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THEORETICA

Andrzej Bałandynowicz[1]

Apotheosis of natural law as the pursuit of the ideal of justice

Abstract

The concept of the natural law is a philosophical and ethical theory that suggests there are fundamental moral principles inherent in the nature of the universe. These principles can be discerned through human reason and intellect, and they are considered objective and universal, transcending man-made laws and regulations. The author argues that by understanding and adhering to these fundamental principles, both individuals and respective societies can attain justice and moral order. Indeed, justice is not solely determined by human laws and institutions; instead, it is rooted in a deeper, inherent sense of what is morally right and just.

Key words

Natural law, philosophy of law, ideal of justice, objective morality.

1. Introduction

The phantasmal construction is the fundamental organizing structure of the individual and the social subject. This structure represents self-

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knowledge and the desire for fusion and integrity, expressing the aspiration for a different organic state. These changes are desired by representatives of the transcultural world – all individuals with a differentiated social habitus[2].

Phantasmagorical structures are manifested in words, which serve as carriers of human thought, encompassing interpersonal relationships, connections between ideas, and objects. As a means of navigation, they act as signposts guiding individuals on their journey to understand reality. The signpost itself holds no intrinsic value; it is the entire path, or rather the act of following it, that brings pleasure to the seeker[3].

Certain actions within the realm of cognitive-emotional freedom and volitional experiences can lead to states of transpassivity, integrating individuals with the natural world. The proactive attitude of the individual possesses limitless potential to influence and bring about changes in the sphere of psycho-spiritual experiences within the broader human community. As the saying goes, “When others rejoice, I rejoice with them (...), my most intimate feelings can become radically externalized; I can literally laugh and cry through the agency of another”[4]. Two poles of transpassivity can be distinguished, reflecting the individual's psycho-spiritual self-perception in relation to the external environment. The individual makes a choice regarding their behavior, either delegating their delight to the image of another or experiencing satisfying experiences that trigger changes in their environment. The distinction between these two attitudes is facilitated by emotions and moods that later undergo sublimation. In the first case, it may be guilt, while in the second, it may be humiliation.

When referring to the phantasmatic formula attributed to the word, it becomes essential to highlight a fundamental conceptual triad that elucidates the mechanism of creation at the ontological level of the entities in question: rightness, truthfulness, and truth. "Truthfulness" is a category that pertains to the personality of the human being within the framework of categorical dimensions. It relates to the definition of the path followed by individuals as they seek to maintain an inner balance between nature and reality. "Truth" on the other hand, serves as a signpost, revealing the horizon of individual and communal life-a per-

[2] J. Lacan, Funkcja i pole mówienia i mowa w psychoanalizie, Warszawa 1996, p. 102.
[3] S. Freud, Nieświadomość, tłum. R. Reszke, (w:) *idem,* Psychologia nieświadomości, Warszawa 2002, p. 224.
[4] S. Žižek, Przekleństwo fantazji, Wrocław 2001, p. 189.

manent existence, unchanging. These concepts share a homogeneous morphology and maintain a close and functionally causal relationship. Their eclectic coherence is marked by interactive features that energize individual words, elevating them to the status of an organized whole. This takes the form of a highly developed entity, revealing its ontology, unaffected by external interference with its identity.

Only individuals who, through upbringing, education, and socialization, develop proactive and creative personalities are prepared to embark on the road as pilgrims, even on rough paths, in pursuit of the ultimately unattainable. Cognition, limited by sensory constraints, should manifest itself as truthfulness, which is inherently probabilistic but garners respect and trust at this level. The signpost in the realm of cognitive reality represents the individual's need for continuous qualitative change, allowing for comprehensive development by constructing intellectual-spiritual consciousness, ushering one into the world of culture.

The face of a creative individual is directly linked to their essential qualities, necessitating constant renewal and co-creation as opposed to regressive behavior and stagnation. These behavioral choices commodify, order, and integrate. By achieving equilibrium between the physical, mental, spiritual, and social realms, individuals gain the potential to form essential identity elements: inner freedom, the right to choose, responsibility, and the ability to make voluntary commitments to others. Attaining autonomy and personal subjectivity equips individuals with knowledge, competence, and practical skills, fostering coherence and hubristicity. Possessing these personal attributes legitimizes individuals to comprehend reality at the level of rational consciousness, embracing gnoseological thinking. This thinking is free from inference influenced by history, mythology, religion, morality, or ideology. Being valuable in itself rather than a means to an end, it compels individuals to labor, effort, sacrifice, resignation, and resistance to reject image-based thinking and perception and resist manipulation and socio-cultural psychomanipulation strategies. Maintaining cognitive purity is intrinsically tied to cultivating honesty with oneself and employing wisdom. The latter unveils life's mysteries, awakening intellectual-spiritual consciousness, guiding individuals towards realizing ideals, and fostering an understanding of values during their life journey, along with a need to integrate with the community and the natural environment. Navigating this path involves adopting new paradigmatic thinking rules, including prioritizing time over place, favoring

global over fragmentary inference, unity over conflict, and ideals over acceptance of existing reality.

The efforts to preserve psycho-physical unity and multidimensional holism, along with the application of gnoseological thinking, enable the realization of an uncolonized life pattern. Within this realm of individual expansiveness, a signpost indicates the need for an affirmative evaluation, through which the states of essence, constituting the core of each individual, are discovered. Thus, two worlds can coexist: one constructed by humans with the involvement of highly organic psychophysical receptors and an alternative, unprocessed, primordial world of a source nature, connected to ideals.

2. Cognitive truthfulness the foundation of law

The interpretation of natural phenomena takes place through a variety of research methods. The most widespread way of viewing reality and making assertions is the realist approach, which boils down to making sense of actions and determining structural order with the participation of rational sensibility. It can be attributed with the hallmarks of rationalism, as it uses *a priori* or *a posteriori* inference. In the first case, experience is excluded and preconceived assumptions are made on the subject of confirming or falsifying claims about the phenomenon under investigation. *A posteriori* interpretation, on the other hand, is grounded in illusory insight and is conditioned at the level of establishing a formal order in relation to specific facts. An individual equipped with intellectual consciousness reads reality through the application of an analytical or synthetic method, or through a synergetic approach. In general, analytic thinking amounts to the separation of constitutive components from a given material or abstract whole and the examination or definition of their purpose, value or mutual relations. In philosophy, this position on this issue was expressed, among others, by Immanuel Kant[5] , who determined the truth or falsity of a sentence solely on the basis of its sense and structure.

The opposite way is synthetic thinking, which amounts to tying together many different elements into a material-spiritual whole. These categories can be used to describe investigations and partial observations, theses and assertions made that are accompanied by formal or pragmatic

[5] I. K a n t, Koniec wszystkich rzeczy. O niedawno powstałym, wyniosłym tonie w filozofii, Toruń 1992, p. 106.

inference, as well as conceptual figures from an abstract construction. At this stage, a person formulates sentences in which the content of the adjudicator goes beyond the content of the subject, and thus the scope of existing knowledge is extended with new dimensives specifying the composition and properties of material entities.

The acquisition of the ability to make *apriori* or *aposteriori* or analytic or synthetic judgements and evaluations following profiled thinking depends on rational-spiritual awareness and the activity and dynamics of using the basic, innate sense, which is intuition. With its participation, the human individual becomes aware of the need to know what is unknown, limited to accepting the existing object order. Delving into the unknown, discovering new categorical content or the substantiality of material entities, requires the active involvement of intuition, allowing the individual, for these purposes, to overcome states of fear, anxiety, dispersion and lack of courage, as well as indifference and fear in the human community. Intuition is, as it were, a compass leading into the depths of human nature; it releases the energy to explore future states. In this way, the individual acquires the ability to transcend limitations and barriers, and makes behavioural choices that deviate from established and popularised standards. For the sake of cognitive correctness, the individual, following the indications of intuition, undertakes actions aimed at verifying the validity of theses and statements; he or she refers to experience or cultural practice.

Man, enriched by the variety of ways in which his individualism defines him, moves towards organised structures of life, understanding that these can be a source of other, different and new experiences for man's all-round development and the cognitive possibilities of the natural world. Experiencing and feeling the need to be rooted in a social community is an expression of personal maturity, manifested in the self-perception of security and justice of its representatives. The dhymens of man's psychological individualism – internally integrated in the form of cognitive, emotional and volitional experiences – accompany him in the development of social interactionist strategies. With their participation, man acquires the ability to experience experiences in a community, to identify with it and to produce personal-cultural bonds in place of the hitherto structural-objective ones. The refinement of personal identity through fusion and integration into society occurs as a result of a re-evaluation of existing relationships with others. Instead of utilitarian relationships, relationships based on axionormative criteria emerge and take on the formula of horizontal and

direct relations. Referring to the philosophical reflection of Georg Wilhelm Friedrich Hegel, it can be said that, from the perspective of dialectical development, organising life at a higher level of functioning, i.e. at the level of community participation, resolves the contradictions existing between the individual good and the common good.

Subjectivist thinking laden with rationalisation and analytical-synthetic inference as the primary thesis is displaced by pro-social thinking and takes the form of dialogic speech, becoming the antithesis in actuality. The reality assimilated by the human being at a higher level of development and following self-development and self-knowledge, as well as interpersonal communication, develops in the human being particular personality predictors in the form of acceptance and understanding of others. Through them, differences are acknowledged, different world views respected, diversity accepted as values. The importance of tolerance and pluralism is emphasised. In the space of public life, in an atmosphere of trust, the individual can abandon a self-directed consciousness and perceive the role of moral obligation towards other people. The material from which a pro-social and empathetic attitude is formed, instead of an egoistic one, is the centripetal predicate of dialogic speech, which is a reflection of the world of objective thought content, that is: differential love. It is this that becomes a self-contained identity value, capable of creating the human being anew: under individual-collectivist conditions. The socialisation carried out on the basis of the individual's integrity and cognitive honesty directs him towards perspective and horizontal thinking. The method of idealisation can be a signpost on this path of communication; only it guarantees efficiency and full effectiveness in the process of socialising man and bringing him closer to the truth.

The method discussed boils down to the identification of relevant factors favouring the discovery of relationships taking the form of legal norms. In order to formulate universal and universal statements, a dual approach should be distinguished: pragmatic methodology and meta-science corresponding to contemporary concepts of formal methodology. In my view, methodology as the process of knowing and analysing the activities that make up science should involve correct reasoning, sentence analysis and hypothesis testing. Meta-science, on the other hand, examines the formal aspects of the language of science and its object, independently of the cognitive activities, and includes the totality of the statements that can be made; it is an 'ideal

science'[6]. Thus, pragmatic methodology treats science as a cultural product, controlled by human beings through values that emerge periodically, thus becoming a humanistic discipline whose aim is precisely to understand it as a human activity. On the basis of this knowledge, considerations of the ontological nature of the things and phenomena under study become relevant, using the relationship between language and cognition. Cognition always takes place in verbal acts, which states that verbal elements are present in every cognitive act. If we accept this judgement, then we have to consider the cognitive process as a dynamic phenomenon, consisting of utterances and the recognition or rejection of sentences. Wisdom, on the other hand, can be identified with the totality of acknowledged sentences, whereby assertion - conviction, refers not to the sentence as a clause, but to the sentence understood in terms of its logical evaluation. In this way, the category of meaning becomes an epistemological fact and is directly linked to semiotics, and therefore: to the logical theory of language. This kind of relationality, the two-way relationship of these facts, can be described as cognitive semantics[7].

Meaning, which is a categorical element, is determined by rules for the use of language; these can be formatted as rules for the recognition of sentences and are referred to in science as purposive directives. There are three types of these directives: axiomatic, deductive and empirical. Axiomatic directives require the unconditional recognition of certain sentences, while deductive directives require the existence of certain sentences in order for other sentences to arise. Empirical directives of an experiential nature condition truthfulness on the occurrence of certain situations identical in cognitive reality. The element of meaning is homogeneous in a certain language, also the indicated types of directives must be relativised to it. With the help of meaning directives, it is thus possible to define the notion of equivalence and then the notion of meaning as a common property of all equivalent expressions in a language. The analysis of the notion of 'meaning' influenced the concept of radical conventionalism formulated by Kazimierz Ajdukiewicz. According to this theory, given experience only partially determines the meaning of sentences, since, in addition to these data, recognition is determined by accepted terminolog-

[6] K. Ajdukiewicz, Zarys logiki, Warszawa 1952, p. 46.
[7] *Idem*, Język i poznanie, Warszawa 1960, p. 79.

ical conventions[8]. Radicalism is expressed here in the claim that the dependence of evaluative conviction on language is far greater than hitherto claimed by the conventionalists. To this end, a distinction is made between open and closed languages and between coherent and incoherent languages. A language is open if there is a second language in which all the expressions of the basic language are contained in the same meaning and, moreover, it contains at least one expression not also present in it that this expression has a direct semantic connection with some expression of the basic language. By direct semantic relation, the scholar meant the relation that expressions are directly semantically related if they occur in a sentence dictated by an intentional-axiomatic directive, in a sentence pair bound by a deductive directive or in a sentence dictated by an empirical semantic directive. A language that does not meet the criteria of an open language is a closed language.

A language is coherent if it cannot be decomposed into such classes of expressions that no expression of one class is directly related in meaning to any expression of the other class. The inverse of a coherent language is an incoherent language, which can be decomposed into meaning-isolated parts[9]. If a new expression that is not a synonym of any expression previously present in the language is added to an open language, this new expression can be directly related in meaning to some found expression; consequently, this does not change the meanings of the resulting expressions. In contrast, the linguistic procedure of attaching a new, non-synonymous expression to the stock of a closed language must result in inconsistency. The category of transitive apparatus, understood as a set of expressions of some coherent and closed language, was introduced and, moreover, he argued that every meaning belongs to some class of it. He showed that two conceptual apparatuses are either identical or have no elements in common. A consequence of these inquiries into conceptual apparatuses is the regularity that the recognition of a sentence can only take place on the grounds of a closed and coherent language, that is, on the basis of a particular conceptual apparatus. On the other hand, the transition from one conceptual apparatus to others may cause that a recognised sentence on the basis of a certain conceptual

[8] K. Brykczyński, Semiotyka logiczna w twórczości Kazimierza Ajdukiewicza, Studia Semantyczne 1979, t. 9, p. 112.

[9] I. Dąmbska, Koncepcja języka w filozofii Kazimierza Ajdukiewicza, Ruch Filozoficzny 1965, t. 23, p. 176.

apparatus may prevent the recognition of this sentence on the basis of another conceptual apparatus, and this in the presence of the same empirical data. This is obvious once one considers that a change in conceptual apparatus is a change in meanings, and this generates sentence recognition directives.

If one defines the image of the world as an entity determined by a stock of recognised sentences, then radical conventionalism is expressed in the thesis that it is determined by a conceptual apparatus. This way of conceiving reality does not by any means exclude the influence of empirical data on its image, but rather confirms that the role of these elements is always revealed within some conceptual apparatus.

It is not true that this concept ignores or marginalises the role of experience in the creation of cognitive entities. Rather, it emphatically emphasises that there are untranslatable conceptual apparatuses in the context of the same empirical data. Ajdukiewicz's findings relating to radical conventionalism acquire universal significance due to the discourses created in contemporary philosophy of science by proponents of the so-called 'new empiricism'. In particular, Thomas Kuhn and Paul Karl Feyerabend propounded the view that science is a sequence of conceptually incommensurable paradigms. The notion of incommensurability of paradigms corresponds to their non-translatability and is entirely consistent with Ajdukiewicz's category of conceptual apparatus[10].

In exploring relationality and cognition, it is worth reflecting on the relationship of the concept of 'meaning' to the theses of empiricism. In particular, the problem of *apriori* knowledge in the context of experience is relevant. In the light of Ajdukiewicz's argument, *apriori* knowledge can be identified with sentences accepted by virtue of deductive and axiomatic directives of meaning. They then become analytic terms and at the same time constitute a type of *apriori* knowledge. Since sentences of this type are recognised on the basis of these purposive directives, i.e. without the participation of experience, it is fair to conclude that there is a type of cognition that is not legitimised by a connection to empiricism. If one looks at this problem from the semantic side, the issue of consequential empiricism boils down to the possibility of a language of knowledge without axiomatic and deductive directives. The laws of logic in terms of determining the

[10] K. Ajdukiewicz, The scientific world-perspective and other essays: 1931–1963, J. Giedymin (red.), Dordrecht 1974, p. 215.

relation involving the resultant sentences can be derived from analytic inference, which is opposed to experience.

The evoked discourse on cognition in the context of the problem of language and speech is relevant not only because of the issue of recognising that, by means of speech, man reflects his thoughts and, moreover, maps his personality, but can also extract axioms that allow him, in interpersonal communication, to discover the truth that should be reflected in positive law. Thus, in causal reality, there are simultaneously three languages through which the individual, receiving stimuli from the environment, processes and determines them in the phase of establishing his own relation to nature. These are the object language, the quasi-object language and the metaphysical language. With the former, man merely describes the material-spiritual entities existing around him. With the latter language, the cognitive subject becomes the discoverer of new events. Metaphysical language, on the other hand, is a phenomenon through which the individual becomes a creator of non-objective reality. The use of the category of descriptive language proves that man becomes aware of the basic needs on which his vitality depends. Cognition of the external environment is linked to persistence, stagnation and the acquisition of material goods. Reaching for the secrets of quasi-objective speech is linked to individual-social maturity, prescribing the realisation of higher-order needs and the fulfilment of moral duty towards members of the community. At this stage, the individual activates inference involving the criterion of meaning, rules for standardising language into open and closed and coherent and incoherent, and categories of conceptual apparatus. Stepping towards goals, objectives and quality of life requires a logical, structured approach. Such an individual functions at a higher level of linguistic perception. In this cognitive phase, a common valuation of entities and events is practised, making the individual use analytic or synthetic speech and *apriori* or *aposteriori* speech.

The cognition of reality in its final phase consists in the acquisition by man of the capacity to create an alternative world without the participation of preconceptual axiological-deductive and empirical thinking. One does not use a methodology indicating rules and procedures of pragmatic or formal inference, but goes beyond the circle of closed knowledge and, based on the method of idealisation, constructs a pattern, a model, a prototype of material-spiritual entities. This kind of self-generated creativity, reaching back to the ontology of entities, requires the fulfilment of

the dimensionality of righteousness by man for a comprehensive development towards a multidimensional individual-collectivist holism.

Reaching the pyramid of life, defined by the three object categories in the form of individual integrity, cognitive truthfulness and the realisation of the ideal of truth, involves acquiring psycho-spiritual hypersensitivity and being guided by the self-feeling dynamics of others involving emotional reactivity and the display of transpersonal feelings. Emotional states and high feelings in the form of friendship, love, fraternity, faith, courage, understanding and acceptance, compassion, spontaneity, patience, optimism and nobility constitute a necessary element – a superstructure in the personality structure, guaranteeing that thinking will move from the state of intellectual-spiritual consciousness to its superconsciousness. This is possible on the condition that high feelings and emotional states are followed and transcended. Only in an atmosphere of psycho-spiritual comfort is the human individual capable of overcoming limitations, overcoming impotence and breaking down the palisades of socio-spatial isolationism. The acquisition of high and uncommon qualities provides the basis for human beings to merge at the level of reason and spirituality, to create axiological self-knowledge. With the help of emotional and volitional experiences, man perceives the world as better than it really is, he indulges in dreamlike thinking through the medium of axiological self-knowledge, reaches out to the dimension of the superconscious; for he is not content with choices of existential behaviour directed towards consciousness alone.

A human being equipped with the attributes of self-consciousness, entering the sphere of super-consciousness and self-knowledge, should participate in a specific social imaginary. The state of mature and complete individual essentialism then finds its place in the community space, because through it, the need for comprehensive human development can be made credible; it equips the individual with qualities that help in the realisation of pro-social actions, because it gives them meaning by virtue of superior values.

Intellectual consciousness and spiritual awareness, rooted in the individual's axiological self-knowledge, play a decisive role in the formation of individual imaginations and desires. Reason and psychic experience are equally important for the formation of interpersonal relationality in the area of communal forms of life. They are, as it were, the backbone of the subjectivity of society within the scopes of the symbolic field, forming a network of connections between meaningful symbols and determining

communal senses and actions stretched over an ethical frame. They can be ascribed a normative power that legitimises and justifies human existence, as opposed to the objectified part, which is deprived of its cultural and identity dimension.

The dictum that defines the vitality of the individual in the creation of a safe and just social order is the need for changeability, movement and the dynamics of creation, which should eliminate from the existential mechanism the state of stasis, rest and stagnation. With the participation of emotional reactivity and orderly consciousness of the mind, man is able to realise choices of actions with outstanding axionormative values in the space of collective life. They will take such a form when the signpost of conduct becomes values, including: social solidarity, requiring honesty, helpfulness and effectiveness on the part of the individual. The individual in interpersonal communication should show acceptance and understanding of diversity, difference and pluralism, relating to other members of the interpersonal community. These categorical symbols of man's righteousness and his social existence based on the principle of cognitive truthfulness, as it were, naturally justify the legitimacy of his action in the civilisation-cultural sphere, including: the discovery of the elemental law. The normative power of these representations is connected with the individual's need to reach a particular class of word-symbols, that is, ideas, including: the idea of truth. They are the main principles, the models for the subject world, since their structure relates to the essence of things and exists independently and autonomously of them.

Material-spiritual objects are merely reflections of ideas. It can be posited that thinking and spiritual consciousness are extrasensory in nature, since their morphological identity is in no way dependent on the object world existing in space-time. The stepping of measurable material entities before things themselves, matter or 'substantial bodies', indicates their primordial nature. This kind of inference makes it possible to understand that it is only at the level of the discovery of reality involving ideas, values and high feelings and emotional reactivity that man confirms his cognitive limitation; he is only able to approximate in sensory form the contours of spatial material-spiritual entities.

Cognitive processes are characterised by relativity when it comes to determining the intrinsic qualities of perceived entities, for they have the character of valuing secondary to what has already existed previously as an object of study. At the level of the world of ideas, including truth, the individual is able, through the method of idealisation

and ontological thinking, to see that it is not possible to determine the beginning or the end of the process of formation of the prototypes of the objects under study; only in a fragmentary way can he outline their substantive content by discovering their dimensions. To this end, the individual makes use of rational consciousness, which, based on the resources of knowledge and the formulated procedures of epistemological methodology, reaches the stage of reproductive thinking, but never – the discovery of the original states of the events under study. Thus, ideas are imaginative states, they arise independently and independently of the object perceived with the mind, the object is merely a reflection of them. In light of the above, one has to ask whether one should rely on rational, scientific judgements or activate extra-sensory resources and potentials, residing in the individual's subconscious and superconscious, in order to break down cognitive barriers regarding the laws and sources of truth. This is a fundamental issue, defining the problem of human self-valorisation and speaking on the genetic factors determining the essence, meaning and axionormative contribution of state law based on the ideal of justice.

3. The core of state law directed towards the ideal of justice

Arriving at truth as an entity in itself and in relation to material-spiritual facts and events must take place with the active participation of man, to whom we attribute the property of righteousness. He engages the sensory faculties in the form of reason and mental experiences in this cognitive process. The intellectual awareness plays a primary role here, as it is responsible for the subject profile of the personality. Very often, the human individual is content with existential and teleological choices, which only require value judgements based on utilitarian and efficiency-oriented criteria. The sphere of psycho-spiritual experiences merely complements causal actions and is subject to rationalisation from the point of view of the overriding interest and purpose defined by reason. The partiality and peripherality of emotional reactivity becomes a fact of cognitive processes.

Integrity as a virtue of man manifests itself in his thinking, speaking and acting for the benefit of others. Through this path, the secret of the inner life, secretly concealed and shown to the external environment in a fragmentary way, is uncovered. The individual chooses to leave clear traces of a choice of actions subordinated to intellectual consciousness and psychic individualism when he perceives the necessity of this, affect-

ing his own and full development. This becomes possible in the space of collective life, as it ensures the realisation of expected changes, having a direct impact on the qualitative transformation of life. These observable signs, documenting the individual's readiness to transform positive and pro-social events, are categorical and generic personality dimensions. The former include courage, honesty, boldness, kindness. All the indicated qualities of human nature confirm, primarily, the need for a positive infecting of the living environment, so that the superiority of the effort in overcoming the hitherto stock of knowledge becomes apparent. On the basis of these changes, the individual prepares – as it were automatically – to emanate positive psychic experiences.

Judgmental relativism, supported by the indicated categorial-generic dimensions of man's personality structure, directs him to the heights of development in the form of the realisation of the need for friendship, love and brotherhood. Through them, invisibility becomes vision, non-existence turns out to be existence, while powerlessness becomes the power of existence. "One must have well-tempered ears to listen to a free judgment of oneself. Few people are able to endure this without resentment: those, therefore, who weigh themselves really in the face, give proof of personal friendship by doing so. It is healthy to love whoever undertakes to hurt and offend us for our benefit. I find it hard to judge someone in whom the bad qualities outweigh the good ones. Plato ascribes three virtues to one who wishes to examine the soul of another: knowledge, kindness, boldness"[11]. Paraphrasing the thought of Michel de Montaigne, it is necessary to complete the thesis concerning the righteousness of the human being who seeks truth and the ideal of justice in life; what is at stake here is a particular subjective characteristic, which is the circumstance of approaching oneself as the creator of one's own life. The freedom to replace what is and the need to achieve new emergent states of development points to an exclusive authority on the part of human nature, rather than the external environment taking control of these processes. On the basis of the emotional-volitional experience, the individual himself makes the final decisions about the proactive form of his own life or its colonised variety.

Subjective correctness is inextricably linked to the notion of health wellbeing, that is, noticing the need to change and improve the current state of being in order to prevent illness; it also implies the need to equip the organism with predictors that form systems of resilience and

[11] M. de Montaigne, Próby, tom III, Warszawa 1985, p. 291.

immunity and to reject pathogenic factors. Man in his cognitive activities preserves the correctness of life when he finds a solution in difficult and oppressive situations, when he uses all the elements of the structure of his personality, especially the psycho-spiritual sensitivity, to transcend barriers and limitations. Such a person endures pain, inconvenience and suffering, but rejects the thought of the greater force of the illness; he does the work to transcend it. Undesirable states are eliminated most effectively not with external interventions, but by strengthening the proactive forces inherent in each individual. The role of the educator is filled here by intuition and axiological self-knowledge, directing behavioural choices in cases of danger towards strengthening and raising immune resistance with the participation of healthy and strong other systems belonging to the organism. Only the scenario of struggle, movement, activity and variability that characterises evolutionary processes has a direct impact on the formation of integrity understood in terms of the well-being of human health in the conditions of community life. "Who knows whether God will not wish it to happen as with a body that purifies itself: it comes to a better state through long and severe illnesses, returning to it a health fuller and more vigorous than it was deprived of before? Mostly I am burdened by the fact that, having counted the symptoms of our illness, I see as many natural ones among them, exclusively sent and suspended from heaven, as those added to them by our licentiousness and human impudence. It would seem, the stars themselves have judged, that we have lasted long enough beyond the ordinary lines. And it also weighs heavily on my mind that the nearest evil that threatens us is not terror in the whole and compact mass, but its scattering and dispersion: the ultimate danger"[12]. One has to agree entirely with the thought expressed by de Montaigne that a passive individual with an impoverished personality and little creativity is content with states of withdrawal, solitude and loneliness. Such a scenario tells of a process of disintegration and degradation of human community.

The determinant of the integrity of a person's character is his or her attitude towards other people, especially in situations of danger or health risk. Psychological individualism characterises specific behavioural choices. The categories of these choices are directed towards helping, passivity or indulgence of the situations that have occurred – difficult and traumatic. Direct actions based on trust, supportive, giving psychological

[12] *Ibidem*, p. 191.

comfort, authentic are evidence of the personal, close presence of the other. They are characterised by an attitude based on helpfulness, engaging with others without expecting any benefit from them. It is a special kind of proactive living occurring in the form of personalistic communion. A righteous person integrates with other people, provides psychological support in order to make them feel safe. Providing security, in turn, is to be understood not stereotypically in terms of charitable activity. The fundamental principle that defines the state of security is the provision of psycho-spiritual gifts to the person in need, ensuring appropriate emotional reactivity. Only interpersonal communication based on this kind of transactionality of inner experiences justifies assistance activities concerning existential conditions and, as such, points to the primacy of psycho-spiritual assistance.

Addressing specific issues concerning the personal properties that condition cognitive truthfulness and the realisation of the most noble ideals, including truth and justice, it is necessary to emphasise the need to change the content of the fundamental paradigm in philosophy, which speaks of the superior and unique role of man in nature. For centuries, man has been ascribed a dominant place among living beings. The fact of possessing a unique dimensionality, not found in other species, is not sufficient for man to feel privileged in the animal world. In the light of natural research, it is documented that animals and plants communicate within their own species and develop in a homogeneous ecosystem, displaying the characteristics of adaptation, gene transmission, selection and diversity.

