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Some Aspects of Interpretation of Private Law

Edited by PIOTR NICZYPORUK
PIOTR KOŁODKO

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Piotr Niczyporuk and Piotr Kołodko

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INTRODUCTION

One of the famous Roman jurist – Ulpian, whose opinion is quoted in the first book of the Digest of Justinain, had told abut private law that *privatum quod ad singulorum utilitatem* (D. 1.1.1.2). It is also worth remembering that the ancient Romans thought that *ius civile vigilantibus scriptum est* (D. 42.8.24). There is no point in questioning that way of thinking, but nowadays it is necessary to remain that any kind of law requires interpretation. The article which are collected in this volume of the Studies in Logic, Grammar and Rethoric reflect a variety of private law, in particular the way of the interpretation of the private law.

In the first text of the volume, Teresa Mróz examines the fundamental rights of the customer, in terms of political and legal changes, which took place in Poland in the 80s and 90s of the past century. The author also refers to the European law in order to analyze the issue in broader sense.

Subsequently, the text written by Agnieszka Malarewicz-Jakubów focuses on the interpretation of declaration of will on the grounds of art. 65 of Polish Civil Code. The author, refers to the achievements of the doctrine, law cases, and carefully examines the interpretation of the regulations.

Joanna Sieńczyło-Chlabicz and Zofia Zawadzka emphasize a very interesting problem of limitation of the right to privacy of public office holders in the light of the principle of proportionality, which fits into a broadly defined private law. In order to investigate the subject, authors analyzed both the doctrine and the jurisdiction of the Constitutional Tribunal of the Republic of Poland.

In the next article, Katarzyna Bagan-Kurluta is outlining the problem of qualifications on the basis of private international law by comparing Polish and English law. The author uses the achievements of the doctrine and also invokes on British regulations in accordance to discussed subject.

Małgorzata A. Dziemianowicz is examining the issue of private law by focusing on the adverse conditions of divorce by analyzing the Polish juris-

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diction of this area. Before discussing the problem, the author presents the changes which were made in the Polish matrimonial law during the last two centuries.

The area of interest of Maciej Perkowski and Ewelina Gruszewska is the public international law, therefore the authors wrote the article on the interpretation of resolutions of international agreements according to reciprocal promotion and protection of investments. The choice of the subject is very current, especially when one takes into consideration the rapidly growing international trade.

Ewa Czech and Marta Pietrzyk wrote the text which is a "link" between private and public law. It touches very interesting issue of interaction between legal norms of environmental law (included in the public law norms) and private law rules which are closely related to each other. The authors present the specific interpretations of both mentioned above types of legal norms.

The two texts which end the volume of Studies in Logic, Grammar and Rhetoric are related to the protection of personal data (Alina Miruć) and problems associated with mental disabilities (Joanna Huzarska).

Referring to the first of the authors, the article examines the issue of protection of personal data in social welfare regulations, by presenting the term – "personal data" and its perception by Polish legislation, especially in accordance to collection and processing of this data in relation to provision of social aid.

Whereas, Joanna Huzarska concentrates on amendments in Polish legislation related to the institution of direct restraint in accordance to people with mental dysfunction. The author suggests that the application of these measures interferes with the sphere of individual rights and freedoms and tries to identify the circumstances and preconditions that would allow for such a far-reaching interference with the privacy of a sick patient.

The editors hope that the variety of problems which are presented by the authors of this volume Studies in Logic Grammar and Rhetoric will provoke discussion and give incentives for careful consideration all the problems included in the volume what would encourage others to further reading.

VERSITA

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 32 (45) 2013

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ON LEGAL INTERPRETATION OF BASIC CONSUMER RIGHTS

Abstract. The liability of an entrepreneur towards a consumer is the specific kind of contractual responsibility. The typical feature of this regime is weakness of two principles that are basic for market economy: freedom of contracts and pacta sunt servanda principle. This liability is regulated by specific acts of law. Its object is to intensify the legal protection of the consumer.

Nowadays in the Polish law, the form of legal provisions concerning protection of the consumer, is influenced by European Union law, especially consumerist directives. The Act on specific terms and conditions of consumer sale, on 27th July 2002, has huge practical significance. The basic premise of this liability is the fact of 'nonconformity of goods with the contract'. Therefore there is no need to prove any damage and other premises inseparably connected with damage liability. Moreover, it must be noticed that normally specific acts of law concerning protection of the consumer, do not entirely realize the compensatory function which is typical of general principles of contractual responsibility.

1. Introduction

The interpretation of legal provisions, which is most frequently identified with interpretation of the law, comprises an extensive area of scientific research requesting expertise in the field of the legal theory and dogmatics, ontology and hermeneutics in particular. Various classification criteria of legal provisions' interpretation are applied both to the needs of science and practice. (Morawski, 2006, p. 33 and next). Thus a large amount of different phenomena and processes that are heterogeneously cognitive in nature compose the establishment of the content of specific legal provisions.

The problem of the interpretation of consumer rights is particularly apparent in the practice of legal provisions' application, mainly due to the dynamism of social life connected with economic and system transformations that occurred in Poland after 1989. In connection with it, it is worth

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paying attention to some aspects of the interpretation of legal provisions, particularly when it regards its meaning in the sphere of the content of fundamental consumer rights, that is of a person acting as a "final subject" in the chain of goods and services exchange, the final link in the economic chain. (Łętowska, 2004, p. 45). This issue appears even more interesting due to the fact that the legislator himself reserves non-symmetry of legal regime, that is in the case of consumer regulations, he departs from the basic principle of civil law – the principle of equality of legal positions of the parties to a legal relation. It is one of the ways of special and specific legal protection of a consumer. (Łętowska, 2004).

As far as the operative interpretation of the law, i.e. performed during the law application process, is concerned, the opinion approved of in science saying that the task of the interpretation is to establish the correct or appropriate meaning of legal texts, which may be reduced to appropriate "decoding" of possibly unequivocal norms contained in these texts, is of fundamental importance. Therefore the interpretation is a sequence of thought operations (based on adequate legal knowledge, the knowledge of legal writing, and the ability to use legalese) aiming at the extraction of legal norms from valid legal provisions. The object of legal interpretation is a legal text since state bodies do not formulate ready norms of procedure but issue legal provisions.

These establishments are of very significant meaning to the analysis of the detailed issue, that is the content and legal character of consumer rights[1] enlisted in the ustawa z dnia 27 lipca 2002 r. o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie kodeksu cywilnego (Dz. U. z 2002 Nr 141, poz. 1176, z późn. zm.) – hereinafter referred to as the Act on consumer sale. (Kańska, p. 2004, as well as the literature cited therein). The notion "consumer sale" comprises, most of all, sales agreement. Moreover, provisions on consumer sale by virtue of the reference (Art. 605^1 770^1 and 627^1 of the kodeks cywilny – hereinafter referred to as Civil Code) are applied directly to supply agreements, consignment sale and respectively to a contract to perform a specified task concluded within the scope of the entrepreneurship's activity whose subject is a "consumer good". Therefore it is a specific legal separation of consumer sale because it is done not with regard to a buyer (consumer) but a seller and the object of sale.

After the above cited Act came into force, there appeared opinions in the legal literature which implied that we deal with an incomplete regulation evoking reservations as to its subject scope, the legal effects resulting from a lack of inter-temporary provisions, and the prerequisites of responsibility. (Kierzyk, 2004, p. 93; Gnela, 2012, p. 403; Puzyna, 2006, p. 109). A detailed

analysis of the Act's text allows to formulate other reservations as well.

Hitherto existing provisions on warranty and guarantee as expressed by the Civil Code (Art. 556–581) have ceased to be binding in consumer relations (apart from the exceptions envisaged by the Act). It should be emphasized here that the introduction of a new legal regulation in the scope of consumer protection was justified, most of all, by the need to implement the Directive No. 1999/44 EC of the European Parliament and Council of 25th May, 1999 (Official Journal L 171, 07/07/1999 P. 0012 – 0016) on certain aspects of the sale of consumer goods and associated guarantees. (See more on this topic in: Żuławska, 2001, p. 230; Łętowska, 2004, p. 279; Gajek, 2003, p. 206). Thus, an amendment to the regulation became a necessity irrespective of the fact whether new provisions did improve the buying consumer's protection or not. (Kierzyk, 2004, p. 91). Despite other legal regulations, the economic relation between the entrepreneur and the consumer remains unchanged. For the entrepreneur, conducting a business activity is the essence of participation in the market whereas the consumer is interested in real satisfaction of an economic need existing at a given moment. (Łętowska, 2000, p. 123). It goes without saying that market mechanisms themselves do not provide protection of consumer's economic interests, thus protective legal regulations are necessary. Poland has decided to "move out" institutions serving consumer protection outside the frames of the kodeks cywilny by passing numerous acts and provisions of a lower degree regulating this issue in a fragmentary way. Without evaluating the adopted legislative technique, it should be added that we also lack a comprehensive regulation of consumer trade. For this reason we have the Act regarding consumer sale, tourist services ustawa z dnia 29 sierpnia 1997 r. – o usługach turystycznych (Dz. U. z 2004 Nr 223, poz. 2268 j.t.), consumer credit – ustawa z dnia 12 maja 2011 r. o kredycie konsumenckim (Dz. U. z 2011 Nr 126, poz. 715) and many other regulations.

2. A legal character of liability for non-conformity with the agreement in the background of the legal construction of warranty

An opinion has appeared in the subject literature according to which, within the frames of harmonization of Polish law with the European Union law, there have been introduced new principles of the seller's responsibility for consumer goods. (Puzyna, 2006, pp. 106, 109). It seems, however, that the analysis of the above quoted Act on consumer sale does not allow to

draw such an unequivocal and far reaching conclusion. It may be assumed, on the other hand, that the responsibility for non-conformity of consumer goods with the agreement is based on the known legal construction of warranty being only partially modified. Accountability for non-conformity of consumer goods with the agreement is based not on traditionally understood defectiveness of goods but on non-conformity of consumer products (goods) with the agreement.[2]

Pursuant to the previously binding regulation, the rights occuring from the warranty for defects regarded all things. The scope of the act on special conditions of consumer sale is narrower, since the act refers solely to the sale of consumer goods which definition is contained in Art. 1 thereof. Pursuant to this provision, a consumer good is a movable thing sold to a natural person who purchases this thing for the purpose not connected with a professional or business activity. The rights guaranteed under warranty as well as the rights under non-conformity of consumer goods with the contract are inherent by virtue of the law and depend neither on the seller's knowledge nor fault. As far as the liability under warranty is concerned. (Katner, 2004, p. 129), as well as liability for non-conformity of consumer goods with the contract, one cannot assume that we deal with the liability for risk. On the other hand, it may be reasonably acknowledged that both legal constructions should be classified as the objective liability. It is not the liability for risk. Both, in the case of the liability under warranty and liability for non-conformity of consumer goods with the contract, the seller does not risk the occurrence of defects but is liable for their occurrence.

A basic prerequisite for the liability under warranty is the product's defect. According to Art. 556 § 1 of the Civil Code, a seller is liable towards a buyer if a sold good has a defect lowering its value or usefulness with regard to the purpose stipulated in the contract or resulting from the article's designation if it does not have the properties about the existence of which the seller assured the buyer, or if the object of sale was offered to the buyer in an incomplete state. As far as the liability for non-conformity of consumer goods with the contract is concerned, a central notion (a basic prerequisite) of the liability is non-conformity of a consumer good with the contract, which results from Art. 4 par. 1 and Art. 4 par. 3 *a contrario* to the Act on consumer sale. Based on Art. 4 par. 3 thereof, it may be concluded that in the case of an individual agreement of consumer goods' properties, such goods are inconsistent with the contract if they cannot be used for the purpose that such kind of products are usually used for, or when their properties do not conform to those featuring in such kind of products, or when they do not conform to expectations regarding such type

of products based on a seller's, producer's or his representative's affirmation or assurance made in public, or if they do not conform to affirmation or assurance expressed in the good's marking or advertisements. Apparently, the legislator has applied different editorial techniques. In the meaning of Art. 556 of the Civil Code, the definition of a defect is based on the indication of features (particularly functional ones) a thing must have so that it could be defined as defective. This concept has also been accepted by judicature (III CZP 48/88). According to the provisions regulating the liability under warranty, this rule of defining defects refers to each and every thing. Whereas Art. 4 of the aforementioned Act allows to expound the notion of the non-conformity with the contract using *a contrario* method solely in the case of an individual agreement of consumer goods' properties. The subject literature debates whether the concept of non-conformity of goods with the contract is narrower or wider than the concept of a defect (Puzyna, 2009, p. 109).[3] In the consumer sale's practice, we usually still deal with employing the notion of a product's defect. It should be assumed that similar to the product's defect, the content of the notion of non-conformity of consumer goods with the contract will be shaped by judicature and legal doctrine to a large extent.

Continuing the issue of principles the liability under non-conformity of consumer goods with the contract is based on, we should pay attention to the circumstances excluding the liability under warranty and under non-conformity of consumer goods with the contract. A seller is exempted from the liability under warranty if a buyer knew about the defect at the moment of the contract's conclusion, or, with regard to the things marked as to their kind and future things, at the moment the thing is offered (Art. 557 of the Civil Code). If the buyer knew about the defect, it may be assumed that we are dealing with the implied consent of the buyer for the purchase of a faulty good. If, however, the seller knew about the defect and failed to inform the buyer about it, then the seller is liable as the one who deceitfully concealed the defect from the buyer (Art. 558 § 2 of the Civil Code).

The issue of the circumstances exempting the seller from liability in the case of consumer goods is regulated in a way similar to the one described above. Pursuant to ustawa z dnia 27 lipca 2002 r. o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie kodeksu cywilnego, the seller is not held liable for non-conformity of consumer goods with the contract if the buyer knew about this non-conformity or, considering it reasonably, should have known about it. The same refers to non-conformity which resulted from the cause inherent in the material delivered by the buyer. We cannot derive the obligation to examine the object of purchase by a consumer from both

regulations, that is the Code's construction of warranty and the Consumer Law. The Act on consumer sale unequivocally obliges the seller to inform the buyer about consumer goods' properties or features (Art. 2 and 3 thereof).

From the point of view of the consumer, a favorable solution adopted in the Consumer Law seems to be the content of Art. 4 par. 1 thereof. According to this provision, the seller is liable before the buyer if at the moment the consumer good is offered, it does not conform to the contract; if the non-conformity is ascertained before the lapse of six months from the moment the product was offered, it is presumed that the non-conformity existed at the moment the product was offered. Nevertheless, it should be added that the expression "it is presumed" contained in this provision arouses serious interpretative doubts. It would be the easiest and most favorable for the consumer to accept that we are dealing here with legal presumption whose task is to strengthen the consumer's legal position and exempts him or her from the burden of proof. However, the opinions have appeared saying that the notion 'it is presumed" contained in the aforementioned provision should be understood not as a legal presumption introduced by this term but as a statutory definition of non-conformity of goods with the contract. (Gajek, 2003, p. 177). Despite internal contradictions of the provisions of Art. 4 of the Act on consumer sale (in the same issue it contains "presumptions" protecting both the consumer and the seller), discussions about the content and purpose of this provision propose to assume that it introduces legal presumptions in situations when the seller would have deserved. (Gajek, 2003, p. 177). Nevertheless, it should be added that even if the existence of the presumption is to be acknowledged, it does not cause a change of the rule upon which the liability under non-conformity of consumer goods with the contract is based on.

Moreover, it is absolutely clear that the issue of the loss of the rights by the buyer has been based on the same scheme. It results from Art. 563 § 1 of the Civile Code that the purchasing consumer loses the rights under warranty for physical defects of a product if he fails to inform the seller about the defect within a month from its detection. Whereas pursuant to Art. 9.1. of the Consumer Law, the buyer loses his rights if before the lapse of two months from the ascertainment of non-conformity of consumer goods with the contract, he fails to inform the seller about this fact.

Both the legal regulation of liability under warranty (Frąckowiak, 2004, p. 29; Koch, 2008, p. 32) as well as liability resulting from non-conformity of consumer goods with the contract contain heterogeneity of the rights the buyer is entitled to. The analysis of the literature on warranty indicates that among the rights the buyer is entitled to we should distinguish claims

and formative rights. It is an opinion absolutely prevailing in the literature and practice.[4] As far as warranty is concerned, claims should also include the demand to remove the defect, the demand to deliver the product free of defects, and the demand to lower the price. Thus, the right emergent from the law is termination of the contract. And exactly such a line of interpretation of the rights under warranty has been adopted by judicature. (Koch, 2008, p. 32). It seems that there are neither thematic nor formal impediments to use the achievement of science and judicature within this scope in the sphere of the interpretation of a legal character of the rights under non-conformity of consumer goods with the contract. What is more, this respectively regards the conditions of initiating claims as well as conditions of enforcing the right to terminate the contract.

The aforementioned circumstances characterizing the basic constructive element of both institutions, that is warranty and liability under non-conformity of consumer goods with the contract, are generally based on the same rules, creating the objective liability that is guaranteed under the law and independent of the seller's fault. What distinguishes them is, above all, their subjective and objective scope, which nevertheless, does not shatter the constructive foundations of both legal institutions. In such a situation, a cautious analogy in the interpretation of the legal regulations analyzed here and regarding implementation of consumer rights is justified.

By all means, it should be emphasized here that the kind and intensity of the use of specific consumer rights depends not only on a legal regulation but various paralegal factors too. For example, consumer goods which, as a production rule, are unrepairable or posses features of disposable products, or their repair is uneconomic, are more and more often produced. Thus a possibility of initiating a claim to bring the thing into the state conforming to the contract through its free repair is necessarily out of the question. Moreover, it would be hard not to mention the role of demand and supply for a specific product and money's purchasing power as factors influencing consumers' decision on the kind of consumer rights being implemented.

3. The issue of sequentiality of the rights in the light of the Act on consumer sale

Pursuant to Art. 8 par. 1 of the Act on consumer sale, where the consumer good is inconsistent with the agreement, the buyer may require to have the good restored to the condition stipulated by the agreement through:

- free repair, or
- a replacement with a new item unless the repair or replacement are not feasible or entail excessive expenses.

Perceiving the problem of the interpretation of excessive expenses, the legislator indicates criteria which should be helpful to settle this issue. Characteristically, the criterion which clearly refers to the consumer is placed only at the end of the statutory enumeration. Namely, pursuant to Art. 8 par. 1 of the Act, while estimating what constitutes excessive expenses, the following factors shall be taken into account: the value of the good consistent with the agreement, the degree of discovered inconsistency, as well as any inconvenience the buyer would be forced to suffer if his claim was to be satisfied by other means. One cannot resist having the impression that while formulating this provision, the legislator omitted the basic idea of the Act and its protective character.

If the buyer, for the reasons specified above, can demand neither repair nor replacement, or if the seller is not able to satisfy such a request in due time, or if the repair or replacement expose the buyer to considerable inconvenience, he has to right to:

- demand an appropriate price reduction, or
- terminate the agreement (Art. 8 par. 4).

Unfortunately, the buyer cannot terminate the contract if the inconsistency of the consumer good with the agreement is irrelevant (Art. 8 par. 4).

Taking into account the most frequently applied classification of consumer rights worked out on the basis of the previously valid legal state and Art. 10 par. 2 of the Act on consumer sale, one may assume that we deal here with three claims:

1) for a free of charge repair,
2) for a replacement with a new item,
3) for a price reduction.

Moreover, the aforementioned claims are completed by one right which is law-formative in nature, that is the right to terminate the agreement.

The statutory right to terminate the agreement is not unconditional. Adopted restrictions of contract termination are a resultant of the seller's (a professional) and consumer's interests and economic risk. Evaluating the relation between the professional and consumer in the light of the Act on consumer sale, one should include a basic motif of this Act, that is its protective character directed at the protection of the consumer as the last and weakest link in the chain of goods trade.

The literature most frequently expresses the opinion according to which the Act provides the buyer with the choice of the rights. Nevertheless, it

remains limited, in the seller's interest, through the rights' sequentiality. It is indicated that while realizing the model of consumer protection adopted by the Directive 1999/44, the Act on consumer sale stipulates that the buyer may request, in the first place, the repair or replacement of a consumer good (Art. 8 par. 1), whereas only in the second place, if specific prerequisites occur, the buyer may demand price reduction, or he may terminate the agreement (Art. 8 par. 4). Moreover, the Act restricts the choice of the right by the buyer by a possibility of raising a charge by the seller that the repair or replacement would entail excessive expenses (Art. 8 par. 1) (Pisuliński, 2004, p. 188).

Nevertheless, one may as well consider the possibilities and arguments deviating from the interpretation of the law presented above. For this purpose, first and foremost, it should be reminded that the resolutions of the Directive determine a certain minimum threshold of consumer protection. In such a case, the domestic legislator has an open way to the regulations that are more favorable than the standard adopted in the Directives. It appears that on the basis of the provisions of the Act on consumer sale, it is admissible to depart from the adopted rigorous sequentiality of consumer rights, which lies in the consumer's interest.

The sequentiality of rights results not so much from the provisions of the Act on consumer sale but from the resolutions of the Directive No. 1999/44. It seems that there are arguments for the acknowledgment that the literal interpretation of the provision of Art. 8 par. 1, sentence 1 of the Act on consumer sale does not determine the sequence of claims enforcement: "Where the consumer good is inconsistent with the agreement, the buyer may require to have the good restored to the condition stipulated by the agreement, free of charge, i.e. to have it repaired **or** replaced by a new item, unless the repair **or** replacement are not feasible or entail excessive expenses." Focusing on the process aiming at determination of the meaning of the provision of Art. 8 par. 1 of the Act on consumer sale as well as the content of the legal norm contained therein, attention should be paid to the role of a conjunction "or". It results from the reading of the above quoted sentence (crucial for the entire provision of Art. 8 par. 1) that we are dealing with two equivalent rights formulated in the configuration of excluding alternative. It is beyond the question that either right may be realized.

Referring to the classification of goods into those marked as to their generic features (substitutable, mass- or series-produced) and those individually identified (e.g. Art. 561 of the Civile Code), we may assume that on the basis of the Act on consumer sale, in the case of generically featured things the consumer can generally demand to bring the object of sale into

the state conforming to the contract through the replacement by a new item. The seller may block the consumer's right to terminate the agreement solely by delivering a new consumer good.

Moreover, the above quoted provision provides a possibility of demanding the repair of the faulty product. Nevertheless, including the aforementioned classification of things, we may assume that the repair should regard solely the thing which is individually identified. In the case of the sale of consumer goods that are individually identified, the requirement to replace the thing by a new item is impossible and the seller may report a charge of impracticability of performance. Then the consumer's right to terminate the agreement may be blocked by the seller solely by bringing the thing into the state conforming to the contract through the free of charge repair of the thing.

Despite the fact that the Act on consumer sale lacks explicit dependence of the buyer's rights on the kind of consumer goods we are dealing with – featured only generically or individually identified – there are no legal impediments to include the rule of intensified protection of consumer interests while referring to the principles adopted in the legal interpretation of the buyer's rights under the liability under warranty (Art. 561 of the Civile Code). Sharing T. Kierzyk's way of thinking presented in the considerations on the rights under warranty,[5] it seems that there are significant arguments for the interpretation of consumer rights which is more favorable to him than the line rooted in the rigorous sequentiality of the rights under non-conformity of consumer goods with the contract.

The seller cannot impose upon the consumer the repair of a consumer good that is generically featured within the liability and under non-conformity of the consumer good with the contract and this way block the consumer's possibility of using the right to terminate the agreement unless the inconsistency of the consumer good with the agreement is irrelevant (Art. 8 par. 4). The situation is different if the buyer was granted a guarantee (most frequently corresponding to the content of quality assurance of Art. 577 of the Civile Code). Then the repairs of the consumer good that is generically or individually featured are taken into account within the provided guarantee.

In practice controversies occur around the notion of irrelevant inconsistency of the consumer good with the agreement. Analyzing Art. 8 par. 4 *a contrario*, we should remember that the evaluation of the "relevance" of inconsistency of a consumer good with the agreement is very important from the point of view of the consumer right to effective termination of the agreement. Relatively rich achievements of doctrine and judicature in the

matter of settlement of the "relevance" of the product's defect as far as the liability under warrant is concerned, may be suitably used here. (Kierzyk, 2000, pp. 56–57 and the literature cited therein). According to the prevailing opinion, while evaluating the relevance, we should take into account the assessment of the product's usefulness and functionality with regard to the purpose envisaged by the contract, which is also made from the point of view of a subjective feeling of the buyer up to the limits specified by Art. 5 of the Civile Code. The "relevance" determined in such a way will allow complete realization of consumer rights with simultaneous assurance of the seller's interests. (Kierzyk, 2000, pp. 56–57 and the literature cited therein).

It seems that the proposed realization of consumer rights is not violated by Art. 8 par. 4 of the Act on consumer sale, which entails that if the buyer, due to impossibility of the repair or replacement, or excessive expenses resulting from these rights, can demand neither the repair nor replacement, or if the seller is not able to satisfy such a demand in due time, or if the repair of replacement exposed the buyer to serious inconvenience, he has the right to demand appropriate price reduction, or to terminate the agreement; whereas he cannot terminate the agreement if non-conformity of a consumer good with the contract is irrelevant. While determining an appropriate time of the repair or replacement, the type of the good and the purpose of its purchase are taken into account. The impossibility to repair, as a prerequisite to terminate the agreement, should be referred to things that are individually identified. Impossibility of the replacement provides the bases for the enforcement of the agreement's termination in the case of the sale of a thing that is generically featured. As a rule, impossibility to repair or to replace the consumer good allows the consumer to go to the second group of the rights, that is price reduction or agreement termination. The choice of the rights belongs to the consumer, nevertheless, he is statutorily limited. (Kierzyk, 2004, p. 103). The purpose of these restrictions is the protection of the seller's (a professional) interest.

Finally, there remains the issue of the realization of the right to price reduction. The literature classifies it as the second group of the rights (Kierzyk, 2004, p. 102) fortified by additional conditions which must occur so that the enforcement of this right is possible. The seller is burdened with the obligation of the repair or replacement of a consumer good "in due time". If the seller fails to do so, the consumer has the right to demand appropriate price reduction. It refers also to the situation when the repair or replacement expose the buyer to serious inconvenience. It seems that in practice this right will be used most frequently when the seller fails to perform the obligation of the repair or replacement "in due time". The buyer

may do the repair himself or use the consumer good of lowered functional or esthetical qualities. Appropriate price reduction refers both to generically featured and individually identified things. This right is not restricted with regard to the kind of a consumer good and it does not seem that there exist any reasons for a normative limitation of the possibility of using price reduction in the case of all consumer goods (either generically featured or individually identified).

Conclusion

On 1st January, 2003, ustawa z dnia 27 lipca 2002 r. – o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie Kodeksu cywilnego (Dz. U. z 2002 Nr 141, poz. 1176) came into force. It changed the position of the consumer with regard to the seller of goods and services. The introduction of this Law was justified by not merely the need dictated by market mechanisms but, first and foremost, by the need to implement the Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees. Previously binding provisions on warranty and guarantee did not harmonize with the Directive's content. It does not mean, however, that these provisions automatically and unquestionably protected the consumer's rights worse than the Directive's resolutions.

From the point of view of the consumer, a favorable solution is a statutory prolongation of special legal protection up to two years from the moment the good was offered. Nevertheless, adopting such establishment, we should remember that special consumer protection is a price-creating element. Thus, sooner or later, it will be "fixed" in the price of a consumer good.

Together with development of modern technologies and various instruments shaping the market, there are more and more mass-produced and "unrepairable" goods. Undoubtedly, this fact influences the kind of consumer rights being realized. The consumer requires the repair more and more rarely, which is also connected with more explicit shaping of the consumer market and a large availability of consumer goods.

Despite the change of the legal regulation in the sphere of consumer's legal status, there are no impediments to suitably use the achievements of science and judicature referring to the principles of realization of the rights under warranty to the liability for non-conformity of consumer goods with the contract. The need to depart from the interpretation of consumer rights leading to their rigorous sequentiality seems justified. Commonly adopted

division into things that are generically featured and individually identified may be useful here. The content of Art. 8 of the Act on consumer sale does not exclude the possibility of appropriate application of the mechanism envisaged in Art. 561 of the Civile Code.

In the case of the mass-produced consumer goods the possibility of using the right to terminate the agreement by a consumer may be blocked by the seller through the replacement of the product by a new item unless the inconsistency of consumer goods with the contract is irrelevant. Moreover, the repair of a merchandise belongs to the essence of the institution of guarantee and not the liability under non-conformity of consumer goods with the contract. In such a context, termination of the agreement on the sale of a product that is individually identified may be blocked by the seller by the product's repair. The right to the repair or replacement by a new consumer item cannot mean that the seller has the right to impose on the consumer the realization of the good's repair within the liability under non-conformity of consumer goods with the contract if this good is only generically featured. Unfortunately, the practice indicates that sellers most often offer to restore the commodity to the state consistent with the contract through the free of charge repair of such an item. As far as goods sold at lowered prices are concerned, e.g. in the system of out-of-season sales, consumers are often unlawfully informed by sellers about the lack of legal protection under non-conformity of consumer goods with the contract, which consumers consent to. It proves still insufficient awareness of consumers as to the scope of the rights they are entitled to. Even though legal awareness of the provisions' recipients remains outside the sphere of the provisions' interpretation, it is a crucial factor shaping the effectiveness and assumed purpose of specific legal regulations.

NOTES

[1] As for the normative term of a "consumer" see, most of all, Art. 221 of the Civil Code.

[2] To read more about the legal construction of liability under non-conformity of consumer goods with the contract see: Pisuliński, J. (2004). In J. Rajski (Ed.), *System Prawa Prywatnego. Volume 7. Prawo zobowiązań – część szczegółowa*, (p. 164). Warszawa: C.H. Beck.

[3] On the matter of the evaluation of the legal regulation of consumer sale see also: Gnela, B. (2008). Uwagi o regulacji umowy sprzedaży konsumenckiej. In M. Pazdan, E. Rott-Pietrzyk & M. Szpunar (Eds.), *Europeizacja prawa prywatnego. Volume I* (p. 259). Warszawa: Oficyna Wolters Kluwer business.

[4] A different opinion on this matter was expressed by Skąpski, J (1976). In S. Grzybowski (Ed.), *System Prawa Cywilnego. Prawo zobowiązań – część szczegółowa* (p. 116). Wrocław–Warszawa–Kraków–Gdańsk: Ossolineum. The author treats all rights the buyer is entitled to as the ones shaping the law.

