THE PROBLEM OF RESPONSIBILITY

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THE PROBLEM OF RESPONSIBILITY

In Search of Common Meanings in Law

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CONTENTS

INTRODUCTION

The formula of *Studies in Logic, Grammar and Rhetoric*, which alludes to the medieval *trivium*, allows the journal to publish a wide variety of social science resources and essays, enabling the use of different methods and approaches to study a number of issues, symbolically brought together under the *trivium*.

For the last ten years, *Studies* have been published in two separate editions – as an annual journal and as a book with a common theme running through each volume; hence a double referencing system for the journal and the book series. Using this formula, *Studies* published items on the methodology of social sciences, the philosophy of language, articles and essays belonging, *sensu stricte*, to the field of logic, as well as essays on the history of ideas.

The editors of this volume, in an effort to broaden the traditional content of the journal to include part of an autonomous, yet essential, field of social research, have approached authors from the academic legal field. The editors' key task was to define the thematic content of articles in such a way that would give it a universal dimension, enforcing a unity of subject matter and at the same time adhering to the same formula of the journal thus appealing to readers from different academic backgrounds.

The title of the volume: **The Problem of Responsibility. In Search of Common Meanings in Law** defines its thematic content by making 'responsibility' the subject of enquiry from the legal sciences' perspective. The notion of responsibility, including responsibility before the law, has long been examined in terms of its meaning, possible forms, its extent and foundations.[1]

[1] See particularly W. Lang: *Spór o pojęcie odpowiedzialności prawnej* (Debate on the notion of legal responsibility), Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika w Toruniu, Nauki Humanistyczne, 37 (1968), Prawo IX, p. 51 and next.

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The notion of responsibility encompasses a broad spectrum of inquiry; it is a subject of philosophical, ethical, religious, social and legal studies. There are marked differences in how responsibility is perceived in different value systems, such differences are also apparent in the aspect of that discipline where responsibility is regulated by law. It is possible also to indicate some fundamental difficulties in defining this concept in different areas of law.[2]

Such methodological and semantic problems, relating to the question of responsibility in employment law, are examined in the first article of this volume by W. Sanetra. It is reasonable to assume that the difficulties in arriving at a uniform concept of responsibility, which the article is concerned with, are applicable to other areas of law, and that they can be applied also to the question of responsibility beyond the law. This is confirmed by B. Kudrycka's study of ethical responsibility of local government officers. Although the majority of the texts concern legal responsibility, the authors of these texts clearly indicate the importance of responsibility beyond the law; of particular interest here may be S. Prutis's article: examining the anti-corruption legislation in unitary authorities, it also touches on the question of reviving ethical standards in the public domain.

Some of the authors, particularly D. Kijowski and M. Rękawek-Pachwicewicz, focus mainly on analysing how successful legal mechanisms are in regulating the question of responsibility in the different areas of law; they advocate the necessity of empirical research which would allow evaluation of the effectiveness of existing regulations. This is a justified argument, as the role of empirical research is gaining in significance; its results ought to be utilised in different aspects of life, both in ongoing work of organisations and in management, production and forecasting.

In some articles, authors discuss issues of widely understood criminal responsibility. K. Laskowska alludes to criminal responsibility in its comparative legal aspect; she examines the subject of crime in the context of criminal responsibility against the backdrop of the Polish and Russian legal codices. As T. Bojarski rightly stresses, the responsibility of the subject exists when the following conditions are met: 1) there is a 'sane' perpetrator, that is the perpetrator is a person who, in terms of their psychological characteristics, especially the ability to make decisions and to direct their actions, conforms to the norms of a given culture, 2) the perpetrator acts in a normal motivational situation, i.e. a situation which, in terms of culturally accepted norms, does not affect the psychological consistency of decision

[2] See W. Sanetra: *Odpowiedzialność według prawa pracy. Pojęcie, zarys, dyferencjacja*, Wrocław, 1991, p. 12 and next.

making, 3) the actions of the perpetrator (defined as the behaviour of the perpetrator and its direct consequences) are qualified as not conforming to the accepted norms.[3] In turn, the work of G. B. Szczygieł and E. Guzik-Makaruk concerns the specific issue of convicts serving a sentence of imprisonment. This type of responsibility relates in all sorts of ways to criminal responsibility. This can be seen as a parallel to criminal responsibility, or it could be the consequence of a lenient treatment of the culprit, especially if a low social impact of the offence is ascertained. The law directs that, in the case of an act having a low social impact, no criminal proceedings should be instigated. If such proceedings have already been instigated, the case should be dropped. This of course does not mean that one is considered not guilty, and does not absolve the culprit from all consequences of their actions. Dropping the case due to its low social impact does not preclude a disciplinary action, resulting from other areas of law.

The highly specific and difficult question of liability to the consumer as part of contractual responsibility is analysed by T. Mróz, who examines the question of disqualified exclusion clauses as a means of protecting the disadvantaged party in an obligational contract. The author rightly argues that there is a need for an urgent change to the legislation on the sale of consumer goods. New legal solutions ought to contain measures designed to protect the consumer in situations where agreement is entered into without the value of the goods being precisely defined, or where the purveyor stipulates such definition of goods that excludes or limits their liability.

A number of important themes belonging to a widely interpreted concept of criminal responsibility in the international aspect are explored by M. Zdanowicz and T. Dubowski, in their evaluation of the modern international criminal justice system.

An interesting and, in our social reality, contemporary issue is that of journalist's liability for defamation in Polish law, raised by K. Święcka. Of particular importance is the issue of individual's rights in the context of the freedom of speech/freedom to express criticism.

Last but not least, the work of A. Breczko, referring to the principle of responsibility in relation to the biotechnological process in medicine, tackles one of the key dilemmas of modern science in the context of issues arising within the overlapping disciplines of law and medicine, the solution to which has to consider the rights of the individual.

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[3] T. Bojarski, *Odpowiedzialność karna. Zagadnienia zakresu i stabilizacji* in *Polska lat dziewięćdziesiątych. Przemiany państwa i prawa* (Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 1999), p. 326.

As mentioned above, *Studies in Logic, Grammar and Rhetoric* is a journal addressed predominantly to researchers who are using tools and methods of a modern scientific approach in Arts and Humanities. This volume aims to encourage editorial cooperation of the members of the Polish legal fraternity, interested in publishing in a foreign language. But first and foremost, in addressing this volume to representatives of foreign academic circles, we are attempting to open up a wide international debate on the issues that unite legal thought, searching for a common meaning in law.

Emil W. Pływaczewski, Halina Święczkowka

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 12 (25) 2007

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RESPONSIBILITY IN LABOUR LAW – BASIC NOTIONAL ISSUES

1. Penalty and reward and the notion of responsibility

Responsibility is a notional category that occurs in multiple domains of knowledge, and it has been a subject of research for many centuries, especially by philosophers, ethicists, sociologists, management specialists and lawyers. Obviously, all discussions concerning the notion of responsibility within various fields of science revolve around a certain common core and common problems, however, apart from that the specific approaches and manners of posing questions differ, as a result of different objectives, assumptions and needs determined by the specifics of the subject and of the research methods characteristic of particular areas of knowledge. In the science of law the notion of responsibility is a fundamental notional category, which is expressed, among others, by the common usage of this term in the texts of normative acts. Thus, one should not wonder that this category constitutes a subject for consideration from the point of view of general legal theory,[1] yet first of all, it is analysed within the scope of specific branches of law, in particular such as criminal law, civil law, administrative law and labour law.

Both legal regulations and the science of law connect the notion of responsibility mainly with the punishment, with the commitment to repair the damage done and with the invalidity of the performed legal act (legal action), thus, in other words, with a sanction that is a consequence of the violation of a legal norm. Generally, the essence of the sanction is seen as

[1] An example here can be the works of W. Lang, *Prawo i moralność* [Law and morality], Warszawa 1989; *Spór o pojęcie odpowiedzialności prawnej* [The debate on the notion of legal responsibility], Acta Universitatis Nicolai Copernici, Prawo [Law] 9 (1969); *Struktura odpowiedzialności prawnej* [Structure of Legal Responsibility], Acta Universitatis Nicolai Copernici, Prawo [Law] 8 (1968).

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a burden of a factual nature, or consisting in the limitation of specific rights, as well as – in a wider perspective – in a resulting disadvantageous legal situation of the specific entity (the entity that is subject to responsibility). The complexity of this issue is realized, among others, by the fact that in notional categories the sanction can be identified with the actual stay in a penal institution (the actual serving of the sentence of confinement), or with the legal obligation to serve such sentence, and with both these states at the same time. At the same time, it remains disputable, and yet highly dependant on the adopted convention, how widely the category of burden is understood, and thus, what scope of meaning is assigned to the term sanction. In this scope, among others, the question arises whether the term sanction, and in consequence also the term responsibility, can and should also encompass situations that consist in the exclusion of a possibility of receiving the reward (whose receipt depends on the discretion of a specific entity). Another question arises whether the term sanction can be extended to the possibility of granting a reward, which is related to the division of sanctions often discussed in literature (including literature on labour law) into negative and positive sanctions. In particular in the literature on labour law, in the context of discussing rewards from the enterprise reward fund (the so-called thirteenth salary), it was once suggested that, apart from the legal norms of the structures: hypothesis, disposition, sanction (negative), norms consisting of hypothesis, disposition and reward (positive sanction, sanction in a wider understanding of the term)[2] should be distinguished as well.

2. Responsibility and the division of legal norms into sanctioned norms and sanctioning norms

The theory of law knows the approach to legal norm as a structure consisting of three elements, i.e. hypothesis, disposition and sanction, and the division of legal norms into sanctioned norms (norms that assign specific behaviour to specific entities in specific conditions) and sanctioning norms (norms that foresee the imposition of a burden in case of failure to fulfil the duty specified in the sanctioned norm), with the assumption that these two types of norms are inter-connected. In case of adopting the second understanding of legal norms (their structure), it can be generally stated that the

[2] H. Szurgacz, *Nagrody z zakładowego funduszu nagród* [Rewards from the enterprise reward fund], Wrocław 1979.

legal responsibility is expressed in the regulation contained in the sanctioning norm. However, it sometimes occurs that the notion of responsibility is extended not only to the results of the sanctioning norms, but also to the burdens (inconveniences and limitations) that result from the binding sanctioning norms, in particular of the duties of certain entities to behave in a specific manner, which are not the legal consequence of the violation of any sanctioned norms, and in this sense they are inconveniences (burdens) of a primary nature, in which they are different from the burdens of secondary nature, resulting from the violation of the sanctioned norms. As far as labour law is concerned, it is common practice to use the expression "being responsible for a certain status" simply in reference to duties of employees (especially in executive positions), resulting from specific legal regulations, regardless of the fact whether the employees violate the law. Responsibility in such cases can also sometimes mean both the duty to behave in a specific manner (pursuant to the sanctioned norm) as well as the consequences of the violation of this duty (as specified in the sanctioning norm).

However, most often, both in legal texts and in the science of law, the term responsibility is used in order to mark the state or a rule expressed in the sanctioning norm, so the burden foreseen as a consequence of the violation of the law (of another legal norm, i.e. the sanctioned norm). Thus, one can state that this is the basic usage of this notion. Furthermore, in my opinion, in order to increase the efficiency and the accuracy of the terminology of the language of legal texts and the legal language (the language of the science, teaching and practice of law), the so-called positive sanctions and the "regular" (primary) duties (inconveniences, burdens) imposed on entities by the binding law should not be placed together among the designates of the notion "responsibility". However, at the same time it should be taken into consideration that – due to the complexity of the legal norms and the related doctrinal disputes – it is not always possible to place a fully convincing, unambiguous border line between those situations which could be referred to as encompassed by the disposition of the sanctioned norm, and those which are encompassed by the sanctioning norm, as well as between the so-called negative and positive sanctions.

3. Types of responsibility in labour law and the grounds for their differentiation

When considering the subject of notional aspects of responsibility in labour law, one must face issues that exist in other branches of law as well,

and in this sense they are common for the whole legal system, however apart from them also specific matters arise, as the consequence of the specificity of the labour law as a separate area of law, of the separateness of its rules and axiology, and at the same time they also are a consequence of the difficulties in setting a precise border line between this law and other areas of law, in particular such as civil law, administrative law and criminal law. Legal responsibility has its structure, defined in particular by the answers to the following questions: 1. on what grounds, 2. to whom, 3. for what, 4. by whom, 5. in what manner and 6. what burdens (sanctions) can be used. The answers to these questions are contained in specific legal regulations (sanctioning norms), which are very complex and varied. This is a consequence of the legislator's constant search for instruments of obligatory nature, whose aim is to make the recipients obey the duties (orders, prohibitions, actions and omissions) and abstain from violating the limitations of their rights and freedoms, which are determined by the sanctioned norms. This should not be surprising, considering that the law cannot exist or act without responsibility or sanctions, and so the development and multiplication of regulations setting still more numerous and varied duties is accompanied by the development and complication of the forms of legal responsibility for the violation of such norms and the broadening of the catalogue of applied sanctions. This process applies to the whole legal system, but also to the particular sub-systems (branches of law), including labour law.

The responsibility in labour law is particularly varied, as this law is of a complex nature, which leads to the fact that within its area different methods of regulating social relations are applied, including – first of all – the commitment-related method (civil law), the administrative law method and the penal method. As a consequence, in the area of social relations constituting the subject of labour law, commitment-based forms of responsibility are applied (originating from the civil law), forms of the administrative legal nature (originating from the administrative law), penal methods (originating from the criminal law), as well as other forms of responsibility, which do not have clear origins in either civil, administrative, or criminal law. Such variety of forms of responsibility is particularly visible in the case of sanctions imposed on employees, as this responsibility, in its general outline, is divided into compensative responsibility (for damage done by the employee – Art. 114–127 of the Labour Code), and non-compensative responsibility. The latter is the responsibility for keeping to order in the broad understanding of the term, and it is again divided into the code based employee responsibility (Art. 108–113 of the Labour Code) and responsibility for acts

committed when on duty, which is regulated by the so-called employee labour regulations, and is applicable to those appointed public servants who, in the view of Polish labour law, belong to the category of employees (this group does not include professional soldiers, police, and the three other so-called uniform services, armed). The type of non-compensative employee responsibility (of a repressive-preventive and educational nature) is also the responsibility of penal nature, which is regulated by the Labour Code as responsibility for violations against the rights of employees (Art. 281–283). This category also encompasses responsibility for specific offences, including offences against the rights of employees (committed by other employees – Art. 218–221 of the Penal Code) and by public servants who are employees. The Labour Code establishes the compensative responsibility of employees, responsibility for keeping to order and responsibility for the violation of rights of employees, however, in the applicable specific regulations, the notion "responsibility" is used by the legislator. However, the legislators are inconsequent in this aspect, as they foresee a series of further charges for the violation of duties by the employee, yet they do not use the term "responsibility" in this context. This refers, in particular, to the case of termination of the employment contract without notice, without the fault of the employee (Art. 52 of the Labour Code), which has not been included in the catalogue of penalties for breach of order (within the framework of responsibility for keeping to order), and which is generally referred to as a sanction (responsibility) of a disciplinary nature. The series of burdens imposed for the violations of the duties of employees is also foreseen by regulations external to the code, including the regulations of the so-called autonomous labour law (branch and office law). They include, among others, the so-called disciplinary bonus regulators, whose essence consists in the fact that, in spite of meeting the positive conditions for the acquisition of the right to a bonus, the employee is deprived of the whole or of a part of the bonus, due to the breach of a specific duty or duties of the employee. Thus, specific forms (cases) of employee responsibility are distinguished. They are foreseen in the Labour Code and in external acts, including, to a large extent, the acts of the so-called autonomous labour law. They are mainly connected to the human resources and remuneration policies of the employers, so they are often referred to as instruments related to remuneration and human resources, which is accompanied by the – in my opinion untrue – statement, that they do not fit into the notion of employee responsibility. The situation where the employer does not use the term "responsibility" in reference to these instruments, still does not justify their exclusion from the scope of the notion, as they are specific types of burdens established as

a consequence of the breach of duties, and as such – of the violation of the sanctioned norm by the employee. Furthermore, it should be stated that among the specific cases (forms) of employee responsibility, it is precisely the sanctions (responsibility) that arise from the execution of human resources policy (employee responsibility related to human resources) and the policy related to remuneration (employee remuneration responsibility) that take a distinguished place.

4. Plurality of subjects of labour law and the differentiation of responsibility

As it has been already mentioned, responsibility in labour law is particularly varied. This variety is expressed especially in the existence of particular types (kinds) of responsibility, which are, in particular, the compensative responsibility, penal responsibility (responsibility for petty offences and offences), responsibility for acts committed when on duty (disciplinary) and the narrowly understood responsibility of employees for keeping to order. Responsibility for acts committed when on duty is, however, sometimes considered as a type of penal responsibility, whereas responsibility for keeping to order (Art. 108–113 of the Labour Code) was, in its origins, connected with the regulations of civil law, yet at present – in the interpretation of the Labour Code – it has more common features with the responsibility for acts committed when on duty (disciplinary) than with the commitment-based (civil) responsibility. Moreover, a separate category is constituted by specific forms of responsibility, in particular such as the human resources-related responsibility of employee (within the sphere of human resources policy maintained by the employer) and employee responsibility related to remuneration (within the sphere of remuneration policy of the employer).

The differentiation of responsibility in labour law can and should be discussed also due to the plurality of the subjects encompassed by the regulations of this law. The main subjects of this law are employees, employers, trade unions, organisations of employers as well as the staff of workplaces. Respective categories are distinguished: employee responsibility, responsibility of employers, responsibility of trade unions, responsibility of employer organisations and responsibility of staff of workplaces. At the same time, a separate problem consists in considering the specific organisational structures or human teams, as subjects of the labour law. This results, among others, from the fact that responsibility and subjectivity are interconnected

and mutually dependant. It is, in particular, difficult to assume that an individual is fully subject to a law, if such individual does not bear responsibility. This, among others, leads to the questioning of the subjectivity of staff of workplaces (the whole staff of employees of a workplace), as it is doubtful whether, and to what extent, such staff bear legal responsibility and who, and in what manner, enforces the responsibility. In the regulations of the labour law, the responsibility of employees is the most developed part. Numerous regulations of the labour law, including in particular the Labour Code, also regulate the responsibility of the employer being a party of the employment relationship. On the other hand, the regulations of labour law are much less specific in reference to the responsibility of trade unions, organisations of employers and of the staff of workplaces (assuming that in the case of staff one can discuss legal responsibility at all). At the same time, this responsibility is of a specific nature, which is expressed, among others, by the fact that within its framework organisational and political responsibility are distinguished.

The extension and development of legal regulations lead in consequence to the broadening of the scope of norms of the labour law, and this results in the emergence of new subjects. Within the orbit of this law, besides employment relationships (the relationships between the employee and the employer) and collective employment relationships, i.e. the relationships between the employer and organisations of employers, associations of employers and staff of workplaces, there also exist – in particular – relationships of non-employee employment (such relationships encompass the performance of work based on conditions similar to the conditions resulting from the employment contract), and relationships preceding the start of the relationship of employment (preparatory relationships for the employment relationships), in particular those which concern individuals searching for work and the unemployed. Within the scope of non-employee employment relationships, one can distinguish relationships based on civil law (relationships on the grounds of contracts for rendering a service, not employment contracts), relationships based on administrative law (concerning uniform services), relationships of penal nature (connected mainly with work performed by individuals who undergo the penalty of confinement) and relationships of a constitutional nature (which emerge in connection with the execution of functions by members of parliament, senators and aldermen).[3]

[3] Cf. W. Sanetra, *Prawo pracy. Zarys wykładu. T. 1* [Labour law. Outline of a lecture. Vol. 1], Białystok 1994, p. 54–69.

As such legal relationships are encompassed by the subject of labour law, also the responsibility borne by the subjects of such relationships belongs to the scope of responsibility of labour law. At the same time, these subjects cannot be identified with the subjects mentioned earlier (employees, employers, trade unions, organisations of employers, staff), and the responsibility that they bear has a series of distinctive features, which have not been subject to a deeper analysis in the science of labour law up to the present moment. The responsibility for acts committed when on duty (disciplinary) of members of public uniform services constitutes an exception from this rule, to a certain extent. They are not included in the category of employees, yet they bear responsibility for acts committed when on duty (disciplinary) basing on similar rules as those public servants whose legal status is established as that of employees.

5. The grounds for responsibility

The question about the grounds for responsibility is the question about what rules imply the possibility to apply the charge (sanction) to a specific subject. In case of legal responsibility the possibility results from the binding legal norm. In case of responsibility pursuant to the labour law, this legal norm is considered that belongs to this law as a separate branch of the law. As the boundaries of labour law are floating, the boundaries of the responsibility of the law are floating, doubtful and disputable in a respective manner. In a general sense, the grounds for such responsibility are the legal norms contained in normative acts that are included in the labour law, in particular such as the Labour Code and other acts, as well as acts of autonomous labour law (collective agreements of employment, other collective agreements, workplace regulations). However, a separate question remains on whether and to what extent the grounds for responsibility pursuant to labour law can constitute and constitute rules and norms external to the law, as practice knows the problem of social responsibility of employees, the use of educational sanctions, e.g. by worker courts, as well as of the reference of legal regulations to rules from outside the legal system (external to the system of law), such as the rules of social existence (e.g. pursuant to Art. 100 §2 of the Labour Code the employee is obliged to follow the rules of social existence in the workplace), or the ethical regulations of the given service. The grounds for the responsibility in labour law in such meaning take into account, apart from legal norms, also external regulations, however, their practical significance is relatively small.

6. Who bears responsibility

The question who, according to labour law, bears the responsibility, resolves in its essence to the determination of the subjects of this law. The circle of such subjects – as it has been previously mentioned – is wide and at the same time it leads to doubts and doctrinal disputes, which, in their turn, are a consequence of the liquidity of the boundaries between labour law, and in particular such branches of law as the civil law, administrative law and criminal law. As the main subject of labour law and at the same time the core of its norms are the relationships of employment, both the attention of the employer and of the doctrine of labour law focus mainly on the responsibility of parties of these relationships, i.e. of employees and employers. Employees are natural persons, whereas employers are both natural persons and legal entities, as well as other organisational units as long as they employ employees (Art. 3 of the Labour Code). This is significant, as not all sanctions (kinds of responsibility) can be applied to subjects other than natural persons. In particular, it is generally excluded to apply penal responsibility (for petty offences and offences) to employers being legal entities and other organisational units.[4] In other words, if the employer is a natural person, then it is possible to apply penal responsibility to it (in particular for petty offences and offences against the rights of employees), although it is not possible in case if the employer is a collective entity (collective employer), and then, as a rule, the responsibility for the offences and violations of the rights of employees is borne by another employee, whose duties include those tasks that are assigned by the labour law to the employer. This means that the responsibility of employers – and, as a consequence, also of employees – differs, depending on whether the employer is a natural person or a collective entity.

However, the differentiation of responsibility of employees and employers is also visible in other areas, and it origins from various reasons and conditions. From this point of view, the division into employees employed by the state (public) structures and those employed outside these structures is essential, as the former are subject to responsibility for acts committed

[4] Divergences from the rule that only natural persons are subject to criminal responsibility (in reference to specific offences and fiscal offences) were introduced in particular by *Ustawa z dnia 28 października 2002 r. o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary* [The Act of 28 October 2002, on the responsibility of collective entities for acts prohibited under penalty], Dziennik Ustaw [Journal of Laws], No. 197, item 1661 amended.

when on duty (disciplinary), whereas to the latter – instead of this responsibility – responsibility for keeping to order as specified in the regulations of Art. 108–113 of the Labour Code is applied. Additionally, the grounds for establishing the relationship of employment are significant in this case, as in the labour regulations – apart from few exceptions – responsibility for acts committed when on duty (disciplinary) is only foreseen for appointed employees, which means that the so-called contract employees employed in public structures are subject to responsibility for keeping to order pursuant to the Labour Code. The differences in the shape of responsibility are also a consequence of the fact that specific employees are employed on the basis of appointment or election for a position (pursuant to the Labour Code the relationship of employment can be established on the grounds of employment contract, co-operative contract of employment, nomination, appointment and election – Art. 3), which is connected with the distinction of executive positions. In general, in the aspect of the problem of responsibility, particularly the differences in the shaping of its rules in reference to the so-called individuals (employees) from the circle of the employer, and – in a broader aspect – to the so-called executive staff are particularly clearly visible.[5] As it was mentioned earlier, there are clear differences in the manner of shaping the responsibility of employees and employers, even in spite of the equality of both parties of the relationship of employment adopted as a general assumption. In a general approach the responsibility of employees is more developed and varied than the responsibility of employers in the regulations of labour law. Employers, obviously, are particularly not subject to responsibility for keeping to order and responsibility for acts committed when on duty, and sanctions related to employment and remuneration are not applicable to them. Even larger differences can be noticed between the responsibility of employees and that of collective entities (trade unions, organisations of employers, staff of workplaces) and other entities included into the category of subjects of labour law. However, performing comparisons and evaluations in this scope is not simple, as numerous different types of responsibility can be applied not to just one but to all these subjects, in different configurations.

[5] On the issue of specific features of the responsibility of executive staff, cf., e.g. *Pracownicza odpowiedzialność kadry kierowniczej. Materiały XII Zimowej Szkoły Prawa Pracy* [Employee responsibility of the executive staff. Materials of the XIIth Winter School of Labour Law], Wrocław 1985.

7. Prerequisites for responsibility

The question on what the responsibility is borne for, resolves in the determination of the prerequisites for responsibility. In the most general sense, it is assumed that responsibility is a consequence of the violation of a legal norm, i.e. of a behaviour non-compliant with such norm. The violation can consist in action or negligence. It can be constituted by a behaviour non-compliant with an order or prohibition established by a legal norm, as well as the transgression by a subject of the rights to which it is entitled. In this context it is an extremely significant and complex question, how the "violation" of a legal norm is understood, and in particular whether – and if so – how significant for its understanding are the so-called subjective elements of behaviour of the given subject. In human behaviour two aspects can be distinguished: objective (external, behavioural) and subjective (internal, psychological). Due to this distinction, the characteristics of the violation of a legal norm (sanctioned norm) separate the issue of unlawfulness (the violation of the legal norm in the "objective" behavioural aspect) from the issue of fault of the perpetrator (the violation of the legal norm in the "subjective" psychological sense), assuming that in order to apply responsibility it is not sufficient to state that a given behaviour is objectively reprehensible (unlawful), as it also has to be caused by fault (subjectively). So, unlawfulness is not sufficient, although one cannot speak of fault, if there is no objective reprehensibility (the contradiction to a specific legal norm) of the specific behaviour of the given subject. The responsibility, for the application of which the necessary prerequisite is not only the unlawfulness but also the fault, is sometimes called subjective responsibility (responsibility for culpable behaviour), while at the same time it is opposed to the so-called objective responsibility, whose essence consists in the fact that it is not dependant on the specific attitude of the perpetrator towards the act (the reprehensible decision of will), and thus on the fault.[6] The adoption of the rule that responsibility is borne only for culpable behaviours is considered as an expression of progress of civilisation. However, some exceptions from this rule are established, in particular

[6] I analysed the fault of employee in the work: *Wina w odpowiedzialności pracowniczej* [Fault in Employee Responsibility], Warszawa–Wrocław 1975, expressing – among others – the view that fault as a prerequisite for different kinds of employee responsibility should be understood in a uniform manner, however, it cannot be fully identified with fault as understood in the criminal law and fault in the civil law, and in this sense it occupies the position between "penal fault" and "civil fault" (p. 190–193).

in the area of compensative responsibility, expressed in particular in establishing responsibility basing on the rule of risk, which corresponds to the belief that in case of damage it is more just for the perpetrator to bear the consequences, even if he does not act in fault, than for the injured party.[7] However, the problem arises here whether one can speak at all about the existence of a general, legal obligation not to cause damage. The existence of such obligation is difficult to accept, which means that the damage can be a consequence of legal actions (clearly accepted by the law), and in spite of that, in specific cases, the legal regulations foresee an obligation to repair it, calling such obligation "responsibility". As a consequence of this fact, responsibility can be a result of unlawful and culpable behaviour, unlawful behaviour (contradictory to a specific, clear legal norm), however, not caused by fault, but also of states, in which it is difficult to find elements of fault or of unlawfulness. This confirms the statement formulated earlier that there are and there can exist doubts when establishing the boundaries, or when distinguishing sanctioned norms from sanctioning norms. The hypothesis of the sanctioning norm, i.e. the set of conditions on which the application of sanction depends, includes the violation of the sanctioned norm, so, a behaviour, which can be assigned at least the feature of unlawfulness, thus, if the given sanction is not dependant on such condition, it does not constitute an element of the sanctioning norm and it belongs to the sanctioned norm, establishing specific burdens (duties), even if they are called "compensative responsibility" by the employer. As the legislator uses the term "responsibility" (compensative) in the context of responsibility based on risk, this terminology has to be adopted and accepted, at the same time taking into account the fact that at least in the aspect of the theoretical distinction between sanctioned and sanctioning norms it can lead to justified doubts.

In the labour law the necessity to base responsibility on the prerequisite of unlawfulness and fault is particularly visible in the case of responsibility of employee (its main forms regulated by the Labour Code and other acts) and the penal responsibility for petty offences and offences against the rights of employees. It is, however, different in the case of the employer (apart from their responsibility of penal nature) and other subjects of labour law, as it relatively often occurs that their responsibility is based on

[7] On the subject of understanding risk as a legal category, including the understanding of risk in labour law, cf.: W. Sanetra, *Ryzyko osobowe zakładu pracy* [Personal risk of work establishment], Warszawa 1971.

the rule of risk. One can also sometimes witness the tendency to impose the risk of responsibility also on the employee (this happens, e.g., in the case of the so-called common responsibility of employees for damage, or in case of remuneration or human resources-related sanctions), although this tendency should be contradicted. As for compensative responsibility, its necessary prerequisites are the damage and the relation of cause, and in case of compensative responsibility of the employee also the unlawfulness and fault of the employee (with the reservation related to – as it has been mentioned – common responsibility of employees for damage). The requirement of existence of damage distinguishes the compensative responsibility, whose basic aim is to repair the damage, from other types of responsibility, whose task is not to lead to the repair of the damage (a separate issue here is the issue of compensation for a damage treated as immaterial damage – Art. 445, 448 of the Civil Code, Art. 94^3 §3 of the Labour Code) and which are thus sometimes referred to by a common name of non-compensative responsibility. The application of the second type of responsibility is also connected with the belief that a specific reprehensible behaviour is also connected with the existence of a certain damage, however, this does not necessarily have to be material damage (or harm), as it happens in the case of compensative responsibility. The damage, and more precisely, the harmfulness of the action, in case of non-compensative responsibility, is only exceptionally included in legal regulations as a prerequisite for the application of responsibility. It is expressed in the regulations of criminal law, which defines petty offence and offence as actions harmful to society.

It should be stated in general that the prerequisites for responsibility, while they are numerous, are phrased and expressed in different ways in the regulations of labour law. Those ways depend, in particular, on the types of responsibility. Generally – if one omits compensative responsibility, where the additional prerequisite of damage and relation of cause appear – the prerequisites for responsibility are unlawfulness and fault, although unlawfulness is also expressed in various manners in the legal regulations, and so are the conditions for the exclusion thereof (the so-called countertypes of unlawfulness). There also exist differences in the description of fault and of circumstances excluding it. Moreover, the responsibility and its burden are sometimes made dependant on the degree of culpability, as it happens, e.g., in the case of termination of the employment contract without notice due to gross breach of basic duties of the employee, which is conditioned by the statement of existence of not any fault on the part of the employee but only of "gross" fault.

8. Who applies responsibility

The question about who applies the responsibility (sanctions) concerns the determination of the subject (organ) competent for its application. In the relationships which constitute the subject of labour law, and in particular in the relationship of employment, there is a possibility to apply responsibility by the subjects of these relationships (this is true particularly in case of application by the employer of administrative, human resources – or remuneration related sanctions to the employee), and even to apply it to some extent to each other, by parties of such relationships (e.g. the employer can dismiss the employee in disciplinary mode, but also the employee can terminate the contract of employment with the employer due to a gross violation of its basic obligations to the employee by the employer, which additionally results in the obligation on the part of the employer to pay compensation to the employee – Art. 55 §1^1 of the Labour Code). However, a typical situation is considered the application of responsibility by organs which are external to the parties of labour law relationships, including particularly labour courts (which are appointed, among others, to judge the compensative responsibility of employees and employers) and criminal courts (which are appropriate for cases of petty offences and offences against the rights of employee). In other words, the responsibility in labour law is applied by courts and other organs (entities). Particular problems arise in connection with the application of responsibility for acts committed when on duty (disciplinary) by disciplinary committees, as it can be assumed that they act on behalf and in favour of the employer, applying sanctions to appointed employees, and so they can be deemed as organs acting in substitution of the employer, thus, that disciplinary sanctions are indeed imposed by the employer, who uses these committees to achieve this objective. However, a different approach prevails, stating that the legal status of disciplinary committees is separate from that of the employer and that they judge in a more general (public) interest. Thus, they are external organs (in relation to the employer) although they impose penalties for the violation of duties of employee encompassed by the relationship of employment, and the penalties consist in the limitation of these rights of employee, whose aim and justification is to influence the given individuals as employees to force them to respect their duties as employees rather than, e.g. their duties as citizens. At the same time, responsibility for acts committed when on duty (disciplinary) does not generally realize the function of just retaliation (which is characteristic of penal responsibility), and the main reason for its existence is to guarantee order in the relationships of employment and to

effectively achieve the objectives for which these relationships are brought to life.

In the legislatory activity the aspiration to create the so-called sanctions applied by force of law is becoming clearly noticeable. In such case the sanction is not imposed by a specific organ (subject), e.g. the court, but it is, to some extent, an automatic consequence of a specific behaviour, e.g. of the employee. In case of a possible dispute, the task of the court is only to state that the specific result (sanction) has taken place, not to impose a specific burden. In such case the court is deprived of the possibility of performing evaluation and of selection of a specific burden. Examples in this aspect can be found in these regulations of the labour law that foresee the expiration of the relationship of employment by force of the law itself, with the additional assumption that the cause for such expiration is reprehensible behaviour of the employee. Thus, a type of "sanction by force of law" can be deemed (Art. 66 of the Labour Code) the expiration of the employment contract after three months of absence of the employee at the place of work due to provisional detention (assuming that the detention results from some reprehensible behaviour of the employee), as well as the expiration of this contract due to abandonment of employment by employee, as it was foreseen by the repealed Art. 64 of the Labour Code. Pursuant to the already invalid Art. 65 of the Labour Code, abandonment of employment was also deemed as lawless abstaining by the employee from the performance of work as well as absence from the place of work without prior notice to the place of work about the cause for absence, which are reprehensible behaviours of employees consisting in culpable breach of specific duties of employee. Regulations of this type are sometimes a proof of distrust of the legislator in the proper functioning of the organs (subjects) appointed for the application of law, including courts, which should be condemned. They lead, in fact, to the legislator taking over the role to perform, which the courts (as well as other entities applying the law) are appointed, they often mean the exclusion of the desired evaluation and valuation, and, finally result in excessive schematism leading to the imbalance of the necessary proportions between the significance of the violation and the burden of the sanction "applied" in an automatic manner, or "by force of the law itself".[8] However, in this

[8] This is stated clearly, among others, in the judgment of the Constitutional Tribunal of 13 March, 2007 (K 8/07 Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy Seria A 2007, No. 3, item 26), in which it deemed Art. 190 (1) point 1a of the Act of 16 July, 1998 – *Ordynacja wyborcza do rad gmin, rad powiatów i sejmików województw* [Electoral law for councils of communities, counties and voivodship parliaments] (uniform text: Dziennik Ustaw [Journal of Laws] 2003, No. 159, item 1547 amended.), Art. 26 (1) point 1a of the *Ustawa o bezpośrednim wyborze wójta, burmistrza i prezydenta miasta* [Act

context it should be stressed that a separate problem is constituted by the (absolute) invalidity of legal actions and of other legal acts (in particular of administrative decisions), which is the so-called sanction of invalidity, which is assumed to be independent from the evaluations of the organ judging the case (the court), in the sense that its judgement is of a declarative nature (the statement that the legal action has a specific defect is in this case equivalent to the statement of its invalidity, so the sanction of invalidity is of an automatic nature), not constitutive.

9. Mode of application of responsibility

The question about the mode in which responsibility is applied pursuant to labour law refers to the various manners of proceedings, which have to be followed so that it is possible to state that responsibility has been applied appropriately. These modes are as varied as is the responsibility in labour law. Obviously, the most developed ones are the modes of proceedings, in which the responsibility is applied by courts (labour courts, criminal courts judging cases of petty offences and offences included in the so-called penal labour law). Elaborate procedures are also foreseen by the regulations establishing responsibility for acts committed when on duty (disciplinary), whereas the specific solutions adopted within this scope in the practice of labour regulations are very different and often rather random. The procedure foreseen in the case of imposition of administrative penalties by the employer pursuant to the regulations of the Labour Code (Art. 114–127) is less detailed. Both cases foresee the possibility to appeal to court. As far as responsibility for keeping to order is concerned, the regulations imply clearly that this type of responsibility cannot be applied by labour courts. They can only reverse the penalty imposed by the employer or refuse to reverse it (dismiss the claim of the employee). Thus, in such case, the court performs a strictly controlling function, although as far as responsibility for

of 20 June, 2002 on the direct election of village and town mayors and presidents of cities], Dziennik Ustaw [Journal of Laws], No. 113, item 984 amended) and Art. 24j par. 3 of *Ustawa z dnia 8 marca 1990 o samorządzie gminnym* [the Act of 8 March, 1990 on communal self-government] (uniform text: Dziennik Ustaw [Journal of Laws] 2001, No. 142, item 1591 amended) as incompatible with specific regulations of the Constitution of the Republic of Poland, pointing to the excessive schematism of the respective regulations concerning territorial self-government (expiration of mandate due to failure to deliver property declaration within term) and the lack of necessary proportion between the importance of offence and the charge resulting automatically from the act (if the overrun of the set deadline is justified or is not excessive).

acts committed when on duty (disciplinary) is concerned, the implemented solutions are sometimes different and varied in particular judgments, granting the court a wider range of possibilities to supervise the judgment of the disciplinary committee than in the case of responsibility for keeping to order pursuant to Labour Code. In this context, in connection with the question about the mode of application of responsibility, it is justified to introduce an additional differentiation, expressed by the question about who and in what mode applies responsibility (sanction) in labour law, and the question to whom one can appeal (in case of application of responsibility, but also, in some cases, in case of non-application thereof), and, in what mode the appeal is handled.

10. Burden (sanction) and its types

The question about what burdens (sanctions) are imposed for the violation of a sanctioned norm assumes the existence of sufficient knowledge about the designates included in the notion "burden" (sanction). This knowledge is provided to us, first of all, by the legislators themselves, as while regulating particular types of responsibility within their scope they enumerate the types of penalties and points to other legal instruments (e.g. compensation, contractual penalty). The types of these burdens are extremely varied, while at the same time it is not always possible to state explicitly that the instrument foreseen by labour law in fact constitutes a burden and that, as such, it should be referred to by the term sanction. In general, the sanctions that one encounters in labour law can be divided into sanctions of a property-related nature (e.g. compensation, fine, lowering of remuneration, withholding of a salary promotion, deprivation of bonus) and those of non-property-related nature, including, in particular, sanctions directed against the personal rights of the employee, creating a detriment to the dignity of the employee (e.g. admonition, reprimand, warning). A special category is constituted by sanctions directed against the permanence of relationship of employment (e.g. termination of the employment contract without notice due to the fault of a party of the employment relationship, termination of the employment contract without notice due to a fault of the employee, a changing notice due to a fault of the employee, transfer to a lower position, disciplinary transfer to another site, recall from a position) and those limiting the possibility of new employment opportunities (e.g. the prohibition to perform a specific job, the prohibition to occupy a specific position). Also, sanctions that can be treated as typical penal sanctions or

sanctions similar to penal sanctions can be distinguished (e.g. penalty of confinement, fine, penalty of restriction of liberty, the prohibition to leave the military unit as disciplinary punishment). A separate group is constituted by sanctions consisting in the invalidity of legal actions (acts) and similar sanctions (e.g. evasion from legal effects of a defective statement of will). At the same time, the process of constant development of the catalogue of burdens applied to subjects of labour law is characteristic of the legislator and the practice.

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ETHICAL RESPONSIBILITY OF LOCAL GOVERNMENT OFFICIALS

Citizens of a democratic state expect the representatives of the public administration to be competent, educated and professionally prepared experts. The current and the future changes result in the necessity of constantly monitoring the national and local administrative personnel, its functioning and the rules governing its actions. The introduction of modern techniques and methods of work organization and new computing technologies, as well as the improvement of the legal system, the new quality of relations between the public and the private sector, the active role of mass media and the low political culture – it all results in the fact that, according to the Polish public opinion, we can observe a deep moral crisis in the public sphere. At the same time, the people have understood that democracy results in a limited trust towards politicians. The role of politicians, who had been exercising the role of grand builders of the system until 1993, is also changing in Poland because nowadays they have to be, first of all, responsible towards their voters. Despite that, public life in our country, especially in between the political and administrative sphere, is still a maze of complicated, often famed with bad reputation behaviors. Fifteen years was not enough to create clear rules and principles of proper conduct. And although the politicians, while understanding the importance of their voters, do realize that the efficiency of their actions depends on the ability of gaining public support, respect and credibility, they still do not always know that, in fact, only ethical behavior will earn them respect and new voters.

It is much easier for mass media, local press and investigating journalists to discover, identify and describe incompetence and dishonesty occurring in a town or village (since unsatisfied needs of local communities are more evident for their inhabitants) than when it happens in offices or agencies of the central government administration. Therefore, every such case described

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in media results in an impression that the local government has fallen to the epidemic of incompetence and dishonesty. Some even say that the local government is a place where councilors and civil servants commit fraud and handle their own interests by using their "five minutes at power". As a result, the local government is under pressure to prove that, on the one hand, the decentralization of the public authority in favor of the local government entities is reasonable and, on the other hand, the local government functionaries (councilors and civil servants) are not a group of incompetent people who are spoiled by power.

According to E. Łętowska, "in Poland, during the revolutionary changes of the system, it is clear that the necessary features of the stabilized systems' strength like clear game rules, the knowledge of public roles and the awareness of what behavior of the authorities is good or bad, are not a subject of the common awareness of the society".[1] Many can just intuitionally feel what should the roles of politicians and civil servants be (from the central and local government). This is affected by, settled in administrative law, theory of an administrative organ, which gathers into one anonymous administration apparatus the positions of politicians and civil servants without analyzing the different quality of their legal position, their complicated relations, as well as the different systems of responsibility they are subject to. Therefore, it is high time for the society, civil servants and politicians to finally find an answer to a question what should their roles in the public system be, who they really are in the public administration and whom do they actually serve. Because the understanding of their roles will help them to perform their functions reasonably and not only in accordance with the law but also in accordance with public expectations.

