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Permissibility of Shooting Down a Civilian Aircraft Used as a Weapon to Perform a Terrorist Aerial Attack within the Jurisprudence of the Polish Constitutional Tribunal

ABSTRACT:

Following an increasing global terrorist threat in the beginning of 2000s, in 2004 a provision was added to the Polish law which allowed to shoot down a civilian aircraft with passengers and crew on board if being used for illegal activities, namely for carrying out a terrorist attack from the air (an aircraft of a RENEGADE status). In 2007 the Constitutional Tribunal was requested to rule the provision unconstitutional for being inconsistent among others with the principles of correct (decent) legislation, legal protection of human life and protection of human dignity. In its judgment dated September 30, 2008, the Constitutional Tribunal declared that the provision authorizing shooting down a civilian airliner was inconsistent with the Constitution. Thus, it annulled the binding force of the provision. The Tribunal recognized human life and dignity as the values constituting the foundation of European civilization and determining the semantic content of the central concept of humanism in our culture (law being no exclusion).

Keywords: Terrorism, shooting down an aircraft, human life protection, protection of human dignity, Constitutional Tribunal.

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I. Introductory remarks

In the Polish legislation, following the international law norms, the concept of an "act of unlawful interference with civil aviation" is present which is understood, *inter alia*, as hijacking an aircraft with or without crew and passengers on board, also for the purpose of using the aircraft as tool of a terrorist attack launched from the air. In fact, such an act usually represents one of terrorist natures, as it involves unreasonable or unlawful use of force or violence against persons or property, aimed at intimidating the government or population of the country or exerting pressure on them. Terror attacks are usually undertaken to promote specific goals. They are directed, as a rule, against the people having no direct influence on achievement of the goals assumed by the attackers, while the effectiveness of the attacks lies in stirring up a significant psychological reaction (intimidation) amidst the public, also due to potentially strong media resonance gained. Consequently, terror attacks are aimed at producing specific effects, namely, death or destruction and are thus expected to cause panic and fear in society to exert pressure on the rulers and make them swing into the political action the terrorists are keen about[1].

According to the international terminology, an aircraft that violates the airspace of a given state and against which aircraft measures are being taken to intercept, is referred to as a RENEGADE plane. In democratic countries, the basic problem to be resolved is to find an adequate response to terrorist attacks, especially those related to hijacking an aircraft. Since World War I, the principal importance has been ascribed to the national sovereignty idea, according to which every single state should enjoy a full and exclusive rule over the airspace above its territory.[2] This principle has been confirmed in many international conventions. Examples include: The Convention on International Civil Aviation, signed in Chicago on December 7, 1944, with its Annex 17 "Protection of International Civil Aviation against Acts of Unlawful Interference," the Tokyo Convention dated September 14, 1963 on offenses and certain acts committed on board and the Hague Convention of 16 December 1970 for the suppression of unlawful seizure of aircraft. The reaction of individual states has never been relevant to the actual level of the threat. Sometimes it resulted from a wrong assessment of the situation. Following the examples, the following cases can be mentioned: shooting

[1] Glen A., Terroryzm lotniczy. Istota zjawiska, organizacja przeciwdziałania, Warszawa, 2013, 11.

[2] Milik P., Legalność zestrzelenia porwanego samolotu cywilnego z pasażerami na pokładzie, Państwo i Prawo, No. 5, 2015, 84.

down a civilian plane of the Israeli El-Al airline in Bulgaria, on July 27, 1955; fetching down a Libyan airliner over the Sinai Peninsula, Israel, 1973; the USSR bringing down a Korean Airplane over Sakhalin in September 1984 or the downing of an Iran Airplane by the American cruiser "Vincennes" over the Persian Gulf on July 3, 1988. The Sakhalin incident, in particular, resulted in a change of approach to the issue. In 1984, the Montreal Protocol to amend the Chicago Convention was adopted. It limited the permissibility of shooting down a civil aircraft in flight.[3] Prohibition of resorting to the use of arms against civilian vessels was regarded as a rule of customary international law.[4] However, with the advent of the intensified air terrorism in late half of the 20th century, a qualitative change occurred in the approach to such events. It resulted in radicalization of air defense measures adopted in several countries.

The September 11 attacks in the US (in 2001) led to a new era of the global terrorist threat (the Terrorism Era).[5] It was confirmed after the attacks in Madrid, on March 1, 2003 and in London on July 7, 2005.

The attack on the World Trade Center and Pentagon became a turning point in the fight against terrorism. Being aware of new hazards, individual countries began large-scale defensive and preventive projects. After September 11, 2001, strict protective measures were introduced in civil aviation, security procedures were tightened and appropriate changes were made to the law, including the possibility of the air defense forces to react fast to threats of terror attacks on civil aircraft. Appropriate regulations were also adopted in the EU. One of the most important ones was the Regulation (EC) No 2320/2002 of the European Parliament and the Council, dated December 16, 2002. It established common rules in civil aviation security. However, this Regulation does not ensure admissibility of the use of armed forces by Member States against a passenger aircraft where unlawful interference took place, but offers measures to prevent such situations. The essential ones are: establishment of common basic standards of aviation security measures; obligation of each Member State to adopt a national civil aviation safety program for national airports and carriers, with a duty to designate an authority responsible for coordinating and monitoring

[3] Ibid., 86.

[4] Barcik J., Czech P., Czy można zestrzelić samolot cywilny? (kontrowersje na tle polskiego prawa lotniczego), "Przegląd Komunikacyjny" of 27 March, 2008, 29.

[5] Lepsius O., The Relationship between Security and Civil Liberties in the Federal Republic of Germany after September 11, A Publications of the American Institute for Contemporary German Studies, The Johns Hopkins University, Washington D. C., 2002, 2 et seq.

implementation of the national civil aviation safety program, national civil aviation security quality control program and regular audits in all the airports.

Prior to analysing the Polish legislation on permissibility of shooting down a civil aircraft, we should note a German example, where similar legal regulations regarding the article subject were previously reviewed by the German constitutional court. Following the experience of September 11, 2001, Germany passed the Act dated January 11, 2005 on the Safety of Air Navigation (*Luftsicherheitsgesetz*). Its aim was to increase the security of air transport and introduce defense measures against new terrorist threats. One of the provisions of the Act declared that: 1. For avoiding a particularly severe catastrophe, armed forces may intercept an aircraft violating airspace, force it to land, threaten to open fire or use warning shots. 2. Out of the available measures possibly least onerous should be selected. A specific measure may be used only over the time to achieve the purpose. 3. A direct use of weapon is only allowed when the surrounding circumstances are considered. It should be recognised if the aircraft is used against human life and solely when such use is the only means of defense against an imminent (present) danger. 4. The application of the measures mentioned in paragraph 3 can only be ordered by the Federal Minister of Defense or other member of the government authorised to represent the Minister. Authorised by the Minister of Defense to apply the measures mentioned in paragraph 1 may be the Commander-in-Chief of the Air Force. The regulation was appealed against to the Federal Constitutional Court. In its judgment dated 15 February 2006, the latter found the provision was inconsistent with the Constitution of the Federal Republic of Germany. The Tribunal's decision relied on three reasons: violation of the federalism principle and the constitutionally defined scope of competence of Germany's *Länder* (the states the German Federal Republic is composed of), scope of operation of the German Armed Forces, violation of the right to live and the requirement to protect human dignity of innocent people on the aircraft (passengers and staff). The Federal Constitutional Court ruled that shooting down a civilian aircraft could be constitutionally legitimate only in case of it being manned solely by terrorists.

In Poland, by the initiative of the Ministry of National Defense, Art. 122a was added to the Aviation Law. That provision came into effect in August, 2004. It reads: "If the reasons of state security require that way and the air defense command authority, taking into account, *inter alia*, information provided by air traffic service agencies, finds that a civil aircraft is used for unlawful actions, like an aerial terrorist attack, the aircraft can be destroyed under the rules defined in the Act of 12 October

1990 on Protection of the State Border." According to the government's explanatory memorandum, the purpose of the amendment was to adopt legal regulations enabling responding to a potential threat of terrorist attacks from the air and, as part of the NATO military airspace surveillance mission, allow the allied aircraft to perform tasks to operate in the Polish airspace.

II. Application Prepared by the First President of the Supreme Court for Declaring the Provision Allowing to Shoot Down an Unconstitutional Civilian Aircraft

The Constitutional Tribunal is Poland's only body competent to rule on the constitutional nature of state laws. It always acts at request of an authorised entity. The review of the constitutionality of legal provisions may be carried out in a particular (specific) or abstract mode. A specific review is initiated upon a constitutional complaint filed with the Tribunal or a legal question posed by the court concerning individual proceedings during which the challenged provision of law was applied. An abstract review, on the other hand, is initiated upon an application made by an authorised entity, unrelated to a specific case pending before the court. The group of entities authorised to initiate an abstract review is obviously limited. According to Art. 181 of the Constitution, the application may be made by: the President of the Republic of Poland, Marshal of the Sejm, Marshal of the Senate, Prime Minister, 50 deputies, 30 senators, President of the Supreme Administrative Court, Prosecutor General, President of the Supreme Audit Office, Ombudsman and First President of the Supreme Court.[6] Notably, it was the latter entity in September 2007 asking the Constitutional Tribunal to rule Art. 122a of the Aviation Law unconstitutional, seeking for the Tribunal's recognition of the provision as inconsistent with Art. 38 (principle of legal protection of life), Art. 31 paragraph 3 (proportionality principle), Art. 2 (principle of the democratic state ruled by law), Art. 26 (principle of providing state security by the armed forces) and Art. 30 (principle of protection of human dignity) of the Polish Constitution.

[6] In addition, the National Council of the Judiciary of Poland, decision-making bodies of local government units, national trade union bodies and national authorities of employers' organizations and professional organisations, as well as churches and other religious associations may submit applications to the Constitutional Tribunal, but only in matters related to the field of the activities of the entities in question.

The applicant raised a number of doubts which, in his opinion, were caused by Art. 122a of the Aviation Law. These are divided into four key issues: 1) lack of sufficient precision of the challenged provision (especially in terms of the scope of the rule application), combined with doubts on the normative scheme's compliance with constitutional guarantees, 2) human life protection, 3) ensuring human dignity and 4) objectives and tasks of the Polish Armed Forces, as defined by the Constitution. The entities participating in the proceedings before the Constitutional Tribunal also included: the Minister of National Defense (questioning the application legitimacy), President of the Civil Aviation Office (who mostly shared the applicant's objections), Prosecutor General (partially sharing the objections of the applicant), Minister of the Interior and Administration (sharing the bulk of the applicant's objections) and Marshal of the Sejm of the Republic of Poland (who, in turn, questioned the legitimacy of the application).

III. Constitutional Tribunal's Judgment on Assessment of Art. 122a of the Aviation Law

By a judgment of September 30, 2008 (K 44/07) the Constitutional Tribunal found Art. 122a of the Aviation Law inconsistent with Art. 2, Art. 30 and Art. 38 in conjunction with Art. 31 paragraph of the Constitution of the Republic of Poland. Thus, acting as the so-called negative legislator, Constitutional Tribunal repealed the legal provision in question.

For the reason of its stance, the Constitutional Tribunal asserted that the First President of the Supreme Court raised two types of allegations as to the constitutionality of the challenged provision. The first group concerned violation of the principle of good (decent) legislation, i.e. the way the provision was phrased, deviating from the standard required by the Constitution (regarding precision and clarity). The other group was related to the legal permissibility of the enactment of a regulation allowing to shoot down an aircraft (as a matter touching the very substance of law and one of fundamental systemic and axiological importance). The constitutional doubts focused on the situation where people other than attackers, i.e. the crew and passengers, are on board and the aircraft is used as a means of terrorist attack from the air. In this context, it is required to answer the question whether a regulation empowering a state authority to make a decision taking the life of innocent people to prevent potential further harm, in a democratic state ruled by law it is mandatory to protect life and

inviolable human dignity – admissible at all, regardless of how the procedural issues were ensured in detail.

As for the first group of allegations, the starting point for the Constitutional Tribunal was to refer to the standards developed in the Tribunal's previous jurisprudence on the required precision of law (the standards resulting from the principles of decent legislation). In turn, those were decoded from the principle of the democratic state ruled by law (Art. 2 of the Constitution). Out of the requirement of definiteness of legal provisions, or – from a broader sense – the principle of decent legislation, it follows that exceeding a certain level of vagueness of legal provisions may constitute, in itself, an autonomous prerequisite for declaring their non-compliance with the rule of law assumption expressed in the Constitution. The requirement of precision of legal provisions becomes particularly important where the value to be violated by actions of the state authorities taken under the challenged legal provision is human life. Meanwhile, to describe the reasons to stand behind the decision on destroying a civil aircraft with passengers on board, such unspecified phrases as "reasons of national security" or the need to recognise that the civil aircraft is being used for "unlawful activities" are used. The fragment of the provision where the term "terrorist attack" has been employed is not free from interpretation doubts, either. The term applies to situations differing in terms of the goals pursued by the attackers and objectively possible aftermath of the attack. This opinion is well confirmed by difficulties to precisely define the very concept of terrorism, which – despite many attempts to provide its definition, made in the world literature and official documents – remains far from being unambiguous. Thus, in the judgment of the Constitutional Tribunal, within the legal system it is unacceptable to leave a provision allowing to shoot down an airplane with innocent persons on board, the above-mentioned vague and imprecise criteria applied in it.

Regarding an assessment of legal substance of the prerequisites for a regulation letting shooting down an aircraft – made from the point of view of constitutional standards – compliance of the prerequisites with the principle of legal life protection comes to the fore.

According to Art. 38 of the Constitution, "The Republic of Poland provides every human being with the legal protection of life". It confirms that in our civilisation and legal culture human life is the highest-rank value and a legal benefit which does not lend itself to differentiation under the Constitution. Similarly, human life is protected under the European Convention on Human Rights. The Art. 2 of the convention states that "Everyone's right to life will be protected by law. No one will be deprived

of his life intentionally, except the execution of a sentence of a court following his conviction when the penalty is provided by law." Simultaneously, the Convention allows deprivation of human life in three cases, when such deprivation results from the use of force which is absolutely necessary: (a) in defense of any person from unlawful violence, (b) to implement a lawful arrest or prevent the escape of a person detained lawfully, (c) in action lawfully taken for the purpose of quelling a riot or insurrection. Similarly, pursuant to Art. 6, paragraph 1 of the Covenant on Civil and Political Rights, "every human being has an inherent right to life. This right is protected by law. No one will be arbitrarily deprived of life."

The Constitutional Tribunal stressed that the most valuable asset of a human being is his or her life. Besides, the right to live is the basic right of an individual, a precondition for holding and exercising all the other rights and freedoms. Taking life, therefore, annihilates man as a subject of rights and duties. The legal protection of life, as guaranteed by Art. 38 of the Constitution, should be primarily viewed as a ban on destruction of human life. In this "defensive" context, the legal protection of life is a consequence of the "right to life" of every human being. Irrespective of that, the right to life also implies the obligation of public authorities to take positive actions aiming life protection. The latter must not be understood merely as protection of the minimum biological functions required for human existence, but the guarantee for people's proper development, ensuring that normal psycho-physical condition, appropriate for a given developmental age (life stage) would be obtained and further maintained by them. In the context of possible terrorist or military threats or social unrest of a different background, an element of the right to legal protection of life is also an obligation to ensure the citizens' safety.

As noted by the Tribunal, the right to legal protection of life is not absolute. In certain cases, especially in consideration of a specific situational context concerning an unresolvable conflict of the right to life of two people, the law may decriminalize acts on taking human life (e.g. in case of self-defense). The statement given above does not equal to the axiological relativism support of any kind. The legislator is empowered to determine possible exceptions, when – due to the collision of goods being constitutional values, rights or freedoms – it is required to sacrifice one of those if they compete with one another. Therefore, limiting legal protection is permitted in case of a need to protect or exercise other constitutional values, rights or freedoms. Based on this assumption, the Tribunal also indicates the general criteria that may justify a legal deprivation of life. All this includes the necessity to examine the following: a) whether

the interest, violation of which is legalised by the legislator, represents a constitutional value itself, b) whether the legalisation of violations of the interest is justified by constitutional values, c) whether the legislator is in compliance with the constitutional criteria for this conflict resolution (including the requirement for proportionality).

For example, criminal law contains commonly accepted regulations regarding the allowed actions that may result in taking human life, not only to directly save one's own or someone else's, but also in other situations, e.g. that of a state of emergency or when police officers use weapons. However, norms authorising the state (*expressis verbis*) to deliberately deprive a person of life must be assessed separately, especially when the deprivation is not required for the protection of other rights and freedoms, or as regards a person who did not trigger such a reaction by his or her behaviour.

The Polish Constitution (Art. 31(3)) lays down restrictions on exercising constitutional rights and freedoms. These restrictions are numerous, including a requirement for a statutory nature of the restriction, a need to impose restrictions in a democratic state, functional relationship of the restriction and values expressly enumerated in the Constitution (namely: national security, public order, environment protection, public health and morals, freedoms and rights of others) and prohibition to violate given right or freedom. The declaration that restrictions may be established only if required in a democratic state ruled by law requires considering whether the established regulation can produce intended effects, whether such regulation is required to protect a related public interest and whether the introduced regulation effects are commensurate with its burdens imposed on the citizens.

With regard to solutions limiting the legal protection of life, indicated premises must be interpreted in a particularly restrictive manner, in the direction convergent with the criterion of "absolute necessity," as developed in the ECtHR jurisprudence under Art. 2 of the Convention for the Protection of Human Rights. When it comes to general standards, any limitation of legal protection of human life must be treated as an *ultima ratio* measure. In addition, due to the fundamental nature of the right to life and its position within constitutional axiology, the right limitation must not serve protection of lower-rank goods in the constitutional hierarchy, like ownership and other property rights, public morality, environmental protection or even people's health. Therefore, a precondition for limiting the right to legal protection of life is a situation when the right cannot be reconciled with similar rights of other people. That premise can be generally defined as the requirement of symmetry of values: sacrificed and saved ones.

In conclusion, the Tribunal stated that the provision challenged by the First President of the Supreme Court violates Art. 38 of the Constitution guaranteeing the right to life and its legal protection. No different conclusion may be justified, whether by the "complex weapon" concept (hijacked plane passengers are part of it), or by the "tacit consent" to the above-described actions of the state authorities in case of a terrorist attack, or – finally – by a statement that the obligation to protect people's lives at the foreseeable point of attack "abolishes" similar obligation to protect passengers' lives and the crew of a RENEGADE aircraft. Finally, under the Polish political-legal system it is not quite reasonable to develop specific theoretical, philosophical and legal concepts of "suspension" or "modification" of the guarantees of civil rights, allegedly required during the "war waged on terrorism." The obligation to ensure security, a component of the right to legal protection of life in its positive aspect, is incumbent on the state both as regards people on the ground and those on board. The state's failure to effectively fulfil this obligation does not exempt it from a need to respect the negative aspect of the right to legal protection of life, i.e. the prohibition taking the life of innocent people intentionally.

Similar conclusions were brought at by the Tribunal analysing statements of the European Court of Human Rights against the background of Art. 2 of the Convention for the Protection of Human Rights.

In the application of the First President of the Supreme Court there was raised the allegation of non-compliance of Art. 122a of the Aviation Law with art. 30 of the Constitution stating that "the inherent and inalienable dignity of man is a source of freedom and human and civil rights. It is inviolable and respecting and the duty of public authorities includes its protection." When analysing that Constitutional provision, the Constitutional Tribunal asserted that the concept of human dignity should be attributed the nature of a constitutional value of key importance for building the axiology of current constitutional solutions. A democratic state ruled by law is a state based on respect for human beings, in particular, protection of life and human dignity. These two values are directly interlinked. Article 30 of the Constitution represents a leading provision for interpreting and applying all other provisions on the rights, freedoms and obligations of the individual.

From the point of view of Art. 30 of the Constitution, in the opinion of the Tribunal the challenged provision of the Aviation Law does not raise that heavy constitutional doubts if it allowed shooting down an airplane with only bombers on board. It is the people that caused the situation in question. The perpetrators chose to die

by their free will, simultaneously risking the lives of innocent people. If such people are shot down, they die in a fight provoked by them. Therefore, they cannot be said to be treated as objects. Meanwhile, to the extent that such a final legal remedy can be directed against non-aggressors on board, i.e. other passengers and staff, it would undoubtedly offend their personal dignity. In this case the Constitutional Tribunal shared the position of the German Constitutional Court. In its above-mentioned judgment of February 15, 2006, the latter expressed a viewpoint that the application of the provision allowing for shooting an airplane with passengers would result in "de-personification" of persons on board merely becoming the object(s) of a rescue operation aimed at preventing hypothetical, further and probably greater losses that could be caused by a targeted terrorist attack. An argument that the passengers and crew of the hijacked plane found themselves in this situation as a result of the unlawful actions of the bombers is fundamentally false. The situation indirectly manifests the state's failure to meet its positive protective obligations.

IV. Conclusions

In conclusion, the Constitutional Tribunal assumed that while assessing compliance of elements of the legal system regarding an issue as sensitive as proper balancing of public security considerations against the right to legal protection of individuals' lives, including those on board the hijacked (RENEGADE) plane, priority should be unequivocally given to human life and dignity. These values represent the foundation of European civilization giving due meaning to the central concept of humanism in our culture (also when its legal components are at stake). They are inalienable for they cannot be "suspended" or "abolished" in a specific situational context. Humanism is not an attitude cultivated as a kind of a *decorum* only during peace and prosperity, but a value that tested in crisis, which is sometimes extremely difficult. The Tribunal also emphasizes that the fight or even regular war against organised crime can be waged without resorting to general negation or "suspension" of basic civil rights and freedoms. Therefore, consequently terrorism can be fought without that far-reaching interference with the right to life of by-standers and notwithstanding the unequivocal condemnation of terrorism, fighting against its manifestations must be carried out taking into account the basic standards of a free, democratic state.

Finally, the Constitutional Tribunal observed that eliminating the challenged legal provision from Poland's legal system does not mean no availability of legal mea-

sures allowing to respond to acts of aerial terrorism. In one hand, all this includes legal construction of the state of necessity and when only assassins that are on board, provisions on necessary defense. To apply them it is imperative an authorised state agency to make a specific decision, taking into account all circumstances of the situation and be ready for taking responsibility in the aftermath. In exceptional situations, the law may de-penalise the effects of this action, recognising a lack of guilt on the entity's side. It may not legalise (excluding illegality) an action consisting in deliberate taking life of innocent people by determining legal conditions of its correctness. The decision to destroy a civil aircraft resulting in death of innocent people on board may not thus constitute a standard legal measure applied by the authorities to defend the life of other people, much less to protect other goods than human life.

As a matter of principle, the judgment of the Constitutional Tribunal dated September 30, 2008 met with a rather favourable public reception. Doubts can only arise and it is actually better – a lack of regulations on shooting down an aircraft, decision being thus subject to general legal principles, namely, a state of emergency, or conditions for making such a decision is regulated in detail. However, this doubt does not essentially undermine the correctness of the Tribunal's deliberations on protecting human life and dignity. Since the repeal of the binding force of Art. 122a of the Aviation Law, attempts were made to adopt a new regulation on neutralization possibilities, including shooting down a RENEGADE aircraft with full respect of the constitutional standard resulting from the judgment dated September 30, 2008 (K 44/07). As it is not acceptable to adopt a law that allows an aircraft to be shot down with passengers and crew on board. These attempts remain limited to situations when the aircraft is manned by only in case of terrorists. Despite numerous efforts, a satisfactory compromise has not been reached yet.[7] Fortunately, so far there is no need to face a terrorist attack from the air, but if this happens, general legal rules will apply. It is of primordial meaning in that respect to release those making the decision to shoot down the plane by the conditions of the state of emergency.[8]

[7] Kraśnicka I., Dopuszczalność zestrzelenia samolotu pasażerskiego nielegalnie przekraczającego powietrzną granice terytorium państwa -nowe propozycje w prawie polskim na tle rozwiązań innych porządków prawnych, in: Państwo i terytorium w prawie międzynarodowym, edited by J. Menkes and E. Cała-Wacinkiewicz, CH Beck, Warszawa 2015, 3 et seq.

[8] Milik P., Stachurski R., Zestrzelenie cywilnego statku powietrznego – aspekty prawne i operacyjne in: Państwo i terytorium w prawie międzynarodowym, edited by J. Menkes and E. Cała-Wacinkiewicz, C. H. Beck, Warszawa, 2015, 11.

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Denial of Russia's Sovereign Immunity in Tort Claims by IDPs in National Courts of Georgian

ABSTRACT:

The occupation of the Abkhazia and Tskhinvali regions by the Russian Federation in 1992-1993 was followed by a complete occupation of 20% of Georgia as a result of the 2008 Russia-Georgia war, when the Russian Federation committed egregious crimes, the genocide of the Georgian people and destruction of their property. By the international community it was recognized as one of the most malicious human rights violations resulting in 300,000 internally displaced persons continuously suffering from material and moral damage due to the ongoing occupation. They are in need of a full and fair restoration of their rights. Therefore, according to international and national law standards, they may be entitled to demand compensation from the Russian Federation for the damages caused by illegal actions in Georgian courts, especially in the conditions when Russia has been expelled from the Council of Europe since March 2022. The European Court of Human Rights (ECtHR) no longer has jurisdiction over new disputes with this country's involvement since September 17, 2022. Therefore, it will not hear such cases as the only means of compensating the IDPs being lodging with national courts.

This research uses a comparative analysis method. The judicial topic is scrutinized by examining decisions of international and foreign courts about the identified problem. The study encompasses an in-depth review of articles focused on this subject, including an exploration of divergent opinions provided in each source.

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Furthermore, the author presents a perspective on resolving the issue, offering a synthesized viewpoint that enriches the ongoing discourse.

Keywords: State Sovereign Immunity, Genocide, National/Domestic Proceedings, Internally Displaced Persons (IDPs), Jus cogens, Peremptory Norms, Egregious Violations of Human Rights, compensate pecuniary and non-pecuniary damages.

I. Introduction

The main obstacle to the above-mentioned proceedings is the principle of state sovereign immunity, profoundly rooted in international law protecting the state from foreign adjudications. According to the sovereign immunity doctrine, the forum state does not possess or possess, but does not extend its own judicial, legislative and executive jurisdiction over the foreign country.[1]

We can trace the beginning of sovereign immunity back to the feudal era. That was the time when kings ruled states. The doctrine of state sovereignty was formed in the 19th century when independent states abundantly in the world. One of the earliest legal depictions of state immunity by the US Supreme Court was the case titled "Schooner Exchange v. M'Faddon." At that time, states were considered equal international players. Thus, exercising jurisdiction over a foreign state was a violation of state dignity and equality. Naturally, this attitude was expressed by the Latin formula appealing to the maximum independence of the sovereign state: par in param non habet imperium (equal has no right to equal).[2]

However, the subsequent change of time led to the thinking modification. The "divine right of kings" was rejected and the sovereignty content changed. Therefore, sovereign immunity was defined differently, i.e., not absolutely but in a somehow

[1] რუხაძე ნ., სამოქალაქო მართლმსაჯულების იურისდიქციისგან სახელმწიფო იმუნიტეტის პრინციპისა და ადამიანის უფლებების ურთიერთმიმართება საერთაშორისო და ეროვნული სასამართლო პრაქტიკის მიხედვით, სადისერტაციო ნაშრომი სამართლის დოქტორის აკადემიური ხარისხის მოსაპოვებლად, ივანე ჯავახიშვილის სახელობის თბილისის სახელმწიფო უნივერსიტეტი, თბილისი, 2012, 12 [rukhadze n., samokalako martlmsajulebis iurisdiktsiisgan sakhelmts'ipo imuniťet'is p'rintsip'isa da adamianis uplebebis urtiertmimarteba saertashoriso da erovnuli sasamartlo p'rakt'ik'is mikhedvit, sadisert'atsio nashromi samartlis dokt'oris ak'ademiuri khariskhis mosap'oveblad, ivane javakhishvilis sakhelobis tbilisis sakhelmts'ipo universit'et'i, tbilisi, 2012].

[2] Belsky A.C., Merva M., Roth-Arriaza N., Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law, California Law Review, Vol. 77, 1989, 377-379.

restricted way. In the 20th century, one of the main reasons for the denial of absolute immunity was the participation of governments in commercial relations and the growing number of state trade bodies. That is the performance of non-public functions by states.[3]

II. State Sovereign Immunity in Historical Context

The classical international law system, first compiled by the Dutch humanist Hugo Grotius, set the norms limiting independence of sovereign states with the motive of peaceful coexistence. As Grotius says, there are three types of law: divine, natural, and customary. It is these last two conditions that lead to a different kind of international law. First, it is the required law for nations and states deriving from natural law, while the second is positive, established law obtained via agreements and customs. The essential law of states comprises principles of fundamental importance for a civilized society. As they are derived from natural law, states do not have the power to abolish or modify these rules through their agreements. The law that binds sovereign states is not an outcome of the expression of the governing actors' will, but expresses the sources by which positive law should be evaluated.[4]

Grotius pointed to the conditions to be met by a state to become an equal member of the world community. In his opinion, the war of conquest, which is to acquire property and enslave others, is unjust. This war violates the natural law requirements. Therefore, the one, initiating a war of conquest is responsible for the damage caused by this war and must compensate for it.[5]

The Grotiusian system of natural law regulating international relations was pushed into the background by the ideas of Thomas Hobbes, who influenced the positivism of the 19th century. According to Hobbes, power, not moral principles, determines the limits of human rights. The man seizes his freedom and surrenders this right to the state. Thus, the will of the state becomes the source of every right[6] and not, as Grotius refers to those natural rights outside the state as immutable values.

[3] Cooper C. G., Act of State and Sovereign Immunity: A Further Inquiry, Loyola University Chicago Law Journal, Vol. 12, No. 2, Art.2, 1980, 199–200.

[4] Belsky A.C., Merva M., Roth-Arriaza N., Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law, California Law Review, Vol. 77, 1989, 382.

[5] გარიშვილი მ., შესავალი სამართლის ფილოსოფიაში, ლექციების კურსი, თბილისი, 2010, 77 [garishvili m., shesavali samartlis pilosopiashi, lektsiebis k'ursi, tbilisi, 2010, 77].

[6] Hobbes T., Leviathan, London, 1651, xiv.