[5] The original interpretation of the buyer's rights resulting from warranty was proposed and justified by Kierzyk, T. (2000). Reklamacje wad pojazdu – wybrane zagadnienia (ochrona konsumentów). *Rejent*, 5, 54.

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INTERPRETATION OF DECLARATIONS OF WILL BY PARTIES TO CIVIL-LAW AGREEMENTS

Abstract. Entering into a civil-law agreement always carries legal consequences. One of the most frequent mistakes committed by the parties entering into civil-law agreements is using ambiguous words or phrases in contracts. The interpretation of declarations of will should be distinguished from establishing their legal consequences. The interpretation of a declaration of will is a legal issue, whereas legal consequences of declarations of will may be specified right after establishing the meaning of a declaration of will. It is the interpretation that serves this purpose, but only after taking into consideration the consequences defined by legal norms. Legal interpretation aims at determining what rights a given person has or what responsibilities they are burdened with. The interpretation of declarations of will by the parties to civil-law relations is a complicated process. The directives and methods of interpretation do not always allow for a precise interpretation of declarations of will contained in agreements. To express their will, the parties concluding civil-law agreements tend to use ambiguous and unclear phrases, inconsistent with their actual will, being unaware of the effects a given declaration carries. That is why so many cases end up in court.

Introductory remarks

Entering into a civil-law agreement always carries legal consequences. One of the most frequent mistakes committed by the parties entering into civil-law agreements is using ambiguous words or phrases in contracts. The interpretation of declarations of will should be distinguished from establishing their legal consequences. The interpretation of a declaration of will is a legal issue, whereas legal consequences of declarations of will may be specified right after establishing the meaning of a declaration of will. It is the interpretation that serves this purpose, but only after taking into consideration the consequences defined by legal norms. Legal interpretation aims at determining what rights a given person has or what responsibilities they are

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burdened with. The interpretation directives may be contained in legal provisions and this is when they are binding on the body applying the law, just like any legal norm. General interpretation directives have been included in Art. 65 of the Civil Code. Their purpose is to show what thinking processes must be started to determine the sense of a declaration of will. These should also be demonstrated in order to resolve the issue of whether a declaration of will was made at all in a given case, and not only to determine its content and meaning. (Radwański, 1996, p. 79). The interpretation of a declaration of will takes place based on Art. 65 of the kodeks cywilny (Dz. U z 1964 Nr 16, poz. 93 z późn. zm.) – hereinafter referred to as Civil Code – and is subject to appeal proceedings since potential errors in this respect constitute a serious infringement of substantive law provisions due to their wrong interpretation.[1]

The interpretation of a declaration of will referred to in Article 65 of the Civil Code is therefore a set of actions undertaken to establish the meaning of a given statement. The purpose is to determine whether a given statement is intended to have a regulatory function or be a declaration of will. (V CSK 70/06; V CKN 801/00). The next step is to determine its meaning, essential from a legal point of view, that is the content of a regulation introduced. The object of interpretation is a person's conduct or a system of things or phenomena created by them and rendered inclusive of the accompanying circumstances and in the appropriate context. (Machnikowski, 2010, p. 98).

The interpretation of a declaration of will is a mental process aiming at interpreting or determining the appropriate meaning of a declaration of will made. This process takes place in accordance with the commonly accepted semantic directives, attributing certain meanings to the terms contained in a declaration of will. (Gawlik, Gajda, 2008, p. 137). The subject of a declaration of will may be any person who gets involved in the mental process of interpretation of a declaration of will, except that not every interpretation will be binding. It is only the interpretation of a body applying the law that is a valid interpretation and ultimately binding on all the participants of a legal transaction. When making an interpretation of a declaration of will, this body should apply the rules specified in the binding provisions of law, which are binding on them just like any other commonly binding provisions, and they should also apply the rules set out in judicial practice and achievements of the doctrine of law. (I PR 146/70).

The object of interpretation of a declaration of will is an external manifestation of an internal will of a person making a declaration, considered in the light of provisions laid out in Art. 60 of the Civil Code. The pro-

cess of making an interpretation refers to the external manifestations of will as perceivable phenomena or systems of things, that is to specific factual circumstances. These circumstances should be interpreted fully, that is in a particular situational context, in which the internal will was made by the declarant and where its manifestation could be observed. (Radwański, 2008, p. 39 and next). The subject of interpretation is a declaration of will considered in a particular factual situation with the accompanying circumstances, regardless of the fact if this declaration is a result of a one-sided legal transaction, or if it is an effect of a two-sided act, for instance in the form of a contracted agreement. It is always the very legal act or in fact its terms and not the effect that are subject to interpretation, and it should never be the case that as a result of interpretation made, the subjects making declarations of will are changed, or that the conclusions of interpretation are inconsistent with the very act as these conclusions are not the object of interpretation of a declaration of will and may be a subject of study in different civil law areas. (Doliwa, 2012, p. 258.).

According to Art. 65 § 1 of the Civil Code a declaration of will should be interpreted as required by the circumstances in which it was made, in accordance with the principles of social cooperation and established customs. However, Art. 65 § 2 of the Civil Code provides that in the case of contracts, the congruent intention of parties and the purpose of agreement rather than the literal wording, should be established. Therefore, Art. 65 of the Civil Code sets out basic directives on the interpretation of a declaration of will referring to all categories of legal acts (§ 1) and in particular to those concerning agreements (§ 2). The criteria for interpretation of declarations of will remain in concordance with the objectivisation concepts which emphasize the way of interpreting a declaration of will that may be reconstructed based on external, verifiable semantic rules related to the context in which a declaration of will was made. This statement is not contradicted by the interpretation directive referring to agreements and contained in Art. 65 § 2 of the Civil Code since the reconstruction of the congruent intention of the parties and purpose of the agreement should be done based on verifiable criteria and have a meaning understandable at least to the other party, i.e. to the contractor with whom the contract is made. Establishing the meaning of a declaration of will according to the rules specified in Art. 65 of the Civil Code means that it is this meaning exclusive of the subjective will of the parties and beliefs of the declarants that will be basis for determining the legal consequences and shaping the relations between the parties. It does not preclude the possibility of evading legal consequences arising out of the declaration of will with a different meaning and content attributed by the

declarant if there are any reasonable suspicions that there are flaws in the declaration of will, and especially those related to error and deceit. (Safjan, Pietrzykowski, 2011, p. 178).

Based on provision 65 of the Civil Code general directives referring to interpretation may be distinguished. The first directive refers to the socially-shaped semantic rules in language norms and established customs. The second directive refers to the need of considering all communications, taking into account their situational context, that is the circumstances in which they were made. In reference to the circumstances in which a declaration of will was made, it should be observed that in the process of making an interpretation they constitute a relevant criterion for the evaluation of its content since they introduce a situational context of revealing the internal will of the declarant, except that only the perceivable external circumstances of making a declaration may be of legal significance, whereas the subjective belief of the declarant does not carry this kind of weight. This view may be supported by the necessity to ensure safety of legal transactions and that is why the risk of erroneous expression of internal will is a burden on the declarant and not on the recipient. However, the above principle of analysing declarations of will is not binding in its entirety. Sometimes provisions of law provide otherwise and then in order to determine the meaning of the examined declaration of will, the internal will of the declarant will be a decisive factor, and not the externalised statement.

The third directive is based on the assumption of prudence and integrity of the parties making a declaration of will. This directive points to the purpose of making a declaration of will and the principles of social co-existence. (Radwański, 1996, pp. 181–182). The principles of social co-existence are certain norms of conduct, moral norms and values preferred in a given community, and also constituting the axiological explanation for the whole binding system of law. The application of social co-existence rules is caused by the social need of interpreting a declaration of will in the way which, as being compliant with these rules and norms, will allow for maintaining certainty of law and trust in safety of legal transactions, especially in the situation where as a result of failing to take account of them in the process of interpreting the declaration, the parties to a legal act could be treated unequally. The established customs are the common practice in relation to a certain conduct which, just like the principles of social co-existence have not been classified, but are commonly used both in internal and international relations. (Doliwa, 2012, p. 261).

Interpretation of declarations of will

The declarations of will should be interpreted according to the circumstances in which they were made since no universal rules can be applied to understand the context of a given declaration. In different contexts a declaration of will may have a completely different meaning. The interpretation of declarations of will in given circumstances depends on the set of external objectivised criteria made up by the principles of social co-existence and established customs. Both the principles of social co-existence and established customs should be correlated to the context in which a declaration of will was made. This context is set by such elements as the location of a given activity or the type or purpose of the very act.

Specifying the criteria resulting from the principles of social co-existence and established customs for specific circumstances entails the imperative of individual interpretation. Art. 65 of the Civil Code contains a general directive on establishing the correct meaning of a legal act. (I C 5/45). The complement to this general interpretation directive from Art. 65 of the Civil Code is a regulation contained in Art. 385^2 of the Civil Code according to which the compliance of agreement provisions with good practice is evaluated based on the state of affairs at the moment of entering into agreement, taking into consideration its content, circumstances of concluding it and other contracts related to the agreement including the provision being subject to evaluation.

The regulation contained in the above-mentioned provision aims at evaluating the compliance of agreement provisions with the principles of good practice. What emerges is also the interpretation directive which calls for a firm relativism of criteria and evaluation resulting from good practice for the whole of situational context the agreement is contracted in, including the legal connections related to the agreement. Determining established customs also occurs as required by the circumstances. The custom which cannot be ignored when determining the meaning of a declaration of will is of significance here.[2] This kind of evaluation should be conducted in consideration of the customs in operation at the moment of performing a legal act, and not at the moment of interpretation. (Safjan, Pietrzykowski, 2011, p. 178.).

The methods of interpreting declarations of will are a system of directives grouped around certain values understood as evaluative assumptions, showing the institutions applying the law the mode of conduct when establishing the meaning and content of declarations of will made by legal entities.

The first of the above-mentioned values grouping the interpretation directives is the real internal will of the legal entity making a declaration, being the result of their psychological experiences and internal decisions which should constitute grounds for establishing what method of interpretation should be adopted by the body applying the law for the interpretation of declaration of will made as the effect of these experiences. Another value is confidence which is evoked in other legal entities by a declaration of will. This confidence results from the need for legal certainty of transactions, thus when making an interpretation of a declaration of will, the person making this interpretation should take into consideration the cognitive skills of other legal entities being participants of the legal transaction. (Radwański, 1992, p. 46 and next).

Taking into consideration the above values, the following methods of interpreting declarations of will may be distinguished: (Radwański, 2008, p. 51 and next).

– the subjective and individual method, focused on the will of the legal entity making a declaration, taking the free will of the legal entity making a declaration as basis for entering into an obligation, being an internal psychological experience and hence the method ordering the interpreting body to make an interpretation of the declaration on these grounds, however inadequate and requiring complementing with objective measures also inclusive of other values;

– the objective (normative) method, focused on cognitive abilities of the recipient of a declaration of will, protecting the legal certainty of transaction and taking the objective meaning of words or conduct of the declarant as grounds for the correct interpretation, and requiring the interpreting body to ask a question of how a declaration of will would be understood by a normative pattern, that is any prudent and honest person in a specific situation of a legal entity making a declaration whose trust in safe legal transactions should be protected;

– the combined method, combining the merits of will and confidence, however requiring a clear system of preferences for these merits and the scope of application for directives putting them into practice, ordering the interpreting body making an interpretation to consider the meaning attributed to the declaration of will by the parties to the legal act, even if this meaning diverged from the objective sense of words and phrases, which is connected to the protection of trust and in the case of misunderstanding the meaning of a declaration of will by the recipient, or the understanding different than the one the declarant intended, and requiring to consider by the interpreting body the cognitive abilities of the re-

cipient in the context of a particular situation of making a declaration of will.

Art. 65 of the Civil Code does not tell us directly which methods must be applied by a given institution to make interpretations of questionable declarations of will. It merely contains guidelines in the form of imperative to consider the circumstances of making declarations of will, being element of general semiotics; references to general clauses in the form of principles of social co-existence recalling the morally preferred values in a given community and legal system as well as its established customs, that is certain social conduct repeated and acknowledged as an obligatory norm. (Radwański, 1992, pp. 58–59).

The method of interpretation contained in Art. 65 § 2 of the Civil Code is a combined method as it is based upon the objective and subjective criteria. According to it, the priority interpretation rule for declarations of will is an actual will of parties. The interpretation of agreement should not ignore the content verbalised in writing as the phrases and concepts used as well as the very systematics and structure of a speech act are one of the most essential interpretations of will of the parties, enabling its recognition and evaluation. Application of the method in question requires explanation how the parties really understood the declarations of will made by them, and in particular what sense they attributed to a given phrase or expression used in a declaration of will. (III CZP 66/95).

Interpretation of declarations of will made by parties to civil-law agreements

Establishing the content of a declaration of will means determining facts. (II UKN 9/96). Art. 65 § 2 of the Civil Code specifies the mode of interpreting the declarations of will in a different way than for interpreting a legal text. Contrary to legal norms, the legal acts, and especially agreements, regulate legal relations between parties. As a consequence the obligations established by way of agreement between the parties are not abstract in character like legal norms, but have individual nature, serving the purpose of furthering interests of parties according to their will.

An entity who desires to know the sense of a declaration of will makes its interpretation. In most cases this is the interpretation made by the body applying the law within the process of law application and within the framework of establishing factual grounds for decision. Each declaration of will, regardless of the form it was made in, is subject to legal interpretation.

Art. 65 of the Civil Code also includes declarations of will made in a written form. Then, the basis for interpretation will be linguistic rules and applicable principles arising under Art. 65 § 2 of the Civil Code. When applying the rules contained herein it may appear that contrary to the wording of agreement, the will of the parties was different. General directives for interpretation contained in the discussed provision are complemented by the so-called interpretation rules – special provisions, frequently using the phrase "in case of any doubts", which order to adopt a specific meaning of the conduct described in them if its meaning cannot be determined with the use of rules framed under Art. 65 of the Civil Code.

According to Article 65 § 2 of the Civil Code when interpreting a declaration of will the circumstances in which the declaration was made should be taken into consideration, and the congruent intention of parties and purpose of agreement established, rather than relying on its literal wording. This provision undoubtedly allows for considering extra-textual circumstances including the purpose the parties had in mind when entering into agreement and establishing them with the help of evidence obtained from witnesses and witness deposition. (I CKN 815/97). Determining the actual understanding of a declaration of will by the parties is establishing certain facts. The need to conduct evidence proceeding for that purpose arises only when a common understanding of the declaration is disputable. It should be emphasized, however, that the fact that one of the parties denies giving the same meaning to the declaration of will as the other party, does not mean the non-existence of the common meaning (congruent intention of the parties) at the moment of making a declaration of will and does not preclude evidence proceeding for establishing it.

Since the psychological fact is being determined, only indirect evidence may be based upon it. These might be the declarations of parties to the legal transaction, made to each other and to other people, either at the same time or after making a disputable declaration of will, in which the parties explain their way of understanding this declaration. These might also be other conducts of the parties taking place after making a disputable declaration of will, and in particular the mode of exercising rights and fulfilling obligations arising on the grounds of this declaration. In the case of discrepancies between the understanding of agreement by the parties and the mode of its implementation presented in the proceeding, it is mainly the latter that corresponds to the actual understanding of agreement at the moment of entering into it. (Safjan, Pietrzykowski, 2011, p. 178).

The actions undertaken by the body applying the law and serving to interpret a declaration of will are made up of two stages. The first one

is establishing how parties understood the declaration made and if this understanding was congruent. The process means establishing facts and that is why it is called the subjective interpretation. The second stage takes place when the "congruent intention of the parties" cannot be established and it consists in determining what is the objectively adopted meaning of a given declaration, and this is the interpretation in the stricter sense, the so-called objective interpretation. (Machnikowski, Gniewek, 2010, p. 98.)

The interpretation of agreements should primarily take into consideration the actual will of the parties to agreement and this sense is expressed in Art. 65 § 2 of the Civil Code. In practice it is not always possible to determine the congruent will of both parties. It is not only the agreement provisions that should be analysed then. What may be important for establishing the congruent will of the parties are prior or later declarations and conducts, that is the so-called situational context. The meaning of a declaration of will made by the parties is essential but as of the moment it is made. Later changes in the way of understanding the declaration by the party are not taken into consideration. In the situation where a congruent change in the way of understanding the declaration by both parties making the declaration takes place, it should be regarded as change in the content of the whole declaration.

Only if based on these grounds, it is impossible to talk about the same understanding of agreement provisions by the parties, the natural step is to move to the next stage of interpreting agreements having in mind another merit, apart from that of respecting the will of a declaring party, which is the protection of trust of the recipient of a declaration of will. The Supreme Court in its judgment of June 11, 2008 (V CSK 2/08) declared that Article 65 of the Civil Code undoubtedly allows courts to take into consideration extratextual circumstances, including the purpose the parties had in mind when entering into agreement. When interpreting a declaration of will, and particularly when the very wording raises some doubts, what should be examined is not only how the declaration of will was understood by the person making the declaration, but also how it was understood by the recipient of the declaration. Both the person making the declaration of will and its recipient may effectively refer to the sense understood by them only if any participant of a legal transaction in a similar situation, and in particular with the same scope of knowledge about the declaration and circumstances of making it, would understand its meaning in the same way. Thus, it is the normative and individualistic point of view of the recipient who with due diligence required in a legal transaction (art. 355 of the Civil Code applied in a similar situation), and in professional relations, in consideration

of the professional character of activity, makes an interpretation intended to recreate the thinking of the person making a declaration of will. When making an interpretation of a declaration of will it should not be assumed that the parties making it acted in an irrational way or the way contrary to the logical reasoning.

On the grounds for the above-presented thesis the Court stated that Article 65 of the Civil Code contains an interpretive directive which allows for an accurate reading of intentions of the parties to the agreement. Therefore, it serves the purpose of establishing what intention of the parties was behind the use of a particular phrase. This provision requires that when interpreting the declaration of will, the "circumstances in which it was made" be taken into consideration, and establish here what the congruent intention of the parties and purpose of agreement were, rather than rely on its literal wording.

Undoubtedly, this provision allows courts for considering extratextual circumstances, including the purpose which the parties had in mind when entering into agreement. (III CZP 66/95; I CSK 261/07).

The text of agreement interpreted according to linguistic rules constitutes basis for attributing the sense it has in a given language. The party to an agreement should understand it in compliance with syntactic and semantic principles of the language in which a given document was made. This is, however, only an assumption which is not absolutely binding. The parties could understand a particular excerpt of the agreement in a different way, or one of the parties could have sufficient grounds to assign a different meaning to it from the common one. Then, in the course of interpreting declarations of will, this kind of situation should be taken into account. When interpreting an agreement based on linguistic rules, not only a controversial fragment of text should be taken into consideration, but also other provisions of agreement assigned to it, that is the language context.

Establishing the real intention of a person making a declaration is not admissible in the situation where the declaration, for instance a public oath, is intended for an unlimited circle of recipients or when an unspecified circle of people may in the future refer to its content, just like in the case of proxies, agreement forms, articles of association of legal persons, documents intended for circulation, such as bills of exchange, cheques, shares, bonds and others. In such cases the interpretation of a declaration of will lies in determining its commonly accepted meaning (objective interpretation).

According to wyrok Sądu Apelacyjnego w Katowicach z dnia 11 marca 2005 r. (I ACa 1606/04), the principles of interpreting agreements as set out in the provision of Art. 65 § 2 of the Civil Code are applicable to

the agreements made in writing only when the document provisions are so unclear that they may give rise to doubts about the intention of parties entering into agreement, and not when the parties expressed their will clearly enough in the content of agreement made in writing. After the manner of the above thesis the court fully recognized the *clara non sunt intrerpretanda* principle in the context of interpreting the provisions of civil-law agreements.

According to this principle what is clear does not require interpretation. The principle says that in the situation where after applying linguistic directives on interpretation, the meaning of a given provision does not any longer give rise to doubts, other arguments and methods of interpretation are not required. The above judgment met with a critical evaluation of legal theorists. Each sign needs interpretation in order to be comprehensible, and only after making an interpretation it could be decided if it is clear. (Radwański, 1996, p. 179). The thesis of the Appeals Court may be regarded as incorrect in principle, with the exception that it becomes justified in certain special circumstances, such as: clearly different will of the parties, the risk of circumventing the provisions about the form of legal transaction, the need to protect the trust of third parties or a potential entering into agreement by persons using professional legal services. (Koszowski, 2009, p. 72).

Interpretation of agreement and its purpose

Article 65 § 2 of the Civil Code requires that during interpretation the purpose of agreement be taken into consideration. The necessity to refer in the process of interpretation to the purpose of a declaration of will, which is an extra-linguistic indication of interpretation of a declaration of will, results from the imperative contained in the above provision.

The purpose of a declaration of will is a future state outside the text of declaration, which will be achieved only in the aftermath of performance of an obligation resulting from a legal act aimed at by the persons making a declaration of will who undertake certain activities to facilitate achieving this state. Therefore, it should be assumed that a legal act (closer goal) is a certain means to achieve the purpose of act (further goal), which may refer to a number of legal situations called social and economic or life goals, bringing sense to legal acts done by entities and expressing their needs and interests. "The purpose" of a declaration of will should be made distinct from its "content". Applying this directive extends to all declarations of will made to other persons.

The purpose of legal act is its effect not included in the content of a declaration of will, the so-called further goal, that is the state of affairs which is supposed to be implemented as a consequence of exercising rights and fulfilling obligations resulting from the legal act performed. If parties agreed on the purpose of a specific agreement, it is this purpose that should be considered when interpreting their declarations of will. In the absence of purpose agreed, what should be taken into consideration is the aim understood objectively, that is the state of affairs which normally arises when implementing a legal act of a given type. The purpose of legal act has two meanings in the process of interpreting a declaration of will. Firstly, in the situation of a few competing results of interpreting the declaration the one that allows for a better and more effective achievement of the goal attributed to parties should be selected. This directive is, for instance, basis for applying the *in favorem debitoris* interpretation (if, in the case of free legal act or one-sided agreement, after applying general interpretive rules the sense of declaration is not clear, it should be interpreted in favour of the debtor, so as fewer obligations be imposed on them by way of declaration). Secondly, the criterion of purpose allows for giving a certain conduct the meaning of a declaration of will if achieving the result of a given conduct would not be possible without making this kind of a declaration of will. (Machnikowski, Gniewek, 2010, p. 98).

The purpose of agreement in the meaning given by Art. 65 § 2 of the Civil Code is mainly an individual aim concerning a specific agreement determined by specific interests of parties, and not the purpose belonging to a certain general category of agreements or class of legal acts. The purpose of agreement is designated by the function which parties choose for a given act within the framework of legal relations they are bound by. (Radwański, 1992, p. 17 and next).

An important issue is that when interpreting declarations of will the assumption should be adopted that their will was rational and the parties had as their aim achievement of results compliant with common reason and their interests. (IV CKN 1474/00).

According to Article 65 § 2 of the Civil Code in the situation where the proper sense of agreement established with the use of directives specified in it will diverge from a clear meaning in the light of language rules, the priority meaning gives the agreement sense given by the parties. Thus, the process of interpreting agreements may terminate on account of its clear sense only when the content of agreement becomes clear after applying consecutive rules of interpretation, that is after a prior establishing of the parties' intention and purpose of agreement. In order to determine how the

parties understood a declaration of will at the moment of making it, also conduct of the parties after making the declaration may be of significance, and it will be, for instance, the mode of performing the agreement (I PKN 532/97), extratextual circumstances, such as the factual context in which the contract was agreed and entered into (IV CK 582/03), the course of negotiation (I CKN 815/97), previous declarations of will by the parties (III CRN 160/75) as well as their status the manifestation of which could be running a business.

In the situation where parties to the agreement understood the declaration of will differently, then the declarations of will determined in keeping with the objective model will be regarded as legally binding. At this stage of interpretation, the need to protect the recipient of the declaration of will seems to be in agreement with the idea that the meaning of the declaration of will accessible to the recipient should be taken into consideration, assuming thorough interpretation attempts on their part. (III CZP 66/95). The above may be supported by what can be found in Art. 65 § 1 of the Civil Code saying that a declaration of will should be interpreted as required by the circumstances in which it was made as well as the principles of social co-existence and established customs.

The inability to establish the congruent intention of the parties by referring to the criteria contained in Art. 65 of the Civil Code may in specific circumstances indicate that the so-called dissent took place, that is the situation in which the agreement was ineffective in the face of a lack of agreement on its essential elements by the parties. The dissent treated in subjective categories as a lack of agreement on the internal will between the parties is not tantamount to the dissent specified above, in which the lack of consensus results from the inability to agree on the declarations of will by the parties according to the criteria of interpretation referred to in Art. 65 of the Civil Code. (Safjan, Pietrzykowski, 2011, p. 190).

Conversion of an invalid legal act

An especially important instrument of interpreting declarations of will is the so-called conversion of an invalid legal act. Under the civil law, conversion is a transformation of an invalid act into another valid legal act, corresponding at least partly to the will of parties. (Radwański, 1996, p. 246). It may take place when the established sense of a specific conduct by way of interpretation is not possible to be maintained on account of the fact that it is contrary to the law or principles of social co-existence.

In the above situation Art. 65 § 2 of the Civil Code requiring to consider the purpose of a declaration of will rather than its literal wording allows for another interpretation of this conduct, in which it would be an important declaration of will of a different content. Conversion consists in determining in what maximal possible scope the content of the declaration made may be maintained in order to serve the purpose of agreement, and then in subjecting the declaration in force to legal qualification.

Conversion cannot take place if the action was not a legal act at all and the declarations made were not declarations of will on account of a lack of intention to bring about a legal effect (a special case of this situation is performing an act where both parties are aware that it is invalid), and also in the situations under Art. 82 and 83 of the Civil Code. When making a conversion one should consider the principles of social co-existence (art. 65 § 1 of the Civil Code), have in mind the interests of both parties to the legal act so as not to distort the distribution of risk, benefits and burden planned by the parties in the created legal relation. (Machnikowski, Gniewek, 2010, p. 98).

Conclusions

The interpretation of declarations of will by the parties to civil-law relations is a complicated process. The directives and methods of interpretation do not always allow for a precise interpretation of declarations of will contained in agreements. To express their will, the parties concluding civil-law agreements tend to use ambiguous and unclear phrases, inconsistent with their actual will, being unaware of the effects a given declaration carries. That is why so many cases end up in court. How the parties understood their declarations of will may be learnt from their statements made in court proceedings. These statements will give information on how the parties interpreted and understood their declarations of will. If the parties interpreted and understood declarations of will in the same way, the court does not conduct further evidence proceeding and adopts thus specified declaration of will as basis for giving a judgment. In the situation where parties have contradictory ideas about the meaning of a declaration of will there are grounds for the court to start interpretation. The court should bear in mind the declarations made by the parties in which they explain the sense of the declaration of will made or received. Further conduct of the parties is of significance here, and especially the mode of performing the agreement. It may be indicative of how the parties understood their declarations of will.

If in the court proceeding the party will demonstrate the interpretation of agreement inconsistent with the mode of performing it by the very party, it should be assumed that the mode of interpretation is an inaccurate account of how in fact the party understood the agreement. Other types of conduct than the performance of agreement demonstrated *ex post* may point to the way of understanding the declaration of will made. (Radwański, 2008, pp. 61–62).

Article 65 of the Civil Code specifies very general ways of interpretation by pointing to only fundamental directives. The scope of application and interpretation criteria is restricted to the interpretation of the will of parties, that is the very content of agreement, and does not lead to any change in the parties to the agreement, or the effects contrary to its content. When establishing the meaning of a declaration of will, one should start with its sense resulting from linguistic rules where principles, phrases and language customs used in the environment the parties belong to should be taken into consideration, and only after that should general linguistic principles be considered. One should, however, have in mind not only an interpreted phrase, but also its context.

When implementing the principles of correct speech interpretation, it is not only the controversial speech extract that should be taken account of, but also other provisions related to it. It is impossible to adopt the meaning of the interpreted phrase which would remain in opposition to the other components of the statement. It would be contrary to the assumption of rational actions of the participants of a legal transaction. Narrowing down the interpretation to only "unclear" provisions of the agreement, could be supported by Art. 65 of the Civil Code if it said that the only significant meaning of speech was the one resulting from linguistic rules. The risk of doubts resulting from unclear provisions of the agreement, impossible to remove by way of interpretation should be borne by the party which prepared the agreement. (IV CSK 90/09). If the parties were previously in the same legal relations, one should also consider the meaning of unclear agreement phrasing which was applied in previous relations between the parties. (I CSK 250/08).

The interpretation of a declaration of will is establishing its meaning by way of interpretation and explanation. The choice of method for interpreting the declarations of will by the parties to the agreement is axiologically determined. According to Art. 65 of the Civil Code, adopting the combined method of interpretation is preferred. (III CZP 66/95). Using the combined method thanks to which the authentic will of the parties is subject to protection and justified expectations of the recipient of a declaration

of will, ensure certainty of a legal transaction. The purpose of interpretation is primarily to understand the authentic will of the parties entering into agreement and secondly showing the objective will of entities making a declaration of will (this is the order for agreements). It should be properly applied in reference to one-sided declarations of will. According to Art. 65 of the Civil Code the following are legally binding elements in regards to interpretation of ambiguous declarations of will by the parties to a civil-law agreement: the circumstances of making a declaration of will, principles of social co-existence, established customs as well as the congruent intention of the parties and purpose of the agreement.

The prevalent view among legal theorists favouring the *ex tunc* interpretation as the one which allows for taking account of and showing respect for the will of the parties at the moment of making declarations of will is, in my opinion, fully justified. However, with regard to the interpretation of agreements creating lasting obligation relations, the scholars of jurisprudence advocate using the adaptation interpretation taking into account the changing economic, social and political relations, facts, and customs. It does not seem indispensable especially when making an interpretation where the future way of agreement implementation is considered, which is not a divergence from the general rule of *ex tunc* interpretation, but may have an impact on the potential change in the primary agreement content, also to be considered during the interpretation, and which does does not necessitate divergence from this interpretation, also when the potential change or a complementing of the obligation relation should be considered on account of future events, which in turn will be subject to a future, separate complementary interpretation. (Radwański, 2008, p. 62).

NOTES

[1] Compare wyrok Sądu Najwyższego z dnia 20 lutego 1997 r., I CKN 90/96, *Prokuratura i Prawo* – supplement 1998, 1, s. 47.