To understand those roles one has to accept the thesis that, although everybody at power is obliged to act reliably, the local government politicians are under different duties compared to the local government civil servants, since there are different public expectations towards each of those groups. While politicians are responsible for the achievement of political strategies before the local government council, their voters and their political parties, the local government civil servants are obliged to act professionally and according to the principle of political neutrality for which they are disciplinary responsible. The law plays a big part in maintaining those differences.

[1] E. Łętowska, *Dobro wspólne, władza, korupcja*, a speech held at the conference organised by Centrum Konstytucjonalizmu i Kultury Prawnej ISP and Fundacja Stefana Batorego.

Therefore, it is important not only to identify the roles and functions of politicians and civil servants when managing the local government affaires, but also to clearly separate different categories of politicians and their influence on the ethical governance of the public sphere.

Ethical responsibility of local government politicians and civil servants

The local government politicians and civil servants should be responsible for violating statutory obligations and rules of ethical behavior. Applying such responsibility is a consequence of the principle that imposing an obligation on a person is resulting in his responsibility which is understood as negative aftermaths of breaching this obligation. Disputes arising from applying such responsibility are settled by courts.

The local government civil servants and politicians have access to information and a right to decide about public matters because of their special status and, therefore, they are subject to the special regime of responsibility. However, the responsibility for unethical behavior of local government politicians and civil servants is limited because not every breach of ethics is punishable under penal law. The unethical behaviors which are qualified as crimes include, for example, bribery and the misuse of powers. Bribery takes place when a local government official is deciding to act partially for personal benefits, while misuse of powers takes place when an official is buying the votes. According to section 108e of the German Criminal Code: "Whoever undertakes to buy or sell a vote for an election or ballot in the European Parliament or in a parliament of the Federation, the Lands, municipalities or municipal associations, shall be punished with imprisonment for not more than five years or a fine".[2]

Local government civil servants are subject to criminal responsibility for corruption when they are receiving certain personal benefits (financial and other) in exchange for, for example, the disclosure of official information or for taking a specific decision. If it is proven that they have transgressed their official obligations in exchange for certain benefits, they bear criminal responsibility. In penal cases concerning official crimes in the United States, unlike in Europe, civil servants do not have the benefit of the presumption

[2] *Wybrane przepisy dotyczące etyki parlamentarnej członków Bundestagu, działalności grup interesu i korupcji*, (in:) *Etyka parlamentarna*, Biuro Studiów i Ekspertyz Kancelarii Sejmu 1997, p. 216. English version of the German Criminal Code: http://www.iuscomp.org/gla/statutes/StGB.htm#108e.

of innocence and they themselves are obliged to prove that they had not committed the crime. There has been many cases when civil servants, while defending their illegal behavior in the name of "a widely and differently understood public interest", were eventually often proven that they had acted according to their financial or other benefits.[3]

It can be summarized that civil servants are responsible for violating the standards of ethical behavior only when their actions constitute a crime. And, although often partial behaviors are unambiguously and without doubt forbidden, unethical actions which are not considered as crimes will not result in the civil servant's criminal responsibility since the law is not working properly when it comes to political party's interests. However, if a certain behavior does not constitute a crime, it does not mean that it is not transgressing the law and that it is not socially blameworthy. According to E. Łętowska, penal law does not constitute a sufficient measure to effectively counteract violations of ethics and of proper performance of public functions. "After all, according to the basic penal rule, before one can talk about a crime, the boundaries of a penal act need to be specified. An act constitutes a crime only when it is forbidden by the law and, additionally, it has to be forbidden clearly and without doubt. There is no crime if the law itself is not clear and, therefore, the public opinion feels far more negative about certain behaviors than they are punishable. If we rightfully feel appalled with the 'freemarketing' of power, than it is not only about punishing the ones which are guilty of law-breaking. The law is not a perfect instrument but it cannot work differently. It will not 'punish' everybody who is 'only' or 'already' immoral".[4]

A breach of rules of ethical behavior by public functionaries constitutes a typical negative behavior, which is not exhausted by penal law sanctions. Therefore, it is necessary to look for responsibility for unethical behavior of politicians and civil servants in moral or social responsibility, as well as in administrative responsibility for transgressing statutory obligations. Civil servants and politicians act illegally when they violate their statutory obligations and they should be responsible for such actions. However, only local government civil servants, and not local government politicians, can bear administrative responsibility.

Although civil servants' administrative responsibility is based on different legal grounds and, in principle, has a repressive nature, it is always

[3] M. Clarke, *Corruption: Causes, Consequences and Control*, New York 1989, p. 415.

[4] E. Łętowska, *Władza bywa sprzedajna, a prawo jest z natury ułomne*, "Rzeczpospolita" 1996, no. 275.

tied to a statutorily restricted system of administrative sanctions available according to the position one is holding, since, for example, it is difficult to punish a civil servant by degrading him to a lower position if he already holds the lowest position in the group.

The differences in applying responsibility towards local government civil servant and politicians are depicted in the table below.

Table No. 1
Types of responsibility of local government politicians and civil servants

Responsibility of politicians	Responsibility of civil servants
Penal (before a court of general jurisdiction)	**Penal** (before a court of general jurisdiction)
Civil (according to tort law)	**Civil** (according to tort law)
–	**Administrative** – disciplinary (before a disciplinary commission)
Political (before the organs of the political party)	–
–	**Professional** (before the organs of a professional association)
Social (towards the council and voters)	**Social** (towards public opinion)
Moral (towards one's own conscience)	**Moral** (towards one's own conscience)

Applying responsibility constitutes a motivation to take actions and, therefore, different types of responsibility of local government politicians and civil servants result in their different motivations. When politicians are performing their public functions they often take actions according to their "political party motivation", which does not always have to be consistent with the public interest since political responsibility is generally motivating them to implement political programs (which are, however, constantly verified by the opposition parties if they do not act in the public interest). On the other hand, the politicians' responsibility towards their voters is motivating them to favor certain groups of voters, which is often based on the political criteria. The fulfillment of the political party's interest is best motivated by the politicians' responsibility before the organs of the political party of which they are members. We can lately observe a tendency in the United States to demand greater political subordination of local govern-

ment politicians, although it is mainly Europe which is known for stronger political discipline. The ties between politicians and their political parties are exceptionally strong in the proportionate election system but the politicians' loyalty towards their parties is not always ethical. The specificity of this situation is that it is the political party itself which should care the most for the objective image of its representatives since this is how a party is building its authority and the moral right to execute power.

It is the responsibility towards voters and one's own conscience which fulfills the role of guaranteeing proper behavior of the local government councilors which is in line with the public interest (often understood as the interest of the local community). Politicians bear responsibility for a breach of the public interest values and other constitutional standards mostly during their next local government elections. It is, however, impossible to normalize or judge moral responsibility towards one's own conscience.

The system of civil servants' responsibility is divergent from the system of politicians' responsibility and thus civil servants' motivations are also different. The application of administrative responsibility is the most important here. However, civil servants do not only bear administrative responsibility but they also bear professional responsibility before special commissions of professional responsibility which are created by professional associations to which they belong (e.g. architects, geodesists, accountants, doctors, etc.).

Applying administrative responsibility towards civil servants for their unethical behavior is a difficult and delicate matter. There is a danger that, as a result of "political party motivations", their political superiors will take decisions punishing civil servants not only by applying disciplinary sanctions but also, for example, by refusing to promote a civil servant or by refusing to grant him a reward solely on the basis of his political preferences. The political superiors' party motivations can also be expressed in the content of their official orders which are directed to their subordinate civil servants. Such politicians' party motivations can then be transformed into official motivations of local government civil servants. Such situations can occur in many countries, although their frequency depends on the nature of interior relations in the office.

It is becoming increasingly emphasized of late that responsibility towards the public opinion is playing a significant role in the motivations of civil servants and politicians. This responsibility is molded by the mechanism of self-conscience similar to the principle Washington Post, which means that while taking their official actions, civil servants should take into account the possibility that their actions may be commented by journalists

on the first page of a widely read newspaper, and thus the principle becomes increasingly important for performing the function of a "guardian" of the public interest by civil servants. In such cases, not only the principles of application of administrative law but also the fear of the public opinion's criticism show directions to civil servants when taking their actions.

It is difficult not to agree with a thesis that the higher the position is, the greater the level of responsibility rests on public functionaries. The theory behind it is that when one gets promoted to a higher position in the local government system, the extent and weight of his administrative tasks enlarges as well as the number of recipients of his actions and their social effects increase subsequently. Therefore, the level of responsibility of local government politicians and civil servants should also expand. According to this theory, the level of responsibility of local government politicians who take decisions concerning such matters as using force to subdue a manifestation or allocating additional public funds to certain categories of people, is greater than the level of responsibility of civil servants who, for example, register cars or decide whether to cut down a tree. Consequently, the people who hold the highest positions in the administrative hierarchy ought to behave according to greater ethical requirements than civil servants of the middle or lowest level.

To be able to judge responsible behavior of local government politicians and civil servants in Poland, their motivations need to be analyzed by sociological questionnaires. For example, it is possible to asses the level of civil servants' ethical motivations by examining if, while taking administrative actions, especially those actions which do not belong to the category of decisions, they concentrate on legal provisions, constitutional values, ethical values, prohibitions and penalties, cooperation and collaboration in the same office, keeping individual position in the structure of the organization, loyalty towards superiors and fear of the public opinion's criticism.[5] To assess the level of ethical motivations of politicians, it is enough to ask them a question whether, when taking an administrative decision, they are guided by: the public interest, the interest of the local community, legal provisions, constitutional values, ethical values, fear of applying responsibility, interest of the local government office, political party's program, loyalty towards their political superiors and voters' opinion. Of course, questions asked to the local government civil servants should be phrased differently than questions meant for the local government politicians. Therefore, to achieve the

[5] B. Kudrycka, *Dylematy urzędników administracji publicznej*, Temida2, Białystok 1995, p. 260.

correct assessment of the level of ethical motivations, civil servants need to be asked about politicians' motivations and politicians, likewise, should be asked about civil servants' motivations. The same questions should be directed to the receivers of administrative actions, that is an adequate group of representatives of local commune's inhabitants.

Political loyalty and professionalism of actions in the local government

The application of ethical responsibility in the local government administration greatly depends on internal relations in a particular local government entity and, most of all, it depends on relations between superiors and subordinates based on the principal-agent theory.

Theoretical and organizational aspects of a model of relations: principal-agent in which it is difficult to take into consideration the variety of organizational structures and psychological conditions of behaviors of the principal and agent, are necessarily carried out in the institutional void. Therefore, it is necessary to analyze the content and the boundaries of such relations occurring in a concrete local government office.

In principle, legal norms in democratic states refer to relations between political superiors and civil servants in four different situations:

1. A subordinate civil servant should pass all needed information and official data to his political superiors in the name of the best comprehended professionalism,
2. A subordinate should, according to the art of a professionally carried out occupation, help his political superiors, by means of advising, to make the best optimal political choices,
3. A subordinate should loyally carry out official orders unless they lead to committing a crime,
4. A subordinate should point out to his superior that the order is illegal or contrary to the public interest, it is causing considerable damage, or is posing risk to human life or health, or is in other ways unethical. In such cases a subordinate should use a special hierarchical concept of procedure.

A legal obligation of civil servants to loyally carry out official orders is differently limited in various legal systems. A legally regulated hierarchical concept of procedure is generally accepted in cases when an order is illegal or erroneous, poses danger to public security or human health, or for other reasons (e.g. political) is unethical – than the servant can draw the superior's

attention to all defects and errors before he carries out the order. It allows the superior to verify his position and correct his order if it was based on wrong data or private political interests. If, however, the political superior does not change his original position and passes it to the servant in writing, the subordinate is obliged to carry out that order, but then it will be the superior who is held directly responsible for its performance. Such a generally regulated hierarchical concept of procedure allows to settle the conflict between the superior and the subordinate in a conciliatory manner if, of course, both parties have the necessary good will to do that. If, however, a political superior insists on keeping his original position (which happens quite often) and he repeats his order not in writing but as a "verbal order" (threatening to use disciplinary consequences), the future relations between both parties will depend on the behavior of the civil servant.

In the political context, the model of superior-subordinate relations presents itself differently. We can imagine that in the different systems of democratic administration, civil servants will behave differently when facing unethical official orders. If they can rely on the legal protection for defending the public interest, they will be more determined to look for new measures in order to oppose unethical orders. However, if there is no such legal protection for defending the public interest, civil servants will very likely silently comply with unethical orders risking having bad conscience or/and the criticism of the public opinion.

In the system of democratic administration, where the role of civil servants as the guardians of the public interest is progressively strengthened, there is a need of finding legal possibilities of counteracting unethical orders, which would induce the political superiors to voluntarily verify their orders' content. As a result of making the administration more and more political (including the local government administration), it does happen that the official orders of political superiors are issued in the interest of the political party which is currently holding power in the particular local government. Such orders may serve to manipulate the public opinion, withhold certain information, finance the political party using public resources, run a camouflaged election campaign or use the public resources to improve one's position in the eyes of the society, etc. They do not necessarily have to be against the legal norms or based on erroneous technical or normative basis or strategic calculations. Legal provisions often contain not concrete legal phrases which result in their diverse interpretation allowing different, constantly changing and often created anew behaviors which are strongly motivated by the protection of one's own interests. It is impossible to foresee, by means of legal provisions, how the ambiguous phrases and loopholes will

be used in the future. They may be used to secure the private ambitions of political parties, social groups and individuals.

Does a civil servant have a possibility to counteract an official order which, in principle, is lawful but is promoting the political party's interest, especially when the hierarchical concept of procedure appeared to be ineffective? In such cases a civil servant has three options:

1. To carry out the order and forget about his compunction being happy that no disciplinary consequences were taken and the relations with the political superior are still proper. In this option, however, it is impossible to prevent possible bad conscience and the criticism of the public opinion.
2. To pass the burden of responsibility for carrying out the order on other civil servant in order to prevent bad conscience while avoiding being directly involved in its performance. This can be achieved either formally by officially passing the task on another civil servant or, informally, by using at the moment one's overdue vacation, sick leave or other possibilities which make it impossible to carry out the order. In this option, although the civil servant does not lose his good opinion of himself and maintains proper relations with his superior, such egoistic behavior might ruin his relations with co-workers.
3. To publicly disclose the content of the official order pointing out its political or other unethical nature or make it known to a specially created body while risking disciplinary or even penal consequences. In the United States, a public discloser of information concerning superior's unethical behavior is known as "whistleblowing" and it is resulting from the need to provide legal protection to a civil servant against official consequences used out of vengeance by superiors. The institution of "whistleblowing" is currently at the stage of being researched and prepared in the European countries and the public discloser of official information is still being contemptuously treated as a "leak" and, if it concerns state secret, it is treated as a crime.

Therefore, the fulfillment by a civil servant of an official order after using the hierarchical concept of procedure is still the most common way of behavior. Why should civil servants care about their possible bad conscience and the uncertain value of the public interest at the cost of losing their position? Erich Fromm has already pointed out that "people are often afraid of making choices and, in exchange for security, they give up their freedom".[6]

[6] E. Fromm, *Escape from Freedom*, New York 1965, p. 87.

The scope of civil servants' freedom not to subordinate to official orders of political superiors

The research prove that civil servants are more determined to use their freedom not to subordinate to the orders of superiors in such industrialized countries where the decentralization of governance of public matters is great, as well as the mobility of civil servants is high and the unemployment is low, where the value of the profession is small and the private sector offers more attractive jobs. On the other hand, civil servants are more susceptible to unquestioningly carry out orders and remain politically loyal towards the people at power (including the people at power in the local government) in small local government entities where the unemployment is high and working in the office is highly valued.[7]

Some theoreticians claim that this is also connected to the professionalism of actions.[8] In such systems where civil servants are well professionally prepared, especially in law, they can better understand the complicated aspects of the political game and, therefore, it is more likely that they will be able to properly verify the motivations, circumstances and conditions of official orders. Knowing the legal provisions and the rules of interpreting the law they can faultlessly identify other than legal aspects of decisions having a political nature and they can more easily judge whether they are taken in the public interest and in accordance with the law and constitutional values or whether they serve private interest of a political party. And the more valued professionals they are, the more often they will be ready not to subordinate to decisions which are political. According to H.-U. Derlien it is economists, and not lawyers, who more demonstrate the engagement and political loyalty towards their superiors.[9]

The research carried out in Germany in the late 1980s prove that when a civil servant considered an official order to be based on incorrect reasons, in 82 cases out of a 100 he had tried to persuade the superior to change his order, and only if this did not work, he carried out the order. On the other hand, 1/3 (27%) of German civil servants claimed that they would rather quit their job than carry out an order which they could not accept from

[7] H. S. Chan, D. H. Rosenbloom, *Legal Control of Public Administration: a Principal-Agent Perspective*, "International Review of Administrative Sciences" 1994, Vol. 60, p. 564.

[8] Ibidem, p. 573.

[9] Ibidem, p. 401.

a professional point of view (15%), or would ask for a change of their task or ask for a shift of their scope of obligations (12%).[10]

The situation that almost 1/3 of German civil servants would not carry out an order which they could not accept from a professional point of view results also from the fact that those civil servants pay bigger attention to their role as professional advisors, initiators of new programs and executioners of outlined political goals than to the orders of politicians or the pressure of the organized groups of interest.[11]

It seems that carrying out a similar study in the Polish local government administration would definitely help to understand and determine whether Polish civil servants highly value their role as professionals competent in governing certain fields of administrative branches and whether they understand their political loyalty as a loyalty towards the law and constitutional values and not towards one's own political convictions or towards instructions based on political criteria of their superiors.

If professionalism in the administration is understood as a behavior consistent with the best comprehended art of performing a profession in the name of which civil servants are able to oppose unprofessional actions resulting from official orders, and if political loyalty is understood as unconditional subordination to all the instructions of superiors (of course if it does not lead to committing a crime) than, in my opinion, it is possible to measure the scope of civil servants' freedom which, after all, differs in various local government entities and even in different sectors of governing. Of course, we are talking here about the civil servants' practical usage of the legally attributed to them scope of freedom. By comparing the research results from different local government entities it would be possible to determine the scope of civil servants' level of political dependence in a given local government office compared to a different entity and to understand the reasons of the identified level of political dependence.

It could be achieved by, for example, using the sociological method of examining 1000 civil servants engaged in performing the same administrative tasks but working in different sectors of the local government administration. They ought to be asked about different ways of behavior towards unethical orders of superiors. Results plotted on a chart should present the number of civil servants who complied with an unethical order and the num-

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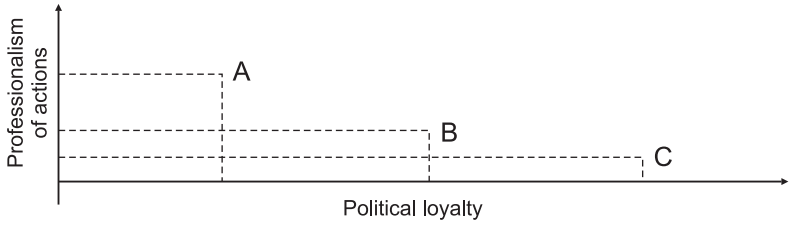
[10] H.-U. Derlien, *Historical Legacy and Recent Developments in the German Higher Civil Service*, "International Review of Administrative Sciences" 1991, Vol. 57, p. 396.

[11] Ibidem, p. 401.

ber of those who chose not to carry it out. The point in which the numbers presented by coordinate axis meet would represent the level of exercising the freedom by civil servants of a certain sector of the local government administration.

The level of exercising freedom not to subordinate to unethical orders can be illustrated according to the chart below:

Chart No. 2
A proposed illustration of the level of exercising the freedom not to subordinate to unethical orders by the local government civil servants.



The example presented above shows that in the local government A the level of exercising the civil servants' freedom is very high because about 50% of questioned people would not comply with an unethical order. On the other hand, in the local governments B and C the level of exercising this freedom is lower because the level of political loyalty is higher in relation to the professionalism of actions. Of course, in realty, this is not a simple directly proportional relation.

The chart is presented in a simplified manner but the problem is much more complicated since it is also determined by political, psychological, organizational, economic and social factors. It is possible, however, to carry out a well prepared research which results could be used to implement new strategies in order to intensify the level of the administration's compliance with the local authorities' politics as well as with legal and constitutional values. It seems needed, especially in such sectors in which political loyalty towards the politics of the local government authorities is predominant over professional actions which serve the protection of the law and constitutional values. Of course this problem will not occur in such local governments where the interest of the local community, and not the individual interest of the political party, determines the local government authorities' actions. It seems, however, that the interest of the local community is more often used by politicians only as a dogmatic slogan and is rarely determining in practice the functioning of the local government office. Especially, that the

conflict of interests is a permanent phenomenon in democratic countries which is just more or less common or known.[12]

The latest reforms of the New Public Management in democratic countries show that the transformation of the hierarchic authoritarian relations in public administration into relations which are based on dialogue and developing common positions, is resulting in a change of political superiors' conduct as well as the behavior of their subordinate civil servants. The political superiors change their conduct because, while acting on the basis of such principles as dialogue and negotiation, they become more open to reform their stance when facing a convincing professional argumentation. On the other hand, the subordinate civil servants change their behavior because they are more open to a conciliatory, less aggressive behavior when their superiors are more open to negotiating their stance. This is especially important because every conflict between a civil servant and his political superior can be more easily mitigated by the receptiveness to open negotiations and, if needed, to the verification of the position than by the escalation of demands. If political superiors value more professional comments of their local government civil servants and are more open to different forms of dialogue and negotiation, it will definitely diminish the number of such dilemmas like, for example, political loyalty versus professionalism of actions.

It is however important to stress out ones more that local government civil servants will not have to choose between professionalism and political loyalty towards the local authorities' politics if professional and political values mutually serve the similarly understood local community's interest which is in line with the law and constitutional values. However, if the values of the political party at power transform from values serving the local community into values serving only the members of this particular party then civil servants, supported and protected by courts, should protect the public interest even if it means risking open conflict with the political superior. Nevertheless, as long as politicians give orders which are in line with the local community's interest, the law and constitutional values, the local government civil servants should carry them out energetically. Neither personal views, nor political views, nor actions of third parties can limit their loyalty towards the actions of the local authorities.

How can one assess whether actions and orders of local government politicians are still taken in the public interest or already in the interest of

[12] M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 1986, p. 87.

the political party at power? Can local government civil servants, who are supposed to protect the public interest, properly verify the actions of their political superiors if it is already difficult to correctly assess the actions of the local government authorities, since the assessment criteria and long-term effects of actions are difficult to verify? So how can local government civil servants properly verify actions of their political superiors? In my opinion, the answer to this question stems from three conditions:

1. Civil servants are professionals and specialists in a certain field of administrating while politicians do not always have this quality. Lately we can observe a clear growth of the number of former high local government civil servants now holding political positions (e.g. a former high local government civil servant is running for a position of mayor or president, or is running for the local government council). It is supposed to secure the professional understanding and convincing justification of cases also by politicians.
2. Civil servants often have access to all sorts of documents, data and information which form the basis for making different political choices. It is easier to convince the local society that a decision was taken on the basis of limited information. However, it is more difficult to convince civil servants because they do know the amount and content of this information. Therefore, it is not surprising that some local governments are searching for methods of limiting civil servants' access to important political information.
3. The experience gained during many years of working in the local government administration under the management of different politicians (who shift whenever there is a change of local authorities) allows civil servants to comparatively judge the politicians' actions and verify their motivations.

The doubts of civil servants towards politicians' motivations are justified when, on the basis of various information, data, opinions, evaluations, alternative variants of decisions and practical experience, politicians are making choices which, according to civil servants, are not professionally legitimate and substantially justified. The politicians are also not eager to negotiate a common position in good faith. The professional doubts of civil servants are even bigger when they use the hierarchical concept of procedure to point out the wrong interpretation of legal provisions, data or information and politicians evade the confirmation of their orders in writing. And although the problem of verbal orders has a long history, the frequency of its occurrence is not at all diminishing in the offices of the local government authorities.

The theory of treating civil servants as a group assigned to protect the public interest has its flaws. Civil servants do not have a monopoly on deciding whether something is in the public interest. Their education, professionalism, experience and long-term practice definitely allows them to identify their proper role in the political game. The legal background must significantly help them as well since it is much easier for civil servants-lawyers than other civil servants to decide whether the law and constitutional values are still or no longer observed by politicians. Such civil servants know the mechanism of interpreting the law and they are able to use the case-law which allows them to answer the question whether the politicians' actions are consistent with the law and constitutional values.

However, even civil servants, who are professionally very well prepared, can falsely interpret the public interest and, according to David Rosenbloom, it can result from four causes:[13]

- Civil servants can be influenced, even unconsciously, by values typical for social, national, professional or religious groups to which they belong,
- The results of sectoral specialization of administration lead to the fact that politicians and their loyal civil servants might care mostly for short-term goals of their actions. For example, they may decide to close community schools or libraries in the name of economic values,
- The permanent specialization of the work in the office or routine while performing official duties can cause a situation when civil servants become not sensitive enough to be able to properly identify the social needs,
- Consumerism and belonging to different corporations can cause a situation when civil servants assimilate the public interest with the interest of corporation groups to which they belong (e.g. hunters, ecologists, breeders of dogs or canaries).

Because social background, specialization and professionalism, routine and corporation links can shape the understanding of the public interest, civil servants should be especially cautious towards their own motivations. The public interest was wrongly understood when, for example, certain community authorities had allocated in its budget a precise amount of money to save an administrative entity which was located a great distance away from this community (Wyrok NSA z 1997–10–14, ISA/Ka 1159/97). In this case the local government politicians and civil servants not only wrongly

[13] D. H. Rosenbloom, *Public Administration. Understanding Management, Politics, and Law in the Public Sector*, Random House, New York 1986, p. 382–385.

understood the interest of their local community but also infringed the law. That is why it is important for the achievement of the proper results of the research study, to identify the local government decisions which were not taken in the interest of the local community nor to satisfy the collective needs of the community in the last, for example, 5 years. Such a study can complement the assessment of the level of responsible actions of the local government in Poland.

Leaks or whistleblowers

In which cases can a civil servant exercise his freedom and not subordinate to politically controversial orders which are influenced by private interests of political parties? What actions can he take in such a situation? What sanctions is he facing for his insubordination? In principle, the rule common to European countries states that civil servants are obliged to understand the public interest in the way it is understood by their superiors. It is also difficult to justify the thesis concerning the priority of referring by civil servants to the protection of the public interest when they have doubts as to the motives of their superiors' orders since it is mostly the law and politics of the local authorities which define the values and priorities of the public interest. It results mostly from the fact that in Anglo-Saxon countries the role of the administration in enacting legal rules and norms is more discretional and therefore creational, while in the continental Europe legal provisions enacted by parliaments are more binding and they limit the discretion of the administration more strongly. However, in modern European theories of administrative responsibility it is more and more stressed out that a certain degree of such responsibility towards the variously defined public interest does exist and it can be very desired in the name of rational administrating.[14] Civil servants, however, cannot always prove the political superiors' political party's interest.

In principle, there are two situations when a civil servant can avoid the performance of an official order referring to the public good: when carrying out the order would result in the commitment of a crime or when it is against constitutional values and thus against the legal system. On the other hand, Robert Paper who analyzed in detail the situation of British civil servants, distinguishes three situations:

[14] Ph. Jos, *Administration Responsibility Revisited; Moral Consensus and Moral Autonomy*, "Administration & Society" 1990, 22 (2), p. 354.

- when carrying out an order is against the law,
- when an order is issued on the basis of an unconstitutional legislation,
- when an official order is politically controversial.[15]

It seems that avoiding orders which are politically controversial is always connected to the risk of being subject to administrative responsibility since it is more difficult in such cases to legally protect a civil servant against the accusation of insubordination than it is in the first two cases. It is easier to defend civil servants who do not subordinate to orders, which lead to corruption or other crimes, than civil servants who get involved in political controversies (especially that they are legally obliged to remain politically neutral in their place of work). However, in the real world of administration and politics, situations which result in the infringement of law or the constitution are often connected with political controversies. It is even possible that cases which are politically sensitive result in corruption, abuse of power, defalcation of public founds, disclosure of state secret, etc.

Civil servants who have doubts as to the nature of their superiors' political instructions can disclose them publicly. However, such behavior is accepted only in the American law and is known as "whistleblowers". According to the United States Whistleblowers Act from 1989 "whistleblowing" takes place when a present or a former civil servant discloses information proving infringements of law, errors in governance, fraud of public funds, abuse of power or threat to human health or public security. In other words, it means that civil servants have a right to comment their superiors' behavior and this right stems from the freedom of speech and the freedom of information provided in the fourth and fourteenth amendments to the United States Constitution.[16]

In Europe, civil servants do not have a right to publicly comment their superiors' behavior since it would be against the constitutional principle of loyalty towards the government, which is identified as a principle of temperance, restrain and reserve in expressing views on official matters. Because of the legal duty of political neutrality which is obliging civil servants not to publicly undermine the reputation of local authorities, and because of the duty to protect the state and official secrets, civil servants who disclose such information often expose themselves to administrative and/or penal responsibility. It does not mean, however, that civil servants in Europe do

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[15] R. Paper, *The British Civil Service*, Prentice Hall, Harvester Wheatsheaf 1995, p. 79.

[16] *Whisthleblowing and the Federal Employee*, Government Printing Office, Washington 1981.

not take the risk of criticizing the government's actions or disseminating the government information.

It can be summed up that civil servants of industrialized democratic countries take the risk of disclosing information concerning unethical actions of their superiors either by "whistleblowing" (USA) or, anonymously, by "leaking" information or documents to the press. Because of the danger of being held penally or administratively responsible for disclosing such information, the disclosure takes the form of anonymous leaks unlike in the American system of "whistleblowing". However, no matter the method of disclosing the information, it is obvious that the same responsibility is not applied in every "leak" case. Civil servants can be variously motivated to take such actions and they can also be differently judged. Three basic types of responsibility have been applied to them so far:

- Disciplinary responsibility. Administrative sanctions are regulated by the civil service legislation and other special acts (starting with a reprimand and a reduction of the position, and finishing with a deposition). Such sanctions are declared either by disciplinary commissions (France, Germany) or depend on the decision of the Permanent Secretary (England).
- Penal responsibility for a breach of state secret. The application of such responsibility depends on the extent of official documents classified as state secret. The rule is that every national legislation determines types of documents classified, e.g. documents concerning country's defenses, the protection of internal and external security etc. In the United Kingdom, on the other hand, the documents classified as state secret are those which are not accessible to the public. Therefore, there is a list of documents which are allowed to be made public. The disclosure of documents which are not on the list can result in the disclosure of state or official secret and in the application of penal sanctions. According to the British Officials Secrets Act a present or a former civil servant who discloses confidential documents is liable to imprisonment for a term not exceeding two years.[17]
- Penal responsibility for corruption. This type of responsibility is applied when a civil servant accepts a bribe (financial or other) in exchange for the disclosure of official information. Such civil servants are considered as criminals and they bear penal responsibility. In the United States, unlike in Europe, civil servants are not presumed innocent before a court and they themselves bear the burden of proving that they did not commit the crime of corruption.

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[17] J. A. Taylor, H. Williams, *Public Administration and the Information Policy*, Public Administration, RIPA, 1991, Vol. 69, p. 287.

Courts rarely take the side of a civil servant who is disclosing information. In the European culture "leaks" are not highly valued. It results not only from the preventive effects of various types of legal responsibility applied to civil servants for the disclosure of official information, but also because of the traditional understanding of ethical rules of performing a profession.

Political scandals, the disclosure of unethical or illegal actions of public functionaries and the crises of trust between civil servants and politicians forces the academics to search for such forms of proceedings which would solve conflicts in the most rational and least painful manner. In principle, however, civil servants are not allowed to treat their understanding of public interest as a higher, overriding value towards orders and instructions of their political superiors. Therefore, they are advised to use the hierarchical concept of procedure when such dilemmas appear. They can also consult their problems with a person responsible for solving such conflicts or a person responsible for personal matters in the office. If, however, this does not help, they can either subordinate to the order or forget about the case. They can also leave their office but it still does not release them from the obligation of keeping state secret.

Using the hierarchical concept of procedure or consulting with people responsible for personal matters does not always help a civil servant to solve such dilemmas. It happens that political superiors are not susceptible to change their orders or instructions and the people consulted avoid responsibility or are unavailable. Unfortunately, political and ethical dilemmas constantly appear in democratic systems, especially during elections. Therefore, it seems that the American institution of "whistleblowing" can constitute an interesting inspiration for finding solutions which would secure the responsible administrating by the local government in Poland.

Lately, some European countries are trying to introduce the institution of "whistleblowing" as a binding regulation and its basis are said to be found in Article 10 of the European Convention on Human Rights (the freedom of expression).[18] An interesting interpretation of the freedom of expression was presented by the European Court of Human Rights in case William Goodwin in 1994: W. Goodwin was an owner of a newspaper which

[18] E.g. M. B., *Whistleblowing on Fraud in the Netherlands*, Final Report Submitted to the European Commission, 1994; M. Bovens, *Are Private Virtues Public Vices? An Inquiry into Integrity of the Managerial State*, article prepared for the VIII conference organized by Stowarzyszenie Administracji Publicznej, March 1995; L.W.I.C. Huberts, *Public corruption and fraud in the Netherlands: research and results*, Crime, Law & Social Change 1994/1995, Vol. 22, Nr 4, p. 311.

published certain information about Tetra Ltd, a company using the public funds, acquired by means of a leak from an informant from this company. Tetra Ltd accused the newspaper of breaching official secret and initiated legal proceedings. The British High Court obliged W. Goodwin to reveal his source's identity. Because he did not want to disclose this information he was fined £5,000. The European Court of Human Rights held that the British order was a violation of W. Goodwin's right to freedom of expression under Article 10 of the European Convention on Human Rights. It stated that if journalists were forced to disclose their source's identity, it would deter the sources from assisting the press in informing the public on matters of public interest. "As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected." Therefore, as pointed above, the European Court of Human Rights aimed at providing better protection to journalists and their sources. Of course, this problem has a lot of supporters as well as opponents.

In the United States, such public institutions as GAO, FBI, CIA, DIA, NASA and all those which are aimed at protecting the state and the security of its citizens are excluded from the right of public disclosure of information concerning unethical actions of superiors. Civil servants employed in all other offices can criticize and disclose superiors' unethical instructions and orders in mass-media while remembering that if they do not manage to prove their reasons, penal and administrative sanctions will be applied to them for disclosing false information. American civil servants disclosing information about unethical actions of their superiors will not be legally protected if their evidence are not recognized by the Office of the Consul General and the special committee of professional ethics. Generally, people disclosing erroneous or unethical actions of their superiors are considered as "problem-makers".

Lately, theoreticians are more and more proving that the institution of "whistleblowing" is desired also in Europe.[19] According to David Lewis, civil servants prefer the system of "whistleblowing" because of problems in communication inside the public office. In such an office where civil servants are encouraged to state their ethical, professional and political doubts by means of special channels allowing them to report their dilemmas and errors of their superiors, "whistleblowing" is no longer needed. If, however, there is no mechanism of reporting official doubts, civil servants might be eager

[19] Ibidem.

to publicly disclose their doubts and information.[20] Often civil servants are aware of the risk and of the administrative and penal consequences of the public disclosure of documents and information and they decide to use this method only if internal channels of reporting appeared to be inefficient or not trustworthy.

Therefore, in my opinion, it is important to document the local government cases which "leaked" to the press, the legal measures which were applied to people responsible for unethical behavior and the legal position of the sources of such information. Such a study would allow to assess how the institution of "leaks" is being used in the public life of the local government in Poland and if it should be modified and how. It might help to find the answer to a question, in which degree the public control initiated by "leaks" has influence on responsible actions of local government politicians and civil servants and whether the channels of passing information inside the local government structure should be legally institutionalized.

Conclusion

The described herein legal institutions present only the beginning of securing the desired behavior of local government politicians and civil servants in Poland. They create only a general structure for implementing responsible behavior of the local government. We need to remember, however, that every local government in a democratic state, although it should expect its civil servants to be loyal, cannot allow partial actions which breach the standards of ethical behavior, because eventually it will be the members of the local authorities who are held responsible before their voters for such actions.

It is thus necessary to promote a search for such regulations which would limit the engagement of the state's capital in undertakings of private parties so that political connections do not influence the method of using those public funds, as such behavior might create informal connections where only private arrangements are important at the cost of effectiveness, quality and efficiency of local services. Such undesirable actions lead to an assumption that those who are at power use it not to serve the local community but to secure their own and their associates' needs and interests. This, on the

[20] D. Lewis, *Whistleblowers and Job Security*, "The Modern Law Review" 1995, Vol. 58, Nr 2, p. 265; L. M. Seagull, *Whistleblowing and Corruption Control: The GE Case*, "Crime, Law & Social Change" 1995, Vol. 22, p. 385–390.

other hand, leads to the erosion of democratic institutions and to the crisis of society's trust towards the local government organs, which is difficult to overcome and which can eventually result in the return of centralized governance of public matters. Such a XIX-century method of governance is very likely to occur in the situation of erosion of the local government authorities although it cannot function properly in the civilized conditions of a modern democracy.

The introduction of the best legal regulations will not be enough if there is no strong social and political will to prevent partial and corruptive actions of local government civil servants. In building such will, it is necessary to inform the society not only about the manifestations of partial behavior but also about examples of applying responsibility for breaches of ethical behavior as well as about the court decisions settling such conflicts. The role of press and mass-media is invaluable because they should make public every unethical action of local government functionaries even when a breach of ethics does not constitute a crime.

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TAKING RESPONSIBILITY FOR PREVENTION AND FIGHT AGAINST CORRUPTION IN LOCAL GOVERNMENTS

I. Foreword

1. Corruption appears to affect almost every public sector in our country and its scale significantly exceeds the western European 'norms'. Although the size of the problem is difficult to estimate, it certainly does **not** decrease, which is confirmed by the Corruption Perceptions Index (CPI) published annually by the Transparency International. In 1996, when Poland was included in this evaluation for the first time, we scored 5.6 points and were on the 24 position out of 54 countries covered by the Index. Ten years later, in 2005, with the score of 3.4 points we share the 70–76 position with Egypt, Lesotho and Syria.

Corruption affects public institutions to such a degree that it calls for preparation and implementation of an **anti-corruption strategy** represented by an integrated system of various actions taken in the areas of politics, administration, prosecution and the judiciary system. Anti-corruption strategy can bring the desired results through effective prosecution and sentencing of corrupted people, on the one hand, and by implementing changes in labour coordination and in access to civil service, on the other, as well as by promotion of ethical principles in public life.

In order to be effective, the anti-corruption strategy must go beyond academic seminars and media inquiries. Political determination of the present government is indispensable in taking action against corruption. So far, the successive governments, while doing their best to retain full privileges of the diplomatic immunity, have led to situations, when former MPs were being issued an arrest warrant, just after their term of office had expired. There are instances when parliamentary mandate becomes a goal and a cover for an offender. All the successive amendments to the Civil Service Act

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were aiming at "ensuring a politically neutral performing of the duties of the state", but by a current government in power.

2. In these circumstances, the idea to establish a Central Anti-Corruption Bureau seems startling; however, after years of unsuccessful actions taken against corruption, setting up a special structure appears necessary and well-grounded. Such initiative is corroborated by similar situations in other countries where corresponding institutions have been founded (Hong Kong, Singapore). Doubts emerge with regards to procedures for establishing the office (a party, not a state office), for appointing a supervising authority and also for selecting the personnel. Additionally, the project of founding a new office may give an impression that we no longer believe the problem could be dealt with through a reform of the prosecution service, the Central Bureau of Investigation and Internal Security Agency, which would enable the battle against corruption to be conducted with similar success but within traditional structures.

Taking into account the actual scale of the problem, it should be considered reasonable to establish a special institution, particularly when dealing with already committed offences of corruption. It is to be noted though that the main direction of the battle against corruption must be towards counteraction and far-reaching prevention. In the case of corruption within the administration sector (corruption in office), prevention would be the principle weapon, which would involve establishing a legal barrier (substantive and procedural) for protection against instances of corruption occurring in conflict of interests cases.

Legal actions, although very important, are still only one of several instruments in battle against corruption. Prevention ought to aim above all at the restriction of access to government and public administration sector positions for people susceptible to corruption.

3. Corruption has also its root in mentality of those depraved by the Communist system, and therefore, for the counteraction to be effective, it is necessary to restore the ethos of civil service. It is particularly important to encourage the restitution of noble and ethical standards of conduct in public life, such as codes of ethics and codes of honour.

In order to fulfil their sanative role, the main aim of codes of ethics is to raise the level of requirements for a particular group of employees in relation to the specifications of official practice and the universally applied laws. For a code to be effective, a specific approach to its implementation is necessary. Firstly, if the standards of ethical conduct are meant to constitute an objective model, they must not depend on agreements and compromises between the involved parties themselves (e.g. when councillors establish codes

of ethics for councillors). Secondly, a code of ethics should not be imposed as an order, even in a form of a normative act. Nevertheless, a code ought to include sanctions for non-compliance, because, with no liability imposed for violation of the standards, such code would represent a mere collection of wishes for desired conduct. Therefore, a code of ethics needs to have an appropriate status of a legal document, which would enable the enforcement of its regulations.

A solution to the problems with implementation of codes of ethics within local authorities may lie in a special **system of accreditation** for assessing the activities of local government and administration. The code of ethics for local government functionaries may be drawn up and agreed by the Joint State and Local Government Committee, and, as a normative act issued by the government or the Prime Minister, it would become a legally enforceable document. Such code would not be universally binding and each governing body would have to apply for the introduction of the document in a particular unit of local authority. After an assessment of a given unit's performance (carried out by a specially selected team) the Joint Committee would give or refuse the accreditation, i.e. permission to introduce the code. Introduction of a code of ethics would serve as a good mark for a local authority unit and this could also constitute a proper system of incentives for all local authorities. In the case of violating the principles of the code, the accreditation granting institution could withdraw the right to use the code in this particular local authority unit. The proposed system of accreditation in implementing the code of ethics would ensure flexibility of using this type of instruments and at the same time would prevent the depreciation and potential abuse of such instruments by members of local authorities.

Finally, it is to be noted that in the fight against corruption ethical codes should be applied with prudence to avoid their depreciation. A code of ethics represents a raised level of requirements imposed on a particular group of employees. With regards to the large majority of public, government and local administration officials, the anti-corruption activities should concentrate on monitoring the adherence to the current legal regulation.

II. Evaluation of the anti-corruption legislation in local government units

4. As far as regulatory methods of prevention and fighting corruption are concerned, it needs to be stated that the deficiency of Polish anti-corruption law is mainly due to the shape of the legislation, which requires radical

and prompt improvement, if it is to be effective. The provisions which are supposed to prevent corruption in public administration are rather dissipated (all the 11 acts, from local government State laws to the Penal Code). Frequent amendments to the legal regulation, necessary for the law to "keep up with" constantly appearing new forms of corruption, result in the formation of far-reaching casuistry of regulations and overlapping dispositions of legal norms, especially when struggling with economic corruption.