The reversal of the current anthropological-philosophical paradigm consists in a new definition of the position of man in the natural world: on defining man in terms of a particle of the Universe, thus placing him on the same level with the other entities of the organic world without a privileged status, on giving up the establishment of a hierarchy of animate entities. There is a justifiable reason for refuting the myth of the superiority of man over other organic entities. For man, in his pride, has revealed destructive tendencies throughout history and poses a real threat to the Earth. Knocking him off his pedestal can therefore save our planet from total degradation and destruction. "Our wisdom draws from the animals themselves the most useful teachings in the greatest and most necessary matters: how we must live and die, manage our possessions, love and bring up our children, observe justice"[13].

[13] *Ibidem,* p. 267.

There is therefore a need to revise the persistent paradigm according to which man occupies a superior position in the natural world due to the circumstance of an exclusive property, namely the capacity for abstract thinking, which supposedly predisposes him as the only representative of living entities to make changes and improvements. Man exploits this advantage in the direction of relevance. He generally achieves his goals through social adaptation and domination over weaker individuals or those expressing different views. Rather than taking care of the world and expanding the network of connections and peer-to-peer communication for development, he rather asserts his superiority by playing the role of aggressor and fighting. Meanwhile, the good of the world requires cooperation, exchange and mutual solidarity based on honesty, assistance, spirituality. The meagre is a guide who steps in front of everyone and does not care about the well-being of the other participants in the journey.

Integrity ensures that epistemological cognition is carried out with particular care and attention. Such a person does not settle for superficial judgements or those imposed by external authorities. The subjectivity and multidimensional holism of the personality structure prescribes a full and independent independence with intellectual and psycho-spiritual sensuality in the subject of judgment formulation. The human individual sculpts the image of reality on the basis of structured self-knowledge and consciousness subordinated to psychic experiences of a cognitive, emotional and volitional nature, aimed at expanding the sphere of self-consciousness. The cognitive effort undertaken by man solely by his own efforts reproduces his reflexivity and emotional freedom, which constitutes the specific character of the socio-spatial order built with security and justice. "Everything that is known is known by the capacity of the knower, for since judgment is the result of the activity of the one who judges, it is natural that this activity is carried out by his own means and will, not by extraneous coercion, as would be the case if we knew things by their essence and according to its properties. Well, all cognition comes to us through the senses, they are our masters"[14].

Cognitive processes are inextricably linked to the development of communication and the social adaptation of the individual. The realisation of this fact is of great importance for the activity of creating personal identity and indicates the need to strive for psycho-spiritual unity

[14] M. de Montaigne, Próby, tom II…, pp. 263–264.

and social-environmental integration. It is only with the participation of intellectual and spiritual consciousness, respecting the right to inner peace and emotional freedom, that man can humanely interact with the world and, in this sense, reign over the world. Thus, the category "to rule" here means to rule on the rights of individual property, to dispose of the space of life, which should be transferred to the universal level in relation to planet Earth.

4. The law as a signpost set by rational-spiritual awareness for the liberation of the world of autotelic values

The process of a person reaching the right dimension, upon which cognitive judgments of an ethical nature depend, requires the existence of two circumstances: on their part and on the part of the external environment. We are speaking here of trust and responsibility, which guarantee personal and supra-individual security and point to the rules of justice applicable to all members of the community. Let us recall Arendt's thought that the condition of trust and responsibility is to do justice to others by specifying the truth about oneself[15]. Thus, cognition in terms of epistemological truthfulness is, in the literal sense of the word, the discovery of the personality structure of the individual with normative power, determining the norms of the ethical order[16]. "It would seem that the soul draws into itself and dulls the faculties of the senses. Thus, both the interior and exterior of a person are full of weakness and falsehood"[17].

Approaching a view of the world through cognitive scientism allows for a variety of ways to reach this cognitive goal. Given the aforementioned limitations on the part of intellectual and spiritual consciousness, it is all the more legitimate. Objective reality is characterized by structural complexity, manifested in the multidimensionality of being, its differences, and generic diversity, which implies the necessity to diversify cognitive methods.

Alternative ways of delving into the depths of things under investigation are intuition coupled with experience and extrasensory hermeneutic methods. Nature has endowed every human being with a sense

[15] H. Arendt, Odpowiedzialność i władza sądzenia, tłum. W. Madej, M. Godyń, Warszawa 2006, p. 124.
[16] Ch. Taylor, Źródła podmiotowości. Narodziny tożsamości nowoczesnej, Warszawa 2001, p. 299.
[17] M. de Montaigne, Próby, tom II…, p. 272.

of intuition, which is a kind of premonition, an accurate perception, or foresight. It makes it possible to know facts and material-spiritual events without resorting to logical reasoning but by means of a total and directly imposing conviction of states of affairs. A person, in order to confirm the validity of the choices made by way of pre-scientific intuition, usually seeks to verify them based on experience. It is, so to speak, an encoded way of proceeding, expressed in the biological ability to formulate accurate judgments and value judgments, which demand materialization through one's own experience. Intuition, combined with individual experience, is an equally valid cognitive tool in defining the truthfulness of events, alongside rational-spiritual awareness. A particular characteristic of intuition is the fact that it triggers two kinds of distinct feelings and sensations, which are its own forms. These are intuitive fear and intuitive certainty. They attest to the orientation of human free will towards a generic choice of behavior or attitude, also in terms of cognitive inference, and they are supported by extrasensory experiences.

An individual with the ability to gain insight into the sphere of intellectual consciousness and spiritual awareness through intuition supported by one's own experience has unlimited possibilities for using the layers of subconsciousness and superconsciousness for the purposes of cognitive truthfulness. A person's multidimensionality is thus linked to the variety of cognitive means inherent in their nature; these allow one to penetrate the ontology of being and thus reach a cognition deeper than that of theoretical cognitive judgment. "There is no more natural desire than the desire to know. We try all the ways that can lead us to it; when reason fails, we resort to experience, which is a much weaker and inferior means, but truth is such a great thing that we should not despise any medium that leads to it. Reason has so many shapes that we do not know which to grasp; experience has no less... You have no more common property in the defense of things than variety and difference"[18].

Cognition of the natural world occurs mainly through the articulation of thinking, which consists in assigning meanings to all entities possessing material and spiritual substantiality. This work is done through the individual creation of constitutive qualities, attributed as exemplary for specific classes of objects. The thinking mapped in word-symbols materializes in the process of creating material constructs with imagi-

[18] M. de Montaigne, Próby, tom III..., p. 280.

native content[19]. It is thus dynamic, a movement combining rational and spiritual perceptions, triggered in reactions to facts and events that have occurred. These factual constructs, as phantasmagorical structures, are represented in words that define the relations between subjects, events, and objects. The individual uses them to realize sublime actions in order to "attach pleasure to desire"[20].

Thinking, in which phantasmatic structures are created at the level of verbal communication in relation to material and non-material phenomena, is a continuous process with the characteristics of dynamic fluidity. Things, therefore, are created by man and every perceived entity retains in its sensuality an ascribed indexation of quantitative as well as qualitative properties. Man, as the creator of himself and his own experiences coupled with his intuition, makes behavioural choices and values reality. He himself must decide whether rationality or idealism is to prevail. The individual's aspiration to experience joy and happiness and the ability to self-experience pain and suffering becomes a signpost on the way to integrating the desired states of his or her psychic individuality in the form of pleasure and desire. Authentic humanity boils down to continuous discovery and cognition on the terms of the truthfulness of the natural world; in every process the core of imagination is intense positive emotions and feelings. The skeleton of personal-social subjectivity then becomes the relationship between meaningful symbols - reflecting thinking about reality from the position of the world of values and ideas rather than utilitarian criteria. "Given, therefore, that the essence of all things is to pass from one variety to another, reason, which seeks true existence in them, meets with disappointment without being able to grasp anything continuous or permanent; for everything either begins to exist and is not yet complete, or begins to die before it is born. Plato said that things never exist, but are born again and again"[21].

The self-valorisation of man, treated as a socio-cultural phenomenon and phenomenon, can be reduced to the disclosure of specific properties in the area of personality structure and the cognitive sphere. These deniers are: integrity and gnoseological truthfulness, thanks to which it is possible to discover constant and unchangeable categories of universal significance in the form of ideals, including: the ideal of truth and justice. Man exists in space-time, hence his thinking

[19] S. Freud, Nieświadomość…, pp. 224–226.
[20] J. Lacan, Funkcja i pole mówienia…, p. 77.
[21] M. de Montaigne, Próby, tom III…, p. 277.

about material and spiritual entities runs continuously in the course of successive moments. The passage of time does not make it possible to permanently and definitively make a source diagnosis of the physical state of perceived objects. However, at each stage of development of the human organism, there is a preceding stage, which authorises the formulation of definitive statements. It must therefore be consistently stated that this development has no beginning or end, it continues uninterruptedly.

In a situation of extraordinary change in the investigation of the essence of things, man obtains only an approximate picture of the prototype of the object of observation. The knowledge and emotional sensitivity of man, whose cognition is relative, should not free him from creative effort and independent thinking. Only in this way can intellectual, moral and aesthetic culture be developed. The very fact of research and cognition is the most important value in the process of acquiring the ability to unleash creativity. Creative individualism transcends the limits of instrumental and axiological rationalism. A person's creative mind is constituted by his or her own justifications for judgements and evaluations - those that grow out of evaluative relativism and a world view, rather than out of reproduced circulating opinions[22]. The need to know is a passion, for it involves the whole human being to the maximum. Epistemological probabilism should not lull the cogniser in his or her pioneering efforts to create a new picture of reality using the power of scientific proof, belief in the mission and conviction in the value of discovering the mysteries of the world. Every human being, including scientists - thanks to free will, emotional freedom, self-awareness, self-knowledge, self-affirmation and self-reflexivity - should climb to the heights of humanity by exploring the mysteries about himself, the surrounding world, the historical past and the future[23].

Man's wandering on the path of truthfulness takes place when he, as a wanderer, merges with all the objects he encounters and blends into them, dynamically moving towards the encounter and acceptance of that which is in accordance with nature. The goal is the ideal of truth and justice, through which the wanderer can experience security, efficiency and existential resourcefulness as well as nobility, understanding, compassion and love. It is therefore justifiable to think that the cognition of reality is a bipolar sequence of cognitive events, acti-

[22] T. Czeżowski, Filozofia na rozdrożu – analizy metodologiczne, Warszawa 1965, p. 106.
[23] K. Ajdukiewicz, Propedeutyka filozofii, Warszawa 1948, pp. 107–114.

vated by the subject. One direction of action, towards oneself, is supported by the use of means that are part of nature, since it has equipped man with the senses necessary for this: intuition coupled with experience as a state that objectifies satisfying and unpleasant experiences, and the instinct of self-preservation. These are inbuilt in man's nature and should serve him for happiness, social communication, communal adaptation and thus proper cognition of the world. The second course of action, from oneself, is based on following the natural processes of nature. It is about creating integrative events with the social environment, the natural environment and the human race as a whole. Acts of exchange and cooperation can be triggered with axiological self-knowledge, intuition and experience, the use of extrasensory consciousness based on the subconscious and superconscious. The truth-seeking wanderer on these paths can unveil the secrets of the matchmaker. In doing so, it is important that he or she does not weigh his or her own particular interest, but that he or she is guided by the supra-individual and culture-creating good. The mechanisms of life and the natural regulators of behaviour reach the constitutive factors of life and duration of organic and inorganic matter. Only they are able to identify the pattern of truth and justice. Philosophical inquiries and dilemmas serve only as food for our curiosity.

Man's nature triggers in him the need for individuality and the independent discovery and creation of his own personality. These processes are interconnected and lead to the peak of all-round development. Through pro-social activity, in turn, they ensure subjective communication and secondary community adaptation. The result of these interactions is righteousness of character and cognitive truthfulness reflected in psychic experiences, high feelings and values of good, beauty, truth. A righteous person's path to truth should encompass the whole of life; as such, transgressive changes abound. Experiencing joy and happiness as well as pain and suffering is, on this path, the deepest psycho-spiritual experience of unity, self-affirming, universal and common. The biological apparatus in the form of self-preservation instinct, intuition, reason, emotional reactivity reinforced by axiological self-knowledge is not sufficient. Man seeks verification at the level of normative knowledge of an ethical nature, he reaches out to ideals as objective content. "Protagoras believed that what is true for everyone is what appears to him. The Epicureans located all judgement in the senses, in the awareness of things and in delight. Plato thought that the judgement of truth and truth itself

were outside of sensation and the senses and belonged only to the spirit and the powers of thought"[24].

Behavioral and attitudinal choices involving transgression and transcendence are symptomatic of the pursuit of needs from the level of intrinsic attribution – experiencing high feeling-emotional states. These are unique because of their universal inaccessibility. Love, courage, understanding, acceptance, nobility, or compassion require thorough and constant work to root them in the rational and spiritual consciousness as transpersonal feelings in each individual. In order for a person to be able to make life choices in accordance with high moral states, they must integrate internally, balance sensations and perceptions as essential for the well-being of health. Every human being should be provided with the conditions for psycho-spiritual growth in order to ascend to ever higher levels of consciousness. Through evolutionary mechanisms, this human being can reach adaptive states that satisfy the need for efficiency, security, and justice. Personal maturity is achieved through qualitative changes. Thus, the realization in life of higher psycho-physical needs cannot take place effortlessly; it involves crossing barriers and boundaries in the living environment. “The truest are not always the most convenient for man”[25].

5. Completion

Ideals, including truth and justice, are fixed phenomena, not subject to change or attempts to minimize or colonize their constitutive structure. They cannot, therefore, be redefined, as their categorical features and properties are immutable and of timeless value in this context. An important premise that underpins the constancy of ideals is the thesis that they themselves constitute the supreme and overriding value for individuals, communities, civilizations, and culture. They are not subject to relativization by time, judgments, or perceptions on the part of external actors. Nor are they subject to limitations; they exist by the power of their own independence and indivisibility. Humans have no power over ideals, nor can they destroy them, but they have the possibility of bypassing, ignoring, or denying them. The weakness of individuals in relation to ideals lies in their inability to confront them at the level of axiological valuation. Determinations made in this respect will be second-

[24] *Ibidem*, p. 263.
[25] M. de Montaigne, Próby, tom III…, p. 254.

ary, not primary and foundational. Therefore, references to ideals made from a position of power or control can, at best, be partial, fragmentary, and a mere substitute for them.

Ideals are a response to the exemplary state of the ethical framework for legitimising the existence of material-spiritual entities, the model of expectations and desires of individuals, communities, civilisations and culture. Human self-determination, the formation of socio-environmental participation, and the creation of transcultural reality based on the pursuit of this model are expressions of the realization of a symbolic universe with humanistic and truly democratic content.

Bibliography

1. Ajdukiewicz K., Język i poznanie, Warszawa 1960.
2. Ajdukiewicz K., Propedeutyka filozofii, Warszawa 1948.
3. Ajdukiewicz K., The scientific world-perspective and other essays: 1931–1963, J. Giedymin (red.), Dordrecht 1974.
4. Ajdukiewicz K., Zarys logiki, Warszawa 1952.
5. Arendt H., Odpowiedzialność i władza sądzenia, tłum. W. Madej, M. Godyń, Warszawa 2006.
6. Brykczyński K., Semiotyka logiczna w twórczości Kazimierza Ajdukiewicza, Studia Semantyczne 1979, t. 9.
7. Czeżowski T., Filozofia na rozdrożu – analizy metodologiczne, Warszawa 1965.
8. Dąmbska I., Koncepcja języka w filozofii Kazimierza Ajdukiewicza, Ruch Filozoficzny 1965, t. 23.
9. Freud S., Nieświadomość, tłum. R. Reszke, (w:) S. Freud, Psychologia nieświadomości, Warszawa 2002.
10. Kant I., Koniec wszystkich rzeczy. O niedawno powstałym, wyniosłym tonie w filozofii, tłum. M. Żelazny, Toruń 1992.
11. Lacan J., Funkcja i pole mówienia i mowy w psychoanalizie, przeł. B. Gorczyca i W. Grajewski, Warszawa 1996.
12. Montaigne M. de, Próby, tom I–III, tłum. T. Żeleński (Boy), Warszawa 1985.

13. Taylor Ch., Źródła podmiotowości. Narodziny tożsamości nowoczesnej, tłum. M. Gruszczyński, Warszawa 2001.
14. Žižek S., Przekleństwo fantazji, tłum. A. Chmielewski, Wrocław 2001.

Apoteoza prawa naturalnego jako dochodzenie do ideału sprawiedliwości

Streszczenie

Prawo naturalne to teoria filozoficzna i etyczna, która sugeruje, że istnieją fundamentalne zasady moralne nieodłącznie związane z naturą wszechświata, które można dostrzec za pomocą ludzkiego rozumu i intelektu. Zasady te są uważane za obiektywne i uniwersalne, wykraczające poza prawa i regulacje stworzone przez człowieka. Autor dowodzi, że poprzez zrozumienie i przestrzeganie tych fundamentalnych zasad, jednostki i społeczeństwa mogą osiągnąć sprawiedliwość i porządek moralny. Sprawiedliwość nie jest bowiem determinowana wyłącznie przez ludzkie prawa i instytucje, ale opiera się na głębszym, nieodłącznym poczuciu tego, co jest moralnie słuszne i sprawiedliwe.

Słowa kluczowe:

Prawo naturalne, filozofia prawa, ideał sprawiedliwości, obiektywna moralność.

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Rules on professional ethics for judges and court assessors

Abstract

In this article, the authors outline selected ethical aspects of the set of rules of professional ethics for judges and court assessors. They present the concepts of judicial independence and justice in relation to the concept of law, which are crucial for the ethical context in which a judge acts. They present a historical outline and the process of creation of the ethical institutions of the judicial profession, considering its evolution and influence on the current wording of the rules, and present the current regulations, crowning the process of codification of the set of rules of professional ethics of judges and court assessors.

Keywords

Independence, justice, ethics, judge, administration of justice, ethical principles.

1. Introduction. Ethical foundations of the code of professional ethics – selected aspects

Ethics in the behaviour of judges and concern for dignity affect the implementation of the main function of the courts, which is the administration of justice, as well as the implementation of the complementary function of performing other legal protection tasks entrusted by law.

The purpose of this article is to present the ethical aspects of the set of rules of professional ethics of judges and court assessors, the notion of judicial independence and justice in terms of the context of

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ethical action of a judge in the legal conception, to present the historical outline and the process of creation of ethical institutions of the judicial profession, taking into account its evolution and influence on the current wording of the rules, and to present the currently binding regulations, crowning the process of codification of the code of ethics of judges.

The leading sense of many discussions concerning the ethics of the judicial profession may lead to the belief that the sphere of judicial ethics belongs to the field of positive law. In this context, discussants considering ethical issues related to the exercise of the judicial profession often refer merely to the interpretation of positive law. In this narrowing perspective in relation to the moral foundations of human action, they refer to a certain spectrum of procedural, criminal, civil or administrative factors. However, it is important to emphasise that everything related to a specific choice and a specific decision made by a judge is always made in attribution to and in connection with their sphere of moral action. The decision-making, choice-related action of the judge clearly introduces an ethical context, and hence it should also be linked to philosophical interpretations.

At the same time, it should be noted that discussions concerning ethical contexts of exercising the judicial profession very often direct the main attention to diagnosing and stigmatising various forms of evil in such action, as well as making an (otherwise necessary) reflection on how to effectively avoid these various forms of evil. To this end, specific instructions for preventive and protective action against evil are created. However, it should be mentioned that the main objective of ethics is to reveal the good as the goal of action and the ways of realising a particular good in specific action[3]. It is only on this recognised basis that the protection of the good or an indication of how to make a separation from evil in action can legitimately emerge. The ethical context of every action of a judge is built primarily by the link to the good as the goal of the action, and not by the separation from evil, which will appear later, already as a consequence of the link to the good. This linking of action with the good as the goal of action is the basis of the universality and voluntariness of every action of the judge.

By the same token, it should be emphasised that, without a doubt, judges, in making certain jurisprudential choices, are practically aiming at a certain fixed point of reference in their professional action (sometimes

[3] The fundamental fact that every human action aims at achieving some good, hence such a good should be regarded as the goal of human action, was pointed out by Aristotle, Etyka nikomachejska (Nicomachean Ethics), 1094 a.

in a way that is not fully realised at a theoretical-ethical level). The point in question is that which, at the deepest and most essential level, would justify their rulings. Both the judge's own instance of conscience and the opinion of the community indicate that such an infallible point of reference, still regarded as the judge's current task, is the realisation of the good of man. This human good, however, must be understood specifically and realistically, not abstractly and ideally. It is not a distant formula, but a good accomplished in the context of specific circumstances, which differ every time. It consists in ensuring the security of human life and protecting the development of this life on all possible material-spiritual levels in the specific circumstances of human existence.

Paying attention to the ethical context of the functioning of Resolution No. 25/2017 of the National Council of the Judiciary of 13 January 2017 Collection of the principles of professional ethics of judges and court assessors (chapter one discusses the general principles, chapter two the principles of service, chapter three the principles of off-duty conduct), the concept of judicial independence contained therein should be emphasised, which is crucial for the ethical context of a judge's action.

It is not difficult to see that the interpretation of the concept of independence is made in relation to the accepted conception of law. Among various conceptions of law that exist in the culture, there is a particularly noteworthy common-sense reading of what the law is. It is justified scientifically by classical realist philosophy, which points out that the existential basis for the functioning of law is to be found in human nature and the relations that occur between people[4]. It is in the sphere of human relations that independence and justice are realised. The moral greatness and significance of justice exceeds, according to ancient thinkers, even the harmony of the cosmos. The Latin name for justice – *iustitia* – derives from the verb *iustari* – to equalize. The process of moral levelling refers to one's relationship with another human being and indicates the compensatory action owed to a person by other people.

Written down in the ranks of codes, the legal order as a law established in the form of legal norms – *lex* arranges the order of social action and introduces rational rules for the communal functioning of man. At the same time, it should be noted that the judge, although in constant professional contact with the order *lex*, is not only in contact with this order in their judicial work. At the base of the statutory law

[4] See M. A. Krąpiec, Człowiek, prawo i naród (Man, Law and Nation), Mikołów 2002.

the *lex*, as enshrined in the various codes to which the judges constantly refer in their work, stands the more fundamental legal order, which is the order of *ius*[5] – the natural law. This order clearly reveals the ethical context of the judge's action and is the basis for the formulation of any code of professional ethics.

At the same time, this order is older than any form of social organisation. It is realised in interpersonal relations, independently of the norms of *lex* jurisprudence in force at a given time. What is the essence of the relationship of *ius* law? It concerns the obligation (duty) to act or not to act, with primary motive, which is the welfare of another person. *Ius* thus determines what the essential order of just action consists of in relation to another human being.

In the action of every judge, the general and analogous norm of natural law is realised, which indicates that good is to be done and evil is to be avoided in action. Therefore, the order of *ius* is defined as the just thing itself, realising the good of a specific human being. This order develops the sphere of man's personal life, i.e. a life that is rational and free. If there were no law embodied in the indication good is to be done and evil is to be avoided, it would be equivalent to acting to help and harm another human being, and thus the aspiration to save a human being's life and the opposite aspiration to deprive him or her of life could be treated equally.

In view of the goal of developing the various forms of social life, the law of *ius* has been made more and more specific and explicit, which has taken the form of the formulation of various legal norms of a *lex* nature, enshrined in specific codes, laws and individual acts. Definitively, it is pointed out that *lex* laws are formulated by human reason, subordinated to the common good, which includes the good of a particular person, as well as issued by a legitimate authority and promulgated in the community to which the law is addressed[6]. Against the background of this definition, laws which do not realise the primary objective and reason for the law, namely the good of man, are not laws, but only pseudo-rights, for it is with a view to realising the good of man that the need for the law itself arises. The factor of the realisation of the human good is therefore crucial in an ethical context.

The set of rules of professional ethics for judges and court assessors identifies independence as the ethical basis of a judge's work.

[5] See M. A. Krąpiec, Człowiek i prawo naturalne (Man and Natural Law) Lublin 1993.

[6] S. Thomae Aquinatis, Summa theologiae, I-II, q. 90, a 4.

The judge's independence is rooted in the judge's decision-making freedom as a human being. The independence of deciding and adjudicating that makes up the independence of a judge's decision-making certainly concerns the judge's relationship to the *lex standi* norm free from indirect interference. However, this does not exhaust the essence of the judge's independence. It must be emphasised that, on the ethical side, independence essentially consists in the freedom to guide the judge's decision with an intellectual reading of the content of reality. In a particular way, the recognition of reality concerns the diagnosis of factors that realise the good of man and the community (*ordo boni ac recti*). Here we are dealing with the freedom of decision consisting in the fact that the will of the judge, guided by the rational discernment, freely chooses specific goods. In the context of the realisation of the moral life of man, this is a fundamental experience of the human condition as a rational and free person.

From judicial independence grows the just action of the judge. In the context of the reading of the Collection of Principles of Professional Ethics for Judges and Judicial Assessors, it should be noted that a judge, by virtue of the potential structure of being and the potential nature of action characteristic of every human being, is capable of acting independently and justly. His or her independent and fair action is formed in the course of experience, but it is not so without the work done beforehand. Such action is not automatically attributed to the judge, but requires repeated efforts and endeavours by the judge. Fundamental to this is the judge's duty to make a renewed effort to understand and implement the law in the context of recognising the good of human beings and the community, and not merely to read and implement the correct course of legal procedure.

The Collection of Principles of Professional Ethics for Judges and Judicial Assessors, pointing to the independence of the judge's action, in fact emphasises that the judge's work is an expression of the realisation of the human capacity to emerge from himself or herself acts of sovereign action. Individual decisions implemented by a judge, concerning taking or not taking an action, choosing a specific legal provision, making a specific interpretation of legal provisions, in the public perception appear as acts of independent action. A judge cannot be compelled to carry out such acts by another person or even by a particular community, if the judge himself does not allow it. They are intrinsically internal and free acts. They are not, however, because of the potential nature of human action, perfect. They require constant work by the judge on his decisions

and his intellectual discernment. The judge both shapes his independence and the justice of his judicial action, which grows out of independence, and does not realise it as ready-made. It can therefore be seen that independence is shaped by repeated acts of independent action, consisting of a willingness to work hard intellectually and morally, which directly influences the acts of decision-making. The judge has a direct opportunity through intellectual and moral work to influence his decisions. Thus, he or she retains the ability to form lasting dispositions to act independently and justly.

In the case of judicial independence and justice, we are undoubtedly dealing with the sphere of moral action. The most important task, therefore, is to improve the volitional sphere accordingly and to educate it as sustainable and prepared to give to others what they are entitled to. Justice does not function outside the world of the judge's action as a distant model or a matchless ideal. Analysed from the subjective side, it is first and foremost a just will or will giving back to others what they are entitled to, securing and protecting by law the welfare of human beings in the concrete circumstances of their condition and situation.

2. Historical background

The first attempt to formalise the rules of conduct of judges took place during a speech by a member of parliament (whose name is unknown) in the Sejm of the Republic in the 17th or 18th century[7]. Stanisław Michał Roliński, a barrister, translated this speech from his book *Orator Polonus*[8]. The most important principles of ethical conduct of judges, were set out in seventeen canons concerning the behaviour and conduct of those administering justice as follows:

„I mo Korrupcyom nie podpadający.
2do Powinni te Prawa zachować, które stanowią.
3tlQ Powinni bydź sumnienia dobrego, cnotliwi.
4to W sądzeniu nec morosi, nec nimis celeres.

[7] A. Korzeniewska-Lasota, Z polskich prac nad kodyfikacją zasad etyki sędziowskiej (From Polish work on the codification of the principles of judicial ethics), Studia Warmińskie 54 (2017), p. 266.

[8] A. Korzeniewska-Lasota, Z polskich prac nad kodyfikacją zasad etyki sędziowskiej (From Polish work on the codification of the principles of judicial ethics), Studia Warmińskie 54 (2017) p. 266 i S. M. Roliński, Sędziowie bydź powinni (Judges should be) Palestra przed laty 1997, Palestra 41/5–6(473–474), pp. 139–153.

5to Prawdę kochaiący y mówiący.
6to Na obie strony uszy maiący.
7mo Łaskawi, dyskretni, cierpliwi.
8vo Nie ubodzy.
9no Wstrzemięźliwi.
10mo Respektami się osób, godności, pokrewieństw, nie uwodzący.
l l mo Sprawiedliwi.
12mo Bez dystynkcyj wedle Prawa zarówno wszystkich sądzący.
13t10 Nie młodzi.
14to Bez Instygatorów nie sądzący.
15to Nikomu nie obligowani.
16t0 Dobrze uczeni.
17 Przy słuszności odważni y ginąć gotowi" [9].

