumed that, although as early as 1794 a special court for the cases of juvenile offenders between the ages of 10 and 16 was established in Geneva, the “homeland” of juvenile justice is the United States, where in 1899 in Chicago (based on the *Illinois Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children*) a “*separate juvenile court was established and the first judge for juvenile was appointed in the person of Richard S. Tuthill*.” (See: M. Cieślak, *Od represji do opieki: (rzut oka na ewolucję zasad odpowiedzialności nieletnich)*, “Palestra” 1973, Issue 1, p. 40).

¹⁵ On 5 August 1915, the Civic Courts were established in Warszawa. At a meeting of the General Court on 10 August 1915, it was decided to establish a juvenile court and to appoint a commission to draw up rules

On 7 February 1919, Head of the State, Józef Piłsudski, signed a decree on the establishment of juvenile courts, published the following day.¹⁶ The Minister of Justice, pursuant to Article 4 of the aforementioned decree, issued on 7 July 1919 a Regulation *On the establishment of juvenile courts*.¹⁷

Pursuant to Article 1 of this Regulation, as of 1 September of that year, juvenile courts were established in the cities of Warszawa,¹⁸ Lublin and Łódź. The subject-matter of their jurisdiction was also indicated in this Regulation.¹⁹

Article 2 of the Decree of the Head of the State stipulated that offices of permanent guardians *ad litem* shall be established at the juvenile courts, appointed by the judge from among persons of both sexes, “particularly qualified to supervise juvenile,” who “in the performance of their duties shall be subject to the directions of the judge in accordance with the instructions to be issued in this regard by the Minister of Justice,” which can be considered as the beginnings of the judicial guardianship.²⁰

Given the subject of the present study, it seems expedient to point to Article 2 of the Regulation of 7 July 1919, which states that in proceedings against the juvenile:

the judge must constantly bear in mind the educational side and endeavour to set the juvenile on the path of improvement, and to remove them from influences which would cause them to commit new criminal acts. To this end, all applicable laws regarding the juvenile should be strictly observed. The appearance of the court and the manner in which cases are conducted should exclude the crude formality and ostentation of adult courts. The judge

of procedure for the operation of juvenile courts and institutions. Pending the drafting of the rules, two judges were delegated to preside at the court’s hearing of juvenile cases. Provision was made for women also to serve as jurors. The German authorities dissolved the civic courts (which operated until 10 September 1915), and the organisation of juvenile courts did not take place at that time. See: Zetbe, *Historja powstania sądów dla nieletnich*, “W Służbie Penitencjarnej. Dwutygodnik Straży Więziennej” 1936, Issue 6, pp. 5–6; *Sądy Obywatelskie (Karta z dziejów przełomu sierpniowego r. 1915), na podstawie źródłowych materiałów opracował Dr. Emil Stanisław Rappaport*, Warszawa 1915. See also: J. Bojarski, *Uwagi o rozwoju polskich rozwiązań prawnych (projektowanych i realizowanych) w zakresie traktowania nieletnich*, “Studia Iuridica Lublinensia” 2013, Issue 19, pp. 69–81.

¹⁶ Journal of the Rights of the Polish State 1919, Issue 14, Item 171.

¹⁷ Journal of the Rights of the Polish State 1919, Issue 63, Item 378.

¹⁸ The first head of the Juvenile Court in Warszawa was Justice of the Peace Antoni Komorowski, followed by Wanda Grabińska, who was the first woman in Europe to be appointed as a judge, and who also took an active part in the work of the Judicial and Child and Youth Welfare Commission of the League of Nations (Société des Nations) and belonged to the International Association of Juvenile Judges, in which she was entrusted with the position of Secretary General (W. Kamińska, K. Pędowski, *Sądy dla Nieletnich w II Rzeczypospolitej*, “Palestra” 1991, Issue 10, p. 41; L. Krzyżanowski, W. Okniński, *Pierwsze kobiety w polskim sądownictwie. Od Wandy Grabińskiej do Małgorzaty Gersdorf – Kalendarium*, “Palestra” 2018, Issue 12, pp. 98–100).

¹⁹ These courts were to hear criminal cases “falling within the competence of the magistrates’ courts” of the mentioned cities against minors up to and including 17 years of age, and against elderly persons “accused of acts committed against juvenile up to and including 17 years of age, listed in Articles: 283; 315 point 4; 365; 366; 421; 423 and 528 (insofar as it relates to juvenile prostitution) of the Criminal Code (Article 1 of the Regulation of the Minister of Justice on the Organisation of Juvenile Courts).”

²⁰ See: K. Szymków, *Instytucja stałych opiekunów sądowych 1919–1929*, “Folia Iuridica Universitatis Wratislaviensis” 2018, Vol. 7(1), pp. 61–82. The transformation of the institution of court guardians into juvenile guardians took place pursuant to the Regulation of the Minister of Justice of 25 June 1929 on the Transformation of the Institution of Court Guardians into Juvenile Guardians at Municipal Courts and at Juvenile Courts, Journal of Laws of 1929, No. 47, Item 387. See: P. Sobierajski, *Historia kurateli sądowej w Polsce – uwarunkowania organizacyjno-prawne*, “Zbliżenia Cywilizacyjne” (Zeszyty Naukowe Państwowej Akademii Nauk Stosowanych we Włocławku) 2019, Issue XV(3), pp. 34–50.

should always deal with juvenile with a view to ensuring that they become useful members of society, their development and their age.

The Regulation of the President of the Republic of Poland of 6 February 1928 – Law on the system of common courts²¹ provides that the Minister of Justice may, by regulation, create in regional courts: “separate juvenile courts at the seat and outside the seat of the regional court and determine the boundaries of the districts of the juvenile courts” (Article 4(1) u.s.p.). The Minister was also given the authority to delegate (by regulation) the handling of criminal cases involving the juvenile to a single magistrate court for several districts of these courts (Article 4(2) u.s.p.).²² However, this provision was not properly implemented and was even assigned to it the “sad role of gravedigger” of the three juvenile courts existing since 1920 in Warszawa, Łódź and Lublin.²³

Until the outbreak of the Second World War, eight magistrates’ courts had sections or departments where criminal cases against the juvenile were grouped together. From 1947 onwards, juvenile cases that fell under the jurisdiction of the magistrates’ courts, assessed as “minor” cases, were transferred to them.²⁴

Article 4 of the Act of 27 April 1949 amending the Law on the System of Common Courts of 1928²⁵ provided that the Minister of Justice may, by regulation, “create in the regional courts separate juvenile departments (juvenile courts),” and this provision already entered into force on the day the Act was promulgated (Article 6). The first regulation was issued, on the basis indicated, on 30 June 1949.²⁶ Pursuant to it, juvenile departments were established in 15 regional courts. By a regulation of 6 September 1949, which entered into force on 1 October 1949, the Minister of Justice established a further 19 juvenile courts²⁷.

By the amendment of 20 July 1950,²⁸ Article 5¹ was added to the u.s.p. law providing for the creation of juvenile departments (unambiguously called “juvenile courts”) in powiat (county) courts by the Minister of Justice by regulation. Article 5¹(2) of the u.s.p. included the authorisation for that Minister (by regulation) to delegate to a single powiat court the

²¹ Regulation of the President of the Republic of Poland of 6 February 1928 – Law on the System of Common Courts, Journal of Laws of 1928, No. 12, Item 93; hereinafter also referred to as the “u.s.p.” or “u.s.p. 1928.”

²² Pursuant to Article 1 of the u.s.p. 1928, civil and criminal justice was to be administered by the following common courts: (1) magistrates’ courts and Justice of the peace, (2) regional courts, (3) courts of appeal and (4) Supreme Court.

²³ K. Grześkowiak, *XXV-lecie sądownictwa dla nieletnich*, “Problemy Wymiaru Sprawiedliwości” 1974, Issue 5(2), p. 142.

²⁴ Ibidem.

²⁵ Journal of Laws of 1949, No. 32, Item 237.

²⁶ Journal of Laws of 1949, No. 39, Item 282. Pursuant this Regulation, juvenile departments were established in the Regional Courts in: Bydgoszcz, Bytom, Częstochowa, Gdańsk, Katowice, Kraków, Lublin, Łódź, Olsztyn, Poznań, Radom, Szczecin, Toruń, Warszawa and Wrocław.

²⁷ Journal of Laws of 1949, No. 51, Item 392. Pursuant to this Regulation, juvenile courts were established in: Chojnice, Cieszyń, Gliwice, Opole, Sosnowiec, Kielce, Tarnów, Gniezno, Gorzów, Kalisz, Ostrów, Przemyśl, Rzeszów, Koszalin, Wałcz, Brzeg, Jelenia Góra, Legnica and Świdnica.

²⁸ Journal of Laws of 1950, No. 38, Item 347.

consideration of juvenile criminal cases, within the jurisdiction of several poviats courts, located in the area of the same voivodship court. It was estimated that during 1951 “the whole country was covered with a network of juvenile courts.”²⁹

The transition of juvenile courts to family courts began with a significant change in 1953, when certain juvenile courts were given the responsibility of hearing specific guardianship cases involving minors. This transfer played an important role in the formal transformation of the juvenile court system. (These were cases for the limitation and termination of parental authority, for the establishment of custody and for adoption).

On 1 March 1976, an amendment to Article 568 of the Code of Civil Procedure came into force. Paragraph two of the then amended provision stated that the guardianship court in minors' cases shall be the juvenile court, which shall hear the guardianship cases of minors from the area of jurisdiction established for it.³⁰ To that extent, therefore, the juvenile court *de facto* became a family court, although it was not yet called so, and the subject-matter of its jurisdiction was relatively small compared to the idea of family judiciary that was later realised. Only since 19 April 2010, when the Act of 17 December 2009 amending the Act – Code of Civil Procedure and certain other acts³¹ entered into force, Article 568 of the Code of Civil Procedure specifies that the guardianship court is now the family court. This means that the family and juvenile department of the district court is responsible for guardianship matters.

3. “Experimental” Family Courts

Although family courts in Poland were finally established “on the basis” of juvenile courts, which initiated the aforementioned transfer of guardianship cases of minors to them from 1953 onwards, an experiment was also undertaken³² to create a separate family department from the civil department of the first instance court hearing family cases. The Family

²⁹ K. Grześkowiak, *XXV-lecie sądownictwa dla nieletnich*, “Problemy Wymiaru Sprawiedliwości” 1974, Issue 5(2), pp. 144–145.

³⁰ Article 2(5)(a) of the Act of 19 December 1975 on Amendments to the Act on the Family and Guardianship Code, Journal of Laws of 1975, No. 45, Item 234. While celebrating the 25th anniversary of the juvenile courts, it was assessed that this reform was not carried out consistently because the juvenile courts recognised only a part of the cases of minors subject to guardianship court cognizance from the areas of the poviats courts in which they had their seat (146 poviats). See: K. Grześkowiak, *op. cit.*, p. 145.

³¹ Journal of Laws of 2010, No. 7, Item 45.

³² ‘Experiment’ in dictionary terms has two meanings. The first is ‘an attempt to implement a novel idea’, the second is ‘a scientific experiment conducted in order to study some phenomenon’ (*Słownik Języka Polskiego PWN*, <https://sjp.pwn.pl/slowniki/eksperyment.html> [accessed on: 17.11.2023]). Organisational solutions applied before 1976 can be treated as an experiment in the first sense. On the other hand, the delimitation of the different ranges of jurisdiction of juvenile departments in specially selected courts by the Juvenile Affairs Department of the Ministry of Justice in 1976 can be regarded as an experiment in the second sense of the term. J.R. Kubiak (*Sądy rodzinne w Polsce: Od eksperymentu do oryginalnego rozwiązania*, “Zeszyty Naukowe Instytutu Wymiaru Sprawiedliwości” 1977, No. 7, pp. 204–205) pointed out that in order to conduct an experiment it is necessary to develop a hypothesis, the tools with which the experiment shall be conducted, and to closely control its course, which will enable objective verification of the validity of the research thesis.

Department, dealing with cases of divorce, paternity determination, alimony and the abolition of statutory community of property between spouses, was established on 1 July 1962 in the Poviát Court in Katowice. From 1 January 1963, such a court also operated in the Poviát Court in Łódź.³³

Based on the order of the Minister of Justice of 26 July 1973,³⁴ family courts were established in 1974 in Braniewo, Inowrocław, Kluczbork, Ostrołęka, Świnoujście, Tarnobrzeg and Tarnów, and in 1975 in Bartoszyce, Nowy Sącz, Szczytno, Gdańsk, Poznań. Their subject-matter jurisdiction varied because they were treated as experimental.³⁵

The creation of “family courts” by the end of 1975 was assessed as a “*spontaneous and uncontrolled*” stage of experimentation, since the scope of jurisdiction of departments in individual courts depended “*on the ingenuity of judges and the management of voivodship courts.*”³⁶

All the experimentally created departments in the various courts heard cases: juvenile criminal cases, guardianship of minors, sending for compulsory anti-alcohol treatment, divorce, alimony, paternity and related claims. Except for one court, all other courts also heard cases of offences against the family, guardianship and youth (Chapter XXV of the Act of 19 April 1969 on the Criminal Code³⁷).

The adjudication of other cases varied. Seven courts ruled on the abolition of the marital community of property, but only two on the division of such property. Four dealt with requests from other family courts to hear the parties and witnesses.

One court ruled on both Article XXV of the Criminal Code and offences under Article 169 of the Criminal Code (acts of fornication with a person totally or to a considerable degree deprived of the ability to recognise the meaning of the act or to direct his/her conduct), Article 170 of the Criminal Code (leading another person to commit an act of fornication or to commit such an act by abusing a relationship of dependence or exploiting the critical position of that person), Articles 174–177 of the Criminal Code (“offences against morality”), and Article 203 of the Criminal Code (misappropriation of another’s movable property) if both the accused and the victim were persons belonging to the same family.

One court ruled on cases ordering the payment of wages to the employee’s spouse, and another on cases for recourse claims under Article 140 of the Family and Guardianship Code

³³ J.R. Kubiak, *Sądy rodzinne – kompetencje, zadania, organizacja*, “Palestra” 1978, Issue 4, p. 61.

³⁴ Official Journal of the Minister of Justice of 1973, Issue 5, Item 37.

³⁵ Usually, the subject-matter jurisdiction of these courts included juvenile criminal and guardianship of minors cases, cases of divorce, alimony, establishment of paternity, cases of sending for compulsory anti-alcohol treatment, and cases of crimes against family, guardianship and youth. Some of these courts also heard cases for the abolition of matrimonial community of property, for the division of joint property and for recourse claims under Article 140 of the Family and Guardianship Code, cases for offences other than those contained in Chapter XXV of the Criminal Code, if they were committed by one family member to another.

³⁶ See: J.R. Kubiak, *Sądy rodzinne w Polsce: Od eksperymentu do oryginalnego rozwiązania*, “Zeszyty Naukowe Instytutu Wymiaru Sprawiedliwości” 1977, Issue 7, p. 202.

³⁷ Journal of Laws of 1969, Issue 13, Item 94.

and for authorisation to perform an act exceeding the scope of ordinary management of the incapacitated person's property.

A study on the impact of cases and the jurisprudence of the courts' departments treated as "family," concerning their operation between 1974 and 1975, showed that in all courts the impact of juvenile criminal cases, guardianship of minors and family cases, which before the experiment were heard in the civil departments, was similar. The share of adult criminal cases was small and varied from 0.7% to 7.3% of the total number of cases. An assessment of the cases made from the point of view of the child's welfare to some extent showed that the need to protect such welfare occurred in as many as 80% of the cases heard.³⁸

The findings regarding the concept of consolidating family cases into a single department, the type of cases recognised, as well as the assessment of the practice of the courts justified the conclusion that the judges' original ideas, resulting from their experience and reflections, were implemented, which, although they turned out to coincide in some of the adopted solutions with the idea of family judiciary implemented in other countries, did not result from legal comparative inspiration.³⁹

In 1976, the Juvenile Affairs Department of the Ministry of Justice formulated three different ranges of subject-matter jurisdiction of the experimental family courts and the cases previously belonging to the juvenile courts.⁴⁰

In the first group, the courts in Bytom, Inowrocław, Ostrołęka and Tarnów were to hear cases of divorce, alimony, establishment of paternity and related claims, payment of wages to a spouse, permission to marry a man who had not reached "marriageable" age, referring to compulsory anti-alcohol treatment.

In the second group, in the courts in Gdańsk, Nowy Sącz, Szczytno, Świnoujście, criminal cases of adults from Chapter XXV of the Criminal Code were heard, as well as divorce and alimony cases if they involved a threat to the welfare of a child.

In the third group, the courts in Poznań, Braniewo, Tarnobrzeg and Kluczbork were entrusted with divorce cases of marriages with joint minor children, all "criminal" cases for acts committed by juvenile prior to the age of seventeen, in which criminal proceedings were initiated after the age of seventeen, or in which the juvenile was under the age of seventeen at the time of the main hearing.

³⁸ The information presented on the jurisdiction of the experimental courts from the first stage of their operation, i.e. in the years 1974-1975, and on their activities is taken from the study by J.R. Kubiak, *Sądy rodzinne w Polsce: Od eksperymentu do oryginalnego rozwiązania*, "Zeszyty Naukowe Instytutu Wymiaru Sprawiedliwości" 1977, Issue 7, pp. 202-203.

³⁹ See: J.R. Kubiak, *Sądy rodzinne w Polsce: Od eksperymentu do oryginalnego rozwiązania*, "Zeszyty Naukowe Instytutu Wymiaru Sprawiedliwości" 1977, Issue 7, p. 203; J. Bafia, *Sądy rodzinne - idea, cel, zamierzenia*, "Państwo i Prawo" 1979, Issue 7, p. 8.

⁴⁰ Information on experimental family courts and their subject-matter jurisdiction is presented based on the study by J.R. Kubiak, *Sądy rodzinne - kompetencje, zadania, organizacja*, "Palestra" 1978, Issue 4, pp. 61-62.

It was assessed that from 1976 onwards, the Juvenile Affairs Department of the Ministry of Justice took over the formation of the experimental tasks and the control over them, and formulated the objectives of the experiment, which were as follows:⁴¹

1. linking the educational problems revealed in the criminal juvenile and guardianship of minors' cases with the educational environment of the respective persons;
2. streamlining proceedings by avoiding "duplication," reducing "clerical" activities and unifying jurisprudence on family, minors and juvenile offenders;
territorial division in the work of judges – one judge deciding all the cases of the family, familiar with all the conflicts that have emerged in the family;
3. expanding preventive and educational activities in the community.

The Institute for the Study of Judicial Law (IBPS) carried out a study in 1976 to verify these assumptions using three research methods: a study regarding case files heard in one of each group of courts whose subject-matter jurisdiction was determined differently, a "passive observation" of the work of the courts, and interviews with judges ruling in all the courts participating in the experiment.⁴² At the same time, the work of the courts was studied by a special inter-departmental visiting team from the Ministry of Justice.

As Jacek R. Kubiak stated, there was no unequivocal positive verification of the experiment. He noted that there were staff shortages in individual courts and judicial vacancies were "filled" by assigning assessors without relevant experience and judges from other departments (including those reluctant to the idea of distributed jurisdiction).⁴³ The territorial division of work was not fully respected, for if only the administrative division (municipalities, neighbourhoods) had been considered, (given the population living in a particular area), the flow of cases to individual judges would have varied. Some judges could not rule on divorce cases because they were too young. When a particular judge had already ruled on the cases of a particular family and another case concerning that family was received, it was usually entrusted to him/her, even if it was not from the area foreseen for him/her.⁴⁴

It was impossible to resolve the issues related to determining the subject-matter of the cases to be examined, as the family court argued for a wide scope of jurisdiction. The wide scope resulted in the inability to protect judges from work overload, difficulties in ensuring a special, friendly atmosphere during the trial "*bringing the court and the parties closer together (the rush in judgment was not conducive to this)*," and implementation of planned extensive preventive activities.⁴⁵

⁴¹ J.R. Kubiak, W. Kasprzycki, *Sądy rodzinne – idea i uregulowania prawne*, "Nowe Prawo" 1977, Issues 7–8, pp. 1046–1047.

⁴² The results of the study were presented in the publication by J.R. Kubiak, *Sądy rodzinne w Polsce: Od eksperymentu do oryginalnego rozwiązania*, "Zeszyty Naukowe Instytutu Wymiaru Sprawiedliwości" 1977, Issue 7, pp. 195–216.

⁴³ Ibidem, p. 205.

⁴⁴ Ibidem, pp. 210–211.

⁴⁵ Ibidem, pp. 206–207.

The implementation of the tasks was hampered by a lack of coordination between the activities of the courts and other public and social entities whose tasks included various (including educational and social) support for children and families.⁴⁶

Before undertaking the indicated study, it was considered that the very large number of divorce and alimony cases might dominate the existing “core” work of the juvenile departments (“criminal” juvenile and guardianship of minors cases) and consequently negate the achievements of the juvenile courts and judges. The study did not confirm the fear that the impact of civil cases would dominate all other cases, although it was very significant in some courts. Civil cases accounted for between 20% and 60% of all cases in the courts surveyed. (Among civil cases, 70% were divorce cases). Civil cases, even when their impact was not the highest in a given court, were very labour-intensive, time-consuming and difficult for judges, most of whom had been ruling only on juvenile cases for a long time.

Interviews with judges indicated that (as a result) they devoted less time to juvenile and minors’ cases than before, assessing, for example, that “*nowadays juvenile are out of control,*” “*we are not as interested in juvenile criminal and guardianship of minors cases as we used to be.*”⁴⁷

A qualitative assessment of the proceedings and evidence gathered, made from an analysis of the files of 230 civil cases heard by three courts (each from a different group of courts when it comes to jurisdiction), led to the conclusion that in no less than 30% of the cases the evidence gathered was “barely sufficient”⁴⁸ to issue a decision.

The researchers also assessed the evidence of the 271 juvenile criminal and guardianship of minors’ case files examined. In 68% of the cases, it was comprehensive, but in 19%, it was insufficient. It was comprehensive in 68% of cases but inadequate in as many as 19%. In the comparable period before the experiment, an insufficient assessment occurred in 12% of the cases (an increase of 7 percentage points).

In the files of 75 adult criminal cases, the evidence collection was assessed as insufficient in 17% of them. At the same time, the initiation of guardianship proceedings on the occasion of the hearing of civil and criminal cases of juvenile and criminal cases of adults was assessed as “extremely rare.”

According to 80% of the judges surveyed, they were not informed well in advance of the tasks they would be entrusted with as part of the experiment. This may mean that the judges were not able to prepare in advance for the judicial tasks they would have to undertake

⁴⁶ This observation was confirmed by a survey of judges conducted within the framework of Inter-Ministerial Problem MR HI/18, entitled: *Family in the period of construction of the developed socialist society*, carried out in 1975–1979. F.F. Zedler, *Z rozważań nad kompetencją sądów w sprawach rodzinnych*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1980, Issue 3, p. 168.

⁴⁷ J.R. Kubiak, op. cit. p. 209.

⁴⁸ A four-point rating scale was used: “comprehensive,” “most likely to enable a decision,” “barely sufficient,” “insufficient.”

(which they had not done before in their judicial practice at all or had done a long time ago and there was a need to familiarise themselves with the new legal situation, case law, etc.).

The judges surveyed were critical of the criteria used to evaluate their work, which did not favour the family court judge's activity and did not consider the workload, its time-consuming nature and the complications of seeking "intervention" assistance. The judges expressed the conviction that adjudication in the family court department has low prestige compared to adjudication in other court departments.⁴⁹

The above comments present only some of the study's findings preceding the decision to introduce family courts across the country. **The evaluation was unsatisfactory, but proposals that could lead to improvements in the existing options were not tested.**

The experimental stage was completed because it was perceived, for substantive reasons, but probably also for political ones⁵⁰ (which may have been decisive), that there was a need to adopt organisational solutions in the Ministry of Justice as soon as possible which would facilitate the "*intensification of actions for the strengthening the family*"⁵¹ and the *protection of children and young people*, "*as the implementation of the tasks "in terms of raising the rank of the family and consolidating respect for it."*"⁵²

⁴⁹ J.R. Kubiak, *Sądy rodzinne w Polsce: Od eksperymentu do oryginalnego rozwiązania*, "Zeszyty Naukowe Instytutu Wymiaru Sprawiedliwości" 1977, Issue 7, pp. 209 et seq.

⁵⁰ J. Bafia, *Rola prawa i sądów rodzinnych w realizacji polityki partii i państwa na rzecz umacniania rodziny*, "Nowe Prawo" 1980, Issue 1, pp. 3–21 (Paper delivered by Jerzy Bafia, Minister of Justice at the First National Conference of Family Court Judges).

⁵¹ By the Act of 10 February 1976, Journal of Laws of 1976, No. 5, Item 29, the Constitution of the People's Republic of Poland was amended. At that time, the protection of the family was enshrined in Article 5, item 7 of the Constitution, placed in the first chapter "Political system," which is assessed as "the content prototype of the contemporary formula of Article 18 of the 1997 Constitution of the Republic of Poland." (D. Dajnowicz-Piesiecka, *Rodzina w świetle wybranych aktów prawnych z okresu Polski Ludowej*, "Czasopismo Naukowe Instytutu Studiów Kobiety" 2021, Issue 2(11), p. 200). This provision stated that the People's Republic of Poland "for the sake of the development of the nation surrounds the family, maternity and upbringing of the young generation." Articles 79 and 80 of the Constitution, included in Chapter Eight, "Fundamental Rights and Duties of Citizens," were also devoted to protecting the family. (In the original version of the Constitution of the People's Republic of Poland enacted on 22 July 1952, Journal of Laws of 1952, No. 33, Item 232, Article 67 stated that "marriage and the family are under the protection and safeguard of the People's Republic of Poland, and the State gives families with many children special care"). See: Z. Radwański, *Zmiany Konstytucyjne PRL dotyczące rodziny*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1977, Issue 2, pp. 1–9. In the 1970s, social policies were pro-family. For example, paid maternity leave was extended in 1972, and the length of unpaid parental leave, counted as length of service, with a guarantee of return to an equivalent staff position at its end, with pay, was extended to three years. (Resolution No. 13 of the Council of Ministers of 14 January 1972 on Unpaid Leave for Working Mothers Caring for Young Children, Polish Monitor of 1972, Issue 5, Item 26. The same issue was dealt with in the Regulation of the Council of Ministers of 29 November 1975, Journal of Laws of 1975, No. 43, Item 219). On 18 July 1974, the Alimony Fund Act was adopted, Journal of Laws of 1974, No. 27, Item 157, which entered into force on 1 January 1975 (it was repealed on 1 May 2004). Commissioned by the Chancellery of the Sejm in 1973 "Information on the state of research conducted in Poland on family and family law issues" was prepared in connection with the work on the evaluation of the application of the family and guardianship code during the 10 years it was in force. The evaluation of this code led to its substantial amendment in the Act of 19 December 1975, Journal of Laws of 1974, No. 45, Item 234. (J. Ignatowicz, *Doniosłe zmiany w kodeksie rodzinnym i opiekuńczym*, "Nowe Prawo" 1976, Issue 4; J. St. Piąkowski, *Zmiany w prawie rodzinnym*, "Państwo i Prawo" 1976, Issue 4; W. Patulski, *Sądownictwo rodzinne*, "Nowe Prawo" 1978, Issue 2, p. 199).

⁵² W. Patulski, *Sądownictwo rodzinne*, "Nowe Prawo" 1978, Issue 2, p. 199. This was a reference to the resolutions of the 7th Congress of the Polish United Workers' Party held in December 1975. Minister of Justice Jerzy Bafia stated that: "The genesis of the decision to establish a family judiciary in Poland is a set of factors lying in the sphere of the directions set out by the resolutions of the Seventh Congress of the Polish United Workers' Party".

For at least a rough estimation of the scale of the workload of future family courts, it should be mentioned that in 1977 the inflow of family cases to district courts amounted to 330,000, which accounted for 39% of the inflow of cases to district courts. The largest number of these cases was for divorce (82,000), guardianship of minors (82,000), and alimony cases (81,000). Cases for offences against the family, guardianship and juveniles were filed 16 thousand, and cases for forced treatment of alcoholics – 8 thousand. There were 175,659 “wards” of the juvenile courts in 1977.⁵³

4. Establishment of Family Courts

Pursuant to the Minister of Justice’s Regulation of 28 December 1977, amending the Provisional Rules of Voivodship and Poviast Courts on Administrative and Supervisory Matters,⁵⁴ on 1 January 1978, family courts were established. This occurred due to the transformation of the juvenile departments functioning in the district courts into family and juvenile courts, referred to as the family courts.

The transformation concerned juvenile courts with a staff of at least three persons. As a rule, such departments operated in district courts with seats in larger urban centres. The 97 family and juvenile departments covered 105 districts.

48 of these 97 family and juvenile departments had territorial jurisdiction overlapping with that of the district courts in which they were established. 27 family and juvenile departments covered less than one district (this was the case in courts in Bydgoszcz, Częstochowa, Gdańsk, Poznań and Warszawa). In comparison, 22 family and juvenile departments (called “asymmetric” family courts⁵⁵) covered more than one district.

4.1. Subject-Matter Jurisdiction of Family Courts, Scope of Their Powers

The subject-matter jurisdiction of the family courts varied according to the territorial scope of their jurisdiction. All family courts heard juvenile criminal and guardianship of minors’ cases, which had hitherto been the jurisdiction of the juvenile courts (Article 568 Section 2 of the Civil Code).

Party (PZPR) and the Second National Conference of the PZPR of the directions of the activities of the state bodies in the field of protection and strengthening of the family, as well as the attempts made for many years in doctrine and practice to take a new approach to court cases related to irregularities in the functioning of the family as well as the protection of children and youth from demoralisation” (J. Bafia, *Sądy rodzinne – idea, cel, zamierzenia*, “Państwo i Prawo” 1979, Issue 7, p. 4).

⁵³ W. Patulski, *Sądownictwo rodzinne*, “Nowe Prawo” 1978, Issue 2, p. 200.

⁵⁴ Official Journal of the Minister of Justice of 1978, Issue 6, Item 24.

⁵⁵ W. Patulski, *Sądownictwo rodzinne*, “Nowe Prawo” 1978, Issue 2, p. 199.

The family and juvenile departments, to which the entire territorial scope of the district courts in which they were established was subordinate, and the family and juvenile departments having a smaller territorial scope than the entire area of jurisdiction of the respective district court (75 family and juvenile departments in total) also dealt with: (1) family and guardianship law cases,⁵⁶ (2) criminal cases of adults for offences against the family, guardianship and youth (Chapter XXV of the 1969 Criminal Code), (3) cases concerning the compulsory treatment of alcoholics under the Act of 10 December 1959 on the Suppression of Alcoholism.⁵⁷

The so-called “asymmetric” family courts, of which 22 were created on 1 January 1978, heard all juvenile criminal, guardianship of minors and divorce cases from the entire territorial area under their jurisdiction. Other cases were heard only from the area of the court where they were established.

Presenting the competences of the family courts, the Minister of Justice at that time, Jerzy Bafia,⁵⁸ paid attention both to the organisation of the work of the judiciary and to the enforcement of judgements and prevention. Family courts were to develop a new way of “approaching the handling of cases related to conflicts occurring in the family and the elimination of negative social phenomena occurring in the family.” The family court was expected to:

1. in the cases of minors and juveniles, to combine adjudicatory activity with guardianship, upbringing and re-socialisation activity “in a way that allows to foresee abnormalities in the upbringing process against the background of the whole negative phenomena existing within the family [taking into account] the whole relations of a given environment;”
2. the unification and consistency of jurisprudence in individual cases concerning the same family which are examined in different modes;
3. territorial organisation of work – one judge shall handle all cases of a given family in cooperation with a professional guardian and a team of social guardians familiar with the environment;⁵⁹
4. the extension of the mediation role of the court;

⁵⁶ However, this did not apply to cases with such issues, which were heard in the first instance by the voivodship courts under Article 17(1) of the Code of Civil Procedure. See: J. Mojak, *Z problematyki sądownictwa rodzinnego*, “Nowe Prawo” 1981, Issue 1, pp. 16–17.

⁵⁷ Journal of Laws of 1959, No. 69, Item 434. This Act was in force from 19 December 1959 to 12 May 1983. It was “replaced” by the Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism, Journal of Laws of 1982 No. 35, Item 230, which entered into force on 13 May 1983. See: M. Horna-Cieślak, *Orzekanie oraz wykonywanie obowiązku leczenia odwykowego z ustawy o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi*, Warszawa 2017 (See: pp. 6–9 for the genesis of the establishment of legal regulations on the treatment of alcohol-dependent persons and the acts preceding the current legal status), available at: https://iws.gov.pl/wp-content/uploads/2018/08/kolor_IWS_Horna-Cie%C5%9Blak-M._Orzekanie-oraz-wykonywanie-obowiazku-leczenia-odwykowego-ost.pdf [accessed on: 20.11.2023].

⁵⁸ J. Bafia, *Sądy rodzinne – idea, cel, zamierzenia*, “Państwo i Prawo” 1979, Issue 7, pp. 8–16. The quotations in the fragment of this text concerning the competences of the newly created family and juvenile departments “come” from this study.

⁵⁹ It was envisaged (J. Bafia, op. cit., p. 11) that the jurisdiction of the judge and his/her team would include an area with a population of 40,000 to 50,000 inhabitants, among whom there would probably be about 150 families “in need of judicial intervention.” A period of 2 to 3 years was considered “minimal for the development

5. the use of opinions of diagnostic and consultation centres,⁶⁰ “on the subject of determining the causes of socially negative phenomena in the family and finding measures for their elimination”;
6. the extension of preventive, guardianship, upbringing, re-socialisation activities and its “close connection with ongoing initiatives of other ministries and social organisations.”

The performance of these tasks should not follow a strict formula. Therefore, the Ministry of Justice did not indicate methods and directions (schemes) of action, which was to be strictly implemented and controlled within the framework of administrative supervision. Later studies pointed to the “extremely important role” played (especially in the first period of the family courts) by visiting judges even called “plenipotentiaries of the minister for family and juvenile matters.”⁶¹

4.2. Conditions for the Selection of Staff for Family Courts and Premises

496 judges, 500 professional guardians and 900 administrative employees were assigned to work in the family courts.⁶²

The Minister of Justice, one year after the introduction of the family judiciary system (assumed to be nationwide), acknowledged that a major problem was the need for judges who had previously ruled in other departments to acquire non-legal knowledge. Training at the Maria Grzegorzewska School of Special Education in Warszawa (now having the title of an Academy) was conducted for candidates for family courts in 1977 and continued the following year for judges already adjudicating in those courts, from which it follows that at

of self-responsibility of this staff and their commitment, based on satisfaction with the educational results achieved and the analysis of their own mistakes.”

⁶⁰ Family Diagnostic and Consultation Centres (RODK) were established by an order of the Minister of Justice dated 7 August 1978, Official Journal of the Minister of Justice of 1978, Issue 3, Item 17. They were created by changing the competences of departmental diagnostic centres for juveniles. Diagnostic examinations of juveniles in the post-World War II period were carried out in juvenile shelters, created by the Regulation of the Minister of Justice of 20 March 1953, Journal of Laws of 1953, No. 22, Item 86. The examinations concerned only juveniles placed in such institutions. Other juveniles were sometimes subjected to examinations in specialist institutions of the Ministry of Education and Upbringing or the Ministry of Health. The first specialised institution conducting psychological, pedagogical and medical diagnostics was the Diagnostic and Selection Centre in Sopot. It was established by order of the Minister of Justice of 19 September 1967, Official Journal of the Minister of Justice of 1967, Issue 7, Item 39. The Centre was associated with the Shelter for Juveniles in Gdańsk-Oliwa, being a branch of that institution. Its task was to “issue pedagogical-social and psychological-psychiatric opinions in juvenile cases referred by the courts of the Gdańsk Voivodship, and in justified cases also at the request of courts from other voivodships.” All diagnostic and selection centres established until 1974 adapted their forms of activity to local needs and possibilities. They worked based on their own regulations. Family diagnostic and counselling centres acquired statutory status when the Act on the Proceedings in Juvenile Matters came into force (13 May 1983), Journal of Laws of 1982, No. 35, Item 228. The role of RODK in juvenile proceedings was defined by Articles 24 and 25 of this Act.

⁶¹ See: M. Bańkowska, *XX-lecie sądownictwa rodzinnego w Polsce*, “Przegląd Sądowy” 1999, Issue 4, p. 133. According to the author, 22 visiting judges were appointed in April 1978.

⁶² M. Bańkowska, *Idea sądownictwa rodzinnego*, “Jurysta” 1999, Issues 2–3, p. 7.

the time of the “start” of the family courts not all judges adjudicating in them had adequate preparation to meet the expectations required for a family court.⁶³

At that time, the support staff consisted of 718 professional guardians (the number of full-time posts was increased by 200), and at the beginning of 1979, there were 7,000 social guardians cooperating with them. It was planned that (as believed in the future) a social guardian should take charge of no more than 5 pupils.⁶⁴

There were 21 diagnostic and counselling centres, but more were under preparation, to reach a total of 46. Their tasks were to be extended to include a “*therapeutic and counselling function*.” It was also planned to create “*branches of existing centres operating directly at the courts*.”⁶⁵ The expectations for these centres were no less high than for the jurisprudence staff.

In terms of diagnosis, they were to be involved “*in almost all cases pending in the family courts, if the court deems it advisable*.” As part of their therapeutic function, their staff were to assist guardians and families where the welfare of children was at risk “*as a result of the parents’ failure to fulfil their parental functions*” and “*where the child may be at risk of psychological trauma due to the marital conflicts of divorcing parents*” (in 1977 alone, 26,026 marriages involving 35,912 children were pronounced divorced). The “*direct assumption of custody*” of juveniles and minors was also mentioned (although, if we should interpret the wording literally, we would have to conclude that this was not legally possible).

The new tasks and the mediation, therapeutic and counselling activities promoted required adequate space and “*avoiding an overwhelming courtroom climate*.” The presidents of the voivodship courts were required to provide suitable rooms for the family and juvenile departments, where the “right climate” should be provided, presumably through appropriate interior design and the expected manner of communication on the part of judges and guardians with the court’s “clients,” facilitating good contact and reducing the stress that usually accompanies when visiting the court. “De-formalisation” was also expected during conciliation sessions, in force at that time during divorce cases.

4.3. Assessments of the Implementation of the Family Judiciary System Made During Its First Period of Operation

In the opinion of the Minister of Justice, “*the undertakings of the Ministry of Justice, preceding the commencement of family judiciary in Poland or implemented simultaneously with its establishment,*

⁶³ It was not clear from the referenced article by Jerzy Bafia whether the specialised studies were undertaken by all judges who had not yet completed them, and whether the studies were “open” to judges contemplating a move to family court adjudication in the future.

⁶⁴ J. Bafia, op. cit., p. 13.

⁶⁵ Ibidem.

constituted the material and organisational basis for the success of this important organisational reform of the judiciary."⁶⁶

A reduction in the number of divorces pronounced (from 45,701 in 1977 to 39,084 in 1978), 6200 divorce cases ending in spousal reconciliation, an increase in interference in the exercise of parental authority (from 25,281 in 1977 to 27,319 in 1978) attributed to increasing court activity, the development of guardianship centres for youth to 576 in 1978, which placed 12,653 minors under supervision, a reduction of 6,759 in the number of inmate custody children released due to return to rehabilitated own families, with adoption or placement in foster families.⁶⁷

The results of practice surveys and surveys of judges on various aspects of the work of the family courts were far less enthusiastic.

For example, a survey of 293 judges ruling in family courts and juvenile departments on cooperation between the court and administrative authorities able to take action in favour of families⁶⁸ showed that in the opinion of almost 11% of the judges there was no cooperation at all, or (as 18.4% of the respondents believed) there was some cooperation, but it fell significantly short of what was actually possible.

Specifying the reasons for insufficient cooperation, which objectively should be possible, 60.4% of judges indicated a lack of interest in cooperating with the court, 22.9% an excessive formalism on the part of the authorities obliged to cooperate that prevents effective action, and 6.2% expressed the belief that the administrative authorities lacked a sufficient understanding of needs.

At the Institute for the Study of Court Law (by a seven-member team led by Adam Strzembosz⁶⁹) statistical,⁷⁰ file⁷¹ and survey⁷² studies were carried out on the functioning of family courts up until the end of 1981.

⁶⁶ J. Bafia, *Sądy rodzinne – idea, cel, zamierzenia*, "Państwo i Prawo" 1979, Issue 7, p. 13.

⁶⁷ J. Bafia, op. cit., pp. 15–16.

⁶⁸ F. Zedler, *Z rozważań nad kompetencją sądów w sprawach rodzinnych*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1980, Issue 3, pp. 165–175.

⁶⁹ A. Strzembosz, *Polskie sądy rodzinne w świetle badań empirycznych*, "Archiwum Kryminologii" 1984, Vol. XI, pp. 167–225. The co-authors of this study were doc. A. Sokołowska, doc. T. Szymanowski, doc. M. Rudnik, dr Z. Rosiak, judge A. Kielasińska, mgr M. Sieradzka, mgr L. Ustaborowicz-Jakimowicz.

⁷⁰ The statistical research concerned divorce cases, parental authority cases, juvenile cases for criminal acts and criminal cases from Chapter XXV of the Criminal Code from two years before the establishment of family courts (1976–1977) and four years after their establishment (1978–1981).

⁷¹ The analysis of the court files was intended to show to what extent the judge's interest is concerned with the totality of problems and conflicts occurring in the family and to what extent real help is given to the family in resolving the conflicts, as well as: 1) whether the court's jurisprudence in all cases of a given family is consistent and complementary, 2) what knowledge the court had of the family at the time of sentencing, 3) whether preventive and rehabilitative activity has actually increased, 4) whether there has been an increase in the efficiency of the court's work expressed in a faster response to the needs of the family.

⁷² The first research on the opinions of family judges, professional guardians of family courts and attorneys standing before family courts was carried out in the first half of 1981 by means of an anonymous questionnaire sent to Kraków, Lublin, Słupsk, Tarnów, Tarnobrzeg and Przemyśl. Questionnaires were only returned from the first three cities, so it was sent additionally to Warszawa and Płock. 106 people responded – 62 judges, 20 guardians and 24 advocates.

The study showed that the postulate of comprehensiveness of family court decisions was not fulfilled.⁷³ In divorce cases, the courts did not make use of existing possibilities, similarly to the civil courts. In guardianship cases, their rulings did not deviate from the commonly previously accepted patterns, and in juvenile criminal cases, the degree of comprehensiveness of rulings was determined by the provisions on rehabilitation measures. In criminal cases, the possibility of imposing obligations on the sentenced person was no longer used by family courts than criminal courts.

In the assessment of the research team, this did not exclude coherence between the individual judgements, understood as their non-contradiction, and the pursuit of a presumed “programme of impact” on individual members of the family in question and on the family as a whole. Nor did it preclude the judgments from complementing each other and thus increasing their impact on the family in the desired direction.⁷⁴ However, as Adam Strzembosz assessed, these cases were:

rare and because of the low percentage of families for which there would be at least 2 cases pending in the family court, and because of the content of the legal relations regulated by the court, and because of the low activity of family judges aimed at causing the court to receive an appropriate application, action or indictment.⁷⁵

The detailed findings concerned the working conditions of the 8 family courts between 1979 and 1980. During the “real working month” (after deducting holidays), the rank (i.e. “non-functional”) judges handled an average of about 50 cases, overseeing the enforcement of decisions concerning 300 to 600 juveniles and minors and supervising a certain (undetermined) number of adult offenders. A specific group of judges assessed as “substantial” were involved in guardianship centres for youth, independently of other tasks carried out. As the author pointed out, all judges “at least theoretically should have devoted a lot of time for preventive activities.”⁷⁶

In assessing the judges’ workload, it had to be taken into account that the judges had to apply various procedural rules and know well the realities of the system of preventive and rehabilitation measures in a specific area to apply them effectively.

⁷³ Of the 163 families with more than one proceeding before the family court, in 68% of all cases there were only 2 cases, in 23% – 3 cases, in 6% – 4 cases, and in 3% – 5 to 7 cases (these were new guardianship cases attached to a previous guardianship case). Of the total number of families subject to custody cases in 1979, 34% of the families had at least one other case besides this. In the case of divorces, another case involved 28% of divorcing spouses. In 15% of cases, a case for a criminal act against a juvenile child was accompanied by another proceeding concerning the same family. The concurrence of cases concerned 16% of proceedings for an offence under Chapter XXV of the Criminal Code.

⁷⁴ A. Strzembosz, *op. cit.*, pp. 199–200.

⁷⁵ *Ibidem*, p. 202.

⁷⁶ A. Strzembosz, *op. cit.*, p. 203.

The study found significant staff fluidity among both judges and court secretarial staff (the author judged this one to be of “alarming proportions”⁷⁷). The assessment of the education and experience of court guardians was also critical.⁷⁸ The study found low availability of diagnostic and counselling centres. The best situation was found in Przemyśl, where 2 diagnostic teams served a small team of three judges, facilitating continuous communication and mutual understanding of expectations, qualifications, and actual capacities. What was intended to be the norm turned out to be a rare exception.

Partially optimistic findings included vacant juvenile detention and foster care places. The waiting time for a place in an educational centre was longer. However, the availability of places in the above-mentioned institutions did not equate to a positive assessment by the courts regarding the variety of institutions, their distance from the children’s place of residence, and the pedagogical level of the staff.

A very big shortcoming was the lack of “day care” centres and other assistance for families failing to properly exercise parental authority, which endangered the welfare of the child, and which could not be prevented by the guardian’s supervision alone. If such facilities were available in the area, the presence of children there for several hours a day and the cooperation of the parents with the guardian could sufficiently safeguard the welfare of the children and enable the children to remain in the family despite its incomplete educational capacity. The lack of such centres often “forced” the court to place the child in a full custody institution, as all the negative effects of such a decision on the children’s psyche were assessed as the “lesser evil” than leaving them in a dysfunctional family. The full custody institutions in which children were placed were often located very far from their parents’ place of residence. This limited (or even excluded) contact between the child and close family members. It might have posed a risk of orphan disease for younger children and was probably also a cause of weakening or even breaking the emotional bonds between parents and children when the situation described was prolonged.

The study also identified serious difficulties with regard to compulsory treatment for alcoholism. There were no treatment facilities in south-eastern Poland. Also, in other “locations,” there was a lack of places in AA centres. This had a negative impact on the degree of implementation of the treatment obligation imposed in criminal proceedings.

⁷⁷ Ibidem. An example of this can be found in the District Court for Kraków-Śródmieście where from February 1977 to the end of 1979 “38 officials passed through the department.”

⁷⁸ Out of 49 professional guardians, 20 had less than 3 years of work experience. Half had only a general secondary education, a pedagogical high school or a teacher’s college. Of the 760 social guardians whose personal files were examined, 18% of the guardians were under 30 years of age, 29% – aged 30–39, 27% – aged 40–49, 14% – aged 50–59, 7% – aged 60–69 and 5% – aged over 70. The latter performed more probation and supervision than the younger ones but had the lowest education. The best educated were social guardians (32% had a university degree, 22% had completed a teacher training college, post-secondary school or had started but not completed a university degree). Only 13% of guardians had no secondary education. As the author wrote (p. 204): *Unfortunately, most of those with higher or semi-secondary education are teachers recruited as guardians often against their will and generally limiting their contacts with their charges and their parents to the school premises.*

The files examined showed what circumstances impede (or even prevent) the proper functioning of the family courts. Also of interest were the results of a survey of judges, guardians, and attorneys representing parties and participants in family court proceedings.

Significantly, 62% of respondents gave a positive opinion on the introduction of family judiciary, while 30% gave a negative opinion (8% of respondents had no opinion). 85% of guardians, 65% of judges and 38% of barristers rated the introduction of family courts well.

Negative ratings were given by 15% of guardians, 26% of judges and 54% of lawyers. In justification of their negative opinions, the respondents pointed to a reduction in the efficiency of the proceedings and the level of jurisprudence, and to the overly broad scope of cases entrusted to the family courts. In this context, it is worth mentioning that, during the course of these surveys, property division cases concerning matrimonial community of property were excluded from the jurisdiction of the family courts as of 1 July 1981 and “returned” to the civil departments. Despite this, 50% of the respondents (among judges 58%) were still critical about the subject-matter jurisdiction of the family courts, postulating e.g., the “return” of divorce cases of childless spouses to the civil departments.⁷⁹

30% of the respondents assessed that the introduction of family judiciary did not bring any benefit to the protection of the family, 52% that it did not bring any benefit to the protection of children and young people from demoralisation. The most frequent (56%) negative assessments were voiced by the surveyed judges, which Adam Strzembosz assessed as an expression of the judges’ ability to “take a critical look at their own activities.”⁸⁰

67% of respondents considered the introduction of family courts deficient in terms of staffing. 80% of them indicated that such a position was justified because judges were inadequately trained, the selection of personnel was flawed, and there were too few judges in relation to the tasks assigned to them.

22% of respondents said that referrals to work in the family and juvenile department were decided by chance, 14% that there were no criteria, i.e. “Willing candidates were selected, and when they were not, pressure was applied to encourage participation.” 6% thought that the selection was negative.

For 17% of the respondents, life experience was the deciding factor for referral to the family department; 13% pointed to seniority, 12% to good professional background and 10% to a moral standing.

56% of respondents believed that the establishment of the family courts was not preceded by proper organisational preparation.

⁷⁹ Already after the completion of the aforementioned analysis, as of 1 January 1982, adult cases of offences against the family, guardianship and youth were transferred to the criminal departments.

⁸⁰ A. Strzembosz, *Polskie sądy rodzinne w świetle badań empirycznych*, “Archiwum Kryminologii” 1984, Vol. XI, p. 206.

44% of respondents believed that juvenile courts handled guardianship cases better before the reform, and only 17% believed guardianship cases were handled worse (the remainder had no opinion or believed that these cases were handled the same way).

47% of respondents, regarding criminal cases, believed that juvenile departments adjudicated better, while 13% held the opposite opinion.

35% assessed that criminal cases for offences against the family were handled better by the criminal departments and 17% that the criminal departments did so worse than the family courts.

22% of respondents indicated that the family courts handle the cases entrusted to them better than the civil departments, while 17% indicated that they do so less well.

As many as 76% of the judges surveyed and 76% of the attorneys were of the opinion that the move to the family court increases the judge's workload.

The Institute for the Study of Judicial Law (IBPS) research team found **“inadequate organisational preparation of the reform of the judiciary, as well as (...) little regard for the currently existing possibilities.”**⁸¹ The findings led Adam Strzembosz to assess that:

The removal of the shortcomings identified would require an enormous expansion of the judicial apparatus, above all an increase in the number of judges so substantial that, despite the need to concentrate attention on the judiciary, they will still have sufficient free time to take care of their other tasks. (...) It is therefore necessary to decide either on really large expenditures involving the privileged treatment of a large number of court cases or on the reduction of the competences of the family courts and the privileged handling of cases that are most important for the proper development of children and youth. It should also be borne in mind the burden on the psyche of family judges from having to deal with several court procedures, which, when trained, results in a focus on the law rather than on rational sentencing policies and forms of family support.⁸²

Consequently, it was pointed out that one of the possible (and probably the easiest) way to improve the presented situation could be the division of cases within the family and juvenile department by creating in it one section for civil cases, procedural and non-procedural, and another one for other cases (already without criminal cases for crimes against family, guardianship and juvenile, which “returned” to the criminal departments as of 1 January 1982). As a consequence, there would be a specialisation of judges within a single department and, when another case concerning the same family was filed, it would be easy to consult the files of the earlier proceedings (and use the material gathered in them), even if they were pending in another section. It would be easier to enforce judgments, preventive actions and initiate guardianship proceedings *ex officio*.

⁸¹ A. Strzembosz, *Polskie sądy rodzinne w świetle badań empirycznych*, “Archiwum Kryminologii” 1984, Vol. XI, p. 205.

⁸² A. Strzembosz, op. cit., p. 212.

Consideration was also given to limiting the types of cases heard to those “*substantially related to child-rearing and guardianship issues.*” Consequently, the family court would not include cases of paternity, alimony or divorce of spouses without minor children.

Another version presented for the scope of cases heard by the family court was a return to the status quo before 1 January 1978. This version would have the advantage of restoring the balance between the three functions of the family court: adjudication, enforcement and prevention. All previously recognized inadequacies, which contributed to the transformation of juvenile departments into family and juvenile departments, would once again become relevant. Such a version would also fail to take into account the acceptance, established in the research, of the considerable expansion of the competences of the family court compared to the state before 1 January 1978, which is justified on the merits, and, in addition, the expectations of former juvenile judges wanting work that is “*more varied and therefore more interesting and more highly ranked in judicial circles and, moreover, offering the chance of promotion to the voivodship court.*”

Consequently, the IBPS team, which carried out the discussed comprehensive study of the functioning of the family courts in comparison with the jurisprudence of the juvenile departments, advocated a significant limitation of the types of cases heard by the family and juvenile departments to those which require “*specific socio-pedagogical qualifications for their handling.*” Among the cases that do not require such qualifications, the study team included adult criminal cases for offences against the family, guardianship and youth, as well as cases for establishing paternity and alimony. At the same time, given the need to pursue a consistent, uniform divorce court policy, the researchers advocated that all divorce cases, including those involving spouses without minor children, should remain in the family courts. They suggested that in larger family courts:

[divorce cases] would be heard by a single judge freed from other duties, who would, in addition, rule on cases of compulsory treatment of alcoholics. The same judge would hear other cases as well, which do not usually have a continuation in the form of enforcement or adjudication proceedings in other court cases related to the same conflict in the family (...) cases for permission to marry, cases for adoption, for permission to undertake acts beyond the scope of ordinary management, etc.⁸³

Other detailed proposals were made concerning the functioning of the family court, its supporting bodies (guardians, diagnostic and consultation centres, cooperation with extrajudicial bodies). However, presenting them may not be advisable, as numerous changes have subsequently been made to implement the idea contained in these proposals, while the optimal scope of the subject-matter jurisdiction of family courts is still not clear.