[2] Compare wyrok Sądu Najwyższego z dnia 20 marca 1965 r., III PU 28/64; wyrok Sądu Najwyższego z dnia 27 października 1971 r., I PR 221/71.

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THE PRINCIPLE OF PROPORTIONALITY AS A METHOD OF LIMITING THE PRIVACY OF PUBLIC OFFICIALS

Abstract. It is unquestionable that people performing public functions are entitled to much narrower range of privacy protection than the so-called private persons, because of voluntarily holding a public office, the right of citizens to public information as well as the necessity of preserving transparency and openness of public life. Thus, the principle of proportionality should refer to foremost needs connected with proper functioning of public institutions, and not only to the status of people performing public functions as citizens. However, it is important to underscore that intrusion into privacy of the people of this category should be justified, every time, on grounds of a direct connection between their functioning in the sphere of private life and the function (office) performed for the state and the public good. The issue of reducing privacy of the people performing public functions requires presenting the premises of the principle of proportionality determining the restrictions in exercising the constitutional rights and liberties. The considerations in this paper will allow to analyse the solutions of the Constitutional Tribunal examining the compliance with the Constitution of statutory legal regulations which constitute an intrusion in the right to privacy of people performing public functions in view of their meeting the premises of suitability, necessity and proportionality in the strict sense in reference to the imposed limitations.

1. Introduction

Rights and liberties of the individual, despite being guaranteed by the Constitution of the Republic of Poland, are not of absolute nature and may be subject to restrictions. However, for these limitations to be acceptable, they should be implemented in accordance with the pattern determined by the principle of proportionality. The provision of Article 31 para 3 of the Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz. U.

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z 1997 Nr 78, poz. 483) – hereinafter referred to as the Constitution of the RP decides that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

The issue of limiting privacy of the people performing public functions requires presenting the genesis and the evolution of the principle of proportionality in the judicial decisions of the Constitutional Tribunal. It is also necessary to analyse the premises determining the restrictions in exercising the constitutional rights and liberties. The considerations in this paper will allow to analyse the solutions of the Trybunał Konstytucyjny, – hereinafter referred to as the Constitutional Tribunal examining the compliance with the Constitution of statutory legal regulations which constitute an intrusion in the right to privacy of people performing public functions in view of their meeting the premises of suitability, necessity and proportionality in the strict sense in reference to the imposed limitations.

2. Development of the principle of proportionality in the judicial decisions of the Constitutional Tribunal in historical perspective

The process of forming the principle of proportionality, which, in its present shape, is expressed in Article 31 para 3 of the as the Constitution of the RP goes back many years ago and results from the gradual process of becoming increasingly precise in the judicial decisions of the Constitutional Tribunal. Forming of the principle of proportionality by the Constitutional Tribunal was a process which consisted of many decisions forming one by one particular elements of this principle. (Stępkowski, 2010, pp. 327–348; Dylewska, 2001, p. 47 and next; Zakolska, 2008, pp. 32–68). The decisions of the Constitutional Tribunal were made in view of questioning the constitutionality of the regulations included in acts of law on various individual rights and liberties. The argumentation in the statements of reasons of the decisions is transferable onto considerations on the constitutionality of other liberties and rights in the case of any doubts occurring in this field, including the right to privacy.

From the historical point of view, neither the Konstytucja Polskiej Rzeczypospolitej Ludowej (Dz. U. z 1952 Nr 33, poz. 232 z późn. zm.) nor the

subsequent amendments or the ustawa konstytucyjna z dnia 17 października 1992 r. o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz o samorządzie terytorialnym (Dz. U. 1992 Nr 84 poz. 426 z późn. zm.) contained a provision providing for a possibility of limiting the guaranteed rights and liberties. The principle of proportionality was expressed directly in the provisions of law only when the Constitution of the RP of 2 April 1997 entered into effect. The derivation of the possibilities of limitations and their premises is a contribution of the Constitutional Tribunal's decisions, which formed the so-called principle of proportionality, also referred to as the prohibition of excessive interference with a right (Wojtyczek, 2002, p. 679), before the Constitution of the RP of 1997 entered into effect.

The principle of proportionality, due to the lack of separate regulations, was derived by the Constitutional Tribunal from the principle of democratic state ruled by law (Zakolska, 2008, p. 32; Walaszek-Pyzioł, 1995, p. 5) as well as from the principle of citizens' trust in the state, which was based on comparative law research as well as judicial decisions and doctrines of western states. (Zakolska, 2008, p. 37). Its development in the form it currently functions was inspired by the German doctrine and judicial decisions. (Wojtyczek, 2002, p. 678; Stępkowski, 2010, p. 189–209). It is important that the very term "principle of proportionality" is derived from German law. This principle has its source in judicial decisions of the Prussian Higher Administrative Court (*Oberverwaltungsgericht*) of the late 19th century, (Wojtyczek 2002, p. 678; Łabno, 2002, p. 704; Dylewska 2001, p. 46) which developed the so-called principle of proportionality (*Grundsatz der Verhältnismäßigkeit*) or, in other words, the prohibition of excessive interference with a right (*Übermaßverbot*) and its three components. In German law the structure of restrictions of individual liberties and rights is based on the relation between the means and the end. It commands that between the aim of the introduced legal regulation and the means resulting therefrom, which aim at achieving this goal be an appropriate proportion, (Zakolska, 2008, p. 10) i.e. the means be adjusted to the ends which the legislator wants to achieve. The structure of the principle of proportionality is a product of the doctrine and judicial decisions for it was not expressed explicitly in the provisions of law. In accordance with the German doctrine of constitutional law the principle of proportionality consists of three elements:

1) the requirement of utility, suitability (*Gebot der Geeignetheit*),
2) the requirement of necessity, indispensability or the mildest intrusion (*Gebot der Erforderlichkeit*) and

3) the requirement of proportionality in the strict sense, also referred to as the prohibition of excessive intrusion (*Gebot der Verhältnismäßigkeit im engeren Sinne/Angemessenheit / Zumutbarkeit*). (Stelzer, 1991, p. 96; Martins, 2001, p. 120; Banaszak, 2009, p. 181; Wojtyczek, 2002, p. 670; Zakolska, 2008, p. 25; Walaszek-Pyzioł, 1995, pp. 15–16).

The first stage of the process of specifying the principle of proportionality was that the Polish Constitutional Tribunal noticed that the nature of constitutional rights and liberties is not absolute and recognising the acceptability of their limitations. This position was presented by the Constitutional Tribunal, for example, in orzeczenie Trybunału Konstytucyjnego z dnia 26 stycznia 1993 r. (U 10/92). The Tribunal stated that this freedom is of no absolute nature. It demonstrated that situations where it will remain in conflict with other principles and constitutional norms and, therefore, its restrictions are acceptable. Moreover, it underscored that the limitations introduced cannot lead to creating "empty norms", cannot go so far that the essence of a particular law was cancelled. Thus, the Constitutional Tribunal noticed the situation of conflict between competing principles and formed an origin of the principle subsequently named by the doctrine and judicial decisions a prohibition of infringing the essence of a particular liberty and right. It also emphasised a very important aspect of possibility of restrictions which must be assumed every time balancing the weight of the right or the liberty subject to limitations and the weight of the right or the liberty justifying this limitation. Failure to comply proportionality in this matter or adopting unnecessarily excessive limitation results in unconstitutionality of the legal regulation.

The next stage of the process of specifying the principle of proportionality was forming the conditions of acceptability of the restrictions of constitutional rights and liberties because of other protected rights and liberties. As for acceptability of limiting the freedom of speech the Constitutional Tribunal repeated in uchwała Trybunału Konstytucyjnego z dnia 2 marca 1994 r. that this principle is not absolute and can be limited even in the Constitution itself because of other rights and liberties protected in the legal system. (W3/93). Analysing the premises of acceptability of limitations the Constitutional Tribunal recognised meeting three necessary conditions, which formed as follows:

1) statutory limitations of rights or liberties are acceptable only when they are explicitly provided for in the constitutional provisions or the need for limitations results from the necessity for mutual harmonising the particular principle with other principles, norms and constitutional values;

2) statutory limitations may be introduced only to a necessary extent and must be treated as exceptions, and their existence must always result from clearly formed statutory provisions;
3) neither particular limitations nor their sum cannot infringe the essence of the particular principle.

The conditions set by the Tribunal, mentioned above as 2 and 3, were defined in the doctrine as the requirement of necessity and the requirement of proportionality in the strict sense. In turn, all the other conditions formed by the Tribunal were repeated, only in a different order, in orzeczenie Trybunału Konstytucyjnego z dnia 7 czerwca 1994 r. (K 17/93). The Tribunal repeated the opinion that constitutional liberties and rights may be limited on condition that: first, the limitation does not infringe the essence of the particular principle; second, the limitation is clearly allowed in other constitutional provisions or it is necessary to harmonise mutually constitutional values and, third, the limitation may be imposed by an act of law only, to a necessary extent and as an exception.

The Constitutional Tribunal for the first time explicitly referred to the principle of prohibition of excessive interference with a right, now known as the principle of proportionality, in orzeczenie Trybunału Konstytucyjnego z dnia 24 czerwca 1997 r. (K 17/93; K 21/96). It pointed out that this principle makes an injunction directed to the state that the intrusion into the sphere of individual rights were reduced to necessary cases only and to a necessary degree only. The principle of prohibition of excessive interference with a right, in the opinion of the Constitutional Tribunal manifests itself in the fact that the legislator cannot impose such limitations that exceed a certain degree of onerousness, in particular if they infringe the proportion between the degree of individual right infringement and the weight of the public interest, which is expected to be protected in this way. *Ipso facto* the function of the principle of proportionality is the protection of individual rights and liberties. (K 12/93). In order to facilitate an assessment if the limitation meets the requirements of proportionality the Constitutional Tribunal posed three questions:

1) Is the introduced legislative regulation able to lead to the results intended by this regulation?
2) Is this regulation necessary to protect public interest with which it is connected?
3) Do the effects of the introduced regulation remain in proportion to the burdens imposed upon the citizen? (K 11/94; K 10/95; K 33/98; K 19/01).

Affirmative answers to all three questions is the evidence of the con-

stitutionality of the regulation and of preserving the proportionality of the limitation imposed. The aforementioned questions are conveyed in the views of the doctrine in form of four specific questions:

1) Does the introduced statutory regulation serve its purpose and is it necessary to shape a legal order in a certain sphere of relations?
2) Is the objective of this regulation, intended by the legislator, possible to achieve without infringing basic standards of law expressing the essence of the rights which it concerns?
3) Is this regulation necessary to protect the public interest with which it is connected?
4) Do the effects of the introduced regulation remain in proportion to the burdens imposed by it upon the citizen? (Oniszczuk, 2000, p. 264; Banaszak, 2009, p. 181–182; Wyrzykowski, 1998, p. 51).

Independently from the aforesaid questions representatives of the doctrine point at the necessity of meeting two additional requirements: first, the aim, because of which the limitation occurs, should be the public good and, second, the form of the limitation of a given individual law should be expressed in form of accurate injunctions and prohibitions. (Walaszek-Pyzioł, 1995, pp. 15–16; Dylewska, 2001, pp. 46–47).

To sum up, despite the different approaches in the judicial decisions of the Constitutional Tribunal and the doctrine, the above questions contain three requirements constituting elements of the principle of proportionality: the requirement of suitability, necessity (indispensability) and proportionality in the strict sense. A similar solution is adopted in the German doctrine.[1] (Łabno, 2002, pp. 705).

In the subsequent decisions of the Constitutional Tribunal, however before the Constitution of the RP entered into effect, the principle of proportionality constituted a model of constitutional control mentioned even in the sentences themselves. (K12/93; K 10/95). The Constitutional Tribunal referred to the infringement of the principle of citizens' trust in the state and its laws through excessive intrusion into particular rights and liberties, which was against the principle of democratic state ruled by law. (K 12/93). In turn, the decision of the Constitutional Tribunal of 17 October 1995 found non-compliance of the regulation assessed with the provisions of the Constitution. The Tribunal decided that without a necessary reason justified with an important public interest, it reduced the rights excessively, thereby violating, *inter alia*, the principle of proportionality.

Along with the Constitution of the RP of 2 April 1997 entering into effect Article 2 of the Constitution of the RP and the principle of democratic state ruled by law were less and less frequently used as a sole pattern of

constitutionality control in the decisions of the Constitutional Tribunal. The independent pattern for deciding on unconstitutionality of the questioned regulations is Article 31 para 3 of the Constitution of the RP expressing the principle of proportionality and the prohibition of excessive interference with a right. (P 2/98; Stępkowski, 2010, pp. 355–360; Wojtyczek, 2002, p. 680; Łabno, 2002, p. 705).

3. The range of the protection of privacy of people performing public functions in the judicial decisions of the Constitutional Tribunal

The Constitution of the RP does not include the notion of privacy, and only Article 47 contains the guarantee of legal protection of private life. It seems that the notion of privacy should be understood and interpreted alike in various branches of law, and the superior position of the constitutional norm makes a basis for distinguishing certain common elements. (Safjan, 2002, p. 232). Currently, the dominant element within the broad sense of privacy is information autonomy. It is just this element of privacy which is most strongly emphasised in the judicial decisions of the Constitutional Tribunal. (Sieńczyło-Chlabicz, 2006, p. 102).

According to the position of the Constitutional Tribunal expressed in its judicial decisions: "the constitutional right to privacy should be understood foremost as a right to keep in secret information about the individual's private life". (K 21/96). Privacy refers to the protection of information about a particular person, guarantees a certain state of independence within which the individual may decide on the scope and the range of sharing and communicating information about his/her life to other people. (K 21/96; U 6/97). Also the state of health and material situation are part of the circle of privacy. By principle this information is not for spreading and it is the eligible and interested person who decides to whom he/she wants to provide the information. (Banaszak, 2009, p. 246).

The Constitutional Tribunal expressed an opinion that it is not possible to present precisely and to enumerate the components of the right to privacy. (K 1/98). However in the content of subsequent decisions of the Constitutional Tribunal we can find an aspiration to specify this term. According to the Constitutional Tribunal the right to privacy resulting from Article 47 of the Constitution of the RP guarantees protection of family life in such aspects as stability of the family and marriage as well as protects family ties in both personal and economic sense. In its considerations in the

decision of 13 July 2004, the Constitutional Tribunal presented a position that frequently even revelation of family relations or their lack may in certain circumstances lead to the violation of privacy, especially in relation to the information about children born out of wedlock or half-siblings. Moreover, the necessity of informing about such situations as purchasing a flat or taking a job in another town may indirectly give away the family situation, life plans, and in particular reveal important circumstances such as the intention of starting a family, its enlargement, actual separation or divorce.[2]

The Constitutional Tribunal also combined the right to privacy with the guarantees of personal information protection included in Article 51 of the Constitution of the RP. In accordance with the judicial decisions of the Constitutional Tribunal the sphere of the individual's private life includes undoubtedly information on the state of health and the type of illness. (U 5/97; Oniszczuk, 2004, pp. 398–399). The Constitutional Tribunal drew attention to the particular protection of the information on the state of health as well as the sphere of intimacy, including sexual life in the decision of 20 March 2006. The Tribunal underscored that such data cannot be subject to the right to information, and citizens cannot demand their revelation in reference to the people performing public functions. (K 17/05).

On the basis of the judicial decisions of the Constitutional Tribunal we can draw a conclusion that the Tribunal frequently considers the right to privacy in connection with Article 51 of the Constitution of the Republic of Poland, which grants the statutory level to the right to the individual's information autonomy, recognising it a component of the right to legal protection of private life. (Oniszczuk, 2004, pp. 468–469). Autonomy means the right to independently decide whether to reveal to others the information concerning a particular person, as well as the right to control such information, being in possession of other entities. (U 3/01). The basic rule in this context is an obligation of obtaining the concerned person's consent to share the information. The Constitutional Tribunal also pointed out that the provision of Article 51 of the Constitution of the RP refers to all the cases where the individual is obligated to reveal the information about him/herself to other entities, both the entities of public authorities and private entities. The constitutional responsibility of protection of the sphere of private life imposed by the legislator demands providing the individual with proper protection to an equal degree from intrusion of public and private entities, i.e. in the vertical and horizontal dimension.

In the aspect of information autonomy of the individual the Constitutional Tribunal decided that the infringement of privacy occurs through the obligation of submitting a lustration statement and revealing the fact of

cooperation with the communist security services. Also the right of Inland Revenue Offices to insight in the taxpayer's bills within the tax proceedings was recognised as intrusion into the sphere of private life, (K 15/98) as well the obligation of providing by councillors the information on their material status, including the information on incomes from employment or other gainful activity or occupation, with providing the sums achieved as the result of each of the titles. (SK 7/05). In the opinion of the Constitutional Tribunal the right to privacy includes the protection of confidentiality of data on the citizen's material situation, including bank accounts (and similar) he/she possesses as well as his/her transactions. (K 21/96). Thus, the Tribunal acknowledged that the revenue and tax organs' control of the bank documentation is an illegal intrusion into citizens' personal lives.

The analysis of the aforementioned judicial decisions of the Constitutional Tribunal indicates that the information on the material situation constitute an element of privacy. (Oniszczuk, 2004, p. 461). The Constitutional Tribunal pointed out that the right to privacy extends over the secret of the citizen's material situation. This also refers to his/her bank accounts and transactions. This concerns in particular the situations where the citizen does not act as a business entity but a private person. (K 21/96). However, data referring to the individual's property and economic sphere, despite the legal guarantees of protection of privacy and providing protection of personal data, are not subject to so rigorous conditions of limitations as the purely personal sphere. (K 41/02).

On the basis of the judicial decisions of the Constitutional Tribunal it is important to state that the Tribunal adopts a wide range of the right to privacy defining this sphere with general terms, unspecified, of the nature of general clauses. Privacy, in accordance with the judicial decisions of the Constitutional Tribunal refers mainly to personal, family and social life. It is also defined with the name of right to be left alone, guaranteeing a certain state of independence, in which the individual may decide on the scope and range of sharing and communicating the information on his/her life to other people. Within privacy the individual has the right to keep in secret the information on his/her private life and protection of the data which concerns him/her. The sphere of private life also includes information on the state of health and the individual's material situation. The Constitutional Tribunal, however, diversifies the range of the granted legal protection depending on the sphere which the violation concerns. Securing the respect for the personal, intimate sphere deserves much more protection that the economic (material) sphere of the individual.

4. Premises of the principle of proportionality

The provision of Article 31 para 3 of the Constitution of the RP as well as the judicial decisions of the Constitutional Tribunal imply the following premises of acceptability of restrictions in exercising the constitutional liberties and rights. They must be met cumulatively for the limitations to be legally acceptable:

1) a statutory form of the limitation;
2) the necessity for introducing limitations in a democratic state, i.e. also lack of other available effective means pursuing a similar end;
3) a functional connection of the limitation with implementing the values outlined in this provision, which are:
   a) security of the state,
   b) public order,
   c) environment protection,
   d) health protection,
   e) protection of public morality,
   f) protection of the rights and liberties of other people;
4) the range of violating the essence of a particular right and liberty. (P 2/98; K 33/02; SK 9/98; Zakolska, 2008, p. 115).

The doctrine emphasises that the first requirement makes a procedural or formal aspect defined as the principle of statutory exclusivity (Łabno, 2002, p. 699), whereas the remaining three premises constitute a material aspect of imposing the restrictions. (Oniszczuk, p. 2004, 392; P 11/98).

4.1. The requirement of a statutory form of limitations

The requirement of a statutory form of limiting the individual's rights and liberties stems from the reasons of guarantee. The statute (act of law) is the highest act of ordinary legislation, resolved through an open procedure, which enables the public opinion to follow works on its final form and gives an opportunity to react in the case of an excessive extension of the acceptable restrictions. Moreover, there is a possibility of controlling its constitutionality by the Constitutional Tribunal even before its promulgation. (Wyrzykowski, 1998, p. 48–49). The principle of statutory exclusiveness means an obligation of regulating a particular limitation in an act of law of the statutory weight and preserving the correctness of the legislative procedure. (Garlicki, 2001, p. 10–12; Łabno, 2002, p. 701 and next). The Constitutional Tribunal pointed out that what is subject to examination is the circumstance if the act came into effect in compliance with the procedure required by provisions of law to pass it. Finding the procedure required

to proper passing the act violated results in incompliance of the questioned regulation and the whole act with the Constitution of the RP. (K 3/98).

The requirement of a statutory form of limitations also contains a proposition of clearness and completeness of an act as well as proper legislation.[3] In accordance with the judicial decisions of the Constitutional Tribunal the reservation of a statutory form of limitations in Article 31 para 3 of the Constitution of the RP means a prohibition of sub delegation or transferring the regulatory (legislative) competence to another body, or regulating a particular matter in a legal document inferior to a statute (act of law). (U 5/97; U 3/01). Simultaneously, however, the term 'statutory form of limitation of rights and liberties' is also understood by the Constitutional Tribunal as a situation, where the act of law (statute) forms only basic forms of limitations, whose development and completion may occur in an inferior legal document. (Banaszak, 2009, p. 176; Wojtyczek, 1999, p. 110). The Constitutional Tribunal emphasised that the due correctness, precision and clarity of legal regulations is of particular importance for protecting constitutional liberties and rights of human and the citizen. (K 39/97). The regulation authorising intrusion into the sphere of civil rights and liberties must meet the requirement of satisfactory definiteness, which results from the principles of the certainty of law and citizens' trust in the state, which are based on the clause of democratic state ruled by law. (Działocha, Zalasiński, 2009, p. 4). The very crossing of a certain level of unclearness of legal regulations may become a sufficient premise to state their incompliance with the Constitution of the RP. Moreover, the statutory regulation must regulate all cases of real importance completely and exhaustively. The Constitutional Tribunal understands this term as a precise determination of the range of the intrusion, as well as the mode in which the entity limited in his/her rights may defend him/herself from the unjustified infringement of his/her personal rights and demand control over the legitimacy of the organ's action. (U 6/92). Considering the case of infringement of the right to privacy the Constitutional Tribunal demonstrated that the legislator granting the state organs competences of invasion in the sphere of privacy should determine the means and the procedure of the protection of this right. The principle of democratic state ruled by law requires it. (K 21/96).

The control of the limitations of the constitutional liberties and rights of the individual in the case of using unspecified (imprecise) phrases is of special importance in reference to the requirement of clarity of an act of law. Unclear edition of the text of regulations results in a threat of leaving the organs which apply them an excessive discretion at establishing in practice the subjective and objective range of the restrictions. (K 33/00). This means

that it is unacceptable to adopt in an act of law 'blank' regulations, which leave the form and range of limitations at the discretion of the organs of local governments or the executive power. (P 11/98).

4.2. The requirement of necessity for restrictions

The requirement of introducing a restriction in a democratic state means a real need for intrusion, in particular circumstances, into the individual's right or liberty. It is about the legal means which are:

- necessary to achieve a particular end,
- indispensable, because using other means fails to achieve the intended end;
- proportional, which means that they are the least burdensome to the entities whose rights and liberties are limited, and simultaneously remain in a rational proportion to the ends the protection of which the limitation justifies. (P. 2/98).

The doctrine underscores that the Constitutional Tribunal relativises the evaluation of meeting particular criteria composing the principle of proportionality depending on the nature of the right or the liberty which the limitation concerns. More severe standards of assessment are applied for regulating personal and political rights and liberties than economic and social rights. (K 10/95; Oniszczuk, 2004, p. 256).

Thus, *de facto* the premise of necessity contains three principles composing the principle of proportionality:

1) the principle of suitability (indispensability),
2) the principle of necessity and
3) the principle of proportionality in the strict sense. (Wojtyczek, 2002, p. 682; Oniszczuk, 2004, p. 256; P 2/98).

Re. 1: The requirement of suitability imposes verifying if the means applied is useful, adequate and if is suitable for achieving the intended end. The application of the principle of suitability requires from the organs applying law establishing the objective of the act of law under examination. (Wojtyczek, 2002, pp. 682–684).

Re 2: The principle of necessity introduces the requirement of checking if there is another, less burdensome means, which is equally effective in leading to the intended end.

Re 3: The principle of proportionality in the strict sense requires preserving accurate proportions between the positive effect of the particular legal regulation and the burdens imposed upon the individual. (Wojtyczek, 2002, p. 685). This narrows down to comparing and weighing between the prospective end and its profits on the one hand, and damages suffered and

reducing other rights on the other. This premise compels preserving an appropriate relation and proportion between the limiting the particular constitutional liberty or right and the intended end of the legal regulation and selecting the means that are the least burdensome and painful. The requirement of proportionality in the strict sense assumes then a necessity of weighing two values which cannot be simultaneously implemented completely through defining their importance. (Wojtyczek, 2002, p. 671). It is just the answer to the question if the so-called "axiological account" speaks in favour of the imposed limitation. In accordance with the principle of proportionality, it is important to pursue the fullest implementation of the rights protected resigning from the full implementation of each of them but in such a way that the limitations in relation to each of these rights were proportional.

The Constitutional Tribunal has emphasised many times that it is not sufficient that the means applied "were conducive to the ends" which should be achieved, "facilitated their achievement" or "were convenient" for the authorities, who are supposed to use them to achieve their ends. The limitations must be justified with the necessity of their introduction. Purposefulness, utility or convenience are not sufficient for imposing limitations (Łętowska, 1998, p. 17), and then the proposal of necessity and proportional in the strict sense is not implemented. (K 41/02; K 4/04).

4.3. Values justifying restrictions

Limitations of the constitutional rights and liberties are acceptable for the values presented in Article 31 para 3 of the Constitution of the RP, which construct the notion of public interest. (Garlicki, 2001, pp. 12–13; Zakolska, 2008, p. 127). This notion is composed of six values enumerated in the regulation in question: the need for providing security or public order, environment protection, public health and morality, or liberties and rights of other people. (Banaszak, 2009, p. 177; Wyrzykowski, 1998, p. 50 and next; Garlicki, 2001, p. 14–18; Zakolska, 2008, p. 128–134). All the aforementioned values appertain to the task of the public authorities. The catalogue of these values is closed and it is not possible to interpret it extensively. (K 23/98). However, it is emphasised that the phrases the legislator used forming the values in Article 31 para 3 of the Constitution of the RP are so general that they embrace almost all cases of limitations of the constitutional liberties and rights. (Garlicki, 2001, p. 13). The doctrine expresses an opinion that the legal regulation in point uses generously clauses allowing for limitations, pointing at other premises which refer to the particular liberties and rights guaranteed by the Constitution of the RP. (Wyrzykowski, 1998, p. 52–55).

4.4. The prohibition of violating the essence of rights and liberties

The prohibition of infringing the essence of a particular right and liberty (*Wesensgehalt*) is expected to prevent excessive intrusion in the content of this law in the way leading to violating its essence and defines the limits of intrusion into the constitutional rights and liberties. In the German doctrine this clause is referred to as *Schranken-Schranke*, which means limitation of limitations. (Łabno, 2002, p. 700; Garlicki, 2001, p. 6). According to this principle it is believed that there is a certain minimum scope of the substance of each liberty and each right, and depriving a person this minimum equals eliminating a given right. (Łabno, 2002, p. 707). The Constitutional Tribunal emphasised it strongly, stating that the scope of the limitations cannot destroy the basic components of the individual right, resulting in depriving it its real substance and leading to transforming it into a pretence of law. This situation leads to the violation of the essence of law and its basic substance, which on the basis of the Constitution is unacceptable. (K 33/02). The essence of a liberty or a right occurs if legal regulations preclude exercising them, however not lifting them in practice. (Banaszak, 2009, p. 180). The Constitutional Tribunal demonstrated that the prohibition of infringing the essence of rights and liberties should not be reduced just to the negative aspect of this principle, which demands moderating the limitations. It is also important to emphasise the positive aspect through pointing at the essence of every right and liberty. (P 2/98; Łabno, 2002, p. 706–707). It is important to mention that determining this core always occurs in concrete circumstances for an abstract determination of the elements of the substance which guarantee the existence of the particular liberty or right is not possible. (Łabno, 2002, p. 708; Garlicki, 2001, p. 24).

The doctrine points at two ways of understanding the prohibition of violating the essence of liberties and rights:

1) the theory of absolute essence, according to which there exists unchanged, absolute essence of any constitutional liberty and right independent from any particular situation,
2) the theory of relative essence, according to which the notion of the essence of constitutional rights and liberties is relative, determined by particular circumstances of the situation. (Banaszak, 2009, p. 180).

The Constitutional Tribunal acknowledges that the conception of the essence of rights and liberties is based on the assumption that it is possible to extract from any liberty and right its core, a nucleus which determines the existence of such right or liberty as well as additional elements, the

so-called 'envelope', which may be limited and modified in a different way without detriment to the particular right and liberty. The inviolable core must remain free from the intervention of the legislator even when the aim of the legal regulation introduced is to protect the values pointed at in Article 31 para 3 of the Constitution of the RP. (SK 9/98). The violation of the essence of a right or liberty would occur if the limitations introduced concerned the basic entitlements comprising the substance of the particular right and preclude this right from implementing the function which it is expected to fulfil in the legal order. (P 2/98; Zołotar, 2008).

The judicial decisions of the Constitutional Tribunal emphasise the view that evaluating the proportionality of the imposed limitations in relation to the sacrificed rights, the legislator has to respect the system of ethical values reflected in the Constitution of the RP, and cannot sacrifice more precious values in order to achieve less precious values (K 2/98). Simultaneously the evaluation of meeting particular criteria depends on concrete factual circumstances, and foremost on the nature of the particular rights and liberties planned to be restricted. (Banaszak, 2009, p. 181; K 23/98). Hence the stricter standards of evaluation should be applied to the regulations concerning the so-called "classical" rights and liberties, i.e. personal and political, than to economic and social rights, which by nature are left to the political discretion of legislative regulation. (K 3/98). The Constitutional Tribunal underscored that within certain matters the Constitution of the RP grants the legislator much narrower framework of political discretion of legislative regulation. This refers foremost to standardising the "classical" (personal and political) rights of human and the citizen because the constitutional assumption is to leave maximum freedom to the individual. Any regulations limiting these rights and liberties must refer to particular requirements established especially in Article 31 para 3 of the Constitution of the RP.