The substantive scope of each of the enumerated canons of conduct for judges, was elaborated with a broad justification of the specific conduct of the judge and included a precise explanation of what exactly it would consist of. As an example, one can cite the rationale for the seventh principle of ethics for judges formulated as follows: "Gracious, discreet, patient"[10]. The author explained precisely what ethical and compliant behavior of a judge in this regard was supposed to consist of:

„Kto wyda wyrok, nie wysłuchawszy jednej ze stron i postanowi, że to jest słuszne, jest niesprawiedliwym. Nie karz nikogo, niezbadawszy go.
Wysłuchaj i strony przeciwnej.
Drugie ucho w całości zachowuję dla pozwanego.
Przy sądzeniu bądź miłosiernym dla dzieci jak ojciec i jak mąż dla matki ich, a będziesz jako syn Najwyższego. Nie mogą godnie sądzić o podwładnych ci, którzy w sprawach ich ulegają nienawiści lub względom. Gdzie wszystko jest karane, tam plami się królewska dostojność. Gdzie wszystko się przebacza, oblicze Majestatu bez bojaźni karalności miane jest za nic. Częściej pożądają wieki dobrego sędziego – rzadziej go widują[11]*".*

[9] S. M. Roliński, Sędziowie bydź powinni (Judges should be) Palestra przed laty 1997, Palestra 41/5–6 (473–474), p. 139.
[10] *Ibidem.*
[11] „Ad septim um punctum. 23) In iudicando esto pupillis misericors ut Pater et pro viro Matri illorum et eris tu velut filius altissimi Eccl. 14. Iudicare digne de subditis nequeunt, qui in subditorum causis vel odium vel gratiam sequuntur. S. Greg. Ubi totum punitur, regia serenitas crudelitate polluitur. Ubi vero totum remittitur, facies

During the Second Polish Republic, we can find the main non-formalized strands of the Polish tradition of professional ethics for judges, when judges who were well-known in the legal community and who prided themselves on their authority, attempted to set out frameworks and canons of behavior for 'being a judge'[12]. These were judges held in high esteem in the judicial community because of their moral authority and extensive knowledge of the law, and the models they created for ethical behavior by judges provided a model for subsequent generations of lawyers[13], with the most important principle for the exercise of their office being that of independence[14]. Although the idea of drafting a normative code of professional ethics for judges emerged during this period, it was not successful because, as indicated, of the complexity of the issues involved[15].

On the other hand, in the inter-war period, the disciplinary jurisdiction of the legal profession (including attorneys) functioned very efficiently, as evidenced by numerous rulings of the Executive Department of the Supreme Bar Council in Warsaw[16] . As an example of a disciplinary ruling, one may cite the judgment of the Higher Disciplinary Court at the Supreme Bar Council in Warsaw of 19 November 1938 in case no. 118/38/Sd, in which it was held that "Conclusion of an agreement by an advocate with a client to the effect that the client cedes a part of the claim to the advocate, in return for which the advocate pays the costs of the trial for him and does not demand any advance payments from the client, is contrary to good practice as an advocate and the dignity of the state", or the judgment of the Higher Disciplinary Court at the Supreme Bar Council in Warsaw of 3 September 1938 in the case no. 118/38/Sd, in which it was held that "It is contrary to good practice as an advocate and

Majestatis sine metu disciplinae contemnitur. Rupert. Bonum iudicem saecula vovent saepius, rarius vident. Pacat." – from S. M. Roliński, Sędziowie bydź (…) (Judges should (…)) pp. 142–143.

[12] A. Korzeniewska-Lasota, Z polskich prac nad kodyfikacją (…) (From Polish work on the codification (…)), p. 266.

[13] A. Żurawski, Etyka zawodu sędziego ze szczególnym uwzględnieniem niezawisłości sędziowskiej (uwag kilka) (Ethics of the judicial profession with particular reference to judicial independence (a few remarks)), (in:) Niezawisłość sędziowska, Warszawa 1990, p. 63.

[14] L. K. Paprzycki, Ten, który jest sędzią (He who is a judge) Palestra 1993, Palestra 37/5–6(425–426), No 5–6, p 39-42.

[15] A. Korzeniewska-Lasota, Z polskich prac nad kodyfikacją (…) (From Polish work on the codification (…)), p. 266.

[16] S. M. Roliński, Sędziowie bydź (…) (Judges should (…)), p. 151.

the dignity of the state". In the case from 3 September 1938 in No. 66/38/Sd, it was pointed out that "a verdict of the Disciplinary Court acquitting an advocate of a charge of not answering a colleague's letters does not entitle him to continue not answering letters after the disciplinary verdict, which cannot constitute a 'settled case' for the future"[17].

An equally interesting example of ethical responsibility of legal professionals, was the disciplinary case conducted against attorney Stanisław Węsławski, who was an ex officio attorney in the appeal proceedings. This attorney, being aware of the "hopelessness" of the case (as he stated), violated various deadlines in the case. As a result of the disciplinary proceedings against him, he was given a penalty of admonishment by the Higher Disciplinary Court at the Supreme Bar Council in Warsaw in a judgment of 17 December 1938[18].

Residual historical sources indicate as early as in 1939 that the Association of Judges and Prosecutors made attempts to develop a code of professional ethics for judges, but detailed proposals for regulating these solutions have not survived to the present day[19].

After the Second World War, the idea of drafting a code of ethical principles for judges was revived, but this did not ultimately happen again, due to the numerous and predominant voices of representatives of the doctrine and the legal profession in the discussion pointing to the fact that the activities of judges do not require additional regulation, as they are standardized in the existing legal provisions[20] .

During the same period, representatives of the legal profession of attorneys succeeded in getting the first ethical code for the legal profession (attorneys) passed. At the plenary meeting of the Supreme Bar Council held on 6 and 7 May 1961, the "Collection of rules of advocacy ethics and dignity of the profession"[21] was adopted. It was pointed out

[17] *Ibidem.*

[18] P. Dąbrowski, Odpowiedzialność dyscyplinarna adwokatów w okresie dwudziestolecia międzywojennego-wileński casus Stanisława Węsławskiego 1896-1942 (Disciplinary responsibility of advocates in the interwar period – the Vilnius case of Stanisław Węsławski 1896–1942), Studia Iuridica Lublinensia 2016, vol. XXV, 2, p. 41–47.

[19] J. R. Kubiak, Wokół idei kodeksu etyki zawodowej sędziów (On the idea of a code of professional ethics for judges) Palestra 1995, 39/3–4(447–448), p. 78–79.

[20] A. Żurawik, Refleksje o etyce zawodowej sędziów (Reflections on the professional ethics of judges), Przegląd Naukowy Disputatio 2011, 12 (1–2), p. 109.

[21] S. Janczewski, Zbiór zasad etyki adwokackiej i godności zawodu (The Rulebook on Bar Ethics and Dignity of the Profession), Palestra 1961, 5/6(42), 5–10, p. 5.

that this body of ethics should constitute a compendium of knowledge for all advocates regarding the proper behavior of members of the profession, and for trainee advocates, knowledge of this body of ethics should be a "sine qua non" condition for taking the bar exam[22]. The Code of Ethics consists of seven chapters: Chapter I – General provisions, Chapter II – Conduct of the profession, Chapter III – Relationship with courts and authorities, Chapter IV – Relationship with colleagues, Chapter V – Relationship with clients, Chapter VI – Relationship with the Bar authorities, Chapter VII – Final provisions[23].

In 2001, the provision of Article 2(1) para. 8 of the Act on the National Council of the Judiciary provided a formal and legal basis for the development by the National Council of the Judiciary, the first normative set of rules of professional ethics for judges[24]. It should be emphasized that at that time, other legal professions already had normatively binding codes of ethics (legal counsels or advocates)[25].

At that time, a set of ethical rules for judges called the "Set of Rules of Conduct for Judges" was developed and enacted in 2002 by one of the judges' associations[26].

3. Body of Principles of Professional Ethics for Judges and Court Assessors

The legal basis for the development of a normative set of ethical principles for judges was the provision of Article 2 para. 1 pt. 8 of the Act of 27 July 2001 on the National Council of the Judiciary, which stipulates the duty of the National Council of the Judiciary to ensure that the principles of professional ethics are observed by judges[27] (currently it is the provision of art. 3 par. 1 pt. 3 of the Act of 12 May 2011 on the National

[22] Ibidem, p. 9–10.

[23] Z. Krzemiński, Z historii prac nad kodyfikacją zasad etyki adwokackiej (From the history of the work on the codification of the rules of advocacy ethics) Palestra 1968, 12/11(131), 58–65, p. 62.

[24] Act of 27 July 2001 on the National Council of the Judiciary, Journal of Laws 2001,No.100, item 1082.

[25] A. Korzeniewska-Lasota, Z polskich prac nad kodyfikacją (…) (From Polish work on the codification (…)), p. 271.

[26] A. Korzeniewska-Lasota, Z polskich prac nad kodyfikacją (…) (From Polish work on the codification (…)), p. 271.

[27] The provision of Article 2(1) para. 8 of the Act of 27 July 2001 on the National Council of the Judiciary, Dz. U. 2001, No.100, item.1082.

Council of the Judiciary)[28]. Resolution of the National Council of the Judiciary No. 16/2003 of 19 February 2003 enacted the Collection of principles of professional ethics of judges, constituting an annex to this resolution[29]. This collection consisted of 3 chapters and contained general provisions (Chapter 1), rules for the performance of the service (Chapter 2) and rules of conduct of a judge outside the service (Chapter 3).

In the following years, the Collection of Principles of Professional Ethics of Judges, was supplemented several times by, inter alia, Resolution No. 741/2009 of the National Judicial Council of 7 October 2009, Resolution No. 1295/2015 of the National Judicial Council of 8 December 2015, Resolution No. 14/17 of the National Judicial Council of 11 January 2017, Resolution No. 15/17 of the National Judicial Council of 11 January 2017.

Resolution No. 741/2009 of the National Council of the Judiciary of 7 October 2009 assumed that the rules of ethics apply mutatis mutandis to retired judges[30].

Resolution No. 1295/2015 of the National Council of the Judiciary of 8 December 2015 clarified that the Rules of Ethics apply to judicial assessors entrusted with the performance of judicial functions and apply accordingly to retired judges[31].

By Resolution No. 14/17 of the National Council of the Judiciary of 11 January 2017, § 3a was added after § 3, indicating that a judge should avoid all kinds of personal contacts and economic relations with natural persons, legal entities and other entities, as well as avoid undertaking activities in the private, professional and public sphere that could give rise to a conflict of interest and thus negatively affect the perception of a judge as an impartial person and undermine confidence in the office of a judge[32].

By Resolution No. 15/17 of the National Council of the Judiciary of 11 January 2017 on amending the content of the Statement of Principles of

[28] Act of 12 May 2011 on the National Council of the Judiciary (i.e. Journal of Laws 2021, item 269).

[29] Resolution of the National Council of the Judiciary No. 16/2003 of 19 February 2003, together with the annex.

[30] Resolution No. 741/2009 of the National Council of the Judiciary of 7 October 2009. www.krs.pl accessed 4.10.2023.

[31] Resolution No. 1295/2015 of the National Council of the Judiciary of 8 December 2015. www.krs.pl accessed 4.10.2023.

[32] Resolution No. 14/17 of the National Council of the Judiciary of 11 January 2017. www.krs.pl accessed 4.10.2023.

Professional Ethics of Judges, § 23 was added after § 22, which stipulates that a Judge should exercise restraint in the use of social media[33].

The National Council of the Judiciary, by a Resolution of 13 January 2017. (No. 25/2017) promulgated the consolidated text of the Collection of Principles of Professional Ethics for Judges and Court Assessors - hereinafter referred to as the Collection of Principles of Professional Ethics for Judges. This resolution takes into account the changes that were introduced to the Collection of Principles of Professional Ethics for Judges and Court Assessors (annex to Resolution No. 16/2003 of the National Council of the Judiciary of 19 February 2003) as a result of subsequent resolutions of the National Council of the Judiciary.

It should be emphasised that the rules of professional ethics of judges adopted in the Code of Ethics apply not only to judges, but also to assessors entrusted with judicial functions and retired judges (to some extent).The Code of Ethics of Judges guarantees the power of the National Council of the Judiciary to amend or supplement the provisions of that Code. The National Council of the Judiciary is also empowered to interpret the provisions of the rules of ethics for judges.

The set of rules of professional ethics for judges and court assessors consists of three chapters. The first chapter contains the general rules applicable to the professional ethics of judges and court assessors, the second chapter sets out the rules for the performance of the service and the third chapter sets out the rules for the conduct of a judge outside the service.

The first chapter contains general provisions indicating the specific duties and personal limitations of a judge that are associated with the exercise of the office of judge. It is emphasised that a judge should at all times be guided by the principles of integrity, dignity, honour, a sense of duty and observe good morals.

Judges, by virtue of their office, have judicial immunity. The provision of the first sentence of Article 80(1) sentence one of the Act of 27 July 2001. Law on the Common Court System, stipulates that a judge may not be arrested or held criminally responsible without the permission of the competent disciplinary court (immunity)[34]. In accordance with the regulations of the Code of Ethics for Judges – immunity should not be abused

[33] Resolution No. 15/17 of the National Council of the Judiciary of 11 January 2017 on amending the content of the Statement of Principles of Professional Ethics of Judges, www.krs.pl accessed 4.10.2023.

[34] The provision of Article 80 of the Law on the System of Common Courts Journal of Laws 2001 No. 98, item 1070 i.e. Dz. U. of 2023, item 217.

and a judge should not carry out activities that could lead to the promotion of the interests of others or his own interest by virtue of his status as a judge and the prestige associated with the office they hold.

A judge should also avoid all kinds of personal contacts and economic ties with various entities, regardless of their organisational structure and legal form (§ 3). The provisions of Article 86 § 3 of the Act of 27 July 2001. Law on the System of Common Courts, establish formal prohibitions on a judge's participation in various organisational forms of enterprises and ways of participation in these entities. According to these provisions, a judge may not be a member of the management board, supervisory board or audit committee of a commercial law company, may not be a member of the management board, supervisory board or audit committee of a cooperative, may not be a member of the management board of a foundation conducting business activities, may not hold more than 10% of the shares or interests representing more than 10% of the share capital in a commercial law company, may not conduct business activities on his own account or jointly with other persons, as well as manage such activities or be a representative or proxy in the conduct of such activities. These restrictions also apply to companies under foreign law[35].

Acts carried out in breach of these provisions are invalid by of law and are not subject to registration in the relevant court registers [36].

It is rightly pointed out that actions which would give rise to a conflict of interest by way of a judge taking actions in different spheres of the judge's life (both private, professional and public) - may undermine confidence not only in that particular judge, but affect the perception of the judiciary as a whole and consequently cause the judge to be perceived as biased in particular circumstances.

Pursuant to the provisions of § 5 and § 6 of the Statement of Principles of Professional Ethics for Judges - caring for the authority of the office of a judge, including the good of the court where the judge works, as well as the good of the judiciary and the systemic position of the judiciary, a judge should not only comply with the principles that have been regulated in the Statement of Principles of Ethics, but should avoid actions that may affect the dignity of the judicial profession or its impartiality.

Restrictions in this respect are reflected in other applicable legal provisions. In the provision of art.86 of the Act of 27 July 2001. Law on

[35] The provision of Article 86 § 3 of the Law on the System of Common Courts Journal of Laws 2001 No. 98, item 1070 i.e. Journal of Laws of 2023, item 217.
[36] *Ibidem,* § 4.

the Common Court System, regulates the possibility for a judge to take up additional employment in a teaching, scientific or research position and to take up another occupation or way of earning[37]. While it is possible for a judge to take up employment in scientific and teaching positions if it does not interfere with the performance of the judge's duties, taking up additional professional activities by a judge is possible only if the following conditions are cumulatively met: they do not interfere with the performance of the judge's duties, they do not undermine confidence in the judge's impartiality and they do not detract from the dignity of the judge's office.

If a situation arises in which a judge or an assessor has breached the ethical rules, the Code of Ethics for Judges imposes an obligation on them to take action, without undue delay, to remedy the consequences of that unethical behavior or, if that is not possible, to take action to compensate for the damage caused by that behavior.

It should be emphasized that the Code of Ethics for Judges imposes on judges and assessors a duty to respond to the unethical behavior of other judges and even the power to require other judges to act ethically. In view of this, the failure to respond to the unethical behavior of other judges should also be considered through the prism of a possible breach of the Rules of Ethics by an irresponsible judge.

Chapter Two, which regulates the rules governing the performance of a judge's and an assessor's duties, imposes an obligation to undertake actions without delay and without exposing the parties and the State Treasury to unnecessary costs. In the event of a breach of this principle, where, as a result of an action or inaction of the court, a party's right to conduct and conclude court proceedings without undue delay has been violated, a party is entitled to file a complaint. The rules and procedure of filing and examining the complaint are regulated by the Act of 17 June 2004 on a complaint for infringement of a party's right to have a case heard in preparatory proceedings conducted or supervised by a public prosecutor and court proceedings without undue delay (i.e. Journal of Laws of 2023, item 1725, as amended).

At the same time, the set of rules of professional ethics for judges, specifies the manner in which a judge and a court assessor should behave during the conduct of court proceedings, inter alia:

[37] The provision of Article 86 of the Law on the Common Court System Journal of Laws 2001 No. 98, item 1070 i.e. Journal of Laws of 2023, item 217.

– when explaining procedural issues to the parties and giving reasons for the ruling, he should do so in a manner that is comprehensible to them (§ 11);
– in the reasons for the decision, the judge should avoid wording which goes beyond the factual need to justify the court's position and which may offend the dignity or honor of litigants or third parties (§ 11);
– should take care for the orderly conduct and proper level of application of the procedures in which he/she participates (§ 12);
– with regard to the parties and other persons involved in the proceedings, the judge should maintain a dignified attitude, be patient, polite, and require of them appropriate behavior (§ 12);
– should react appropriately in the event of inappropriate behavior of persons participating in the proceedings, in particular if they show prejudice on the grounds of race, sex, religion, nationality, disability, age or social or financial status or for any other reason (§ 12);
– should not express his or her opinion in public on pending or impending proceedings (§ 13).

With regard to the attribute of a judge's independence, a judge may not be subject to any influence that interferes with his or her independence (regardless of its source or cause). If a situation arises that prevents an independent judge from exercising his or her office, the judge is obliged to immediately notify this fact to the relevant superior. There may also be a situation in which there are grounds for a judge to apply for exclusion from hearing a case.

In civil procedure, pursuant to Article 49 § 1 of the Act of 17 November 1964 – the Code of Civil Procedure[38], the court excludes a judge at his or her request or at the request of a party if there is a circumstance of such a kind that it could give rise to a justified doubt as to the judge's impartiality in a given case. In criminal procedure, pursuant to Article 42 § 2 of the Act of 6 June 1997 – the Code of Criminal Procedure, if a judge recognizes that there is a reason excluding him/her by virtue of the Act pursuant to Article 40 of the Code of Criminal Procedure[39], he/she excludes himself/herself by submitting a written statement to the file, and another judge steps into the case in his/her place. On the other hand, a judge in respect of whom a request for exclusion has been submitted, due to the occurrence of circumstances of such a kind that

[38] Act of 17 November 1964 Code of Civil Procedure (i.e. Journal of Laws 2023, item 1550, as amended).
[39] Act of 6 June 1997 Code of Criminal Procedure (i.e. Journal of Laws 2022, item 1375, as amended).

could raise a justified doubt as to his impartiality in a given case, may submit a relevant written statement to the file.

The Code of Ethics for Judges specifies, however, that such a request for exclusion from consideration of a case may be submitted by a judge only if there are reasonable grounds for doing so. Abuse of the institution of exclusion of a judge, which may be qualified as a violation of the rules of ethics of the judiciary, is unacceptable.

Chapter three regulates the judge's off-duty conduct. Not only should a judge avoid personal contacts and any economic ties with other parties if they could raise doubts as to the impartial performance of his duties or undermine the prestige and confidence in the judicial office (§ 17), but a judge must also not create even the appearance of disrespect for the legal order by any of his behavior (§ 16).

An additional duty of a judge is to take steps to ensure that his or her next of kin do not perform the activities set out in § 16 and 17 of the Code of Judicial Ethics. The definition of persons next of kin to a judge can be found, for example, in Article 115 § 11 of the Act of 6 June 1997 – Penal Code (Journal of Laws of 2022, item 1138, as amended) [40], according to which a person closest to a judge is a spouse, ascendant, descendant, sibling, relative in the same line or degree, a person in an adoption relationship and their spouse, as well as a person in cohabitation.

In addition, a judge should properly and diligently manage his or her financial affairs and not undertake financial activities that may be perceived as taking advantage of the judge's own position (§ 18).

Judges are also prohibited from providing legal services or accepting any benefits that may give the impression that they are an attempt to influence him or her. Nor should those closest to the judge accept such benefits.

One of the most recently introduced provisions in the Ethics Rulebook is a regulation mandating restrained use of social media, which means careful, prudent and balanced use of these forms of participation in virtual spaces.

4. Conclusion

In conclusion, it should be emphasized that one of the basic elements of the Body of Principles of Professional Ethics for Judges and Judicial

[40] Act of 6 June 1997 Criminal Code (i.e. Journal of Laws 2022, item 1138, as amended).

Assessors, is the duty of every judge (and judicial assessor entrusted with the performance of judicial duties) to care for the dignity of the office of judge, in his/her conduct during the performance of official duties, as well as during the time when professional duties are not directly performed. The purpose of the professional ethics of judges is either to serve the good performance of the profession or to safeguard it from the dangers and temptations that threaten it[41]. Judges' ethical behavior and concern for the dignity of the office affect the main function of the courts, which is the administration of justice.

Bibliography

1. Aristotle, Etyka nikomachejska (Nicomachean Ethics), 1094 a.
2. Aquinatis S. T., Summa theologiae, I–II, q. 90, a 4.
3. Dąbrowski P., Odpowiedzialność dyscyplinarna adwokatów w okresie dwudziestole-cia międzywojennego-wileński casus Stanisława Węsławskiego 1896–1942 (Disciplinary responsibility of advocates in the interwar period – the Vilnius case of Stanisław Węsławski 1896–1942, Studia Iuridica Lublinensia 2016, vol. XXV, 2.
4. Janczewski S., Zbiór zasad etyki adwokackiej i godności zawodu (The Rulebook on Bar Ethics and Dignity of the Profession), Palestra 1961, 5/6(42), 5–10.
5. Korzeniewska-Lasota A., Z polskich prac nad kodyfikacją zasad etyki sędziow-skiej (From Polish work on the codification of the principles of judicial ethics), Studia Warmińskie 2017, 54.
6. Krąpiec M. A., Człowiek, prawo i naród (Man, law and the nation), Mikołów 2002.
7. Krąpiec M. A., Człowiek i prawo naturalne (Man and natural law), Lublin 1993.
8. Krzeminski Z., Z historii prac nad kodyfikacją zasad etyki adwokackiej (From the history of the work on the codification of the rules of advocacy ethics), Palestra 1968, 12/11(131).

[41] M. Ossowska, Socjologia moralności. Zarys zagadnień (Sociology of Morality. Outline of issues), Warsaw 1963, p. 49.

9. Kubiak J. R., Wokół idei kodeksu etyki zawodowej sędziów (On the idea of a code of professional ethics for judges), Palestra 1995, 39/3–4(447–448).
10. Ossowska M., Socjologia moralności. Zarys zagadnień (Sociology of Morality. Outline of issues), Warsaw 1963.
11. Paprzycki L. K., Ten, który jest sędzią (He who is a judge), Palestra 1993, Palestra 37/5–6 (425–426), no. 5-6.
12. Roliński S. M., Sędziowie bydź powinni (Judges should be), Palestra przed laty 1997, Palestra 41/5–6(473–474).
13. Żurawik A., Refleksje o etyce zawodowej sędziów (Reflections on the professional ethics of judges), Przegląd Naukowy Disputatio 2011, 12 (1–2).
14. Żurawski A., Etyka zawodu sędziego ze szczególnym uwzględnieniem niezawisłości sędziowskiej (uwag kilka) (Ethics of the judicial profession with particular reference to judicial independence (a few remarks)), (in:) Niezawisłość sędziowska, Warsaw 1990.

Legal acts and judgments

1. Act of 27 July 2001 on the National Council of the Judiciary, Journal of Laws 2001,No.100, item 1082.
2. Act of 12 May 2011 on the National Council of the Judiciary (Journal of Laws of 2021, item 269).
3. Act of 17 June 2004 on a complaint for violation of the right of a party to hear a case in preparatory proceedings conducted or supervised by a prosecutor and court proceedings without undue delay (i.e. Journal of Laws of 2023, item 1725, as amended).
4. the Act of 6 June 1997 – the Penal Code (i.e. Journal of Laws of 2022, item 1138 as amended).
5. the Act of 17 November 1964, Code of Civil Procedure (i.e. Journal of Laws of 2023, item 1550, as amended).
6. The Act of 6 June 1997 – the Code of Criminal Procedure (i.e. Journal of Laws of 2022, item 1375 as amended).
7. Resolution of the National Council of the Judiciary No. 16/2003 of 19 February 2003.

8. Resolution No 741/2009 of the National Council of the Judiciary of 7 October 2009.
9. Resolution No. 1295/2015 of the National Council of the Judiciary of 8 December 2015.
10. Resolution No. 14/17 of the National Council of the Judiciary of 11 January 2017.
11. Resolution No. 15/17 of the National Council of the Judiciary of 11 January 2017 on amending the content of the Statement of Principles of Professional Ethics of Judges.
12. Judgment of the Higher Disciplinary Court of the Supreme Bar Council of 19 November 1938 in Case No. 118/38/Sd.
13. Judgment of the Higher Disciplinary Court of the Supreme Bar Council of 3 September 1938 in Case No. 66/38/Sd.
14. The Collection of Rules of Advocacy Ethics and Dignity of the Profession adopted by the Supreme Bar Council on 6 and 7 May 1961.

Zasady etyki zawodowej sędziów i asesorów sądowych

Streszczenie

W artykule autorzy zarysowują wybrane aspekty etyczne zbioru zasad etyki zawodowej sędziów i asesorów sądowych. Przedstawiają kluczowe dla kontekstu etycznego działania sędziego pojęcie niezawisłości sędziowskiej i sprawiedliwości w odniesieniu do określonej koncepcji prawa. Prezentują rys historyczny i proces tworzenia instytucji etycznych zawodu sędziego z uwzględnieniem jego ewolucji i wpływu na aktualne brzmienie przepisów oraz przedstawiają aktualnie obowiązujące regulacje, wieńczące proces kodyfikacji zbioru zasad etyki zawodowej sędziów i asesorów sądowych.

Słowa kluczowe

Niezawisłość, sprawiedliwość, etyka, sędzia, wymiar sprawiedliwości, zasady etyczne.

PRACTICA

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Legal prohibition of hate speech in jurisprudential practice – between judicial discretion and arbitrariness

Abstract

Based on a comparative study of jurisprudence in hate speech cases, especially criminal cases, a consideration of judicial discretion and arbitrariness is made. The author argues that discretion – in the sense of a certain amount of latitude within the limits of the law on the part of the court in making findings and decisions – is inevitable and necessary. However, not infrequently the courts, in the administration of justice, resort to arbitrary actions, which in hate speech cases takes forms such as, in particular: selective and biased application of the law according to the ideological key; self-proclaimed expansion of the statutory catalog of groups of people protected from hate speech; failure to take into account or depreciate the argument formulated by the accused from freedom of speech or freedom of religion in their deliberations; a priori assumption that the expression of hateful content is the same as stirring up or incitement to hatred; ignoring the question of the relationship of the accused's incriminated behavior with the violation of or threat to the protected legal good, in particular public order. Judicial arbitrariness is a blatant distor-

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tion of the standards of the adjudicatory process and the role of the judiciary in the rule of law.

Key words

Judicial discretion, judicial arbitrariness, hate speech, jurisprudence.

1. Introduction

The characterization of judges as "mouths of the law" in its literal sense is neither normatively nor – even less – descriptively valid today[2]. This in no way implies acquiescence in the arbitrariness of representatives of the judiciary in judicial activity. Sometimes, however, judges overstep the limits of their discretionary power, entering the field of arbitrariness. One of the thematically or objectively distinguished categories of cases in which the judiciary's power is sometimes abused are those involving legally prohibited hate speech. The article, based on a study of cases from the judicature of more than a dozen legal orders, presents the perceived regularities, trends, interpretative directions in the judicial application of the law against hate speech, mainly criminal law. The intention was to delimit, synthesize and critically-valuably analyze the various forms or manifestations of judicial discretion and judicial arbitrariness accompanying the practice of jurisprudence with regard to incriminated hate speech.

2. The concepts of judicial discretion and arbitrariness

Judicial discretion is the judicial latitude, which is within the limits of the law, to resolve the case under review in a manner that takes into account and is appropriate to its specifics, and at the same time in accordance with the applicable legal regulations. Although not infrequent objections are raised to it in the legal doctrine – rather not so much to discretion as such, but more to its practice[3] – to some extent it is both

[2] J. Zajadło, Banał formuły dura lex sed lex, Palestra 2019, No. 5, p. 10. See: P. Tuleja, Dlaczego sędzia nie może być ustami ustawy? Prawa człowieka a ustrojowa pozycja sądu, (in:) J. Ciapała, R. Piszko, A. Pyrzyńska (eds), Dylematy wokół prawa do sądu, Warszawa 2023, p. 81–93.