The first half of the 20th century was a period of world wars that undermined philosophical thinking of positivism. The experience of the first and WWIIs forced international community to reconsider the principles and norms regulating relations. The unheard and unprecedented crimes committed by the Nazi regime were a clear example that the principle established by positivism, sounding "the law is the law," was to be replaced by a more humane principle to reduce a risk of violation of fundamental human rights coming from totalitarian states. The Nuremberg process represents the conditional event that brought the legal order back into the circle of natural law dominance. In this respect, after seeing the crimes of Nazism, German philosopher of law, Minister of Justice of the Weimar Republic – Gustav Radbruch – deviated from positivism and moved his theory of law to the rails of natural law.[7] In "Statutory Lawlessness and Supraq-Statuto-ry Law," Radbruch asks how the justice and legal security conflict can be resolved giving an answer to define the central thesis of his late work: "The dispute between justice and legal security can be resolved as follows: positive law, ensured by legislation and power is superior even if it includes provisions that are unjust and less useful to the people except when the law and dispute between justice reach such an intolerable degree that the law as "deficient justice" must give way to justice... When there is not even an attempt to strive for justice when equality as the essence (core) of justice is deliberately neglected in the development of positive law, the law is not only "defective" but illegal by its very nature. Law, including positive law, cannot be defined otherwise, but the system and institution, with the primary purpose of serving justice...[8]

Therefore, the Nuremberg process practically applies the Radbruch formula, recognizing fundamental principles. These immutable and supreme human values are not subject to their abrogation or change by states.

III. Weakening of State Sovereign Immunity from Absolute to Restricted

The legacy of the Nuremberg Tribunal and its emphasis on individual responsibility put the values of humanity rather than state sovereignty at the center of international law.

[7] Radbruch G., Statutory Lawlessness and Supra-Statutory Law, B. Litschewski Paulson and S. L. Paulson, Oxford Journal of Legal Studies, Vol. 26, No. 1, 2006, 4-5.

[8] Ibid., 5.

As already mentioned, state sovereign immunity was initially formed as absolute immunity, which meant that the states enjoyed immunity before foreign courts about any legal matter regardless of the nature of the legal relationship and proceedings. Whether actions are governmental (Jure imperii) or non-governmental (Jure Gestionis), the state could not be a defendant before a foreign court without its consent.[9]

However, in the 20th century, governments' participation in commercial relations and a growing number of state trade bodies, that is the performance of non-public functions by states, became one of the main reasons for the denial of absolute immunity. A restricted immunity replaced it. It was distinguished from acts of the states (acta jure imperii), i.e., acts of sovereign power, including the acts of the government armed forces, public, state, and non-governmental, i.e., commercial, or private (acta jure gestionis) actions and states were generally granted immunity only in cases related to the second type of actions. As international law on state immunity was developed mainly by national courts balancing important values and public interests to exempt foreign states from local jurisdiction, the replacement of absolute immunity with restricted one was first initiated by Belgian and Italian courts in the late 19th century.[10]

IV. Continuing Erosion of State Sovereign Immunity in Favor of Human Rights

The continuing erosion of the state sovereign immunity primarily concerns changes in international law, which, due to the recognition of imperative norms

[9] Bankas E. K., The State Immunity Controversy in International Law, Private Suits Against Sovereign States in Domestic Courts, 2nd Edition, Springer, 2022, 37-38.

[10] See: Document A/46/10: Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991), Yearbook of the International Law Commission, Report of the Commission to the General Assembly on the Work of Its Forty-Third Session, Vol. II, part 2, 1991, 36, Footnote 111–113; Cf.: Germany v. Italy: The Right to Deny State Immunity When Victims Have No Other Recourse, Amnesty International Publications, 2011, 1-23; Wyrozumska A., Can Human Rights Overcome State Immunity? National Courts at the Crossroads, in: Sovereign Immunity Under Pressure: Norms, Values and Interests, edited by R. Bismuth, V. Rusinova, V. Starzhenetskiy and G. Ulfstein, Springer, 2022, 211. Subsequently, the doctrine of limited immunity was codified into national law by the United States in 1976 with the FSIA (Foreign Sovereign Immunity Act), which went into effect on January 19, 1977, and was ruled by the U.S. Supreme Court to be retroactive, that is, to apply prior to its enactment. The United Kingdom in 1978, Singapore in 1979, Pakistan in 1981, South Africa in 1981, Canada in 1982, Australia in 1985, and Argentina in 1995 adopted restrictive state immunity acts. The Council of Europe also adopted the Basel Convention on State Immunity in 1972 and the United Nations in 2004 which has not entered into force.

(Jus Cogens, Peremptory norms) and development of human rights protection, is no longer understood as only the law of obligations between states. In international law, a specific category of duties was established, saying that states are considered to have them before all members of the international community. These are erga omnes obligations."[11]

In contemporary scenarios, instances of the jus cogens norms in international law include acts like genocide, crimes against humanity, slave trade, unauthorized use of force, egregious human rights violations, piracy, racial discrimination and treaties breaching the rules of war and self-determination principles.[12]

1. Italy's Pioneering Efforts to Erode State Sovereign Immunity Once Again

On the issue of sovereign immunity, more specifically on public, state (Jure imperii) acts of sovereign power in the context of military occupation and aggression, the most extensive saga was caused by the German-Italian dispute in ICJ where Germany won as a claimant.[13]

The dispute's initiation hinges, firstly, on the Italian national courts overcoming Germany's sovereign immunity in civil claims by Italian citizens seeking compensation for the atrocities committed by Nazi Germany during WWII (deportation for forced labor to Germany, the refusal to recognize members of the Italian armed forces as prisoners of war, massive execution of civilians in June 1944 in Civitella, Cornia and San Pancrazio). Concurrently, the trend began with the recognition and enforcement in Italy of decisions by Greek courts against Germany in analogous proceedings,[14] marking the commencement of the enforcement trend. Luigi Ferrini's lawsuit in 2004 marked the inception of this legal process and the subsequent scholarly discourse on this trend was symbolically named after Ferrini's jurisprudence.[15]

[11] Case Concerning the Barcelona Traction, Light and Power Company, Limited, ICJ, 1970, para. 33.

[12] Bankas E. K., The State Immunity Controversy in International Law, Private Suits Against Sovereign States in Domestic Courts, Springer, 2005, 266.

[13] Germany v. Italy: Greece intervening [ICJ], Jurisdictional Immunities of the State, Judgment, 3 February 2012, ICJ Reports, 2012.

[14] A German state property known as "Villa Vigoni" near Lake Como in Italy has been mortgaged by the Italian Supreme Court to enforce a Greek court's decision on damages related to Nazi Germany's extermination of 300 inhabitants of Distomo and the destruction of their property during World War II.

[15] See: De Sena P., De Vittor F., State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case, The European Journal of International Law, Vol. 16, No. 1, 2005.

In the groundbreaking Ferrini case, the Supreme Court of Italy adeptly navigated the delicate balance between sovereign immunity, crucial for maintaining stability in international relations and the jus cogens norms, designed to prevent particularly egregious crimes and hold perpetrators accountable. The court accorded priority to the latter, recognizing its imperative international legal character. In tandem with the Jus Cogens argument, the court gave significant importance to the "tort exception,"[16] asserting that national courts possess the authority to extend jurisdiction over wrongful acts committed in their territory, even when carried out by a foreign state under the guise of "jure imperii."[17]

ICJ's 2012 decision does not reflect a concerted effort to fairly and rationally balance crucial principles of international law.

ICJ highlighted that state immunity underscores a tension between the foundational principles of state equality and territorial sovereignty. The Court acknowledged that exceptions to state immunity deviate from the principle of sovereign equality, while also noting that immunity itself may depart from the principle of territorial sovereignty and the jurisdiction derived from it (paragraph 57). The court further indicated that there is no exception to state immunity solely based on the allegation of a serious violation of International Humanitarian Law or International Human Rights Law (paragraph 90), the entitlement to immunity remains unaffected by the existence or availability of an alternative remedy for redress (paragraph 101-102). As immunity is maintained, there is no need to scrutinize inquiries regarding a direct entitlement of individuals to compensation for breaches of International Humanitarian Law (IHL) and the validity of states waiving claims on behalf of their nationals in such instances (paragraph 108), there is no contradiction between a substantive rule proscribing specific conduct recognized as jus cogens and procedural rule establishing state immunity. Consequently, there is no override of immunity by jus cogens principles (paragraph 93).[18]

[16] The 'territorial tort exception' is a provision found in both the European Convention on State Immunity (Basel, 1972) and the U.N. Convention on Jurisdictional Immunities of States and Their Property (New York, 2004). This rule stipulates that immunity does not extend to tort cases where the plaintiff seeks redress for death or injury to a person, or damage to or loss of tangible property, provided that the harmful act or omission took place within the territory of the court's state. The exception applies if the tortfeasor was physically present in that territory while committing the said harmful act or omission.

[17] Cf.: Fontanelli F., I know it's wrong but I just can't do right: First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court, October 27, 2014. <https://shorturl.at/eBV12> [20.10.2023].

[18] Milanovic M., Germany v. Italy: Germany Wins, EJIL: Talk!, Blog of the European Journal of International Law, <https://www.ejiltalk.org/germany-v-italy-germany-wins/> [20.10.2023].

The court observed that state acts, even if unlawful, could still be qualified as acts jure imperii (paragraph 60). Its rationale for supporting immunity for Germany did not hinge on simply categorizing Nazi acts as sovereign. Instead, the court relied on the settled practice and opinio juris among national courts of various countries at that time. Considering that by 2012, the Italian court was in the minority opposing immunity denial for former torts committed by a foreign state in the forum country during armed conflict (ICJ applied the approach of the Italian courts to the decisions of the courts of Poland, Belgium, Serbia, Canada, Slovenia, New Zealand, United Kingdom, USA, Brazil, Germany and France and two decisions of the European Court of Human Rights – Al-Adsani v. the United Kingdom and Kalogeropoulou and Others v. Greece and Germany). The court concluded that customary international law dictates granting immunity to a State in proceedings involving torts allegedly committed in another state's area by its armed forces during an armed conflict (paragraph 77-78). The court's reasoning did not suggest that had it found a body of case law and opinio juris against immunity, including widespread exceptions to the immunity rule, it would have granted sovereign immunity for Germany in such cases. Ultimately, ICJ sought and found state practice and opinio juris supporting immunity from civil suits by a foreign state in the forum state for acts of armed forces during an armed conflict.[19]

Despite not directly stemming from this perspective, certain authors rightfully assert that ICJ exhibited a selective and biased conservative approach. Simultaneously, the Court seemingly overlooked broader precedent, omitting several decisions opposing granting sovereign immunity to those responsible for damages in cases involving serious human rights violations, especially when there is no alternative remedy for damages.[20] Nevertheless, the Court selectively incorporated or overlooked relevant practices of the US courts, with approximately half of the cited decisions originating from the US legal domain. The omission of crucial decisions addressing legal impediments like serious violations of the jus cogens norms, international humanitarian law, "normative hierarchy theory" and tort exception (Tort Exception) in relation to the application of "Jure Imperii" raises suspicions of deliberate exclusion. This skepticism arises because the broader US jurisprudence does not uniformly

[19] Dodge W. S., Why Terrorism Exceptions to State Immunity Do Not Violate International Law, August 10, 2023, <https://shorturl.at/qvNY0> [20.10.2023].

[20] See: Conforti B., The Judgement of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity, The Italian Yearbook of International Law Online, Vol. 21, 2011, 138-142.

support the notion that states engaging in severe violations of fundamental human rights are entitled to sovereign immunity in proceedings initiated by another country (under FSIA), a stance also observed in Canada (SIA).[21]

It should be noted that the ICJ decision was accompanied by different opinions.[22] Significantly, we should note Judge Cançado Trindade's exceptional 88-page opinion, emphasizing the primacy of the jus cogens norms over the claims of immunity.

As for ICJ's argument that there exists no contradiction between a substantive rule proscribing specific conduct recognized as jus cogens and a procedural rule establishing state immunity. Consequently, there is no override of immunity by jus cogens principles, a procedural norm hindering access to redress, renders the underlying substantive rule practically meaningless. Consequently, divorcing the inherent right from the protective remedies would defy the principle, meaning that rights must be pragmatic and efficacious, not merely theoretical or illusory.[23]

"There is not an atom of sovereignty in the occupant's authority.[24]" One appellate Court held that violations of the jus cogens norms cannot be considered "official acts" (Jure Imperii) for immunity.[25] When a state acts contrary to the jus cogens norms goes beyond the framework of permissible sovereign action, it implicitly waives the right to grant immunity.[26]

Despite the seemingly binding nature of ICJ's decision, in 2014, the Italian Constitutional Court, with its historic decision 238/2014, declared it unconstitutional for it could not be automatically integrated into the Italian legal order and sacrificed the

[21] See: Pavoni R., An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State, Italian Yearbook of International Law, Vol. XXI, 2012.

[22] Dissenting opinion of Judge Cançado Trindade in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment, ICJ Reports, 2012, 179; Dissenting opinion of Judge Yusuf in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) Judgment, ICJ Reports, 2012, 291; Dissenting opinion of Judge ad hoc Gaja in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) Judgment, ICJ Reports, 2012, 309.

[23] Zubac v. Croatia [ECtHR], Judgement, App. No. 40160/12, April 5, 2018, May 2, 2022, para. 77.

[24] Oppenheim L, The Legal Relations Between an Occupying Power and the Inhabitants, Law Quarterly Review, Vol. 33, No. 4, 1917, 363, 364-65; Dennis M. J., Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation, The American Journal of International Law, Vol. 99, No. 1, 2005, 131.

[25] Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012); Keitner I. C., Sovereignty, Humanity, and Justice: Reflections on U.S. Law of Foreign Sovereign Immunity, in: Sovereign Immunity Under Pressure: Norms, Values and Interests, edited by R. Bismuth, V. Rusinova, V. Starzhenetskiy and G. Ulfstein, Springer, 2022, 19.

[26] Zouapet A.K., Sovereignty, Too Hard-Won to be Wasted... Sovereignty, Immunities, and Values: A (Sub-Saharan) African Perspective, in: Sovereign Immunity Under Pressure: Norms, Values and Interests, edited by R. Bismuth, V. Rusinova, V. Starzhenetskiy and G. Ulfstein, Springer, 2022, 102.

victims' right to a fair trial for the violation of peremptory norms recognized in international Law (Jus Cogens). The sovereign immunity concept should have stayed the same, especially when recourse to national courts was the last resort.[27]

Italian practice had come full circle on the issue of the exclusion of immunity for serious human rights violations that have the status of jus cogens when the act complained of was committed under jure imperii.[28]

In the meantime, Italy became a party to the United Nations Convention on Jurisdictional Immunities of States and Their Property (United et al. on Jurisdictional Immunities of States and Their Property) adopted by the UN General Assembly on December 2, 2004, by resolution N59/38 (Germany is not a party to this Convention).

Enforcement began in some cases.[29] Several German properties were seized in Rome for sale. Because of this, on April 29, 2022, Germany applied to the Hague Court with applications to initiate a case based on Italy's non-compliance with the 2012 decision of this Court and request temporary measures.[30] According to this application, by April 2022, the number of cases in Italy on claims against Germany for the actions of the Reich during the WWII totalled more than 25 cases. Minimum 15 of them were ruled. Germany requested Italy to cease such legal acts to immediately take adequate measures and prevent such cases in the future as well as damages for violating the sovereign immunity and temporary measure to stop such sales.[31]

Perhaps, the outcome of the temporary measure was predictable at this stage, but of course, we cannot say the same about the longevity and results of the trial

[27] See: De Sena P., The Judgment of the Italian Constitutional Court on State Immunity in Cases of Severe Violations of Human Rights or Humanitarian Law: A Tentative Analysis under International Law, Questions of International Law, Vol. I, 2014, <https://shorturl.at/acinT> [20.10.2023]; Pinelli C., Decision no. 238/2014 of the Constitutional Court: Between Undue Fiction and Respect for Constitutional Principles, Vol. I, 2014, <http://www.qil-qdi.org/prova-2-4/> [20.10.2023]; Pavoni R., Simoncioni v. Germany, The American Journal of International Law, Vol. 109, No. 2, 2015, 400-406.

[28] Walker L. C., Foreign State Immunity & Foreign Official Immunity: The Human Rights Dimension, A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy, University of Sydney, 2018, 179.

[29] Giorgio v. Germany, Judgment of the Court of Bologna No. 2892/2011; Judgment of the Appellate Court of Bologna No. 2120/2018; Cavallina v. Germany, Judgment of the Appellate Court of Rome No. 5446/2020.

[30] Germany Institutes Proceedings Against Italy for Allegedly Failing to Respect Its Jurisdictional Immunity as a Sovereign State, Unofficial Press Release No. 2022/16 of April 29, 2022, International Court of Justice.

[31] Application Instituting Proceedings Containing a Request for Provisional Measures Filed in the Registry of the Court on 29 April 2022, Questions of Jurisdictional Immunities of the State and Measures of Constraint Against State-Owned Property (Germany v. Italy), International Court of Justice.

itself. The decisions of the Constitutional and General Courts put the International Court in a very awkward position. It faced a new, significant problem. In particular, it should discuss the scope of jurisdiction of local (state) courts and, most importantly, their independence. The latter is of fundamental importance in international law. Besides, it is problematic to overcome the decision of the Italian Constitutional Court both from the status of this Court and from the essence of the decision. However, the situation changed rapidly. The dispute ended with the states' agreement in the International Court of Justice. Italy undertook to satisfy the victims and Germany made an application.

The content of the diplomatic negotiations is unknown, but it is conceivable that several circumstances caused such a move by Italy:

- The assumption that the International Court of Justice and Italian Constitutional Court would remain faithful to the earlier decision;
- Based on the previous practice of inter-state disputes underway for 20 years, one more decade would likely be necessary. The results would not have changed the situation substantially;
- In this situation, the satisfaction of the immediate victims would be highly illusory;
- The Italian state approached the issue of protecting the interests of its citizens not formally due to endless continuation of disputes but based on democratic standards of taking care and being responsible for them;
- We make a prudent assumption that this responsibility was also for Italy being an ally of Germany during the WWII.

These quick measures included the following:

On April 30, 2022, the Italian President issued Decree-Law №36 on further emergency measures to implement the National Recovery and Resilience Plan.[32] Notably, the decree was signed on April 16, almost a week before Germany submitted its application to the International Court of Justice, indicating that the Italian authorities acted in good faith, unilaterally, with the motives mentioned earlier. However, in such a case, it needs to be clarified why Germany hastened submitting the application when the diplomatic negotiations preceded and Italy conducted these talks constructively.

[32] See: Testo coordinato del decreto-legge 30 aprile 2022, No. 36, <https://shorturl.at/mqKQ5> [20.10.2023].

Under Article 43 of the Decree, a fund was established for Italian citizens. Between September 1, 1939 and May 8, 1945 they were victims of military and crimes against humanity committed in Italy or, in any case, due to violations of their integrity by the Third Reich forces to compensate for the damage. A total of 55,424,000 EUR is expected to be accumulated in the fund by 2023-2026, while the Italian government finances it. The fund is available to those having received a final decision that has determined and assessed their right to compensation. The final decision must be rendered within the framework of proceedings launched before the the Decree Law enforcement (i.e., May 1, 2022) or within 30 days after the law's enforcement. No new enforcement proceedings may be instituted. The ongoing ones, in turn, will be terminated.

Thus, we have a specific settlement between the parties, which, in general, cannot resolve the legal problem. The same applies to our research issue, the decision of which, due to this precedent, remains postponed indefinitely. Although certain conclusions from the point of view of such disputes' outcome (consideration, enforcement) and specifically perspective of the Italian legal position are already sufficiently clear:

- The decree is not the final act. It still needs to be approved by the Italian Parliament;
- The decision No. 238/2014 of the Italian Constitutional Court is valid and will not be changed. In any case, there are no preconditions for its revision in the near or distant future;
- Litigation continues. Italian courts will continue receiving lawsuits, make decisions on them, effective enforcement and, accordingly, the satisfaction of the victim is ensured;
- Germany is the defendant in the already accepted decisions of the Italian courts and it will be the same in future lawsuits as well. Italy has only undertaken to compensate for the damage, which is the prerequisite for applying to the fund. Accordingly, Germany's sovereign immunity in civil damage cases in Italian courts has been defeated and will remain so. Moreover, within the framework of the decree, a settlement is possible between the claimant and the German state, which must be conducted under the condition of non-immunity in the Italian court system;
- Germany's demand for Italian guarantees non-repetition of the actions that looked weak. Following the Constitutional Court decision, giving such guar-

> antees by representatives of other branches of government is impossible and absurd. No one can infringe on the independence of the judiciary. To support such a demand on the part of democratic Germany would put it in a very uncomfortable position in the trial;

The case situation fails to prevent it. On the contrary, it helps the plaintiffs and Italian justice to overcome the sovereign immunity of Germany or another country. In other matters of jus cogens, claims may be granted. Besides, enforcement may be launched and carried out.

2. Ukraine – a New Beginning, Continuation of Jurisprudence Initiated by Italy in 2004

Building upon the Ferrini jurisprudence (2004) set by the Italian courts, Ukrainian courts extended the precedent by rejecting Russian sovereign immunity in the context of civil tort claims filed by Ukrainians. This development comes in the aftermath of Russia's military aggression against Ukraine in February 2022. Notably, several leading authorities have recognized Russia's actions in Ukraine as constituting genocide.[33]

Against Russia's military occupation of Ukrainian territories since 2014 and current war, the Ukrainian courts overcame Russia's sovereign immunity in several cases. According to authoritative sources, Ukrainian first instance courts issued minimum eight decisions on compensation for damage caused by the military aggression of the Russian Federation. The most prominent claim totalls UAH 154 million. The aggressor country was obliged to pay 173 million hryvnia for damage caused to Ukrainians. In the beginning of 2023, 209 cases remained pending before the national courts on the Russian compensation for property and moral damage to Ukrainian people and companies. More often, citizens having lost their property for the armed aggression of the Russian Federation go to the Court. There are many such cases in the courts. As of January 30, 2023 a total 154,7 of them are already in the appealing phase. Only 55 claims of damages by the aggressor are submitted by businesses. According to a study by the Russia Will Pay project KSE Institute experts, at least 109 large and medium-sized enterprises suffered direct losses for

[33] See: Musiienko O., The Evolution of Russia's Genocide against the Ukrainian People, Analytical Report, Kyiv, 2022, 39.

the full-scale Russian invasion in 2022.[34] The Russian invasion caused more than $97 billion in direct damage to Ukraine through June 1 alone.[35] Most appealed cases were pending before the full-scale invasion. Their claims were met. However, the courts fully satisfy almost all claims filed after February 24, 2022, provided that the amount of property and moral damage was proven.

The landmark decision by the Supreme Court of Ukraine on April 14, 2022 set the precedent for bypassing Russia's sovereign immunity in Ukrainian courts. The court ruled that since the harm occurred in Ukraine's sovereign territory, invoking the territorial tort exception in the 1972 Basel European Convention and the UN Convention on Jurisdictional Immunities is warranted. The damage, attributed to Russian agents violating the UN Charter principles against military aggression, negates sovereign immunity. The act of military aggression violates its obligations to respect Ukraine's sovereignty, rendering Russia ineligible for jurisdictional immunity. Under the Ukrainian principle of "general delict," any damage in Ukraine due to wrongful actions can be compensated through court judgments.[36]

As mentioned above, the courts, which overcame the sovereign immunity of the respondent states, relied on the opinion of the jus cogens norms as maxims hierarchically above immunity. Besides, the concept that such norms' violation does not occur only before the citizens of a particular state. Besides, their protection obligation is the responsibility of the responding state before the entire humanity. The international community considers the jus cogens norms to be war crimes. It also assesses them as crimes against humanity, including the genocide prevention, which also implies the prevention of massive destruction of property.

3. Georgia's Opportunity to Follow the Courageous Legal Path of Italy and Ukraine

The Law of Georgia on Occupied Territories states the international crime – armed aggression and military occupation committed by the Russian Federation in the sov-

[34] Over 173 million UAH in compensation already awarded by Ukrainian courts to Russia, <https://opendatabot.ua/en/analytics/courts-ua-russia> [01.03.2024].

[35] Shalal A., Rebuilding Ukraine after Russian Invasion May Cost $350 Bln, Experts Say, Reuters, September 9, 2022, <https://shorturl.at/dfzS9> [01.03.2024].

[36] See: Karnaukh B., Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity with Regard to Tort Claims Brought by the Victims of the Russia-Ukraine War, Access to Justice in Eastern Europe, Vol. 5, No. 3, 2022, 165-177.

ereign territory of Georgia, Abkhazia and Tskhinvali region. In accordance with international legal norms and principles, the law holds the Russian Federation accountable for both material and moral damages suffered by displaced persons, recognizing it as a violator of universally recognized human rights within occupied territories.[37]

The Law of Georgia on internally displaced persons from occupied territories establishes the status of a victim – an internally displaced person.[38] Simultaneously, the law clearly describes the reasons for forced displacement, which also represents a massive, outrageous violation of the fundamental norms and principles of international law.[39]

Apart of illegal military aggression and occupation, subsequent events indicate that Russia is taking actions for the complete annexation of Abkhazia in a gross violation of the international law principles. For example, on August 26, 2008 it recognized independence of Abkhazia by presidential decree № 1260.[40] In 2009-2020 Russia's direct transfer to the so-called Abkhazia budget totalled 63.2 billion Ruble, while in 2022-2023 it equalled 18 billion.[41]

The Russian aggression, genocide[42]/ethnic cleansing in Abkhazia's territory is mentioned in the legal acts of the Parliament of Georgia.[43]

[37] See. Article 1 and 7 of the Law of Georgia "On Internally Displaced Persons from the Occupied Territories of Georgia." See also: Georgia v. Russia (II) [ECtHR] Judgment, App. No. 38263/08, 21 January 2021, and Mamasakhlisi and Others v. Georgia and Russia [ECtHR], Judgment, App. No. 29999/04 and 41424/04, 7 March 2023.

[38] Article 6 of the Law of Georgia "On Internally Displaced Persons from the Occupied Territories of Georgia."

[39] Ibid.

[40] See: Указ Президента Российской Федерации от 26.08.2008 г. № 1260, <http://www.kremlin.ru/acts/bank/27957> [01.03.2024].

[41] <https://shorturl.at/quCEL> [20.10.2023].

[42] See: Shankar P., Before Bucha in Ukraine, There Was Abkhazia in Georgia, <https://shorturl.at/kBHO9> [20.10.2023].

[43] See for example: Resolution of the Parliament of Georgia "On the Russian Military Units on the Territory of Abkhazia", February 25, 1993; Resolution of the Parliament of Georgia "On Withdrawal of Military Units of the Russian Federation from the Conflict Zone of Abkhazia", April 27, 1993; Resolution of the Parliament of Georgia "On Apartheid and Racist Legislative Practices in the Autonomous Republic of Abkhazia", March 10, 1994; Resolution of the Parliament of Georgia "On the Supreme Authority of the Autonomous Republic of Abkhazia", of February 24, 1995; Resolution of the Parliament of Georgia "On Measures to Settle Conflicts in Abkhazia", April 17, 1996; Statement of the Parliament of Georgia "Regarding the Work of the Inter-Factional Conciliation Group", March 20, 1997; Resolution of the Parliament of Georgia "On Measures to Ensure Implementation of Chapter VII of the UN Charter in Abkhazia", March 30, 2002; Resolution of the Parliament of Georgia "On Gross Violation of Human Rights in Abkhazia and Tskhinvali Region Occupied by the Russian Federation and "Otkhozoria-Tatunashvili List", March 21, 2018.

Several international legal acts[44] are essential for the qualification the Russian aggression outcomes and occupation of Georgia's territories, with the genocide, ethnic cleansing and crimes against humanity:

It was first indicated in the declaration of the OSCE Budapest summit on December 6, 1994. The following was noted: "The participating states expressed deep concern about the ethnic cleansing" and expulsion of the population – mainly Georgian – from their places of residence and the death of a large number of innocent citizens."

The declaration of the OSCE Lisbon summit of December 3, 1996, says: "We reaffirm our full support for the sovereignty and territorial integrity of Georgia within its internationally recognized borders." We condemn the "ethnic cleansing" which resulted in the mass destruction and forced expulsion of mainly Georgian population of Abkhazia."

The OSCE summit declaration of Istanbul dated January 17-18, 1999, says: "We reiterate as set out in the documents of the high-level meetings in Budapest and Lisbon that we resolutely condemn the ethnic cleansing that led to the physical destruction and violent expulsion of the mainly Georgian population from Abkhazia, Georgia, and Acts of violence of 1998 in Gali region."[45]

The declarations of the OSCE Budapest, Lisbon and Istanbul summits appear in the UN Security Council's periodic resolutions.

The case of Georgian IDPs is severe. Unlike the Nazi regime, which ended and Germany condemned the worst crimes committed by its predecessors, the Russian occupation lasted more than 30 years.

In addition, it is crucial that, in general, domestic and international law does not remain frozen. It is a living organism develop according to time, circumstances and views. The doctrine of the "evolutionary definition"[46] and "living instrument" (established in the legal practice of the European Court since 1978 – Tyrer v. United Kingdom, 1978) is the fundamental pillar of all modern legal systems. It provides the fundamental legal basis of all international and high-ranking domestic treaties and

[44] See also: Georgia v. Russia (II) [ECtHR] Judgment, App. No. 38263/08, 21 January 2021, and Mamasakhlisi and Others v. Georgia and Russia [ECtHR], Judgment, App. No. 29999/04 and 41424/04, 7 March 2023.

[45] Istanbul Summit Declaration, para 17 in: Istanbul Document 1999, OSCE, Istanbul, 2000, 49.

[46] See: Evolutionary Interpretation and International Law, edited by G. Abi-Saab, K. Keith, G. Marceau and C. Marquet, Hart Publishing, 2019.

ensures the act's flexibility, viability and effectiveness (constitution, etc.). This is the general trend of international law. In the US it is called a "living constitution" and in Canada – a "living tree."

"The Convention is a living instrument which, as the Commission properly pointed out, must be understood in the light of current conditions."[47] This classic definition is invariably transferred from case to case. "The Convention is a living instrument, which must be interpreted in the light of current conditions and ideas that prevail today in democratic states."[48]

Therefore, the "evolutionary development" principle applies to court definitions and decisions and a general understanding of human rights. This is a broad concept of human rights, the main characteristic of which is the development of collective guarantees for the protection of human rights and freedoms and the establishment of increasingly high standards of rights protection.

The Vienna Convention on the Law of Treaties of the United Nations (May 23, 1969, enforced in Georgia on 08/07/1995) contains several elements that separately and together indicate the use of "evolutionary interpretation" in interpreting an international agreement.[49]

The unmistakable sign of "evolutionary definition" in this norm is:

- The terms "in good faith" and "ordinary meaning" of the "object and purposes of the contract" (Article 1);
- Any subsequent practice of the contract application, based on the parties' agreement on its interpretation (Article 31.3 b);
- Any relevant norms of international law applicable in the relations between the parties (Article 31.3 c).
- The possibility of applying the definitions of the European Court of Human Rights and Fundamental Freedoms (Article 31(3) (b) and (c)).