⁸³ A. Strzembosz, op. cit., p. 215.

5. Family and Juvenile Departments (Family Courts), as a Permanent Organisational Element of District Courts

The longevity of the family courts and the constant expansion of the range of cases they handle attest (at least indirectly) to the desirability of the decision to establish them.

A presentation of the subsequent changes and an assessment of the rationale for their introduction would require an extensive historical study. These comments are only of a signalling nature, as they are only intended to provide the background for an assessment of the current situation as the family courts enter their 46th year of operation across the state. Their work during this period has confirmed the desirability of continuing their operation which, however, still encounters serious difficulties prompting the formulation of proposals for remedial measures. Practical problems, already revealed in the 1970s and early 1980s, were not solved. The legal situation has changed repeatedly and proposals for change have sometimes been put forward which are contrary to the idea of family judiciary.

Given the purpose of this part of the study, which is to serve as a background for the presentation of *de lege ferenda* postulates, the following remarks will only signal (in a selective and limited manner), the issues relevant to the realisation of the idea of family judiciary, which guided the authors in implementing it on 1 January 1978.

5.1. Legal Basis for the Organisational Separation of Family Courts and the Scope of Their Activities

5.1.1. General Arrangements

For the first time, the family and juvenile departments were called “family courts” in the Act of 26 October 1982 on Proceedings in Juvenile Matters,⁸⁴ in force since 13 May 1983.

Under this Act, Article 6 Section 1 of the repeatedly amended Act of 6 February 1928 – Law on the System of Common Courts was amended. In its new wording, this provision stated that the Minister of Justice, by regulation (and not by order, as was the case when the family courts were established on 1 January 1978), shall create family and juvenile departments (family courts) for the following cases: (1) family and guardianship law, (2) treatment of alcoholics, (3) demoralisation and criminal acts. This act provided in Article 6 Section 2 that the Minister of Justice may, by regulation, delegate to a single district court the examination of cases falling within the competence of the family and juvenile department within the jurisdiction of several district courts located in the area of operation of the same voivodship.

⁸⁴ Journal of Laws of 1982, No. 35, Item 228. Hereinafter, this Act will be called as the u.p.n. or u.p.n. 1982.

Władysław Patulski, commenting on Article 101 of the u.p.n., amending the u.s.p. 1928,⁸⁵ stated that the aforementioned standardisation:

‘ennobles’ the Polish model of family judiciary (...) and enables (through an appropriate statutory delegation to the Minister of Justice) the organisation throughout the country of an optimal network of family courts in individual district courts, adapted to social needs.

Before the entry into force of the u.p.n., as already mentioned with regard to the scope of cases heard by the family courts set when they commenced operations on 1 January 1978, there were two “adjustments” made by the orders of the Minister of Justice of 15 May 1981, No. 15/81RN⁸⁶ and of 17 December 1981, No. 53/82.⁸⁷ Cases of division of joint property of spouses and criminal cases of offences against the family, guardianship and youth were excluded from the jurisdiction of the family courts.

Despite the proposal to further limit the scope of cases heard by family courts (such as those formulated in the presented conclusions of the research at the IBPS), it remained very broad. In particular, the demand to exclude civil cases from the jurisdiction of the family courts in which proper resolution does not require “specific socio-pedagogical qualifications” was not taken into account. Still, among civil procedural cases, family courts recognised divorce cases (regardless of whether the spouses had minor children), alimony cases, cases for establishing paternity and related claims, for abolition of marital joint property, for eviction of a spouse grossly violating the rules of social intercourse (Article 59 of the Family and Guardianship Code).

Implementing the statutory delegation contained in the amended Article 6 of the u.s.p. 1928, the Minister of Justice issued a Regulation of 7 May 1983⁸⁸ on the establishment of 272 family and juvenile departments in 245 district courts. Family courts were not established in 20 district courts out of a total of 265 such courts.

Amendments to the u.s.p. 1928 law under Article 101 of the u.p.n. also improved the “rank” of court guardians (including family guardians).⁸⁹

On 1 September 1985, the Act of 20 June 1985 – Law on the Common Courts System⁹⁰ – entered into force. Article 19 of that Act had the same wording as Article 6 of the u.s.p. 1928, as amended by Article 101 of the u.p.n.

⁸⁵ W. Patulski, [in:] *Ustawa w postępowaniu w sprawach nieletnich. Komentarz*, A. Krukowski (ed.), Warszawa 1984, p. 247.

⁸⁶ Official Journal of the Minister of Justice of 1981, Issue 2, Item 10.

⁸⁷ Official Journal of the Minister of Justice of 1982, Issue 1, Item 2.

⁸⁸ Official Journal of the Minister of Justice of 1983, Issue 26, Item 128.

⁸⁹ On this subject, see: the remarks of W. Patulski in the commentary to the u.s.p. 1928 referred to earlier, pp. 250–252, as well as K. Grześkowiak, *XXV-lecie sądownictwa dla nieletnich*, “Problemy Wymiaru Sprawiedliwości” 1974, Issue 5(2), pp. 153–155; P. Sobierajski, *Historia kurateli sądowej w Polsce – uwarunkowania organizacyjno-prawne*, “Zbliżenia Cywilizacyjne” (“Zeszyty Naukowe Państwowej Akademii Nauk Stosowanych we Wrocławku”) 2019, Issue XV(3), pp. 34–50.

⁹⁰ Journal of Laws of 1985, No. 31, Item 137.

The Act continued to use the term “family court” for the family and juvenile department of the district court. It also appears that its Article 151 further strengthened the prestige of this court, as it provided that whenever a juvenile court was referred to in the applicable legislation, it should be understood as the “family court.” Unfortunately, this law also did not provide for the creation of family departments in voivodship courts.

During the enactment of the Act of 20 June 1985 – Law on the Common Courts System (i.e. until 1 October 2001, when the subsequent Act of 27 July 2001 on the Common Courts System⁹¹ entered into force, the jurisdiction of the family courts was amended, in particular with regard to family and guardianship cases. The most significant reduction of burdens was expressed in the transfer of divorce cases to the jurisdiction of voivodship courts from 1 January 1991.⁹²

In the justification of the government’s draft Act (the 10th Sejm’s print⁹³ No. 403) introducing the change in question, it is only indicated that it is proposed that cases “of significant social importance, such as divorce and marriage annulment cases”⁹⁴ shall be heard in voivodship courts.

Usually, a reduction in the accessibility of the divorce court reduces the number of divorces adjudicated. It cannot be ruled out that this was intended (although not stated in the explanatory memorandum of the draft Act). Such an effect was achieved but was not permanent. In 1990, when divorce cases fell within the subject-matter jurisdiction of the family courts, 42,436 divorces were pronounced. In 1991, the voivodship courts pronounced 33,823 divorces and in 1993 27,891 divorces. The growth rate and the number of pronounced divorces per 10,000 population also decreased (in 1990, there were 11.1 divorces per 10,000 population, in 1991 – 8.8, in 1993 – 7.3).⁹⁵ In 2000, the number of pronounced divorces was 42,770 and increased in the following years (up to 65,341 in 2019) There was and is also a high number of pronounced divorces per 1,000 new marriages (in 1980 – 129.6, in 1990 – 166.2, in 2000 – 202.6, in 2010 – 268.5, in 2020 – 352.7, and in 2022 – 386.1).⁹⁶

⁹¹ Journal of Laws of 2001, No. 98, Item 1070.

⁹² Act of 13 July 1990 on the establishment of appellate courts and amending the Act – Law on the System of Common Courts, the Code of Civil Procedure, the Code of Criminal Procedure, the Supreme Court, the Supreme Administrative Court and the National Council of the Judiciary, Journal of Laws of 1990, No. 53, Item 306. Article 3 of this Act, *inter alia*, gave a new content to Article 17(1) of the Code of Civil Procedure (The jurisdiction of the voivodship courts includes cases: for non-property rights and property claims asserted jointly with them, in addition to cases for the establishment and denial of paternity, for the establishment and denial of maternity and for adoption).

⁹³ It should be recalled that the indicated term of the Sejm, marked as the tenth – “X” – lasted from 1989 to 1991. To emphasise the accomplishment of the political change of the state, which began at the end of the 1980s, the next term of the Sejm (1991–1993) was marked as the first, which makes the current term of the Sejm, which began as a result of the elections of 15 October 2023, also an X term.

⁹⁴ <https://orka.sejm.gov.pl/procx.nsf/o/28517CEADB4871DEC1258A1A004961C6?OpenDocument> [accessed on: 24.11.2023].

⁹⁵ Data from court statistics (after E. Holewińska-Łapińska, *Uwagi o poselskim projekcie nowelizacji prawa dotyczącego rozwodów*, “Przegląd Sądowy” 1996, Issue 5, p. 25).

⁹⁶ *Roczniki Demograficzne GUS 2020, 2021, 2022. Tablica „Rozwody”* 31(55).

Observations concerning the first period of divorce adjudication by the voivodship courts showed a significant increase in the length of divorce proceedings, which may have impacted the lower number of cases concluded with a divorce judgment in a given year. The proportion of proceedings terminated by the dismissal of divorce proceedings also decreased. In 1989, it was 2.7%, in 1991 – 2.4%, in 1993 only 0.1%. This could indicate a greater liberalism of the voivodship (civil) courts than of the family courts in assessing the fulfilment of positive grounds for divorce and less rigour regarding the so-called negative grounds for divorce. There was also a decrease in the proportion of cases terminated by discontinuance of proceedings from 19.2% in 1989 to 13.9% in 1991 and 2.3% in 1993, which may have been, *inter alia*, the result of the lower effectiveness of the civil court compared to the family court in inducing the spouses to reconcile.⁹⁷

Both in the opinion of practitioners⁹⁸ and in the literature,⁹⁹ the transfer of divorce cases to voivodship courts has been criticised. In the MPs' bill to amend the divorce law, submitted to the Sejm of the second term of office on 28 September 1994 (print No. 800), there was a proposal to "return" divorce cases to the district courts.¹⁰⁰ The draft aroused numerous controversies,¹⁰¹ but this change was not contested. During the first reading of the draft Act, the Minister of Justice admitted that transferring divorce cases to the voivodship courts was a mistake, but another change would "greatly deepen the troubles of the judiciary."¹⁰²

By the end of the second term of Sejm (1997), work on the draft had not been completed, and it had been referred to the Justice Committee, the Social Policy Committee, and the Legislative Committee. In subsequent terms of the Sejm, there were no attempts to transfer divorce cases to the family courts in the form of a draft Act.

⁹⁷ E. Holewińska-Łapińska, *Uwagi o poselskim projekcie nowelizacji prawa dotyczącego rozwodów* "Przegląd Sądowy" 1996, Issue 5, p. 25.

⁹⁸ See, for example, H. Włazewicz, *Sądy rodzinne*, "Jurysta" 1999, Issues 2–3, p. 12.

⁹⁹ The most blunt assessment of the transfer of divorce cases to voivodship/regional courts was made by W. Stojanowska (*Rozwód a ochrona rodziny i dziecka – wybrane zagadnienia*, "Rodzina i Prawo" 2008, Issues 7–8, pp. 6–8) stating the following: "This change has led, first of all, to the overturning of the idea of a family court, according to which the same judge should hear all family cases concerning a given family, just like a family doctor in terms of medical care. It is impossible to find motives for such a change. On the other hand, its contraindications are easy to see and understand. There is no doubt that divorce cases are the most important matters for the existence of a family. Deciding whether or not to grant a divorce can be compared to Hamlet's 'to be or not to be' regarding the family. This fundamental decision has been excluded from the competence of the family court and hence from the specialised court (...) We can only guess that this change in the jurisdiction of the court (...) was intended to make access to the court more difficult for persons intending to terminate their marriage by divorce."

¹⁰⁰ Article 2 of the draft Act providing for amendments to the Code of Civil Procedure states: "1) in Article 17(1), the words «and cases of adoption» shall be inserted after the words «and cases of divorce»."

¹⁰¹ At the 43rd session of the Sejm of the 2nd term of the Republic of Poland (17 February 1995), a motion was put forward to reject the draft Act at the first reading. "For" the rejection, 94 MPs voted, 195 were "against" and 43 abstained. <https://orka.sejm.gov.pl/proc2.nsf/o/B4F802C961EA47FCC12574580021A77D?OpenDocument> [accessed on: 28.12.2023]. Critically on the draft Act (but approvingly as to the jurisdiction of family courts in divorce cases) see: W. Stojanowska, *Poselski projekt nowelizacji prawa rozwodowego a zasada trwałości małżeństwa i rodziny*, "Jurysta" 1995, Issue 12; E. Holewińska-Łapińska, *Uwagi o poselskim projekcie nowelizacji prawa dotyczącego rozwodów*, "Przegląd Sądowy" 1996, Issue 5,

¹⁰² E. Holewińska-Łapińska, *Uwagi o poselskim projekcie nowelizacji prawa dotyczącego rozwodów* "Przegląd Sądowy" 1996, Issue 5, p. 26.

The jurisdiction of the family and juvenile department as a guardianship court was constantly expanded to include new categories of cases that were not strictly related to the core of the family court's tasks. In particular, this concerned the imposition on family courts of the duties provided for in the Act of 19 August 1994 on the Protection of Mental Health¹⁰³ and later also in numerous so-called medical laws.¹⁰⁴

On 1 October 2001, the Act of 27 July 2001 – Law on the System of Common Courts entered into force. Article 12 stipulated which departments the district court shall be divided into. There were five of them,¹⁰⁵ including as the third (Article 12(3)) the family and juvenile department explicitly named as the family court: “for cases of family and guardianship law, cases of demoralisation and criminal acts of juveniles, treatment of alcoholics and drug and psychotropic addicts and cases belonging to the guardianship court under separate laws.” Article 16 also listed five departments of the regional court, but the family court department was not among them. However, it was specified which cases within the jurisdiction of the family and juvenile departments in the second instance are heard by the civil departments and which by the criminal departments.

By the Act of 18 August 2011 amending the Act – Law on the System of Common Courts and Certain Other Acts,¹⁰⁶ which entered into force on 11 October 2011, the principle that the establishment of a family and juvenile department is mandatory in district courts has been changed. Only the establishment of a civil and criminal department became mandatory.

Revised Article 12 § 1(1) of the u.s.p. 2001 law provided that the jurisdiction of the civil department included e.g., hearing cases of “family and guardianship law, cases concerning demoralisation and criminal acts committed by juveniles, treatment of alcoholics and drug and psychotropic addicts and cases belonging to the guardianship court under separate laws.”

At the same time, Article 12 of the u.s.p., added to Article 1a, Subsection 1 provides for the possibility of establishing a family and juvenile department for cases of family and guardianship law, demoralisation and criminal acts committed by juveniles, treatment of alcohol, narcotic and psychotropic addicts and cases belonging to the guardianship court under separate acts. The alternative name of this department, “family court,” which appeared in the first version of the Act, was not retained.

The new wording of Article 16 of the u.s.p., concerning the division of the regional court into departments, still did not provide for a family and juvenile department (even if created

¹⁰³ Journal of Laws of 1994, No. 111, Item 535.

¹⁰⁴ The Act of 5 December 1996 on the Professions of Doctor and Dentist, consolidated text, Journal of Laws of 2023, Item 1516; the Act of 1 July 2005 on Collection, Storage and Transplantation of Cells, Tissues and Organs, consolidated text, Journal of Laws of 2023, Item 1185; the Act of 6 November 2008 on Patient's Rights and Patient's Rights Ombudsman, consolidated text, Journal of Laws of 2022, Item 1876; the Act of 15 April 2011 on Therapeutic Activity, consolidated text, Journal of Laws of 2023, Item 991.

¹⁰⁵ The following departments were listed: civil, criminal, family and juvenile (with “family court” added in brackets), labour (with “labour court” added in brackets), mortgage registers.

¹⁰⁶ Journal of Laws of 2011, No. 203, Item 1192.

on an optional basis). Family and guardianship law cases, cases concerning the treatment of alcohol, narcotic and psychotropic addicts, cases belonging to the guardianship court and cases concerning demoralisation and criminal acts committed by juveniles were assigned to the civil department, except for cases against juveniles for committing a criminal act if a correctional measure has been applied to the juvenile or if the appeal contains a request for a correctional measure. The latter cases have been assigned to the jurisdiction of the criminal departments.

As a result of one of the subsequent amendments by the Act of 20 July 2018,¹⁰⁷ the principle was introduced that the departments listed in Article 12 may be created in the district court,¹⁰⁸ including the family and juvenile department (still without calling it a family court). According to the new wording of Article 16 of the u.s.p. law, the departments indicated therein can also be created (there is no obligation to create them) in regional courts.¹⁰⁹ Cases “traditionally” entrusted to the family and juvenile departments (family courts) in district courts and regional courts were assigned to the civil departments.

5.1.2. Contemporary Assessments and Demands for Change in the Operation of Family Courts

From the previously presented evaluations of the concept of family judiciary from the period of its implementation, there was an acceptance of the idea itself and a criticism of the way it was implemented.

Family courts have been entrusted both in the past and in the present with a broad and systematically increasing range of tasks. A very high standard of their performance was, and still is, expected without providing adequate resources for implementation. This impacts the quality of the jurisprudence and the time taken to adjudicate individual cases, as is shown in numerous reports on the jurisprudence of family courts conducted by the Justice Institute. Findings of the factual situation and postulates for improving the organisation of the functioning of family courts are also made in resolutions of the Congresses of the Association of Family Judges in Poland.¹¹⁰ The resolutions deal with issues at the time of their adoption with varying degrees of detail. Many postulates are repeated many times but are not implemented. It seems expedient to draw attention to some of them.

¹⁰⁷ Journal of Laws of 2018, Item 1443.

¹⁰⁸ The following departments are provided: civil, criminal, family and juvenile, labour, social insurance (or labour and social insurance), commercial, mortgage registers.

¹⁰⁹ Provided for civil, criminal, labour, social insurance (or labour and social insurance), economic, telecommunications, postal and internet data control departments.

¹¹⁰ The resolutions are posted on the website of the Association of Family Judges in Poland, available at: <https://www.sssrwp.pl/>

(1) *Organisation of instance control – postulate at least a two-instance family judiciary.*

In formulating the idea of family judiciary, the specificity of family cases and the desirability of having them decided by judges with additional non-legal knowledge, interpersonal communication skills and psychological predisposition, sometimes even referred to as a “vocation,” were pointed out.¹¹¹ However, family courts are only part of the organisational structure of the district courts. **No argument has ever been put forward to show that, to properly carry out an instance review of a decision issued in a family case, no knowledge and experience, at least of the kind required from family judges, is needed.**

Meanwhile, family cases at second instance are adjudicated in the civil departments by judges who specialise mainly in civil law, particularly property law. Probably only a few of them had ruled in the family court before their professional promotion to the court of appeal and later deepened their knowledge in family law and guardianship issues. As a consequence, it may happen that a decision of questionable reasonableness, for example from the point of view of the welfare of the child concerned, even sometimes erroneous, is reached at second instance, but not corrected given the limited availability of a cassation appeal in cases within the subject-matter jurisdiction of the family courts. Practising judges recognise that at second instance: “changes in rulings sometimes come as a surprise, are contrary to generally accepted practice and the lines of jurisprudence established at training courses and specialist conferences.”¹¹²

The demand for at least a two-instance family judiciary has been repeatedly voiced in resolutions of conferences and congresses of family judges.¹¹³ The First President of the Supreme Court has recognised its legitimacy.¹¹⁴ However, the demand for a two-instance family judiciary has not been realised. This problem is still relevant today.

¹¹¹ M. Arczewska, *Społeczne role sędziów rodzinnych – wyniki badań własnych*, “Rodzina i Prawo” 2007, Issue 3, pp. 13–14.

¹¹² E. Ważny, *Organizacja sądownictwa rodzinnego – bariery i problemy* (Appendix to the panel report of the Congress of Parental Rights), available at: <https://bip.brpo.gov.pl/pl/content/kongres-praw-rodzicielskich/panel/organizacja-sadownictwa-rodzinnego-bariery-i-problemy> [accessed on: 28.12.2023].

¹¹³ See, for example: Resolutions of the Conference of the Association of Family Judges in Poland (Popowo, 09.–19.04.1999), (Zakopane 30.03.2000–01.04.2000); Resolution of the General Meeting of the Association of Family Judges in Poland (Warszawa, 07.03.2001) <https://www.sssrwp.pl/aktualnosci.php?typ=uc&art=47&-start=32&ierek=35> [accessed on: 28.12.2023]; as well as the position expressed at the Congress on Parental Rights organised by the Ombudsman on 25–26 June 2018. It should be noted that these resolutions pointed to the problem of limited opportunities for professional promotion of family judges. It is also important to recognise the social losses associated with the situation when an experienced family judge, when promoted to a regional court, has to “retrain.”

¹¹⁴ First President of the Supreme Court, *Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie* (2015), Warszawa 2016, pp. 44–45; First President of the Supreme Court, *Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie*, Warszawa 2016, pp. 49–50; First President of the Supreme Court, *Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie*, Warszawa 2017, p. 59; First President of the Supreme Court, *Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie*, Warszawa 2019, p. 29; First President of the Supreme Court, *Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie*, Warszawa 2020, p. 43.

(2) *Doubts about the random allocation of cases.*

Organisational arrangements have been introduced that exclude some of the assumptions of the family court idea. Already in the 1980s, during the first period of the family courts' operation, as mentioned earlier, attention was drawn to the significant difficulties in implementing the assumption that a single judge should handle all cases of the single family falling within the family court's jurisdiction. The uneven caseload influenced this in the area "assigned" to a particular judge, the danger of a lack of complete objectivity, staff shortages, needs in terms of departmental organisation, etc. The random allocation of cases ruled out the postulate of "family case management" by a single judge. Arguably, ensuring objectivity and an even case load for the judges was considered more important.¹¹⁵

This issue was discussed, for example, during the Congress on Parental Rights organised by the Ombudsman on 25–26 June 2018. It was pointed out that:

The system of random allocation of cases to judges in guardianship cases makes it impossible for the judge, guardian, social worker, educator from a particular area to work closely together and to develop a comprehensive plan of work with the family; therefore, the departure from the principle of the judge working in regions in many cases is not beneficial. The judge should know the family, many cases overlap, the new judge has to get acquainted with the material of not known to him/her cases; the draw algorithm is unknown, keeping the same composition with jurors in divorce cases is difficult.¹¹⁶

During the Congress on Parental Rights, Judge Ewa Ważny also drew attention to other shortcomings of the system of random allocation of cases. She pointed out that cases are not drawn evenly (the draw algorithm is not known, she said),¹¹⁷ there are situations where cases are periodically allocated to only one judge and there is a significant burden on judges

¹¹⁵ The System of Random Allocation of Cases (SLPS) was introduced on 1 January 2018. It was expected to ensure an equal and fair workload for judges and guarantee impartiality for litigants. See: M. Pytlewska, *System Losowego Przydziału Spraw jako gwarancja bezstronnego prawa do sądu w kontekście zaleceń Unii Europejskiej*, "Prawo w Działaniu" 2019, Issue 40. For a critical view of the SLPS, see: S. Gregorczyk-Abram *System Losowego Przydziału Spraw w sądach powszechnych*, "Archiwum Osiatyńskiego" 15 January 2018, available at: <https://archiwumosiatsynskiego.pl/wpis-w-debacie/system-losowego-przydzialu-spraw-sadach-powszechnych/> [accessed on: 28.12.2023]

¹¹⁶ *Organizacja sądownictwa rodzinnego – bariery i problemy. Relacja z panelu #KPR*, available at: <https://bip.brpo.gov.pl/pl/content/kongres-praw-rodzicielskich/panel/organizacja-sadownictwa-rodzinnego-bariery-i-problemy> [accessed on: 28.12.2023].

¹¹⁷ ¹³² The Supreme Administrative Court, in its judgment of 26 May 2022, III OSK 1189/21, found that "consideration of the transparency of social life and the proper functioning of the courts supports the recognition that the source code of the SLPS constitutes public information within the meaning of Article 1(1) of the Act of 6 September 2001 on access to public information (consolidated text, Journal of Laws of 2016, Item 1764). "The rules for assigning cases to judges, assessors and court registrars are currently governed by Article 47a of the Act on the System of Common Courts, consolidated text, Journal of Laws of 2023, Item 217, and Section 1 of the Rules of Procedure of Common Courts ("Rules of case assignment"), consolidated text, Journal of Laws of 2022, Item 2514."

working during the holiday period.¹¹⁸ Problems are also caused by the need to maintain the same composition in appeal cases and the system of drawing jurors to decide divorce cases.¹¹⁹

(3) *Overburdening of judges and staff shortages.*

Throughout the operation of family courts, judges have numerous non-judicial duties. It is noted that the family judge does not only adjudicate at hearings. Indeed, he/she also hears cases assessed as “urgent,” applications for security. He/she also conducts enforcement and guardianship proceedings.

The family and juvenile departments are on duty for juvenile cases, for cases under the Act on Counteracting Domestic Violence, under the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland and also under the “medical” laws.

Judges inspect psychiatric hospitals, Juvenile Detention Centres, Correctional Institutions, Youth Hostels, Police Children’s Chambers, and Social Care Homes.

Despite such heavy workloads, staff shortages are observed in the family and juvenile departments, which concern judicial, assistant and registrar posts.¹²⁰ A separate (present since the 1980s) problem is insufficient staffing and fluidity in the secretariats of the family and juvenile departments.¹²¹

(4) *Poor quality of legislation.*

The work of family judges and its effectiveness is negatively affected by the quality of legislation, which is often assessed as poor. Many problems do not have clear normative solutions. Judges indicate that their opinions and demands are not (at all or sufficiently) taken into

¹¹⁸ This results, for example, in “one judge, based on the «Opm» or «Nw» file, initiating *ex officio* a case Nsm or Nkd, another judge referee appointed as a result of the draw of lots conducts the case and will only become familiar with the material collected in the guardianship or enforcement file,” See: E. Ważny, *Organizacja sądownictwa rodzinnego – bariery i problemy* (Appendix to the panel report from the Congress on Parental Rights – address as above).

¹¹⁹ As pointed out by E. Ważny in the referenced study prepared for the Congress on Family Rights, the same juror is assigned to different judges, which complicates the scheduling of hearings, may cause the limits of juror participation in cases, increases the costs of juror participation in hearings, and in the case of clashes of dates or fortuitous events concerning the juror e.g., his/her illness, a further date or postponement of the hearing occurs. Jurors, especially when they are working persons, resign from this function.

¹²⁰ E. Ważny, in a referenced 2018 study, reported that there has been a halt in competitions for judicial positions, an exodus of judges from the profession, the removal of judges of retirement age from adjudication, the posting of judges to the Ministry of Justice and to regional or appellate courts without directing others to replace them.

¹²¹ E. Ważny, op. cit., stated that experienced secretaries leave, newly recruited staff require training and support, and mistakes are often made. As a consequence, orders are executed with considerable delays. Secretarial staff also have burdensome duties regarding statistics and responding to administrative supervision letters. Difficult working conditions and unsatisfactory salaries have resulted in strikes by court secretariat employees e.g., in 2018 (mass use of sick leave taking the form of a labour protest). See: P. Szymaniak, M. Kryszkiewicz, *Resortowe remedium na strajk w sądach: Zastępstwo na śmieciówce* (text posted on 12 December 2018), available at: <https://prawo.gazetaprawna.pl/artykuly/1386856,zastepstwo-na-smieciowce-w-sadach-strajk.html> [accessed on: 28.12.2023].

account. The imposition of new duties is not preceded by adequate information, training or organisational changes.¹²²

5.2. Family Judges

5.2.1. Preparation to Be a Family Judge

During the period of operation of the family courts (from 1 January 1978 to the present day), the norms concerning the candidate's path to becoming a judge have been changing. They apply to all judges, regardless of which department of the court they sit in. Consequently, they pay no attention to the specific qualifications that the theoretical model of family judiciary ascribes to the family judge.

It seems pointless to discuss the changes in detail. It is only necessary to mention that judges who ruled in family and juvenile departments after their nationwide establishment in 1978 were prepared to practise their profession, usually in the form of judicial apprenticeship, most often on a full-time basis, within a specific voivodship court, combining theoretical training organised by that court with work under the supervision of a patron judge in various court departments (district and voivodship). They observed the activities undertaken by the judge, the activities of the court secretariats, the auxiliary bodies, and performed the activities assigned to them (e.g., preparing minutes of the court sessions, drafts of some judgements as well as their justifications. They learned about the work of judges, court secretariats, and organizational units of the court from behind the scenes. The period of the apprenticeship (which also changed but was never shorter than 2 years) ended with the judicial examination. The training was the next stage of the work preparing to become a judge. At that time, the State Council appointed common court judges at the request of the Minister of Justice, pursuant to Article 53 of the amended u.s.p. 1928.¹²³

In the first period of the family courts, judges had the opportunity to complete specialised postgraduate studies, organised for them, in non-legal sciences useful for adjudication in the family and juvenile department. In practice, not all family judges completed the relevant postgraduate studies when there was such a possibility (at least in theory). For several decades, however, there has been no such possibility, guaranteed by the organisational measures of the Ministry of Justice.

On 1 September 1985, the Act of 20 June 1985 – Law on the Common Courts System – entered into force, regulating the appointment of judges (Chapter 2). The application of the

¹²² As Judge Ewa Ważny (op. cit.) concluded: “the lack of calm and substantive consultation with the affected communities, the lack of prior organisational preparation regarding these changes and training.” For examples of critically assessed legislation, see: E. Ważny, *Sędzia rodzinny – prawnik, praktyk, człowiek*, “Dziecko Krzywdzone. Teoria, Badania, Praktyka” 2020, Vol. 19, Issue 3, p. 132.

¹²³ Consolidated text, Journal of Laws of 1964, No. 6, Item 40.

Minister of Justice for appointment to the position of judge had to contain information on the content of the opinion of the competent college of the voivodship court.

Following the political changes, the Act of 29 December 1989 on the National Council of the Judiciary (EN – NCJ, PL – KRS) came into force.¹²⁴ The competences of the National Council of the Judiciary included consideration of candidates for judicial posts and presentation of proposals for appointment to the office of judge to the President.

Chapter VIII of the 1997 Constitution of the Republic of Poland describes the position, tasks, composition and term of office of the NCJ and its role in the process leading to the nomination for the position of a judge. The relevant laws have been enacted and amended several times.¹²⁵ The currently effective legislation is the repeatedly amended Act of 12 May 2011.¹²⁶

After various changes, “getting to” the judicial profession has been more difficult. Since 2017, the judge’s apprenticeship has been conducted only by the National School of Judiciary and Public Prosecution in Kraków.¹²⁷ Its commencement can occur after successfully passing a two-stage, paid, difficult exam.

Currently, the candidate for judge is selected through a competition, which can be entered by lawyers (assistant judges, registrars, prosecutors, lawyers, legal advisers, notaries, legal academics with a certain length of service).

There are no norms devoted to the qualifications of judges ruling in the family and juvenile departments and their professional training, although specialised, non-legal knowledge was considered an important element of a family judge’s qualifications when the concept of family judiciary had been formulated.

¹²⁴ The Act of 20 December 1989 on the National Council of the Judiciary, Journal of Laws of 1989, No. 73, Item 435.

¹²⁵ Enacted before the entry into force of the 1997 Constitution of the Republic of Poland and amended several times, the Act on the NCJ of 1989 was repealed by the Act of 27 July 2001 on the NCJ, in force since 1 October 2001, consolidated text, Journal of Laws of 2010, No. 11, Item 67. This Act was in force until 18 July 2011, when the Act of 12 May 2011 on the NCJ, currently in force (with amendments), entered into force, consolidated text, Journal of Laws of 2021, Item 269.

¹²⁶ Journal of Laws of 2011, No. 126, Item 714; consolidated text, Journal of Laws of 2021, Item 269, as amended; Journal of Laws of 2023, Item 1615. On 20 December 2023, the Sejm of the Republic of Poland of the 10th term adopted a resolution on removing the consequences of the constitutional crisis in the context of the constitutional position and functions of the National Council of the Judiciary in a democratic state of law, available at: <https://www.sejm.gov.pl/media10.nsf/files/TNON-CYQR9K/%24File/Uchwa%C5%82a%20Sejmu%20ows.%20Krajowej%20Rady%20S%C4%85downictwa.jpg> [accessed on: 29.12.2023]. On the same day, the Presidium of the NCJ referred to this resolution by adopting its own resolution. <https://krs.pl/pl/aktualnosci/2331-uchwala-prezydium-krajowej-rady-sadownictwa-z-dnia-20-grudnia-2023-r.html> [accessed on: 29.12.2023].

¹²⁷ By the Act of 23 January 2009 on the National School of Judiciary and Public Prosecution, Journal of Laws of 2009, No. 26, Item 157; consolidated text, Journal of Laws of 2022, Item 217; the National School of Judiciary and Public Prosecution was established to educate and improve the personnel of common courts and public prosecutors. The Minister of Justice supervises the School in terms of its compliance with statutory provisions and the Statute. The National School replaced the National Centre for the Training of Personnel of Common Courts and the Public Prosecutor’s Office, operating pursuant to the Act of 1 July 2005, Journal of Laws of 2005, Item 1410, as amended.

Experienced family judges surveyed in 2012 found expertise in general psychology, child psychology, interpersonal communication, pedagogy, ethics, sociology and sexology to be most useful in their work.

Other statements made by judges and questions sent to specialists before the family judges' conferences show that numerous doubts are raised regarding the specialised, extra-legal issues of the so-called medical acts, the issue of mental health protection, addictions and how to recognise the symptoms of addiction.¹²⁸

As Ewa Ważny, a long-time family judge and visiting judge, Vice President of the Association of Family Judges in Poland, assessed in a 2020 study regarding judges about to start adjudicating in the family and juvenile departments:

These persons, after receiving their nomination from the President of the Republic of Poland, are thrown into »the deep jurisprudential water« without any practice. A significant proportion of newly appointed judges, thanks to a lot of hard work and self-discipline, find themselves in their new role. However, there are occasions when a new judge is not able to manage the docket organisationally, is short of patience in the courtroom, or has trouble making a ruling and concluding a case. Perhaps a return to the judicial apprenticeship, which combines study with practice in court, would be a much better source for the appointment of future judges, and in addition, the period of the apprenticeship would allow the verification of a person's suitability for the profession.¹²⁹

5.2.2. Professional Standing, Self-Evaluation and Organisation of the Family Judges' Community

5.2.2.1. Selection of Family Judges

The outlined expectations of family judges, formulated in the second half of the 1970s, were very high regarding their professional qualifications and non-judicial tasks. Even at the stage of organising experimental family courts, the majority of the judges who participated in the IBPS survey (58.8%) did not apply to adjudicate in such a court.¹³⁰

The same was also true later on. A survey of judges adjudicating in the family and juvenile departments conducted by Magdalena Arczewska in 2007 and 2012 showed that most were not influenced by their referral to adjudicate in the family court (it was not their choice). However, as many as 80.5% of the respondents in 2012 estimated that, knowing the reality

¹²⁸ M. Arczewska, *Spółeczne role sędziów rodzinnych*, Warszawa 2009, pp. 175–176; H. Ciepla, B. Janiszewska, *Odpowiedzi na pytania przesłane przez Sędziów Rodzinnych na II Ogólnopolską Konferencję "Rodzina a prawo i Sąd Rodzinny"*, "Rodzina i Prawo" 2015, Issues 34–35.

¹²⁹ E. Ważny, *Sędzia rodzinny – prawnik, praktyk, człowiek*, "Dziecko Krzywdzone. Teoria, Badania, Praktyka" 2020, Vol. 19, Issue 3, p. 131.

¹³⁰ Of those with adjudicatory experience in an experimental family court, 26.5% did not want to remain in such a department. However, they assessed the very idea of family judiciary positively. The reasons for reluctance to remain in the family and juvenile department were varied: other legal interests, too much work, and also the lack of friendliness from the management and the judicial environment, as well as from other lawyers. (J.R. Kubiak, *Sądy rodzinne w Polsce: od eksperymentu do oryginalnego rozwiązania*, "Zeszyty Naukowe Instytutu Badania Prawa Sądowego" 1977, Issue 7, pp. 212–213).

of the work of a family judge in practice and having the opportunity to freely “choose their profession and plan their career path,” they would fully consciously choose to adjudicate in the family court.¹³¹ This result confirmed Magdalena Arczewska’s thesis that:

although the profession of family judge is a vocation, judges practising this profession end up in the family departments by chance, and a sense of ‘mission’ or ‘vocation’ is formed in them over time.¹³²

The finding quoted above that judges adjudicating in family and juvenile departments have developed a sense of “mission” may suggest a possible hypothesis that the lack of interest in adjudicating cases within these departments may stem from a limited understanding of the issues these cases present and the social significance of the proper work of the department at the adjudicatory and non-judicatory level. However, the judges interview reported that gaining such knowledge while performing their duties positively influenced their attitudes toward these cases. Insofar as this hypothesis is valid, it supports the idea of specialised preparation of candidates for adjudication in the family court.

5.2.2.2. Self-Organisation of the Family Judges’ Community

Most judges from the establishment of the family courts on 1 January 1978 to the present day have not chosen to adjudicate in these matters themselves. One of the reasons for the reluctance to take up the function of family judge was the emotional reception by family judges of the assessments formulated in the legal community. Already in a study of judges from the experimental period of the operation of family courts, Jacek R. Kubiak noted the statement of one of the interviewees that other lawyers, “laugh at «pedagogue judges».”¹³³

Judges surveyed in 2007 estimated that in the opinion of the public “a judge, regardless of the department in which he/she works, commands respect and enjoys prestige”, although this attitude is changing (deteriorating) as a result of “the image of the judge created by the media [and] statements made by politicians about specific court cases, which consequently leads to their politicisation.”¹³⁴

¹³¹ M. Arczewska, *Sędziowie rodinni o sobie – wyniki badania 2012*, “Rodzina i Prawo” 2013, Issue 24, p. 9.

¹³² Ibidem.

¹³³ J.R. Kubiak, *Sądy rodzinne w Polsce: od eksperymentu do oryginalnego rozwiązania*, “Zeszyty Naukowe Instytutu Badania Prawa Sądowego” 1977, Issue 7, pp. 212–213.

¹³⁴ M. Arczewska, *Spółeczne role sędziów rodzinnych*, Warszawa 2009, p. 180–181. Assessed, in line with the quoted position of family judges (K. Daniel, *Kryzys społecznego zaufania do sądów*, “Studia Socjologiczne” 2007, Issue 2(185), p. 79), that: “the role of the media in shaping public opinion, including about the judiciary, is beyond doubt. In the vast majority of cases, what ordinary people know about the courts and how they judge them is shaped by television, radio, press and, perhaps increasingly, the Internet. The media also play a key role in broadcasting the opinions expressed by politicians.” In connection with the quoted position, it is worth mentioning the position of the judicial profession in the light of the hierarchy of respectability of professions. A 2019 survey by the Centre for Public Opinion Research (CBOS, *Which professions do we respect?*, Research Communiqué No. 157/2019, Warszawa 2019, p. 3, Figure 1 entitled: “Hierarchy of professions according to

At the same time, the family judges surveyed noted that they are “a closed professional group that tends to isolate itself.”¹³⁵ They expressed the belief that in the legal community (including judges) they encounter the opinion that: “neither a good legal background nor extensive knowledge is necessary to work in family courts.”¹³⁶ As Magdalena Arczewska assessed the statements of the surveyed judges:

the respondents agreed that they were considered a »side track« of the judicial system and that they did not enjoy the recognition of other judges (...) The respondents stressed that there is an opinion circulating in the community that in the family courts only cases that are simple in terms of their merits are dealt with and that there is much less work than in other departments.¹³⁷

The research above did not verify to what extent this conviction of family judges as to how they were perceived in the legal, mainly judicial, community was justified. Arguably, however, it impacted the search for a space for “sharing experiences and discussing problems.”¹³⁸

Before the Second World War, such a “space” was provided by the International Association of Juvenile Judges co-founded in 1938 by, among others, Polish judges.

The Association’s activities in Poland were reactivated in 1987 (in 2013, the name of the Association was changed to Association of Family Judges).¹³⁹ “The financial base” for the Association is the Veillard-Cybulski Foundation,¹⁴⁰ established on 30 December 1988 by Henryka Veillard-Cybulska.

According to the Association’s website, it has 248 members, affiliated to 16 chapters across Poland. It cooperates with similar European organisations and the Geneva-based International Association of Youth and Family Judges.

The objectives of the Association of Family Judges in Poland are set out in § 7 of the statute of 23 March 2019.¹⁴¹ It indicates e.g., strengthening the independence and autonomy of family judges and concern for their authority (point 1), improving the knowledge and professional qualifications of judges and persons cooperating with the family judiciary (point 3), representing the professional and social interests of the judiciary (point 7), integrating the family judiciary (point 10).

social esteem”) showed that 58% of respondents held the profession of judge in high esteem, 28% in medium esteem, 10% in low esteem (4% had no opinion). After standardising the average assessments of the prestige of professions (referenced CBOS Communiqué, p. 8, Table 3) and assuming that the prestige of very high is 100%, high is 75%, medium is 50%, low is 25% and very low is 0, the assessment of the prestige of the judicial profession in subsequent surveys was as follows: 1995 – 71%, 1996 – 69%, 1999 – 70%, 2008 – 69%, 2013 – 67%, 2019 – 66%. The surveys did not consider in which court the judge rules, or in which issues he/she specialises.

¹³⁵ M. Arczewska, *Społeczne role sędziów rodzinnych*, Warszawa 2009, p. 172

¹³⁶ Ibidem, p. 180.

¹³⁷ Ibidem.

¹³⁸ Ibidem, p. 171.

¹³⁹ Association of Family Judges in Poland. History, available at: <https://www.sssrwp.pl/onas.php?typ=hi> [accessed on: 28.12.2023].

¹⁴⁰ Statute of the Veillard Cybulski Foundation, available at: <https://www.sssrwp.pl/onas.php?typ=sf> [accessed on: 28.12.2023].

¹⁴¹ <https://www.sssrwp.pl/onas.php?typ=ss> [accessed on: 28.12.2023].

Among the means set out in §8 of the Statute to achieve the Association's continuing professional development objectives are listed, *inter alia*, the conduct of training activities (point 2), the organisation of meetings, scientific conferences, exhibitions and lectures (point 3), cooperation with other associations of a similar profile at home and abroad (point 4).

The Association organises Congresses every year, the programmes of which include lectures on current topics. It co-organises and/or informs about various training courses and postgraduate studies (usually paid). For example, in the academic year 2023/2024, the 8th edition of the postgraduate course "*Family Law with Elements of Psychology*,"¹⁴² organised by the Department of Law and Administration of the University of Łódź and comprising 165 teaching hours divided into 11 sessions conducted online, is underway.

In the community of family judges, the "Pro Familia" Family Judges Association, based in Kraków, also commenced its activities in 2013, defining the main direction of its activity as "*striving to improve the conditions of judicial work*" by "*carrying out training and giving opinions on legislative projects*." The objectives and methods of activity of the "Pro Familia" Association set out in its statute¹⁴³ are very similar to the objectives of the Association of Family Judges in Poland signalled above. This association pursued them, *inter alia*, through cooperation with the periodical "Rodzina i Prawo" (family judges' quarterly publication) published by the company "DNA Research Institute."¹⁴⁴ It also organised training courses and congresses.¹⁴⁵ Currently, there is no information about the activity of this association.

6. Concluding Remarks

The idea of family judiciary and the history of its implementation in Poland (from the juvenile court to the family court) indicates that **the most important task of the family court is to act appropriately, in a timely manner, as a reaction to manifestations of dysfunctional phenomena in families with minor children, threatening their welfare, and to dysfunctional behaviours among juveniles**, manifestations of their demoralisation and commission of criminal acts, as well as to counteract demoralisation and juvenile criminality.

There is no doubt that a large number of factors contribute to dysfunction in families. They can be found out by the court when dealing with cases of various subjects (for example divorce, alimony, management of spouses' and children's property, medical treatment, criminality of family members, etc.). However, the subject-matter jurisdiction of the family court should

¹⁴² <https://www.ssrwp.pl/aktualnosci.php?art=411&start=0&ierek=395> [accessed on: 28.12.2023].

¹⁴³ <http://sedziowierodzinni.pl/o-nas/statut/> [accessed on: 28.12.2023].

¹⁴⁴ The quarterly was published between 2006 and 2017.

¹⁴⁵ The latest information posted on the website of the Pro Familia Family Judges' Association (under the "News" tab) refers to the VI Training Congress planned for 15-19 September 2019 in Zakopane entitled: "The role of the family court in light of changes in the law."

be established in such a way that the judges can focus their attention on the most relevant tasks indicated above.

Throughout the operation of the family courts since 1 January 1978, they have been entrusted with an excessive scope of jurisdiction (in relation to the number of staff and the resources necessary to fulfil their tasks), with a tendency to constantly expand it. The only serious limitation of this jurisdiction – the transfer in 1991 of the examination of divorce cases, also of marriages with minor children – to the civil departments of the voivodship/regional courts, violated the idea of family judiciary. Despite criticism of this solution, and even the admission by the Minister of Justice during the work on the parliamentary bill on amendments to the divorce law brought on 28th September 1994 to the Sejm of the second term (parliamentary paper no 800) that the transfer of divorce cases to voivodship courts was a mistake, this mistake has not been rectified.

One of the important factors in achieving the social tasks set for the family courts is the uniformity of jurisprudence and the consistency of the adjudication policy. These can be achieved through an instance-based control exercised at the best possible substantive level. This argues in favour of **at least a two-instance family judiciary**. A family court of second instance, where the most experienced family judges would adjudicate, could ensure this. Establishing second-instance family courts would also “retain” the best judges in the family judiciary through the possibility of career advancement not linked to a change of specialisation.

One of the factors for the proper implementation of the concept of family judiciary is the very good preparation of staff for the family courts. This was highlighted during the preparation of the family judiciary but has never been consistently implemented so far. Therefore, this is one area of desirable change.

Research on the social roles of family judges has uncovered a peculiar phenomenon of these judges developing a sense of “mission,” discovering a “vocation” to perform their functions.

A significant proportion of judges belong to associations of family judges who care about the cohesion of the community and its professional development. It can be assumed that, despite the marginalisation of this group, the closed path of professional promotion for the majority of family judges, as well as the “lack of respect in the general judicial system” perceived by this group of judges, there is a significant number of family judges ready to improve their qualifications, convinced of the social value of their own work despite its extremely high “own costs” due to the ‘emotional overload’ associated with the subject of their work. This leads to the hypothesis that there are human resources in this professional group that could be better used for the implementation of the principle of the protection of the family and the well-being of the child if they were provided with good work organisation, continuous professional development, protection against “burn-out” and the setting of tasks adequate to their abilities.

II. Assumptions for the Reform of Family Judiciary in Poland

The presented tendencies regarding the functioning of family judiciary in Poland, consisting in stopping the development of this idea and even in withdrawing from it, cause *de lege ferenda* postulates to be made, intended to come back to the original assumptions of the family judiciary system. These demands are expressed in particular by the community of family judges, represented by associations operating in Poland: Pro Familia Family Judges' Association and the Association of Family Judges in Poland. The congresses of these associations, which are held annually, are an opportunity to formulate resolutions defining the desired direction of legal changes concerning the organisation and functioning of the family judiciary. In recent years, in some cases repeatedly, the following demands have been formulated (they have been collected and organised based on the resolutions summarising the annual congresses of the Association of Family Judges in Poland of 18 September 2013, 25 September 2014, 10 September 2015, 22 September 2016 and 20 September 2017):

1. establishing specialised family departments and judges at all levels of the general judiciary;
2. organising postgraduate training for judges in psychiatry and for doctors in child and adolescent forensic psychiatry;
3. assessing the efficiency of the adjudication of family cases based on the duration of the proceedings, taking into account its specificity, considering the conduct of cases in executive proceedings when assessing the performance of family judges;
4. developing new rules for the horizontal promotion of meritorious family judges, maintaining the procedures for assessing the qualifications of judges in connection with their official promotion;
5. not eliminating judicial posts in the family judiciary;
6. opposing the tendency to formalise family law, to limit the competence of the family judiciary, and to impose restrictions on the free and independent adjudication of family cases;
7. extending and strengthening the ongoing cooperation of institutions and organisations involved in assisting, supporting and protecting the family and child with the family judiciary;

8. clearly defining the duties and competences of bodies and institutions cooperating with the family judiciary, in particular court guardians when enforcing court decisions, and extending and strengthening ongoing cooperation in this respect;
9. amending the provisions on the creation, functioning and selection of the staff of the Specialist Court Opinions Teams to provide family courts with an efficient and substantive diagnosis for the purpose of ongoing proceedings;
10. introducing in the Code of Civil Procedure a separate section containing provisions on enforcement proceedings in guardianship cases;
11. bring about the enactment of a new, comprehensive juvenile law, adapted to the current realities of social life and European standards;
12. amending the rules on contact with the child procedures, to improve their efficiency;
13. simplifying alimony procedures;
14. amending the rules on protective proceedings in family matters, given the specific nature and characteristics of these cases, to improve proceedings at this stage and prevent protraction;
15. establishing an effective central system for the referral of juveniles to psychiatric hospitals or other appropriate treatment facilities;
16. amending the Act on Upbringing in Sobriety and Counteracting Alcoholism, for the adjudication by family courts of the obligation to undergo drug treatment;
17. statutory regulation of the obligation of sobriety and the consequences of failure to remain sober by women during pregnancy;
18. placing an obligation on social welfare centres to effectively identify candidates for guardians and curators for incapacitated persons;
19. introducing separate procedural rules for cases conducted under the so-called medical laws;
20. developing the idea of mediation in family and juvenile matters at the pre-court and court stages;
21. retaining the Family and Guardianship Code as a separate codification.

The listed postulates are, at the same time, a diagnosis of the functioning of the family judiciary in Poland. However, they belong to different categories – concern systemic issues, are related to specific adjudicatory problems requiring the legislator's intervention, and also refer to the policy pursued by the Ministry of Justice regarding the organisation of the general judiciary. Although all these aspects ultimately affect the level of adjudication in family cases, from the point of view of the subject of this study, i.e. defining the basic assumptions of the family judiciary reform, attention should be paid primarily to issues of a systemic nature, bearing in mind that even an organisationally perfectly structured family judiciary may prove ineffective in the absence of appropriate procedural regulations

or an inadequate personnel policy. The systemic issues are mainly related to the postulates listed in the first nine points.

Bearing in mind the above-mentioned threats to the system of judicial protection of family rights, the original assumptions of the family judiciary system, its evolution to date and the demands of the family judiciary community, the following areas for desirable systemic changes should be identified.

A fundamental objective of the reform should be the organisational separation of the family judiciary. At present, it should be recognised that it would not be appropriate to create a division of such judiciary of a special nature (as in the case of military courts). Such a solution is opposed by significant problems of an organisational (primarily staffing) as well as substantive nature – some of the cases heard by guardianship courts are closely related to civil law issues, both in property and personal civil law. On the other hand, it is most appropriate to adjudicate family matters exclusively in the family and juvenile departments established for this purpose. They should be established in both instances, i.e. in district and regional courts. Only by structuring the family judiciary in this way would it be possible to realise the purpose of its establishment, i.e. to achieve an appropriate level of professionalism of the judiciary in the areas of competence necessary for the adjudication of family cases (e.g., psychology, pedagogy, re-socialisation). Hearing family cases in both instances by family departments would be beneficial from the point of view of instance control. A solution in which the instance control of specialised family courts is currently usually exercised by civil courts should be assessed as inconsistent and non-functional. In both instances, the creation of family departments would also create real opportunities for the promotion of family judges sitting in the district courts, who could make full use of their acquired competencies in their careers.

With the proposed changes, the elimination of the recognition of appeals in family cases by the courts of appeal should correspond. Due to their systemic location, these courts cannot be fully functional (i.e., in permanent cooperation with auxiliary bodies of the family court (guardians, opinion teams of court specialists) to adjudicate on family matters. The establishment of family and juvenile departments at the level of district and regional courts should, therefore, be accompanied by the submission of all family cases to the jurisdiction of the district court, as the court of first instance.

The transfer of divorce and separation cases to these courts represents a major organisational challenge and could therefore be carried out over a longer period of time, requiring an adaptation of the organisational and staff resources of the common courts. However, it is fully justified on the merits. The adjudication of these types of cases by regional courts does not provide significant benefits. It is not justified to claim that these courts guarantee a higher substantive level of assessment of family law issues e.g., by contributing to a reduction in the number of divorces. On the contrary, empirical studies conducted in the field

of judicial practice allow the claim to be made that when adjudicating family cases in the civil departments of regional courts, the contradictory principle, typical of civil proceedings, often plays an important role, to the detriment of the adjudication of issues such as the parental authority of divorcing parents.¹

The organisational separation of the family judiciary must be accompanied by mechanisms to ensure that judges adjudicating in family and juvenile cases are of an appropriate level of merit.