[3] "The irregularities related to the abuse of discretionary power result not so much from the fact that a judge is equipped with this type of powers, but from their im-

inevitable[4], and necessary[5]. A certain freedom, flexibility or latitude[6] on the part of the court accompanying the adjudicatory process derives from the nature of the law, especially the characteristics of the legal language (such as, for example, the use by the legislator of vague and evaluative terms, often marked axiologically – for example, the term "hatred", the occurrence of general reference clauses, the presence of estimative phrases), as well as from the institution of judicial discretion (for example, in the context of the judicial assessment of punishment) or proportional balancing of conflicting rights, goods, values, legal interests (such as balancing in cases of unlawful hate speech the need to protect human dignity and public order with the need to respect freedom of speech and freedom of religion)[7]. In contrast, the concept of judicial arbitrariness[8] – which appears much less frequently in legal scholarship and is often used interchangeably with the phrase "arbitrality"[9] – supposes unrestrained action and consequent misappropriation or violation of the applicable law[10]. It usually does not involve overt insubordination, ostentatious judicial disobedi-

proper use to achieve extra-legal goals". S. Dąbrowski, A. Łazarska, Nadużycie władzy sędziowskiej, Polski Proces Cywilny 2012, No. 1, p. 43.

[4] The Regional Court in Częstochowa recognizes judicial discretion as the "principle of judicial sentencing". Judgment of the Regional Court in Częstochowa of 9 July 2019, VII Ka 536/19, LEX no. 2699773.

[5] Hoping "for a complete elimination (of judicial discretion) is simply indulging in illusions". Ł. Machaj, Wypowiedzi symboliczne w orzecznictwie Sądu Najwyższego USA, Wrocław 2011, p. 30.

[6] See: judgment of the Court of Appeal in Łódź of 25 February 2014 (I ACa 1116/13, LEX no. 1439202), in which judicial discretion was expressed in terms of "decisional latitude".

[7] See more: B. Wojciechowski, Dyskrecjonalność sędziowska. Studium teoretycznoprawne, Toruń 2004; R. Mańko, W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja, Łódź 2018, p. 95–146; V. Nor, M, Dzyndra, The Concept of Judicial Discretion in Criminal Proceedings, Wrocławsko-Lwowskie Zeszyty Prawnicze 2015, No. 6, p. 259–265.

[8] See the dictionary meaning of the term “arbitrariness”: https://wsjp.pl/haslo/podglad/59428/arbitralizm and https://wsjp.pl/haslo/do_druku/69340/arbitralnosc.

[9] Lawyers often assume implied meaning of judicial „arbitrariness/arbitrality”, therefore use it without explaining the given concept. See, e.g., T. Zych, W poszukiwaniu pewności prawa. Precedens a przewidywalność orzeczeń sądowych w tradycji prawa anglosaskiego, Toruń 2017, *passim*.

[10] M. Safjan, Niezależność Trybunału Konstytucyjnego i suwerenność konstytucyjna RP, Państwo i Prawo 2006, No. 6, p. 7–8 (The author combines "judicial arbitrariness" with "interpretive freedom").

ence[11] through outwardly communicated *contra legem* conduct. It is more about ignoring the basic principles of the judicial process (such as impartiality and objectivity), interpretive methods and directives or, more broadly, certain canons of conduct that make up the methodology of the judge's work. It is not uncommon for judicial arbitrariness to go hand in hand with judicial law-making and an activist attitude[12]. It also contradicts the principle of legal certainty and security[13].

In legal doctrine, including criminal law, it is not uncommon for the terms discretion and arbitrariness to be used interchangeably. As one author argues, "hate crimes are more vulnerable to the arbitrariness of criminal procedural authorities than other crimes; and the threat of discretion is all the greater because the pressure of groups interested in stigmatizing certain behavior as hate crimes can be an important factor in determining specific procedural decisions"[14]. Similarly, another author points out that, in turn, the use of analogies in criminal law "increased the scope of the judge's discretionary power, allowing him to decide arbitrarily whether to criminalize a particular act"[15].

However, there is also no shortage of examples of a legitimate distinction between the two conceptual categories. Aleksandra and Piotr Kardas contrast the "discretionary power of the court" precisely with "arbitrariness", understanding by the first concept "necessary for the realization of the function of judicial administration of justice freedom...in making findings of fact and for the application of norms to established facts, as well as the dimension of punishment" serving "the realization of the principle of individualization of criminal responsibil-

[11] See: J. Zajadło, Sędziowskie nieposłuszeństwo, Państwo i Prawo 2016, No. 1, p. 18–39.

[12] A manifestation of "judicial arbitrariness" is considered to be "the subjectivization of case law by effectively giving the power to create judicial law in the strict sense to the panel of judges adjudicating in a given case". P. Mysłowski, Prawo sędziowskie a pewność sytuacji prawnej jednostki – spojrzenie krytyczne, (in:) A. Błaś (ed.), Pewność sytuacji prawnej jednostki w prawie administracyjnym, Warszawa 2012, LEX No. 369251458.

[13] A. Rychlewska, Zasada *nullum crimen sine lege* w systemie państwa prawa. Analiza porównawcza na tle europejskiego systemu ochrony praw człowieka, Kraków 2018 (PhD dissertation), pp. 154, 158, 240–241, 258, 280 and 295.

[14] M. Woiński, Prawnokarne aspekty zwalczania mowy nienawiści, Warszawa 2014, LEX No. 369312599.

[15] T. Kaczmarek, Chapter I. Kara kryminalna i jej racjonalizacja, (in:) *idem* (ed.), Nauka o karze. Sądowy wymiar kary. System Prawa Karnego, vol. 5, Warszawa 2017, p. 26.

ity"[16]. At the same time, these authors add that the "discretionary power of the court" is "the decision–making freedom vested in the court, within the limits set by the legal norms"[17]. Similarly, Stanisław Dąbrowski and Aneta Łazarska emphasize that judicial discretion does not mean "arbitrary latitude" and "cannot serve to justify judicial willfulness," since its limits are "set by law." Not only that "the judge in his activity is limited by the law," but "in addition, his action is to be characterized by the diligence of adjudication, expressed in taking into account all the circumstances of the case, respecting universal standards of action, such as, for example, rationality, justice and fairness"[18].

Analogous views are also given expression in the case law itself. In the justifications of the judgments it is indicated that the scope of the court's discretion "is determined by the provisions of the law"[19] or it is "allowed by the legislator"[20]. Even if the scope is wide, it still "does not mean arbitrariness"[21]. The arbitrariness of action is not a feature of judicial discretion, but synonymous with the capriciousness of the court[22], understood, among other things, as "ruling in a mechanical and thus unjust manner"[23]. However, as in legal doctrine, so also in jurisprudence, it is sometimes mistaken to equate judicial discretion with arbitrariness[24].

[16] P. Kardas, A. Kardas, Zasada równości w prawie karnym (zarys problematyki), Czasopismo Prawa Karnego i Nauk Penalnych 2019, iss. 1, pp. 23 and 29.
[17] *Ibidem*, p. 37.
[18] S. Dąbrowski, A. Łazarska, Nadużycie…, p. 30.
[19] Decision of the Supreme Administrative Court of 23 September 2010, II FZ 474/10, LEX No. 742526.
[20] Judgment of the District Court for the Capital City of Warsaw of 11 January 2022, I C 1703/21, LEX No. 3416542.
[21] Decision of the Supreme Court of 10 January 2020, II CSK 436/19, LEX No. 3220723; judgment of the Supreme Court of 13 July 2022, II CSKP 769/22, LEX No. 3399826; judgment of the Supreme Court of 28 April 2021, I CSKP 87/21, LEX No. 3175568.
[22] Judgment of the Supreme Administrative Court of 26 January 2012, II OSK 2146/10, LEX No. 1138088.
[23] Judgment of the Court of Appeal in Warsaw of 6 March 2015, VI ACa 666/14, LEX No. 1740721.
[24] As the Court of Appeal in Katowice puts it, "free assessment of evidence cannot be associated with judicial discretion. The judge cannot freely evaluate individual means of evidence because he is obliged to explain how he assessed them and why he drew certain conclusions regarding factual findings from them". It thus suggests that judicial discretion consists in the full freedom of actions and the lack of the need to rationalize them. Judgment of the Court of Appeal in Katowice of 29 November 2018, II AKa 413/18, LEX No. 2671571.

The jurisprudence recognizes various sources of judicial discretion, not restricting it to the institution of judicial margin of appreciation or free evaluation of evidence, but including interpretive discretion. As one court states, "within the scope of the discretionary power of the courts is the manner of interpreting the law"[25].

The line between discretion and arbitrariness can be debatable *in concreto*, especially in cases of misused discretion. The classification of a court's action into one or the other posture is determined not so much by the content of the decision made or the particular determination made preceding that decision, but by the chosen method of reasoning and argumentation leading to one conclusion or another. The erroneousness of the conclusion reached by the court is not *per se* a sign of arbitrary conduct. However, if the conclusion was reached *a priori*, everything that contradicts it was ignored *ex ante*, the universally recognized standards of legal interpretation were not observed, a biased view of the facts was made, an extremely selective and one-sided reference was made to the body of case law, the requirements of the principle of proportionality were disregarded in cases involving a collision of competing rights, the point of reference for its considerations was made not the law in force, but personally expected law, then it is impossible to define the practice of the court other than arbitrary, i.e. not grounded in the constitutional and procedural norms governing the proceedings of the judiciary or manifestly inconsistent with the substantive law applied.

3. Interpretation of the legally relevant term "hatred"

As mentioned above, the interpretation of the statutory term "hatred"[26] in the context of such unlawful acts as, in particular, criminal stirring up or incitement to hatred, inevitably carries a certain amount of discretion. Courts in the clarification of this concept usually do not exceed the limits of their interpretative discretion. However objectionable some of the results of operative interpretation are, even their erroneousness is not of that degree or that obviousness which would allow us to speak definitively of arbitrariness, a certain capriciousness

[25] Decision of the Supreme Administrative Court of 15 June 2011, II FZ 218/11, LEX No. 852080.

[26] As a rule, in individual legal orders, the term of legal language (language of legal acts) is the word "hatred", while the phrase "hate speech" remains a term of lawyers' language, i.e. the language of legal scholarship and the practice of applying law.

in decoding the meaning of the legal text. In the case of constitutional courts, or those competent in judicial review, courts sometimes contest the legislature's official interpretation. Aptly, in one of its judgments, the Canadian Supreme Court held that the legislature's classification as unlawful hate speech of speech that ridicules or belittles a protected group of people constitutes a disproportionate interference with freedom of expression. He also opted for classifying defamatory speech as hate speech simply because of its slanderous nature. He also opposed classifying calumny statements as hate speech just because of false misrepresentations alone. Instead, he linked hate with detestation and vilification[27]. Cases of questioning an overly broad understanding of hate speech are also shared by jurisprudence in civil law states. For example, the Hungarian Constitutional Court correctly assumed that hate speech is not merely "offensive" speech[28].

Polish jurisprudence lacks a common definition of hate speech, or more precisely, the statutory formulation of "incitement to hatred." In its decision of February 5, 2007, the Supreme Court reduced incitement to hatred "to this type of speech, which arouses feelings of strong dislike, anger, disapproval, even hostility to individual persons or entire social or religious groups, or because of the form of speech sustains and intensifies such negative attitudes and thus emphasizes the privilege, superiority of a particular nation, ethnic group, race or religion"[29]. Over time, the Supreme Court has legitimately moved, it seems, away from defining hate speech in terms of "no approval", "disapproval", "antipathy", "prejudice", "dislike", "negative attitudes", "anger", "privileging", "superiority", in favor of "hostility", "contempt", "vilification", "humiliation", "scorn" or "aggression", which better and more accurately reflect the essence of hatred[30].

[27] Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 [2013]. Similarly, the Greek Supreme Court explained incitement to hatred in terms of arousing hostility, repulsion and disgust in the recipients. Judgment of the Greek Supreme Court of 29 June 2020, no. 858/2020, http://www.areiospagos.gr/nomologia/apofaseis_DISPLAY. asp?cd=MM8X2SENB1Z5BP10XPW156841DB4JS&apof=858_2020&info=%D0%CF%C9%CD%C9%CA%C5%D3%20–%20%20%D3%D4.

[28] Judgment of the Hungarian Constitutional Court, 30/1992 (pt V.3), https://hunconcourt.hu/uploads/sites/3/1992/06/30_1992–ab_eng.pdf.

[29] Decision of the Supreme Court of 5 February 2007, IV KK 406/06, LEX No. 245307.

[30] Decision of the Supreme Court of 1 September 2011, V KK 98/11, LEX No. 950444; judgment of the Supreme Court of 8 February 2019, IV KK 38/18, LEX No. 2621830; judgment of the Supreme Court of 16 February 2022, IV KK 168/21, LEX No. 3402189.

The courts in Poland often define hate speech too broadly, and thus "exaggeratedly," including in it statements "of a homophobic nature"[31], spreading "negative views and prejudices"[32], or being "the opposite of the language of love"[33]. It is also an erroneous *interpretatio extensiva* to treat collectively in terms of hate speech utterances with discriminatory overtones, which ascribe inferiority to certain groups of people or deny them some rights[34].

It is disappointing to see a universal determinant of hate speech in giving expression to criticism of the granting of certain rights to certain people or communicating a belief in the superiority of one group of people over others. It is impossible to completely abstract this issue from the context and specifics of particular acts of expression, to determine what "rights" and how understood "superiority" are at stake. For example, it is not a manifestation of hate speech for adherents of a particular religion to proclaim a belief in their "spiritual" superiority, based on the conviction that only they believe in the true god(s), and everyone else worships imaginary idols, and therefore will experience eternal damnation as unbelievers if they do not convert. Similarly, it does not constitute hate speech to criticize the permissibility of marriage for same–sex couples, even if one were to consider that this criticism fits into the judicial definition of hate speech, in which hate speech is understood as "denying the right to equal treatment" or "calling for restrictions on the exercise of certain rights and freedoms by representatives of negatively valued groups"[35].

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[31] Judgment of the Regional Court in Warsaw of 21 March 2016, XX GC 1186/14, LEX No. 2095550.

[32] Judgment of the Regional Court in Warsaw of 27 March 2012, I C 426/09, LEX No. 1306049.

[33] Judgment of the Court of Appeal in Katowice of 5 March 2010, I ACa 790/09, LEX No. 1236397.

[34] For example, judgment of the Court of Appeal in Warsaw of 20 April 2015, II AKa 26/15, LEX No. 1711578; judgment of the Regional Court in Wrocław of 12 September 2017, III K 199/17, LEX No. 2374894; judgment of the Regional Court in Częstochowa of 11 December 2018, II K 104/18, LEX No. 2718194; judgment of the Regional Court in Piotrków Trybunalski of 8 February 2022, IV Ka 879/21, LEX No. 3341031; judgment of the Regional Court in Białystok of 30 June 2021, III K 131/20, LEX No. 3477420; judgment of the Court of Appeal in Szczecin of 4 February 2010, I ACa 691/09, LEX No. 1089005.

[35] Judgment of the Regional Court in Białystok of 30 June 2021, III K 131/20, LEX No. 3477420; judgment of the Regional Court in Białystok of 9 November 2015, VIII Ka 409/15, LEX No. 1933524.

4. Hate expression vs. incitement to hate

The rule in the criminal legislation of individual states is to include the crime of hate speech as an intentional crime[36]. This confronts the courts with the need to make findings on the subjective side of the incriminated act. It is a manifestation of arbitrariness to anticipate that the mere externalization of one's own hatred against a protected group of people proves the intention to arouse hatred in others. The use of inference of this type in its symplistic nature is impermissible. Assessing the subjective side of criminal act requires contextual considerations by the court, such as, for example, considering the fact that the accused communicated sincerely held religious teachings[37]. While without taking this context into account the accused would be attributed with the intention to stir up or incite hatred, when it is taken into account it may turn out that his sole purpose was to preach the word of God, bear witness to the professed faith and convert sinners[38]. In the jurisprudence of the courts of various countries there are cases of too hasty, somewhat automatic imputation of the intention to incite hatred[39].

An exemplification of the judicial discrepancies in assessing the subjective side of the crime of hate speech is the divided stance of the Polish Supreme Court in a case involving a social media posting with xenophobic and nationalistic overtones. Dismissing the cassation of the conviction, the Supreme Court assumed that the defendant's use of an imperative sentence with an exclamation point shows that his statement is "in the form of a call, a strong appeal," "a strong exhortation, with reference to an unspecified audience, for taking action (unspecified as to form)," and not "in the form of a discussion or commentary"[40]. However, the Su-

[36] For example, in the Polish legal order it is assumed that an act under Art. 256 § 1 of the Penal Code it can only be committed with direct intent (*dolus directus coloratus*). In turn, in Hungarian jurisprudence, in the context of the crime of inciting hatred, there is a position on the possibility of committing this act also with eventual intent. See judgments of the Hungarian Supreme Court: BH 1997/165, BH 1998/521, BH 2005/46, BH 2011/242.

[37] E. Brincat, Court clears priest of hate speech charges, https://timesofmalta.com/articles/view/court–clears–priest–hate–speech–charges.983888

[38] P. Edge, Oppositional Religious Speech: Understanding Hate Preaching, Ecclesiastical Law Journal 2018, Vol. 20, pp. 278–289.

[39] G. Maroń, Krytyka homoseksualizmu (homoseksualistów) w świetle orzecznictwa sądów kanadyjskich, Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza 2015, No. 17, pp. 57–60.

[40] Decision of the Supreme Court of 13 July 2022, IV KK 32/22, LEX No. 3480944.

preme Court came to a different conclusion when considering the extraordinary appeal against the same verdict. He pointed out that criminal law does not permit basing a conclusion about the defendant's intent "on presumptions or assumptions that have no basis in the evidence of the case." He aptly argued that an ethically negative assessment of a given statement does not prejudge the criminal nature of its public formulation, but "it is additionally necessary to demonstrate that, by posting the statement, the perpetrator had a real intention to provoke negative feelings and hatred in the audience." In the opinion of the Supreme Court, the court of first instance failed to demonstrate such an intention on the part of the convict, essentially failing to address this issue at all in the reasons for its ruling. Paradoxically, even the court of merit considered the convict's explanations, in which the convict explicitly denied having the intention to arouse hatred in others, as "deserving of belief, because they are consistent and logical"[41].

The court should be expected to provide arguments in favor of the conclusion that the defendant intended to stir up hatred. Stopping in this regard at an analysis of the content of the incriminated speech itself is unreliable. An example of the correct approach is the consideration of a Canadian court in one of the criminal cases involving hate speech against homosexuals. The court, in contrast to the prosecutor, noted that the defendant, by distributing leaflets during the Pride Parade, did not so much want to stir up hatred against homosexuals, but his goal was to criticize the parade itself and what it symbolizes, and to get active homosexuals to convert. He added that the intention to make one's act of expression controversial, ostentatious and shocking is not tantamount to an intention to provoke hatred. He also commonsensically argued that if the defendant had intended to stir up hatred against homosexuals, he probably would not have distributed leaflets precisely to them, the allegedly targeted group of people[42].

5. Verification of the violation or threat of violation of a legally protected good

In cases of punishable hate speech, the courts should determine whether the defendant, by his behavior, violated the legal good protected

[41] Judgment of the Supreme Court of 19 April 2023, II NSNk 12/23, LEX No. 3570699.
[42] R. v. Whatcott, 2021 ONSC 8077 (pts 72–93).

by the legal provision prohibiting hate speech or created a threat to this good. This fits into the systemic and functional interpretation of the law. In the various legal orders, the crime of hate speech is usually captured as harming public order or the dignity or honor of those attacked[43].

For example, Hungarian courts in hate speech cases consistently verify the reality of the threat to the protected legal good in the context of a given factual situation. According to the case law there, the commission of a crime can be said to be conditional on the existence of a "clear and real danger" of acts of violence or violation of individual rights. An implied or assumed danger in this regard is not enough. The assessment of the reality of the threat to the legal good is made according to objective criteria, and not the subjective conviction of the person acting as a victim[44].

An exemplification of just such a contextual assessment is the position taken by the Greek Supreme Court in the case of Orthodox Bishop Amvrosios, convicted of publicly inciting discrimination, hatred and violence against homosexuals by publishing an online post titled "The scum of society have raised their heads. Let's spit on them." The court aptly pointed out that the occurrence of the danger of violent acts following hate speech was increased by the fact that the hate speech came from a church hierarchy enjoying the recognition and authority among his disciples ready to follow his instructions[45].

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[43] In Poland, art. 256 and 257 of the Criminal Code are included in the chapter concerning crimes against public order. Similarly, in the UK, the crime of hate speech is regulated by the Public Order Act 1986 (c 64) and in Hungary it is a crime against the public peace (Article 332 of the Act of 25 June 2012, Criminal Code). In Canada, although the crime of hate speech is included in the chapter on crimes against the person and reputation, the constitutive element of this criminal act is the threat of breach of the peace (Article 319 of the Criminal Code, R.S.C., 1985, c. C–46). To some extent, the opposite is the case in the German Penal Code, where although § 130 is included in the chapter relating to crimes against public order, it refers to "violation of the dignity of persons" (Act of May 15, 1871). This phrase also appears in Art. 510 of the Spanish Penal Code (Organic Law No. 10/1995 of 23 November 1995) in the chapter on offenses related to the exercise of fundamental rights and freedoms. In Italy, the crime of hate speech is included in the chapter of the Penal Code dealing with crimes against individual freedom (Article 604–bis of the King's Decree No. 1398 of October 19, 1930), and specifically against equality, which can be explained by legislature's assumption of the content-related connection between hate speech with discriminatory acts.

[44] See judgments of the Hungarian Supreme Court: BH 1997/165, BH 1998/521, BH 2005/46 i BH 2011/242.

[45] Judgment of the Greek Supreme Court of 29 June 2020, no. 858/2020.

When the crime of hate speech is linked to a threat to public order, the circumstance of from whom the threat comes, i.e. whether it actually comes from the speaker or from listeners, remains relevant. Silencing and punishing a speaker for a threat of violence coming from critical or hostile listeners reacting aggressively to content they do not tolerate constitutes a so–called "heckler's veto" regarded as the antithesis of freedom of speech and the standards of the demo-liberal state. An example of the judicial sanctioning of the heckler's veto is the case of British street Christian preacher Harry Hammond. He preached biblical teaching on homosexuality on the sidewalk, holding up posters with the words: "Stop immorality," "Stop homosexuality", "Stop lesbianism", "Jesus is Lord". A group of dozens of people hostile to the man gathered around him. Hammond was taunted, pelted with clods of soil, doused with water, and turned over on his back. Police officers who arrived at the scene arrested the evangelist, deciding that it was he who was making insulting remarks against homosexuals that was violating public order. This erroneous position was shared by the courts of both instances[46].

Similarly, the flawed reasoning, in which a threat to public order from those prone to violence and aggression who are critical of a speaker's disapproved speech is read as evidence of the illegality of that speaker's act of expression, is also shared by Strasbourg jurisprudence. In E.S. v. Austria, the European Court of Human Rights shared the position of the Austrian courts that it was hate speech threatening religious peace to present at a public seminar the view of the pedophilic nature of the Prophet Muhammad's relationship with his 9-year-old wife Aisha[47]. The Court ignored the circumstance that "the applicant's remark was not made in a context in which it could have directly and inevitably provoked the audience to violence – the applicant did not, for example, go to a mosque on Friday to preach to the people gathered there what madness Muhammad's marriage to Aisha was." Instead, he accepted that the limits of freedom of speech are defined "not so much by the violence of the disputed speech, but by the potential violence of those who claim to feel offended by it. Thus, all it takes is for a few outraged individuals to announce that they feel offended, and as long as they pose a threat, that is enough to justify censorship against their opponents”[48].

[46] Hammond v. DPP [2004] EWHC 69.

[47] Judgment of the ECtHR of 25 October 2018, E.S. v. Austria, app. no. 38450/12.

[48] G. P u p p i n c k, Cenzura wypowiedzi dotyczących islamu w Europejskim Trybunale Praw Człowieka: uderzający przypadek sprawy E.S. przeciwko Austrii, Chrześcijaństwo–Świat–Polityka 2020, p. 122.

6. Deliberation of the argument from freedom of speech

Since the criminal hate speech act is an act of expression, it should be natural for the courts to take into account the issue of freedom of speech in their deliberations and address whether the defendant's behavior can be considered an exercise of this freedom[49].

Depending on the content and context of the incriminated speech, freedom of religion, artistic freedom and freedom of scientific research may come into play in addition to freedom of speech. This by no means means that an argument from freedom of speech – or the other listed freedoms – on its own excludes the unlawfulness of an incriminated act. For freedom of expression is not an *ius absolutum*. When criminalizing hate speech, just as when criminalizing slander or insult, the legislator should consider freedom of expression when giving particular shape to statutory provisions. In other words, on the basis of the concept of a rational legislator, one can assume that, for example, the form of Articles 256 or 257 of the Polish Criminal Code is the result of a proportional balance between the constitutional legal values protected by these provisions (such as public order and human dignity) and the values regulated by these provisions (such as precisely freedom of expression). Only that the legislative process allows such a balancing at the general–abstract level. This does not abolish the need to confront the same competing values at the stage of application of the law, only that with regard to the specifics and circumstances of a particular state of facts.

In a ruling, the German Federal Constitutional Court overturning criminal court convictions for incitement to hatred – by publishing a poster calling for the deportation of immigrants – argued that the courts reviewing the case either did not consider the constitutional principle of freedom of speech at all, or did not give it sufficient weight in the legal evaluation of the defendants' incriminated behavior[50].

The technique of proportional balancing by its very nature implies discretion. The application of the principle of proportionality, including its element in the form of balancing conflicting values, however, requires recognition of the importance, the significance of competing legal goods. Even at the outset, downplaying or trivializing the argument from freedom

[49] See: T. Bojanowski, Wybrane prawnokarne aspekty mowy nienawiści w kontekście standardów ochrony wolności słowa, Prawo w Działaniu 2021, No. 47, p. 168–186.

[50] Decision of the German Federal Constitutional Tribunal of 4 February 2010, 1 BvR 369/04.

of speech or freedom of religion in unlawful hate speech cases makes that the court's considerations of the possibility of reconciling a conviction with respect for freedom of expression are merely apparent, and the conclusion reached arbitrary.

Failure to sufficiently consider the argument from freedom of speech and freedom of religion in its deliberation was the case of the Zurich District Court (*Bezirksgericht*), which in 2022 fined a street Christian preacher for publicly criticizing homosexuality from a religious perspective. The man taught on a public sidewalk during the city's Pride Month that homosexuality is a sin, "evil lust" and "shameful desire", homosexual marriages are not valid before God, and that one can "convert" from homosexuality. Public proclamation of these contents with reference to Scripture was considered a crime of discrimination and incitement to hatred[51]. The court, in qualifying pointing out the sinfulness of homosexual acts, questioning the legalization of same-sex unions and calling for repentance as criminal humiliation of persons on the basis of their sexual orientation, ignored, or at least did not give due weight to, the fact that the accused communicated and convinced others of his sincerely professed Christian teaching on the subject of homosexuality and same–sex unions[52].

This position contrasts with the ruling of the US Supreme Court, which, while declaring the unconstitutionality of the ban on same–sex marriage, at the same time made it clear that the legalization of such unions in no way deprives religious people of the opportunity to proclaim their sincere views that "by divine precepts, same-sex marriage should not be condoned... The same is true of those who oppose same–sex marriage for other reasons"[53].

It must be acknowledged, however, that courts face a lack of consistent jurisprudential standards for balancing competing values in unlawful hate speech cases. Strasbourg jurisprudence, which could be

[51] Art. 261 bis Swiss Criminal Code (*Schweizerisches Strafgesetzbuch*) of 21 December 1937, https://www.fedlex.admin.ch/eli/cc/54/757_781_799/de.

[52] See: J. Schumacher, Straßenprediger in Zürich wegen Hassrede verurteilt, https://www.pro–medienmagazin.de/strassenprediger–in–zuerich–wegen–hassrede–verurteilt/.

[53] Obergeffel v. Hodges, 576 U.S. 644 (2015). See similarly judgment of the South Africa Constitutional Tribunal, National Coalition for Gay and Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC). The Court noted that the belief that sexual acts are limited to marriage between a woman and a man for procreative purposes cannot be attributed only to "primitive bigots", as it is sincerely shared by a number of people for religious and non-religious reasons.

expected to act as a benchmark in this regard with an instructive function for national courts, is itself internally heterogeneous, often being more a source of confusion than unification of jurisdictional practice[54]. It is telling that the Swedish Supreme Court, acquitting Pastor Ake Green in 2005 of the charge of the crime of expressing contempt for homosexuals through a sermon[55] critical of them, stated that, although the clergyman fulfilled the elements of the crime with his behavior, at the same time it assumed that his conviction would be contrary to the standards of freedom of expression developed in ECtHR case law, in particular, it would violate the principle of proportionality[56]. From the perspective of the ECtHR's two subsequent judgments in analogous cases, the Swedish court's prediction of a possible ECtHR recognition of Pastor Green's conviction as a violation of Article 10 of the Convention is highly questionable[57].