Another circumstance, namely Article 32, should also be noted. It indicates that "referring to the preparation materials and the circumstances of its laying" is only a secondary source of the definition. In addition, the UN Court of Justice applies this principle.[50]

[47] Tyrer v. The United Kingdom [ECtHR], judgement, App. No. 5856/72, 25 April 1978.

[48] Bayatyan v. Armenia [ECtHR], judgement, App. No. 23459/03, 7 July 2011.

[49] The Vienna Convention on the Law of Treaties of the United Nations, Article 31.

[50] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, Judgment of 16 December, I.C.J. Reports 2015., Pauwelyn J., Elsig M., The Politics of Treaty Interpretation:

While the Italian Constitutional Court's decision is present, it will be complicated for the UN Justice court to overcome this decision during alleged retrials against Italy or another country, for it is difficult to avoiding conflict with the principle of independence of local courts and solve the case against this one. Besides, it is difficult to imagine that the Ukrainian courts will stop the flood of overcoming the sovereign immunity of Russia.

In the case "Jones v. Saudi Arabia," British judge Lord Birmingham criticized Italy's decision to waive sovereign immunity for Saudi Arabia in the first decision.[51] As mentioned earlier by the Court, which led to the UN Court of Justice's consideration of the German claim ironically saying that "one swallow cannot bring about a rule of international law." However, in the same legal literature, an elegant answer was given to this after the decisions mentioned above of the Italian Constitutional Court and the General Courts: it is no longer "one swallow" creating justice but several decisions during the year.[52] From our side, we say that the actions already taken by the leading states for the war between Russia and Ukraine, the accompanying legal definitions will bring spring for the Ukrainian victims and Georgian IDPs as well. Current general unification against Russia, the flood of international sanctions against it, including property confiscations based on specific events (Russia's invasion of Ukraine, the genocide of the Ukrainian people, and the occupation of territories) emphasize the need of intensified protection of their rights during the most severe massive human right violations. Therefore, sacrificing the right of the displaced persons to a fair trial and granting sovereign immunity to a country not recognizing Georgia's sovereignty and territorial integrity contradicts the fundamental values of international law and causes a legal vacuum.

In light of the perpetration of genocide, military aggression, war crimes, crimes against humanity and the continuing occupation of Georgian territories, Russia is found to be in breach of its obligations to uphold Georgia's sovereignty. As a result of this violations, Russia forfeits its entitlement to jurisdictional immunity,

Variations and Explanations Across International Tribunals, <http://ssrn.com/abstract=1938618> [20.10.2023].

51 Ferrini v. Federal Republic of Germany, Court of Cassation, judgment No 5044 of 6 Nov. 2003, registered 11 Mar. 2004.

52 Walker L. C., Foreign State Immunity & Foreign Official Immunity: The Human Rights Dimension, A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy, University of Sydney, 2018, 180.

particularly given its expulsion from the Council of Europe since March 2022. The European Court of Human Rights ceased to have jurisdiction over new disputes involving Russia as of September 17, 2022.[53] Consequently, the recourse of Internally Displaced Persons (IDPs) to Georgian National courts stands as the last resort for seeking redress, given the prevailing circumstances. This assertion aligns with the stipulations of Article 992 of the Civil Code of Georgia, specifically outlined in Section Three, Torts, Chapter One, General Provisions. The said article establishes that an individual who, whether unlawfully, intentionally, or negligently, inflicts harm upon another party is obligated to compensate for the resulting damage incurred by the aggrieved party. In the context of the ongoing infringements of rights suffered by Internally Displaced Persons (IDPs), they maintain the legal entitlement to seek restitution for damages directly from the Russian state through the avenues provided by national courts.

V. Conclusion

The Nuremberg process stands as a pivotal moment, reintegrating legal order within the realm of natural law dominance. The enduring legacy of the Nuremberg Tribunal, with its pronounced emphasis on individual responsibility, has successfully repositioned the core values of humanity above the traditional sovereignty of states within the framework of international law. Notably, Italian courts have consistently exhibited a practice aimed at circumventing sovereign immunity in cases against Germany, holding Nazi Germany accountable for egregious human rights violations that deeply offend the collective conscience of humanity.

Drawing a parallel, the current practice of Ukrainian courts offers a compelling precedent. This practice is grounded in the context of the February 2022 invasion of Ukraine by Russia, marking the initiation of a large-scale war against Ukraine. Significantly, numerous authoritative sources have acknowledged Russia's activities in Ukraine as meeting the criteria for genocide.

This robust legal precedent established by Ukrainian courts provides a compelling argument for Georgian Internally Displaced Persons (IDPs) to pursue analogous legal proceedings before Georgian courts. In light of the historical resonance of the

[53] European Court of Human Rights, The Russian Federation ceases to be a Party to the European Convention on Human Rights, Press Release issued by the Registrar of the Court, ECtHR 286 (2022), 16.09.2022.

Nuremberg principles and the consistent trajectory of Italian and Ukrainian legal practices, Georgian IDPs have a strong foundation to seek justice in Georgian courts for the violations they have endured.

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Natural Beauty Protection as an Aesthetic Value under International Environmental Law

ABSTRACT:

There is a huge realm of environmental law, with more than five hundred multilateral agreements regulating environmental sub-regimes. The complexity of this field of law is compounded by diverse environmental values requiring strong legal protection from human impairment. One of such values is the aesthetic value (natural beauty) of the environment. As it is claimed in the present article, value has quite a strong influence on the well-being of human beings, and thus their penchant for natural beauty is intrinsic. Therefore, it is of great importance to ascertain what legal approach, if any, exists at the international level to legally protect natural beauty as an aesthetic value.

Keywords: International environmental law, environmental law, aesthetic, aesthetic value, natural beauty, environmental rights, International Court of Justice, ECtHR.

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I. Introduction

Even before environmental protection became one of the key priorities for the international society, the natural beauty, "immaterial value" of the environmnmet, had represented the major inspiration for many celebrated artists for being environmentalists.[1] Therefore, it is widely recognised that importance of natural beauty undeniably refers to art, literature and philosophy.[2]

There is also a question of whether the importance of natural beauty goes beyond the aforementioned areas and what extra impacts it has on human life, while people's well-being is a central idea of the international environmental law. Notably, in the simplest way, natural beauty could be delineated "as a non-material benefitit obtainted from [...] aesthetically pleasing environments."[3] According to the Statute of the International Union for the Conservation of Nature and Natural Resources "natural beauty is one of the sources of inspiration of spiritual life and the necessary framework for the needs of recreation, intensified now by man's increasingly mechanised existence."[4] Therefore, it is obvious that natural beauty has beneficial influence on human beings and it provides us with "joy, solace, inspiration; it is life-enhancing."[5] In other words, it improves their life quality.[6] Thus, beautiful surroundings do not only promote human being's well-being but show significant impact on the life quality.[7] It is attested that the view of natural beauty in the vicinity of living or working area can be as beneficial for human being's mental health as good quality of physical environment.[8] Furthermore,

[1] Basilio J. S. M., Fostering Environmental Protection through the Right to Religious Freedom, in: Sustainable Management of Natural Resources: Legal Instruments and Approaches, edited by H. T. Anker and B. E. Olsen, Intersentia, 2018, 244.

[2] Richardson B. J., The Art of Environmental Law Governing with Aesthetic, 1st edition, Bloomsbury Publishing, 2019, 14; Carlson A., Environmental Aesthetics, in: The Stanford Encyclopedia of Philosophy, edited by E. N. Zalta and U. Nodelman, Stanford, 2023, <https://shorturl.at/hwyIX> [01.12.2023].

[3] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Memorial of Costa Rica on Compensation, Vol. I, ICJ, 3 April 2017, 104.

[4] Gillespie A., International Environmental Law, Policy, and Ethics, 2nd edition, Oxford University Press, 2014, 70.

[5] Cooper N., Bradly E., Steen H., Bryce R., Aesthetic and Spiritual Values of Ecosystems: Recognising the Ontological and Axiological Plurality of Cultural Ecosystem 'Services', Ecosystem Services, Vol. 21, Part B, 2016, 220.

[6] Carlson A., Environmental Aesthetics, in: The Stanford Encyclopedia of Philosophy, edited by E. N. Zalta and U. Nodelman, Stanford, 2023, <https://shorturl.at/hwyIX> [01.12.2023].

[7] Council of Europe Landscape Convention (Florence Convention) No. 176 of 20 October 2000, Preamble.

[8] Filipova T., Kopsieker L., Gerritsen E., Bodin E., Brzezinski B., Rubio-Ramirez O., Mental Health and

in the first environment-related letter to the UN Secretary-General the pernicious influence on man's mental health caused by changing natural environment was named as one of the main reasons for higher attention to the problems of the human environment.[9]

Taking all the aforementioned into account, the essence of this article is to determine whether the protection of natural beauty, as an aesthetic value, falls within the scope of international law. Thus, first we should determine that natural beauty, as an aesthetic value of the environment, is recognised as one of the legally protected ones in accordance with international environmental law. The following chapters analyse the case law of the International Court of Justice and European Court of Human Rights to elucidate their approaches, if any, concerning the protection of natural beauty as part of their jurisdiction.

II. Defining Natural Beauty as an Aesthetic Value of the Environment

To identify the values protected by International Environmental Law, we should have at least general understanding of the term "environment." A lack of global legal framework that would have defined the key terms and principles of International Environmental Law and fragmentation of this field of law are conducive factors to some dearth of legal certainties.[10] One of the salient features of this problem is that even after fifty years of global recognition of the environmental protection importance the universal definition of "the environment" does not exist.[11] However, it has always been

the Environment: How European Policies Can Better Reflect Environmental Degradation's Impact on People's Mental Health and Well-being, the Institute for European Environmental Policy (IEEP) and the Barcelona Institute for Global Health (IS-Global), 2020, 53; Richardson B. J., The Art of Environmental Law Governing with Aesthetic, 1st edition, Bloomsbury Publishing, 2019, 3.

9 ECOSOC forty-fifth session provisional agenda addendum, "The question of convening an international conference on the problems of human environment – Letter dated 20 May 1968 from the permanent representative of Sweden addressed to the Secretary – General of the United Nations", 22 May 1968, UN doc E/4466/Add, 2.

10 Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment, Report of the Secretary-General, 2018, UN Doc A/73/419, 1-4.

11 Jacobsson M. G., Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts, submitted to the International Law Commission Sixty-sixth session, 2014, UN Doc A/CN.4/674, para. 80; Sands P., Peel J., Principles of International Environmental Law, 4th edition, Cambridge University Press, 2018, 4.

certain that the environment includes "the natural as well as its man-made components."[12] For the purposes of this article, we will focus on the natural environment.

Aesthetic value is one of the intrinsic values of the environment.[13] According to the UN International Law Commission, (ILC) the natural environment, in its terms, includes "non-service values" and the aesthetic value belongs to it.[14] The ILC does not explain the meaning of the "non-service value", which is not commonly used by authoritative institutions and scholars. For instance, the UNEP uses the terms "use value" and "non-use value."[15]

In general, use value of the environment could be differentiated as "a direct use value and an indirect use value."[16] The former includes environmental resources which have direct contribution to the market economy (for instance, timber), while the latter provides services essential for maintaining healthy environment (for instance, carbon absorption by forests).[17] The direct use value of the environment has its sub-categories such as "non-consumptive use" values which includes "enjoyment of scenic beauty."[18] Therefore, it is required to deem that ILC implied "non-consumptive use value" while mentioning a "non-service value."

It has already been noted that universal definition of legal terms is not a strongpoint of international environmental law and the aesthetic value of the environment does not represent any exception to the rule. Though we can still find certain authoritative sources to understand the key idea bihind the term. Namely, according to the ILC, an aesthetic value of the environment means "the enjoyment of nature because

[12] Problems of the Human Environment, Report of the Secretary-General, 1969, UN Doc E/4667, para. 17.

[13] Brady E., Prior J., Environmental Aesthetics: A synthetic Review, People and Nature, Vol. 2, Issue 2, 2020, 2; Convention on Biological Diversity of 05 June 1992, No. 1760 UNTS 79 CBD.

[14] Jacobsson M. G., Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts, submitted to the International Law Commission Sixty-sixth session, 2014, UN Doc A/CN.4/674, para 80; Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, the International Law Commission, 2006, UN Doc A/61/10, 69.

[15] Brander L., Guidance Manual on Value Transfer Methods for Ecosystem Services, UNEP, 2004,31-48; Ecosystems and Human Well-being: A Framework for Assessment, Millennium Ecosystem Assessment, World Resources Institute, edited by J. Sarukhán and A. Whyte, Island Press, 2003, 127.

[16] Keske C.M., How to Value Environmental and Non-Market Goods: A Guide for Legal Professionals, Denver Journal of International Law & Policy, Vol. 39, No. 3, 2011, 425-426.

[17] Ibid.

[18] Ecosystems and Human Well-being: A Framework for Assessment, Millennium Ecosystem Assessment, World Resources Institute, edited by J. Sarukhán and A. Whyte, Island Press, 2003, 210; Keske C. M., How to Value Environmental and Non-Market Goods: A Guide for Legal Professionals, Denver Journal of International Law & Policy, Vol. 39, No. 3, 2011, 426.

of its natural beauty and its recreational attributes and opportunities associated with it."[19] Notably, ILC includes recreational value within an aesthetic value, while there are other sources enumurating recreational and aesthetic as separate environmental values. For example, one of the first reports of the UN Secretary-general regarding the problems of human environment dated 1969 and Convention on Biological Diversity adopted in 1992 mention them separately.[20] It is a prevalent attitude, however, that the main idea behind an aesthetic value of the environment is a natural beauty.[21] The latter in itself includes recreational value as it has been emphasized in the Statute of International Union for Conservation of Nature adopted in 1948 and by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1962.[22] Futhermore, even in the abovementioned report by the UN Secretary-General notes that "areas of natural beauty [...] have a social function of providing recreation facilities."[23] Therefore, it should be more logical that the term "aesthetic value" is used to denote natural beauty (which includes recreational value) and these two terms could be interchangeable.

On the whole, aesthetic value of the environment has been legally protected for more than a century.[24] In particular, one of the key goals of the natural conservation acts (at national and international levels) has always been the legal protection of natural beauty of certain areas.[25] There are number of international environmental tools (both binding and non-binding) that recognise importance of legal protection of an aesthetic value of the environment.[26] For instance, Our Common Future: the report of the World Commission on Environment and Development and Future We Want:

[19] Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, the International Law Commission, 2006, UN Doc A/61/10, 69.

[20] Convention on Biological Diversity of 05 June 1992, No.1760 UNTS 79 CBD; Problems of the Human Environment, Report of the Secretary-General, 1969, UN Doc E/4667, 40.

[21] Kiester A. R., Aesthetics of Biological Diversity, Human Ecology Review, Vol. 3, No. 2, 1996/1997, 152; Richardson B. J., The Art of Environmental Law Governing with Aesthetic, 1st edition, Bloomsbury Publishing, 2019, 3.

[22] Richardson B. J., The Art of Environmental Law Governing with Aesthetic, 1st edition, Bloomsbury Publishing, 2019, 3.

[23] Problems of the Human Environment, Report of the Secretary-General, 1969, UN Doc E/4667, 17.

[24] Gillespie A., International Environmental Law, Policy, and Ethics, 2nd edition, Oxford University Press, 2014, 68.

[25] Jenkins V., In Defence of Natural Beauty: Aesthetic Obligation and the Law on the Designation of Protected Landscapes in England and Wales, Environmental Law Review, Vol. 22, No. 1, 2020, 7.

[26] Gillespie A., International Environmental Law, Policy, and Ethics, 2nd edition, Oxford University Press, 2014, 72.

outcome document of the Earth Summit[27] and World Charter for Nature recognise aesthetic value and natural beauty of enviornment as a requisite for environmental conservation.[28] As for the legally binding instruments, clearly acknowledging aesthetic as legally protected value, the most salient ones are Convention on Biological Diversity adopted in 1992 and the Convention for the Protection of the World Cultural and Natural Heritage adopted in 1972.[29]

III. Natural Beauty Protection and the Case Law of the International Court of Justice

In general, international judicial system have a long-standing practice[30] of considering environmental legal disputies, but yet relatively small amount of such cases leave many environmental legal issues either out of its realm or ambiguous.[31]

In 1993, International Court of Justice (ICJ) decided to create a chamber dedicated specifically to the environmental legal issues. However, for the member states had never shown any interst in bringing their cases to the Chamber it ceased existence in thirteen years.[32] Despite this fiasco, the ICJ's role in development of the International Envrionmental Law should be recognised.[33] Therefore, modest but still important ICJ's case law should be delved into to ascertain its legal approach (if any) to legal protection of the natural beauty as an environmental asethetic value in the context of transboundary environmental damage.

In its advisory opinion on *Legality of the Threat or Use of Nuclear Weapon* while naming what could be inflicted by explosion of nuclear weapon[34] the ICJ does not explicitly mention an aesthetic value of the environment and generally indicates nu-

[27] Both are non-binding UN documents: 'Our Common Future', Report of the World Commission on Environment and Development, United Nations, 1987, UN Doc A/42/427 and Resolution No. 66/288 of General Assembly of United Nations of 27 July 2012.

[28] Gillespie A., International Environmental Law, Policy, and Ethics, 2nd edition, Oxford University Press, 2014, 72-73.

[29] Ibid.

[30] The Trail Smelter Case (1941) is widely recognised as the first international environmental-related case.

[31] Bodansky D., Customary (and Not so Customary) International Environmental Law, Indiana Journal of Global Legal Studies, Vol. 3, No. 1, 1995, 117.

[32] ICJ, Chambers and Committees Chambers, <https://shorturl.at/lQX37> [01.12.2023].

[33] Vinuales J. E., The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment, Fordham International Law Journal, Vol. 32, No. 1, 2008, 233-234.

[34] The court names "health, agriculture, natural resources and demography".

clear weapon's potential "to destroy all civilization and the entire ecosystem of the planet."[35] It is understandable for the very nature of the nuclear weapon leaves almost no room for pondering over loosing the aethetic value of the environment while in case of using such weapon, as judge Weeremantry says, "what is at stake can well be the very survival of humanity."[36] In their dissenting opinions, few judges mention the environmental issues and those who mention focuses on the consumptive use values of the environment.[37]

In its dissenting opinion, judge Weeremantry, being one of the the most progressive judges in terms of environmental legal issues,[38] speaks of importance of protection of cultural treasure during wartime. In general, natural envrionment could be of "cultural importance" and represent "cultural heritage," which generally includes natural beauty,[39] but the judge refers to the provisions of two treaties[40] neither of which defines the natural beauty as protected subject. Futhermore, his statement says that in "cultural treasure" he means man-made objects "showing the progress of civilization through the ages" rather than natural environment.[41]

One of the most important features of this case is that ICJ provided iconic definition of the term "environment" which "is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn,"[42] according to the court. As it has already been mentioned above, the natural beauty is of certain importance for maintaining the good quality of life. Therefore, we can assume that by mentioning this phrase, ICJ implicitly recognised the aesthetic

[35] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, 1996, 35.

[36] Dissenting Opinion of Judge Weeramantry, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, 1996, 140.

[37] Dissenting Opinion of Judge Koroma, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, 1996, 570-578.

[38] Vinuales J. E., The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment, Fordham International Law Journal, Vol. 32, No. 1, 2008, 247.

[39] Draft Principles on Protectionof the Environment in Relation to Armed Conflicts, the International Law Commission, 2022, UN Doc A/77/10, 107; Jacobsson M. G., Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts, submitted to the International Law Commission Sixty-sixth session, 2014, UN Doc A/CN.4/674, 81.

[40] The Judge refers to Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and Additional Protocol (II) to the Geneva Conventions of 1977.

[41] Dissenting Opinion of Judge Weeramantry, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, 1996, 455.

[42] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, 29; Manual on Human Rights and the Environment, 3rd edition, Council of Europe, 2022, 16.

value as the legaly protected one by international environmental law. Though, such interpretation of the ICJ's statement could not be claimed to be well-established without any other specification.

In *Kasikili/Sedudu Island Case,* the importance of natural beauty was generally emphasized by judge Weeremantry, who said that the integrity importance and natural areas' protection with outstanding possibility to enjoy watching "a rich variety of wildlife" could be so significant that it could have a crucial influence even on the international boundary delimitation rules.[43]

As part of the *Case Concerning Pulp Mills on the River Uruguay* Argentina argued that a mill construction in Uruguay had caused not only air pollution and noise, but also was an "undesirable addition to the natural landscape" and had a deleterious impact on views from one of its resorts.[44] Futhermore, Argentina claimed that the aesthetic quality of the resort could have been lost due to "unattractively coloured water" as a result of pollution by the mill.[45] Thus, this "visual nuisance" would have harmed its tourism industry.[46] But the court missed the opportunity to consider the "visual pollution" issue stating it lacked the jurisdiction over it due to certain circumstances.[47]

As part of the *Gabcikovo-Nagymaros Project Case* neither the court nor the parties paid any special attention to the aesthetic value of the damaged environment and strongly focused on its consumpive use values. Athough, in his dissenting opinion of *Gabcikovo-Nagymaros Project Case* Judge Weremantry provides us with the interesting reamarks, which sometimes create special combination of law and phylosophy. To attest Europeans' "deep-seated tradition of love for the environment," he mentions works of Thoreau, Rousseau, Tolstoy, Chekhov, Goethe as "[representing] a deep-seated love of nature that was instinct in the ancient traditions of Europe."[48] It is notable that Judge implied love for natural beauty if we recall the passionate repre-

[43] Dissenting Opinion of Vice-President Weeramantry, Kasikili/Sedudu Island (Botswana/Namibia), Judgement, ICJ Reports, 1999, 84.

[44] Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Memorial of Argentina, 2007, 144, 193.

[45] Ibid., 165, 160.

[46] Ibid., 193.

[47] Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Merits), 2007, ICJ Reports, 49.

[48] Separate Opinion of Judge Weeramantry, Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, ICJ Reports, 1997, 105.

sentations of natural beauties by the writers mentioned above. For instance, Thoreau prefered even "ugly places of nature" and considered them "superior to the most cultivated places of humanity."[49] However, impressive words uttered by even such an authoritative ICJ judge cannot suffice to asccertain the legal protection of the natural beauty by the ICJ case law.

In the latest case related to the environmental issues, ICJ experienced its first opportunity to examine compensation for damage to the environment. In particular, Costa Rica (the applicant) claimed "22 categories of [ecological] goods and services that could have been impaired or lost" as a result of violation of International Law by Nicaragua.[50] The list of the goods and services presented by Costa Rica included both non-use and use values, including natural beauty as an aesthetic value of the environment.[51] But Costa Rica claimed compensation only for the damage to the consumptive use values of the environment.[52] This is logical, as according to the international law, the compansation is required for only monetary damage.[53] In this case Nicaragua argued that it was not possible to "observe market prices for the aesthetic values"[54] and Costa Rica agreed by affirming that aesthetic value had no monetary valuation.[55]

IV. Protection of Natural Beauty and Case Law of European Court of Human Rights

There is a huge realm of environmental law with more than five hundred multilateral environmental agreements protecting environment and its diverse values.[56] Hovewer, European Convention on Human Rights (ECHR) is not one of them, as

[49] Gillespie A., International Environmental Law, Policy, and Ethics, 2nd edition, Oxford University Press, 2014, 70.

[50] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, ICJ Reports, 2018, 55; Harrison J., Significant International Environmental Law Cases: 2017–18, Journal of Environmental Law, Vol. 30, No. 3, 2018, 528.

[51] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Memorial of Costa Rica on Compensation, Vol. I, ICJ, 3 April 2017, 103.

[52] Ibid.

[53] Draft Articles on Responsibility of State for Internationally Wrongful Acts, with Commentaries, the International Law Commission, 2001, UN Doc A/56/10, 99.

[54] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Counter Memorial of the Republic of Nicaragua on Compensation, ICJ, 02 June 2017, 116.

[55] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Memorial of Costa Rica on Compensation, Vol. I, ICJ, 3 April 2017, 131.

[56] See: ECOLEX, The Gateway to Environmental Law, <https://shorturl.at/djKT0> [01.12.2023].

the European Court of Human Rights (ECtHR) clarified several times in its case law that the ECHR does not provide the protection of the environment as general.[57] Though it clarified in its case law that if the environmental deterioration "directly affect an [individual's] home, family or private life and the adverse effects of the environmental hazard [...] attain a certain minimum level of severity," then an issue under article 8 of the ECHR could be raised.[58] ECHR also explained that "the assessment of that minimum [level of severity] is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects."[59]

Futhermore, like certain rights, including the right to property guaranteed under the Convnention, there is not an absolute one that could be restricted and one of the legitimate aims for that is the environmental conservation,[60] "which in today's society is an increasingly important consideration, having become a cause the defence of which leads to a constant and sustained interest of the public and consequently the public authorities."[61] Therefore, in a number of cases, the Court established that "environmental conservation policies, where the community's general interest is pre-eminent, confer on [a] state a margin of appreciation that is greater than when exclusively civil rights are at stake."[62] As it was explained above (Chapter II) one of the main reasons for natural conservation is protection of natural beauty. Therefore, according to the ECHR case law the Parties to the Convention can restrict an individual right in the name of environmental conservation, including the natural beauty protection. In addition, in the Muriel Herric v. UK Case the protection of "outstanding natural beauty" was explicitly recognised as a "general interest."[63] But what happens when a state itself violates environmental conservation rules and as a result, aesthetic value of the environment is lost at the same time?

[57] Manual on Human Rights and the Environment, 3rd edition, Council of Europe, 2022, 29.

[58] Leon and Agnieszka v. Poland [ECtHR], Judgement, App. No. 12605/03, 21 July 2009, para.100; Kobylarz N., The European Court of Human Rights: An Underrated Forum for Environmental Litigation, Sustainable Management of Natural Resources: Legal Instruments and Approaches, edited by H. T. Anker and B. E. Olsen, Intersentia, 2018, 112; Manual on Human Rights and the Environment, 3rd edition, Council of Europe, 2022, 29.

[59] Ibid.

[60] Darpö J., Can Nature Get It Right? A Study on Rights of Nature in the European Context, European Parliament, 2021, 27.

[61] Deppalle v. France [ECtHR], Judgement, App. No. 34044/02, 29 March 2010, para. 81.

[62] Ibid., para. 84.

[63] Muriel Herrick v. United Kingdom [ECtHR], Judgement, App. No. 11185/84, 11 March 1985, para. 279.

In this respect we need to discuss two ECHR cases: *Unver v.Turkey* and *Kyrtatos v.Greece*.[64] In the first case of *Unver v.Turkey,* the applicant contended at national court that violation of natural conservation rules by local authorities "...[deprived] him of his right to the peaceful enjoyment of the panoramic view from his house."[65] But the applicant himself repudiated that he did not contend "the violation of his right to a panoramic view" but just violation of his right to "... peaceful enjoyment of his property..."[66]

ECHR founded the application inadmissible. It observed that "Article 1 of Protocol No. 1 does not, in principle, guarantee a right to the peaceful enjoyment of possessions in a pleasant environment."[67] The term "pleasant environment" could be interpreted in such a broad manner that we should suppose the Court definitly implied natural beauty. Although, it should be noted that in this case the Court speaks from the perspective of the Article 1 of the Protocol No. 1 and not the entire Convention. Thus, one could think that this decision does not exclude the opportunities for protecting an aethetic value of the environment provided that losing of it influences the other rights within the scope of the Convention. However, in the case of *Kyrtatos v. Greece* the ECtHR stated that the applicants did not present the cogent arguements to prove that losing the "scenic beauty" near the applicant's house had a direct impact on their rights under the article 8 of the Convention. Therefore, losig the "scenic beauty" near the applicant's house, if any, would amount to the "general deterioration of the environment" and the court reiterated that "...neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such."[68]

In addition, the Court noted that if the case had been related to the forest destruction in the vicinity of the applicant's house, there could have been higher possibility of

[64] Kobylarz N., The European Court of Human Rights: An Underrated Forum for Environmental Litigation, Sustainable Management of Natural Resources: Legal Instruments and Approaches, edited by H. T. Anker and B. E. Olsen, Intersentia, 2018, 106; Manual on Human Rights and the Environment, 3rd edition, Council of Europe, 2022, 87.

[65] Unver v. Turkey [ECtHR], Judgement, App. No. 36209/97, 26 September 2000, A.

[66] Ibid.

[67] Ibid.

[68] Kyrtatos v. Greece [ECtHR], Judgement, App. No. 41666/98, 22 May 2003, para. 52; Manual on Human Rights and the Environment, 3rd edition, Council of Europe, 2022, 34; Roagna I., Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights, Council of Europe Human Rights Handbooks, Strasbourg, 2012, 78.

establishing the direct impact on applicant's well-being.[69] It should be concluded that by mentioning the forest destruction, the court implies the air quality deterioration. It means that the problem of the applicant's arguements was not a dearth of high degree of convincement but the Court merely does not recognise the influence of the aesthetic value of the environment on the quality of human life.

In his dissenting opinion, Judge Zagrebelsky noted that he sees "no major difference between the forest destruction and destruction of the extraordinary swampy environment the applicants were able to enjoy near their house." The latter indeed had an influence on the applicants' life quality. He also reminds the court of the status of the Convetion of a living instrument and recommends the Court to "recognise the growing importance of environmental deterioration on people's lives."[70] The fact that the first decision was adopted unanimously and the second one has just one dissenting opinion, manifests that the court is very adamant about recognising losing access to the natural beauty being "decisive for the"[71] life quality.

V. Conclusion

In this article it was clarified that the natural beauty as an aesthetic value is considered non-consumptive use value and is recognised as a legally protected value of the environment. The case law of ICJ and ECtHR was analysed to examine whether the value is practically protected.

The ICJ case law does not establish any certain approach for protecting the natural beauty. In particular, the analysis given in the Chapter 3 reveals that the court has never considered issues regarding the protection of the environmental aesthetic value. It had an opportunity, however, which was missed for the Court declared the issue to be out of its jurisdiction due to specific circumstances. But the ICJ case law is still worthwhile in this respect. Despite the fact that the issue has never been a subject of its judgments on the merits, the court has never refused that the natural beauty represents a legally protected value. Furthermore, there are meaningful memorials of the dispute parties manifesting a legal understanding of the value. Therefore, we can conclude that the precendental judgment of ICJ on the natural beauty

[69] Kyrtatos v. Greece [ECtHR], Judgement, App. No. 41666/98, 22 May 2003, para. 53.

[70] Partly Dissenting Opinion of Judge Zagrebelsky, in: Kyrtatos v. Greece [ECtHR], Judgement, App. No. 41666/98, 22 May 2003.