The obligation on judges to continuously improve their qualifications results from Article 82a of the Act of 27 July 2001 – Law on the System of Common Courts.² It is general in nature, relative to the regularity of training received, and applies to all judges. There is no regulation addressed to a specific profile of judicial activities performed.

Family judges' upgrading of qualifications depends, therefore, on their commitment and the educational offer presented to them, primarily by the National School of Judiciary and Public Prosecution, which organises the training (Article 2 and Article 15a et seq. of the Act of 23 January 2009 on the National School of Judiciary and Public Prosecution).³

During the design of the future family judiciary in Poland, proposals were made to establish a specific educational prerequisite for judges adjudicating in family cases. This would be a requirement to have a degree in psychology or pedagogy in addition to law. At present, such a demand seems to go too far. A family judge does not need to be qualified as an expert witness, but should have the ability to assess the evidence, which is of a particular nature in family cases, and have the necessary competences to conduct the evidence procedure and select the appropriate instruments for interfering with family rights (e.g., listening to the child, knowledge of social welfare institutions and the foster care system, the offer of non-governmental organisations).

It seems optimal to create a system of extended training dedicated to family judges, the completion of which would be a condition for adjudication in family and juvenile departments. They would cover, *inter alia*, selected issues concerning the methodology of work of a family judge, developmental and educational psychology, pedagogy, psychiatry, re-socialisation, the social welfare system and the foster care system. Consequently, the organisation and conduct of training should be entrusted to the National School of Judiciary and Public Prosecution, using an amendment to the Act on the National School of Judiciary and Public Prosecution. On the other hand, introducing mandatory training for judges requires an amendment to the Act on the system of common courts.

¹ See: M. Domański, *Powierzenie wykonywania władzy rodzicielskiej jednemu z rodziców w wyroku rozwodowym*, "Prawo w Działaniu" 2015, Issue 21.

² Consolidated text, Journal of Laws of 2023, Item 217.

³ Consolidated text, Journal of Laws of 2022, Item 217.

The specificity of the work in the family court, consisting in the constant involvement in solving problems affecting the family, which represents a significant psychological burden for the judge himself/herself, also requires a specific type of support. It should ensure that the professional standards of the work performed are maintained, that competencies are strengthened, that professional “burnout” is prevented, that skills are acquired to identify work difficulties and self-assessment, that communication skills are strengthened. Supervision can be carried out individually or in groups as an instrument for achieving these goals.

The experience of the Ministry of Family, Labour and Social Policy, where a programme of social work supervision has been implemented, should be recalled here. It has been provided for in Article 121a of the Act of 12 March 2004 on social assistance⁴ and in the implementing regulation issued pursuant to this provision.

The model of supervision envisaged in these normative acts, together with the definition of its objectives, may inspire the reform of the family judiciary. As in the case of the social welfare system, in the first stage, it is necessary to provide a cadre of supervisors in a number that guarantees the conduct of supervision in all family and juvenile departments in Poland. A system of professional qualification and training of supervisors should, therefore, be established. As in the case of the laws mentioned above, detailed measures in this regard can be standardised at the level of an executive regulation.

Creating the possibility for judges to undergo supervision requires an amendment to the Act on the System of Common Courts. It seems advisable to introduce obligatory supervision within the statutory period (e.g., once every three years). More frequent use of such support should be optional. At the same time, it should be underlined that supervision is not a form of top-down control of the judge’s work. Its conduct should therefore only be notified to the president of the court, without providing detailed information on the course of supervision.

As mentioned earlier, the systemic reform of the family judiciary should be accompanied by organisational measures of the Ministry of Justice in terms of personnel policy, workload assessment system, taking into account factors in the work of the family judge that are not present in other areas of common court jurisprudence (e.g., executive proceedings in guardianship cases).

The organisation of the work of the auxiliary bodies of the family court, i.e. the court guardians and the opinion teams of court specialists, is also of great importance. It is necessary to valorise – including financially – these professional groups and to provide them with optimal working conditions, focused on the fulfilment of the tasks entrusted to them and not on the fulfilment of duties of a bureaucratic nature. It should be strongly pointed out that the lack of efficient and competent auxiliary bodies of the family court prevents it from performing its functions.

⁴ Journal of Laws of 2018, Item 1508, as amended.

The directions for the reform of the general judiciary outlined above pose serious legislative and organisational challenges. In particular, it could prove difficult to introduce all the changes in a leap (one-off) manner. As already mentioned, in the previous century, during the period of introduction of legal solutions establishing the family judiciary system in Poland, the method of phased implementation of this idea was used, sometimes on an experimental basis. The latter method now seems unacceptable from the point of view of constitutional principles concerning the State of Law. On the other hand, it is possible to establish appropriate transitional periods allowing for evolutionary implementation of the changes. However, these difficulties should not stand as an obstacle – as has been the case so far – to a reform which, from the point of view of the protection of family rights and the need to counter the trends indicated above, is now necessary.

ANNEX: Draft Act Amending the Act – The Code of Civil Procedure, the Act on the System of Common Courts and the Act on the National School of Judiciary and Public Prosecution

ACT of amending the Act – the Code of Civil Procedure, the Act on the System of Common Courts and the Act on the National School of Judiciary and Public Prosecution

Article 1. The Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws of 2016, Item 1822, as amended) shall be amended as follows:

1) Article 17(1) shall read as follows:

“1) for non-property rights and jointly asserted property claims in addition to cases for divorce and separation, for establishing or denying the origin of a child, for establishing the ineffectiveness of an acknowledgement of paternity and for the dissolution of adoption.”

2) in Article 3982:

a) § 2(1) shall read as follows:

“1) for rent or lease and for infringement of possession;”

b) § 3 shall read as follows:

“§ 3. An appeal in cassation against a judgment declaring a marriage invalid or divorced or establishing the non-existence of a marriage shall be inadmissible if even one of the parties has entered into a new marriage after the judgment has become final.”

3) in Article 5191:

a) § 1 shall read as follows:

“§ 1. A cassation appeal to the Supreme Court may be lodged against the decision of the second instance court on the merits of the case and against the decision on the rejection of the application and discontinuance of the proceedings ending the proceedings in the case – in

personal, family, guardianship and custody, property and inheritance law cases – unless a special provision provides otherwise.”

b) § 2 and 21 are deleted;

c) § 22 shall read as follows:

“§ 22. A cassation appeal in cases of taking away a person subject to parental authority or under guardianship conducted based on the 1980 Hague Convention may be brought by the Prosecutor General, the Children’s Ombudsman or the Ombudsman within four months from the date on which the ruling becomes final.”

Article 2. The Act of 27 July 2001 – Law on the System of Common Courts (Journal of Laws of 2018, Item 23) shall be amended as follows:

1) Article 12(1) shall read as follows:

“1) civil – for civil law cases;”

2) in Article 16:

a) point 1 shall read as follows:

“1) civil – for civil law cases;”

b) after point 2, the following point 2a shall be added:

“2a) family and juvenile – for cases in the field of family and guardianship law, cases concerning demoralisation and criminal acts committed by juveniles, treatment of persons addicted to alcohol and to narcotic and psychotropic drugs, and cases belonging to the guardianship court under separate laws;”

3) in Article 22a the following § 3a and 3b shall be added after § 3:

“§ 3a. A judge may be assigned to the family and juvenile department of a district court who:

- 1) has a special personal predisposition to deal with family and juvenile matters;
- 2) has completed the Interdisciplinary Study for Judges Adjudicating in Family and Juvenile Departments conducted by the National School of Judiciary and Public Prosecution.

§ 3b. A judge may be assigned to the family and juvenile department of a regional court who:

- 1) meets the criteria set out in § 3a;
- 2) has adjudicated for at least four years in the family and juvenile department of a district court; this requirement does not apply to advocates, legal counsels and prosecutors with significant professional experience in family or juvenile matters, as well as to persons with the academic title of professor or a post-doctoral degree, with significant scientific achievements in family or juvenile law.”

3) in Article 82 the following § 5 and 6 shall be added after § 4:

“§ 6. A judge adjudicating in the family and juvenile department shall be obliged at least once every three years to undergo a supervision organized in the court where he/she adjudicates by the National School of Judiciary and Public Prosecution.

§ 7. A judge adjudicating in the family and juvenile department shall notify the court’s president of his/her willingness to undergo supervision, indicating whether it is obligatory pursuant to the preceding paragraph. The court’s president shall annually, by 30 June, provide the National School of Judiciary and Public Prosecution with information on the need for supervision.”

Article 3. The Act of 23 January 2009 on the National School of Judiciary and Public Prosecution (Journal of Laws of 2018, Item 624) shall be amended as follows:

1) in Article 2:

a) section 2(3) shall read as follows:

“3) developing programmes and organising training courses and other cyclical forms of in-service training, including conducting the Interdisciplinary Study for judges adjudicating in family and juvenile departments, hereinafter referred to as the «Study»;

b) after point 2, the following point 3a shall be added:

“3a. Organising supervision for judges adjudicating in the family and juvenile departments;”

2) the following Chapters 2b and 2c shall be added after Chapter 2a:

“Chapter 2b.

Interdisciplinary study for judges ruling in the family and juvenile departments.

Article 15d. 1. The Minister of Justice supervises the organisation of the Study.

2. The Minister of Justice commissions the National School to conduct the Study, specifying a limit for admission, taking into account the staffing needs of the courts. The Minister of Justice may determine admission limits separately for candidates adjudicating in the family and juvenile departments, judges adjudicating in other departments and assessors.

Article 15e. 1. The Director of the National School shall announce recruitment to the Study three months before its commencement.

2. Participants in the Study may be judges and court assessors.

3. Admission to the Study shall be determined by the order in which applications have been received.

Article 15f. 1. The Study lasts for 6 months and shall be conducted in an assembly mode and with the use of distance learning methods.

2. Classes within the study shall include, in particular, issues concerning:

- 1) methodology of work of a judge adjudicating in the family and juvenile department;
- 2) educational and developmental psychology of children;
- 3) forensic psychology, including techniques of listening to the child;

- 4) the methodology of drafting expert opinions in cases heard in the family and juvenile departments and the evaluation of these opinions by the court;
- 5) mediation and amicable settlement of disputes;
- 6) medicine including psychiatry and neurology;
- 7) social welfare systems, family support and foster care;
- 8) cooperation with auxiliary bodies of the court and other entities performing tasks in the field of family assistance.

3. A person who has completed the Study receives a certificate issued by the Director of the National School.

Article 15g. The Director of the National School shall issue regulations specifying, *inter alia*, the manner of organisation of the Study, detailed rules on recruitment to the Study, a detailed curriculum for the Study, and rules on the completion of individual subjects.

Article 15h. Expenses related to the conduct of the Training shall be covered by...

Chapter 2c. Supervision of judges ruling in the family and juvenile departments.

Article 15i. Supervision of judges ruling in the family and juvenile departments, hereinafter referred to as supervision, is aimed in particular at strengthening the professional competence of judges by seeking the sources of difficulties in their work and possibilities to overcome them, considering cognitive, emotional and ethical issues related to the judge's work and providing support in this respect.

Article 15j. Supervision shall take place in the department in which the judge rules.

Article 15k. 1. To conduct the supervision, the person conducting the supervision may inspect the files of cases heard by the judge.

2. The supervisor must keep confidential the information he/she obtained in connection with conducting the supervision.

3. The supervisor shall notify the court's president of the completion of the supervision.

Article 15l. The organisation of supervision by the National School consists in particular in:

- 1) selecting the persons conducting supervision;
- 2) defining standards for supervision and a detailed scope of activities to be undertaken by the supervisor;
- 3) provision of supervision according to the needs reported by the presidents of courts.

Article 15l. The standards for supervision and the detailed scope of activities to be undertaken by the supervisor shall be determined by the Director of the National School after obtaining the opinion of the Council of the National School.

Article 15m. Supervision may be conducted by a person:

- 1) having full legal capacity;
- 2) who is a Polish citizen, a citizen of another EU Member State, a member state of the European Free Trade Association (EFTA) – a party to the Agreement on the European Economic Area or the Swiss Confederation, or a citizen of another state, if based on provisions of the European Union law he/she has the right to take up employment or self-employment on the territory of the Republic of Poland on the terms stipulated in those provisions;
- 3) who is of good repute;
- 4) who has not been sentenced by a final sentence for an offence prosecuted by public indictment or a fiscal offence;

- 5) against whom proceedings for an offence prosecuted by public indictment or a fiscal offence are not pending;
- 6) whose health condition allows him/her to conduct supervision;
- 7) who has completed higher studies in psychology in the Republic of Poland and obtained a master's degree or completed foreign studies in psychology recognised in the Republic of Poland and who has at least 5 years of work experience in family counselling or with socially maladjusted youth or 5 years of clinical practice;
- 8) who assures professional performance of his/her duties and has knowledge concerning the functioning of family judiciary.

Article 15n. The expenses of conducting the supervision shall be paid from...

Article 4. 1. The obligation to complete the Study provided for in Article 22a § 3a of the Act of 27 July 2001 – Law on the System of Common Courts (Journal of Laws of 2018, Item 23) by added Article 2, shall not apply to judges who, on the day this Act enters into force, are already adjudicating in the family and juvenile department of the district court.

2. Judges ruling in the family and juvenile department of the district court who have not completed the Study may participate in it. Completion of the Study fulfils the obligation provided for in Article 82a § 3 of the Act of 27 July 2001 – Law on the System of Common Courts (Journal of Laws of 2018, Item 23) for a period of 3 years counted from the end of the year in which the training was completed.

3. Judges assigned to the family and juvenile department of the regional court are required to complete the Study within 3 years from the entry into force of Article 2.

Article 5. This Act shall enter into force on... except for Articles 1 and 2, which shall enter into force on...

Justification

I. Amendments to the Code of Civil Procedure.

1. Change of subject-matter jurisdiction in divorce and separation cases.

The draft proposes to amend Article 17(1) of the Code of Civil Procedure by generally excluding family law cases from the subject-matter jurisdiction of regional courts. Such a solution will first cover cases for divorce and separation, but also for marriage annulment, determination of non-existence of marriage or determination of non-existence of paternity as a result of non-existence of acknowledgment.

The subject-matter jurisdiction in family matters (particularly in divorce cases) was changed from district courts to voivodship courts (from 1 January 1999 to regional courts) by the Act of 13 July 1990, which entered into force on 1 January 1991. Consequently, in separation cases, since the introduction of this institution into the Polish legal system (by the Act of 21 May 1999 amending the Family and Guardianship Code, the Civil Code, the Code of Civil Procedure and certain other acts (Journal of Laws of 1999, No. 52, Item 532, which

entered into force on 15 June 1999)), regional courts had material jurisdiction. The indicated modification of jurisdiction from the very beginning aroused doubts and was criticised.⁵

Before 1 January 1991, divorce cases were heard in the family and juvenile departments, like other family cases. They represented one of the most important categories of cases heard by the family courts. As a result of the aforementioned legislative changes, they are heard by civil departments and have become one of the least important cases over which the regional court has material jurisdiction. These proceedings are most often conducted by judges hearing primarily in civil cases in which the guiding principles of the proceedings are dispositive and adversarial. These principles are far less important in divorce and separation cases than in general proceedings. To a large extent, it is necessary for the court to act *ex officio* e.g., when establishing the factual basis for the decision.⁶ Studies of court practice indicate that transferring solutions and practice from the scope of general civil proceedings to the ground of divorce proceedings is a source of significant jurisprudential problems, including serious deficiencies in establishing the factual basis of cases and related failure to establish fulfilment of substantive legal prerequisites.⁷

Cases of divorce and separation, as well as, for example, annulment of marriages, are family matters and their specific character, the way the court operates and the methodology of conducting proceedings definitely indicate that, in terms of their content, it is justified that they should be heard in family and juvenile departments. Judges adjudicating in these departments are not only specialised in the indicated issues, but they also have at their disposal support apparatus in the form of teams of court guardians operating in district courts. Direct day-to-day contact between the court and the court guardians definitely facilitates and is often even a necessary condition for the proper performance of the court's functions in these proceedings.

It should be recognised that the improvement of the quality of jurisprudence in family law cases, in particular on divorce and separation, which directly prejudices the implementation of the principles of special protection of the family and protection of the welfare of the child (which have the status of constitutional system principles – Article 18 of the Constitution of the Republic of Poland) should have a definite priority over possible organisational problems

⁵ See: B. Czech, [in:] *Czy potrzebna jest w Polsce zmiana prawa rodzinnego i opiekuńczego? Materiały z ogólnopolskiej konferencji naukowej zorganizowanej w dniach 21 i 22 września 1995 roku w Katowicach*, B. Czech (ed.), Katowice 1997, p. 14; W. Stojanowska, *Rozwód a ochrona rodziny i dziecka – wybrane zagadnienia*, "Rodzina i Prawo" 2008, Vol. 7–8, pp. 6 et seq.; T. Sokołowski, [in:] *System Prawa Prywatnego*. Vol. 11. *Prawo rodzinne i opiekuńcze*, T. Smoczyński (ed.), Warszawa 2014, p. 726.

⁶ See: P. Ryłski, *Działanie sądu z urzędu a podstawa faktyczna wyroku cywilnego*, Warszawa 2009, p. 265.

⁷ See: M. Domański, *Oddalenie powództwa o rozwód w sprawach, w których małżonkowie mieli wspólne małoletnie dzieci w świetle orzecznictwa sądów powszechnych*, "Prawo w Działaniu" 2013, Vol. 14, pp. 192 et seq.; M. Domański, *Orzekanie o pieczy naprzemiennej w wyrokach rozwodowych*, "Prawo w Działaniu" 2016, Vol. 25, p. 146. Furthermore, problems with the implementation of the guardianship function by divorce courts have been revealed (M. Domański, *Powierzenie wykonywania władzy rodzicielskiej jednemu z rodziców w wyroku rozwodowym*, "Prawo w Działaniu" 2015, Vol. 21, pp. 55 et seq.).

related to the implementation of the discussed proposal. It constitutes a correction of the mistake made by the Legislator in 1990.

Consequently, in addition to the modification of Article 17 of the Code of Civil Procedure, it is proposed to amend Article 576[1] of the Code of Civil Procedure, changing the subject-matter jurisdiction in cases of separation at the unanimous request of the spouses as well as for the annulment of the separation from regional to district courts.

2. Extension of admissibility of cassation appeal in family matters

The Act of 22 December 2004 (which entered into force on 21 January 2005) excluded the admissibility of cassation appeals in divorce and separation cases. Previously, by the Act of 24 May 2000 amending the Code of Civil Procedure (which entered into force on 1 July 2000), the scope of cassation exclusions was extended to alimony cases (since the reinstatement of the cassation system in 1996, cassation was not admissible only in alimony cases when it concerned the number of benefits).

The current solution is questionable. The changes introduced should be considered inconsistent. On the one hand, the legislator considered that divorce cases are so important that they should be heard in the first instance by experienced judges from regional courts and, on the other hand, that they are so insignificant that they do not even require the introduction of the possibility of their review by the Supreme Court.

However, practical considerations – the lack of legal issues that could raise doubts, which meant that the previously filed complaints were mostly based on challenging factual findings – were indicated as the reason for this solution.⁸ However, it should be noted that pursuant to Article 398[3] § 3 of the Code of Civil Procedure, cassation appeals cannot be based on allegations concerning the establishment of facts or the assessment of evidence. Moreover, Article 398[9] of the Code of Civil Procedure specifies the prerequisites for the Supreme Court to accept the case for examination. Thus, the existing solutions allow to “sift out” cases in which there are no significant legal issues as well as those in which the allegations concern only the establishment of facts (assessment of evidence). The assumption that a broad category of socially significant cases *en bloc* is excluded from the possibility of review by the Supreme Court seems unjustified, the more so as this is the only group of cases in which the regional court has subject matter jurisdiction and, at the same time, the possibility of filing a cassation appeal is excluded.

The exclusion of cassation appeals in alimony cases must be assessed similarly. It should be stressed that the jurisprudence of the Supreme Court, due to the construction of both divorce and alimony provisions – the extensive use of undefined phrases and general clauses – is extremely important for legal certainty and uniformity of jurisprudence.

⁸ See: T. Zembrzuski, *Skarga kasacyjna. Dostępność w postępowaniu cywilnym*, Warszawa 2011.

A similar solution, limiting the scope of the cassation appeal, was introduced in the area of cases heard under the non-procedural procedure by the Act of 24 May 2000 amending the Act – the Code of Civil Procedure, the Act on Registered Pledge and the Pledge Register, the Act on Court Fees in Civil Cases and the Act on Court Bailiffs and Enforcement (Journal of Laws of 2000, No. 48, Item 554). The amended Article 519[1] of the Code of Civil Procedure adopts the principle that in family law, guardianship and custody cases, cassation appeals are not allowed. The maintenance of an extremely broad exclusion in cases of considerable social and substantive gravity has been questioned in the doctrine⁹ It must be concluded that the existing restrictions are completely arbitrary in nature. It is difficult to justify why a cassation appeal is generally available in personal civil law or succession cases, but not in family law, guardianship or custody cases. As in the case of divorce and separation cases, the method of general exclusion must be questioned. This is all the more questionable as the Act of 26 January 2018 on the exercise of certain activities of the central authority in family matters in the field of legal circulation, adopted based on EU law and international agreements, which entered into force on 27 August 2018 (Journal of Laws of 2018, Item 416) introduced the possibility of a cassation appeal in cases of taking away a person under parental or guardianship authority conducted on the basis of the 1980 Hague Convention (providing, after all, for the legitimacy only of the Prosecutor General, Children's Ombudsman or Ombudsman). Such a solution arbitrarily introduces a different standard of protection of the same rights for subjects in very similar situations.

The proposed solution provides for amendment of Article 398[2] § 2 of the Code of Civil Procedure, defining the scope of cases in which the cassation appeal is inadmissible, by deleting in point 1 cases of divorce, separation and alimony. In connection with the proposed modification, § 3 should also be amended, which indicates the inadmissibility of a cassation appeal in cases related to a marriage when even one of the parties has entered into a new marriage after the judgment has become final. To avoid complications in the form of the possibility to conclude a bigamous marriage, this rule should also apply to divorce cases (similarly, Article 400 of the Code of Civil Procedure excludes the possibility to request the resumption of divorce proceedings in such circumstances).

The modifications of Article 519[1] of the Code of Civil Procedure provide for an amendment of § 1 by adding family law, personal law and guardianship cases to the catalogue of proceedings in which, in principle, a cassation appeal is available. The draft assumes the retention of the principle that in cases conducted based on the 1980 Hague Convention, only the Prosecutor General, the Children's Ombudsman and the Ombudsman have the right to lodge a cassation appeal. The specific nature of these cases and the need for their speedy resolution argues against allowing the legitimacy of the participants themselves. To prejudge

⁹ T. Zemburzuski, *op. cit.*

that in the indicated cases only the listed entities have legitimacy, it is proposed to underline such a solution by amending § 2[2]: “may lodge only...”

II. Creation of a two-instance family judiciary (amendments to Articles 12 and 16 of the Act on the System of Common Courts).

To meet the demands of both family law doctrine and the family judges community, it is proposed that both first and second instance family and juvenile cases as well as guardianship cases shall be heard by specialised judges ruling in the family and juvenile departments.

Maintaining the optionality of creating a departmental structure in the courts introduced by the Act of 20 July 2018 amending the Act – Law on the System of Common Courts and certain other Acts (Journal of Laws of 2018, Item 1443), which entered into force on 10 August 2018, it is proposed that family and guardianship law cases concerning demoralisation and criminal acts committed by juveniles, treatment of persons addicted to alcohol and narcotic and psychotropic drugs as well as cases belonging to the guardianship court should be compulsorily heard in the family and juvenile departments and not in the civil departments (proposed amendment to Article 12(1) of the u.s.p. defining the subject matter scope of cases that may be examined in civil departments).

At the same time, the solution contained in Article 20 of the APS remains, according to which the Minister of Justice, by way of a regulation, establishes, *inter alia* the scope of cases heard by the courts (point 1) and that he may transfer to one district court the hearing of cases concerning family and guardianship law, cases concerning demoralisation and criminal offences committed by juveniles, treatment of persons addicted to alcohol and narcotic and psychotropic drugs as well as cases belonging to the guardianship court based on separate acts, from the jurisdiction or a part of the jurisdiction of other district courts operating in the same judicial district, which means that the proposed rule is to recognise cases from the indicated scope in family and juvenile divisions and not obligatory operation of such divisions in each district court.

The project proposes to adopt a similar approach at regional court level. Firstly, it is proposed to establish family and juvenile departments to hear cases concerning family and guardianship law, cases concerning the treatment of persons addicted to alcohol and narcotic and psychotropic drugs, cases belonging to the guardianship court under separate acts as well as cases concerning demoralisation and criminal acts committed by juveniles (Article 16(2a) of the u.s.p.). Secondly, it is proposed to limit the scope of cases heard in the civil departments to civil law cases.

III. Extension of requirements for judges adjudicating in family and juvenile departments (amendments to the Act on the System of Common Courts and the Act on the National School of Judiciary and Public Prosecution)

The literature points out that one of the basic conditions for the effectiveness of family courts in implementing the special protection of the family and the protection of the welfare of the child is the specialisation of judges and the broadening of their qualifications also in non-legal areas (psychology, sociology, pedagogy, etc.).

The draft proposes to define a special category of judge assigned to the family and juvenile department. Two criteria will have to be met for a judge to be assigned to such a department in a district court. According to the first, he/she must have a special personal predisposition to deal with family and juvenile cases. The introduction of an evaluative and not fully specified requirement is necessary in this case. It is neither possible nor operationally precise to indicate the complex of qualities which a family judge must fulfil. However, the criterion is intended to indicate the need for the president of the court, when assigning a judge to the family and juvenile department, to take into account the specifics of adjudicating in such cases, the need to possess special predispositions and the “soft skills and competences” necessary for this work.

The second requirement is already of a specific nature. It is proposed to create a specialised study conducted by the National School of Judiciary and Public Prosecution (Interdisciplinary study for judges adjudicating in family and juvenile departments). Completion of this study would be a prerequisite for the assignment of a judge to the family and juvenile department. The requirement would not apply to judges who, on the date of entry into force of the Act, are already adjudicating in these departments (Article 4(1) of the draft).

Similar requirements are set out in Article 22a § 3b for the assignment of a judge to adjudicate in the family and juvenile department of the regional court. Firstly, the judge must meet the requirements for his/her assignment to adjudicate in the family and juvenile department of the district court. This implies both the need to take into account the “soft” criterion of personal predisposition to deal with family and juvenile cases and the need to have completed an interdisciplinary study. Thus, while the latter requirement will not apply to judges already adjudicating in the family and juvenile departments, it will be a condition for such a judge to work in the family and juvenile department of a regional court. However, the introductory provisions (Article 4(1) of the draft) indicate that judges assigned to the family and juvenile departments of the regional court would have three years from the entry into force of the Act to complete the indicated study.

In addition, a judge who has ruled for at least four years in the family and juvenile department of a district court will be able to be assigned to such a department. This requirement will not apply to advocates, legal advisers and prosecutors. However, they must have significant professional experience in family or juvenile matters. However, they must have significant professional experience in family or juvenile matters. A similar solution has been provided for persons holding the academic title of professor or a post-doctoral degree in legal sciences

who, in order to be assigned to the family and juvenile department of the regional court, must have significant work experience in family or juvenile law.

The creation of a study programme for judges adjudicating in family and juvenile departments necessitates amendments to the Act on the National School of Judiciary and Public Prosecution. After Chapter 2a, it is proposed to add a new Chapter 2b entitled “Interdisciplinary study for judges ruling in the family and juvenile departments.” Participants in this study could be judges and court assessors (those adjudicating in the family and juvenile departments as well as other departments or those planning to adjudicate in the family and juvenile department).

Pursuant to the proposed Article 15d of the Act on the National School of Judiciary and Public Prosecution, the Minister of Justice shall supervise the organisation of the study and commission the National School of Judiciary and Public Prosecution to conduct the study. The Minister will also determine the enrolment limit, taking into account the staffing needs of the courts. The possibility of setting separate enrolment quotas for candidates adjudicating in family courts and judges adjudicating in other departments, as well as assessors, is intended to allow the implementation of an optimal staffing policy in the courts and prevent a situation in which one of the groups targeted by the study completely dominates enrolment in the study. Such a concern could be real, since pursuant to Article 15d(3), admission to the study is decided on a first-come, first-served basis.

The planned Studies shall be conducted in the session mode, and the entire cycle shall last 6 months. A detailed programme (as well as the principles of passing the subjects, method of organisation and detailed rules of recruitment) will be specified by the Director of the National School of Judiciary and Public Prosecution in the regulations issued (Article 15g).

In the course of the Study, students should become acquainted with both the methodology of a judge’s work in such a department and: elements of psychology (educational and developmental of a child, court psychology, techniques of listening to a child), methodology of preparing opinions by experts in cases recognised in family and juvenile departments, mediation and other methods of amicable dispute resolution or basics of medicine (in particular psychiatry and neurology). Moreover, in the course of the programme, students should acquire knowledge concerning the organisation and functioning of the social welfare system, family support and foster care, as well as the principles of cooperation with auxiliary organs of the court and other entities performing tasks in the field of family support. The catalogue of issues discussed in the course of the Study is open, and the Director of the National School may expand it in the separate regulations.

A judge or assessor who has completed the Study will receive a certificate issued by the Director of the National School of Judiciary and Public Prosecution (Article 15f) confirming that he/she has fulfilled the requirement necessary to be assigned to the family and juvenile department. Completion of the Study by a judge already adjudicating in the family and

juvenile department satisfies the training obligation (set out in Article 82a § 3 of the Act on the System of Common Courts) for a period of three years counted from the end of the year in which he/she completed the Study.

IV. Supervision for judges adjudicating in family and juvenile departments (amendments to the Act on the System of Common Courts and the National School of Judiciary and Public Prosecution).

The specificity of the work of a judge adjudicating in the family and juvenile department, the strong psychological load, the daily confrontation with extremely difficult and painful situations, make it necessary to develop support mechanisms and instruments allowing to develop the interpersonal skills of judges, the methodology of dealing with the parties involved in the proceedings, as well as allowing to solve problems arising independently. These objectives shall be served by supervision intended for judges adjudicating in family and juvenile departments. It is proposed to entrust its organisation to the National School of Judiciary and Public Prosecution. The School's activities would consist in the selection of persons conducting supervision, the definition of its standards and a detailed scope of activities to be performed by the persons conducting it, as well as the provision of supervision itself, according to the needs of courts (Article 15l of the Act on the National School of Judiciary and Public Prosecution). Detailed standards and the scope of activities performed by persons conducting supervision would be determined by the Director of the National School of Judiciary and Public Prosecution (after the Council's opinion).

It is important to underline the assumption that supervision is not intended to verify or assess the merits of procedural decisions made by judges. For this reason, supervisors need (in addition to the requirements of full legal capacity, good repute, no conviction for an offence prosecuted by public indictment or for a fiscal offence, etc. – Article 15m of the Act on the National School of Judiciary and Public Prosecution) to have a degree in psychology and at least 5 years of experience working in family counselling or with socially maladjusted young people, or 5 years of clinical practice. Completion of a law degree is not a requirement for being able to conduct supervision.

It is proposed that supervision should occur in the court where the judge is sitting. Therefore, it would not require judges to travel. The supervisor would have the right to familiarise himself/herself with the files of cases conducted by the judge (Article 15 k(1) of the Act on the National School of Judiciary and Public Prosecution). However, he/she would be obliged to keep the information obtained in connection with the conduct of the activity confidential. It should also be stressed that the court's president would only be informed of the completion of the supervision and not of its course or results (Article 15k(3)). Indeed, the proposed instrument is not intended to be a mechanism of control of the judge, but a means of strengthening the judge's competence and providing support.

An extremely important element of the proposed solution is that it is mandatory for all judges adjudicating in family and juvenile divisions to undergo systematic supervision at least once every three years (Article 82a § 6). The willingness of a judge to undergo supervision would be notified to the president of a court (Article 82a § 7), and the latter would annually (by 30 June) provide the National School of Judiciary and Public Prosecution with information on the need for supervision. Such a solution is intended to ensure that the School can prepare a supervision plan for the following year and that an appropriate number of supervisors can be provided.

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Vehicular Homicide. The Issue
of Separate Typology in Selected
Foreign Criminal Law Systems and
the Issue of Legitimacy of Separate
Typology in Polish Criminal Law
– *Ad Hoc* Report Commissioned
by the Ministry of Justice

CRIMINAL LAW AND CRIMINOLOGY

Introduction

This paper, as indicated in its subtitle, will address two issues. The first is to provide an overview of whether selected foreign criminal law systems include a separate typology for vehicular homicide.¹ The analysis in this context covers Austrian, British, French, Spanish, German, Norwegian, Swedish, and Italian criminal law systems. It is worth noting at this point that the analysis was somewhat broader in focus as the attention was paid not only to the presence of the typology in the above systems but also to how these systems deal with causing death in road traffic.

The second issue, in turn, is the opinion on the legitimacy of introducing a separate typology for vehicular homicide into Polish criminal law. This issue could be expressed in response to the question of whether it is justified to extend the Criminal Code currently in force in Poland² by introducing a provision which would explicitly specify the statutory characteristics of this homicide and would bind it to a sanction of magnitude more severe than that of the sanction for the basic (essential) form of human homicide.³ Thus, this opinion is intended to answer the question of whether vehicular homicide should be assigned the status of a classified form of human homicide in Polish criminal law.⁴

¹ Only intentional causing of death of a human being in road traffic is recognised as vehicular homicide. Indeed, a constitutive element of every homicide of a human being – in the area of Polish criminal law – is an intention on the part of the perpetrator to cause such an effect. Thus, the unintentional causing of death of a human being in road traffic is not a vehicular homicide as there is no specified intention on the part of the perpetrator.

² Act of 6 June 1997 – Criminal Code (Journal of Laws of 2024, Item 17, as amended) – hereinafter: CC).

³ Let us recall that the legislator refers to this form in Article 148(1) CC in the following way: “Whoever kills a human being shall be subject to imprisonment for a term of not less than 10 years or to life imprisonment.”

⁴ Let us also recall that in Polish criminal law, solutions provided for in Article 148(2) and (3) CC adopt the concept of distinguishing classified forms of human homicide. These provisions stipulate that:

§ 2. Whoever kills a human being: (1) with particular cruelty, (2) in connection with hostage taking, rape or robbery, (3) for motives deserving particular reprobation, (4) with the use of explosives, shall be subject to imprisonment for a term of not less than 15 years or to life imprisonment. § 3. Whoever kills more than one person in one act or has earlier been validly and finally convicted of homicide and a perpetrator of the homicide of a public official committed in the course of or in connection with the performance of their official duties related to the protection of human security or the protection of public safety or order, shall be subject to the penalty specified in § 2.

It should be noted that the above concept was not adopted in the criminal codes previously in force in Poland. It was known neither in the Criminal Code of 1969 nor in the Criminal Code of 1932. At this point, it is also to be added that the solution of not distinguishing classified forms of homicide has its undeniable advantages, one of which being the fact that it avoids the difficult task of providing an adequate legal classification for the perpetrator’s behaviour fulfilling the elements of both classified and privileged forms of homicide. Krystyna Daszkiewicz wrote that the opposite solution, in its approach adopted in CC, may give rise to problems at a level of legal classification of the perpetrator’s behaviour – see: K. Daszkiewicz, *Przestępstwa przeciwko życiu*

1. The Issue of Separate Typology of Vehicular Homicide in Selected Foreign Criminal Law Systems

1.1. Austria

In the Austrian criminal law system, no provision provides for a separate typology of vehicular homicide.

Situations in which a fatal road accident occurs, if this fatal outcome was the result of gross negligence on the part of the perpetrator, are classified as behaviour fulfilling the elements of an offence described in § 81 of the Austrian Criminal Code.⁵

In accordance with this paragraph:

- (1) Whoever causes the death of another person through gross negligence shall be subject to imprisonment for a term of up to three years.
- (2) The same penalty shall be imposed on any person who causes the death of another person through gross negligence after having, prior to the offence, even if only negligently, put themselves into a state of intoxication not impairing their sanity, by consuming alcohol or taking another intoxicating substance, although they foresaw or could have foreseen that they would be in a situation in which their condition would be likely to cause or increase a threat to the life, health or physical safety of another person.
- (3) Whoever causes the death of a large number of people through gross negligence or in the case referred to in (2) shall be subject to imprisonment for a term of six months to five years.⁶

However, it is worth noting and emphasising that the provided solution is not dedicated exclusively to causing human death in road traffic. As such, it also manifests the Austrian codifier's distance from developing the casuistic typology. The relatively light sanction

i zdrowiu. Rozdział XIX Kodeksu karnego. Komentarz, Warszawa 2000, p. 21. The publication also legitimately points out that the approach in question is casuistic, which, in the author's opinion,

(...) is also simply dangerous in periods when the rate of this crime is increasing and new "advanced" ways of executing crimes against life are constantly being revealed. Why – K. Daszkiewicz asks – after considering the overall circumstances of a particular case, should courts refrain from classifying as a murder, for example, a homicide committed when acting as part of an organised criminal group? Why should it be possible to classify the killing of a human being "in connection with a robbery" as a murder, contrary to homicide involving racketeering?

– K. Daszkiewicz, *Przestępstwa...*, p. 22. On classified forms of homicide, see more: R. Kokot, *Zabójstwo kwalifikowane*, Wrocław 2001, p. 297, and Ł. Pohl (ed.), *Zabójstwa kwalifikowane w Kodeksie karnym z 1997 r. Naukowa i sądowa wykładnia znamion kwalifikujących*, Warszawa 2018, p. 227, and the literature cited in these references.

⁵ *Strafgesetzbuch*, available at: <https://www.jusline.at/gesetz/stgb> [accessed on: 20.09.2024].

⁶ Original wording:

(1) Wer grob fahrlässig (§ 6 Abs. 3) den Tod eines anderen herbeiführt, ist mit Freiheitsstrafe bis zu drei Jahren zu bestrafen. (2) Ebenso ist zu bestrafen, wer den Tod eines Menschen fahrlässig herbeiführt, nachdem er sich vor der Tat, wenn auch nur fahrlässig, durch Genuss von Alkohol oder den Gebrauch eines anderen berausenden Mittels in einen die Zurechnungsfähigkeit nicht ausschließenden Rauschzustand versetzt hat, obwohl er vorhergesehen hat oder hätte vorhersehen können, dass ihm eine Tätigkeit bevorstehe, deren Vornahme in diesem Zustand eine Gefahr für das Leben, die Gesundheit oder die körperliche Sicherheit eines anderen herbeizuführen oder zu vergrößern geeignet sei. (3) Mit Freiheitsstrafe von sechs Monaten bis zu fünf Jahren ist zu bestrafen, wer grob fahrlässig (§ 6 Abs. 3) oder in dem in Abs. 2 bezeichneten Fall den Tod einer größeren Zahl von Menschen herbeiführt.

applicable to causing the death of a human being in road traffic by the perpetrator in a state of intoxication also deserves emphasis.⁷ In comparison, Polish criminal law, through Article 178(1a)(2) of the CC, provides for a more severe punishment, with 5 years' imprisonment being only the lower limit of the statutory threat for such behaviour. The upper limit is 20 years' imprisonment if the death of a human being was caused by an accident under Article 177(2) CC or 30 years' imprisonment if the death of a human being was caused by a catastrophe under Article 173(3) CC.

1.2. United Kingdom

In the UK criminal law system, the primary normative act addressing the issue of vehicular homicide is the Road Traffic Act of 1988.

Pursuant to its Part I, a person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.⁸ The British act further defines the notion of *dangerous driving*. Namely, according to subsection 1 of section 2A thereof,⁹ dangerous driving occurs when a person's way of

⁷ It is pointed out, however, that no other European Union Member State has such a low penalty for a fatal road traffic accident caused by an offender who was under the influence of alcohol, see: <https://www.anwaltfinden.at/ratgeber/verkehrsrecht/autounfall-mit-alkohol-am-steuer/> [accessed on: 23.09.2024].

⁸ Original wording: "A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence."

⁹ Original wording:

(1) For the purposes of sections 1, 1A and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if) –

(a) the way he drives falls far below what would be expected of a competent and careful driver, and
(b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

But this subsection does not apply where subsection (1B) applies.

(1A) Subsection (1B) applies where a designated person –

(a) is driving for police purposes (subject to subsections (1E) and (1F)), and
(b) has undertaken prescribed training.

(1B) For the purposes of sections 1, 1A and 2 above, the designated person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if) –

(a) the way the person drives fall far below what would be expected of a competent and careful constable who has undertaken the same prescribed training, and
(b) it would be obvious to such a competent and careful constable that driving in that way would be dangerous.

(1C) In subsections (1A) and (1B) "designated person" means –

(a) a constable,
(b) a member of staff appointed by the chief officer of police of a police force in England and Wales,
(c) a member of staff appointed by a local policing body and employed to assist a police force in England and Wales,
(d) a member of staff appointed by the Scottish Police Authority under section 26(1) of the Police and Fire Reform (Scotland) Act 2012 (asp 8),
(e) an employee of the British Transport Police Authority appointed under section 27 of the Railways and Transport Safety Act 2003,
(f) a person employed or engaged by –
(i) a chief officer of police,
(ii) the British Transport Police Authority,

driving falls below what would be expected of a competent and careful driver and if it would be obvious to a competent and careful driver that driving the vehicle in that way would be dangerous. However, this definition does not apply in the cases determined in subsection 1B of section 2A. Pursuant to this provision, for the purposes of sections 1, 1A and 2, *the designated person*¹⁰ is to be regarded as driving dangerously if they drive a motor vehicle in a way that falls below what would be expected of a competent and careful *constable* who has undertaken the same prescribed training, and it would be obvious to such a competent and careful *constable* that driving in that way would be dangerous.

Another provision worth attention is section 2B.¹¹ Pursuant to this provision, a person who causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place is guilty of an offence. Pursuant to section 3ZA,¹²

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- (iii) the Civil Nuclear Police Authority,
 - (iv) the chief constable for the Ministry of Defence Police, or
 - (v) the Scottish Police Authority,

to train a person within any of paragraphs (a) to (e) to drive for police purposes, or

(g) a person employed or engaged by a person within paragraph (f)(i) to (v) to train another person to carry out training of the kind mentioned in that paragraph,

(h) a National Crime Agency officer, or

(i) a person engaged by the National Crime Agency –

(ii) to train a National Crime Agency officer to drive for law enforcement purposes, or

(iii) to train another person to carry out training of the kind mentioned in sub-paragraph (i).

(1D) In subsection (1C)(a) “constable” does not include a port constable within the meaning of section 7 of the Marine Navigation Act 2013 or a person appointed to act as a constable under provision made by virtue of section 16 of the Harbours Act 1964.

(1E) In the case of a National Crime Agency officer, the reference in subsection (1A)(a) to driving for police purposes is to be read as a reference to driving for law enforcement purposes.

(1F) In the case of a person within paragraph (i) of subsection (1C), the reference in subsection (1A)(a) to driving for police purposes is to be read as a reference to driving for the purpose of the training mentioned in that paragraph.

(2) a person is also to be regarded as driving dangerously for the purposes of sections 1, 1A and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.

(3) In subsections (1), (1B) and (2) above “dangerous” refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver or constable (as the case may be) in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.

(4) In determining for the purposes of subsection (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried.

¹⁰ Under subsection (1A) of section 2A, this is a person driving a vehicle for police purposes and receiving the prescribed training. Further subsections of section 2A indicate the catalogue of designated persons, which includes, among others, constables, police officers and employees or officers of the National Crime Agency.

¹¹ Original wording: “A person who causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, is guilty of an offence.”

¹² Original wording:

(1) This section has effect for the purposes of sections 2B, 2C and 3 above and section 3A below.

(2) A person is to be regarded as driving without due care and attention if (and only if) the way he drives falls below what would be expected of a competent and careful driver. But this subsection does not apply where subsection (2B) applies.

(2A) Subsection (2B) applies where a designated person –

a person is to be regarded as driving without due care and attention if (and only if) the way they drive falls below what would be expected of a competent and careful driver. However, by analogy with section 2A, this provision does not apply to subsection 2B. Pursuant to subsection 2B, the designated person¹³ is to be regarded as driving without due care and attention if (and only if) the way the person drives fall below what would be expected of a competent and careful constable who has undertaken the same prescribed training. Pursuant to subsection (3), in determining for the purposes of subsection (2) or (2B) above what would be expected of a careful and competent driver or constable (as the case may be) in a particular case, regard shall be had not only to the circumstances of which they could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused. On the other hand, pursuant to subsection 4, a person is to be regarded as driving

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- (a) is driving for police purposes (subject to subsections (2E) and (2F)), and
 - (b) has undertaken prescribed training.
 - (2B) The designated person is to be regarded as driving without due care and attention if (and only if) the way the person drives fall below what would be expected of a competent and careful constable who has undertaken the same prescribed training.
 - (2C) In subsections (2A) and (2B) “designated person” means –
 - (a) a constable,
 - (b) a member of staff appointed by the chief officer of police of a police force in England and Wales,
 - (c) a member of staff appointed by a local policing body and employed to assist a police force in England and Wales,
 - (d) a member of staff appointed by the Scottish Police Authority under section 26(1) of the Police and Fire Reform (Scotland) Act 2012 (asp 8),
 - (e) an employee of the British Transport Police Authority appointed under section 27 of the Railways and Transport Safety Act 2003,
 - (f) a person employed or engaged by –
 - (i) a chief officer of police,
 - (ii) the British Transport Police Authority,
 - (iii) the Civil Nuclear Police Authority,
 - (iv) the chief constable for the Ministry of Defence Police, or
 - (v) the Scottish Police Authority,
 - to train a person within any of paragraphs (a) to (e) to drive for police purposes,
 - (g) a person employed or engaged by a person within paragraph (f)(i) to (v) to train another person to carry out training of the kind mentioned in that paragraph,
 - (h) a National Crime Agency officer, or
 - (i) a person engaged by the National Crime Agency –
 - (i) to train a National Crime Agency officer to drive for law enforcement purposes, or
 - (ii) to train another person to carry out training of the kind mentioned in sub-paragraph (i).
 - (2D) In subsection (2C)(a) “constable” does not include a port constable within the meaning of section 7 of the Marine Navigation Act 2013 or a person appointed to act as a constable under provision made by virtue of section 16 of the Harbours Act 1964.
 - (2E) In the case of a National Crime Agency officer, the reference in subsection (2A)(a) to driving for police purposes is to be read as a reference to driving for law enforcement purposes.
 - (2F) In the case of a person within paragraph (i) of subsection (2C), the reference in subsection (2A)(a) to driving for police purposes is to be read as a reference to driving for the purpose of the training mentioned in that paragraph.
 - (3) In determining for the purposes of subsection (2) or (2B) above what would be expected of a careful and competent driver or constable (as the case may be) in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.
 - (4) A person is to be regarded as driving without reasonable consideration for other persons only if those persons are inconvenienced by his driving.

¹³ Although section 3ZA formulates a definition of this notion, it is nevertheless consistent with the definition provided in Section 2A.

without reasonable consideration for other persons only if those persons are inconvenienced by their driving.

In addition to the above-mentioned offences, the normative act in question also penalises causing the death of another person by a person driving without a licence or using a motor vehicle while uninsured (section 3ZB);¹⁴ and causing the death of another person while driving a motor vehicle on a road by a perpetrator who was driving while disqualified *tempore criminis* (section 3ZC).¹⁵

Finally, attention should also be drawn to section 3A.¹⁶ Under subsection 1 thereof, an offence is committed if a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and (a) they are, at the time when they are driving, unfit to drive through drink or drugs, or (b) they have consumed so much alcohol that the proportion of it in their breath, blood or urine at that time exceeds the prescribed limit, or (ba) they have in their body a specified controlled drug and the proportion of it in their blood or urine at that time exceeds the specified limit for that drug, or (c) they are, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it, or (d) they are required by a constable to give their permission for a laboratory test of a specimen of blood taken from them under section 7A of this Act, but without reasonable excuse fails to

¹⁴ Original wording:

A person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under –

(a) section 87(1) of this Act (driving otherwise than in accordance with a licence),

(b) ... or

(c) section 143 of this Act (using motor vehicle while uninsured...).

¹⁵ Original wording:

A person is guilty of an offence under this section if he or she –

(a) causes the death of another person by driving a motor vehicle on a road, and

(b) at that time, is committing an offence under section 103(1)(b) of this Act (driving while disqualified)."

¹⁶ Original wording:

(1) If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and –

(a) he is, at the time when he is driving, unfit to drive through drink or drugs, or

(b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit, or

(ba) he has in his body a specified controlled drug and the proportion of it in his blood or urine at that time exceeds the specified limit for that drug, or

(c) he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it, or

(d) he is required by a constable to give his permission for a laboratory test of a specimen of blood taken from him under section 7A of this Act, but without reasonable excuse fails to do so,

he is guilty of an offence.

(2) For the purposes of this section a person shall be taken to be unfit to drive at any time when his ability to drive properly is impaired.

(3) Subsection (1)(b), (ba), (c) and (d) above shall not apply in relation to a person driving a mechanically propelled vehicle other than a motor vehicle.

do so. Pursuant to subsection (2), for the purposes of section 3A, a person shall be taken to be unfit to drive at any time when their ability to drive properly is impaired. On the other hand, under subsection (3), the provisions of subsections (1)(b), (ba), (c) and (d) shall not apply in relation to a person driving a mechanically propelled vehicle other than a motor vehicle.

In view of the foregoing, it should be pointed out that the British criminal law provides for separate types of offences involving causing the death of another person while driving a motor vehicle. However, these are not classified forms of human homicide but separate types of offences other than homicide. Still, this indicates, in fact, the casuistic criminalisation of unintentional causing of the death of a human being.

1.3. France

In France, the basic normative act relating to the issue concerned is obviously the Criminal Code (*Code pénal*).¹⁷

In the context of the vehicular homicide issue, attention should first be drawn to Article 221-6-1.¹⁸ In accordance with this provision, when due to clumsiness, recklessness, inattention, negligence or failure to comply with the duty of care or safety provided for in Article 221-6,¹⁹ unintentional causing of the death has been committed by a driver of a land motor vehicle, the offender shall be subject to five years' imprisonment and a fine of EUR 75,000.

It should be noted, however, that the length of imprisonment is increased to seven years and a fine of EUR 100,000 in situations where:

¹⁷ *Code pénal*. Version en vigueur au 20 septembre 2024, available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/ [accessed on: 20.09.2024].

¹⁸ Original wording:

Lorsque la maladresse, l'imprudence, l'inattention, la négligence ou le manquement à une obligation législative ou réglementaire de prudence ou de sécurité prévu par l'article 221-6 est commis par le conducteur d'un véhicule terrestre à moteur, l'homicide involontaire est puni de cinq ans d'emprisonnement et de 75 000 euros d'amende. Les peines sont portées à sept ans d'emprisonnement et à 100 000 euros d'amende lorsque:

1° Le conducteur a commis une violation manifestement délibérée d'une obligation particulière de prudence ou de sécurité prévue par la loi ou le règlement autre que celles mentionnées ci-après;

2° Le conducteur se trouvait en état d'ivresse manifeste ou était sous l'empire d'un état alcoolique caractérisé par une concentration d'alcool dans le sang ou dans l'air expiré égale ou supérieure aux taux fixés par les dispositions législatives ou réglementaires du code de la route, ou a refusé de se soumettre aux vérifications prévues par ce code et destinées à établir l'existence d'un état alcoolique;

3° Il résulte d'une analyse sanguine ou salivaire que le conducteur avait fait usage de substances ou de plantes classées comme stupéfiants, ou a refusé de se soumettre aux vérifications prévues par le code de la route destinées à établir s'il conduisait en ayant fait usage de stupéfiants;

4° Le conducteur n'était pas titulaire du permis de conduire exigé par la loi ou le règlement ou son permis avait été annulé, invalidé, suspendu ou retenu;

5° Le conducteur a commis un dépassement de la vitesse maximale autorisée égal ou supérieur à 50 km/h;

6° Le conducteur, sachant qu'il vient de causer ou d'occasionner un accident, ne s'est pas arrêté et a tenté ainsi d'échapper à la responsabilité pénale ou civile qu'il peut encourir.

Les peines sont portées à dix ans d'emprisonnement et à 150 000 euros d'amende lorsque l'homicide involontaire a été commis avec deux ou plus des circonstances mentionnées aux 1° et suivants du présent article.

¹⁹ This provision classifies the type of unintentional causing of death.

1. a driver has clearly and deliberately violated the particular duty of care or safety prescribed by law;
2. a driver was in a state of obvious intoxication or was under the influence of alcohol characterised by a level of alcohol in the blood or breath equal to or greater than the limits set out in the legislative or statutory provisions of the Traffic Code, or where a driver refuses to take the tests provided for by the Code and designed to establish the existence of an alcoholic state;
3. a blood or saliva test reveals that the driver has used substances or plants classified as intoxicants, or where a driver has refused to take the tests provided for by the Traffic Code that are designed to establish whether the driver was driving under the influence of drugs;
4. a driver did not hold a licence as required by law or their licence had been cancelled, invalidated, suspended or retained;
5. a driver exceeded the maximum speed limit by 50 km/h or more;
6. a driver, being aware that they had just caused an accident, did not stop and thus attempted to avoid any criminal or civil liability they might have incurred.