7. The criterion of truthfulness of the incriminated speech

When hate speech takes the form of group defamation, courts should verify in each case whether the incriminated statements are truthful, regardless of whether the criterion of truthfulness of the statements formally excludes liability or criminality, as, for example, on the grounds of Article 319(3)(a) of the Criminal Code of Canada. Indeed, also in legal orders in which the truthfulness of the statement *ipso jure* does not abolish the illegality of the act, such as with regard to Article 212 of the Polish Criminal Code, the issue nevertheless remains relevant to the overall contextual assessment of the case. A manifestation of judicial arbitrari-

[54] Zob. S. Sottiaux, Conflicting Conceptions of Hate Speech in the ECtHR's Case Law, German Law Journal 2022, Vol. 23, p. 1193–1211.

[55] During the sermon, the pastor criticized homosexuality and homosexual acts from a biblical perspective as manifestations of man's departure from God. He presented them as immoral, sinful, filthy, sick, unclean, and at the same time consciously chosen. He included them, along with bestiality, as abnormal human sexual behavior, which is "a deep cancerous tumor on the entire body of society". Moreover, he linked homosexuality with the emergence and spread of AIDS and pedophilia ("defilers of boys"), although he also noted that not all homosexuals are people with AIDS or sexually abusing children.

[56] Judgment of the Swedish Supreme Court of 29 November 2005, B 1050–05, http://www.emaso.com/links/ref–articles/ref29e/ref29s.htm

[57] Judgment of the ECtHR of 12 May 2020, Lilliendahl v. Iceland, app. no. 29297/18; judgment of the ECtHR of 9 February 2012, Vejdeland and others v. Sweden, app. no. 1813.

ness is the *apriori* categorization of statements critical of a given group of people as unlawful, or outright punishable, hate speech without even attempting to determine whether they reflect reality or, having the form of a value judgment, have a sufficient factual basis[58].

The above-mentioned Canadian case of R. v. Whatcott, in which criminal hate speech was charged in connection with the distribution of leaflets critical of homosexuality during the 2016 Toronto Pride Parade, may serve as an example of the court's proper approach. On the one hand, they depicted homosexual acts as contrary to God's law. On the other hand, they pointed out the health risks associated with practicing homosexuality, such as, in particular, shorter statistical life expectancy, higher incidence of HIV infection and AIDS, increased risk of contracting various other diseases. The court, objectively approaching the body of scientific medical literature on the subject, came to the conclusion that the content communicated on the leaflets was essentially "plausible." It found some claims to be admittedly "inaccurate," fraught with "exaggeration" and partly "misleading," but still not reaching the level of hate speech[59].

The opposite attitude is presented in a number of ECtHR rulings. In cases involving anti-Muslim and anti-immigrant expressions, the Court has been rather laconic and cursory in addressing their facts. In a way, it manifests a tendency to label many critical remarks against Muslims as acts of expression that are somewhat *a priori* defamatory, expressing contempt without even attempting to verify whether the evaluative and somewhat generalized statements are sufficiently grounded in facts. It happens, as in the case of Le Pen v. France, that the Court rejects evidence submitted by the applicant to prove the unsubstantiated nature of the assessments he makes, without recounting and responding to them. All that can be learned from the text of the ruling is that Le Pen referred to certain unspecified "alleged facts" that discredited both the national courts and the Court[60]. The persuasive power of this type of explanation is negligible. The recipient of the justification must take the Court's word for it that the applicant has not sufficiently substantiated the thesis that the Muslim community poses a threat to public order and security in France. Similarly, in Féret v. Belgium, the Court uncritically followed the Belgian court in accepting that an electoral leaflet circulated by the complainant stating that the operation of

[58] E.g. Saskatchewan (Human Rights Commission) v. Whatcott (pts 182–183, 188).
[59] R. v. Whatcott (pts 51–52, 58, 69).
[60] Judgment of the ECtHR of 20 April 2010 r., Le Pen v. France, app. no. 18788/09.

a refugee center had a negative impact on the neighborhood was "undocumented on cause and effect" comments[61].

8. Catalog of groups of people protected from hate speech

It is impossible to judge other than as judicial arbitrariness the modification, and in fact the expansion, by the courts – as bodies of law application – of the statutory catalog of groups of persons protected against hate speech. In such a case, a law-making *interpretatio extensiva* takes place. On the grounds of criminal law, it also means a violation of the principle of *nullum crimen sine lege* and the prohibition of analogy to the detriment of the accused. Thus, the Polish Supreme Court correctly objected to the self-proclaimed judicial addition to the persons protected by Article 257 of the Criminal Code of those singled out by their sexual orientation. As it noted, if the reason for insulting a group of people is their sexual orientation, the statement does not exhaust the elements of an offense under Article 257 of the Criminal Code. This provision "contains a closed catalog of reasons for the perpetrator's actions, and therefore it is not permissible to interpret this legal norm extending the protection contained therein to a group of people not mentioned therein"[62]. Determination of the subjective scope of criminalized hate speech belongs, according to the division of powers, to the legislature, which in turn should take into account the social, cultural, demographic and criminological factors accompanying hate speech.

However, it happens that the legislator, in selecting the groups of persons subject to protection from hate speech, violates constitutional principles. In such a case, in countries where there is no judicial review institution, it is up to the constitutional court to challenge the statutory framing of the hate speech ban. In 2008, for example, the Hungarian Constitutional Court declared a provision of the Civil Code making group defamation of any minority group unlawful, contrary to the Basic Law. In the opinion of the Court, the provision was, on the one hand, too broad and at the same time indefinite in scope, as it protected any minority group, and on the other hand, its scope was too narrow, as it did not cover majority groups in a discriminatory man-

[61] Judgment of the ECtHR of 16 July 2009, Féret v. Belgium, app. no. 15615/07. See more: G. Maroń, Mowa „antymuzułmańska" i „antyimigrancka" w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka w Strasburgu, Przegląd Prawa Publicznego 2016, No. 1, p. 9–28.

[62] Judgment of the Supreme Court of 3 March 2022, II KK 534/21, LEX No. 34091.

ner[63]. Similarly, it deemed unconstitutional, because it introduced too broad a scope of criminalization, a provision of the Criminal Code criminalizing hate speech against "any group of persons"[64].

9. Legal evaluation vs. ethical evaluation of hate speech

Despite the undoubted links between law and morality, these are not identical normative orders. Law is not a "mirror image" of morality[65]. The court's recognition of the incriminated behavior as immoral in light of the prevailing ethical assessments in a given society cannot be the same basis for simultaneously treating it as unlawful. For example, in criminal cases, the acceptance of the ethical reprehensibility of the accused's alleged act does not relieve the court of the duty to verify whether the elements of the type of criminal act have been fulfilled, whether all the elements of the subject and object sides of the crime have occurred. The acquittal of the accused on the grounds that he did not commit a crime cannot be perceived as affirming, praising, sympathizing or legitimizing his immoral behavior by the court. It is unacceptable to condition the direction of the settlement of unlawful hate speech cases – as well as all other court cases – on social expectations and the expected critical social reaction, but juridically indefensible, to this or that verdict. This would be a misappropriation of the essence of the administration of justice.

The above remarks, however truistic they may seem, need to be raised again and again. Justifiably, the Canadian court in the above-cited case of Robert Whatcott emphasized that finding him not guilty should not be seen as "a vindication or as an endorsement of his views". As the court explained: "Our values as a free society and our centuries–old legal tradition requires that our system not criminalize those who hold views that are merely obnoxious and unpopular. We take this approach not because we like or approve of Mr. Whatcott's views but because protection

[63] Judgment of the Hungarian Constitutional Court, no. 96/2008, https://api.alkotmanybirosag.hu/ en/wp–content/uploads/sites/3/2017/11/en_0096_2008.pdf.

[64] Judgment of the Hungarian Constitutional Court, no. 95/2008, http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun–2008–2–005?fn=document–frameset. htm$f=templates$3.0.

[65] See: A. Wąsek, Prawo karne – minimum moralności? Annales UMCS. Sectio G Ius 1984, Vol. 31, No. 3, pp. 35–65.

of speech we dislike, or even despise, protects everyone in a free and democratic society"[66].

Prejudicial character is not implied for the court by the result of the evaluation or adjudication of a case by entities outside the judiciary, even if they enjoy moral authority in society. In a judgment dated September 22, 2022, a Maltese court acquitted Catholic priest David Muscat of a charge of inciting hatred against another person(s) because of his or her sexual orientation[67]. The incriminated act consisted of posting two posts on social media regarding a bisexual person experiencing mental problems and with satanic inclinations suspected of committing murder and rape. In the first post, the priest categorized identification with the LGBTQ community as a disorder, along with schizophrenia and demonic possession, while adding that "the least serious problem is possession by the devil... being gay is the worst"[68]. In a second post, referring to a photo of the suspect wearing a T–shirt with a rainbow logo, Father Muscat wrote that he looked like he was just coming back from "gay pride". According to the court, the priest expressed his opinions on social media, which, although morally reprehensible in judge's view, did not constitute a crime due to the lack of intent on his part to incite hatred or violence against homosexuals. The court ruling was not influenced by the fact that the priest's ecclesiastical superior, Metropolitan Charles Scicluna of Malta, formally admonished Father Muscat. He urged him to desist from "inflammatory and hurtful comments" under threat of being banned from public priestly ministry[69].

10. Judicial moralizing

A related issue to the influence of moral judgments on the resolution of court cases is the making of moralizing remarks with an educational function by the court in the oral justification of the judgment or in the written reasons for the decision, usually to a party to the proceedings. Judicial moralizing may be within the limits of discretion or combined with arbitrariness. It is permissible under three conditions. First, moral admonitions must not go beyond the axiology of the legal order. The point of ref-

[66] R. v. Whatcott (pt 95).

[67] See art. 82A Maltese Criminal Code of 10 June 1854, https://legislation.mt/eli/cap/9/eng/pdf.

[68] Fr David Muscat not guilty of homophobic comments, https://tvmnews.mt/en/news/fr–david–muscat–not–guilty–of–homophobic–comments/.

[69] E. Brincat, Court…

erence for them must be values and ethical judgments close to the legislator, not so much personally to the judge. Second, with its remarks, the court must not cast reasonable doubt on its own impartiality towards the parties to the proceedings. Thirdly, in formulating comments of this type, one must remember to respect the principle of ideological neutrality of public authorities, that is, courts as well. Otherwise, the court becomes not an organ of law application, but an indoctrinator[70].

Arbitrary in nature were the remarks made by the Zurich District Court in the above–mentioned case of a self–proclaimed street preacher accused of inciting hatred against homosexuals by publicly criticizing homosexuality from a biblical perspective. The court accused the defendant of embedding the Scripture quotes used in his own literalist and fundamentalist interpretation, in a situation where "these views are definitely outdated in Central Europe in 2022." He suggested to him the need to revise and change his religiously dictated approach to homosexuality, analogous to his departure from the Old Testament prohibition of interest on loans. He also reproached the preacher for hypocrisy, or at the very least inconsistent behaviour, since he holds a mortgage in violation of the letter of the Scripture, while at the same time, citing the same Bible, radically condemns homosexuality.

The moralizing rhetoric of the Zurich District Court is unacceptable for several reasons. Firstly, the court in self-proclaimed manner limits the scope of legally protected religious freedom, excluding religious content that is not accepted by the social majority. An astonishing reasoning is that the permissibility of expressing religious views does not apply to those arbitrarily deemed "outdated". Secondly, the court ignores the fact that strictly religious matters are not within the court's jurisdiction. The role of the courts in a secular state is not to review religious doctrine, make authoritative exegesis of holy books, or decide which interpretation of the Holy Scripture is the right one and which is the result of an allegedly erroneous, because of "literal and fundamentalist" reading of the Bible. Thirdly, the court exceeded its competences by assessing the orthodoxy of the accused and calling on him to abandon some of his religious views[71].

[70] G. Maroń, Sędziowie jako „arbitrzy moralni" i „moraliści" na przykładzie wybranych orzeczeń sądów karnych, Prokuratura i Prawo 2020, No. 10–11, p. 7–8.

[71] G. Maroń, Jurysdykcja sądów w „sprawach religijnych" w ujęciu komparatystycznym, (in:) P. Sobczyk (ed.), (Nie)odpowiedzialność cywilnoprawna kościelnych osób prawnych za czyny niedozwolone popełnione przez osoby duchowne, Warszawa 2022, p. 113–144.

11. Ideologically motivated bias and partiality in the application of the law

The most glaring example of judicial arbitrariness in cases involving hate speech is the biased application of the law according to the key of "political correctness." The adjudicatory process then ceases to be an impartial enforcement of the law against everyone with respect to the principle of equality, becoming a tool in the service of social engineering. There is no shortage of examples where courts in various countries, for political reasons, have not treated as unlawful hate speech those acts of expression that are even textbook examples of it.

In 2022, a court in Johannesburg, South Africa, ruled that the repeated singing at political rallies by the leftist group Economic Freedom Fighters of a song with the words "Kill the Boer/kill the farmer" did not constitute legally prohibited hate speech[72]. The case did not involve words "merely" expressing contempt or praising physical violence against others – which would have to be considered unlawful anyway – but directly calling for the murder of Boers, or representatives of South Africa's white community. The group attacked was one that was distinguished on the basis of race, and at the same time a demographically minority group. In addition, the incriminated words "Kill the Boer/ kill the farmer" cannot be interpreted in isolation from the socio-cultural context, part of which are the not-so-individual killings of white farmers in South Africa, where the perpetrators' dominant robbery motive is not infrequently accompanied by a racist motive as well[73].

Cases of selective and biased application of the law prohibiting hate speech also involve the judiciary of countries with mature democracies considered to be the model of a demo-liberal country. The Australian case of McLeod v. Power can be cited as an exemplification. The vulgar taunting[74] of a prison guard by an aboriginal woman with several references to his skin color was not considered racial vilification[75]. In the peculiar reasoning of the court, the term "white" used by the defendant did

[72] Afriforum v. Economic Freedom Fighters and Others (EQ 04/2020) [2022] ZAEQC 2; 2022 (6) SA 357 (GJ).

[73] Country Report: South Africa https://www.genocidewatch.com/_files/ugd/c67f7d_b8bcca0fdaee42079432de28103d54dc.pdf.

[74] The Racial Discrimination Act 1975.

[75] The following words were addressed to the prison guard and white people in general: “you white piece of shit”, “you fucking white piece of shit” and “fuck you whites, you're all fucking shit”.

not refer to a racial group and had no connection with the race of the prison guard. In the court's conviction – which defies common sense – a reasonable light–skinned prison guard hearing vulgarities containing the phrases "white" or "whites" at his address would not perceive them for precisely this reason as offending, insulting, humiliating or intimidating to him. According to the court, the above-quoted phrases are not racist because "white or pale skinned people form the majority of the population in Australia"[76]. The court completely arbitrarily ruled that racist speech can only refer to a demographically minority group.

12. Summary

In the scientific discussion of the legal prohibition of hate speech, especially its criminalization, it is impossible to abstract from the practice of jurisprudence. On the basis of the assumptions of the school of legal realism, it is jurisprudence *nolens volens* that ultimately determines the form of the law (the so-called “law in action”). When debating one or another form of legislation criminalizing hate speech, one should keep in mind the judicial operationalization of existing regulations in this regard. For the reasons indicated above, the application of the law prohibiting hate speech is associated with a considerable amount of discretion. This is, on its own, nothing atypical for the legal order. In the current law, including criminal law, a number of issues are regulated with the help of vague and evaluative terms marked axiologically, while balancing the legal goods and values in conflict, such as the criminalization of insulting religious feelings. Courts sometimes make improper use of their decision-making discretion, performing *in concreto* erroneous acts of evaluation, valuation and interpretation. This applies to many different categories of cases. Mistaken findings, faulty reasoning, and misguided argumentation testify to the human imperfect nature of the administration of justice.

Although such situations are always painful for litigants wronged by judicial error, they do not, in principle, radically and completely undermine the legitimacy of the judiciary and public confidence in it. A much bigger problem is judicial arbitrariness, representing a glaring distortion of

[76] McLeod v. Power [2003] FMCA 2. See also similar case Gibbs v. Wanganeen [2001] FMCA 14, in which it was found that an aboriginal prisoner had not racially vilified a white prison guard by the words: "fucking white cunt", "white trash".

the standards of the judicial process and the role of the judiciary in the rule of law.

An exemplary case study from the jurisprudence of various countries shows that in cases of unlawful hate speech, judicial discretion sometimes unfortunately gives way to arbitrariness, which takes various forms, such as, in particular: selective and biased application of the law according to the ideological key; self-proclaimed expansion of the statutory catalogue of groups of people protected from hate speech; disregard or depreciation by the court in its considerations of the argument formulated by the accused on the basis of freedom of speech or freedom of religion; a priori assumption that the expression of hateful content is the same as stirring up or incitement to hatred; ignoring the question of the relationship of the discriminated behaviour of the accused with the violation or threat to the protected legal good.

All such cases being abuses of judicial power do not undermine the desirability of legal prohibitions, including through criminal means, of hate speech. Instead, they are an empirically grounded argument for the need to pay closer attention – both on the part of the legal community and society in general – to how courts apply the law targeting hate speech. The idea is that, on the one hand, the normative category of hate speech ban should not become an instrument of judicial silencing of those spreading views opposed to mainstream ideological orthodoxy[77] (e.g., those giving expression to religious conviction about the immorality and sinfulness of homosexual acts), and, on the other hand, that legal responsibility in the name of political correctness should not be avoided by those who actually incite hatred against other people (e.g., against white people or Christians[78]). The legal prohibition of hate speech is supposed, with the help of the courts, to uphold public order and the dignity and safety of human beings, and not to be a tool of censorship in the service of social engineering.

[77] Similarly: A. Dziadzio, Wolność słowa a mowa nienawiści – dawniej i dziś, Forum Prawnicze 2015, No. 4, p. 15.

[78] Raport przedstawiający przypadki naruszania prawa do wolności religijnej w Polsce w 2020 roku, https://laboratoriumwolnosci.pl/wp–content/uploads/2021/08/LWR–Raport– 2020.pdf.

Bibliography

1. Bojanowski T., Wybrane prawnokarne aspekty mowy nienawiści w kontekście standardów ochrony wolności słowa, Prawo w Działaniu 2021, No. 47.
2. Brincat E., Court clears priest of hate speech charges, https://timesofmalta.com/articles/view/court–clears–priest–hate–speech–charges.983888.
3. Dąbrowski S., Łazarska A., Nadużycie władzy sędziowskiej, Polski Proces Cywilny 2012, No. 1.
4. Dziadzio A., Wolność słowa a mowa nienawiści – dawniej i dziś, Forum Prawnicze 2015, No. 4.
5. Edge P., Oppositional Religious Speech: Understanding Hate Preaching, Ecclesiastical Law Journal 2018, Vol. 20.
6. Fr David Muscat not guilty of homophobic comments, https://tvmnews.mt/en/news/fr–david–muscat–not–guilty–of–homophobic–comments/.
7. Kaczmarek T., Rozdział I. Kara kryminalna i jej racjonalizacja, (w:) tenże (red.), Nauka o karze. Sądowy wymiar kary. System Prawa Karnego, Vol. 5, Warszawa 2017.
8. Kardas P., Kardas A., Zasada równości w prawie karnym (zarys problematyki), Czasopismo Prawa Karnego i Nauk Penalnych 2019, issue 1.
9. Machaj Ł., Wypowiedzi symboliczne w orzecznictwie Sądu Najwyższego USA, Wrocław 2011.
10. Mańko R., W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja, Łódź 2018.
11. Maroń G., Jurysdykcja sądów w „sprawach religijnych" w ujęciu komparatystycznym, (in:) P. Sobczyk (ed.), (Nie)odpowiedzialność cywilnoprawna kościelnych osób prawnych za czyny niedozwolone popełnione przez osoby duchowne, Warszawa 2022.
12. Maroń G., Sędziowie jako „arbitrzy moralni" i „moraliści" na przykładzie wybranych orzeczeń sądów karnych, Prokuratura i Prawo 2020, No. 10–11.

13. Maroń G., Mowa „antymuzułmańska" i „antyimigrancka" w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka w Strasburgu, Przegląd Prawa Publicznego 2016, No. 1.

14. Maroń G., Krytyka homoseksualizmu (homoseksualistów) w świetle orzecznictwa sądów kanadyjskich, Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza 2015, No. 17.

15. Mysłowski P., Prawo sędziowskie a pewność sytuacji prawnej jednostki – spojrzenie krytyczne, (in:) A. Błaś (ed.), Pewność sytuacji prawnej jednostki w prawie administracyjnym, Warszawa 2012.

16. Nor V., Dzyndra M., The Concept of Judicial Discretion in Criminal Proceedings, Wrocławsko-Lwowskie Zeszyty Prawnicze 2015, No. 6.

17. Puppinck G., Cenzura wypowiedzi dotyczących islamu w Europejskim Trybunale Praw Człowieka: uderzający przypadek sprawy E.S. przeciwko Austrii, Chrześcijaństwo–Świat–Polityka 2020.

18. Rychlewska A., Zasada *nullum crimen sine lege* w systemie państwa prawa. Analiza porównawcza na tle europejskiego systemu ochrony praw człowieka, Kraków 2018 (PhD disseration).

19. Safjan M., Niezależność Trybunału Konstytucyjnego i suwerenność konstytucyjna RP, Państwo i Prawo 2006, No. 6.

20. Schumacher J., Straßenprediger in Zürich wegen Hassrede verurteilt, https://www.pro–medienmagazin.de/strassenprediger–in–zuerich–wegen–hassrede–verurteilt/

21. Sottiaux S., Conflicting Conceptions of Hate Speech in the ECtHR's Case Law, German Law Journal 2022, Vol. 23.

22. Tuleja P., Dlaczego sędzia nie może być ustami ustawy? Prawa człowieka a ustrojowa pozycja sądu, (in:) J. Ciapała, R. Piszko, A. Pyrzyńska (eds.), Dylematy wokół prawa do sądu, Warszawa 2023.

23. Wąsek A., Prawo karne – minimum moralności?, Annales UMCS. Sectio G Ius 1984, Vol. 31, No. 3.

24. Woiński M., Prawnokarne aspekty zwalczania mowy nienawiści, Warszawa 2014.

25. Wojciechowski B., Dyskrecjonalność sędziowska. Studium teoretycznoprawne, Toruń 2004.

26. Zajadło J., Banał formuły dura lex sed lex, Palestra 2019, No. 5.

27. Zajadło J., Sędziowskie nieposłuszeństwo, Państwo i Prawo 2016, No. 1.

28. Zych T., W poszukiwaniu pewności prawa. Precedens a przewidywalność orzeczeń sądowych w tradycji prawa anglosaskiego, Toruń 2017.

Prawny zakaz mowy nienawiści w praktyce orzeczniczej – pomiędzy sędziowską dyskrecjonalnością a arbitralizmem

Streszczenie

W oparciu o komparatystyczne studium orzecznictwa w sprawach o mowę nienawiści, zwłaszcza sprawach karnych, poczyniono rozważania nad sędziowską dyskrecjonalnością i arbitralizmem. Autor twierdzi, że dyskrecjonalność – w rozumieniu pewnej mieszczącej się w granicach prawa swobody po stronie sądu w czynieniu ustaleń i podejmowaniu rozstrzygnięć – jest nieunikniona i potrzebna. Niejednokrotnie jednak sądy sprawując wymiar sprawiedliwości uciekają się do działań arbitralnych, co w sprawach dotyczących hate speech *przybiera formy, takie jak zwłaszcza: wybiórcze i tendencyjne stosowanie prawa według klucza ideologicznego; samozwańcze poszerzanie ustawowego katalogu chronionych przed mową nienawiści grup osób; nieuwzględnianie czy deprecjonowanie przez sąd w swoich rozważaniach formułowanego przez oskarżonego argumentu z wolności słowa bądź wolności wyznania; aprioryczne zakładanie, że ekspresja treści nienawistnych jest tym samym co podżeganie czy nawoływanie do nienawiści; pomijanie kwestii związku inkryminowanego zachowania oskarżonego z naruszeniem bądź zagrożeniem dla chronionego dobra prawnego, w szczególności porządku publicznego. Sędziowski arbitralizm stanowi jaskrawe wypaczenie standardów procesu orzeczniczego i roli judykatywy w państwie prawa.*

Słowa kluczowe

Sędziowska dyskrecjonalność, sędziowski arbitralizm, mowa nienawiści, orzecznictwo.

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The welfare of the child in the mediation process

Abstract

The welfare of the child is a fundamental criterion for any regulation on children's rights. It is an instrument for interpreting any norms contained in national and international legislation. It is also a directive in the creation of laws and their implementation, and is a criterion of evaluation in making decisions concerning children and in resolving conflicts of interest between children and other persons, particularly parents. The article explores the use of mediation as a means of renegotiating family relationships and promoting the welfare of the child. The authors analyse the potential benefits of mediation in resolving family conflicts, taking into account the implementation of the postulate of child welfare.

Keywords

Child welfare, mediation, child-centred mediation, mediator, family relationships.

1. Introduction

The essence of conflict is a clash between opposing needs, views, aspirations and expectations. Conflicts can both generate goodness and destroy it. Sensibly resolved conflicts – as Maria Ryś[4] notes – can

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[4] M. Ryś, Jakość związku małżeńskiego a poziom bliskości małżonków i sposoby rozwiązywania przez nich konfliktów, Studia Psychologica 2004, 5, p. 58.

contribute to the development of human self-knowledge and autonomy, as well as provide the foundation for new principles of cooperation. Violent conflicts that are resolved without taking into account the rationale and subjectivity of the parties can be disintegrating and pose a threat to the survival of specific social groups, communities, and even humanity as a whole. Violent conflicts evoke deep fear, cause suffering and trigger instinctive biological 'fight or flight' responses. While animals do not seem to know otherwise and surrender to this instinct, humans have developed more sophisticated ways of dealing with conflict, including negotiation and mediation. Nevertheless, there are certainly a whole host of people whose repertoire for dealing with conflict is limited to 'give up or fight'. If any benefits arise from these reactions, they will be one-sided. More often than not, they are destructive to all parties in the relationship. The energy that arises in conflict can be used integratively, but this requires procedures that go beyond biological instincts and that include respect for the other person's dignity and worth, responsibility for one's own actions and those of one's interaction partners, and finally, the competence to express one's own needs, concerns and emotions constructively and honestly.

Mediation seem to be a relatively new form of conflict management but in fact it has a long tradition in different civilisations and cultures. For example, in ancient China, Confucius urged people to use mediation instead of going to court. He warned that litigation could lead to parties becoming bitter and unable to work together, so he recommended that people should instead choose to meet with a neutral mediator to help them reach an agreement[5]. What is new, however, is the institutionalisation of mediation and the extent of its use and compatibility with the legal system. Since the late 1970s, and in Poland since the late 1990s[6], mediation has become an institutionalised, officially approved and expanding mode of decision-making in many areas of social life. Mediation is now also an approved pathway in the landscape of family dispute resolution processes[7]. Mediation is a pathway

[5] K. Jaspers, Autorytety: Sokrates, Budda, Konfucjusz, Jezus, Warszawa 2000, Wydawnictwo KR, p. 36.

[6] Mediation was introduced into Polish law in 1997 in the Criminal Code and the Code of Criminal Procedure. It was initially regulated in relation to adult offenders and in relation to juveniles by decrees of the Minister of Justice in 1998 and 2001.

[7] Mediation in family courts has been possible in the Polish legal system since 2005, when an amendment to the Code of Civil Procedure enabled courts to refer cases to mediation. However, it was not until the 2015 amendment that the number of

with the recognised potential to benefit a wider section of society, with less acrimony than traditional court processes, and with fuller consideration of the interests of the parties, including children. There are many arguments in favour of choosing mediation over litigation in situations of conflict between family members. We will mention two that are central to the issue addressed in the article. Mediation protects the interests of individual family members by allowing them to make their own decisions. After all, parents have the right – and responsibility – to make decisions for their children. Empowering parents, and their responsibility for the upbringing and well-being of their children, are a key aspect of mediation[8]. Mediation also protects the interests of minors, who – considering their legal situation – do not have the instruments to assert their rights, and their situation depends on parents exercising custody and parental authority[9]. In mediation, on the other hand, children's voices can be heard and their interest and well-being is protected through the person of the mediator, even in situations in which the parents threaten the welfare of the child. Furthermore, family law indicates the desirable and foreseeable space for the behaviour of individual family members and the consideration of the child's welfare as a priority, but without the possibility of sanctions for breaches of parental duties it has little real influence on the attitudes of parents towards children in conflict situations. The institution of mediation, through the person of the mediator, makes it possible to focus on the children in the conflict management process and to sensitise parents to care for the welfare and situation of the children.

We will start our analysis of the situation of the child in the mediation process when a renegotiation of the family relationship is necessary by pointing out the essential defining elements of family mediation.

2. Mediation

Mediation is a way of conflict management and dispute resolution in which the position of balancing the opposing perspectives of the participants is taken by the mediator, whose task is to direct the positions of the

cases referred by common courts to mediation increased significantly (Ministry of Justice, 2022).

[8] R. Emery, Renegotiating Family Relationships Divorce, Child Custody, and Mediation, New York 2012, The Guilford Press, p. 149.