5. The principle of proportionality and the limitations of privacy of people performing public functions

Considerations on the process of specifying the principle of proportionality in the judicial decisions of the Constitutional Tribunal and its premises allow to evaluate the way and for what values limitations of the right to privacy of people performing public functions occur. The judicial decisions of the Constitutional Tribunal referring to the problems of limiting the privacy of people performing public functions concerned the examination of compli-

ance with the Constitution of the RP the regulations included in particular in the following acts of law:

1) ustawa z dnia 11 kwietnia 1997 r. o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944–1990 osób pełniących funkcje publiczne (D. U. z 1999 Nr 42, poz. 428 j.t.).
2) ustawa z dnia 23 listopada 2002 r. o zmianie ustawy o samorządzie gminnym oraz o zmianie niektórych innych ustaw (Dz. U. z 2002 Nr 214, poz. 1806).

Re 1: The Lustration Act has been a subject of many examinations of the constitutionality of its particular solutions with the Constitution of the RP. (K 24/98; K 39/97; P 3/00; K 11/02; K 7/01; SK 10/99; P 8/02; Zakolska, 2008, pp. 209–214). One of the decisions concerned the very obligation of submitting appropriate statements (so-called lustration statements), which, according to the initiators of the proceedings before the Constitutional Tribunal, a group of deputies, led to the situation of "self-accusation", which is against the rule of "the right to silence" and cannot be in harmony with the principle of social justice. The Constitutional Tribunal decided that the weighing between the aim of the Lustration Act and the right to legal protection of private life speaks in favour of the former, which is a proposal of securing transparency of public life and protection of the interest of the state connected with the correct performing the most important public functions through elimination the threat of blackmailing with the past facts in relation to the people who occupy key decisive positions in the state. (K 39/97; K 7/01; Oniszczuk, 2004, p. 403 and next). The Tribunal emphasised that the limitations of the right to privacy and the right to decide on one's personal life and burdens connected with the obligation of submitting the lustration statement are included in the price of applying for election or nomination for public functions in the state. (Oniszczuk, 2004, p. 404).

The question being the basis of the application to the Constitutional Tribunal for certifying the conformity with the Constitution in the case in point was not evaluated unequivocally. Four judges of the Constitutional Tribunal declared their dissented opinions. Judge Z. Czeszejko-Sochacki argued that the content of the lustration statement concerns the facts in the sphere of private life, which have not been known so far, and admitting to which, on the one hand, may expose the person to social effects (moral, in his/her environment, professional, family), whereas not admitting them to losing the performed public function. Hence the statement is an intrusion into the sphere of private life and a breach of the information autonomy. According to Judge Z. Czeszejko-Sochacki the legislator introducing the

aforesaid limitation by no means proved that imposing a legal obligation of revealing information is necessary in the democratic state for its security or preserving freedoms and rights of other people. Hence he recognised the questioned solution as not in conformity to the Constitution.

In accordance with the position of the Constitutional Tribunal, the right to privacy is violated by the obligation of submitting the lustration statement itself. However, this finds justification in the ends of lustration and results directly from the will of performing a public function by the particular person. Thus, limiting the right to privacy is justified because of the protection of values in Article 31 para 3 of the Constitution of the RP, which is the security of the state. It is important to note, which the Constitutional Tribunal emphasised, that no citizen is obligated to apply for a public function. Deciding to do so, he/she makes a fully independent and conscious decision, including certain restrictions and discomfort connected with the intrusion into his/her private life. It is commonly assumed that in relation to the people performing public functions, limiting the sphere of their privacy is acceptable.

Re 2: A justified intrusion in the sphere of privacy of people performing public functions cannot lead to infringement of privacy of their family members, who still remain private persons. This is the position taken by the Constitutional Tribunal in the decision of 13 July 2004. (K 20/03). The subject of the examination of constitutionality was the regulation imposing upon local government functionaries an obligation to submit statements – open and published in the Bulletin of Public Information – concerning spouses, ascendants, descendants and siblings on businesses run by these people on the territory of a, respectively, commune, district and province, the functionary of which is the person submitting the statement as well as on civil law agreements these people entered with local government organs.[4] This regulation lead to violation of the right to privacy of these people, who do not perform public functions. *Ipso facto* it was against Article 61 para 1 of the Constitution of the RP. The Constitutional Tribunal, confirming the legitimacy of the objective of the regulation, which was, *inter alia*, combat against corruption, decided that it is not a proper means to achieve it, because the limits resulting from Article 31 para 3 of the Constitution of the RP were exceeded. The effects of the questioned regulations concerned very sensitive and delicate affairs. According to the Constitutional Tribunal, the very revealing of kinship in certain cases may infringe privacy of the functionary and his close person (e.g. in the case of children out of the wedlock, raising a child of whom the functionary is not a parent, half-siblings). Moreover, certain events may lead to an indirect revealing

of situations or life plans of the person in point (separation, divorce or an intention of marriage). Also informing about events in the life of the family, publicly connecting accomplishments with the fact of being in family relationships with the functionary may be simply humiliating, if the family members reached certain property or position through their own efforts only. Thus, the fact that in some local government units occur pathologies does not justify imposing upon all functionaries the obligation of informing about important events in their relatives' lives.

The question of the spouse, on the other hand, is different. In the opinion of the Constitutional Tribunal, gaining a profit by the functionary's spouse should be treated almost the same as gaining a profit by the functionary him/herself because in most cases they remain in the statutory joint marital property regime, and even if not, the profits gained are for the spouses' joint use. Hence the obligation, imposed by regulation, of submitting statements and informing on the property situation of the functionary's spouse remains within the limits of the principle of proportionality and by the same token is not inconsistent with the Constitution.

It is important to underscore that the values connected with the transparency of public life lead to considerably narrower outlining the limit of legally protected privacy of people performing public functions in comparison with private people. An intrusion in privacy, however, occurs only when these people decide to perform public functions, which is not obligatory. Transparency of public life in a democratic state sometimes results in revealing information on people performing public functions evoking negative reactions of the public opinion. This is, however, often justified with public interest and protection of the democratic institutions of the state. (K 7/01).

In accordance with the judicial decisions of the Constitutional Tribunal the sphere of the public activity of people performing public functions sometimes overlaps with the sphere of their private life and there is no possibility of strict and clear separation of both these spheres. Privacy of the people of this category may be limited for the openness, transparency and availability of information about the functioning of public institutions in a democratic state. However, this cannot lead to a complete negation of the protection of the sphere of private life. The moment these people begin performing public functions, they have to take into account and accept the broader range of intrusion into the sphere of their privacy. (K 17/05). Simultaneously, the Constitutional Tribunal pointed out that in the situation of a collision or conflict of two values: the civil right to information and the right to privacy, it is not allowed to give priority to the former. We should not guarantee

citizens access to information at all costs. (K 11/02). Exercising the civil right to information in the case of people performing public functions cannot lead to exclusion of protection of the rights which the Constitution of the RP guarantees everybody. This concerns mainly the right to privacy. (K 41/02). The Constitutional Tribunal emphasised that the range of the right to information definitely does not include information on the intimate sphere, for instance, on the state of health. (K 17/05).

The analysis of the judicial decisions of the Constitutional Tribunal allows us to draw the conclusion that in reference to the information concerning the past of people performing public functions referring to the fact of these people's collaboration with the organs of security, limitations of the right to privacy are acceptable. This information is connected directly with the public functions performed and not revealing it may expose the persons to the danger of blackmail during performing their public tasks. Similarly, it is acceptable to limit privacy of people performing public functions through obliging them and their spouses to submitting the so-called property statements. These limitations are justified on grounds of the openness and transparency of public life as well as the necessity of preventing corruption in the organs of public authorities. However, the obligation of sharing personal and sensitive information, which even indirectly contribute to revealing life plans and family information of personal and delicate nature was recognised as violating the guarantee of legal protection of privacy and as intruding into the essence of this right.

6. Conclusions

It is unquestionable that people performing public functions are entitled to much narrower range of privacy protection than the so-called private persons, because of voluntary holding a public office, the right of citizens to public information as well as the necessity of preserving transparency and openness of public life. Thus, the principle of proportionality should refer to foremost needs connected with proper functioning of public institutions, and not only to the status of people performing public functions as citizens. (SK 7/05). However, it is important to underscore that intrusion into privacy of the people of this category should be always justified on grounds of a direct connection between their functioning in the sphere of private life and the function (office) performed for the state and the public good. The Constitutional Tribunal pointed in its judicial decisions at the conditions on the cumulative meeting of which depends the acceptable intrusion into

privacy of the so-called public persons. First, the limitations must be justified with the necessity of protection of one of the values listed in Article 31 para 3 of the Constitution of the RP. Secondly, it is indispensable to demonstrate that performing a public function constitutes an adequate criterion of lowering the standard of protection of this person's privacy. (Laskowska, 2008, p. 76).

This means that the information infringing the rights and liberties of the person cannot exceed the absolute necessity or be incommensurate with the value which is the openness and transparency of public life. Otherwise, the requirements of the principle of proportionality in imposing limitations on exercising the constitutional liberties and rights are not met. The information should also be of importance for evaluating the functioning of an institution of a person performing a public function and must be connected with the fact of performing this function. Between the information about the person and the public function performed by this person there should be a functional connection evaluated *in concreto*. Even a socially important aim, such as combating corruption or preventing political blackmail, cannot lead to eliminating the essence of the right to privacy or to revealing information of intimate and personal nature, concerning the family of a person performing public functions, his/her state of health or sexuality. Moreover, the information cannot intrude into the essence of the right to privacy or, in reality, eliminate the sense of legal protection of private life. The limits of intrusion into the sphere of private life are always outlined with the injunction of respecting personal dignity, and when imposing limitations it is important to take into consideration the fact that the good (right) which is assumed to be pursued and the good "sacrificed" on the basis of the Constitution of the RP are equal values.

NOTES

[1] See also wyrok Trybunału Konstytucyjnego z 16 kwietnia 2002 r. (SK 23/01) as well as Judge Andrzej Mączyński's dissented opinion on this decision.

[2] Wyrok Trybunału Konstytucyjnego z dnia 13 lipca 2004 r.: the decision in point was taken on the basis of the evaluation of theconstitutionality of legal solutions introduced to laws on local governments, which imposed upon local government officials an obligation of submitting statements concerning their spouses, their ascendants, descendants and siblings, whose content was to be information on business run by these persons on the territory, respectively, of the commune, the district and the province of which the person submitting the statement is a functionary as well as in civil law agreements between these people and the organs, organisational units or legal persons of, respectively, the commune, the district and the province. (K 20/03).

[3] For more see the judicial decisions of the Constitutional Tribunal cited by Koźmiński, A. K. (2008). Wolności, prawa i obowiązki człowieka i obywatela. In M. Zubik (Ed.), *Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów* (pp. 171–174). Warszawa: C.H. Beck.

[4] This regulation was introduced by the Act of 23 November 2002 (Dz.U. Nr 214, poz. 1806) on amending the Act on Commune Local Government and on amending certain other acta.

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QUALIFICATION OF CONCEPTS AND ITS PROBLEMS IN CASES WITH FOREIGN ELEMENT IN POLAND AND THE UNITED KINGDOM

Abstract. Qualification is the basic instrument used in the process of application of the law. It is impossible to apply the law without conducting it. The main internal source of collision law in Poland, Act of private international law dated February 4th, 2011, does not specify how to carry on the process of the qualification, and doctrine is of the opinion that the Polish court applying foreign law should interpret the foreign concepts according to the rules of this law and give them such meanings as this law assigns to them. But also there are four doctrinal proposals concerning methods of qualification. The first one (with various modifications) is relatively popular in a number of countries, while the Polish doctrine has the greatest respect for the latter: 1) *lex fori* approach, 2) *lex causae* approach, 3) autonomous method and 4) functional method (or collision *lex fori* approach).

The English judge applying the rules derived from his own internal law remembers about the function of private international law – and therefore takes into account the rules and institutions adopted in the foreign laws. That is application of *lex fori* approach modified because of the function of collision law, indeed reminiscent of a functional method. However, due to the lack of a uniform approach to qualification and identification of the only way to proceed by the doctrine and case law, it is permissible to move away from the use of this method. For instance it is possible to use the *lex causae* approach, if it leads to an equitable solution.

Lack of regulation of qualification gives a person applying the law a freedom, but at the same time leads to uncertainty about the effects.

The main internal source of collision law in Poland is Act of private international law dated February 4th, 2011. It settles the law applicable to the private law relations connected with more than one country, containing general regulations of application of collision norms and specific collision norms responsible for choice of law in specific cases. However, it does not specify how to carry on the process of the qualification of concepts (notions), and doctrine is of the opinion that the Polish court applying foreign law should interpret the foreign concepts according to the rules of this law and

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give them such meanings as this law assigns to them. The Act also does not indicate what should be interpreted in the process of qualification and does not define qualification.

According to M. Pazdan (2009, pp. 55–56) the qualification is the interpretation of the expressions describing the scope of the collision norm undertaken in order to establish the conditions for its use. This narrow understanding of qualification as process concerning only the scope of the collision norm was extended in the doctrine. Qualification process shall also be applied in relation to the concepts being a part of the point of contact in the collision norm. As a result, qualification in a broader sense can be defined as the interpretation of expressions/notions used in the collision norm in order to apply this norm – and therefore also as subsumption, an assignment of the facts in the process of application of law formulated by the interpretation of the notions used in the rules of collision law. If, however, the qualification of the scope of collision norm consists of both interpretation and subsumption, it is enough to provide interpretation only while qualifying the point of contact.

The method of qualification process may vary depending on the time when it is used. Owing to the French scholar, E. Bartin (1930, p. 565 and next), the division of qualification exists in the Polish doctrine – there is a primary and secondary qualification. From the point of view of this division, the most important is the fact (moment) of an indication of the applicable/proper law, as the first one takes place before the indication and the second – just after it. Therefore, we assume that the primary qualification applies to the forum law rules (collision norms), and secondary – to norms (as it seems, not only of conflict law) of the indicated law and their correct application.

In the absence of a statutory reference how to carry on the qualification process, the proposals come from the doctrine. It provides four different approaches – methods of qualification. The first one (with various modifications) is relatively popular in a number of countries, while the Polish doctrine has the greatest respect for the latter: 1) *lex fori* approach, 2) *lex causae* approach, 3) autonomous method and 4) functional method (or collision *lex fori* approach). (Bagan-Kurluta, 2002, pp. 61–69; Bagan-Kurluta, 2011, pp. 126–133; Bagan-Kurluta, 2012, pp. 51–56).

Lex fori approach allows to apply the law of the forum to the interpretation of legal concepts, which means that the ways of interpretation should be found in this legal system and the meanings of the notions should be the same as in this internal (private) law. In fact it means that we should interpret the concepts provided in the rules of private international

law the way it is done in civil law. *Lex causae* approach provides application of a law that would probably be proper in specific case, but it has not been chosen yet. It is perfect for secondary qualification, because it takes place after indication of law. If we know the proper law (the chosen one), we can easily apply all the rules of interpretation and also take all the meanings of legal concepts from this law. Autonomous method makes universal law out of collision law, which means that hypothetically we have one catalogue of notions being used in private international law and their universal meanings for all the countries in the world. That is untrue. The last approach underlines the importance of the international function of collision law. In a consequence of application of this method we should take the ways of interpretation and the meanings of legal concepts from our national (*forum*) collision law, remembering that they are different than the ones takes from our (*forum*) internal (civil/private) law. The problem is that in fact the methods of interpretation are the same for both – collision and private laws. The meanings can differ, because we should respect the international function of collision law, that is why we should accept the idea that the meaning of a notion in international case may be a little bit different than in the national case. For instance in a case of marriage (national one), a notion of marriage is taken from definition written in art. 18 of the Polish Constitution (Dz. U. z 1997 Nr 78, poz. 483). Marriage is an union between a man and a woman. When we have the same case, but with so called foreign element (international one) it is possible to accept the idea that the legal concept of marriage also contains the same-sex unions.

Lack of rule responsible for qualification in the Polish law can be interpreted in two ways. Firstly, it gives the possibility to apply a method chosen for a given case. Secondly, an issue of classification seems to be the more controversial as the more situations unknown to Polish law arise in courts or just as subjects of public discussion. Its best example was the discussion about a change of private international law regarding marriage, and especially a notion of marriage itself. The main question was if a draft was contrary to shown above constitutional rule regarding marriage. In fact the discourse involved not an issue of inconsistency but a method of classification of the concept of marriage.

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In the United Kingdom the interpretation of terms is largely based on English rules of private international law, assuming the existence of differences in meanings between collision and domestic/internal law, and assum-

ing that the meaning of the terms in the light of the former are wider than in the light of the latter. Definitions should be relative and functional, and besides, they should be created separately for each case, because meaning of the concept accepted in one case must not necessarily correspond to the situation in the other case. When analyzed, institution or rule of foreign law has no equivalent in the English law, the court gives it the meaning of the institution or rule closest to it, existing in the English law, it is possible to also use the analogy to the institution from the foreign law. (De Nicols *v.* Curlier [1900] AC 21).

The judge applying the rules derived from his own internal law remembers about the function of private international law – and therefore takes into account the rules and institutions adopted in the foreign laws (Cheshire and North's, 2004, p. 38). That is, as it seems, application of *lex fori* approach modified because of the function of collision law, indeed reminiscent of a functional method. However, due to the lack of a uniform approach to qualification and identification of the only way to proceed by the doctrine and case law, it is permissible to move away from the use of this method, which can take place, as it seems, accidentally.

It is therefore possible to use the *lex causae* approach, if it leads to an equitable solution. (In the Estate of Maldonado [1953] 3 WLR 204; [1953] 2 All ER 300; [1954] P. 223). In addition, the meaning of the notion of citizenship, as the universally used concept of international function, is determined on the basis of this law, which is used to determine its existence, and therefore the national law (Oppenheimer *v.* Cattermole [1972] 3 WLR 815), while the nature of other points of contact is determined by the English collision law. (Graveson, 1974, p. 58).

According to the principle of application of its own procedure by the court, the English court may make a performance of the contract in the light of the relevant foreign law valid and effective dependent on the compliance with the rules of the English procedure (Leroux *v.* Brown [1852] 12 CB 801) or analyze foreign concept of limitation of claims and if it corresponds with the English one, use the English procedural provisions regardless of whether the institution is a part of the procedure or substantive law in the foreign legal system. (De Reneville *v.* de Reneville [1948] P. 100). Although with regard to this last point, the court since the entry into force of the Foreign Limitation Periods Act of 1984[1] should always apply the proper foreign law. However, the court may very well decide about the qualification of institutions based not on a strict division of the institutions of substantive and procedural law, but on the circumstances of the case (Re Fuld's Estate (No. 3) [1968] P. 675), or just very liberally assume that an institu-

tion is part of the substantive law, but in fact, it is regulated by the rules of the English civil procedure (Fentiman, 1998, p. 39). Equally liberal approach to the qualification of institutions, where there is a discrepancy in the location of the institution as part of the process or the material law, is an outcome of the assertions of the doctrine, as well as of the case law in some part, with regard to the legal presumptions and burden of proof. In the case of the latter, it is suggested to choose between two methods of qualifications – the *lex fori* or rather the *lex fori* in the broader sense (Graveson, 1974, pp. 46–53; See Re Korvine's Trusts [1921] 1 Ch. 343) or the *lex causae* (Fentiman, 1998, pp. 40; Re Fuld's Estate (No. 3) [1968] P. 675).

Some scholars, such as A. Briggs (2007, p. 1528) consider the fact that the qualification of a situation as falling within the specific category of legal institution – that is, as part of the substantive law, the law of marriage, etc. should be held in the conceptual structures of English law, but bearing in mind that the flexible use of analogy may lead to a rational solution.

It should be assumed that the British courts generally apply a specific *lex fori* method described above, but they can use it in modified by a Canadian scholar, J.D. Falconbridge, form. He assumed that the qualification is a two-step process. The first stage involves the use of *lex fori* to define the scope of legal category (concept), the second – the analysis of the relevant foreign norm in its own context in order to determine whether it fits within the scope pre-determined by the *lex fori.* (Collier, 2004, pp. 17–19). This means that the courts actually do not use foreign qualification. This two-steps process is also seen by other representatives of the English doctrine. They use the division into classification of the cause of action, which enables the identification of the category of the legal institution, and the classification of a rule of law which enables the identification of the collision norm, which is to be applied, and as a consequence of its application – an indication of the applicable/proper law. (Hayward, 2006, p. 7–8, Cheshire, North's, 2004, p. 36 and next). The first one is defined by G.C. Cheshire, P. North and J.J. Fawcett as assigning the question at issue in the facts considered by the court to the relevant legal category (and thus the discovery of the true cause of claim), in order to reveal the collision norm – relevant and proper to apply. (Cheshire, North's, 2004, pp. 36; Tezcan *v.* Tezcan [1992] 87 DLR (4th) 503; Re Musuru's Estate [1936] 2 All ER 1666). The second is to apply the appropriate collision norm. While to the first of these relate all of the foregoing, the indication of the basis (i.e. on the occasion – of the method) of qualification, in the second of them it is problematic.

In matters related only to the area of England the base (and subject) of qualification are generally the rules provided in the domestic/national law. In cases with the foreign element, because of the specific nature of conflict of laws, even before the start of qualification of the English norm one should make sure of the purpose to be realized as a result of its application. The same can be said about qualification of foreign norms, provided that it is conducted according to the rules provided by the indicated foreign law – but again, with the objectives to be achieved as a result of their use in mind. In matters of family law doubts about the method of qualification raised in regard to issue of consent to marry, and potential conflict of qualification (here, in particular in English-French cases) while deciding about it as a material or formal prerequisite of the marriage. (Simonin *v.* Mallac [1860] 2 Sw & Tr 67, Ogden *v.* Ogden [1908] P 46; Lodge *v.* Lodge [1963] 107 Sol Jo 437; Mahadervan *v.* Mahadervan [1964] P. 233; Shahnaz *v.* Rizwan [1965] 1 QB 391; Apt *v.* Apt [1947] P. 127; [1948] P. 83 (CA); [1947] 1 All ER 624; Starkowski *v.* Attorney-General [1954] AC 155; Graveson, 1974, pp. 53–56).

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To recapitulate, the qualification is the basic instrument used in the process of application of the law. It means that it is impossible to apply the law without conducting it. Lack of regulation of qualification gives a person applying the law a sort of freedom, but at the same time leads to a kind of uncertainty about the effects. For example, this problem emerges in the case of ambiguous term, such as domicile. As a result, the method of qualification will decide whether we are dealing with domicile in a particular country. Each method has disadvantages – the use of the first, apart from the need to carry out the re-interpretation of the term, is associated with doubts as to the possibility of using all of the provisions contained in the law forum (e.g. art. 26–28 of the kodeks cywilny (Dz. U. z 1964 Nr 16, poz. 93 z późn. zm.)). The use of the second means, in turn, acceptance of a false assertion that the State determines the domicile of a person (after all, it is a relationship created by a person, not by the state). It can be assumed that this is a way of multiplication of problems connected with domicile – by denying the existence of domicile or creating a situation in which one person has more than one domicile. Analysis of utility of the third method, in turn, leads to the conclusion that it can only be used for interpretation of the Polish collision norms, so to the interpretation of foreign rules we need to apply one of the methods already mentioned here (Bagan-Kurluta, 2001, p. 106), for example, to understand it as it is understood by foreign collision law (Pazdan, 2009, p. 53).

NOTES

[1] Art. 1 Application of foreign limitation law. (1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter- (a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings subject to section 1A; and (b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply. (2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account. (3) The law of England and Wales shall determine for the purposes of any law applicable by virtue of subsection (1)(a) above whether, and the time at which, proceedings have been commenced in respect of any matter; and accordingly, section 35 of the M1Limitation Act 1980 (new claims in pending proceedings) shall apply in relation to time limits applicable by virtue of subsection (1)(a) above as it applies in relation to time limits under that Act. (4) A court in England and Wales, in exercising in pursuance of subsection (1)(a) above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country. (5) In this section "law", in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of England and Wales, this Act. http://www.legislation.gov.uk/ukpga/1984/16/section/1 (accessed October 25, 2012).

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INTERPRETATION OF NEGATIVE PREREQUISITES FOR DISSOLVING MARRIAGE BY DIVORCE – COMMENTS IN THE LIGHT OF DIRECTIVES OF THE SUPREME COURT

Abstract. The issues discussed in the following article focus on the interpretation of negative prerequisites for dissolving marriage by divorce. In Poland, special protection of the family stems both from the Constitution and the Family and Guardianship Code of 1964. The obstacles which seem to counteract the independent breaking of the marriage knot are the regulated positive and negative divorce prerequisites. In the area of divorce prerequisites in question, the Family and Guardianship Code functions in the unchanged form. As provided by the Family and Guardianship Code one of the negative divorce prerequisites was the welfare of minor children who could suffer as a result of granting a divorce. It is interesting for the contemporary judicial practice and the interpretation of law made in court judgments whether and in what scope it is possible to use the contemporary achievements of the Supreme Court as regards the guidelines. It seems that in the situation where the directives lost their binding force, it is not purposeful to refer to them as a source of law interpretation. The practice of judicial decisions seems to oppose this idea. Moreover, the guidelines of the Supreme Court passed at the time when they were a commonly binding interpretation of the law will undoubtedly be useful for creating the judicial law now and in the future.

1. Introductory remarks

Starting from the Konstytucja Rzeczypospolitej Polskiej (Dz. U. z 1997 Nr 78, poz. 483) – hereinafter as the Constitution, and finishing with minor legislation,[1] the Polish law safeguards the marriage and family. Therefore, it appreciates the incontestable values which a properly functioning marriage and family contribute to the society, and it sees the durability of these instruments as a guarantee of the sustainable social development in all its aspects.

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The Polish legislation does not allow for the possibility that the spouses untie the marriage knot by way of an independent decision or declaration of will. It does not treat marriage as a civil-law agreement in its strict sense whose existence is conditional on the will of the very spouses (Piasecki, 2009, p. 370.), being the parties to it. An obstacle which seems to counteract the independent breaking of the marriage knot are the regulated positive and negative divorce prerequisites. In their essence the positive prerequisites impose on the court the obligation to determine, by way of the conducted evidence proceedings, that they emerged in a specific factual state, being an unrepeatable set of circumstances and facts from a marriage life. The durable character of marriage is safeguarded not only by the requirement of positive prerequisites to be fulfilled. In order to commence the action for a dissolution of marriage by divorce, it is also necessary to show that there were no negative prerequisites, that is those hampering the possibility of granting a divorce and whose effect is dismissing a claim lodged.

Despite the fact that it was already known in ancient legislature, the instrument of divorce has not always functioned in the Polish family law and has not always had a secular character as it is the case now. Among the post-Partition, sector legal systems, it was only the German civil code from 1896, binding in the territories of the western Rzeczpospolita that was based on the principle of the secular character of marriage. The remaining legislative authorities being heritage of the Russian and Austrian partitions tended to favour the religious law in all or most cases.

Divorce was introduced into the Polish legal order by the dekret z dnia 25 września 1945 r. Prawo małżeńskie (Dz. U. z 1945, Nr 48, poz. 270) which came into force on 1 January, 1946 and bore the title "Marriage Law". This decree commenced the process of secularization of marriage law. The procedure of declaring the sacrament of matrimony null and void so far implemented in the course of religious proceeding so far was replaced by a secular mode of contracting marriage and dissolving it by a court granting a divorce. In the first place it meant interference and participation of state in reference to the very act of contracting marriage (before an official of the Registry Office) and entering it in proper registers, regulated by substantive law implications of an effective contracting, duration and cessation of marriage as well as entrusting the independent state courts with the exclusive jurisdiction in the cases related to divorce and annulment of marriage, with an absolute ignoring of ecclesiastical (consistory) courts (Gawrońska-Wasilkowska, 1966, p. 12).

Art. 24 of the decree states that "at the request of one of the spouses the court grants a divorce upon deciding that the consideration of the welfare

of minor children is not an obstacle to that and upon declaring a permanent disintegration of matrimonial life...". In the further part of the provision the law-maker enumerated, by way of example, reasons for this disintegration, from those most frequent and typical, such as adultery, to the most serious marital misconducts, such as "an infectious venereal disease posing a hazard to the spouse or offspring". As it emerges from the above, the law-maker saw the positive prerequisite for granting a divorce in the "permanent disintegration of matrimonial life". Considering the welfare of minor children the court found granting a divorce inadmissible and treated it as a negative divorce prerequisite.

It was at that time that the judicial decisions, based on the provision in question, apart from the decree prerequisites, shaped the principle of recrimination which was refusing a divorce to a spouse who was a sole guilty party of the disintegration of matrimonial life, admitting the possibility of granting a divorce through the fault of both spouse's. (Wa G 126/48). What is more, the principle did not arise from the literal reading of the provision, but owed its existence exclusively to the judicial decisions of courts.

The pace of works aimed to unify the marriage law after the Second World War affected its content, enforcing a prompt activity by the codifying commission. The effect of its works was the ustawa z dnia 27 czerwca 1950 r. Kodeks rodzinny (Dz. U. z 1950 Nr 34, poz. 308) – Family Code which came into force on 1 October, 1950.

The new Family Code adopted two positive and two negative prerequisites as basis for the divorce proceedings. Thus, divorce could be granted only if there was a "complete and permanent disintegration of matrimonial life evoked by serious reasons". (Dz. U. z 1950 Nr 34, poz. 308). Contrary to the Marriage Law the Code did not enumerate, even by way of example, these serious reasons, leaving it to the courts to decide in this scope. Despite the complete and permanent disintegration of marital life, divorce could not be granted if it was contrary to the welfare of minor children, and if it was sought by the sole guilty party in the disintegration of matrimonial life. There were two exceptions to the latter prerequisite, namely divorce could be granted if the innocent spouse expressed their consent thereto or if the spouses remained in the long-lasting separation and there were important social reasons for granting a divorce (Dobrzański, Ignatowicz, 1975, p. 265).

This kind of legislative solution functioned until 1 January, 1965, that is until the ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy – Family and Guardianship Code – came into force which, amended on numerous occasions, is still binding. (Dz. U. z 1964, Nr 9, poz. 59).

2. Negative prerequisites for dissolving marriage by divorce governed by the provisions of the Family and Guardianship Code according to the directives of the Supreme Court

In the area of divorce prerequisites in question, the Family and Guardianship Code functions in the unchanged form. It seems that the adopted legal regulations pertaining to the divorce prerequisites suit the social needs, having a clear and transparent character.