Knowledge of the legislation establishment politics as well as prudence is required when employing law as an instrument to fight corruption. Anti-corruption legislation must be characterised by determination (never allowing exceptions) and effectiveness. In my view, a legal regulation fulfils the **effectiveness** requirement when:

1) Each norm of the anti-corruption legislation is accompanied by a precisely defined sanction for its violation;
2) A subject whose duty is to enforce this sanction is specified;
3) A clear and simple procedure for enforcing the disposition and sanction is specified;
4) A method of monitoring whether the enforcing subject has adequately fulfilled their duty is defined.

Determination is to be perceived as the absolutely irrevocable quality of legal solutions, which would allow for no exceptions and no relativization of the established legal rules. Determination is crucial, for instance, when dealing with the rule of equal treatment of all legal entities. It needs to be stressed here that local administration constitutes only a part of all public authorities, and therefore, corruption in administration should not be dealt with separately. Methods for prevention and counteraction of corruption in local administration need to be considered, created and applied as an extensive, integrated system for fighting corruption in public authority sectors – the executive, the judiciary and the legislative.

5. There is a lack of determination of the legislative body with regard to the basic condition for preventing corruption, namely, **the elimination of corrupt people among public functionaries**. Considering the scale of corruption and mafia crimes that are being reported in the circle of public authorities, it is indispensable to form a kind of barrier that would prevent the access of potential offenders to governmental positions. Those with legally valid conviction for deliberate crimes should be deprived by law of the eligibility to undertake and exercise any function or position in the area of public authority.

Until now the ban on access to governmental positions was through depriving a person of public rights by a legally valid ruling of a court.

This is stated in the rules of article 8 section 1 in relation to article 7 point 1 of the electoral law of the Polish Sejm and Senate.[1] According to the above regulations, in order to have a passive right of vote to Sejm and Senate one needs to have an active right to vote, which is removed if a person is deprived of all public rights by a valid judicial ruling. The same regulation is in force regarding the electoral law of district, powiats and province councils,[2] where the passive and active right to vote is withheld for individuals deprived of all public rights by a valid judicial ruling (art. 5 in relation to art. 6 point 1 of the Act). With respect to any restrictions to the voting rights, in unsettled cases, the Act of 20 April 2002, regarding the election of a borough leader and a mayor,[3] refers to the electoral law of district councils, which is characterised by the same standard of requirements.

Employment in the judicial sector and the eligibility to apply for judicial positions is regulated mainly by rules of the Act on the Ordinary Courts.[4] According to its provisions, in order to hold a judicial position one is required to be a Polish citizen, to exercise the civil rights fully and, additionally, to be of impeccable character (art. 61 of the Act). The same requirements apply to the election of judges in administrative courts, the Supreme Court and the Constitutional Tribunal. There is no doubt, therefore, that any legal conviction eliminates the eligibility to hold a position in judiciary sector. This solution is a consequence of the raised standards imposed on judges and prosecutors.

The question is whether, in the situation of an increased risk of corruption, the requirement of exercising all public rights is a sufficient barrier in the access to the legislative and executive power sector. Here, we need to refer to the Penal Code regulations. According to the article 40, section 1 of the current Penal Code of 1997, the deprivation of public rights includes the loss of the active and passive right to vote with regards to any position within public authorities or in any professional or economic self-government, the loss of eligibility to hold a position in the judiciary sector, civil service and local governments, as well as the removal of a military rank and de-

[1] Act of 12 April, 2001 (Dziennik Ustaw [Journal of Laws], No. 46, item 499 as amended).

[2] Act of 16 July, 1998 (Dziennik Ustaw [Journal of Laws], No. 95, item 602 as amended).

[3] Dziennik Ustaw [Journal of Laws], No. 113, item 984.

[4] Act of 27 July, 2001 (Dziennik Ustaw [Journal of Laws], No. 98, item 1070 as amended).

grading to the lowest rank in the army. Deprivation of public rights also involves the loss of all orders, decorations and honours, and also the inability to receive any of the above during the time of the deprivation of rights. According to the statutory directive of the Penal Code (art. 40 § 2), the court can order the removal of public rights in a case concluded with 3 or more years of imprisonment sentence for an offence committed with a motive deserving particular contempt.

The statutory requirements for exercising a penalty in the form of deprivation of public rights indicate that the penalty should be used in cases of severe punishments for offenders deserving 'particular contempt'. It is fully acceptable that the deprivation of public rights results in the loss of active right to vote in a public government election. With regard to the passive right to vote, the barrier in the form of public rights deprivation is too low, because it allows the access to public authority sector for common offenders. This gives rise to the proposal that **all offenders convicted for deliberate unlawful acts should, regardless of the kind and severity of punishment, be denied the access to public authority sector**. The subject side, i.e. the deliberate act by an offender, should determine the removal of eligibility to hold a public office. Therefore, those convicted for unintentional offences should not be deprived of the passive right to vote.

The above postulate is not a novelty, as similar normative solutions appeared in the legislation of 2002. The amendment to the electoral law of district, powiat and province councils, introduced by the Act of 20 April 2002 on direct election of borough leader, has established the rule that termination of mandate of a councilor (in all governmental levels) occurs as a result of a legally valid conviction ordered by a court for a deliberate offence (art. 190 sec. 1 point 4 of the statute). The similar rule applies to the positions of borough leader or mayor, i.e. legally valid conviction for deliberate offence results in the termination of this function (art. 26, sec 1 point 5 of the Act).

The sanction of mandate termination for councilor or borough leader has applied to individuals who were already holding the function. **The same *ratio legis* supports a regulation that would be both repressive and preventive**. If the sense of decency in public life is to be treated seriously, it is necessary not only to eliminate offenders from public authorities, but also, and above all, to prevent offenders from undertaking public functions in the first place. This loophole has been closed by the amendment of 1 May 2004 to the electorate law of district, powiat and province councils, which introduces a rule that individuals convicted for deliberate offences and who

are charged by the public prosecution service (art. 7 sec. 2 of the electoral law) cannot be elected to these governing bodies. The same rule applies to the election of borough leader or mayor.

Legal solutions that eliminate offenders from public offices should not be restricted to local governments only. Parallel legal solutions ought to be applied to personnel selection within government administration, both central and local. It appears well grounded to introduce a regulation to official practice of all services, inspectorates and public security units, saying that any previous conviction for a deliberate offence excludes the eligibility of an individual in question to be enlisted or be employed by government administration office. Consequently, if such conviction occurs during a service or employment, termination of this service or employment will be the consequence.

The World Bank assessment of Poland's ability to fight corruption holds an observation that: 'In general Poland has got most of the necessary instruments, but it lacks the will and the potential of its institutions to make good use of them'. It should be stated that, first of all, there is a lack of political determination to undertake the battle against corruption in the legislative power sector.

The demand for radical elimination of offenders from public authority sector manifests a need to restrict the scope of diplomatic immunity solely to acts committed in relation or in the course of holding a parliamentary position. Withdrawal of the immunity in cases of common offences can indicate the actual willingness of the parliament to combat the corruption in the legislative power sector, based on the principles parallel to the executive power sector.

The level of requirements for candidates for parliamentary positions should be raised in the electoral law of Sejm and Senate by means of the withdrawal of the passive right to vote for those with valid conviction for a deliberate offence. Similarly, the electoral law regulations should provide for the termination of a parliamentary mandate as a result of such a conviction, which would be parallel to the electoral law of district, powiat and province councils. A frequently repeated argument that it is the electorate's will to decide who will be holding parliamentary mandate is totally unacceptable. A sense of decency in public life **requires the definite elimination of offenders from the legislative power sector. No law established by offenders would ever gain authority**.

The proposal of restricting the access to positions in the legislative and executive power concerns individuals convicted by a legally valid court

ruling. This ban should be in effect until the rehabilitation of a subject (art. 106–108 of the Penal Code).

It may pose difficulties to define the situation when a person in a public position commits an offence during the period of holding that office. The termination of mandate takes effect (or should take effect) only after the court ruling becomes legally valid. The preliminary and court proceedings usually require a considerable amount of time, even if the offence is obvious. The question is whether it is acceptable that a lawbreaker, guilty of a deliberate offence, continues to hold a public position.

It appears necessary to put forward a proposal introducing suspension of a public functionary (MP, senator, borough leader, starosta, provincial governor, civil servant, etc.). This suspension should last until a legally valid conclusion of the case is issued by a court. As for the initial period of suspension there are two options: either when an offender is declared a suspect (i.e. an individual against whom there is a decision to issue charges; art. 71 § 1 of the Penal Code), or when the lawbreaker is charged with the offence (against whom the charge was filed in a court; art. 71 § 2 of the Penalty Code). I would advocate the latter, when the outcome of the preliminary procedures provides the grounds to bring an accusation to the court. A court advice, addressed to that public authority unit, regarding the charges of deliberate offence filed against their official could constitute the grounds for suspension of that person in holding the official position. Adequate procedures for this suspension ought to be formulated.

6. To proceed with the main stream of this discussion, i.e. the assessment of the legal regulations for preventing corruption in local government units, it is necessary to specify key circumstances regarded as causing corruption, which, according to the legislative, are to be eradicated by the established bans, restrictions and orders concerning local functionaries (councillors and local government officials, including executive bodies' officials). These are as follows:

1) Proscription to hold a councillor's seat together with a parliamentary mandate, provincial governor or his deputy position or membership of any local government unit;
2) Restrictions for local government officials with regard to their public duties:
   a. Councillors cannot undertake any other employment
   b. Restrictions of legal civil relations
   c. Actions that could undermine electorate's trust cannot be taken
   d. Restriction of business activities for councillors, which includes business activities involving public funds;

3) Government officials are obliged to submit their financial disclosure as well as financial and business disclosure of their close relatives;[5]
4) Bans regarding employment and other activities for local government officials;[6]
5) Restrictions on business activity of members of executive bodies, treasurers (chief accountants in district, powiat and province), secretaries and other officials deciding on behalf of borough leader, starosta and provincial governor.[7]

7. As stated above, the aim of this presentation is, first of all, to assess the **effectiveness** of the legal solutions, which are currently in force. As discussed earlier, the effectiveness of a legal regulation is manifested by an anti-corruption norm which is equipped with a strictly defined sanction for its violation, by specifying a subject whose duty is to enforce this sanction, as well as by adequate monitoring whether the enforcing subject has adequately fulfilled their duty.

A. Evaluation of the effectiveness of the current regulation of anti-corruption laws reveals that this effectiveness is inhibited, above all, by **superficial bans and restrictions** that are not supported by any sanctions.

A rule saying that councillors cannot invoke their position in connection with any other activities or business activities undertaken individually or with partners[8] represents a classic example of a superficial ban. The *ratio legis* of this ban is not clear – holding a councillor's seat can by no means influence any other activities of that individual. There is not need to regulate obvious problems, because, for instance, in a situation when a councillor violates the decency threshold and invokes to his position, then, apart from public opinion and media, no public administration unit has any authority to exercise disciplinary procedure.

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[5] Bans, restrictions and obligations mentioned in point 1–3 are regulated by the rules: 1) art. 24 'a' – 24 'm' and art. 25 'a' of the Act of 8 March, 1990 on District Government (uniform text: Dziennik Ustaw [Journal of Laws] 2001, No. 142, item 1591 as amended), 2) art. 21 sec. 8 and 23–25 'h' of the Act of 5 June, 1998 on Powiat Government (uniform text: Dziennik Ustaw [Journal of Laws] 2001, No. 142, item 1952 as amended), 3) art. 23 sec. 4 and art. 24–27 'h' of the Act of 5 June, 1998 on Province Government (uniform text: Dziennik Ustaw [Journal of Laws] 2001, No. 142, item 1950 as amended).

[6] See art. 6 and 18–19 of the Act of 22 March, 1990 on self-government employees (uniform text: Dziennik Ustaw [Journal of Laws] 2001, No. 142, item 1953 as amended).

[7] See the Act of 21 August, 1997 on restrictions referring to conduct of business activities by persons holding public functions (Dziennik Ustaw [Journal of Laws] No. 106, item 679 as amended).

[8] See art. 24 'e' sec. 2 of the Act on District Government. Similar rules are included in Acts on Powiat Government and Province Government.

A similar conclusion arises with respect to the norm saying that councillors can neither undertake any other employment, nor accept any gifts that could undermine the electorate trust, in compliance with the words of councillor's oath.[9] The only practical sanction of this ban is the actual loss of trust of the electorate, who in the future election can change their preferences. This potential regularity, however, should not be written down as a legal rule. Councillors' activities that could undermine electorate trust ought to be assessed in ethical or political categories. If not accompanied by a sanction, they should not be a part of the regulation.

Deregulation of rules which indeed constitute superficial bans and restriction, because their application only results in **law depreciation**, should be the first step in improving the anti-corruption law.

B. A ban enacted in art. 7 sec. 1 of the 21 August 1997 Act[10] represents a legal norm which is of marginal effectiveness due to the **defectively formulated sanction**. According to the indications of the above rule, individuals in public positions cannot be employed by or provide any services for an entrepreneur, if they participated in any decisions regarding personal matters of this entrepreneur, within a year of the termination of their public function. In justified cases, an approval of earlier employment can be given by a committee appointed by a PM. The sanction for violation of this ban is of penal character, i.e. custody or fine (art. 15 of the Act) for the entrepreneur who employs an individual in public position within a year of termination of this position.

My opinion of this rule is absolutely critical in several aspects. As stated above, anti-corruption mechanisms should be characterised by determination. Allowing for the exception to the employment ban generates by itself a situation which could cause corruption, mainly because exceptions are made through discretionary decisions based on the ambiguous clause: 'in justified cases'. Appointing a committee to approve these exceptions to the rule by a high-ranking office (PM) does not guarantee objective decisions, particularly in the tense relations between the government and the opposition. After all, the fact of resolving exceptions by a committee manifests the vagueness of the responsibility for a decision. This rule should definitely be repealed.

As for the penal sanction, it appears that financial penalty in the form of a fine would be adequate. It is doubtful, however, whether the penalty is imposed on the right person. It is an entrepreneur who is to be punished for

[9] See art. 24 'e' sec. 1 of the Act on District Government.

[10] See footnote 7.

employing of a former public official and thus violating the ban. My view is that a functionary himself ought to be held responsible for undertaking employment with this entrepreneur, because it is the functionary who should be aware if and to what extent he 'participated in decisions regarding personal matters of this entrepreneur' and who should prevent this clear conflict of interests situation.

C. There is a number of anti-corruption rules that do fulfil the aforementioned conditions of effectiveness. For instance, there is a **clearly formulated sanction** regarding a situation when a public official is appointed to a board of a company, a cooperative or a fund, which violates the bans about restrictions of business activities for public officials, as described in the Act. A parallel problem occurs in a case of electing a councillor to an executive board or monitoring and inspection bodies of commercial law companies with the share in the profit by local authority legal entities or economic operators involving such entities. In both cases, election or appointing to a public authority, with violation of the ban, is hedged with an **invalidity sanction *ex lege*** – acts of election or appointing which are legally void cannot be entered into an appropriate register.

Regulations are considered well formulated with respect to effectiveness, if they employ a sanction of renouncing the mandate by an official by choice. Consequently, a refusal to take an oath by a councillor – a member of legislative body within all levels of local government – is equal to renouncing his mandate.[11]

Similarly, failure to submit an application for unpaid leave by a person who works in a council and who was elected a councillor is parallel to renouncing the mandate.[12] Equally effective is a sanction of **dismissal from position** or **termination of employment** with respect to local government officials, which is equivalent to termination of employment contract without notice based on article 52 § 1 point 1 of the Labour Code.[13] Assessment of the sanction of the **termination of mandate** is more complicated and will be discussed in a further section of this essay.

D. There is an important legislative step that could foster the effectiveness of anti-corruption regulations and this is the **simplification of legal provisions**, which can be achieved by use of simple, clear and easy to understand legal formulas, as well as by verbalisation of legal norms with unambiguous language. Classic examples of such Byzantine regulations are

[11] See art. 23 'a' sec. 4 of the Act on District Government as an example

[12] See art. 24 'b' sec. 5 of the above act.

[13] See art. 24 'k' sec. 4 of the above act.

art. 24 'h'–'l' of the Act on District Government, which regulate **the obligation to submit financial disclosures** by councillors and other district council officials.[14] Several further amendments to the procedures for submitting and monitoring of financial disclosures have led to uncontrolled expansion of this very casuistic regulation (the body of the regulation currently exceeds 2 pages of 'Journal of Laws').

One of positive effects of the amendments is the principle of openness of information given in financial disclosures. Open information provided in financial disclosures is available in the Public Information Bulletin.[15] With regards to the principle of publication of financial disclosures there is no need for an extensive and bureaucratic system of supplying disclosures, and especially of the data analysis. Disclosures are supplied in two copies and the analysis is carried out by both an appropriate local or public administration body and a relevant local revenue office. According to the article 24 'h', section 3, 6–13 of the local government Act, the circulation of documents, information and analyses proves that administration is able to develop well and satisfy its needs.

The procedure of monitoring financial disclosures can be simplified and this would entail no expenses and no other than already involved bodies. I suggest considering the following solutions to ensure swiftness, reliability and effectiveness in the monitoring of financial disclosures submitted by local government officials:

1) The analysis of financial disclosures falls within the competence of local revenue offices who receive adequate instructions.
2) In a case of challenged credibility of a disclosure, the revenue office orders an inspection by an appropriate local revenue monitoring unit.
3) The competence to order an inspection is also given to the chairman of the deciding body of a local government, to the executive body of a local government and to the provincial governor who has an authority over the lawfulness of activities of that particular local government with which the official in question is involved.
4) In a case of refusal to undertake the inspection of a particular disclosure, the body that orders the inspection has the right to appeal to the General Revenue Inspector. To appeal against the final decision, a complaint can be directed to an administrative court.
5) The outcome of an inspection is revealed to the involved body and, if an offence is suspected, to the prosecutor.

[14] Parallel regulations apply to powiat government and province government.

[15] This is mentioned in the Access to Public Information Act of 6 September, 2001 (Dziennik Ustaw [Journal of Laws], No. 112, item 1198 as amended).

6) These bodies execute administrative sanctions provided by regulations or they initiate legal action.

With respect to the **system of sanctions applied**, it is fully legitimate to employ penal responsibility for providing false information or suppression of truth in submitted financial disclosures, which is based on article 233 § 1 of the Penal Code. However, the system of **administrative sanctions** for failure to keep the deadline of submitting financial disclosure appears to be very inconsistent. For instance, suppression of truth in a disclosure results in criminal responsibility of the individual, based on article 233 § 1 of the Penal Code, and failure to submit financial disclosure by a councillor results only in suspension of his allowance until the disclosure is submitted (art. 24 'k' sec. 1 point 1 of the Act on District Government). This gives an impression that the legislative body encourages officials to calculate what is more advantageous, to provide false information or to give up the allowance. As a matter of fact, the sanction of losing allowance by a councillor (or losing salary by a borough leader) is the only sanction imposed for failure to submit a disclosure. Apparently, the law allows the situation that a position of councillor or governor can be held by individuals despite their failure to fulfil the statutory duty of submitting financial disclosure. And the loss of allowance is not a substantial sacrifice for a wealthy person. Thus such procedure ought to be severely criticised.

Failure to provide financial disclosure by other (than councillors or borough leaders) local government functionaries results in ultimate dismissal or termination of employment contract (art. 24 'k' sec. 2, 3 and 4 of the Act). That being the case, we deal here with **a situation of unequal treatment of local government officials**. This inequality cannot be justified by the condition that councillors and borough leaders are selected in direct election, because there are no rational grounds for functionaries selected in direct election to 'evade' the statutory duty to submit financial disclosure and 'get away' with this by only losing their allowance.

The attempt to toughen the sanction for failure to submit disclosure by councillor or borough leader (regarding their financial status and business activities of their spouse) by the amendment to the rules in 2005 was not successful. A sanction of termination of the councillor or borough leader mandate was introduced for failure to submit disclosure on time, which was defined by rules of appropriate acts. This solution was recognised by Constitutional Tribunal as violating Polish Constitution (the Court's judgment of 13 March 2007), and consequently lost its legal validity. Indeed, the sanction of mandate termination for merely missing a deadline for disclosure submission is disproportionate. Thus the problem to formulate an

appropriate sanction for refusal or failure to submit financial disclosure by councillors and borough leaders remains unsolved. This kind of regulation is indispensable for the anti-corruption regulations to satisfy the principles of universality and determination.

E. Another reason for the lack of success of the anti-corruption initiatives lies in the **application of law** and is related to the **enforcement** of rules of anti-corruption law. In Poland, it is typical for corruption to be detected by prosecution service, which is when its form and scale has already violated the **rules of the Penal Code**. Rarely does the public hear of anti-corruption actions being undertaken in **the form of disciplinary responsibilities** or in accordance with **the Labour Code regulations** which allow for termination of employment without notice due to severe violation of employee's responsibilities. Such state can indicate that preventing and fighting corruption is not a major concern of local authorities. This, however, necessitates the **formulation of procedures** which would determine **methods of enforcement** of anti-corruption regulations and clearly define the **responsibility of public administration bodies** for this enforcement.

Effective enforcement procedures are particularly required when it comes to creating solidarity among public functionaries with regard to the elimination of corruptive behaviour within local government authorities and administration. So far, we have repeatedly dealt with instances of negative solidarity among local authorities, who try to protect their colleagues from the responsibility for their criminogenic behaviour; for instance, commonly occurring disturbances due to dismissal of a starosta by provincial board, with him being already in custody, or frequent cases of failure to execute termination of mandate of a councillor or a borough leader despite the existence of evident grounds to impose this sanction.

Scarce responsiveness of local government officials to the necessity of elimination of people violating anti-corruption rules have encouraged the legislator to introduce regulations that give provincial governors the competence to undertake appropriate action, by means of successive amendments to State laws. The intervention mechanism is as follows: if relevant district, powiat or province authorities do not take appropriate action in the form of mandate termination, dismissal or termination of employment with individuals who, according to specific laws,[16] violate the anti-corruption regulations, the province governor requires a relevant local government

[16] See art. 98 'a' of the Act on District Government; art. 85 'a' of the Act on Powiat Government; art 85 'a' of the Act on Province Government.

body to undertake appropriate action within 30 days. In case of a failure to act within the deadline, the governor, having informed a relevant minister dealing with public administration, issues a provisional order. Such provisional order can be appealed against in administrative court which controls its legality.

Introduction of provisional orders can be regarded as the first step in the development of the province governor **supervision over the legality of enforcement of anti-corruption** law by local government units. This solution is, however, largely casuistic, as it deals only with violation of a number of enumerated regulations. For instance, a governor had no legal basis for undertaking effective action, despite the fact that the powiat council refused to dismiss a starosta who had been detained in custody. The intervention procedure gives rise to doubts, because it is not clear whether the governor's provisional order can be disputed only by the local government body or also by the functionary in question. The right to dispute given to the interested party can result in the differentiation of court procedures for monitoring of legality of termination of councillor mandate. Legality of mandate termination due to the violation of anti-corruption regulations will be monitored by administrative court, while the council's decision about the termination of mandate due to the loss of passive voting right or lack of this right at the time of election can be appealed against in relevant district court.[17] This duality of the procedure ought to be eliminated.

As the corruption increases and the corruption fight toughens, it is necessary to foster **the supervision of government administration over the legality of application of anti-corruption law** by local government units. This reinforcement should involve broadening the scope of supervision and implementation of effective legal instruments for supervision. Effectiveness and simplification of procedures could be improved by enabling province governors to issue orders with decisions of mandate termination of local government functionaries. Administrative courts ought to have the competence to monitor the legality of these orders.

The supervision over anti-corruption regulations by a provincial governor would serve as a kind of safeguard. Local authorities should seek to eliminate individuals violating these regulations, because any act in defence of people suspected of corruption can severely affect public support for the self-government idea. Therefore, prevention and fight against corruption in local government units is in their own interest.

[17] See art. 7 sec. 1 point 17 of the Act on District Government.

Anti-corruption actions could be accelerated by **specifying who is responsible for counterfeiting corruption in particular** organisational units of public authorities. Pursuant to the provisions of labour law, within working establishment units, **official responsibility ought to be held by a manager of the unit**. In collegial authorities or administration the duty of executing the anti-corruption regulations should lie with **the leader of a given collegial body**. After all, the role of a leader does involve obligation.

III. Factors restricting corruption in local governments

Negative assessment of effectiveness of anti-corruption regulations does not exempt us from the obligation to adhere to these laws, and therefore, the basic problems related to applying anti-corruption regulations in the functioning of local governments should be addressed. There are two main issues with regard to these problems: 1) the level of familiarity with the anti-corruption regulation among government functionaries and members of local communities, 2) accomplishment of openness and transparency in the functioning of government bodies.

8. It is truistic to say that the successful implementation and application of anti-corruption regulations is determined by the level of familiarity with these regulations among persons involved in local government units through various social roles (councillors, officials or members of local community). Therefore, at least with regard to government functionaries (councillors and other officials), one cannot rely on the presumption of good knowledge of the published law, and it is necessary to ensure the adequate level of familiarity with regulations through a well-organised system of education. The responsibility and **burden of providing the training for local government functionaries belongs** certainly to **a given local government unit**, which ought to fulfil this need in the public as well as its own well understood interest. Familiarity with power and responsibilities of a councillor, and with competencies of local government officials, is a decisive factor in achieving the high standard of functioning of legislative bodies or local administration officials.

Methods for education of local officials may **vary**; the differences arise with regard to the rank and size of an office, financial capabilities or the internal teams of educators. It is important, however, that each public official is acquainted with the principles of local government functioning, particularly with the principles of openness of any activity and its practical

consequences for the responsibilities of a given functionary who holds a particular position. The proof of completion of such training, confirmed by the statement of that functionary, ought to be attached to their personal file, so that any violation of anti-corruption regulations cannot be justified by the lack of knowledge about these responsibilities or the lack of supervision by a leader of the local administration unit in question.

A more difficult problem is posed by preparing members of legislative bodies (councillors) to fulfil their duties in compliance with the statutory rules for local government activity, including the restrictions related to holding the position of councillor. Certainly, a democratic act of election of a councillor does not guarantee the adequate preparation to hold this office. But at the same time, unlike other officials, councillors cannot be obliged to participate in organised training. Still, it is popular among councillors to get acquainted with the anti-corruption regulation which apply to their office, because violating these rules involves the risk of losing the councillor mandate. The executive body of a local government may prepare and offer its councillors, at the initial stage of the office, a guidance session where legal status of a councillor will be discussed. This could be conducted, for instance, by a legal advisor to the local administration unit.

The pressure of public opinion, which monitors whether a councillor fulfils his duties 'duly, diligently and honestly' (the words of the councillor's oath), is the only incentive for councillors to partake in the training on principles for functioning of legislative bodies, including the principle of openness of their activities. It appears that educational projects, when professionally prepared by either an executive body or a public organisation, can be of great interest to councillors and can improve their knowledge about functioning of the local government unit.

The understanding of community members' rights regarding public administration, when dealing with members of local community, is significant for ensuring the transparency of activities of local functionaries and consequently for preventing corruption occurrences.

The level of legal knowledge among community members should be a subject of **concern for local authorities**, and community members cannot be treated as intrusive supplicants. With regard to youth education, information on responsibilities and principles of functioning of local government could be conveyed in the form of optional classes offered by schools which are administered by a given local government. According to the regulation of article 34 'a' section 4 of the Act of 7 September, 1991 on the Education System, a body which administers an edu-

cational establishment but does not have a competence for methodological supervision, can present a motion regarding educational matters to the head teacher.

The education of adults can be carried out in various forms by either a given local government unit or one of many public or administrative organisations, or both. We need to bear in mind that the responsibility for support and propagation of self-government idea belongs to the district authorities.[18] The self-government idea is to be propagated through acquainting community members with the principles of local government administration. The commitment of a local government to the propagation of self-government idea can be measured by the financial means allocated for this task in their budget.

In the process of widely understood legal education of local government communities it is important to provide the access to free legal advice with regard to local government issues. Each local government unit should aim to set up at least one office offering legal advice. Their organisational forms may vary; for instance, in rural districts, the advisory body can be localised in local rural government, whereas in municipalities such activities are already in progress in the form of student advisory services at universities.

In order to successfully prepare and accomplish the anti-corruption initiatives it is necessary to assess the level of legal awareness among local government officials and community members, which can be delivered only by empirical studies.

9. The principle of openness of government activities and the right to access to public information on functioning of local governments do not guarantee the adherence to every single anti-corruption regulation, but they still constitute prerequisites to the assessment and monitoring of local functionaries by the public. Therefore, for the effective enforcement of current anti-corruption solutions, it is important to ensure the actual openness and transparency of local government activities.

The constitutional right to access to information about activities of governing bodies and public officials (art. 61 of the Polish Constitution) was created by the State government regulations in the form of **the principle of openness of government activities**, as well as the openness of activities of district ancillary bodies and openness of financial activities. The obligation of open activities of local government units is supplemented structurally by a correlate, i.e. the right to access to public information, the

[18] See art. 7 sec. 17 of the Act on District Government.

realisation of which is regulated by the Act on Access to Public Information of 6 September 2001.[19]

Openness of local administration activities is multifaceted and includes:

1) Access to the local legislation established by a given local government,[20] inclusive of fundamental acts defining the structure and working procedures of local authorities (statute) and principles of office organisation (regulation);
2) Admission to sessions of local government legislative units and their commissions;
3) Openness of procedures established for local government institutions in fulfilling their duties;
4) Access to documentation regarding public tasks performed by a body (rules of access to and use of documentation are defined in the statute of a district, a powiat or a province; the statute **defines only technical 'rules for the access'** and cannot restrict the statutory openness regulations).

It needs to be stressed that if a person makes use of the right to access to public information, there is no requirement to present their legal or actual interest, which means that any person, whether it is a Polish citizen or a foreigner, can demand the access to public information without justifying this request (no explanation for asking about particular information is required).

The right to public information is restricted only in cases defined by relevant laws. According to the rules of article 5 sections 1 and 2 of the Access to Public Information Act, the right to public information is subject to restrictions as defined by the rules of protection of secret information and of protection of other confidential information secured by laws. The access to information is also limited with regard to privacy of individuals. This restriction does not apply to individuals holding public offices if requested information is related to their functions, including conditions of their appointing and performing duties.

The aforementioned regulations give rise to an observation that the application of the rules of openness of activities and obligation to provide access to public information by local government units is, from the practical

[19] Dziennik Ustaw [Journal of Laws], No. 112, item 1198 as amended.

[20] According to art. 28 of the Act of 20 July, 2000 on Promulgation of Normative Acts (Dziennik Ustaw [Journal of Laws], No. 62, item 718), the office of a starost collects and allows the access to the local law acts established by the powiat, and the district office gathers and gives access to the district regulations.

point of view, a very complex problem. In the actual functioning of an office, it is essential to provide adequate **information about the right to access to information** to which members of local community are entitled. The message about what type of information can be requested from authorities needs to be conveyed to the community members by means of all available media, from the press and local broadcasting stations to simple information boards in offices.

There are two methods for the **delivery of factual information**: either each information unit of the office provides the information regarding their scope of activities, or a separate informative body is established. There are no doubts that the second option ought to be enforced. Where possible, it is necessary to create departments that will be responsible for providing access to and disseminating public information, for advising community members, propagating the self-government idea, as well as receiving complaints, motions and proposals from the members of community.

Principles for the access to public information and related restriction are too complex for the task of providing information to be split among units dealing with other diverse administrative matters. In today's world information is of great significance and this requires a proper approach to the 'public information' issue, which should be dealt with by a factually and legally specialised organisational structure.

Familiarity with regulations for giving access to public information is very important due to the procedures stipulated for exercising the right to information, in the form of the right to complain to the administrative court about refusal to provide information. The Access to Public Information Act is equipped with a sanction saying that a person who, despite the obligation, refuses the access to public information is subject to a fine, restrictions of freedom or imprisonment of up to a year (art. 23 of the Act).

Prevention of corruption is fostered by transparency of activities of local government units. Transparency can only be achieved when the access to information will no longer be treated as an interference of an intruder into the secrets of a government and when the goal of authorities will be to spread widely all information regarding their activities to the local community. The **responsible** attitude to the obligation to provide information by local authorities should become **a kind of a dialogue between the authorities and community members**. Open information may support the promotion of local government unit in their proposed, completed and future activities.[21]

[21] See P. Sitniewski: *Dostęp do informacji publicznej w jednostkach samorządu terytorialnego*, Wyższa Szkoła Administracji Publicznej, Białystok 2005, p. 11–12.

IV. Constructive principles of the act on prevention and fight against corruption in public authorities

If anti-corruption mechanisms are to be effective, it is of utmost importance to urgently perform a review of current legal solutions and **prospective amendments**, which would involve the **deregulation of redundant norms, simplification of monitoring procedures** and introduction of **resolute and unambiguous sanctions**. With respect to the **anti-corruption strategy** one should also consider the **establishment of a law** which would **thoroughly** regulate the counteraction and fight against corruption in **all areas of public authority**. Such law ought to be explicitly titled as an **act on prevention and fight against corruption in public authorities**, which would define the fundamental objective of the regulation and would stigmatize corruptive behaviour.

10. Regulations of such law should apply to all members of public authorities, though the legislative definition of **the range of regulation subjects** may be diversely formulated.

It is known that the current legislation employs various legal constructions to define persons holding public offices or performing public duties. The Penal Code, for instance, uses the term 'public functionary' and encloses an exhaustive list of individuals belonging to this category (art. 115 § 13 point 1–8 of the Penal Code). Until recently, the Civil Code, when defining principles for compensative responsibility, used the term 'functionary', differentiating between 'State functionaries' and 'local government functionaries'. The former included officials from governing bodies, State administration or economic institutions, as well as contractors of these institutions, persons appointed in elections, judges, prosecutors and armed forces servicemen. The latter included local authority clerks, councillors, borough leaders, mayors, members of powiat and province boards and other persons to whom local government regulations applied, as well as contractors providing services for local governments and their associates.[22]

'Individuals who hold public positions' and who are subject to the regulation restricting business activities have been defined as individuals who hold leading civil service positions, according to the rules of remuneration for civil servants and judges of Constitutional Tribunal (art. 1 of the Act). This definition is supplemented by a rule of article 2 of the Act, which lists other officials included in the category of individuals holding public positions.

[22] See art. 417 and art. 4201 of the Civil Code, version valid until 31 August 2004.

According to the rules mentioned above, there are **two methods of defining the range of subjects of the anti-corruption law**, each with advantages as well as faults. The method of the casuistic enumeration of all positions within public authorities allows for precise indication of individuals that are subject to regulation, but poses a risk of 'missing out' a position, and each deep reorganisation in the administration will necessitate an amendment to such rules. Taking into the account the fact that public functionaries also include 'other individuals who can issue administrative decisions' on behalf of administrative bodies, the anti-corruption regulation ought to apply to all officials employed in the State and local governments' administration. In compliance with the rule of article 268 'a' of the Code of Administrative Conduct, a public administration body can authorize officials of a particular organisational unit, in writing, to deal on its behalf with specifically agreed matters, and also to issue administrative decisions, rulings and certificates. Each of these employees is therefore, at least potentially, holding a public function, as defined by the regulation restricting business activities.

The above state of affairs justifies the attempt to introduce and define the term **'public functionary'**, as stipulated by the rules of the draft law for prevention and fight against corruption. **Public functionary** is an individual who performs public functions in organisational structures of the legislative, the executive (the State and local government administration) and the judiciary, as well as in other State organisational units that are appointed by the regulation to perform public activities. This rather general definition could be complemented by examples of certain categories of public functionaries. Such representative cases ('public functionaries include particularly:

1) senator, MP, councillor
2) judge, prosecutor, debt collector, etc')

of various categories of functionaries could represent an important direction for interpreting the application of general definition for public functionary.

11. An initial step in substantive provisions of anti-corruption law is to ensure the **impartiality** of activities of public **functionaries** through impeding all **situations of corruption**. As for the legal definition of a situation of corruption, it is necessary to describe the state of **a conflict of interests**. It appears that **a conflict of interests** is a **situation** which may give rise to reasonable suspicions with regard to the **impartiality** of behaviour of a public functionary, whereas a **situation of corruption occurs** when a public functionary, faced with a conflict of interest situation and under the influence of personal considerations and motives, fails to act

in compliance with orders and restrictions provided by legal regulations, including anti-corruption laws.

Anti-corruption regulation ought to include requirements, orders and bans formulated specifically for public functionaries. The **formulation** of the requirements, orders and bans should be **determined** and, in principle, **uniform** for all public functionaries. From the point of view of legislation techniques, specific regulations can be distinguished in the draft law systematics regarding the following categories of public functionaries:

1) Regulation of requirements, orders and bans **applying to all public functionaries** in general, for instance, elimination of offenders from public offices or the obligation to submit financial disclosures,
2) Regulation of requirements, orders and bans referring to **members of parliament and councillors**, i.e. public functionaries chosen by public election,
3) Regulation of requirements, orders and bans applying to public functionaries who have **the status of employee**, regardless of the type of employment,
4) Regulation of requirements, orders and bans affecting **functionaries of administrative police**, i.e. public services, guards and inspectors whose role is to control the abiding of law (e.g. police, local guards, customs service, sanitary inspections, construction supervision, labour inspection).

It is necessary to distinguish between functionaries chosen by public election and officials with the status of an employee because of the need to differentiate between sanctions for violating anti-corruption regulations. In the case of a functionary **elected by public vote**, **sanctions** for failure to fulfil orders and for disobeying bans should lead to the **termination of mandate** or qualify the official's behaviour **as equal to resigning from the office**. In the case of an **employee**, **sanctions** ought to range from disciplinary to dismissal or termination of employment contract. In accordance with anti-corruption regulation, **dismissal from a position or termination of employment contract** would be **parallel to termination of employment contract without notice**, according to article 52 § 1 of the Labour Code.

When formulating the index of orders and bans designed to eradicate corruption, each rule ought to specify the sanction for its violation; if a legislator experiences difficulties with establishing a precise sanction, this would indicate that the proposed anti-corruption solution is meaningless and unnecessary.

Responsibility for preventing corruption should be specified for every single organisational unit within public authority. In units defined by labour law as workplaces, a unit manager is to hold public responsibility, whereas in collegial government or administration bodies the responsibility for enforcement of anti-corruption law should lie with the leader of a given body.

The grounds for separating the category of functionaries working within administrative police institutions are that these officials are to be given specific requirements or bans (in official praxis, for instance), because any type of corruption behaviour within these group of workers is very dangerous and should be counteracted through prevention and repressive measures by means of increased standards of requirements and stricter sanctions.

The supervision of the legality of anti-corruption law enforcement by local government units should be entrusted to government administration bodies (province governors). The formulation of methods for supervision needs to be simplified and ensure protection of interested parties in the form of the final adjudication of a case by the court. In case of a failure to take action of enforcing anti-corruption law by a relevant local government, the province governor should have competence to request the court to issue an appropriate order. When dealing with termination of mandate or dismissal, administrative court will be relevant, whereas in the situation of declaring the invalidity of civil and legal functions or commercial activities, the court of general jurisdiction will be appropriate.

V. Final word

12. The degree of corruption risk justifies the application of exceptional measures. Therefore, the decision to establish a new special structure responsible for fighting corruption is mostly approved by the public. The creation of a new structure aims to **increase the effectiveness of operational actions** in detecting corruption and prosecuting offenders. The formation of this structure should not delay the headwork regarding legal regulation, which would represent **a legal basis to implement the anti-corruption strategy** that puts most emphasis on **preventing corruption**.

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 12 (25) 2007

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RESPONSIBILITY IN THE LOCAL GOVERNMENT UNDER ADMINISTRATIVE LAW

1. Essence of the issue

Essence of the responsibility problem in the local government under the administrative law and administrative procedure law is that binding force of law doesn't create any feeling of responsibility for the public local functionaries. It concerns both impression of the recipients of the activities carried out through administrative power and – what might be believed to follow the examples of public behaviors by different public officials – frame of mind of the people employed in public administration.

The scope of the mistakes made during procedures taken by local-government organs in the matters regulated through Administrative Procedure Code (APC) and Tax Regulation testifies to exonerating liability of the public officials. It is illustrated by annual specification of information on the activity of the local government appeal board prepared by the Prime Minister. It is said that in many appeal boards more than 50% cases is finished by establishment of breach of the law by local administration of *gmina*, *powiat* and *województwo*. These are both breach of the procedures and the substantive law. Unfortunately, neither these official specifications nor information which was used, allow to ascertain precisely social and economic effects of ineffective legal and organizational solutions.

We dare to express a thesis that the mentioned above effects are really severe to society and economics, and the reason to indicate "imperfections" is assuming no responsibility for carrying out duties of local government institutions by persons who joined organs (boards, legislative and executive bodies) of local government units (LGU) or persons who perform its functions (*wójt*, *burmistrz* or *prezydent*). It is believed that it is caused by

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improper mechanisms "coded" in the present system of law or lack of mechanisms extorting or at least stimulating them to responsible actions. To prove the base of accepted assumptions it demands deep, empirical research on mentioned phenomenon. Positive effect of the research should dispose academics to develop law-comparative and doctrinal studies, aimed at finding out what mechanisms should be introduced to Polish legal system to replace current feeling of irresponsibility by conviction that disadvantages of incorrect public duties fulfillment are inevitable.

2. Conception of administrative responsibility

Whenever administrative responsibility is mentioned in literature on administrative law, we cope with considerations concentrating on personal responsibility of persons whose duties (orders or bans) arise from acts and other rules of common law in force which regulate relations between state (or public-private corporations) and citizens or established by them organizations and institutions. It is mostly about duties of persons who are recipients of public administration (administered ones), not organs and bodies which carry out public functions (administrators).[1] It is an attempt to define the conception of administrative responsibility this way.

The issue of administrative responsibility for environment protection is treated, e.g. by J. Boć (2000), as "legally regulated possibility to start legal instruments carried out in specific to public administration forms and procedures against concrete subject caused by its activity breaching environment".[2] As we can see, the mentioned above author noticed exclusively in his definition responsibility of persons and organizations using the environment.

Similar attitude is represented by R. Paczuski, who believes that administrative responsibility is the principle of taking the consequences for events or state of affairs, actions or desistance by subject using the environment which are the subject of negative legal qualification and attributed the subject by environment protection law being in force.[3] It is specific that in their definitions neither of the authors take into account the "legal instru-

[1] See: e.g. W. Radecki, *Odpowiedzialność administracyjna w prawie polskim*, "Zeszyty Naukowe Akademii Spraw Wewnętrznych", No. 37 (1984), p. 116–141; A. Michór, *O charakterze odpowiedzialności administracyjnej*, "Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji", No. 60 (2004), p. 215–234; Z. Leoński, *Zarys prawa administracyjnego*, Warszawa 2004, p. 397 & following.

[2] See: J. Boć, K. Nowacki, E. Samborska-Boć, *Ochrona środowiska*, Wrocław 2000, p. 323.