However, the sentence is increased to 10 years' imprisonment when unintentional causing of death has been committed with the occurrence of two or more of the above-mentioned circumstances.

In the context of the potential typology of vehicular homicide in this provision, it should be noted that this is not the case. In fact, the provision defines a classified form of unintentional causing of human death. This leads to the conclusion that the French legislation does not separate a Criminal Code provision by virtue of which vehicular homicide would be assigned the status of a classified form of human homicide. Thus, according to the French Criminal Code, vehicular homicide is simply behaviour by which the perpetrator fulfils the elements of the initial form of human homicide, as defined in Article 221-1 of *Code pénal*.

However, it is essential to mention that the legislative work is currently in progress in the French Senate on a bill amending *Code pénal* by introducing provisions (i.e. Article 221-6-1-1 and Article 221-6-1-2) that penalise vehicular homicide (French: *homicide routier*).²⁰ Under the proposed Article 221-6-1-1, the fact that under the conditions and per the distinctions provided for in Article 121-3, through clumsiness, recklessness, inattention, negligence or failure to comply with the duty of care or safety imposed by law or regulations, a driver of a land motor vehicle causes the death of another person shall constitute vehicular homicide subject to five years' imprisonment and a fine of EUR 75,000.²¹ However, in accordance with

²⁰ Proposition de loi n°157, available at: https://www.assemblee-nationale.fr/dyn/17/textes/l17b0157_proposition-loi, [accessed on: 20.09.2024].

²¹ Original wording:

Le fait, pour le conducteur d'un véhicule terrestre à moteur, de causer, dans les conditions et selon les distinctions prévues à l'article 121-3, par maladresse, imprudence, inattention, négligence ou manquement à une

the proposed Article 221-6-1-2,²² the fact that under the conditions and per the distinctions provided for in Article 121-3, through a clearly intentional breach of the specific duty of care or safety imposed by law or regulations, a driver of a land motor vehicle causes the death of another person shall constitute vehicular homicide by posing threat to life (French: *homicide routier par mise en danger*), subject to seven years' imprisonment and a fine of EUR 100,000. Moreover, the causing of death by a driver of a land motor vehicle, under the conditions and per the distinctions provided for in the same Article 121-3, also is classified as vehicular homicide by threat and is punishable in any of the following circumstances:

1. a driver was in a state of obvious intoxication or was under the influence of alcohol characterised by a level of alcohol in the blood or breath equal to or greater than the limits set out in legislative or statutory provisions of the Traffic Code, or where a driver refuses to take the tests provided for by the Code and designed to establish the existence of an alcoholic state;
2. a blood or saliva test reveals that the driver has used substances or plants classified as intoxicants, or where a driver has refused to take the tests provided for by the Traffic Code that are designed to establish whether the driver was driving under the influence of drugs;
3. a driver did not hold a licence as required by law or their licence had been cancelled, invalidated, suspended or retained;

obligation de prudence ou de sécurité imposée par la loi ou le règlement, la mort d'autrui constitue un homicide routier puni de cinq ans d'emprisonnement et de 75 000 euros d'amende.

²² Wording in French:

Le fait, pour le conducteur d'un véhicule terrestre à moteur, de causer, dans les conditions et selon les distinctions prévues à l'article 121-3, par la violation manifestement délibérée d'une obligation particulière de prudence ou de sécurité imposée par la loi ou le règlement, la mort d'autrui constitue un homicide routier par mise en danger puni de sept ans d'emprisonnement et de 100 000 euros d'amende.

Est également qualifié d'homicide routier par mise en danger et puni des mêmes peines le fait, par le conducteur d'un véhicule terrestre à moteur, de causer, dans les conditions et selon les distinctions prévues au même article 121-3, la mort d'autrui dans l'une des circonstances suivantes:

1° Le conducteur se trouvait en état d'ivresse manifeste, était sous l'empire d'un état alcoolique caractérisé par une concentration d'alcool dans le sang ou dans l'air expiré égale ou supérieure aux taux fixés par les dispositions législatives ou réglementaires du code de la route ou a refusé de se soumettre aux vérifications prévues au même code destinées à établir l'existence d'un état alcoolique;

2° Il résulte d'une analyse sanguine ou salivaire que le conducteur avait fait usage de substances ou de plantes classées comme stupéfiants ou a refusé de se soumettre aux vérifications prévues audit code destinées à établir s'il conduisait en ayant fait usage de stupéfiants;

3° Le conducteur n'était pas titulaire du permis de conduire exigé par la loi ou le règlement ou son permis avait été annulé, invalidé, suspendu ou retenu;

4° Le conducteur a commis un dépassement de la vitesse maximale autorisée égal ou supérieur à 30 kilomètres à l'heure;

5° Le conducteur, sachant qu'il vient de causer ou d'occasionner un accident, ne s'est pas arrêté et a tenté ainsi d'échapper à la responsabilité pénale ou civile qu'il peut encourir ou n'a pas porté secours ou prêté assistance à une personne en danger.

Les peines sont portées à dix ans d'emprisonnement et 150 000 euros d'amende lorsque l'homicide routier par mise en danger a été commis avec deux ou plus des circonstances mentionnées aux 1° à 5° du présent article. Dans le cadre des procédures engagées sur le fondement de l'article 221-6-1-1 et du présent article, les parties civiles sont informées des actes de procédure, notamment lorsque la personne condamnée a interjeté appel ou lorsqu'elle s'est pourvue en cassation.

4. a driver exceeded the maximum speed limit by 30 km/h or more;
5. a driver, being aware that they had just caused an accident, did not stop and thus attempted to avoid any criminal or civil liability they might have incurred, or failed to rescue or assist a person exposed to danger.

It should be mentioned that the penalties in that case are increased to 10 years' imprisonment and a fine of EUR 150,000 if the vehicular homicide was committed with the occurrence of two or more circumstances listed in points (1) to (5) of this article.

Summing up, French law currently provides for a separate type of offence involving the unintentional causing of the death of another person by a driver of a motor vehicle in road traffic. However, this offence – due to the lack of intent (*l'homicide involontaire*) – is not referred to as vehicular homicide. In the proposals that are being discussed, the so-called vehicular homicide is defined as an unintentional act punishable by a heavier penalty than the potential penalty for the offence classified in Article 221-6 of the French Criminal Code.

1.4. Spain

The Spanish Criminal Code (*Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*)²³ does not provide for vehicular homicide as a separate type of offence. However, the provision worth attention is Article 381. It is included in Chapter 4 of the Criminal Code, entitled “Offences against Road Traffic Safety”.

However, before citing the content of this article, the provisions of Article 380 of this Code should first be presented, as this article is referred to by Article 381. Article 380(1) stipulates that anyone who drives a motor vehicle or a moped with manifest recklessness and poses serious threat to the life or integrity of others shall be subject to imprisonment for a period from six months to two years and to deprivation of the right to drive motor vehicles and mopeds for a period exceeding one and up to six years. Article 380(2) provides that, for the purposes of this provision, driving under the circumstances referred to in Article 379(1) and the second sentence of Article 379(2) shall be deemed manifestly reckless.²⁴ Article 379(2) refers to driving a motor vehicle or moped under the influence of toxic drugs, narcotics, psychotropic substances or alcoholic beverages; and with regard to driving of a motor vehicle or moped under the influence of alcohol, Article 379(2) refers to a situation where driving

²³ Available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444> [accessed on: 20.09.2024].

²⁴ Original wording:

Artículo 380. 1. El que condujere un vehículo a motor o un ciclomotor con temeridad manifiesta y pusiere en concreto peligro la vida o la integridad de las personas será castigado con las penas de prisión de seis meses a dos años y privación del derecho a conducir vehículos a motor y ciclomotores por tiempo superior a uno y hasta seis años. 2. a los efectos del presente precepto se reputará manifiestamente temeraria la conducción en la que concurrieren las circunstancias previstas en el apartado primero y en el inciso segundo del apartado segundo del artículo anterior.

a motor vehicle or moped occurs when the alcohol level in expired air is above 0.60 milligrams per litre or the alcohol level in the blood is above 1.2 grams per litre.²⁵

Further, as referred to in Article 381(1), anyone who, with manifest disregard for the lives of others, behaves as described in the previous article (i.e. Article 380) shall be subject to imprisonment from two to five years and a fine, and may be deprived of the right to drive motor vehicles and mopeds for a period of six to ten years. Article 380(2), on the other hand, stipulates that where the life or integrity of persons has not been seriously endangered, the penalty is imprisonment from one year to 2 years, a fine, and deprivation of the right to drive motor vehicles and mopeds for the period provided for in the preceding paragraph, i.e. for a period of six to ten years.²⁶

Article 382 stipulates that where the offences referred to in Articles 379, 380 and 381 cause, in addition to the foreseeable risk, a harmful effect constituting a specific offence, irrespective of its severity, the court shall decide only on the most serious offence, imposing a penalty of the upper limit and awarding, in each case, compensation due to civil liability. If the harmful effect is concurrent with an offence under Article 381, the deprivation of the right to drive motor vehicles and mopeds shall be ruled for each of these offences.²⁷

It is also worth citing at this point the wording of Article 382 bis:

1. A driver of a motor vehicle or moped who, except in the cases referred to in Article 195 (failure to assist a person in obvious and serious danger), wilfully and without endangering themselves or others, leaves the scene of an accident after causing an accident in which one or more persons are killed or injured as defined in Article 147(1) (injury to another person which impairs their bodily integrity or their physical or mental health and requires medical treatment), Article 149 (loss or permanent damage to a major organ or limb, loss of sense or ability to procreate, serious disfigurement of the body or serious physical or mental illness) and Article 150 (loss or permanent damage to an organ other than a major organ or

²⁵ Original wording:

Con las mismas penas será castigado el que condujere un vehículo de motor o ciclomotor bajo la influencia de drogas tóxicas, estupefacientes, sustancias psicotrópicas o de bebidas alcohólicas. En todo caso será condenado con dichas penas el que condujere con una tasa de alcohol en aire espirado superior a 0,60 miligramos por litro o con una tasa de alcohol en sangre superior a 1,2 gramos por litro.

²⁶ Original wording:

Artículo 381.

1. Será castigado con las penas de prisión de dos a cinco años, multa de doce a veinticuatro meses y privación del derecho a conducir vehículos a motor y ciclomotores durante un período de seis a diez años el que, con manifiesto desprecio por la vida de los demás, realizare la conducta descrita en el artículo anterior.

2. Cuando no se hubiere puesto en concreto peligro la vida o la integridad de las personas, las penas serán de prisión de uno a dos años, multa de seis a doce meses y privación del derecho a conducir vehículos a motor y ciclomotores por el tiempo previsto en el párrafo anterior.

²⁷ Original wording:

Artículo 382. Cuando con los actos sancionados en los artículos 379, 380 y 381 se ocasionare, además del riesgo prevenido, un resultado lesivo constitutivo de delito, cualquiera que sea su gravedad, los jueces o Tribunales apreciarán tan sólo la infracción más gravemente penada, aplicando la pena en su mitad superior y condenando, en todo caso, al resarcimiento de la responsabilidad civil que se hubiera originado. Cuando el resultado lesivo concorra con un delito del artículo 381, se impondrá en todo caso la pena de privación del derecho a conducir vehículos a motor y ciclomotores prevista en este precepto en su mitad superior.

disfigurement of another person), shall be punished as a perpetrator of the offence of leaving the scene of an accident.

2. The acts referred to in this article, resulting from the driver's reckless behaviour, shall be subject to imprisonment of six months to four years and to deprivation of the right to drive motor vehicles and mopeds for a period of one year to four years.

3. If the circumstances that led to the abandonment were accidental, the offender shall be sentenced to three to six months' imprisonment and shall be deprived of the right to drive motor vehicles and mopeds for a period of six months to two years.²⁸

1.5. Germany

The German Criminal Code (*Strafgesetzbuch*)²⁹ does not provide for vehicular homicide as a separate type of offence.

However, attention should be drawn to Section 315d, which provides for criminal liability for organising and participating in illegal motor vehicle races. Section 315d(5) refers to a situation resulting in the death of a person, serious injury or damage to the health of a large number of people as a consequence of the perpetrator's act. The section is included in Division 28 of the Criminal Code, entitled "Offences constituting public danger". In accordance with Section 315d:

- (1) Whoever, in road traffic,
 1. organises or conducts an illegal motor race,
 2. participates in an illegal motor race as the driver of a motor vehicle or
 3. moves with inappropriate speed as the driver of a motor vehicle and in gross violation of road traffic regulations and carelessly in order to achieve maximum speed incurs a penalty of imprisonment for a term not exceeding two years or a fine.
- (2) Whoever, in the cases under subsection (1) no. 2 or 3, endangers the life or limb of another person or property of significant value belonging to another incurs a penalty of imprisonment for a term not exceeding five years or a fine.
- (3) In the cases under subsection (1) no. 1, the attempt is punishable.
- (4) Whoever causes the danger by negligence in the cases under subsection (2) incurs a penalty of imprisonment for a term not exceeding three years or a fine.

²⁸ Original wording:

Artículo 382 bis. 1. El conductor de un vehículo a motor o de un ciclomotor que, fuera de los casos contemplados en el artículo 195, voluntariamente y sin que concurra riesgo propio o de terceros, abandone el lugar de los hechos tras causar un accidente en el que fallecieron una o varias personas o en el que se les causare alguna de las lesiones a que se refieren los artículos 147.1, 149 y 150, será castigado como autor de un delito de abandono del lugar del accidente. 2. Los hechos contemplados en este artículo que tuvieran su origen en una acción imprudente del conductor, serán castigados con la pena de prisión de seis meses a cuatro años y privación del derecho a conducir vehículos a motor y ciclomotores de uno a cuatro años. 3. Si el origen de los hechos que dan lugar al abandono fuera fortuito le corresponderá una pena de tres a seis meses de prisión y privación del derecho a conducir vehículos a motor y ciclomotores de seis meses a dos años.

²⁹ Available at: <https://www.gesetze-im-internet.de/stgb/>, [accessed on: 20.09.2024].

(5) Whoever, in the cases under subsection (2), causes another person's death or serious damage to another person's health or causes damage to the health of a large number of people incurs a penalty of imprisonment for a term of between one year and 10 years, in less serious cases imprisonment for a term of between six months and five years.³⁰

It should be emphasised that Section 315f of the German Criminal Code stipulates that vehicle involved in an offence defined in Section 315d(1), (2), (3), (4) or (5) may be confiscated.³¹

It is also noteworthy that, if a perpetrator is convicted of an offence under Section 315d, it is possible to adjudicate the disqualification of their driving licence. Indeed, in accordance with Section 69 of the Criminal Code:

(1) Whoever has been convicted of an unlawful act which they committed in connection with the driving of a motor vehicle or in breach of the duties of the driver of a motor vehicle, or whoever has not been convicted merely because their lack of criminal responsibility has been proved or cannot be ruled out, is disqualified from driving by the court if the act shows that they are unfit to drive a motor vehicle. A further examination pursuant to section 62 is not required.

(2) If, in the cases under subsection (1), the unlawful act is a less serious criminal offence of

1. endangering road traffic (section 315c),
- 1a. illegal motor racing (section 315d),
2. driving under the influence of drink or drugs (section 316),
3. leaving the scene of an accident without cause (section 142) although the offender knows or culpably does not know that a person was killed, seriously injured or significant damage to the property of another was caused in the accident or
4. intoxication (section 323a) if the offence relates to one of the offences referred to in nos. 1 to 3,

then the offender is typically to be deemed unfit to drive motor vehicles.

³⁰ Original wording:

§ 315d (1) *Wer im Straßenverkehr*

1. *ein nicht erlaubtes Kraftfahrzeugrennen ausrichtet oder durchführt,*

2. *als Kraftfahrzeugführer an einem nicht erlaubten Kraftfahrzeugrennen teilnimmt oder*

3. *sich als Kraftfahrzeugführer mit nicht angepasster Geschwindigkeit und grob verkehrswidrig und rücksichtslos fortbewegt, um eine höchstmögliche Geschwindigkeit zu erreichen,*

wird mit Freiheitsstrafe bis zu zwei Jahren oder mit Geldstrafe bestraft.

(2) *Wer in den Fällen des Absatzes 1 Nummer 2 oder 3 Leib oder Leben eines anderen Menschen oder fremde Sachen von bedeutendem Wert gefährdet, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.*

(3) *Der Versuch ist in den Fällen des Absatzes 1 Nummer 1 strafbar.*

(4) *Wer in den Fällen des Absatzes 2 die Gefahr fahrlässig verursacht, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.*

(5) *Verursacht der Täter in den Fällen des Absatzes 2 durch die Tat den Tod oder eine schwere Gesundheitsschädigung eines anderen Menschen oder eine Gesundheitsschädigung einer großen Zahl von Menschen, so ist die Strafe Freiheitsstrafe von einem Jahr bis zu zehn Jahren, in minder schweren Fällen Freiheitsstrafe von sechs Monaten bis zu fünf Jahren.*

³¹ Original wording:

§ 315f *Kraftfahrzeuge, auf die sich eine Tat nach § 315d Absatz 1 Nummer 2 oder Nummer 3, Absatz 2, 4 oder 5 bezieht, können eingezogen werden. § 74a ist anzuwenden.*

(3) The offender's driving licence lapses upon the judgment becoming final. A driving licence issued by a German authority is confiscated in the judgment.³²

However, as stipulated in Section 69a(1), if the driving licence is disqualified, the court shall simultaneously impose a ban on its reinstating for a period of six months to five years (suspension). Deprivation of a driving licence may be imposed for life if it can be expected that the statutory maximum period for which its imposition is permissible will not be sufficient to prevent the threat posed by the perpetrator. If the perpetrator does not have a driving licence, only a driving ban is imposed.³³

1.6. Norway

In Norway, the major act governing substantive criminal law is *Lov om straff (straffeloven)*.³⁴ Offences involving the deprivation of human life are regulated in Chapter 25. The offences classified in this chapter relating to causing the death of another human being include homicide (Section 275),³⁵ mercy killing (Section 278),³⁶ and negligent causing of death (Section 281).³⁷ Among the provisions in the Norwegian Code, there are no provisions separately

³² Original wording:

(1) Wird jemand wegen einer rechtswidrigen Tat, die er bei oder im Zusammenhang mit dem Führen eines Kraftfahrzeuges oder unter Verletzung der Pflichten eines Kraftfahrzeugführers begangen hat, verurteilt oder nur deshalb nicht verurteilt, weil seine Schuldunfähigkeit erwiesen oder nicht auszuschließen ist, so entzieht ihm das Gericht die Fahrerlaubnis, wenn sich aus der Tat ergibt, daß er zum Führen von Kraftfahrzeugen ungeeignet ist.

(2) Ist die rechtswidrige Tat in den Fällen des Absatzes 1 ein Vergehen

1. der Gefährdung des Straßenverkehrs (§ 315c),

1a. des verbotenen Kraftfahrzeugrennens (§ 315d),

2. der Trunkenheit im Verkehr (§ 316),

3. des unerlaubten Entfernens vom Unfallort (§ 142), obwohl der Täter weiß oder wissen kann, daß bei dem Unfall ein Mensch getötet oder nicht unerheblich verletzt worden oder an fremden Sachen bedauerlicher Schaden entstanden ist, oder

4. des Vollrausches (§ 323a), der sich auf eine der Taten nach den Nummern 1 bis 3 bezieht,

so ist der Täter in der Regel als ungeeignet zum Führen von Kraftfahrzeugen anzusehen.

³³ Original wording:

§ 69a (1) Entzieht das Gericht die Fahrerlaubnis, so bestimmt es zugleich, daß für die Dauer von sechs Monaten bis zu fünf Jahren keine neue Fahrerlaubnis erteilt werden darf (Sperre). Die Sperre kann für immer angeordnet werden, wenn zu erwarten ist, daß die gesetzliche Höchstfrist zur Abwehr der von dem Täter drohenden Gefahr nicht ausreicht. Hat der Täter keine Fahrerlaubnis, so wird nur die Sperre angeordnet.

³⁴ Norwegian Criminal Code (English version available at <https://lovdata.no/dokument/NLE/lov/2005-05-20-28>).

³⁵ The wording of the provision in English: "A penalty of imprisonment for a term of between eight and 21 years shall be applied to any person who kills another person."

³⁶ The wording of the provision in English: "If any person on compassionate grounds kills a person who is terminally ill or otherwise close to death, the penalty may be set lower than the minimum penalty or to a milder penalty type than follows from section 275."

³⁷ The wording of the provision in English: "A penalty of imprisonment for a term not exceeding six years shall be applied to any person who negligently causes the death of another person."

classifying the offence of vehicular homicide. In the Norwegian criminal law, vehicular homicide is, therefore, not a classified form of human homicide.

1.7. Sweden

In Sweden, the basic act of criminal law is the Criminal Code (Swedish: *brottsbalken*).³⁸ When looking for *brottsbalken* provisions that penalise vehicular homicide as a type of offence separate from homicide, one should look for this type of offence in the part relating to offences against life and health and offences against traffic safety. Anticipating further considerations, let us note from the outset that *brottsbalken* does not contain any provisions relating to the latter category of offences – they are regulated by a separate act.

Turning to the first category of offences, i.e. offences against life and health, it should be pointed out that they are classified in Part 2, in Chapter 3, entitled “On offences against life and health”. Section 1 classifies the offence of murder (Swedish: *mord*).³⁹ The material elements of this offence include taking the life of another person. Section 2,⁴⁰ on the other hand, classifies the offence of homicide, or manslaughter (Swedish: *dråp*), which – in view of the circumstances of its committing – is a crime less severe than murder. Further, Section 3⁴¹ penalises the offence of infanticide. Another offence is the offence of causing the death of another (Swedish: *vållendetill annans död*), which involves causing a criminal effect through negligence. It is classified in Section 7.⁴² The last provision relating to causing a fatal effect in Chapter 3 of Part 2 of *brottsbalken* is the attempt to commit the above-mentioned offences.⁴³ As such, this act of law does not contain any provision assigning the status of a separate

³⁸ *Brottsbalken* (Swedish and English versions available at <https://www.government.se/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf> [accessed on: 20.09.2024]).

³⁹ Original wording:

Den som berövar annan livet, döms för mord till fängelse på viss tid, lägst tio och högst arton år, eller på livstid. Som skäl för livstids fängelse ska det särskilt beaktas om gärningen föregåtts av noggrann planering, präglats av särskild förslagenhet, syftat till att främja eller dölja annan brottslighet, inneburit svårt lidande för offret eller annars varit särskilt hänsynslös.

⁴⁰ Original wording:

Är brott som i 1 § sägs med hänsyn till de omständigheter som föranlett gärningen eller eljest att anse som mindre grovt, dömes för dråp till fängelse, lägst sex och högst tio år.

⁴¹ Original wording:

Dödar kvinna sitt barn vid födelsen eller eljest å tid då hon på grund av nedkomsten befinner sig i upprivet sinnes-tillstånd eller i svårt trångmål, dömes för barnadråp till fängelse i högst sex år.

⁴² Original wording:

Den som av oaktsamhet orsakar annans död, döms för vållande till annans död till fängelse i högst två år eller, om brottet är ringa, till böter. Är brottet grovt, döms till fängelse i lägst ett och högst sex år. Vid bedömande av om brottet är grovt ska särskilt beaktas 1. om gärningen har inne-fattat ett medvetet risktagande av allvarligt slag, eller 2. om gärningsmannen, när det krävts särskild uppmärksamhet eller skicklighet, har varit påverkad av alkohol eller något annat medel eller annars gjort sig skyldig till en försummelse av allvarligt slag.

⁴³ Original wording:

För försök eller förberedelse till mord, dråp, barnadråp eller sådan misshandel som inte är ringa, och för stämpling till mord, dråp, grov misshandel eller synnerligen grov miss-handel eller underlåtenhet att avslöja eller förhindra sådant brott döms det till ansvar enligt 23 kap.

type of offence to vehicular homicide, i.e. separate from both the offence of murder and the offence of homicide.

Offences committed in road traffic are covered by the Act on Penalties for Certain Road Traffic Offences of 1951 (Swedish: *Lag (1951:649) om straff för vissa trafikbrott* Początek formularza).⁴⁴ Among other things, the act classifies the offences of driving a motor vehicle without a licence (Section 3) and driving a motor vehicle after drinking alcohol (Sections 4 and 4a). This act does not contain any provisions penalising vehicular homicide as a type of offence separate from basic homicide.

Summing up, a separate type of vehicular homicide offence is not classified in Swedish criminal law.

1.8. Italy

In the Italian Criminal Code (*Codice penale*, *Regio Decreto 19.10.1930, n. 1398*)⁴⁵, liability for vehicular homicide is regulated in Article 589-bis. This provision is included in Book 2, more specifically in its Title 12, entitled “Offences against a person”. The provision concerned was added by Article 1(1) of Act No. 41 of 23 March 2016 Introducing the Offence of Vehicular Homicide and the Offence of Road Injury,⁴⁶ and entered into force on 25 March 2016. Then it was amended by the Act No. 138 of 26 September 2023 Introducing the Offence of Maritime Homicide and the Offence of Maritime Bodily Injury,⁴⁷ and, in its new wording, entered into force on 25 October 2023.

According to Article 589-bis, whoever culpably causes the death of a human being by violating the traffic, maritime or inland navigation regulations shall be subject to imprisonment for a period from two to seven years.⁴⁸

Whoever, while driving a motor vehicle or one of the recreational craft referred to in Article 3 of the Recreational Navigation Code,⁴⁹ in a state of alcohol intoxication or mental

⁴⁴ *Lag (1951:649) om straff för vissa trafikbrott*, available at: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-1951649-om-straff-for-vissa-trafikbrott_sfs-1951-649/ [accessed on: 20.09.2024].

⁴⁵ Available at: <https://www.altalex.com/documents/codici-altalex/2014/10/30/codice-penale> [accessed on: 20.09.2024].

⁴⁶ Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2016-03-23;4> [accessed on: 20.09.2024].

⁴⁷ Available at: <https://www.gazzettaufficiale.it/eli/id/2023/10/10/23G00146/sg> [accessed on: 20.09.2024].

⁴⁸ Original wording:

Art. 589-bis. Omicidio stradale chiunque cagioni per colpa la morte di una persona con violazione delle norme sulla disciplina della circolazione stradale o della navigazione marittima o interna è punito con la reclusione da due a sette anni.

⁴⁹ Article 3 of the Recreational Navigation Code provides the following definition of the structures designed for recreational navigation:

(a) a recreational craft means any structure of any type equipped with propulsion intended for recreational navigation;

and physical changes resulting from the use of narcotic or psychotropic drugs within the meaning of Article 186(2)(c) and 187 of the Road Code⁵⁰ (i.e. if the blood alcohol level exceeds 1.5 grams per litre) culpably causes the death of a human being, shall be subject to imprisonment from eight to twelve years.⁵¹

The same penalty shall be imposed on the driver of a motor vehicle referred to in Article 186-bis(1)(b), (c) and (d) of the Road Code (i.e. a driver engaged in passenger transport activity, a driver engaged in goods transport activity and a driver of motor vehicles with a total weight exceeding 3.5 t, a driver of motor vehicles towing a trailer with a total weight of two vehicles exceeding 3.5 t, a driver of buses and other motor vehicles intended for the carriage of passengers with more than eight seats, excluding the driver's seat, and a driver of articulated vehicles) or driver of a recreational craft who, while in a state of alcoholic intoxication within the meaning of Article 186(2)(b) of the Road Code (i.e. where the blood alcohol level is higher than 0.8 and does not exceed 1.5 grams per litre) culpably causes the death of a human being.⁵²

(b) a craft used for commercial purposes – a commercial yacht: means any craft referred to in Article 2 of the Code, as well as a vessel referred to in Article 3 of the Act of 8 July 2003, no. 172;

(c) a large recreational craft means any vessel with a hull longer than 24 metres, measured in accordance with harmonised UNI/EN/ISO/8666 standard and of more than 500 gross tonnage, referred to as “GT”, or more than 600 gross tonnage, referred to as “BRT”;

(d) a small recreational craft means any vessel with a hull longer than 24 metres, measured in accordance with harmonised UNI/EN/ISO/8666 standard, and of tonnage up to 500 GT or 600 BTR, excluding the craft referred to in point (e);

(e) a historic small recreational craft means any vessel with a hull longer than 24 metres, measured in accordance with harmonised UNI/EN/ISO/8666 standard, and of tonnage up to 120 GT or 100 BTR, built before 1 January 1967;

(f) a recreational craft means any craft with a hull longer than 10 metres and not longer than 24 metres, measured in accordance with harmonised standard UNI/EN/ISO/8666;

(g) rowing recreational craft means any rowing boat or a craft with a hull length equal to or less than 10 metres, measured in accordance with the harmonised standard referred to in section (c), excluding jet skis;

(h) a jet ski means any recreational craft with a hull length of less than 4 metres, using a jet pump propulsion engine as the main source of propulsion and designed to be operated by one or more persons sitting, standing or kneeling on the hull and not inside it.

Original wording available at: <https://www.altalex.com/documents/codici-altalex/2014/11/03/codice-della-nautica-da-diporto> [accessed on: 20.09.2024].

⁵⁰ *Codice della strada*, <https://www.aci.it/i-servizi/normative/codice-della-strada.html> [accessed on: 20.09.2024].

⁵¹ Original wording:

Chiunque, ponendosi alla guida di un veicolo a motore o di una delle unità da diporto di cui all'articolo 3 del codice della nautica da diporto, di cui al decreto legislativo 18 luglio 2005, n. 171, in stato di ebbrezza alcolica o di alterazione psicofisica conseguente all'assunzione di sostanze stupefacenti o psicotrope ai sensi rispettivamente degli articoli 186, comma 2, lettera c), e 187 del codice della strada, di cui al decreto legislativo 30 aprile 1992, n. 285, nonché degli articoli 53-bis, comma 2, lettera c), e 53-quater del codice della nautica da diporto, di cui al decreto legislativo 18 luglio 2005, n. 171, cagioni per colpa la morte di una persona, è punito con la reclusione da otto a dodici anni.

⁵² Original wording:

La stessa pena si applica al conducente di un veicolo a motore di cui all'articolo 186-bis, comma 1, lettere b), c) e d), del decreto legislativo 30 aprile 1992, n. 285, o di un'unità da diporto di cui all'articolo 53-ter, comma 1, lettera b), del decreto legislativo 18 luglio 2005, n. 171, il quale, in stato di ebbrezza alcolica ai sensi rispettivamente degli articoli 186, comma 2, lettera b), del decreto legislativo 30 aprile 1992, n. 285, e 53-bis, comma 2, lettera b), del decreto legislativo 18 luglio 2005, n. 171, cagioni per colpa la morte di una persona.

Without prejudice to the provisions of paragraph 3, anyone who, while driving a motor vehicle or one of the recreational craft referred to in Article 3 of the Recreational Navigation Code, in a state of alcoholic intoxication within the meaning of Article 186(2)(b) of the Road Code, (i.e. if the blood alcohol level is higher than 0.8 and does not exceed 1.5 grams per litre) culpably causes the death of a human being, shall be subject to imprisonment for a period of five to 10 years.⁵³

The penalty provided for in paragraph 4 also applies to:

1. a driver of a motor vehicle who, when driving in built-up areas at a speed equal to or greater than twice the speed limit, and in any event not less than 70 km/h, or outside built-up areas at a speed of at least 50 km/h above the maximum speed limit, culpably causes the death of a human being;
2. a driver of a motor vehicle who, by passing through an intersection at a red light or driving on the wrong side of the road ("against the flow"), culpably causes the death of a human being;
3. a driver of a motor vehicle who, as a result of a manoeuvre to change direction at or near intersections, curves or speed bumps, or as a result of overtaking another vehicle at a pedestrian crossing or continuous line, culpably causes the death of a human being.⁵⁴

In the cases referred to in the preceding paragraphs, the penalty shall be aggravated if the offence was committed by a person driving without a licence or, except in the cases referred to in paragraph 5, a boatmaster's licence if required, or by a person whose driving licence has been suspended or revoked, or if the motor vehicle or recreational craft is owned by the offender and does not have compulsory insurance.⁵⁵

⁵³ Original wording:

Salvo quanto previsto dal terzo comma, chiunque, ponendosi alla guida di un veicolo a motore o di una delle unità da diporto di cui all'articolo 3 del decreto legislativo 18 luglio 2005, n. 171, in stato di ebbrezza alcolica ai sensi rispettivamente degli articoli 186,, comma 2, lettera b), del decreto legislativo 30 aprile 1992, n. 285, e 53-bis, comma 2, lettera b), del decreto legislativo 18 luglio 2005, n. 171, cagioni per colpa la morte di una persona, è punito con la reclusione da cinque a dieci anni.

⁵⁴ Original wording:

La pena di cui al quarto comma si applica altresì:

1) al conducente di un veicolo a motore che, procedendo in un centro urbano ad una velocità pari o superiore al doppio di quella consentita e comunque non inferiore a 70 km/h, ovvero su strade extraurbane ad una velocità superiore di almeno 50 km/h rispetto a quella massima consentita, cagioni per colpa la morte di una persona;
2) al conducente di un veicolo a motore che, attraversando un'intersezione con il semaforo disposto al rosso ovvero circolando contromano, cagioni per colpa la morte di una persona;
3) al conducente di un veicolo a motore che, a seguito di manovra di inversione del senso di marcia in prossimità o in corrispondenza di intersezioni, curve o dossi o a seguito di sorpasso di un altro mezzo in corrispondenza di un attraversamento pedonale o di linea continua, cagioni per colpa la morte di una persona.

⁵⁵ Original wording:

Nelle ipotesi di cui ai commi precedenti la pena è aumentata se il fatto è commesso da persona non munita di patente di guida o, ad eccezione delle ipotesi di cui al quinto comma, di patente nautica, ove prescritta, o con patente sospesa o revocata, ovvero nel caso in cui il veicolo a motore o l'unità da diporto sia di proprietà dell'autore del fatto e tale veicolo o unità da diporto sia sprovvisto di assicurazione obbligatoria.

In the cases referred to in the preceding paragraphs, if the incident is not a sole consequence of the perpetrator's act or omission, the penalty shall be reduced by a maximum of half.⁵⁶

In the cases referred to in the preceding paragraphs, if a driver of a vehicle or recreational craft causes the death of more than one person, or the death of one or more persons and injury to one or more persons, the sentence imposed on that perpetrator for the most serious of their offences shall be imposed as the penalty for the whole act, but increased by a maximum of three times, with a maximum period of eighteen years.⁵⁷

In Article 589-ter., the Italian Criminal Code provides for a stricter liability in the event of a driver's escape from the scene. Indeed, this provision stipulates that in the cases referred to in Article 589-bis, if the driver escapes from the scene of the incident, the penalty shall be increased from one-third to two-thirds, but shall in no case be lower than 5 years.⁵⁸

As stated in the fourth sentence of Article 222(2) of the Road Code, if the perpetrator is convicted of the offences specified in Articles 589-bis and 590-bis of the Criminal Code, the perpetrator shall be disqualified from driving.⁵⁹ Pursuant to Article 222(3-bis), in the case of a conviction for the offences referred to in Article 589-bis (2), (3) and (4) of the Criminal Code, the convict may not obtain a new driving licence until 15 years after its revocation, and in the case of the conviction for the offence referred to in Article 589-bis (5) of the Criminal Code –until 10 years after its revocation. This period shall be extended to 20 years where the perpetrator has previously been convicted of the offences referred to in Article 186(2)(b), i.e. driving a motor vehicle with a blood alcohol level of more than 0.8 and not exceeding 1.5 grams per litre, in Article 186(2)(c), i.e. driving a motor vehicle with a blood alcohol level of more than 1.5 grams per litre, in Article 186(2-bis), i.e. causing a traffic accident while intoxicated, in Article 187(1), i.e. driving a motor vehicle in a state of mental and physical changes resulting from the use of narcotic drugs or psychotropic substances, and in Article 187(1-bis), i.e. causing a traffic accident in a state of mental and physical changes

⁵⁶ Original wording:
Nelle ipotesi di cui ai commi precedenti, qualora l'evento non sia esclusiva conseguenza dell'azione o dell'omissione del colpevole, la pena è diminuita fino alla metà.

⁵⁷ Original wording:
Nelle ipotesi di cui ai commi precedenti, qualora il conducente del veicolo o dell'unità da diporto cagioni la morte di più persone, ovvero la morte di una o più persone e lesioni a una o più persone, si applica la pena che dovrebbe infliggersi per la più grave delle violazioni commesse aumentata fino al triplo, ma la pena non può superare gli anni diciotto.

⁵⁸ Original wording:
Art. 589-ter.
Fuga del conducente in caso di omicidio stradale e nautico (1) (2)
Nel caso di cui all'articolo 589-bis, se il conducente si dà alla fuga, la pena è aumentata da un terzo a due terzi e comunque non può essere inferiore a cinque anni.

⁵⁹ Original wording:
Alla condanna, ovvero all'applicazione della pena su richiesta delle parti a norma dell'articolo 444 del codice di procedura penale, per i reati di cui agli articoli 589-bis e 590-bis del codice penale consegue la revoca della patente di guida.

resulting from the use of narcotic drugs or psychotropic substances. This period shall be further extended to 30 years if the perpetrator of the accident has failed to comply with the obligations defined in Article 189(1) of the Road Code concerning due behaviour in the event of a traffic accident and has escaped from the scene.⁶⁰

2. The Issue of the Legitimacy of a Separate Typology of Vehicular Homicide in Polish Criminal Law

As commonly known in Poland, the Polish Criminal Code does not distinguish a provision by virtue of which vehicular homicide is assigned the status of a classified form of human homicide.

The absence of such a provision in the CC makes vehicular homicide, understood as an intentional causing of death of a human being resulting from driving a motor vehicle in road traffic, a conduct classified in Polish criminal law under the general rules.

Thus, depending on the circumstances of its committing, it may mean the fulfilment of the elements of:

1. the basic form of human homicide (Article 148(1) CC),
2. the specific classified form of homicide of a human being; after all, it is unquestionable that vehicular homicide may, in particular, include: homicide with particular cruelty (Article 148(2)(1) CC), homicide committed as a result of motivation deserving particular condemnation (Article 148(2)(3) CC), homicide of more than one person (Article 148(3) CC), or homicide of a public official committed during the performance of their official duties related to the protection of human security or the protection of public safety or order (Article 148(3) CC), or finally,
3. the specific privileged form of human homicide; after all, the possibility of committing vehicular homicide under the influence of strong agitation justified by the circumstances (Article 148(4) CC) cannot be excluded.

Depending on the circumstances – which should also not raise any doubts – vehicular homicide may also be classified under another provision, and this is justified by the Code assumption (see: Article 11(2) CC) that the legal classification of the perpetrator's behaviour

⁶⁰ Original wording:

Nel caso di applicazione della sanzione accessoria di cui al quarto periodo del comma 2 del presente articolo per i reati di cui all'articolo 589-bis, secondo, terzo e quarto comma, del codice penale, l'interessato non può conseguire una nuova patente prima che siano decorsi quindici anni dalla revoca; per il reato di cui all'articolo 589-bis, quinto comma, del codice penale, l'interessato non può conseguire una nuova patente prima che siano decorsi dieci anni dalla revoca. Tale termine è elevato a venti anni nel caso in cui l'interessato sia stato in precedenza condannato per i reati di cui all'articolo 186, commi 2, lettere b) e c), e 2-bis, ovvero di cui all'articolo 187, commi 1 e 1-bis, del presente codice. Il termine è ulteriormente aumentato sino a trenta anni nel caso in cui l'interessato non abbia ottemperato agli obblighi di cui all'articolo 189, comma 1, del presente codice, e si sia dato alla fuga.

must be shaped in such a way that the content of this classification – by means of the legal provisions indicated therein – fully reflects the criminal-law characteristics of such behaviour, thus reflecting, without the slightest prejudice, the scope of criminal lawlessness caused by the perpetrator.⁶¹ This will be the case, for example, if the perpetrator commits vehicular homicide in a state of intoxication or under the influence of an intoxicant (Article 178a CC and depending on further circumstances: paragraphs 1 or 2 thereof). Then – and in line with the aforementioned assumption – the legal classification of the vehicular homicide so committed will be cumulative since, in addition to the provision defining the type of human homicide as committed, it should include a provision defining the relevant form of driving a motor vehicle in road traffic in a state of intoxication or under the influence of intoxicant.

The answer to the question of whether a separate provision should be introduced into the CC to regulate vehicular homicide as a classified form of human homicide is obviously dependent on the answer to another question, namely, the question of whether the current status of law is, in the aspect of interest to us, shaped in a way that is deficient in both the justice-related and preventive impact of criminal law.

As far as the justice-related aspect is concerned, the position is that the current status of law is correct as it provides for an appropriate level of sanction for each case of vehicular homicide. Indeed, in the most common situations, i.e. where the perpetrator of vehicular homicide has committed the basic or classified form of homicide, the level of the sanction will be determined by the lower and upper limits of the penalties for the commission of homicide. These limits, in turn, are set at the appropriate level of victimisation for vehicular homicide. At this point, it should be recalled that in the current legal status, the basic form of human homicide is punishable by both a fixed term of imprisonment between 10 and 30 years and an indefinite term of imprisonment, i.e. life imprisonment, while for the classified form of human homicide, the range of penalty is increased, with the lower limit of the statutory threat being 15 years of imprisonment. The point of view expressed here is obviously based on the assumption that the circumstances of killing a human being through vehicular homicide in terms of their impact on the level of sentence should ultimately be resolved by the court. There is no doubt that, in the context under consideration, the circumstances may vary, for example, killing of a fellow passenger and killing of a person outside the motor vehicle driven by the perpetrator. After all, in the first case, the fact that vehicular homicide has been committed is not, in principle, a circumstance which appears to be an aggravating factor for the penalty, while in the second case, it may, undoubtedly, deserve to be classified so under certain circumstances. Drawing attention to the potential various impacts of the

⁶¹ Regarding the principles governing the adequate legal classification of the perpetrator's behaviour, see, in particular: Ł. Pohl, *Kwalifikacja prawna form popełnienia czynu zabronionego (uwagi na tle kodeksu karnego z 1997 r.)*, [in:] *Współczesne oblicze prawa karnego prawa wykroczeń kryminologii i polityki kryminalnej*, J. Bojarski, N. Daško, J. Lachowski (eds.), Warszawa 2023, pp. 776 et seq.

circumstances of vehicular homicide is, therefore, a substantive objection to the introduction of a provision on vehicular homicide into the CC as a classified form of human homicide.

In terms of the preventive aspect, on the other hand, it seems that any potential doubts in this field regarding the adequate design of the current Criminal Code may arise with regard to this component of prevention, which in criminal law theory is referred to as general prevention. Further, one may risk a statement that, in fact, the primary source of prevention relies on distinguishing classified forms of human homicide in the CC, i.e. those forms which are structurally linked with a more severe potential sanction for their commission than the sanction linked with human homicide in its basic form.⁶² Thus, it can be considered that in the absence of these provisions in the CC, the above-mentioned doubts about the general preventive deficit of this code in relation to vehicular homicide would not have occurred. In such a case, the vehicular homicide would then, in principle, be subject to the highest level of punishment. However, these potential doubts should ultimately be regarded as unconvincing as they obscure the fact that the circumstances of vehicular homicide are not in every case, as demonstrated above, the circumstances that increase the penalty. As such, the circumstances in question do not fulfil such a function in every case in which they occur. With regard to the example of another classifying criterion – and, we should add, a criterion which is, in principle, unquestionably qualifying in substantive terms – i.e. the criterion of particular cruelty, we immediately recognise that the cruelty in question differs from the circumstances of vehicular homicide since it always has an aggravating effect on the penalty, which justifies its status as a statutory classifying criterion.⁶³

For the reasons provided above, the idea of introducing a provision into the CC converting vehicular homicide into a classified form of human homicide should be assessed as substantively unconvincing.

The foregoing conclusion does not mean that the Criminal Code currently in force is an optimally designed normative act ensuring adequate response, by means of criminal repression, to every case of vehicular homicide. Fully justifiable doubts arise in those situations where vehicular homicide takes place through behaviour by which its perpetrator fulfils the elements of a type of offence which differs from homicide. This will refer, in particular, to cases where vehicular homicide is committed by driving a motor vehicle in road traffic while intoxicated or under the influence of an intoxicant. The Criminal Code prescribes a cumulative legal classification for such behaviour (see: Article 11(2) CC), and obliges the court to punish the perpetrator on the basis of the most severe provision (see: Article 11(3) CC). The component of this solution that generates the doubts concerned is obviously the norm

⁶² Particularly those forms among the classified types of human homicide which are legitimately described as casuistic – on this issue, see: K. Daszkiewicz, *Przestępstwa...*, pp. 21 et seq.

⁶³ Another point is that it is not a legitimate solution to expose particular cruelty as a classifying characteristic only in a selected passage of the special section of the CC.

arising from the last of the above-mentioned provisions, a norm resulting from an attempt to maintain coherence in reasoning: one offence – one penalty. However, the literature has already pointed out the irrationality of the solution concerned.⁶⁴ It also emphasises that the simplest way to delete it from the CC is to replace the substantively doubtful theory of the unity of offence (the same act can constitute only one offence) with a theory of the multiplicity of offences (with the cumulative penalty as a response to this multiplicity).⁶⁵ Such a solution would not give rise to any objections as to the inadequacy of the level of the penalty imposed. Penalties would then be imposed separately for the fulfilment of the elements of each type of offence and would then be combined into a cumulative penalty. Thus, such an approach would fully realise the ideas of penalty that is both just and properly shaped by the important needs of its preventive impact. The current legal status, through Article 11(3) CC, implements these ideas, unfortunately, in a fragmentary manner, thus giving grounds to raise justified, in this scope, axiological objections, as they relate to the defective model of criminal law valuation shaped therein.

⁶⁴ See: Ł. Pohl, *Propozycja nowelizacji art. 11 Kodeksu karnego*, "Prawo w Działaniu" 2022, Issue 49, pp. 113 et seq.; Ł. Pohl, *Raz jeszcze o zasadności usunięcia teorii jedności przestępstwa z Kodeksu karnego – odpowiedź na polemikę*, "Prawo w Działaniu" 2024, Issue 57, pp. 296 et seq.

⁶⁵ See: the studies cited in the preceding footnote.

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**Offence of Participating
in a Fight or Beating Resulting
in Death vs. Homicide
with Conceivable Intent**

CRIMINAL LAW AND CRIMINOLOGY

I. Empirical Part

1. Sampling

A stratified sample was used in the study, according to the number of final convictions in 2015. Eleven (regional) courts were drawn, while 98 cases were adjudicated under Article 148(1) of the Criminal Code (CC) and 38 under Article 158(3) CC, i.e. a total of 136. More cases were drawn under Article 148(1) in order to include those cases where the court attributed to the perpetrator an action with conceivable intent, in a number approximating to the number of those adjudicated under Article 158(3) CC – as they could not be selected at the drawing stage. Although the courts were asked to submit files, consequently only files in 55 cases – 40 under Article 148(1) and 15 under Article 158(3) CC – were received. The courts gave various reasons for being unable to provide all the cases requested. Only eleven of the homicide cases involved conceivable intent, and equally only 11 cases under Article 148(1) CC ultimately remained to be analysed on the merits of the court's statement of reasons for the judgment (convictions for homicide with conceivable intent) and 15 under Article 158(3) CC. Furthermore, in six cases no statement of reasons was provided for the judgment, while in a few more cases classification under Article 158(3) was not an option at all (homicide with conceivable intent, where the involvement of a third party was not even mentioned).

2. Brief Descriptions of the Cases Examined

The research material was characterised separately for homicide cases. All cases were examined, i.e. concerning direct and conceivable intent, and involvement in a fight or beating resulting in death.

a. Homicide Cases (Article 148(1), N = 40)**Other Provisions Concerning the Legal Classification of the Act**

In the legal classification of the convicted persons' acts (according to the judgments of the courts of first instance), the following provisions of the CC, other than Article 148(1) CC, were applied:

- Article 4(1) (new or more relative law) – 2 cases;
- Article 11(2) (concurrence of provisions of the Act) – 6;
- Article 13(1) (attempt) – 6;
- Article 25(2) (exceeding the limits of necessary defence) – 2;
- Article 31(2) (substantially impaired sanity) – 3;
- Article 60(2) (extraordinary mitigation of punishment) – 2;
- Article 64(1) (special, basic relapse) – 4;
- Article 64 § 2 (specific, multiple relapse) – 1.

The Legal Classification of the Act Adopted by the Court of Second Instance

In 26 cases, the classification under Article 148(1) CC was upheld in the second instance judgment. In one case, the Court of Appeal repealed the judgment and referred the case for judicial review. The remaining thirteen cases were not subject to appeal.

Number of Other Acts for Which (In Addition to Homicide) There Was a Conviction by the Court of First Instance

In six cases, the conviction also included an offence in addition to homicide; in two cases there were two such offences.

Form of Accessory Liability for the Offence of Homicide

In 37 cases, accessory liability for the offence of homicide was due to individual perpetration, while in three cases it was joint perpetration (in all of the cases there were only two accomplices).

Form of Commission of the Offence of Homicide

In 35 cases, the form of commission of the offence of homicide was the accomplished homicide, and in the remaining five cases it was attempted homicide.

Intent

In 29 cases, the perpetrator acted with the direct intent of committing homicide, and in ten cases with the conceivable intent of committing homicide. One case concerned both of these forms of intent.

Penalty

In 33 cases, custodial sentences of various lengths were imposed; in six cases, the sentence was 25 years of imprisonment and in one case life imprisonment.

Number of Years of Imprisonment (Article 32(3) CC)

The numbers of years of imprisonment are presented in Table 1.

Table 1. Numbers of years of imprisonment (homicide)

Number of years	Number of cases	%
4	1	3.0
6	1	3.0
8	4	12.1
10	9	27.3
11	3	9.1
12	5	15.2
15	9	27.3
ND	1	3.0
Total	33	100

Cumulative Classification

In three cases, cumulative classification under Article 157(2) CC was applied, and in two cases – under Article 156(1) CC (all of these cases involved convictions for attempted homicide).

Cumulative Penalty

A cumulative penalty was imposed in eight cases. The penalties are presented in Table 2.

Table 2. Cumulative sentence

Sentence in years	Number of cases	%
8	1	12.5
10	1	12.5
12	1	12.5
15	3	37.5
25	2	25.0
Total	8	100

b. Cases of Involvement in a Fight or Beating Resulting in Death (*N* = 15)

Other Provisions Concerning the Legal Classification of the Act

In the legal classification of the convicted persons' acts (according to the judgments of the courts of first instance), the following provisions of the CC, other than Article 158(3) (and (1)) CC, were applied:

- 11(2) (concurrence of provisions of the Act) – 1;
- 57(1) (extraordinary aggravation or mitigation of punishment, concurrence of provisions) – 1;
- 64(1) (special, basic relapse) – 4.

The Legal Classification of the Act Adopted by the Court of Second Instance

In 10 cases, the classification under Article 158(3) CC was upheld in the second instance judgment. The remaining five cases were not subject to appeal.

Number of Other Acts for Which (In Addition to Homicide) There Was a Conviction by the Court of First Instance

In four cases, the conviction also included an act other than involvement in a fight or beating; in one case there were two such acts and also in one case – five such acts.

Form of Accessory Liability for the Offence of Involvement in a Fight or Beating

In all 15 cases, the accessory liability for the offence concerned was joint perpetration, including thirteen cases in which two accomplices were convicted and one case in which five accomplices were convicted (and one in which the second accomplice was not tried).

Form of Commission of the Offence of Involvement in a Fight or Beating

In all 15 cases, the form of commission of the offence of involvement in a fight or beating resulting in death was the accomplishment, which, however, stems *ex definitione* from the wording of the provision (the effect is a signifier).

Form of Unintentional Perpetration

Perpetration was found to be unintentional by the courts in two cases; unintentional in eight (there was insufficient data in five cases).

Penalty

Numbers of years of imprisonment are presented in Table 3.

Table 3. Number of years of imprisonment (involvement in a fight or beating resulting in death)

Number of years	Number of cases	%
1	1	6.7
3	4	26.6
4	3	20.0
5	1	6.7
6	3	20.0
8	1	6.7
10	2	13.3
Total	15	100

Cumulative Penalty

A cumulative penalty was imposed in four cases. The penalties are presented in Table 4.

Table 4. Cumulative sentence

Sentence in years	Number of cases	%
5	1	25.0
6	1	25.0
7	1	25.0
9	1	25.0
Total	4	100

3. Examples of Cases – Article 158(3) CC

Regional Court (SO) in Łódź, XVIII K 81/14

Brief Description of the Act

The victim was staying with his cohabiting partner and an acquaintance at home consuming alcohol. One of the perpetrators had a previous conviction for a beating. The perpetrators had gone to beat him up again because he had *grassed* on one of them to the police.

Both perpetrators (one was a minor) began beating the victim with their fists and, when he fell, kicking him all over his body, including his head. They also hit him with a wooden rake handle and a rubber garden hose. After a few minutes, they stopped, approached the victim's cohabiting partner and beat her as well (not resulting in death). After taking her phone and wedding ring, they left.