The provision of Art. 56 of the Family and Guardianship Code allows for the possibility of dissolving marriage by divorce if a permanent and complete disintegration of matrimonial life occurred between the spouses. These are two positive divorce prerequisites. In contrast to the Family Code from 1950 the prerequisite of "serious reasons for the disintegration of matrimonial life" was abandoned, and in relation to the Marriage Law, there was no enumeration of circumstances which could be regarded as an "important reason".

As provided by the Family and Guardianship Code one of the negative divorce prerequisites was the welfare of minor children who could suffer as a result of granting a divorce, and thus it introduced a so far unknown prerequisite in the current Code regulations, namely a conflict of granting of a divorce with the principles of social co-existence. Unlike in the Family Code, the Family and Guardianship Code formed an exception to the rule of inadmissibility of divorce request by the spouse who is a sole guilty party of the disintegration of matrimonial life. Compliant to Art. 56 § 3 of the Family and Guardianship Code the divorce requested by the spouse who is a sole guilty party of the breakdown of marriage is admissible if "the other spouse has expressed their consent to that, or the refusal of such consent to divorce is contrary to the principles of social co-existence".

"The best welfare of minor children" as a negative divorce prerequisite occurred in each codified solution presented above. It gave rise to a number of discrepancies and misunderstandings in the judicial practice at the time the Family Code was in force. At that time two different interpretive approaches were shaped. (Gawrońska-Wasilewska, 1966, p. 92).

According to the first one, the welfare of minor children was always an obstacle to the granting of divorce since children are best raised in marriage.

Another view holds that divorce only sanctions the prior state of marriage breakdown, not changing anything in it. Therefore, it does not have any influence on the welfare of children.

Both views, on account of their radical character, were not to be accepted by the judicial practice. The first one would entail the prohibition

on the granting of divorce in relation to the spouses with minor children, which viewpoint was strongly opposed by the Sąd Najwyższy – hereinafter as Supreme Court (C 184/51), and the second one would effect the rejection of a provision of law and assumption that the provision will not be applicable in practice.

Undoubtedly, the need arose to make an interpretation of the provisions of law and taking a position which would be a result of both approaches. In the period of the Second Polish Republic until the second half of 1948 the Supreme Court was primarily a court of cassation for the judgements of common courts of law and functioned in compliance with the pre-war legislation, amended deliberately and of a small scope. The political crisis in the communist party started the worst period of Stalin's rule whose essence was adjusting all institutions and solutions as well as the law to fit the Soviet models. The Supreme Court was no exception. (Garlicki, Resich, Rybicki, Włodyka, 1983, p. 135). On 27 November 1948, the General Assembly of the Supreme Court declared that the pre-war judicial decisions and principles, if not compliant with the current system of government, were only of historical significance. It was later (12 February, 1955) extended in its ambiguous formula to the pre-war statutes by the Supreme Court. A situation occurred where the Supreme Court was given a task to construe the provisions of the newly-created law, show the principles of its application and mode of resolving disputes concerning its interpretation. In order to facilitate the implementation of this task the judicature and judicial procedures required significant changes. It took place in the years 1949–1950. A lot of the adopted legislative solutions in the system of courts and in the court proceedings applied by them survived, in full or in part, until the end of communist regime in Poland. (Lityński, 2010, p. 61). On the wave of reforms of this period both court procedures were changed in the way that the pre-war three-level character of procedure was changed, with the instruments of cassation and appeal being cancelled, and the two-level review system modelled on the Soviet one was introduced.

Since 1951 the Supreme Court became a second-level court for judicial decisions made by provincial courts. In the course of taking cognizance of cases involving ordinary means of appeal (judicial review), it has jurisdiction over the lower courts. Within the framework of this jurisdiction the Court has inherent powers of extraordinary review, of passing directives for the judicature and judicial practice, responding to legal queries posed by provincial courts as second-level courts. In view of rejecting the achievements of pre-war judicial decisions, the Court had an incontestable role in the scope of law interpretation. The aim was to unify the judicial practice of

lower courts and eliminate discrepancies in court judgments. The Supreme Court achieved this by applying the instruments typical of the legal system and corresponding to the Soviet solutions, namely by:

A) the directives of the judicature and judiciary according to ustawa z dnia 27 kwietnia 1949 r. o zmianie prawa o ustroju sądów powszechnych (Dz. U. z 1949 Nr 32, poz. 237) – in the beginning, since 1949 they have been called the directives of the judicature and judiciary, and since 1984 – the directives on the interpretation of law and judicial practice. These were the resolutions of the Supreme Court which aimed to ensure cohesion of judgments of all courts in the People's Republic of Poland in civil and criminal cases as well as their "compliance with the principles of people's law and order". By making the interpretation of law and establishing the meaning of legislative norm, the Supreme Court pointed to the mode of its implementation by courts. It was binding to all courts in Poland;

B) the resolutions of the Supreme Court explaining dubious legal provisions the application of which evoked discrepancies in court judgements (binding on all panels of the Supreme Court provided that they were entered into the book of legal principles);

C) legal principles adopted by the Supreme Court in a specific case and binding upon all courts in the subject matter as well as the responses of the Supreme Court to the queries of lower courts, adjudicating as second-level courts and binding on courts in a given matter.

Among the above-mentioned instruments the directives of the judicature and judiciary were incontestably of greatest significance, emerging from the fact that they were passed at the General Assembly of the Supreme Court composed of the whole chamber or combined chambers as as well as because of the range and scope of binding decision (all courts in Poland), and the effect of infringement (independent basis for appeal). They were equal to the provisions of law. (Siedlecki, 1986, p. 207). The interpretive solutions adopted in the directives were binding directly on all courts and in a fast and effective way guaranteed the cohesion of judgements, thus limiting free interpretation of courts. The purpose of directives specified in the ustawa z dnia 27 kwietnia 1949 r. o zmianie prawa o ustroju sądów powszechnych (Dz. U. z 1949 Nr 32, poz. 237) aimed at the "specific tasks of the judicature and ways of implementing them in conformity with the social, economic and political conditions" caused that the issue of law interpretation remained marginal, and the expectations related to the policies of law and its implementation in congruence with the social and economic conditions came to the fore. This conclusion seems apt even more on observation that in practice the essence of directives was worked out outside the

Supreme Court by the political authorities and the "editing of text and its justification" lay with the Supreme Court". (Lityński, 2010, p. 63).

The political changes at the end of the eighties and the beginning of the nineties of the twentieth century gave rise to a new law on the Supreme Court. (Dz. U. z 1984, Nr 45, poz. 241). It defined the Supreme Court as the safeguard of the political, social and economic system, and ultimately of the citizens' rights. This hierarchy of tasks and goals set for the Supreme Court did not raise any doubts as to the political use of judgements passed by this Court, with the marginalising of and giving secondary priority to law and order. As the main court, the Supreme Court kept supervision over the activity of all other courts in relation to the passing of judgements. The functions of ensuring coherent judicial interpretation and court practice were realized, just like in the previous period, by recognizing means of appeal, passing directives in the scope of law and judicial practice, construing legal provisions and resolving dubious legal issues. This form of the Supreme Court survived until 20 December, 1989 (Dz. U. z 1989 Nr 73, poz. 436), when the instrument of directives was cancelled and the Supreme Court by its resolution of the combined chambers adjudicated upon the loss of binding force of all the previously passed directives.

When considering the problem of directives of the Supreme Court, the date 26 April, 1952 should be pointed to when the uchwała Sądu Najwyższego Izba Cywilna z dnia 26 kwietnia 1952 r. (Civil Chamber of the Supreme Court) passed a resolution (C 798/51) on establishing directives for the judicature and judiciary regarding the application of Art. 30 of the Family Code established by the Law of 22 August, 1950. (Dz. U. z 1950 Nr 34, poz. 308). For many years, that is until the Family and Guardianship Code came into force, which took place on 1 January, 1965, it shaped the interpretation of law pertaining to the judgements in divorce cases. According to the Supreme Court the fundamental principle was that with regard to the safeguarding and strengthening of family, whose basis was in turn marriage. It rejected the principle of formal indissolubility of the marriage knot, and it had in mind the social harm done by the so-called dead relationships. In the further part the guidelines gave explanation concerning the meaning attributed to the consent to divorce and differences between the consent and granting a divorce as well as the application of principles of restricting the evidence proceeding to the hearing of parties. The Supreme Court recommended cautiousness in applying this instrument, having in mind the purpose of counteracting rash decisions of divorce which, with the lack of alertness on the part of the court could lead to a divorce despite the lack of necessary prerequisites.

In the directives the Supreme Court reaffirmed its position regarding the inadmissibility of granting a divorce at the request of the sole guilty spouse, although it indicated that this principle should not be binding without any exceptions. The first exception concerns the cases when the other spouse has expressed their consent to a divorce. According to the Supreme Court it is this position of the guilty spouse that "the law takes into account and it is this position that in view of the complete and permanent disintegration of matrimonial life evoked by important reasons decides about the fact that divorce can be granted unless it is detrimental to the welfare of minor children". (C 798/51 – thesis III). Beside the consent given by the defendant, another exception to the above rule is contained in Art. 30 § 2 of the Family Code saying that the court, having in mind the social interest may grant a divorce at the request of the sole guilty spouse, but this can be done exclusively in exceptional cases when the spouses have remained separate for many years.

When analysing the specific elements of the normative act quoted above, the Supreme Court concluded that the period of separation of spouses which allows for defining it as long-lasting "should be based upon the evaluation of specific circumstances, in particular those concerning the time of matrimonial life of the spouses, their lifestyle, age, etc. Life experience shows in principle that the idea of a five-year period is fully justified. This term should be treated as approximate one, allowing for its potential extension, depending on the result of evidence proceeding". (C 798/51 – thesis V).

The subsequent directives of the Supreme Court of 18 March, 1968 (III CZP 70/66) concerning the judicature and judiciary pertaining to the application of provisions of Art. 56 and 58 of the Family and Guardianship code refer to the current achievements of the judicature based on Art. 30 of the Family Code. They clearly indicate that despite the fact that the time interval from the moment of cessation of matrimonial life is not a condition indispensable for divorce at the request of the spouse who is solely guilty of the disintegration, it may constitute auxiliary circumstances to establish if the refusal of consent to a divorce was in a specific case contradictory to the principles of social co-existence. "The result of this evaluation may especially be influenced by the long-lasting lack of manifestations of actual bonds between the spouses, even when not accompanied by the fact of establishing a new family by the spouse who is the sole guilty party". (III CZP 70/66 – thesis IV).

The Supreme Court expressed the view that a longer period of time causes so important changes in the life of both spouses that although difficult

to specify they result in the assessment that the refusal of granting a divorce is contrary to the principles of social co-existence. The life experience of judges adjudicating in divorce cases allows for a generalization that the period of separation between the spouses often leads to a creation of new cohabitation relationships of each of the spouses, establishing new families of which offspring is born as well as the need for independence of spouses in the economic and professional sphere.

It is interesting for the contemporary judicial practice and the interpretation of law made in court judgements whether and in what scope it is possible to use the contemporary achievements of the Supreme Court as regards the guidelines. Is it advisable and purposeful to refer to their content in completely different (in relation to the time they were passed in) social, political and economic conditions, and also to what extent, if any, the directives of the Supreme Court affect the judicial independence. It seems that in the situation where the directives lost their binding force, it is not purposeful to refer to them as a source of law interpretation. The practice of judicial decisions seems to oppose this idea.

The currently-binding ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych (Dz. U z 2001 Nr 98, poz. 1070 z późn. zm.) grants the Supreme Court the right of supervision over the activity of courts in relation to judicial decisions (Art. 7). This provision of law, being a repetition of Art. 183 section 1 of the Constitution (Dz. U. z 1997 Nr 78, poz. 483), makes into law the principle of judiciary control of the Supreme Court over the judicial decisions of common courts of law. The purpose is to eliminate mistakes and imperfections affecting negatively the accuracy of judicial decisions. Apart from the judicial control concerning the cassation, adjudicating on legal issues raising serious doubts as regards judicial decisions, the Supreme Court adopts by virtue of Art. 59 the so-called resolutions of a specific character and the so-called abstract resolutions as prescribed in Art. 60. The resolutions of the Supreme Court adopted pursuant to Art. 59 are always connected with a specific case since the need to consider it, "as a result of serious doubts over the law interpretation", is created when taking cognizance of cassation or other means of appeal. Their impact and binding force are connected with a specific case in relation to which the need to adopt them emerged. In turn, the abstract resolutions concern the interpretive discrepancies in court judgements. (III CZP 25/04; I KZP 33/04). They have an influence on the common courts of law only based on arguments and authority of the Supreme Court, and do not have a binding force upon all courts in Poland as it was the case in the past period.

Undoubtedly, the contemporary guarantees of judicial independence regulated in the Constitution and Act on the Organization of Common Courts of Law, such as impossibility to remove a judge from office, judicial immunity, lack of political affiliations, being subject solely to the Constitution and statutes, allow the judiciary to use freely the achievements of the Supreme Court as regards the directives. The independent interpretation of the content of a legal provision, resolving doubts as to the understanding and correct application of evaluative concepts in a specific case as well as resolving issues related to the value and force of presented evidence all point to the judicial independence (Dz. U. z 2001 Nr 98, poz. 1070), but does not mean entirely free choices on the part of a judge. They act within the confines of the obligation to apply generally binding principles, law-making judgements of other courts as well as a binding judicial interpretation, or the interpretation contained in the grounds of the appellate court or the Supreme Court passing a case for a repeated cognizance, and the interpretation of law, which in a specific case constitutes a response to a legal issue presented by a second-level court to the Supreme Court to resolve. This kind of interpretation is called an operative interpretation. (Morawski, 2008, p. 138).

In reference to the cases for a dissolution of marriage by divorce the current legal status resulting from the change in the civil proceeding provisions as regards cassation made by way of the law of 22 December, 2004 (Dz. U. z 2005 Nr 13, poz. 98) caused that the cassation in the Supreme Court in divorce matters became inadmissible. The lack of current judgements of the Supreme Court which would be created under the judicial supervision results in acknowledging the directives as a valuable source of the law interpretation, but used creatively by courts and the judiciary. Also nowadays, both regional courts as first-level courts in the cases for a dissolution of marriage by divorce and appellate courts, being second-level courts for the judgments of regional courts in divorce cases, (Dz. U. z 1964 Nr 43, poz. 296 z późn. zm.) refer to the directives of the Supreme Court in the grounds to their judgements. It means that a lot of guidelines of the Supreme Court regarding the interpretation of the law contained in the directives are of universal value, in particular those conveying a very general message relating to the permanent character of family, understanding of the welfare of the minor child in the family of divorcing spouses, conflict with the principles of social co-existence and refusal of consent to divorce by the innocent spouse. The critical approach to the directives of the Supreme Court and adjusting the guidelines contained in them to the current situation, with the possibility to ignore ideological, "socialist" element, allows for a consideration of

the directives passed in divorce matters when creating the judicial law, or the "internal law of the judiciary". (Wróblewski, 1988, p. 371 and next).

The circumstances relating to the fact that the current interpretation made by the Supreme Court is not commonly binding in character does not mean at all that it is ignored by courts. (SK 22/99). The level-structure of court proceeding and control over the judgments of appellate courts call for giving consideration to the judgments of higher level courts despite the fact that they are not formally binding. It should be remembered that the significance of operative interpretation made by legal practitioners grows when it represents a congruent, or at least prevailing or coherent opinion in a given case, and diminishes when judgements are not uniform and stable. Currently, there is an assumption of correct interpretation of the law made by higher-level courts. The weight of this interpretation undoubtedly depends on the position of court in the hierarchy of bodies of the judicature, character of decision and way of publishing it. (W. 9/94).

3. Conclusions

It may be concluded that the guidelines of the Supreme Court passed at the time when they were a commonly binding interpretation of the law will undoubtedly be useful for creating the judicial law now and in the future. The non-binding character of resolutions by the Supreme Court from the period before 1989 allows for a free and creative use of ideas contained in these resolutions. Depriving the resolutions of their binding force resulted in the lack of institutional guarantee, whose purpose was to ensure the coherent judgements of the courts and bodies subject to it. Nowadays the same effect can be achieved through the judicial control of higher-level courts over first-level courts and the operative interpretation applied during this control. It should be remembered that the earlier regulatory provisions limited the freedom of the judge as to the choice of purpose and mode of interpretation, thus having an impact upon the restricting of judicial independence. It should serve the purpose of development of law, evolution of opinions and court judgements in dubious, contentious and ambiguous issues. Judicial independence means, on the one hand, the belief and awareness of the judge that when making decisions they are subject solely to statutes, and on the other hand a number of formal and substantive guarantees, which are granted by the state, and concern both the position of the judge in general and their position in a proceeding. These guarantees can be found in the Constitution, the Act on the Organization of Common Courts of Law as

well as in the statutes providing for specific procedures (criminal, civil and administrative). The apolitical character of the judiciary, impossibility of removal from office, remuneration guarantees, professional stability or a ban on joining a political party as well as secret court sessions, possibility of issuing a votum separatum, the instrument of excluding a judge, all constitute the example foundations of judicial independence. In order to be a firm support for judges they cannot be restricted by the executive or legislative powers, especially on the part of politicians. Beyond question, the judicial independence is also the independence of the whole judicature.

NOTES

[1] for instance: Art. 1, 24, 28, 39 ustawy z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy (Dz. U. z 2012 Nr 788 j.t.); art. 2 ustawy z dnia z dnia 28 listopada 2003 r. o świadczeniach rodzinnych (Dz. U. z 2006, Nr 139, poz. 992 j.t.); art. 3 ustawy z dnia 9 czerwca 2011 r. o wspieraniu rodziny i systemie pieczy zastępczej (Dz. U. z 2011, Nr 149, poz. 887).

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INTERPRETATION OF BILATERAL TREATIES FOR THE PROMOTION AND PROTECTION OF FOREIGN INVESTMENTS

Abstract. The issues discussed in the following article focus on legal regulations regarding bilateral interstate treaties for the promotion and protection of foreign investments (in the doctrine and the practice of international investment law commonly referred to as 'BITs', hereinafter referred to as 'BITs') that are made by nationals of one state in another state. Subject to this matter, contracting states agree to protect investors from the state party in the territory of their country and to arbitrate international investment disputes that might arise. Taking this into account the authors of this article would like to take up issues concerning bilateral investment treaties in the context of their interpretation. Both general problems regarding interpretation of bilateral investment treaties and specific rules of investment clauses' interpretation are taken into consideration. Simultaneously, in the last part of this paper, the authors briefly indicate rules for the interpretation made by the International Centre for Settlement of Investment Disputes (hereinafter referred to as 'ICSID'), an institution engaged in the settlement of investment disputes, mainly based on bilateral investment treaties. The specificity of the subject matter requires their thorough and accurate interpretation. Scientifically, it is important whether in relations between states situated on different stages of economic development, the interpretation confirms their inequality or rather this interpretation tries to restore such equality. In addition, the impact of regional legal regimes, binding for one contracting party, on the interpretation of BITs, appears to be meaningful. Due to the limited scope of this study, it is difficult to provide clear answers to these questions, however – given the on-going development of international cooperation and its interdependence – attempts to systematize the mere matter of bilateral treaties' interpretation, in the authors' opinion are worth studying.

Development of Bilateral Investment Treaties

Within the framework of deepening economic integration, international economic cooperation relates to the possibility of investing private investment in countries in which the investor does not have its registered office

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or place of residence. Before in the doctrine of public international law this issue was marginalized.[1] Recently, there has been significant improvement in this respect, new appropriate monographs on the international investment law appeared. (Jeżewski, 2011). Failures in regulating comprehensively the status of foreign investment in the form of a multilateral convention was the result of general difficulties encountered in reaching a broader agreement on the principles of foreign investment protection. Despite this, the failure of the of international investment law development cannot be settled, which, however, is evolving constantly.[2] Consequently, this is why prospecting for the international legal measures that were restricted subjectively and objectively was stimulated. The solution of the *status quo* are bilateral investment treaties concluded by states. These are agreements for the promotion and protection of foreign investments establishing the terms and conditions for private investment by nationals and companies of one state in another state. Based on the agreements, the investments made by foreign investors are treated fairly and on equally favourable conditions as business investment of national entrepreneur in host countries that are party to the treaty. The Vienna Convention on the Law of Treaties from the 23 of May 1969 r. – hereinafter referred to *the Vienna Convention* (United Nations Treaty Series, vol. 1155, p. 331), entered into force on 27 January 1980, defines a *treaty* as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Currently multilateral international agreements are perceived as the main instruments governing international relations. Simultaneously, little attention is paid to playing vital role bilateral treaties that are concluded by individual countries, these are among other investment treaties. The first such kind of treaty was signed in 1959 between Germany and Pakistan. (Jeżewski, 2001, p. 98; Amerasinghe, 2008; Gaillard, 1999, (Eds.) Galicki, Kamiński & Myszona-Kostrzewa, 2009, Hallward-Dreimeier, 2003; (Eds.) Muchlinski, P., Ortino F. & Schreuer Ch., 2008, Schill, 2009; van Harten, 2007; Wyrozumska, 2006). Since the end of fifties there have been already over 2600 such kinds of agreements signed. Nearly 40% of those treaties contain specific clauses to ensure legal protection for the investors from "a sending country" in "a host country". These are very different specific detailed solutions; often even bilateral investment treaties formed by one state differentiate between each other (Piontek, 2009, p. 35 and next). Most BITs grant investments made by an investor of one Contracting State in the territory of the other, a number of guarantees, which typically lay down fair and equitable treatment, protection from expropriation, free transfer

of means and full protection and security. The distinctive feature of many BITs is that they allow for an alternative dispute resolution mechanism, whereby an investor whose rights under the BIT have been violated could have recourse to international arbitration, often under the auspices of the International Centre for the Settlement of Investment Disputes, rather than suing the host State in its own courts (Wong, 2007, pp. 135–177). Poland has signed 61 such kind of bilateral agreements. (http://www.mg.gov.pl, accessed November 25, 2012).

Shortly after the conclusion of the first bilateral treaties for the promotion and protection of foreign investments, other European countries have introduced their own programs for the protection of foreign investments, together with developing countries, especially African countries, sometimes also Asian and Latin American. European countries usually before sending their investors prepared a model text of bilateral investment treaty, which was the starting point for negotiations with potential partners of an investment treaty. (Vandevelde, 2010, p. 5). Accordingly, BITs were similar in their structure, but under the influence of ensuing economic changes over recent years its model has evolved. What's more, the origin of developing canons is associated with the influence that was exerted by various draft conventions on the protection of foreign investment, which in turn resulted in the fact that the whole network of BITs was characterized, as a rule, by unique uniformity, although differences in their contents were noticeable due to divergences in the legal systems of *common law* and *civil law* and the nature of diverse languages. Most of BITs are concluded between highly developed and developing countries. On the other hand, two developing countries hardly ever conclude a bilateral investment treaty. However, bilateral treaties for the promotion and protection of foreign investments between two highly developed countries are rarely formed, because of greater confidence in the protection guaranteed to foreign investment under national law and the national judicial system. Currently, the network of BITs concluded by various countries is characterized by relative uniformity and consistency. They retain the structure of organized fundamental principles for the promotion and protection of foreign investments. (Vandevelde, 2010, pp. 6–10).

Ratio decidendi of concluding such contracts is to eliminate barriers to the free flow of private international investment, reduce the risk of foreign capital investment in the host countries and the constitution of specialized methods in order to protect investors' rights. Entrepreneurs, investing capital in a foreign country and facing economic barriers were basically helpless to ignorance of internal regulations. Therefore, the countries that were interested in inflow of foreign direct investment have decided to improve both, the

situation of investors and their own economic situation. This is why agreements concluded with developed countries constituted a kind of a remedy to ensure the improvement of economic conditions based on the principle of the rule of law and *ultima ratio* the equal treatment. The value added of treaties for the promotion and protection of foreign investments depends on the will of the host countries, which are required to meet a number of legal obligations imposed on them by the treaties. Simultaneously, an encouragement and an incentive for host countries is the fact that the purpose of concluding BITs is to promote economic development through the creation of a more liberal system of international investment; precisely they aim at creating such favourable conditions in order to encourage foreign investors to invest in the market of the host country.

Bilateral treaties for the promotion and protection of foreign investments are international agreements governing pretty narrow subject matter of economic activity. So how should they be interpreted? Is it enough to apply general rules of international treaties interpretation based on the general theory of public international law? Are detailed rules for treaties' interpretation required because of their characteristics? Does the conceptual grid used in the agreements concluded by European countries have the same meaning as the one used by Asian countries, for instance in China? In the following article the authors try to answer the above-mentioned questions.

The notion of foreign investment

Deliberations on the interpretation of the bilateral treaties for the promotion and protection of foreign investments should start from the concept of foreign investment. Both statutory law and doctrine have not developed commonly accepted definition of *foreign investment*, yet. M. Sornarajah, the author of a comprehensive study on the foreign investment issue defines it as an undertaking on a foreign scale based on the transfer of tangible or intangible assets from one country to another to exploit them in the host country in order to produce wealth under full or partial control of the owner of the relevant assets. (Sornarajah, 2010, p. 10). The capital-exporting state adopts the obvious strategy of defining the foreign investment protected by the treaty to contain three principal concerns. These are, first, to protect the physical property of the foreign investors; second, to extend protection to the intangible rights, which are themselves to be regarded as property and to be protected as such; and, third, to include within foreign investment the administrative rights that are necessary for the operation of the investment

project. The latter rights are granted by the state as intangible rights relating to most intellectual property. Technically, the state which gives can take back what it gives. But, the treaty has the effect of lifting out of the realm of domestic law the right that is given to the foreign investor and subjecting it to treaty protection so that the right cannot be withdrawn without engaging the responsibility of the state. However, the right that is given by the domestic law is subject to conditions created in that law, there cannot possibly be treaty violations where the right is withdrawn for violations of the conditions. (Sornarajah, 2010, p. 16). Quoted definition acknowledges the criteria of its absolute stability and having control by investors over transfer assets with the aim of reaping benefits. The statement phrased by Sornarajah and similar opinions (Graham, Krugman, 1995) are amply proved correct in practice. Also, it is confirmed by arrangements laid down in the Report of the United Nations Conference on Trade and Development (UNCTAD) on the legal status of foreign investment.[3]

Substantially, in the European Union free movement of capital is an essential element for the proper functioning of the large European internal market. Investors and suppliers of capital must be able to offer their resources on the market where there is the greatest interest. The 1988 Directive (Official Journal L 178, 08/07/1988) and the Agreement on the European Economic Area (Official Journal L 001, 03/01/1994) ensure the full liberalization of capital movements. Under this Directive, all restrictions on capital movements between persons (natural or legal) resident in Member States were removed in the beginning of the nineties. Monetary and quasi-monetary operations (financial loans and credits, operations in current and deposit accounts and operations in securities and other instruments normally dealt in on the money market) in particular were liberalized. However, the provisions of the new European treaties go even further than the 1988 Directive in the liberalization of capital movements. The principle of the free movement of capital and payments is now expressly laid down in the Treaty on the functioning of the EU. Article 63 of the TFEU (Official Journal of the European Union C 83/47) declares, in fact, that all restrictions on the movement of capital between Member States and on payments between Member States and third countries are prohibited. It thus extends the liberalization of capital movement to and from third countries. Article 66 of the TFEU however, authorizes temporary safeguard measures to be taken where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union. In addition, article 65 of the TFEU authorizes Member States to take all requisite measures to prevent infringements

of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions. (Moussis, 2011, pp. 85–116). According to the Court of Justice, the free movement of capital is a fundamental principle of the Treaty on the functioning of the EU, which may be restricted only by national rules which are justified by overriding public-interest grounds and that national rules guarantee the attainment of the objective pursued and satisfy the criterion of proportionality.[4]

General principles concerning the interpretation of bilateral treaties for the promotion and protection of foreign investments

Bilateral treaties for the promotion and protection of foreign investments have, as a rule, similar structure and scope of application. Due to that fact, most legal theoreticians and practitioners perceive them as a legal standard applicable to the obligations of foreign investors. In fact, each of the treaty constitutes separate legal regulations; however, the scope of application of some bilateral investment treaties may be of great importance and significance for the interpretation of other contracts.[5] Interpretation of bilateral investment with its entitling and obligating nature, although seemingly appears not to cause any problems, but in fact is not a simple matter. Since the practice of mutual application of the bilateral investment treaties does not stir up controversy, there are also no problems with their interpretation. However, when such controversies arise, the situation appears to be much more complicated, as the scale of the interpretation difficulties grows significantly comparing with the interpretation of multilateral agreements. While interpreting the latter, there are numerous frames of reference, such as the stands taken on this matter by other parties to the agreement in question or the depositary's opinion. When a dispute of the parties to bilateral investment treaty arises, it means that the parties will be thorougly involved. Then each argument that is put forward encounters a counter-argument. Certainly, substantive matter of BITs facilitates its interpretation. Since the terms of the mutual investment protection constitute an objective point of reference, the principles of international investment law and aims to protect the investor and the investment must be taken into account. International investment law has developed itself to such an extent that nowadays it has particular canons and legal models.[6]

Some countries, adopting an expansive investment policy, decided to draw up a model of investment treaties, which usually constitute only a starting point for further negotiations with the latter party to an agree-

ment. These model laws show the general approach of the state to such treaties as well as facilitate their conclusion. These models are changing following changes of the investment policy of the state and the external legal trends. As an example it is worth pointing out the case of American investment policy. Until recently, the model from 1994 had the force of law, which could be described as very aggressive – promoting the protection of investors. This was due to the fact that at that time the U.S. primarily exported capital to other foreign countries. In 2004, The United States Department of Commerce drew up a new model, much more balanced and securing the fundamental interests of the state, which in turn was the result of changes in the structure of capital flows from and to the United States. Similar changes can be discerned in the Chinese policy, hence one can talk about the third or even the fourth generation of Chinese bilateral investment treaty model. A number of other states also publicly announced its model regulations, which can be regarded as a kind of basis for the determination of some trends in this area. It is worth indicating that Poland has not developed its own model of BIT, what in historical perspective should be evaluated negatively. However, given the current trends within the European Union focusing on reducing the competence of the Member States in subject area, this opinion loses some of its importance.