[71] Unver v. Turkey [ECtHR], Judgement, App. No. 36209/97, 26 September 2000.

protection is yet to come. Therefore, the main challenge the court may face is a lack of unified methodology for assessing the environmental damage, including a damage to the aesthetic value.[72]

As for the case law of ECHR, it was stated above that the Parties to the Convention are entitled to restric an individual right in the name of the environmental conservation, including the protection of natural beauty. But the Court does not establish interference in the right ensured under the article 8 of ECHR when the natural beauty is destroyed in the vicinity of the applicants' living area. The court's approach is quite unambiguous, but reasonableness of this approach could be questioned.

As it was mentioned, despite "there is no explicit right in the Convention to the clean and quiet environment"[73] the Court has well established case law that significant detorioration of the environment influencing an individual's "living area" and thus provides a direct and serious effect on the quality of his/her life that can be qualified as a violation of the article 8 of the Convention.[74] Such interference may stem from intangible sources like noise, emissions, smells or other..."[75] For instance, in the case titled *Brânduşe v. Romania* it was established that odour near a living area may have a deleterious impact on the quality of human life.[76] It is out of both the author's intention and competence to compare the significance of the sense of smell and the sense of vision with each other. Though, bearing in mind that both represent essential parts of a human being's health, arises a question: can the distruption of a sense of smell be regarded as an interference at a certain level of severity in certain circumstances and why the same approach should not be used to the distruption of a sense of vision by distroying the natural beauty? It is obvious,that in case of the latter it will be required for the Court to determine strict criteria for establishing interference. For instance, at least the beauty of the natural place should not be disputed. As people have different perceptions of beauty,[77] it is necessary the place to be officialy protected.

[72] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, ICJ Reports, 2018, 44.

[73] Leon and Agnieszka Kania v. Poland [ECtHR], Judgement, App. No. 12605/03, 21 July 2009, para. 98; Manual on Human Rights and the Environment, 2nd edition, Council of Europe, 2012, 47.

[74] Manual on Human Rights and the Environment, 3rd edition Council of Europe, 2022, 34.

[75] Ibid., 34.

[76] Ibid., 36.

[77] Richardson B. J., The Art of Environmental Law Governing with Aesthetic, 1st edition, Bloomsbury Publishing, 2019, 112.

It has been twenty years since Judge Zagrebelsky recommended the court to keep up with contemprorary environmental challenges. Therefore, new application like *Kyrtatos v. Greece* could have a great importance to ascertain whether the recommendation is taken into consideration. An existing precedent of a substantial evovlement of the Court Case Law (as it happened in case of Bancovich Decision)[78] increases the chance of reviewing Court's established approach in this regard as well.

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[78] Partly Dissenting Opinion of Judge Chanturia, Georgia v. Russia (II) [ECtHR], Judgement, App. No. 38263/08, 29 January 2021, para. 7; Mallory C., A second coming of extraterritorial jurisdiction at the European Court of Human Rights?, Questions of International Law, Vol. 82, 2021, 32.

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Legal Nature of Appeals in Polish Civil Proceedings

ABSTRACT

The analysis of the characteristic features of appeals in civil proceedings in Poland gives a way to the conclusion that the system of these measures is extensive. The proper regulation of legal remedies system is important to preserve the right to a court. This is determined by the characteristics of these remedies. The article discusses the most important features, thus, it can be concluded that inadequate regulation of legal remedies mostly concerns the decisions, as the legislator introduced a horizontal complaint (at the expense of the horizontal complaint) too broadly. In certain respects, this standardisation violates the principle of instantiation, which should be the rule.

Keywords: Legal remedy, right to a court, devolution, vertical and horizontal complaints.

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I. Introduction

The appealability of judgments is one of the basic elements of the right to a court, as it allows for their review and elimination of judgments from legal circulation while the judgments are contrary to the law, erroneous or unjust in the public perception. This is because it is assumed that judges adjudicating at higher instances, have greater legal knowledge, professional and life experience. Besides, their reasoning is more logical and they are guided by a stronger sense of justice. It is important, however, that the legal remedies system is established by each state for there is no uniform standard in this respect. As a result, it is regulated differently in various legal systems, even in case of common or similar elements. In particular, it applies to the decisions' catalogue that may be subject to appeal and remedies that may be brought.

In the Polish civil proceedings, the appeals system is very extensive. Each appeal can be characterised by different criteria, but the rule is that a judgment may be subject to one appeal only (the so-called non-competitive appeal rule). It should be obvious to the party whether and how he/she may challenge a specific decision. In practice, however, many doubts arise in this area, particularly regarding complaints.

The purpose of the study is to indicate the basic features of the legal remedies and assess if they were properly shaped. It is extremely important, as the system of these remedies is quite elaborate, with the structure being relatively complex, which is especially the case when it comes to challenging orders.

II. The Principle of Contestability of Decisions

The contestability of decisions, although it is one of the basic assumptions of the right to a court and is considered a jurisdiction and feature of judicial decisions,[1] does not derive from international regulations. Therefore, it does not constitute a sanctioned standard of a fair trial. In particular, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome, dated 4 November 1950,[2] says in its first sentence that everyone is entitled to a fair and public hearing within a reasonable period of time by an independent and impartial law-established tribunal defined by law when adjudicating on his civil rights and obligations. The Convention does not oblige Contracting States to establish appeal or cas-

[1] Zembrzuski T., Skarga kasacyjna. Dostępność w postępowaniu cywilnym, Warsaw, 2011, 162.

[2] Journal of Laws of the Republic of Poland of 1993, No. 61, item 284, as amended.

sation courts, but the guarantees of Article 6 ECHR must be respected there where such courts exist, e.g., to the extent that it should guarantee litigants an effective right of access to the courts for determining their "civil rights and obligations." How this provision applies to appellate or cassation courts depends on particular features of the proceedings in question and their totality in the national legal order, including the role of the cassation court in the national legal order, that must be taken into account.[3]

Besides, this requirement (the contestability of decisions) is not introduced by Article 47 of the Charter of Fundamental Rights of the European Union, dated 26 October 2012.[4] Only in Article 14(5) of the International Covenant on Civil and Political Rights of 19 December 1966,[5] the right of appeal to a higher court is guaranteed, but only to a person convicted of a criminal offence (to have the decision on guilt and punishment reviewed under the law). A similar provision is contained in Article 2 of Protocol No. 7 to the ECHR, drawn up on 22 November 1984 in Strasbourg.[6]

In one hand, it is pointed out that instanalisation of proceedings causes an additional guarantee of a correct (in procedural and substantive terms) decision contributing to fuller realisation of the right to a court. On the other hand, it leads to a prolongation of the proceedings' duration and significant increase in their costs having a negative impact particularly on the position of the weaker party.[7] It is also submitted that at least to some extent, any appeal proceedings constitute a repetition of the previous decision-making process, while not guaranteeing the avoidance of errors and omissions that may be committed by the second instance court.[8]

[3] See e.g.: judgments of the ECtHR: of 22 March 2007, application No. 8932/05, Siałkowska v. Poland, Legalis, § 103; of 12 January 2010, application No. 33539/02, Bąkowska v. Poland, Legalis, § 44.

[4] OJ EU C No. 326, 2012, 391.

[5] Journal of Laws of the Republic of Poland of 1977, No. 38, item 167.

[6] Journal of Laws of the Republic of Poland of 2003, No. 42, item 364. As Article 2 states: "(1) Anyone who has been found guilty of an offence by a court shall have the right to have his case heard by a higher court, both as to the verdict of guilt and as to the punishment. The exercise of this right, as well as its grounds, shall be regulated by law. (2) Exceptions to this right may be made in the case of minor offences, as defined by law, or in cases where a person has been tried in the first instance by the Supreme Court or has been found guilty and convicted as a result of an appeal against an acquittal by a court of first instance.".

[7] Zieliński A., Budzące wątpliwości przepisy Konstytucji o ochronie sądowej i ich wykładnia, in: Proces cywilny. Nauka, kodyfikacja, praktyka. Księga jubileuszowa dedykowana Profesorowi Feliksowi Zedlerowi, edited by P. Grzegorczyk, K. Knoppek and M. Walasik, Warsaw, 2012, 66.

[8] Grzegorczyk P., Dopuszczalność i kształt apelacji w postępowaniu cywilnym – perspektywy przyszłej regulacji z uwzględnieniem standardów konstytucyjnych i międzynarodowych, in: Postępowanie rozpoznawcze w przyszłym Kodeksie postępowania cywilnego, edited by K. Markiewicz and A. Torbus, Warsaw 2014, 221.

However, the instance-based model of judicial proceedings is widely accepted in the Eu member countries in criminal and broadly defined civil matters. Only few countries have chosen to explicitly or implicitly (by mentioning specific levels of courts) give a constitutional status to this principle (e.g. Article 25(4) of the Hungarian Constitution, Section 98 of the Finnish Constitution, Article 119 of the Bulgarian Constitution, Article 91 of the Czech Constitution).[9] In this connection, it is emphasised that in most countries the instancerity of judicial proceedings is understood as a natural rule, not requiring constitutional legitimacy.[10]

Relevant provisions are contained in the Constitution of the Republic of Poland. Each party has the right to appeal against judgments and decisions issued in the first instance and exceptions to this principle and the procedure of appealing are determined by law (Article 78 of the Constitution of the Republic of Poland). This constitutes the implementation of the principle stemming from Article 176(1) of the Constitution of Poland, according to which court proceedings are at least two-instance.

III. Systematics of Legal Remedies

"Legal remedies" shall be deemed to be all means provided by law for a party aggrieved in whole or part by a judicial decision to restrain the injustice or illegality of the decision[11] and thus producing adverse consequences for the applicant. A party or a participant of the proceedings (or possibly another entity) is therefore (in principle) in a position to initiate a procedure to review the judgment or decision rendered to eliminate the defective judgment or decision from the market. It is important to note that following the exclusivity principle, only one legal remedy can be available to an entity against a given type of decision. Therefore, there is no choice. It is therefore stressed that the legal remedies system should be designed in a way that it could exclude any possibility of their concurrence or competition.[12] However,

[9] Konstytucja RP, Tom II, Komentarz do art. 87–243, edited by M. Safjan and L. Bosek, Warsaw, 2016, art. 176, 4.

[10] See: Michalska-Marciniak M., Zasada instancyjności w postępowaniu cywilnym, Warsaw 2013, 40 et seq.

[11] Michalska-Marciniak M., Konstytucyjne podstawy środków zaskarżenia w prawie polskim, in: Wokół problematyki środków zaskarżenia w postępowaniu cywilnym, edited by M. Michalska-Marciniak, Sopot, 2015, 23.

[12] See e.g.: Bladowski B., Zażalenie w postępowaniu cywilnym, Cracow 2006, 37; Zembrzuski T., Komplementarność nadzwyczajnych środków zaskarżenia – skarga kasacyjna a skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia, in: Wokół problematyki środków zaskarżenia w postępowaniu cywilnym, edited by M. Michalska-Marciniak, Sopot, 2015, 239 et seq.

there are exceptions to this rule in the procedural law: for example, the decision on the costs of the proceedings may be challenged by a complaint (a formal measure) or by a measure challenging the decision on the merits, if the party challenges it on the merits (there is then no need to file a separate complaint).

The legal remedies for eliminating a defective court decision do not represent a uniform group.[13] Over the years, the legal remedies system evolved in Poland's[14] civil proceedings and this particularly applies to the complaints being subject to numerous modifications recently.

It is generally accepted to divide legal remedies (appeals) according to the following criteria:

(1) the judgment nature:

- **a.** ordinary – available against decisions that aren't final,
- **b.** extraordinary – available against final judgments;

(2) the court hearing the appeal:

- **a.** devolutive (appeals *sensu stricto*) – transfer the case cognizance to a higher court,
- **b.** non-devolutive (appeals *sensu largo*) – does not transfer the case cognizance to a higher court. It is cognized by the court which issued the contested decision;

(3) suspension of the contested decision:

- **a.** suspensive – suspends the execution of the contested decision,
- **b.** non-suspensive – does not suspend the execution of the contested decision;

(4) type of error that may lead to a challenge:

- **a.** complete – where the law does not limit the grounds on which they may be brought,
- **b.** incomplete – may rely only on the grounds indicated in the Act.

The legal remedy nature is determined primarily by the first three criteria and will be discussed later. The fourth subdivision coincides with the first one greatly. In that extraordinary remedies there are incomplete remedies, while ordinary remedies

[13] Hanausek S., System zaskarżania orzeczeń sądowych w nowym polskim postępowaniu cywilnym, Studia Cywilistyczne, No. 9, 1967, 141 et seq.

[14] Doubts have been expressed in the doctrine as to whether it's possible to speak of a system of legal remedies in Polish civil proceedings at all, and that the notion of a system of legal remedies is currently used traditionally rather than in the dictionary – see more fully: System postępowania cywilnego, Tom 5, Środki zaskarżenia, edited by A. Góra-Błaszczykowska , Warsaw, 2023, 7.

are, in principle, complete ones. They may be challenged on the basis of any defect, i.e. relating to both factual and legal grounds and concerning procedural and substantive law infringement.[15] The nature of a legal remedy is not also determined by the criterion of the outcome that may be achieved through consideration, i.e. review and cassation. For it is not possible to make a strict division in this respect, since even if a certain appeal is in principle of a revisional nature, i.e. it should aim to change the contested decision (reformatory ruling) like an appeal or a complaint, in certain cases it is possible to make a cassation ruling, i.e. to overturn the contested decision and refer the case for re-examination to a lower instance court or to formally end the proceedings (rejection of a lawsuit, discontinuance of proceedings).

IV. Ordinariness VS Extraordinary Nature of Appeals

Following Article 363 (1) of the Civil Procedure Code, a court decision is final if no means of appeal or other legal remedies are observed against it.

The legal remedies are thus distinguished as:

1/ the means of appeal: appeal and complaint;

2/ other legal remedies: objection against a default judgment, objection against a payment order under the writ of payment procedure, complaint against a decision of a court registrar, complaint against bailiff's actions, objections in enforcement proceedings.[16]

Some authors also report other legal remedies:

- an appeal against a decision of a pension authority,
- appeal against a decision of the UOKiK President and other Presidents (so-called market regulators).[17]

These are all ordinary legal remedies, as they are available in the course of an instance against non-final decisions of courts or other authorities. On the other hand, extraordinary remedies, i.e. the ones available against final judgments aiming to overturn them, are as follows: action for annulment of an arbitral award, application for

[15] An exception to this rule is provided for in Article 505^{9} (1^{1}) of the Code of Civil Procedure, according to which an appeal in summary proceedings may be based only on allegations of: (1) violation of substantive law through its misinterpretation or misapplication; (2) violation of procedural rules if it could have affected the outcome of the case.

[16] See e.g.: Dolecki H., Postępowanie cywilne. Zarys wykładu, Warsaw, 2007, 335; Jodłowski J., Resich Z., Lapierre J., Misiuk-Jodłowska T., Weitz K., Postępowanie cywilne, Warsaw, 2007, 471-472.

[17] Dolecki H., Postępowanie cywilne. Zarys wykładu, Warsaw, 2007, 335; Świeboda Z., Skarga jako środek zaskarżenia w postępowaniu o zamówienia publiczne, Przegląd Sądowy, No. 4, 2002, 65.

the resumption of proceedings, cassation appeal, extraordinary appeal and application for a declaration of the final decision invalidity.[18]

Beyond this division we see an extraordinary legal remedy, a special one (outside the course of proceedings)[19] – appeal for a declaration of unlawfulness of the final judgment (decision on the merits) of a second instance court ending case proceedings, if by its issuance a party was prejudiced, and it was not and is not possible to amend or set aside that judgment through other legal remedies available to a party under the Code. Exceptionally, when the unlawfulness results from the violation of fundamental principles of the legal order or constitutional freedoms or rights of a human being and citizen, the unlawfulness of the final judgment of a first or second instance court ending the case proceedings may also be required if a party did not use the legal remedies to which it is entitled, unless it is possible to amend or set aside the judgment by other legal remedies the party is entitled to (Article 424^1 (1) and 2 of the Civil Procedure Code).

As defined above, the obligation to ensure the final judgment challengin possibility does not derive from the EctHR case law, as it is not an implementation of the right to a court. A party is supposed to be able to challenge a judgment by ordinary means of appeal. Nevertheless, it should be remembered that if such a possibility is introduced in a given country (as it is in Poland), it must be real. Thus, the final judgment challenging premises should be constructed in a way ensuring the parties to know when they ca file an extraordinary appeal. In other words, the state is free to enjoy the possibility of challenging final judgments, but this freedom is limited.

The basic aspects of extraordinary legal remedies (including an appeal for a declaration of the final judgment unlawfulness) in civil proceedings in Poland:

1/ there are subject-matter barriers. They are not necessarily available in all cases (primarily a cassation appeal);

2/ there are subjective barriers (extraordinary complaint), i.e. it can be brought only by strictly defined entities (the Prosecutor General, the Ombudsman, the President of the General Prosecutor's Office of the Republic of Poland, the Ombudsman for Children, the Ombudsman for Patients' Rights, the Chairman of the Financial Supervision Commission, the Financial Ombudsman, the Ombudsman for Small and Medium-sized Entrepreneurs and the President of the Office of Competition and Consumer Protection);

[18] Asłanowicz M., Nadzwyczajne środki zaskarżenia w postępowaniu cywilnym, Warsaw, 2022, 29-20.

[19] Such remedies are defined as legal means by which a final judicial decision may be overturned (set aside) if it's affected by a specific defect. See: Osowy P., Systemy nadzwyczajnych środków zaskarżenia w prawie procesowym cywilnym w Europie – zagadnienia wybrane, Rejent 2004, No. 5, 87-89.

3/ they can only be brought on specific grounds (incomplete remedies);

4/ if they are brought before the Supreme Court, the so-called attorney-client privilege applies (Article 87[1] of the Civil Procedure Code) so that, apart from certain exceptions, a party cannot bring this measure independently but with the help of a professional attorney;

5/ a party bringing an action for a declaration of the final judgment unlawfulness (Article 424[1] of the Civil Procedure Code) is not required to show that it was not and is not possible to raise the contested judgment through an extraordinary action. Thus, the action is not subject to rejection[20] – this is a kind of exception to the rule that one decision may be subject to a single remedy.

V. Devolution VS Non-Devolution of Appeals

1. General Considerations

A judgment issuance (and in some cases an order) during civil proceedings is linked with the contestability and – in accordance with the constitutional principle – it applies to judgments of the first instance court (not only that, as we will discuss below). Referring to the Constitutional Tribunal jurisprudence, the doctrine[21] points out that the constitutional principle of two-instance court proceedings presupposes the following:

1) an effective access to the second instance court: the parties should be granted appropriate remedies that trigger the review of judgments issued by the first instance court;
2) entrusting the case hearing at second instance to a higher court (devolutive remedies);
3) appropriate shaping of the procedure before the second instance court to comprehensively examine the case and issue a substantive decision.

In the current state of the law, the instantionality principle shows significant deviations, which will be discussed below. Notaby, while statutory limitation of the appealability of judgements (including the limitation of devolutiveness) does not con-

[20] Resolution of 7 judges of the Supreme Court – legal principle of 15 October 2020, III PZP 4/20, Case law of the Supreme Court of Labour and Social Insurance Chamber (OSNP) 2021, No. 5, item 48.

[21] See: Michalska-Marciniak M., Konstytucyjne podstawy środków zaskarżenia w prawie polskim, in: Wokół problematyki środków zaskarżenia w postępowaniu cywilnym, edited by M. Michalska-Marciniak, Sopot, 2015, 26 et seq.

stitute a breach of Article 78 of the Polish Constitution, the appeal shaping with the exclusion of devolutiveness should be justified by important and objective reasons.

2. Devolutive and Non-Devolutive Complaints

The first exception is the the so-called horizontal (non-devolutive) complaint phenomenon, when the contested procedural decision (court decision or order of the presiding judge) is reviewed not by a higher, but the court that issued it, albeit in a different composition. A significant extension of this phenomenon was made by the Act of 4 July 2019, amending the Act – Code of Civil Procedure and certain other acts.[22] Currently, the following complaints can be distinguished:

- vertical complaint to the second instance court (Article 394 (1) of the Civil Procedure Code);
- horizontal complaint to the first instance court (Article 394^{1a} (1) of the Civil Procedure Code);
- horizontal complaint to the second instance court (Articles 394^{2} (1) and 1^{1} of the Civil Procedure Code);
- vertical complaint to the Supreme Court (Articles 394^{1} (1) and 1^{1} of the Civil Procedure Code)[23].

There is a solution that in trial proceedings a complaint is entitled if it is listed in a closed catalogue. Besides, the decisions being contestable by complaint are indicated in other proceedings. Besides, the above-given provisions are also applied accordingly in other civil proceedings than trial (Article 13 (2) of the Civil Procedure Code). Subsequent amendments to the Civil Procedure Code resulted in creating completely different categories of complaints, deviating from the classic approach to a complaint as a measure of devolutive character. While the appeal is not subject to changes (as far as the nature of this remedy is concerned), with regard to decisions being in principle ancillary (formal orders and, exceptionally, orders of the president), the legislator considered that the complaint proceedings should be accelerated without forcing the second instance court to deal with minor issues of little procedural importance and complexity.[24] Doing so, it is emphasised in the doctrine that, besides to the positive

[22] Journal of Laws of the Republic of Poland of 2019, item 1469, as amended.

[23] In view of the subject of the study, complaints, which are de facto means of initiating proceedings before the court, have been omitted; see more fully: System postępowania cywilnego, Tom 5, Środki zaskarżenia, edited by A. Góra-Błaszczykowska , Warsaw, 2023, 184-185.

[24] See: Explanatory Memorandum to the Draft Amendment, Parliamentary Paper No. 3137, 87.

aspects (shortening the complaint procedure duration, eliminating the case file transfer to the second instance court, delimitation of the competences of the courts of both instances while relieving the second instance court of the burden to resolve minor issues), horizontal complaints also show negative aspects (lack of an instance-based review of the decision, risk of consolidation of the views developed in individual courts on the principles of interpretation and application of the provisions[25]). It is therefore important the negative aspects not to outweigh the positive ones, as it may result in a departure from the principle of the right to a court in relation with the instance-based review of court decisions.

The Polish legislator expanded the system of horizontal complaints, although the principle still represents the vertical one. All this follows from Article 394 (4) of the Civil Procedure Code (which entered into force on 1 July 2023), saying that if a specific provision stipulates that a party is entitled to lodge a complaint against a court decision, but does not specify which court is to hear it, the complaint is heard by the second instance court. This rule was adopted unanimously in the jurisprudence of the Supreme Court, nevertheless it excludes interpretative doubts on the introduction of the horizontal complaint and moreover, resolves the problem of the so-called orphan complaints against decisions of the first instance court.[26] It follows from the fact that a horizontal complaint can be lodged only if a statutory provision ensures this.

It is also a consequence of the regulation defined in Article 394^{1b} of the Civil Procedure Code, according to which, if the order referred to in Article 394 (1) of the Civil Procedure Code is appealed against and simultaneouslythe order referred to in Article 394^{1a} (1) of the Civil Procedure Code, the complaint shall be heard by the second instance court. This is the conflict rule for vertical and horizontal complaints. It applies particularly to the decision to refuse giving reasons for the decision and serve it, which is indicated in Article 3941a (1(7)) of the Civil Procedure Code (as appealable by a horizontal complaint) and which simultaneously ends the case proceedings, if it concerns a decision ending the proceedings (e.g. on discontinuance of the pro-

[25] Biała M., Nowy model postępowania zażaleniowego ze szczególnym uwzględnieniem zażalenia poziomego – problemy praktyczne, Lex/el, 2020, point I.

[26] In ancillary proceedings and separate laws, there are provisions which provide for a complaint against a specific order of the court of first instance, but do not specify whether this is a vertical or horizontal complaint, e.g. Articles 547 (2), 551 (2), 554 (3), 556 (1) and 2, art 586^{1} of the Code of Civil Procedure etc; see more fully: Dziurda M., Charakter zażalenia na postanowienie sądu I instancji po nowelizacji KPC, Monitor Prawniczy, No. 11, 2021, 604 et seq.; Dziurda M., Nowelizacja Kodeksu postępowania cywilnego z 4.7.2019 r. w orzecznictwie Sądu Najwyższego, Monitor Prawniczy, No. 17, 2021, 897.

ceedings, on rejection of the claim). Article 394 (1) *in prinicipio* of the Civil Procedure Code applies, meaning that such a decision is subject to appeal to the second instance court following general rules.[27]

The decisions' catalogue of the first instance court and orders of the presiding judge, subject to appeal to the second instance court (Article 394 (1) of the Civil Procedure Code), can be divided into the following categories:[28] 1) court decisions or presiding judge's orders terminating the case proceedings (discontinuance of proceedings, rejection of a claim statement, return of a claim statement or a letter filed as a claim statement, which does not indicate a demand for the case examination); 2) orders relating to the transfer of the proceedings to another court (transfer of the case to an equal or lower court or taking up the proceedings in another mode); 3) orders resulting in a stay of proceedings (suspension of proceedings and refusal to take up suspended proceedings); 4) orders as to the content of a decision (rectification or interpretation of a decision or refusal to do so); 5) orders (orders) as to costs and fees (reimbursement of costs, determination of the rules for the parties to bear the costs of a trial, reimbursement of a fee or order to pay court costs – if a party does not file an appeal on the merits).

The decisions' catalogue on which a complaint to the same panel of the first instance court is ensured, is relatively broad (Article 394^{1a} (1) of the Civil Procedure Code). This catalogue is not entirely correct, for:

1) the refusal or withdrawal of exemption from court costs, refusal or withdrawal of the appointment of a lawyer and a motion dismissal to exclude a judge affect the procedural situation of the parties and their right to a fair trial;
2) the dismissal of an opposition to an intervener's intervention and an intervener's inadmissibility as a result of the opposition's allowance may have a significant effect on the trial;
3) sentencing a witness, expert, party, his/her attorney and third party to a fine, ordering a witness to be forcibly brought in and arrested and refusing to exempt a witness and expert from a fine and a witness from being forcibly brought in represent the order penalties.

[27] See decisions of the Supreme Court: of 15 December 2021, III CZP 89/20, OSNC-ZD (Case law of the Supreme Court of the Civil Chamber – Additional collection) 2022, No. 3, item 43; of 21 January 2022, III CZP 10/22, OSNC 2022, No. 6, item 63; resolution of the Supreme Court of 4 August 2021, III PZP 6/20, OSNP 2022, No 1, item 1.

[28] See too: Kodeks postępowania cywilnego. Komentarz, edited by A. Zieliński, Warsaw, 2022, art. 394, 3.

The decisions of the second instance court that may be appealed to another panel of that court, concern the following (art. 394^2 (1) and 1^1 of the Civil Procedure Code): the appeal rejections, rejection of the application for the proceedings' resumption, discontinuance of the proceedings caused by the appeal filing, exemption refusal from court costs or withdrawal of this exemption, refusal to appoint a lawyer or a legal adviser or their dismissal, motion dismissal for a judge exclusion, reimbursement of the trial costs, unless a cassation appeal is filed, reimbursement of the costs of unpaid legal aid provided *ex officio*, remuneration of an expert, mediator and witness fees, sentencing a witness, expert, party, his/her attorney and third party to a fine, refusal to give reasons for a decision and serve it, ordering compulsory import and arrest of a witness, refusal to exempt a witness and expert from a fine and a witness – from compulsory import (with the exception of decisions issued following the examination of a complaint against an order of the first instance court). As for the orders terminating case proceedings, more appropriate remedy should be a complaint to the Supreme Court, although the possibility of appealing to this Court is an exception. As for such orders, the acceleration of proceedings shouldn't overtake the overriding objective of letting a party have such a decision reviewed by a higher court.

The court decisions catalogue that may be appealed by the Supreme Court is therefore very narrow including only the decision of the second instance court rejecting the cassation appeal and the decision of the second or first instance court rejecting the complaint about the final decision illegality. Besides, the cassation judgment (decision on the merits) of the second instance court, i.e. overturning the judgment of the first instance court and referring to the case for re-examination, may be appealed (Articles 394^1 (1) and 1^1 of the Civil Procedure Code).

3. Self-Control

The second exception to the principle of instantiation is the phenomenon ensured in Article 395(2) of the Civil Procedure Code making the complaint a *de facto* appeal, with a relatively devolutive nature. Pursuant to this provision, if the complaint alleges the proceedings to be invalid or clearly justified, the court which issued the contested decision may revoke the contested decision at a closed session, without sending the files to the second instance court. If required, it can hear the case anew and the reissued decision is subject to appeal following general rules. The self-review purpose (autoremediation) that can take place only after a party lodges

a complaint,[29] is to resolve the case more quickly, in accordance with the applicant's request. By eliminating the proliferation of court instances, this provision aims to rationalise the proceedings and implement the order to consider the case without undue delay (Article 45(1) of the Polish Constitution). All this results in the relatively devolutive nature of the complaint, applying (of course) to the vertical complaint, as the horizontal complaint is not devolutive. However, with regard to the latter complaint, the same court deals with an incidental issue in three cases: by making the contested order, through self-control and by deciding on the complaint merits. The self-control phenomenon should therefore be excluded with regard to horizontal complaints, since the same court examines the complaint on its merits (or, as the case may be, rejects it), then verifies whether the complaint is "manifestly justified," that is to say, when the contested order defect is observed without a deeper analysis (*prima facie*).[30] Alternatively, it considers whether the proceedings are invalid and ultimately, the same court (albeit in a different formation) assesses the complaint merits.

Self-monitoring is only possible in relation to formal orders (possibly orders). It does not apply to substantive judgments. In other words, even if the court observes making a substantive manifest error in a payment order or judgment (in procedural proceedings) or a decision on the merits (in non-procedural proceedings) or that the proceedings are invalid, it is impossible to change the decision (this can only be done by the appellate court and only if the decision is challenged by an appropriate appeal).

4. Specific Appeals

The third exception to the instantionality principle are represented by the so-called specific appeals (objections against a payment order in proceedings by writ of payment, objections against a payment order in proceedings by writ of payment or electronic writ of payment – EPU, objections against a default judgment), for once they are lodged, the case is heard by the court having issued the contested decisions (or possibly by another court with jurisdiction over the case – in the case of an appeal against a payment order issued in the EPU). While appeals show the effect (in principle) of transferring the case examination to a higher court, other (specific) appeals do

[29] See e.g.: decision of the Supreme Court of 18 October 2011, III PZ 8/11, Legalis; Bladowski B., Rozpoznanie zażalenia w postępowaniu cywilnym, Nowe Prawo, No. 5, 1973, 689 et seq.