Arguments from the Statement of Reasons of the Court of First Instance

The offence defined in Article 158(1) is an intentional offence, while the offence described in Article 158(3) CC is intentional with regard to the participation in the beating itself, while the consequence unintentional. The participant in the beating must have foreseen or be objectively able to foresee the consequence determining the classification of the offence concerned. In the case adjudicated, the defendant jointly and in agreement took part in the beating of the victim. As a result of this incident and the violence used, the victim sustained injuries that led to his death. The defendant could have foreseen the effect of their act. It is well known that the head and the torso are the parts of the body where the vital organs are located. By inflicting strong blows and by kicking exactly at these parts of the body, everyone has to expect that this would cause the kind of injuries that may lead to death.

Regional Court (SO) in Warsaw, VIII K 114/13

Brief Description of the Act

(First act)

The perpetrator and the victim were acquaintances. On the day of the incident, they met at the perpetrator's flat and consumed alcohol there. A disagreement occurred, during which the perpetrator hit the victim twice. The victim fell, suffering a head injury – intracranial bleeding. The victim got up, left and returned to his flat, where he went to bed. On the

next day, the victim was visited by his girlfriend. The victim was lying on his back, covered in blood, with blood pouring from his mouth and nose. He was grunting and breathing heavily. The girl ran to ask her friend for help and, together with him, she called the ambulance. At the hospital, without regaining consciousness, the victim died.

(Second act)

A few months later, the perpetrator invited a friend (later the second perpetrator), and they consumed alcohol together. After some time, they were joined by a third colleague (later the victim). During the meeting, the victim began to insult one of the perpetrators. He was defended by perpetrator 1, who began to struggle with the victim. They wanted to ask the victim to leave but he refused. Perpetrator 1 started beating the victim with his fists on his face and then all over his body. When the victim fell, the perpetrator sat on top of him and continued beating him. Then he stopped. At that time, perpetrator 2 was sitting on the sofa heavily drunk and made no attempt to check the victim's condition. The perpetrators continued drinking alcohol. Perpetrator 2 fell asleep and perpetrator 1 leaned over the victim to check if he was breathing. After a while, he stopped breathing. Perpetrator 1 called an ambulance and the police. The victim died.

Arguments from the Statement of Reasons of the Court of First Instance

Perpetrator 1

The difference between homicide and the offence provided for in Article 156(3) CC lies in the subjective aspect of the act and is that in the case of the crime of homicide, the perpetrator has the intention – direct or conceivable – to deprive of life, while in the case of the offence under Article 156(3) CC, they act with the direct or conceivable intention to cause severe bodily harm to the victim, and the death resulting from the offence is unintentional. Thus, the subjective side of the offence defined in Article 156(3) CC is complex, as it requires combined guilt. Intentional action relates only to the causing of severe bodily harm; the effect of death of a person is an unintentional act, being a consequence. Through their action, the perpetrator met the criteria under Article 156(3) CC (first act). Under such circumstances, the perpetrator is liable for death as a consequence not subject to the intentional nature of the behaviour. The intention to cause injury only arose in the defendant during the incident – he did not plan to beat the victim. The defendant is also liable for the effect in the form of death of the second victim. There is an adequate causal link between his death and the actions of the defendant. Description 1 – the classification in the indictment (offence under Article 158(1) and (3)) does not fully encapsulate the essence of the offence committed by the defendant. The classification under Article 158(3) CC applies to a perpetrator involved in a fight or beating only if no causal link can be established between the individual act and

the effect, or if the perpetrator's behaviour was not intended to cause the effect described in (3). Indeed, where the intention of a perpetrator involved in a fight or beating is to cause death, the provision of Article 148(1) CC applies. The intentional causing of death or severe injury to health excludes a possibility of the act qualifying under Article 158(3) CC, since the consequences indicated in this provision can only be unintentional on the part of the perpetrator. When it is established that the fatal outcome is the direct result of the act of one of the participants in a fight or beating, they should be held accountable for causing the effect intentionally independently of the other participants pursuant to Article 158(3) CC. For the demonstration of direct or conceivable intent to commit homicide, it is not sufficient to describe the *modus operandi* and elements such as the type of tool used, the force of the blow or the direction of the aggressive actions. In addition, it is usually necessary to analyse the motivation of the perpetrator, the relationship between the perpetrator and the victim, the background to the incident, etc. It is conclusive for the assessment of the intent of the defendant that he inflicted numerous, powerful blows on life-critical parts of the body. The defendant did not provide assistance to the victim – he sat down and continued to drink alcohol. Thus, the defendant was fully aware of the obvious effect of these blows in the form of death as a necessary consequence of the action he had taken. The perpetrator's behaviour, *modus operandi*, extreme brutality and the highly dynamic nature of the action indicate the intention of the defendant. The defendant made no attempt to curb his aggression until the moment the victim was unable to resist it. The court also took into account the perpetrator's relationship with the victim – he was a stranger to him, which makes his guilt even more serious. The defendant had a prior conviction, in a final judgment, for a similar offence. The defendant acted with the conceivable intent of depriving of life, as he was aware of the possibility of death and consented to it.

Perpetrator 2

The defendant took part in the beating of the victim. Due to the mere fact that the victim was brutally beaten repeatedly, this potential effect should and could have been foreseen, even if this was not the defendant's intention and they did not consent to it.

Brief Description of Potential Changes After the Second Instance

With regard to the second perpetrator, the court changed the classification from that under Article 158(3) to that under Article 217(1) CC and imposed a sentence of six months of imprisonment.

Regional Court (SO) in Łódź, IV K 236/12**Brief Description of the Act**

The two perpetrators had previously known the victim. One of them had a bad relationship with him.

On the day of the incident, they both went to the victim's house. He did not want to let them in, but eventually they managed to enter. They were aggressive and irritable. They started to consume alcohol. They quarrelled and the perpetrators started beating the victim with their fists on his face, a belt with a buckle and a wooden stick. The victim was also attacked with a monkey wrench and hit in his leg with a meat pestle. The perpetrators left the flat, and the victim was still conscious at the time. He went to the bathroom, lay on his side in the bathtub and died in that position.

Arguments from the Statement of Reasons of the Court of First Instance

The defendants wanted to take part in the beating and did so. In doing so, they acted jointly and in concert. The common intent to beat the victim is also demonstrated by the behaviour of the defendants on the next day, when one of the perpetrators informed the other of the victim's death, after which they both left Łódź. The defendants intentionally took part in a beating during which the victim was exposed to the immediate threat of losing his life. The victim was hit with a number of blows, using fists and tools. The direct injuries caused covered almost the entire body of the victim, including such sensitive body parts as the chest and the head. Even a person with a very primitive mental level could have foreseen that the victim might die as a result of such aggressive behaviour. Therefore, such an effect could also have been foreseen by the defendant. The defendants cannot be said to fulfil exhaustively the criteria under Article 156(1)(2) and (3) CC. Such an offence can only be attributed to the person who, through their action or omission, caused a specific injury resulting in severe bodily harm. In the case concerned, it is impossible to determine which specific injuries were caused by each of the defendants. There are also no grounds for concluding that any of the defendants fulfilled exhaustively the criteria of Article 159(1) CC. Unlike in the case of an offence under Article 158(3) CC, this offence does not involve every participant in a fight or beating, but only a participant who uses a firearm, a knife or other dangerous object. It is impossible to determine who used the monkey wrench and the meat pestle. With regard to the other tools, the court found that they could not be treated as dangerous. The court also found that there was also no basis for assuming that the defendants intended to cause or accepted the death of the victim. When they were leaving the flat, the victim was conscious and was even able to move around. Furthermore, none of the circumstances of the case

indicate that the defendants had direct or conceivable intent to cause the death of the victim. In these circumstances, the act does not qualify under Article 148(1) CC

Regional Court (SO) in Gliwice, IV K 120/14

Brief Description of the Act

The perpetrator and his brother knew the victim. They were consuming alcohol together on the day the act was committed. In addition, the perpetrator's cohabiting partner was in the flat. When the brothers went to the shop to buy more alcohol, the victim started touching the cohabiting partner of the defendant. She resisted him, he ruffled her blouse. He tried to force her to have sex, and stopped when he heard footsteps coming from the stairwell. They all continued drinking alcohol and the woman left. A few hours later, she called her partner and said that the victim had tried to rape her. The victim confirmed what the woman had said, admitting that he liked her. A struggle and fight started between the perpetrator and the victim. The perpetrator's brother tried to separate them. Subsequently, the perpetrator and his brother left the room. At the time, the victim was still conscious. The deceased victim was found by third parties the following morning.

Arguments from the Statement of Reasons of the Court of First Instance

The perpetrator was charged under Article 158(3), but the court ultimately accepted the classification under Article 156(3) CC. Due to the beating, the defendant acted with the direct intention of inflicting injury. For such intent to be imputed, it is not necessary for the perpetrator to be precisely aware of the form of injury caused. The multiplicity and force of the blows inflicted, as well as their location, determine that he intended to cause severe harm to the victim. Causing severe bodily harm to the victim was an intentional action, while the effect of death was caused unintentionally by the perpetrator. By beating the victim on the face in such a way as to cause, among others, broken bones, he had full reason to foresee even the most far-reaching consequences, i.e. the victim's death. There are no grounds to deny a causal link between the perpetrator's behaviour and the victim's death. When leaving the scene, the defendant did not take any action that could have resulted in specialist assistance being given to the victim.

Regional Court (SO) in Gliwice, IV K 85/14

Brief Description of the Act

The perpetrators and the victim were family members and lived together. There were frequent arguments among them, with family members resenting their father for not contributing to maintaining of the house. On the day of the incident, the perpetrator did not go to school and bought beer and cannabis. When he and the victim – the perpetrator’s father – returned home, another argument ensued. The son beat his father on the head with his fists, shouting that he did not want to know him. The second perpetrator (ex-husband of the first perpetrator’s mother living with them) also started shouting at the victim, accusing him of not paying his bills. The event lasted several hours. During this time, the victim’s son left his room several times and inflicted blows. None of the other household members stopped him. By the end of the incident, the father was lying on the floor as the defendants would not allow him to sit on a chair. The perpetrators then went to bed, leaving the bleeding man on the floor. During the night, perpetrator 2 woke up and noticed that the victim was dead. He went out to buy a beer, and there he met a friend who told him that the victim was dead. The friend called an ambulance.

Arguments from the Statement of Reasons of the Court of First Instance

The provision of Article 158 does not define the *modus operandi* in the case of a beating, which means that it can be any form of conscious interaction between the participants. A conscious combination of the action of one of the perpetrators with the action of another person or a group of persons against another person is sufficient to acknowledge involvement in this offence. It is sufficient that the perpetrator, through their behaviour, contributed to the strengthening of forces on one side of the incident. The offence committed by the perpetrators is an intentional offence classified according to an unintentional consequence in the form of death of the victim. While the beating itself was the intent of the perpetrators, its effect in the form of the death of the victim is no longer a matter of such intention. It is clear that the defendants, by inflicting blows with considerable force, mainly in the area of the victim’s head, must have been aware of the possible consequences. Both defendants were intoxicated and aggressive. The victim was an ailing person with disabilities, and this prevented him from defending himself or escaping. The defendants could have foreseen that the injuries sustained by the victim might lead to death. The victim was beaten for several hours, had visible injuries in the form of bruises, and was covered in blood. Moreover, leaving him on the floor without any assistance also endangered his life. Anyone acting in this way must anticipate a possibility of human death.

Regional Court (SO) in Kraków, III K 113/14

Brief Description of the Act

The so-called *set-up* took place between *pseudo-fans* of the football clubs TS Wisła and KS Cracovia. The participants in the fight used dangerous tools such as machetes, knives, clubs, axes, pitchforks, etc. The victim was beaten to death by several perpetrators who (with the exception of the defendant in the present case) had previous convictions.

Arguments from the Statement of Reasons of the Court of First Instance

The evidence collected clearly confirmed the involvement of the defendant in the beating of the victim, resulting in his death. A person is subject to criminal liability if they take part in a fight or beating in which a person is exposed to a direct risk of loss of life or of the kind referred to in Article 156(1) CC or Article 157(1) CC, whereby participation in a fight or beating is not only starting the fight or beating, but also joining a group of persons fighting consciously with the intention of actively participating in the incident. This offence can only be committed through an action, and is a substantive, i.e. effectual, offence. The Supreme Court has shown that the mere exposure of the victim to harm to their health or exposure to more serious danger should be regarded as an effect. Hence, in order for the perpetrator to be attributed with the offence under Article 158(1) CC, they must be found to have participated in a beating of a dangerous nature causing a real, direct threat of the consequences listed in this provision. Any participant in a beating where a person is put in imminent danger of *moderate* bodily harm will incur criminal liability under Article 158(1) CC. Liability for participation in a beating is joint liability of those taking part in such an incident (quasi-collective liability).

A perpetrator of an offence under Articles 158(1)–(3) CC may be anyone who participates in a fight or beating in any way, irrespective of whether their personal participation can be considered an action dangerous to human life or health, and irrespective of whether they can be attributed with the infliction of a blow causing the consequences referred to in Article 158(2) or (3) CC. A causal link must be established between the collective action of the participants in the fight or beating and the effect described in the law. The effect which determines classification under Article 158(3) CC must be objectively attributed to the participant in the fight, and thus the perpetrator will be liable under this article when the effect objectively should have and could have been foreseen. For classification of an offence under Article 153(3) CC, it does not have to be established that the perpetrator violated the bodily integrity of the victim in any direct way, but it is sufficient that such perpetrator, through their behaviour, e.g. by creating conditions facilitating the actions of the direct perpetrators,

due to their attitude, or even due to their mere presence among those actively acting against the victim, increased the threat and contributed to the disproportion of forces. People who participate in a beating jointly and in agreement are liable for its consequences regardless of who caused the individual injuries of the victim or even did not cause them, if they are the consequence of an offence committed jointly. The perpetrator was aware of the dangerous nature of the incident and should and could have foreseen the consequence of death of a human being. All those who arrived at the scene knew the nature of the meeting and the action that would be taken. For classification of an offence under Article 158(3), the degree of activity of individual participants in the beating is immaterial; a conscious combination of the action of one of the perpetrators with the action of the other perpetrators against the victim is sufficient, if the beating results in consequences under Article 158(3) CC, and these consequences could have been foreseen by the participant in the beating.

Regional Court (SO) in Kraków, III K 111/14

Brief Description of the Act

The victim often visited a nearby shop and used to buy alcohol there, which he would consume nearby, sometimes in the company of the perpetrators of the offence. On the day of the beating, he had bought alcohol, met the perpetrators, and began to consume it with them. At a certain point, the victim started arguing with one of the perpetrators. He then attacked him with a knife which he used to open bottles. The latter stroke his knife. The other perpetrator tried to calm the arguing parties. A struggle ensued. The situation calmed down and everyone returned to drinking alcohol. Later, the victim began to challenge everyone present. Another fight started, during which the victim sustained multiple injuries. The police were notified after a few hours – a third party reported that a man was lying unconscious near the shop. The doctor who arrived at the scene pronounced him dead.

Arguments from the Statement of Reasons of the Court of First Instance

The offence described falls within the group of common offences. It can be committed by anyone who in any way takes part in a fight or beating resulting in the death of a human being. The offence is therefore a type qualified by consequence, of an intentional or unintentional nature. Beating should be regarded as an active assault by two or more persons on one person or a group, where a clear distinction can be made between the attackers and the defenders.

Thus, the conduct of the defendants must be assessed as a beating, due to the fact that the three persons were the attackers, while the victim defended himself. Participation in

a beating is considered an active assault by two or more persons on another person, without it being necessary to inflict specific blows. Indeed, a conscious combination of the attackers' actions is sufficient. Therefore, irrespective of the degree of the activity, the defendants, by inflicting even single blows or kicks on the victim, participated in the beating of that person. At the same time, the degree of activity of individual participants in the beating is not important. The subject of the executive action of the offence under Article 158(3) CC is the person who suffers death as a result of a beating. It was objectively foreseeable that the conduct of the defendants could have led to injuries resulting in the death of the victim. Calling an ambulance could have increased their chances of survival. However, such assistance was not called for by the defendants, and the person in need of such assistance was assured that it was not necessary. As far as the subjective side is concerned, it is an intentional offence classified according to an unintentional consequence. The defendants acted with the intent of beating the victim. They could and should have foreseen that the injuries they caused to the victim could lead to death. The act is socially harmful to a degree greater than negligible. The perpetrators violated an important legal welfare in the form of the health and life of the victim. They violated the general rules of dealing with legal welfare and no circumstances were found that could exclude this unlawfulness. There is also no doubt about the degree of culpability.

Regional Court (SO) in Kraków, III K 7/13

Brief Description of the Act

The perpetrators jointly and in concert, using a gas thrower, a machete and a knife, beat the victims, as a result of which one of them died. The incident occurred during the birthday party of a friend who had invited a dozen friends to a club. These friends invited further friends. The event was peaceful, although there were some minor incidents (verbal taunts). After leaving the club, a group of birthday party attendees (the perpetrators) ran up to their colleagues, shouting vulgarities related to football club affiliations. One of them stabbed the victim in the abdomen, as a result of which the victim died two days later. When he attacked the victim's colleagues, he received a blow and then a second blow with a telescopic baton. The second perpetrator hit [others] with a machete, while the third one was struck in the face by a fist. The incident occurred very quickly and lasted approximately 20 seconds.

Arguments from the Statement of Reasons of the Court of First Instance

A causal link does not have to exist between the behaviour of an individual perpetrator and the effect. There will be no basis for such attribution when, for example, after the fight is over, one of the participants has caused grievous bodily harm to another. This effect can only be attributed to the perpetrator as an offence under Article 156(1), which truly corresponds to the offence of participation in a fight. The prejudicial effect of the classification under Article 158(3) is an intentional offence classified according to an unintentional consequence. The perpetrators' conduct qualifies as an offence under Article 158(3) CC. The deliberate manner in which each of the aforementioned defendants acted is undisputed. As conscious adult persons, they must have foreseen and accepted the consequences their actions might have for the victims. The concerted action and agreement between the defendants were determined by the dynamics of the incident.

Regional Court (SO) in Suwałki, II K 91/14

Brief Description of the Act

On the day of the incident, four colleagues (including both perpetrators) met. During the meeting, one of them said he wanted to beat up a man who had once allegedly pelted his mother with stones and sticks. The three of them had moved to the place where the man was staying and started beating him. One of the perpetrators went to another room where he beat up a second man who was staying there. The three colleagues then left the scene. They then formulated a plan to beat up yet another woman who had allegedly once stolen a passport and PLN 500 from one of the perpetrators. They went to pick her up but encountered a man. They asked where the woman was, and the man identified the place, whereupon the perpetrators began punching and kicking him all over his body. They then abandoned him and left the building. The injuries sustained by the victim resulted in his sudden and violent death. From there, the perpetrators went to the place where the woman was staying. The man they had beaten was with the woman. They then found the woman, who they also beat up, and also attacked another man she was staying with – kicking him in the legs, torso, arms, face and head. The woman was pushed down the stairs and dragged out of the house. They dragged her by her legs along a gravel road for about 30 metres. They had then laid her down and started beating her all over her body, hitting her with their fists and kicking her where they could. One of the perpetrators demanded money from her and threatened to throw her into the river. They left the woman beaten on the road, went for a beer and then dispersed.

Arguments from the Statement of Reasons of the Court of First Instance

There is no doubt about the defendants' guilt. Through their conduct, the perpetrators fulfil exhaustively the criteria for an offence under Article 158(1) and (3) CC, and additionally one of them committed an offence under Article 157(1) CC. The defendants committed the offences with direct intent, as the defendants' awareness of the consequences associated with assaulting the victims is absolutely clear. The defendants had the desire and intention to a beating and pursued this goal in an entirely conscious manner. The fact that they acted under the influence of alcohol (they had been drinking beer) is not relevant here, as these circumstances did not exclude the consciousness of the decision to beat the victims and the direction of the defendants' conduct.

Regional Court (50) in Rzeszów, II K 73/14

Brief Description of the Act

The victim demanded a beer from an acquaintance of the perpetrator and a loan of PLN 50. The man refused and was doused with alcohol and punched in the face by the victim. A few days later, the two defendants, under the influence of alcohol, went to the victim's house and beat him up. A colleague had come to pick up the perpetrators and shouted for them to stop. One of the defendants struck the victim once again and the victim lost consciousness. The perpetrators left. A friend who was in the toilet in the same house during the incident called an ambulance. The condition of the beaten man was severe. Death followed a few days later.

Arguments from the Statement of Reasons of the Court of First Instance

Due to their actions, the perpetrators fulfilled exhaustively the criteria of the objective and subjective side of an offence under Article 158(1) and (3) CC. Participation in a beating is the active assault by at least two persons on another person. A beating must have the effect of placing a person in immediate danger of losing life or suffering injury to health described in Article 156(1) CC or Article 157(1) CC, while also qualifying as an offence under Article 158(3) CC, i.e. leading to someone's death. Thus, the death follows an incident perceived as joint action by the participants in the beating.

The defendants directed their actions against another person. Their activity constituted inflicting blows in the form of punches delivered with the hands, and kicking.

Subjective side: the type of offence under Article 158(3) CC is classified according to the consequence. Thus, the perpetrator intentionally takes part in the beating, while the consequence is an unintentional act. Thus, under Article 158(3) CC, this consequence can only be attributed to the perpetrator under Article 9(3) of the CC when, due to the beating, the consequence of that beating in the form of death of another person was foreseen or could have been foreseen. In order to attribute liability for a qualified consequence, it is not necessary to establish a causal link between the perpetrator's individual conduct and the result in the form of the victim's death. The subjective aspect of the act classified according to succession (3) is not uniform. Only participation in the beating is intentional (Article 158(1)), while the dynamic element, which is the death of the victim, resulting after the accomplishment of the basic type and being causally linked to the beating, must be objectively attributed to the perpetrator under Article 9(3) of the CC. The defendants took part in the beating of the victim intentionally. They were aware that the actions they were taking posed a direct threat as referred to in Article 158(1). Not only did they intend to take part in the beating of the defendant, but in the conceptual sphere they wanted to do so. The defendants targeted their criminal behaviour towards one person, the actions were undertaken jointly and in agreement, the blows were directed not only at the torso but also at the victim's head, and the force of the blows was considerable. Objectively, being fully mature individuals, they were in a position to foresee the fatal effect. The guilt of the defendants is beyond doubt – they fulfilled all the criteria required for the attribution of guilt. They are also persons to whom guilt may be attributed because of their age. The offence was committed intentionally and unintentionally, and at the time of commission they were acting in circumstances in which they had the opportunity to recognise the unlawfulness of their conduct. There were no negative indications. The degree of culpability is therefore high.

Regional Court (SO) in Koszalin, II K 43/15

Brief Description of the Act

On the day of the incident, several colleagues consumed alcohol together. At that time, the victim was walking along the road and one of the perpetrators started to talk to him. This perpetrator had persuaded the other perpetrator to use physical violence against the victim and then ran up to him himself, knocked him over, and together with the other perpetrator began to beat him. After a while they ceased the beating and left. The victim got up and started shouting at the perpetrators, after which they ran up to him and started punching and kicking him again. On the following day, the victim's body was found by his father. The perpetrators declared that they would.

Arguments from the Statement of Reasons of the Court of First Instance

The judgment was handed down without an evidentiary hearing – the court granted the defence lawyers' motions for a guilty judgment.

Regional Court (SO) in Tarnobrzeg, II K 23/15

Brief Description of the Act

On the day of the incident, two homeless people came to a caravan where homeless people were living. They consumed denatured alcohol. Subsequently, they were joined by others, including two perpetrators. A few hours later, when they were all under the influence of alcohol, another homeless man arrived. A woman present among them said that the man could not drink with them because he had tried to rape her one time. At that point, two perpetrators started beating the homeless man so that he fell out of the caravan. The others made no attempt to establish what had happened to him and stayed in the caravan, continuing to drink alcohol. A day later they realised that the man was dead and they contacted the police.

Arguments from the Statement of Reasons of the Court of First Instance

The offences under Articles 158(1)–(3) of the CC apply to anyone who participates in a fight or beating in any way, irrespective of whether their personal participation can be categorised as an action dangerous to human life or health, and irrespective of whether a blow causing the consequences described in Article 158(2) or (3) of the CC can be attributed to them. Liability for participation in a fight or beating is joint liability of the persons involved in such an incident. The findings indicated allow perpetration to be attributed to the defendants under Article 158(3) of the CC. The defendants took part in the beating and the beating resulted in death. In terms of intentional guilt, there was a direct intention to participate in the beating of the victim jointly with other persons. In terms of unintentional guilt, the death of the victim occurred even though such an outcome could have been foreseen. The Supreme Court has ruled that for the offence under Article 153(3) CC to be found to have been committed, the degree of participation of the individual participants in the beating may be relevant to the level of the penalty. The level of involvement of the defendant during this incident was high. He was the one to initiate the beating of the victim, then attacked and beat him in a violent manner.

Comments

The statement of reasons of the judgment were limited to one defendant, pursuant to Article 423(1a) CCP.

4. Examples of Cases – Article 148(1) CC (Conceivable Intent)

Regional Court (SO) in Poznań, XVI K 6/15

Brief Description of the Act

The perpetrator comes from a dysfunctional family. At the age of 19, she got pregnant with a man who, upon becoming aware of the pregnancy, broke off contact with her and refused to offer her any assistance from that time. On the day of the incident, the 4.5-month-old daughter of the defendant woke up in the morning and started crying. Her mother did not know how to calm her down. Driven by impulse, she placed her hand on the child's neck and squeezed it with her thumb and forefinger with little force. The baby stopped crying, and at that time was still alive. She put the baby on the couch and lay down next to it and fell asleep. The defendant then acted with the conceivable intent of depriving her daughter of her life. The child died. The perpetrator woke up at around 10 a.m., and the child was not moving – it died as a result of irritation of the cervical *sinus vagus* nerve. For a while, the perpetrator tried to save her child by performing artificial respiration. She then called an ambulance.

Arguments from the Statement of Reasons of the Court of First Instance

In this case, the court assumed conceivable intent. The defendant confessed to her daughter's murder in a coherent way, and from the outset her account of events was consistent. Undoubtedly, she was led to perform this act due to a certain helplessness and indeed a desire to calm the child down. By squeezing the child's neck, the defendant at least accepted the child's death, but it was calming and silencing the child that was her main objective. Upon committing the act, the defendant was 20 years old and had an immature personality. Due to the lack of proper upbringing role models, her personality developed in a wrong direction. Her immature personality was compounded by the stress of her difficult living situation, lack of income, lack of housing, and being abandoned by her partner.

Regional Court (SO) in Gliwice, IV K 226/14**Brief Description of the Act**

The defendant had a child with his ex-wife. He had a child support obligation towards the child, which he failed to meet on time. On the day of the incident, the perpetrator was looking after his son. The child's mother came to the family home of the defendant with her partner (the victim). The woman had previously called her ex-husband regarding alimony, which he had not paid on time. On that day, the defendant called his ex-wife's brother with a proposal to drink alcohol together. The man invited him to his home; there were more people in the flat, including his ex-wife. The defendant was already under the influence of alcohol. The woman accused him of having money for alcohol instead of money for alimony. The man got angry and started insulting his ex-wife and her partner. He then left and went to his mother's house and there had an exchange of text messages with the woman regarding alimony. He subsequently borrowed PLN 300 from his mother for the alimony, returned to the site and gave the money to the woman. Whilst she was signing confirmation of receipt of the money, he started shouting and insulting her and her partner (the victim). The victim asked the defendant to calm down, upon which the defendant took a kitchen knife and pushed the victim against the fridge. An argument followed, during which the perpetrator hit the victim twice with the knife. The victim died.

Arguments from the Statement of Reasons of the Court of First Instance

The defendant was aware that by acting in this way he was attacking the vital functions of a human being. He struck at those areas of the victim's body where life-sensitive organs are located, using a dangerous sharp instrument and considerable force when delivering the blow. Due to the tool used by the defendant, the defendant's actions created an immediate, real risk of injury resulting in death or severe bodily harm. On top of that, the motive of the defendant was not fear of being attacked by the victim. It was the defendant who behaved aggressively while in the flat, insulting his ex-wife and addressing her in a vulgar way, as well as humiliating the victim. The defendant attacked the victim suddenly, without any warning. He had already threatened to beat him up, demonstrating his dislike of him. The defendant was under the influence of alcohol, which had a disinhibiting effect on him, causing a lack of control over his aggression.

Subjective side: it is impossible to establish a clear motive for the action in the case, apart from the fact that the defendant was still jealous of his ex-wife despite the divorce. However, this is not enough to conclude that he wanted to kill her partner. Meanwhile, determining a motive is not a *sine qua non* condition for attributing this act to the defendant. The defendant

was under the influence of alcohol, which increased the level of his aggression. Alcohol intoxication does not, however, deprive a person of the ability to assess their behaviour. Thus, the defendant could and should have foreseen that the consequence of his actions could be the death of the victim, and since he nevertheless made the decision to use the knife, this shows that he had foreseen and accepted the victim's death and therefore acted with the conceivable intent of depriving his colleague of his life. In addition, the behaviour of the defendant, his *modus operandi* and personal characteristics, and the infliction of a knife blow on sensitive areas of the body, must be taken into account. However, one of the wounds was only superficial rather than life-threatening. The second blow, delivered with great force, proved fatal. The use of the knife, the force of the attack, the number of blows inflicted, the location of the wounds and the extent of the injuries clearly support the conclusion that the defendant acted with the conceivable intent of depriving a person of their life. A factor relevant to the finding that the defendant acted with conceivable intent was the fact that the defendant did not prepare beforehand and did not threaten to deprive the victim of his life, and that the event itself was sudden, unexpected for anyone. The kitchen knife was not brought to the scene by the defendant, but was at hand by chance and was only used for that reason. It was not irrelevant for the determination of the form of intent of the defendant that he later rendered assistance to the victim, by calling 112.

Regional Court (SO) in Gliwice, IV K 165/14

Brief Description of the Act

The two perpetrators and the victim lived together in the same building. Two days before the incident, the perpetrator of the homicide had had an argument with an acquaintance. The defendant owed him money and, while returning it to him, hit him in the face with his fist. The perpetrator of the homicide complained to the other of the impertinent behaviour of his colleague with whom he had a dispute. Eventually, they both descended the stairs to get to the victim. Perpetrator 1 went to the toilet. Perpetrator 2 started to insult the victim, broke a bottle and hit his head with it, and beat him with his fists on his head and face. The victim had no opportunity to defend himself. Having returned from the toilet, perpetrator 1, seeing perpetrator 2 hitting the victim, also hit him himself and then dragged perpetrator 2 away. They both returned to the room where they continued to consume alcohol. After some time, while going to get more alcohol, perpetrator 1 noticed that the victim was lying in blood and showed no signs of life. He asked a friend to call an ambulance. Perpetrator 2 was told to testify, in any case, that the victim had fallen down the stairs.

Arguments from the Statement of Reasons of the Court of First Instance

The perpetrator acted with the conceivable intent of depriving a person of their life, foresaw that the victim would die as a result of the beating, and accepted this. The fact that injuries were inflicted on vital organs (the head), as well as the brutality of the defendant and his ruthlessness, indicated by the fact that he continued the attack despite the fact that the victim was practically not defending himself, confirm that the intended result of the defendant's actions was the victim's death, and that the defendant accepted this effect. Being an adult male with no mental or intellectual deficiencies, the defendant was able to foresee the possibility of such an effect. In addition, leaving a severely beaten victim without attempting to help them is an element of acceptance of the victim's death. The defendant was driven by anger and a desire for retaliation and therefore had a low motive for action. The reconstruction of the motivation process taking place in the perpetrator's psyche is based on the externalised manifestations of his behaviour and the effect. The defendant used a broken bottle, a dangerous and sharp object, to perform the act, delivering blows targeting the head and causing injuries that were causally linked to the death – the victim bled out. On the other hand, he ceased this activity due to being dragged away by the co-defendant. The perpetrator did not act with premeditation, intending to kill, and there is no evidence that it was planned in advance. The blows were inflicted repeatedly, aggressively and, in addition, targeting vital parts of the victim's body, and this indicates the motivation of the perpetrator acting with the conceivable intent of homicide.

Regional Court (SO) in Gliwice, IV K 155/14

Brief Description of the Act

The perpetrator and the victim had cohabited for several years. They abused alcohol and often had arguments. The defendant frequently used violence against the victim – the latter frequently walked around bruised, sore and with black eyes. She had already used a knife against the victim in the past, but this was not the subject of court proceedings. On the day of the incident, there was another argument in which the perpetrator beat the victim, throwing him out of the house. The man returned, the partners argued again, after which the defendant stabbed the victim in the chest with a kitchen knife. Then, without calling for help, she left the house and threw the knife into the bushes. As a result of the wound inflicted, the victim died. After returning to the flat, the perpetrator visited a neighbour, saying that someone had killed the victim and called the emergency services.

Arguments from the Statement of Reasons of the Court of First Instance

The court assumed that the defendant acted with conceivable intent. By stabbing the victim in the chest with a kitchen knife, the defendant showed total indifference to the possibility of causing the victim's death. The perpetrator, as an adult and with at least a minimum of life experience, knew that the stabbing she inflicted could be fatal. Taking into account also the relationship between the perpetrator and the victim, the background of the incident, the perpetrator's previous lifestyle and all other indications, the defendant, with her intention to cause bodily harm, due to her acceptance, which constitutes a real mental process, considered that the victim would die.

Regional Court (SO) in Gliwice, IV K 117/14

Brief Description of the Act

The victim had met the perpetrator at his home, where they consumed alcohol in large quantities. At some point an unspecified argument occurred between them. The perpetrator had stood up suddenly and stabbed the victim several times with a kitchen knife in the chest and neck area, as a result of which the victim slumped to the floor and died. When the perpetrator realised what he had done, he called an ambulance, admitting that he had committed the homicide.

Arguments from the Statement of Reasons of the Court of First Instance

The perpetrator's intention is evidenced by the overall subjective and objective circumstances. Subjective aspect: it is impossible to determine a clear motive for the perpetrator's action. However, determining a motive is not a *sine qua non* condition for attributing an act to the defendant. Only the fact that the defendant acted at least with the conceivable intent of possibly causing death is relevant, and these circumstances can be indisputably established on the basis of all the evidence and also on the basis of an analysis of the circumstances of the case concerned. In the case of an act under Article 148(1) CC, there is often no discernible motive for the perpetrator's action, but this does not mean that guilt cannot be proven. In assessing the subjective aspect of the conduct of the defendant, the court was mindful that both parties were under the significant influence of alcohol. In the case of the defendant, this increased the level of aggression. Alcohol intoxication does not, however, deprive a person of the ability to assess their behaviour in terms of the basic rules of life experience. Therefore, the defendant could and should have foreseen that the consequence of his behaviour could

be the death of the victim. Since he used a knife, this proves that he foresaw and accepted the death of the victim and therefore acted with the conceivable intent of depriving his colleague of his life. The infliction of a stab wound to vital areas of the body must involve the perpetrator reflecting on the possibility of the effect being fatal. Moreover, the perpetrator inflicted the blows with great force. The use of a knife, the force of the attack, the number of blows inflicted, the location of the wounds and the extent of the injuries clearly support the conclusion that the defendant acted with the conceivable intent of depriving the victim of his life.

Regional Court (SO) in Poznań, III K 56/15

Brief Description of the Act

The perpetrator and the victim lived in cohabitation. On the day of the incident, they were drinking alcohol together with other people. During the party, the defendant boasted that he was holding PLN 20,000 in cash. When the defendant and his friend were about to go home, the latter realised that his money was no longer in the drawer. He accused his partner of theft. He started beating her on her head with his fist, then, when she fell down, he started kicking her all over her body, although she asked him to stop and assured him that she had not stolen any money from him. The perpetrator also choked her. The victim did not inflict any blows on the defendant, and tried to defend herself by shielding her body. When friends in the other room heard the incident, they tried to drag the perpetrator away, to no avail. After he had finished, he wiped his bloody hands on a towel and then turned to one of the people and said *I'm going to kill that whore because she robbed me*. He then left the flat and returned home.

Arguments from the Statement of Reasons of the Court of First Instance

The evidence did not definitively establish that the defendant intended to deprive the victim of her life (leading to the view that he did not act with direct intent). When inflicting the blows, he did not use a tool to do so, which, in addition, he would have prepared for himself in advance for this very purpose. When hitting the victim, he used only his hands and legs. It also cannot be ignored that the incident occurred between two people in a state of severe alcohol intoxication, both of whom had known each other for several years and had lived together, forming an informal relationship. While there were no grounds to challenge the account given by the defendant, denying his intention to deprive the victim of her life (and thus no grounds for assuming direct intent to deprive her of her life), the acceptance of the

claim made by the defendant during the trial that he only intended to beat the victim and did not intend to kill her (even with conceivable intent) was not consistent with the evidence collected. At least a dozen (rather than a few) blows were inflicted on the victim. Moreover, the victim was also strangled by the defendant during the incident. The blows were inflicted on life-sensitive parts of the body (face, head), with great force. At least some of the blows were inflicted while the victim was lying on the floor covering herself with her hands, so she had limited possibilities to defend herself. However, the perpetrator, despite being restrained by witnesses, did not stop beating the victim, which showed, in combination with the brutality of the action and the number, force and location of the blows, that the defendant then considered that the victim might die as a result of the blows inflicted. He was aware of this possibility at the time, but he accepted it and did not stop beating the victim.

In addition, the words he uttered after beating the victim perfectly illustrate the state of awareness of the defendant regarding potential consequences of his criminal behaviour, which the perpetrator accepted – he was indifferent as to whether they would occur or not. In addition, he did not provide any assistance to the victim. After he had returned home, when he was warned by a friend that he might have killed the victim, he said *I don't feel sorry for the whore*.

Regional Court (SO) in Częstochowa, II K 94/15

Brief Description of the Act

The victim was the perpetrator's half-brother (they shared the same mother). There was no conflict between them. On the day of the incident, the perpetrator came to visit his brothers. He brought 1.5 litres of vodka and several bottles of beer. There were several people in the flat. After midnight, they had fallen asleep while the perpetrator and the victim continued drinking. The defendant started accosting the victim, arguing with him. When the perpetrator turned up the volume of the television, the victim admonished him. The man turned down the volume of the television, but then approached the victim and punched him in the face with his fist. After some time, when the victim was smoking a cigarette in the kitchen, the perpetrator approached him, started arguing with the victim, pushing him around. At a certain point he grabbed a kitchen knife and stabbed his brother in the heart. He then leaned over and checked if his victim was breathing. A colleague entered the kitchen. She wanted to call an ambulance, but the perpetrator said the man had only lost consciousness and took her phone. She eventually managed to make a call from the victim's phone. The doctor arriving at the scene pronounced him dead.

Arguments from the Statement of Reasons of the Court of First Instance

The defendant acted intentionally with abrupt conceivable intent. This is evidenced by the fact that the perpetrator did not plan to kill the victim. He maintained close contact with him and loved him like a brother. However, the homicide occurred due to the aggressive behaviour of the defendant, who was in a state of intoxication. It was this condition that caused the perpetrator to easily become furious and, willing to cause harm to his brother, and stabbed him with a knife. He had not planned to kill him, but accepted that the stab could have caused death. The behaviour of the defendant immediately after stabbing his brother is the evidence of conceivable intent. When the man collapsed, the defendant tried to provide assistance and said to his friend that his brother was alive and had only lost consciousness. There is a direct causal link between the actions of the defendant and the victim's death.

Comments

The court gave credence to the testimony of the defendant that he tried to provide assistance after the stabbing. He subsequently took his friend's phone, saying that the victim had only lost consciousness. This is not obvious, as he may not have tried to help him at all (he only checked that he was breathing), and he took the phone from his friend because he feared the consequences of the whole incident being revealed rather than because he thought the victim had fainted. This conclusion could lead to a change in the nature of the deed from conceivable intent to direct intent.

Regional Court (SO) in Częstochowa, II K 90/15

Brief Description of the Act

The victim moved into the perpetrator's flat. They were both in a poor financial situation, doing odd jobs, collecting cans, etc. They led an unstable lifestyle and abused alcohol. Arguments occurred between them due to excessive alcohol consumption and then they would be physically aggressive towards each other, including attacking each other with knives (on both sides). The victim tried several times to force the other into sexual intercourse, but the defendant was unwilling and would usually go out. On the day of the incident, the victim attempted to have sex with the perpetrator. Although she had refused, he continued this conduct. The perpetrator then grabbed a kitchen knife, intending to cause the victim to cease this conduct. However, the man did not step, so she stabbed him seven times with a knife.

Arguments from the Statement of Reasons of the Court of First Instance

The defendant, acting under conditions of justifiable defence in repelling a direct and unlawful attack on her sexual freedom, exceeded the limits of that defence by using a mode of defence disproportionate to the danger posed in the attack, acting with the conceivable intent of depriving the victim of his life. In homicide cases, the perpetrator rarely articulates their intention, and it must be determined on the basis of the circumstances. It is not sufficient to determine that the perpetrator intended or consented to commit any offence harmful to life and health. It is necessary to demonstrate that the perpetrator's intent also included the effect of death of a human being. The intent to kill is established on the basis of factors such as the type of instrument used, the location, quantity and intensity of the blows inflicted, the nature of the injuries caused and the attitude towards the victim, and the perpetrator's personality and behaviour after the act was committed. In the case concerned, the defendant could certainly have foreseen that this could lead to death. It resulted in damage to internal organs and subsequent bleeding. She wanted to call an ambulance and tried to wake the victim beforehand. This type of reaction shows that she certainly did not act with the direct intention of homicide. Defence to a necessary extent is self-contained. In order to assess whether the limits of the defence have been exceeded, it is necessary to determine, based on the assessment of the totality of the circumstances of the case, that the person repelling the attack considered and intended an infringement of the assailant's goods to an extent going beyond the threat of the attack on those goods. While living with the perpetrator, the man tried several times to force her to have sexual intercourse, to which she did not consent. On the day of the incident, however, she did not wish to retaliate against the victim, as she did not provoke a conflict situation. She lay down on the sofa with the victim as usual and intended to sleep. Only when the perpetrator tried to force her to have intercourse did she undertake an effective defence. The perpetrator acted unlawfully in violation of the most intimate sphere of freedom, which is sexual freedom. The infliction of the blows was preceded by several emphatic actions which conveyed the will of the defendant in no uncertain terms and were ignored by the victim (harsh refusal, threatening use of a knife).

Brief Description of Potential Changes After the Second Instance

The defendant's behaviour cannot be assessed in terms of justifiable defence, as it was not a repulsion of a direct attack, but a reaction to the victim's undesirable behaviour. The number and location of the wounds inflicted indicate that the aim of the defendant was to deliberately deprive the victim of his life for reasons unknown to the Court of Appeal, assessed by the Regional Court as acting with conceivable intent rather than direct intent.

Regional Court (SO) in Zamość, II K 81/14**Brief Description of the Act**

The victim was sitting on a bench with his friends and drinking beer. The perpetrator approached him and asked for cigarettes. The man replied that he did not have any cigarettes, and even if he had, he would not give them to him. A fierce argument and a struggle ensued. The defendant left the scene, went home and picked up a meat axe. He returned to the victim and attacked him, focusing on his head. The victim tilted his head and was only scratched on his cheek. The perpetrator made another unsuccessful attempt and was knocked over by his colleagues and then beaten and kicked. He got on his bike and fled. A colleague of the defendant threatened the victim with homicide if he tried to inform the police.

Arguments from the Statement of Reasons of the Court of First Instance

There must be a causal link between the perpetrator's conduct and the result in the form of death of a human being. Every human being, acting as a perpetrator, must foresee the possibility of causing a human being's death and accept this. The defendant inflicted two blows on the victim with a meat axe that was of such a size that undoubtedly, in the opinion of the perpetrator, it must have provoked thoughts about not only causing grievous bodily injury but also death. Life experience shows that every human being, acting in the aforementioned way, must foresee a possibility of causing a human being's death and accept this. The victim was a stranger to the defendant, and there was no conflict between them. He was attacked in a vicious and violent manner when he did not expect the attack and could not have taken any defensive action. The only disagreement between the two men had occurred 15 minutes earlier and was caused by refusal to give the defendant cigarettes. All these circumstances mean that the perpetrator considered the effect that the victim would die and accepted it. In addition, the defendant asked other people to assist him. The classification of the act of the defendant as attempted homicide is determined primarily by the intention of the defendant rather than by the nature of the injury caused.

Regional Court (SO) in Kraków, VI K 77/15**Brief Description of the Act**

A group of friends were drinking alcohol and then went out to eat. Walking down the street, they passed two men (including the perpetrator of the subsequent homicide) consuming beer.

The perpetrator of the homicide insulted one of the people in the group. The man (later the homicide victim) approached the perpetrator and punched him in the head. The other two men in the group ran up to the friend of the perpetrator of the subsequent homicide and kicked him. The perpetrator, after the subsequent victim had hit him on his head, pulled out a folding knife and then dealt the fatal blow to the victim. An ambulance and the police were called to the scene.

Arguments from the Statement of Reasons of the Court of First Instance

The perpetrator had foreseen the possibility of deprivation of life and accepted it. He had foreseen that he would cause the victim's death by his behaviour and accepted this outcome. The perpetrator committed the act while acting in justifiable defence, which consists of repelling a direct and unlawful attack targeted at himself, but at the same time exceeded the limits of this defence. Had it not been for the aggression of the perpetrator, the incident would not have happened. Under such circumstances, his opponents' advantage over him was considerable, since there were three of them, while the perpetrator was alone. His colleague had been overpowered and lay knocked down on the pavement. The defendant could reasonably have feared for himself and his health and therefore had the right to defend himself, even with dangerous tools. The perpetrator, by employing defence disproportionate to the risk, caused the death of a human being, an effect which he accepted, acting with conceivable intent and therefore foreseeing such a possibility. The perpetrator struck a powerful blow with a knife to the chest, i.e. to the place where the most critical organs for human life are located. Disproportionate means of defence were used against the supreme value of human life, despite the fact that the perpetrator was aware that, by acting in such a way, he could have caused the death of the attacker and accepted such an outcome. In the present case, there could be no question of a fight. Indeed, a fight is a clash involving at least three people, each of whom is both the aggressor and the defender. The situation was different in the present case.

Brief Description of Potential Changes After the Second Instance

Despite the assumption that the defendant acted under conditions of justifiable defence, the limits of which he exceeded, extraordinary mitigation of punishment was not justified in the case concerned. The court of first instance failed to take into account the fact that the incident would not have occurred if the perpetrator, while under the influence of alcohol, had not insulted verbally persons who, also being intoxicated, were making their way through the area. Nor can the fact that the defendant had a predilection for breaking the law, having been convicted several times in the past, be underplayed. The sentence of six years' imprisonment is grossly lenient, therefore the court of first instance increased it to eight years.

Regional Court (SO) in Łódź, IV K 29/14**Brief Description of the Act**

The perpetrator of the homicide (and the perpetrator of the offence under Article 162 CC) were a couple. They lived together at a friend's house (the subsequent victim) and abused alcohol. On the day of the incident, an argument occurred between the women over a man. The man's cohabitant partner accused the victim of sleeping with him. A struggle ensued during which the women fell over onto the couch and began to pound each other with their fists. At a certain point, the victim escaped to the kitchen and the perpetrator followed her, grabbed a kitchen knife, and dealt two blows to the victim's back. The man tried to pull her away, but she wounded him too, then dealt the woman a third blow. The defendant did not render any form of assistance to the victim and fled the house to the forest, where he spent the night. The perpetrator also spent the night away from home. The next day, the man called the police at the instigation of a friend.

Arguments from the Statement of Reasons of the Court of First Instance

The defendant used a knife. This is a dangerous object that can cause very serious consequences, significant wounds and injuries, and ultimately death to a human being, relatively easy. This is common knowledge, requiring no complex thinking processes. The nature of the tool, as well as the generally dangerous characteristics of the object, as well as the fact that, after the incident, the defendant left the injured victim in an empty house, without providing any assistance, and without attempting in any way to mitigate the effect being death by her behaviour, strongly support the assumption that the defendant acted with the intention of killing the victim. At the same time, the evidence gathered in the case excludes the possibility of attributing direct intent to the defendant, as the prosecutor saw it. Direct intent in the case of homicide boils down to the perpetrator acting to kill. The perpetrator does so for this very purpose, which is either the sole or the main element of their mental experience. This is the will of the perpetrator and this is why the perpetrator takes action to achieve this goal. The intent to kill is evidenced, among other things, by the place where the blows were delivered – the perpetrator delivered three knife blows to the back between the scapular and the spinal line, a place that is not directly associated with the area where vital human organs are located. The stab wounds were not absolutely fatal and there was a chance of survival had medical intervention occurred promptly. The severity of the blows did not have to be great, as only soft tissue damage occurred. If the defendant had intended to kill, there was nothing to prevent her from using even more drastic forms of violence, e.g. by inflicting further blows more strongly with the knife. In assessing intent, it must also

be borne in mind that there is no indication that the defendant bore any animosity towards the victim prior to this incident. The occurrence was incidental. It was not a deliberate act. The evidence gathered does not determine that, during the incident, any words were uttered or gestures made by the defendant indicating an intention to kill the victim. The defendant knew that the blows she inflicted could have caused injuries that would lead to the victim's death and she accepted this, but at the same time there is no evidence in the case that the defendant wanted to kill the victim.

Comments

The prosecutor filed the charge of homicide with direct intent.

II. Evaluation of Judicial Practice from the Perspective of the Findings of Criminal Law Theory

What differentiates a homicide committed with conceivable intent from a beating and a fight resulting in death is the subjective side of the perpetrator's behaviour. In order to display this difference properly, the general issues must first be addressed. It is the correct perception of fundamental issues that lies at the heart of the issue under analysis.

Thus, in the theory of criminal law, the subjective side of a criminal act is in fact defined as the perpetrator's intellectual and volitional attitude towards their behaviour, by which the perpetrator fulfils the subjective criteria of the criminal act. Equally, however, when defining this intellectual and volitional attitude, it is most often referred to directly in terms of the perpetrator's merely mental attitude towards this behaviour.¹

Thus, what is emphasised within the subjective side of a criminal act is the separation of two mutually penetrating spheres: the intellectual (cognitive) and the volitional (volitional, voluntary, mental, emotional, etc.).²

As is well known, the intellectual sphere, limiting ourselves here to the wording of Article 9(1), (2) and (3) CC, which is crucial in this respect, is reduced to the perpetrator's anticipation of a possibility of committing an offence. On the other hand, the volitional sphere is directly oriented towards depicting the perpetrator's mental attitude towards that deed.

This attitude – obviously – can vary, and it is precisely the fact of this diversity that has underpinned the identification in criminal law of several characteristic forms of the subjective side of an offence. Under the Polish Criminal Code currently in force, by virtue of the content of Article 9(1) and (2) – it is possible here, first of all – due to the criterion of intent and lack thereof – to identify the forms of the subjective side of an offence in the form of intentional and unintentional behaviour, and further to distinguish, within these forms

¹ The subjective aspect of the criminal act as an intellectual and volitional relationship is explicitly referred to by Ł. Pohl, *Prawo karne. Wykład części ogólnej*, Warszawa 2015, pp. 133 et seq. On the other hand, the said aspect as a mental relationship is addressed among others by: L. Gardocki, *Prawo karne*, Warszawa 2013, p. 81; O. Sitarz, *Strona podmiotowa*, [in:] T. Dukiet-Nagórska (ed.), *Prawo karne. Część ogólna, szczególna i wojskowa*, Warszawa 2010, p. 99. See also: R.A. Stefański, *Prawo karne materialne*, Warszawa 2008; A. Grześkowiak, *Prawo karne*, Warszawa 2009, p. 97; J. Giezek, *Znamiona strony podmiotowej*, [in:] M. Bojarski (ed.), *Prawo karne. Część ogólna i szczególna*, Warszawa 2012, p. 125 – although let us emphasise that the analysis of the forms of the subjective side of the offence unquestionably shows that in fact the authors have in mind a relationship in which intellectual and volitional aspects intermingle.

² See, in particular: Ł. Pohl, *Prawo...*, p. 133; J. Giezek, *Znamiona...*, p. 128; W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2010, p. 204.

of intention, between direct and conceivable (consequent, secondary) intent – as possible variants of intention, as well as a conscious unintentional act and unconscious unintentional act – as possible variants of unintentional behaviour;³ since, under Article 9(1) CC:

A criminal act is committed intentionally if the perpetrator intends to commit it, i.e. wants to commit it or, foreseeing the possibility of committing it, agrees to commit it,

and under Article 9(2) CC:

An offence is committed unintentionally if the perpetrator, without intending to commit it, nevertheless commits it by failing to take the care required under the circumstances, even though they have foreseen or could have foreseen the possibility of committing the act.

When characterising the presented variants of the subjective side of an offence from the perspective of this aspect as described above, i.e. as the perpetrator's intellectual and volitional attitude towards their behaviour which bears the subjective characteristics of an offence, criminal law theory comes to the conclusion that the indicated intellectual sphere is a component not only of all statutorily separate variants of intentional behaviour, i.e. direct intent and conceivable intent, but also of deliberate unintentional behaviour, as even in the case of the latter form of the subjective side of an offence, the perpetrator is a subject who foresees a possibility of committing an offence. Consequently, the only form of the subjective part of the offence in respect of which this intellectual sphere does not occur is the unconscious unintentional behaviour, since, without any doubt, in this case the perpetrator is a subject who does not foresee the possibility of committing an offence.