[9] J. Haberko, Sytuacja prawna dziecka jako pacjenta, Dziecko Krzywdzone. Teoria, badania, praktyka 2020, 1(19), p. 13.

participants in order to create acceptable solutions. The Polish Mediation Centre[10] defines mediation as a form of restorative justice that focuses on repairing and rebuilding relationships between parties with the support of a mediator acceptable to the parties, guided by the principles of impartiality, neutrality and confidentiality.

The word 'mediation' comes from the Latin '*medius*', meaning 'agent' but also 'mediator'. The etymology of 'mediation' gives expression to the importance of the role played by the mediator in the process of repairing and rebuilding relationships. The affirmation of a 'person-centred perspective' that characterises mediation and distinguishes it from the 'act orientation' of litigation[11] challenges traditional attitudes and values in the context of dispute resolution. At the core of mediation as a practical intervention are respect for the participants in the process, respect for the power of the parties and their ability to make their own decisions, and respect for their views and values. Norms of fairness, mutual respect and equality form the basis of mediation practice. This is also because conflict and the strong emotions that accompany it often bring out the 'worst' qualities in people, who, for example in the context of family breakdown, become victims of their strong feelings, which they are unable to channel constructively due to finding themselves in a crisis situation. However, due to their circumstances and personal vulnerability to injury, the parties to the dispute cannot be considered incapable of making their own decisions. Mediation, by offering a calm, safe forum for a reasonable exchange of ideas, provides the conditions to have the conversation that the parties were unable to have on their own, but also allows them to regain control of their own affairs[12]. The placement of decision-making power with the parties in mediation distinguishes it both from other forms of dispute resolution (such as negotiation and court adjudication) and from other forms of intervention (such as therapy, counselling or social work). The affirmation of the decision-making power of the parties derives from the tradition of humanist ideas of equality and freedom, which accords respect to the inherent dignity and autonomy of the individual[13].

[10] Mediacje rodzinne. Skrypt szkoleniowy (n.d.), Warszawa, Polskie Centrum Mediacji.
[11] L. L. Fuller, Mediation – its forms and functions, Southern California Law Review 1971, 44, p. 305.
[12] M. Roberts, Mediation in Family Disputes. Principles of Practice, New York 2016, Routledge, p. 19.
[13] J. Michalski, Sens życia a pedagogika. Impulsy myśli Viktora E. Frankla, Toruń 2011, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, p. 16.

As family mediation has developed, as well as its use across borders when divorcing parties reside in different countries, it has become necessary to agree on a universal definition. Accordingly, the Council of the European Union issued a directive on mediation, with the objective of, inter alia, to 'facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings' (Directive, 2008, Article 1(1)). The Directive defines mediation as: "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State" (Directive, 2008, Article 3(a)).

In turn, the mediator is defined as: "any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation" (Directive, 2008, Article 3(b)).

Family mediation in Polish conditions has emerged from an innovative, empirical basis as an autonomous professional practice, independent of other professional interventions in the field of separation and divorce, such as therapy, counselling, social assistance and legal aid. Areas of family mediation practice go beyond divorce and separation cases and include child protection in a broad sense, homeless youth, and other types of family disputes. Mediation is voluntary in Poland and although the parties are not compelled to accept it, many do. In 2012, the number of cases in which the parties were referred to mediation on the basis of a court order, connected to divorce and separation, was 1634; in 2021, there were already 3221 such cases. Thus, the number of cases referred to mediation in this category of civil cases has almost doubled in nine years[14]. Family mediation is also available prior to court proceedings. One limitation on the use of family mediation is the low public awareness of the needs of children in situations of divorce and other family disputes. Many parents – the situation applies mainly to those filing for divorce, most of whom are

[14] Postępowanie mediacyjne w świetle danych statystycznych. Sądy okręgowe i rejonowe w latach 2006–2021, Warszawa 2022, Ministerstwo Sprawiedliwości. https://isws.ms.gov.pl/pl/baza-statystyczna/publikacje/.

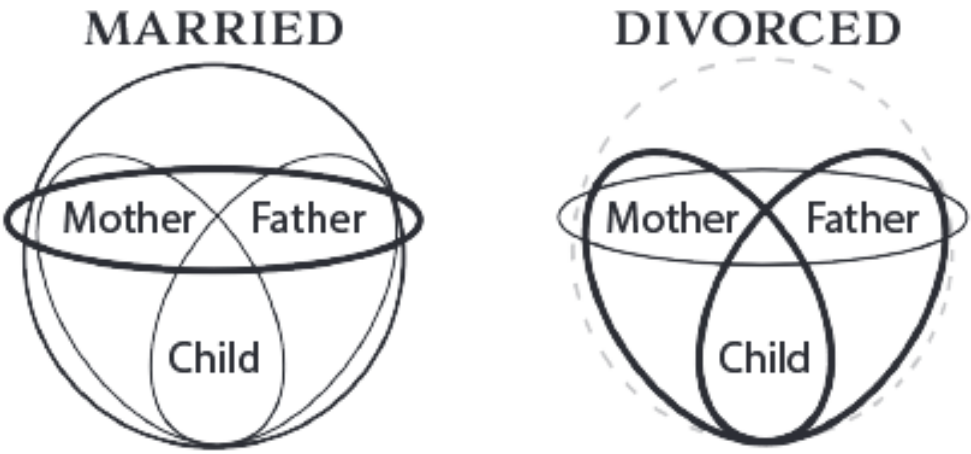
women[15] – are not interested in mediation because they expect to get a better result in court, e.g. in the form of a sole custody ruling. Another important factor limiting the use of mediation is the cost, which, although incomparably lower than the court costs associated with a full court proceeding, are fully covered by the parties themselves usually in equal shares, unless the parties agree on a different method of settlement.

3. Child-oriented mediation

Parents should renegotiate their relationship during divorce and separation. Many feuding partners probably find this observation more than a little ironic, as at least one of them is trying to end the relationship definitively. However, partners who are also parents can never fully divorce. When there are children in the family, former spouses inevitably have to maintain the relationship in some intermediate form. Going forward, parents need to establish pragmatic issues: how to share custody of the children, how to share basic information about the children, and how to deal with parenting – together, independently or in opposition to each other. One of the reasons why parents should renegotiate their relationship in a divorce is that parents and children form the apex of a lasting family relationship, even when the parents themselves are no longer in a relationship. In short, a divorced or separated family is still a family, a family defined by a shared relationship rather than a shared residence. Therefore, the successful renegotiation of the parent-child-parent relationship is key to ensuring the proper care of children. A symbolic representation of the boundaries in married and divorced families is shown in Figure 1. The space around the parents' marital relationship is strongest in a married couple, while the space of the parent-child relationship becomes more important with a divorced or separated family. Nevertheless, the parental alliance is preserved in both types of families.

[15] Rocznik Demograficzny (Demographic Yearbook of Poland), Warszawa 2022, GUS (Statistics Poland).

Figure 1: Family relationships in a married and divorced family



Source: Emercy, 2012.

The focus on children in family mediation brings the children's needs to the fore – recognising them and working out how to meet them constructively. The question that arises in such a situation is whether parents in a situation of stress, severe agitation and poor communication between each other, especially in the immediate aftermath of separation, are able to recognise and look after the best interests of their children. Many researchers point to the 'diminished parenting capacity' of individuals in a perinatal divorce situation[16], which may explain the discrepancy in perceiving the best interests of their own children. Family mediators support parents in this regard, in particular by:

– the closure of marital emotions and the opening of parental emotions,
– emphasising the motives and objectives of mediation related to children, and moving away from the blame and accusation characteristic of considering marital issues,
– highlighting positives and common positions,
– support in discussing the issues of each child separately,
– encouraging parents to mutually accept their ongoing role in their children's lives,

[16] J. Wallerstein, J. B. Kelly, Surviving the breakup: how children and parents cope with divorce, New York 1996, Basic Books; R. Emery, *op. cit*., p. 159.

– helping to develop solutions that free children from conflicting loyalties to their parent(s),
– helping to work out a parenting plan and the amount of child maintenance, also involvement in financial (non-alimony) support for children,
– discussing with parents what their children may be experiencing and their position on their position in a family conflict,

Considering with parents whether children should be directly involved in mediation, so that their views and feelings can be taken into account, but without putting them in charge of decisions[17].

The most obvious issue to be determined in family mediation is the extent to which day-to-day parenting responsibilities will be shared between the parents or performed mainly by one parent, with support from the other parent or other family members. The commitment to continue shared parenting forms the basis of post-separation arrangements and follows directly from the Family and Guardianship Code (1964). Many parents make these arrangements without the involvement of third parties. Others may need mediation to work out detailed decisions regarding such issues as:

– health care (including during the child's illness),
– education – e.g. school choice,
– religious education,
– participation in extra-curricular activities,
– communication - passing on information about children,
– children's contact with other family members,
– educational aspects, such as rules and boundaries, daily rhythms, etc,
– responsibility for the safety and development of the child,
– how to deal with crisis situations – contacting the other parent.

The legal task of negotiating a parenting plan[18] is inextricably linked to the psychological task of renegotiating family relationships. Many parents find it difficult to resolve child custody disputes not so much because they disagree on child settlements, but because of their own problems. Many conflicts over children in everyday parenting, mediation or legal negotiations are exemplifications of parents' past conflicts and their ongoing emotional struggles, and are also an attempt to 'get back' at a former partner for a broken relationship. On the other hand, a parenting plan is

[17] L. Parkinson, Family Mediation. Appropriate Dispute Resolution in a new family justice system, Bristol 2011, Jordan Publishing Limited, pp. 184–187.
[18] Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy; tekst jedn. Dz. U. z 2020 r., poz. 1359, z 2022 r., poz. 2140 (Family and Guardianship Code).

not only a legal settlement, but also an important step towards redefining the family relationship.

Family mediation creates a space to listen to the voice of children. The participation of children in mediation is a controversial issue because it requires consideration of the position of the child in mediation, what weight should be given to the child's voice in mediation; at what age and in what circumstances a child can be interviewed; who should decide whether a child can participate in mediation; how professionals (particularly mediators) should be prepared for the task of listening to children; how to address issues of confidentiality, consent and safety; what it means for a child to participate in mediation – whether children's views are taken seriously or through an adult lens; what is in their best interests. These and similar questions create a space to discuss the validity and extent of children's participation in family mediation. There is also a widespread view that mediation may offer the best space for the child's voice to be heard[19]. This is also linked to legal norms, e.g. the UN Convention on the Rights of the Child (1989), which Poland ratified in 2005, details a number of children's rights that indicate the need for and importance of the child's voice in mediation and a certain presumption that greater awareness of children's views and feelings and greater attention to them constitutes recognition of their value and importance, thus influencing the implementation of the principle of caring for their welfare, also during separation and divorce. The Convention (1989)[20] specifically states the following rights for children:

– freedom of thought, conscience and religion, and expression of opinion, including in administrative and judicial proceedings,
– the protection of private, family and domestic life, the confidentiality of correspondence, the right to be brought up in a family and to have contact with parents in the event of separation from them,
– the right meet parents, if possible,
– the right to age- and developmentally-appropriate treatment within the framework of criminal proceedings,
– the right to an adequate standard of living, care in institutions and establishments, social protection, health care, and social and health rehabilitation.

[19] B. Simpson, Giving children a voice in divorce: The role of family conciliation, Children and Society 1989, 3, p. 274.

[20] Konwencja o prawach dziecka, przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r.; Dz. U. z 1991 r., Nr 120, poz. 526.

The provisions of the Convention (1989) point to the legitimacy of children's participation in mediation and the inclusion of their voice in family matters of vital interest. Although the question of direct participation of children in the mediation process is still troublesome, good practices have already been developed in the aforementioned area. It is worth mentioning in this context the 'child inclusive' model piloted in Australia, which is a practice that includes children in mediation by supporting both the parental role and the needs of children throughout the mediation process[21]. This pilot scheme has helped to highlight important implications of including children in mediation. In particular, it has identified the importance of: encouraging parents in mediation to talk to and listen to their children; placing an emphasis on understanding and incorporating children's perspectives so that decisions made by parents are supported by children's views; and making parents the decision makers[22].

The focus of family mediation on the child and his or her issues leads to an acceptance that the separation of the roles of spouses and parents involves a recognition that the bond of kinship between the parties as parents, created by the very existence of their children, can never be separated. While the relationship of kinship does not change, the way in which it is exercised does. This requires working out arrangements for the children, both through negotiation between the parties and through their cooperation, but always with the basic premise of all such arrangements, which should be the welfare of the child.

4. The welfare of the child

The welfare of the child is the central concept of all legislation concerning children's rights. It is an instrument for the interpretation of legal norms, a directive in the case of the creation and application of laws, a criterion of evaluation in all decisions on children's matters and in the resolution of clashes between the interests of the child and oth-

[21] J. McIntosh, Child inclusive mediation: Report on a qualitative research study, Mediation Quarterly 2000, 18(1), pp. 55–69.

[22] M. Mackay, Through a Child's Eyes. Child Inclusive Practice in Family Relationship Services. A Report from the Child Inclusive Practice Forums, held in Melbourne, Brisbane, Newcastle, Adelaide and Sydney, Canberra 2001, Department of Family and Community Services and the Attorney-General's Department.

er persons[23]. Since there is no agreed definition of what child welfare is, the main value of the child welfare principle lies in the moral and social ideal it represents, namely that children must be protected from harm and have every opportunity to develop, maintain their well-being and become happy adults. Wanda Stojanowska, after analysing legal, sociological and psychological definitions of child well-being, put forward the position that child welfare means "a complex of values of a material and immaterial nature, necessary to ensure the proper physical and spiritual development of the child and the proper preparation of the child for work (independence in life) in accordance with his or her talents, these values being determined by a wide variety of factors, the structure of which depends on the content of the applicable legal norm and the specific, currently existing situation of the child, assuming the convergence of the 'good of the child' so understood with the social interest"[24].

When considering the welfare of children from the perspective of their functioning within the family, it should be emphasised that it is a common concern for all parents, including separated or divorced parents. Parental authority should be exercised in such a way as to satisfy the best interests of the child while also considering the interests of society, including those of the parents. In mediation, the well-being of the child and the well-being of each parent are closely intertwined and form the central theme of the entire mediation. However, as Maria Łopatkowa has pointed out, the good of the child is such a capacious term that almost any harm can also fit within it[25]. Therefore, the professional duty of family mediators is properly focused on concern for the welfare of the child and its protection, even when this concern involves undermining parental competence in this respect. The parties to mediation – and their children – are not seen as helpless objects of influence, 'clients' or 'patients', but are self-determining subjects with full rights, including full responsibilities.

The view expressed above that the stress and strong emotions associated with a divorce can result in a 'diminished capacity to be a parent' obliges the mediator to be sensitive to the welfare of the child in the pro-

[23] W. Stojanowska, Dobro dziecka w aspekcie sprawowanej nad nim władzy rodzicielskiej, Studia nad Rodziną 2000, 4/1 (6), p. 56.

[24] W. Stojanowska, Rozwód a dobro dziecka, Warszawa 1979, Wydawnictwo Prawnicze, p. 27.

[25] M. Łopatkowa, Dziecko a polityka czyli walka o miłość, Warszawa 2001, Wydawnictwo APS, p. 119.

cess of supporting the family in resolving the dispute. However, it does not disqualify parents from having the competence to look after the interests of the children and the interests of the family, nor is it a reason to remove the responsibility for decision-making from the parents. The aims of mediation would be distorted if this intervention were used as a means of extending supervision of separating or divorcing couples and their families under the guise of protecting children. Furthermore, there is no evidence that parents, no matter how angry and argumentative, are less committed to the welfare of their children than the mediator, and that without the mediator's intervention they would act with disregard for their children's interests and needs.

Parents – as a rule – know their children better than anyone else and can be the real experts on the best solutions for children and looking after their welfare[26]. Parents' rights to determine their own decisions regarding their children should therefore be considered as a principle in line with a child welfare perspective. However, the mediator has an ethical and practical responsibility to ensure that the needs of the children – and all those who are not directly involved in the mediation but who are affected by the decisions made during the mediation process (e.g. grandparents) – are taken into account in the parents' exploration of different options for resolving contentious situations and their consequences. The mediator should therefore be sensitive to bringing out and communicating the child's perspective in the mediation process, while keeping the burden of decision-making on the parents[27].

The mediator's task is to focus the parties' conversation about the children's issues. This can be done through a statement such as: “The main reason for attempting mediation is the welfare of your children. We would like to know a little more about what your children are like before we talk about your agreements or disagreements with them”. This opening of the conversation allows the parents to step out of their role as spouses, taking away the narrative of grievance and complaint about the relationship, inviting a lively conversation about the children, their strengths, interests, educational plans, also the children's antics

[26] M. Ryś, Poczucie własnej wartości w relacjach interpersonalnych i odporność psychiczna u osób wzrastających w różnych systemach rodzinnych, Warszawa 2020, Wydawnictwo UKSW, s. 40.

[27] J. McIntosh, B. Smyth, M. Kelaher, Y. Wells, C. Long, Post-separation parenting arrangements: Patterns and developmental outcomes. Studies of two risk groups, Family Matters, Australian Institute of Family Studies Journal 2011, 86, pp. 40–48.

or funny parenting stories. Such a conversation allows the parents to focus on the well-being of the children, and creates a space for looking in retrospect at shared interests and successes in raising the children. A well-conducted mediation conversation (transformative function) will also help to turn the sense of being a failure who cannot look after the best interests of one's own children into a sense of educational success, of being a competent parent, and therefore allows parents to retain or regain agency in looking after the family and its legitimate interests. It is the parents' objective insecurity of agency in family matters that may itself have contributed to communication problems between adults and their children in the post-separation period, as well as to confusion and insecurity in the children.

Focusing on children's issues in the family mediation process also means encouraging parents to adopt a child's perspective. This can take the form of a question such as: “What is best for the child?”. The answer remains a matter of negotiation between the parents in terms of their differences in assessing the children's interests. The mediator can offer expertise and communication support in this situation. However, he or she remains impartial and non-directive: parents are encouraged to cooperate and considering the children's needs, making their own decisions and agreements. If the mediator allies himself with anyone, it is the children[28].

The mediators' concern for the welfare of the child and the child's right to express his or her own opinion and be heard does not mean that the mediator acts as the child's advocate or takes responsibility for ensuring the child's welfare. The mediator's role is to support the parents in addressing the situation, needs and feelings of each child, in working out arrangements that will work best for the whole family, without imposing a 'child welfare discourse' on the parents or ignoring the fact that the views of some children may differ from those of one or both parents.

5. Conclusions

The considerations outlined above warrant a few conclusions of a general nature. Firstly, the value of family mediation remains that it bases its arrangements on mutual trust and a family relationship that is also preserved in situations of divorce and separation. This has its

[28] D. T. Saposnek, Mediating child custody disputes, San Francisco 1983, Jossey-Bass, s. 42.

basis in the permanence of the family relationship and the commitment to the well-being of its individual members. Secondly, mediation pursues a certain model of behaviour that implements the postulates indicated above, without imposing specific ways of achieving the objectives set, such as the welfare of the child, in connection with the interests of the whole family and society. This allows the parents to realise the child's well-being according to their own life experience and views. Thirdly, the mediator's intervention in the dispute concerns only those situations in which the welfare of the child, or alternatively the welfare or interest of other family members not represented in the mediation, is clearly at stake. It should be stressed, however, that in this respect the premise for the application of interference does not necessarily have to be that the welfare of the child is at risk because of the proposed method of agreeing on situations that are important from the perspective of the child, but also a situation of disagreement between the parents that could jeopardise the welfare of the child (e.g. the absence of an agreement leaves the children without proper care and home).

Summarising the considerations covering the mediation process with regard to the implementation of the idea of child welfare, it should be pointed out that the management of family conflicts should take into account the interests of all actors involved, in particular the welfare of the child. Parents have responsibilities towards their children and not rights over them, hence it should be postulated that the voice of the children should be heard in the mediation process without entrusting them with the responsibility of making decisions. Moreover, parental responsibility does not end with divorce or separation – it continues. One of the most important pragmatic indicators of this is parental agreement on a position concerning the children regarding the extent and form of custody. At the same time, mediation services should not be expected to be a remedy for all family problems. In situations of divorce and separation, other support services for parents and their children, such as family counselling, therapy or legal advice, may be helpful and sometimes even necessary.

Bibliography

1. Emery R., Renegotiating Family Relationships Divorce, Child Custody, and Mediation, New York 2012, The Guilford Press.

2. Fuller, L. L., Mediation – its forms and functions, Southern California Law Review 1971, 44, pp. 305–339.
3. Haberko J., Sytuacja prawna dziecka jako pacjenta. Dziecko Krzywdzone. Teoria, badania, praktyka 2020, 1(19), pp. 11–27.
4. Https://isws.ms.gov.pl/pl/baza-statystyczna/publikacje/.
5. Jaspers K., Autorytety: Sokrates, Budda, Konfucjusz, Jezus, Warszawa 2000, Wydawnictwo KR.
6. Łopatkowa M., Dziecko a polityka czyli walka o miłość, Warszawa 2001, Wydawnictwo APS.
7. Mackay M., Through a Child's Eyes. Child Inclusive Practice in Family Relationship Services. A Report from the Child Inclusive Practice Forums, held in Melbourne, Brisbane, Newcastle, Adelaide and Sydney, Canberra 2001, Department of Family and Community Services and the Attorney-General's Department.
8. McIntosh J., Child inclusive mediation: Report on a qualitative research study. Mediation Quarterly 2000, 18(1), pp. 55–69.
9. McIntosh J., Smyth B., Kelaher M., Wells Y. i Long C., Post-separation parenting arrangements: Patterns and developmental outcomes. Studies of two risk groups. Family Matters, Australian Institute of Family Studies Journal 2011, 86, pp. 40–48.
10. Mediacje rodzinne. Skrypt szkoleniowy (n.d.), Warszawa, Polskie Centrum Mediacji.
11. Michalski J., Sens życia a pedagogika. Impulsy myśli Viktora E. Frankla, Toruń 2011, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika.
12. Parkinson L., Family Mediation. Appropriate Dispute Resolution in a new family justice system, Bristol 2011, Jordan Publishing Limited.
13. Postępowanie mediacyjne w świetle danych statystycznych. Sądy okręgowe i rejonowe w latach 2006–2021, Warszawa 2022, Ministerstwo Sprawiedliwości.
14. Roberts M., Mediation in Family Disputes. Principles of Practice. New York 2016, Routledge.
15. Rocznik Demograficzny (Demographic Yearbook of Poland), Warszawa 2022, GUS.

16. Ryś M., Jakość związku małżeńskiego a poziom bliskości małżonków i sposoby rozwiązywania przez nich konfliktów, Studia Psychologica 2004, 5, pp. 57–67.
17. Ryś M., Poczucie własnej wartości w relacjach interpersonalnych i odporność psychiczna u osób wzrastających w różnych systemach rodzinnych, Warszawa 2020, Wydawnictwo UKSW.
18. Saposnek D. T., Mediating child custody disputes, San Francisco 1983, Jossey-Bass.
19. Simpson B., Giving children a voice in divorce: The role of family conciliation, Children and Society 1989, 3:3, pp. 261–274.
20. Stojanowska W., Dobro dziecka w aspekcie sprawowanej nad nim władzy rodzicielskiej, Studia nad Rodziną 2000, 4/1 (6), pp. 55–65.
21. Stojanowska W., Rozwód a dobro dziecka, Warszawa 1979, Wydawnictwo Prawnicze.
22. Wallerstein J., Kelly J. B., Surviving the breakup: how children and parents cope with divorce, New York 1996, Basic Books.

Legal acts

1. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters; Official Journal of the European Union; L 136/3.
2. Konwencja o prawach dziecka, przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r.; Dz. U. z 1991 r., Nr 120, poz. 526.
3. Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy; tekst jedn. Dz. U. z 2020 r., poz. 1359, z 2022 r., poz. 2140.

Dobro dziecka w procesie mediacji

Streszczenie

Dobro dziecka stanowi podstawowe kryterium wszelkich regulacji dotyczących praw dziecka. Jest instrumentem interpretacji wszelkich norm zawartych w przepisach krajowych i międzynarodowych. Jest także dy-

rektywą w tworzeniu prawa i jego realizacji, kryterium oceny przy podejmowaniu decyzji dotyczących dziecka oraz rozstrzygania kolizji interesów dziecka i innych osób, w szczególności jego rodziców. Artykuł bada wykorzystanie mediacji jako środka renegocjacji relacji rodzinnych i promowania dobra dziecka. Autorzy analizują potencjalne korzyści płynące z mediacji w rozwiązywaniu konfliktów rodzinnych, z uwzględnieniem realizacji postulatu dobra dziecka.

Słowa kluczowe

Dobro dziecka, mediacja, mediacja skoncentrowana na dziecku, mediator, relacje rodzinne.

Anna Dziergawka[1]

The juvenile criminal responsibility

Abstract

The purpose of the study is to assess the current legal status and the provisions of the Act of July 7, 2022 on the juvenile criminal responsibility. The author discusses the evolution of the juvenile responsibility starting from the Criminal Code of 1932. The study concerns the juvenile criminal responsibility in terms of their age, subject scope, punishment and procedure. In addition, the article addresses the issue of juvenile responsibility under the Act on the Support and Social Rehabilitation of Juveniles of 9 June 2022, and indicates the need to adapt this Act to the changes to the Criminal Code.

Key words

Juvenile, the juvenile criminal responsibility, offense, punishment, normative changes.

1. Introduction

As an introduction, it is necessary to define the term "juvenile", which was included in the Act on the Support and Social Rehabilitation of Juveniles of June 9, 2022[2] and has a pejorative connotation. The content of art. 1 paragraph 2 point 1 in connection with art. 1 paragraph 1 Act on the Support and Social Rehabilitation of Juveniles shows that there is no uniform definition of juveniles. The concept of a juvenile covers three groups of people, and these groups are not separable and often overlap. They can be persons from the age of 10

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[2] Act of 9 June 2022 on the Support and Social Rehabilitation of Juveniles, (Journal of Laws 2022, item 1700).

to the age of majority in cases of demoralization and aged 13 to 17 in cases of criminal acts. A juvenile is also a person to whom an educational measure, a therapeutic measure or a corrective measure is applied, as a rule, not longer than until the age of 21.

It should be emphasized that the status of a juvenile acquired in connection with the commission of a criminal act before the age of 17 is remains in force , regardless of the time when the act was revealed[3]. Only the jurisdiction of the family court may be changed to the criminal court, which, however, will be able to adjudicate only educational, therapeutic or corrective measures currently provided for in the Act on Supporting and Social Rehabilitation of Juveniles in all cases of criminal acts committed as a juvenile.

Another issue is the definition of a child. In Polish criminal proceedings, as well as in the Criminal Code, there is no legal definition of the term "child" or "minor". Therefore, the definition contained in the Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989[4], is of great importance. It clarifies that a child is any human being under the age of 18, unless under the law applicable to the child, they comes of age earlier. Also the content of Art. 10 § 1 of the Civil Code[5] indicates that an adult is a person who has reached the age of eighteen. At the same time, Art. 10 § 2 of the Civil Code specifies that when entering into marriage, a minor reaches the age of majority and does not lose it in the event of annulment of the marriage. Additionally, Art. 10 § 1 of the Family and Guardianship Code[6] states that a person who has not turned eighteen may not enter into marriage. However, for important reasons, the guardianship court may allow a woman who has reached the age of sixteen to marry, and the circumstances indicate that the marriage will be in accordance with the good of the family.

Due to the content of Art. 10 § 2 of the Civil Code, in Art. 1 paragraph 1 point 1 Act on the Support and Social Rehabilitation of Juveniles, the definition of the upper age limit for juvenils was changed by adopting the formula: "and they are not of age of consent" instead of:

[3] Judgment of the Supreme Court of 1 June 2006, V KK 158/06, Lex No 146284.

[4] Convention on the Rights of the Child adopted by the United Nations General Assembly of November 20, 1989, Journal of Laws of 1991, No 120, item 526.

[5] The Civil Code Act of 23 April 1964 (consilidated text: Journal of Laws 2022, item 1360).

[6] The Family and Guardianship Code Act of 25 February 1964 (consilidated text: Journal of Laws 2020, item 1359).

"who have not turned 18". The purpose of the change in question is to exclude from the proceedings for demoralization those people who have age of consent in the light of the law, which applies to women who got married after the age of 16 and before the age of 18. At the same time, in Art. 1 paragraph 1 point 1 of the Act on the Support and Social Rehabilitation of Juveniles, as a new solution, a minimum age limit of 10 years was introduced[7]. Therefore, it is a statutory condition for conducting proceedings in cases of demoralization in relation to minors. In the previous legal status, the lower age limit was not set, which meant that proceedings for demoralization could be initiated against the youngest children.

Initially, the responsibility of juvenile was fully regulated in the Criminal Code of 1932[8] and in the Criminal Code of 1969[9]. The emergence of juvenile law as a separate branch of Polish law can be associated with the anactment of the Act of 26 October 1982 on juvenile proceedings[10], which entered into force on 13 May 1983. Up to that point, proceedings against juvenile offenders had been an integral part of criminal law and procedure. The possibility of educational and corrective intervention against a juvenile was limited to his commission of a prohibited act[11].