[30] See e.g.: order of the the Supreme Court of 20 May 1999, II UZ 58/99, OSNP 2000, No. 15, pos. 602; System prawa procesowego cywilnego, Tom III, edited by T. Ereciński and J. Gudowski, Część 1, Środki zaskarżenia, Warsaw, 2013, 478.

not express this feature.[31] This solution, however, cannot be criticised, although the final payment order shows the effect of the final judgment (Article 480^2 (4) of the Civil Procedure Code), while the final default judgment simply represents a judgment. However, when they are issued, there is no full examination of the case merits, either because the procedure is arranged in a way that the court issues a payment order without the defendant expressing his/her position for the first time within 14 days of being served with the order together with the claim statement copy, or because the defendant (for various, specified reasons) did not take a position on the merits of the claim statement and the default judgment was issued as a result. In such cases, the legislator considered that it could be appropriate for the defendant to express his/her position in the case by filing an appeal initiatig relevant proceedings before the court concerned. It is only after the court renders its decision terminating the proceedings that the parties have a remedy before a higher court (depending on a substantive or formal decision, they are entitled to an appeal or a complaint, respectively).

5. Suspensiveness VS Non-Suspensiveness of Appeals

As to whether the appeal lodging suspends the contested judgment execution, the answer is simple: if the non-final judgment is contested, the appeal lodging suspends that judgment execution. If the final judgment is contested, no suspension occurs. However, it should be remembered that the term "enforceability" should be understood as situations when the judgment is actually enforceable, i.e. it is enforceable by the competent enforcement authority (bailiff), as well as when the judgment is not enforceable, but is effective.

An exception in case of non-enforceable judgments is a payment order issued under a writ of payment procedure based on a bill of exchange or cheque (only the former one occurs in practice; a payment order based on a cheque mainly does not take place). It is because pursuant to the first sentence of Article 492(3) of the Civil Procedure Code, this order becomes immediately enforceable upon expiry of the time limit for meeting the claim[32] meaning that it may be enforced by execution even

[31] See: Bodio J., Uwagi o miejscu zażalenia wśród środków zaskarżenia w procesie – z uwzględnieniem nowelizacji kodeksu postępowania cywilnego z 2019 i 2023 r., Palestra, No. 8, 2023, 44.

[32] Pursuant to Article 480^2 (1) and (2(3)) and (4) of the Code of Civil Procedure, in an order for payment the court orders the defendant to satisfy the claim in full, including costs, within the time limit specified in the order, or to lodge an appeal, whereby in the case of an order for payment issued under the order procedure, the time limit (calculated from the date of service of the order) is: one month if the

before it becomes final. This payment order is an enforcement title which, after being provided with an enforcement clause, constitutes grounds for enforcement (Article 777 (1(1)) of the Civil Procedure Code).

Significantly, if objections are lodged against the order, at the request of the defendant, the court may suspend its enforcement. Thus, merely filing the objections to the payment order does not affect its enforceability. In this case, the defendant's motion (included in the objections to the payment order or in a subsequent pleading) is still required. The law does not specify when the court should suspend the enforceability of the payment order, but it should be done when the content of the objections indicates a high probability of the payment order being set aside and/or likelihood of the defendant's damage as a result of the payment order's immediate enforcement.[33]

All this mentioned above does not apply to the case when the State Treasury is the defendant: a payment order issued against the State Treasury is not immediately enforceable after the expiry of the time limit for the claim meeting. It is correct, as in this case there is no fear of a lack of security to deprive the claimant of satisfaction. Interestingly, the legislator privileges the employee, because when adjudicating an employee's claim in labour law cases, the court, *ex officio*, renders the judgment immediately enforceable in the part not exceeding a full monthly remuneration of the employee. It also applies when the State Treasury, represented by the competent *statio fisci*, acts as a defendant.

As for the other payment orders issued during the order procedure, i.e. those issued based on other documents listed enumeratively in Articles 485 (1) and 2^1 of the Civil Procedure Code,[34] in the claim statement the plaintiff may request such an order to be made immediately enforceable (pursuant to Article 333(3) in conjunction with Article 353^2 of the Civil Procedure Code). This request relies on showing how

service of the order on the defendant is to take place in the territory of the European Union, or three months if the service of the order is to take place outside the territory of the European Union.

[33] See: Draniewicz B., Piebiak Ł., Postępowania odrębne, Warsaw, 2007, art. 492, 13; Rylski P., Czy wyłączną przesłanką wstrzymania natychmiastowej wykonalności nakazu zapłaty wydanego na podstawie weksla, warrantu, rewersu lub czeku jest groźba poniesienia przez pozwanego niepowetowanej szkody, Polski Proces Cywilny, No. 4, 2011, 115 et seq.

[34] These are: 1) an official document; 2) a bill accepted by the debtor; 3) the debtor's demand for payment and the debtor's written statement of acknowledgement of the debt; 4) a contract, proof of fulfilment of a mutual non-monetary benefit, proof of delivery of an invoice or bill to the debtor, if the claimant is pursuing a claim for payment of a monetary benefit within the meaning of the Act of 8 March 2013. on counteracting excessive delays in commercial transactions (consolidated text Journal of Laws of the Republic of Poland of 2023, item 711, as amended), interest in commercial transactions specified in that Act or costs of collection referred to in Article 10(1) or (2) of that Act.

the payment delay makes it impossible or considerably difficult to enforce the order or expose the plaintiff to loss.[35]

As defined, a different rule applies to final judgments, i.e. the ones to which no ordinary remedy applies. They are enforceable or effective. However, if a party files an appeal in cassation against a judgment (decision on the merits) of a second instance court, he/she can request this court to suspend the enforcement or effectiveness of that judgment until the cassation proceedings are over. The party must demonstrate that irreparable damage can be caused to it as a result of the judgment enforcement, meaning a severe damage for the party, with consequences difficult to reverse due to: for example, the financial condition of the opposing party or financial or personal condition of the applicant.[36] In this case, the second instance court may (though it is not mandatory) suspend the decision enforcement and if the appeal is dismissed, the court can also suspend the enforcement of the first instance court decision (Article 388 (1) of the Civil Procedure Code).[37] Thus, here we see relative suspensiveness (on application), except for the sale of the property being suspended *ex officio* until the expiry of the time limit for the cassation appeal filing (after filing this appeal, the party must apply for suspension of the enforceability of the judgment). If the opposing party requests, the second instance court may make the stay of judgment enforcement conditional on the plaintiff providing appropriate security (usually, the deposit of an amount in court to secure a possible claim by the defendant). Security may also consist of withholding the release of sum of money to the plaintiff once having been enforced against the defendant or withholding the seized property sale.

The above-mentioned rules on security do not apply to judgments that are not enforceable (e.g. a judgment establishing the invalidity of a contract or the ineffectiveness of a termination of a contract). It means that it is not possible to make the enforceable judgment withholding conditional on the provision of appropriate security, besides the awarded litigation costs.

[35] See: Draniewicz B., Piebiak Ł., Postępowania odrębne, Warsaw, 2007, art. 492, 12.

[36] Kodeks postępowania cywilnego. Komentarz, edited by E. Marszałkowska-Krześ, Legalis, 2023, art. 388, thesis number 4.

[37] The Supreme Court has no jurisdiction to hear such an application; see e.g. order of the Supreme Court of 7 February 2002, II UKN 47/01, OSNP 2002, No. 13, pos. 9.

VI. Summary

The analysis of the appeals' characteristic features during civil proceedings in Poland gives a way to the conclusion that the system of these measures is extensive. From this point of view, when it comes to ordinary legal remedies, the appeal structure does not raise major doubts. The same cannot be said about the complaint developed excessively, with too much emphasis on the horizontal (non-evolutive) complaint. The legislator properly assumes that it is not required for the second instance court to hear a complaint also on a matter with a little impact on the proceedings' course. However, non-devolutive complaints are regulated too broadly. It should be the exception. If the first instance court commits a procedural (*error in procedendo*) and/or judgment error (*error in iudiciando*)[38], there must be a system of procedural measures to eliminate the erroneous ruling and replace it with a correct one. Besides, this system should be as effective as possible. This objective is achieved through the use of devolutive appeals. In the Polish civil proceedings, this principle has been "shaken up."

The extraordinary appeals system is also developed, while – despite various doubts (e.g. as to the legitimacy of an extraordinary complaint) – the legislator-introduced barriers (subjective and objective) are effective letting one conclude that the principle that they are entitled to during strictly defined conditions (not in every case when a party refuses to agree with the final decision) is not violated. They are based on the ordinary legal remedies.

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[38] See more fully: Bladowski B., Środki odwoławcze w postępowaniu cywilnym, Warsaw, 2013, 25; Ereciński T., Apelacja w postępowaniu cywilnym, Warsaw, 2012, 15.

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Legislative Function of the Second Chamber of Parliament of Poland Against the Background of the Solutions of Czech Republic and Romania: *de lege lata* v. *de lege ferenda*

ABSTRACT:

The power of a particular parliamentary chamber is determined by its competences, with law-making being most important. In Poland, the adoption of a bicameral solution was not without controversy. There are many theses in the doctrine that puts into question the adopted order, proposing an attempt to remodel the system. The present study represents an attempt to compare the legislative function of the Senate of Poland, Czech Republic and Romania. The research hypothesis is that the Polish second chamber's competences are most limited in this respect.

The choice of these countries is led by their geographical proximity – they are located in Central and Eastern Europe and share a common history. Besides, they also have similar cultural links often. These countries also have

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bicameral parliaments being uncommon in the region. It is worth noting that these countries had the second chambers of the parliament in their current form since 1990s.

Key words: Parliament, senate, legislative, second chamber.

I. Introduction

The legislative function is to regulate social life areas by means of enacted laws. The parliament is responsible for this process. The power of a particular parliamentary chamber is determined by its competences, with law-making being most important. In Poland, the adoption of a bicameral solution was not without controversy. There are many theses in the doctrine that puts into question the adopted order, proposing an attempt to remodel the system[1]. The present study represents an attempt to compare the legislative function of the Senate of Poland, Czech Republic and Romania. The research hypothesis is that the Polish second chamber's competences are most limited in this respect.

The choice of these countries is led by their geographical proximity – they are located in Central and Eastern Europe[2] and share a common history. Besides, they also have similar cultural links often. These countries also have bicameral parliaments being uncommon in the region[3]. It is worth noting that these countries had the second chambers of the parliament in their current form since 1990s.

[1] See: Opaliński B., Uwagi o potrzebie modyfikacji drugiej izby parlamentu we współczesnym polskim systemie ustrojowym, Przegląd Prawa Konstytucyjnego, No. 1, 2012; Jamróz L., Refleksje nad ustrojową pozycją Senatu RP, in: Prawo, parlament i egzekutywa we współczesnych systemach rządów – Księga poświęcona pamięci profesora Jerzego Stembrowicza, edited by S. Bożyk, Białystok, 2009, 70; Woźnicki M., O potrzebie zmiany Konstytucji RP z 2 kwietnia 1997 r. w zakresie kadencji oraz funkcji Sejmu i Senatu – kilka uwag na tle konstytucji Czech i Słowacji, Przegląd Prawa Konstytucyjnego, No. 2, 2022, 31.

[2] The most commonly referred to area of Central and Eastern Europe was adopted. See: Kłoczowski J., Europa Środkowo-Wschodnia i jej miejsce w Europie, Rocznik Instytutu Europy Środkowo-Wschodniej, No. 1, 2007, 11-33; Skotnicki K., Senat Rzeczypospoliej Polskiej i Senat Republiki Czeskiej. Analiza porównawczo-prawna, Acta Universitatis Lodzensis, Folia Iuridica, No. 70, 2009,103.

[3] Articles 10(2) and 95 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, 78, 483); Article 15(2) Ústava České Republiky, 1992; Article 90 Constitution of Romania,1991; Sebe M., Vas E., The Untapped Potential of Direct Democracy in Romania, in: Direct Democracy in the European Union. The Myth of a Citizens' Union, edited by S. Blockmans and S. Russack, Brussels, 2018, 345-346; Apahideanu I., Unicameralism versus Bicameralism Revisited: The Case of Romania, Studia Politica, Romanian Political Science Review, Vol. 14, No. 1, 2014, 47-88; Admittedly, a consultative referendum was held in Romania in 2009, the majority of citizens voted for the abolition of the Senate, however, its outcome did not result in changes to the structure of the parliament.

II. Legislative Function in Polish Constitutional Solutions

According to the Constitution of the Republic of Poland, the legislative initiative[4] is vested in the MPs, President, Council of Ministers, group of at least 100,000 citizens and the Senate as well. With regard to the second parliamentary chamber as a whole, it means that it is exercised on the basis of a resolution the chamber adopts *in gremio*[5]. There is no analogy here to the MP's initiative. It is meant as an expression of the will of the nation and the second chamber is its voice[6].

The Senate has two competences as part of its participation in the legislative process. The first one is to take a position on the laws passed by the Sejm, while the second one is to put forward legislative initiatives[7]. The Senate has a task of reviewing and correcting bills adopted by the Sejm.

With regard to a legislative initiative, the Senate, on the motion of a committee or at least ten Senators, launches its proceedings. Accordingly, the Marshal (Speaker) of the Senate informs the Prime Minister and the Marshal of the Sejm concerning the fact[8]. The motion, including the bill (draft law), is submitted to the Marshal of the Senate, who forwards it to the relevant committees, including the legislative one. The committees deliberate collectively and submit a jointly developed report to the Senate within maximum 2 months. It shall include issues as to the compatibility of the bill with EU legislation and will be presented by a rapporteur selected out of the Senators[9]. During the second reading, a report is presented to the Senate, a discussion is held and motions are put forward, concluding with the referral of the bill to the relevant committee that is obliged to respond to the motions. If there are no motions, the Senate opens the third reading. During it, an additional committee report is presented and the bill is put to the vote. A bill is passed by the Senate if a simple majority of Senators vote in favour of it, in the presence of at least half of the Senators. Howev-

4 Article 118 of the Constitution of the Republic of Poland, 1997.

5 Szepietowska B., Proces ustawodawczy, in: Parlament, model konstytucyjny a praktyka ustrojowa, edited by Z. Jarosz, Warszawa, 2006, 103.

6 Banaszak B., Rola Senatu w procesie legislacyjnym, Przegląd Sejmowy, No. 5, 2000, 30.

7 Read more about the legislative functions of parliamentary committees: Pajdała H., Komisje w parlamencie współczesnym, Warszawa, 2001, 161-167. On the legislative process since the enactment of the 1997 Constitution of the Republic of Poland see: Wronkowska S., Proces prawodawczy dwóch dekad – sukcesy i niepowodzenia, Ruch Prawniczy, Ekonomiczny i Socjologiczny, No. 2, 2009, 111-128.

8 Article 76 of the Senate of the Republic of Poland Resolution of 23 November 1990.

9 See: Kruk M., Prawo inicjatywy ustawodawczej w nowej Konstytucji RP, Przegląd Sejmowy, No. 2, 1998.

er, if a resolution fails to be adopted in case of a tie vote or if the Senate resigns to hold a vote, the Rules of the Senate provide that the motion in question is again referred to committees for further work. It does not mean that the motion is rejected, however, the second reading phase is extended[10].

The Senate is noticeably more active on legislative matters in relation to acts enacted by the Sejm[11]. There is sometimes a conviction among the deputies of the first chamber that the second chamber existence can cause a reckless attitude in drafting a law because there is the certainty that the second chamber can tackle the bill once again[12].

Undoubtedly, the Republic Constitution identifies bills as the outcome of the first chamber's work. However, the proceedings in the first chamber do not conclude the entire legislative procedure. The Senate can influence and modify the bill. It should be noted that bills initiated by the Senate are subject to consideration by the second chamber. Once a bill is received by the Senate, the written proposal including the bill is submitted to the Marshal, who refers it to the appropriate committee and the Committee on Legislation. The committees may shape the bill in accordance with their discretion, without obtaining a consent of the original initiator. Meetings may also be attended by other Senators, overnment officials, government administration members or MPs. They may take part in the discussion, propose amendments but they do not have a right to vote.

Draft resolutions are also submitted to the Marshal and undergo the same procedure. The Marshal is entitled to request the proposers of a motion for its justification.[13] The committees are obliged to submit a report proposing the position of the Senate on a particular issue.[14] The bill or draft resolution is then considered at first reading, but not earlier than 14 days after the bills' delivery to the Senators. After the debates, the second chamber adopts a resolution, in which it may include one of the proposed views, i.e., to accept the bill without amendment. In this case the bill is sent back to the Marshal and forwarded to the President for promulgation. The President can also make amendments to the bill as a resolution by an absolute majority in the presence

[10] Banaszak B., Przesłanki istnienia Senatu w Polsce, in: Kierunki zmian pozycji ustrojowej i funkcji Senatu RP, edited by A. Bisztyga and P. Zientarski, Warszawa, 2014, 18-22.

[11] Article 121(1) of the Constitution of the Republic of Poland, 1997.

[12] Jaskiernia J., Wizja parlamentu w nowej Konstytucji RP, Warszawa, 1994, 20.

[13] See: Article 84 of the Resolution of the Senate of the Republic of Poland of 23 November 1990.

[14] Bożyk S., Senat Rzeczypospolitej Polskiej, in: Izby drugie parlamentu, edited by E. Zwierzchowski, Białystok, 1996, 54.

of at least half of the Senators.[15] Afterwards, the bill returns to the Sejm, which is entitled to reject it. The amendments that the Senate makes, may not, however, go beyond the subject matter of the specific bill. Notably, the Senate-proposed amendments occasionally lead to disputes between the two parliamentary chambers, which should be resolved by the Constitutional Tribunal. It indicates that an amendment is a secondary proposal to a legislative initiative. Thus, the right to submit amendments by the Senate cannot be a legislative initiative.[16] The subsequent judgment indicates that amendments may only concern the subject matter of a bill referred to the Senate. Therefore, the second chamber cannot replace its subject matter with a different one, as it means introducing its own legislative initiative.[17] The Constitutional Tribunal also points out that the Senate has a limited scope of amendments, which is clear under the Article 121(2) of the Constitution of Poland. This is because they are submitted during the final phase of the entire proceedings, as the Senate makes amendments to a bill already enacted by the Sejm and not to its bill as well.[18]

The third and most far-reaching competence is the possibility to entirely reject the bill. However, it does not mean that the entire bill is definitively cancelled. The Sejm can reject the motion at this phase by an absolute majority in the presence of at least half of MPs. When this fails, however, the legislative process must resume.[19] Another option is a specific reaction, namely, the Senate's inability to respond to a bill passed by the Sejm within the specified 30-day period, as provided for in the Constitution of the Republic of Poland[20]. Such a course of conduct implies full acceptance of the bill, so the Marshal of the Sejm is empowered to send it to the President of Poland[21].

Notably, Article 121 of the Constitution of Poland provides that the Senate, after the Sejm refers a bill to it, has 30 days to take one of the three steps mentioned

[15] See Grzybowski M., Poprawki Senatu do ustawy uchwalonej przez Sejm w świetle Konstytucji RP z 1997 i orzecznictwa Trybunału Konstytucyjnego, in: Stanowienie prawa-kompetencje Senatu w procesie legislacyjnym. Materiały z konferencji zorganizowanej przez Komisję Ustawodawstwa i Praworządności pod patronatem Marszałka Senatu RP Longina Pastusiaka 22 października 2002r., Warszawa, 2002, 27.

[16] Judgment of the Constitutional Tribunal of Poland 24 June 1998, K 3/98, OTK ZU, 4/1998.

[17] Judgment of the Constitutional Tribunal of Poland of 23 February 1999, K. 25/98, OTK ZU, 2/1999.

[18] Cf. judgment of the Constitutional Tribunal of Poland of 19 September 2008, K 5/07, OTK ZU 2008/7A/124.

[19] Kudej M., Postępowanie ustawodawcze w Sejmie RP, Warszawa, 1998, 80; Garlicki L., Polskie prawo konstytucyjne, zarys wykładu, 15th edition, Warszawa, 2011, 240.

[20] See Article 121(2) of the Constitution of the Republic of Poland.

[21] Dobrowolski M., Prawo Senatu do wnoszenia poprawek do ustaw uchwalonych przez Sejm w świetle orzecznictwa Trybunału Konstytucyjnego, Przegląd Sejmowy, No. 5, 2001, 26.

above. If it fails to meet the required time limit, the bill is enacted in the wording passed by the Sejm.

It should also be emphasised that none of the legal acts indicates a specific time limit in which the Sejm must consider the position of the Senate in case of amendments. This may result in failure of the legislative process to be concluded until the end of the parliamentary tenure, which means the conclusion of the legislative procedure, being in compliance with the principle of the discontinuation of parliamentary work. However, when the Sejm acts in this way it is a violation of the constitutional principle of a democratic state ruled by law. It will also obviously be an impediment to the Senate in the performance of its duties.

The Senate's involvement in the legislative process definitely improves the law-making quality in Poland. The abolition of the second parliamentary chamber can increase the workload of the Constitutional Tribunal in terms of reviewing bills enacted in haste by the unicameral parliament.[22] However, the Constitutional Tribunal also emphasizes that the possibility of exercising the legislative function[23] is insufficiently ensured by the Constitution and emphasised its limited powers in this respect.[24]

III. The Senate's role in the legislative process in Romania

When discussing the legislative process in Romania, it should be noted that its Senate, compared to the Czech one, has even more far-reaching competences as legislative proposals can be submitted to both chambers of parliament. The solutions of the Basic Law (Constitution) in Romania point to the symmetric bicameralism model of the parliament in terms of legislation.[25]

[22] Banaszak B., Przesłanki istnienia Senatu w Polsce, in: Kierunki zmian pozycji ustrojowej i funkcji Senatu RP, edited by A. Bisztyga and P. Zientarski, Warszawa, 2014, 18-22.

[23] See: judgements of the Constitutional Tribunal of Poland of: 21 November 1993, K 5/93 OTK 1993, No. 2, 39; 9 January 1996, K 18/95 OTK ZU 1996, No. 1, 1; 22 September 1997, K 25/97 OTK ZU 1997, No. 3-4, 35; 24 June 1998, K 3/98 OTK ZU 1998, No. 4, 52; 23 February 1999, K 25/98 OTK ZU 1999, No. 2, 23; 19 June 2002, K 11/02 OTK ZU 2002 4A, No. 43; 14 June 2002, K 14/02 OTK ZU 2002 No. 4A, 45.

[24] See: Banaszak B., Rola Senatu w procesie legislacyjnym, Przegląd Sejmowy, No. 5, 2000, 32; about amendments in the Senate see: Skwarka B., Orłowski W., Zakres poprawek Senatu – problemy teorii i praktyki, Studia Prawnicze, No. 3-4, 2001; Grabowski R., Refleksje nad polskim systemem parlamentaryzmu, Przegląd Prawa Konstytucyjnego, No. 5, 2018, 37.

[25] See more: Ionescu C., Organizarea bicamerală a Parlamentului României între tradiție istorică și oportunitate politică, Pandectele Române, No. 7, 2014,25-41; Chelaru I., Bicameralismul in Romania, Curierul Judiciar, No. 152, 2016, 152-153.

According to the Constitution, the legislative initiative is vested in the Government (which submits proposals). Legislative proposals are also submitted by Senators, MPs and a group of at least 100,000 citizens with the provision that they must represent at least 1/4 of the country provinces and the city of Bucharest, provided that there must be 5,000 signatures in each province.[26] Until 2003, the figure was 250,000 citizens and 10,000 signatures in each province, respectively. The legislator thus wanted the legislative initiative to be supra-local, to concern national rather than local issues. It should also be noted that citizens' bills cannot concern fiscal policy, international affairs, as well as amnesty and pardoning.[27]

The Government can submit a bill to any chamber of parliament and the proceedings that commence in that chamber. Thus, both chambers have equal powers to legislate. Senators and MPs have equal rights to propose an individual legislative initiative. Senators, MPs and citizens submit legislative proposals, which cannot concern the national public budget,[28] laws that authorise the Government to issue decree-laws[29] and laws or amendments that could entail significant public expenditures.[30]

Bills and legislative proposals shall be submitted to the lower chamber as the "first chamber to consider" if they concern international treaties or agreements, particular legislative acts that result from the application of international treaties or organic laws.[31] All other bills and legislative proposals are submitted to the Senate. The chamber must then proceed to adopt the bill within a maximum period of 45 days. In case of laws of 'particular complexity' or codes, the time limit is prolonged to 60 days.[32] If the above time limits are exceeded, it is assumed that the bill was adopted by the chamber. At this stage the bill is forwarded for consideration to the other chamber, which is also tasked to declare its position. If the second chamber amends the bill, it is returned to the editorial board of the competent chamber with an explanatory statement accepting or rejecting the amendments. Laws are passed in three readings. The bill is received by the presidium of the chamber, which forwards

[26] Article 74 of the Constitution of Romania,1991; Article 89 of the Regulamentul Senatului, aprobat prin Hotărârea Senatului, 2005; Brodziński W., System konstytucyjny Rumunii, Warszawa, 2006, 48.

[27] Article 73 of the Constitution of Romania, 1991.

[28] Article 138 of the Constitution of Romania, 1991.

[29] Article 115 of the Constitution of Romania, 1991.

[30] Article 138(5) of the Constitution of Romania, 1991.

[31] Under Article 75(1) of the Constitution of Romania, 1991.

[32] Article 90(3) of the Regulamentul Senatului, aprobat prin Hotărârea Senatului, 2005.

it to the relevant committee. The latter prepares a report proposing the adoption of the bill with or without amendments or rejection of the bill entirely. Senators, MPs, parliamentary clubs and the government are entitled to submit written opinions, which are addressed to the presidium of the chamber in a specified time limit. They are included in the report.[33]

The second reading takes place during a plenary session of the chamber. It begins with an address by the proposer, who is to present the bill and justify the advisability of its enactment.[34] It is followed by the committee's preliminary assessment of the bill.[35] Subsequently, there is a debate in which the parliamentary groups take the floor. If the committee previously proposes the bill rejection, the chamber President puts it to the vote. A detailed debate follows and the individual provisions of the bills are considered.[36] Each member of the chamber has the right to submit written amendments and take part in the discussion. This may also relate to motions by the minority which were rejected by the committee. If the amendments submitted at the plenary session change the bill, the chamber President is entitled to return the bill to the committee for reconsideration. It is obliged to prepare a supplementary report.

When the debate on the bill concludes, the chamber President orders a vote on the enactment of the bill. Organic laws, as well as resolutions on the chamber procedural rules are passed by the majority of each chamber, while ordinary laws and other resolutions are passed by the majority of present members of each chamber.[37]A bill passed and signed by the chamber President is referred to the other chamber for consideration, provided that the Government is notified in advance.[38] If a bill is not reserved in the Constitution for the jurisdiction of a particular chamber, the decision of the other chamber is final.[39] If, on the other hand, the competent chamber adopts a bill compatible with its subject matter, it is finally adopted if the other chamber shows its consent. Otherwise, the bill is referred back to the first chamber for consideration. The latter must take the final decision on the provisions

[33] Brodziński W., System konstytucyjny Rumunii, Warszawa, 2006, 50.

[34] Article 98(1) of the Regulamentul Senatului, aprobat prin Hotărârea Senatului, 2005.

[35] Ibid., Article 98(2).

[36] Ibid., Article 101.

[37] Article 74 of the Constitution of Romania, 1991.

[38] Article 141 of the Regulamentul Senatului, aprobat prin Hotărârea Senatului, 2005.

[39] Article 75 of the Constitution of Romania, 1991.

in question as a matter of urgency. Afterwards, the law is forwarded to the Republic President, who promulgates it. It must be done within maximum of 20 days following the receipt of the law. However, prior to this process, the law may be submitted to the Constitutional Court with a request to examine its constitutionality. With regard to the second chamber, it can be requested by the Speaker of the Senate and at least 25 Senators. If the Constitutional Court rules on the constitutionality of a law, the Republic President promulgates it within ten days of receiving it.[40] Before the promulgation the Republic President may request reconsideration of an ordinary or limited law by the parliament. If it is re-enacted, the Republic President is obliged to promulgate it also within ten days of receiving the law. Subsequently, it is promulgated in the "Official Monitor of Romania" and afterwards, takes effect within three days after its publication.[41]

The chamber may also pass a law on its initiative or the motion of the Government as a matter of urgency.[42] Such a motion shall be approved at the next plenary session of the Senate. If it is passed, amendments to the bill are adopted within 48 hours, which may be submitted by the Government, members of the chamber or parliamentary clubs. At the same time, the Legislative Council should forward a report to the competent committee, which has to make a report within three days of receiving the bill.[43] The chamber President places the bill on the agenda of the next session. Opinions on the priority issue may be delivered by a Government official, chamber members, who submitted amendments to the bill during the committee's work and representatives of parliamentary clubs. Following the debate conclusion, the chamber President orders a vote on the amendments having been acknowledged in the committee report. Finally, the chamber votes on the entire bill.[44]

[40] Article 77 of the Constitution of Romania, 1991; Brodziński W., System konstytucyjny Rumunii, Warszawa, 2006, 51; Dzemidok-Olszewska B., System polityczny Rumunii, in: Systemy polityczne państw Europy *Środkowej* i Wschodniej, edited by W. Sokół and M. *Żmigrodzki*, Lublin, 2005, 446; see also: Grabowska S., Formy odpowiedzialności konstytucyjnej w Republice Rumunii, in: Formy odpowiedzialności konstytucyjnej *w* państwach europejskich, edited by S. Grabowska and R. Grabowski, Toruń, 2010.

[41] Article 78 of the Constitution of Romania, 1991; Dzemidok-Olszewska B., System polityczny Rumunii, in: Systemy polityczne państw Europy Środkowej i Wschodniej, edited by W. Sokół and M. Żmigrodzki, Lublin, 2005, 445-446.

[42] Article 108 of the Rules of Procedure of the Senate of Romania.

[43] Article 110 of the Rules of Procedure of the Senate of Romania.

[44] System konstytucyjny Rumunii, Warszawa, 2006, 28.

IV. Legislative practice in Czech Republic

At the very beginning of the consideration of the legislative function in Czech Republic, it is worth pointing out that the Czech Senate has a high legislative position, as it has the legislative initiative, but also, in case of the disbanding of the Chamber of Deputies, the right to enact decrees with the force of law autonomously.

In Czech Republic, the entire legislative process commences each time with the submission of a bill to the Chamber of Deputies, specifically, its President. The right to initiate legislation is held by a MP, group of MPs, Senate,[45] representation of the country (a higher-level local government body) and Government as well. Similarly to Poland, Czech senators are not granted any individual legislative initiative. Thus, it applies to the chamber as a whole. A Senate legislative initiative for the bill consideration in the Senate may be initiated by a Senator, group of Senators, Senate commission or committee. It is considered by the chamber in three readings. Once passed, the chamber authorises its President to refer the bill to the Chamber of Deputies.[46]

The Senate considers a legislative initiative in three readings. The first reading begins with the proposal presentation by the rapporteur. After the debate it is referred to the committee for consideration. The relevant committee has 60 days to consider it, but the period may be extended or shortened to 30 days.[47] When the bill is considered in two readings, it may submit a motion to approve, cancel, amend or adjourn the bill.[48]

The second chamber may pass a bill with the presence of at least 1/3 of all Senators, with a majority of at least half of the statutory number of Senators, unless the Constitution defines otherwise. An exception applies to constitutional laws, for the enactment of which the consent of 3/5 of the Senators and the same required presence is required.