Further, based on the above characteristics, criminal law scholars differentiate between the forms of the subjective side of a criminal act based on the nature of the perpetrator's mental attitude towards the criminal act they are committing. The following distinctions are made based on this criterion:

1. direct intent, where the perpetrator intends to commit an offence and foresees the possibility of committing it,
2. conceivable intent (consequent, secondary), where the perpetrator accepts commission of an offence and foresees the possibility of committing it, and
3. conscious unintentional behaviour, where the perpetrator has neither expressed the intention nor accepts commission of the offence.

³ However, in the case of the latter form, i.e. unconscious unintentional act, fully justified objections may be raised as to whether it is a form of the subjective part of the offence. In this case, none of the above-mentioned spheres can be identified, as the perpetrator committing a criminal act in the form of unconscious unintentional act commits it under the conditions in which they do not foresee the possibility of committing the act (lack of intellectual sphere), thus under conditions which exclude the possibility of them having any volitional attitude towards committing the said act once it is committed (lack of volitional sphere).

This perception is accompanied by the common conviction that, in view of the foregoing, the forms of the subjective side of an offence characterised by the above-mentioned intellectual sphere differ only in terms of the nature of the perpetrator's mental attitude towards the offence committed, and therefore that, being identical with regard to the intellectual part of the subjective side of the offence, they differ with regard to the volitional part of this side.⁴

However, it has been stated in the literature that such a point of view is not accurate.⁵ Due to the importance and great significance of these observations in the context of the issue under consideration related to the difference between homicide committed with the intent of causing death and beating resulting in death, let us reiterate – in greater detail⁶ – the reasons why the commonly held position in this regard is flawed, i.e. the standpoint that the forms of intentional fulfilment of the criteria of an offence differ only in the nature of the mental attitude of the perpetrator of this act.

As a starting point, the intellectual part of the subjective part of the offence – apart from the perpetrator's anticipation of a possibility of committing the offence, which has already been highlighted – in fact comprises a number of other components which characterise this part. These are components which influence the offender's volitional attitude towards the

⁴ See, in particular: A. Zoll, *Czyn zabroniony popełniony nieumyślnie*, [in:] K. Buchała, A. Zoll, *Kodeks karny. Część ogólna. Komentarz do art. 1–116 Kodeksu karnego. Komentarz do k.k. T.1*, Kraków 1998, p. 100, where the following opinion can be found:

In the case of conscious unintentional behaviour, an intellectual side occurs coinciding with the intellectual side characterising both forms of intent. Conscious unintentional behaviour is distinguished from intentional behaviour by the volitional side – the absence of an intention to commit an offence and the absence of acceptance of commission of such an act.

J. Giezek, *Świadomość sprawcy czynu zabronionego*, Warszawa 2013, pp. 193–194, also addressed the matter in a similar way, stating that:

After all, on an intellectual level – when the diagnosis of the circumstances under which the perpetrator operates is formulated – the state of affairs appears quite similar both on the grounds of conscious unintentional behaviour and on the grounds of conceivable intent (as well as direct intent). The essential similarity is shown by the statement that in both cases the intellectual platform of the subjective side of the perpetrator's behaviour is characterised by the anticipation of a possibility of committing an offence. Both in the case of conceivable intent and in the case of conscious unintentional behaviour, the perpetrator is, after all, aware of the fact that they behave inappropriately, and violate a certain rule of conduct towards a legal good, which potentially triggers some known causal regularity, according to which such inappropriate behaviour may have an adverse effect. The status of their consciousness – including the diagnosis of the behaviour as excessively risky and the projection of potential consequences – thus appears to be, in the case of conceivable intent and conscious unintentional behaviour, largely coincidental, if not identical.

I would add [Ł.P.] that it has been stated in literature that such a point of view can only be defended if the intellectual component of the subjective side of the offence is reduced exclusively to the issue of the perpetrator's anticipation of the possibility of committing an offence, and thus when it is reduced to that element of the said component, as referred to in Article 9 § 1, 2 and 3 of the CC – see: Ł. Pohl, *Błąd co do okoliczności stanowiącej znamię czynu zabronionego w polskim prawie karnym (zagadnienia ogólne)*, Poznań 2013, pp. 153–154.

⁵ See, in particular: Ł. Pohl, *Przyczynek do rozważań o strukturze nieumyślności i sposobie jej opisanie w kodeksie karnym*, [in:] J. Giezek, P. Kardas (eds.), *Obiektywne oraz subiektywne przypisanie odpowiedzialności karnej*, Warszawa 2016, pp. 427 et seq., as well as the obligatory fundamental studies on the matter elaborated upon by Wojciech Patryas – see: W. Patryas, *Uznawanie zdań*, Warszawa-Poznań 1987; W. Patryas, *Interpretacja karnistyczna. Studium metodologiczne*, Poznań 1988, p. 161. See also: M. Kowalewska-Łukuć, *Zamiar ewentualny w świetle psychologii*, Poznań 2015, p. 116.

⁶ The following argument will therefore repeat the statements made earlier – see: Ł. Pohl, *Przyczynek...*, p. 427.

committed offence, often also explaining why this attitude takes such a form. Indeed, the knowledge of a perpetrator consciously committing an offence (including knowledge of their own preferences), which is the main, if not the only, determinant of their conduct, is a set of his numerous assertions about the reality surrounding him. Anticipating a possibility of committing an offence is only one of the components of this set. It is not uncommon for this not to be the component of the highest significance for the perpetrator, as evidenced by W. Patryas' advanced philosophical analysis of the issue of sentence recognition in epistemic logic, which sought to answer the question of what sentences reproducible from a person's thoughts constitute their knowledge and consequently determine, to a greater or lesser extent, their behaviour.⁷ Also, to make this argument more accessible, these analyses refer to sentences, since they are regarded as the basic structural unit of knowledge, although – and this is particularly important – they are assigned this status only when they are in the appropriate relationship, namely that of recognition by their subject. However, as the extremely valuable and fully scientific analyses by W. Patryas make clear, the perpetrator's anticipation of a possibility of committing an offence is not always a component of the perpetrator's knowledge. Consequently, it is not always an element that determines their conduct. Indeed, the indicated author, through an analysis of the mental attitude of a perpetrator acting in a consciously unintentional manner, came to the entirely accurate conclusion that, in the case of such a perpetrator, some other component must be part of his knowledge, which pushes the perpetrator to commit the prohibited act despite not intending to.⁸

Therefore, in the concept of W. Patryas regarding the anticipation of a possibility of committing an offence characterising conscious unintentional behaviour, does not confer the status of a sentence acknowledged by the perpetrator acting in a consciously unintentional manner, but the status of the objective supposition. To reiterate, we face this when the assertion of a certain state of affairs, included in the cognitive sphere of a person, called a representation in the referred concept, is not combined with his strong conviction that the situation is as the representation claims.⁹ Assigning the status of objective supposition to the prediction under consideration is extremely important, as the objective suppositions – as judgements that are not beliefs, i.e. sentences expressing a representation correlated with a strong conviction that the situation is as the representation suggests – are not components of a person's knowledge and, consequently, as such, do not determine their behaviour.¹⁰

⁷ See: W. Patryas, *Uznawanie...*, pp. 3 et seq.

⁸ See: W. Patryas, *Interpretacja...*, pp. 161 et seq.

⁹ See: W. Patryas, *Interpretacja...*, pp. 163 et seq. On the subject of representations and convictions, see: W. Patryas, *Uznawanie...*, pp. 18 et seq.

¹⁰ See: W. Patryas, *Interpretacja...*, p. 163. See also: M. Kowalewska-Łukuć, *Zamiar...*, p. 119, stating: The modified cognitive aspect of conscious unintentional behaviour thus consists in including the assumption that the commission of the offence will be avoided in regard to the originally recognised possibility of committing such an act. This does not mean that the perpetrator is no longer aware of this possibility. This means only that it is negated by the perpetrator, which enables them to engage in the behaviour that leads to an offence.

However, an issue of particular interest to criminal law practitioners is why the concept referred to above denies that this is an opinion recognised by the perpetrator of the prohibited act to the foresight that characterises the subjective side of an offence committed in the form of conscious unintentional behaviour. This is because that perpetrator is a person who presumes that they will avoid committing an offence and that it is precisely this presumption – as a representation of a possibility of not committing an offence combined with a strong belief that the situation is as the representation suggests – that is the component of that perpetrator’s knowledge that makes him commit an offence in a consciously unintentional manner. Thus, in the case of a perpetrator who accomplishes the subject of an offence in a consciously unintentional manner, according to W. Patryas, we face a system characterised by the fact that:

(...) the subject’s supposition is acutely at odds with his prediction. He foresees that he is performing the act concerned and supposes that he will avoid it, i.e. he supposes that he is not performing it. The expression “supposes” used here informs of the subject’s positive attitude towards the sentence contradicting the prediction. The subject of the supposition is thus a sentence of the form “X does not perform (will not perform) act C.” As one can see

– continues the author quoted –

(...) the reckless perpetrator has a positive epistemic relation to two mutually contradictory sentences, namely the sentences in the form “X performs act C” and “X does not perform act C”. We perceive, however, that this is not an identical relationship. This is because the false sentence being the subject of supposition influences the actions of the reckless perpetrator. He performs the prohibited act being driven by a false belief that he is not performing it. On the contrary, the true sentence that is the subject of the prediction does not affect his actions. It is not a component of his knowledge.¹¹

The point of view formulated by W. Patryas is accurate, despite the fact that it was formulated by the author on the basis of the previously applicable CC, of which Article 7(2) provided a clear basis for articulating the epistemic properties specified by W. Patryas that characterise a perpetrator committing an offence in the form of conscious unintentional behaviour. This is because the CC currently in force also provides full basis for the formulation of the approach presented above. However, it provides it, in fact, in the provision defining the intentional commission of the act rather than in the provision defining unintentional commission of the offence. It is this provision that informs us that the mental attitude of the perpetrator committing an offence in a consciously unintentional manner may consist neither in the willingness to commit an offence (because it underlies the direct intent), nor in accepting to commit such an act (because it underlies the conceivable intent), and consequently it must consist in a desire not to commit the act,¹² which may be present only when

¹¹ See: W. Patryas, *Interpretacja...*, p. 163.

¹² See: M. Kowalewska-Łukuć, *Zamiar...*, p. 116.

the perpetrator, foreseeing the possibility of committing an offence, is at the same time convinced of the impossibility that it will be committed.¹³ Indeed, M. Kowalewska-Łukuć is right that in the case of conscious unintentional behaviour:

Although the perpetrator is aware of a possibility of committing a criminal act, in order to reduce the dissonance (caused by the conflict of this awareness with the motivation to accomplish his desired state of affairs), they assume that they will avoid committing the act.¹⁴

The author also has this intention when she explains that:

Indeed, if a perpetrator who has no intention of committing the offence, i.e. they do not want to commit the offence and do not accept commission of the offence, or even wish not to commit the offence, but nevertheless commit the offence, there must be some factor which, despite foreseeing a possibility of committing the offence, enabled the perpetrator to act or refrain from acting, which, they realised, could have led, and did lead, to commission of the offence. Otherwise, the perpetrator's behaviour would be paradoxical and illogical. Behaviour that may lead to something that is not desired and is not accepted must be justified by something. This justification in the case of conscious unintentional behaviour is precisely the presumption that the act will not be committed.¹⁵

In connection with the foregoing, the excerpted property of the intellectual segment of conscious unintentional behaviour should be honoured with adequate wording in the provision defining unintentional committing of an offence.¹⁶ After all, as has already been argued, "(...) the role of a provision designed to indicate when a criminal act is committed in the form of conscious unintentional behaviour is to provide as precise a statement as possible of when this actually occurs".¹⁷ Consideration could be given, for example, to the following proposals to amend Article 9(2) CC:

- 1) An offence is committed unintentionally both when, and only when, a perpetrator who foresees the possibility of committing an offence and has no intention of committing it commits it believing that they will succeed in avoiding committing the offence, and when, and only when, a perpetrator who does not foresee the committing of an offence commits it when they could have foreseen its commission,¹⁸

¹³ See: M. Kowalewska-Łukuć, *Zamiar...*, p. 120, stating:

In the current regulation, the requirement of presumption on the part of the perpetrator is simply not there. (...). At present, the perpetrator's presumption of avoiding commission of an offence, which is the element that gives the sense of conscious unintentional behaviour in general, has to be added, as it does not stem directly from the regulation of Article 9 § 2 of the CC. As this presumption characterises the cognitive aspect of conscious unintentional behaviour, it should be articulated in this provision.

¹⁴ M. Kowalewska, *Zamiar...*, p. 118.

¹⁵ *Ibidem*, p. 118.

¹⁶ See: Ł. Pohl, *Przyczynek...*, pp. 430 et seq. See also: Ł. Pohl, *O potrzebie zmian w części ogólnej k.k. na tle węzłowych zagadnień nauki o przestępstwie (zagadnienia wybrane)* – in print in: *Księga Jubileuszowa Profesora Stanisława Hoca*. This position was also taken by M. Kowalewska-Łukuć – see: M. Kowalewska, *Zamiar...*, p. 120.

¹⁷ See: Ł. Pohl, *Przyczynek...*, p. 430.

¹⁸ *Ibidem*, p. 431.

2) An offence is committed unintentionally both when the perpetrator, foreseeing the possibility of committing the offence, commits the offence in the reasonable belief that it will not happen, and when the perpetrator, not foreseeing the possibility of committing the offence, commits the offence in a situation in which they could have foreseen its commission.¹⁹

The proposals presented take on particular relevance in the context of the difference between homicide committed with conceivable intent and beating and a fight with a consequence of death as analysed in this report.

The case law we have analysed implies that the courts too often disregard the above theoretical findings. In particular, they pay far too little attention to the differences between the conceivable intent and the conscious unintentional behaviour outlined above. Such an attitude leads us to find, in the case of many judgments, classifications adopted by the courts in the most arbitrary manner.

The most important errors of adjudication practice are, in our opinion, as follows:

failing to draw attention to the difference between the conceivable intent and conscious unintentional behaviour as regards the nature of their intellectual component (belief in the possibility of committing an offence in the case of conceivable intent and belief of not committing an offence in the case of conscious unintentional behaviour),

and failing as a consequence to do so

2) lack of insight into the differences between the volitional elements of conceivable intent and conscious unintentional behaviour (acceptance of an offence in the case of conceivable intent and the intention not to commit an offence in the case of conscious unintentional behaviour).

The above-mentioned irregularities, in view of the foregoing, result in **errors in the assessment of the evidence**.

This is because when assessing the facts the courts do not analyse whether the perpetrator had a belief that they would not commit the offence, so in our case – they do not analyse whether the perpetrator had, at the time of commission of the offence, a belief that he would not cause the death of a human being. Without analysing this, they therefore do not deal with proving circumstances that could support the existence of such a belief on the part of the perpetrator.

On the other hand, having failed to note the requirement for conscious unintentional behaviour in the form of an intention on the part of the perpetrator not to commit an offence, i.e. in our example, an intention not to cause the death of a human being, they do not in fact deal with the demonstration of circumstances that could be regarded as the material justifying its adoption in a judicial decision.

¹⁹ See: Ł. Pohl, *O potrzebie...*

Consequently, the errors of the courts in the area under consideration ultimately take the form of lack of adequate reasoning behind the decision adopted in the judgment as regards the form of the subjective side of the offence.

It may be inferred from the case law reviewed that the courts very often fail to recognise that foreseeing the possibility of committing an offence is an element present in both conceivable intent and unintentional behaviour (of course, only in its conscious form), which means that they fail to realise that proving such foresight is not sufficient, because – as the theoretical considerations indicated demand – it is also necessary to provide circumstances which would justify recognising that the foresight was linked either with the conviction of the perpetrator that an offence might be committed, and thus with a belief that the effect might be fatal, which would then lead to the imputation of homicide or that it was combined with a belief on the part of the perpetrator that the criminal offence would not be committed, and thus a belief that death would not be caused. This in turn would make it possible to impute the commission of a beating or a fight resulting in death to the perpetrator. Indeed, without the actions indicated, the classification of the perpetrator's conduct either as homicide or as a beating or fight resulting in death is inadequately justified and is thus an arbitrary classification adopted by the court.

In this state of affairs, we believe that the errors in the case law in this regard could be – to a significant extent – eliminated by an adequate change in the law, i.e. a change that would force courts to respect the theoretical findings indicated above. We believe that the best solution in this case would be to amend the provision defining the unintentional commission of an offence, whereby the conscious unintentional behaviour would be restricted explicitly in the legal text to a status characterised by the perpetrator's belief that the offence will not be committed. This is because such a requirement would force the court – in the event that it assumes that an unintentional offence (in our example, a beating or a fight resulting in death) has been committed – to state the circumstances justifying the existence of such a belief on the part of the perpetrator.²⁰ At present – as indicated – the courts do not do so, resulting in a registrable misuse of the construction of conscious unintentional behaviour which, in our example, results in the unjustified adoption of a classification as a beating or a fight resulting in death in these situations where, in the absence of any basis for believing that the perpetrator had the conviction that the death of a human being would not occur, an intention to cause death would have to be presumed, and thus – as a result – a homicide (actually committed at the time) would have to be presumed.

The postulated change in the law could – in our opinion – take the shape of one of the two above-mentioned proposals to modify Article 9(2) CC (with an indication of the latter).

²⁰ After all, it must be justified by something objective.

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YEARBOOK

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**Recidivism of Convicts Who Have
Served Their Sentence under
the Electronic Monitoring System
(EMS)**

JUSTICE ANALYSES

Introduction

The project described in this paper aimed to evaluate one of the dimensions of the effectiveness of the Electronic Monitoring System (hereinafter: the EMS) in Poland, i.e. the recidivism rate of convicts who have served their sentence in this system.

Thus, the project fits into the framework of the research on the functioning of the justice system or, more broadly, criminal policy, as well as penitentiary policy, i.e. the imposition and execution of custodial sentences in a prison condition and in the alternative form provided by electronic monitoring. Barbara Stańdo-Kawecka emphasises that:

Currently, criminal policy analyses indicate that, in the backdrop of mass imprisonment, which has been widely discussed in the academic literature, massive surveillance of offenders in non-custodial settings has been developing for a long time. Both in the United States and Europe, the number of offenders subject to sanctions and measures of remaining at liberty under the supervision of probation authorities or others has increased in recent decades, as has the length of time under supervision.¹

Electronic supervision, or electronic monitoring, is used more and more frequently and in an increasing number of countries as a form of serving a short-term custodial sentence or as a form of early conditional release from penitentiary institutions. This is a so-called *back-door* form used, for example, in Poland. The electronic monitoring system has also been successfully applied in many countries as a form of execution of a preventive measure, i.e. as an alternative to pre-trial detention (*front door*).² In 2024, Poland also launched works to introduce this form of executing pre-trial detention. Moreover, in some countries, electronic monitoring is used as a type of the so-called post-penal measure, i.e. as a form of control over

¹ M.S. Phelps, *Mass Probation. Toward a More Robust Theory of State Variation in Punishment*, "Punishment & Society" 2017, Vol. 19, Issue 1; F. McNeill, K. Beyens, *Introduction. Studying Mass Supervision*, [in:] *Offender Supervision in Europe*, F. McNeill, K. Beyens (eds.), Basingstoke 2013; see: B. Stańdo-Kawecka, *Dozór elektroniczny w wymiarze sprawiedliwości - wybrane problemy etyczne i praktyczne*, [in:] K. Banasik, A. Kargol, A. Kubiak-Cyrul, M.J. Lubelski, E. Plebanek, A. Strzelec (eds.), *W poszukiwaniu prawdy: rozważania o prawie, historii i sprawiedliwości*, Kraków 2018.

² However, an important limitation is worth noting here: in the systems of many countries, including Germany, pre-trial detention can only be imposed on a suspect who is feared to be hiding, i.e. to prevent a potential escape. The electronic surveillance system does not prevent escape and hiding, so from a legal point of view, it may not be used as an alternative to custody. See, for example: F. Dünkel, C. Thiele, J. Treig, "You'll never stand-alone": *Electronic monitoring in Germany*, "European Journal of Probation" 2017, Vol. 9, Issue 1, pp. 28-45.

a convicted person after they have served their sentence. Electronic surveillance systems have also been introduced to supervise juvenile offenders³ and migrants.⁴

A review of studies on the effectiveness of the electronic monitoring system shows relatively weak evidence of its impact on reducing recidivism rates among convicts sentenced to imprisonment.⁵ However, the problem with comparative analyses lies in the often diverse forms of organisation of these systems in various countries. In general, the studies indicate that placing convicts who have already served part of their sentence in prison under electronic supervision does not increase their recidivism (and sometimes lowers it), lowers costs for the justice system, and has positive effects for the convicts themselves. The unambiguous reduction in recidivism due to electronic monitoring used during conditional release from prison, particularly in the case of sex offenders, is demonstrated by a review of Australian research.⁶

An important phenomenon described in the context of analyses concerning electronic monitoring and its role as an alternative to imprisonment is the risk of so-called *net-widening*, i.e. the inclusion of other (additional) categories of convicts in this system than originally designated. This refers, for example, to the case where electronic monitoring was intended to cover only unconditional imprisonment, i.e. to serve as a lighter form of imprisonment, however, the possibility of imposing it as a separate sanction or even the ease of obtaining a change into this form prior to imprisonment may lead to covering people who otherwise would not be sentenced to unconditional imprisonment at all but, for example, only to the restriction of liberty or a fine. For this reason, the question arises whether, given such an alternative, courts would reach for a sanction which is, in fact, more severe, i.e. isolation, motivated by the suggestion that “after all, the convicted person may always request to serve this sentence under the electronic surveillance system.” This, unfortunately, further hinders the possibility of researching the effectiveness of this measure and comparative analyses, especially based on data from conviction records.

Electronic supervision is cheaper than detention in prison.⁷ This is one of the more important arguments in favour of its use, especially in the context of seeking efficiency, including

³ See, for example: M. Nellis, *The “Tracking” Controversy: The Roots of Mentoring and Electronic Monitoring*, “Youth Justice” 2004, Vol. 4, Issue 2.

⁴ M. Bhatia, *Racial surveillance and the mental health impacts of electronic monitoring on migrants*, “Race & Class” 2021, Vol. 62, Issue 3, pp. 18–36.

⁵ E. Villman, *Early release from prison with electronic monitoring: Hook for or hindrance to change?*, “Criminology & Criminal Justice” 2022, online first, available at: <https://doi.org/10.1177/17488958221080887>, p. 4; S.N. Andersen, K. Telle, *Better out than in? The effect on recidivism of replacing incarceration with electronic monitoring in Norway*, “European Journal of Criminology” 2019, Vol. 19, Issue 1, pp. 3–4.

⁶ K. Gelb, N. Stobbs, R. Hogg, *Community-based sentencing orders and parole. A Review of Literature and Evaluations across Jurisdictions*, Queensland University of Technology 2019, available at: https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0003/615018/edited-final-literature-review.pdf [accessed on: 28.05.2023].

⁷ See, for example: A. Łukaszewicz, *Pobył skazanego w domu wszystkim się opłaca*, “Rzeczpospolita” 11 January 2023, available at: <https://www.rp.pl/prawo-karne/art37762531-pobył-skazanego-w-domu-wszystkim-sie-oplaca> [accessed on: 07.06.2023].

cost-effectiveness, in criminal justice.⁸ It should be noted, however, that most studies on the use of electronic monitoring focus on its potential negative consequences for convicts and their well-being, as well as for the entire justice system and the organisation of social life. Its invigilation and surveillance features are highlighted, which may stem from a tendency to extend the scope of control over society.⁹ It is also worth bearing in mind such considerations when analysing the electronic monitoring system as an undoubtedly valid alternative to the ineffective, costly, and often even harmful penalty of imprisonment executed in prison conditions.

However, following Katharina Meuer and Gunda Woessner, it is also necessary to point out at the outset that the significant shortcomings of the theoretical basis of research projects focusing on the effectiveness of this measure, i.e. the theoretical assumptions as to why, in the first place, subjecting a convicted person to supervision using technical means would have an impact on their attitudes, decisions and behaviour, and the empirical verifications of such assumptions.¹⁰ Seven groups of such theoretical explanations can be distinguished.

The first assumption is that a person subjected to constant surveillance raises their sense of risk of detection when committing a criminal act, which, according to rational choice theory, would reduce their criminality because, being aware of the risk of detection, they would avoid “bad behaviour”. However, there are also dissenting views that electronic monitoring is less likely to encourage long-term change in a convict than other custodial sentences as its impact function is limited to merely instilling fear of violating its conditions.¹¹

The second assumption, which is compliant with the theory of routine activities, is that the structured daily schedule resulting from the rigours of electronic monitoring reduces the risk of committing a crime because a person under surveillance cannot stay in places where they could encounter a convenient victim or in places without control mechanisms. Further, after completing the sentence of electronic supervision, they should acquire the habit of staying at home more often and a daily routine that will keep them away from potentially risky places, people, and situations. However, the theory of routine behaviour may also generate the opposite suggestion that it is staying in the community, being in contact with family members and others at liberty that may raise the risk of committing crimes against them. There are far fewer such “opportunities” in prison.

⁸ S.N. Andersen, K. Telle, *Better out than in? The effect on recidivism of replacing incarceration with electronic monitoring in Norway*, “European Journal of Criminology” 2019, Vol. 19, Issue 1.

⁹ See, for example: C.R. Berry, *Under surveillance: An actor network theory ethnography of users’ experiences of electronic monitoring*, “European Journal of Criminology” 2021, Vol. 18, Issue 6, pp. 817–835; T. Daems, *Electronic Monitoring. Tagging Offenders in a Culture of Surveillance*, Cham 2020.

¹⁰ K. Meuer, G. Woessner, *Does electronic monitoring as a means of release preparation reduce subsequent recidivism? A randomized controlled trial in Germany*, “European Journal of Criminology” 2020, Vol. 17, Issue 5, pp. 563–584.

¹¹ D. Smith, *Electronic monitoring of offenders: The Scottish experience*, “Criminal Justice” 2001, Vol. 1, Issue 2, p. 211.

The third explanation is the internalisation of external control resulting from the conditions of the electronic monitoring system – the convict should take over the control functions even when the electronic monitoring is over. As such, this explanation is compliant with the concept of self-control, which states that what prevents people from breaking the law is an individual's ability to control their behaviour and refrain from undesirable actions. These skills develop in the course of learning. In this sense, being subject to electronic supervision and external control may facilitate learning such restraint – just as a convict has to refrain, for the period of supervision, from leaving home outside the permitted hours and doing whatever they feel like doing.¹² They also have to learn to plan their activities and day schedule in advance, and they are becoming aware that exceeding this plan will bring negative consequences.¹³

The fourth explanation, which is in line with concepts of social control, assumes that a person under electronic monitoring establishes and maintains stronger social ties with their family and work environment, and engages more strongly in positive activities related to these environments, which deters them from “following the wrong path.” This impact may be particularly noticeable when compared to the weakening of such ties associated with being in prison and the risk of stronger contacts with the criminal subculture that may occur there.

This, in turn, leads us to the fifth group of explanations for the impact of electronic monitoring on recidivism, related to theories of criminal behaviour learning and criminal subcultures. The less contact with other offenders and members of negative peer groups in an individual's environment, the lower the risk of recidivism. Further, being under supervision implies significant restrictions on opportunities such as staying together or enjoying parties in peer groups. In addition to limited contacts with other criminals, a reduced impact of the imprisonment effect¹⁴ would also be associated with a shorter period of imprisonment.

Most studies on the potential impact of electronic monitoring on reducing recidivism recognise the concept of deterrence (*deterrence theory*) as crucial, and this concept can be briefly introduced here as the sixth explanation. Like the first explanation discussed above, it stems from the rational choice theory and, in the nutshell, provides that a convict who has experienced the negative consequences of their bad behaviour, in the form of a significant restriction of their freedom under electronic monitoring, will try to avoid experiencing these situations again in the future, and thus, avoid committing crimes. However, it should

¹² E. Shoham, S. Yehosha-Stern, R. Efodi, *Recidivism Among Licensed-Released Prisoners Who Participated in the EM Program in Israel*, “International Journal of Offender Therapy and Comparative Criminology” 2015, Vol. 59, Issue 9.

¹³ L. Bartels, M. Martinovic, *Electronic monitoring: The experience in Australia*, “European Journal of Probation” 2017, Vol. 9, Issue 1, pp. 80–102.

¹⁴ K. Meuer, G. Woessner, *Does electronic monitoring as a means of release preparation reduce subsequent recidivism? A randomized controlled trial in Germany*, “European Journal of Criminology” 2020, Vol. 17, Issue 5, pp. 563–584.

be noted that this explanation is not very logical in the context of the alternative role of electronic monitoring to the more severe sanction of unconditional imprisonment. The reason is that prison, as a more severe sanction, should be more deterrent, and the use of electronic monitoring means precisely a reduction in the sanction severity, which, according to this concept, should have the opposite effect, leading to a rise in recidivism.¹⁵

The seventh theoretical concept considered in research on the effectiveness of electronic monitoring is related to the research on offenders' careers and life trajectories. In this context, the right of a convicted offender to request and be granted a decision, compliant with their wish, to serve a custodial sentence in the form of electronic monitoring, may prove to be a catalyst for a major change in the offender's criminal trajectory (*a hook for change*), while a stronger deterrent may lead to recidivism. Interestingly, this mechanism is observed in older convicts (aged over 25), which links it to the process of growing out of crime.¹⁶

The last group of explanations for the effectiveness of electronic monitoring that can be distinguished includes purely economic descriptions of the system cost-effectiveness. According to these explanations, if the recidivism rate is not higher with a significantly lower expenditure to maintain a convict under EMS compared to keeping them in prison, this is enough to recognise the system as effective. Although this is not a theoretical explanation, it is definitely worth noting.

An important element of research on electronic monitoring (also in the context of deterrence concept cited above, which is the most frequent theoretical basis used for analyses of the impact of electronic monitoring on recidivism) is the so-called pains associated with serving a sentence in the form of electronic monitoring. They are often analogical to the pain of imprisonment as the concept also originates precisely from penitentiary studies. These pains include: restriction of an individual's autonomy, restriction of the possibility of gainful employment, restriction of the possibility of maintaining social and family relations and performing family duties, psychological harm (such as the feeling of shame and constant comparison of one's situation to that of others at liberty, fear of returning to prison), financial losses (such as the requirement to pay fees for staying under electronic monitoring, inability to work more than one full-time job), physical harm (inconvenience of wearing an annoying ankle transmitter), harm to the convict's close ones (such as the necessity to adjust their activities and plans to the requirements of the monitoring).¹⁷

Research also highlights negative factors for convicts associated with serving their sentence in this form, including: imprisonment at home (the need to plan in advance and obtain permission for leaving home in most situations), lack of privacy (constant contact with

¹⁵ S.N. Andersen, K. Telle, *Better out than in? The effect on recidivism of replacing incarceration with electronic monitoring in Norway*, "European Journal of Criminology" 2019, Vol. 19, Issue 1.

¹⁶ Ibid.

¹⁷ M. Richter, B. Ryser, U. Hostettler, *Punitiveness of electronic monitoring: Perception and experience of an alternative sanction*, "European Journal of Probation" 2021, Vol. 13, Issue 3, pp. 262–281.

supervisors), the need to comply with many different rules and additional requirements, the need to charge the monitoring device, the restriction of the autonomy and dignity of the family of the supervised, the requirements to incur supervision expenses (e.g., telephone line fees and court fees for supervision), higher risk of re-imprisonment due to stronger control and numerous potential rules to be violated, implementation of the supervision activities by private profit-oriented companies.¹⁸ However, juxtaposing these pains with the classic deprivations resulting from imprisonment (*pains of imprisonment*), it seems that the electronic monitoring system offsets most of them, and that the pains of convicts serving a sentence under the EMS should be linked to the undoubtedly essential and indispensable feature of any criminal punishment, which is its inconvenience.

Both because of the relatively long period of EMS application in Poland and due to the significant population of convicts subject to this system, it is advisable to conduct an extensive and multifaceted study of its effectiveness. One of the indicators of the effectiveness of enforcing penalties is the recidivism rate of convicted offenders. To this end, at the Institute of Justice, we have undertaken the first large-scale study of recidivism among convicts who have served their sentences under EMS conditions.

The paper consists of four chapters. The first chapter briefly describes the Polish Electronic Monitoring System. The second chapter provides an overview of Polish and foreign research on the use and effectiveness of electronic monitoring. Further, the third chapter discusses the methodology of the recidivism survey conducted for the purposes of this project and covering convicts who have served their sentence under the Electronic Monitoring System and the control group. Finally, the fourth chapter presents the survey results.

¹⁸ K Weisburd, V. Bhadha, M. Clauson, J. Elican, F. Kahn, K. Lawrenz, B. Pemberton, R. Ringler, J. Schaer, M. Sherman, S. Wohlsdorf, *Electronic prisons: The Operation of Ankle Monitoring in the Criminal Legal System*, "GWU Legal Studies Research Paper" 2021, No. 2021-41, available at: <https://ssrn.com/abstract=3930296> [accessed on: 07.06.2023].

1. Electronic Monitoring System in Poland

The Electronic Monitoring System is a form of imprisonment not exceeding 1 year and 6 months, imposed with the authorisation of the penitentiary court (or, in the case of shorter sentences, of the penitentiary commission), consisting of the obligation to stay at a specific place of permanent residence (house/flat) during specific hours of the day and specific days of the week, the obligation to wear a transmitter (an ankle or wrist band), to perform other imposed duties, and to provide explanations to the court authorities. The court may authorise serving a sentence under this system if this is sufficient to achieve the purposes of the penalty, and when security considerations, the degree of demoralisation and other circumstances do not support the need to keep the convicted person in prison and when the convicted person has a place of permanent residence that meets the technical conditions for the installation of a monitoring device. While serving a sentence in this system, a convicted person can work professionally, fulfil family and household duties, study, participate in religious practices or, for example, participate in treatment or therapeutic interventions, which are important elements of effective rehabilitation.¹⁹

The Electronic Monitoring System in Poland was introduced in 2009 in the selected court appeal areas, and has been functioning in its full extent, as a method of serving a penalty of imprisonment, since 1 January 2012. In 2015, for a short period of time, the Electronic Monitoring System became a form of restriction of liberty penalty,²⁰ but as early as in 2016, it returned to its original form. In addition,

the electronic monitoring system is also used to enforce the criminal measure of the obligation for a convict to stay at a permanent place of residence during certain prohibited mass events and the prohibition on approaching certain persons. It is also used as a security measure in the form of electronic monitoring of the place of residence.²¹

¹⁹ E. Smolińska, *System Dozoru Elektronicznego. Co to jest?*, available at: <https://www.sw.gov.pl/aktualnosc/areszt-sledczy-w-warszawie-grochowie-system-dozoru-elektronicznego-co-to-jest> [accessed on: 07.06.2023].

²⁰ The Act of 20 February 2015 Amending the Criminal Code and Certain Other Acts, *Journal of Laws of 2015*, Item 396.

²¹ P. Sidor-Borek, P. Ostaszewski, *Funkcjonowanie dozoru elektronicznego w państwach europejskich w świetle danych European Sourcebook of Crime and Criminal Justice Statistics*, [in:] *O wolność i prawo. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Rzeplińskiemu*, B. Błońska, Ł. Chojniak, B. Gruszczyńska, A. Kosyło, K. Witkowska-Rozpara, D. Woźniakowska-Fajst (eds.), Warszawa 2022, pp. 985–1003.

In order to obtain the court's permission to serve a sentence under this system, the convict must meet several requirements: they must have a permanent place of residence (a house, a flat) that meets the technical and organisational conditions; any adult persons living with them must agree to the installation of the system; their sentence of imprisonment must be a maximum of 18 months (until 31 March 2020, it was 12 months); and the objectives of the sentence must be met.²²

The introduction of the electronic monitoring system in Poland was intended to meet the following objectives: to reduce the prison population; to find innovative means of effective rehabilitation of convicts alternative to imprisonment; to introduce a penal repression measure of moderate severity aimed at perpetrators of less serious crimes, combining the retributive and resocialising functions of punishment with the preparation of the convict to function at liberty; to increase the cost-effectiveness of punishment; to bring the Polish criminal justice system closer to Western standards and solutions; to lower the general repressiveness of criminal reaction; and to improve conditions and possibilities of conducting resocialising activities in prisons and general conditions of serving a prison sentence.²³

By the end of 2022, 154,000 custodial sentences in total had already been served in the form of EMS. According to the Electronic Monitoring Office of the Central Administration of Prison Service (CZSW), the effectiveness of the system, understood as the completion of an adjudicated sentence on time (without withdrawal of permission and "return" to prison) is at 90%. The system is constantly expanding, with 8,000 people able to be covered by the system simultaneously in 2022²⁴ and plans to increase this figure to 10,000 in the following years. Significantly, the cost of maintaining a convict under the EMS conditions is more than five times lower than the cost of maintaining a convict in prison: "In 2021, the average monthly cost of serving a sentence under the EMS was PLN 800. In contrast, the average monthly cost of prison isolation of a convict amounted to PLN 4,150".²⁵

However, there is a concern that the expansion of the EMS system does not entail the reduction of the prison population. On 31 December 2022, there were 71,228 inmates in Polish prisons, a number that has remained fairly stable since around 2015, after a marked decline since the period 2001–2013, when it fluctuated around 80,000. In 2023, on the other hand, we saw a significant increase in the number of prisoners, reaching 78,016 on 2 June 2023.²⁶

²² Ibid.

²³ M. Jankowski, A. Kotowski, S. Momot, A. Ważny, *Przyczyny niedostatecznego wykorzystania ustawy o dozorze elektronicznym*, Warszawa 2012, available at: <https://iws.gov.pl/wp-content/uploads/2018/08/Jankowski-Kotowski-Momot-Wa%C5%BCny-Doz%C3%B3r-elektr-2012.pdf> [accessed on: 07.06.2023].

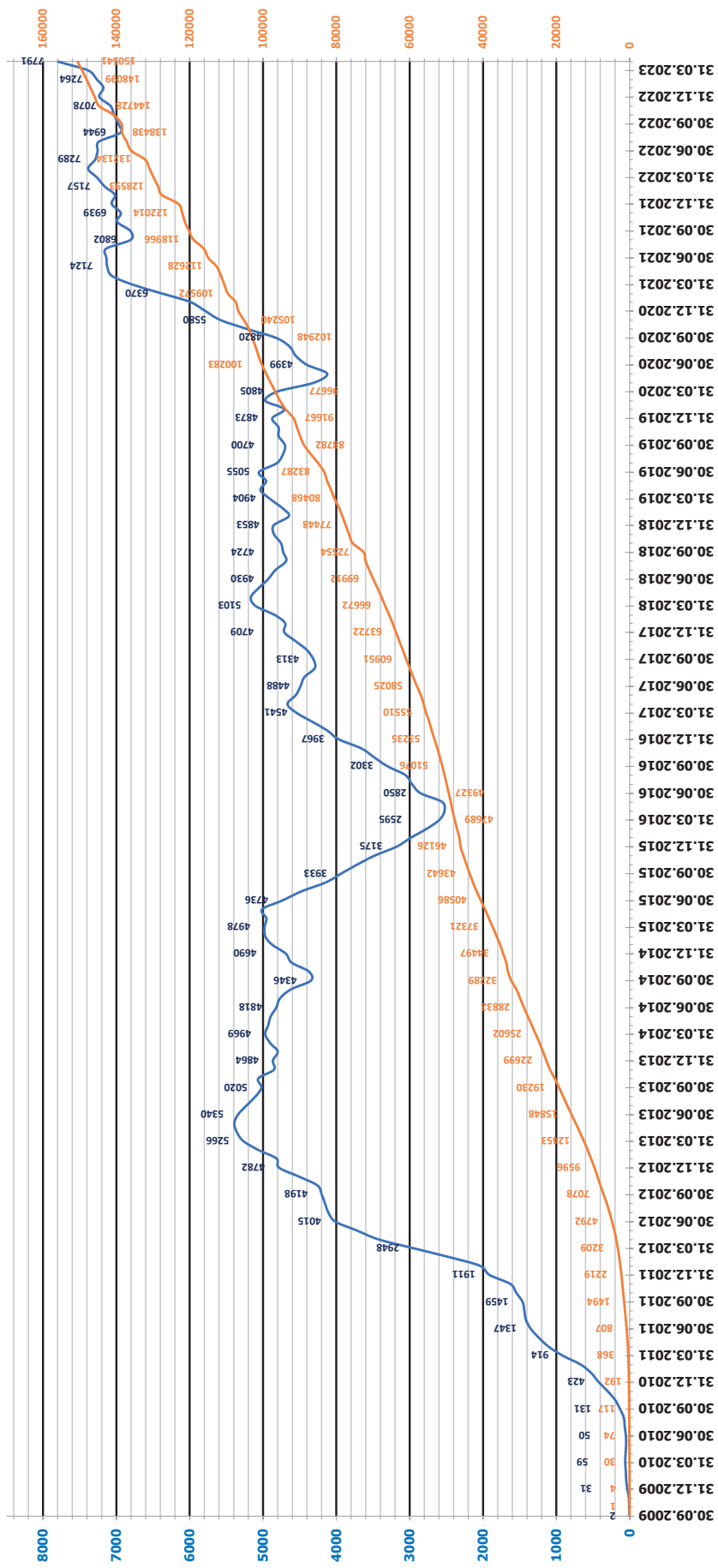
²⁴ Biuro Komunikacji i Promocji Ministerstwa Sprawiedliwości, *Sukces systemu dozoru elektronicznego nad skazanymi*, 31 January 2023, available at: <https://www.gov.pl/web/sprawiedliwosc/sukces-systemu-dozoru-elektronicznego-nad-skazanymi> [accessed on: 07.06.2023].

²⁵ Ibid.

²⁶ Centralny Zarząd Służby Więziennej, Biuro Informacji i Statystyki, *Informacja o zaludnieniu jednostek penitencjarnych*, available at: <https://sw.gov.pl/assets/67/93/72/a3f0d1b623576f3378f3472d20c3d2f987f3df72.pdf> [accessed on: 07.06.2023].

Figure 1 below shows the number of persons serving sentences under the electronic monitoring system and those who completed their sentences from its launch in 2009 to 31 March 2023. Further, Table 1 contains data on the number of persons serving a sentence under this system as of 31 December each year, in addition to the total number of inmates in Polish prisons (on the same date). Both graphic representations indicate a systematic increase in the population subject to electronic monitoring and its growing share in the prison population. However, at the same time, it is clear that the increase in the number of people under the EMS does not translate into a decrease in the prison population.

Figure 1. Number of convicts in EMS in the years 2009–2023*



* Blue line – serving a sentence, red line – completed a sentence.

Source: Office of Electronic Monitoring, *Number of convicts in the years 2009–2023*, available at: <https://sw.gov.pl/assets/39/50/42/901107a810b1f58758280ff23cd292caa6011048.pdf> [accessed on: 30.01.2024].

Table 1. Number of persons serving sentences in EMS and number of inmates in the years 2009–2023

Status as at	Serving sentence in EMS	Inmates in prisons	Ratio of the number of convicts in EMS to the total number of inmates and convicts (%)
31 December 2009	31	84,003	0.0
31 December 2010	423	80,728	0.5
31 December 2011	1,911	81,382	2.3
31 December 2012	4,782	84,156	5.4
31 December 2013	4,864	78,994	5.8
31 December 2014	4,690	77,371	5.7
31 December 2015	3,175	70,836	4.3
31 December 2016	3,967	71,528	5.3
31 December 2017	4,709	73,822	6.0
31 December 2018	4,853	72,204	6.3
31 December 2019	4,873	74,130	6.2
31 December 2020	5,580	67,894	7.6
31 December 2021	6,939	71,874	8.8
31 December 2022	7,264	71,228	9.3
31 December 2023	6,465	73,822	8.1

Source: Office of Electronic Monitoring, *Number of convicts in the years 2009–2022*, available at: <https://sw.gov.pl/assets/39/50/42/901107a810b1f58758280ff23cd292caa6011048.pdf> [accessed on: 07.06.2024]; and Prison Service, *Annual Statistics*, available at: <https://sw.gov.pl/strona/Statystyka> [accessed on: 07.06.2024].

A request for serving a custodial sentence under EMS conditions can be submitted by a convict themselves, their attorney, or the director of the penitentiary institution. Almost all, i.e. 95%, of the requests for granting a convict permission to serve their sentence under the electronic monitoring system are submitted by the convict themselves or their attorney, and only 5% – by the director of the penitentiary institution. Among these requests (in 2021, a total of 55,239), only approximately 30% are granted.²⁷ As such, it is apparent that convicts are interested in serving their sentences under this system, and there are potentially great opportunities for further expansion.

The data of the National Criminal Record for 2020²⁸ includes the recidivism statistics measured in two ways. The first one covers the recidivism of adults with a first-instance sentence which became final in 2016 and after the final decision to permit the serving of a custodial sentence under the electronic monitoring system in 2016. The second way analyses the recidivism of adults leaving prisons and detention facilities after they have completed a custodial sentence under electronic monitoring in 2016. Let us take a closer look at the

²⁷ Wydział Statystycznej Informacji Zarządczej, Ministerstwo Sprawiedliwości, *SDE – system dozoru elektronicznego w latach 2011–2021*, available at: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html> [accessed on: 07.06.2023].

²⁸ The most recent data available when writing this report.

latter analysis. The calculation for this purpose took into account the date of the offence and comprised all persons who have re-offended at least once within 5 years since the date of leaving prisons or detention facilities.

Among people who had completed their custodial sentence fully in prisons, nearly 41% returned to crime within five years, while among those who had completed this sentence in the EMS, it was 32%. The highest recidivism rate is recorded in the first year after the completion of the sentence; almost half of the convicts – regardless of the form of imprisonment (in prison or in the EMS) or the way the sentence ended (conditional release or full execution) – committed another offence in the first 12 months after the end of their penalty.

Table 2. Recidivism of adults leaving prison or detention facilities and after completing a custodial sentence under the electronic monitoring system in 2016 (%)

Adults		Total	Persons subject to (depending on what was first)		Persons who have completed serving their sentence of imprisonment under the electronic monitoring system
			conditional release	termination of imprisonment in its entirety	
Persons who either completed their imprisonment sentence in its entirety or were conditionally released within 5 years preceding the survey (2016) and who returned to crime after completing their imprisonment sentence or conditional release in the period 2016–2020		39.5	35.2	40.7	32.1
Persons who have returned to crime since the end of their imprisonment or conditional release in the period of:	1 year	47.0	50.2	46.2	46.2
	2 years	27.9	26.7	28.2	31.0
	3 years	16.7	15.5	17.0	15.7
	4 years	7.6	7.1	7.7	6.3
	5 years	0.9	0.6	1.0	0.8

Source: The data of the National Criminal Record (KRK) for 2020, *Recidivism of adults leaving prisons and detention facilities and after completing a custodial sentence under the electronic monitoring system in 2016*.

2. Effectiveness of electronic monitoring systems in light of criminological research

Nowadays, the issues of electronic monitoring, its severity and its effectiveness are an important subject of criminological research. In one of the more recent systematic meta-analyses of these issues, Marina Richter, Barbara Ryser and Ueli Hostettler identified about 230 scientific articles on the subject.²⁹ As mentioned at the beginning, systematic reviews of quantitative studies conducted in other countries and dedicated to the effectiveness of electronic monitoring systems indicate that there is no strong confirmation of the effect of reducing recidivism as a result of such systems. Many of the studies conducted in this area have been assessed to be of poor quality, without the possibility to draw any far-reaching conclusions.³⁰

Barbara Stańdo-Kawecka cites data showing that electronic monitoring is used in approximately 40 countries and covers about 250,000–300,000 people, of which about 100,000 are in the United States alone. However, these figures seem small compared to the estimated size of the global prison population (about 10 million people), this population in the United States alone (about 2 million people), and the number of people under the supervision of probation authorities.³¹

Paulina Sidor-Borek and Paweł Ostaszewski indicate that Poland is one of the European leaders in terms of its prison population size and the undisputed leader in terms of the number of people under surveillance and probation supervision. In 2015, almost 350,000 people stayed under such forms of control in Poland, of whom more than 300,000 were adults and less than 40,000 were minors. Poland was also at the forefront of European countries with regard to the number of people covered by electronic monitoring. Only France and Turkey had larger populations of such convicts in 2015. However, comparing these figures to the size of prison populations and people under all types of surveillance and probation supervision led these authors to the conclusion that “electronic monitoring systems are a viable

²⁹ M. Richter, B. Ryser, U. Hostettler, *Punitiveness of electronic monitoring: Perception and experience of an alternative sanction*, “European Journal of Probation” 2021, Vol. 13, Issue 3, pp. 262–281.

³⁰ J. Belur, A. Thornton, L. Thompson, M. Manning, A. Sidebottom, K. Bowers, *A systematic review of the effectiveness of the electronic monitoring of offenders*, “Journal of Criminal Justice” 2020, Issue 68.

³¹ B. Stańdo-Kawecka, *Electronic surveillance...*, p. 659.

alternative to imprisonment still only in a few countries”, such as Norway or France, but hardly Poland.³²

Peter Ibarra, Oren Gur and Edna Erez identify three basic electronic monitoring models depending on the effects this supervision has on prisoners: managerial-supervisory, repressive-punitive, and humanistic-rehabilitative.³³ This issue is also developed by Anthea Hucklesby, Kristel Beyens and Miranda Boone, who analyse in detail the differences between the three electronic monitoring systems – in England and Wales, Belgium, and the Netherlands – in terms of their repressiveness, or otherwise *tightness*. They use the concepts of *length*, *breadth*, *weight* and *depth* of supervision for this analysis. *Length* is the time spent under supervision. *Depth* is understood as the scale of the impact of the sanction on the convict’s daily functioning. *Weight* is the impact that electronic surveillance is expected to have on the prisoner’s mental condition and quality of life. Finally, *breadth* means the level to which the EMS permeates through the whole life of a convict, blurring the boundaries between their monitored and unmonitored life, and the degree to which supervision also affects people and spaces other than a convict themselves and their home. The severity, or *tightness*, of the electronic monitoring system of a country is a product of these four dimensions.³⁴ The authors identify several indicators of the severity of such systems. The primary indicator is the ratio of people staying under this supervision in a country concerned (per 100,000 population). However, more in-depth analyses of electronic monitoring systems should also take into account dimensions such as: the type of monitoring devices (e.g. GPS transmitters or radio transmitters); intensity (number of hours of “house arrest” per day, number and size of compulsory stay and no-home zones, co-occurrence with other sanctions and measures of influence); intrusiveness (number of necessary contacts between a convict and the supervising officers); and rules for dealing with non-compliance and breaches of supervision.³⁵

On the one hand, taking all these dimensions into account makes it very difficult and complex to conduct international comparisons on the functioning and effectiveness of electronic monitoring systems, but on the other hand, valid conclusions will only be drawn after considering these factors.

³² P. Sidor-Borek, P. Ostaszewski, *Funkcjonowanie dozoru elektronicznego w państwach europejskich w świetle danych European Sourcebook of Crime and Criminal Justice Statistics*, [in:] *O wolność i prawo. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Rzeplińskiemu*; B. Błońska, Ł. Chojniak, B. Gruszczyńska, A. Kosyło, K. Witkowska-Rozpara, D. Woźniakowska-Fajst (eds.), Warszawa 2022, pp. 985–1003.

³³ P.R. Ibarra, O.M. Gur, E. Erez, *Surveillance as casework: supervising domestic violence defendants with GPS technology*, “Crime, Law and Social Change” 2014, Vol. 62, Issue 4, pp. 417–444.

³⁴ A. Hucklesby, K. Beyens, M. Boone, *Comparing electronic monitoring regimes: Length, breadth, depth and weight equals tightness*, “Punishment & Society” 2021, Vol. 23, Issue 1, pp. 88–106.

³⁵ Ibid.

2.1. Polish surveys on the use of the Electronic Monitoring System

The first surveys on the use of the Electronic Monitoring System in Poland were conducted in the first years of its functioning. Noteworthy is the study by Michał Jankowski, Artur Kotowski, Stanisław Momot, and Andrzej Ważny on the reasons for negative decisions on granting the EMS request in cases from the second half of 2010 and the first half of 2011 from all district courts where this institution was then in operation. An important finding of this study is that in the vast majority of cases, the processing of the request for serving a custodial sentence under electronic surveillance lasted longer than the recommended period of 14 days. The reasons for refusals most often included: the perception of the EMS as not fulfilling the objectives of the sentence in a particular case; the degree of demoralisation of the convict and their behaviour while serving the sentence; and security considerations and the lack of technical conditions for the EMS installation.³⁶

Another case file examination regarding requests for serving a prison sentence under electronic monitoring was conducted by Kamil Mamak. The author examined, among others, the share of specific decisions among the five judges of the Kraków court (the author examined only this single court) and found an interesting disproportion: one of these five judges was far more likely to refuse the requests, while the others mostly granted them. If the allocation of cases to individual judges was random, it must be assumed that decisions in this regard may be affected by the attitude or beliefs of the judge resolving the case. The author also notes the relatively high ineffectiveness of the requests, understood as the number of requests left unconsidered or unsuccessful – including those filed by professional attorneys for convicted prisoners or prison directors.³⁷

It is also worth referring to the study by Zbigniew Nowacki – not directly on the issue of the effectiveness of the Electronic Monitoring System, but on the evaluation of this system as perceived by prisoners³⁸ – and two studies conducted under the leadership of Tomasz Przesławski.³⁹ These studies analyse in detail the reasons for granting and rejecting requests but do not address the effectiveness of this system as they only consider the increasing

³⁶ M. Jankowski, A. Kotowski, S. Momot, A. Ważny, *Przyczyny niedostatecznego wykorzystania ustawy o dozoru elektronicznym*, Warszawa 2012, available at: <https://iws.gov.pl/wp-content/uploads/2018/08/Jankowski-Kotowski-Momot-Wa%C5%BCny-Doz%C3%B3r-elektr-2012.pdf> [accessed on: 07.06.2023].