Interpretation of bilateral treaties for the promotion and protection of foreign investments is particularly significant in the process of their application. This procedure is far more complicated than the interpretation of domestic law. Texts of the agreements are often vague, simply not because of inaccurate editorial techniques, but conduct of the parties to the contract agreed-upon taking into consideration necessity for different interpretations. The starting point in the interpretation of the contracts in question are three most important issues concerning the problem of international treaties interpretation, namely the basis on which interpretation is done and who (the subjects) and how actually does the interpretation?

When answering this question one should start from the general rules of interpretation of international treaties rooted in public international law that form foundation of their interpretation.[7] According to Article 31 of the *Vienna Convention on the Law of Treaties* "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Article 31 (3) of *the Vienna Convention*, United Nations Treaty Series, vol. 1155, p. 331). It means that the Convention points out three main rules regarding a treaty's interpretation: in connection with *pacta*

sunt servanda principle, a treaty shall be interpreted in good faith; a special meaning shall be given to a term if it is established that the parties so intended, and the meaning of particular terms of the treaty should be considered together with their context and in the light of its object and purpose. (Góralczyk, Sawicki, 2011, p. 95; Grzybowski, 2012, pp. 46–60, especially 50). "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". (Article 31 (2) of *the Vienna Convention*, United Nations Treaty Series, vol. 1155, p. 331). Simultaneously, together with the context, there shall be taken into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; any relevant rules of international law applicable in the relations between the parties". (Article 31 (3) of *the Vienna Convention*, United Nations Treaty Series, vol. 1155, p. 331).

Regardless of the afore-mentioned differences, bilateral investment treaties are characterized by certain common features allowing for pointing a common denominator, and also treating them as being of the same kind of agreements. The essence of BITs is the purpose of their conclusion expressed in reciprocal encouragement to increase the flow of foreign investment, promotion and protection of investments in each other's territories by companies based in either country. The aim of the parties to an agreement is to make profits – financial profit by an investor and infrastructural by a host state, these are measured among others by the creation of workplaces and the economic development. Moreover, it is important to take into account the subject matter and characteristics of foreign investment and mutual protection and promotion (as it was described above). To all intents and purposes, most treaties define (for the purpose of each particular contract) the notions of *an investment* and *an investor*, sometimes adding definitions of other terms, such as "the flow of capital". BITs rarely normalize investors' obligations, except for the general obligation to respect the law of the host state, taking into consideration other standards directly connected with the protection of international investments. However, it is worth noting that modern models of bilateral investment treaties include such standards broadly. Above-mentioned was analysed by the Arbitrary

Tribunal in the case of Vivendi versus the Republic of Argentina, where the Tribunal indicated three elements making up together a general rule of interpretation. Firstly, the principle of good faith is of the great importance. Secondly, linguistic interpretation cannot rely solely on semantic treatment based on determining the literal meaning of words. Thirdly, words should not be analysed *in abstracto* but in the context of the treaty and in the light of their object and purpose.[8]

Legal value of bilateral treaties for the promotion and protection of foreign investments also depends, to a large extent, on who interprets the contract. And here one should distinguish: the doctrinal interpretation – carried out by theoreticians of public international law and the formal interpretation – carried out either by the parties themselves, or by international courts (judicial interpretation) or by organs of international organizations.

The doctrinal interpretation can only have an indirect effect on the interpretation adopted by the parties to the agreement or the officials and international courts. To follow with, the formal interpretation plays a crucial role. The main role is played by the so-called authentic interpretation, which is carried out jointly by the parties to the contract, or the quasi-authentic interpretation, resulting from the consistent conduct of states. However, such interpretations are extremely rare in practice. Interpretation is also of great importance at the stage of dispute resolution. Therefore, when there are differences in the understanding of the agreement, these issues are decided by judicial interpretation – by the International Court of Justice or by an arbitral tribunal (the arguable arbitration clause), and it is formally binding on the parties to the dispute. (Art. 59 of *ICJ Statute*, an integral part of the UN Charter, available at the official website of International Court of Justice http://www.icj-cij.org, retrieved November 01, 2012). In the case of bilateral treaties for the promotion and protection of foreign investments, the interpretation put on by international organizations is of great importance, namely the International Centre for Settlement of Investment Disputes (as expanded later in this article).

In a situation where the above-mentioned types of interpretation leave ambiguity and when by usual means one cannot reach a reasonable and consistent results, then the auxiliary means of interpretation are used, including *travaux préparatoires*[9] of an agreement and the circumstances in which it was concluded.

Furthermore, bilateral treaties for the promotion and protection of foreign investments usually include framework clauses, these are typical sub-

stantive standards expressed in treaties. They contain objective and relative standards. These are as follows:

- most-favoured-nation treatment,
- national treatment,
- fair and equitable treatment,
- protection and security standard,
- guarantees of free transfers of funds,
- compensation in the event of expropriation or damage to the investment,
- dispute settlement mechanisms, both state-state and investor-state.[10]

Interpretation of treaties' clauses in general outline

From the economic point of view, concluding investment agreements does not directly affect the increase in the inflow of foreign investment to countries that enter into a contract. (Hallward-Dreimeier, 2003).

Significance should be attached substantially to investments conditions set unilaterally by the host country, such as tax-related initiatives, special privileges and the potential for development of the particular sector of the economy. However, bilateral investment treaties constitute a kind of an insurance policy in a broad sense that allows the investor to eliminate at least part of the risk associated for instance with seizing power by a new government which might influence changeable investment conditions. Therefore, models of bilateral treaties for the promotion and protection of foreign investment assure the confidence in the country, as well as provide a stable balance between the rights of the investor and the states – parties to a treaty. In the following paper the authors concentrate on the clauses that affect BITs interpretation the most.

The first type of the above-mentioned canons are relative standards, which are typical elements of the treaties in the field of international investment law relating to the treatment of other entities. The analysis of these standards should begin with deliberation of most-favoured-nation treatment clause (hereinafter referred to *MFN treatment*), which in the context of investment ensures that a host country extends to the covered foreign investor and its investments, as applicable, treatment that is no less favourable than that which it accords to foreign investors of any third country.[11] While MFN is a standard of treatment which has been linked by some to the principle of the equality of States, the prevailing view is that a MFN obligation exists only when a treaty clause creates it.[12] In the absence of a treaty obligation (or for that matter, an MFN obligation under national law), nations retain

the possibility of discriminating between foreign nations in their economic affairs. (*Most-Favoured-Nation Treatment in International Investment Law*, Organization for Economic Co-operation and Development's working papers on international investment, 2004/2). The MFN treatment is defined by the Draft articles on MFN as the: "[...] treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable that treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State" (Article 5 of the *Draft Articles on Most-Favoured-Nation Clauses*, (Yearbook of the International Law Commission, 1978, Vol. II, Part Two, p. 21)).[13] And an MFN clause as: "...a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured treatment in an agreed sphere of relations". (Article 4 of the Draft Articles on Most-Favoured-Nation Treatment). In the context of international investment, in early BITs, the inclusion of MFN treatment clauses was generalized in order to ensure that the host States, while not granting national treatment (hereinafter referred to *NT*), would accord a covered foreign investor a treatment that is no less favourable than that it accords to a third foreign investor and would benefit from NT as soon as the country would grant it. Nowadays the overwhelming majority of international investment agreements have a MFN provision that goes alongside NT, mostly in a single provision. (*Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2010, p. 13). The MFN treatment provision has some main legal features. Firstly, it is a treaty-based obligation that must be contained in a specific treaty and it requires a comparison between the treatment afforded to two foreign investors in like circumstances. It is therefore, a relative standard and must be applied to similar objective situations. Simultaneously, an MFN clause is governed by the *eiusdem generis* principle (Kałduński, 2006, p. 177), in that it may only apply to issues belonging to the same subject matter or the same category of subjects to which the clause relates. The MFN treatment operates without prejudice to the freedom of contract and thus, States have no obligation under the MFN treatment clause to grant special privileges or incentives granted through a contract to an individual investor or to other foreign investors. In order to establish a violation of MFN treatment, a less favourable treatment must be found, based on or originating from the nationality of the foreign investor. In the context of its purposes international trade, MFN treatment is essential for ensuring a level playing field between all trading partners and is therefore the central pillar of

the international trading system. Likewise, MFN treatment in investment treaties is meant to ensure equality of competitive conditions between foreign investors of different nationalities seeking to set up an investment or operating that investment in a host country. Foreign investors seek sufficient assurance that there will not be adverse discrimination which would put them at a competitive disadvantage. Such discrimination includes situations in which competitors from other foreign countries receive more favourable treatment. The MFN standard thus helps to establish equality of competitive opportunities between investors from different foreign countries. It prevents competition between investors from being distorted by discrimination based on nationality considerations. The scope of application of an MFN treatment clause needs to be considered both in its subject-matter coverage and in its substantive coverage. Substantive coverage is generally established by the text itself by defining the covered beneficiaries, the covered phases of investment and any applicable exceptions. More specifically, the scope of application of the clause and its interpretation will depend on whether MFN treatment covers: investors; or/and their investments and whether it covers: the post-establishment phase; or both the pre/post-establishment phases. Moreover, this basic construction may include: generic exceptions; or/and country-specific exceptions. Furthermore, the MFN treatment clause may include specific qualification or clarification in order to provide certainty and guidance so as to facilitate its interpretation and application as intended by the contracting parties. (*Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2010, p. 13–14). The application of MFN treatment in international investment treaties has to be interpreted in the light of general principles of treaty interpretation. MFN treatment refers to material treatment in the economic sphere and concerns the rules that establish the competitive conditions and opportunities to foreign investors and their investments. By prohibiting differentiated treatment as regards the competitive framework, the MFN treatment clause establishes a level field amongst the relevant players and avoids market distortions, favouring a sound competitive environment, thus contributing to the economic objective of the international investment treaties. MFN treatment means subjecting all foreign investors to the same rules and operational and transactions costs they face in their regular activities, as well as offering them the same market access and operational conditions and opportunities. (*Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2010, p. 30–33).

Another relative standard, which is worth discussing in the context of bilateral treaties' interpretation, is the national treatment clause, a concept of international law that declares if a state provides certain rights and privileges to its own nationals, it also should provide equivalent rights and privileges to foreigners who are currently in the country. (Bjorklund, 2008, p. 29). While this is generally viewed as a desirable principle, in custom it conversely means that a state can deprive foreigners of anything of which it deprives its own nationals. This concept of equality can be found in bilateral tax treaties and also it is an integral part of most World Trade Organization agreements. Together with the most-favoured-nation treatment principle, national treatment is one of the cornerstones of the WTO trade law. Article 3 of *the General Agreement on Tariffs and Trade*, shortly referred to as *GATT*, prohibits discrimination between imported and domestically produced goods with respect to internal taxation or other government regulation; article 17 of *the General Agreement on Trade in Services*, shortly referred to as *GATS* and art. 3 of *the Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, shortly referred to as *TRIPS* aims at the trade rule to prevent internal taxes or other regulations from being used as a substitute for tariff protection. (The World Trade agreements available online on its official website, from http://www.wto.org, retrieved November 28, 2012). It is important, as shown by R. Dolzer and Ch. Schreuer, as it is "generally recognized that the use of the clause depends on the actual state (...). This statement means that the standard is not subject to any abstract definitions and there is no single point of reference to its interpretation" (Dolzer, Schreuer, 2008, pp. 178–179, quotation from: Jeżewski, 2011, pp. 178–201). Therefore, any analysis of the national treatment standard requires firstly to determine the specific wording of the treaty clause and its interpretation in accordance with the provisions of the Vienna Convention on the Law of Treaties.

The above-discussed clauses have different scope of application, include both issues on the admission of investment in the territory of the contracting parties and limit national treatment only to investments already admitted. (Jeżewski, 2011, pp. 178–204).

The second type of clauses in the field of international investment law are objective standards, that are separate from the treatment of other entities. The first of these canons is the fair and equitable treatment standard (hereinafter referred to as *FET*) which is an absolute standard of protection. It applies to investments in a given situation without reference to how other investments or entities are treated by the host state. Thus, host gov-

ernments are unable to resist a claim under this standard by saying that the treatment is no different from that experienced by their own nationals or other foreign investors operating in their economy. In relation to usage in BITs, the original purpose and intent behind FET clauses was to protect against the many types of situations of how unfairness may manifest itself, such as, for example, an arbitrary cancellation of licenses, harassment of an investor through unjustified fines and penalties or creating other hurdles with a view to disrupting a business. Here the standard would provide a gap-filling device, as not all kinds of unfair administrative or governmental conduct could be subsumed under the more specific non-discrimination or protection-of-property standards contained in BITs. (Dolzer, Schreuer, 2008, p. 122). Until the recent rise of arbitral interpretations of the FET standard, its meaning was not generally determined. The word *fair* is defined by the *Concise Oxford Dictionary* as "just, unbiased, equitable, in accordance with rules". Therefore, fairness connotes, among other things, equity. The concepts of fair and equitable are, to a large extent, interchangeable. In addition, equity suggests a balancing process, weighing up of what is right in all the circumstances. It is a word related to the idea of equilibrium defined as "a state of physical balance". The balancing function of equity is accepted as an aspect of international law. Thus, based on a plain meaning of the words, "fair and equitable" treatment requires an attitude to governance based on an unbiased set of rules that should be applied with a view to doing justice to all interested parties that may be affected by a State.[14] Next, most bilateral investment treaties include provisions granting full protection and security for investments. The meaning of these clauses suggests that the host State is under an obligation to take active measures to protect the investment from adverse effects. (Cordero-Moss, 2008, p. 132). The adverse effects may stem from private parties or from actions of the host State and its organs. Recently tribunals have found that provisions of this type also guaranteed legal security enabling the investor to pursue its rights effectively. However, tribunals have disagreed on whether full protection and security merely reflects the broader, fair and equitable treatment standard and customary international law or offers an independent and additional standard. Arbitral practice has generally agreed that this standard of protection merely requires due diligence and does not create absolute liability. (Dolzer, Schreuer, 2008; Salacuse, 2010). Other specific provisions of a bilateral investment treaty guarantee free transfers of funds. It is of great importance for investors to assure the standard at every stage of making investments. Initially, it is essential to transfer the capital to the host country in order to start the investment. Then, this standard should aim at guaran-

teeing freedom of investment and its extensions. Then, the efficiency benefits of the investments required to be able to transfer profits and other benefits to the investor's home country. Finally, in the event of termination of investment, the investors should be able to transfer their capital back to their home country or any location of their choice. (Jeżewski, 2011, pp. 284–296; Salacuse, 2010; Schill, 2009).

Moreover, the doctrine of the investment also indicates other model standards – called 'indirect standards', these are among others the principle *pacta sunt servanda* and the prohibition of expropriation and measures.

Interpretation of bilateral investment treaties put on by International Centre for Settlement of Investment Disputes

According to art. 38 of the International Court of Justice Statute,[15] sources of international law consist of international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law and the general principles of law recognized by civilized nations. Judicial decisions and the teachings of the most highly qualified publicists of the various nations are subsidiary means for the determination of rules of law. Legal theory indicates that the interpretation of law must take into account the existence of legal institutions (however lawyers do not consistently use a well-defined notion of an international institution). Specific provisions should be interpreted in the context of legal institutions and interpretation should also take into consideration the objectives of the institutions and rules that govern them. In other words, lawyers deal with the legal provisions that should not be viewed in isolation, but as components of legal institutions. (Gizbert-Studnicki, 2011, p. 123). A slightly different opinion on this thesis is substantiated by legal practitioners. (Walencik, May 30, p. C4). International Centre for Settlement of Investment Disputes is an autonomous international institution established under *the Convention on the Settlement of Investment Disputes between States and Nationals of Other States with over one hundred and forty member States.*[16] The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes.[17] The Convention sought to remove major impediments to the free international flow of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created by the Convention as an impartial international forum providing facilities

for the resolution of legal disputes between eligible parties, through conciliation or arbitration procedures. Recourse to the ICSID facilities is always subject to the parties' consent. The ICSID Convention requires the Centre to maintain a Panel of Conciliators and a Panel of Arbitrators. The Panels are an important component of the ICSID system of dispute settlement. When the Chairman of the Administrative Council is called upon to appoint conciliators, arbitrators or *ad hoc* Committee members under the ICSID Convention, these appointees must be drawn from the Panels.[18] According to the art. 50 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, if any dispute shall arise between the parties as to the meaning or scope of an award of ICSID, either party may request interpretation of the award by an application in writing addressed to the Secretary-General. The request shall, if possible, be submitted to the Tribunal which rendered the award. As evidenced by its large membership, considerable caseload, and by the numerous references to its arbitration facilities in investment treaties and laws, ICSID plays an important role in the field of economic development and international investment, including its interpretation. Today, ICSID is considered to be the leading international arbitration institution devoted to investor-State dispute settlement. ISCID tribunals arbitrate disputes arisen between investors and states, this is why they might face problems of interpretation in relation to the following issues: not only bilateral investment treaties but also the meaning of the provisions of the ICSID Convention, multilateral investment agreements, international customary law, general principles of international law or national legislation. (Jeżewski, 2011, pp. 14–19). Those tribunals apply interpretative arguments in determining the meaning of the rules applicable in particular cases. Among those *per analogiam* and *a contrario* arguments are two interpretive arguments used the most.

Summary

Contracting parties to bilateral investment treaties should not duplicate provisions of positive international law, but seek to establish uniform rules for treaties' interpretation as effective instruments for the promotion and protection of foreign investments in each other's territories by companies based in either country. Simultaneously, secondary improvement of the interpretation of bilateral investment treaties provides a constructive argument for the settlement of disputes between an investor and the host coun-

try, which directly affects economic undertakings and so-called "economic climate". (For more information, see: Gilas (1998). Globalization introduces some chaos, however it requires very structured legal services.

NOTES

[1] Discussions regarding these issues were held in various ways, for example (Gilas, 1998).

[2] Interestingly this process was explained (Lachs, 1992, p. 17–24).

[3] For more information, see: (World Investment Report 2007, *Transnational Corporations, Extractive Industries and Development*, New York–Geneva 2007).

[4] Commission of the European Communities v. Italian Republic, Case C-174/04, from (http://eur-lex.europa.eu, retrieved November 27, 2012).

[5] Compare: Asian Agricultural Products Ltd. Versus Republic of Sri Lanca, arbitration award from June 27, 1990, § 21, quotation from: (Jeżewski, 2011, p. 98).

[6] Disquisition is based on the simplistic reasoning from (Bos, 1984, p. 105 and next; Kawaguchi, 2003, 53).

[7] Systematized rules of interpretation are comprised in the *Vienna Convention on the Law of Treaties*, (United Nations Treaty Series, vol. 1155, p. 331, part III, section 3, Art. 31–33).

[8] Suez, Sociedad General de Aguas de Barcelona S.A. and *Vivendi* Universal S.A. versus Argentine Republic, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on August 20, 2007, *ICSID Case* No. ARB/03/19, § 7.4.3, from (https://icsid.worldbank.org, retrieved November 25, 2012).

[9] Preparatory works constitute the materials used in preparing the ultimate form of an agreement or statute, especially of an international treaty. The materials constitute a legislative history. Travaux preparatoires contain the various documents including reports of discussions, hearings and floor debates that were produced during the drafting of a Convention, treaty or an agreement. Travaux preparatoires of a statute or treaty are usually recorded so that it can be used later in order to interpret that particular statute or treaty. This is a secondary form of interpretation and is used to clarify the intent of the makers of the statute or treaty. No reference should be made to *travaux préparatoires*, if the text of the agreement is sufficiently clear, as it has been confirmed by the jurisdiction of international courts.

[10] The division adopted from United Nations Conference on Trade and Development. See also (Jeżewski, 2011, p. 141).

[11] See (*Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2010, p. 13). See also: (Ziegler, 2008).

[12] See Article 7 of the *Draft Articles on Most-Favoured-Nation Clauses*, the related comments and the doctrine here referred ((Eds.) Jennings, Watts, 1992, p. 1326).

[13] Article 5 of the *Draft Articles on Most-Favoured-Nation Clauses* (*ILC Draft*), (Yearbook of the International Law Commission, 1978, Vol. II, Part Two, p. 21). It constitutes useful material for interpretative purposes.

[14] *Fair and Equitable Treatment*, (UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2012, p. 6–10). See also: (Jeżewski, 2011, pp. 205–216, 267–284).

[15] International Court of Justice Statute, from (http://www.icjcij.org/documents/index.php?p1=4&p2=2&p3=0, accessed November 18, 2012).

[16] Convention on the Settlement of Investment Disputes between States and Nationals of Other States. (www.worldbank.org/icsid/, accessed November 18, 2012).

[17] The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It was opened for signature on March 18, 1965 and entered into force on October 14, 1966. For more information, see: official website of the International Centre for Settlement of Investment Disputes. (https://icsid.worldbank.org/ICSID/Index.jsp, accessed November 21, 2012).

[18] With an increasing ICSID caseload, it has become ever more important for States to exercise their right to make designations to the ICSID Panels. To this end, the Centre continues to encourage States to name qualified candidates where nominations have expired or the Panels are otherwise incomplete. For more information, see: (*2012 ISCID Annual Report*, the access online, p. 17 and next).

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INTERPRETATION OF ADMINISTRATIVE LEGAL NORMS DEMONSTRATING STRONG RELATIONS WITH CIVIL LAW WHICH AIM ENVIRONMENTAL PROTECTION

Abstract. The penetration process of structures traditionally assigned to civil law into administrative law, especially administrative law aiming environmental protection, has been more noticeable through recent years. This process resulted in deepening the absence of a clear separation of private law norms from public law norms. It led to the existence of so-called *quasi* civil solutions, which can be found for example in the *Act on prevention from damages in environment and its repair*. Their specificity consists in the fact that they cannot be regarded as civil law structures due to the differences between them and the civil law structures. This legal status sets new challenges for legal theorists as well as practitioners. They concentrate on interpretation of administrative law provisions which were penetrated by civil law structures, taking into account differences between interpretation of administrative and civil law provisions. We should not reject specific character of the civil law provisions' interpretation and interpret these provisions only by taking into account specificity of administrative law interpretation. Civil law institutions are characterized by a larger field for action, which is left for parties or performers, in comparison to the institutions of administrative law. This specificity of civil law structures should be considered as its advantage that should not be removed in the activities of public authorities.

Introductory remarks

The penetration process of structures traditionally assigned to civil law into administrative law is getting more noticeable throughout recent years. This process is also more noticeable in scope of administrative law, which is the base of protection of environmental components. This legal status sets new challenges for legal theorists as well as practitioners. It concentrates on

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interpretation of administrative law provisions which were penetrated by civil law structures, taking into account differences between interpretation of administrative and civil law provisions. In our opinion, it would be far too risky to reject specific character of the civil law provisions interpretation and interpret these provisions only by taking into account specificity of administrative law interpretation. It should not be assumed that civil law structure, through its transfer into the administrative law area, loses its links with the nature of the civil law. The achievements of the legal theory and science regarding civil law provisions shall be taken into account in this situation. Only this approach to this issue may guarantee accurate interpretation of administrative law provisions in which civil structures were transferred.

Detailed considerations regarding this problem in scope of administrative law provisions on base which the environment is protected, shall be proceeded by some introductory remarks of law interpretation.

1. Interpretation of the law – basic issues

Interpretation of the law, that is its interpretation, is the process of determining the meaning of legal provisions or product (result) of this activity. (Chauvin, Stawecki, Winczorek, 2012, p. 221). This is not a mechanical process, which in any case takes place in a similar manner. Facts of the case that are the subject of legal analysis raise so much doubts that the process of interpretation requires not only to delve into the text of a normative act, but also into other sources. In the Polish legal theory there were two basic positions regarding the purpose and scope of the necessary interpretation of the law. The first, so-called interpretation of the concept of clarification assumes that the interpretation is made only so far as it is necessary to remove perceived ambiguities in the text during the reading, according to the Latin legal maxim: *non sunt interpretanda clara* (what is clear shall not be interpreted) and *interpretatio cessat in claris* (interpretation ends when you reach the brightness). (Chauvin, Stawecki, Winczorek, 2012, p. 221). On the other hand, other authors argue that interpretation shall be made in each case, when the content of the current legal provision has to be determined, which will clearly indicate who, in what circumstances and how shall behave (the interpretation of the concept of derivation). (Chauvin, Stawecki, Winczorek, 2012, p. 222–223). Proponents of this theory do not negate the need to interpret ambiguous expressions, but such actions they consider insufficient. They argue that

interpretation of the law provisions is always necessary, even if the text seems clear, according to the Latin legal maxim: *interpretanda sunt omnia* (everything is the subject of interpretation). (Chauvin, Stawecki, Winczorek, 2012, p. 223).

Interpretation of law can be characterized by identifying specific types or kinds of interpretation. Due to the entity who interprets, interpretation can be divided into: authentic (carried out by an entity established by a legal provision), legal (carried out by specially authorized by law an authority of the state), operative (carried out by the authorities which apply the law), private and doctrinal. It should be also indicated the division of interpretation due to its scope. Here we can point out: the literal interpretation (in the strict sense) (taking into account the use of semantic and structural rules of language), extensive interpretation (adopting a broader interpretation of the provision) and restrictive interpretation (adopting a narrow interpretation of the provision). When analysing interpretation due to the way it was made, we can point out: linguistic interpretation (involving the use of semantic and structural rules of law and natural language), systematic interpretation (taking into account a location of the normative act in the law system), functional and teleological interpretation (based on taking into account conditions in which this norm has to be operated). It should be also noted that in addition to the various methods of interpretation, two additional types of argumentation are used: inference rules and legal topics. (Chauvin, Stawecki, Winczorek, 2012, p. 222–245).

2. The specificity of the interpretation of civil law

Analysing the issue of civil law interpretation at the outset attention should be drawn to the fact that private law regulates social relations between individual entities. Entities participating in these relations act as autonomous entities who regulate the content of those relations with a view to their own interests – within the limits determined by common good or moral rules. (Safjan, 2012, p. 481). In contrast to this, in public relations, at least on one side appears public authority established by the law, not to pursue individual interests, but common interest of particular community (public interest). Entities' autonomy in private law, however, is not synonymous with equality of their situation. Also in cases specified by law, public authorities may have in mutual relations an equivalent position by concluding agreements (administrative agreements). (Safjan, 2012, p. 481).

Different character of civil law provisions may to some extent condition specific interpretation activities.

On the basis of civil law, interpretation includes obviously activities which consist in reconstruction of legal norms from legal provisions (interpretation of the strict sense). But that interpretation in the area of civil law does not stop there. Practical difficulties caused by errors such as legislative errors, force to accept a situation when the scope of the interpretation also includes activities with the inferential nature, which consist in filling gaps, especially constructional gaps, by analogy *legis* (*sensu largo* interpretation). (Safjan, 2012, p. 492–493). In Polish science of civil law the applicability of the inference from analogy is not controversial. Incompleteness and openness of the civil law provisions are consequences of the basic feature of civil law – that is the autonomy of will understood as a general competence of the civil law entities to form civil relations between them. The *legis* analogy is applicable i.e. in the principle of freedom of contract (Article 353^1 of the kodeks cywilny (Dz. U. z 1964 Nr 16, poz. 93 z późn. zm.)) which justifies so-called existence of unnamed contracts. They are not regulated by law, but in the scope of the contract which is not regulated by the parties, analogy applies. The *legis* analogy applies not only in the provisions regulating relations of obligations, but also in the provisions regulating property rights. Fixed view of jurisprudence and legal science show the similarity between perpetual usufruct right and ownership right, which justifies the analogous application of the provisions of the ownership right to the perpetual usufruct right in scope which is not regulated by the law. It is also widely recognised that the provisions of the declaration of will may be applicable by analogy to other declarations. (Wolter, Ignatowicz, Stefaniuk, 2001, p. 106). The position of the Supreme Court confirms the widespread use of the *legis* analogy, which is reflected also in the use of the term "legal loophole". (III CZP 11/98; III CZP 3/98; III CZP 19/96).

In accordance with the general guidelines for interpretation primarily linguistic rules should be used, what was clearly pointed out by the Supreme Court, which stated that "the interpretation of the legal norm requires the interpretation primarily based on application of linguistic rules, which assign such a sense to a legal norm that is the result of the correct application of the linguistic rules, which, in principle, are considered to be known to all members of a particular linguistic group." (III CZP 29/02). The process of linguistic interpretation consists in the first place of a rule of law expressed in legal definitions. It should be also taken into account the context of the word, general rules of the Polish language and the linguistic context. According to the doctrine of civil law basic rules of the language are fundamental,

but not the only rules of interpretation. An important role is played also by the systematic and functional rules that are used in a successive way. This view was confirmed by the Supreme Court, which stated that "the literal wording of the provision cannot only determine its meaning. In the translation of the provision also systematic interpretation should be taken into account." (III CZP 35/01). The Constitutional Court also positively referred to the use of systematic rules in the interpretation of law as it was exemplified by the statement that: "the use right and the perpetual usufruct right are the institutions of civil law. Moving these institutions to other areas requires acting with the full respect of the principles that shaped the civil law." (P 2/88).

3. The specificity of the interpretation of the administrative law

Interpretation of administrative law because of the diversity and breadth of the subject of regulation (including environmental law, medical law or energy law) is characterized by several distinguishing characteristics from the interpretation of i.e. civil law. Administrative law is distinguished by the following characteristics: a specific function (different from functions carrying out by i.e. criminal law or civil law), the specificity of relations between an administered and an administer, catalogue and the nature of the protected goods, liquidity, size and casuistry of provisions, the use of specific phrases acquired from different areas of life, relatively (compared to other fields of law) little legal experience, lack of general provisions (general principles relating to the substantive administrative law), use of the very widely understood administrative discretion, use of undefined phrases, use of so-called 'an open structure' (use of the phrases "for example", "and others"). (Duniewska, 2000, pp. 172–173). The activity of the state intervention specific for administrative law is also often stressed, although covering a specific area of social relations by an administrative regulation cannot be considered only as a sign of the intervention activity. (Duniewska, 2000, p. 173).

The question of interpretation of the provisions of administrative law should be considered especially when taking into account rule of law, rule of legality and rule of competence. In the literature of administrative law it is emphasized that the rule of legality requires that every public administration act of interference into the legal sphere of citizen has to be based on a specific legal provision. The rule of legality should be the main criterion in the process of interpretation made by the state authorities. (Jaki-

mowicz, 2006, p. 67–68). Universal significance should be attributed to the view, expressed by J. Zimmerman on the basis of the administrative procedure that the fundamental rule of general administrative proceedings in the state of law is the rule of legality. Other general rules have undeniable importance for the state of law which has to be extracted and protected. However, if the facts of the case would set any of these rules in opposition to the rule of legality, this last rule should always have priority. (Zimmerman, 1993, p. 116).