[3] See: R. Paczuski, *Prawo ochrony środowiska*, Bydgoszcz 2000, p. 136–137.

ments" or "consequences" at least minimum disadvantage to the subject who is responsible. It might be attributed to the obvious character of those factors in every definition of responsibility. Analogical attitude to the subjective aspect of administrative responsibility is represented by other authors with the only difference that they notice and emphasize the necessity of the consequences to those who are responsible.[4]

In fact, Environment Protection Act,[5] which regulates the most developed and constantly developing field of administrative law, doesn't contain any administrative penalties imposed on public bodies in forms and procedures specific to administration for inactivity in environment protection or for tolerance of actions taken without legal excuse. In the Act we can find exclusively rules containing administrative pecuniary penalties imposed on those who use environmental resources unlawfully in a way of administrative decisions. Does it mean that in fact Polish legal system doesn't regulate any administrative forms and procedures which could be used against public administration bodies breaching Environment Protection Act by exposing them to consequences? Does it mean that also in other fields of administrative law not carrying out or improperly carrying out duties imposed on public administration bodies do not include any legal forms specific to administrative law in means of disadvantages for breaching binding rules?

We stand for the idea that such legal solutions exist, however, consciousness and frequency of using them are imperfect, moreover, they are insufficient, which causes their ineffectiveness. Having said that we have in mind, e.g. legal regulation about supervision of LGU organs, which contain a duty to control those organs and react to not carrying out their duties and legally improper actions of local government bodies by *wojewoda*, Ministry of Public Administration and Prime Minister. However, the exclusive right to control is still not a mechanism. Apart from this, they don't comprise activities taken by local government bodies in respect of administrative decisions. They act practically without control and supervision in this field. Probability of taking the responsibility for administrative mistakes made during the mentioned above activity is finally lower.

Disregarding those instruments as means used also for its protection by people who deal with matters concerning environment protection law, they prove weakness and imperfection of the system. Researchers of legal

[4] See: W. Radecki, op. cit.; A. Lipiński, *Elementy prawa ochrony środowiska*, Kraków 2001, p. 240.

[5] Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska [Environment Protection Act of 27th April, 2001], Dziennik Ustaw [Journal of Laws], No. 62, item 627.

rules and control as well as supervision institutions have pointed out many critical arguments to the whole sphere of the local government activity,[6] which unfortunately – were left without any proper reaction from the public authorities responsible for state of law and protection of fundamental social values. If expressed thoughts and critiques could have been supported by empirical data, the chance to notice the need to change the actual, but rarely used, solutions would have definitely arisen.

M. Wincenciak presents a different attitude to the definition of administrative responsibility of the mentioned above authors.[7] According to the author, the subject of responsibility in administrative law is an action or illegal relinquishment by every object of relations under administrative law. On the other hand, the subject of responsibility are the parties having administrative capacity – administrators, and in some situations, administrated subjects. Aiming at research process on imposing administrative sanctions he divided administrative responsibility into responsibility resulting from breaching administrative law and responsibility resulting from non-breaching it. Administrative responsibility resulting from breaching administrative law is – according to the author – secondary responsibility in relation to the basic one. It is created exclusively in a situation when appreciation of an action is negative.[8] Therefore, fundamental for the administrative responsibility is the act according to which rules regulating consequences of ignoring it, administrative relation could be created.

The presented above point of view should be supported, however, one might find it difficult because of high level of abstraction when trying to understand it and use in practice. It is also impossible to share an opinion of the mentioned above author, as he states it without deep and convincing reflection that administrative responsibility for breaching administrative law is "secondary responsibility in relation to the basic one" and it is applicable only when "appreciation of an action is negative". These statements excessively restrict the defined term and are in opposition – what is proved in the further part of the paper – to positive law. These are the case studies when both estimation of the administrative law breach by specific beha-

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[6] See: D. Kijowski, *Skuteczność i zupełność nadzoru nad samorządem terytorialnym*, (in:) *Reforma administracji publicznej 1999 – dokonania i dylematy*. Edited by M. Stec, Instytut Spraw Publicznych – Ekspertyzy – Rekomendacje – Raporty z Badań, Warszawa 2001, p. 36 and next; D. Kijowski, M. Kulesza, W. Misąg, St. Prutis, M. Stec, J. Szlachta, J. Zaleski, *Diagnoza stanu terytorialnej administracji publicznej w Polsce*, "Samorząd Terytorialny" 2004, No. 1–2, p. 152–157.

[7] See: M. Wincenciak, *Sankcje administracyjne i ich stosowanie*, unpublished Doctor's thesis, Faculty of Law University of Bialystok, p. 19–22 (tutor: prof. B. Kudrycka).

[8] See: ibidem.

vior and the responsibility imposed on them take place according the same procedure.

The most important is that in the latter example of the related term the necessity of research on administrative responsibility essence was noticed. It concerns not only citizens (administered subjects) but, first of all, administrators of public administration bodies and public officials. The mentioned author hasn't taken detailed research on administrative responsibility so far, but he paid his attention mainly to sanctions imposed on the administered subjects. The further research on responsibility in local government is undoubtebly an aim, otherwise our attitude to responsibility in local government will be left in the sphere of intuition.

Aiming at the postulate of research on responsibility of the local government we propose an assumption that administrative responsibility is imposed by administrative acts on both administrators and administered ones addressing to them the consequences of breaching orders and bans.

The proposed definition is based on the widest assumption of responsibility which points at disadvantages of the subject against whom it is imposed (or person who is responsible). We don't concentrate on the sphere of breaching the administration law assuming that the public administration bodies are obliged to comply with the legal orders and bans addressed to them. On the other hand, behavior which doesn't breach directly the administrative law may also cause administrative consequences.

The tribe and forms of describing the legal situation and duties of the person responsible on the basis of breaching legal system should forejudge about the administrative character of the responsibility. During the legal process (and qualification procedure) civil, criminal (collective responsibility as well) and employees responsibility is imposed. In a way of resolving law – depriving LGU of competences in matters where they were not able to fulfill their duties correctly[9] – the specific political responsibility is imposed on. In case of the local election *wójt* and *burmistrz* (or *prezydent*) are politically liable for improper fulfillment of their duties. To sum up, we deal with administrative responsibility in the cases where executive public organs (public administration) or controlling them administrative courts decide about consequences of breaching legal orders and bans.

[9] It may appear soon that this possibility is real because during previous and current term of Parliament the conception of depriving *gminas* of the right to decide on placing investments at their ground is considered. It could happen on condition that they don't use all possibilities of land management by resolving proper land management plan. As the newspaper informed, the government has prepared a draft of the act ("Rzeczpospolita", 24th November 2005, p. 6A).

3. Relations of responsibility in public administration to administrative law and its doctrine

The issue concerning the feeling of the responsibility by public officials and the reality of imposing it on them does not seem to be closely tied to the field and methods of regulation by the administrative law. In general opinion, it is connected more to classic types of responsibility and issues of labour law as well as civil and criminal law. However, this attitude is not a proper one. It doesn't fit positive law and challenges of modern administration. It is difficult to give in this rather short discourse even a vague "picture" of legal rules which could be classified as administrative law which ensures responsible fulfillment of public duties. Apart from this, we could indicate the most specific few examples, e.g. the mentioned above disciplinary responsibility of nominated local servants, teachers, city guardians or policemen. However, it concerns responsibility for breaching employees' duties and is similar to the responsibility imposed and executed in actions of law trial (especially criminal actions), but undoubtedly decisions made during disciplinary actions are of authoritarian character, closely tied to the legal status of nominated official regulated by decision on nominating him to the concrete post. According to it, disciplinary actions are not taken by judicial organs but by specially elected panels (disciplinary commissions) or by public officials possessing disciplinary power (e.g. commander, Chief of Police etc.). It is worth mentioning that since 27th May, 1990 (caused by a mistake of parliamentary reporter and the MPs oversight)[10] the rule excluding appliance of Administrative Procedure Code (APC) hasn't been bound in disciplinary actions.

Decisions taken during disciplinary actions are characterized by all essential elements typical to administrative decisions (acts), that is a reason why research on current solutions, their application and postulates for eventual modifications should be based on basic rules of administrative law and academic research.

Following instruments – the means of administrative responsibility according to the above definition – are decisions on suspending or dissolving

[10] Reports concerning work of Parliamentarian Special Commission elected then by contractual Sejm aiming at preparing drafts of act introducing in Poland local government recorded that commission proposed Sejm and Senate not to exclude in art. 3 in § 2 of APC a rule excluding applying it in disciplinary actions, but a rule excluding judicial control of disciplinary actions. A parliamentary reporter had presented arguments of Commission, then proposed inverse solution and MPs (having no idea on the proper solution to vote) voted draft law opposite to its justification. The author, as the Commission expert, was the witness of this sitting.

local government bodies, regulated by three fundamental local government acts. Indeed, decisions on dissolution of LGU legislative body was constitutionally reserved to Sejm, however, the reasons for making such decisions and their legal meaning and required procedure justifies the statement that the effects of breaching Constitution and acts brings consequences addressed to all local-government institutions also carrying out their executive power.

Typical administrative acts' structure and essence forejudged administrative character of this type of solutions. Such construction is characteristic, based on applying abstract and general rule to the concrete case. The essence of this solution is to apply the act, to apply the administrative or constitutional law.

The legal status of an organ applying this instrument isn't also an obstacle. General competence to dissolve LGU legislative body is reserved by Constitution to the Sejm. In the Constitution also it was allowed to charge Sejm with the executive power, however, it doesn't change the administrative nature of the decision.

Suspending LGU bodies is, without doubts, an administrative act which is given as a consequence of breaching legally binding rules. It is not always administrative law, however, but the act taken in administrative procedure and by administrative executive organ. Moreover, it should be noticed that this type of administrative responsibility, especially threatened by applying it, can be used to extort duties from LGU apart from its legal character forms realization and type of organs obliged to carrying out duties of concrete LGU. It is also regulated by local government acts.[11]

Moreover, we can add to the catalogue of examples of administrative responsibility sanctions regulated by law on procedure of administrative courts applied in situations when administrative organ doesn't execute the administrative court judgment. According to Art. 154 § 4 of the Act of 30th August, 2002 – Law on Administrative Courts Procedure (LACP), in case of not executing the judgment on inactivity claim and in case of organ inactivity when the reversing or quashing act or action judgment was given, a party has the right to take legal action claiming imposing a fine on this organ after a previous written call addressed to the organ competent to execute a judgment or to deal with a matter. It should be emphasized that

[11] According to Art. 97 p. 1 USG, in case of hopeless lack of efficiency in fulfillment public duties by *gimna* bodies, Prime Minister, according to the motion given by Minister of Public Administration, is in power to suspend *gmina* body and appoint receivership for the term of two years, not longer then election of the council and *wojt* for the next term. Identical rule is regulated in art. 84 p. 1 usp and Art. 85 p. 1 usw which regulate suspending organs of *powiat* and *wojewodztwo*.

the fine is imposed on the organ, not on the person who holds the position of the organ. However, as it was mentioned, imposing consequences of breaching the law on public administration organ is essential for administrative responsibility.

It doesn't interfere with assenting this sort of action taken by administrative courts as a feature of administrative responsibility and the fact that it is imposed by judicial organ exclusively as a result of a claimant bringing an action to the court. The main task of the court is not only executing judicial power in administrative cases but also controlling public administration. The administrative court applies in these matters exclusively the administrative law and takes decisions which are more similar to imposing fines in administrative procedure than deciding a dispute between the administrator and claimant. Therefore, classifying administrative courts as a legal instrument (Art. 154 § 1 LACP) of administrative responsibility is justified.

It is difficult to admit as an instrument of administrative responsibility for breaching duties by local government organs solutions regulated by art. 155 § 1 LACP. According to that rule, in case of ascertainment of serious breach the law or factors influencing such action, the panel of judges is in charge of informing competent organs or their superiors about the transgression. According to Art. 155 s. 2 LACP, a competent organ is obliged to inform the court within 30 days of a taken standpoint after consideration of the provision. In case where the local government organs are not supervised by any superior organs (e.g. *wójt*, *starosta* or *president* are in such position because *gmina* and *powiat* councils don't have any supervision power) such courts provisions are exclusively the reason for a mood of a person holding the public post. The usefulness as a reason for feeling a responsibility between officials of *gmina* is slender. The same situation is in *powiat* and *województwo*.

However, the instruments presented above are rarely used and – apart from a case of appointing compulsory administrator in Warsaw in 2001 – they are not noticed by public opinion. Doctrine hasn't been also interested in the subject so far. What are the reasons? Why – apart from general critique of local government, its officials' lawlessness and judicial judgments' disrespect – aren't they used? Undoubtedly, the subject is worth conducting a systematic research.

Continuing these thoughts, we should ask: What is the reason for administrative responsibility of "classic" judgments of administrative courts (invalidating resolutions of LGU organs and lawful decisions of *wójt*, *starosta* and *marshall*) or typicall supervising decisions of *wojewoda* and *RIO*? Their administrative character leaves no doubt. This way competent bodies

decide on consequences of breaching general rule of law: acting on the base and within binding law. However, applying these instruments doesn't cause direct disadvantage of the responsible object. This way local government organs are deprived of a possibility to fulfill legally taken decisions and enforced to reconsider decisions already taken. It is obvious to the addressee that these decisions are arduous.

The administrative procedure is based on the constitutional right of appeal (Art. 78 s. 2). Moreover, final LGU decisions, even not appealed, may be reversed in officio (as some authors say "form of supervision") by supervising bodies. According to the general fiscal administrative procedure, also interference of supervisors is possible in case when LGU organs' actions caused essential breach of parties' procedural rights and correct reversing procedure so a reversal decision was necessary to take.

At this point it is inevitable to ask a question: Shouldn't we treat eventual changes of decisions taken in appeal or special procedure, reversing them or forcing to reversal procedure as a specific responsibility for illegal action in the case ? It is without a doubt: decisions taken as a result of this procedure are the administrative decisions, and they are examples of applying the administrative law. The answer to the above questions needs deeper analysis and it is impossible to give it here. However, an assumption of a possible answer gives automatically a question for research: Are these instruments (forms of responsibility) correct? Do they guarantee the increase in fulfilling the responsibility or does it go the other way around or maybe both?

Mentioned in section 1 of the paper, the information about LGU organs jurisdiction duties are part of essential but not dominating activity of local government. Mass-media – newspaper, radio, television and academic publications[12] emphasize an enormous number of critique addressed to the local government. It is really desired to provide an empirical research (based on documents, comparative law and theory) which could give a precise diagnosis. The diagnosis could be the base for preparing new mechanisms and introducing legal solutions which aim at strengthening the responsibility of organs and public officials in the local government. Following examples of administrative responsibility of persons holding public functions in local government are regulated in every local government act where it is prohibited to share functions in local government with other ones, such as to share them with professional and individual business activity. Sanctions regulated

[12] See: D. Kijowski, M. Kulesza, W. Misiąg, St. Prutis, M. Stec, J. Szlachta, J. Zaleski, *Bariery prawne efektywnego i skutecznego funkcjonowania lokalnej i regionalnej administracji publicznej oraz propozycje ich likwidacji lub ograniczenia*, "Samorząd Terytorialny" 2005, No 1–2, p. 5 and next and idem, *Diagnoza...*, op. cit.

by Art. 5 Act of 21st August, 1997 on limitation of business activity by persons holding public functions[13] are also similar. These rules regulate the loss of the mandate, revoking the post, etc. and other consequences of breaching the bans regulated by the mentioned act. The decisions are taken in form of individual administrative acts by executive organs. Therefore these are examples of administrative responsibility.

To conclude, we could say that, having in mind significant capacity of the term "administrative act", which includes both the double concrete act and general situation act as generally addressed act, and the fact that loss of the possibility to take independent decision or necessity to adjudicate reversely the case with the threat to take it out by superior organ or other appointed organ, are also a disadvantage to the organ which activity could be reached by consequences, we could recognize the following examples of administrative responsibility:

1) personal and merit decisions taken as supervision act on local government organs
2) disciplinary responsibility of appointed local government officials
3) taking reformatory decisions in administrative procedure during appeal actions
4) decisions and resolutions of appeal organ taken in cases finished by final decisions
5) imposing punishment (pecuniary and other, depriving of the right to take up activity or hold a post) on persons holding functions in local government and local government organs
6) the loss of the mandate to hold a function or a post
7) other situations regulated by law but not mentioned in the paper

Present knowledge on the estimation of the administrative law regulating responsibility in local government is, without doubts, insufficient. Moreover, the research on the subject hasn't been conducted for a long time, neither has been any comprehensive publication on administrative responsibility of persons and institutions hasn't been published yet. The proposals to regulate it systematically aren't also known. There are not also presented in Poland the legal rules' best practices and worldwide known systems responsible for legal and illegal actions of institutions and public administration personnel. It justifies an idea to organize and prepare the research on the mentioned issue. The result of the research should present the analysis of the current situation as well as the proposals of new, efficient legal and organizational solutions.

[13] Dziennik Ustaw [Journal of Laws], No. 106, item 679.

The academic research should be based on Polish and European systems of law, jurisdiction and doctrine presented in library resources, computer data base and systems of academic information exchange.

The research should analyze and estimate current solutions concerning:

- administrative procedure as a collection of fundamental rules for taking all the mentioned types of administrative responsibility
- legal position of a "sufferer" in official and disciplinary procedures
- mechanisms of individual interest protection of persons responsible in administrative procedures aiming at establishment of the responsibility
- mechanisms of public interest protection of persons responsible in administrative procedures which aim at establishing the responsibility.

As consequence of the previous step, it is necessary to establish a possibility of different legal solutions of administrative responsibility in local government based on assumptions prepared individually by the team members and best practice of other countries.

4. Illusion of conviction about Polish law perfection

After few years of a new political situation, it is the right time to prove the need to verify a general conviction that Polish law is perfect but people are not able to use it properly. It is an illusion. The reality is different. Currently regulated by law rules of responsibility for social consequences of local government actions and their officials are not working or they cannot achieve the expected results.

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THE SUBJECT OF CRIME IN THE CONTEXT OF CRIMINAL RESPONSIBILITY (on the basis of penal codes of Poland and Russia)

The subject (perpetrator) is one of the obligatory elements of a crime. Actually, without his participation, a forbidden act cannot be committed. Criminal law defines the subject of a crime as the person who is able to bear criminal responsibility for the commission of forbidden acts stipulated by the penal code. Nevertheless, as the practice demonstrates, not every perpetrator bears criminal responsibility, because not everyone can bear it. It is, therefore, necessary to consider what characteristics determine the ability of the perpetrator to bear criminal responsibility, who stipulates these characteristics, and what is their scope.

This paper will analyze provisions of Polish and Russian criminal law (limited, for practical reasons, to penal codes). As both codes were enacted in a similar period, on the background of political, social, and economic changes (the Polish penal code was enacted in 1997 and the Russian one in 1996), this paper demonstrates and compares the characteristics of the subject of criminal responsibility that were adopted in each of these countries. Such a demonstration and comparison makes possible the effort to estimate the degree of repressiveness of the legal solutions that constitute the object of this analysis.

1. The subject of crime in the Polish penal code of 1997[1]

It is necessary to notice, at the beginning of our discussion, that the characteristics of a subject of crime have not been defined in the Polish

[1] Kodeks karny [Penal code] – Act of 6 June 1997, Dziennik Ustaw [Journal of Laws], No. 88, item 553 (with changes).

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penal code (PC) in one legal provision. They can be determined by analyzing several articles. Thus, article 1 of the PC stipulates that the subject of crime, able to bear criminal responsibility, is a natural person; article 10 of the PC stipulates that it is a person of certain age; article 31 of the PC stipulates that it is a person who is able in body and mind.

In commencing to analyze the characteristics of a subject of crime, one should state that currently in Poland criminal responsibility can be borne both by a natural person, and a so-called collective subject (legal persons and legal entities without juridical personality).

A collective subject bears criminal responsibility only under the principles set forth in the law of 28 October, 2002 on responsibility of collective subjects for committing acts under penalty.[2] At the same time, the penal code stipulates that only a **natural person**, or a human, can bear criminal responsibility.

Another characteristic of a subject of crime is his or her **age**. According to article 10, § 1, of the PC, criminal responsibility is borne by a person who has committed a forbidden act after reaching the age of 17 years. Such responsibility is a general responsibility. However, in article 10, § 2, of the PC, the legislator has provided for an exceptional responsibility of persons who have reached the age of 15 years at the time of perpetrating the forbidden act. Such persons bear responsibility in the case that they have: committed an attempt against the life of the President of the Republic of Poland (art. 134), a homicide (art. 148, § 1) and a homicide of the qualified type (art. 148, § 2, items 1, 2, 3), deliberately caused a grave detriment to health (art. 156, § 1 and 3), deliberately caused a generally perilous event, to include the qualifying consequences (art. 163, § 1 and 3), conducted a terrorist attack on a ship or aircraft (art. 166), deliberately caused a calamity, to include the qualifying consequences (art. 173, § 1 and 3), participated in a group rape (art. 197, § 3), taken a hostage, to include the qualifying consequences (art. 252, § 1 and 2), committed a robbery (art. 280). Such responsibility may take place when the circumstances of the case, the degree of the perpetrator's development, his or her qualities and conditions support it, and in particular when previously applied educational or correctional means have turned out to be ineffective. The word "may" used by the legislator means that the responsibility is optional, and is dependent on the court's judgment.

[2] Ustawa z dnia 28.10.2002 r. o odpowiedzialności podmiotów zbiorowych za czyny popełnione pod groźbą kary [Act of 28 October, 2002 on responsibility of group entities for committing acts subject to penalty], Dziennik Ustaw [Journal of Laws], No. 197, item 1661 (with changes).

It is notable that the application of the above regulation may take place if the premises stipulated in it occur simultaneously.[3] Consequently, the court has to analyze the circumstances of the case (e.g. how severe was the crime, what were the motives of the perpetrator, what was his role in the criminal cooperation),[4] the perpetrator's level of development (intelectual, moral, and emotional development),[5] his or her personal characteristics and conditions (age, personality, and degree of demoralization).[6] A complete analysis of these premises by the court serves the purpose of determining whether guilt can be attributed to the perpetrator at the moment the act was committed. It is guilt that determines criminal responsibility (art. 1, § 3 of the PC).

The court may also take into consideration the fact that educational and correctional measures have been used towards the perpetrator before, and how effective they were. While the lack of such measures may certainly have a positive impact on the perpetrator's situation, their previous application may lead to a judgment calling for a more stringent penalty.

A 15 years old perpetrator of a forbidden act may, in accordance with Polish legislation, face a penalty that will not exceed 2/3-rds of the upper limit of statutory penalty associated with the perpetrator's purported crime. The court may also apply an extraordinary commutation of the sentence. Thus, the legislator has introduced a limitation on the penalization of an act committed by a minor. At the same time, the legislator has acknowledged that the principal directive that courts should use as a guidance in pronouncing a sentence towards such a perpetrator is the directive included in art. 54, § 1, of the PC, which stipulates the priority of the educational purpose of punishment. The legislator has also banished a life sentence towards a perpetrator who, at the moment of the crime, has not reached the age of 18 years (art. 54 § 2 of the PC).

Another mitigation of criminal responsibility of a minor has been provided for in art. 10, § 4, of the PC. This provision states that a perpetrator who has committed a crime after reaching the age of 17 and before reaching the age of 18 is subject to a court sentence imposing educational, medical

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[3] A. Wąsek, (in:) O. Górniok, S. Hoc, M. Kalitowski, S. M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz* [Penal code. A commentary], T. 1, Art. 1–116, Gdańsk 2005, p. 142.

[4] Ibidem, p. 144.

[5] M. Budyn-Kulik, (in:) *Kodeks karny. Praktyczny komentarz* [Penal code. A practical commentary], ed. M. Mozgawa, Kraków 2006, p. 36.

[6] R. Góral, *Kodeks karny. Praktyczny komentarz* [Penal code. A practical commentary], Warszawa 1998, p. 26.

or correctional means foreseen for minors, if the circumstances of the case and the degree of the perpetrator's development, his or her qualities and personal conditions support it.

The need to differentiate the responsibility is, according to R. Góral,[7] related to the uneven intellectual development of minors, a different degree of their demoralization, and the required consideration for the severity of their crimes. The achievement of such an approach in Poland is served, besides the penal code, by the law of 26 October, 1982 on procedure in cases involving minors,[8] which provides for pronouncing solely educational, medical, and correctional means in case of such perpetrators.

Poland's penal code includes one more category of a subject of crime related to his or her age: a juvenile. According to art. 115, § 10, of the PC, a juvenile is a perpetrator who, at the moment the criminal act was committed, had not reached the age of 21 years, and at the moment the sentence is issued in a particular instance, had not reached the age of 24 years. One has to conclude that this is a particular category of an adult perpetrator who, due to his age, is treated a little different, with more lenience. The premise of such a conclusion is in the provisions of art. 54, § 1, of the PC (which require the court to consider the educational aspects of a punishment in its sentence), and art. 60, § 1, of the PC (which provides for the possibility to apply an extraordinary commutation of sentence towards such a perpetrator).

The last matter to be analyzed is **accountability**, which constitutes another characteristic of a subject. At the beginning of this paper there is a statement that one of the conditions that make criminal responsibility possible is the perpetrator's accountability; consequently, only a person who is accountable (able in body and mind) can be the subject of a crime. The Polish penal code does not, however, include a definition of accountability. On the other hand, it defines the state of non-accountability by pointing at its reasons and consequences. Art. 31, § 1, of the PC states that non-accountability occurs when, due to a mental illness, a mental handicap, or another disorder of mental activities, the perpetrator cannot, at the moment of committing the deed, recognize its meaning or direct his or her own actions. The legislator concluded that a perpetrator acting in such a state does not commit a crime.

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[7] Ibidem, p. 26.

[8] Ustawa o postępowaniu w sprawach nieletnich z dnia 26.10.1982 r. [Act on procedure in cases involving minors of 26 October, 1982], Dziennik Ustaw [Journal of Laws], No. 35, item 228 (with changes).

Polish law assumes a mixed method to define the notion of non-accountability. As noticed by L. Gardocki,[9] it is based, on the one hand, on indicating the mental state of the perpetrator (inability to recognize the meaning of the deed or to direct his or her own behavior), and on the other hand, on indicating the biological and psychiatric reasons for such a situation (a mental illness, a mental handicap, or other mental disorders). One should note that a mental illness is to be defined as a disorder of mental functions of a man (e.g. paranoia, schizophrenia, cyclophrenia, psychoses), as a mental handicap, i.e. limited mental capacity of a person (e.g. as a result of genetic illnesses, brain defect in fetus), as other mental disorders, i.e. biological disorders in a human body (e.g. poisoning, intoxication with narcotics).[10]

On the other hand, the inability to recognize the meaning of one's own actions means, in the legal sense, that it is a forbidden act, and in the factual sense that the perpetrator cannot tell the difference between good and evil. The inability to direct one's own actions means a lack of ability to decide on a certain behavior.[11]

The consequence of adopting such a method of determining non-accountability is that in every given case, in order to conclude the presence of such non-accountability, one has to indicate the simultaneous occurrence of one of the reasons stipulated in art. 32, § 1, of the PC, and at least one of the consequences to the mental state.

In order to conclude lack of responsibility, it is also important that the non-accountability occur at the moment the act is committed. This moment, as stated in art. 6, § 1, of the PC, is the moment when the perpetrator acted or failed to perform an act that he was obligated to perform. The consequence of finding the perpetrator to be non-accountable at the moment of committing an act, is that he or she is released from responsibility due to lack of guilt. Nevertheless, the perpetrator may be subject to security measures (e.g. may be placed in a mental institution or an addiction treatment facility).[12]

Art. 31, § 2, of the PC identifies an intermediate state between full accountability and non-accountability. Its reasons are the same as in the case of non-accountability, but the consequences are different. In this case the medical conditions stipulated in art. 32 § 1 of the PC result not in

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[9] L. Gardocki, *Prawo karne* [Criminal law], Warszawa 2004, p. 131.

[10] M. Budyn-Kulik, op. cit., p. 87.

[11] Ibidem, p. 87.

[12] M. Dietrich, B. Namysłowska-Gabrysiak, *Prawo karne – część ogólna* [Criminal law – the general part], Warszawa 2003, p. 124.

cancellation, but in limitation, to a large extent, of the ability to recognize the meaning of the action or to direct one's actions. Consequently, such a state does not result in an elimination of guilt, but it limits its degree.[13] Thus, the perpetrator who acts in a state of limited accountability does commit a crime (unlike the perpetrator who is non-accountable), but his guilt is diminished.[14] The court can apply an extraordinary commutation of sentence in the case of such a perpetrator.

Another matter that ought to be discussed at this moment in the discussion is the criminal responsibility of persons who commit crimes in the state of drunkenness or intoxication with other substances. Such criminal responsibility is regulated by art. 31, § 3, of the PC, which states that the perpetrator who is drunk or intoxicated is subject to general principles on responsibility, which are the same as for a person who is fully accountable. Such a concept of responsibility has been adopted due to the fact that such perpetrator has introduced himself into the state of intoxication (by willingly and deliberately consuming alcohol or other intoxicating substances) and has expected, or could expect, that by getting into that state he or she will induce his own non-accountability or a significant limitation of accountability. At the same time, he or she does not have to expect to commit a crime. This provision is not applied in cases of perpetrators who commit crimes in the state of pathological drunkenness, i.e. in a state that results in cancellation of awareness after drinking even a small quantity of alcohol due to physical or mental exhaustion of the person.

According to L. Gardocki,[15] applying general principles of responsibility towards drunk or intoxicated perpetrators is a deviation from the rules of determining guilt. However, the rationale behind such a deviation is the need to protect the society from such perpetrators, as well as the lack of acceptance for such perpetrators being exempt from punishment.

Before the conclusion of the discussion of characteristics of a subject of crime that are applied in Polish law, one ought to briefly mention that the subject who demonstrates the above mentioned characteristics is called a general subject (which in the penal code is expressed by the pronoun "who"), while the subject who has other, additional characteristics, is called an individual subject. Such additional characteristics may be the deciding factors in determining if a crime has occurred at all (e.g. only a soldier can be guilty of a desertion) or influence the identification of

[13] M. Budyn-Kulik, op. cit., p. 88.

[14] A. Wąsek, op. cit., p. 412.

[15] L. Gardocki, op. cit., p. 134.

a crime as a privileged type or a qualified type, which in turn influences the possible punishment and the sentencing. E.g. a mother (an individual subject) who kills a newborn baby at the time of delivery, under the impact of its course, faces a more lenient sentence than that due in case of a murder.

2. The subject of a crime in the Russian penal code of 1996[16]

The characteristics of the subject of crime have been defined in the penal code of the Russian Federation (PC RF) of 1996 in chapter 4 of division II titled, "Persons who are subject to criminal responsibility". They are listed in art. 19 of the PC RF, which says that "only a person who is accountable, and who has reached the age specified in this Code is subject to criminal responsibility". Consequently, this provision means that the characteristics of the subject of a crime are: accountability, being a natural person, and having a certain age. These characteristics constitute the obligatory characteristics of a subject of any crime.

Such approach means that the Russian legislator links criminal responsibility with a person's ability to recognize his or her actions and to direct them. A lack in the perpetrator of one of these elements excludes his or her criminal responsibility.

The Russian criminal code considers only a natural person, or a human, i.e. a rational creature who has free will, as a subject of a crime. This means that neither animals nor objects can be considered as perpetrators of a crime. According to Russian lawyers,[17] such an approach fully fulfills the tasks of criminal law, its principles, the notion of a crime, and the purposes of a punishment defined in the law itself. Art. 11–13 of the PC RF specify that a subject of a crime is a citizen of the Russian Federation, a foreigner, or a person without citizenship.

Consequently, in accordance with the classical criminal law principle of individual responsibility that the Russian law incorporates, the penal code does not allow for a legal person to be a perpetrator of crime. Although during the works leading to the enactment of the current penal code, the inclusion of this category of persons as subjects of criminal responsibi-

[16] *Ugolovnyj kodeks Rossijskoj Federacii s 13 06 1996 g.* [Penal code of the Russian Federation of 13 June, 1996], "Rossijskaja Gazeta" [The Russian gazette] 1996, 113–115.

[17] L. V. Inogamovaja, V. S. Komissarov, A. I. Rarog, ed., *Rossijskoje ugolovnoe pravo. Obshchaya chast'* [Russian criminal law. General part], Sankt Petersburg 2006, p. 193.

lity was considered, but ultimately such a provision of law was dismissed. The responsibility of such entities was regulated in civil and administrative law.

Another characteristic of a subject of crime is his or her age. The Russian legislator, in determining the age at which criminal responsibility becomes possible, used the psychological criterion. The age limit was linked to the level of intellectual development of the individual, his or her ability to comprehend the nature and social impact of the act, to evaluate the act, and on the ability to realize his or her needs in accordance with social norms. The legislator concluded that the ability to recognize the surrounding world, its appraisal, the ability to make a choice between various motives occurs in line with a person's biological and social development, at the moment when a certain level of legal awareness is in place. Therefore, criminal responsibility should be effective once a person reaches a certain age.[18]

In Art. 20 of the PC RF, the legislator stipulated two age limits that constitute a basis for criminal responsibility. In principle, persons who have reached the age of 16 at the time the crime is committed face criminal responsibility (art. 20, item 1, PC RF); except for responsibility of persons who have reached the age of 14 (art. 20, item 2, PC RF).[19] Article 20, item 2, of the PC RF states that a minor who, at the moment of committing a crime, has reached the age of 14, is subject to criminal responsibility for: committing a homicide (art. 105), deliberately causing a grave bodily injury (art. 111), deliberately causing a medium bodily injury (art. 112), kidnapping a person (art. 126), rape (art. 131), committing sexual acts using violence (art. 132), theft (art. 158), plunder (art. 161), robbery (art. 162), extortion (art. 163), illegal seizure of a car or another means of transportation without the purpose of appropriation (art. 166), deliberately destroying or damaging property in aggravating circumstances (art. 167, item 2), terrorism (art. 205), taking a hostage (art. 206), false notification of an act of terrorism (art. 207), hooliganism in incriminating circumstances (art. 213, item 2), vandalism (art. 214), theft or extortion of weapons, ammunition and explosive materials (art. 226), theft or extortion of intoxicating or psychotropic substances (art. 229), and incapacitating means of transportation

[18] N. I. Vietrov, J. I. Liapunov, ed., *Ugolovnoje pravo. Chast' obshchaya. Chast' osobiennaya* [Criminal law. General part, Specific part], Moskva 2007, p. 122.

[19] One ought to notice that these regulations are in conflict with the UN Convention on Children's Rights, ratified by Russia in 1990, which says that a child is considered a person below the age of 18 years. Consequently, bringing 14 years old children to responsibility testifies to the high restrictiveness of these provisions.

or roads (art. 267). The legislator has concluded that the nature of these crimes, their danger to the society, and the fact of deliberate commission, are adequately understandable for 14 years old persons.

However, this does not mean that minors bear responsibility on the same level as adults. In sentencing the court takes into consideration the principle of humanizm, as well as regulations concerning sentencing in cases involving minors, the course of serving the sentence, the ability to release them from criminal responsibility.[20] The issue of criminal responsibility of minors is regulated in the general part of the PC RF, in chapter V "Criminal responsibility of minors".[21]

Moreover, in art. 20, item 3, of the PC RF, the legislator provides for the release of a minor from responsibility despite reaching the age of criminal responsibility in situations where, as a result of a delay in his or her mental development, nor related to a mental disorder, he or she is unable to fully realize the actual nature and the threat to the society caused by his or her actions (or omissions) or to direct his or her actions.[22] Thus, the above mentioned provision, called the age non-accountability, excludes criminal responsibility of minors.

Because the age of a perpetrator of a crime is determined at the time the crime is committed, the exact date of the person's birth (day, month, year) is important with respect to his or her criminal responsibility. Practical questions in this matter are answered in point 7 of the Statement of the Plenary Assembly of the Supreme Court of the Russian Federation of 14 February, 2000 No. 7 "On court practice in cases involving criminal acts committed by minors".[23] It states that "a person is considered to have reached the age where the criminal responsibility starts, not starting on the day of birth, but after twenty four hours which starts the next day, i.e. starting at 12.00 AM".

The Russian penal code does not provide for a category of a juvenile perpetrator.

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[20] L. V. Inogamova, V. S. Komissarov, A. I. Rarog, op. cit., p. 200–201.

[21] You will find more on this subject (in:) M. Filar, *Nowy kodeks karny Federacji Rosyjskiej. Kary i zasady wymiaru* [New penal code of the Russian Federation. Punishments and the principles of sentencing], "Prokuratura i Prawo" 1997, No. 7–8, p. 69–70; M. Melezini, *Odpowiedzialność nieletnich w świetle kodeksu karnego Federacji Rosyjskiej* [Responsibility of minors in the light of the penal code of the Russian Federation], "Przegląd Prawa Karnego" 20 (2000), p. 38–46.

[22] N. I. Vietrov, J. I. Liapunov, op. cit., p. 123.

[23] *O sudiebnoj praktikie po dielam o priestuplienijach niesoviersholetnich* [On judiciary practice in cases involving crimes committed by minors], "Biulietien Vierkhovnovo Suda RF" [The bulletin of the Supreme Court] 2000, No. 4, p. 10.

Another characteristic of a subject of crime is **accountability**. The Russian law specifies that only an accountable (able in body and mind) person can be the subject of a crime. However, the PC RF does not provide a precise definition of the notion of accountability. Nevertheless, it defines non-accountability, in art. 21 of the PC RF, as a state in which a person "could not realize the actual nature and the danger to the society posed by his or her actions (omissions) or to direct them, due to a chronic mental disorder, a temporary mental disorder, a mental handicap or another pathological mental state". The consequence of actions (omissions) in such a state is exemption from criminal responsibility.

This definition indicates that the legislator has characterized the state of non-accountability by two criteria. One of them constitutes a basis for determining the biological pathological state of the body, which consists in:

- a chronic mental disorder, characterized by a long duration and frequency of pathological states (e.g. schizophrenia, epilepsy, manic-depressive psychosis),
- a temporary mental disorder (e.g. pathological drunkenness, alcoholic psychoses),
- mental handicap (oligophreny, imbecility, idiocy).

The second criterion characterizes the mental state of the person at the moment the crime is being committed. It is such a level of intellect that makes it impossible to realize the actual nature and the danger to the society posed by one's actions (omissions), as well as an element of will which makes it impossible to direct one's actions. This criterion is called legal or psychological.[24]

In order to conclude a state of non-accountability it is necessary to determine, through psychiatric expert examinations ordered by the court, the presence in a person of one form of a mental disorder. The conclusion of a mental disorder in a perpetrator of a crime testifies to the lack of one characteristic required of a subject of crime. Consequently, actions conducted by a person who cannot, due to a pathology, realize the nature of his or her actions or to direct them, ought not to be considered as criminal, and such a person is not subject to a punishment. Consequently, according to the provisions of law, such a person does not commit a crime and does not bear criminal responsibility.[25] On the other hand, on the basis of art. 21

[24] V. M. Liebiediev (ed.), *Kommentarij k ugolovnomu kodeksu Rossijskoj Federacii* [Commentary to the penal code of the Russian Federation], Moskva 2007, p. 60.

[25] M. P. Zhuravliov, S. I. Nikulin (ed.), *Ugolovnoyje pravo. Obshchaya i osobiennaya chasti* [Criminal law. The general and the specific part], Moskva 2007, p. 103.

item 2 of the PC RF the court may apply towards this person the means of coercion of medical nature stipulated in the PC RF.

At this moment we should mention the issue of criminal responsibility of persons with a mental disorder which does not eliminate accountability. This is how the Russian law describes limited accountability. According to art. 22, item 1, of the PC RF, "an accountable person who, at the moment of committing the crime, due to a mental disorder, could not fully realize the actual nature and the threat to the society posed by his or her actions (omissions) or direct them, is subject to criminal responsibility". This means that the legislator has identified limited accountability not as a state between accountability and non-accountability, but as a part (manifestation) of accountability.[26] Thus, the legislator has provided for a full criminal responsibility in such cases.

On the other hand, according to art. 22 item 2 of the PC RF, acting in a state of limited accountability should be taken into consideration by the court at sentencing and may constitute a basis for applying measures of coercion of medical nature.

At this stage of the analysis it is necessary to present a regulation concerning the responsibility of a drunk or intoxicated perpetrator of a crime. This regulation demonstrates that the Russian penal code does not release a person from responsibility for crimes committed by him or her in a state of intoxication that resulted from consumption of alcohol, narcotics or other intoxicating substances. What this means is that such a person is responsible on the basis of general principles. Consequently, a state of intoxication is not considered at all by the legislator in the aspect of non-accountability. The legislator concludes that intoxication with alcohol or narcotics does not constitute a mental illness, although consumption of such substances may cause pathological conditions (e.g. drug craving or delirium tremens).[27] Such a solution should be considered as rightful, especially in a country where the proportion of crimes committed under influence of alcohol to the total number of crimes amounts to approximately 30%.[28]

In contrast to the above considerations, the legislator treats differently the commitment of crimes in the state of pathological intoxication. It may occur, for instance, as a result of severe stress, a physical or mental

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[26] A. I. Chuchayev (ed.), *Postateyniy kommentariy k ugolovnomu kodeksu Rossijskoj Federacii* [Detailed commentary to the penal code of the Russian Federation], Moskva 2005, p. 38.

[27] M. P. Zhuravliow, S. I. Nikulin, op. cit., p. 105.

[28] J. I. Gilinskij, *Deviantologija* [Science of deviations], Sankt Petersburg 2004, p. 306.

weakening of the human body, even after consuming a small amount of alcohol. Such intoxication is considered to be a manifestation of a temporary mental disorder which precludes accountability and thus releases the person from criminal responsibility.[29]

At the conclusion of this discussion, it is necessary to mention that the characteristics of the subject of crime discussed above are obligatory. Besides these, Russian criminal law also distinguishes optional characteristics of a subject of crime. A subject who does possess such additional characteristics is called a special subject. The criteria necessary to distinguish such a subject are: the legal and professional status of the individual and his or her demographic characteristics. These are the deciding factors to determine if a crime has occurred (e.g. only an official can commit an official or business counterfeit) or to qualify the criminal act as an act of a certain type (e.g. as the qualified type of a crime consisting in smuggling of goods by an official who took advantage of his official position).[30]

The discussion of characteristics of a subject of crime that substantiate his criminal responsibility in accordance with the Polish and the Russian penal code, allows us to make the following conclusions.

The penal codes of both countries provide for similar characteristics of a subject of crime. Nevertheless, while the Rusian code stipulates them in a particular legal provision (although, as commentators of penal codes say, for the first time in the history of Russian law), in the Polish code these characteristics have to be deduced from several articles.

The penal codes of both countries conclude that only a natural person is subject to criminal responsibility. One should note that the discussion on punishing legal persons (group entities) that has been going on for many years, has lead to the enactment of a relevant law in Poland, while in Russia such an effort has not come to fruition. Nevertheless, this discussion is continuing, because that country needs such solutions, too.

The two penal codes take a different standing on the age of criminal responsibility of a subject of crime. Both statutes have a basic age limit (17 years in Poland and 16 years in Russia) and an exceptional age limit (15 years in Poland and 14 years in Russia), but the actual age is set differently in both countries. For the purpose of exceptional responsibility, both penal codes have finite catalogues of crimes that result in criminal responsibility. One has to conclude that, both with respect to age and the number of crimes, the Russian code is more restrictive.