³⁷ K. Mamak, *Funkcjonowanie dozoru elektronicznego w świetle badań aktowych*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2014, Issue 3.

³⁸ See: Z. Nowacki, *System dozoru elektronicznego w ocenie osadzonych w zakładach karnych*, "Resocjalizacja Polska" 2015, Issue 10.

³⁹ See: T. Przesławski, M. Sopiński E. Stachowska, *Analiza i oceny funkcjonowania systemu dozoru elektronicznego w Polsce w latach 2013–2017*, Warszawa 2020; T. Przesławski, E. Stachowska, *Analiza i oceny funkcjonowania systemu dozoru elektronicznego w Polsce w latach 2018–2019*, Instytut Wymiaru Sprawiedliwości, Warszawa 2021, available at: https://iws.gov.pl/wp-content/uploads/2021/05/IWS_Przeslawski-T.-Stachowska-E.-Analiza-i-oceny-funkcjonowania-systemu-dozoru-elektronicznego.pdf [accessed on: 07.06.2023].

numbers of convicts who had served their sentences under this system as an indicator of this effectiveness, i.e. in short, the system is effective because it works.

A very interesting and enormously labour-intensive survey was conducted by Bartosz Kędzierski,⁴⁰ who investigated the recidivism among convicts serving a custodial sentence under the electronic monitoring system. The author found that electronic monitoring was mainly used for perpetrators committing offences: driving while intoxicated, theft, maintenance payment default and fraud. Its introduction and application have not translated into a reduced prison population. However, the most important conclusion from the study appears to be that a longer time under electronic supervision was associated with a lower recidivism rate, which may signal the effectiveness of this system. Unfortunately, this study did not include a control group, so it did not enable the verification of the actual extent of reduced recidivism as an EMS outcome.⁴¹

Other interesting study is that of Agnieszka Lewicka-Zelent regarding the experiences and views on the electronic monitoring described by prisoners who, in the past, were and were not subject to this system. The study was conducted on a group of 200 people: 100 convicts previously covered by the EMS and 100 not covered by the system. Respondents recognised the advantages of the EMS, including the possibility to take up or continue working, to maintain contact with their families and to rectify mistakes in their family relationships, or the possibility to make amends to the victim and not to be negatively influenced by other convicts; however, the fact that the respondents had previously served their sentence in this system did not significantly influence these views.⁴² The researcher does not formulate her own conclusion about the system effectiveness but cites the study by the US National Institute of Justice,⁴³ indicating that electronic supervision reduces the risk of recidivism by approximately 31%, and the views of General Paweł Nasiłowski, who assesses the effectiveness of the system at 90% (as noted earlier, by ineffectiveness he means the proportion of decisions and judgments to serve sentences and penal measures in the electronic supervision system that have been overturned by courts).⁴⁴

⁴⁰ See: B. Kędzierski, *Efektywność systemu dozoru elektronicznego w Polsce w świetle badań empirycznych*, Gdańsk 2021.

⁴¹ Ibid.

⁴² A. Lewicka-Zelent, *Doświadczenia i wyobrażenia osadzonych związane ze skutecznością dozoru elektronicznego*, "Resocjalizacja Polska" 2021, Issue 22, pp. 465–483.

⁴³ *Electronic Monitoring Reduces Recidivism*, U.S. Department of Justice, 2011, available at: <https://www.ojp.gov/pdffiles1/nij/234460.pdf>, [accessed on: 05.01.2021].

⁴⁴ P. Nasiłowski, *System dozoru elektronicznego w praktyce*, "Na Wokandzie" 2016, Issue 29, available at: [https://www.tarnobrzeg.so.gov.pl/sites/default/files/Na%20wokandzie%203\(29\)2016.pdf](https://www.tarnobrzeg.so.gov.pl/sites/default/files/Na%20wokandzie%203(29)2016.pdf) [accessed on: 04.01.2021].

2.2. Foreign studies on the effectiveness of electronic monitoring

As already mentioned, the application and effectiveness of electronic monitoring systems in various countries have been the subject of numerous studies, but not always (as also already signalled) fully comparable to the Polish system.

A 2001 UK (England and Wales) study, conducted according to a plan analogical to that of the study carried out under this project, compared the recidivism of people released from prison for electronic monitoring with a control group of those not released. The study found no differences in recidivism rates between both groups. At the same time, however, the convicts themselves and their family members expressed greater satisfaction with this form of serving their sentence. Women were more likely to be sentenced to electronic monitoring.⁴⁵ It is worth adding that the system of electronic monitoring in England and Wales is slightly different than the Polish one – it allows control of the place of residence up to 12 hours a day for a maximum of six months, and the convict's consent to the imposition of this system is not required.⁴⁶

Other British studies show that sentenced prisoners serving their sentences in the electronic monitoring system clearly perceive the restriction of their liberty under this measure and even the significant inconvenience associated with it but also clearly prefer it over the inconvenience of serving the sentence in prison. Thus, the sentence served under this system also seems to fulfil a repressive function. In the United Kingdom, the subjection to electronic monitoring is often concurrent with the imposition of other probation obligations or a community service sentence. In the Polish system, such solutions do not occur.

A detailed analysis of the impact of electronic monitoring on prisoners in England and Wales shows inconclusive results. For some convicts, the supervision has a deterrent effect on recidivism by reducing their antisocial social capital (as a result of limiting links to situations, people, and places associated with the commission of offences) and by raising pro-social social capital related to family and work relationships. However, in the case of some people, this form of influence had a negative impact on these pro-social factors, destabilising family and work ties. Still, it is worth emphasising that this study used the interview method, so its conclusions are based only on respondents' self-declarations. Further, it was conducted only among those who continued the surveillance, while it excluded those who, for example, violated the rules and returned to prison.⁴⁷

⁴⁵ K. Dodgson, P. Goodwin, P. Howard, S. Llewellyn-Thomas, E. Mortimer, N. Russell, M. Weiner *Electronic Monitoring of Released Prisoners: An Evaluation of the Home Detention Curfew Scheme*, "Home Office Research Study" 2001, Vol. 222.

⁴⁶ M. Nellis, *Surveillance and Confinement: Explaining and Understanding the Experience of Electronically Monitored Curfews*, "European Journal of Probation" 2009, Vol. 1, Issue 1, p. 44.

⁴⁷ A. Hucklesby, *Vehicles of desistance? The impact of electronically monitored curfew orders*, "Criminology & Criminal Justice" 2008, Vol. 8, Issue 1, pp. 51–71.

The effectiveness of electronic monitoring was also studied in Finland, based, among other things, on the results of interviews with prisoners released conditionally at the end of their sentence and subjected to electronic monitoring. In this country, virtually all prisoners are released conditionally before the end of their sentence, as part of a gradation system of impact. This system is based on a prisoner sentenced to unconditional imprisonment starting in a closed prison, then moving to an open prison, then to the electronic monitoring system, subsequently being conditionally released and finally released. Approximately a quarter of those conditionally released are placed under the supervision of the probation service. The so-called early release and submission to electronic monitoring only cover about a quarter of all inmates. The monitoring is supervised by the prison service. In 2020, it lasted an average of 97 days. If the conditions of early release and electronic monitoring are violated, the convict will serve the rest of the sentence in closed-prison conditions. The absence of revoking early release and the electronic monitoring was considered as an indicator of their effectiveness. From 16% to 19% of releases were revoked – most often because of alcohol or drug abuse.⁴⁸

Also of interest is a German study on a random sample of 137 sentenced prisoners serving a sentence in the electronic monitoring setting compared to the control group of sentenced prisoners serving a sentence in prison. The analysis shows no significant difference in recidivism rates between the two groups.⁴⁹ The authors' review of previous studies on recidivism after serving a sentence under electronic-monitoring conditions also indicated a fundamental lack of such an effect.⁵⁰

A Norwegian study, on the other hand, demonstrates that electronic monitoring reduces the risk of recidivism compared to imprisonment by approximately 30% during the first year after release. Interestingly, however, this difference diminishes in the subsequent years; the differences between the two groups are no longer statistically significant after two and three years following the release.⁵¹

A study in California, USA, conducted on convicted sex offenders finds no differences in recidivism and probation violation rates between the test group with GPS-enabled electronic monitoring and the control group, i.e. the same kind of offenders subjected only to the probation officer's supervision. Still, the costs of electronic monitoring were higher than probation officer's supervision alone.⁵²

⁴⁸ E. Villman, *Early release from prison with electronic monitoring: Hook for or hindrance to change?*, "Criminology & Criminal Justice" 2022, online first, available at: <https://doi.org/10.1177/17488958221080887>, pp. 3–4.

⁴⁹ K. Meuer, G. Woessner, *Does electronic monitoring as a means of release preparation reduce subsequent recidivism? A randomized controlled trial in Germany*, "European Journal of Criminology" 2020, Vol. 17, Issue 5, pp. 563–584.

⁵⁰ Ibid.

⁵¹ S.N. Andersen, K. Telle, *Better out than in? The effect on recidivism of replacing incarceration with electronic monitoring in Norway*, "European Journal of Criminology" 2019, Vol. 19, Issue 1.

⁵² M.K. Omori, S.F. Turner, *Assessing the Cost of Electronically Monitoring High-Risk Sex Offenders*, "Crime & Delinquency" 2015, Vol. 61, Issue 6, pp. 873–894.

An Israeli study, on the other hand, confirms a significantly lower re-imprisonment rate for those subjected to an early release programme using electronic monitoring compared to convicts who served the rest of their sentence in prison (42% to 15%).⁵³ However, it must be made clear here that there will be significant differences between these comparable groups in studies based on actual court decisions rather than on random samples. Those released earlier will be perceived by those making release decisions as “better performers” and will, therefore, be released.

In-depth interviews with sentenced prisoners under electronic monitoring and their family members are a frequent form of research on the functioning of such supervision in different countries. Despite reporting inconveniences associated with this form of serving a sentence, convicts clearly prefer it to imprisonment and see its definite advantages.⁵⁴

To conclude this chapter, it is worth noting that studies have also focused on officers responsible for performing supervision activities under the electronic monitoring and, *inter alia*, their opinions on the effectiveness of this system.⁵⁵

Studies conducted on the functioning and effectiveness of electronic monitoring often use different indicators of this effectiveness, are based on small research samples, and do not explicitly demonstrate the positive impact of such surveillance on reducing recidivism rates. In this respect, it is worthwhile and necessary to conduct further research on this issue – based on a standardised methodology and large research samples. This was also the aim of our project described in the following chapters of this report.

⁵³ E. Shoham, S. Yehosha-Stern, R. Efodi, *Recidivism Among Licensed-Released Prisoners Who Participated in the EM Program in Israel*, “International Journal of Offender Therapy and Comparative Criminology” 2015, Vol. 59, Issue 9, pp. 913–929.

⁵⁴ See, for example: A. Gibbs, D. King, *Home detention with electronic monitoring: The New Zealand experience*, “Criminal Justice” 2003, Vol. 3, Issue 2, pp. 199–211; Y.J. Hwang, P.L. Simpson, T.G. Butler, *Participant experiences of a post-release electronic monitoring program for domestic violence in New South Wales, Australia*, “Journal of Criminology” 2021, Vol. 54, Issue 4, pp. 482–500.

⁵⁵ A. Hucklesby, *The working life of electronic monitoring officers*, “Criminology & Criminal Justice” 2011, Vol. 11, Issue 1, pp. 59–76.

3. Research methodology

The aim of the research conducted as part of this project was to analyse the effectiveness of a sentence served under the electronic monitoring system, understood as the impact of the use of such a system on reducing recidivism. This analysis concerned convicts who, in the period from 1 January 2018 to 31 December 2019, completed serving their sentence in this system and a control group of convicts who, in the same period, were sentenced to unconditional imprisonment of no more than 12 months, i.e. who met the basic condition for granting the permission to serve their sentence in the EMS, and yet a custodial sentence has been enforced against them in prisons. The first stage of the ongoing longitudinal studies – three years after the end of the sentence – is described here.

In consultation with the Electronic Monitoring Office of the Central Administration of Prison Service, we have prepared a database of convicts from the test and control groups comprising a total of 67,305 people, including 21,425 in the test group and 45,880 in the control group. The database was then forwarded to the National Criminal Record to verify convicted persons' recidivism. The National Criminal Record (NCR) prepared criminal records for the entire test group in electronic form (PDF files). Criminal records are standardised documents that contain information about whether or not a person has been convicted by a court. If a person was convicted, the records include details such as: the date of conviction and the name of the court that imposed the sentence, the legal classification of the act (i.e. what the person was convicted of), the sentence imposed by the court and its length, and other information about the execution of the sentence. Unfortunately, despite repeated attempts and requests, we have been unable to obtain re-criminalisation data in the form of a database. It was a logistical challenge for the NCR to check such a large number of people and generate a separate criminal record document for each of them, which took more than six months – the first group of criminal records was received in December 2021 and the last in July 2022. Thus, the timeframe for checking for potential recidivism was very close, but it was not the same for all respondents.

The data as acquired made it possible to check the difference between the level of recidivism of convicts serving sentences under EMS conditions and those serving sentences in prisons, as well as to verify how the groups studied differ in terms of variables such as gender,

age at conviction, type of offences committed, the type and length of sentences imposed, and other factors.

It should be pointed out from the outset that the method of selection of respondents – based on actual decisions of penitentiary courts to apply the EMS and on entire populations of those convicts – may, unfortunately, have partly affected the results obtained (so-called *selection bias*). The convicts in the test and control groups were not randomly selected. They thus may have differed from each other, as the granting of permission (or refusal to grant permission) to serve a custodial sentence under the EMS may have been due to formal grounds for refusal, e.g., a previous criminal record or the characteristics of their offences (permission for the EMS may have been granted to “better convicts”, colloquially speaking).

Furthermore, in deciding to analyse recidivism on the basis of criminal records, we were forced to take subsequent convictions rather than subsequent commissions of an offence as the measurement of this phenomenon. This is because the documents we have analysed do not contain information on the date the offender committed the offence. The dates of subsequent convictions are the only point of reference. However, conducting the study on the basis of criminal records makes it possible to verify the criminality of a large sample of people, which is what we intended to cover in our study.

We had to extract the data of interest from the criminal records as acquired and process it into a form that would allow us to perform analyses on such large data sets. For the purpose of this processing, as a first step, we decided to develop and procure specialised computer software. An advantage of the software is that it can be reused at subsequent stages of the recidivism study of the same convicts. Unfortunately, due to excessive variability of the data in the criminal records analysed and the numerous technical problems encountered by the software provider that was awarded the tender, the attempt to create software ultimately failed. For this reason, in the second step, we manually coded a random sample of 10,000 criminal records (5,000 each from the test and control groups). The size of this sample resulted from the cost of the coders’ salaries and the pre-determined study budget for the software contract, which we could not exceed.

The convicts were assigned to two categories:

1. “PI” – offenders who were released from serving a custodial sentence in prison (PI) in 2018–2019 and met the criterion of the length of sentence to be served in the EMS (maximum 12 months) but, nevertheless, did not serve their sentence in this system;
2. “EMS” – offenders who served a sentence of imprisonment in the EMS in 2018–2019.

After we had compared the two databases provided to us by the Central Administration of Prison Service (“PI” convicts) and the Electronic Monitoring Office (“EMS” convicts), it turned out that there were cases of people appearing in both databases. We separated these individuals and initially coded them as “PI” (1,716 convicts). However, we decided to exclude them from further analysis to ensure the transparency of the final results. Thus, the total

sample of people for the study, less the convicts appearing in both databases and less the cases for which criminal records could not be obtained, amounted to 65,586 convicts, of which 44,162 were “PI” convicts and 21,424 – “EMS” convicts.

The most important element of the coding of the criminal record data was the identification of the EMS decisions or the EMS-eligible decisions (i.e. the convictions that provided the legal basis for enforcing the prison sentence in 2018–2019) in the databases provided to us from the CZSW and the EMS Office. In operational terms, we referred to this conviction as the “key conviction”. After this identification, all convictions from the convict’s criminal record had to be divided into three groups: (1) EMS/EMS-eligible decision (key conviction), (2) Criminal record before EMS/EMS-eligible decision, (3) Criminal record after EMS/EMS-eligible decision.

For the category of “EMS” offenders, we identified, as a key conviction, the last conviction between 1 January 2018 and 31 December 2019 for which there was the entry “permission to serve the sentence under the electronic monitoring system was granted” in the criminal record column “Execution of the sentence, penal, compensatory and protective measures, and forfeiture”. For the “PI” category, this identification was based on the criminal case reference number indicated in the database provided to us by CZSW, i.e. the executed conviction from the years 2018–2019.⁵⁶

We coded all convictions before the identified “EMS/EMS-eligible decision” as “Criminal record before the EMS/EMS-eligible decision”. We coded the number of convictions after the identified “EMS/EMS-eligible decision” as “Criminal record after the EMS/EMS-eligible decision”.

As single convictions may have involved more than one offence, a single legal classification from each conviction was identified as a single offence in the study.

From each criminal record, the researchers were asked to code the following information as separate variables: the convict’s gender, date of conviction (for each conviction), number of committed offences of each type (number of single classifications), type of sentence imposed (for each conviction), length of suspended custodial sentence (for each conviction, if any), whether the suspended custodial sentence imposed became unsuspended (if any), length of unconditional custodial sentence (for each conviction, if any), duration of the alternative custodial sentence (for each conviction, if any), number of convictions before the EMS/EMS-eligible decision, the number of offences before the EMS/EMS-eligible decision, the date of the first conviction in the criminal record, the date of the last conviction (the date of the judgement) before the EMS/EMS-eligible decision, whether the person was convicted for

⁵⁶ For the “EMS” group, it was not possible to identify the key conviction in the criminal records by the case file reference number as the database provided to us by the EMS Office only collected the file reference numbers of the courts’ decisions permitting the execution of the sentence in the EMS, but lacked the file reference numbers of the criminal cases.

a custodial sentence before the EMS/EMS-eligible decision, the total number of convictions after the EMS/EMS-eligible decision.

The appointed team of researchers was trained, and then each researcher coded the criminal records in an Excel database prepared for this purpose. The finished data were subsequently analysed in the SPSS statistical programme.

4. Recidivism of convicts who have served their sentence in the Electronic Monitoring System

As a reminder, the study covered two groups of convicts: those who served their sentence in the EMS (test sample – “EMS”) and those who served a similar length of imprisonment under prison conditions (control sample – “PI”). The samples were randomly selected from databases provided to us by the CZSW and the Electronic Monitoring Office. We drew 5,000 convicts from each group. However, during the data analysis, it was necessary to exclude some cases from the EMS sample,⁵⁷ resulting in an original sample size of 4,994 convicts.

Counterintuitively, criminal records do not necessarily have to contain all convictions against a given convict. This results, for example, from the expungement of certain convictions. Hence, the first step in the analysis was to verify whether the person under study held a criminal record. In the EMS sample, 4,771 convicts held criminal records (96% of persons in this group) and in the control sample – 4,687 (94%).

Table 1. Holding a criminal record

Does the convict hold a criminal record?	EMS sample		PI sample	
	N	%	N	%
No	223	4.5	313	6.3
Yes	4,771	95.5	4,687	93.7
Total	4,994	100.0	5,000	100.0

Source: own study.

The second step of the study was to identify the key conviction in the criminal records, i.e. the conviction where the completion of the executive stage was the reference point for the selection for the study. It means the imprisonment in the EMS or in prison completed in the years 2018–2019. For the reasons mentioned above, even if the convict held a criminal record, it was not always this conviction that was entered therein. Therefore, from the total number of convicts who held the record, it was then necessary to subtract those cases where the key conviction was missing – this included 36 people in the EMS sample, while in the PI sample, the number was 72. **Accordingly, data analysed further relate to the samples less**

⁵⁷ Convicts performing preventive measures under the EMS conditions rather than serving a custodial sentence were excluded.

these values, i.e. 4,735 convicts in the EMS sample and 4,615 convicts in the PI sample (9,350 people in total). In other words, these are convicts who held criminal records and whose criminal record contained the conviction that served as a reference point in our study, i.e. the so-called key conviction.

All convicts covered by the study were predominantly men: 92% in the test sample and 94% in the control sample. Almost all convicts were Polish (97% in the EMS sample and 99% in the PI sample). Other nationalities included Ukrainians (11 convicts in the EMS sample and 38 in the PI sample) and single individuals from other countries.

Table 2. Gender of convicts under study

Convicts	EMS sample		PI sample	
	<i>N</i>	%	<i>N</i>	%
Male	4,365	92.2	4,338	94.0
Female	370	7.8	277	6.0
Total	4,735	100.0	4,615	100.0

Source: own study.

On the date of completion of the EMS sentence arising from the key conviction, convicts were, on average, 37 years old (the median was 35). The youngest convict in this group was 18 years old on that date, and the oldest was 79 years old. People from the control group were slightly older on the date they completed their custodial sentence arising from the key conviction. The average age in this group was 40 years (the median was 39). However, the age range was similar to the test group, with the youngest offender in the control group being 18 years old and the oldest – 83 years old.

Table 3. Age of convicts under study

Age of convicts	EMS sample		PI sample	
	<i>N</i>	%	<i>N</i>	%
18–24	627	13.2	422	9.1
25–39	2,422	51.2	1,951	42.3
40–59	1,468	31.0	1,898	41.1
60 and above	218	4.6	344	7.5
Total	4,735	100.0	4,615	100.0

Source: own study.

4.1. Key conviction

It may seem surprising that in the key conviction which, as it should be recalled, was determined based on the databases provided to us by the Prison Service and the EMS Office, i.e. based on the collections of sentences executed by these authorities, imprisonment was not the most common (and certainly not the only) sentence imposed by the court (see: Table 4).

This situation is less surprising if we consider the frequency of “de-suspension” of conditionally suspended prison sentences, as well as the substitution of custodial sentences for the alternative isolation penalty. Therefore, in key convictions where the court imposed a sentence other than unconditional imprisonment, the above-mentioned modifications were introduced, ending either in the execution of a custodial sentence in the form of EMS or in prison conditions.

It should be noted, however, that persons from the EMS test group were more often sentenced to imprisonment (including suspended sentences) and far less often to non-custodial penalties.

Table 4. Type of sentence in the key conviction

Type of sentence	EMS sample		PI sample	
	<i>N</i>	%	<i>N</i>	%
Imprisonment	2,075	43.7	1,457	31.6
Conditional suspended prison sentence	1,074	22.7	871	18.9
Community service	1,196	25.3	1,768	38.2
Fine	70	1.5	332	7.2
Mixed punishment (imprisonment and community service)	320	6.8	187	4.1
Total	4,735	100.0	4,615	100.0

Source: own study.

The maximum imprisonment sentence imposed on the convicts under study was 12 months. Half of the offenders were sentenced to penalties of up to 6 months – approximately 53% in both the EMS sample and the PI sample.

Table 5. Penalty level (where the key conviction includes a sentence of unconditional imprisonment or a suspended sentence of imprisonment)

Penalty level	EMS sample		PI sample	
	N	%	N	%
1 to 2 months	119	3.5	100	4.1
3 to 4 months	577	16.8	464	19.1
5 to 6 months	1,106	32.3	721	29.6
7 to 9 months	489	14.3	370	15.2
10 to 12 months	1,134	33.1	777	32.0
Total	3,425	100.0	2,432	100.0
Data not available	44	—	83	—

Source: own study.

The analysis of the criminal records shows that in one in ten cases, a convict against whom the court ordered the execution of the sentence under the electronic monitoring system has returned to prison. We do not know the reasons for this decision. We can only assume that the conditions for serving a sentence under this system have been violated.

Table 6. Was there an order for the execution of a custodial sentence in EMS?

Answers	EMS sample	
	N	%
Yes, and served in EMS	4,245	89.7
Yes, but then return to the PI	490	10.3
Total	4,735	100.0

Source: own study.

Under a single decision, each person under study may have been convicted of more than one offence, and we recorded each of these offences (that is why the sum of offences in Tables 7 and 8 is higher than the number of convicts). As already mentioned, we counted each legal classification as one offence, so the number may be higher. Some offences were committed, e.g. in connection or concurrently, or a continuous act was committed.

As far as key conviction is concerned, people in both groups were most frequently convicted of three offences: driving while intoxicated (Article 178a of the Criminal Code, hereinafter “CC”), maintenance payment default (Article 209 CC), and theft (Article 278 CC). These three offences were the reason for conviction for 37% of the people under study in the EMS sample and 39% in the PI control group. As such, these results confirm the findings of earlier studies on the EMS implementation in Poland.⁵⁸

⁵⁸ See: B. Kędzierski, *Efektywność systemu dozoru elektronicznego w Polsce w świetle badań empirycznych*, Gdańsk 2021.

It is interesting to note the significant difference between the two samples concerning the offence of abuse (Article 207 CC). In the control sample, 9% of convicts were responsible for this act in the key conviction; thus, it was the fourth most common offence. On the other hand, in the test sample, convicts serving their sentence in the EMS were responsible for this act three times less often (3% of convicts). This may be due to one of the conditions for executing a sentence in the EMS: the consent of persons cohabiting with the convict.⁵⁹ In the case of the offence of abuse, it is possible and understandable that close relatives do not wish to give such consent.

How do the legal classifications of the subjects under study compare to the total number of convictions in Poland? This question is not straightforward, given that the key conviction decisions were issued over a twenty-one-year period (from 1999 to 2019). Taking *Atlas przestępczości w Polsce 6* [*Atlas of Crime in Poland 6*]⁶⁰ as a point of comparison between 2002 and 2018, some similarities are apparent. In both 2002 and 2018, the most common convictions were for offences against property (33% and 27% of convictions, respectively). In 2002, the second most frequently convicted offence was the traffic offence under Article 178a CC (32%), which also occupied a prominent place in 2018 (16%). Importantly, however, the conviction rate for offences against the family and guardianship increased significantly between these two years – from approximately 9% in 2002 to 19% in 2018. This increase was directly impacted by the rise in the number of convictions for the offence of maintenance payment default (Article 209 CC), which in turn, was directly related to the amendment to this provision of the Criminal Code in 2017.⁶¹

Summing up, the offences for which the people under study were convicted in the key conviction fit into the nationwide pattern of convictions. It is dominated by acts against property, the offence of driving while intoxicated and, in recent years, the offence of maintenance payment default.

Table 7. Criminal classification in the key conviction – the “EMS” test sample

Convictions	N	%
Driving while intoxicated (Article 178a CC)	1,166	19.7
Maintenance payment default (Article 209 CC)	584	9.8
Theft (Article 278 CC)	469	7.9
Fraud (Article 286 CC)	455	7.6

⁵⁹ Article 43h(3) of the Executive Criminal Code (hereinafter: “ECC”) If the convict is cohabiting with another person or other persons of legal age, the condition for the commencement of stationary supervision is the prior written consent of these persons submitted to the court or the penitentiary commission, which includes allowing the supervising entity to carry out control activities.

⁶⁰ B. Gruszczyńska et al., *Atlas przestępczości w Polsce 6*, Warszawa 2021, p. 64.

⁶¹ P. Ostaszewski, *Między przemocą ekonomiczną a karaniem za długi: kryminologiczne studium przestępstwa niealimentacji*, Warszawa 2022, p. 147.

Convictions	N	%
Other offences against property (other than those listed in the table)	448	7.5
Bodily injury or participation in a fight (Article 156 CC, Article 157 CC, Article 158 CC, Article 159 CC)	382	6.4
Possession of drugs (Article 62, Article 62a, Article 62b of the Drug Abuse Prevention Act, hereinafter: "DAPA")	289	4.9
Failure to comply with penal measures as imposed (Article 244 CC)	246	4.1
Burglary (Article 279 CC)	228	3.8
Offences against the activities of state institutions and local government and offences against the administration of justice	223	3.7
Forgery of documents and other document fraud	214	3.6
Threats and stalking and offences against honour and bodily integrity (Article 190 CC, Article 190a CC, Article 212 CC, Article 216 CC, Article 217 CC, Article 217a CC)	187	3.1
Domestic violence (Article 207 CC)	185	3.1
Other offences under the Drug Abuse Prevention Act (other than those listed in the table)	182	3.1
Robbery offences (Article 280 CC, Article 281 CC, Article 282 CC)	132	2.2
Public order offences	43	0.7
Other offences against sexual freedom and morals (other than those listed in the table)	16	0.3
Rape (Article 197 CC, Article 198 CC, Article 199 CC)	12	0.2
Sexual abuse of a minor (Article 200 CC)	7	0.1
Other	486	8.2
Total	5,954	100.0

Source: own study.

Table 8. Criminal classification in the key conviction – the "PI" control sample

Convictions	N	%
Maintenance payment default (Article 209 CC)	769	13.8
Driving while intoxicated (Article 178a CC)	743	13.3
Theft (Article 278 CC or Article 119 of the Code of Petty Offences, hereinafter: "CPO")	643	11.5
Domestic violence (Article 207 CC)	482	8.6
Other offences against property (other than those listed in the table)	461	8.3
Fraud (Article 286 CC)	313	5.6
Bodily injury or participation in a fight (Article 156 CC, Article 157 CC, Article 158 CC, Article 159 CC)	299	5.4
Offences against the activities of state institutions and local government and offences against the administration of justice	282	5.1
Threats and stalking and offences against honour and bodily integrity (Article 190 CC, Article 190a CC, Article 212 CC, Article 216 CC, Article 217 CC, Article 217a CC)	264	4.7
Failure to comply with penal measures as imposed (Article 244 CC)	205	3.7
Robbery (Article 279 CC)	200	3.6
Forgery of documents and other document fraud	191	3.4
Possession of drugs (Article 62, Article 62a, Article 62b of the Drug Abuse Prevention Act, hereinafter: "DAPA")	169	3.0
Other offences under the Drug Abuse Prevention Act (other than those listed in the table)	111	2.0
Robbery offences (Article 280 CC, Article 281 CC, Article 282 CC)	78	1.4

Convictions	N	%
Public order offences	40	0.7
Other offences against sexual freedom and morals (other than those listed in the table)	13	0.2
Rape (Article 197 CC, Article 198 CC, Article 199 CC)	10	0.2
Sexual abuse of a minor (Article 200 CC)	7	0.1
Other	303	5.4
Total	5,583	100.0

Source: own study.

4.2. Previous criminal record

Most subjects in both groups had been convicted by court decisions prior to the key conviction. However, given the age of the convicts (to recall, some were over 80 years old) and the institution of the expungement of convictions, analyses concerning previous criminal records should be approached with caution. Indeed, some data may have already been deleted from the NCR register.

In the EMS sample, the key conviction was the first conviction listed in the criminal record for 1,571 convicts, i.e. one in three (33%) from the sample. This means that the majority of subjects (67%) had at least one conviction in the past. Among these, more than half (1748 – 55%) had been previously sentenced to prison. The record holder had previously been convicted 37 times before the key conviction.

Similarly, among the subjects in the control sample, there were 3082 people with a previous criminal record, i.e. 67% of the studied PI sample. The majority of the subjects previously sentenced in this group had previously served the imprisonment penalty – 75% (2309 people). Thus, it can be seen that convicts serving the key conviction in prison were more likely to have already had this experience compared to the EMS test group. The prisoner previously convicted 26 times had the highest number of convictions before the key conviction in this group.

Table 9. Was the key conviction the first conviction (listed in the criminal record)?

Type of offender	EMS sample		PI sample	
	N	%	N	%
First-time offenders	1,571	33.2	1,533	33.2
Reoffenders	3,164	66.8	3,082	66.8
Total	4,735	100.0	4,615	100.0

Source: own study.

The two groups did not differ significantly in terms of the offences for which they had been punished before the key conviction. Convicts from both the EMS group and the PI group were most often previously convicted of driving while intoxicated (Article 178a CC) and offences against property – mainly theft, burglary, and others from this group of offences (e.g. damage to property). Injury or affray was also a common past offence.

Table 10. Previous criminal record – for what offences: EMS sample

Offences	N	%
Driving while intoxicated (Article 178a CC)	1,089	12.1
Theft (Article 278 CC)	1,052	11.8
Other offences against property (other than those listed in the table)	878	9.9
Burglary (Article 279 CC)	636	7.1
Bodily injury or participation in a fight (Article 156 CC, Article 157 CC, Article 158 CC, Article 159 CC)	582	6.5
Offences against the activities of state institutions and local government and offences against the administration of justice	525	5.9
Maintenance payment default (Article 209 CC)	484	5.4
Failure to comply with penal measures as imposed (Article 244 CC)	443	5.0
Threats and stalking and offences against honour and bodily integrity (Article 190 CC, Article 190a CC, Article 212 CC, Article 216 CC, Article 217 CC, Article 217a CC)	428	4.8
Fraud (Article 286 CC)	424	4.8
Forgery of documents and other document fraud	418	4.7
Domestic violence (Article 207 CC)	412	4.6
Robbery offences (Article 280 CC, Article 281 CC, Article 282 CC)	405	4.6
Possession of drugs (Article 62, Article 62a, Article 62b of the Drug Abuse Prevention Act, hereinafter: "DAPA")	228	2.6
Other offences under the Drug Abuse Prevention Act (other than those listed in the table)	172	1.9
Public order offences	85	1.0
Rape (Article 197 CC, Article 198 CC, Article 199 CC)	51	0.6
Other offences against sexual freedom and morals (other than those listed in the table)	44	0.5
Sexual abuse of a minor (Article 200 CC)	18	0.2
Homicide (Article 148 CC)	14	0.2
Other	512	5.8
Total	8,900	100.0

Table 11. Previous criminal record – for what offences: PI sample

Offences	No.	%
Driving while intoxicated (Article 178a CC)	1,344	17.4
Theft (Article 278 CC)	712	9.2
Other offences against property (other than those listed in the table)	693	8.9
Bodily injury or participation in a fight (Article 156 CC, Article 157 CC, Article 158 CC, Article 159 CC)	491	6.3

Offences	No.	%
Offences against the activities of state institutions and local government and offences against the administration of justice	445	5.7
Burglary (Article 279 CC)	433	5.6
Failure to comply with penal measures as imposed (Article 244 CC)	431	5.6
Fraud (Article 286 CC)	430	5.5
Forgery of documents and other document fraud	361	4.7
Maintenance payment default (Article 209 CC)	351	4.5
Possession of drugs (Article 62, Article 62a, Article 62b of the Drug Abuse Prevention Act, hereinafter: "DAPA")	335	4.3
Threats and stalking and offences against honour and bodily integrity (Article 190 CC, Article 190a CC, Article 212 CC, Article 216 CC, Article 217 CC, Article 217a CC)	312	4.0
Robbery offences (Article 280 CC, Article 281 CC, Article 282 CC)	279	3.6
Other offences under the Drug Abuse Prevention Act (other than those listed in the table)	219	2.8
Domestic violence (Article 207 CC)	173	2.2
Public order offences	81	1.0
Other offences against sexual freedom and morals (other than those listed in the table)	28	0.4
Rape (Article 197 CC, Article 198 CC, Article 199 CC)	24	0.3
Sexual abuse of a minor (Article 200 CC)	16	0.2
Homicide (Article 148 CC)	8	0.1
Other	597	7.7
Total	7,763	100.0

4.3. Recidivism after completion of a custodial sentence in the EMS or in prison

This study aimed to compare recidivism among convicts who had served their sentence in the form of EMS and a (similarly sized) sentence in prison. This methodological approach makes it possible to measure the number of re-convictions fairly evenly over a uniform period of three years after the end of the sentence. Further, the aim was to compare the criminal records of convicts after they have finished completely opposed forms of imprisonment, and thus to try to answer the question of whether its execution under EMS conditions can contribute to a better reintegration into society than after leaving prison. Of course, the measurement of recidivism in this way may be subject to certain errors, for example, when a convict is re-sentenced at the end of their sentence but for an offence committed much earlier (before or during their first sentence). Is it then possible to speak of recidivism? Nevertheless, in our opinion, these may be exceptions and *de facto* subsequent convictions. By allowing such exceptions, we gain clarity regarding the length of time covered by the longitudinal studies. The opposite method of measuring recidivism is based on measurement from the date of the relevant conviction (such statistics are prepared by the Ministry of Justice). However, in this

methodology, it becomes problematic how many years should be covered by the verification. This is because the convicts subject to our study, who served their sentence in 2018–2019, had not infrequently been sentenced also many years earlier (20 years to be precise, counting from 1999). As a consequence, the measurement of recidivism for one convict could last a few years and for another – a dozen years or more.

For example, the oldest key conviction resulting in a custodial sentence served in 2018–2019 was the judgment of 1999 (case 30433/K). The offender in question was sentenced on 15 April 1999 (the judgment became final on 5 May 1999) under Article 209(1) CC to 6 months' imprisonment, suspended for 3 years. A court decision of 3 July 2002 ordered the execution of the conditionally suspended sentence. The next information in the convict's criminal record refers to the end of his sentence on 4 August 2019. He was not subsequently, either after the above judgment or after the completion of his sentence, punished again even once. As such, in the case of this convict, the recidivism measurement period calculated from the date of conviction until 2022 would be 23 years.

Let us, therefore, turn to the results of measuring recidivism (re-convictions) after the convicts completed their sentences. Recidivism to crime does not differ significantly between the two samples. One in three convicts who served their sentence in the EMS (33%) and 40% of convicts after they had left prison were re-sentenced by the court. Most commonly, it was a single conviction, with 66% of the re-sentenced convicts from the EMS sample and 56% – from the PI group. The convict with the highest number of reappearances before the court was in the EMS test sample – he was convicted as many as 60 times during the three-year longitudinal studies.⁶²

Table 12. Recidivism after the completion of the EMS sentence or the sentence in prison

Recidivism	EMS sample		PI sample	
	N	%	N	%
No recidivism (no convictions in the criminal record)	3,196	67.5	2,749	59.6
Yes, convicted again	1,539	32.5	1,866	40.4
Total	4,735	100.0	4,615	100.0

Source: own study.

As already mentioned, for one in 10 convicts from the EMS sample, the court decided to stop the execution of their sentence under the EMS and to start further execution in prison. It turns out that the completion – or not – of a whole sentence in the EMS is, indeed, statistically significant when it comes to the recidivism of convicted offenders after they have completed their sentence.⁶³ Prisoners whose sentences in the EMS had been interrupted and who had

⁶² Convict 1635/W – convictions only for fraud (Article 286 CC) by courts from different parts of Poland.

⁶³ Statistical significance (< 0.001); Phi = 0.074.

gone to prison were more likely to be sentenced after completing their sentence – a difference of about 12 p.p. (see: Table 13).

Table 13. Recidivism after the completion of the sentence among convicts who have served their whole sentence in the EMS and those who have only partially served their sentence in this system

Recidivism after the completion of the sentence among convicts	Recidivism after the completion of the sentence				Total	
	N	%	Yes	%	N	%
Yes, and served in the EMS	2,915	68.7	1,330	31.3	4,245	100.0
Yes, but then return to the PI	281	57.3	209	42.7	490	100.0
Total	3,196	67.5	1,539	32.5	4,735	100.0
Phi = 0.074***						

The asterisks next to the results indicate the strength of statistical significance: * statistical significance at a level of 0.05, ** statistical significance at a level of 0.01, *** statistical significance at a level of 0.001.

Source: own study.

Other variables and configurations that may have been relevant to recidivism should also be considered. Indeed, it is legitimate to ask whether re-sentencing was influenced not so much by the form of custodial sentence convicts had served but by their criminological profiles, including previous criminal record, gender, or age. In the following section, we will consider four variables: age, gender, the offence for which the key conviction was passed, and the subjects' previous criminal record.

Regardless of the sample studied, recidivism appears to decrease with age. In other words, the older the offender, the less often they were re-sentenced within three years after the completion of their sentence. This observation proved to be strongly statistically significant, as confirmed by the decrease in the percentage of re-sentenced by age presented in Table 14. It should also be noted that convicts who had served their sentence in prison were re-sentenced more often than those who had completed their sentence in the EMS, regardless of the age group.

Table 14. Age of prisoners versus recidivism after the completion of the sentence – only for recidivism (%)

Age of prisoners	EMS	PI
18–24	37.5	49.3
25–39	35.3	48.1
40–59	28.5	33.9
60 and above	14.7	22.1
Cramér's V	0.111***	0.176***

Source: own study.

In criminological terms, it is not surprising that men show a significantly higher tendency to re-offend than women. Nevertheless, interestingly, a similar difference in recidivism between genders at a level of approximately 10 p.p. persisted in both samples. One in four women and one in three men were re-sentenced after completing their sentence in the EMS. On the other hand, after completing a sentence in a prison setting, recidivism was higher regardless of gender; 31% of women and 41% of men were re-convicted.

Table 15. Gender of prisoners versus recidivism after the completion of the sentence – only for recidivism (%)

Gender of prisoners	EMS	PI
Female	24.9	30.7
Male	33.2	41.1
Phi	0.047***	0.050***

Source: own study.

To recall, the key convictions concerned mainly theft, failure to fulfil marital or parental obligations, and driving while intoxicated. In this respect, it seems expedient to separate these three groups and to examine how recidivism developed for each of them in the period of three years following the end of the sentence.

Those whose key conviction had been for theft were mostly not re-sentenced by the court over a period of three years. The absence of recidivism was higher in the EMS test sample (64%). 36% of convicts sentenced for this offence who had served their sentence in the EMS and 41% of convicts who had served their sentence in prison were re-sentenced during this three-year period.

Table 16. Convicts for theft in the key conviction – recidivism after the completion of the sentence

Recidivism after the completion of the sentence	EMS sample		PI sample	
	N	%	N	%
No recidivism	302	64.4	378	58.8
Recidivism – 1 conviction	113	24.1	140	21.8
Recidivism – 2 or more convictions	54	11.5	125	19.4
Total	469	100.0	643	100.0

Source: own study.

Roughly half of convicts for failure to fulfil marital or parental obligations were re-sentenced during the three-year period under study. Among the convicts in the EMS sample, 48% returned to crime, and in the PI sample, this figure was 53%.

Table 17. Convicts for failure to fulfil marital or parental obligations in the key conviction – recidivism after the completion of the sentence

Recidivism after the completion of the sentence	EMS sample		PI sample	
	<i>N</i>	%	<i>N</i>	%
No recidivism	305	52.3	358	46.6
Recidivism – 1 conviction	159	27.2	229	29.7
Recidivism – 2 or more convictions	120	20.5	182	23.7
Total	584	100.0	769	100.0

Source: own study.

Against the backdrop of the three types of offences analysed, those convicted of driving while intoxicated were the least likely to be re-sentenced. Among prisoners who had served their sentence in the EMS, 27% returned to crime, and among prisoners who had served their sentence in prison, it was 33%.

Table 18. Convicts for driving while intoxicated in the key conviction – recidivism after the completion of the sentence

Recidivism after the completion of the sentence	EMS sample		PI sample	
	<i>N</i>	%	<i>N</i>	%
No recidivism	854	73.2	498	67.0
Recidivism – 1 conviction	218	18.7	152	20.5
Recidivism – 2 or more convictions	94	8.1	93	12.5
Total	1,166	100.0	743	100.0

Source: own study.

A convict's criminal record seems to be an important variable in analysing the impact of the imposed forms of punishment (EMS or IP). Comparing the samples in terms of past criminal records will verify whether this factor was relevant from the perspective of recidivism of convicted offenders.

As shown in the previous subsection, regardless of the group studied (EMS or PI), for one in three convicts, the key conviction was the first one in their life (or, more precisely, the first listed in their criminal record at the time of the study). There were 1,571 first-time offenders from the EMS test sample and 1,533 from the PI control sample.

The first-time offenders in the EMS test group were punished similarly to the whole of this sample – most often for driving while intoxicated (Article 178a CC), failure to fulfil marital or parental obligations, fraud, and other offences against property. With regard to the first-time convicts in the PI group, they were most frequently punished for failure to fulfil marital or parental obligations, driving while intoxicated, abuse, and theft.

It turns out that first-time offenders who had served their custodial sentence in prison were slightly more likely to re-offend afterwards, compared to first-time offenders who had served their sentence in the EMS (difference of 6 p.p.).

Table 19. Recidivism after the completion of the EMS sentence or the sentence in prison – first-time offenders

Recidivism	EMS sample		PI sample	
	<i>N</i>	%	<i>N</i>	%
No recidivism (no convictions in the criminal record)	1,125	71.6	1,015	66.2
Yes, convicted again	446	28.4	518	33.8
Total	1,571	100.0	1,533	100.0

Source: own study.

Regardless of the sample, recidivism was higher among convicts with a past criminal history listed in the criminal record prior to the key conviction. Nevertheless, again, it was lower among convicts who had served their sentence in the EMS as compared to convicts who had left prison.

Table 20. Recidivism after the completion of the EMS sentence or the sentence in prison – recidivists

Recidivism	EMS sample		PI sample	
	<i>N</i>	%	<i>N</i>	%
No recidivism (no convictions in the criminal record)	2,071	65.5	1,734	56.3
Yes, convicted again	1,093	34.5	1,348	43.7
Total	3,164	100.0	3,082	100.0

Source: own study.

4.4. Statistical analyses of recidivism

The study on recidivism raises questions about predicting dependencies that are relevant or not to its occurrence. In the study we undertook, in principle, we did not have access to individual information about the convicts, such as their background (e.g. education, family history), psychological or biological conditions (e.g. illnesses or mental disorders and addictions), current family or financial situation, as well as other relevant events in their lives that may have been relevant to their criminal record.

However, based on the available data derived from criminal records, we can use statistical analyses to estimate the significance of certain factors for recidivism. For this purpose,

we used a logistic regression model. Taking recidivism after the completion of the sentence as a dependent variable (in binary form: recidivism/no recidivism), we can thus determine the probability of recidivism as a function of changes in values such as: serving a sentence in either EMS or in prison, the convict's gender, the key conviction for 21 types of offences listed in the study, age on the date of the completion of the sentence, previous criminal record, and previous stay in prison (before the key conviction). The following results have been obtained for the model so adopted (see: Table 21).

Serving a sentence in the EMS reduces the chance of recidivism by 30%. This observation is strongly statistically significant regardless of the regression model adopted in the analysis. Consequently, we can conclude that convicts who served their sentences in the EMS are less likely to be re-sentenced than those sentenced to similar imprisonment lengths in prisons. The reasons for this are a separate question. On the basis of the data analysed, it is not possible to state whether the form of imprisonment itself (EMS or prison) or a combination of other factors has an impact on the results obtained. Certainly, the selection process of convicts, which is performed by judges when deciding whether to authorise the execution of a sentence in the EMS, is significant. As we have noted in the previous subsections, convicts referred to this system were less likely to have had a previous custodial sentence and, in principle, should have better prospects than those who have to serve their sentence in prison.

As mentioned earlier, gender is strongly associated with recidivism, with statistical significance. Men are almost 40% more likely to become re-offenders. However, it is important to bear in mind the disproportion in the gender share in the samples studied (men accounted for approximately 93% of all convicts), affecting the statistical analysis result.

The logistic regression model (Table 21) does not demonstrate the significance of the age of the subjects for re-conviction. To recall, the intersection of just these two variables (age and recidivism) shows a strong significance according to which recidivism decreased with age. The explanation for these divergent results lies in the inclusion of other variables in the regression model, with age no longer being so significant.

The previous criminal record shows relevance in increasing the chance of recidivism – a conviction alone before the key conviction raises such a chance by 16%, while the previous stay in prison by as much as 44%.

Also, the fact of being convicted of certain offences significantly increases the chance of recidivism. The highest chance of recidivism – more than double – is among those convicted of failure to fulfil marital or parental obligations. A conviction of theft raises the chance by 24%, of drug possession – by 34%, and of stalking, threats and offences against bodily integrity – by 37%. On the other hand, conviction of public order offences seems to reduce the risk of recidivism, which may, however, be a statistical artefact related to the limited number of these convictions in the sample.

Table 21. Logistic regression ($N = 9,350$, confidence interval of 95%)

Logistic regression:	Odds Ratio	Standard Error	z	P > z	Coefficient of Variation	
					low	high
Sentence served either in the EMS or in PI	0.69	0.03	-7.94	0.001	0.63	0.76
Gender (1-M, 0-F)	1.38	0.13	3.38	0.001	1.15	1.67
Age	0.99	0.01	-0.95	0.341	0.96	1.01
Age squared	1.00	0.00	-1.72	0.085	1.00	1.00
Conviction for:						
Theft	1.24	0.10	2.53	0.01	1.05	1.45
Burglary	1.05	0.12	0.43	0.665	0.84	1.30
Robbery	1.07	0.16	0.44	0.663	0.79	1.44
Fraud	1.02	0.10	0.21	0.831	0.84	1.25
Other offences against property	1.09	0.09	0.99	0.323	0.92	1.28
Injury or affray	0.97	0.09	-0.34	0.734	0.81	1.16
Driving while intoxicated	0.90	0.07	-1.42	0.155	0.77	1.04
Stalking, threats and offences against bodily integrity	1.37	0.15	2.97	0.003	1.11	1.69
Rape	1.02	0.48	0.03	0.974	0.40	2.55
Sexual abuse of a minor	1.75	0.99	0.98	0.326	0.57	5.31
Other offences against sexual freedom	0.53	0.25	-1.35	0.178	0.21	1.34
Domestic violence	1.18	0.12	1.62	0.105	0.97	1.44
Failure to fulfil marital or parental obligations	2.36	0.20	10.14	0.001	2.00	2.79
Failure to comply with penal measures as imposed	1.16	0.13	1.31	0.190	0.93	1.45
Offences against the activities of state institutions	1.09	0.11	0.87	0.383	0.89	1.34
Public order offences	0.52	0.14	-2.35	0.02	0.31	0.90
Forgery of documents	1.00	0.12	0.01	0.991	0.79	1.27
Possession of drugs	1.34	0.16	2.53	0.01	1.07	1.68
Other offences under the Drug Addiction Prevention Act	0.79	0.11	-1.66	0.096	0.59	1.04
Other offences	1.09	0.10	0.94	0.350	0.91	1.29
Previous convictions	1.16	0.07	2.38	0.02	1.03	1.31
Previous stays in prison	1.44	0.08	6.28	0.000	1.29	1.62
Constant	0.80	0.22	-0.82	0.415	0.46	1.38
Pseudo $R^2 = 0.0536$						

Source: own study.

A problematic subgroup in the EMS sample is those convicts whose imprisonment under this system was interrupted and who completed their sentence in prison. Thus, they are not an example of an effective execution of a sentence in the EMS; nevertheless, they were given this opportunity by court decision, unlike the convicts in the “PI” control group. Due to this last argument, they were left in the test group. However, in order to check that they do not significantly differentiate recidivism in the longitudinal studies, we performed a logistic regression model analogical to the previous one, excluding this subgroup of convicts

(490 individuals). The results obtained can be recognised as identical (see: Table 22). The most important indicator from the perspective of our study – the form of imprisonment (EMS or PI) – remained statistically significant at the same level.

Table 22. Logistic regression (number of observations = 8,860, confidence interval of 95%)

Logistic regression:	Odds Ratio	Standard Error	z	P > z	Coefficient of Variation	
					low	high
Sentence served either in the EMS or in PI	0.66	0.03	−8.60	0.000	0.60	0.73
Gender (1-M, 0-F)	1.33	0.13	2.89	0.004	1.09	1.61
Age	0.99	0.01	−0.71	0.478	0.96	1.02
Age squared	1.00	0.00	−1.86	0.063	1.00	1.00
Conviction for:						
Theft	1.26	0.11	2.64	0.008	1.06	1.49
Burglary	1.09	0.13	0.74	0.457	0.87	1.37
Robbery	1.08	0.17	0.47	0.640	0.79	1.47
Fraud	1.05	0.11	0.44	0.657	0.85	1.29
Other offences against property	1.09	0.09	1.00	0.318	0.92	1.29
Injury or affray	0.98	0.09	−0.22	0.824	0.81	1.18
Driving while intoxicated	0.90	0.07	−1.34	0.179	0.77	1.05
Stalking, threats and offences against bodily integrity	1.40	0.15	3.07	0.002	1.13	1.74
Rape	1.04	0.49	0.08	0.936	0.41	2.61
Sexual abuse of a minor	1.81	1.03	1.04	0.296	0.59	5.50
Other offences against sexual freedom	0.60	0.29	−1.08	0.282	0.23	1.53
Domestic violence	1.20	0.13	1.77	0.076	0.98	1.47
Failure to fulfil marital or parental obligations	2.41	0.21	9.99	0.000	2.03	2.87
Failure to comply with penal measures as imposed	1.22	0.14	1.72	0.085	0.97	1.54
Offences against the activities of state institutions	1.08	0.12	0.72	0.472	0.88	1.33
Public order offences	0.49	0.14	−2.45	0.014	0.28	0.87
Forgery of documents	0.96	0.12	−0.34	0.732	0.75	1.23
Possession of drugs	1.37	0.16	2.64	0.008	1.08	1.73
Other offences under the Drug Addiction Prevention Act	0.82	0.12	−1.34	0.179	0.61	1.10
Other offences	1.09	0.10	0.99	0.324	0.91	1.31
Previous convictions	1.17	0.08	2.44	0.015	1.03	1.33
Previous stays in prison	1.41	0.09	5.68	0.000	1.25	1.59
Constant	0.77	0.22	−0.92	0.359	0.44	1.35
Pseudo R ² = 0.0548						

Source: own study.