In the current legal status, both juveniles committing criminal acts and juveniles showing other signs of demoralization are treated in a uniform manner on the basis of the same legal act. The above did not change after the entry into force on 1 September 2022 the Act on Supporting and Social Rehabilitation of Juveniles of 9 June 2022. However, the Act in question extended the catalog of punishable acts to include all crimes or fiscal crimes and all offenses or fiscal offenses (Article 1(2)(2)(b) of Act on the Support and Social Rehabilitation of Juveniles). Therefore, it can be concluded that the Polish system of

[7] See J. Lorencka-Mierzwińska, Odpowiedzialność karna nieletnich w świetle ustawy o wspieraniu i resocjalizacji nieletnich, Komentarz praktyczny, LEX/el 2022, point 2.

[8] The Criminal Code Regulation of the President of the Republic of Poland of 11 July 1932 (Journal of Laws 1932, No 60, item 571).

[9] The Criminal Code Act of 19 April 1969 (consilidated text: Journal of Laws 1969, No 13, item 94).

[10] Journal of Laws 1982, No 35, item 228.

[11] T. Kaczmarek, Psychologiczne i ustawowe kryteria odróżniania nieletnich od dorosłych w polskim prawie karnym, NP 1990, No. 1–3, p. 16; M. Mączyńska, Nowelizacja ustawy o postepowaniu w sprawach nieletnich – zagadnienia wybrane, Palestra 2016, No. 5, p. 31.

dealing with juveniles is one-track systems and has an educational, not penal character[12].

On the other mand, the responsability of juveniles for committing a prohibited act in Polish law is regulated in two ways. It is included both in the Act on Supporting and Social Rehabilitation of Juveniles, where a crime is treated as demoralization, and in the Penal Code. It is the juvenile criminal responsibility that is the subject of the author's further considerations.

The purpose of the article is to assess the current legal status and the provisions of the Act of July 7, 2022 on the juvenile criminal responsibility. The author discusses the evolution of juvenile responsability, starting from the Criminal Code of 1932. The study concerns juvenile criminal liability in terms of their age, subject matter, punishment and procedure. The subject of the analysis will also be the *de lege ferenda* postulate related to the need to adapt the Act on the Support and Social Rehabilitation of Juveniles to the proposed changes in the Criminal Code.

2. The evolution of juvenile criminal responsibility

According to the Criminal Code of 1932, the principle of criminal responsability after the perpetrator turned 17 had no exceptions. According to Art. 69 of the Criminal Code of 1932, the following juveniles were not punishable:

– a juvenile who, before the age of 13, committed a prohibited act under the threat of punishment,
– a juvenile who, after the age of 13 and before the age of 17, committed such an act without discernment, i.e. has not reached such mental and moral development that he could recognize the meaning of the act and control his conduct. To these juveniles the court applied only educational measures namely: a warning, placing them under the supervision of their parents, current guardians or a special probation officer, or placing them in an educational institution. In the case of a juvenile who, after turning 13 and before turning 17, knowingly committed an act prohibited under penalty, the court could impose placement in a correctional facility (Article 70 of the Criminal Code of 1932). The juvenile remained in a correctional facility until the age of 21 (Article

[12] A. Walczak-Żochowska, Systemy postępowania z nieletnimi w państwach europejskich. Studium prawno-porównawcze, Warszawa 1988, pp. 41–48.

72 of the Criminal Code of 1932). The institution of a correctional facility was not regarded as a punishment under the Criminal Code of 1932, but it was considered as a mean of social re-education, giving the possibility of rational upbringing of morally neglected individuals, in order to improve them and prepare them for an honest life[13].

The Criminal Code of 1932 provided the possibility of adjudicating a juvenile who is over 13 years old but not yet 17 years old, subject to the penalty provided in the Act, with its extraordinary mitigation and without adjudicating additional penalties, if he has knowingly committed a prohibited act under the threat of punishment, and criminal proceedings were instituted after he turned 17, and placement in a correctional facility was no longer advisable (Article 76 of the Criminal Code of 1932). In accordance with the content of article 77 of the Criminal Code of 1932, if the person sentenced to be placed in a correctional facility turned 20 years old before the commencement of execution of the sentence, he was not placed in a correctional facility, but a penalty was imposed according to article 76 of the Criminal Code of 1932.

On 1 January 1970, the Criminal Code of 1969 entered into force. The Code adopted the rule that only people who committed a prohibited act after the age of 17 were liable under the rules set out in this act (Article 9 § 1 of the Criminal Code from 1969). However, an exception to this rule has been introduced, consisting in the possibility of applying criminal liability in certain cases in relation to juveniles who have reached the age of 16 at the time of committing the act (Article 9 § 2 of the Criminal Code of 1969). As Z. Sienkiewicz points out, in the opinion of project promoters, educational or corrective measures often turned out to be inadequate for juveniles who committed the most serious crimes and at the same time showed a serious degree of demoralization[14].

According to Art. 9 § 2 of the Criminal Code of 1969, a juvenile could be prosecuted if, after reaching the age of 16, he committed the following acts:

– crime against life,
– the crime of rape,
– crime of robbery,

[13] Por. E. Jurgielewicz-Delegacz, Ewolucja odpowiedzialności nieletnich na przestrzeni lat, Studia Prawnoustrojowe UWM 2019, No. 44, p. 174.

[14] Z. Sienkiewicz, (in:) Nauka o karze. Sądowy wymiar kar. System Prawa Karnego, tom 5, ed. T. Kaczmarek, Warszawa 2015, p. 372, cited after E. Jurgielewicz-Delegacz, Ewolucja odpowiedzialności nieletnich na przestrzeni lat…, *op. cit.*, p. 177.

– crime against public safety,
– deliberately causing grievous bodily injury or serious health disorder.

The legislator did not precisely specify each prohibited act, which could give rise to many difficulties in interpretation.

An additional condition for responsability under the rules set out in the Criminal Code of 1969 were the circumstances of the case as well as the characteristics and personal conditions of the perpetrator, which justify this, especially when the previously applied educational or corrective measures turned out to be ineffective.

It is worth pointing out that pursuant to Art. 57 § 1 of the Criminal Code of 1969, the court could apply extraordinary mitigation of punishment in relation to a juvenile responsible under Art. 9 § 2 of the Criminal Code of 1969, and in particularly justified cases also in relation to a juvenile delinquent. Pursuant to Art. 51 of the Criminal Code of 1969, when imposing a penalty on a juvenile delinquent, the court was primarily guided by the need to educate the convict, teach him a profession and introduce him to the observance of the legal order. Whereas, according to the content of Art. 120 § 4 of the Criminal Code of 1969, a juvenile delinquent was a offender who was under 21 at the time of sentencing.

In art. 9 § 3 of the Criminal Code of 1969 stipulated that in relation to a perpetrator who committed a crime after turning 17 and before turning 18, the court, instead of punishment, applied educational or corrective measures provided for juveniles, if justified by the circumstances of the case and the characteristics and perpetrator's personal conditions.

In the Criminal Code of 1997[15], which entered into force on 1 September 1998, the legislator regulating the issue of criminal responsibility, maintained the upper age limit of 17 years for juveniles. At the same time, pursuant to art. 10 § 2 of the Criminal Code, the exception was extended both in terms of age, which was set at 15, and in terms of the category of acts committed by juveniles. In turn, the Act of 7 July 2022[16] provides for an additional lowering of the age of a juvenile to 14, subject to the fulfillment of specific conditions, which will be addressed later in the discussion.

[15] The Criminal Code Act of 6 June 1997 (Journal of Laws 2020, item 1138).
[16] Journal of Law 2022, item 2600, which is expected to enter into force on 1 October 2023.

3. The age of criminal responsibility

According to Art. 10 § 1 of the Criminal Code, the principle of incurring criminal responsibility is the commission of a prohibited act by a person who has reached the age of 17. Being a juvenile is a circumstance excluding guilt. The age of the offender is determined using Art. 112 of the Civil Code[17], which states that a natural person ends a certain age at the beginning of the last day. In the case of committing part of the prohibited act after reaching the age of 17, the perpetrator may be criminally responsible only for those behaviors that he committed after reaching this age, which also applies to a continuous act[18], unless these are acts specified in Art. 10 § 2 of the Criminal Code[19]. Similarly, one prohibited act composed of several behaviors should be assessed, which may apply to burglary, where the perpetrator may only be responsible for ordinary theft, if the act of overcoming the obstacle took place before the age of 17[20]. The behavior of the offender that took place before the age of 17 may not affect his responsibility for the crime committed after the age of 17.

From criminal responsibility at the age of 17, the legislator introduced two derogations. The first concerns the possibility of bringing to criminal responsibility a perpetrator who, after reaching the age of 15, commits a prohibited act specified in Art. 134, art. 148 § 1, 2 or 3, art. 156 § 1 or 3, art. 163 § 1 or 3, art. 166, art. 173 § 1 or 3, art. 197 § 3 or 4, art. 223 § 2, art. 252 § 1 or 2 and in art. 280 of the Criminal Code. Such person may be responsible under the rules set out in the Criminal Code, if the circumstances of the case and the degree of development of the offender, his characteristics and personal conditions justify it, and in particular if the previously applied educational or corrective measures turned out to be ineffective (Article 10 § 2 of the Criminal Code).

The second derogation from this principle consists in the possibility for the court to apply to the offender who has reached the age of 17, but before the age of 18, instead of punishment – educational, therapeutic or corrective measures provided for juveniles, if the circumstances of the case and the degree of personal development of the

[17] The Civil Code Act of 23 April 1964. (Journal of Laws 2022, item 1360).
[18] Judgment of the Supreme Court of 17 June 2014, II KK 24/14, LEX No. 1483950.
[19] T. Bojarski, (in:) E. Kruk, E. Skrętowicz, Postępowanie w sprawach nieletnich. Komentarz, Warszawa 2016, p. 52.
[20] J. Lachowski, (in:) Kodeks karny. Komentarz, wyd. III, WKP 2020, komentarz do art. 10 teza 5, LEX.

perpetrator, his characteristics and personal conditions justify it (Article 10 § 4 of the Criminal Code).

The Act of 7 July 2022 provides for an additional reduction in the age of the juvenile. It adds Art. 10 § 2a of the Criminal Code, which states that a juvenile may be criminally responsible after reaching the age of 14. Such responsibility will be possible if the following conditions are met jointly:

1) a juvenile after turning 14 and before turning 15 has committed a prohibited act specified in Art. 148 § 2 or 3 of the Criminal Code;
2) the circumstances of the case and the degree of development of the perpetrator, his characteristics and personal conditions support it;
3) there is a reasonable assumption that the use of educational or corrective measures is not able to ensure social rehabilitation of the juvenile.

In addition, the aforementioned act extends the possibility of punishing juvenile offenders who have reached the age of 15, pursuant to Art. 10 § 2 of the Criminal Code, for basic rape and rape qualified by the consequence in the form of the victim's death (Article 197 § 1 and 5 of the Criminal Code). A crime qualified under Art. 197 § 5 of the Criminal Code will be introduced for the first time by the Act of 7 July 2022.

4. The range of juvenile criminal responsibility

According to Art. 10 § 2 of the Criminal Code, prohibited acts for which a juvenile after the age of 15 may be held criminally responsible are:

– attempt on the life of the President of the Republic of Poland (Article 134 of the Criminal Code),
– homicide in the basic type and qualified varieties (Article 148 § 1, 2 or 3 of the Criminal Code),
– deliberately causing grievous bodily harm (Article 156 § 1 or 3 of the Criminal Code),
– deliberately causing generally dangerous events (Article 163 § 1 or 3 of the Criminal Code),
– water or air piracy (Article 166 of the Criminal Code),
– deliberately causing a traffic disaster (Article 173 § 1 or 3 of the Criminal Code),
– gang rape of a minor under the age of 15, incest or with particular cruelty (Article 197 § 3 or 4 of the Criminal Code),

– active assault on a public official or a person assisting him with the effect of serious damage to health (Article 223 § 2 of the Criminal Code),
– taking or holding a hostage or making preparations for this act (Article 252 § 1 or 2 of the Criminal Code),
– robbery (Article 280 of the Criminal Code).

Enumeration from Art. 10 § 2 of the Criminal Code is exhaustive and cannot be interpreted extensively. The above-mentioned acts can also be committed in stages in the form of an attempt or performance, as well as in any form of criminal cooperation, such as: complicity, managerial perpetration, recommending perpetration, instigation or aiding[21]. In a situation where the perpetrator after turning 15 years of age committed one of the acts described in Art. 10 § 2 of the Criminal Code and, additionally, this act exhausted the characteristics of another act which was not indicated in Art. 10 § 2 of the Criminal Code is responsible only for the act listed in art. 10 § 2 of the Criminal Code. The provision remaining in the cumulative legal classification of the act should be omitted, otherwise the exception described in the commented provision would be extended inadmissibly. This provision is optional, and therefore the fulfillment of the conditions set out there does not mean that a juvenile who has turned 15 at the time of the act will be criminally responsible.

Another premise for the juvenile's responsibility under the rules set out in the Criminal Code is the fact that the circumstances of the case and the degree of development of the offender, his personal characteristics and conditions are to justify this, in particular if the previously applied educational or corrective measures turned out to be ineffective.

The concept of the circumstances of the case has a broader scope than the circumstances of the act. These are circumstances indicating, among others, the degree of demoralization of the perpetrator, the motives for committing the act, the manner of its commission, activity and role in the criminal group[22]. Since the criminal liability of a juvenile

[21] See i.a.: P. Górecki, V. Konarska-Wrzosek, (in:) P. Górecki, V. Konarska-Wrzosek, komentarz do niektórych przepisów Kodeksu karnego, (in:) Ustawa o postępowaniu w sprawach nieletnich. Komentarz, wyd. II, WKP 2019, komentarz do art. 10, teza 5, LEX; J. Lachowski, (in:) Kodeks karny. Komentarz, wyd. III, WKP 2020, komentarz do art. 10 teza 8, LEX; differently A. Zoll, (in:) Kodeks karny. Część ogólna, t. 1, Komentarz do art. 1–52, ed. W. Wróbel, A. Zoll, Warszawa 2016, p. 181.

[22] Judgment of the Supreme Court of 21 December 1981, I KR 287/81, OSNPG 1982, No. 2, item 90.

is exceptional, only the accumulation of circumstances aggravating the minor may justify the application of the provision of Art. 10 § 2 of the Criminal Code[23].

The degree of development of the perpetrator concerns both his physical and mental development and their mutual relations [24].The more mature the perpetrator is, the more can be expected from him, also in terms of the possibility of prosecuting him. It is primarily about reaching such a degree of maturity by the perpetrator that he is able to recognize the social significance of the act he commits[25].

The perpetrator's characteristics concern his age, level of mental and physical development, health, character traits, attitude to important social values, interests, degree of demoralization. By personal conditions should be understood the environment in which the juvenile resides. These conditions concern the demoralizing influence of the family, living conditions in the family, housing and material situation, the degree of meeting the needs of the juvenile, the environment of co-workers[26]. The jurisprudence has rightly indicated that determining the properties and personal conditions is one of the basic duties of the authority conducting the proceedings[27]. At the same time, these circumstances concern the possibility of imposing a penalty pursuant to Art. 10 § 2 of the Criminal Code, and not only its dimension.

Another condition is the ineffectiveness of the applied educational and corrective measures. The use of educational and corrective measures is not a necessary condition for bringing a juvenile to criminal responsibility under the provision of Art. 10 § 2 of the Criminal Code[28]. On the other hand, even if the applied measures proved ineffective, this is not a sufficient reason to hold the juvenile criminally responsible. The reasons for

[23] V. Konarska-Wrzosek, Prawny system postępowania z nieletnimi w Polsce, Warszawa 2013, p. 122–123.

[24] *Ibid*.

[25] A. Dziergawka, Komentarz do art. 25, (in:) Ustawa o wspieraniu i resocjalizacji nieletnich. Komentarz…, *op. cit*., p. 173, No 7.

[26] A. Dziergawka, Komentarz do art. 25, (in:) Ustawa o wspieraniu i resocjalizacji nieletnich. Komentarz…, *op. cit*., p. 173, No 8.

[27] Decision of the Supreme Court of 24 June 1983, III KZ 87/83, OSNKW 1983, No. 12, item 97; judgment of SA in Wrocław of 6 November 2012, II AKa 311/12, LEX No. 1238670.

[28] V. Konarska-Wrzosek, Prawny system postępowania z nieletnimi w Polsce…, *op. cit*., p. 125; judgment of SA in Gdańsk of 15 June 2000, II AKa 149/00, LEX No. 1680963.

ineffectiveness may be different, not always dependent on the perpetrator, and these reasons should be investigated and assessed.

According to the content of Art. 10 § 2a of the Criminal Code, the basic condition for the possibility of accepting criminal responsibility of a juvenile after the age of 14, and before the age of 15, is that he has committed a serious homicide, as defined in Art. 148 § 2 or 3 of the Criminal Code. This murder concerns the killing of a person (§ 2):

– with particular cruelty,
– in connection with hostage-taking, rape or robbery,
– as a result of a motivation deserving particular condemnation,
– with the use of explosives,

and also (§ 3):

– to kill more than one person with one act,
– a previous final conviction for homicide,
– the perpetrator of the murder of a public official committed during or in connection with the performance of his official duties related to the protection of people's safety or the protection of public safety or order.

Moreover, Art. 10 § 2a of the Criminal Code provides for an additional condition in the form of a justified assumption that the use of educational or correctional measures is not able to ensure social rehabilitation of the juvenile. This is a clear reference to the content of Art. 6 of the Act on the Support and Social Rehabilitation of Juveniles, which states that "a juvenile may be punished only in the cases specified in the Act, if other measures are not able to ensure the juvenil's social rehabilitation". This condition therefore applies to all imposed penalties. However, contrary to the content of Art. 10 § 2 of the Criminal Code, Art. 10 § 2a of the Criminal Code does not require the use of educational and correctional measures to be ineffective.

In the justification for the bill, the legislator indicates that in the population of people who have turned 14 but have not turned 15, there may be people who have reached such a level of psycho–social development that they are aware of the committed act of homicide, and therefore can be prosecuted for it to criminal responsibility[29].

[29] J. P o b o c h a, Psychiatryczne i medyczne uwarunkowania ustalenia minimalnego wieku odpowiedzialności karnej, opinion of 17. November 2021, ordered by the Ministry of Justice, explanations to the draft law, p. 7.

5. Penalty

The legislator modifies the range of the juvenile's responsibility, limiting both the types of punishment that can be imposed and its amount. According to Art. 10 § 3 of the Criminal Code, the imposed penalty may not exceed two–thirds of the upper limit of the statutory penalty provided for the crime attributed to the perpetrator. The court may also apply extraordinary leniency. From the content of art. 54 § 2 of the Criminal Code additionally states that a person who has not reached the age of 18 may not be sentenced to life imprisonment.

There are doubts about the possibility of imposing a penalty of 25 years imprisonment, which, according to Art. 38 § 3 of the Criminal Code may not exceed 20 years. However, if the provision of Art. 10 § 2 of the Criminal Code prohibits the imposition of a penalty above 2/3 of the upper limit of the statutory threat, it is necessary to reduce the penalty of 25 years of imprisonment to the maximum penalty of 16 years and 8 months of imprisonment. However, if a sentence of 25 years' imprisonment appears as an alternative to life imprisonment, it may be imposed[30].

As indicated by the Art. 54 § 1 of the Criminal Code, when imposing a penalty on a or a juvenile delinquent, juvenile, the court is primarily guided by the need to educate the perpetrator. According to Art. 115 § 10 of the Criminal Code, a juvenile delinquent is a offender who at the time of committing the prohibited act was under 21 years old and at the time of adjudication in the first instance was 24 years old. Correct interpretation of Art. 54 § 1 of the Criminal Code does not justify the resignation from the statutory directives on the imposition of penalties indicated in Art. 53 of the Criminal Code, and only puts educational considerations in the first place. Therefore, age and educational considerations do not constitute a separate, independent premise for the imposition of a penalty, but only a reference point for further assessment. At the same time, they must be juxtaposed with other subjective and objective circumstances relevant to the sentencing. At the same time, significant premises in determining the penalty should be the degree of demoralization, lifestyle conducted before committing the crime, behavior after committing it, motives and manner of acting. These factors may prevail to such an extent that it will be justified to

[30] Judgment of the Supreme Court of 22 September 1999, III KKN 195/99, OSNKW 1999/11–12, item 73; decision of the Supreme Court of 4 May 2005, II KK 454/04, LEX No. 149647; J. Lachowski, (in:) V. Konarska-Wrzosek (red.), Kodeks karny. Komentarz, Warszawa 2018, p. 91.

impose a penalty on a juvenile within the upper limits of the statutory threat. Article content 54 § 1 of the Criminal Code does not constitute an order to treat the perpetrator more leniently due to his age[31].

According to Art. 10 § 3 of the Criminal Code, after the amendment provided for by the Act from 7 July 2022, in the cases specified in Art. 10 § 2 and 2a of the Criminal Code, the court may apply extraordinary leniency. On the other hand, in the case specified in Art. 10 § 2 of the Criminal Code, the imposed penalty may not exceed two-thirds of the upper limit of the statutory threat provided for the crime attributed to the perpetrator, if it is not punishable by life imprisonment. If the law provides lowering the upper limit of the statutory threat, the penalty imposed for an offense punishable by life imprisonment may not exceed 30 years of imprisonment (Article 38 § 3 of the Criminal Code). Therefore, a juvenile who commits an act under Art. 148 § 2 or 3 of the Criminal Code, after reaching the age of 14 may be punished a maximum penalty of 30 years of imprisonment.

6. The juvenile criminal responsibility procedure

As a general rule, juvenile proceedings are heard in the Family Divisions of the District Courts (referred to as "Family Courts") (Section 23 of the Act on the Support and Social Rehabilitation of Juveniles). According to Art. 25 of the Act on the Support and Social Rehabilitation of Juveniles, if there are grounds for holding a minor accountable on the terms set out in Art. 10 § 2 of the Criminal Code, the case is heard by the competent court according to the provisions of the Code of Criminal Procedure.

The jurisdiction of the district court in the first instance is defined in Art. 24 § 1 of the Code of Criminal Procedure[32], and of the circuit court in Art. 25 § 1 of the Code of Criminal Procedure. Most of the cases indicated in Art. 10 § 2 of the Criminal Code is subject to the jurisdiction of the regional court, with the exception of acts described in Art. 223 § 2 and Art. 280 § 1 of the Criminal Code.

As indicated by the Art. 67 paragraph 1 of the Act on Supporting and Social Rehabilitation of Juvenils, if in the course of the proceedings there are circumstances that may justify holding the juvenile accountable on the terms set out in Art. 10 § 2 of the Criminal Code, the family court decides to transfer the case to the prosecutor. From the

[31] Decision of the Supreme Court of 26 February 2020, V KK 382/19, Legalis.

[32] The Code of Criminal Procedure Act of 6 June 1997 (consolidated text: Journal of Laws 2022, item 1375, as amended).

moment the case is transferred to the prosecutor, the proceedings are conducted in accordance with the provisions of the Code of Criminal Procedure. In the event of disclosure of new circumstances indicating that there are no grounds for holding a minor accountable on the terms set out in Art. 10 § 2 of the Criminal Code, the prosecutor transfers the case to the family court (Article 67(3) of the Act on the Support and Social Rehabilitation of Juveniles). If the punishable act committed by a minor is related to the act of an adult, the prosecutor excludes the juvenil's case and transfers it to the Family Court (Section 26(1) of the Act on the Support and Social Rehabilitation of Juveniles). If a joint examination of the case is necessary, the prosecutor transfers the case with the indictment to the court having jurisdiction under the provisions of the Code of Criminal Procedure, which adjudicates on the juvenile in compliance with the provisions of the Act on the Support and Social Rehabilitation of Juveniles (Article 26(4) of the Act on the Support and Social Rehabilitation of Juveniles).

In connection with the content of the Act of 7 July 2022, according to which from 1 October 2023, Art. 10 § 2a of the Criminal Code, it is necessary to supplement the content of Art. 25 and Art. 67 paragraph 1 and 3 of the Act on Supporting and Social Rehabilitation of Juvenils by the provision of Art. 10 § 2a of the Criminal Code[33]. In the Act of July 7, 2022, the legislator omitted the need to adapt the Act on the support and social rehabilitation of juvenils to the proposed amendments to the Criminal Code. According to Art. 25 of the Act on the Support and Social Rehabilitation of Juveniles, if there are grounds for holding a juvenile accountable on the terms set out in Art. 10 § 2 of the Criminal Code, the case is heard by the competent court according to the provisions of the Code of Criminal Procedure. Therefore, this provision does not apply to the acts specified in Art. 10 § 2a of the Criminal Code. Under the amended legal status, it is not possible for the prosecutor's office to conduct criminal proceedings against a juvenile who has reached the age of 14 in the scope of an act penalized in Art. 10 § 2a of the Criminal Code, the Family Court has no grounds to transfer pursuant to Art. 67 paragraph 1 Act on the Support and Social Rehabilitation of Juveniles, the case of such a juvenile to the prosecutor's office, which may result in a criminal indictment against the juvenile. Also, the prosecutor's office is not able to transfer the case to the

[33] A. Dziergawka, Komentarz do art. 25, (in:) Ustawa o wspieraniu i resocjalizacji nieletnich. Komentarz…, *op. cit*., p. 175, No 17.

family court, according to Art. 67 paragraph 1 Act on the Support and Social Rehabilitation of Juveniles. As a result, without the postulated normative change, the provision of art. 10 § 2a of the Criminal Code will not have any practical application due to the existing legal loophole.

7. Conclusions

Concluding the considerations, it is worth noting that in the legal status introduced by the legislator under the Act of 7 July 2022, there is a situation of extreme discrepancies.

On the one hand, the act on the support and social rehabilitation of juveniles increases the age of children who can be subjected to any educational and corrective measures to 10 years. According to this act, it becomes pointless to conduct proceedings for demoralization in relation to an individual who is not yet able to fully understand the meaning of moral norms and the reprehensibility of the actions taken. Upbringing should be done using other methods. Therefore, the enactment of the lower limit of juveniles is intended to protect children up to 10 years of age against stigmatization, which is associated with the initiation of proceedings against a juvenile. At this point, the psychosocial development and level of maturity of the juvenile should be considered, as well as the possibility of recognizing the meaning of the act and distinguishing between good and wrong. The Act also does not provide for any criminal reaction against juveniles who have committed an criminal act under the age of 17.

On the other hand, the legislator, under the Act of 7 July 2022, introduced Art. 10 § 2a of the Criminal Code, which lowers the age limit of a juveniile to 14, when he may be held criminally responsible for up to 30 years in prison.

Judging juvenile offenders of the most serious crimes, one cannot omit the still valid words of Halina Spionek that "difficult once and criminal children did not become so because they were endowed with hereditary bad instincts or were born abnormal, but because they were improperly brought up”[34]. Similarly, Janusz Korczak stated that “man is not born a criminal or an angel. Upbringing makes him a dirty or radiant being”[35].

[34] H. Spionek, Trudności wychowawcze a przestępczość nieletnich, Wrocław 1956, p. 146, own translation.
[35] J. Korczak, Pisma wybrane, Warszawa 1978, p. 11, own translation.

Therefore, there is no basis for evaluating a child's behavior in isolation from his upbringing[36].

Since we assume that the upbringing process determines the child and his actions, it must be consistently recognized that the same child after the age of 14 cannot be fully responsible for the crime. As Janusz Korczak rightly pointed out, the responsibility of a child for a crime becomes a responsibility that rests on parents, educators and the whole society, and therefore "on us for the moral content and happiness of those who will replace us in the life arena"[37].

According to Art. 72 paragraph 1 of the Constitution, the Republic of Poland ensures the protection of children's rights, while public authorities protect children against violence, cruelty, exploitation and demoralization. It is difficult to assume that serving a long-term prison sentence with other offenders will lead a 14-year-old child to his social rehabilitation. It is also impossible to state categorically that other educational and corrective measures are not able to ensure social rehabilitation of such child. The range of the issues raised requires avoiding penal populism and following the fundamental directive of dealing with juveniles in the best interests of the child[38].

Bibliography

1. Bojarski T., (w:) E. Kruk, E. Skrętowicz, Postępowanie w sprawach nieletnich. Komentarz, Warszawa 2016.
2. Dziergawka A., Normatywny i praktyczny aspekt mediacji w sprawach nieletnich, Probacja 2020, nr 1.
3. Dziergawka A., Odpowiedzialność odszkodowawcza rodziców za ich dziecko, Consilium Iuridicum 2023, nr 5.
4. Dziergawka A., Komentarz do art. 1, 25, (w:) P. Drembkowski, G. Kowalski (red.), Ustawa o wspieraniu i resocjalizacji nieletnich. Komentarz, Warszawa 2023.

[36] A. Dziergawka, Odpowiedzialność odszkodowawcza rodziców za ich dziecko, Consilium Iuridicum 2023, No 5, p. 69.
[37] J. Korczak,..., *op. cit*., p. 10–11, own translation.
[38] Judgment of the Supreme Court of 1 June 2006, V KK 158/06, LEX No. 188369; A. Dziergawka, Normatywny i praktyczny aspekt mediacji w sprawach nieletnich, Probacja 2020, No 1, p. 49.