In administrative law as well as in civil law, strict sense interpretation is used. However, in contrast to the doctrine of private law, use of *legis* analogy raises a lot of controversy, and authors present different opinions. According to the first view, the use of analogy in administrative law is unacceptable. It is submitted that, in accordance with the constitutional principle – rule of law, administrative authorities are obliged, when making decisions, i.e. issuing licenses for broadcasting radio and television, to apply the law strictly, that is, according to well-established doctrinal views as well as judicature, shall be understood as a ban on the use of analogy. (Krasuski, 2001, p. 19). It is emphasized that in the process of law enforcement administration decisions may be made only on the basis of the legal provisions which directly justify a competence of the public administration to a particular form of action. On the other hand, proponents of the use of analogy, say that it is acceptable to use by analogy administrative discretion in some cases and never for individual's disadvantage. (Smoktunowicz, 1970, p. 142–143).

Similarly to the rules applicable to the interpretation of civil law provisions also in administrative law, linguistic rules are applied primarily. Administrative law orientation on the legal text, the dominance of terminology and no conceptual analysis of the normative text, make interpretation of administrative law for the most part based solely on linguistic rules. Such actions cause that in practice, the difficulties of interpretation related with i.e. the ambiguity of words (polysemic and homonymic) are often encountered. The homonymous ambiguity does not cause serious problems of interpretation, but the polysemic ambiguity does. (Jakimowicz, 2006, p. 67–68). It is worth noting, however, that in addition to the dominant linguistic interpretation of administrative law, particular importance should have functional and teleological interpretation. The activity of public administration focuses on the public interest realisation. So, if it is assumed that the legislative activity is a purposeful activity, in other words seeks to carry out specific purposes, a legislator referring to the category of *ratio legis*, is obliged to take these aims into account. The legislator cannot accept

meaning of the provision which has any *rationis legis.* (Jakimowicz, 2006, p. 182). This view was confirmed by the Supreme Administrative Court, which stated that "it is clear both in the judicature and in the doctrine that linguistic interpretation dominates over functional and teleological interpretation. In case the result of linguistic interpretation is not acceptable due to the systematic consequences, functional and teleological interpretation should be used." (I OSK 1499/08).

It should be also noted that the organisational function of state and corresponding to its regulatory function of administrative law clearly connect social action of this law with the effectiveness. Using interpretation which respects functions of law and through them functions of state in the process of administrative application of law provisions, contributes in achieving this aim. The significance of this argument increases by special normative structures which are present in administrative law. The most important of them is structure of task norms. Its reconstruction is carried out by use of the argument of function as a basic argument from the initial stages of the interpretation. This also applies to the European Union law, under which administrative regulations combine the role of the functional argument resulting from the features of administrative law and the characteristics of the European Union law. Here appears the structure "effect utile" (useful effect), which is directly associated with the functional interpretation. (Leszczyński, Wojciechowski, Zirk-Sadowski, 2012, pp. 270–271).

4. The specificity of interpretation of administrative law provisions having strong links with the civil law whose aim is environmental protection

A representative of the pre-Second World War legal science indicated that it is not possible to carry out the boundary between the areas of public and private norms (postscript of the authors of this article). This is justified by the fact that the protection of individual rights brings benefits for an individual, and the rights granted for society also bring benefits to individuals. What is more, most of the legal norms have two sides. One of them is that of a public nature. The other side has a private dimension. Due to this fact, the division into public and private law is not about the individual feature, but the point of view from which they are judged. Thus, neither in legislation nor in the scientific presentation of norms of private law it is not possible to strictly separate private law norms from the public ones. (Zoll, 1931, see: Langrod, 1948, p. 42–43).

Penetration of civil law structures into sphere of administrative law norms resulted in deepening the absence of a clear separation of private law norms from public law norms. It led to the existence of so-called *quasi* civil solutions. Their specificity consists in the fact that they cannot be regarded as civil law structures due to the differences between them and the civil law structures. However, it is necessary to use in their scope output which was developed on the basis of civil law relations. This situation is usually determined by insufficient achievements of administrative legal science on one side, and the need to use these structures despite existing legal doubts. The similarity to the structures known to the civil law makes it possible to apply auxiliary solutions proposed by the judicature and doctrine within the civil law relations. This image of legal regulations significantly reflects in the regulations by which the legislator intended to protect the environmental elements. The reasons for this situation should be seen in a number of circumstances. It is the result, although not positively seen by legal scientists, of need to recognize that the institutions of administrative law based on the method of dominance no longer have sufficient capacity for administrative protective regulations. Secondly, the idea that has to be achieved by passing and applying norms protecting natural environment consists in perceiving by administrated entities protection of environmental elements not only as a common good but also as protection of their own interests. (Czech, 2012, pp. 181–182).

Relatively wide scope of norms that include *quasi* civil structures, can be found in the ustawa z dnia 13 kwietnia 2007 r. o zapobieganiu szkodom w środowisku i ich naprawie (hereinafter: the repair act). (Dz. U. 2007 Nr 75, poz. 493 z późn. zm.). Due to formulation of these norms in such way, they have strong links with the norms of civil law, but despite this fact they must be seen as administrative law norms. Examples of these regulations are provisions of article 2 of the repair act. It was indicated here that the provisions of this act shall apply to 1) any direct threat of damage to the environment or 2) damage in the environment caused by the activities posing the risk of damage to the environment if they are caused by an entity who benefits from environment, 3) caused by activities other than these which pose risk of damage to the environment if they are caused by an entity who benefits from the environment, if they regard protected species or protected natural habitats and occurred due to fault of the entity who benefits from the environment. Further, the legislator determines that the provisions of repair act shall apply to any direct threat of damage to the environment or damage to the environment caused by a diffused emission, coming from many sources, if it is possible to establish a causal link between the direct

threat of damage to the environment or damage to the environment and the activities of the entity who benefits from the environment.

Wording of this article indicates the intention of the legislator to determine the scope of the repair act. It contains also prerequisites of liability for environmental damage or direct threat of damage. This perception of the article 2 of the repair act provisions justifies other provisions of this regulation, including also art. 9. In this article, the legislator defines the duties of the entity who benefits from the environment if an environmental damage or an direct threat of such damage occurs. At the same time the legislator does not regulate in this act prerequisites of these duties fulfilment.

Legislator in art. 1 point 2 of the repair act introduces guilt as a prerequisite of the responsibility for specified category of environmental damages or the direct threat of damage to environment. The use in the provisions structure of fault which is unknown to the traditional administrative responsibility may indicate a distinction between this provision and other regulations with administrative origins. If we add to this the fact that repair act sets liability for damage or direct threat of damage, which is traditionally perceived as appropriate to civil law, the following conclusion should be made. It is necessary to recognize that the interpretation of these norms without specific character of interpretation of civil law, may lead to unsatisfactory results that may negatively affect their application.

Example of art. 2 of the repair act illustrates problems that may arise in the process of interpretation of the provisions contained therein. If we assume that the specific nature of the interpretation is affected by the character of protected interest in the application of civil law and respectively, administrative law, it is to highlight the need the following circumstance.

In scope of regulation, on the basis of which environment is protected, the main aim of administrative law loses its clarity (that is: protection of public interest) and in scope of civil law its main aim (that is: protection of individual interest). This is caused by the specificity of the legal interest, which is the environment, and hence the different essence of its protection.

Legal science indicates that the state of environmental risk threatens the public interest, but at the same time can also harm the interest of any entity that is in the range of harmful effects. Individual interest existing in relation to many or even all people in a particular comparable situation does not lose an individual reference, and thus does not melt in the higher category of general (public) interest. This reflects the specific feature of environmental risk – the threat of the public interest and at the same time the treat of the individual interest. (Radecki, 1979, p. 12–13).

Final conclusions

The use of *quasi* civil legal norms aiming at environment protection, which examples can be found in the repair act, in our opinion, justify the following conclusion. It is to consider the acceptance of the possibility of inclusion in the process of these provisions interpretation specificity of the civil law interpretation. Obviously this should be done taking into account the high degree of diligence in the use of these instruments.

At the same time, more flexibility of these provisions in relation to, let us name it – traditional solutions of administrative law. This requires more significance for teleological and functional interpretation beside linguistic interpretation. An important question may be also the appropriateness of allowing the use of analogy.

Being aware of the complexity of the issues and changes that are taking place in administrative law, the following course of action has to be indicated. By introducing civil law structures in the field of administrative law, we should not resign from the specificity of these structures. Civil law institutions are characterized by a larger scope of action, which is left for parties or performers, in comparison to the institutions of administrative law. This specificity of civil law structures should be considered as the advantage that should not be removed in the activities of public authorities.

The development of public administration, and consequently administrative law, clearly indicates the extension of the requirements for legal knowledge for public administration employees engaged in administrative law. This process in the coming years will certainly intensify further. It may also lead to the need to modify the views on the issue of the interpretation of administrative law. Administrative rules, on the base of which the environment is protected, at least in part, will require such modification.

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LIMITS OF THE PROHIBITION OF USING PERSONAL DATA OF SOCIAL ASSISTANCE BENEFICIARIES

Abstract. The objective of this paper is to present the limits of using personal data of the social assistance beneficiaries. Therefore, it will analyse issues concerning such terms as personal data, the essence of its protection, the essence of the limit in personal data use, acceptability and rules of personal data processing on the grounds of both general and specific legal solutions included in the Act on Social Assistance.

It is important to emphasise that the limits of using personal data of the persons benefitting from social security are determined by means of legal solutions referring to personal data protection. The basic regulation in this question is APDP of 29 August 1997, and specific solutions may be found foremost in Article 100 ASA of 12 March 2004, which implies that in the proceedings on social assistance benefits it is important to pursue primarily the good of social assistance beneficiaries, as well as protection of their personal rights. In particular, the names of social assistance beneficiaries and the type and range of the benefit granted must not be published. On the other hand, to a degree necessary for granting and allotting social assistance benefits, it is allowed to process personal data of applicants for and users of these benefits referring to: ethnic origins, state of health, bad habits, convictions, statements of penalties, as well as other statements issued in judicial or administrative proceedings. The existence of exceptions which allow making beneficiaries' personal data available is justified. Every acceptance of revealing social assistance beneficiaries' personal data is subject to many provisions of universally binding law, due to which beneficiaries may protect their rights and good name.

1. Introduction

In Poland, in accordance with the binding law, granting social assistance benefits should occur in accordance with the principle of extraordinary nature, i.e. the rule of personal data protection of the people using social assistance benefits. Among these values the Civil Code lists, for example: health,

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freedom, dignity, name, freedom of conscience, secret of correspondence and provides for their general protection. In the case of their infringement we may demand to repair the harm caused by the infringement, especially/such as an appropriate statement, cash compensation, or a payment of certain amount of money to a specified charity by the person commitinng infringement. (Sierpowska, 2006, pp. 71–72).

In the ustawa z dnia 12 marca 2004 r. o pomocy społecznej – on Social Assistance, hereinafter referred to as ASA (Dz. U. z 2009 Nr 175, poz. 1362) the legislator refers directly to protection of personal rights.[1] It is important to underscore that it is one of the tasks for the Social Assistance Administration, which determines proceedings of social assistance benefits, for the legislator obliged the bodies conducting the proceedings in social assistance cases to protect personal rights of the social assistance beneficiaries as well as to pursue the good of these people. In social security cases this protection is of a particular importance, for benefitting from social assistance may be connected with the sense of shame and an intention to conceal this fact.

The objective of this paper is to present the limits of using personal data of the social assistance beneficiaries. Therefore, it will analyse issues concerning such terms as personal data, the essence of its protection, the essence of the limit in personal data use, acceptability and rules of personal data processing on the grounds of both general and specific legal solutions included in ASA.

2. The term 'personal data' and the essence of its use

The provisions of ASA include a general rule of pursuing the good of social assistance beneficiaries and protecting their personal rights in administrative proceedings in social assistance benefits. It is, however, important to note that the term *personal rights* is broader than *personal data* and includes such values as health, freedom, freedom of conscience, name and secret of correspondence.

According to the solutions in the ustawa z dnia 29 sierpnia 1997 r. o ochronie danych osobowych (Dz. U. z 2002 Nr 101, poz. 926) – Act on Personal Data Protection – hereinafter referred to as APDP – personal data is recognised as "any information concerning a natural person identified or identifiable". (Barta, Fajgielski, Markiewicz, Retrieved from Lex Sigma on-line). This definition corresponds basically with that of *individual data* in the ustawa z dnia 29 czerwca 1995 r. o statystyce publicznej (Dz. U.

z 2012 Nr 591 j.t.), which recognises it as "*personal data* which can be connected with a particular natural person" (further on it was added that individual data is also the individual data which can be connected with business entity or another legal entity, or else an organisational unit not being a legal entity).

Because the Polish noun *dane* (data) has no singular form, (Szymczak, 1995, p. 337) sometimes a proposal is raised to replace the term *personal data* (dane osobowe – plural) with another term, for instance *nominal information*, for the noun *information* in Polish may be used in both singular and plural forms. (Harla, 2001, p. 38). However, the literature raises an argument that the expression *personal data* accurately conveys the essence of the notion in point and, moreover, it is a precise counterpart of the terms used in Directive 95/46/EC (Official Journal L 281, 23/11/1995 P. 0031 – 0050) in English (*personal data*) and in German (*Personenbezogene Daten*), which also occur in plural only.

The definition of personal data in Article 6 of APDP embraces the following elements (premises): (Barta, Fajgielski, Markiewicz).

1) information,
2) concerning a natural person,
3) identified or identifiable.

The first premise in the definition under analysis concerns information. It is understood as communications (messages, speeches, presentations) expressed and recorded in any way: with graphic signs, symbols, in a computer language, in a photograph, on an audio or a video tape etc.) regardless of the method, range and freedom of making them available as well as regardless of the way of their acquisition.

The literature indicates the need for an interdisciplinary agreement on the term information and proposes a definition in accordance to which information is "a transferable (intangible) property reducing uncertainty." (Szpor, 2008, p. 8). There is also a consent on the broad understanding the semantic field of the term *information* used in the definition of personal data. This term should embrace not only language signs but also other circumstances accompanying language signs, or else, only non-language information. (Drozd, 2007, p. 44).

Part of the information used in social relations quite frequently concerns more than one natural person and is strictly connected with one of the qualities of information, which is understood as "unlimited possibilities of linking." (Drozd, 2008, p. 31). In connection with the aforesaid appears a problem of assigning such information to a concrete natural person. It seems reasonable to argue that in a particular situation certain information

is recognised as personal data of this natural person with whom they are connected to the highest degree, which may be decided through, for example, the purpose of personal data processing.

It is assumed that an email address belongs to the category of personal data only when it includes the information on the first name and the surname of the user or "other information like this". (Barta, Markiewicz, 2002, p. 290). On the other hand, W. Zimny (2002, p. 8) holds another position. In his opinion every email address is included in the term personal data. According to X. Konarski, (2004, p. 165) an email address belongs to the category of personal data if the user's identifier in the address is his first name and surname, or if the entity providing the service of electronic mail boxes collected the user's personal data during signing the agreement on providing the services.

The object of the protection guaranteed by APDP is personal data of living natural persons, which are identifiable, where identifiability should be understood as a possibility of connecting the information with a concrete natural person. This information may refer to any type of relations, both personal and property relations, professional achievements, education and character traits. (Fischer, 2010, p. 56). Too restrictive interpretation could, however, lead to qualifying practically any information as personal data. The information should concern a natural person and communicate something on this person.

Thus, an identifiable person is understood as a person whose identity may be determined directly or indirectly, especially through referring to the identity number or else one or more specific factors defining his/her physical, physiological, mental, economic, cultural and social features. However, the information which requires excessive expenses, time and actions to be established is not considered as information enabling to determine a person's identity. (Bunikowski, 2008, p. 74).

The doctrine includes various conceptions on the categorisation of personal data. Two dominating ones are emphasised. One is the theory of spheres, which divides any human's behaviours and personal data referring to them as intimate, private and public. The other is the theory of mosaic which assumes that individual personal data permeate and complement each other. Juxtaposed, they may reflect different aspects of personal life, including the sphere of privacy and even intimacy. (Fajgielski, 2008, p. 32).

3. The essence of the limit of the prohibition of using personal data

Thus, the notion of personal data is not homogeneous. Article 27 of APDP distinguishes data of special nature, the so-called sensitive data (delicate), as opposite to the so-called ordinary data (common), in order to introduce more intense protection of sensitive data and establish separate rules for the processing. (Drozd, 2007, p. 51). APDP recognises sensitive data as data concerning (Barta, Fajgielski, Markiewicz): racial background, political views, religious or philosophical beliefs (this refers also to atheistic and agnostic positions; this category does not, however, include moral principles), affiliations with a religious denomination, a political party or a trade union (also the fact of not belonging and quitting the organisation), state of health, genetic code, bad habits (including withdrawal treatment or abandoning it, participation in groups and organisations with the aim of combating addictions), sexual life, convictions, decisions on punishment, penalty fines as well as other decisions/sentences issued in judicial or administrative proceedings.[2]

The above enumeration of sensitive data is comprehensive. In some cases some ambiguities may occur if a particular piece of information on a particular person does not reveal, for example, his/her religious or political beliefs, or allow the reader to infer his/her race or ethnic background. A broad category is data on the state of health, and therefore certain doubts arise if some information, as sensitive data, should be subject to intense protection.

The criterion of data division into sensitive and ordinary is constituted by the fact that they concern directly spheres of privacy and even intimacy of a natural person. In the remaining cases (e.g. with ordinary data, neutral data, trivial data) the intrusion into privacy either does not occur at all, or even if it does it is not from the very substance of the data but rather from their juxtaposition or context. This division is important for indicating the limits of the prohibition of using personal data of the people benefitting from public security.

The provision of Article 27 section 1 of APDP introduces a rule of the prohibition of sensitive data processing, regardless of the form of processing (automated or traditional). Decisions allowing to process such data are then exceptional regulations. ASA contains such provisions.

APDP introduces several exceptions, included in a closed catalogue, to the rule that sensitive data processing is prohibited. This operation of the legislator decides on the prohibition of applying extensive interpretation. It is also important to underscore that each of the circumstances justifying sensitive data processing is of autonomous and independent nature. Con-

sequently, for example, in the situation where such processing is carried out on the basis and within the limits of a specific regulation, it cannot be recognised as illegal.

When the commonly binding law allows the processing of sensitive data, we should, while transferring them or making them available, emphasise that we deal with this type of data (either directly, or even through the annotation *confidential*). Such behaviour, we may say, is adequate to the obligation, imposed on the administrator, of particular care in order to protect the interests of the persons whom the data concern. (Drozd, 2008, p. 31).

4. Acceptability and rules of personal data processing

The term *data processing* is broad and embraces any operation on personal data, including collecting, recording, storing, developing, changing, publishing and removing. (Fajgielski, 2008, p. 33). General bases of acceptability of data processing were outlined in Article 23 of APDP, constituting a basis for the legalisation of processing.

A condition allowing for personal data processing is a written consent thereto of the person whose data are to be used. The specificity connected with the particular nature of sensitive data involves the requirement that the consent must be in writing. (Fischer, 2010, p. 62).

The other circumstance legalising the processing of sensitive data is particulary liberal provision of another act of law, e.g. ASA. Therefore, it is exclusively a regulation included in the source of law of the status of statute, with a reservation that this regulation must provide full guarantees of the protection of these data. It is important to note that the assessment if a particular provision (or broader, a particular regulation) meets this condition, may in certain concrete situations be a subject of disputes. (Barta, Fajgielski, Markiewicz).

The third premise allows processing personal data as the result of entering into an agreement in order to implement it. This concerns only the situation of processing the data of the parties of this agreement. There may also occur a necessity for processing data, which is a condition of entering into the agreement on demand of the person whom the data concern. (Fischer, 2010, p. 63).

The fourth premise embraces a situation where data processing is indispensable to perform certain legally determined tasks carried out for the public good. In the literature it is accurately pointed out that this provision

concerns exclusively "non-executive actions of the public administration (in forms proper for private law). Executive actions require, in accordance with the basic principle of public law, a precise authorisation in regulations." (Fischer, 2010, p. 63).

The fifth general premise accepts personal data processing for legally justified ends implemented by data administrators or data recipients, and the processing does not infringe the rights and liberties of the person whom the data concern.

On the basis of the analysis of the APDP provisions and the provisions of Directive 95/46/EC P. Fajgielski (2008, pp. 17–26) distinguished ten general principles of processing and protecting personal data: the principle of reliability and legality of processing; the principle of purposefulness of processing; the principle of data adequacy; the principle of substantial correctness of the data; the principle of time limit of processing; the principle of informing about processing, the principle of respecting the rights of the people whom the data concern; the principle of confidentiality and security of the data; the principle of control of the data processed as well as the principle of using sanctions for the infringement of the norms of data protection.

Processing and protection of personal data are based on the norms determined by law. Among them of particular importance are just general principles referring to the activity of entities processing personal data. The principles of processing and protecting data are the basic rules which constitute the essence of legal protection of personal data. They are of particular importance for applying and interpreting the regulations on personal data protection. For the infringement of the principles of personal data processing the law envisages punishments, which are specifically regulated in Articles 49–54 of APDP.[3]

5. Specific solutions in the Act of 12 March 2004 on Social Assistance

Granting benefits from social assistance is an important public task of the social assistance administration. In view of the binding law the organs of social assistance are obligated to obey the general rules determined by the Constitution of the Republic of Poland, the Code of Administrative Procedures and ASA. (Miruć, 2010, pp. 533–543; Nitecki, 2008, p. 89).

The Act on Social Assistance refers directly to the principle of personal data protection. Foremost this principle is a determinant of conduct in the

case of social assistance benefits. The aforementioned term *personal right* should be attributed with a broad meaning and it should be interpreted in the context of the principles and purposes of social assistance. (Nitecki, 2008, 58). In accordance with Article 100 section 1 of ASA the main principle of conduct in the case of granting benefits is pursuing the good of the people benefitting from social assistance and the protection of their personal data.

Article 100 section 1 of ASA forms specific principles strictly connected with the limits of the prohibition of using the personal data of people receiving benefits from social assistance, including the principle of pursuing the good of the parties of the proceedings, the principle of intense protection of personal rights of the party as well as the principle of prohibition of publishing the data identifying the party and the range of the entitlement granted him/her by social assistance.

Article 100 section 2 of ASA basically determines more precisely the limits which reach the prohibition of using the personal data of the parties receiving benefits. This prohibition does not concern the course of proceedings in the case of benefits as well as the stage in implementing the decision on granting the benefit. (Maciejko, Zaborniak, 2010, p. 385).

The principle of pursuing the good of the party receiving benefits in its structure is close to the code principle of taking into consideration the right interest of the party in administrative proceedings. It embraces every case of the occurrence of the necessity for the good of a person in need who is not able to overcome his/her difficult life situation with his/her own resources, capabilities and rights. Social assistance organs are obligated to take into consideration the good of the party of the proceedings if this party meets the statutory conditions of granting him/her the benefit, and in the case of discretionary benefits, if it fits in the actual, i.e. organisational and financial, capabilities of the commune or the district.

The prohibitions in Article 100 section 1 of ASA concerning publishing personal data are listed as examples after the phrase *in particular*. In particular the protection is provided for names and other data of the persons who were granted the aid. In accordance with the provisions of ASA it is forbidden to publish or reveal the type and the range of the benefit granted, i.e. in practice it is prohibited to hang lists of the beneficiaries' names, publish them in local press or the Internet. This prohibition should be also considered in the context of declining granting a benefit because of the lack of financial resources. (Sierpowska, 2006, p. 383). According to judicature the decline should be supported by evidence and justified in details. In view of the wyrok Naczelnego Sądu Administracyjnego (Supreme Administrative Court – hereinafter referred to as SAC) w Warszawie z dnia 9 grudnia 1999 r.

benefit amounts depend on, among other things, the financial capability of the commune. (I SA 2407/99). However, in the opinion of the Court, the commune organs are not entitled to transfer the information on the beneficiaries and the type and range of the benefit granted. The aforementioned prohibitions should be also interpreted in the light of social workers' responsibilities, including the obligation of pursuing the principles of professional ethics and keeping confidential the information acquired during their professional activities.

The Polish social assistance law also limits the freedom of collecting information on current and potential beneficiaries. The legislator accurately envisaged the possibility of processing some personal data of the beneficiaries of social assistance, for certain data on a person, e.g. concerning his/her health are simply necessary to establish the basis for granting the aid. Thus, the point is the personal data processing for the needs of the entity granting the benefits only, and the processing cannot cause any transfer of information outside.

Personal data, or concrete information on: ethnic origins, state of health, bad habits, convictions, decisions on punishment and other statements issued in administrative and civil proceedings, may be processed only in the scope indispensable to grant the aid. SAC, in its decision of 2 March 2001 argued that a social assistance centre granting benefits determined by the state of health of the person applying for a benefit has the right to collect and process the information on his/her state of health when it has an important influence on the recognition of the life situation of the person applying for the aid. (II SA 401/00).

Personal data processing by the organs exercising the rights and responsibilities determined by the provisions of ASA, in particular in Article 2, 3 and 36, is acceptable when it is indispensable to exercise the right or perform the responsibility resulting from a provision of law (Article 23 section 1 point 2 of APDP). The process of processing the personal data of beneficiaries is carried out exclusively in connection with the proceedings concerning granting social assistance benefits on the basis of ASA.

Data processing means operations on personal data such as: collecting, recording, storing, developing, changing, publishing and removing. The legislator envisaged different degrees of protection depending on whether it concerns ordinary data or sensitive data. Ordinary data is any information allowing to identify a person, which are not listed in the closed catalogue of sensitive data. Sensitive data, on the other hand, are: the data informing on racial or ethnic origins, political, religious or philosophical views, affiliation with a religious denomination, a party and a trade union, state of

health, genetic code, bad habits, sexual life, information on criminal records. (Chrapek, 2010, p. 124).

The premises legalising personal data processing are of great importance. (Chrapek, 2010, pp. 125–127). In view of the binding law, as far as ordinary data processing is concerned, which means any information allowing to identify a person, the conditions of personal data processing include: the person's consent, unless it is about removing the data concerning him/her; it is indispensable for performing legally determined tasks carried out for the public good as well as it is necessary to achieve legally justified ends pursued by data administrators or data recipients and the processing does not infringe the rights and liberties of the person whom the data concern.

In the case of particularly sensitive data, for example: origins, political views or the state of health, the premises legalising personal data processing include: a written permit of the person whom the data concern, unless it is about removing his/her data; a specific provision of another act of law allows to process such data without the consent of the person whom the data concern and provides full guarantees of their protection; processing such data is indispensable to protect vested interests of the person whom the data concern or another person, when the person whom the data concern is not physically or legally capable of expressing consent, until the time of establishing a legal guardian or curator; the processing relates to the data necessary to pursue a legal claim; the processing concern the data which have been published by the person whom the data concern, or else, if data processing is conducted in order to exercise rights and responsibilities resulting from a decision issued in judicial or administrative proceedings.

In reference to ordinary personal data, personal data processing is acceptable when it is indispensable to exercise a right or to perform a responsibility resulting from the provision of law. According to the provisions of APDP, on the other hand, sensitive data processing is acceptable if the specific provision of another act of law allows to process such data without the consent of the person whom the data concern and provides full guarantees of their protection. Such a provision is Article 100 ASA, which introduces an option of processing the data particularly protected to the degree necessary for providing benefits. This regulation enumerates the types of particularly protected data, which may be processed. The data particularly protected may be processed only to the degree necessary to grant and allot social security benefits. The provision of ASA forbids to collect the enumerated data in any case but only if granting or declining of granting the benefit

is, in accordance with ASA, dependent on obtaining certain information, e.g. ethnic origin, the state of health or convictions.

An important issue is also the rules of processing the personal data of social assistance beneficiaries. Here we can undoubtedly list: the principle of legality, the principle of purposefulness, the principle of adequacy, the principle of data correctness and the principle of time limit (according to M. Chrapek).

In view of the general principle significant for the whole system of law, which is the principle of legality, organs of public authorities are obligated to act on the basis of law and within its limits. Thus, processing the data of social security beneficiaries should be carried out in compliance with law, or fulfil foremost the premises of legality of personal data processing indicated in APDP and the special act, i.e. ASA, and these operations should be in compliance with executive regulations related to this matter.

In turn, the principle of purposefulness indicates that personal data processing should occur exclusively for legal purposes. Thus, the person processing personal data cannot conceal the purpose from the person whom the data concern. The aim should also not be outlined in too general terms.

The principle of relevancy or necessity indicates that the personal data administrator may process them only to the degree which is indispensable for the purpose of data collecting. The content of ASA this principle expressed literally in Article 100 para 2, in reference to particularly sensitive data, i.e. referring to ethnic origins, state of health, bad habits, decisions on penalties. Undoubtedly this principle should also refer to ordinary data. (II SA/Wa917/2005). Ordinary data should also be processed to the degree necessary to reach the goals of social assistance.

Another rule referred to as the principle of data correctness means that the personal data administrator commits himself to secure the correctness of personal data, which means their accordance with the truth, validity and completeness. The beneficiary of social assistance should update and verify personal data.

The principle of time limit also plays an important role. In view thereof personal data are stored in the file by the administrator not longer than it is necessary to achieve the aim. It is strictly connected with the principle of purposefulness. One group of data may be erased or sent to the archive on the basis of the binding law.

Every person whose personal data are processed has certain rights that protect his/her privacy. Among them are: the right to exhaustive information on processing the date which concern him/her; the right to complete, update or correct the data as well as to demand to stop their processing

or their erasure; the right to demand in writing to stop data processing because of the extraordinary situation of the person whom the personal data concern, as well as the right to protest against data processing if the administrator intends to process the data for marketing purposes or if his/her personal data are transferred to another data administrator. (Chrapek, 2010, pp. 131–132).

It is also worth mentioning that in accordance with ASA, granting a benefit does not depend on expressing a consent to personal data processing.

Every beneficiary should also be allowed the refusal of making personal data available by the organ of public administration. The refusal is written but not in a form of administrative or any other decision. Thus the refusal of making personal data available is neither an operation nor an act of public administration referring to granting, stating or recognising a right or responsibility resulting from provisions of law.

The currently binding law indicates exceptions which allow possibilities of making the social assistance beneficiaries' personal data available.