[29] N. I. Vietrov, S. I. Liapunov, op. cit., p. 128.

[30] M. P. Zhuravliov, S. I. Nikulin, op. cit., p. 104–105.

One should also note that Poland, besides the provisions of the penal code, also has regulations included in the act of 1982 on the procedure in cases involving minors, which allow for treating minor offenders in a different, more lenient fashion. On the other hand, the Russian law only provides for responsibility in accordance with the penal code, which frequently results in severe punishment, including nearly all corrective measures (except for the death penalty). Still, the same code provides more possibilities to release a minor perpetrator from criminal responsibility by applying towards him the principle of the so-called age non-accountability. It is, therefore, important that in both countries the (young) age of perpetrators has an impact on decreasing or limiting the amenability to punishment.

Moreover, one has to state that in Poland proper shaping of minors' responsibility is done through both the criminal court system and the minor court system; the latter does not exist in Russia. Therefore, one can conclude that judging minors in the court system for adults provides for possibilities for very stringent treatment of minors, without understanding of their situation conditioned by their age.[31]

Both penal codes stipulate that only accountable persons bear criminal responsibility. For the purpose of responsibility, this group includes also persons who are drunk or intoxicated with narcotics. What differentiates the two countries is the way that persons with limited accountability are treated.

To summarize, the penal codes of Poland and Russia correctly define the characteristics of a subject that influence his or her criminal responsibility, while realizing both the protective and the guarantee functions. The differences in scope and methods of regulating the matter result from the penal policy of those countries and the practice of the administration of justice.

[31] The need to create a court system for minors was indicated, among others, by V. N. Kudriavcev, V. J. Eminov (ed.), *Kriminologija* [Criminology], Moskva 2005, p. 494.

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DISCIPLINARY RESPONSIBILITY OF CONVICTS SERVING A SENTENCE OF IMPRISONMENT

As J. Śliwowski correctly observes, "Life in a prison is a social life, too, although in specific conditions, and therefore is also subject to the scrutiny of social rules".[1] Consequently, a convict who lives in a specific community such as a prison is supposed to abide by orders and interdictions that are stipulated in these rules and are in force there. A culpable breaching of the orders and prohibitions provided for in a statute, a regulation, or other acts of law issued on the basis of a statute, or an order imposed in the prison or a work place constitutes an infringement (art. 142 § 1 of the Penal Executory Code, PEC) and results in a disciplinary responsibility. According to T. Szymanowski,[2] not following instructions of a supervisor may constitute a basis for charging a convicted person with an infringement, as long as these instructions are supported by rules that the convict is obligated to observe.

Committing an infringement results in the prisoner serving one of the following disciplinary penalties:

- a reprimand,
- divestiture of all or some outstanding rewards or mitigations, or suspension of their going into effect, for a period of up to three months,
- divestiture of the right to participate in some cultural and educational or sport activities, with the exception of access to books and press, for a period of up to three months,
- divestiture of the right to receive food in parcels, for a period of up to three months,

[1] J. Śliwowski, *Prawo i polityka penitencjarna* [Law and penitentiary policy], Warszawa 1982, p. 189.

[2] T. Szymanowski, (in:) T. Szymanowski, Z. Świda, *Kodeks karny wykonawczy. Komentarz* [Penal executory code, commentary], Warszawa 1998, p. 330.

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- divestiture or limitation of the possibility to purchase food or tobacco products, for a period of up to three months,
- meetings with visiting persons only is such a way that makes impossible a direct contact with a visiting person, for a period of up to three months,
- lowering the convicts' part of compensation for work, by no more than 25%, for a period of up to three months,
- solitary confinement for a period of up to 28 days.[3]

The catalogue of disciplinary penalties has been arranged in accordance with an abstract degree of severity: from the mildest to the most severe punishment, which the solitary confinement undoubtedly is. One should note that the legislator makes the latter punishment an exceptional one. It can be adjudicated towards a convict who has committed an infringement that gravely breaches the law and order in a prison (art. 143 § 3 of PEC). Notably, the Human Rights Committee has concluded that the penalty of solitary confinement, if longer that one month, breaks the prisoner's right to proper treatment.[4] The European Committee for the Prevention of Torture is of the opinion that isolation of a prisoner is detrimental to his mental state and in some circumstances can amount to inhumane and degrading treatment or punishment, and hence it advises to take steps to eliminate the penalty of solitary confinement.[5]

In discussing questions concerning disciplinary responsibility of convicted persons serving a sentence of imprisonment, one should remember that disciplinary penalties are inflicted on people who are serving a sentence that deprives them or, as A. Peyrefitte accurately notes,[6] suspends their

[3] Such disciplinary penalties as divestiture of the possibility to receive food parcels, for a period of up to three months, divestiture or limitation on the possibility to purchase food or tobacco products, for a period of up to three months, solitary confinement of up to 28 days are not inflicted on pregnant or breastfeeding women, or women who are taking custody of their own child in a family shelter home.

[4] G. B. Szczygieł, *Kara dyscyplinarna umieszczenia w celi izolacyjnej a standardy międzynarodowe* (in:) *Aktualne problemy prawa karnego, kryminologii i penitencjarystyki. Księga ofiarowana Profesorowi Stefanowi Lelentalowi w 45. roku pracy naukowej i dydaktycznej* [Disciplinary penalty of solitary confinement and international standards, (in:) Current problems of criminal law, criminology and penitentiary science. A book offered to Profesor Stefan Lelental on the 45th anniversary of his academic and didactic work], Łódź 2004, p. 257.

[5] See: G. B. Szczygieł, *Społeczna readaptacja skazanych w polskim systemie penitencjarnym* [Social re-adaptation of convicted persons in the Polish penitentiary system], Białystok 2002, p. 51–52.

[6] A. Peyrefitte, *Wymiar sprawiedliwości. Między ideałem a rzeczywistością* [The administration of justice: between ideal and reality], Warszawa 1987, p. 58.

freedom, which is a value second only to human life. Disciplinary penalties affect various areas of prison life, deteriorate the conditions of the sentence, and limit the liberties of the convicted person, thus aggravating the pain of the sentence of imprisonment. However, we cannot forget that the purpose of serving a sentence of imprisonment is to raise in the convict a will to cooperate in shaping his socially desired attitudes, and especially a sense of responsibility and a need to observe the legal order (art. 67 § 1 of PEC). The legislator has not included penalties or rewards in the catalogue of means to influence convicted persons, a fact that, according to Z. Hołda,[7] testifies that disciplinary penalties are not preferred from the standpoint of the aims of serving a sentence of imprisonment. One cannot, however, depreciate the educational aspect of punishing and rewarding in influencing the behavior of convicts.[8]

Before the main part of the discussion, one should note that the disciplinary procedure concerning persons serving a sentence of imprisonment has been stipulated in the detailed part of the PEC which covers the penalty of imprisonment. In particular we can point to chapter 9, titled "disciplinary penalties". Articles 142–149 of the PEC are dual in nature, as they include material law provisions and procedural provisions. One should note that these provisions have been modified and substantially enlarged by the revision of the PEC of 2003.[9] The substantiation of the presidential draft of the statute that revised the PEC states that the goal of the proposed revision was to include the principles of administering and serving disciplinary penalties, which affect the convicted person's legal situation, in the code and not in the regulation on serving a sentence of imprisonment, where they had been included before.[10] The procedural regulations have been significantly expanded in comparison with the previous PEC of 1969.[11]

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[7] Z. Hołda, (in) Z. Hołda, K. Postulski, *Kodeks karny wykonawczy. Komentarz* [Penal executory code: a commentary], Gdańsk 2005, p. 483.

[8] A special role of punishing and rewarding in the process of penitentiary influence is indicated by P. Wierzbicki, *Indywidualizacja penitencjarna w Polsce* [Penitentiary individualization in Poland], Warszawa 1976, p. 135.

[9] Ustawa z dnia 24 lipca 2003 r. o zmianie ustawy – kodeks karny wykonawczy oraz niektórych innych ustaw [Statue of 24 July 2003 of an amendment to the penal executory code and some other statutes], Dziennik Ustaw [Journal of Laws] 2003, No. 142, item 1380.

[10] Uzasadnienie przedstawionego przez Prezydenta Rzeczypospolitej Polskiej projektu ustawy o zmianie ustawy – Kodeks karny wykonawczy oraz niektórych innych ustaw [The substantiation of the draft by the President of the Republic of Poland of the statute of amendment to the statute of the penal executory code and some other statutes], issue 183, Sejm IV Kadencji [Polish Parliament of the 4th term], www.orka.sejm.gov.pl, p. 75.

[11] T. Szymanowski, (in:) T. Szymanowski, Z. Świda, op. cit., p. 333.

What deserves attention here is the definition of an infringement. The doctrine unanimously states that infringement of orders and prohibitions may consist both in commission and omission.[12]

In defining an infringement, the legislator has used the term "culpable breach of orders and prohibitions", and hence, similarly to the Penal Code, assumed guilt – based responsibility. In the light of article 9 of the Penal code, as Z. Hołda noted,[13] breaching prohibitions or orders that results in disciplinary responsibility may be an act committed in a willing or unwilling fashion. One should note the opinion of S. Lelental[14] who claims that "even though the regulation in question does not directly stipulate that it is limited to a willful act, this should be our assumption. The essence of an infringement, as a breach of orders and bans is that the perpetrator must have a will to commit such an act, which precludes disciplinary responsibility for infringements committed unwillingly. Apparently it is possible to assume that the convicted person has foreseen that his behavior may breach a certain prohibition but has expected to avoid it. On the ground of the Penal Code one should note the unintentionality clause (art. 8 of the Penal Code): "...a misdemeanor can also be committed unintentionally, if a statute provides for it"). Due to this provision, it is worth considering whether the phrase "culpable breach of orders and prohibitions" in art. 142 § 1 of the Penal Code should be replaced with "willful breach of prohibitions and orders". One should note that in a situation where the infringement also meets the prerequisites of a crime, the prisoner is subject to disciplinary responsibility regardless of his criminal responsibility.[15] The authorities of a penitentiary institution are obligated to inform law enforcement of such an act. If the infringement meets the prerequisites of a misdemeanor, the convicted person is subject to disciplinary authority. In the case that the misdemeanor has been committed outside of the penitentiary institution, the convicted person is subject to disciplinary responsibility regardless of his responsibility for the misdemeanor (art. 146 § 1 kkw).

The next question which has been drawing the attention of representatives of the doctrine is the issue of a catalogue of infringements. An effort to

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[12] S. Lelental, *Kodeks karny wykonawczy. Komentarz* 2. wyd. rozsz. i zaktual. [Penal executory code. A commentary. Second extended and updated edition], Warszawa 2001, p. 358; T. Szymanowski, (in:) T. Szymanowski, Z. Świda, op. cit., p. 330.

[13] Z. Hołda, (in:) Z. Hołda, K. Postulski, op. cit., p 482; T. Szymanowski, (in:) T. Szymanowski, Z. Świda, op. cit., p. 330.

[14] S. Lelental, op. cit., p. 358.

[15] See: Z. Hołda, (in:) Z. Hołda, K. Postulski, op. cit., p. 482.

make one was made during the works on the prison regulations of 1931,[16] on the initiative of one of the co-authors of the regulation, Z. Bugajski,[17] who claimed that a lack of a catalogue of infringement that stipulates appropriate penalties, and hence leaving a large extent of freedom to the prison superintendent, "leads to a situation where, depending on the superintendent's nature and frequently his good or bad mood, the very same offense may result in either a severe or a mild penalty", which in turn has a negative impact on prisoners' psyche and decreases the respect that the prison authorities enjoy among the inmates. Consequently, the prison regulation of 1931 distinguishes three groups of disciplinary offenses, with a separate set of penalties for each.[18] One should note, however, one important question. Although the regulation constitutes an effort to make a catalogue of offenses that are subject to responsibility, the authors appear to not have been fully certain that they have included in it all possible offenses, as the regulation includes a clause which states that all other acts that are not stipulated in the regulation are subjects to penalties listed in the regulation.[19]

The question of making a catalogue of misdemeanors was later addressed, as the substantiation of the PEC indicates,[20] in works on the Penal Executory Code of 1997. Nevertheless, the legislator did not decide to make a catalogue of infringements due to a difficulty in determining all the negative behavior of a convicted person.

Such approach has been criticized by the authors[21] of the commentary to the European Prison Regulations of 1987. The commentary highlights the fact that a lack of catalogue of disciplinary infringements and penalties is

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[16] Rozporządzenie Ministra Sprawiedliwości z dnia 20 czerwca 1931 roku w sprawie regulaminu więziennego [Ordinance of the Minister of Justice of 20 June, 1931 on a prison regulation], Dziennik Ustaw [Journal of Laws], No. 71, item 577.

[17] Z. Bugajski, *Wykład więzienioznawstwa* [A lecture on system of prison], Warszawa 1927, p. 84.

[18] The co-author of the prison regulation, Z. Bugajski proposed to divide disciplinary infringements into four categories and to assign appropriate penalties to each category. See more (in:) J. Śliwowski, op. cit., p. 203.

[19] See more (in:) J. Śliwowski, ibidem, p. 205.

[20] *Uzasadnienie rządowego projektu kodeksu karnego wykonawczego* (in:) *Nowe kodeksy karne – z 1997 roku z uzasadnieniami, kodeks karny, kodeks postępowania karnego, kodeks karny wykonawczy* [Substantiation of the government draft of the penal executory code (in:) New criminal codes of 1997 with substantiations, criminal code, code of criminal procedure, penal executory code] Warszawa 1997, p. 558.

[21] D. Gajdus, B. Gronowska, *Europejskie standardy traktowania więźniów (rekonstrukcja standardów oraz ich znaczenie dla polskiego prawa i praktyki penitencjarnej). Zarys wykładu* [European standards of prisoner treatment (reconstruction of standards and their importance to the Polish law and penitentiary practice. Draft of a lecture, Toruń 1998, p. 141.

a weakness of the Polish legislation. In the opinion of the authors, it is even more surprising that "on the basis of practice one can, with much facility, determine a catalogue of the most typical disciplinary infringements and assign to them adequate penalties".

In presenting a positive opinion of the legislator's approach, which is supported by representatives of the doctrine,[22] one has to note, along with B. Stańdo-Kawecka,[23] that making a catalogue of infringements would undoubtedly be advisable due to a guarantee role of law. Certainly, such effort can be made on the basis of the catalogue of duties[24] that has been defined in art. 116 § 1 of the PEC and of the catalogue of prohibitions that has been defined in art. 116 of the PEC. Nevertheless, such an effort is bound to encounter some difficulties which are bound to lead to its failure. In defining, in art. 116 of the PEC, the duties of the convicted person, the legislator has included a general clause which states that "the convicted person has a duty to observe regulations that stipulate the principles and process of serving the penalty, the order that is in force in the penal institution, and to follow instructions of supervisors and other authorized personnel". This clause is followed by a list of duties, preceded by the phrase "in particular". Consequently, the legislator has not defined a closed catalogue of duties, whereas only the catalogue of prohibitions is a closed one. Thus, in using the catalogue of duties and orders one can at most make a catalogue of the most serious infringements.

One ought to highlight the fact that the authors of the commentary to the European Prison Rules of 1987 have noted that it is possible to make a catalogue of the most typical infringements. Therefore, the remaining question is what should be done with non-typical ones.

J. Śliwowski,[25] who was an avid supporter of Z. Bugajski's concept of making a catalogue of infringements and who expressed his positive opinion on the effort to do so in the regulation of the penalty of imprisonment of 1931, by saying that "this is a very unusual tendency, not seen so far in foreign penitentiary legislation. (...) In this case we see not only the application of a certain principle of *nulla poena (dicisplinaria) sine lege*, but also *nullum delictum (disciplinare) sine lege*, and yet also with a tendency of the

[22] S. Pawela, *Kodeks karny wykonawczy. Praktyczny komentarz* [Penal executory code. A practical commentary], Warszawa 1999, p. 325; Z. Hołda, (in:) Z. Hołda, K. Postulski, op. cit., p. 481.

[23] B. Stańdo-Kawecka, *Prawne podstawy resocjalizacji* [Legal grounds for reeducation], Kraków 2000, p. 160.

[24] See: Z. Hołda, (in:) Z. Hołda, K. Postulski, op. cit., p. 482; S. Pawela, op. cit., p. 325.

[25] J. Śliwowski, op. cit., p. 203–204.

legislator to measure disciplinary responsibility according to the importance of the committed act", observed that "the use in the prison regulation of the *nullum delictum sine lege* principle is not fully possible."

One should highlight the fact that the legislator puts an accent on one infringement, self-mutilation. According to art. 119 of the PEC, the convicted person who commits self-mutilation or causes a health disorder, in order to force a certain decision or conduct of an executive body, or to avoid his duties, is subject to a disciplinary responsibility.

The convicted person is responsible for infringements committed both in the penitentiary institution and outside of it, whether he is outside with permission (e.g. works outside of the penitentiary institution or has been granted a leave) or without it (e.g. when he has not returned from a leave).

What is important is the fact that committing an infringement does not always lead to the convicted person's responsibility. A disciplinary process, as Z. Hołda highlights,[26] is based on the principle of opportunism. This means that disciplinary penalties are inflicted by the superintendent of a penitentiary institution by his own decision or upon a written request of the convicted person's supervisor. Art. 72 § 2 of the PEC defines the term supervisor as officials and employees of the penitentiary institution in which the convicted person is serving his sentence. Supervisors of a convicted person also include persons who, in the scope of their duties, manage the convicted person's work or other activities.

The very nature of a disciplinary process indicates that, if it concerns an infringement, it is an internal process conducted within a penitentiary institution. The PEC provides for two types of subjects who have the authority to inflict a disciplinary penalty: the superintendent of a penitentiary institution and a person authorized by the superintendent.

According to art. 144 § 1 of the PEC, the superintendent has the authority to inflict any disciplinary penalty provided for in the statutory catalogue, while the subject authorized by the superintendent may only inflict penalties of a lower degree of severity, that is:

- a reprimand,
- divestiture of all or some outstanding rewards or mitigations, or suspension of their going into effect, for a period of up to three months,
- divestiture of the right to participate in some cultural and educational or sport activities, with the exception of access to books and press, for a period of up to three months.

[26] Z. Hołda, (in:) Z. Hołda, K. Postulski, op. cit., p. 483.

What can easily be noted is that inflicting more severe penalties is in the scope of responsibilities of the superintendent, while less severe penalties, although resulting in negative material consequences for the convicted person (e.g. divestiture of the right to receive food parcels for a period of up to 3 months)[27] may be inflicted by a person authorized by the superintendent. This results from acceptance of the superintendent's role as the subject who holds full powers in the area of security, order and discipline in the penitentiary institution.[28]

Notably, before a disciplinary penalty of solitary confinement is effected, an opinion of a doctor or a psychologist is required. S. Pawela proposes that opinion of psychologists and psychiatrists ought to be sought prior to inflicting disciplinary penalties on convicted persons who deviate from the psychological norm, at the same time noting that punishment as an educational factor can and should be used in the re-education of these convicted persons.[29]

Participation of a penitentiary judge in a disciplinary process is evident, among others, in granting permission to place a convicted person is solitary confinement for a period exceeding 14 days. According to T. Szymanowski, the aim of such a regulation is an "attentive control" of the penalty of solitary confinement and, simultaneously, the legislator's stress on the requirement that the average length of the penalty of solitary confinement extend from one to fourteen days, while the more severe penalty of solitary confinement (between 14 and 28 days) be inflicted only in exceptional situations upon permission of the penitentiary judge.[30]

In this respect, T. Szymanowski rightly states that the scope of competence in inflicting disciplinary penalties ought to contribute to a more effective use of disciplinary penalties, and thus to greater impact of the more severe penalties.[31]

According to J. Śliwowski,[32] and earlier to Z. Bugajski, "The problem of disciplinary penalties is among the most important ones, because regulations pertaining to order restrain the convicted persons in all aspects of life, deprive him of all his personality and, depending on circumstances, especially on the superintendent who is deciding of the penalty, shape his

[27] Ibidem, p. 331.
[28] S. Pawela, op. cit., p. 329.
[29] Ibidem, p. 326.
[30] T. Szymanowski, (in:) T. Szymanowski, Z. Świda, op. cit., p. 335.
[31] Ibidem, p. 332.
[32] J. Śliwowski, op. cit., p. 189.

fate is various ways. Due to the specific nature of the disciplinary judgment, it is reasonable to put it in the hands of a team, especially in the case of more serious infringements, as it is easy to make a mistake of being either too harsh or unreasonably lenient".

It appears that these reservations are not justified, considering the provisions on disciplinary process in the PEC. A justification ought to indicate that the legislator has introduced directives on the scope of penalty, both general and detailed. In the doctrine,[33] general directives on the scope of disciplinary penalty, as stipulated in art. 145 § 1 of the PEC, include the degree of guilt and the principle of individualization, as well as educational goals to be reached by the penalty with respect to the convicted person. The detailed directives, on the other hand, include the type and circumstances of the act, the attitude of the convicted person towards the committed infringement, his record, personality, health, and educational goals, all listed in the same article of the PEC. Considering that in stipulating these circumstances the legislator used the term "in particular", it appears that these circumstances are particularly important, but they do not exclude others. In this context, one should also note the role of the penitentiary judge in the disciplinary process, and specifically his authority stipulated in art. 148 § 1 of the PEC and in regulations on penitentiary oversight. These questions will be the topic of discussion in the remaining part of this paper.

Art. 145 § 2–4 of the PEC stipulates the phases of disciplinary process, which is described as an explanatory proceeding, and requires that before a disciplinary penalty is inflicted the accused person ought to be listened to and that he ought to hear the opinion of his educator. If necessary, the accused person should also hear the opinion of the subject requesting his punishment as well as of other persons and witnesses. For educational reasons the infringement case can be heard in the presence of other prison mates, which may bring measurable preventive and educational results. T. Szymanowski pays particular attention to the preventive aspect, saying that an open hearing in the presence of other prisoners may significantly influence their legal awareness and make evident that very often infringement of regulations becomes known to the authorities of the penitentiary institution. Consequently, this may prove the effectiveness of law and deter potential future infringements.[34]

As Z. Hołda accurately points out, in a disciplinary proces the prisoner has the right to a defense, both material and formal. This consists in

[33] S. Lelental, op. cit., p. 363; Z. Hołda, (in:) Z. Hołda, K. Postulski, op. cit., p. 487.

[34] T. Szymanowski, (in:) T. Szymanowski, Z. Świda, op. cit., p. 334.

defending against accusations and presenting own reasoning, as well as the possibility to use the assistance of a counsel. Just as Z. Hołda does, one should underline the fact that the prisoner has the right to provide explanations, but may also refuse to provide them, taking advantage of his right to remain silent and his right to abstain from self-accusation.[35]

One should also note that is some cases the opinion of a doctor is immensely important in considering the effects of some penalties on the health of a prisoner. This is particularly important in the case of solitary confinement and the following penalties:

- divestiture of the right to receive food in parcels, for a period of up to three months,
- divestiture or limitation on the possibility to purchase food or tobacco products, for a period of up to three months.

The requirement to consult a doctor before inflicting the two above penalties does not concern all prisoners, but only the group which, for health-related reasons, is on a diet, or to those prisoners who, for health-related reasons, have been allowed to purchase additional food products or to receive larger food parcels (art. 145 § 4 of the PEC). After consulting a doctor, the superintendent of the penitentiary institution may decide to postpone the execution of the above-mentioned penalties.

Breaching the rules of conduct stipulated in art. 145 of the PEC may result in certain consequences, including the following, most important ones:

- the possibility of a prisoner to appeal against the penalty on the correct grounds that it is inconsistent with the law (art. 7 § 1 of the PEC),
- postponing the execution of the disciplinary penalty by the penitentiary judge, in accordance with art. 148 § 1 of the PEC, due to the need to clarify the circumstances leading to the adjudication of the penalty,
- annulment of the penalty by the penitentiary judge, in accordance with art. 148 § 1 of the PEC due to its groundlessness,
- the penitentiary judge returning the case to the superintendent of the penitentiary institution, in accordance with art. 148 § 1 of the PEC, for the purpose of a reconsideration.

S. Lelenthal[36] correctly observes that the lack of procedure for stopping the execution of a disciplinary penalty by the judge for a time required to clarify the circumstances leading to its adjudication, as well as annulling the penalty due to its groundlessness, or to return it to the superintendent for reconsideration, raises doubts about the practicality of this provision of law.

[35] Z. Hołda, (in:) Z. Hołda, K. Postulski, op. cit., p. 488.

[36] S. Lelental, op. cit., p. 259.

One should also point at the authority of a penitentiary judge in the area of penitentiary oversight because these provisions are also applied in disciplinary process. In the scope of penitentiary oversight, a penitentiary judge (art. 32 of the PEC) monitors and verifies correctness of proper adjudication of penitentiary penalties and their use as a means of penitentiary influence.[37] In exercising his penitentiary oversight authority, the judge annules those decisions of the penitentiary institution supervisor that contradict the law.

The Superintendent General and the district superintendent of the Prison Service also have the authority to annul a penitentiary institution superintendent's decision when it contradicts the law.

A disciplinary process must be conducted in accordance with the principle of adversarial process and the rule of law. In a situation where the prisoner bears both disciplinary and criminal responsibility for a crime he has committed or an offense that he is responsible for, there is a dangerous possibility that the findings of the disciplinary process may be used in the criminal process.[38]

A decision on inflicting a disciplinary penalty should include a precise definition of the infringement committed by the prisoner. It has to be made in writing and delivered to the prisoner for his information (art. 144 § 3, 4). If educational concerns justify it, the decision is also distributed to other prisoners or other persons, e.g. the prisoner's relatives.[39] This is another example of strengthening the preventive, affirmative and motivational role of a disciplinary process.

Similarly, a decision on annulling, remission, postponement, changing, suspension, or discontinuance of a disciplinary penalty and on renouncing from a disciplinary penalty, must be made in writing. The prisoner absolutely must be informed of any of these decisions; they may also be distributed to other prisoners or other persons, if it is desired for educational reasons.

The principle of legal unity of act is binding in a disciplinary process. In accordance with art. 146 § 1 of the PEC, one infringement results in only one disciplinary penalty. In the case that a prisoner has committed more than one infringement before he is punished for any of them, one can talk about

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[37] § 2 pkt 12 Rozporządzenia Ministra Sprawiedliwości z dnia 26 sierpnia 2003 r. w sprawie sposobu, zakresu i trybu sprawowania nadzoru penitencjarnego [§ 2 item 12 of the Ordinance of the Minister of Justice of 26 August, 2003 on a method, scope, and procedure of conducting penitentiary oversight], Dzienik Ustaw [Journal of Laws], No. 152, item 1496.

[38] Z. Hołda, (in:) Z. Hołda, K. Postulski, op. cit., p. 488.

[39] S. Pawela, op. cit., p. 329.

the so-called real coincidence of infringements, and it is necessary to indicate that this case is governed by different principles than a real coincidence of crimes. In a situation of a real coincidence of infringement, only one, the most severe, penalty is adjudicated. To repeat S. Lelental's statement, the adjudication of the most severe penalty has to follow the general and detailed directives, which excludes concerns of repression.[40] According to 146 § 2 of the PEC, an adjudication of another disciplinary penalty may not occur so that it constitutes a direct extension of a penalty of the same type, unless a total period of the inflicted penalties does not exceed the permitted limit of duration of the penalty. Also in this case, concerns of rejecting the oppressive nature of the penalty as a directive of the adjudication of penalty raise to the surface.[41] It is remarkable that provisions of law do not define minimum periods of interruption between consecutive disciplinary penalties of the same kind. The doctrine indicates, for example, a week-long period,[42] but what is the most important in this is the actual practice.[43] The correctness of adjudication of disciplinary penalties should be verified in the framework of the penitentiary oversight even through a periodic analysis of disciplinary policy.[44]

A very important issue for disciplinary responsibility and formal correctness of process in this area is the statute of limitation. According to art. 147 § 1 of the PEC, a disciplinary penalty must not be adjudicated unless the time that has passed since the supervisor gained knowledge of the infringement has not exceeded 14 days, or 30 days in the case of a misdemeanor (limitation of penalty). Also, the execution of a penalty must not commence later than 14 days of its adjudication (limitation on execution of penalty). As court judisprudence rightly highlights, the law in question defines two deadlines to protect the defendant's rights. If the former expires, it is impossible to adjudicate the penalty despite the occurrence of the infringement, while if the latter expires, a correctly adjudicated penalty must not be executed.[45]

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[40] S. Lelental, op. cit., p .364.

[41] Ibidem, p. 364.

[42] T. Szymanowski, (in:) T. Szymanowski, Z. Świda, op. cit. , p. 336.

[43] S. Lelental, op. cit., p. 364.

[44] S. Pawela, op. cit., p. 331.

[45] Postanowienie Sądu Apelacyjnego w Krakowie z dnia 22.01.2004 r., Sygn. akt II AKz 21/04 [Decision by the Appellate Court in Krakow on 22 January, 2004. Signature akt II AKz 21/04] (System Informacji Prawnej Lex – Lex Omega), 34/207, record no. 103966; Postanowienie Sądu Apelacyjnego w Krakowie z dnia 15.06.2004 r., Sygn. akt II AKz 202/04 [Decision by the Appellate Court in Krakow on 15 June, 2004. Signature akt II AKz 202/04] (System Informacji Prawnej Lex – Lex Omega), 34/207, record no. 120304.

One should note that art. 147 § 2 provides for the institution of resting of the flow of time of limitation. Both of the above-mentioned deadlines stop approaching if the prisoner is outside of the penal institution without a permit or if he is undergoing medical treatment due to self-mutilation; they also rest during a period of suspension of a disciplinary penalty.

At the end of the discussion on procedure, one should briefly point at the institution of a specific resumption of a disciplinary process, which traditionally belongs in the category of extraordinary processes. If new facts or evidence that have not been known before are revealed, and they indicate that the convicted person is innocent, the superintendent of the penitentiary institution reverses the disciplinary penalty, declares it as null and void, and makes an appropriate decision to reverse the effects of the penalty (art. 149 of the PEC). The appropriate decision may be made at any time, depending on the circumstances of the case.[46]

A disciplinary process in cases concerning infringements committed by convicted persons serving a sentence of imprisonment most certainly differs from disciplinary processes typical of various professional groups, e.g. academic teachers, members of the legal or medical profession. Most of all this is a result of the nature of the penalty of imprisonment, which extensively interferes in the area of basic liberties of an individual.

[46] Z. Hołda in: Z. Hołda, K. Postulski, op. cit., p. 492.

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 12 (25) 2007

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ENTREPRENEUR'S LIABILITY IN FRONT OF THE CONSUMER AS A SPECIFIC KIND OF CONTRACT LIABILITY

1. General remarks on civil liability and its functions

The liability is always being placed in the central position of every part of legal system being in effect. Legal liability is a general category that has an interdisciplinary character. That is why it is distinguished as, i.e.: criminal, civil, constitutional or labor liability.

The liability has also a deep meaning in the context of moral aspects. Even though in a common language it is understood in different ways, it is always pieced together with negative consequences.

The classical definition of legal liability says that legal liability means "(...) bearing by subject, stipulated by the law, negative consequences that come out of the events and states being put under negative normative qualification which are legally addressed to the specific subject in the concrete legal order".[1] That general definition allows accepting that the civil liability consists in bearing by the subjects of civil relations negative consequences stipulated by the civil law on the basis of the facts negatively judged within the legal order and signed by the civil law to that concrete subject. The civil law doctrine makes a visual comparison where the role of the civil liability is exactly the same as a role of a lever, which within the help of the justice dimension puts the whole burden of the risen damage from the injured to another person, usually the party responsible for damage.[2] Within the civil law doctrine, the party responsible for damage does not always bear the liability for the caused damage.

[1] W. Lang, *Struktura odpowiedzialności prawnej*, "Acta Universitatis Nicolai Copernici, Prawo" 8 (1968).

[2] W. Warkałło, *Odpowiedzialność odszkodowawcza. Funkcje, rodzaje, granice*, Warszawa 1962, p. 7 and next.

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The most significant role among civil law sanctions plays, in practice, a damage sanction and connected with it liability for damages. It means that its scope of the subject is narrower than the one in the general definition of civil liability. Moreover, that liability has a tangible property character and plays above all compensatory function. In spite of the compensatory function, there are also other like: repressive, preventive and educational function.

The major meaning has, of course, the compensatory function, which is particularly visible in the range of liability for damages.

The point of the liability for damages consists in the possibility of the fulfillment of the creditor's claim risen as a result of the damage borne by him, on the way of the execution from the person's (to whom that damage was credited by the legal norms) property.[3] Thus, these are the legal relations with the character of the obligation. The injured is a creditor, and the person obliged to the compensative service is a debtor. The service is a behavior of the debtor meaning by a remedy of the creditor's loss, which appeared after the encroachment of his goods and interests protected by the law.

The provisions regulating compensative relations (law of the compensation)[4] can be found in different legal acts. They are divided into two categories: general regulations and specific regulations in general.[5]

There are different ways of legal solutions that regulate the matter of liability for damages in the Polish legal system. In most cases the interested person has a variety of choices out of the rights determined by the different converged legal provisions.[6] As a general rule there is no possibility of using general regulation if the specific provisions exist in the concrete legal sphere (*lex specialis derogar legi generali*). Taking into consideration goals and functions of the liability for damages mentioned above, it is needed to admit that the use of specific provisions cannot exclude the use of general regulation, when this is the only way to achieve the complete result of the remedy of the damage. The only condition is that there are no constraints within the legal acts regulating a scope of the remedy of the damage.

The general provisions are placed in the Civil Code (especially within the 3rd book of the Civil Code – Obligation), where the major position belongs to provisions about principles and manners of remedy of the damage,

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[3] T. Dybowski, (in:) Z. Radwański (editor), *System prawa cywilnego...*, p. 167 and the bibliography risen there.

[4] Much more on that: W. Warkałło, *Odpowiedzialność odszkodowawcza...*, p. 7.

[5] P. Dzienis, *Odpowiedzialność cywilna władzy publicznej*, Warszawa 2006, p. 12 and next.

[6] Z. Radwański, *Prawo cywilne – część ogólna*, 2nd ed., Warszawa 1994, p. 70.

the results of non-performance or improper performance of the obligation. The regulation including exchange of goods and services within the legal turnover with the consumers' participation (mixed, unilaterally professional)[7] does not usually exclude the possibility of realization of claims on the general basis.

2. The entrepreneur and the consumer

The entrepreneur is every natural person, legal person and organizational entity that is not a legal person, to whom the legal act admits a legal status and who is engaged on his own behalf in the business or professional activity – the article 43^1 of the Civil Code. The code definition of the entrepreneur has a priority meaning and is legally binding within the sphere of the civil relations including the relations with the consumers.

The article 22^1 of the Civil Code states that the consumer is every natural person who makes a legal transaction which is not directly connected with his business or professional activity.[8] The most important issue which is subject scope of the consumer law is defined by the Civil Code,[9] but most of the consumer law provisions that protect a consumer – the weaker party in the legal relation, are regulated outside the Code in other legal acts. Moreover, the part of those provisions belongs not only to the private law but also to the public law system.[10]

It is necessary to admit that the article 76 of the Constitution of the Republic of Poland puts the obligation of consumers' protection on public authority that protect them from actions which threaten their health, privacy, security, but especially, unfair market practices. The provision does not give the right for the consumer to claim with the constitutional complaint. Thus, it is essential to place the constitutional rule in the common legislation (article 81 of the Constitution). Article 76 of the Constitution does not have any direct effect in practice from the consumer's point of

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[7] A. Doliwa, (in:) T. Mróz, M. Stec (editors), *Prawo gospodarcze prywatne*, Warszawa 2005, p. 6.

[8] More on that: J. Pisuliński, (in:) J. Rajski (editor), *Prawo zobowiązań – część szczegółowa. System prawa prywatnego*, vol. VII, Warszawa 2004, p. 165.

[9] There are also other rules talking about mixed turnover that protect consumer in the Civil Code. As examples, see articles: 74§2, $384–385^3$, $4491–4491^1$, 535^1, 558, 605^1, 627^1, 770^1 of the Civil Code.

[10] As an example see: Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów [Legal act of 16 February, 2007 on competition and consumer protection], Dziennik Ustaw [Journal of Laws], No. 50, item 331.

view. It is true that the sphere of consumer's business has been raised to the constitutional rank, but at the same time, the rule of direct use of the Constitution that cannot be in force in that concrete matter has been placed too.[11] Creating lots of new legal regulations on consumer protection in Poland is a symptom of adopting the European standards, where the tendency of consumer protection is very strong.[12]

3. The characteristic of the consumer protection legal rules

As mentioned above, creating lots of new legal regulations on consumer protection in Poland is a symptom of adopting the European standards, where the tendency of consumer protection is very strong.[13] Consumer protection in the European Union law is treated as a political and legal problem. Since the Maastricht Treaty, the issues of consumer protection have been treated as a task of the European Union.[14] Thus, consumer protection stays as a part of the sphere of Community authorities' activities.

The shape of the Polish legal provisions on consumer protection is nowadays influenced mainly by the European Union law, especially by the consumer directives. It is not possible to specify all the European directives on consumer protection law, so just as examples, the ones can be shown:

- Directive 1999/44/EC of the European Parliament and of the Council of 25 May, 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12–16),
- Council Directive 92/59/EEC of 29 June, 1992 on general product safety (OJ L 228, 11.8.1992, p. 24–32),
- Council Directive 85/374/EEC of 25 July, 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29),
- Directive 97/7/EC of the European Parliament and of the Council of 20 May, 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19–27),

[11] More in the matter on relations of constitutional and legislative regulations in the sphere of private law, see: M. Pyziak-Szafnicka, *Prawo podmiotowe, Studia Prawa Prywatnego*, 2006, z. 1, p. 53 and next.

[12] E. Łętowska, *Europejskie prawo umów konsumenckich*, Warszawa 2004, p. 49, 279.

[13] Ibidem, p. 49, 279.

[14] Ibidem, p. 6–7.

- Council Directive 87/102/EEC of 22 December, 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48),
- Council Directive 90/314/EEC of 13 June, 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59–64).

The most important value for the consumer in his everyday life has the legal act of 27 July, 2002 on certain aspects of the sale of consumer goods and on the change of the Civil Code,[15] and the legal act of 2 March, 2000 on protection of some consumer's rights and the liability for the damage caused by the dangerous product,[16] moreover, the legal act of 20 July, 2001 on consumer credit,[17] and finally, the legal act of 29 August, 1997 on package travel.[18]

Those legal acts provide special regime in the scope of concluding, forming content of the contract, execution and liability, when the consumer is one party and the entrepreneur is the other party of the contract. They are called the consumer contracts. The characteristic feature of the regime is weakening, basic for the market economy, of the rule of the freedom of contracts and the rule *pacta sunt servanda*. The provisions out of the Code regulations defining consumer turnover are strengthen by the Civil Code, which determines illegitimate rules of the contract and the legal results, including those kinds of rules in it. They have to be treated as a protection of the weaker contractual party.[19] They apply to all kinds of contracts which are signed up with the consumer as a party. The provisions of the consumer protection have a semi imperative character.[20] Thus, the parties of the legal relation can form it differently than it comes out from the concrete model included in the legal act, but only more favorable for the consumer. Those provisions establish the minimum border of the consumer protection and characterize unsymmetricality of the legal regime in favor of the weaker part – consumer.

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[15] Dziennik Ustaw [Journal of Laws], No. 141, item 1176. It is worth adding that on the basis of article 14, the rules included in that legal act can be used with: contract of delivery, contract to perform a specified task and contract of commission.

[16] Dziennik Ustaw [Journal of Laws], No. 22, item 271.

[17] Dziennik Ustaw [Journal of Laws], No. 100, item 1081.

[18] Dziennik Ustaw [Journal of Laws], No. 55, item 578 with later amendments.

[19] Article 3851 of the Civil Code. Moreover, see: Ł. Węgrzynowski, *Niedozwolone postanowienia umowne, jako środek ochrony słabszej strony umowy obligacyjnej*, Warszawa 2006, p. 39 and next.

[20] More on the issue of semi imperative character of the regulations see: P. Machnikowski, *Rodzaje ustawowych ograniczeń swobody kształtowania treści zobowiązania*, "Monitor Prawniczy" 2005, No. 24, p. 1244.

The seller can always offer better conditions and more rights than the legal act stipulates but never less than that. Worse conditions are always invalid because of the provisions included in the legal act (article 11 of the legal act on some special conditions of consumer sale).

It comes from the article 535^1 of the Civil Code that the provisions of the Civil Code applicable to the sale agreement are also implemented to the consumer sale within the range in which the sale is not regulated by other legal acts.

The provisions of the legal act on some special conditions of consumer sale are applicable only to the sale that is made within the range of the enterprise activity of the movable property for the natural person who owes that property for the reason not connected with one's business or professional activity.[21] One party of the contract is then a professional, and the other is a consumer. The seller is liable for the buyer on the basis of risk, which is called strict liability, if the merchandise is not consistent to the contract in the moment of handing it out. The liability is a consequence of the improper execution of the contract. Thus it is a regime – *ex contractu* of liability.

4. The characteristic of liability prerequisites

The prerequisites of seller's liability in case of consumer sale are different than in case of liability that comes out from non-performance or improper performance of the sale contract regulated by the Civil Code. The prerequisites of liability are mentioned in the sense that without their existence the liability does not appear. They are thereby the conditions of existence of the concrete claim on the eligible side. Three prerequisites are necessary to the occurrence of the contract liability regulated by the rules:

- Firstly, the creditor has to bear the damage in the sense of the property loss. In general, the damage is both *damnum emergens* and *lucrum cessans*.
- Secondly, the damage has to be caused by non-performance or improper performance of the obligation by the debtor. The damage in the case of improper performance of the obligation determines the loss value, which

[21] Those rules are applicable to: contract to perform a specified task, contract of delivery and contract of commission, if they are signed up within the scope of the enterprise activity and if the other party is the consumer.

comes out of the non-performance of the obligation. The damage in the case of improper performance of the obligation defines the value of an additional loss, which harms the creditor, even though the obligation has been executed within the content of the obligation.[22]

- Thirdly, the normal causality has to exist between non-performance and improper performance of the obligation. The article 417 of the Civil Code states, moreover, that non-performance or improper performance of the obligation has to be the consequence of the circumstances which the debtor is not responsible for. There is nothing like an automatic liability for damages. The crucial are the reasons because of which came to an insult of creditor's business.[23]

Discussing the consumer sale, it is worth describing the fact that every seller – natural or legal person who accomplishes a sale within the scope of his enterprise, is liable for the incompatibility with the sales contract in the period of two years since handing the good out for the buyer. The term starts running again from the very beginning in the case of exchanging the good. If the subject of sale is a second hand thing, the term can be shortened by the seller but no less than to a year, and only when the buyer agrees to that. In the case of detecting the incompatibility, before the six month term passed since the release of good, it is assumed that the incompatibility existed in the moment of releasing the good. It means that the seller's liability is abstract from the fault (the evidence of lack of guilt does not release from liability), independent from the fact whether the seller knew about the existence of incompatibility with the contract or not.