[45] The so-called Senate Bill, § 127 of the Act of Czech Republic of 11 May 1999 on the Rules of Procedure of the Senate,1999; Linek L., Mansfeldova Z., The Parliament of the Czech Republic, 1993-2004, The Journal of Legislative Studies, No. 13, 2007, 13; Boháč R., Legislativní proces (teorie a praxe), Praha, 2011, 98-102.

[46] Jirásiková V., Skotnicki K., Parlament Republiki Czeskiej, Warszawa, 2009, 52-53; Sokół W., System polityczny Czech, in: Systemy polityczne państw Europy Środkowej i Wschodniej, edited by W. Sokół and M. Żmigrodzki, Lublin, 2005, 256; see more: Murár F., Srovnání západoevropských regionálních druhých komor a alternativy regionalizace Senátu Parlamentu České republiky, Politologický časopis – Czech Journal of Political Science, No. 3, 2013, 299-318; Zpěvak A., Zdeněk F., Jonáková T., Základy teorie práva, Praha, 2015, 110.

[47] § 128 of the Act of Czech Republic of 11 May 1999 on the Rules of Procedure of the Senate, 1999.

[48] Ibid., § 129; Kysela J., Dvoukomorové systemy, Praha, 2004, 472-484.

The upper chamber has an opportunity to respond to a bill sent by the Chamber of Deputies. Firstly, it can put the bill on its agenda, consider it and adopt a resolution within 30 days since the bill was forwarded.[49] In the Polish order, if the chamber takes no action, the bill is deemed to be passed. On the other hand, if it is passed without amendments, the parliamentary legislative process is concluded. If it wants to expedite the whole procedure, it may pass a resolution assuring that it will not proceed with the bill, which results in the automatic enactment of the law.[50] Other options are to reject the bill or refer it to the Chamber of Deputies with amendments.[51] In these two cases, the first chamber is obliged to reconsider the bill. In order to vote on the position of the second chamber, it requires the majority of votes of all the deputies. If the Senate returns a bill with amendments, the MPs first vote on the bill as passed by the second chamber. However, if this is not a case, a new vote is held on the text of the bill as passed by the Chamber of Deputies and then returned to the Senate. A bill is deemed to be enacted if the first chamber passes it by its absolute majority. No amendments can be submitted.[52] Afterwards, it is forwarded to the President of Czech Republic for being signed.[53]

The legislative process can also be shortened. This is the case when the fundamental rights and freedoms of citizens are at risk, their security is at risk, economic damage is at risk, or the vote on a bill to implement the UN Security Council decision on action to guarantee peace and national security cannot be adjourned. A state of legislative interim is then declared and if the Government requests the Parliament to consider the bill in the accelerated mode, the Chamber of Deputies has 72 hours to consider it, while the Senate has only 24 hours.[54]

At this point, the statutory provisions of the Senate should be noted. On the motion of the Government, when the Chamber of Deputies is disbanded, this chamber is entitled to issue statutory provisions that can be compared to the Polish decree-law. They concern matters that cannot be postponed. However, they cannot relate to the constitutional matters, closure of state accounts, state budget, electoral laws or con-

[49] Article 46(1) of the Ústava České Republiky, 1992.

[50] Ibid., Article 48.

[51] Ibid., Article 46(2) and (3); Jirásiková V., Skotnicki K., Parlament Republiki Czeskiej, Warszawa, 2009, 54-56.

[52] Article 47 of the Constitution of the Czech Republic.

[53] Klíma K., Constitutional law of the Czech Republic, Plzen, 2008, 183-184.

[54] Sokół W., System polityczny Czech, in: Systemy polityczne państw Europy Środkowej i Wschodniej, edited by W. Sokół and M. Żmigrodzki, Lublin, 2005, 256-257.

sents for the ratification of international agreements. Such documents are signed by the President of the Senate, President of Czech Republic and its Prime Minister. They have the same legal effect as the laws do. However, to remain effective, they require statutory approval of the Chamber of Deputies at its first meeting. Otherwise, the provisions become null and void.[55]

V. Conclusion

Undoubtedly, bicameral parliaments receive much criticism. While in the constitutional order the lower chamber is obligatory, the upper chamber represents an appendix. Without it, the parliament can fulfil its functions as shown by the actions of the unicameral orders. Taking into account the principle of "checks and balances," the bicameral order becomes the rule for the existence of liberal constitutionalism. The condition, however, is a proper institutional balance, represented by the distributed competences between the two chambers. Summing up the research on the legal solutions in Poland, Czech Republic and Romania, a conclusion on the differentiated approach to the systemic role of the second chambers emerges.

In Poland, the concept of parliament adopted systemically provides the Sejm with a dominant position. In the context of legislative matters, the position of the Senate is of no significance as it can be outvoted. We see a different situation only in case of amending the Constitution, as the Senate's consent is required for adopting such a law. On the other hand, in Czech Republic we observe a slightly stronger legislative role of the second chamber. Admittedly, a proposed amendment to a bill (not a law) can only be challenged by the Chamber of Deputies if the first chamber adopts it again in the wording that was submitted to the second chamber. Moreover, in case of certain laws, it is required to obtain the consent of both parliamentary chambers. The Czech legal solutions show a strengthened position of the Senate and the distinction of its political image.

It should be noted that Romania's legal system, which represents a model of balanced bicameralism, allows both parliamentary chambers to legislate to the same extent. It imposes the same tasks on both parliamentary chambers, as the legislative process can commence in either chamber. Besides, the process is carried out in the same way. It leads to equally divided competences and certain elevation of the second

[55] Article 33 of the Constitution of the Czech Republic; Gdulewicz E., Republika Czeska, Ustroje państw współczesnych, edited by E. Gdulewicz, Warszawa, 2002, 101.

chamber in terms of its competences, or even the prestige and importance of the chamber in respect of state power.

We suppose that in Poland it is important to distinguish the possibility of the Senate membership from the Sejm. In the Senate it is possible for people with a high social position to be members of the chamber; namely, university employees, recognized authorities, those holding various professions. On the other hand, as in federal states, representatives of administrative and territorial units and local public administration authorities could become members. This change can have a positive impact on law-making, as there would be no political game in the legislative process and these representatives can bring a lot of substance and knowledge.

Lastly, it should be noted that currently, in Poland, depending on the political force constituting the majority of the Sejm and the Senate, the second chamber represents a place of prolonged proceedings of bills, because even if the Senate contradicts the bill, the Sejm can pass it. If the second parliamentary chamber is to engage in the legislative process, systemic changes must be similar to the system of Romania or Czech Republic. This power is strengthened there.

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Justice Dilemmas in Law – the Law Justice Meta-Principle Under the Example of the Polish Administrative Process

ABSTRACT:

The article given below concerns a titular problem of justice in law. As a special exemplification of this problem, the example of the Polish administrative process is taken. It poses a location question of the justice meta-principle in it. Considerations on this topic are universal, affecting multiple normative systems. In each of them the said justice was and is discussed. The term "justice" accompanied normative systems since ancient times. Even in the Old Testament we read about acting righteously and justly. Currently, as well, if only by the example of the EU's Fair Transition Mechanism, discussions on this topic are alive and present. Thus, one can risk saying that justice is still relevant and remains "on the lips" of lawyers, but also politicians, philosophers, theologians or people not at all concerned with science, who may have a conviction that something for them is just or not. This raises the legitimate question of whether one of the guiding principles and therefore a kind of meta-principle of law, can become a justice principle? The author attempts to answer a number of questions below.

Keywords: Theory and philosophy of law, law principles, meta-principle of law, justice, administrative process, just law, justice dilemmas in law.

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I. Introduction

Justice dilemmas in law – this is the leitmotif of my research. Within the framework of a broad concept of the mentioned "dilemmas" the present article was created. It focuses on the universal concept of the principle (meta-principle) of law. In one hand, it touches on issues of a universal nature that we can attribute to many law systems. On the other hand, it treats the Polish administrative process. It is a kind of exemplification of the previous problems of a universal nature.

I believe the subject of justice should gain a "new life" in international legal and philosophical scholarship. Simultaneously, I express a cautious belief that currently, due to a relativistic trend outlined in this writing, the subject of the title justice and its dilemmas is not very popular. Moreover, in my opinion, there is a need to take up this topic. This is because it is of a fundamental nature, fundamental to legal systems. Therefore, it has a strong scientific and practical justification, also leading to the integration of the theory and law philosophy with dogmatic-legal areas. This is because the problems of justice in law – understood in a theoretical-legal way, translate directly into dogmatic solutions. Thus, the discussion of justice in law shapes specific legal regulations, present in legal systems.

Finally, I think this can be stated with full force: justice dilemmas represent an issue that is attractive not only from the perspective of legal science, but also from the perspective of popular science journalism *sensu largo*, as well as social or political discourse. For example, on the grounds of functioning multistate organizations like the European Union, we are dealing with a common (in the sense of being binding on its members, who, for various reasons, have not been excluded from it) policy on economic transformation. Let alone this program, it should be noted that there is a talk of the "Fair Transformation Mechanism," "Fair Transformation Fund" or a "Fair Transformation Platform."[1]

In the discourse on justice, including justice in law, there is a certain natural controversy, which, in my opinion, justifies talking about the title justice dilemmas. I mean that the justice concept is very capacious, containing huge layers of values. For centuries, not only on the ground of jurisprudential science, it has aroused divergent opinions. This can lead to difficulties in building a consensus on it. For some, the just may turn out to be something unjust and vice versa. Therefore, for the purposes of

[1] <https://shorturl.at/nyAQ1> [04.10.2023].

this article, I will somehow narrow down, focusing mainly on the title "meta principle." I will leave a broader consideration of justice to my readers encouraging to read other items (including mine),[2] where the subject is expanded. Thus, there will be no search for a definition of justice. As Ronald Dworkin says, "to find such a definition of the justice concept that is at once abstract enough to pass uncontroversial among us and concrete enough to be useful is difficult. Our disputes about justice are too rich, and there are too many different kinds of theories in use."[3] This author even concludes that "perhaps, no useful definition of the justice concept exists. If this is in fact the case, it does not cast doubt on the point of debating justice, but only highlights the ingenuity of people who try to be just."[4]

In the context of a divergent understanding of justice, it is impossible not to mention a kind of "charging" or "stewardship" of the justice concept. Doing so, such a term is used for a phenomena that has nothing in common with justice as understood by the paradigm of the democratic legal state of the Western model. Various scientific disciplines are familiar with the phrases, for example, "justice of the Soviet Union" or "justice in the Third German Reich." History shows that the justice, exposed in reality, may not be it for being a facade creation.[5]

At this point, concluding the introduction, I want to point out some assumptions that are related to this article for it is appropriate to move on specific scientific considerations.

As for the main research theses, first of all, in legal systems, on the grounds of procedural regulations, it is reasonable to talk about meta-principles. Secondly, it is equally reasonable to talk about the justice meta-principle. In doing so, in one hand I assume a broad research area. I consider certain issues from a systemic perspective, without focusing on a specific research area. On the other hand, I narrow it down to the extreme and study specific institutions of law using the example of the Polish administrative process. Thus, I assume that such specific examples are *sui generis* ex-

[2] See: Kokoszkiewicz A., Sprawiedliwy proces administracyjny jako zadanie państwa. Studium teoretycznoprawne. Just administrative process as a task of the state theoretical and legal study, Warszawa, 2022.

[3] Dworkin R., Imperium prawa, Warszawa, 2006, 75-76.

[4] Ibid., 76.

[5] Exeler F., Nazi Atrocities, International Criminal Law, and Soviet War Crimes Trials. The Soviet Union and the Global Moment of Post-Second World War Justice, in: The New Histories of International Criminal Law: Retrials edited by N. Bhuta, A. Pagden and B. Straumann, Oxford, 2019, 218-219.

emplification of certain general problems. Of course, certain conclusions that may prove reasonable for this "narrow" research object, are not required to be the same for all other law systems. However, it is a topic to be separately analyzed. I purposely do not excessively analyze it here, as I do not want to avoid the main research objective mentioned above. I fear that an excessive blurring of the topic will not serve the stated goals by undertaking a causal analysis of too many issues.

I am using methods characteristic of legal science. In the main, it will be a logical-linguistic analysis method. I also reach for a comparative or historical method asI believe that all methods serving the research purpose are valuable.

II. Principles and Meta-Principles in Law: about Keeping Hierarchy

As for the consideration of the principle (meta-principle) of justice, first, it should be emphasized that the administrative process norms are undoubtedly parts of elementary needs of a modern democratic state of law. The provision of procedural laws, including procedural guarantees, principles of control and supervision, realizes some of its elementary assumptions. After all, it is common to talk about justice administration by administrative courts. Simultaneously, I am in favor of a broader understanding of the exercise of justice, i.e., the one not limited to the activities of the courts, but to the activities of public administration bodies.

Indeed, after all, their elementary purpose, the rationale for the need of their existence and functioning is to carry out the functions entrusted to them that should be done in a just manner. Hence, I would argue that in the context of their functioning, we can talk about certain principles of the administrative process, in particular, the justice principle. Thus, justice administration is carried out by all authorized entities, administrative bodies and courts.

In the Polish legal sources, the reference of justice to specific dogmatic-legal rules is not very common (which, by the way, is a trend identical to which we observe in the world's legal literature). It is a pity for being an attractive example of the law science integration, determining a broader view of the problems we face. Let's hope for the development of this line of scientific activity. As an interesting and important view on this topic, we note Tomasz Bąkowski's position, who, according to Gustav Radbruch, proposes research "in the context of justice as the basic idea and main

goal of law."[6] I believe the idea of such research is right. Regardless of the conceptual apparatus adopted, whether we are talking about the justice principle or the goal or idea it represents, they are valuable and necessary. After all, "in the Western intellectual tradition (dating back to antiquity), justice is to this day recognized (although not by all doctrines) in principle as the highest moral standard, to which other ideals underlying the functioning of state organization are subordinated, allowing a rational critique of the relations prevailing in the state."[7]

Thus, let me several introductory remarks. "Meta" is a prefix meaning that the formulation that follows it is "over" and "above." In case of meta-principles and principles, we can say that the meta-principle stands above other ones towering over them with its superior character. This prefix is commonly used on the ground of many scientific disciplines, although it seems to me that in the most widespread popular scientific perspective has Aristotelian roots, "metaphysics."[8]

As for the law principles, they carry a very extensive research material having already achieved a recognized achievement in the Polish and world literature on the theory of state and law, while it is worth proudly emphasizing that the Polish thought in this area seems to take shape first. The achievements of J. Wróblewski and S. Wronkowska, M. Zieliński and Z. Ziembinski, while in case of foreign literature the work of authors such as R. Dworkin, R. Alexy, M. Atienza and J. Manero or H. Avila.[9] While it is obvious that the explicit presentation of the "law principle" concept is very problematic, one may already be tempted to present some of its characteristics or assumptions. As L. Leszczynski points out, one can treat a "principle of law" as a type of "legal norm characterized by a special axiological importance,

[6] Bąkowski T., Poszukiwanie sprawiedliwości po kilkudziesięciu latach – Rzecz o braku czasowego ograniczenia wyłączającego stwierdzenie nieważności decyzji administracyjnej określonych w przepisach art. 156 (2) Kodeksu postępowania administracyjnego, GSP, No. XXXV, 2016, 84; Citing also: Radbruch G., Zarys filozofji prawa, Warszawa–Kraków, 1938, 41, 45.

[7] Karp J., Sprawiedliwość społeczna. Szkice ze współczesnej teorii konstytucjonalizmu i praktyki polskiego prawa ustrojowego, Kraków, 2004, 15.

[8] Arystoteles, Metafizyka, Warszawa, 2020.

[9] See: Wróblewski J., Prawo obowiązujące a "ogólne zasady prawa", Zeszyty Naukowe Uniwersytetu Łódzkiego, No. 42, 1965; Wronkowska S., Zieliński M., Ziembiński Z., Zasady prawa, zagadnienia podstawowe, Warszawa, 1974; Dworkin R., Law's Empire, London 1990; Atienza M., Manero J.R., A Theory of Legal Sentences, Dordrecht, 1998; Alexy R., On the Structure of Legal Principles, Ratio Iuris, No. 3, 2000; Avila H., Theory of Legal Principles, Dordrecht, 2007, quoting after: Leszczyński L., Zasady prawa – założenia podstawowe, Studia Iuridica Lublinensia, Vol. XXV, No. 1, 2016, 12-13.

consisting in the protection of values fundamental to the entire legal system or a particular branch of law."[10]

It is also argued that "law principles can also serve to reveal the common ideological and doctrinal basis on which normative settlements of one kind or another shape not only individual legal institutions, but also sets of these institutions within a field of law, or even within the entire legal system."[11] In the context of the law principles, or more precisely, the justice principle in the law on administrative process, it is also worth quoting the view of W. Dawidowicz, pointing out that "by the basic principle of state administration [now we would say: public administration (author's note)] should be understood some legal rule, according to which the state administration is to act" while "it should be – due to the characteristic of its "basicness" – derived from the basic assumptions of the social-economic and political system defined by law."[12] It is reasonable to ask: can the justice meta-principle be a principled legal rule by which public administration could operate?

So, we can ask further – is there a certain meta-principle related to fairness in the administrative processes of various legal systems and especially in the Polish administrative process? And if not, would it be justified to introduce it? Is it really possible to speak of a "meta justice principle" or would it, however, be an "ordinary principle of law?" What kind of consequences might arise from the findings given above? Finally, one can ask, taking a purely dogmatic-legal perspective about the legitimacy of this meta-principle.

III. Exemplification of Principles in the Polish Administrative Process

To answer the questions posed, it should first be clearly stated that the justice principle is not expressed in the Polish administrative process explicitly. Despite "justice" may be associated with something genre-wise more important or more momentous than other principles of the administrative process, namely, the rule of law (Art. 6 KPA[13]), principle of objective truth (Art. 7 KPA) or informing the parties (Art. 9 KPA). The justice principle is not found in the KPA. In the field of tax law, there is a claim

[10] Ibid.

[11] Wronkowska S., Zieliński M., Ziembiński Z., Zasady prawa, zagadnienia podstawowe, Warszawa, 1974, 49.

[12] Dawidowicz W., Nauka prawa administracyjnego: zarys wykładu, T. 1: Zagadnienia podstawowe, Warszawa, 1965, 201.

[13] The Polish Code of Administrative Procedure, 2023.

that "the tax justice principle is one of the guiding principles of tax law. However, it is not defined in any act included in this branch of law."[14] We observe similar situation in administrative law. Although it is not expressed in literal, direct terms, "the principle opposite to the justice principle is not distinguished."[15] J. Zimmermann emphasizes that "nowhere, especially in the general rules of administrative procedure, is "justice" included as an order for action, probably based on the assumption that in administrative proceedings absolute norms are applied and the field left to the justice criterion is negligible. Such a view, however, is erroneous and dangerous. After all, the administration adjudicates on rights and obligations, so it must be just and the law governing its actions should be enacted in a way enforcing this justice. The administration actions should therefore consist of a fair interpretation of norms, fair consideration of all rationales and fair exercise of all discretion forms with the fair adjudication."[16] I fully share this position. Despite the administrative process peculiarities, it should be emphasized that it belongs to the area of public law, extremely important from the perspective of the functioning of any state. In turn, this naturally enforces the need to refer to justice.

In the Polish legal writing, it is possible to find positions that compare justice to the principle expressed in Art. 8 KPA, that is, with the principle of deepening the confidence of participants in proceedings in public authority. In this context, the Polish legal writing indicates that "the issues of justice and trust in public authorities, due to the semantic similarity, show the closest relationship with the general principle of deepening the trust of those involved in proceedings in public authority formulated in Art. 8 KPA."[17] However, it seems that such an equation depreciates justice, reducing it to a lower-order principle. Justice represents a certain supreme value of a higher order. "Justice, as the supreme value of law, serves as a criterion for evaluating other values – political institutions, social systems, individual and group actions."[18]

[14] Święch-Kujawska K., Zasada sprawiedliwości podatkowej a udzielanie ulg w spłacie zobowiązań podatkowych in: Sprawiedliwość i zaufanie do władz publicznych w prawie administracyjnym, edited by M. Stahl, M. Kasiński and K. Wlaźlak, Warszawa, 2015, 676.

[15] Wronkowska S., Zieliński M., Ziembiński Z., Zasady prawa, zagadnienia podstawowe, Warszawa, 1974, 44.

[16] Zimmermann J., Aksjomaty postępowania administracyjnego, Warszawa, 2017, 35.

[17] Kledzik P., Sprawiedliwość i zaufanie do władz publicznych w aspekcie zasad ogólnych postępowania administracyjnego, in: Sprawiedliwość i zaufanie do władz publicznych w prawie administracyjnym, edited by M. Stahl, M. Kasiński and K. Wlaźlak, Warszawa, 2015, 412.

[18] Tokarczyk R., Sprawiedliwość jako naczelna wartość prawa, in: Teoria prawa, filozofia prawa, współczesne prawo i prawoznawstwo : Księga pamiątkowa prof. W. Langa, edited by many various authors, Toruń, 1998, 348.

As for discretion of administrative authority, which is also relevant in terms of our topic, Artur Kotowski stresses that "when discretion is inappropriate, in the sense that it is non-transparent and contradicts the principles of proportionality, justice, equality, or – consequently – legality? When the decision takes care not necessarily of the parties' interests, but primarily of the interests of the state. The state represents a current political sovereign. It is the interest of the party that is most often the interest of the public in a democratic state, while in an authoritarian state an individual's interest counts less than that of the public as a whole."[19]

The Polish jurisprudence achievements also do not apply the "justice principle," although it regularly refers to justice, namely, by articulating the citizen's right to a "fair administrative procedure."[20]

It should be noted that justice is referred to in the Polish Constitution. Its Article 2 states that Poland is a democratic state governed by the rule of law, realizing the principles of social justice. In the Polish Constitution, we do not find additional provisions specifying the principles of social justice specifically based on. It is argued in the constitutional law sources that "in academic and political discourse, social justice appears most often in the context of the theoretical dispute of the social (interventionist) state vs. the minimum (libertarian) state, or when analyzing the concept of political liberalism."[21]

At this point, a remark should be made on linguistic observations. Both in the Polish and world sources we meet numerous adjectives concerning the justice concept. These are like epithets. Therefore, from the word "epithet," I propose to use the term "epithetization" to describe the phenomenon of in-defining, over-describing, characterizing justice. Simultaneously, doing so, the phenomenon is divided into smaller areas. The point is that if we write about procedural justice, we naturally narrow the field of consideration. In one hand, this is a correct and justified action. After all, it is necessary to focus on reasonably selected research material. On the other hand, restriction when researching such a momentous and capacious phenomenon

[19] Kotowski A., Dyskrecjonalność władzy administracyjnej – próba nowego ujęcia, Krytyka Prawa, No. 6, 2014, 75.

[20] Judgment of NSA (Polish Supreme Administrative Court), 19.10.1993 r., V SA 250/93.

[21] Arndt W., Bober S., Sprawiedliwość społeczna w Konstytucji RP, Kraków, 2016, 83, citing also: Laska A., Sprawiedliwość społeczna w dyskursie polskiej zmiany systemowej, Toruń, 2011; Karp J., Sprawiedliwość społeczna. Szkice ze współczesnej teorii konstytucjonalizmu i praktyki polskiego prawa ustrojowego, Kraków, 2004; Miller D., Principles of Social Justice, Cambridge (MA)London, 1999.

can lead to a certain scientific confusion, omission of important observations and, consequently, incorrect conclusions.

Therefore, I express my opinion that the epithetization of justice should not be overexposed. After all, excessively dividing, shoveling and limiting the researched value does not deserve the approved aims. By the same reasoning, it is not reasonable. As Z. Ziembiński aptly notes, "all these additional elements, associated with the adjective "social" in relation to justice, however, do not outline themselves clearly enough to establish in a reportable way a separate sense of the term "social justice" in the Polish legal system. "Social justice" practically refers to "justice" in general, only that it refers to justice that is in some way socially institutionalized, concerning matters of greater general importance."[22]

As for the previous considerations on the position of "justice" in the Polish normative system, special attention should be paid to the constructed concept of "procedural justice." M. Bernatt notes that "procedural justice is one of the principles of a democratic state of law, which is not mentioned *expressis verbis* in Article 2 of the Constitution. However, it can be considered a derivative principle of the rule of law ... [for it derives from it]. The obligation to create a mechanism of effective legal protection in a statutorily defined procedure against all actions of all state authorities, to ensure fair and equal procedures and the necessity to extend procedural guarantees to an individual when this is not prevented by a precise statutory provision." One more reference to justice is included in its Art. 45(1), which states that everyone is entitled to a fair and public hearing without undue delay by a competent, independent, impartial and independent tribunal.[23] This justice is explained by commentators associating with it the hearing of a case by a competent court.[24] I do not agree with it at all, as there are a dozen features other than the jurisdiction of the court speaking whether the case is judged justly or not.

To sum up, the justice principle is not explicitly expressed in the Polish legal regulations of administrative procedures. We find some references to justice in the body of jurisprudence and in the Polish Constitution, although here we observe a literal reference to "social justice" (so we are experiencing the epithetization). Not quite explicitly, but it is indicated that the justice principle is essential to fundamental functioning

[22] Ziembiński Z., Sprawiedliwość społeczna jako pojęcie prawne, Warszawa, 1996, 56.

[23] See: Chróścielewski W., Kmieciak Z., Niezależny organ kontroli w postępowaniu administracyjnym (Raport badawczy), Samorząd Terytorialny, No. 11, 2005, 5–32.

[24] Tuleja P., Komentarz do art. 45 in: Konstytucja Rzeczypospolitej Polskiej. Komentarz (ed. P. Tuleja), Warszawa, 2019 (digital edition, unnumbered pages).

of a democratic state of law. Such a conclusion is led by the provision contained in Article 2 of the Polish Constitution, as well as the judgments of administrative courts referring to justice as a value essential for a state functioning.[25] Paweł Sut aptly points out that "behind the concept of social justice there are different understandings of it and different theories, the choice of which is a matter of individual axiology, subjective preferences and belief. I think it is a contentious issue even to define those spheres of life that relate to this concept, i.e. to determine whether it refers to economic issues, social security, equality, or the struggle for the rights of individuals or yet others."[26]

The constatation may be a bit surprising. Whoever expected that the justice principle, although not explicitly articulated, would commonly or regularly appear in administrative and legal transactions, will not be satisfied? Direct references to the justice principle are not frequent. The justice principle, more broadly, justice in the Polish administrative process, will somehow be imponderable: intangible values difficult to qualify for a lack of a normative account, but with an impact on surrounding legal institutions. Meanwhile, both theoretically and dogmatically, I think it is legitimate to refer to justice in the administrative process. After all, this is a value that measurably shapes the law in the broad sense. At the general ceiling, as well as below, it allows the desirable, fair handling of individual cases.

[25] See: the judgments of the polish administrative courts, together with excerpts from the theses of these judgments referring to the principle of justice: WSA Gdańsk, 7.2.2019, III SA/Gd 889/16: "The denial of an upbringing benefit in such a case would be in flagrant contradiction both with the purpose of the law and with the principles of social justice embodied by the Republic of Poland, in accordance with Art. 2 of the Polish Constitution"; WSA Białystok, 30.11.2017, II SA/Bk 564/17: "It would be incompatible with the principles of social justice to take the position that it is possible to proceed with the expropriation goal and its implementation itself over an indefinitely long period of time, without there being some special reasons to justify an excessively long period of implementation of the expropriation goal"; WSA Wrocław, 21.3.2017, I SA/Wr 1100/16: "In the Court's opinion, this shatters the average sense of fairness and rationality, as well as fails to realize the principle of social justice, viewed also through the prism – in the present case – of special assistance to an incomplete family"; NSA, 5.4.2016, II FSK 462/14: "The application per analogia of normative solutions from a tax law other than the one directly applicable to a specific event (analogia legis) is possible – on an exceptional basis – only when filling the existing legislative gap is beneficial to the taxpayer, there will be no expansion of the scope of his tribute obligations, but also of the scope of tax benefits, and only in this way can a violation of the constitutional principles of justice or equality be avoided, and, moreover, it is rational for economic and social reasons", or NSA, 2.3.2016, II FSK 2474/15: "There are certain limits of administrative discretion within which a tax authority may move when making a decision following the occurrence of the premise of "important interest of the taxpayer" or "public interest" referred to in Article 67a (1) of the Tax Ordinance Act of August 29, 1997. Exceeding these limits occurs, among other things, when the choice of a decision alternative was made in flagrant violation of the principle of fairness".

[26] Sut P., Uwagi o sprawiedliwości społecznej jako realizowalnym prawnie celu państwa demokratycznego, GSP, No. XXXV, 2016, 405.

IV. The Law Principles Are Ultimately Real and Specific Consequences Follow Out of Them

An emphasis should be made here. For the readers may have a valid point – that is, that all of our considerations so far about principles, meta-principles, justice, the state, law – may not have practical implications. In other words, somewhat interesting discourse, including the resulting values, indications, demands, may remain in the abstract realm. This, in turn, would amount to an action of a slogan or facade nature. However, this is not the case and should never be. Principles and meta-law principles, as carriers of values and entities of axiological nature, should have tangible consequences. I mean that if we take a hierarchically higher premise X, lower premises Y and Z should take their origin from it and follow it. To simplify: a meta-principle shapes a principle. In turn, the principle shapes a specific legal norm and ultimately, a rule of law. It is a very important postulate and seems to be universal for all law systems. As it has already been mentioned, there are known cases of "Soviet justice," characterized by beautiful values in the layer of principles. Practically, their realization, implying hierarchical implementation through dogmatic solutions, was facade.

To get back to the main storyline finale, I should say the following: I am not a proponent of separatism in classifications of justice and make other, so to speak on broader assumptions about the "justice idea" and its meaning, I share the position shown by Z. Kmieciak. He points out that "the idea of procedural justice cannot be considered only as a purely theoretical assumption or a general, unverifiable postulate. On the contrary, it should be assumed that it experiences concretization in the form of findings and directives of practical value (...). The procedural justice is seen, as a theoretical concept characterized by a high abstraction degree, with clear philosophical implications. On the other hand, it is a concept expressing the same axiological assumptions without any practical value."[27] In other words, the justice principle represents a certain carrier of values and ideas, with the solutions having a tangible, pragmatic impact on the administrative process at each stage. Tangible manifestations of justice in the administrative process can be a right to a hearing, transparency of the proceedings, provision of legal aid and opportunity to act by an attorney, a reasonable time for issuing a decision.[28]

[27] Kmieciak Z., Ogólne zasady prawa i postępowania administracyjnego, Warszawa, 2000, 149, 152.