It is APDP that indicates making personal data in family if community interviews available by social assistance centres for the family if community interview includes sensitive data. In order to make it available to another entity as a whole there must exist a specific provision of law which allows such an operation. Social assistance centres are entitled in view of law to demand access to personal data from another organ, if they are of importance for deciding on granting a benefit or its amount (e.g. from a court of law, a public prosecutor or the police on the beneficiary's service in prison). In this question also a probation officer has the right to demand from the police and other state organs and institutions, local government organs, associations and community organisations within the range of their activities, as well as from natural persons assistance in performing their official duties, which involve making information available to the particular supervised. These data, however, must be indispensable in order to correctly perform official duties. An exception is a family and community interview. The guardianship court may order the probation officer to conduct a community interview as well as to turn for information to a proper organisational unit of social assistance in order to establish important data. It is also important to note that managers of social security centres may transfer to managers of canteens, for example in schools, lists of the names of the people who were granted aid in the form of a meal, which constitute both the basis of financial settlements between the centre and the canteen, as well as serve to identify the persons

attending a meal. This list is not, however, an infringement of personal data protection.

6. Concluding remarks

Summing up these reflections, it is important to emphasise that the limits of using personal data of the persons benefitting from social assistance are determined by means of legal solutions referring to personal data protection. The basic regulation in this question is APDP of 29 August 1997, and specific solutions may be found foremost in Article 100 ASA, which implies that in the proceedings on social assistance benefits it is important to pursue foremost the good of social assistance beneficiaries, as well as protection of their personal rights. In particular the names of social assistance beneficiaries and the type and range of the benefit granted must not be published. On the other hand, to a degree necessary for granting and allotting social assistance benefits it is allowed to process personal data of applicants and users of these benefits referring to: ethnic origins, state of health, bad habits, convictions, statements of penalties, as well as other statements issued in judicial or administrative proceedings.

The existence of exceptions which allow making beneficiaries' personal data available is justified. As you can see, every acceptance of revealing social assistance beneficiaries' personal data is subject to many provisions of universally binding law, due to which beneficiaries may protect their rights and good name.

NOTES

[1] Particularly Articles 100, 2, 3 and 36.

[2] The amendment to APDP of 25 August 2001 included into the catalogue of sensitive data the information concerning convictions, decisions/sentences on punishment and penalty tickets, as well as other decisions/sentences issued in judicial or administrative proceedings, the processing of which had previously been the subject of regulation of Article 28 section 1 of APDP, which in the previous wording required only a statutory basis for processing this type of data.

[3] Article 49 1. A person, who processes personal data in a data filing system where such processing is forbidden or where he/she is not authorised to carry out such processing, shall be liable to a fine, a partial restriction of freedom or a prison sentence of up to two years. 2. Where the offence mentioned in point 1 of this article relates to information on racial or ethnic origin, political opinions, religious or philosophical beliefs, religious, party or trade-union membership, health records, genetic code, addictions or sexual life, the person who processes the data shall be liable to a fine, a partial restriction of freedom or a prison sentence of up to three years.

Article 50 A person who, being the controller of a data filing system, stores personal data incompatibly with the intended purpose for which the system has been created, shall be liable to a fine, the penalty of restriction of liberty or deprivation of liberty up to one year.

Article 51 1. A person who, being the controller of a data filing system or being obliged to protect the personal data, discloses them or provides access to unauthorised persons, shall be liable to a fine, the penalty of restriction of liberty or deprivation of liberty up to two years. 2. In case of unintentional character of the above offence, the offender shall be liable to a fine, the penalty of restriction of liberty or deprivation of liberty up to one year.

Article 52 A person who, being the controller of a data filing system violates, whether intentionally or unintentionally, the obligation to protect the data against unauthorised takeover, damage or destruction, shall be liable to a fine, the penalty of restriction of liberty or deprivation of liberty up to one year.

Article 53 A person who, regardless of the obligation, fails to notify the data filing system for registration, shall be liable to a fine, the penalty of restriction of liberty or deprivation of liberty up to one year.

Article 54 A person who, being the controller, fails to inform the data subject of its rights or to provide him/her with the information which would enable that person to benefit from the provisions of this Act, shall be liable to a fine, partial restriction of freedom or prison sentence of up to one year.

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DIRECT COERCION IN PSYCHIATRICS – INTERPRETATION OF LEGAL REGULATIONS AS AMENDED IN JUNE 2012

Abstract. The issues connected with direct coercion are of vital importance due to the fact that the application of coercive measures leads to restriction of personal freedom and limiting individual autonomy. It may even result in violating bodily integrity. Thus, it is an interference with the sphere of fundamental rights guaranteed to every human by the Constitution of the Republic of Poland.

The article includes an interpretation of the legal provisions concerning the application of direct coercion in psychiatrics. It comprises the changes which are in force as of June 2012. There is a comprehensive analysis of the meaning of the term "direct coercion", as well as a detailed study of the prerequisites of its application. The legal regulations related to the forms of exerting direct coercion are thoroughly scrutinized. Next, the analysis of current regulations is carried out in order to evaluate their coherence, clarity and accuracy. It is also examined whether the currently applicable legal regulations are sufficient and if the rights of persons against whom direct coercion is applied are appropriately secured and protected.

1. Introduction

Persons suffering from mental disorders constitute a specific category of patients due to their unstable frame of mind and, what is connected with it, unpredictability of behaviour. Their conduct is often uncontrolled mentally, which may cause danger both to them and the people in their immediate company. Mental disorders are frequently accompanied by aggression. Its consequence might be destroying various items being in close vicinity. Aggression could be directed both against other people and against the ill persons themselves and assume the form of self-aggression which may lead to health disturbances, physical injury and sometimes even to death. Family members and people in ill person's environment are most often exposed to

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such danger. It seems worth pointing out that during hospitalization other patients might become aggrieved. By and large, the members of the medical staff become injured.

Dangerous conduct of persons with mental disorders justifies taking action that is aimed at suppressing aggression and non-admission of inflicting damage. Taking the above into account, in order to safeguard legally protected rights, it is admissible to apply direct coercive measures. In such event a doctor takes action not only without the patient's consent but actually in spite of their objections and quite often against their active resistance.

M. Balicki (1999, p. 40) observes that the doctor's actions consisting in applying coercive measures, thus being against the patient's will, irrespective of their justifiable motives, are indeed restrictions of personal freedom, violating bodily integrity and individual autonomy. Therefore, such actions are equal to interference with the sphere of rights guaranteed to every individual by the Constitution.

According to T. Cysek and Ł. Korózs (1997, p. 95) direct coercion constitutes "the most drastic form of violating personal dignity of psychiatric patients". However, in certain situations, the application of coercion is necessary. In the opinion of the authors the treatment of some patients with mental disorders would be impossible without resorting to this measure.

The application of direct coercion towards persons with mental disordersis regulated by the ustawa z 19 sierpnia 1994 o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.) – hereinafter referred to as "the Psychiatric Act" – and the relatively recent regulation of rozporządzenie Ministra Zdrowia z 28 czerwca 2012 r. w sprawie sposobu stosowania i dokumentowania zastosowania przymusu bezpośredniego oraz dokonywania oceny zasadności jego zastosowania (Dz. U. z 2012 r., poz. 740) – hereinafter referred to as "regulation concerning direct coercion of 2012". This regulation has replaced the former regulation of rozporządzenie Ministra Zdrowia i Opieki Społecznej z 23 sierpnia 1995 r. w sprawie sposobu stosowania przymusu bezpośredniego (Dz. U. z 1995 Nr 103, poz. 514).

It seems worth emphasizing that the above mentioned provisions must be interpreted very restrictively since they allow for the possibility of violating important personal rights and open the door for posing a threat to personal dignity.

Direct coercion may be applied towards persons with mental disorders. The Psychiatric Act provides in art. 3 item 1 that these persons include:

- mentally ill persons (persons displaying psychotic dysfunctions),
- mentally handicapped, and

- persons who display other disturbances of mental activities which are, according to the medical knowledge, included to mental disorders and who require medical service or other forms of assistance and care indispensable to exist in family and society.

It needs to be stressed here that the legislator has precisely defined application of direct coercion by pointing to the forms in which it may be performed. Pursuant to art 3 item 6 of the Psychiatric Act one should comprehend the term "direct coercion" as:

- holding up,
- compulsory application of medicines,
- immobilization,
- isolation.

In addition, each of these measures contains a separate definition.

1. holding up – temporary, short-term immobilization of a person with the use of physical force;
2. compulsory application of medicines – temporary or planned in the course of medical treatment implementation of medicines to the organism of a person without their consent;
3. immobilization – incapacitating a person with the use of strips, handles, sheets, straitjackets or other technical devices;
4. isolation – allocating a person separately, in a confined and appropriately adapted premises.

It seems worth noticing that the definition of direct coercion was introduced to the Psychiatric Act as recently as on 11 February 2011. Previously, an identical provision was included in art 3–6 of the repealed regulation of 1995 concerning direct coercion. Undoubtedly, adopting such a definition in the Act was a timely legislative measure as such important issues should be regulated by a legal document equal in rank to an Act and not by a minor document.

It must be noticed that until the effective date of the current regulation concerning direct coercion, i.e. until June 2012, the definition of direct coercion could be found in both the binding legal documents, i.e. in the regulation and in the Act. The regulation concerning direct coercion of 2012 does not cite this definition, however. The legislator has justifiably assumed that since it is included in the Act, there is no point in reiterating it in the document of minor rank.

Moving on to the analysis of the term "direct coercion", it seems necessary to carry out a linguistic interpretation.

According to the dictionary of the Polish language, coercion means "duress, pressure exerted on someone, circumstances forcing someone to act

against their will". (Szymczak, 1979, p. 1048). Physical constraint is defined in the dictionary as "using force towards somebody, compelling somebody to something by using physical force". (Szymczak, 1979, p. 1048).

The term "direct" means "not having intermediary links, concerning somebody or something directly" (Szymczak, 1979, p. 148). "Directly" should be understood as:

1. without any intermediary, personally, straightforwardly..."
2. "in spatial terms: very close, right alongside; without any physical barrier..."
3. "at the moment following an event or precedent to an event..." (Szymczak, 1979, p. 148).

However, there is no definition of the term "direct coercion" as a whole.

Taking into account the above definitions, it appears that direct coercion towards a person with mental disorders might be interpreted as compelling them by using force to act in a certain way, e.g. abstain from aggression; exerting pressure for this purpose (without using physical force); making somebody behave against their will. Such behaviour is acceptable at the moment following undesirable behaviour of the patient or at the moment precedent to dangerous, violent behaviour. Two elements deserve being highlighted:

- firstly – immediate character, which requires acting at the moment that "immediately follows" aggressive behaviour, or "immediately precedes" dangerous behaviour, and
- secondly – compelling character, which involves acting against the patient's will, also by the use of force.

2. Forms of direct coercion

The legislator has determined which coercive measures may be applied and what they should consist in. It seems worth carrying out a thorough interpretation of the terms that appear in the regulations and considering whether the wording is precise enough and does not cause any doubt.

2.1. Holding up

According to art. 3 item 6a of the Psychiatric Act, holding up means a temporary, short-term immobilisation of a person with the use of physical force.

In accordance with the dictionary of the Polish language the expression "hold up" means:

- "to hold and not allow to move, leave, escape; detain for a short time; withhold (...)
- keep in a particular position, not allow to fall down, move away (...)
- hold and keep someone in a particular place for a certain time (...)". (Szymczak, 1979, p. 1062).

It appears that the term "holding up" itself is quite precise and consistent with its literal wording.

What does immobilization of the patient mean? How should this term be understood? According to the dictionary of the Polish language "immobilize" equals "make something or somebody stop moving; seize, halt". (Szymczak, 1981, p. 602).

The provision refers to a temporary, short-term immobilization. Therefore, it seems proper to deliberate on the meaning of these expressions.

"Short-term" means "applied circumstantially, in a particular situation, acceptable for some time; improvised, incidental, immediate". (Szymczak, 1978, p. 431). "Temporary" means: "lasting for a short time, transient, short-lived". (Szymczak, 1978, p. 431).

While carrying out a literal interpretation of the provision which defines a coercive measure as an act of holding up, it should be pointed out that this measure consists in immobilizing a person with mental disorders, thus maintaining them in a certain position, keeping them in a place, making them stand still. Such immobilization ought to be of short duration, last temporarily and be short-term, so it must be applied occasionally, as a measure acceptable at this very moment.

The legislator allows thereby to use physical force and here arises an issue: what does using force mean, and how large may be the applied force and what actions are acceptable? Apparently, this provision should be clarified so as the degree of using physical force could be determined as appropriate in the given circumstances to apply a coercive measure. One needs to emphasize the fact that violence must not be used. A. Milik notices that one cannot "blow strikes". According to this author it is accessible to "apply the elements of self-defence, including using the following grips in particular: incapacitating, transport, defensive and releasing ones." (Milik, 2007, p. 115).

2.2. Compulsory application of medicines

Pursuant to art 3 item 6b of the Psychiatric Act compulsory application of medicines must be interpreted as a temporary or planned in the course of medical treatment implementation of medicines to the organism of a person without their consent.

Apparently, this provision does not need clarification as it is clear and precise enough.

The coercive measure mentioned above consists in administering medications to the patient without their consent or even despite their objections. This may be understood as both one-off application of the medicine if such a necessity arises from the existing circumstances and administering the medicine within the frames of a pre-scheduled course of treatment. Coercion is necessary due to the fact that the patient refuses to take the medicine at their own free will. It is worth noticing that the provision mentions application of medicines. Consequently, it does not provide a basis for administering curatives which are not medicines. The legislator has not defined either what kind of medicine it must be. Therefore, not only is it a matter of administering tranquilizers (which will be administered occasionally), but also medicines causing various effects. Since the legislator uses the term "implementation of medicines to the organism of a person", it does not matter in what form it will happen: i.e. whether by oral application, intravenous drip or injection. What is worth highlighting here is the fact that the legislator does not allow for using physical force.

2.3. Immobilization

Pursuant to art. 3 item 6c of the Psychiatric Act immobilization consists in incapacitating a person with the use of strips, handles, sheets, straitwaistcoat or other technical devices.

According to the dictionary of the Polish language "immobilize" equals "render something immobile, make something or someone stop moving; seize, halt". (Szymczak, 1981, p. 602). "Incapacitate" means "render someone inert, powerless; deprive them of the freedom to move at ease". (Szymczak, 1979, p. 409).

Accomplishing a literal interpretation of this provision, one ought to acknowledge that direct coercion in the form of immobilization consists in depriving someone of their freedom to move at ease, halting them in place with the use of suitable objects.

For the purpose of incapacitating the patient the medical staff might apply, among other means, strips, handles or other technical devices. The legislator does not precise, however, what kind of strips they may be and what material they should be made of: are these leather strips, or made of other material. It is not clear either what is behind the term "handles": what they should be made of; what they must look like. The above mentioned provision also refers to a "technical device". Instantly, it must be

pointed out that this is a very broad term and not precise enough. One can hardly guess what equipment was meant by the legislator. According to the dictionary of the Polish language a "device" is "a kind of mechanism or a set of elements, instrumental devices serving to perform certain actions (...)". (Szymczak, 1981, p. 619). Moreover, in accordance with the currently analyzed provision these should be "technical" devices. By the way, it seems worth adding that the wording "or other technical devices" means that the legislator recognizes strips, sheets or straitjackets as technical devices, which may be not fully comprehensible, particularly when one bears in mind the linguistic definition of this term. In addition, the legislator does not indicate that these must be devices similar to those previously mentioned in the provision. Thus, it may be assumed that these can be any technical devices.

To sum up the deliberations so far, one fact must be highlighted – while the term of immobilization itself is not questionable, the legislator's failure to provide a list of objects which may be applied to this purpose raises serious reservations.

It is definitely worth adding here that according to § 7 of the regulation concerning direct coercion of 2012, direct coercion in the form of immobilization should be applied in one-person premises. In the event of the lack of such possibility direct coercion should be applied in the way which allows for separating the patient from other persons who are in the same room and provides respect of their dignity and intimacy. In particular, this refers to performing nursing procedures without the presence of other persons. The regulation concerning direct coercion of 1995 did not provide for such a requirement.

2.4. Isolation

The next coercive measure stipulated in the Psychiatric Act is isolation. Pursuant to art. 3 item 6d of the document, isolation consists in allocating a person separately, in a confined and appropriately adapted premises.

§ 8 of the regulation concerning direct coercion of 2012 defines characteristics of such a place. It ought to be furnished in a way which protects a person with mental disorders from bodily injury and in a way equivalent in terms of sanitation and living conditions to other premises in a psychiatric hospital or unit of social institution. In addition, the isolation premises must be equipped with video surveillance installation enabling the medical staff to carry out constant supervision over the patient with mental disorders residing there and control their physical condition. It is worth emphasizing that the obligation to provide the premises with video surveillance instal-

lation was introduced by the regulation concerning direct coercion of 2012. Admittedly, thanks to this the regulator enhanced the guarantees of respecting patient's rights and increased the safety of isolated persons, thanks to their constant observation and the possibility to react immediately if such a need arises.

In accordance with the provisions of the Psychiatric Act, the coercive measures listed in art. 3 item 6 constitute a closed catalogue. It is unacceptable then to apply other measures except for those discussed above. There exists, however, a possibility to apply simultaneously a few of the coercive measures. Apparently, such a solution may be justifiable and in practice, together with holding up, immobilizing or isolation, compulsory application of tranquilizing medicines often takes place.

3. Premises of applying direct coercion

Apart from specifying coercive measures, the legislator thoroughly described the premises of their application. Pursuant to art 18 p. 1 of the Psychiatric Act, direct coercion towards persons with mental disorders may be exerted only when these persons:

1. commit attempts against their own life or health, or
2. commit attempts against other person's life or health, or
3. commit a crime against public safety, or
4. violently destroy or damage objects in their environment, or
5. gravely disturb or obstruct functioning of medical entity providing health services pertaining to mental care or a unit of social welfare institution.

Moreover, there is a possibility to apply direct coercion when the provision of the Psychiatric Act permits that. This encompasses the following situations:

A. conducting a compulsory psychiatric examination or transporting a person to a mental hospital for this purpose if their behaviour indicates that due to mental disorders they may pose an immediate threat to their own life or other persons' lives and health, or they are unable to cater for their own basic necessities (art. 21 p. 1 and 3 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.));
B. conducting a compulsory psychiatric examination for the purpose of issuing a medical statement justifying the need for treatment in a mental hospital (art. 30 p. 4 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.));

C. if it is necessary in order to perform essential medical procedures that aim at removing the cause of admitting the patient to the mental hospital without their consent (art. 34 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.));
D. preventing a person admitted to hospital without their consent from leaving the place at will (art. 34 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.));
E. preventing a person, whose behaviour poses a threat to their own life or health or other persons' lives or health, from leaving a psychiatric institution at will (art. 49 p. 3 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)).

It is a proper thing to pay attention to the fact that situations and purposes for which direct coercion may be applied towards a person with mental disorders are thoroughly defined by the legislator and cannot be extended by way of interpretation.

Let us now analyse the prerequisites that determine the admissibility of applying direct coercion.

1. A person with mental disorders commits an attempt against their own life or health or other persons' lives or health (art. 18 p. 1 item 1a of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)).

Apparently, this prerequisite has been precisely defined and does not need further in-depth interpretation. It seems worth pointing out that the expression "commit" has been used in a present tense. Thus, one should highlight the fact that it is admissible to apply a coercive measure only at the moment of dangerous behaviour but not in the situation preceding the attempt, or immediately following the attempt. Undesirable behaviour may consists in, among others, attempting to commit a suicide or self-mutilation or attacking another person, which might result in bodily injury or even death.

In such an event direct coercion is applied for the purpose of protecting the patient's life and health as well as for the purpose of protecting the lives and health of other persons. In hospital conditions most often it would be medical staff, but also other patients and visitors. Given that the protection of such vital rights as life and health is at stake, applying coercion in these circumstances should not raise any reservations.

2. A person with mental disorders commits a crime against public safety (art. 18 p. 1 item 1b of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)).

According to M. Balicki (1999, p. 53) the above describes a situation when the patient's behaviour poses a threat to a bigger number of people or the property of considerable value, e.g. causing real danger of setting fire, triggering explosion or bringing about a disaster.

Here, coercion is applied in order to protect this person's or other persons' life and health as well as to protect substantial property.

3. A person with mental disorders violently destroys or damages objects in their environment (art. 18 p. 1 item 2 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)).

According to the dictionary of the Polish language "destroy" is synonymous to: "annihilate, extinguish, demolish (...); cause exhaustion, decay, deterioration (...)" (Szymczak, 1979, p. 381); whereas "damage" is equivalent to "partially destroy, bring about a minor defect, spoil, impair, strain, derogate."(Szymczak, 1981, p. 629). In accordance with the literal wording of these expressions one may assume that the behaviour of the patient which consists in impairing or partially destroying objects justifies applying direct coercion towards them. Furthermore, the legislator stipulates that such behaviour must be violent, thus "impulsive, impetuous, quick-tempered, (...) turbulent, vehement; abrupt, rapid, quick." (Szymczak, 1978, p. 715).

The object of protection is tangible property which is located in the environment of the patient with mental disorders. It is necessary to notice that the provision in question does not precisely define:

- what kind of property it is,
- what is the value of the property,
- who is the owner of this property.

This means that destroying something abruptly, even a valueless item, gives grounds for applying a coercive measure. It does not matter either that the owner of this property is the destroyer himself. Such a structure of the provision appears to be incomprehensible. Even more so, given that from the property law stems the right of the owner to destroy the item (*iusabutendi*). Moreover, one can hardly accept the admissible and lawful possibility of using direct coercion to the aim of protecting a valueless item. Apparently, the current wording of the provision being interpreted may raise serious doubts, bearing in mind in particular the fact that applying a coercive measure always constitutes infringement of human rights, including the right for self-determination and may lead to violating the patient's dignity.

It seems proper to agree with K. Zgryzek (1996, p. 395) that the current wording of this provision results in the situation when the issue of lawfulness

of the application of direct coercion is dependent on the arbitrary assessment of the subject authorised to apply it.

In view of the above, it should be determined that this provision is derogatory. There are proper grounds for introducing a provision that determines the minimal value of the object as, for instance, considerable, major or substantial value. It should be also stipulated that these are objects which do not belong to the person destroying those objects.

4. A person with mental disorders gravely disturbs or obstructs functioning of medical entity providing health services pertaining to mental care or a unit of social welfare institution (art. 18 p. 1 item 3 of the ustawa o ochroniezdrowiapsychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)).

What is worth emphasizing here is the fact that pursuant to the above provision applying direct coercion is not justified by any disturbance of functioning of medical entity but this disturbance must be aggravated, thus massive, as it appears. It refers likewise to the situation when functioning of the medical institution is actually obstructed.

J. Duda (2012, p. 196) remarks that the term "gravely", due to its vagueness, may give grounds for abusive behaviour of the medical staff towards the patients with mental disorders, since it might be understood and interpreted in various ways.

In the case mentioned above, the coercion is applied for the purpose of protecting other patients of the medical entity so that they can take advantage of the provided services.

As it appears, in practice the discussed provision will not be a frequent basis for applying direct coercion, since one can hardly imagine a behaviour which is oppressive and dangerous enough that it may result in a serious disturbances in the work or obstruction of functioning of, say, psychiatric hospital. However, should such situation occur, only two out of four coercive measures, i.e. holding up or compulsory application of medicines (art. 18 p. 6 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)) may be used towards these patients.

To sum up the above discussion, one must point out that the prerequisites and purposes for which direct coercion towards a person with mental disorders can be applied are quite clearly determined by the legislator. An unacceptable practice then is applying a coercive measure for other purposes such as the inclination to punish a patient, or in order to discipline them, or for the convenience of the medical staff towards cumbersome or importunate patients (cf. Ciecierska, Gajdus, 1998, p. 69), or for the purpose of subordinating the patients to the personnel's will.

It is worth emphasizing that the doctor, while deciding whether to apply a direct coercive measure, should always do their best to appropriately evaluate the circumstances, bearing in mind that the essential issue is ensuring safety of the patient towards whom coercion will be exerted, as well as securing other persons' safety. Protecting property, including the equipment of the institution, should be a matter of secondary importance. (Milik, 2007, p. 124).

4. General principles of applying direct coercion

While analysing the provisions that permit applying direct coercion, three general principles of its application ought to be listed:

1. It is the doctor who decides whether to use coercive measures. The doctor also determines the type of coercive measure which is to be applied and personally supervises performing the action (art 18 p. 2 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)). In exceptional situations, if it is impossible to obtain an instant decision of the doctor, a nurse, who is to inform the doctor promptly, may decide as to the application of coercion.

2. Prior to applying direct coercion the patient, towards whom the coercive measure is to be applied, should be informed about it (art 18 p. 8 sent. 1 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)).

M. Balicki (1999, p. 54) takes note of the fact that explanation of the reason and purpose of applying a coercive measure may result in the patient's consent for suggested procedures without exerting coercion. Alternatively, it may contribute to mitigation of their resistance.Besides, every individual has the right to be informed what procedures and why they will be implemented towards them.

Owing to various circumstances and reasons, it is lawful to concurrently inform the patient and commence application of coercive measure. (Paprzycki, 1996, p. 22).

3. While choosing a coercive measure, one should opt for the measure which is possibly the least severe for the patient (art. 18 p. 8 sent. 2 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)).

4. Upon applying coercion one ought to exercise particular caution and care for the person's well-being (art. 18 p. 8 sent. 2 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)).

5. Direct coercion may last only until the reason for its implementation ceases to exist (§ 3 of the rozporządzenie w sprawie sposobu stosowania i dokumentowania zastosowania przymusu bezpośredniego oraz dokonywania oceny zasadności jego zastosowania (Dz. U z 2012 r., poz. 740)).

Accordingly, the applied coercive measure ought to be withdrawn if the reason for its application ceases to exist. It must be emphasized, however, that such an obligation stems from the regulation but not from the Act, which is a defective solution. It ought to be provided for by a provision of statutory rank.

6. A system of monitoring and supervising the applied coercive measures is provided for by the law.

7. The evaluation of justification of application of direct coercion needs to be done (art. 18 p. 10 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)).

8. The application of direct coercion must be adequately documented (art. 18 p. 2 sent. 3 of the ustawa o ochronie zdrowia psychicznego (Dz. U. z 2011 Nr 231, poz. 1375 j.t.)).

Pursuant to § 12 of the regulation concerning direct coercion of 2012, each application of whatever coercive measure is to be registered in individual and collective medical documentation. Should direct coercion be applied in psychiatric hospital, the following things must be noted in the case history: the measure which was applied, the reasons for its application (including the justification of choice), the duration of its application and the reasons for prolongation of the procedure, information about a notice concerning application of coercion given to the patient (§ 13 of the rozporządzenie w sprawie sposobu stosowania i dokumentowania zastosowania przymusu bezpośredniego oraz dokonywania oceny zasadności jego zastosowania (Dz. U z 2012 r., poz. 740)).

It seems worth pointing to some amendments that regard the application of coercive measures which have been introduced by the regulation concerning coercive measures of 2012.

1. There has been introduced a requirement to obtain another psychiatrist's opinion if the doctor, having prolonged the application of coercion in the form of immobilization or isolation twice, wants to prolong the procedure again.
2. There has been introduced an obligation to inform the ward head about any case of applying direct coercion in the form of immobilization or isolation for more than 24 hours.
3. The duration of applying coercive measure in the form of immobilization or isolation in the unit of social institution has been reduced from 24

to 8 hours. Any further prolongation of the application can exclusively take place in a hospital setting.
4. There has been introduced a requirement that direct coercion in the form of immobilization must be applied in a one-person premises.
5. There has been introduced a requirement for the isolation premises to be equipped with video surveillance system. The principles of conducting surveillance have also been established.
6. It has been determined in more detail how application of direct coercion must be documented.
7. According to new regulations direct coercion may be exerted only by persons appropriately instructed in this field (formerly, it could be done by appropriately instructed medical staff but also by other persons in their presence).
8. It has been described in detail what circumstances are to be taken into account while making judgement as to the justification of applying direct coercion.

5. Practical implementation of the regulations concerning direct coercion

Let us present the results of the report of the Supreme Chamber of Control dated 8 May 2012 on the control which was carried out regarding compliance with the provisions concerning application of direct coercion in Poland. (Nr ewid. 19/2012/P/11/093/KZD). The inspection was carried out in 18 hospitals, including 11 psychiatric hospitals, 7 psychiatric wards in general hospitals, located within 9 voivodeships.

As the result of the analysis of 153 case histories containing 199 sheets of "Register of Application of Immobilisation or Isolation" of the patients towards whom direct coercion was applied a number of irregularities have been found. These include:

- lack of record in the case history containing the description of medical examination which justifies administering the application of coercion (92 cases – 46.2%) and the examination preceding the decision concerning the prolongation of its application for subsequent 6-hour terms (114 cases – 57.3%);
- lack of the confirmation of the evaluation of the grounds for applying direct coercion carried out by the head of hospital (89 cases – 44.7%);

- failure to register in patients' documents instances of short-term release from immobilisation every 4 hours, satisfying physiological needs, taking in meals and beverages (97 cases – 48.7%).

In addition to the above, there have been found cases of:

- administering direct coercion for 24 hours immediately,
- failure to note down the date, time and reasons for prolongation of applying coercion,
- lack of confirmation that the hospital head has been notified of the applied coercion,
- the duration of placing a patient in safety has not been noted, the type of safety devices used has not been indicated, or the time of releasing the patient from safety devices has not been recorded.

6. Conclusion

To sum up the above discussion, it seems important to highlight that accurate interpretation of the provisions which regulate application of direct coercive measures is of great significance. It is worth stressing here that direct coercion is not subject to automatic control of the court. As it follows form the carried out inspections, in practice the provisions concerning the application of direct coercion are not always observed.

Finally, one must stress the fact that the legislator quite thoroughly specified the premises of applying direct coercion and defined the particular coercive measures. The principles of application of coercive measures have been established as well. Moreover, for the purpose of protecting the rights of the persons with mental disorders, there have been introduced some provisions aimed at reinforcement of the supervision over executing coercion. In spite of all these legislative measures, it must be acknowledged that not all provisions are clear enough and not all solutions are sufficient. This conclusion is additionally supported by alarming results of the carried out inspections that regard respecting patients' rights in connection with application of direct coercion.

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