It is universally known that the basic prerequisite of the liability is the fact of existence of good's incompatibility with the sale contract, so there is no need to prove the damage and other prerequisites which are legally binding to the liability for damages. The closer analysis of the issue can lead to different remarks. If we assume that the damage is a loss within the legally protected goods and interests arisen without the consent of the injured party, then, without any doubts, the existence of good's incompatibility with the sale contract is a loss within the good legally protected. The loss is meant as a difference between the state of good that could be generated in the normal state of affairs and the state that arisen as a consequence of the accident that made the change (the legislator called that the occurrence

[22] W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania. Zarys wykładu*, Warszawa 2003, p. 318.

[23] Ibidem.

of the liability for damages in the literature).[24] Referring the problem to the issue of consumer sale, the loss has a property character.

There is a discussion in the literature whether the prerequisite of incompatibility with the sale contract should be understood the same as a physical defect in the case of liability of warranty, or it is a wider term than the defect (as understood in the article 556 § 1 of the Civil Code). More rational and convincing are the arguments of those who state that the good's incompatibility with the sale contract is a wider term than the physical defect of the thing.[25]

The consumer good's incompatibility with the sale contract includes:

- defects in the Civil Code of warranty and guarantee terms;
- the incompatibility with the assurances of the people who market goods within the scope of their enterprise activity;
- the incompatibility with the assurances of the people who placed themselves as producers by placing on the goods their name, trademark or other distinguishing marks;
- incorrectness of installation and initialization of goods if the activities have been done within the sale by the seller or the person by whom the seller is liable for;
- incorrectness of installation and initialization of goods if the activities have been done by the buyer in accordance with the manual received in the time of sale.[26]

It is worth analyzing that including the term of incompatibility with the sale contract in above second and third case, first of all, is aimed at counteracting unfair and misleading advertisement.

The buyer has been subjected to the obligation of seller's notification about the determination of incompatibility with the sale contract by the legislator. The notification should occur within the period of two months since the determination of incompatibility. The consequence of lack of determination is loss of rights of the concrete determined incompatibility of consumer's good with the sale contract. The seller is also exempted from the liability when the buyer knew about the good's incompatibility, or when judging reasonably, should have known about it. The buyer's claims expired within the year since the determination of the good's incompatibility. The expiration cannot finish until the end of two years since the release of the good to the buyer.

[24] Z. Radwański (editor), *System prawa cywilnego...*, p. 214.

[25] W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania...*, p. 639.

[26] Ibidem.

According to the article 4 of the legal act on some special conditions of consumer sale, the seller is liable in the face of the buyer if the consumer's good is not compatible with the sale contract in the moment of their release. There are some interpretational dilemmas here. The language of the above provision can entitle to the statement that the seller is liable on the basis of that legal act only in the case of improper performance of the contract. Thus, the legal act does not include the situation of the contractual non-performance, so then when the seller did not start at all to fulfill the obligations coming out of the contract, i.e.: he did not transfer the ownership or did not transfer the good. The only possibility of the buyer in that case could be use of the Civil Code provisions about the consequences of non-performance of the obligation (article 471 of the Civil Code and next).

5. Critical analysis of consumer's rights

Article 8 provisions of the analyzed legal act form rights that entitle the consumer. In the case when the consumer's good is not compatible with the sale contract, the buyer can demand that it should be restored to the condition consistent with the contract by a no payable repair or exchange the good into new one. These are two general and basic rights. If the seller received from the buyer one of the mentioned demands and he did not take any position (he did not respond to that) within the period of 14 days, then it is statutory determined that it was reasonable.

It seems that more from the practical point of view of the entrepreneurs than the provisions of article 8 of the mentioned legal act, derives the rule of the sequencing consumer's claims, which means their realization in the appropriate order: firstly – the repair of good, then – exchange, and finally other statutory provisions. This kind of interpretation harms the basic idea of the consumer protection and its axiology. The rule of the sequencing is also exposed by the part of the civil law doctrine representatives.[27] Implementing the rule leads to the crucial weakening of the consumer's position. It entitles to express the opinion that those provisions within the scope of executing of the consumer's rights place him in the worse situation than under the provisions of, before being in force, consumer warranty provisions regulated in the Civil Code.

[27] W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania...*, p. 641.

The use of other consumer rights provided by the legal act depends on some conditions. Only when:

- repair or exchange of the consumer's good is not possible,
- repair or exchange of the consumer's good requires excessive costs,
- the seller is not able to repair or exchange the good in the concrete term,
- repair or exchange could expose the buyer to significant inconvenience.

The buyer can demand the relevant reduction of the price or renouncing the contract Nevertheless, he cannot renounce the contract when the consumer's good incompatibility is irrelevant. The assessment of the relevant or irrelevant incompatibility with the sales contract has, apparently, a crucial meaning in the process of pursuing consumer claims. The kind of the incompatibility decides whether it is possible to demand effectively the price reduction, particularly whether it is possible to execute the statutory right to renounce the contract by submitting the unilateral declaration of will. The claim arisen then is about the return of the paid price and the repair of eventual property damage on the general basis.

Many court disputes arise in connection with the performance of the provisions, yet in the time when the warranty provisions (article 556 of the Civil Code and next) were applicable to the consumer sale. Unfortunately, there are fewer of them nowadays than at the time. The evaluation whether the incompatibility with the sale contract is relevant or irrelevant depends on its character, the work that can be used to repair, and especially, on the influence on the good's usefulness. Repeated repairs should be also recognized as a relevant incompatibility. Not only objective patterns of assessment, totally abstract from consumer's feelings and believes, should play an important role there. The evaluation of the product's usability, its functionality and usefulness with a view to a contractual goal, done also from the buyer's subjective point of view to the borders defined by the article 5 of the Civil Code, should be taken into consideration by the evaluation of the relevance.[28] The consumer's proof (the weaker party of the contract) of the relevant consumer's good incompatibility with the sale contract is onerous and difficult, more difficult than showing damage and the rest of the contract liability prerequisites.

It can happen that the consumer suffers damage which appears as a different loss than the consumer good, because of the good's incompatibility with the sale contract. The provisions of legal act on some special conditions

[28] T. Kierzyk, *Reklamacje wad pojazdu – wybrane zagadnienia (ochrona konsumentów)*, Rejent 2000, No. 5, p. 53.

of consumer sale do not give the legal basis to demand repairing the loss different than the one connected with the consumer's good. It is impossible to base the claim of full redressing the damage within the scope of *damnum emergens* and *lucrum cessans* on that basis.

Looking for more conductive institutions for consumer conditions, it is good to consider the possibility of using the solution included within the article 4.1 of the legal act of 27 July, 2002. The statement included in the provision notices that "(...) in the case of determination the consumer's good incompatibility with the sale contract before the end of the six months term since the release of good, it is assumed that it existed in the moment of the release. Unfortunately, the rest of the provision is dedicated to presumptions that protect the seller, not the consumer (presumption of the good's compatibility with the sale contract). The opinions within the literature state that the statement "it is assumed" should be understood not as a legal presumption, but as a statutory definition of the good's incompatibility with the sale contract.[29] This is the next shortcoming within the analyzed statutory provisions, unfortunately that acts to the detriment of the consumer.

The current regulation included within the legal act does not decide on the seller's liability under legal defects. It does not apply to the cases when the seller does not have the right of ownership to the good or when the right of ownership has been encumbered to the third party. The article 4 of the legal act and the scope of rights show that the idea is to physical characteristic of the good. There is no agreement in that issue within the legal literature. There are expressed views that assumed the possibility of taking up by the scope of validity of the legal act legal defect cases because the provisions of the legal act do not provide that the incompatibility with the contract could entail its physical features.[30] That view cannot be approved without any critique. Using the same arguments (lack of the regulation), it is possible to prove that the legal act does not apply to legal defects, moreover, that the kind of consumer's rights (article 8 of the legal act) is very characteristic of the physical features of the good.

The legal act resigned from the division of things to those specified as to kind only and to identity. That classification exists in the Civil Code and has a priority meaning in case of the seller's liability due to the warranty, and is bound with the possibility of consumer's rights differentiation. The

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[29] M. Gajek, *Niezgodność z umową jako przesłanka odpowiedzialności sprzedaży towaru konsumpcyjnego*, "Monitor Prawniczy" 2003, No. 5, p. 206.

[30] J. Puzyna, *Niezgodność towaru z umową jako przesłanka odpowiedzialności sprzedawcy w ramach sprzedaży konsumenckiej*, Rejent 2006, No. 10, p. 118 and the literature risen there.

consumer's right depends on the things he has to do with. It placed the consumer in a better position than nowadays. Before the legal act on some special conditions of consumer sale came into force, a consumer within the scope of his rights due to the warranty (when the defect applied to thing specified as to kind only), could effectively demand renouncing the contract and his demand could be blocked only by the good's exchange into the new one.[31] The effective repair of the thing specified as to identity only restricted the possibility of renouncing the contract.

Within the current legal status the main place (regardless of the thing's kind) takes the demand of supplying to the state compatible with the sale contract by repair free of charge. That kind of conclusion is made on the basis of practice's observation. Concluding – after acknowledging the general goal of the legal act that is the consumer protection, it can be assumed that that the expression included in the article 8 provision of the legal act: "(...) the seller can demand supplying (...) to the state compatible with the contract by *repair free of charge or by the good's exchange into the new one*, unless *repair or exchange* is impossible or requires excessive costs", should give to the consumer the possibility of choice between demand of repair or exchange into new one. Both of these rights should be treated then alternatively, by giving the choice to the consumer. The same rule could be applied in the case of existence of conditions which allow demanding a reduction of the price or renouncing the contract.

The right to renouncing the contract is very limited in the Polish consumer legislation. That limitation is a little bit less restrictive in the case of concluding the contract negotiated away from business premises, so in places where we – consumers, are not prepared to conclude the contract and in the cases of the contracts that are concluded at a distance, without the presence of both contractual parties (usually – internet sale). Only in mentioned above cases we – consumers, have the right to renounce the contract within 10 days without giving the reasons for renouncing. In some cases the term can be extended up to 3 months. The issues are regulated by the legal act of 2 March, 2000 on protection of some consumer's rights and the liability for the damage caused by the dangerous product.[32]

The common custom is attaching a guarantee (the accessory contract) to the good, which gives fewer rights (only repair or exchange of the good) than the consumer's good's incompatibility with the sale contract. The guarantee can concur with other institutions because of the long terms of its

[31] T. Kierzyk, *Reklamacje...*, p. 54.

[32] Dziennik Ustaw [Journal of Laws] 2000, No. 22, item 271.

validity. Granting a guarantee should occur without any additional fee (see: article 13 of the legal act). Guarantee for the sold consumer's good does not exclude, limit or suspend buyer's rights that come out of the good's incompatibility with the sale contract.

6. Conclusions and *de lege ferenda* postulates

In a consequence, it can be recognized that as a result of implementation of the legal act on some special conditions of consumer sale, consumer did not receive any more intensive measures of legal protection. In some cases they are even weakened. The current shape of the prerequisite of good's incompatibility with the sale contract is a quite unclear term, which limits consumer protection in the same way as the rule of claims sequencing.

Usually, exercising only the institutions regulated by the legal act does not lead to full redress of the loss within the goods legal protection. Thus, the legal act does not fully realize the compensative function of the contract liability according to general rules.

A quick change of consumer sale provisions should be demanded. New legal solutions should include provisions which assure protection for the consumer in the cases when concluding the contract occurs without precise designation of good's features and in the cases when the seller imposes such a good's designation that can lead to limitation or abolition of his liability. It is necessary to implement the provision which allows for the designation when the good is compatible with the contract. That kind of regulation is used by the German legislator.[33]

Polish legal situation is quite peculiar because of the fact that conducting the rational interpretation of the legal regulation about proper consumer protection is only possible when disregarding the rules of the legal act described above and in accordance with the provisions of the Civil Code. The dispersion of provisions about consumer turnover should be also judged negatively.

[33] J. Puzyna, *Niezgodność towaru...*, p. 122.

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THE LIABILITY OF AN INDIVIDUAL IN MODERN INTERNATIONAL LAW

Introduction

The problem of international legal subjectivity remains contestable until today. The reason for this state of affairs is the fact that none of the norms of international law defines the very term of subjectivity or contains a catalogue of entities subject to this law. What is more, these norms hardly ever refer to the term "subject of international law".[1] As a result, there is no consensus about the uniform criteria of international legal subjectivity.[2] It is commonly accepted, however, that a subject of international law is an entity that has rights and obligations resulting directly from international law.[3] Legal capacity defined as above is supplemented by one more component that is referred to in the doctrine as capacity to act (capacity to perform acts in law),[4] and that consists in one's capability to shape their own position within the sphere of international law by means of their own actions. Full international legal subjectivity therefore encompasses the capacity to have rights and obligations resulting directly from international law and the

[1] An example of a change in this trend and a sign of incorporating the indicated term into the acts of international law can be, e.g. art. 3 of *Vienna Convention on the Law of Treaties*, which refers to "other subjects of international law", *Konwencja Wiedeńska o Prawie Traktatów*, (in:) A. Łazowski (ed.), *Prawo międzynarodowe publiczne. Zbiór przepisów*, Kantor Wydawniczy Zakamycze, Kraków 2003, p. 69–100.

[2] B. Wierzbicki (ed.), *Prawo międzynarodowe publiczne*, Temida 2, Białystok 2001, p. 51.

[3] W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2004, p. 115–116.

[4] R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2004, p. 117.

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capacity to acquire them. In light of the norms of modern international law the above definition allows to determine the circle of its subjects which – what is important – changes in time.[5]

It is beyond all doubt that they are states that are traditionally regarded as entities that acquire rights and obligations directly from international law. They are the ones that take a major part in establishing norms of international law, being the subjects thereof at the same time.[6] States, being sovereign organisms, are therefore the main subjects of international law with full authority, while their subjectivity is of primary nature, i.e. results from the very fact that a state exists.[7]

The development of international law led to the emergence of new categories of entities that derive their rights and obligations directly from the norms of this law. Ones that are listed among them are international organisations, non-sovereign territorial organisations (e.g. Wolne Miasto Gdańsk /*Free City of Danzig*/ or presently Monaco), nations, parties to war or insurgents.[8] However, although the subjectivity of a state is of primary nature, the subjectivity of international organisations, parties to war, etc. does not have this property. This results from the fact that they are states that, being sovereign, full and primary entities, decide about their creation, legal capacity and capacity to perform acts of international law. The scope of rights and obligations vested in these entities (their legal capacity) and their capacity to shape their own international legal position (their capacity to act) is therefore a derivative of the will of states expressed in the form of international law that they establish. Their subjectivity thus has to be described as secondary.[9]

In the context described above the international legal subjectivity of an individual remains a controversial issue. In essence, the question about their subjectivity becomes a question of whether an individual has any rights and obligations that arise directly from international law. In other words, an individual may be recognized as a subject of international law provided that it can be successfully proven that this law directly vests in them certain rights and obligations and – at least to some extent – the capability to shape their own international legal position.

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[5] W. Góralczyk, S. Sawicki, *op. cit.*

[6] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, C. H. Beck, Warszawa 2004, p. 131.

[7] *Ibidem*, p. 133.

[8] W. Góralczyk, S. Sawicki, *op. cit.*, p. 138–143.

[9] R. Bierzanek, J. Symonides, *op. cit.*, p. 118.

Modern international practice shows that an individual increasingly becomes a beneficiary of rights arising directly from international law. This is the case particularly in the sphere of human rights and means of control existing in that system and entitling entities such as natural persons to lodge individual complaints to international bodies (e.g. the Human Rights Committee or the European Court of Human Rights).[10] The right of individuals to raise petitions also existed in the system of governance of internationally controlled dependent territories.[11] Thus, in exceptional situations where the state is a party to certain international agreements,[12] the individual is a subject of laws arising directly from international law. These have their source in the will of states. The individual themselves neither establish any standards of international law, nor are they able to change it (with their actions). Hence, in this sense, the subjectivity of an individual is of limited, incomplete and secondary nature.

In modern international law, however, the subjectivity of an individual is not proven only by rights that they can derive directly from the norms of this law. When referring to the definition of international legal subjectivity presented above, one should notice the aspect of it that relates to obligations derived directly from international law. By acknowledging the international legal subjectivity of an individual it is assumed that obligations provided for in this law are binding for the individual, which means, in short, that the individual has no right to violate orders or bans included in the norms of international law. Any violation of these norms by the individual requires to hold the individual accountable. At present we are therefore dealing with a situation where the component that determines the shape and scope of the international legal subjectivity of an individual consists in not only their rights, but also their obligations, the fulfilment of which may be required from such an individual on the grounds of interna-

[10] For more information about modern systems for human rights protection see, e.g. B. Banaszak, M. Jabłoński, K. Complak, R. Wieruszewski, A. Bisztyga, *System ochrony praw człowieka*, Kantor Wydawniczy Zakamycze, Kraków 2005; R. Kuźniar, *Prawa człowieka: prawo, instytucje, stosunki międzynarodowe*, Scholar, Warszawa 2006.

[11] W. Góralczyk, S. Sawicki, *op. cit.*, p. 145.

[12] Such agreements include, but are not limited to: *Międzynarodowy Pakt Praw Obywatelskich i Politycznych* [International Covenant on Civil and Political Rights], Dziennik Ustaw [Journal of Laws] 1977, No. 38, item 167 with the annexed *Protokół Fakultatywny* [Optional Protocol], Dziennik Ustaw [Journal of Laws] 1994, No. 23, item 80 and *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności* [Convention for the Protection of Human Rights and Fundamental Freedoms], Dziennik Ustaw [Journal of Laws] 1993, No. 61, item 284, (in:) A. Łazowski (ed.), *Prawo międzynarodowe publiczne. Zbiór przepisów*, Kantor Wydawniczy Zakamycze, Kraków 2003, p. 280–299 and 315–333.

tional law.[13] In this context the problem of the liability of an individual for violating international law becomes a matter of utmost importance, as it forces us to answer the following questions. Does a violation of any international agreement by an individual result in the individual's liability under international law? Is there a defined catalogue of offences that an individual shall be liable for? Are treaty norms the only source of this liability or is it also possible to demonstrate the existence of common norms regarding this matter? Are the norms of international law that regulate the liability of an individual a complete solution or are they only fragmentary? Finally, are the currently existing legal and institutional mechanisms an effective tool for enforcing the liability of individual and what practical problems hinder their functioning?

The history of criminal liability of individuals

History indicates that there have been cases of departure from the rule that only states are liable for the acts of their leaders or persons acting upon their command. The first examples of punishing natural persons that are referred to in the doctrine relate to war crimes and date back as far as to the 15th century.[14] However, the most famous historical precedents involve leaders of states, or parties, that were defeated in wars. Napoleon Bonaparte was exiled to Saint Helen's Island, whereas Jefferson Davis – the president of the Confederate Southern States – was brought to court after the Civil War.[15]

The problem of the liability of an individual returned after World War I. In the Versailles Treaty[16] allied and associated powers publicly arraign William II of Hohenzollern, formerly German Emperor, of a supreme offence against international morality and the sanctity of treaties and decide to constitute a special Tribunal "to try the accused, thereby assuring him the guarantees essential to the basic right of defence" (art. 227 of the Treaty). Despite that, William did not face the Tribunal, as he found shelter in the territory of the Netherlands, that in turn refused to extradite him.[17]

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[13] W. Czapliński, A. Wyrozumska, *op. cit.*, p. 456.

[14] J. Nowakowska-Małusecka, *Odpowiedzialność karna jednostek za zbrodnie popełnione w byłej Jugosławii i Rwandzie*, Wydawnictwo Uniwersytetu Śląskiego, Katowice 2000, p. 15.

[15] *Ibidem.*

[16] English text of the *Versailles Treaty* is available at: http://net.lib.byu.edu/~rdh7/wwi/versailles.html.

[17] W. Góralczyk, S. Sawicki, *op. cit.*, p. 171.

In the period between World War I and World War II the issue of defining rules of liability for international crimes received greater attention from scholars and international law organisations than from international bodies or governments of states.[18] The reason for this was the fact that efforts were primarily concentrated on establishing anti-war law, which resulted in signing the Briand-Kellog Pact,[19] in the year 1928 that delegalized war. Thus, as indicated by J. Nowakowska-Małusecka, an initiation of war operations itself, regardless of possible violations of the *ius in bello*, became an international crime.[20]

The end of World War II made the issue of the liability of an individual a very significant problem of current interest. Trying and punishing Hitler's war criminals became a very important component of shaping the post-war reality. Members of the German Army and members of Hitler's party who were guilty of committing atrocities in occupied countries were tried and punished in countries where they had committed their crimes, under the applicable national law. Contrary to the above, for the so-called head criminals, "whose crimes are impossible to localize in the territory of a single state",[21] an international military tribunal was established. The scope of liability of the main war criminals was based on the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of August 17th, 1945. The Agreement was annexed with the Statute of the International Military Tribunal.[22] It has to be emphasized that it was the first time an international agreement explicitly specified three categories of crime – crimes against peace, war crimes and crimes against humanity. It was also the first time in history that it was made possible to hold state officials (supreme state officials) accountable under international law, regardless of the liability of the state for the actions of its organs

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[18] K. Karski, *Realizacja idei utworzenia międzynarodowego sądownictwa karnego*, "Państwo i Prawo" 1993, No. 7, p. 66.

[19] *Traktat Przeciwwojenny podpisany w Paryżu dnia 27-go sierpnia 1928 r.* [Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy. Signed at Paris, August 27, 1928], Dziennik Ustaw [Journal of Laws] 1929, No. 11, item 88. Polish text is available at: http://wikisource.org/wiki/Pakt_Brianda-Kelloga_1928.

[20] J. Nowakowska-Małusecka, *op. cit.*, p. 17.

[21] W. Góralczyk, S. Sawicki, *op. cit.*, p. 172.

[22] Porozumienie międzynarodowe w przedmiocie ścigania i karania głównych przestępców wojennych Osi Europejskiej, Karta Międzynarodowego Trybunału Wojskowego, Londyn, 8 sierpnia 1945 r. [International Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, London, August 8th, 1945], (in:) M. Flemming, *Międzynarodowe prawo humanitarne konfliktów zbrojnych. Zbiór dokumentów*, Akademia Obrony Narodowej, Warszawa 2003, p. 489–493.

(bodies). In the Nuremberg Trial 22 major war criminals were indicted, of which 13 were sentenced to death, 2 received life imprisonment and 4 others received sentences of from 10 to 20 years in prison. 3 persons were acquitted.[23] Hitler, Himmler and Goebbels were not among the accused as they had all committed suicides. The International Military Tribunal explicitly pronounced that international law may also impose obligations on natural persons. It decided that an individual who acts on behalf of the state shall bear liability if their actions are recognized as crimes.[24]

The Nuremberg Tribunal was not of permanent nature (and neither was the Tokyo Tribunal). After it had completed its tasks, it ceased to exist. Its activity, however, did have repercussions, whereas the principles concerning the liability of an individual, that the functioning and ruling of the Tribunal were based on, were of permanent nature. These rules – the so-called "Nuremberg principles" – were soon codified. Already at the beginning of 1946 the General Assembly of the UN approved them by its Resolution no. 95(I).[25] Furthermore, in 1950 the International Law Commission of the UN formulated a closed list of "the Nuremberg principles"[26] and presented them to the General Assembly as Principles of International Law. This was also the form in which the Assembly adopted these Principles.[27]

"The Nuremberg Principles" were of exceptional significance. First of all, they indicated and defined categories of acts punishable as crimes under international law (Principle VI). These are: crimes against peace, war crimes and crimes against humanity. For committing these crimes an individual is held accountable (and punished) under international law. Secondly, "the Nuremberg Principles" define conditions on which an individual shall be held liable. For example, the act of committing one of the defined crimes is punishable under international law and the fact that internal law does not

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[23] J. Nowakowska-Małusecka, *op. cit.*, p. 19. See also: K. Karski, *op. cit.*, p. 69–70.

[24] Whereas the International Military Tribunal for the Far East (the Tokyo Tribunal) established in January 1946 pronounced sentences against 25 people, of which 7 were sentenced to death, 16 to life imprisonment and 2 received lesser penalties. See J. Nowakowska-Małusecka, *ibidem*.

[25] *Resolution No. 95(I) of December 11th, 1946*, English and French text available on the official website of the General Assembly: http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement.

[26] *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal with commentaries*, "Yearbook of International Law Commission" 1950, vol. 2 http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf.

[27] See *Resolution No. 488(I) of December 12th, 1950*, English and French text available on the official website of the General Assembly: http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/060/86/IMG/NR006086.pdf?OpenElement.

impose a penalty for this act does not relieve an individual who committed it from this responsibility (principle II). Similarly, the fact that a person acted as Head of State or responsible government official (Principle III) or pursuant to order of their Government or of a superior (Principle IV) also does not relieve this person from responsibility. "The Nuremberg Principles" also provide certain minimum protection for the rights of an individual accused of a crime under international law – under such circumstances everyone has the right for a fair trial (Principle V).

The momentous importance of "the Nuremberg Principles" also consists in the fact that the principles contained in them and defining the responsibility for certain acts became, already upon the moment of formulation thereof, a factor that accelerated the development of common law.[28] Today they are commonly accepted to such an extent that it is justified to say that there exists a common norm regarding the discussed scope of matters.

Post-war international legal regulations concerning the liability of individuals

Sadly, after World War II the accomplishments of the Military Tribunal in the form of the codified "Nuremberg Principles" have not been put into extensive practice. What turned out to be particularly difficult was the adoption of complex, permanent legal and institutional solutions regarding the international liability of an individual. The idea of establishing the criminal tribunal of permanent character revived.[29] However, as M. Płachta indicates, the idea of creating a permanent tribunal was smouldering, "fuelled by theoretical deliberations raised at numerous conferences, without any hope for realisation".[30]

Evidently, certain initiatives were taken in the discussed matter. Soon after the war ended, in 1947, the General Assembly of the UN requested the International Law Commission to develop a code of crimes against the peace and security of mankind. These works resulted in the adoption of the draft code in 1996.[31] The catalogue of crimes contained there is broad and

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[28] J. Nowakowska-Małusecka, *op. cit.*, p. 20.

[29] K. Karski, *op. cit.*, p. 70.

[30] M. Płachta, *Międzynarodowy Trybunał Karny*, Kantor Wydawniczy Zakamycze, Kraków 2004, p. 82.

[31] *Draft code of crimes against the peace and security of mankind*, English text available on the official website of the International Law Commission: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf.

includes: crime of aggression (art. 16), crime of genocide (art. 17), crimes against humanity (art. 18), heavy war crimes (art. 20) and crimes against the United Nations and associated personnel involved in operations of the UN (art. 19). The fact that a state may be held accountable for crimes has no effect on individual liability and vice versa. It should be remembered, however, that regardless of the significance of the regulations contained in the draft penal code, to this day the code itself has remained only a draft of an international agreement.

Nevertheless, this does not mean that post-war international law does not at all govern in a binding manner the liability of an individual for violations of international law. Such regulations do exist, although they are fragmentary and provided in a number of international agreements.[32]

The liability of an individual for violating the laws of war is provided for in the Geneva Convention Relative to the Treatment of Prisoners of War from 1949 (Geneva Convention III).[33] It authorizes a fighting state to punish members of other state's armed forces who violated the provisions of the convention, and requires from the other state the same treatment for members of its own armed forces. The responsibility for **crimes of genocide** is regulated in the Convention from 1948 on the Prevention and Punishment of the Crime of Genocide.[34] It states that persons committing genocide or any other acts enumerated in the convention will be punished, whether they are constitutionally responsible rulers, public officials or private individuals The parties thereto undertook to enact legislation that would allow to punish the guilty. Persons charged shall be tried by competent tribunals of the State in the territory of which the act was committed, or by an international tribunal appointed by the Parties (no such tribunal has been appointed to this day). Modern international law also defines the scope of liability of individuals for terrorist acts – a number of conventions obliges parties thereto to punish such individuals under their internal law or to extradite them. Conventions adopted the principle of *out dedere out punire*. These are conventions that relate to international airline terrorism: The Tokyo Convention from 1963

[32] W. Czapliński, A. Wyrozumska, *op. cit.*, p. 457.

[33] Konwencja Genewska o traktowaniu jeńców wojennych [The Geneva Convention from 1949 Relative to the Treatment of Prisoners of War], Dziennik Ustaw [Journal of Laws] 1956, No. 38, item 171.

[34] Konwencja w sprawie zapobiegania i karania zbrodni ludobójstwa, uchwalona przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 9 grudnia 1948 r. [The Geneva Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of United Nations on December 9th, 1948], Dziennik Ustaw [Journal of Laws] 1952, No. 2, item 9.

on Offences and Certain Other Acts Committed On Board Aircraft,[35] the Hague Convention from 1970 for the Suppression of Unlawful Seizure of Aircraft[36] and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[37] Apart from that, terrorist acts are addressed in: the Convention from 1973 on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomats[38] and the Convention from 1979 Against the Taking of Hostages.[39] The above listing is not complete. It could be supplemented with items including, but not limited to, regulations concerning worldwide repression adopted against piracy (the Convention on the High Seas from 1958[40] and the Convention on the Law of the Sea from 1982[41]).[42]

The conventions referred to above show that the problem of the liability of an individual for violating international law has already been tackled more than once. What was missing, however, was a binding agreement that would address the problem comprehensively. It should be emphasized that

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[35] Konwencja w sprawie przestępstw i niektórych innych czynów popełnionych na pokładzie statków powietrznych, sporządzona w Tokio dnia 14 września 1963 r. [The Convention on Offences and Certain Other Acts Committed on Board Aircraft signed at Tokyo on 14 September, 1963], Dziennik Ustaw [Journal of Laws] 1971, No. 15, item 147 (annex).

[36] Konwencja o zwalczaniu bezprawnego zawładnięcia statkami powietrznymi, sporządzona w Hadze dnia 16 grudnia 1970 r. [Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December, 1970], Dziennik Ustaw [Journal of Laws] 1972, No. 25, item 181 (annex).

[37] Konwencja o zwalczaniu bezprawnych czynów skierowanych przeciwko bezpieczeństwu lotnictwa cywilnego, sporządzona w Montrealu dnia 23 września 1971 r. [Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September, 1971], Dziennik Ustaw [Journal of Laws] 1976, No. 8, item 37 (annex).

[38] Konwencja o zapobieganiu przestepstwom i karaniu sprawców przestepstw przeciwko osobom korzystającym z ochrony międzynarodowej, w tym przeciwko dyplomatom, sporządzona w Nowym Jorku dnia 14 grudnia 1973 r. [Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomats, signed at New York on 14 December, 1973], Dziennik Ustaw [Journal of Laws] 1983, No. 37, item 168 (annex).

[39] Międzynarodowa Konwencja przeciwko braniu zakładników, sporządzona w Nowym Jorku dnia 8 grudnia 1979 r. [International Convention Against the Taking of Hostages, signed at New York on 8 December, 1979], Dziennik Ustaw [Journal of Laws] 2000, No. 106, item 1123.

[40] Konwencja o morzu pełnym sporządzona w Genewie dnia 29 kwietnia 1958 r. [Convention on the High Seas signed at Geneva on 29 April, 1958], Dziennik Ustaw [Journal of Laws] 1963, No. 33, item 187 (annex No. 2).

[41] Konwencja Narodów Zjednoczonych o prawie morza, sporządzona w Montego Bay dnia 10 grudnia 1982 r. [The UN Convention on the Law of the Sea, signed at Montego Bay on 10 December, 1982], Dziennik Ustaw [Journal of Laws] 2002, No. 59, item 543 (annex).

[42] W. Czapliński, A. Wyrozumska, *op. cit.*, p. 457–459.

pursuant to these regulations an individual is usually held accountable for violating international law before domestic courts. It is worth noting, by the way, that the Constitution of the Republic of Poland from 1997 also provides for such an arrangement.[43]

Coming back to the primary thread of our deliberations it should be stressed that, generally speaking, the interwar period (between World War I and World War II) was the time when the discussion began on the need and purpose to establish a permanent penal tribunal for punishing individuals responsible for violating certain norms of international law. However, despite the lively debate and intensive works on a draft of such an agreement, continued also after World War II, events from the beginning of the 90s and their extent made the international community face an entirely new challenge. Meeting this challenge – massive genocide, crimes against humanity and severe breaches of the Geneva Conventions that took place in Somalia, in the territory of former Yugoslavia and in Rwanda – turned out to be very difficult. The reason for that was the lack of international agreements concerning the discussed subject that would bind states, international agreements that would address the issue comprehensively. So what was the response of states to these events and what was its legal basis?

In 1993 and 1994 the Security Council condemned the violations of human rights in Somalia and indicated that the perpetrators of these acts will be "held individually responsible".[44] However, in the sphere of international law, no special tribunal was appointed for the purpose of judging these crimes.

The situation was different in the case of Yugoslavia and Rwanda.

International Criminal Tribunals for the former Yugoslavia and Rwanda (Reasons and legal grounds for their establishment, jurisdiction and activities)

The process that led to the establishment of the International Criminal Tribunal for the former Yugoslavia began in 1991, when Croatia and Slovenia proclaimed independence. This started an open military conflict and

[43] See art. 42 of Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution of the Republic of Poland of 2 April, 1997], Dziennik Ustaw [Journal of Laws] 1997, No. 78, item 483.

[44] Compare Resolutions of the UN Security Council concerning Somalia (from 1993, No. 865, 885, 886, and from 1994, No. 946, 953), text available on the official website of the Security Council: http://www.un.org/Docs/sc/unsc_resolutions.html.

ruthless ethnic fights, especially in Bosnia and Herzegovina. Mass murders, rapes, ethnic cleansing, torture and inhumane conditions in detainment centres and camps shocked the world's public opinion. The Security Council condemned the policy that had been implemented and called for ceasing thereof. In a resolution adopted in 1992 (no. 764)[45] the council reaffirmed that persons who committed grave breaches of the provisions of the Geneva Conventions from 1949 would be individually responsible. It also appointed a Commission of Experts and authorized it to investigate and analyse the situation. As a result of the efforts of the Commission a report was presented in which it was stated that humanitarian law had been violated in the former Yugoslavia. Considering the remarks of the Commission of Experts and Special Rapporteur of the UN Human Rights Commission, the Security Council took appropriate steps in order to appoint an international tribunal. On 22 February 1993 it adopted resolution 808[46] that obliged the UN Secretary General to present within 60 days a report on the issue, together with concrete proposals.

Fulfilling the resolution already in May 1993, the Secretary General presented the Security Council a report containing a draft statute of the international tribunal.[47] After the report was published, certain doubts began to appear. The first one concerned the official seat of the tribunal. Considering the on-going conflict, the tribunal was seated in the Hague. The other problem consisted in the fact that Resolution 808 did not specify legal grounds for the functioning of the tribunal, nor did it specify grounds for sentencing. The statute of the International Criminal Tribunal was still in preparation. The necessity for immediate actions precluded the long process of negotiating, signing and ratifying an international agreement on this matter, whereas the Security Council was determined to take an immediate preventive action.[48] Apart from that there was also a concern that some states of the former Yugoslavia would not sign this treaty. That is why – in

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[45] *Resolution 764 (1992) of 13 July, 1992*, English text available on the official website of the Security Council: http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/011/23/IMG/NR001123.pdf?OpenElement.

[46] *Resolution 808 (1993) Adopted by the Security Council at its 3175th meeting, on 22 February, 1993*, English text available on the official website of the Security Council: http://daccessdds.un.org/doc/UNDOC/GEN/N93/098/21/IMG/N9309821.pdf?OpenElement.

[47] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, text available on the official website of the International Criminal Tribunal for the former Yugoslavia: http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm.

[48] D. Shraga, R. Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, European Journal of International Law 1994, vol. 5, p. 2, http://www.ejil.org/journal/Vol5/No3/art4.pdf.

accordance with the proposal of the UN Secretary General – a decision was made to appoint the International Criminal Tribunal for the former Yugoslavia[49] and adopt its Statute[50] (annexed to the report of the Secretary General). The legal basis for the establishment of the Tribunal was chosen to be Chapter VII of the UN Charter.[51]

The indicated chapter of the Charter refers to action with respect to threats of the peace, breaches of the peace, and acts of aggression. This decision was justified by the "serious" threat to the international peace and security, caused by the conflict in the former Yugoslavia. Thus, the appointment of the Tribunal was to contribute to ending the conflict and be one of the means to restore peace and security in this region. The Security Council therefore established the tribunal as a means of coercion, a subsidiary organ within the meaning of art. 29 of the Charter of UN.[52] This was the first time when a tribunal was established in practice to punish individuals pursuant to chapter VII of the Charter of UN. Nevertheless, such a method of appointing the Tribunal did bring about some criticism.[53] Art. 29 of the Charter of UN does give the Security Council the right to appoint such subsidiary organs as it deems necessary for the performance of its functions, which might suggest that it is also authorized to establish organs of judiciary nature. However, so far such organs were established only on the basis of an international agreement, in accordance with the commonly accepted practice. That is why it was called into question whether the Security Council is entitled to establish an international tribunal.[54] This accusation was also brought forward in on-going trials, where, e.g. the defender of Tadic, argued that the Criminal Tribunal for Yugoslavia was appointed improperly. The Tribunal issued a decision in which it acknowledged its own lack of competence to review decisions of the Security Council, assuming that this problem was not subject to consideration by court. Considering the fact that the Tribunal was appointed in an exceptional situation where states were involved in an

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[49] *Resolution 827 (1993) Adopted by the Security Council at its 3217th meeting, on 25 May, 1993*, English text available on the official website of the Security Council: http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement.

[50] *Statute of the International Criminal Tribunal for the Foomer Yugoslavia*, current text of the statute available on the official website of the Tribunal: http://www.un.org/icty/legaldoc-e/index-t.htm.

[51] Karta Narodów Zjednoczonych [Charter of the United Nations], Dziennik Ustaw [Journal of Laws] 1947, No. 23, item 90.

[52] J. Nowakowska-Małusecka, *op. cit.*, p. 41.

[53] See e.g. K. Karski, *op. cit.*, p. 74–75.

[54] J. Nowakowska-Małusecka, *op. cit.*, p. 42.

existing conflict and that it was an ad-hoc organ that would continue its functioning until the international peace and security have been restored and maintained in the area, it was acceptable to quote these legal bases for the appointment of the Tribunal.

The genesis of the appointment of the Criminal Tribunal for Rwanda should be sought in the several-centuries long ethnic conflict between the tribes of Tutsi and Hutu. On 6 April, 1994 an aircraft approaching landing at the airport in Kigala, on board of which were presidents of Rwanda and Burundi (both members of the Hutu tribe), was shot down, which began a bloody carnage that plunged the country into the chaos of a civil war. On the next day the Prime Minister of Rwanda, Belgian soldiers from the UN mission and many nuns and missionaries were killed.[55] According to data provided by the UN Information Centre, the death toll reached approx. 800 thousand people and the 100 day long carnage was actively participated in not only by militarized police and army units, but also by civilians. It was also noticeable that the acts of genocide were highly organized and took a form of an organized criminal undertaking.[56]

The UN took appropriate actions with respect to Rwanda. In July 1994 the Security Council adopted a resolution, in which it appointed an independent Commission of Experts whose task – as in the case of the former Yugoslavia – was to provide the UN Secretary General with the evidence and conclusions regarding grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of acts of genocide.[57] The report presented already in September explicitly stated that the mass extermination performed by Hutu against Tutsi was an act of genocide. The Commission suggested that the statute of the International Criminal Tribunal for the former Yugoslavia should be also applied to the crimes committed during the armed conflict in Rwanda. However, in view of the Security Council it was not possible to extend the jurisdiction of the existing Tribunal over the situation in Rwanda. Under these circumstances the Security Council used the principles developed earlier for the Criminal Tribunal for Yugoslavia and on 8 November 1994 adopted a resolution (955) in which it established – in order to "restore international peace and

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[55] *Ibidem*, p. 45.

[56] Data were obtained from the official website of the UN Information Centre in Warsaw, http://www.unic.un.org.pl/rwanda/wydarzenia_1994.php.

[57] *Resolution 935 (1994), Adopted by the Security Council at its 3400th meeting, on 1 July 1994*, English text available on the official website of the Security Council: http://daccessdds.un.org/doc/UNDOC/GEN/N94/273/51/PDF/N9427351.pdf?OpenElement.

security" – the International Criminal Tribunal for Rwanda.[58] It was the second time that the same legal grounds for the appointment of the tribunal were assumed by referring to Chapter VII of the Charter of UN and art. 29 thereof.

The location of the official seat of the Tribunal was not indicated in the Statute. On 22 February, 1995 the Security Council chose Arusha in Tanzania for the official seat of the Tribunal.[59]

What is interesting is the position of Rwanda itself regarding the appointment of the Tribunal. The government of Rwanda had fully supported the idea of establishing the ad hoc Tribunal and, being a non-permanent member of the Security Council, actively participated in the preparation of the statute. It may therefore seem surprising that during the voting Rwanda was against the adoption of the resolution, whereas China abstained. One of the reasons for this position of Rwanda was the matter of ratione temporis jurisdiction of the Tribunal. It was defined that it would cover the period from 1 January to 31 December 1994. The government argued that this period should begin on 1 October 1990. The next doubt concerned the structure of the Tribunal. According to Rwanda, it should have a separate Appeals Chamber and its own Prosecutor. Finally, another objection was related to the inability of the Tribunal to impose the death penalty, which is provided for in the penal code of Rwanda, and the placement of the Tribunal's seat outside the territory of Rwanda.[60]

It has to be emphasized that both of the Tribunals were appointed by means of the Security Council's resolutions in order to serve as coercive measures pursuant to chapter VII of the Charter of UN. Although the Tribunals belong to subsidiary bodies of the Security Council, within the meaning of art. 29 of the Charter, they are not subject to the authority or control of the Council when it comes to the performance of their judicial functions.

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[58] *Resolution 955 (1994), Adopted by the Security Council at its 3453th meeting, on 8 November, 1994*, English text available on the official website of the Security Council: http://daccessdds.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement. Annexed to the resolution is the statute of the Tribunal – *Statute of the International Criminal Tribunal for Rwanda*, current text is available on the website of the tribunal: http://69.94.11.53/ENGLISH/basicdocs/statute.html.

[59] *Resolution 977 (1995), Adopted by the Security Council at its 3502nd meeting, on 22 February, 1995*, English text available on the official website of the Security Council: http://daccessdds.un.org/doc/UNDOC/GEN/N95/050/66/PDF/N9505066.pdf?OpenElement.

[60] J. Nowakowska-Małusecka, *op. cit.*, p. 50–51.

The participation of interested states in the preparations looked differently. Rwanda, as indicated above, not only actively participated in the preparations, but was even the initiator of the establishment of the Tribunal. The procedure of adopting the resolution was also slightly different. While establishing the Tribunal for Yugoslavia, first the UN Secretary General was obliged to prepare the draft Statute and only then the Council accepted the draft and appointed the Tribunal. In the case of the Tribunal for Rwanda earlier experience was taken into account and the resolution appointing the Tribunal was adopted straightaway.

What is essential to our deliberations is the assessment of the scope of jurisdiction of each of the Tribunals.