[28] Krawiec G., Europejskie standardy związane z przebiegiem postępowania administracyjnego, Roczniki Administracji i Prawa : Rok XI, 69-85.

Hence, I put forward that in absence of a justice principle explicitly shown in the Polish legal system (and in particular in the law of administrative process), the justice principle is a meta-principle. A meta-principle from which the administrative process general principles take their existence, such as the rule of law[29] and principle of unbiased truth. Other principles, not defined in the KPA, originate from the justice principle. They are called "basic principles" in the sources. As J. Starościak aptly notes, "the general principles formulated in the introductory articles of the KPA cannot be identified with the full list of basic principles of the KPA."[30] Therefore, I think that the justice principle can be considered a kind of matrix. Thereby, as it has a principled, superior character, it can be called a meta-principle.

The above-mentioned considerations can be carried to the whole law system (e.g., the state law) or the law system governing functioning of multiple states. As W. Sadurski notes, "a law that does not respect the justice principles is a morally reprehensible law. On the other hand, it represents a law pursuing only the justice principle at the expense of all other social values. *Fiat iustiti, pereat mundus* (let justice be done, though the world perish – own footnote) is not a motto that should guide lawmakers and politicians."[31] Simultaneously, it seems that the realization of the justice principle (meta-principle) should take into account other social values embodying it. An optimal normative model includes a room for the realization of the justice principle through the realization of other values, namely, mercy, subsidiarity, moderation of punishment and others. These values can support justice without opposing to it or being in a neutral position. It is worth signaling the position that "in the conflict of mercy and justice, legal and political theory should choose justice."[32]

Without rejecting this position, since there are reasonable rationales behind it, I point out that there is a space in normative systems to draft procedural rules in a way that justice and mercy are not conflated. The latter value should be able to become an element of the former. The juxtaposition on the basis of contrast or conflict between certain values does not make much sense. It is better to focus on their constructive use to build an optimal, normative model. Such a model should consider a synthesis of the aforementioned values. Exposing formalism or materialism in justice and opposing them to each other by referring to the above-mentioned paraphrase about

[29] See: Borucka-Arctowa M., Woleński J., Wstęp do prawoznawstwa, Kraków, 1997, 111.

[30] Starościak J., Prawo administracyjne, Warszawa, 1971, 263.

[31] Sadurski W., Teoria sprawiedliwości: podstawowe zagadnienia, Warszawa, 1988, 266.

[32] Ibid., 78.

how "the world may perish/burn, but let (implicitly "my") vision of justice prevail, is not desirable and rational. Of course, it does not stand in conducting research and formulating conclusions considering the chosen perspective, but putting it together and taking it to an even higher level. All this requires caution and restraint.

Despite a number of rules of conduct in the law implementing the justice value, we also find rules directly relating to the cited value of mercy. An exemplification of such action in the Polish legal system is Art. 67a of the Tax Ordinance regulating relief in the debts repayment or entire social law system. In an opposite case, when we bet on the conflict of values rather than their complementarity, normative systems become similar to primitive systems under the *dura lex sed lex* principle. Meanwhile, it is precisely a broad understanding of justice in the state and law as a value incorporating other values representing an outstanding achievement of the democratic legal state. Moreover, it confirms the validity of the thesis that one can speak of a justice meta-principle in law.

It is also required to signal the opposition to the above-mentioned claims, such as that "the justice system depends on values other than the value of justice. Its purely moral value is a function of the arbitrary claims that serve it as a starting point."[33] I do not share the thesis of the arbitrariness of claims serving as a starting point in the justice system understood as I gave above. On the other hand, this claim, coming from Chaim Perelman, will be true if we assume the purely formal nature of the justice system.

V. Conclusions

To sum up, despite a lack of a direct expression of the principle or justice meta-principle in the Polish system of administrative procedural law, we can still detect its presence. It has solid foundations – expressed in the existence of legal principles that are inferior to it. It also has a justified axiological basis. Perhaps, on the basis of *de lege ferenda* considerations, it is worth the Polish legislator thinking on clearly articulating this meta-principle, being the key to the entire administrative process. In my opinion, placing it in the initial part of the Administrative Procedures Code is justified. Moreover, it seems justified to apply analogous conclusions to other legal systems, although it requires deeper examination.

[33] Perelman Ch., O sprawiedliwości, Warszawa, 1959, 98.

Responding to the theses given in the beginning of the document, I would like to say that they are verified positively and confirmed. Moreover, I express the cautious belief that such theses can apply (of course, also verified) to many law systems, particularly the ones based on the democratic legal state standard of the Western model. Thus, it can be considered reasonable to refer to meta-principles in law and the justice meta-principle in particular. The immanent nature of justice specifically makes it possible to grant this regulation an overriding role and supply such a principle of law with the meta prefix. I consider particularly important and worth emphasizing the demand – which is also universal – that in the lawmaking hierarchical process, these principles and meta-principles should not remain a slogan and measurably shape the norms and rules of law.

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Tax Evidence Proceedings in Polish Tax Law – General Characteristics

ABSTRACT:

Along with the evidence, evidence proceedings represent a key element of tax proceedings regulated by the Tax Ordinance Act (TOA) of August 29, 1997. It seems to be most essential stage due to its expediency and legitimacy. Therefore, it is important to be aware when all legally available methods to provide evidence get exhausted. Due to an open evidence catalogue it is possible to make findings in any legally permissible mode. Besides, evidence in tax proceedings has equal evidentiary value and should not be prioritized. Activities like obtaining, gathering or evaluating the evidence collected through a case must meet all the requirements of the law. Therefore, the tax administration authority, a party and other entities involved in the proceedings are obliged to perform the statutorily indicated activities and duties to comply with the general principles of tax proceedings, as they constitute a model of proper procedures.

Keywords: tax proceedings, evidence proceedings, tax law, evidence, general principles of tax proceedings.

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I. Introduction

Tax proceedings considered through the prism of expediency should be understood as the implementation of the substantive tax law provisions. Its function focuses on determining the legal and tax situation of the taxpayer. As a result, the tax authority makes a decision concerning a specific case.[1] As part of the tax proceedings, individualized external administrative acts are created – like tax decisions. They specify the rights and obligations of the legal-tax relationship subject.[2] The tax authority is obliged to initiate all actions required to accurately define and clarify the facts. All this involves collection and exhaustive consideration of the evidence, as well as its evaluation under legal regulations through logical principles and life experience.[3] Tax proceedings are not of adversary nature[4], for in tax proceedings relationships between the tax authority and the taxpayer are characterized by the superior position of an administrative body.[5]

Evidence proceedings are considered to be the process of providing evidence. Its course and results directly affect decisive settlements.[6] Taking into account its legitimacy and expediency, it is the most important stage of tax proceedings. In turn, evidence represents the basic instrument for achieving all mentioned above.[7] Evidence proceedings consist in collecting evidence and drawing conclusions according to it. The substance of the evidence proceedings is determination of the facts in the context of a specific legal and tax norm. Therefore, tax evidence proceedings do not represent a goal. They constitute a search for an answer whether sometimes taxpayer's situation qualifies for the hypothesis of a certain substantive tax law norm.[8]

1 Dąbrowski A., Postępowanie dowodowe, in: Postępowanie w sprawach podatkowych. Komentarz praktyczny, edited by D. Malinowski, Warsaw, 2004, 121.

2 Walkowski G. K., System polskiego prawa podatkowego w praktyce: wybrane zagadnienia. Tom I, Podstawowe procedury podatkowe, Bydgoszcz, 2012, 43.

3 Staniszewski M., Postępowanie podatkowe. Kontrola podatkowa, Warsaw, 2011, 146.

4 Brzeziński B., Masternak M., O tak zwanym ciężarze dowodu w postępowaniu podatkowym, Przegląd Podatkowy, No. 5, 2004, 57.

5 Judgment of the Supreme Administrative Court of April 11, 2012, II FSK 1921/10, LEX No 1137624; Nowak I., Uznanie okoliczności faktycznych za udowodnione w świetle czynnego udziału podatnika w procedurze podatkowej, Prawo Budżetowe Państwa i Samorządu, No. 3, 2019, 23.

6 Dąbrowski A., Postępowanie dowodowe, in: Postępowanie w sprawach podatkowych. Komentarz praktyczny, edited by D. Malinowski, Warsaw, 2004, 122.

7 Rutkowski B., Dowody w postępowaniu podatkowym, Warsaw, 1999, 60.

8 Judgment of the Supreme Administrative Court of October 11, 2017, II FSK 1317/17, LEX No. 2400782; judgment of the Supreme Administrative Court of September 29, 2011, I FSK 1476/10, Legalis No. 379161; judgment of the Voivodeship Administrative Court in Szczecin of April 11, 2018, I SA/Sz 93/18, LEX No. 2482402; judgment of the Voivodeship Administrative Court in Cracow of

While proving something (thought process), some conclusions are made about the presence or absence of given facts resulting from the evidence.[9] It is established whether the statements concerning these facts are true or false.[10] Importantly, more evidence available to gather leads to greater certainty that the facts will be established following the material truth principle.[11]

One of the most crucial elements of the evidence procedure is that the tax authority considers a given fact to be proven on the basis of the evidence. It consists of the totality of evidence, collection of which is required to accurately clarify the case facts.[12] The evidence must meet two basic criteria to properly resolve an individual case. Firstly, the evidence must allow the authority to define the case facts. Secondly, it must be considered thoroughly, scrupulously. Its completeness is an important feature, as the correct determination of actual state cannot rely on partial or incomplete material.[13] It is essential to collect and consider everything without omitting any evidence in a way that the facts submitted for proof to be complete, coherent and logical whole.[14]

As part of the tax evidence proceedings, there are two auxiliary institutions that simplify the proceedings. The first is probability. This leads to a belief in the existence of specific factual circumstances, in a thought process that is not limited by the rules of evidence.[15] The other auxiliary institution is the presumption,[16] implying generally known facts, while the ones known to the authority as ex officio do not require any approval. The ex officio facts should be informed to the party.[17] There is also an exception – the principle *in dubio pro tributario*, according to which doubts about the content of the tax law that cannot be removed are resolved in favour of the taxpayer.[18]

May 14, 2015,I SA/Kr 502/15, LEX No. 1756813; judgment of the Voivodeship Administrative Court in Bydgoszcz of July 23, 2013, I SA/Bd 309/13, Legalis No. 765630.

9 Staniszewski M., Postępowanie podatkowe. Kontrola podatkowa, Warsaw, 2011, 145.

10 Kędziora R., Ogólne postępowanie administracyjne, Warsaw, 2008, 192.

11 Staniszewski M., Postępowanie podatkowe. Kontrola podatkowa, Warsaw, 2011, 145.

12 Strzelec D., Dowody w postępowaniu podatkowym, Warsaw, 2013, 31.

13 Dąbrowski A., Postępowanie dowodowe, in: Postępowanie w sprawach podatkowych. Komentarz praktyczny, edited by D. Malinowski, Warsaw, 2004, 144.

14 Judgment of the Voivodeship Administrative Court in Cracow of March 24, 2021, I SA/Kr 9/21, LEX No. 3190574; judgment of the Voivodeship Administrative Court in Cracow of June 13, 2019, I SA/Kr 136/19, LEX No. 2697656; judgment of the Voivodeship Administrative Court in Warsaw of October 2, 2006, III SA/Wa 1352/06, Legalis No. 83194.

15 Judgment of the Supreme Administrative Court of October 21, 2011, I FSK 1649/10, LEX No. 1069308.

16 Rutkowski B., Dowody w postępowaniu podatkowym, Warsaw, 1999, 64.

17 Judgment of the Voivodeship Administrative Court in Białystok of May 18, 2005, I SA/Bk 47/05, Legalis No. 158155.

18 Article 2a TOA.

II. Evidence

Evidence should be understood as a means to demonstrate the truth of the circumstances relevant to a case resolution.[19] According to the Tax Ordinance, anything contributing to the case clarification not being contrary to law should be admitted as evidence.[20] The Act indicates their exemplary catalogue, namely, tax books, party declarations, witnesses' testimonies, expert opinions, materials and information collected after visual inspection, tax information and other documents collected during analytical activities conducted by the National Tax Administration, verifying activities, tax inspection or customs and fiscal control and materials collected during criminal proceedings or those in case of fiscal crimes or fiscal offenses.[21] Evidence can be classified any way without limitation to the statutory, exemplary catalogue. There is evidence of a material or personal nature.

In tax proceedings there is an open system of evidence of equal evidentiary value. Any introduction of restrictions as a type of evidence that should be prioritized while determining the presence of a given fact is impermissible.[22] Moreover, it is impermissible to apply the formal theory of evidence, i.e., claiming that a particular event can only be proven by a certain type of evidence or in a certain mode.[23]

In the context of means of evidence, the Tax Ordinance ensures restrictions conditioning formal correctness of evidence. In literature they are called evidentiary prohibitions. The general rule implies that evidence must not be contrary to the law. Therefore, the tax authority examines a given piece of evidence when the procedural rules do not exclude this. Thus, evidentiary prohibition can be described as actions concerning collection of evidence violating all the applicable provisions of the law by which they exclude the examination, or indicate the evidence that cannot be used within the framework of pending proceedings.[24]

The fundamental importance during tax evidence proceedings is brought by the issue of the proof burden. However, there are many doubts as to who is responsible for this obligation. The Tax Ordinance regulations indicate the tax authority.

[19] Dowody, in: Encyklopedia Popularna PWN, Warsaw, 1999, 183.

[20] Article 180 (1) TOA.

[21] Article 181 TOA.

[22] Judgment of the Voivodeship Administrative Court in Poznań of November 18, 2022, I SA/Po 111/22, LEX No. 3480303.

[23] Judgment of the Supreme Administrative Court of February 4, 2020, II FSK 635/18, LEX No 3059106.

[24] Strzelec D., Dowody w postępowaniu podatkowym, Warsaw, 2013, 37 and next.

This is due to the statutory duty to collect and exhaustively consider the evidence. However, such vague and general provisions cannot pose any grounds for deriving an exclusive obligation of the authority on the burden of proof.[25] Moreover, there is no clear legal regulation, which would strictly indicate an entity responsible for this burden.[26] However, the view expressed by the Supreme Administrative Court that a certain range of matters is beyond the capacity of the authority deserves approval. Therefore, the regulations of the Ordinance imposed an obligation on the authority to clarify the facts and not this state.[27] It is repeatedly emphasized in the judicature of administrative courts that anyone deriving legal consequences for himself from facts must prove these facts.[28]

III. General principles of Tax Proceedings

Tax proceedings are carried out under general principles – the basic procedural rules. They do not constitute recommendations for action, but represent the norms of applicable law. Their function is to systematize interpretation of the rules, fill legal gaps and intensify a procedural position in tax proceedings.[29] They act not only as norms binding tax authorities, but set the limits for their behaviour.[30] They are undoubtedly only ideas, forming statutory legal rules making up an integral part of

[25] Olech M., Ciężar dowodu w postępowaniu podatkowym, in: Ordynacja podatkowa w teorii i praktyce, edited by B. Kucia-Guściora, M. Münnich, L. Bielecki and A. Krukowski, Lublin, 2008, 281.

[26] Hanusz A., Podstawa faktyczna rozstrzygnięcia podatkowego, Cracow, 2006, 193.

[27] Judgment of the Supreme Administrative Court of April 15, 2015, I GSK 648/13, Legalis No. 1311044; judgment of the Supreme Administrative Court of January 11, 2013, II FSK 1470/11, Legalis No. 594205; judgment of the Supreme Administrative Court of December 6, 2012, II FSK 182/11, Legalis No. 817229; judgment of the Supreme Administrative Court of May 28, 2008, II FSK 491/07, Legalis No. 119067; judgment of the Supreme Administrative Court of February 6, 2008, II FSK 1671/06, Legalis No. 111518.

[28] Judgment of the Supreme Administrative Court of June 12, 2015, II FSK 1262/13, Legalis No. 1311924; judgment of the Supreme Administrative Court of June 12, 2012, I FSK 1090/11, Legalis No. 778933; judgment of the Supreme Administrative Court of January 18, 2012, I FSK 343/11, Legalis No. 448370; judgment of the Supreme Administrative Court of April 24, 2007, I FSK 582/06, LEX No. 467334; judgment of the Supreme Administrative Court of January 13, 2000, I SA/Ka 960/98, Legalis No. 51025; judgment of the Voivodeship Administrative Court in Gliwice of March 18, 2022,II SA/Gl 1194/21, LEX No. 3337962; judgment of the Voivodeship Administrative Court in Bydgoszcz of January 15, 2020, II SA/Bd 769/19, LEX No. 2775922.

[29] Presnarowicz S., Postępowanie podatkowe w systemie polskiego prawa podatkowego, Warsaw, 2003, 37.

[30] Szumlakowski R., Zasady prawne postępowania podatkowego organu administracji podatkowej **w** relacjach **z** podatnikiem, in: Prace Naukowe Wydziału Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, edited by P. Borszowski, A. Huchla and E. Rutkowska-Tomaszewska, Wrocław, 2011, 213.

the procedural rules of tax law.[31] Violation of general rules is equated with a breach of the law.[32]

The following *numerus clausus* general principles are available in the Tax Ordinance (Articles 120-129 of the Tax Ordinance): the rule of law, principle of acting in a manner instilling confidence in the tax authorities, principle of providing information, principle of objective truth, principle of active participation of parties in the proceedings, persuasion principle, principle of insight, speed and simplicity of proceedings, principle of writing, principle of two-instance proceedings, principle of permanence of final decisions and openness principle of proceedings exclusively for the parties. This catalogue is of closed nature.

The rule of law[33] is an overriding principle of any democratic state and because of that it is called the rule of law.[34] It consists in the fact that tax authorities act on the basis of the law, i.e., laws and executive acts issued for their implementation.[35] Tax administration bodies ensure the rule of law. They do not only observe the law, but control all actions within each phase of proceedings in relation to other participants.[36]

For the implementation of the proceedings' principle via instilling confidence, the tax authority shall act in such a way that no allegation of lack of objectivity can be made. The actions of the authority must not meet conditions for being considered pro-fiscal.[37]

The information providing principle is expressed through the obligation of the authority to provide required information and explanations of laws directly associated with the subject matter of a pending case.[38] The information providing principle correlates with that of conducting proceedings in a manner that instils confidence for the tax administration authority is obliged to explain the case state as accurately as possible.[39]

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[31] Mariański A., Rozstrzygniecie wątpliwości na korzyść podatnika. Zasada prawa podatkowego, Warsaw, 2011, 108.

[32] Judgment of the Supreme Administrative Court of June 4, 1982, I SA 258/82, Legalis No. 34718.

[33] Article 120 TOA.

[34] Staniszewski M., Postępowanie podatkowe. Kontrola podatkowa, Warsaw, 2011, 8.

[35] Presnarowicz S., Postępowanie podatkowe w systemie polskiego prawa podatkowego, Warsaw, 2003, 38.

[36] Staniszewski M., Postępowanie podatkowe. Kontrola podatkowa, Warsaw, 2011, 8.

[37] Dąbrowski A., Zasady ogólne postępowania, in: Postępowanie w sprawach podatkowych. Komentarz praktyczny, edited by D. Malinowski, Warsaw, 2004, 86.

[38] Judgment of the Voivodeship Administrative Court in Lublin of February 4, 2015, I SA/Lu 978/14, Legalis No. 1198028.

[39] Judgment of the Voivodeship Administrative Court in Olsztyn of April 14, 2015, I SA/Ol 120/15, Legalis No. 1272428.

The objective truth principle, regarded as the material truth principle, defines the obligation imposed on the tax authority, according to which it must take all measures to scrupulously clarify the facts of the case in tax proceedings and settle it in compliance with the law.[40] The principle of material truth is an axiological ideal to be pursued during the proceedings.[41]

The parties' active participation principle ensures participation in shaping the course of the proceedings including the final settlement.[42] It is expressed by the fact that the tax authorities are obliged to ensure active participation of the parties at every stage of the proceedings and before issuing a decision, they should be given an opportunity to comment on the collected evidence and materials collected and requests having been made.[43]

Implementation of the persuasion principle takes place via obligation of tax authorities to provide parties with an explanation of the relevance of the reasons used in the case settlement that enabled the party to implement the decision without coercive measures.[44] The persuasion principle imposes a certain obligatory action on the tax authority. It consists in the obligation to justify all the grounds on which the authority was guided in issuing this or that particular decision. This includes specification of the facts and legal basis as well.[45]

To deal with a given tax case, based on the principle of insight, speed and simplicity of proceedings, tax authorities should act carefully and quickly. Simultaneously, the authorities should use the simplest means to do it. In addition, the cases in relation to which require no collection of evidence, information or explanations, should be dealt with immediately.[46]

The writing principle means that, as a rule, tax matters are resolved in writing recorded electronically or on sheet of paper. The writing principle applies to decisions and resolutions and any action taken by authorities during tax proceedings,[47]

[40] Staniszewski M., Postępowanie podatkowe. Kontrola podatkowa, Warsaw, 2011, 15.

[41] Judgment of the Voivodeship Administrative Court in Łódź of April 16, 2010, I SA/Łd 1032/09, Legalis No. 352726.

[42] Nowak I., Czynny udział podatnika w podatkowym postępowaniu odwoławczym, Studia Prawno-Ekonomiczne, No 79, 2009, 105.

[43] Article 123 (1) TOA.

[44] Article 124 TOA.

[45] Patyk J., Zasady procedury podatkowej w Polsce, <https://shorturl.at/cvPSV> [04.04.2023].

[46] Article 125 TOA.

[47] Judgment of the Supreme Administrative Court of Poland of January 13, 2012, I FSK 1106/11, Legalis No. 418271.

including summonses, minutes or annotations.[48] Undoubtedly, the writing principal addressees are tax authorities carrying out tax proceedings.[49]

The two instances principle forces the tax authorities to examine and resolve a tax case twice,[50] i.e., by the first instance body and by the appellate authority afterwards. It is regulated directly by the provisions of the Constitution of the Republic of Poland, according to which each party is entitled to appeal the first instance rulings and decisions.[51]

The principle of permanence of final decisions should be understood as a norm ensuring the legal state stabilization resulting from a decision that is not subject to appeal.[52] The cancellation or change of such decisions, their annulment and resumption of proceedings may take place only in cases ensured by law.[53] Any final decision has a presumption of correctness assumed in advance. The authority is bound by it until it is changed in a law-regulated manner.[54]

The openness principle indicates that tax proceedings are open only to the parties.[55] From the point of view of its expediency, it is important to protect their interests from disclosure of information about the conduct and course of tax proceedings to any third parties. This is for the authority-obtained information directly related to the taxpayer's financial condition, which is quite sensitive. They are confidential and also covered by tax secrecy.[56]

At each stage of the proceedings, the tax authority is obliged to make the case file available to the party.[57] This right is exercised by making it possible to review the

[48] Judgment of the Voivodeship Administrative Court in Olsztyn of August 26, 2010, I SA/Ol 443/10, Legalis No. 440959.

[49] Masternak M., Zasada ogólna pisemności w postępowaniu podatkowym, Kwartalnik Prawa Podatkowego, 2022, No. 3, 170.

[50] Teszner K., Czynności dowodowe w podatkowym postępowaniu odwoławczym, in: Ordynacja podatkowa. Dowody w postępowaniu podatkowym, edited by R. Dowgier, Białystok, 2013, 212 and next.

[51] Article 78 the Constitution of the Republic of Poland of April 2, 1997.

[52] Szubiakowski M., Nowe dowody jako podstawa wzruszenia ostatecznej decyzji podatkowej, Monitor Podatkowy, No. 2, 2016, 26.

[53] Article 128 TOA.

[54] Judgment of the Voivodeship Administrative Court in Kielce Of March, 2011, I SA/Ke 164/11, Legalis No. 364146.

[55] Article 129 TOA.

[56] Drywa A., Odpowiedzialność odszkodowawcza za wydanie niezgodnej z prawem decyzji podatkowej, Warsaw, 2014, 110.

[57] Judgment of the Voivodeship Administrative Court in Cracow of April 28, 2015, I SA/Kr 171/15, Legalis No. 1261885.

files and to make notes, copies or duplicates of them.[58] Moreover, a party may request their authentication or issuance of certified copies from the case file.[59]

Apart of the rules indicated directly in the provisions of the Tax Ordinance, the principles considered as auxiliary apply, being confirmed in the case law and literature.[60] This group also includes the principle of free evaluation of evidence[61] which means that while considering the collected evidence, the tax authority is not bound by any formal criteria. The only framework of unrestricted evaluation is determined by the compliance with the law, the laws of logic, life experience and purposefulness of the evidence in the ongoing proceedings and impartiality of the authority.[62]

It is also important to bear in mind the role played not so much by the regulations, but the activities of the administrative courts developing and unifying standards of evidence in tax cases. These functions become apparent during the practical application of the law, with the line of jurisprudence evolving simultaneously within specific categories of evidence.[63]

An example of standards (models) of evidence confirmed by administrative courts is that directness principle does not apply in tax proceedings. The Tax Ordinance does not specify whether the tax authority is obliged to interview a witness each time. The Supreme Administrative Court decided that if a witness has already given testimony in criminal proceedings, it can be used. The Court confirms that in this case there is no violation of the active participation principle of the parties in tax proceedings.[64] Another example is the inclusion of private opinions prepared at the taxpayer's request during or beyond the proceedings. The Tax Ordinance establishes the principle of open catalogue of evidence: it can be anything not being contrary to the law. Submitting such evidence in tax proceedings with an appropriate application obliges the tax authority to consider it and evaluate it, if the evidence is admitted.[65]

[58] Article 178 (1) TOA.

[59] Article 178 (3) TOA.

[60] Służewski J., Postępowanie administracyjne, Warsaw, 1982, 44.

[61] Article 191 TOA.

[62] Judgment of the Supreme Administrative Court of October 8, 2010, I FSK 1674/09, Legalis No. 338332; judgment of the Supreme Administrative Court of September 20, 2005, FSK 2127/04, Legalis No. 80610; judgment of the Supreme Administrative Court of June 29, 2000, I SA/Po 1342/99, Legalis No 52617; judgment of the Voivodeship Administrative Court in Lublin of January 14, 2009, I SA/Lu 399/08, Legalis No 367704.

[63] Strzelec D., Zasady postępowania dowodowego-uwagi o stosowaniu prawa przyczynkiem do dyskusji nad kształtem przyszłych regulacji prawnych, Przegląd Podatkowy, 2014, No 4, 12.

[64] Judgment of the Supreme Administrative Court of June 7, 2019, I FSK 785/17, LEX No. 2698753.

[65] Judgment of the Supreme Administrative Court of June 3, 2022, I GSK 2748/18, LEX No. 3368923.

Judgments of administrative courts develop models of conduct for example presenting evidence. However, it should be remembered that judgments are issued individually. There is no common law in Poland.

IV. Conclusion

The primary task of the authority during tax proceedings is to thoroughly clarify and resolve the tax case in question above all. For this purpose, evidence is used which differs in essence and characteristics. Besides, although the statutory catalogue is exemplary, it has only one goal. Namely, it constitutes the basis the facts can rely on. The reasons for the initiation of tax proceedings and their duration must be justified and supported by solid evidence.

Tax regulations say that the authorities cannot conduct evidence-gathering activities if they are not prescribed by the law. Any procedural activity must be reflected in the principle of acting on the basis and within the limits of the law. Thus, it should be emphasized that according to the Latin *paremma argumenta non numeranda, sed ponderanda sunt*, evidence should not be counted but weighed. The most important thing is the value of the evidence gathered in the case, with a certain amount of evidence not included in it.

In conclusion, it should also be noted that the use of evidence in tax proceedings requires awareness of the basic concepts and legally valid procedural steps taken in its framework. Having a knowledge of the issues of evidence and general principles of tax proceedings is a kind of procedural guarantee for the protection of taxpayers' rights. Therefore, it is expected that taxpayers should be informed in more detail on the rights and obligations associated with tax proceedings. In many cases, taxpayers are unaware of their rights or feel weakness or fear before the tax authority's power and they adopt a passive attitude. Changing this state of affairs represents a challenge. The most important thing would be the simplification of tax law which is difficult to understand for taxpayers and causes many interpretation problems. Moreover, a taxpayer with a legal interest in tax proceedings should strive to establish the credibility of his actions and clarify the given actual situation. He cannot deprive himself of the right to formulate his claims. Therefore, the challenge is to increase the level of information for taxpayers about their rights. In many cases, taxpayers are not aware of their rights or feel feeble and afraid of the tax authorities.

The conclusion should also emphasize the challenges concerning tax evidence proceedings on the creation of comprehensive conditions for protecting taxpayers' interests. An important shaping element is the awareness of exhaustion of all available methods of proof, both by the tax administration authority and the taxpayer himself. It is worth calling for the issue of evidence and tax evidence proceedings to be treated in a factual and fair manner concerning other tax law regulations.

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Polish Fiscal Criminal Law, Legislative Tradition and Special Features

ABSTRACT:

The article refers to the essence and specific characteristics of the Polish Fiscal Penal Code. Polish legislative traditions in this area have been taken as a starting point. The philosophy guiding the fiscal criminal law, including the system of penal sanctions and measures, with the adopted regression of punishment, is extensively analysed. The article discusses the structure of this code, leading characteristics of the substantive, procedural and executive provisions contained therein, and several legal institutions specific to this code that are not found in common criminal law.

Keywords: Fiscal criminal law, Polish fiscal criminal responsibility, degression of punishment, substantive, procedural, executive criminal law, intervention in fiscal criminal law, subsidiary liability.

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I. Introduction

Fiscal criminal law, as a separate codification is not common in the European countries. In general, European legislatures avoid placing such norms in one separate law. The "decentralization" of the fiscal criminal provisions prevails and the provisions are located in numerous special laws. Against this background, Poland represents a commendable exception. For the sake of accuracy, it should be noted that separate fiscal criminal codifications also function in Switzerland and Austria (Finanzstrafgesetz). Countries like Germany, Czech Republic, Russia and Hungary have ceded the substantive fiscal criminal law norms to special laws. In the face of violations of these norms' elements, the procedure ensured in the general criminal procedure codes is applied and the perpetrators of crimes and offenses, regardless of their type are tried following the same rules.[1] In this perspective, it is worthwhile to analyse the formation of fiscal criminal norms in the Polish legal order and characterize specific institutions that are the subject of the Fiscal Penal Code regulation.