5. Górecki P., V. Konatska-Wrzosek, (w:) P. Górecki, V. Konarska-Wrzosek, komentarz do niektórych przepisów Kodeksu karnego, w: Ustawa o postępowaniu w sprawach nieletnich. Komentarz, wyd. II, WKP 2019, komentarz do art. 10, LEX.
6. Jurgielewicz-Delegacz E., Ewolucja odpowiedzialności nieletnich na przestrzeni lat, Studia Prawnoustrojowe UWM 2019, nr 44.
7. Konarska-Wrzosek V., Prawny system postępowania z nieletnimi w Polsce, Warszawa 2013, s. 122–123.
8. Kaczmarek T., Psychologiczne i ustawowe kryteria odróżniania nieletnich od dorosłych w polskim prawie karnym, NP 1990, z. 1–3.
9. Klimek-Łakomy A., Odpowiedzialność osób nieletnich za czyny karalne – uregulowanie dwutorowe, Biuletyn PKT nr 24, Warszawa 2017.
10. Korczak J., Pisma wybrane, Warszawa 1978, s. 11.
11. Lachowski J., (w:) Kodeks karny. Komentarz, wyd. III, WKP 2020, komentarz do art. 10 teza 5, LEX.
12. Lachowski J., (w:) Kodeks karny. Komentarz, V. Konarska-Wrzosek (red.), Warszawa 2018.
13. Lorencka-Mierzwińska J., Odpowiedzialność karna nieletnich w świetle ustawy o wspieraniu i resocjalizacji nieletnich, Komentarz praktyczny, LEX 2022.
14. Mączyńska M., Nowelizacja ustawy o postepowaniu w sprawach nieletnich – zagadnienia wybrane, Palestra 2016, nr 5.
15. Pobocha J., Psychiatryczne i medyczne uwarunkowania ustalenia minimalnego wieku odpowiedzialności karnej, opinia z dnia 17 listopada 2021 r., zlecona przez Ministerstwo Sprawiedliwości.
16. Sienkiewicz Z., (w:) T. Kaczmarek (red.), Nauka o karze. Sądowy wymiar kar. System Prawa Karnego, tom 5, Warszawa 2015.
17. Spionek H., Trudności wychowawcze a przestępczość nieletnich, Wrocław 1956, s. 146.
18. Walczak-Żochowska A., Systemy postępowania z nieletnimi w państwach europejskich. Studium prawno-porównawcze, Warszawa 1988.

19. Zoll A., (w:) W. Wróbel, A. Zoll (red.), Kodeks karny. Część ogólna, t. 1, Komentarz do art. 1–52, Warszawa 2016.

Odpowiedzialność karna nieletnich

Streszczenie

Celem opracowania jest ocena obowiązującego obecnie stanu prawnego oraz unormowań ustawy z dnia 7 lipca 2022 roku, dotyczących odpowiedzialności karnej nieletnich. Autorka omawia ewolucję odpowiedzialności nieletnich, począwszy od kodeksu karnego z 1932 roku. Opracowanie dotyczy odpowiedzialności karnej nieletnich w aspekcie ich wieku, zakresu przedmiotowego, wymiaru kary i trybu postępowania. Dodatkowo w artykule poruszono problematykę odpowiedzialności nieletnich na podstawie ustawy o wspieraniu i resocjalizacji nieletnich z dnia 9 czerwca 2022 r. oraz wskazano na konieczność dostosowania tej ustawy do zmian kodeksu karnego.

Słowa kluczowe

Nieletni, odpowiedzialność karna nieletnich, przestępstwo, kara, zmiany normatywne.

VARIA

Robert Kucharski[1]

Influence of the Napoleonic Code on judicial system of the Dutchy of Warsaw

Abstract

The creation of the Duchy of Warsaw as a result of the Napoleonic wars in Europe created the need to reorganize the state administration to conform to modern models and meet the new challenges of a new era in European history. Alongside this, there was a need to reform the institution of the judiciary and remove from its practices outdated institutions imposed by the partitioners, namely Prussian models. This ambitious goal was set and carried out by Justice Minister Feliks Lubienski, to whom the Polish judiciary owes its introduction to the new era. Thanks to his work, it was possible to base the legal system of Poland at that time on the regulations of the Napoleonic Code. The present study outlines the institutions of the judiciary (courts and prosecutor's offices) that were created on the basis of modern legal and political solutions of the Napoleonic regulation, based on the tradition of Roman law, based on the foundations of Christian civilization and elements of Greek philosophy. This was an important impetus for the modernization of the judiciary in Poland and initiated the social and economic changes necessary for the smooth functioning of the modern Polish State.

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Key words

Napoleonic Code, Dutchy of Warsaw, courts, prosecution, instruction, Poland, judiciary, instruction, Constitution.

1. The Napoleonic Code

A consequence of the Napoleonic Wars at the beginning of the 19th century was the reestablishment of the Polish state under a name "the Duchy of Warsaw" as an element of France's imperial projectin Europe. On 21 March 1804, legislative work on the text of the Code civil des Français, also called the Napoleonic Code (later referred to as NC) and, after its fall, the Code civil, was completed in France[2]. The legal model developed in France was adopted in various countries in Europe subordinated to the French Empire[3]. The idea behind the introduction of the code in countries within the political influence of imperial France was the relative unification of social systems and the introduction of modern legal institutions that would take into account the needs of modern legal practices[4]. The Code came into formal force in Poland on 1 May 1808, when the article 69 was introduced into the Constitution of the Duchy[5].

The reception of the Napoleonic Code in Poland was important for the functioning of the courts, because it directed them towards the path of positive, written law and for this to be achieved required appropriate substantive preparation. The requirement to subsume existing facts into specific provisions, often of abstract and general meaning, required professional legal education. The need to become familiar with the regulations was accompanied by the need to prepare a commentary on the regulations and, above all, translate them into Polish. The fact that this was not an easy and obvious process is evidenced by the struggles of the Minister of Justice Feliks Łubieński, member of the Council of the State under the leadership of Ludwik Gutakowski. Some Council members slowed down work on the organization of the judiciary system and implementation of the code despite

[2] W. Wołodkiewicz, 200 lat Kodeksu napoleona w Polsce – od nienawiści do miłości, Palestra 2008, no. 1–2.

[3] P. Cichoń, Wpływy francuskie w administracji Księstw Warszawskiego, Zeszyty Naukowe Uniwersytetu jagiellońskiego, vol. 1, p. 1.

[4] D. Makiłła, Historia prawa w Polsce, Wydawnictwo Naukowe PWN, Warszawa 2008, p. 356.

[5] Dziennik Praw Księstwa Warszawskiego (DPKW), year 1808 , no. 2, pp. 53–54.

the order of King Frederick Augustus to complete these works by May 1808. One of the grounds for the obstruction of the Council of State was the lack of an official translation of the code, which was prepared by the minister's secretary Father Franciszek Szaniawski. His working text was to be the starting point for the work of the Society of Friends of Sciences on translation conducted by a special committee. As a result of its work, only minor changes were introduced to Szaniawski's text, which resulted in Polish courts using the French text and Szaniawski's translation as an auxiliary tool until the end of the Duchy's existence[6]. The number of legal publications, translations and publications devoted to the new law gradually increased. French original codes were translated, as well as commentaries to them, which were a source of guidelines for the interpretation of legal norms and provisions. Already in 1808, a manual named "Models for various court activities" was published, and in 1813, Antoni Podolski's another work entitled "Guide for ushers and bailiffs". An obligation to subscribe to "the Principality's Journal of Laws and Departmental Journals" was introduced among state officials and court lawyers[7].

Having already translated the text of the code into Polish, although without official value, was of paramount importance for Polish courts, thus allowing judges and other court employees to learn its official text applied in daily work. The first attempt to remedy this problem and introduce senior justice officials to the new regulations were private courses initiated in 1807, where new legal institutions were presented. Distinguished lawyers from Polish nobility namely Franciszek Szaniawski, Antoni Łabęcki and Antoni Wyczechowski[8] took part in them as lecturers. Minister Feliks Łubieński placed particular emphasis on education of the judicial staff[9].

[6] S. Grodziski, Wpływ Code Civil oraz innych kodyfikacji napoleońskich na ziemiach polskich, Czasopismo Prawno-Historyczne 2005, Volume LVII, no. 2, page 64, także: H. Grynwaser, Kodeks Napoleona w Polsce, Pisma, Wrocław 1951, vol. I, page 27–28.

[7] „Gazeta Krakowska" z 1811, no. 7 (supplement), za: A. Rosner, Sędziowie i urzędnicy sądów pokoju w Księstwie Warszawskim, Przegląd Historyczny, vol. 4, 1988, p. 671.

[8] B. Leśnodorski, Szkoła Prawa i Nauk Administracyjnych w Księstwie Warszawskim, w: Studia z dziejów Wydziału Prawa Uniwersytetu Warszawskiego, Warszawa 1963, p. 9.

[9] R. Kucharski, Szkolenie sędziów w czasach Księstwa Warszawskiego, Collegium Iuridicum 2023, no. 7, p. 120.

The Napoleonic Code was an extensive legal act consisting of 2,281 articles systematized in three books: Book I. “On persons”, Book II. “On Estates and Various Kinds of Property”, Book III. “About different ways of acquiring property”. The above division opened the way for modern judicial practice, but its greatest and most significant advantage was the clarity of legal solutions, the use of precise and understandable legal language, and above all, the substantive content[10]. The codification mainly introduced provisions of material civil law, but the then Minister of Justice, Feliks Łubieński, rightly concluded that procedural provisions shall be an integral part of the legal system[11]. Full French legislation was not in force on Polish soil, especially since it was not published in the "Journal of Laws", but it was in fact in force in court practice and was applied in daily adjudication. French criminal law was applied but the provisions introducing the NC into practice made it possible to apply also old Polish law in certain cases[12]. It allows to assume that Napoleon's regulations contributed not so much to the full reception of his provisions, but rather as it is described in literature, to their adaptation in Poland[13]. Taking under consideration the conditions of that time, it was significant step forward in the strengthening of the Polish state and the judiciary. As rightly emphasized in writings[14], code principles have shaped court practice for nearly seventy years and beyond.

2. The courts

During the times of the Duchy of Warsaw, the idea of establishing separate criminal and civil divisions in common courts was implemented. Thus, the modern organization of courts was established in the justice system, not only guaranteeing the constitutional independence of judges, but also practically securing it with lifetime appointment ordered by the King of Poland. Justices of the peace were appointed from among candi-

[10] T. Maciejewski, Historia powszechna ustroju i prawa, Wydawnictwo C.H. Beck, Warszawa 2015, p. 618.
[11] L. Krzyżanowski, Historia ustroju i prawa w Polsce, Wydawnictwo OdNowa, Toruń 2013, p. 111.
[12] A. Korobowicz, W. Witkowski, Historia ustroju i prawa polskiego (1772–1918), Wolters Kluwer, Warszawa 2017, p. 55.
[13] A. Rzeczkowski, Recepcja prawa francuskiego w Księstwie Warszawskim, Kortowski Przegląd Prawniczy 2018, no. 2, p. 56.
[14] G. Smyk, Francuskie prawo i instytucje ustrojowe w Księstwie Warszawskim, Annales Universitas Mriae Curie-Skłodowska 2007, no. LXII, p. 41.

dates submitted by the local assemblies, so in practice representatives of the nobility continued to be elected to these positions. Nevertheless, even considering the limited jurisdiction of peace courts and the fact that representatives nominated by local councils were granted the offices, there has been a tendency towards the professionalization of people running for this dignity. This was related not only to the changed social situation, but above all to the legal environment in which they functioned. The introduction of new legal provisions required thorough familiarization with the regulations of substantive law on the basis of which justices of the peace made judgments.

The newly created judiciary of the criminal division consisted of Simple police courts; Correctional Police Courts; Courts of criminal justice; and Council of State (Court of Cassation)

Simple police courts were established to try offenses. The hearing was conducted by a sub-judge or the mayor (nominated for the position by the Minister of the Interior) or the commune head (appointed to the administrative structure by the prefect and approved by the Minister of the Interior). Their territorial jurisdiction included the district, although sometimes they also included larger cities creating separate jurisdictional circuts.

The law entrusted correctional police courts with cases involving offenses punishable by law with a penalty of up to 2 years' imprisonment. Their territorial jurisdiction covered part of the department, so 2–3 correctional courts were established in each of them.

Criminal justice courts were placed higher in the hierarchy, and their jurisdiction included criminal crimes cases and appeals filed against judgments of simple and correctional police courts respectively.

Cassation appeals against "final judgments" passed in correctional justice courts were submitted to the Council of State, acting as a court of cassation.

The structure of civil courts introduced by the Napoleonic Code consisted of: Magistrates' courts; Civil tribunals of the first instance; Court of appeal (called the "appellate court"); and Council of State (court of cassation)[15].

Magistrates' courts were established in the counties and cities of the Principality. Their task was to consider cases in non-contentious and conciliatory proceedings, presided by justices of the peace, appointed by

[15] J. Bardach, B. Leśnodorski, M. Pietrzak, Historia ustroju i prawa polskiego, Wydawnictwo Naukowe PWN, Warszawa 1994, p. 357.

the King of Poland from among candidates proposed by local assemblies. Sub-judges adjudicated cases considered in property dispute proceedings, where the value of the subject of the dispute was small.

Civil tribunals of the first instance were the higher courts, whose task was to resolve cases of greater importance. They were presided by judges who were required to have professional legal education covering provisions of newly adopted Napoleonic Civil Code, the Notarial Act and the Commercial Code. The subject matter under jurisdiction of these courts covered non-property matters (family, marital status) and more serious property matters (obligations, contracts, commercial disputes). These courts were established in number of one for each department.

An appellate court, ("odzewny"), was established for the entire Duchy, with its seat in Warsaw. Its role was to consider appeals filed against judgments of first-instance civil tribunals.

The Napoleonic Code, based on the French model, introduced the institution of cassation in Poland, to be eventually filed against a judgement in certain situations provided by the law to the Council of State, serving as a court of cassation in civil and criminal cases. Due to the fact that a distinction was made between civil and criminal proceedings, a cassation-appeal against a civil court judgment could be filed no later than three months from the date of delivery of the contested judgment. It was submitted to the court office and then signed by the attorney. Its filing did not suspend the execution of the contested judgment, except for divorce cases. In turn, an appeal against a final judgment of a criminal court could be lodged by the convict (within the deadline of 10 days) or the prosecutor (within 15 days). The cassation appeal could be signed by the convict in person, by a defense lawyer or a prosecutor himself. Its filing suspended the execution of the criminal judgment. It was filed through the court that issued the contested judgment. Then the complaint was sent to the cassation prosecutor and, together with his case review and conclusions formulated after analyzing the case files, the court clerk presented it to the president of the court. The President appointed a case clerk (rapporteur), who read the files, the content of the complaint and then submitted the case summary to the Applications and Instructions Committee.[16] The proceedings were written and public. At the first hearing, the clerk-rapporteur again presented his report on the case. The court decided on the verdict by a majority of votes in the presence of the

[16] R. Kucharski, Sądownictwo Księstwa Warszawskiego – zręby nowożytnego wymiaru sprawiedliwości, Consilium Iuridicum 2023, no. 6, p.120.

parties but without the participation of the audience. If the case was not difficult, the verdict was announced immediately after the first hearing and sent to the Minister of Justice for publication.

3. Prosecutors Office

The Napoleonic Code implemented the institution of the Prosecutor's Office into the Polish justiciar system. It should be mentioned that Napoleon's victorious military march during the war of 1806/1807 and his victory over the Prussian occupation of Polish territory was associated with the elimination or, at best, cessation of the functioning of German courts. By order of Józef Wybicki issued in 1806, their functioning and structures were resumed as functioning under Polish authority and named as Polish courts. The political elites of the Duchy of Warsaw saw the reactivation of the justice system and the introduction of modern institutions as an important state-building element. On 1 December 1806, a new judicial institution was established in the form of “the Supreme Chamber of Justice” based in Warsaw, which on 26 December 1806, Józef Wybicki with his decree equipped with procedural regulations[17] that created the office of public investigator to prosecute crimes ex officio, conduct investigations and bring charges to criminal courts. In turn, civil proceedings were suspended until the full structure of common courts was established[18], This happened a month later, by resolution of 26 January 1807, when the Governing Commission established a new court system. The prosecutor's office called "public investigator" was established and to function only in the structures of the Final Tribunal and its task, in accordance with paragraph 61 of the resolution, was to prosecute state crimes and cases which "violated public security". Landlord courts, as first-instance courts, were to conduct investigations involving the nobility through a lower local instigator, and after full preparatory proceedings in the form of a judicial investigation was completed, the materials were transferred to the "departmental court of appeal", where the case was represented by an instigator appointed by this court[19]. There were no instigators for the bourgeoisie and peasants in

[17] Text of the regulation published in: K. Małkowski, Przepisy postępowania sądowego w sprawach karnych, Warszawa 1865, p. 94–98,

[18] Archiwum Wybickiego (1802–1822), Edited by: A. Skałkowski, Gdańsk 1950, v. II, pp. 43, 56, 76–79.

[19] Materiały do dziejów komisji rządzącej z roku 1807, wyd. M. Roztworowski, Kraków 1918, pp. 544–553, 660–675, 700–703, 715–718.

the courts. As can be seen in this example, the beginnings of the institution of the prosecutor in the Duchy of Warsaw referred rather to the pre-partition institutions of the Polish-Lithuanian Commonwealth[20], for the Parliament Act of 1793 retained in powers and functions national instigators (in structures of the Parliament Court). The reception of a truly modern prosecutor's office was to take place along with changes in the state's political system[21].

A truly important step towards introducing the institution of the prosecutor into the Polish legal system were the provisions of the Constitution of the Duchy of Warsaw, where in the chapter entitled "On judicial order" in Art. 76 legislators created the "royal prosecutor", whose competences were related to the competence of the Court of Appeal to submit a request to the king to remove from office a judge of a civil tribunal of first instance or a judge of a criminal court in the event of proof of a crime committed in connection with his office. Shortly after the entry into force of the constitutional provisions, it turned out that the practice of justice required further development and consolidation of the prosecutor's competences in connection with judicial practice based on the foundations of modern solutions of the Napoleonic Code.

In November 1807, the Minister of Justice of the Duchy of Warsaw, Feliks Łubieński, presented a project of judicial organization that transferred French solutions shaped by the Napoleonic Code into Polish judicial system[22]. These provisions proposed only one paragraph, namely number 61, relating to prosecutors. The legislator intended them to be "government officials" using the title of "Royal Prosecutor General" affiliated with the Court of Cassation, the Court of Appeal and criminal courts. These prosecutors were to have their deputies operating at the appropriate levels of courts – deputy Royal prosecutors. Their task was to investigate "the execution of everything that may concern public order." The draft decree on the organization of the judiciary was discussed at the Council of State of the Principality in January 1808. The amendments to the draft regulations were introduced on 21 April 1808, were sent to the King of Poland for final approval. The changes included regulations relating to prosecutors (Articles 36–41). The prosecutors were to be appointed by the King

[20] W. Zarzycki, Oskarżyciel publiczny w okresie reform z drugiej połowy XVIII w., Problemy praworządności 1972, no. 2.
[21] Z. Szczą ska, Instygatorzy w Trybunale Koronnym i innych sądach danej Rzeczypospolitej, Problemy Praworządności 1978, no. 6, p. 54–63.
[22] ADAG, Akta Rady Stanu Księstwa warszawskiego, v. II 71, p. 4–30.

decree at the request of the Minister of Justice. The following levels of the Prosecution were tabled: the Royal Prosecutor General at the Court of Cassation, the Prosecutor General and two deputy prosecutors general at the Court of Appeal, the Royal Prosecutor and a deputy prosecutor at the tribunal of first instance[23]. The draft regulation provided for prosecutors to remain "under the supervision" of the Minister of Justice. Interestingly enough, certain new requirements and practices were provided, namely prohibition for a prosecutor to leave his place of office without the minister's consent and the principle of replacing an absent prosecutor by the judge or assessor. The suspension or deprivation of office of a prosecutor was carried out in the same way as judges of the Court of Appeal.

The draft law submitted by the Council of State on 21 April 1808 awaited royal approval, which, however, was delayed because the King did not reside in Warsaw but in Dresden, Saxony so the possibility of signing the act was reduced. Meanwhile, on 1 May 1808, the Napoleonic Code came into force in the Duchy of Warsaw, which was ordered by the royal decree of 27 January 1808 in implementation of provisions of Art. 69 of the Constitution[24]. In this situation the Minister of Justice, Feliks Łubieński, could not continue to delay the introduction of new justice institutions that would implement and exercised regulations of the Code. Certain offices like prosecutors, were entrusted by the Napoleonic Code with tasks of performing many legal acts in ongoing proceedings. Therefore, minister Łubieński submitted to the King requests to appoint prosecutors. The Cassation Prosecutor was nominated on 19 March 1808, the appellate prosecutor, 3 criminal prosecutors and 6 department prosecutors on 12 April 1808. In the ministerial instruction of 13 May 1808, Minister Feliks Łubieński sent instructions to the courts in which he established new organization schemes of courts and prosecutor's offices[25]. The document was to be in force temporarily until formally approved by the King. This instruction was to be modified, but it remained in force as a document on which the functioning of the Prosecutor's Office in the new justice system rested for the next years. Thus, the first organizational level, i.e. criminal prosecutors, stated to perform their duties at criminal courts. The criminal prosecutor was entrusted with the power to ensure com-

[23] ADAG, Akta Rady Stanu Księstwa warszawskiego, v. II 71, p. 38–45, p. 214.
[24] Dziennik Praw księstwa Warszawskiego (DPKW), v. I, no. 2, p. 53.
[25] A. Heyl man, Historia organizacji sądownictwa w Królewskie Polskim, vol. I, Warszawa 1861, p. 23–30.

pliance of the judicial staff with ministerial instructions. Pursuant to § 21 of the instruction of 13 May 1808, a general report on the implementation of the instructions was to be submitted by the cassation prosecutor in order to ensure the efficient field operation of criminal prosecutors and the functioning of the new justice system. This created momentum so much needed for the effective adjudication of the criminal cases and smooth functioning of the judiciary in the Dutchy of Warsaw. The events that followed proved that these ambitious efforts were highly needed but faced some obstacles connected to the typical inertia of bureaucracy and organizational problems connected to the scare resources allocated to the new judicial system. Nevertheless, the influence of the Napoleonic Code on the Polish judicial system was visible and resulted with positive outcome in the long run.

4. Summary

The introduction of the Napoleonic Code in Poland on 1 May 1808 gave a modernization impulse for the justice system and based it on modern institutional solutions. This was not without resistance, doubts and obstacles that appeared in judicial and administrative practice when implementing new solutions unknown to old practice. Although the institution of the public prosecutor in the Kingdom of Poland[26] had several centuries of tradition of functioning under the guise of the royal instigator[27], the new competences granted to prosecutors in the legal system of the Duchy of Warsaw constituted a breakthrough. The creation of a new court structure based on modern legal solutions along with the organization of the modern structure of field administration gave a important modernization impulse to the entire state[28]. The judicial institutions established at that time, with consecutive changes, survived the existence of the Duchy of Warsaw and have been used with some changes in practice of Polish judiciary for over 200 years.

[26] R. Kucharski, Zarys historii Prokuratury w Polsce, Prokuratura i Prawo 2021, no. 11, p. 121–161.
[27] R. Kucharski, Sądownictwo szlacheckie od XV do XVIII wieku, Consilium Iuridicum 2022, no. 3–4, p. 242.
[28] R. Kucharski, Geneza sądów polskich, Consilium Iuridicum 2022, no. 1–2, p. 237–252.

Bibliography

1. ADAG, Akta Rady Stanu Księstwa warszawskiego, v. II 71.
2. Archiwum Wybickiego (1802-1822), Edited by: A. Skałkowski, Gdańsk 1950, v. II.
3. Bardach J., Leśnodorski B., Pietrzak M., Historia ustroju i prawa polskiego, Wydawnictwo Naukowe PWN, Warszawa 1994.
4. Cichoń P., Wpływy francuskie w administracji Księstw Warszawskiego, Zeszyty Naukowe Uniwersytetu jagiellońskiego, vol. 1, p. 1.
5. Dziennik Praw Księstwa Warszawskiego (dalej DPKW), year 1808, no. 2.
6. Dziennik Praw księstwa Warszawskiego (DPKW), v. I, no. 2.
7. Grodziski S., Wpływ Code Civil oraz innych kodyfikacji napoleońskich na ziemiach polskich, Czasopismo Prawno-Historyczne 2005, Vol. LVII, no. 2.
8. Grynwaser H., Kodeks Napoleona w Polsce, Pisma, Wrocław 1951, vol. I, Gazeta Krakowska 1811, no. 7 (supplement).
9. Heylman A., Historia organizacji sądownictwa w Królewskie Polskim, vol. I, Warszawa 1861.
10. Korobowicz A., Witkowski W., Historia ustroju i prawa polskiego (1772-1918), Wolters Kluwer, Warszawa 2017.
11. Krzyżanowski L., Historia ustroju i prawa w Polsce, Wydawnictwo OdNowa, Toruń 2013.
12. Kucharski R., Geneza sądów polskich, Consilium Iuridicum 2022, no. 1–2.
13. Kucharski R., Sądownictwo Księstwa Warszawskiego – zręby nowożytnego wymiaru sprawiedliwości, Consilium Iuridicum 2023, no. 6.
14. Kucharski R., Sądownictwo szlacheckie od XV do XVIII wieku, Consilium Iuridicum 2022, no. 3–4.
15. Kucharski R., Szkolenie sędziów w czasach Księstwa Warszawskiego, Collegium Iuridicum 2023, nr 7.
16. Kucharski R., Zarys historii Prokuratury w Polsce, Prokuratura i Prawo 2021, no. 11.

17. Leśnodorski B., Szkoła Prawa i Nauk Administracyjnych w Księstwie Warszawskim, w: Studia z dziejów Wydziału Prawa Uniwersytetu Warszawskiego, Warszawa 1963.
18. Maciejewski T., Historia powszechna ustroju i prawa, Wydawnictwo C.H. Beck, Warszawa 2015.
19. Makiłła D., Historia prawa w Polsce, Wydawnictwo Naukowe PWN, Warszawa 2008.
20. Małkowski K., Przepisy postępowania sądowego w sprawach karnych, Warszawa 1865.
21. Materiały do dziejów komisji rządzącej z roku 1807, wyd. M. Roztworowski, Kraków 1918.
22. Rosner A., Sędziowie i urzędnicy sądów pokoju w Księstwie Warszawskim, Przegląd Historyczny 1988, vol. 4.
23. Rzeczkowski A., Recepcja prawa francuskiego w Księstwie Warszawskim, Kortowski Przegląd Prawniczy 2018, no. 2.
24. Smyk G., Francuskie prawo i instytucje ustrojowe w Księstwie Warszawskim, Annales Universitas Mriae Curie-Skłodowska 2007, no. LXII.
25. Szczęska Z., Instygatorzy w Trybunale Koronnym i innych sądach danej Rzeczypospolitej, Problemy Praworządności 1978, no. 6.
26. Wołodkiewicz W., 200 lat Kodeksu napoleona w Polsce – od nienawiści do miłości, Palestra 2008, no. 1–2.
27. Zarzycki W., Oskarżyciel publiczny w okresie reform z drugiej połowy XVIII w., Problemy Praworządności 1972 no. 2.

Wpływ Kodeksu Napoleona na system sądowniczy Księstwa Warszawskiego

Streszczenie

Utworzenie Księstwa Warszawskiego w wyniku wojen napoleońskich w Europie stworzyło potrzebę zorganizowania na nowo administracji państwowej odpowiadającej nowoczesnym wzorcom i odpowiadającej

nowym wyzwaniom nowej ery w dziejach Europy. Obok tego zaszła potrzeba zreformowania instytucji wymiaru sprawiedliwości i usunięcie z jej praktyk przestarzałych i narzuconych przez zaborców instytucji, szczególnie wzorców pruskich. Ten ambitny cel postawił i przeprowadził minister sprawiedliwości Feliks Łubieński, któremu polskie sądownictwo zawdzięcza wprowadzenie do nowej epoki. Dzięki jego pracy udało się oprzeć system prawny ówczesnej Polski na regulacjach Kodeksu Napoleona. Niniejsze opracowanie przedstawia zarys instytucji wymiaru sprawiedliwości (sądów i prokuratury) jakie zostały utworzone w oparciu o nowoczesne rozwiązania prawno-ustrojowe regulacji napoleońskiej, bazujące na tradycji prawa rzymskiego, opierającej się na fundamentach cywilizacji chrześcijańskiej oraz elementach filozofii greckiej. Było to ważnym impulsem do modernizacji wymiaru sprawiedliwości w Polsce oraz zapoczątkowało zmiany społeczne i gospodarcze niezbędne dla sprawnego funkcjonowania nowoczesnego Państwa Polskiego.

Słowa kluczowe

Kodeks Napoleona, Księstwo Warszawskie, sądy, prokuratura, instrukcja, Polska, sądownictwo, instrukcja, konstytucja.

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