While assessing ratione personae jurisdiction it is worth noting that only natural persons may be held accountable before these courts. Both of their Statutes contain a provision stating that they have jurisdiction over natural persons (art. 6 of the Statute of the Tribunal for Yugoslavia and art. 5 of the Statute of the Tribunal for Rwanda). This excluded the possibility of bringing legal entities (organisations, associations) before the Tribunal. From these regulations results the lack of connection with the institution of citizenship. The statutes also exclude the possibility of mitigating or waiving the criminal liability of persons accused of committing crimes only because of their position of the head of the state or government.

Ratione loci and ratione temporis jurisdiction were regulated differently for each of the Tribunals. The jurisdiction of the Tribunal for the former Yugoslavia extends to the territory of the former Socialist Federal Republic of Yugoslavia (including its land area, airspace and territorial waters – art. 8 of the Statute). The temporal jurisdiction extends to a period beginning on 1 January 1991 (also art. 8 of the Statute). The above date is not associated with any event. No ending date was specified – it was left for the decision of the Security Council which should make such a decision after international peace and security is restored in the region.

The Criminal Tribunal for Rwanda, on the other hand, has the authority to adjudicate in cases of crimes against international humanitarian law committed in within the surface and airspace of Rwanda, as well as crimes committed by Rwandan citizens in neighbouring states (art. 7 of the Statute). It is thus clear that the authority of the Tribunal was extended to the territories of states neighbouring Rwanda. The reason for this was the fact that throughout the years thousands of people fled persecution to Burundi, Uganda or Zaire. However, the jurisdiction of the Tribunal in relation to crimes committed in neighbouring states was limited to Rwandan citizens only. Ratione temporis was also defined differently by containing the tempo-

ral competence between two fixed dates: 1 January and 31 December 1994 (art. 7 of the Statute).

In its resolution 1503 from August 2003 the Security Council called on both of the tribunals to take all possible measures to complete on-going investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008 and to complete all work by 2010.[61]

Ratione materiae jurisdiction is defined in a similar way. The International Criminal Tribunal for the Former Yugoslavia, in accordance with Resolutions 808 and 827, deals with grave violations of international humanitarian law that is composed of both treaty and common norms. It is important that common norms are included in the grounds for sentencing, which eliminates the possible problem of states being bounded by specific convention as common law is applicable to all states. The Statute (art. 2–5) of the Tribunal lists four categories of crimes that may be prosecuted by the Tribunal. These are:

1. grave breaches of the Geneva Conventions of 1949. The Statute lists, for example: wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a civilian, taking civilians as hostages.
2. Violations of the laws or customs of war, including employment of poisonous weapons or other weapons calculated to cause unnecessary suffering, wanton destruction of cities, towns or villages, plunder of public or private property, seizure or destruction of institutions dedicated to religion, historic monuments and works of art.
3. Genocide, understood as acts committed with intent to destroy, in whole or in part, a national, ethnical or religious group. This includes acts such as: killing members of the group, causing serious bodily or mental harm to members of the group, imposing measures to prevent births within the group, forcibly transferring children of the group to another group;

[61] *Resolution 1503 (2003), Adopted by the Security Council at its 4817th meeting, on 28 August, 2003*, English text available on the official website of the Tribunal: http://www.un.org/icty/legaldoc-e/index-t.htm.

4. Crimes against humanity, including murder, extermination, enslavement, deportation, imprisonment, torture, rapes, persecutions on political, racial and religious ground, other inhumane acts.

An important feature of the jurisdiction of the Tribunal for Rwanda is that its Statute explicitly states that the conflict in Rwanda is of a non-international character. Two categories of crimes are common for both of the Tribunals, namely genocide and crimes against humanity. Additionally, the Tribunal for Rwanda adjudicates in cases of violations of art. 3, which is common to the Geneva Conventions of 1949,[62] and the provisions of Additional Protocol II from the year 1977[63] (art. 2–4 of the Statute). The provisions of these articles prohibit acts including, without limitation, attempts upon lives or bodily inviolability, taking hostages, inhuman treatment, collective punishment, terrorist operations.

In the Statutes of both of the Tribunals there are provisions stating that the Tribunals and national courts shall have concurrent jurisdiction on the same conditions, i.e. that the Criminal Tribunals shall have primacy over national courts (art. 9 and 8 of the Statutes, respectively). This means that each of the Tribunals may demand a case to be transferred to them at any stage of the procedure. Also, both of the Tribunals introduce the non-bis-in-idem principle where a perpetrator has already been tried by the Tribunal.

The Statutes of both of the Tribunals therefore identify crimes for which an individual may be held accountable. The accused may only be tried in their presence, judgments by default were rejected.

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[62] This refers to the following conventions: Konwencja Genewska o polepszeniu losu rannych i chorych w armiach czynnych [Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field], Konwencja Genewska o polepszeniu losu rannych, chorych i rozbitków sił zbrojnych na morzu [Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea], Konwencja Genewska o traktowaniu jeńców wojennych [Geneva Convention relative to the Treatment of Prisoners of War] and Konwencja Genewska o ochronie osób cywilnych podczas wojny [Geneva Convention relative to the Protection of Civilian Persons in Time of War]. They were all signed on 12 August, 1949 – see Konwencje o ochronie ofiar wojny, podpisane w Genewie 12 sierpnia 1949 roku [Conventions for the Protection of War Victims, signed at Geneva on 12 August, 1949], Journal of Laws [Dziennik Ustaw] 1956, No. 38, item 171 (annex).

[63] Protokoły dodatkowe do Konwencji genewskich z 12 sierpnia 1949 r., dotyczący ochrony ofiar międzynarodowych konfliktów zbrojnych (Prokotół I) oraz dotyczący ochrony ofiar niemiędzynarodowych konfliktów zbrojnych (Protokół II), sporządzone w Genewie dnia 8 czerwca 1977 r. [Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) and Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted in June 1977], Dziennik Ustaw [Journal of Laws] 1992, No. 41, item 175 (annex).

The structures of the Tribunals were also arranged in a similar manner. It is of importance that the Statute of the Tribunal for Rwanda was based on the Statute of the Tribunal for the Former Yugoslavia. Each of the Tribunals consists of the Chambers, the Prosecutor and a Registry (art. 11 of the Statute of the Tribunal for the Former Yugoslavia and art. 10 of the Statute of the Tribunal for Rwanda). The Chambers of each of the Tribunals comprise Trial Chambers and an Appeals chamber, which ensures compliance with the principle of two instances. The term of judges of the Tribunal for Yugoslavia and Tribunal for Rwanda is the same and equals 4 years (art. 13 *bis* par. 3 and art. 12 *bis* par. 3, respectively). Each of the Tribunals has its Prosecutor. The Prosecutor is appointed by the Security Council for a term of four years (art. 16 par. 4 of the Statute and art. 15 par. 4 of the Statute, respectively). The Prosecutor is responsible for the investigation and prosecution of persons responsible for crimes identified in the Statutes of the Tribunals – according to their temporal and territorial jurisdiction (art. 16 par. 1 and art. 15 par. 1, respectively). The Prosecutor initiates investigations ex-officio or on the basis of information obtained from any source. Each of the Tribunals has its own Registry (art. 17 and art. 16, respectively). They fulfil duties normally entrusted on these category of bodies, i.e. they are responsible for, without limitation, administration, servicing of meetings, keeping records or publishing documents.

As indicated above, the intention is that both of the Tribunals will complete their work in the year 2010, therefore we may already venture to draw first conclusions.

According to up-to-date data published by the Tribunal for the Former Yugoslavia,[64] 161 persons were indicted. Proceedings are currently in progress against 53 defendants, of which 12 are in the pre-trial stage, 12 are being processed before Trial Chambers, 2 persons were sentenced in the first instance and in the case of the last 8 the procedure is in progress before the Appeals Chamber. One person was acquitted in the first instance. There are 4 persons that are still wanted and at large, including Radovan Karadzic and Ratko Mladic who are known to the public.[65] Until today cases against 108 defendants have been closed. Seven persons received sentences of acquittal. 52 persons have been found guilty, of which 16 already served their sentences and 2 died in the course of serving theirs.

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[64] Data available on the official website of the Tribunal: http://www.un.org/icty/glance-e/index-t.htm.

[65] Case No. IT-95-5/18 "Bosnia and Herzegovina" & "Srebrenica", *Case Information Sheet, "Bosnia and Herzegovina" & "Srebrenica" (IT-95-5/18)*, http://www.un.org/icty/cases-e/cis/mladic/cis-karadzicmladic.pdf.

One of the most infamous criminals sentenced by the Tribunal (to 20 years of imprisonment) was Dusko Tadic.[66] He was arrested in Munich after he had been recognized by a Muslim refugee, one of his victims. Among the greatest criminals who were charged but remain at large is – apart from aforementioned Karadzic and Mladic – Goran Hadzic, the leader of Srpska Krajina. Hadzic is accused of crimes against humanity (murders, tortures, deportations), as well as violations of the laws and customs of war.[67]

However, the best known case considered by the Tribunal was the case of Slobodan Milosevic,[68] the former president of Yugoslavia. The case of Milosevic was the one in which the problem of the lack of co-operation between Yugoslavia and the Tribunal became the most apparent. Since judgments in defaults are not possible, repudiation of the jurisdiction of the Tribunal and refusals to give away an individual despite international arrest warrants become a significant problem. The establishment of the Tribunal pursuant to chapter VII of the Charter meant that states are obliged to co-operate with the Tribunal and provide all legal assistance that may be necessary at any stage of the procedure. A demand of the Tribunal to hand over a certain individual to the custody of the Tribunal should have been treated as the application of executive measures provided for in chapter VII. As shown by the casus of Milosevic, this principle was not respected by states, not only by Yugoslavia. But no sentence was ever passed on Milosevic – arrested and handed over to the Tribunal for the Former Yugoslavia in 2001, he died of a heart attack in the prison in Hague on 11 March, 2006.

The problem of the lack of full co-operation from the Balkan countries was pointed out by Carla del Ponte, the Prosecutor of the Tribunal. In her statement of 18 June, 2007 addressed to the Security Council[69] she indicated that the temptation to interfere in the functioning of the Tribunal is still existing in the activities of "respective" governments. She also presented a similar position during a meeting with members of the European Parliament that was held in Brussels on 26 June, 2007. It seems that these accusations are directed mainly to the government of Serbia. According to

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[66] Case No. IT-94-1 "Prijedor", see *Case Information Sheet, "Prijedor" (IT-94-1)*, http://www.un.org/icty/cases-e/cis/tadic/cis-tadic.pdf.

[67] Case No. IT-04-75 "Hadzic", see *Case Information Sheet, "Hadzic" (IT-04-75)*, http://www.un.org/icty/cases-e/cis/hadzic/cis-hadzic.pdf.

[68] Case No. IT-02-54 "Kosovo, Croatia and Bosnia", see *Case Information Sheet, "Kosovo, Croatia and Bosnia" (IT-02-54)*, http://www.un.org/icty/cases-e/cis/smilosevic/cis-slobodanmilosevic.pdf.

[69] *Statement by Carla del Ponte, Prosecutor, International Criminal Tribunal for the Former Yugoslavia to the Security Council*, http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/afet_26062007_pontestate_/afet_26062007_pontestate_en.pdf.

the Prosecutor, the wanted Radovan Karadzic and Ratko Mladzic are most likely staying in the Serbian territory, but the Tribunal does not have any information on their location. Nevertheless, Carla del Ponte expressed an opinion that the states from that region do have appropriate means at their disposal to determine the location of and arrest the wanted.

So far the activities of the Tribunal, and particularly of its Prosecutor, demonstrated deep correlation between the possibility to perform effective investigation and prosecute suspects and the internal political situation in the countries of the described region. In terms of looking for the evidence of crimes, the Prosecutor was particularly the one who was dependent on the co-operation from national judicial administration, as well as political and military factors. The co-operation has not always been successful. Consequently, it may be alleged that the activities of the Tribunal lack the desired effectiveness. According to C. del Ponte, the fact that the greatest criminals, such as Karadzic and Mladic still remain at large gives an impression of impunity and thus undermines the credibility of the Tribunal.

Nevertheless, in her statement the Prosecutor also mentioned that recently positive tendencies have been noticeable. The co-operation with the authorities of Serbia and Montenegro recently resulted in capturing more of the wanted. The co-operation from Croatia and Bosnia and Herzegovina attained a satisfactory level. The conclusion therefore has to support the opinion of Prosecutor de Ponte that despite the alleged lack of effectiveness and slow action, during the last dozen or so years the Tribunal has had significant achievements. One proof of that is, for example, the number of high officials punished by the Tribunal.

The Tribunal for Rwanda did not experience problems resembling the ones described above. The authorities of this country are interested in punishing the guilty. The problems that affect in the activity of this Tribunal are totally different. It is not able to judge all perpetrators of crimes because the number of them is huge. It therefore concentrates on leaders, leaving other suspects for the judiciary of Rwanda. It is not rare that the Tribunal has difficulties in proving the guilt of the accused due to the lack of evidence. The Tribunal also has significant financial problems. This slows down its work. Some of the cases have been ended by now. For example, in the case of Kambanda,[70] the Prime Minister in the Interim Government of

[70] Case No. *ICTR-97-23-DP*, Case records available on the official website of the Tribunal: http://69.94.11.53/default.htm.

Rwanda, a sentence of life imprisonment was pronounced. It is also worth recalling the case of a Belgian radio reporter who was found guilty of crimes against humanity, which in his case consisted in inciting murders of and attacks on the Tutsi and the opposing Hutu. The Tribunal sentenced him to two penalties of 12 years of imprisonment.[71]

To summarize the previous activities of the Tribunal it is worth quoting the following data. Until now the Tribunal has completed the trials of 33 persons. Currently there are 29 trials that are being conducted before the Trial Chambers. 6 persons are awaiting trial. There are 6 persons that are in the process of appeal. Six persons are serving pronounced sentences, 5 persons were acquitted, one person has already completed their sentence. One person died during the trial, another one died even before the trial.[72] It is noticeable that the cases that are currently in progress before the Tribunal are against people that did not have only political or military functions. Apart from the convicted radio reporter, among the accused there are also persons such as Simon Bikindi, who not only worked in the Ministry of Youth and Sport, but was also a popular composer and singer. He is accused of taking part in crimes against humanity, genocide and murders.[73] In this context it is also worth noting the case of Hormidas Nsengimana – a priest and the rector of a college (Christ-Roi College) who is accused of committing acts such as crimes against humanity and genocide.[74]

The analysis of the activities of the two ad-hoc Tribunals allows to formulate several conclusions relating to the problem of the international liability of an individual.

First of all – the existing regulations are not perfect. This became apparent particularly in the context of the obligation of states to prosecute and punish war criminals, which is not enforced by any sanctions that would be imposed of states failing to comply. When it comes to the Tribunal for Yugoslavia, a satisfactory level of practical co-operations between states and the organs of the Tribunal has not been attained also.

Secondly – the establishment of the Tribunals was an important step in defining the principles of the liability of an individual in modern international law. The activities of the Tribunals contributed to the application

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[71] Case No. *ICTR-97-32-I*, case records available on the official webpage of the Tribunal: http://69.94.11.53/default.htm.

[72] Data published on the official website of the tribunal: http://69.94.11.53/default.htm.

[73] Case No. *ICTR-2001-72-I*, case records available on the official webpage of the Tribunal: http://69.94.11.53/default.htm.

[74] Case No. *ICTR-2001-69-I*, case records available on the official website of the Tribunal: http://69.94.11.53/default.htm.

of the existing norms that so far had not been enforced by anyone, e.g. the application of art. 3 which is common to all the Geneva Conventions.[75]

The International Criminal Court as a permanent body enforcing the international liability of an individual

The tragedies that took place in Yugoslavia and Rwanda made the international community realize how much needed are permanent regulations concerning the criminal liability of individuals for violations of international law. Possibilities to establish the Court were investigated as early as in 1948 by the International Law Commission, acting upon the request of the UN General Assembly. The possibility to establish such a court is provided for in art. 6 of the Convention on the Prevention and Punishment of the Crime of Genocide from 1948[76] and art. V of the Convention on the Suppression and Punishment of the Crime of Apartheid from 1973.[77] In the 50s the Commission prepared a number of drafts, but they did not receive substantial support. It was not until 1994 that a draft of the statute of the International Criminal Court was successfully elaborated to later become the basis of discussion for the Preparatory Committee. In the year 1998 an UN conference was summoned in Rome in order to establish an International Criminal Court. During the conference the United States of America expressed their dissatisfaction about a number of provisions and proposed a number of amendments.[78] Upon a motion from the USA there was only one voting on the acceptance/rejection of the Statute. 120 states

[75] This article states that persons taking no active part in hostilities, including members of armed forces who laid down their arms, shall in all circumstances be treated humanely, it also prohibits violence to life and person, taking of hostages, humiliating or degrading treatment, etc.

[76] Konwencja w sprawie zapobiegania i karania zbrodni ludobójstwa, uchwalona przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 9 grudnia 1948 r. [Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December, 1948], Dziennik Ustaw [Journal of Laws] 1952, No. 2, item 9.

[77] Międzynarodowa konwencja o zwalczaniu i karaniu zbrodni apartheidu, przyjęta dnia 30 listopada 1973 r. rezolucją 3068 (XXVIII) Zgromadzenia Ogólnego Narodów Zjednoczonych [Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly of the United Nations on 30 November, 1973], Dziennik Ustaw [Journal of Laws] 1976, No. 32, item 186 (annex).

[78] For information about the view of the USA on the International Criminal Court, see. M. Morris, *Stany Zjednoczone a Międzynarodowy Trybunał Karny*, (in:) E. Zielińska (ed.), *Międzynarodowy Trybunał Karny. USA i UE: dwa różne podejścia*, Fundacja Instytut Spraw Publicznych, Warszawa 2004, p. 125–142. See also M. Płachta, *op. cit.*, p. 1132–1209.

voted for the acceptance of the Statute,[79] 7 were against it and 21 abstained. To this day the Statute has been signed by 139 states, whereas 105 states, including Poland, became bound by the Statute by means of ratification, accession, succession, etc.[80] To enter into force the agreement needed to be ratified by 60 states, which happened on 11 April, 2002. The Statute entered into force on 1 July, 2002.[81] The International Criminal Court thus became the first permanent judicial body created by means of an international agreement.

There are 18 judges of the Court who are chosen by the states being the Parties to the Statute from among their citizens (art. 36 of the Statute). The judges are elected for a term of nine years. The judges are independent in the performance of their functions (art. 40 of the Statute), which requires that they shall not engage in any other occupation of professional nature or any other activity that may affect confidence in their independence.[82] The Organs of the Court are (art. 34 of the Statute): the Presidency, Divisions (Pre-trial, Trial and Appeals), the Office of the Prosecutor and the Registry.[83] The Court is officially seated in the Hague.

Under the jurisdiction of the Court are neither states nor legal entities – only natural persons (art. 25 par. 1 of the Statute). However, the Court has no jurisdiction over persons who were under 18 years of age at the time when they committed a crime. What is interesting, pursuant to art. 27 of the Statute, immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[84] Rationae materiae jurisdiction extends to (art. 5 par. 1 of the Statute): the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The inclusion of the last is of initial and provisional nature, as it was impossible to agree upon its definition. Under these circumstances the exercising of the Court's jurisdiction in cases of aggression was suspended

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[79] Rzymski Statut Międzynarodowego Trybunału Karnego sporządzony w Rzymie dnia 17 lipca 1998 r. [Rome Statute of the International Criminal Court, signed in Rome on 17 June, 1998], Dziennik Ustaw [Journal of Laws] 2003, No. 78, item 708.

[80] Data available on the official website of the UN: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp.

[81] J. Izydorczyk, P. Wiliński, *International Criminal Court – Międzynarodowy Trybunał Karny*, Kantor Wydawniczy Zakamycze, Kraków 2004, p. 21.

[82] *Ibidem*, p. 38–39.

[83] For details of the organisation and structure of the Court see M. Płachta, *op. cit.*, p. 265–349.

[84] J. Izydorczyk, P. Wiliński, *op. cit.*, p. 62.

till the Statute is supplemented with a definition of this crime and conditions are specified on which the Court will be competent to judge the perpetrators of these crimes. In practice – pursuant to art. 123 of the Statute – it will be possible to introduce a valid definition of the crime of aggression in the year 2009 at the earliest.[85] It results from the fact that it is only then when the Secretary General will be obliged to convene a review conference. A revision of the Statute may apply in particular to the list of crimes provided in art. 5 of the Statute.

Genocide (art. 6 of the Statute) was defined as any act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Such acts include:

- killing members of the group
- causing serious bodily or mental harm to the members of the group
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- imposing measures to prevent births within the group
- forcibly transferring children of the group to another group.

Crimes against humanity (art. 7 of the Statute) were defined as acts committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack. The Statute lists 11 examples of such acts, including: murders, extermination, enslavement, torture, enforced disappearance of persons or the crime of apartheid.

War crimes (art. 8 of the Statute) were defined as grave breaches of the Geneva Conventions of 1949 (art. 8 par. 2 item a) of the Statute) and other serious violations of war laws and customs (art. 8 par. 2 item b of the Statute). The categories of these acts were described in great detail and their scope was defined very widely. It should also be emphasized that the Court also has jurisdiction over some violations committed during an armed conflict not of an international character, i.e. internal conflicts – excluding internal disturbances such as riots or isolated acts of violence (art. 8 par. 2 items c) and d) of the Statute).

During the Roman Conference it was deemed necessary to prepare a separate document containing the definitions of all crimes and detailing their constitutive elements for the purpose of interpretation and application of relevant provisions of the Statute.

The Statute (art. 13) provides for three methods to initiate exercising of the jurisdiction of the Court:

[85] In art. 123 of the Statute it is stated "Seven years after the entry into force of the Statute".

a) upon a motion filed to the Prosecutor by a State Party
b) upon a motion filed by the Security Council acting pursuant to chapter VII of the Charter of the UN.
c) when the Prosecutor has initiated an investigation, but only in terms of explanatory or operational proceedings.[86]

To be exercised, the Jurisdiction of the Court must be accepted by the state in the territory of which the crime was committed, or by the state that the perpetrator of the crime is a citizen of. Every State becoming a party of the Statute automatically accepts the jurisdiction of the Court over crimes described above. Such acceptance is not required if a case is brought before the Court by the UN Security Council (pursuant to chapter VII of the Charter).

A fundamental principle contained in the Statute is the principle of complementarity of the Court with respect to national jurisdictions (art. 1 of the Statute), which means that national courts have priority. Different relations were defined for ad hoc tribunals. The jurisdiction of the International Criminal Court may be exercised only when a state competent to exercise its own jurisdiction is not willing or able to prosecute and punish a perpetrator on its own.

The experiences of the Tribunal for the former Yugoslavia and the Tribunal for Rwanda demonstrate how important the co-operation with respective states is. Entire chapter IX regulates this co-operation. It has to be pointed out that one of the forms of co-operations is referred to in the Statute of the ICC as surrender, not extradition. The provisions of the Statute clearly oblige states to incorporate such procedures in their internal legislations that allow to realise all forms of co-operation, including the form referred to as "surrender". Even before the Statute entered into force there appeared a problem of how to interpret this term and how to determine whether the term "extradition" encompasses "surrender", or whether it is a new institution. The Party States do not share a uniform opinion on this matter. Among states that already ratified the Statute and assumed that "surrender" is not "extradition" that is defined in their constitutions are, without limitation, Italy, Spain, Finland and Austria. The Federal Republic of Germany, on the other hand, amended its constitution.[87] In the Polish doctrine a partition of views also became apparent during the ratification of

[86] J. Izydorczyk, P. Wiliński, *op. cit.*, p. 64.

[87] J. Kranz, A. Wyrozumska, *Ratyfikacja Rzymskiego Statutu Międzynarodowego Trybunału Karnego a interpretacja Konstytucji RP z 1997 roku: art. 90 – czy tylko klauzula europejska?*, (in:) "Studia Prawno-Europejskie," t. 5 (2001), p. 27.

the Statute.[88] According to professor Wyrozumska, Kranz[89] and Płachta, the meanings of these two terms should not be considered identical.

Professor Płachta emphasizes that this term was not used accidentally, as the creators of the Statute had two objectives in mind: to "loosen" the rigor of the law and extradition procedure in relation to this form of co-operation and to dramatically reduce the catalogue of grounds on which assistance can be refused. The intention was to create a new form of co-operation between the state and the International Criminal Court.[90]

A different view is expressed by professor Galicki, who believes that the essence of the institution is not determined by its name or the entity to which an individual is surrendered, but by the content of such a surrender.

Despite the fact that the Statute of the Court entered into force in the year 2002, today it is difficult to assess the real significance and effectiveness of the Court. The Court did not begin its real functioning until the year 2003 when the first panel of judges was appointed.[91] It began resolving cases in the year 2004.[92] Today its main efforts are concentrated around the African continent. Cases that are being resolved relate to violations of international law in the Democratic Republic of Congo, Uganda, the Central African Republic and Darfur (Sudan).

The incapacity of the international community and the lack of response of states to the events that took place in Yugoslavia or Rwanda explicitly prove the purposefulness and legitimacy of the Court. The events of September 11th also made the world aware of the need for closer co-operation among states to ensure security and peace. Already in the year 1999 the Parliamentary Assembly of the Council of Europe adopted a recommendation that obliged the Committee of Ministers to request that the Member States of the Council of Europe ratify the Statute "as soon as possible". The General Assembly of the UN adopted a similar resolution in 1998. Also in the year 1999 the European Parliament adopted a resolution in which it obliged the European Commission and Council to treat the ratification as

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[88] See, e.g. K. Karski, *Ratyfikacja Statutu Międzynarodowego Trybunału Karnego (Zagadnienia prawnomiędzynarodowe i konstytucyjne)*, "Państwo i Prawo", 2001, No. 1, p. 51–63 and M. Płachta, A. Wyrozumska, *Problem ratyfikacji Statutu Międzynarodowego Trybunału Karnego (Uwagi polemiczne w związku z artykułem Karola Karskiego)*, "Państwo i Prawo", 2001, No. 5, p. 87–97.

[89] J. Kranz, A. Wyrozumska, *op. cit.*, p. 28–33.

[90] M. Płachta, *(Stały) Międzynarodowy Trybunał Karny: triumf idealizmu nad polityką?*, "Palestra" 1998, No. 11–12, p. 173.

[91] J. Izydorczyk, P. Wiliński, *op. cit.*, p. 40.

[92] *ICC marks five years since entry into force of Rome Statute*, "ICC Newsletter June/July 2007", http://www.icc-cpi.int/library/about/newsletter/16/en_01.html.

an important issue in negotiations with the governments of states applying for EU membership. These arguments were considered when the ratification procedure was initiated in Poland.

What can be considered a success today is not only the mere fact of having concluded the negotiations and signed the Statute of the Court – the first permanent judicial organ – but rather the fact that the Court began real functioning. It is only left to hope that it will live up to the hopes staked on it. It is an extremely important achievement as it introduces a qualitative change in the scope of the liability of an individual under modern international law. It is worth remembering, however, that there are countries like, for example, the United States that are not parties to the Statute, which may hinder the practical functioning of the Court.[93]

Conclusion

To recapitulate it has to be emphasized that modern international law provides for the liability of an individual for violations of this law. Next to the sphere of an individual's rights and possibilities to claim these rights, it is a factor that may decide about recognizing the international legal subjectivity of an individual. This subjectivity, however, is of a secondary and limited nature. It is the state that decides how much an individual will use this subjectivity. This is demonstrated in the context of the liability of an individual by the indicated regulations in which states define material, temporal and territorial jurisdiction over acts for which an individual can be held accountable. They also define the capacity of an individual to face international organs enforcing the compliance of individuals with international law.

The previously existing and applicable regulations treated this issue only fragmentarily. The need for comprehensive regulations was detected, the effect of which is the draft penal code. It was also managed to successfully establish a permanent international tribunal competent for dealing with violations of international law committed by individuals. Liability for certain acts (defined in, e.g. the Nuremberg Principles) is accepted so commonly today that we can talk about the existence of a common norm in

[93] The United States did sign the Statute, but were not willing to ratify it. The current status of the ratification of the Court's Statute is available on the official website of the UN http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp.

this field. Thus, an individual can bear responsibility for violating not only contractual, but also common norm.

In principle, individuals were tried before national courts. The Nuremberg and Tokyo Tribunals gave rise to new solutions – international tribunals. The events that took place in Yugoslavia and Rwanda revealed that the international community was not prepared to hold perpetrators of crimes accountable. Tribunals, despite objections regarding the effectiveness of the Tribunals, judge individuals guilty of certain violations. We should hope that the established International Criminal Court will measure up to the challenges. But even today it seems legitimate to state that the ICC is a new phase in determining the international legal liability of an individual and approaching the issue of the subjectivity of an individual under international law.

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JOURNALIST'S LIABILITY FOR PERSONAL INTERESTS VIOLATION IN POLISH LAW

The subject matter of personal interests violation in mass media is most important while considering the issue of civil liability of the press. Personal interests protection as provided for in civil law is of much wider range than the one envisaged by the Constitution.[1] Personal interests are contrasted with other constitutional interests, especially the freedom of media, the right to express one's opinions freely. We can see here apparent collision of rights and interests that should be considered equal. It is justified by balancing these two rights in concrete cases as to provide appropriate evaluation of the items protected by the Constitution. The most important task of the press is passing information and shaping social attitudes towards matters that are significant for the public interest. Therefore, on the one hand, freedoms necessary to accomplish their tasks should be guaranteed and provided, on the other hand, however, they must accept the fact that due to personal interest of third parties the observation of required rules is subject to special judgment.

Generally, the basis of personal rights protection vary considerably, depending on the sphere of life they refer to. Intrusion into one's private or even intimate sphere of life should be evaluated differently than the reports about one's social or economic activity. A person participating in political and social life or entertainment industry must approve of different evaluation of their actions than those of a person avoiding public appearance. Personal interests violation may occur already in the very publication about a certain person, depending on a report type and a way of its realization. We should

[1] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [The Constitution of the Republic of Poland as of 2.04.1997], Dziennik Ustaw [Journal of Laws] No. 78, item 483). The Constitution protects personal rights of specified persons in art. 47, 51, 31 par. 1.

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pay special attention to humiliating criticism referring to professional, social or artistic activity.

What personal interests can be threatened by the press? The media most frequently violate personal interests such as dignity, privacy, confidentiality of correspondence or surname,[2] as well as creation, freedom (in its wide meaning adopted by the doctrine, that is freedom from importunate disturbance, threat, fear and anxiety, therefore, both physical and mental overpowering). One's health violation in result of psychological trauma caused by shocking publication is also possible.[3] The doctrine and jurisdiction constantly establish new kinds of personal interests protected by civil law. The importance of one's voice, perceived as personal interest, protection against unauthorized publishing (broadcasting)[4] is also emphasized. Legal persons' personal interests, such as their goodwill, company name, confidentiality of correspondence, may also be subject to violation. With reference to enterprises we can intrude on the enterprise confidentiality, make false information about them public or violate exclusive rights to their trade mark. Violation of subject rights may also include omission, concealment or revelation of a creator's surname against their will. Therefore, do we deal here with copyrights[5] or industrial property rights?[6]

Publications evoke massive social interest, they frequently reveal incompetence or failure of public authorities organs, besides, they serve a role of a controller leading to institution of criminal investigations. These publications reveal irregularities in institutional operations. What is more, they are made for the sake of social interest. No one doubts an incredible role of mass media. Freedom of speech and freedom to express one's attitudes and opi-

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[2] See: J. Sadomski, *Naruszenie dóbr osobistych przez media* [Personal Interests Violation by the Media], Warszawa 2003, p. 9.

[3] J. Kamieniecki, *Odpowiedzialność prasy za naruszenie dóbr osobistych* [Liability of the Press for Personal Interests Violation], "Państwo i Prawo" 1984, No. 11, p. 55. Court jurisdiction examined such cases of health impairment in result of a mental trauma caused by press publication acknowledging the existence of a reason-result relation between trauma triggered by tragic information and loss of health. There are also cases of, e.g., heart attacks caused by the reception of a football match. See: A. Szpunar, *Ochrona dóbr osobistych* [Personal Interests Protection], Warszawa 1979, p. 173–234 and jurisdiction referred to therein; J. Panowicz-Lipska, *Majątkowa ochrona dóbr osobistych* [Personal Interests Financial Protection], Warszawa 1975.

[4] See: J. St. Piątowski, *Ewolucja ochrony dóbr osobistych*, (in:) *Tendencje rozwoju prawa cywilnego* [Personal Interests Protection Evolution, (in:) Tendencies in Civil Law Development], ed. by E. Łętowska, Wrocław 1983, p. 35–36.

[5] Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych, Dziennik Ustaw [Journal of Laws] 2000, No. 80, item 904 with changes.

[6] Ustawa z dnia 30 czerwca 2001 r. Prawo własności przemysłowej, Dziennik Ustaw [Journal of Laws] No. 49, item 508 with changes.

nions in public are commonly treated as one of the basis of human freedoms. However, we should also pay attention to the other side of this situation. An individual attacked by the media practically has no chance for equal means of defence. We cannot talk about even approximately "equal chances" between the media (television, radio, press) and an individual. A person living in a given society depends on the state protection, most of all against abuse by institutions and authorities organs, but against abuse by the mass media as well.[7] There is a basic difference between the violation of personal interests in a place of limited range of private opinions' impact/effect (so called small public) and those exerted by mass media (massive public), which additionally are usually very well prepared. In such a case a person is confronted with a powerful organizational apparatus. What is more, it depends if they will be granted a chance of getting access to public opinion and presenting their own point of view at all. It seems that in such a situation we can talk about media privileged position. In contemporary society there is a discrepancy between the right of an individual to their personal interests protection and the right of the society to be informed in connection with the freedom of the press. This discrepancy becomes more apparent with reference to public persons' private lives. Maintenance of potential balance of interests is not always an easy task.

Personal interest violation is a factor deciding about adopting presumption of subject right violation.[8] Personal interest violation does not have to be culpable, it is sufficient to be unlawful. Unlawfulness is a circumstance of proceedings which involves illegality/contradiction with legal norms or principles of community life.[9] Non-financial liability for threat or violation of personal interests specified in art. 24 § 1 of Criminal Code is excluded if

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[7] See: B. Rüthers, *Konflikt między wolnością mediów a ochroną dóbr osobistych – doświadczenia i zasady w wykładni prawa Republiki Federalnej Niemiec*, (in:) *Kultura i prawo* [Conflict between Freedom of Media and Personal Interests Protection – Experiences and Principles in West Germany Interpretation, (in:) Culture and Law], v. 2, Wolność mediów, J. Krukowski (ed.), Towarzystwo Naukowe KUL, Lublin 2002, p. 99.

[8] This concept is negated by B. Gawlik, *Ochrona dóbr osobistych. Sens i nonsens koncepcji tzw. praw podmiotowych osobistych* [Personal Interests Protection. Sense and Nonsense of the Concept of so Called Personal Subject Rights], Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z Wynalazczości i Ochrony Własności Intelektualnej (41) 1985.

[9] K. Pietrzykowski holds an opposite opinion presenting unlawfulness in a narrow meaning as inconsistency of specified behavior with the law. K. Pietrzykowski, *Bezprawność jako przesłanka odpowiedzialności deliktowej a zasady współżycia społecznego i dobre obyczaje*, (in:) *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara* [Unlawfulness as Prerequisite of Tort Liability against Principles of Community Life and Good Morals, (in:) Civil Liability. Book of Memoirs to Commemorate Prof. Adam Szpunar], Kraków 2004, p. 179.

an offender's action is not unlawful. The principle of presumption of unlawfulness resulting from art. 24 § 1 of Criminal Code is applied here, therefore, it is a journalist who must prove the existence of circumstances justifying his or her action. Then such a presumption will be reversed and his or her liability will be excluded.[10] Moreover, we should be aware of the fact that he or she takes the risk of not proving the above. They are liable in two cases, when, for instance, the information included in their article is false but they are not able to prove it is true,[11] and when it is true but other prerequisites of permissible criticism do not exist.

The examination/revision of the circumstances excluding unlawfulness (countertypes) has been analyzed the most on the basis of criminal law, which is applied by civil law.[12] The catalogue of these circumstances is of an open character and can be listed here: action within the area of public order, exercise of subject law, action within the area of justified social interest, self-defence, higher emergency state, self-help/assistance. In the situations we are interested in, that is violations committed by the press, such circumstances excluding unlawfulness will be: the journalist's right to criticize, the authorized person's consent[13] or action defending interest deserving protection. Norms included in art. 41 (the right to press criticism) and art. 14 paragraph 6 of the Press Law[14] (the right to enter the sphere of privacy) as well as art. 81 of the Copyright Law and Relating Laws[15] (considering dissemination of an image) effect the scope of mass media liability. These regulations (art. 41 of the Press Law in particular), however, have slight impact on courts decisions/jurisdiction, which, in general, results from lack of knowledge in this subject and many-year-long duplication of doctrines

[10] Exclusion of liability on the basis of lack of unlawfulness cannot include reference to lack of subjective elements of the acting person's guilt. Provisions of art. 24 § 1 Civil Code refer only to features of "unlawfulness", as opposed to art. 415 of Civil Code referring to "guilt" of a person inflicting damage. (See: P. Grzybowski, *System prawa cywilnego* [System of Civil Law], t. 1, Część ogólna, p. 302).

[11] See Resolution of 7 judges of 18 February, 2005 III CZP 53/04, Orzecznictwo Sądu Najwyższego Izba Cywilna 2005, No. 7–8, par. 114 with gloss: Z. Radwański, *Orzecznictwo Sądów Polskich 2005*, No. 9, par. 110; P. Sobolewski, *Orzecznictwo Sądów Polskich 2005*, No. 12, par. 144. SN of 7.11.2002 II CKN 1293/00.

[12] See A. Zoll, *Okoliczności wyłączające bezprawność czynu* [Circumstances Excluding Act's Unlawfulness], Warszawa 1982; A. Gubiński, *Wyłączenie bezprawności czynu* [Exclusion of Act's Unlawfulness], Warszawa 1961.

[13] In the doctrine we can find an opposite position saying that these two exclusions do not form separate countertypes: as J. Sadomski, op. cit., p. 48.

[14] Ustawa z dnia 26 stycznia 1984 r. – Prawo prasowe (Dziennik Ustaw) [Journal of Laws] No. 5, item 24 with changes), further: Press Law.

[15] Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych (uniform text: Dziennik Ustaw [Journal of Laws] 2006, No. 90, item 631).

position, when issues of press criticism were not regulated by the law. At that time a reference to out-of-legislation countertype of "justified interest" was appropriate. Thus, it is incomprehensible that doctrine and court jurisdiction "create" boundaries of press criticism referring to justified social interest[16] if it is regulated by the law.[17]

Assuming that a journalist committed public defamation of a particular person, he or she has to prove that their action was not unlawful, therefore, prerequisites of art. 41 (it applies to the press) have been fulfilled, or in case of criminal liability, they have to prove that the charges were true and the person acted in accordance with/within social interest (art. 212 and 213 of Criminal Code).

I would like to present here the solution adopted by the press law. In Polish law, art. 41 of the press law specifies that negative comments referring to scientific and artistic works, or other artistic, creative, professional or public activity, are not considered unlawful acts if they are reliable and in accordance with the law and principles of community life. Therefore, there are no grounds/bases referring to the additional circumstance, which a justified interest is. This objective should result from art. 1 of the Press Law, that is informative function of the press.

The object of criticism is a work in the meaning of copyright law as a manifestation of creative activity. Another object of criticism is professional or public activity. Each professional activity may become the object of professional criticism as long as it lacks features of privacy but provides professional consideration for third parties. Laws regulating performance of a specified profession are the fundamental basis of such activity. Other acts of professional character that are not defined by the law may be treated as public activity as long as they are not limited to, e.g., a narrow social circle, and are polite in character.[18]

Additionally, public activity is subject to negative evaluation provided it lacks features of privacy, or any other public activity which is generally accessible/available.

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[16] For application of art. 41 Press Law in press criticism, see B. Michalski, *Ochrona praw osobistych a wolność krytyki* [Personal Rights Protection and Freedom of Criticism], "Jurysta" 1996, No. 1, p. 12 and others, as well as M. Zaremba, *Granice prawa obywateli do informacji o życiu prywatnym osób prowadzących działalność publiczną* [Boundaries of Citizens Rights to Information about Private Life of Persons Conducting Public Activity], "Studia Medioznawcze" 2005, No. 1, p. 40 and other. Advocates of "justified interest" are, e.g., A. Szpunar, J. P. Piątowski, I. Dobosz, P. Dmowski, J. Wierciński, B. Kordasiewicz.

[17] Press Law of 1984 introduced the institution of press criticism included in art. 41.

[18] B. Michalski, *Ochrona praw osobistych...*, op. cit., p. 13.

Therefore, a critical opinion will be protected only if the circumstances envisaged by the Law, such as reliability of evaluations, consistence with principles of community life and the objective of an action included in art. 1 of the Press Law, will be met.

First, permissible criticism must meet objectives of art. 1 of the Press Law, that is realize the right to inform the society, openness of public life and the right to social criticism.[19] Provision of art. 1 of the Press Law is emanation of freedom of speech and informative function of the press.[20]

Second, a journalist's critical opinion must meet additional condition, it must be reliable, exact and trustworthy. Sometimes, however, if negative evaluations refer to artistic criticism, the assessment of rationality is considerably limited or excluded due to subjective and personal evaluations (e.g. the issue of beauty).[21]

The interpretation of the postulate of care guaranteeing reports' truthfulness instead of recipient manipulation seems equally difficult. The concept of reliability includes in itself journalist's honesty towards a subject he or she presents as well as true presentation of criticized elements of a work. Journalistic practice mainly involves realization of rules of particular professional care when establishing actual grounds for the subject of criticism as well as elimination of informative or evaluative manipulation and use of dishonest ways of action taken as to achieve a specified aim.

Unreliable action also means behavior that lacks objectivism and adopts generally unrecognized a priori assumptions, or subjective ones (excluding criticism in subjective-esthetic categories).[22] The doctrine emphasizes that "reliable" means the same as responsible, consistent with principles of art, honest, and not misleading, which is not synonymous to the phrase "consistent with truth".[23] Media credibility should also be identified with the re-

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[19] In the meaning of art. 54b of the Press Law, provisions of legal liability and procedure in press cases are applied appropriately to law violation connected with passing human thought by means other than the press that are designated for dissemination regardless of transmission technique, in particular non-periodical publications and other creations of print, vision and sound." This provision extends critical statements to cover any media transmissions (other than the press), such as: books publications, non-periodical publications, so called press-like, videocassettes, CD-ROMs or internet transmissions.

[20] See K. Święcka, *Polityka informacyjna organów publicznych w Polsce* [Information Policy of Public Administration Organs in Poland], Roczniki Nauk Prawnych KUL 2006, No. 1, p. 411 and other; of the same author: *Prasowe instrumenty informacyjne*, "Studia Medioznawcze" 2006, No. 1, p. 26 and other; of the same author: Press Instruments of Information: http://sm.id.uw.pl/Numery/2006_1_24swiec.pdf.