In contrast, the next model, comprising only convicts who had served their sentence in the EMS, also tested the impact of the variable of whether the convict had completed their sentence in this system or it had been changed to a traditional prison (Table 23). This variable

shows strong statistical significance and, based on it, it can be assumed that convicts who had completed their whole sentence in the EMS were about 30% less likely to re-offend. This confirms the findings of subsection 4.3 (see: Table 13).

Table 23. Logistic regression for convicts sentenced to the EMS
(number of observations = 4735, confidence interval of 95%)

Logistic regression:	Odds Ratio	Standard Error	z	P > z	Coefficient of Variation	
					low	high
Gender (1-M, 0-F)	1.34	0.18	2.25	0.025	1.04	1.74
Age	1.00	0.02	0.08	0.935	0.96	1.04
Age squared	1.00	0.00	-1.57	0.116	1.00	1.00
Conviction for:						
Theft	1.24	0.15	1.73	0.083	0.97	1.58
Burglary	0.92	0.14	-0.54	0.591	0.68	1.25
Robbery	1.19	0.23	0.88	0.379	0.81	1.73
Fraud	1.10	0.15	0.71	0.480	0.85	1.43
Other offences against property	1.02	0.12	0.14	0.886	0.81	1.29
Injury or affray	0.88	0.12	-0.94	0.349	0.68	1.14
Driving while intoxicated	0.87	0.09	-1.30	0.195	0.71	1.07
Stalking, threats and offences against bodily integrity	1.12	0.19	0.66	0.508	0.80	1.56
Rape	0.95	0.64	-0.08	0.938	0.25	3.59
Sexual abuse of a minor	2.06	1.66	0.90	0.370	0.42	10.00
Other offences against sexual freedom	0.17	0.17	-1.72	0.086	0.02	1.29
Domestic violence	1.19	0.21	0.94	0.345	0.83	1.69
Failure to fulfil marital or parental obligations	2.27	0.28	6.70	0.000	1.79	2.89
Failure to comply with penal measures as imposed	1.10	0.17	0.61	0.539	0.81	1.49
Offences against the activities of state institutions	0.91	0.14	-0.58	0.561	0.67	1.24
Public order offences	0.54	0.21	-1.56	0.119	0.24	1.17
Forgery of documents	1.08	0.18	0.45	0.654	0.78	1.48
Possession of drugs	1.55	0.24	2.86	0.004	1.15	2.09
Other offences under the Drug Addiction Prevention Act	0.68	0.13	-1.98	0.048	0.46	1.00
Other offences	1.02	0.12	0.16	0.873	0.81	1.28
Previous convictions	1.12	0.09	1.32	0.185	0.95	1.32
Previous stays in prison	1.39	0.11	4.20	0.000	1.19	1.63
The sentence has been served in the EMS (1 yes, in full, 0 it was interrupted)	0.67	0.07	-4.03	0.000	0.55	0.81
Constant	0.61	0.26	-1.17	0.241	0.27	1.39
Pseudo R ² = 0.0431						

Source: own study.

Summing up, serving a sentence in the EMS may significantly reduce the chance of convicts returning to crime compared to serving a custodial sentence in prison. However, it should be borne in mind that the analysis carried out on the available data does not show strong prediction: both models explain approximately 5% of the variance in the dependent variable (Pseudo $R^2 = 0.0536$ and 0.0548). Nevertheless, this relationship was confirmed in each regression model presented, suggesting that, in fact, individuals after completing their sentence in the EMS are less likely to become clients of the justice system again, compared to former prisoners leaving prison.

Conclusions

The aim of the project that produced this study was to examine and compare the level of recidivism (re-conviction) after a custodial sentence served in the EMS and in prison. The number of convictions from the date of imprisonment termination during the three-year longitudinal study period was taken as a measure of recidivism.

The recidivism measurements we obtained appear to coincide with those developed by the Ministry of Justice; and so approximately 33% of convicts who had served their sentences in the EMS and approximately 40% of convicts who had completed their sentences in prison were re-sentenced at least once.

The study makes it possible to conclude that EMS convicts and those serving similar custodial sentences in prisons are similar in certain respects: they have been convicted just as often previously (for one in three, it is their first conviction), and the reasons for their conviction tend to be the same offences: driving while intoxicated, failure to fulfil marital or parental obligations, and theft.

What differs between both groups of convicts is, firstly, earlier prison experience – convicts who served their sentence in the EMS were less likely to have spent time in prison before (55% of the previously sentenced subjects from this sample) compared to convicts who served a similar length of sentence in prison (75% of the previously sentenced respondents from this sample). Secondly, as highlighted above, the samples under study differed in terms of recidivism, i.e. re-convictions by the court after the completion of the sentence. Convicts who had completed their sentence in the EMS were 30% less likely to be re-sentenced than prisoners who had left prison. However, it should be strongly emphasised that the study does not make it possible to conclude whether the lower recidivism in this group of convicts is due to the electronic monitoring system. While the data confirm that a group of people who had completed their custodial sentence in the EMS were subsequently sentenced less frequently than former prisoners, a separate question remains as to the reasons for this. Undoubtedly, an important factor in this regard is the prior selection of convicts permitted by courts to serve their sentence in the EMS. As mentioned in the methodological chapter, we were aware of this difference between the groups when we launched the study, and it cannot be ruled out that it influenced the test results as obtained. It can only be said that courts perform this selection properly by referring to the EMS convicts with better prospects, who then

return less frequently to crime. However, the refusal to serve a sentence in the EMS may be due to several different reasons which, in addition to objective grounds, such as the length of the sentence or the fact of having been convicted in the context of multiple recidivism, may also relate to the convict's housing conditions. If the place of residence does not meet the technical conditions and the electronic monitoring system cannot function there, the convict will have to serve their sentence in prison, even when they have good prospects. Thus, presumably, in some cases, the selection of convicts who are referred to the EMS is technically limited, regardless of the potential criminological prognosis.

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YEARBOOK

of the Institute of Justice in Warsaw

2025

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**Second National
Victimisation Survey 2024
Survey Report**

JUSTICE ANALYSES

1. Methodological remarks

The second edition of the National Victimization Survey was conducted from 26 June to 16 July 2024 on behalf of the Institute of Justice as a CATI telephone survey on a random-quota sample of 5,000 adult residents of Poland. The survey aimed to assess: the current magnitude of crime other than reported to law enforcement agencies; the extent of the reportability of this experience; the extent of the fear of crime; the punitive aspect of society; and the ratings assigned to the work of the police and common courts. Conducting research into victimisation is a long-standing tradition of the Institute of Justice, dating back to the early 1990s.¹

The survey used a questionnaire based on the questions asked in the International Crime Victims Survey (ICVS) and the Polish Crime Survey (PCS), and this allowed for comparative analyses. As in the previous edition, we asked about victimisation experience relating to 13 types of crime: car theft; motorbike/scooter/moped theft; bicycle theft; burglary; robbery; other theft; intentional property damage; assault; online fraud; theft of money from a bank account or a payment card; identity theft; hacking into an email/social networking/auction site account; and stalking. Conventionally, we were interested in victimisation experience from the period of one year preceding the survey: the survey was conducted in June/July, and we asked about the period of 12 months up to the survey date. The victimisation questions were followed by a module of questions on the fear of crime, evaluation of the work of the police and Polish common courts, punitive attitudes, and conspiracy thinking, as well as supplemented by metric questions.

The gender distribution of the survey sample was relatively even, with a slight predominance of women. The sample was dominated by middle-aged people and people aged over 60, those with tertiary and secondary education, and the married ones. 30% of respondents lived in villages, with the share of the remaining respondents relatively evenly distributed

¹ See: A. Siemaszko, *Przestępczość nieujawniona. Porównanie polskich rezultatów ICVS '86 i '92*, "Archiwum Kryminologii" 1998, Vol. XXIII-XXIV; A. Siemaszko, *Kogo biją, komu kradną. Przestępczość rejestrowana w Polsce i na świecie*, Warszawa 2001; A. Siemaszko (ed.), *Geografia występków i strachu. Polskie Badanie Przestępczości '07*, Warszawa 2008; A. Siemaszko et al., *Stalking w Polsce. Rozmiary – formy – skutki. Raport z badania nt. uporczywego nękania*, "Archiwum Kryminologii" 2010, Vol. XXXII; J. Włodarczyk-Madejska, P. Ostaszewski, J. Klimczak, A. Siemaszko, *Ogólnopolskie Badanie Wiktyimizacyjne 2020. Raport z badania*, Warszawa 2020, available at: https://iws.gov.pl/wp-content/uploads/2021/05/IWS_Wlodarczyk-Madejska-J.-i-in._Ogólnopolskie-Badanie-Wiktyimizacyjne-2020.-Raport-z-badania.pdf [accessed on: 09.09.2024]; J. Włodarczyk-Madejska, P. Ostaszewski, J. Klimczak, A. Siemaszko, *Nękanie, oszukiwani, hakowani. Nowe i tradycyjne wymiary wiktyimizacji*, Warszawa 2020.

among residents of different-sized cities. The respondents were most often professionally employed, while approximately 30% were retired and unemployed. They lived in households mainly consisting of four, two or three people (see: Table 1).

Table 1. Distribution of the sample

Details		N	%
Gender	Male	2,387	47.7
	Female	2,613	52.3
Age	18–24	410	8.2
	25–39	1,220	24.4
	40–59	1,724	34.5
	60 and above	1,646	32.9
Education	Primary education	78	1.6
	Vocational education	636	12.7
	Secondary education	1,863	37.3
	Tertiary education	2,423	48.5
Marital status	Single	771	15.4
	Married	3,368	67.4
	Cohabiting/unmarried permanent relationship	249	5.0
	Divorced or separated	300	6.0
	Widower/Widow	285	5.7
Place of residence	Village	1,509	30.2
	City of up to 20,000 inhabitants	658	13.2
	City of 20,001 to 50,000 inhabitants	900	18.0
	City of 50,001 to 100,000 inhabitants	903	18.1
	City of 100,001 to 500,000 inhabitants	538	10.8
	City of more than 500,000 inhabitants	492	9.8
Number of people in a household	1	580	11.6
	2	1,241	24.8
	3	1,179	23.6
	4	1,266	25.3
	5 and more	732	14.7
Professional activity	Students	95	1.9
	Employed	3,292	65.8
	On leave and running households	116	2.3
	Unemployed and pensioners	1,459	29.1

Source: Own study based on the Second National Victimization Survey results.

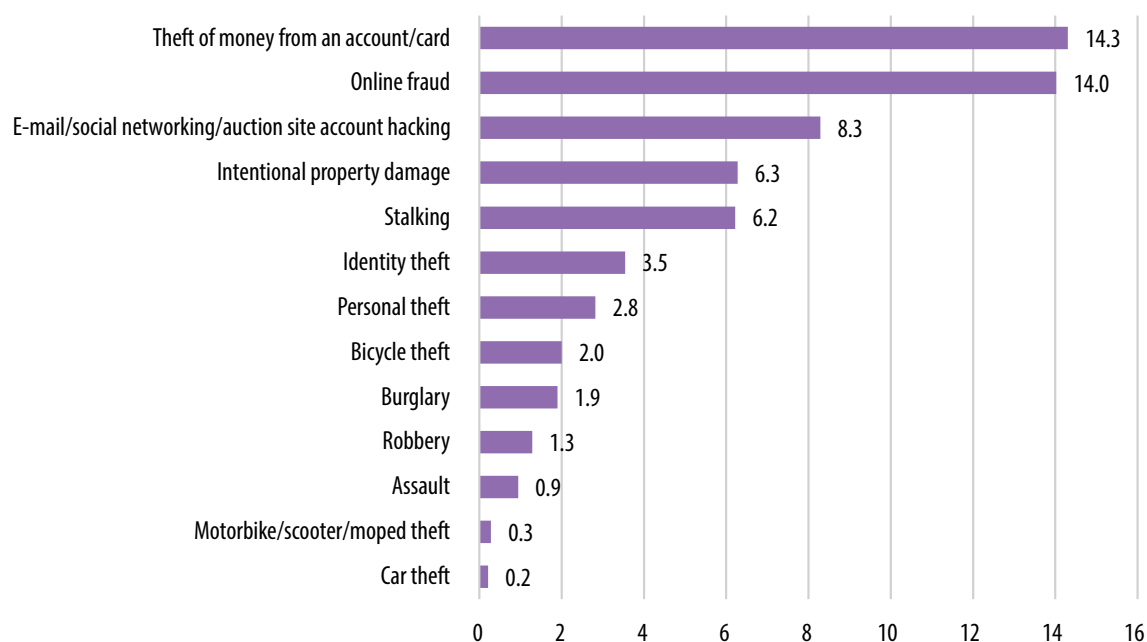
2. Victimisation

According to respondents' declarations in 2024, the crimes they were most often affected by included theft or attempted theft of money from a bank account or a payment card and fraudulent online purchases (victimisation rates² amounted to approx. 14% – see: Figure 1). However, while online fraud also showed a very high victimisation rate in the previous edition, in the 2020 National Victimization Survey (11.2%), theft or attempted theft of money from an account or a card in 2020 was one of the least frequent crimes (1.7%). Such a huge, almost ninefold change seems nearly improbable but is most likely linked to the widespread attempts in recent years, especially after the outbreak of the COVID-19 pandemic, to extort data and money – via fake emails, phone calls or text messages. As such, it is beyond doubt that the scale of the harm caused by such acts will have to be constantly monitored. Having said that, it is worth noting that among the thirteen offences we asked about in the survey, this was one of two that included both committed and attempted acts (the other one was the so-called identity theft, understood as the use or attempted use of another's data, without their knowledge and consent, to incur a liability in the form of a loan, credit, entering into a contract with mobile network operators or electricity/gas suppliers; the incidence of identity theft also increased – from 1% to 3.5%). It is therefore possible that such a significant increase in the rate of victimisation by these offences was due to the number of attempts to extort access to a bank account or a payment card, as well as of attempts to extort and use personal data, rather than necessarily the number of thefts and extortions that were actually committed.

Hacking into an email/social networking/auction site account was ranked third in the list and also saw a significant increase in the years 2020–2024 (from 4.9% to 8.3%). Further, intentional property damage placed fourth, with the prevalence falling slightly (from 6.8% in 2020 to 6.3% in 2024). The victimisation rate for the crime of stalking also decreased significantly (from 10.1% in 2020 to 6.2% in 2024). However, even despite this decline, it is clear that the so-called new crimes, which we started asking respondents about in 2020, are dominating among the forms of crime victimisation now, and that “traditional” crimes are losing their significance, at least in quantitative terms.

² The victimisation rate is the percentage of respondents who were victims of at least one crime committed at least once in the period of one year preceding the survey.

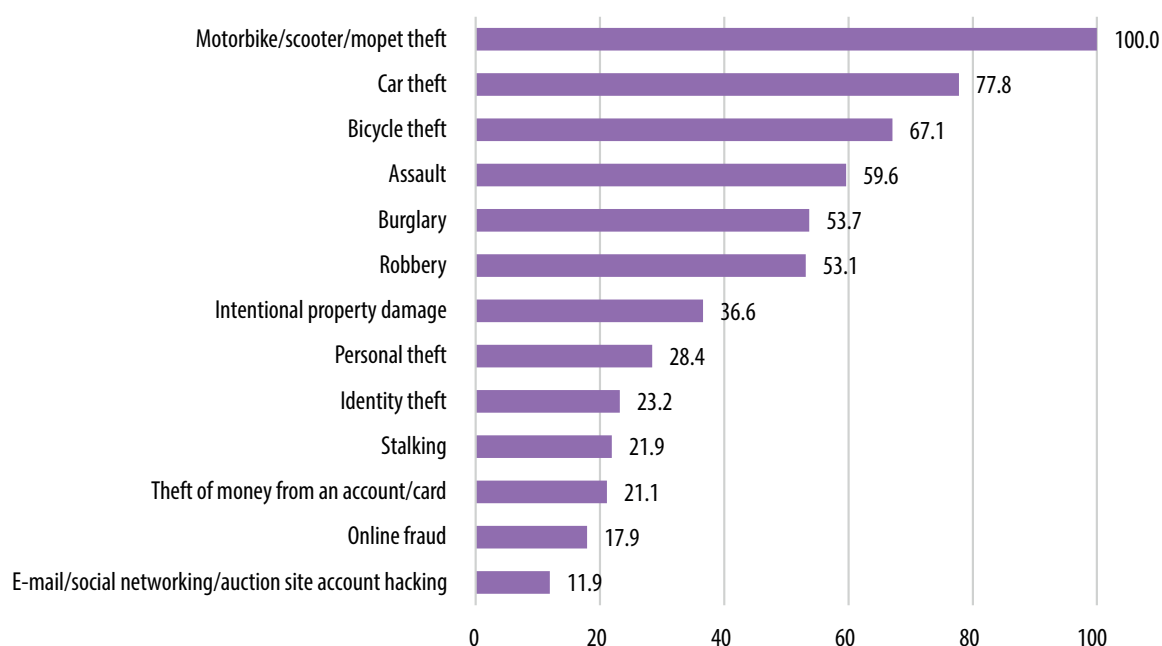
Figure 1. Victimisation rates in 2024



Source: Own study based on the Second National Victimisation Survey results.

The frequency of reporting crime victimisation to the police is practically inversely proportional to the frequency of its occurrence: the most frequently reported offences included vehicle theft, assault, burglary, and robbery – more than 50% (see: Figure 2). The least-reported offences, on the other hand, included much more common “new” crimes, such as hacking into email and social media accounts, online fraud, theft from a bank account or a payment card, stalking, and identity theft – only from 12% to 23% of cases were reported.

Figure 2. Rates of reporting offences to the police in 2024



Source: Own study based on the Second National Victimisation Survey results.

Questions about the occurrence of so-called traditional crimes, i.e. robbery, burglary, assault, personal theft, and vehicle theft, were also included in the eight previous editions of the victimisation surveys conducted in Poland. This enables tracing their trends over the last 30 years. Some of them are presented below.

The victimisation of car theft (which, for the possibility of making comparisons with earlier studies, is calculated as the share of victims of this crime to the total population of Poland rather than to the owners, as in the data presented in Figure 1) increased in the 1990s and then decreased sharply – to a record low of 0.2% in 2024 (see: Figure 3). It seems that the outlier result obtained in 2020, which is also inconsistent with the trend observed in the official police recordings, simply could be a statistical artefact related to the very low percentage of victims.

Figure 3. Car theft*

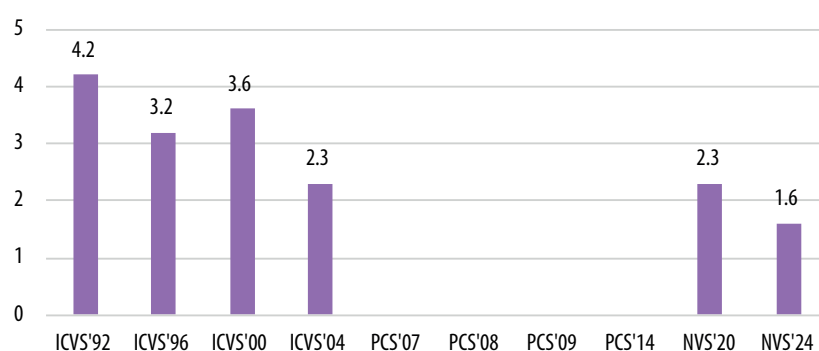


* ICVS – International Crime Victims Survey, PCS – Polish Crime Survey, NVS – National Victimization Survey.

Source: data compilation based on international and national surveys conducted in the years 1992–2024.

Data from 1992–2004 and 2020–2024 show a steady decline in the number of bicycle thefts, from a victimisation rate of 4.2% in 1992 to 1.6% in 2024 (see: Figure 4).

Figure 4. Bicycle theft*

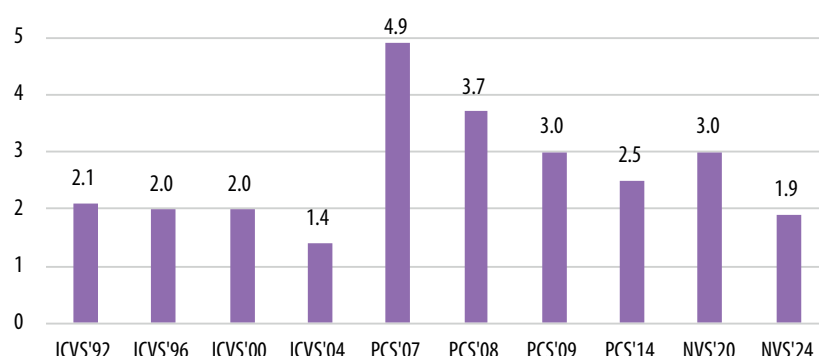


* ICVS – International Crime Victims Survey, PCS – Polish Crime Survey, NVS – National Victimization Survey.

Source: data compilation based on international and national surveys conducted in the years 1992–2024.

The trend for the offence of burglary was less clear but also downward. However, what is striking, above all, is the clear, but difficult to explain, more than a threefold increase in the declaration of having been affected by this offence in the years 2004–2007. It might have been caused by a minor modification of the question concerning this crime. Indeed, while the International Crime Victims Survey (ICVS) only contained questions about burglaries of flats and houses, the Polish Crime Survey (PCS) and the National Victimization Survey (NVS) also covered basements and garages. The victimisation data thus shows a definite decline in the risk of burglary, at least since 2007 (see: Figure 5).

Figure 5. Burglary*

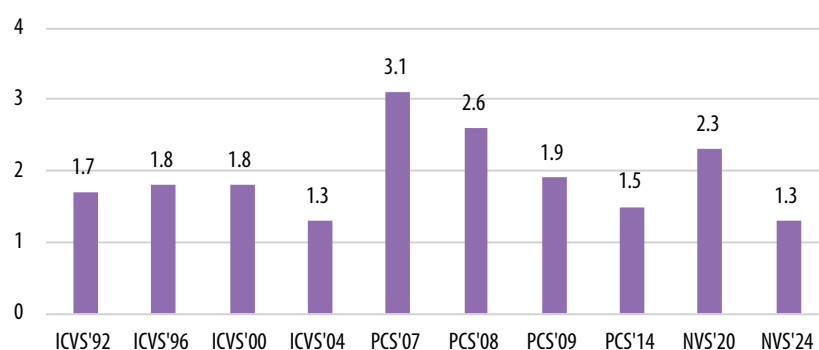


* ICVS – International Crime Victims Survey, PCS – Polish Crime Survey, NVS – National Victimization Survey.

Source: data compilation based on international and national surveys conducted in the years 1992–2024.

With regard to robbery, as in the case of burglary, an increase in the declarations of victimisation was recorded in the years 2004–2007 but was unconfirmed by the number of crimes recorded by the police. The increase was followed by a relatively steady decline in the percentage of victims – to 1.3% in 2024 (see: Figure 6).

Figure 6. Robbery*

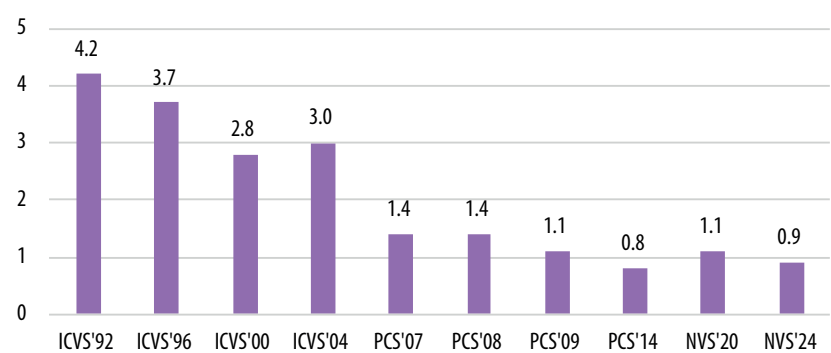


* ICVS – International Crime Victims Survey, PCS – Polish Crime Survey, NVS – National Victimization Survey.

Source: data compilation based on international and national surveys conducted in the years 1992–2024.

In contrast, assault was declared systematically less frequently over the period analysed and reached a near-record low of 0.9% of victims among respondents in 2024 (see: Figure 7).

Figure 7. Assault*

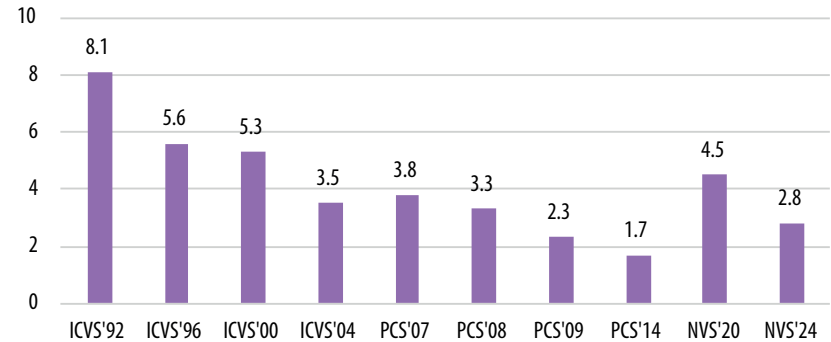


* ICVS – International Crime Victims Survey, PCS – Polish Crime Survey, NVS – National Victimization Survey.

Source: data compilation based on international and national surveys conducted in the years 1992–2024.

The last crime considered in the National Victimization Survey was a different type of theft than the previously discussed vehicle theft, burglary, and robbery. The experience of this crime was becoming increasingly rare in Polish society until 2014, after which, however, the last two surveys indicate significantly higher percentages of victims, including a particularly striking value of this indicator for 2020 (see: Figure 8).

Figure 8. Theft*



* ICVS – International Crime Victims Survey, PCS – Polish Crime Survey, NVS – National Victimization Survey.

Source: data compilation based on international and national surveys conducted in the years 1992–2024.

3. Fear of crime

Fear of crime and other threats, and perceived fear of one's safety, are important elements of victimisation research, allowing us to enrich the picture described by the frequency of experience of being a victim of different crimes so that this picture has a more general dimension. The second National Victimisation Survey used the same fear indicators as its first edition: (1) the so-called traditional question:³ "Do you feel safe walking alone in your neighbourhood after dark?"; (2) the question: "Can the place where you live (neighbourhood, housing estate, village) be referred to as safe and peaceful?"; (3) question: "Are you, in general, worried that you might become a victim of crime in the next 12 months?"; (4) an additional dimension: "Are there any abandoned, neglected, destroyed buildings at a place where you live (neighbourhood, housing estate, village) or buildings on which someone has painted some drawings or inscriptions (graffiti) without permission?"; and (5) a multiple-choice question: "What, if any, threats do you fear most near your place of residence?"

The answer to the first of these questions indicates that in 2024, the vast majority of people in Poland do not feel anxious about their safety (almost 88% feel very safe or rather safe, as shown in Table 2).

Table 2. "Do you feel safe walking alone in your neighbourhood after dark?" (NVS 2024)

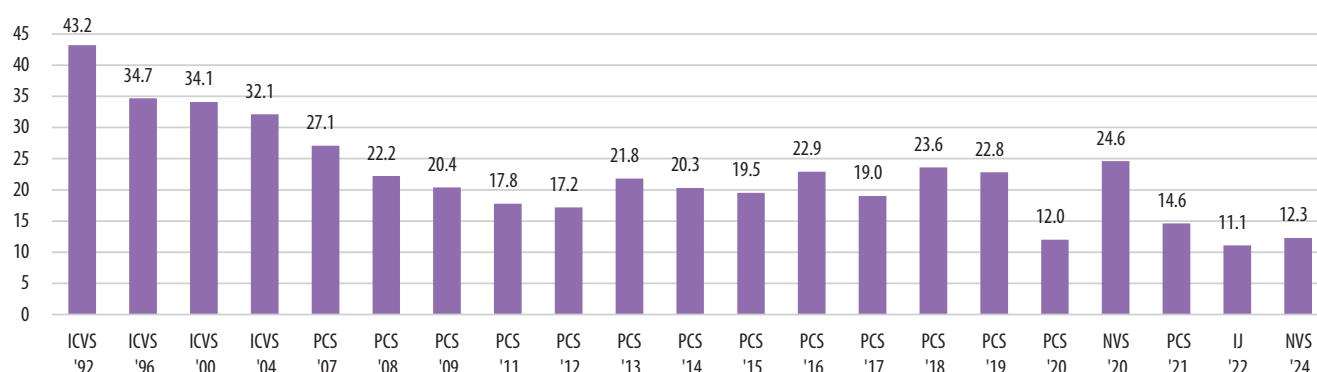
Answers		N	%
Safe	Very safe	1,519	31.3
	Rather safe	2,739	56.4
	Total	4,258	87.7
Unsafe	Rather unsafe	498	10.3
	Very unsafe	99	2.0
	Total	597	12.3
TOTAL		4,855	100.0
Difficult to say		145	2.9

Source: Own study based on the Second National Victimisation Survey results.

³ See: P. Ostaszewski, *Lęk przed przestępczością. Aspekty teoretyczne, metodologiczne i empiryczne*, Warszawa 2014, pp. 65–80.

One of the most commonly used indicators of the fear of crime is the percentage of negative answers to the above question, specifying what percentage of the population fears for their safety when walking alone after dark. This question was also asked in all editions of the Polish Crime Survey (the 2020 PCS results have been omitted for better clarity) and in the Institute of Justice's 2022 survey focusing on the Polish penal policy.⁴ The fear, understood in this way, decreased multiple times from the peak of 43.2% in 1992 to 12.3% in 2024 (see: Figure 9).

Figure 9. Level of fear of crime in the years 1992–2024*



* ICVS – International Crime Victims Survey, PCS – Polish Crime Survey, NVS – National Victimization Survey, IJ – survey of the Institute of Justice.

Source: Own study based on data from the National Victimization Survey, and from P. Ostaszewski, *Lęk przed przestępczością. Aspekty teoretyczne, metodologiczne i empiryczne*, Warszawa 2014; Wydział Analiz i Kontroli Zarządczej Gabinetu Komendanta Głównego Policji, *Polskie Badanie Przestępczości. Wyniki czternastej edycji badania w porównaniu do poprzednich*, 2024, available at: <https://eod.siecobywatelska.pl/filem/552715e1881ccfdcoeebcf5082e78433> [accessed on: 10.09.2024].

The analysis of the answers to the other questions in this section leads to similar conclusions, namely that, basically, Polish residents have a very high sense of security. As many as 94% of respondents assess their place of residence as safe and peaceful (Table 3), and only 29% are concerned that they may fall victim to a crime in the near future (Table 4). Finally, only about one-third of the respondents observed signs of social disorganisation in their immediate neighbourhood, such as abandoned, neglected, destroyed buildings or graffiti (Table 5).

⁴ See: J. Klimczak, *Punitiveness of Polish Society a Variable or Permanent Trait?*, “Societas/Communitas” 2023, Vol. 35, Issue 1, pp.113–126.

Table 3. “Can the place where you live (neighbourhood, housing estate, village) be referred to as safe and peaceful?” (NVS 2024)

Answers		N	%
Yes	Definitely yes	2,074	41.7
	Rather yes	2,589	52.0
	Total	4,663	93.7
No	Rather not	256	5.1
	Definitely not	60	1.2
	Total	316	6.3
TOTAL		4,979	100.0
Difficult to say		21	0.4

Source: Own study based on the Second National Victimization Survey results.

Table 4. “Are you, in general, worried that you might become a victim of crime in the next 12 months?” (NVS 2024)

Answers	N	%
Yes	1,376	29.2
No	3,331	70.8
Total	4,707	100.0
Difficult to say	293	5.9

Source: Own study based on the Second National Victimization Survey results.

Table 5. “Are there any abandoned, neglected, destroyed buildings at a place where you live (neighbourhood, housing estate, village) or buildings on which someone has painted some drawings or inscriptions (graffiti) without permission?” (NVS 2024)

Answers	N	%
Yes	1,766	35.7
No	3,183	64.3
Total	4,949	100.0
Difficult to say	51	1.0

Source: Own study based on the Second National Victimization Survey results.

The percentages of responses to the question on the specific threats that Polish residents would be concerned about have not changed substantially since 2007 and the first edition of the Polish Crime Survey when the question was introduced. Both now and over the last almost 20 years, Poles have been most concerned about dangerous drivers (41.4%), followed by burglaries, aggression by intoxicated people, and harassment by aggressive youth (see: Table 6). The next is the fear of personal computer hacking, which was not asked about before 2020. The threat of a terrorist attack and such common offences as beating, robbery

and theft, and drug trafficking were placed at the end of the list, once again confirming the very low level of fear of crime among Polish residents.

Table 6. “What, if any, threats do you fear most near your place of residence?” (NVS 2024)*

Answers	N	%
Drivers driving recklessly	2,068	41.4
Burglaries (e.g. of flats, basements or cars)	1,175	23.5
Aggression by drunk or drug-addicted people	1,051	21.0
Harassment by groups of aggressive young people	981	19.6
Hacking into the computer you use	865	17.3
Damage to property by vandals	643	12.9
None. I am not afraid of anything near my place of residence	616	12.3
Noisy, rude neighbours	568	11.4
Theft	516	10.3
Assaults, robberies	368	7.4
Clashes and beatings	355	7.1
Drug trafficking	343	6.9
Other threats	297	5.9
Terrorist attack	219	4.4
Difficult to say	49	1.0

* Percentages do not add up to 100% – respondents could tick three answers.

Source: Own study based on the Second National Victimisation Survey results.

4. Evaluation of the police and court work

In the first and second editions of the National Victimization Survey, we also asked respondents to evaluate the work of the police and common courts. In 2024, three-quarters of Polish society evaluated the police as effective in combating crime (Table 7), while only less than half of the respondents positively assessed the work of common courts (Table 8).

Table 7. “Taking all aspects into account, do you assess combating crime by the police in your area as: very effective, rather effective, rather ineffective or very ineffective?” (NVS 2024)

Answers		N	%
Effective	Very effective	344	9.0
	Rather effective	2,530	66.3
	Total	2,874	75.3
Ineffective	Rather ineffective	716	18.7
	Very ineffective	229	6.0
	Total	945	24.7
TOTAL		3,819	100.0
Difficult to say		1,181	23.6

Source: Own study based on the Second National Victimization Survey results.

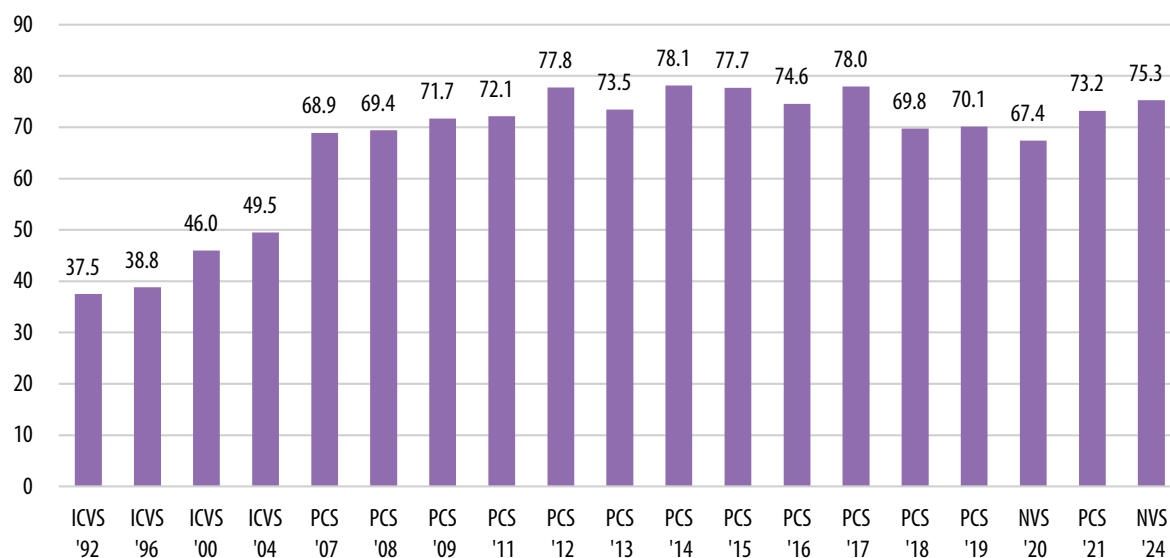
Table 8. “How do you evaluate, in general, the work of the Polish common courts? I evaluate their work as:” (NVS 2024)

Answers		N	%
Good	Very good	141	3.7
	Rather good	1,709	44.7
	Total	1,850	48.4
Bad	Rather bad	1,349	35.3
	Very bad	627	16.3
	Total	1,976	51.6
TOTAL		3,826	100.0
Difficult to say		1,174	23.5

Source: Own study based on the Second National Victimization Survey results.

The question on the evaluation of police performance was asked in the same form in successive (all) editions of the International Crime Victims Survey (ICVS) and the Polish Crime Survey (PCS), thus the whole trend of these evaluations from 1992 to 2024 can be presented (the 2020 PCS results are omitted for better clarity). A steady increase in positive evaluations of the police work since the early 1990s can be observed. This was the case in the 1990s until around 2017. The period of 2018–2020 saw a significant decline, after which the improvement seems to have recovered – up to 75% in 2024 (see: Figure 10).

Figure 10. The police's effectiveness in combating crime (percentage of positive ratings)*



* ICVS – International Crime Victims Survey, PCS – Polish Crime Survey, NVS – National Victimization Survey.

Source: Own study based on data from the National Victimization Survey, and from A. Siemaszko, B. Gruszczyńska, M. Marczewski, *Atlas przestępczości w Polsce 4*, Warszawa 2009; Wydział Analiz i Kontroli Zarządczej Gabinetu Komendanta Głównego Policji, *Polskie Badanie Przestępczości. Wyniki czternastej edycji badania w porównaniu do poprzednich*, 2024, available at: <https://eod.siecobywatelska.pl/filem/552715e1881ccfdcoeebcf5082e78433> [accessed on: 10.09.2024].

5. Punitive attitudes

Three basic questions served as the indicators of punitive attitudes in the Second National Victimization Survey: (1) the question whether “in order to reduce crime and improve the safety of citizens, it is necessary to tighten the criminal law and punish crimes more severely or whether punishing consistently according to the existing law is sufficient without making penalties stricter”; (2) the question about being in favour of introducing the death penalty, the penalty of flogging, and the penalty of being sent to a labour camp into the Polish Criminal Code; and (3) the question on the penalty the respondent considers relevant for a 21-year-old man, with no previous criminal record, who is involved in brawl and causes severe bodily harm to another person, with a knife.

Analysis of the answers given to the first of the above questions and comparison of these answers with the share of corresponding answers provided in 1996, 2018, 2020, and 2022 allows us to observe a trend of decreasing punitiveness in Polish society. In 2024, 40% of Poles wanted tightening of criminal law and more severe punishment for offenders, which, obviously, still seems a high percentage, but in 1996 and 2018, the share of these responses was as high as 60% (see: Table 9).

Table 9. “Do you think that in order to reduce crime and improve the safety of citizens (1996–2024)?” (%)*

Answers	CBOS'96	IJ'18	NVS'20	IJ'22	NVS'24
The provisions of criminal law should be tightened, and criminal offences should be punished more severely	62	60	46	47	40
Punishing consistently according to the existing law is sufficient without making penalties stricter	35	31	45	43	54
Difficult to say	3	9	9	10	6
Total	100	100	100	100	100

* CBOS – survey of the Public Opinion Research Center, NVS – National Victimization Survey, IJ – survey of the Institute of Justice.

Source: Own study based on the results of the National Victimization Survey and CBOS, *Sposoby walki z przestępczością. Komunikat z badań*, Warszawa, May 1996, available at: https://www.cbos.pl/SPISKOM.POL/1996/K_074_96.PDF [accessed on: 12.09.2024].

The most common answer to the question about the penalty that should be imposed on a 21-year-old knifeman who seriously injures another person during brawl was unconditional imprisonment (58% of respondents), which can be perceived as not a very high percentage for such a serious crime. In 2020, the percentage of choosing this most severe punishment was very similar and amounted to 57%, while in 2022, it was slightly lower, reaching 47%. Compared to these two previous surveys, the share of choosing “fine” and “community service” decreased, while the share of “other penalty” increased (see: Table 10). The latter category included a wide variety of further responses, most often evasive, such as “penalty in accordance with the Criminal Code”, “it depends on additional circumstances”, “it’s difficult to say”, and suggesting combinations of existing and non-existing penalties and punitive measures.

Table 10. “People have different views on how severely criminals should be punished. For example, a 21-year-old man, with no previous criminal record, is involved in brawl and causes severe bodily harm to another person, with a knife. What penalty do you think he should be given?”

Answers	N	%
He should not be punished	5	0.1
Fine	64	1.3
Community service, i.e. unpaid work for social purposes	826	16.5
Suspended prison sentence	699	14.0
Unconditional imprisonment	2,910	58.2
Other penalty	496	9.9
Total	5,000	100.0

Source: Own study based on the Second National Victimization Survey results.

The last questionnaire section on the punitiveness of the Polish society included three questions about the support for introducing the currently non-existent penalties into the Criminal Code: death, flogging, and a labour camp. The first edition of the National Victimization Survey (and also the 2022 IWS survey) included a question in this section about yet another sentence – life imprisonment without the possibility of applying for conditional release. In the current edition of the survey, this question is omitted as this penalty was introduced into the Criminal Code on 1 October 2023 by way of the Act of 7 July 2022 Amending the Criminal Code and Certain Other Acts (Journal of Laws of 2022, item 2600, as amended). It should be noted that the introduction of this penalty into Polish legislation contradicts the international law signed by Poland, for example in the light of the judgments

of the European Court of Human Rights.⁵ Obviously, all four penalties discussed above must be recognised as inhumane. However, it is crucial to separate the reality of criminal law from human attitudes and opinions. In order to measure the punitive attitudes of society (in other words, the severity beyond the norm accepted in a given background or the tendency to use severe punishments), researchers need to use appropriate metrics. There are at least two reasons in favour of using questions about extremely severe penalties that do not exist in current legislation. Firstly, such penalties are still applied in a surprisingly large number of countries (e.g. China, Singapore, and some US states). Secondly, the public views on these penalties appear to be a good indicator of the phenomenon analysed here.⁶ For years, attitudes to the death penalty – the very essence of support for severe punishment, have been recognised as such (and monitored). In 2024, 45% of the Polish society wanted to see this penalty introduced into the Criminal Code, while 50% presented the opposite view (Table 11). Only 20% of the public supported the penalty of flogging, but two-thirds of adult Poles supported the penalty of sending to a labour camp. Support for the latter two penalties is surprisingly stable compared to previous public opinion surveys. In the last two IWS surveys, support for the introduction of flogging ranged from 20 to 25% and for the introduction of labour camps, was around 60%.⁷

Table 11. “If it were possible, would you support introducing the following penalties into the Polish Criminal Code:”

	Answers	N	%
Death penalty	Yes	2,240	44.8
	No	2,510	50.2
	Difficult to say	250	5.0
Flogging	Yes	1,003	20.1
	No	3,832	76.6
	Difficult to say	165	3.3
Referral to a labour camp	Yes	3,336	66.8
	No	1,527	30.5
	Difficult to say	137	2.7

Source: Own study based on the Second National Victimisation Survey results.

As already mentioned, the percentage of supporters of the death penalty in Poland has been monitored since the late 1980s when it was abandoned. Since then, we have first seen

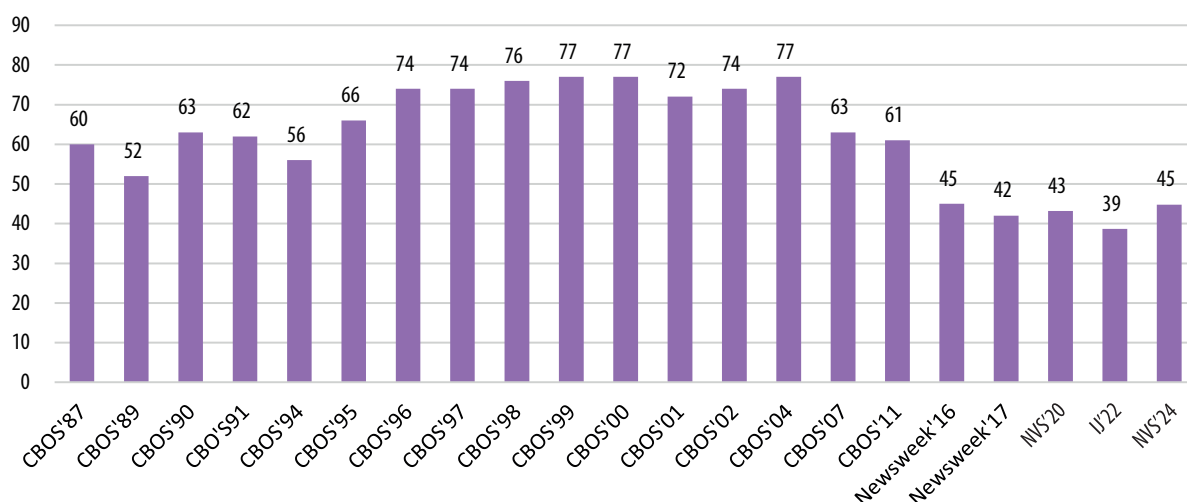
⁵ For example, the so-called “right to hope”, as the right to seek release from life imprisonment, has been recognised by the European Court of Human Rights (ECHR) as a “fundamental aspect of... humanity” [Vinter and others v. the United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10) III ECHR 317 (9 July 2013)].

⁶ See: J. Klimczak, *Punitiveness of Polish Society a Variable or Permanent Trait?*, “Societas/Communitas” 2023, Vol. 35, Issue 1, p. 117.

⁷ Ibid, pp. 118–120.

a significant increase in support for this punishment at the crime rate peak, i.e. until the early years of the 21st century, and it was followed by a steady, systematic decline. In 2022, the percentage of this punishment supporters was the lowest in the period under review, at a level of 39%, rising slightly to 45% in 2024 (see: Figure 11).

Figure 11. Percentage of supporters of reinstating/introducing the death penalty in Poland in the years 1987–2024*



* CBOS – survey of Public Opinion Research Center, Newsweek – survey for the Newsweek, NVS – National Victimization Survey, IJ – survey of the Institute of Justice.

Source: Own study based on data from the National Victimization Survey, and from CBOS, *Poczucie bezpieczeństwa, zagrożenie przestępczością i stosunek do kary śmierci*, Warszawa, May 2011, (1987–2011), available at: https://www.cbos.pl/SPISKOM.POL/2011/K_o6o_11.PDF [accessed on: 11.09.2024]; M. Gajek, *Poparcie dla kary śmierci spada. Coraz mniej Polaków chce jej przywrócenia [SONDAŻ NEWSWEEKA]*, *newsweek.pl*, 10 October 2017, (2016–2017), available at: <https://www.newsweek.pl/polska/spoleczenstwo/przywrocenie-kary-smierci-w-polsce-czy-polacy-to-popieraja/xlg7do> [accessed on: 11.09.2024].

Conclusions

The survey we conducted is not only a part of the long-standing tradition of the Institute of Justice but also a part of the international trend of studying victimisation and the fear of crime. The current edition shows major changes in this area since 2020. Criminals, like any other profession, follow the developments, and this is reflected in the survey results. Indeed, it appears that victims' declarations of becoming a victim more often relate to a crime committed using new technologies. Hence, the highest victimisation rates refer to theft and attempted theft of money from a bank account or a cash card and fraudulent online purchases – 14% each. A comparison of these results with those of the previous edition of the National Victimisation Survey shows that the scale of victimisation by online fraud was very similar; however, for theft and attempted theft from a bank account or a cash card, it increased about ninefold. Since we asked about both attempts and actual acts, it may be optimistically assumed that it is not so much the number of people who have had money stolen from their bank account or cash card that has increased but the number of people against whom such theft was attempted. The intensification of the phenomenon in question occurred around the COVID-19 pandemic, and it seems that it will stay with us forever. For criminals, it is probably a more convenient and safer form of theft (as it is more difficult to detect), and as such, it is difficult to assume that they would like to give it up. Therefore, this aspect, undoubtedly, needs to be observed in the forthcoming years.

The victimisation by a hacked e-mail, social media or auction account occupies the third place among respondents' declarations. Compared to 2020, the percentage of people victimised in this way has almost doubled. Intentional property damage and stalking were next in terms of prevalence. In both these cases, however, a decrease compared to 2020 can be seen, and while there was a slight decrease in intentional property damage, the decline in stalking reached 1.5 times. All the above circumstances show that new offences are beginning to take the forefront in victimisation research, while "old" offences have started to lose their relevance. Indeed, international victimisation surveys demonstrate that the percentage of people declaring themselves as victims of assault, car theft, bicycle theft, and burglary has been falling for years. The trends of these declines vary: some rates have been dropping systematically since the first edition of the International Crime Victims Survey (1992), while others have had some spikes. However, the reason for these spikes may lie, for

example, in the slightly different wording of some questions, including those about burglary, and this should be borne in mind when making such comparisons. Expanding the definition of burglary may have led to an increase in the percentage of people affected, as in the case of the first edition of the Polish Crime Survey (2007). In the last two editions of the National Victimization Surveys, an increase can be observed in the number of people declaring that they have been affected by theft.

Offences that are less likely to occur, i.e. traditional offences such as vehicle theft, assault, burglary or robbery, tend to be reported more often. There may be several reasons for this. People may be unaware that the behaviour concerned was criminal, and sometimes may also feel ashamed that they clicked on something too quickly, too naively, and that was enough to lose money. Furthermore, they may believe that reporting this technologically “new” act to the police will not restore their lost funds, so it is not worth doing. In addition, the reports do not always reach the police. For example, the Office for Competition and Consumer Protection is the competent institution for consumer fraud. Depending on the incident, some cases may be attempted to be resolved on one’s own, for example, through the Allegro Court if the purchase was made via this portal. Finally, perhaps, the lower reporting rate results from the fact that our respondents have not been victims of these offences at all; they only experienced attempted offences against them, which were not reported anywhere.

In addition to questions about falling victim to specific offences and reporting them to law enforcement agencies, victimisation surveys also ask about other issues, such as the fear of crime, the evaluation of police work, and the punitiveness of society. The conclusions remain similar also this time. The results show that Poles generally feel safe. Such declarations were made by almost 90% of respondents. The fear of crime is decreasing. In 2024, it affected around 12% of the population, but as recently as in 1992, it affected over 40%. With a high degree of probability, it can be assumed that the respondents’ answers are correlated with the decline in crime rate during this period. Respondents also feel safe in places where they live (94% of declarations), even though a third of them live in a neighbourhood where damaged and neglected buildings can be found (e.g. with graffiti painted on them), manifesting social disorganisation. Only 29% of respondents are afraid of becoming a victim of a crime in the near future. For the past 20 years or so, people invariably have been scared of the same things: dangerous drivers, followed by burglaries, aggression by intoxicated people, and harassment by aggressive youth. However, they are least concerned about terrorist acts and falling victim to crimes such as theft, assault, robbery, and drug trafficking.

The ratings indicating the police effectiveness in combating crime are high, with approximately three-quarters of respondents recognising the police as effective in their work. These ratings have been improving since 1996, but in the years 2018–2020, a noticeable decline was recorded, which could partly be due, for example, to the police’s participation in the

women's strikes. Nevertheless, the ratings assigned to the police are higher than those for courts. Less than a half of the respondents assessed the work of courts well.

The study also shows that, in principle, society is becoming less punitive. In 2024, 40% of respondents wanted stricter regulations and more severe punishments for offenders, compared to 60% in 1996 and in 2018. The question remains whether attitudes in this respect actually changed or whether the tightening of the law that had taken place in previous years slightly satisfied the punitive desires of some respondents, particularly as other variables do not allow for favouring unequivocally the direction of a decrease in punitiveness – 11% more respondents wanted unconditional imprisonment for the 21-year-old knifeman than in 2020, and 6% more respondents wanted the introduction of the death penalty. The question of the death penalty has been asked in social surveys since the 1980s, and the public attitude towards it has been subject to significant changes. Initially, when crime rates were high, a higher percentage of respondents supported its reinstatement, but this view declined sharply in subsequent years. Interestingly, in 2024, supporters of flogging and labour camps constituted 20% and 60% of respondents, respectively.

Numerous conclusions may be drawn from the survey conducted, but one seems particularly important: generalising the results, it may be concluded that although we feel safe, and although only one-third of us are afraid of falling victim to a crime and we experience traditional forms of victimisation less frequently, we are increasingly becoming victims of the so-called new offences, which are not only difficult to avoid but also extremely difficult for law enforcement agencies to detect. This means nothing more than the fact that such acts are rarely visible in the statistics of suspected offences or the statistics of committed and judged offences. As such, it is essential not only to provide preventive and public awareness-raising measures but also to continue victimisation surveys in the following years and monitor the changes that are already visible in order to find out which direction they take.

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