II. The Tradition of Maintaining a Separate Fiscal Criminal Regulation in the Polish Legal Order

Poland's first fiscal criminal law was enacted in 1926. Earlier, there were three fiscal criminal acts in force nationwide established by the partitioning states.[2] In the Austrian partition, the Fiscal Penal Law dated July 11, 1835 (Collection of Political Laws, Vol. 63, No. 112) was in effect. In the Russian partition, the principles defined in the fiscal and criminal provisions of the Russian laws listed in the 5th and 6th volumes of the Collection of Russian Laws were in force. On the other hand, in the Prussian partition, the Law on Administrative Criminal Procedure in Customs and Indirect Taxes dated July 26, 1897 was effective. In parts of the Silesian province, the All-German Tax Ordinance dated December 13, 1919, was temporarily effective. It also contained fiscal penal norms (Reich Gazette, p. 1993).[3]

After the restoration of independence, the Fiscal Penal Law of August 2, 1926 (Journal of Laws No. 105, item 609) was enacted. It came into force on January 1, 1927 and at that time the partition laws were ceased. The Fiscal Penal Law was the

[1] Zgoliński I., Voluntary Surrender to Liability in Fiscal Penal Law, Warsaw, 2011, 14.

[2] Ibid., 17.

[3] Borowski W., Principles of criminal law, Vol. II, Special part, Warsaw, 1923, 74.

first comprehensively drafted Polish law of that time, which testifies to its social importance. This is because it safeguarded the interest and financial order of the state.[4] It consisted of two parts: substantive and procedural. This piece of legislation was a kind of foundation for further fiscal criminal regulations in Poland, based on various solutions contained in the partition laws. It drew from them what was most beneficial and proven in practice.[5] Later, the Fiscal Penal Law of March 18, 1932 (Journal of Laws No. 34, item 355) was enforced. Its novelty was the introduction of the general criminal law solutions.[6] This law, like its predecessor, included substantive and procedural provisions. The next and last law of the interwar period was the Presidential Decree dated November 3, 1936, titled as the Fiscal Penal Law (Journal of Laws No. 84, item 581). This was a legal act with the main purpose to bring fiscal penal regulations in line with the legal solutions adopted by the Criminal Code of July 11, 1932 and the Criminal Procedures Code of 1928. Compared with the previous regulation, the general part was significantly expanded.

III. Fiscal Criminal Law in the People's Republic of Poland

In the People's Republic of Poland, there were three legal acts, with the fiscal criminal law as the subject of regulation. The first was the Decree of the Council of Ministers dated April 11, 1947 which was enforced on May 1, 1947. It had almost all-encompassing character, for it did not criminalize only foreign exchange offenses.[7] The following enforced law was the Fiscal Penal Law of April 13, 1960 (Journal of Laws No. 21, item 123, as amended). The law was enacted for the need to adapt the legislation to the requirements of a socialist country. The law criminalized tax offenses, customs offenses, offenses related to various types of fees, foreign exchange offenses, lottery offenses, offenses related to settlements with state funds, bonds and entries in the register of government-owned enterprises. It largely replicated institutions known to the common criminal law with an extensive general section.

On October 26, 1971, another fiscal criminal law was enacted (Journal of Law, No. 28, item 260, consolidated text of Journal of Laws of 1984, No. 22, item 103). The law was enacted in the wake of changes in criminal legislation concerning common

[4] Prusak F., Revenue Criminal Law and Proceedings, Warsaw, 2002, 6.

[5] Siwik Z., Fundamentals of Fiscal Criminal Law, Warsaw, 1983, 9-10.

[6] Konarska-Wrzosek V., Oczkowski T., Criminal Fiscal Law, Zagadnienia materialnoprawne i wykonawcze, Toruń, 2005, 24, 29.

[7] Siwik Z., Systematic Commentary to the Fiscal Penal Law, General part, Wroclaw, 1993, 4.

crimes. It was undoubtedly one of the manifestations of changes in the systemic model of the state.[8]

IV. Fiscal Criminal Law in its Current Normative Form

The law being currently in force in Poland, was adopted on September 10, 1999. Fiscal Penal Code is thus the seventh regulation, albeit the first one with the systematic characteristics of a code. As part of this law, three ranges of regulation can be distinguished: substantive law, procedural law and executive law. In the given prism there is a complete structure not completely separate from the other criminal laws represented by the Criminal Code, Criminal Procedures Code and Executive Criminal Code.

It should be noted that in the substantive legal part, the Fiscal Penal Code is independent from the 1997 one and the 1971 Misdemeanour Code. This is due to the fact that it independently determines the principles of incurring fiscal criminal liability, institutions that exclude criminal liability, a catalogue of penalties, punitive, probationary, protective measures and the directives for their adjudication. Moreover, it contains the terminology, providing for a number of statutory definitions. The set of definitions, which are the subject of legal interpretation, is much more extensive than the Criminal Code. However, generally, they are analogous to the institutions ensured in the Criminal Code and Misdemeanour Code, or modified accordingly. However, there is no doubt that the Code includes a set of features enabling it to be considered an independent, specific criminal law regulation with its legal principles and philosophy of punishment. Among the most important distinguished elements, one should emphasize the following:

- Different object of defense than in common criminal law,
- Autonomy vis-à-vis the common criminal law,
- Subsidiarity to financial law,
- The blanket legislative technique adopted by the legislator with reference to the types of fiscal criminal offenses,
- The airtight nature of fiscal criminal norms,
- The priority of enforcement purpose over repression.

[8] Konarska-Wrzosek V., Oczkowski T., Skorupka J., Prawo i postępowanie karne skarbowe, Warsaw, 2013, 33.

These elements are subordinate to various code solutions; namely, the applied degression of punishment, institutions enabling the omission of the offender's punishment, the phenomenon of voluntary surrender of responsibility and other characteristic solutions, like subsidiary liability and procedural intervention.

V. Philosophy of Fiscal Criminal Repression

One of the main characteristics of the Polish fiscal criminal law solutions is the priority of enforcement of public-law receivables over repression. The norms of the Code at each stage of the proceedings enable the fiscal offense perpetrator or misdemeanour to pay the depleted public-law receivable, associated with a milder punishment (in proportion to the various stages of the proceedings). The Code ensures a wide range of instruments aimed at the earliest possible payment of due public debts, the offender evades to pay so far. For this behaviour, the offender is offered a reduction in criminal liability, headed by the impunity guarantee, albeit only in certain situations. Authorities conducting fiscal criminal proceedings for this reason must (Article 114 of the Fiscal Penal Code) inform the fiscal criminal act perpetrator about his rights in the event of a financial loss compensation to the State Treasury, a local government unit or another authorized entity. Of course, the fiscal criminal law also has other functions that are similar to the norms of common criminal law. Among the main ones there are protective, preventive and educational, repressive-justice and guarantee function.[9]

VI. Various Legal Instruments for the Adopted Punishment Philosophy

The first among the instruments of degression of punishment is active fiscal criminal regret. It is based on the fact that despite the perpetrator's commission of a fiscal offense or fiscal misdemeanour, it guarantees the maintenance of impunity (Articles 16, 16a, 16b of the Fiscal Penal Code). It is further provided for other institutions, such as the following:

- Conditional discontinuance of fiscal criminal proceedings (Articles 66§1, 67 and 68 of the Criminal Code in conjunction with Article 20§2 of the Criminal Code),

[9] V. Konarska-Wrzosek, T. Oczkowski, Criminal fiscal law, Zagadnienia materialnoprawne i wykonawcze, Toruń, 2005, 25-26.

- Voluntary surrender of responsibility (Articles 17-18 of the Criminal Code),
- Waiver of punishment (Article 19 of the Criminal Penal Code),
- Application of a sentence of freedom restriction (Article 58§1 of the Criminal Code in conjunction with Article 20§2 of the Criminal Code) in lieu of imprisonment (Article 26 of the Criminal Code),
- An obligation to treat imprisonment as *ultima ratio* (Article 58§1 of the Criminal Code in conjunction with Article 20§2 of the Criminal Code).

The offender is also entitled to use procedural instruments to mitigate his liability. They rely on a consensus with the prosecuting authority on the duration of the threatened penalty (while maintaining the obligation of paying the public debt). According to all discussed above, the catalogue of penalties adopted in the Fiscal Penal Code is also attractive. It provides for three among the four penalties known to general criminal law. The Fiscal Penal Code does not know the penalty of life imprisonment. Moreover, the penal measures of prohibition and injunction, listed in Article 39, sections 2a-2e and 3 of the Fiscal Penal Code and monetary benefit, listed in Article 39, section 7 of the Fiscal Penal Code. In formal terms, the Fiscal Penal Code also does not recognize the category of compensatory measures. However, the obligation of paying the due public debt is omnipresent here. The catalogue of the criminal law measures is divided into three groups: penalties, punitive measures and protective measures. This division is disputed in the doctrine, since the probationary measures in relation to putting the offender on probation, are included in the list of criminal measures in Article 22 § 2 (sections 1-7) of the Criminal Penal Code. Their essence and functions, diametrically opposed to the other criminal measures, are contained therein. The division of criminal legal measures in Article 22 of the Criminal Penal Code also leads to concerns for the inclusion in this group of the institution of voluntary submission to responsibility. It has a rather clear procedural tinge and does not end with the conviction of the offender. Instead, the fine remains the leading punitive measure, which is financial in nature. This is the only punishment provided for the commission of fiscal offenses (Art.47§1 of the Criminal Code). In the case of fiscal offenses, the other penalties are imprisonment and freedom restriction. Interestingly, the penalty of freedom restriction as a basic penalty provided for in the sanction of a special provision occurs only once (Art.110 of the Fiscal Penal Code). However, it is possible to impose it as an alternative penalty. On the other hand, imprisonment is not ensured on its own, although it is indicated as a sanction in 39 types of fiscal

offenses and their varieties. It appears in the greatest number as part of the sanctions threatened for tax (22) and customs offenses (10). It leads to the conclusion that no fiscal crime is socially harmful to an extent that might require exclusively this penalty.[10] The type of sanction in question always occurs in an alternative-cumulative formula, where the fine represents an accompanying penalty. It is sometimes possible to impose these penalties together. Thus, the punishment of imprisonment is primarily intended to fulfil a preventive function. Its duration should also be noted, for when it comes to a basic type, the highest penalty is five years, while in the extraordinary aggravation circumstance it hits ten years (Article 38§2 of the Criminal Penal Code). Besides, when it comes to the imposition of a total penalty it equals fifteen years (Article 39§1 of the Criminal Penal Code). The relatively low upper limit of imprisonment is the aftermath of the social harmfulness level of fiscal offenses. It is lower than that of common crimes. Therefore, special-preventive considerations also do not back the need of punishing fiscal offenders with imprisonment. An organized fiscal crime represents an exception against this background. Usually, by their behaviour, fiscal offenders harm the income and financial interests of the country, local government units or the European Union, i.e. society in its entirety. Here we should also add that under the provision of Article 58§1 of the Criminal Code, applied through Article 20§2 of the Fiscal Penal Code, if the law provides for the possibility of choosing the punishment type and the crime is subject to imprisonment for maximum 5 years, the court can impose imprisonment only if another punishment or punitive measure fails to meet the punishment objectives. This is a special directive, formulated for the use of judicial sentencing, which prescribes treating imprisonment as *ultima ratio*. There is also a functioning norm of Article 26§1 of the Criminal Penal Code, enabling the imposition of the freedom restriction in lieu of imprisonment as an alternate penalty. This solution intends to minimize the imposition of short-term sentences.[11] The Fiscal Penal Code, moreover, gives a way to reinforce such an alternate punishment with a punitive measure from Article 22§2(2-6) of the Fiscal Penal Code, or it gives a way to the fine. This construction introduces the possibility of imposing a penalty of freedom restriction and the fine for the same act simultaneously. In case of the basic

[10] Konarska-Wrzosek V., Commentary to Article 27 of the Fiscal Penal Code, in: Fiscal Penal Code. Commentary, edited by I. Zgoliński, Warsaw, 2018, 177.

[11] Raglewski J., Principles of punishment for fiscal crimes and fiscal offenses – an attempt to assess and directions of changes, in: The Fiscal Penal Code after ten years in force – assessment and perspectives of changes, edited by Z. Siwik, Wroclaw, 2010, 69.

sanction type, such a possibility is provided for in Article 110 of the Criminal Penal Code. In the Polish criminal law this is a rare combination of punishments, found in non-Code criminal law. As for the fine, it is listed first in the catalogue of penalties, which illustrates the priority of measures of economic annoyance. The fine is imposed under the so-called Scandinavian system, which boils down to determining the number of rates, adequate to the degree of social harmfulness of the committed crime and level of guilt and adjusting its amount with the individual financial capacity of the offender. In one hand, it intends to consider the phenomenon of inflation in the code, while on the other hand – to prevent the passing of expiation to other persons, mainly members of the immediate family. It also minimizes the execution of the fine as a substitute for imprisonment. The focus is made on the upper limit of the fine. At the basic level, its daily rate equals 720. Declared under extraordinary aggravation its daily rate even totals 1080 (Article 23§1 and Article 28§2 of the Criminal Penal Code). The daily rate amount is set in a range and can be from 1/30 of the minimum wage to 400 x 1/30 of the minimum wage (Article 23§3 of the Criminal Penal Code). On a comparative basis, it is a rather low amount. Indeed, it remains on the eighth place from the end among the EU member countries. Lower minimum wages are set in Lithuania, Slovakia and Czech Republic, Croatia, Hungary, Romania and Bulgaria. However, relativizing the income earned by offenders to the general economic situation in Poland, it should be recognized that the upper limit of the fine for a fiscal criminal offense has been set at a very high level. Thus, the perpetrator of a fiscal criminal offense has two obligations. After all, he is not exempt from compensating for the financial damage caused by his actions and the fine is imposed on him.[12]

The adopted philosophy of punishment in the Fiscal Penal Code is also subordinate to criminal measures. These are additional sanctions of a penal nature, making the punishment more flexible and strengthening the preventive function. This is because they minimize the possibility of committing further crimes and allow for the seizure of unlawful gains or items which are banned to be manufactured, possessed, circulated, stored, transported, transferred or transmitted. Most importantly, one can point to the forfeiture of objects or collection of the monetary equivalent of the forfeiture of objects, forfeiture of pecuniary gain or collection of the monetary equivalent of the forfeiture of pecuniary gain and prohibition to conduct a certain business, practice a certain profession or hold a certain position. It is also significant that the

[12] See: Skowronek G., Commentary to Article 23 of the Criminal Code, Legalis/el., 2020.

very fact of being convicted of an intentional crime, while all fiscal crimes are considered international, leads the convicted to lose the right to practice these professions or conduct various types of business activities), where their practice prerequisite is the requirement of not having a criminal record or impeccable character.

VII. Fiscal criminal offenses

The above-mentioned leading sanctions, i.e. the fine and criminal measures as forfeiture of objects or collection of the monetary equivalent of the forfeiture of objects, also represent leading means of repressing fiscal offenses (Article 47§1 and 2(2) and (3) of the Criminal Penal Code). Of course, the fine penalty here is set at lower limits, as we deal with a lower degree of social harmfulness of this type of act. Nonetheless, the fine for a fiscal criminal offense can also be a great annoyance. The minimum fine for a fiscal offense is 1/10 of a minimum wage. The maximum dimension is 20 times more than the minimum wage. We should remember that those acts in which the amount of the public liability was depleted or exposed to depletion or the object value of the act does not exceed the minimum wage five times during its commission are considered misdemeanours.

VIII. Instruments to compensate for the impairment of fiscal receivables

Regardless of the system of gradation of sanctions in the Polish Fiscal Penal Code, there is also a system of instruments aiming to induce the perpetrator to compensate for the matured receivables depleted by the fiscal criminal act as soon as possible. To achieve this goal, they operate with the possibility of mitigating the punishment and sometimes even guarantee non-criminal punishment. Thus, quick and voluntary compensation of the loss of fiscal receivables is beneficial to both parties. The wronged parties receive their due with interest for late payment, avoiding losses therefore. However, an appropriate incentive is required for this. It must be significant enough to lead the perpetrator to strive to quickly and fully cover the resulting financial depletion. Otherwise, it would be impossible to achieve the stated goal. For this reason, the perpetrator is granted exemption from fiscal criminal liability decreasing in direct proportion to the stage of the proceedings at which the depletion is compensated. For this reason instruments for the punishment regres-

sion play an extremely relevant role in fiscal criminal law. Among such instruments, the most far-reaching one is the so-called "active regret," which guarantees that the case will not be subject to punishment if the law enforcement agency is notified, the relevant circumstances of the commission of the act are disclosed and the due public receivable is fully paid (Articles 16 and 16b of the Fiscal Penal Code). This construction is unprecedented in its form in the common criminal law, although it provides for active regret based on the benefit of impunity.[13] The phenomenon of conditional discontinuance of fiscal criminal proceedings represents another means of response. However, it is dedicated exclusively to fiscal criminal offenses. It is applicable to perpetrators who were not previously punished for an intentional crime and for whom there is a positive criminological prognosis (Article 66§1 of the Criminal Code in conjunction with Article 20§2 of the Criminal Tax Code). In this case, it is required the offender to be obliged to pay the entire depleted public liability within a specified period and it is optionally permissible to impose other obligations as well (Article 41§2 of the Criminal Code, Article 67 of the Criminal Code in conjunction with Article 20§2 of the Criminal Code). The offender, however, avoids further proceedings, conviction and the imposition of punishment and criminal measures. On the other hand, however, he considers the possibility of taking proceedings in specific situations, including the ones when he evades an obligation of paying the public liability (Art. 41§3 of the Criminal Penal Code). Another form of the punishment de-escalation is voluntary submission to liability.[14] The initiative to use this mode of termination of fiscal penal proceedings belongs to the perpetrator, although there are quite few exclusions in this regard, i.e., entitled ones are the perpetrators of all misdemeanours and fiscal criminal offenses, the commission of which is sanctioned by the fine (Article 17§1 and §2(1) of the Fiscal Penal Code). On the side of the perpetrator, various obligations are outlined. In addition to the obligation of paying the due public receivable in full (if they actually caused the depletion of this receivable), their number includes paying a specific amount as a fine (however, this is not a fine in the strict sense), agreeing with the forfeiture of objects or paying their monetary equivalent and bearing the lump sum equalling the costs of the proceedings (Articles 17§1 and 18§1 of the Criminal Penal Code). However, the benefits on the part

[13] Łabuda G., Commentary to Article 16 of the Fiscal Penal Code, in: Kardas P., Łabuda G., Razowski T., Fiscal Penal Code. Commentary, Warsaw, 2017, 298.

[14] Almost half of the criminal fiscal proceedings in Poland find their conclusion precisely on this path, cf. I. Zgoliński, Voluntary Surrender to Liability in Fiscal Penal Law, Warsaw, 2011, 240 et seq.

of the perpetrator are important.[15] All this includes charging the offender with the consequences with which he agreed, including a financial sanction (paid as a fine), limited by law as to amount. Its amount falls within the range corresponding to the lowest fine threatened for the act in question up to maximum half of the sum corresponding to the upper limit (Articles 17§1(2), 18§1 and 146§2(1) of the Criminal Penal Code). It remains of utmost importance for the final court decision to allow voluntary surrender of responsibility not to be subject to entry in the National Criminal Register. Thus, the offender avoids the status of a convicted person, while the payment of a certain amount as a fine for a fiscal offense is not a prerequisite for fiscal recidivism (Art. 18§2 and 3 of the Criminal Code). The following similar phenomenon is the waiver of punishment. This solution can be implemented only by paying the public liability due entirely (Art. 19§2 of the Fiscal Penal Code) and only against perpetrators of fiscal misdemeanours and fiscal offenses subject to imprisonment for maximum 3 years or less. The perpetrator shall not be given a penalty or a penalty measure, or the penalty shall be waived, with the sanction being limited to a self-imposed penalty or penalty measure (Article 19§1 of the Criminal Penal Code). Elements of the regression of punishment adopted in Polish fiscal criminal law also include the so-called consensual modes, set forth in the procedural part of the Code (Art. 156§3 of the Criminal Code and Art. 161§1 of the Criminal Penal Code). They can be implemented as long as the offender does not refuse that he committed the act, admits his guilt and expresses his willingness to be convicted with an agreed penalty or punitive measures without trial or taking evidence at a trial. The benefit to the offender is undoubtedly smallest amounting to a reduction in the sanction. From the fiscal point of view, these tools are also not as attractive as the other ones. However, it is still a precondition for taking advantage of the two procedural agreements in question that the perpetrator pays the entire depleted public liability (Articles 156§3 and 161§1 of the Criminal Penal Code).

The primacy of execution and compensation over repression, does not include an absolute dimension in the Polish fiscal criminal law. This is for the incentives system for the depletion payment in exchange for the sanctions' reduction does not apply to offenders whose role was significant or reprehensible in the act commission and who are considered a threat to the legal order. This is the outcome of the conundrum that these perpetrators do not deserve leniency at the expense of a financial boost to fiscal.

[15] Sawicki Cf. J., Failure to Punish as an Element of Criminal Policy in Fiscal Criminal Law, Wroclaw, 2011, 175.

Given their role in the crime, they should be severely punished. We mean the perpetrators who are in charge, recommenders, provocateurs, i.e. the ones organizing or leading criminal associations or groups (Article 16§6 of the Criminal Code.), the ones having made a regular source of income out of committing fiscal criminal acts, those committing a sequence of fiscal criminal acts, fiscal recidivists, perpetrators operating in organized criminal structures and the ones using violence or threats of immediate use of abuse or cooperating with such people (Articles 17§2(2), 19§1(1), 156§2(1) of the Criminal Penal Code).

A rather pragmatic punishment philosophy on the level of fiscal criminal law given above is allegedly the most prominent feature of this law and one of the main reasons for the adopting a separate, autonomous regulation on this matter in the Polish law.[16]

IX. Other prominent features of the Polish Criminal Tax Code

Fiscal criminal liability is based on separate regulations, although it remains a typical criminal liability, generally based on the same principles. After all, it refers to the culpable liability of individuals for their behaviour, which is prohibited under the penalty. The differences in regulation are determined mainly by the type of reprehensible behaviour that caused or could have caused property damage to public law entities and the priority importance of the enforcement function. From the normative construction perspective, the Fiscal Penal Code consists of three titles, respectively referring to the matter of substantive, procedural and enforcement law. Title I (Articles 1 – 53 of the Fiscal Penal Code) regulates substantive law issues that are divided into the general part (Section I), including introductory provisions, phenomenon of the omission of punishment for the offender, other general regulations, relating to fiscal offenses and an explanation of statutory expressions. The second section normalizes the special part, the fiscal offenses and misdemeanours are styled in, divided into four groups, i.e., 1) fiscal offenses and misdemeanours directed against tax obligations and accounting for grants or subsidies (Articles 54-84 of the Criminal Code.); 2) fiscal offenses and misdemeanours directed against customs obligations and foreign trade rules in goods and services (Articles 85-96 of the Criminal Code);

[16] Konarska-Wrzosek V., Penal Code and Fiscal Penal Code – Convergences and Differences Prompting Reflection on the Legitimacy of Maintaining Separate Codifications, in: Problem spójności prawa karnego z perspektywy jego nowelizacji, edited by A. Marek and T. Oczkowski, Warsaw, 2011, 180.

3) fiscal offenses and misdemeanours against foreign exchange (Articles 97-106[3] of the Criminal Code); 4) fiscal offenses and misdemeanours against the organization of gambling (Articles 107-111 of the Criminal Code). Fiscal offenses contained in Division II constitute a closed catalogue of this behaviour in the sense that the Polish fiscal criminal law is not subject to extra-Code regulation. As a result, the fiscal crime or fiscal offense status can only apply to the penalty-banned acts that are included in the Fiscal Penal Code (Article 53 § 1, sentence 2 of the Fiscal Penal Code). Therefore, only these acts will be subject to the rules of incurring liability, penalties, punitive measures and other norms provided in the Fiscal Penal Code. Title II (Articles 113-177 of the Fiscal Penal Code) normalizes proceedings during fiscal crimes and fiscal offenses. It also contains general provisions, with the guiding principle referring to the provisions of the 1997 Code of Criminal Procedure, unless otherwise provided for in the Fiscal Penal Code. (Article 113 § 1 of the Fiscal Penal Code). Thus, in this respect, the Fiscal Penal Code is not autonomous, but has a supplementary-modifying character to the common criminal procedure. A fiscal criminal procedure is coherent with the common criminal one, but contains numerous distinctions. In general, they arise from the peculiarities of fiscal criminal proceedings. It regulates phenomena like the holding of subsidiary liability, rules of procedural intervention, types and powers of financial and non-financial procedural bodies, procedure for authorizing voluntary surrender of liability or treatment of absentees. As part of the procedural provisions, the enforcement function of the fiscal criminal law is also observable, exemplified in the content of Article 114 § 1 of the Fiscal Penal Code. Title III of the Fiscal Penal Code (Articles 178-191 of the Fiscal Penal Code), on the other hand, regulates the enforcement proceedings in cases of fiscal crimes and fiscal offenses. Thus, it refers to the final stage of fiscal criminal proceedings directly performing the enforcement-liquidation function. The purpose of these proceedings is to execute the final decision made during fiscal criminal proceedings. This chapter contains only 16 articles, so it is the smallest part of the Code. Here is a reference (in Article 178 § 1 of the Fiscal Penal Code) to the appropriate application of the provisions of the Executive Penal Code of 6.06.1997. This reference is dictated by the assumption that the enforcement issues should be concentrated in a single legal act serving this purpose, i.e. the Executive Penal Code. Article 1 § 1 of the Code of Criminal Procedure contains the principle that the Code regulations apply both to the execution of judgments made in criminal proceedings on common and military offenses and in proceedings during

the fiscal offenses as well as in the ones when it comes to misdemeanours (so-called common offenses) and penalties and coercive measures involving deprivation of liberty – unless otherwise defined by the law. Thus, Title III of the Criminal Penal Code contains only additional norms that are not included in the Executive Penal Code and regulates some issues differently, if required due to the specific nature of punishments or other measures imposed, as well as the parties to the enforcement proceedings, enforcement bodies or a need to adequately secure the financial interest.[17] Title III includes the general (Articles 178-181 of the Criminal Penal Code) and special parts (Articles 182-191 of the Criminal Penal Code). The general one contains a norm on general application of the Executive Criminal Code provisions in executive proceedings, equates the financial pre-trial authorities' status with that of the prosecutor, defines a larger catalogue of executive authorities, special conditions for the destruction of objects, authorities with the authority to carry out security and enforcement of proper criminal measures, enforcement of claims by an intervener, settlement of execution of penalties and measures in case of a non-simultaneous conviction for the same act under the institution of a perfect concurrence of fiscal criminal offenses with other criminal ones. The special part, on the other hand, defines certain possibilities of mitigating the ailments of the imposed sentences, conversion of sentences into alternate forms, enforcement of vicarious liability and issues of executing criminal measures and possibility of recognizing criminal measures as previously executed.

Among the distinguishing features of the Fiscal Penal Code, it is impossible to overlook two phenomena specific only to fiscal criminal liability proceedings, namely, the holding of subsidiary liability and procedural intervention. The first one implies derogation from the principle of liability individualization for unlawful acts. However, it is not a criminal, but property liability, dictated by the specific nature of fiscal criminal cases. It aims to safeguard the Treasury's financial interests in those situations when the convicted was unable to pay his charges. Auxiliary liability boils down to the responsibility of second parties for the fine and monetary equivalent of the crime objects' forfeiture, adjudged against the fiscal crime perpetrator. The basis for holding the secondary liability is a specific relationship linking the perpetrator to the entity held liable for secondary liability, based on the fact that the perpetrator was a deputy of that entity in managing its affairs and gaining or possibility to gain a financial benefit from the fiscal crime. Substitution in the conduct of the affairs of

[17] Konarska-Wrzosek V., Oczkowski T., Skorupka J., Prawo i postępowanie karne skarbowe, Warsaw, 2013, 494 et seq.

another entity may show various powers of attorney, such as the result of a power of attorney, exercise of management, conclusion of an employment contract, contract of mandate or actual representation. Vicarious liability shows a certain empowerment of the so-called fault in choice and fault in supervision. It is duly pointed out in the literature that the holding of subsidiary liability is excluded if the fiscal crime perpetrator acts independently, in his interest.[18] Subsidiary liability applies only to the fine and criminal measure of collecting the monetary equivalent of the objects forfeiture imposed on the fiscal offense perpetrator.

An intervention is a completely different type of institution, as it intends to guarantee bystanders with due protection of their rights during a pending fiscal criminal trial. It concerns the subjects who, not being suspects or defendants in a proceeding for a fiscal offense or fiscal misdemeanour, made a claim to the items subject to forfeiture in that proceeding (Article 53 § 41 of the Fiscal Penal Code). Thus, an intervener is a person (natural person, legal entity, unincorporated organizational unit, as well as a person held under subsidiary liability) who makes a claim to objects subject to forfeiture, be it mandatory or optional.[19] The concept of right to things includes not only the right of ownership, but other claims as well, including limited rights.[20]

X. Conclusion

The above-given analysis illustrates an outline of certain peculiarities and legislative traditions of the Polish fiscal criminal law. It is the subject of a separate regulation from the provisions of general criminal law, procedural law and executive law. In practice, these norms function properly, fulfilling the purpose they were intended to serve. They also bear a well-established interpretation through judicial jurisprudence. However, it should be noted that currently in the Polish literature there is a noticeable trend to make the broadest possible modification of these norms and even their partial shift to the regime of administrative law.[21] It is a clear doctrinal answer to the question of whether the adopted model is still effective for prosecuting and combat-

[18] Rydz-Sybilak K., Institution of Drawing Subsidiary Liability in Polish Fiscal Penal Law, Lodz 2014, 97-98.

[19] Skorupka J., Commentary to Article 119 of the Fiscal Penal Code, in: Fiscal Penal Code. Commentary, edited by I. Zgoliński, Warsaw, 2018, 702.

[20] Skowronek G., Evolution of Process Institutions in the Fiscal Penal Law, Warsaw, 2005, 62.

[21] More extensively see: Sepioło-Jankowska I., Optimal Model of Legal Responsibility for Fiscal Criminal Acts, Warsaw, 2016, 97 et seq.

ing this type of crime, especially tax crime. This is because this crime increasingly coexists with the organized crime. This forces law enforcement agencies to do much more that requires specialization and appropriate logistics. There must be an appropriate normative basis for such activities. In its current form, the Fiscal Penal Code is not prepared for the kind of challenges posed by strictly economic crime. This is no surprise, however, as it was by design dedicated to other types of behaviour. However, the Polish legislator has implemented certain mechanisms for responding to this most serious type of crime into the general criminal law. The result is that perpetrators can now bear criminal and fiscal criminal liability.

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