[21] B. Michalski, *Ochrona praw osobistych...*, op. cit., p. 13.

[22] Ibidem, p. 14.

[23] J. Sobczak, *Prawo prasowe*, Warszawa 2000, p. 461.

port's "truthfulness", which, however, is not equally important. Media may manipulate true information in such a way as they may lose their credibility.

Reliability, which is the basis of a journalist profession, seems difficult with reference to criticism, what is more, it is particularly dependent on the character of this evaluation. The scale of rationality spreads from extremely subjective evaluations to objective ones. It depends on the area of the subject of criticism. Our evaluation is different in case of esthetic impressions in art whereas it should by all means be more reliable in case of scientific criticism, where in concrete areas/fields separate rules are observed. That is why in scientific criticism negative evaluation arguments may refer to such factors as, e.g., value, novelty, state of knowledge, professional accuracy, research results and sources evaluation. However, in each situation evaluation should be based on true factual basis.

Third, criticism must be consistent with principles of community life (art. 5 of Civil Code).[24] Negative evaluation is deprived of contentious abuses and does not unreasonably/unjustifiably attribute a work with features it fails to possess.[25] It must be consistent with good manners. Principles of community life complete the rule of reliability as they may consider a form of criticism deprived of offensive language, of particular care while collecting and verifying data (this is also a statutory obligation – art. 12 of the Press Law), of honesty towards one's informers, and eliminating manipulation assuring better position for the critic than his of her opponent in argument.[26]

Criticism in the meaning of art. 41 of the Press Law refers to basic/fundamental personal interests. At the same time this is a circumstance excluding legal liability, which is often realized in practice. Therefore, the conclusion drawn should be the following: the scope of the circumstance should not be treated in an extensive way, instead, it should be limited to strictly specified prerequisites such as (apart from the already mentioned objective under art. 1 of the Press Law) not entering in the sphere of privacy, not using the language generally considered offensive, not manipulating information and not using false or wrong information, not violating dignity of a criticized person nor humiliating him or her.[27]

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[24] With reference to journalists, internal customs of a particular environment included in, e.g., codes of ethics or morals, or in customs adopted by a particular environment, are important.

[25] B. Michalski, *Dziennikarstwo a ograniczenia praw autorskich* [Journalism and Limitations of Copyright Laws], Łódź 1998, p. 41; the same author, *Ochrona...*, op. cit., p. 14.

[26] B. Michalski, *Ochrona...*, op. cit., p. 14.

[27] Ibidem.

Talking about criticism, there is a difference between information about facts and evaluating opinions. Defining boundaries of permissible criticism, particularly the press one, whose criteria are included in the Press Law, is of the utmost importance, unfortunately, these boundaries are not applied in court practice. They are impossible to be measured precisely because we deal here with a variety of different factors. Each kind of criticism follows its own rules. It does not mean, though, that we should not aim to establish rules of permissible press criticism and separate it from so called general criticism, whose prerequisites civil law should work out, including criminal law scientific output. However, we should not forget that as far as press criticism is concerned, such criteria are already established. They only require explanation and solution of existing problems. At the same time, we should remember that in the field of criticism the criterion of truth partially fails, e.g. with reference to artistic criticism.

It seems obvious that using false facts in order to criticize is unlawful and as such is not protected by the law regardless of the criticizing party's intention, even if this criticism aims at correctly understood social interest.

Journalist protection resulting from art. 41 of the Press Law is of an objective character. Therefore, journalist's good faith and his or her subjective belief that they act according to art. 41 of the Press Law, does not matter. This provision clearly lists the object of criticism and refers to concepts of liabilities included in art. 1 and 6 par. 1 and 12 of the Press Law, or art. 10 of the Press Law referring to journalists' professional ethics,[28] whereas a criticizing person must know legal basis of art. 41 of the Press Law. In the situation when criticism goes beyond prerequisites of art. 41 of the Press Law (e.g., it refers only to a person being criticized, it offends him or her when a journalist writes untruth), boundaries of criticism are transgressed and a journalist will not make use of protection provided for in this regulation/provision.

An interested person, that is a person whose activity or work has been criticized, has the right to defend their values. They may make use of correction and response (art. 31–33 of the Press Law) but they may also realize their rights on the basis of claims under art. 24 of Civil Code, where the legislator introduced a general presumption of unlawfulness of action violating personal interests. They may also bring a criminal case for defamation *ad personam* under art. 212 and 213 of Criminal Code. In such a case a countertype under art. 41 of the Press Law is excluded.

[28] Ibidem, p. 14.

The task of legal protection of personal interests is the protection of the victim, therefore, it is necessary to define boundaries/limits causing exclusion of liability. Personal interests remain in a sort of opposition to other constitutional interests, most of all to the freedom of opinion and the freedom of the press. This conflicting relation justifies balancing interests of two parties.

We can venture a statement that possibly the furthest protection of strictly private life of citizens and their family secrets, as well as limitation of possibilities of entering this sphere to cover only incidents/cases when it really becomes necessary, is in public interest.[29] Circumstances of private and family life include those spheres of life into which social interest and informative function of the press do not cause the state interference. The sphere of private life makes use of special legal protection. Exceptionally reasonable/justified criticism is permissible on the basis of art. 14 par. 6 of the Press Law, blamed behavior of the criticized person in a given case goes beyond the boundaries of strictly private or family life and in consequence effects the system of social relations.[30] As we can see also with reference to private sphere the prerequisite of "justified/reasonable interest" is excluded.[31] It is possible to make the information about a particular person's life public when they themselves wish to reveal it to others as self-creationism, that is they give consent to this.[32] Pursuant to art. 14 par. 6, information referring to private life of a particular person can be published without their consent if this information is directly connected with this person's public activity.

It seems that we should concede to this part of doctrine negating absolute protection of privacy (of intimacy and sensitivity).[33]

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[29] See decision of 3 February 1925, II K 2663 1924, Zbiór Orzeczeń 1925, z. 1, par. 35.

[30] See decisions V CKN 440/00, Orzecznictwo Sądu Najwyższego Izba Cywilna 2002 No. 5, par. 68; IV CKN 925/00 Orzecznictwo Sądów Polskich 2003 No. 5, par. 60; II CKN 559/99, Orzecznictwo Sądu Najwyższego Izba Cywilna 2002, No. 6, par. 82.

[31] Opposite position B. Kordasiewicz, *Cywilnoprawna ochrona prawa do prywatności* [Legal Protection of the Right to Privacy], "Kwartalnik Prawa Prywatnego" 2000, No. 1, par. 30 and other.

[32] Comp. theory of M. Wild, according to whom boundaries of a given person's privacy are established by this person himself/herself, *Ochrona prywatności w prawie cywilnym (koncepcja sfer a prawo podmiotowe)* [Protection of Privacy in Civil Law (Concept of Spheres and Subject Law)], "Państwo i Prawo" 2001, No. 4, p. 66 and other.

[33] M. Safjan, *Refleksje wokół konstytucyjnych uwarunkowań rozwoju ochrony dóbr osobistych* [Reflections around Constitutional Conditions of Personal Interests Protection Development], "Kwartalnik Prawa Prywatnego" 2002, No. 1, p. 239.; B. Kordasiewicz, *Cywilnoprawna ochrona...*, op. cit., p. 32. Opposite position: P. Sut, *Czy sfera intymności jest dobrem osobistym chronionym w prawie polskim* [Is the Sphere of Intimacy a Personal Interest Protected by Polish Law?], "Palestra" 1995, No. 7–8, p. 54; the same author,

According to M. Zaremba, entering a particular person's privacy should only happen in the situation of influencing the way this person carries out their public activity. It is essential just to show the reason-result relation and not the fact whether the information is of intimate or "less private" character.[34]

In the countries where there is neither such apparent basis for press criticism as art. 41 nor the right to interfere in privacy – art. 14 par. 6 of the Polish Press Law, "reasonable/justified interest" is the basis deserving public dialogue and criticism with reference to political, social or cultural activity.[35]

The freedom of the press should not be abused. We should adopt a rule of not interfering in a particular person's private life. An exception can be a situation when a person's private activity is directly connected with public duties. An example here can be professional preparation or the state of health.[36] Interfering in the sphere of privacy does not seem reasonable/justified by any public interest. Such should be the rule, which probably cannot go without exceptions, but these should be special deviations. What is more, the way of passing information very often proves that it is not only difficult to talk about social interest but about any principles of decency. Frequently, it is a pursuit of sensation or increase of viewing or reading ratings. However, it is not a problem that is a subject to legal regulations. Perhaps the information referring to love affairs of this or that president is interesting indeed, but, is it really necessary to protect righteous interest? The solution should be searched between the freedom of the press – the right to information, and respect of human dignity. It seems that it is not right to determine a strict boundary/limit. What seems right is to look for harmony

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Ochrona sfery intymności w prawie polskim – uwagi de lege lata i de lege ferenda [Protection of the Sphere of Intimacy in Polish Law. Remarks de lege lata and de lege ferenda], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1994, No. 4, p. 102 and other.

[34] M. Zaremba, op. cit., p. 52. B. Kordasiewcz and R. Stefanicki hold a slightly different position: It is not sufficient to prove that a given information was related to public activity, but it is necessary to show that it influenced shaping social opinion and that it justifies such interference in a given person's privacy. The deeper the interference, the more serious the arguments allowing the masses interest must be. Comp: B. Kordasiewicz, *Cywilnoprawna...*, op. cit., p. 33; R. Stefanicki, *Cywilnoprawna ochrona prywatności osób podejmujących działalność publiczną* [Legal Protection of Privacy of Persons Starting Public Activity], "Studia Prawnicze" 2004, No. 1, p. 27.

[35] See: Y. Karakostas, *Personality & Press*, AntN. Sakkoulas Publications, Athens 2000; idem: *Media Law*, Ant. N. Sakkoulas Publications, Athens 2003. On the subject of interests balance see: P. D. Dagtoglou, *Constitutional Law, Private Libierties*, v. A, 1991, p. 516 and other.

[36] About so called moral competence see the position held by: M. Zaremba, op. cit., p. 52 and other.

and right proportion between those spheres. Although in the Constitution itself we can see a conflict between the right to information and the right of other persons, we cannot omit art. 54 of the Constitution that guarantees the freedom of expressing opinions and collecting and disseminating information.

Regulations of various countries do not refer to reasonable/justified interest as a general circumstance justifying the press interference in personal interests violation. Justified interest appears, though, as one of the prerequisites in special provisions, most often in criminal codes (referring to press criticism and defamation[37]). Few legal regulations, such as art. 28 § 2 of the Swiss Civil Code, refer to social interest.[38] It is just the opposite when we look at other countries' jurisdiction.[39] It appears here that connecting justified interest and freedom and social mission of the press is by all means right.

In most countries (Germany, France, Switzerland, Greece and Great Britain) reasonable/justified interest may be (and is) connected with the press. This interest may be connected with any publication of facts and reviews referring to public persons' behavior and conduct. Publications referring to these persons may also include strong criticism or unpleasant remarks.[40]

The interpretation of the postulate of taking care of reasonable/justified interest seems quite difficult. We should consider here the whole of legal regulations. Social interest[41] should be identified with the state interest. On the other hand, it is undeniable that the state interest is nothing more than action in accordance with raison d'état, that is the need of binding

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[37] E.g.: § 193 of German Criminal Code, art. 367 of Greek Criminal Code (GPC).

[38] Art. 28 of Swiss Civil Code specifies that "violation is unlawful unless it is justified by the victim's consent, prevailing private or public interest or it results from the law".

[39] See, e.g.: in Greece: Athens Court of Appeal, Case 2323/1986 (1986) Elliniki Dikaiossini 695; Supreme Court, Case 854/2002, Nomos Datebase, Supreme Court, Case 1177/2002, Nomos Datebase; Piraeus Multimember First Instance Court, Case 4100/2002, Nomos Datebase. (Moreover, in the light of Greek jurisdiction justified interest may also derive from freedom and social mission of the press because they are protected by the Greek Constitution (Art. 14 of the Greek Constitution). In Germany jurisdiction of Federal Tribunal, e.g., BGH, judgment of 17.11.1992, IV ZR 344/91, NJW 1993, p. 930; judgment of 30.1.1996, VI ZR 386/96, NJW 1996, p. 1131. In Great Britain's jurisdiction, e.g., Francome v Mirror Group Newspapers Ltd (1984) 1 WLR 892; Theakson v MGM Ltd (2002) EWHC 137. On this subject see: M. Tughendhat, I. Christie: *The law of privacy and the media*, Oxford University Press 2002, p. 364 and other.

[40] See Court of Appeal of Dodoni, Case 98/2002, Nomos Database. See: establishment and expiration of unlawful act Karakostas, *Personality & Press...*, p. 51–76; Georghiades, *General Principles of Civil Law*, p. 129. See M. Tughendhat, I. Christie, *The law of privacy and the media*, Oxford University Press, New York 2000, p. 365.

[41] Comp. art. 7 of the Kodeks Postępowania Administracyjnego, Ustawa z 14 czerwca 1960. Uniform text Dziennik Ustaw [Journal of Laws] 2000, No. 98, item 1071.

regulation of social, economic or cultural relations strengthened by the nation's interest.[42] In case of press publications this interest is realized by reporting information about important phenomena and events from the sphere of public life, through which the principle of public life openness and social control and criticism is realized (art. 1 of the Press Law). This objective of the press in connected with the right of the society to receive such information and which can only be realized through information and criticism aiming at true presentation of phenomena.[43]

Balancing between civil rights to personality and the rights to freedom of the press lead us to the conclusion that interest is most of all justified only when it is directly connected with public persons' public and social activity. This activity should be known also because of the constitutional principle of their public life's openness.[44]

Dissemination of certain information should also serve the objective of social interest protection. Other considerations, such as pursuit of sick sensation or financial profit, etc., do not allow reference to such type of activity even though there might be an external appearance of this defence.[45] It happens that the press take up action in their own interest and not in the interest of other persons.

In case of personal interests violation, on the one hand, and the press reasonable/justified interest, on the other hand, we should balance those two rights. In such a case we should start from personal rights, which exclude any violation thereof by third parties. In case of violation it is examined whether a person committing violation is entitled to interfere. Such right is guaranteed by the legislation (e.g. self-defence or the authorized person's consent) and results in expiration of unlawful character of violation. If the reason for third parties' interference is one of those exhaustively listed in the Act and which justifies such interference, the balance of rights takes place in a self-contained way in the law itself. This is the way in Polish law where the provision of art. 41 of the Press Law includes clear prerequisites of press

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[42] J. Pruszyński, *Odpowiedzialność – fundamentem praworządności (Marcina Jełowickiego koncepcja odpowiedzialności politycznej i jej aktualność*, (in:) *Jakość administracji publicznej. Międzynarodowa konferencja naukowa. Cedzyna k. Kielc, 24–26, wrzesień 2004)* [Liability – the Basis of Law and Order (Marcin Jełowicki's concept of political liability and its topicality, (in:) Quality of Public Administration (International Scientific Conference 24–26 September 2004], Rzeszów 2004, p. 341.

[43] Judgments of Supreme Court of 14 May 2003, I CKN 463/01, Orzecznictwo Sądów Polskich 2004, no. 2, par. 22; see also the judgment of Supreme Court of 5 March 2002, I CKN 535/00, not published.

[44] See: K. Święcka, *Polityka informacyjna...*, op. cit., p. 411 and other; P. D.Dagtoglou: *Constitutional Law*, *Private Liberties*, v. A, 1991. p. 517.

[45] See: judgment of 28 March 1934, 3K 178/34, Zbiór Orzeczeń 1934, z. 10, par. 211.

criticism, art. 14 par. 6 of the Press Law, which enables publication from the sphere of private life, or art. 81 of copyright law, which include conditions allowing dissemination of a particular person's image. Apart from this right guaranteed by the legislation there can also be the case of "reasonable/justified interest" through which the constitutional principle of the freedom of the press is expressed. Then, the reason for interfering in other person's interests is relative. In such a situation a judge must balance these rights, of course not having unlimited competence in this respect.[46] In the widest possible scope a judge must look for criteria, if not general, then at least such that can be applied in the cases he or she is to judge. A judge must take violation (a nature of violated right, violation burden and the effect it may have upon the sufferer) as well as justifying motives quoted by the person who committed violation (their burden and the effect of their exclusion) into consideration.

Talking about preservation of balance between the freedom of the press and personal interests protection, we should consider the fact that in cases in which the freedom of the press allows the press interference in those interests, we should always remember not to violate the very essence of these interests, which would result in humiliation or degradation of human dignity, which is an offence to human values. The point of reference is, therefore, to respect the value of human existence.[47] Strict protection of the value of human existence is the protection guaranteed by given countries' constitutions.

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[46] Y. Karakostas, *Media Law*, Ant. N Sakkoulas Publication, Athens 2003, p. 251.

[47] See: P. D. Dagtoglou, op. cit., p. 517–518; W. Łączkowski, *Wolność słowa w mediach a poszanowanie godności człowieka w prawie polskim* [Freedom of Speech in Media and Respect of Human Dignity in Polish Law], (in:) "Kultura i prawo" ["Culture and Law"], v. 2, Wolność mediów, J. Krukowski (ed.), Towarzystwo Naukowe KUL, Lublin 2002, p. 115 and other.

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THE PRINCIPLE OF RESPONSIBILITY IN RELATION TO BIOTECHNOLOGICAL PROGRESS IN MEDICINE (FUNDAMENTAL MORAL AND LEGAL ISSUES)

Introduction

Every science aspires to have potential applications. Scientists work to achieve concrete goals. In doing this, they have a power greater than that of politicians, who are held to account by society.[1] This is why the issue of scientists' responsibility for the world's future assumes such great importance. In the field of medicine, in the light of new biotechnological capabilities, we are today faced with a quite explicit question: should everything that is technically possible be permitted by law? Who, and on what principles, is to take responsibility for the activity of experimenters, which may have an impact on the condition of future generations? Difficulties in giving an unambiguous answer result partly from the lack of doctrinal consensus. Biotechnological progress has exposed gaps in the existing system of supervision over biomedical research.[2]

The risk of doing harm is an inseparable feature of any kind of medical experiment. Resulting from it is the issue of a doctor's personal responsibility. Today this issue arises most commonly in relation to liability under civil law, as is shown by the growing number of cases where patients pursue claims on the grounds of improper medical treatment. Numerous controversies arise in areas such as reproduction and in relation to the occurrence of prenatal and preconception injuries.

[1] T. Kielanowski, *Odpowiedzialność uczonych. Dylemat współczesnej nauki*, Warszawa 1970, p. 41–46.

[2] F. Fukuyama, *Koniec człowieka*, Kraków 2004, p. 267.

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Moreover, there arises a question – a hypothetical one for the moment – concerning the responsibility of "artificially manipulated" individuals. Soon it may be asked who is to take responsibility for a person who has undergone some radical kind of transplant (e.g. of the head). Difficulties in resolving the issue of responsibility also arise out of the development of neuropharmacology and new possibilities of controlling human behaviour. Doubts arise in relation to issues of responsibility for children born as a result of artificial reproduction. Matters of filiation become more complex as different varieties of parenthood come into being.[3] It is also not clear who is to be liable for the potential actions of a cloned human being: can a clone, being an artificial creation, be ascribed any kind of responsibility? Such hypothetical problems are numerous, and with time, as biotechnological progress is made in the field of medicine, their number will grow even higher.

The aim of this paper is to draw attention to the fundamental issues relating to the question of responsibility, arising in the areas of contemporary bioethics, biojurisprudence and biolaw. The author is aware of the extensive simplifications being made when analysing these issues. The subject requires deeper exploration, and this work can serve merely as a contribution to the discussion.

I

There is an increasingly general awareness today that the progress of science cannot be checked, and the rate of its development cannot be slowed down without repercussions. T. Kielanowski points out that technical progress is linked with a certain human drama, one which may change into a tragedy: "(...) humanity has become a slave of civilization and ever-advancing science, in that it cannot live without it, but at the same time does not control it and is afraid of it (...)".[4] How can we prevent this? We can do so only when people control technology, instead of technology controlling people. And although the foregoing statement sounds like a truism, in order for this to happen in reality people must have clearly defined goals – values for which we could "harness" technical forces.[5] There is not, however, any developed consensus in this matter. Modern technology has given rise to

[3] Legal, biological, genetic, psychological, sociological, etc.

[4] T. Kielanowski, op. cit., p. 115.

[5] R. Tokarczyk, *Prawa narodzin, życia i śmierci*, Kraków 2000, p. 294.

activities which are so new that they cannot be embraced within systems of classical ethics.[6] It can, nonetheless, be noted that ethical and legal viewpoints relating to technical progress are moving – under the conditions of European civilization – in the direction of utilitarian maximization of the good and minimization of the harm caused by the technologies.[7]

In the development of science and civilization today, a huge role is played by biotechnology, closely related to the medical sciences. It should be pointed out that medicine, as a science, has certain special features. It is based on empiricism, observation, experiment and induction, and not on speculation or deductive reasoning. M. Safjan notes that medicine has encroached into new areas "where it is increasingly difficult to make distinctions between standard methods and innovative ones, or those which are pure research experiments. The speed at which modern medical 'technologies' develop and spread is an inseparable feature of contemporary civilization (...)."[8]

The concept of *biotechnology* is most often explained as the doing of good and rendering of services with the use of biological methods.[9] Biotechnology is undoubtedly one of the most promising fields of industry in the 21st century, having an impact on the chief areas of human life and activity. Over recent years it has been developing exceedingly quickly. And although the resulting benefits (e.g. economic and health advantages) can be belittled, it must be remembered that biotechnology is creating new, previously unknown problems of a philosophical, moral and legal nature: "The progress of the biological sciences and the development of biotechnology not only extend the scope of known possibilities of action, but enable a new type of interference. What was previously 'given' as organic nature and could at most be 'bred' can today be the subject of deliberately directed intervention. (...) The distinction 'to be a body' and 'to have a body' becomes astonishingly topical; there is a blurring of the boundary between the nature we 'are' and the organic equipment which we 'give' ourselves. The subjective maker then finds itself in a new situation with respect to itself: it can interfere in the organic substrate of its own subjectivity."[10] It therefore

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[6] H. Jonas, *Zasada odpowiedzialności*, Kraków 1996, p. 34.

[7] R. Tokarczyk, op. cit., p. 296.

[8] M. Safjan, *Prawo i medycyna. Ochrona praw jednostki a dylematy współczesnej medycyny*, Warszawa 1998, p. 166.

[9] T. Twardowski, A. Michalska, *Dylematy współczesnej biotechnologii z perspektywy biotechnologa i prawnika*, Toruń 2000, p. 14–15.

[10] J. Habermas, *Przyszłość natury ludzkiej. Czy zmierzamy do eugeniki liberalnej?*, Warszawa 2003, p. 19.

becomes realistically possible that biological progress may be used as a tool of dictatorial authority of human being over human being.[11]

The incursion of technology into human birth, life and death may endanger basic goods such as human life, autonomy and dignity, the inviolability of the individual's psychophysical integrity, freedom of belief and custom, etc. There are threats to various spheres of human existence, but primarily intimacy and privacy.

The progress of biotechnology in the medical field has led to the development of *bioethics*. Based on the methodologies of many sciences, bioethics describes, analyses and evaluates – in the light of moral values – the effects of artificial interference in the natural processes of birth, life and death, connected with biogenesis, biotherapy and thanatology.[12]

In bioethics, two extremes can be observed as regards the approach taken to issues of biotechnological progress in medicine. The liberal approach is based on relativism of values and emphasizes the principles of freedom of the individual and freedom of scientific activity. Meanwhile the absolutist viewpoint, closely linked to Christian personalism, denies the legitimacy of medical experimentation on the grounds of the inviolability of the divinely ordained order of nature.

In practice, attitudes to biotechnology depend to a large degree on one's belief system. Religious persons express far-reaching scepticism. They distance themselves from, or simply reject, biotechnological capabilities such as human cloning or all embryonic stem cell research.[13] Those with secular beliefs recognize the benefits of the new biotechnological techniques and are tolerant towards them. It seems, though, that attitudes to biotechnology are influenced – to a greater extent than by belief systems or real medical knowledge – by habits of thought, popular opinions, myths and irrational

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[11] B. Suchodolski, *Labirynty współczesności. Niewola i wolność człowieka*, Warszawa 1975, p. 19–20.

[12] Biogenesis is connected with the biological beginnings of human life (e.g. animation of the human embryo, abortion, prenatal experiments: medical assistance to reproduction in the form of *in vitro* fertilization, prenatal diagnosis, foetal therapy, etc.). Biotherapy involves issues arising in the course of a person's life, connected with the treatment of that person using biotechnological means. Thanatology concerns issues related to human death (e.g. artificial life support, euthanasia, treatment of human remains, etc.). Certain significant issues, nonetheless, cross the borders of this classification (e.g. cloning, related to human biogenesis, but also concerning the continuation of human life; a similar situation applies in the case of cryonics, transplantation, and certain experiments involving human stem cells).

[13] A comprehensive legal analysis of issues of the cloning of humans and embryonic stem cells in Polish jurisprudence can be found (in:) J. Kapelańska, *Klonowanie człowieka i embrionalne komórki macierzyste w świetle prawa międzynarodowego i porównawczego*, Toruń 2006.

fears. Such fears are augmented especially by the cases known from history where science has been abused and its achievements put to use against humanity.

A practical consequence of the appearance of bioethics is the shaping of what is called biojurisprudence. According to R. Tokarczyk – the originator of the concept – biojurisprudence "is one of the newest fields of jurisprudence, coming into being under the influence of the use of biological discoveries, with the help of technology, by medicine, for the purpose of interference in the natural processes of life, particularly human life." [14]

A result of the progress of biotechnology in the field of medicine, and also of the development of bioethics and biojurisprudence, is the appearance of a new field of law, called biolaw, which according to R. Tokarczyk is to define the scope "(...) of the legal use of biological (biotechnological) discoveries, through technology, by medicine, evaluated by bioethics, considered by biojurisprudence (...)." [15]

Appropriate legal regulations would combat potential threats, regulate new phenomena, and change and adapt existing laws to meet modern requirements. This is the minimum role of biolaw. It should lay down legal grounds for medical interference and experiments and set limits on them, in order that the zeal of doctors and biologists to carry out research should not lead to infringement of the rights of the individual.

As M. Safjan notes, there is at present a lack of clarity as to the direction which future legal measures are to take, "for it depends on the acceptance of specific axiological assumptions, accepted philosophical ideas and the resulting hierarchy of values." [16]

Of particular importance in Polish bioethics is the view – established under Catholic influence – of a person as a creation constituting a substantial unity of body and soul, who is shaped in the image of God, and who should not encroach into areas reserved for the Creator. There is a dominant pessimistic attitude to biotechnological progress in the field of medicine, reflected in the arguments, advanced on the basis of doctrine, referring to the "slippery slope", "playing God", etc. According to B. Chyrowicz, these constitute an appeal for sensible judgement. [17] Biotechnological pessimism has an influence on biojurisprudence and on Poland's developing biolaw.

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[14] R. Tokarczyk, op. cit., p. 29.

[15] Ibidem, p. 33.

[16] M. Safjan, op. cit., Warszawa 1998, p. 10.

[17] B. Chyrowicz, *Bioetyka i ryzyko. Argument „równi pochyłej" w dyskusji wokół osiągnięć współczesnej genetyki*, Lublin 2002, p. 336.

A situation at the opposite end of the scale exists in most European countries, which are characterized by marked biotechnological optimism. Under the influence of Cartesian thought and the consequent dualist conception of man, there appear various conceptions of the philosophy of the individual, giving grounds for the development of the natural sciences.[18] The body of a human begins to be treated on the pattern of a machine, whose worn-out or broken parts ought to be replaced by new ones.[19] This provides a doctrinal impulse to the development of biotechnology in the field of medicine. Faith in medicine begins to take the place of ethics. More and more often it is acknowledged that only doctors should have a voice in medicine-related matters, and that it is they who are to a large degree responsible for the consequences of biotechnological progress in that sphere.[20] The acceptance that a living body is nothing more than a machine in motion leads to the thesis that no mechanical (physical) transformations of the body violate the person as such. Hence, action which leads to the improvement or prolongation of human life cannot be immoral. The discovery of the complete human genome strengthens the position of the proponents of genetic determinism. There is a growth in the importance of the utilitarian approach and of the deontological theories of rights based on it.[21] Ever more popular in practice are bioethical theories, focusing on the criterion of 'quality of life", which assert that human life – when a person is seriously handicapped – has no value. Its destruction should not be regarded as evil.[22] Besides, it is the individual who is responsible for his own life, and thus no-one can hold back scientists (doctors) from making efforts to improve nature, provided that there is no proof that there is any real danger associated with this.[23] A consequence of biotechnological optimism

[18] For information on the influence of Cartesian thought on contemporary philosophy, see e.g. J. Kopania, *Etyczny wymiar cielesności*, Kraków 2002, or *Boski sen o stworzeniu świata. Szkice filozoficzno-teologiczne*, Białystok 2003.

[19] J. O. de La Mettrie, *Człowiek maszyna*, Warszawa 1984, p. 22.

[20] J. O. de La Mettrie writes, for example: "Only doctors have examined and explained the labyrinth which is man. Only they uncovered the springs concealed under the cover which hides so many miracles from our sight. Only they, calmly observing our soul, saw it a thousand-fold in misery and in glory, neither despising it in the first and nor admiring it in the second. I repeat, it is only doctors who can speak in this matter." See J. O. de La Mettrie, op. cit., p. 73–74.

[21] A special position among contemporary deontological concepts which permit efforts to "improve on God" is held by the theory of R. Dworkin, who states that human life ought to be successful first and foremost; thus any efforts undertaken in order to improve on nature are justified.

[22] This view is taken, for example, by P. Singer; see: P. Singer, *O życiu i śmierci. Upadek etyki tradycyjnej*, Warszawa 1997, p. 41 et seq.

[23] J. Habermas, op. cit., p. 35 et seq.

is the legalization of various kinds of medical experiments. Recently there has been great controversy concerning the legality in the UK of creating hybrid embryos, obtained by combining human DNA with the female cells of animals.[24]

Biotechnological progress in the field of medicine is closely linked to the issue of responsibility. Of particular importance is the responsibility of scientists for the future of humankind, and the personal responsibility of doctors in the case of failure of medical experiments.

II

According to encyclopaedia definitions, "responsibility" means the taking on oneself of the effects of one's own actions. However, only in the 20th century did it become a strictly philosophical concept, without which there can be no attempt to give an ontological description of human existence. The problem of responsibility is becoming a part of philosophical anthropology, of the ontology of human existence: "to be a human being" means "to be responsible".

According to Kierkegaard, responsibility is based on a "self-obligating bond" joining a man to the world. It is a part of the existential equipment of a human being. It is implied by a person's relationship with the world, with others and with himself.[25]

L. Kołakowski claims that without responsibility we cannot be moral subjects, or indeed subjects at all.[26]

R. Ingarden points out that the phenomenon of responsibility focuses around four situations: 1) someone incurs liability for something; 2) someone takes responsibility for something; 3) someone is called to account for something; 4) someone acts responsibly.[27]

For a long time doctrine was dominated by the so-called negative approach to responsibility, defining it on the basis of evil committed, for which a moral or legal punishment ought to be suffered. Today a positive approach

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[24] Scientists believe that this may speed up research into the incurable Alzheimer's and Parkinson's diseases. Hybrid embryos, produced by combining an animal ovum cell with human genetic material, taken from the skin or a sperm, for example, could be used to obtain stem cells; see K. Świerczyńska, A. Grabarczyk, *Eksperyment podzielił świat*, Dziennik 7 Sept. 2007, p. 8–9.

[25] S. Kierkegaard, *Albo-albo*, vol. II, Warszawa 1976, p. 113.

[26] L. Kołakowski, *Moje słuszne poglądy na wszystko*, Kraków 1999, p. 203 et seq.

[27] R. Ingarden, *Książeczka o człowieku*, Kraków 2003, p. 75.

is increasingly common, which makes it possible to show the power of responsibility: "which looks into the future and shows a person the good which is dependent on him. The growing feeling of responsibility here is not of the nature of a feeling of guilt, but is a help-giving feeling of one's own opinion, dignity and significance." [28] In this regard the responsibility of scientists for their work takes on a special significance. This type of responsibility would seem at the present time to be moving ahead of all others. After all, the future of the world is in the balance.

Reference to the freedom and competence of specialists has ever-increasing significance. A scientist's responsibility is a relation between the holder of responsibility – the scientist (a doctor, for example) – and other parties (connected with him through the subject of the responsibility) such as the authorities, society, a nation, humanity. [29] It has been noted that "almost all responsibility for the course and effects of development of research and therapeutic techniques rests within the medical world itself, which cannot cede much of this responsibility to the legislature, to which by the nature of things it is obliged to recommend decisions." [30] For this reason it is concluded more and more frequently that "the only honest and rational approach for the medical world to take is one of intellectual authority and moral principle." [31] An example of this type of argument can be found in the *Declaration in Defence of Cloning and the Independence of Scientific Research*, published in 1997 by a group of representatives of various natural and philosophical sciences. [32] According to this declaration, a decision on the permissibility of experimental actions should be taken by the scientific bodies which are qualified to pronounce on issues involving the latest medical techniques. This does not mean that axiology is neglected completely. There is a place here for account to be taken of absolutely fundamental values, developed within European civilization, common to democratic societies. Attention is also drawn to the importance of the conscience, not only the technical competence, of experts.

It would appear that the principle of scientific freedom ought to be treated as a priority. Scientists have already proved to the world that they can work effectively only in conditions of full and uninhibited freedom to

[28] J. Filek, *Filozofia odpowiedzialności XX w.*, Kraków 2003, p. 12.

[29] R. Tokarczyk, op. cit., p. 263.

[30] J. Hartman, *Klonowanie człowieka jako wyzwanie*, Medycyna Wieku Rozwojowego 1999, No. 3 (Supplement 1), p. 30.

[31] Ibidem, p. 31.

[32] *Medycyna Wieku Rozwojowego* 1999, No. 3 (Supplement 1), p. 229–231.

carry out research: "Nothing, no dogma, no inviolable truths, can inhibit their freedom to draw conclusions from their observations or experiments." [33] Unlimited freedom would, nonetheless, have to be secured by an absence of responsibility for the possible consequences of abuses of scientist's discoveries. For this reason it is necessary to make a legal demarcation of its boundaries. Decisions concerning the development of science should be guided by reason. The principle of scientific research planning and the principle of scientists' responsibility for the subject matter and consequences of their experiments in no way infringe scientific freedom. This freedom involves the right to freely propagate the content and results of one's own research, the right to comment on scientific accomplishments according to one's own beliefs and conscience, and the right to put forward hypotheses and assert the need for new research. The limit of scientific freedom is thus set by the inviolability of the public interest of humankind. [34]

In considering the principle of responsibility in conditions of biotechnological progress, we cannot overlook the thoughts of the contemporary philosopher H. Jonas, who proposes that Kant's categorical imperative be replaced by a rule which is appropriate to a new type of human activity. It might take the following form: "Act only in such a way that the effects of your actions can be reconciled with the continued existence of authentic human life." [35] This implies that we are permitted to risk our own life, but we may not risk the life of humanity. Novel types of activity require an appropriate ethics of prediction and responsibility, which will be just as new as the potential situations with which it must deal. Seeing that man himself has been "(...) placed among the objects of technical activity, Homo faber now addresses himself – the creator of all other things – and prepares to transform even himself." [36] This concerns possibilities of prolonging human life, as well as possible pharmacological behaviour control or even genetic modification enabling people to take evolution into their own hands, having set themselves the goal not merely of preserving the integrity of the species, but of modifying it by perfecting their own design. H. Jonas distinguishes formal responsibility from material responsibility. Formal responsibility is a consequence of the doing of damage by one who acts (or refrains from acting). It is reflected in civil or criminal liability. Material responsibility, on the other hand, involves settling accounts *ex post facto*. To feel responsi-

[33] T. Kielanowski, op. cit., p. 122.
[34] Ibidem, p. 136.
[35] H. Jonas, op. cit., p. 38.
[36] Ibidem, p. 50.

ble does not mean to feel guilty of some already committed evil, but means to feel capable of taking care of some good which is dependent on us and useful for us.[37] This responsibility obliges us to perform specific acts. It is this which constitutes the kernel of humanness. It may become the foundation of a new ethics – the ethics of responsibility for the future. H. Jonas states that we are living today in an axiological vacuum. What is becoming the basis for our responsibility is a "heuristics of fear", based on the fear of a possible catastrophe befalling civilization. Today this is also widespread in connection with medical interference with the human body. It often causes us to refrain from acting.

Together with the development of new technologies, there arise issues of historical responsibility – responsibility for the life and quality of life of future generations – which concern another outstanding philosopher, Z. Bauman. He notes that, with technological progress, a new domain is coming into being in which it is not possible to define clearly the borders of what is permissible, meaning that for which one can take responsibility. Care for the future of humanity is the overriding obligation in the collective actions of man in the era of technical civilization. Moral autonomy means moral responsibility – not to be taken away, but not to be renounced either.[38]

In international law, in European Union law and indeed in the laws of individual democratic countries, there is a lack of unambiguous regulation concerning this type of responsibility. It becomes apparent that there is a gap in the law as regards the monitoring of biomedical research, resulting from the lack of definition of the boundaries of the responsibility of the state or the responsibility of a specific professional group for experimental activity with respect to future generations. It is undeniable that, in the case of scientific experiments (research), the risk associated with the occurrence of accidental and inevitable damage is borne by the whole of society, which benefits from the development of medical knowledge.

III

Alongside the responsibility of scientists, another important role is played by personal responsibility. Some believe that a liberal civilization destroys the very idea of such responsibility. In contemporary global societies there is a noticeable tendency towards a gradual abandonment of the

[37] J. Filek, op. cit., p. 235.

[38] Z. Bauman, *Dwa szkice o moralności ponowoczesnej*, Warszawa 1994, p. 75, 267.

idea of a moral responsibility to be taken by individuals for their choices. Responsibility for individual actions is increasingly frequently offloaded onto the state.[39]

It is natural that the benefits in the case of therapeutic procedures are felt in general by the patients themselves, and it is they who should also bear the potential risk. Every free human being is thus burdened by personal responsibility for his or her fate. This applies also to situations which result from biotechnological progress. In agreeing to take part in a medical experiment, an individual must be aware of its consequences. Autonomy of will is fundamental.

In connection with damage resulting from medical experiments, there arises the question of the personal responsibility of the doctors themselves. It must be borne in mind that their work is concerned with the highest values: human life, health, dignity, etc. Therefore the responsibility of a doctor ought to be based on objective assessments. However, discussions on this topic are dominated by emotions and subjective opinions, particularly those of the patients and their families.

Most generally, a doctor's responsibility results from the particular type of relationship existing between doctor and patient. It relates to his undertaking various actions in the course of medical experiments, which after all are not guaranteed to succeed. They may result in harm in the form of damage to health or even loss of life, or at least a state where there is immediate danger of such consequences.

Dominant today is the principle of individualization and personalization of responsibility. The actions of a doctor are evaluated from the point of view of his or her consciousness, i.e. the awareness of adverse effects. A doctor as a responsible individual must be free in his intentions and decisions and in their realization. Thus any duress excludes the doctor's responsibility. For it to be possible to speak of responsibility, there must be a causal link between two facts, of which one became the cause of the fact following after it as its effect.

A doctor may incur responsibility of different types. Of great importance is moral responsibility. Moral norms are written down in codes of medical ethics, which means that representatives of the medical professions are bound not only by the rules of individual morality, but also by the principles of medical deontology. A particularly significant type of responsibility for a doctor, however, is legal responsibility, regarded as a consequence of

[39] L. Kołakowski, op. cit., p. 203 et seq.

a violation of a legal standard. Professional (disciplinary) liability is extremely important also.

It should be noted that doctors' legal responsibility is most often reflected in practice as liability in civil law. In discussions of civil liability attention is drawn to the fact that risk of damage is an inevitable feature of any experiment. It is thus possible to talk of a greater or smaller probability of such damage. A legally conducted experiment generally gives no ground to exact such liability, as it is devoid of features of illegality. As a rule, civil liability is made dependent on fault.[40] The principal condition is that there should have been an error of medical practice, usually regarded as meaning action not in accordance with generally recognized principles of medical science.[41] Increasingly popular today is civil liability arising from reproductive issues. This concerns firstly *prenatal injuries*, relating to liability for damage done to a child who has been conceived but not yet born.[42] Civil liability of a doctor may also relate to events taking place prior to a child's conception, causing damage to the body or to health, if they were the fault of medical staff (*preconception injuries*).[43] Issues of civil liability are also arising increasingly often in relation to the conception (birth) of an unplanned child (*wrongful conception*), birth of an unwanted handicapped child (*wrongful birth*) or a child who "ought not to have been born" (*wrongful life*).[44]

The basis for criminal liability in all modern systems of so-called continental law includes the meeting of all statutorily defined conditions for a prohibited act. The consequence of a medical experiment may be damage to the life and health of persons affected by the experimenter's actions. Current laws of individual European Union countries lay down rules on a doctor's criminal liability for failure to provide medical treatment, and for unintentional offences against life and health. Rules are also laid down on criminal liability relating to non-therapeutic medical actions, such as transplantation, abortion, cosmetic procedures, castration, sterilization,

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[40] M. Safjan, op. cit., p. 199–200.

[41] Several theoretical types of error are distinguished, such as diagnostic error, therapeutic error, prognostic error, error of adjudication and technical error; see M. Filar, *Odpowiedzialność lekarzy i zakładów opieki zdrowotnej*, Warszawa 2004, p. 85; M. Nesterowicz, *Prawo medyczne*, Toruń 2005, p. 156.

[42] M. Nesterowicz, *Odpowiedzialność cywilna według common law za szkody wyrządzone nasciturusowi przed i po jego poczęciu*, Państwo i Prawo 1983, No 8.

[43] See, e.g. M. Nesterowicz, *Prawo medyczne*, Toruń 2001, p. 175; M. Safjan, *Prawo wobec ingerencji w naturę ludzkiej prokreacji*, Warszawa 1990, p. 174 et seq.

[44] See T. Justyński, *Poczęcie i urodzenie się dziecka jako źródło odpowiedzialności cywilnej*, Kraków 2003.

sex-change operations, cloning, etc. The law lays down specific consequences in case of breach of the requirement for consent to be given by the patient. It also defines criminal actions in the medical sphere such as euthanasia and assisting suicide.[45]

Summary

Along with biotechnological progress in the field of medicine, there arise previously unknown moral and legal problems. The development of bioethics is shaping the new fields of biojurisprudence and biolaw. Gaps are coming to light in systems of legal regulation in the area of biotechnology, particularly as concerns the scope of legal interference in the spheres of human birth, life and death. There arise various questions relating to the responsibility of doctors, which require legal regulation. It would appear particularly important today to lay down legal regulations on the responsibility of scientists for the future of humankind. However, the issue of doctors' personal responsibility for failure of medical experiments cannot be belittled. Poland lacks specific laws to regulate these issues.

[45] See M. Filar, *Lekarskie prawo karne*, Kraków 2000.

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