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CAUSA OMNE IUS CONSTITUTUM SIT

Collection of Scientific Papers of the Polish-Hungarian Research Platform

VOLUME I

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Omne Ius Constitutum Sit

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Preface

In today's fast-paced, technologically driven world, the legal landscape is continually evolving to address the challenges posed by modern societal transformations. The Institute of Justice in Warsaw is proud to present a collection of scholarly works derived from the Polish-Hungarian Research Platform 2022, an international research project that delves deep into critical aspects of contemporary legal studies. This project brings together a network of dedicated researchers committed to exploring and understanding *Legal Aspects of Artificial Intelligence*, *The Reform of the Administrative Judiciary*, *Legal Protection of Older People*, and *Mediation in Court Proceedings*.

The multifaceted nature of this project is reflected in its overarching objectives. We aim to conduct comprehensive research and engage in activities that contribute to the advancement of four primary areas:

- *Legal Aspects of Artificial Intelligence*: In the age of Artificial Intelligence, the interplay between technology and the law is an imperative concern. Our project strives to propose a relevant legal framework for the practical application of artificial intelligence solutions within the domains of national law, including criminal law, civil law, administrative law, and public and private international law.

- *The Reform of the Administrative Judiciary*: A fair and efficient administrative judiciary is the bedrock of a just legal system. Our research seeks to propose a relevant legal framework that ensures the fairness and efficacy of administrative proceedings.
- *Legal Protection of Older People*: The elderly population faces distinct challenges in contemporary society, necessitating enhanced legal protection. We endeavor to propose a comprehensive legal framework to safeguard the rights of older individuals in the realms of criminal law, civil law, and administrative law, addressing the unique threats they encounter.
- *Mediation in Court Proceedings*: Mediation plays a pivotal role in facilitating dispute resolution and ensuring justice in the court system. Our goal is to propose new or improved solutions that enhance the effectiveness and universality of mediation, with a particular focus on its application in civil and criminal proceedings.

Our research is not limited to academic realms; we aim to bridge the gap between theory and practice, with the ultimate goal of shaping legal developments. As such, the results obtained through this project will not only enrich the theoretical underpinnings of law but also contribute to practical applications, offering *de lege ferenda* postulates for the Polish legislator.

The Institute for Justice in Warsaw is proud to present this monograph, consisting of 19 scientific articles on the topics of the research teams, a testimony to the commitment and joint efforts of researchers from different corners of the world. We believe that the findings presented in this collection will stimulate in-depth discussions and serve as a valuable resource for scholars, policymakers, and legal practitioners alike. It is our hope that the legal frameworks proposed within these pages will pave the way for a more just, technologically aware, and compassionate legal system.

Marcin Wielec,
Paweł Sobczyk,
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Court Mediation within Administrative Court Proceedings in Hungary

Introduction

At the end of 2022 I had visited the Warsaw Rising Museum (Polish: Muzeum Powstania Warszawskiego), dedicated to the Warsaw Uprising of 1944. On the one hand it was uplifting because of the courage and self-sacrifice shown by the insurgents, but on the other hand it was a sad experience because there was so much pain, there were so many wounds and losses during those two months of the uprising… I have to say that there are conflicts in which you cannot reach any compromise – but if there are any chances for that, you have to have proper and effective techniques, even some institutionalised ones. Almost all the forms of **ADR (Alternative Dispute Resolution**) are aiming to prevent or avoid the escalation of human conflicts both outside and within court proceedings – and that's the reason behind the importance of mediation and court mediation as well. In connection with the previous thoughts we should also add that mediation is more effective when conflict is moderate rather than intense, and when the parties are highly motivated to reach settlement, as they are in a hurting stalemate.[1]

[1] D.G. Pruitt, *Negotiation and Mediation*, "Annual Review of Psychology" 1992, 43(1), p. 562.

Mediation in Hungary was initially regulated only for specific kinds of mediation (consumer protection, health care, etc.) in the 1990s. The first general statutory regulation was adopted in the form of Act LV of 2002 on Mediation, which remains the main legal source for mediation even today. Directive 2008/52/EC was implemented in Hungary in 2009.[2] The regulation on mediation – with regard to the specifics of the different fields of law – is still diverse.[3]

A specific form of mediation, i.e., **court mediation**, has been available in Hungarian civil courts since 2012, and is an effective tool of enhancing customer satisfaction and timeliness in civil litigious and non-litigious cases. Moreover, under the provisions of Act I of 2017 on the Code of Administrative Court Procedure, a brand new institution has been introduced in Hungary: from 1 January 2018, in administrative court proceedings, the judge may, with the agreement of the parties, allow court mediation procedure in the cases in which the law does not preclude it.

Within our Hungarian court-related, **centralised model** of mediation within administrative proceedings that is well-known also in Germany and Slovenia, the court refers parties to mediation, the (court) mediation takes place in a court building and is conducted by court-based mediation practitioners. The mediators are drawn from the judiciary or other members of court personnel, the mediators are chosen and appointed by the court and the costs of the mediation are treated as costs of the justice system. In most of cases it means that these services are at no cost.[4] By contrast, a different form of court-related mediation is also used at some countries: the **marketplace model** represents such a form

[2] Related to the Polish implementation see: M. Dąbrowski, *Assessment of the Correct Implementation of Article 4 of Directive 2008/52/EC of 21 May 2008 on Some Aspects of Mediation in Civil and Commercial Matters in the Polish Legal System*, "Krytyka Prawa. Niezależne Studia nad Prawem" 2022, 14(3), pp. 5–19.

[3] See some examples on the early Hungarian scientific literature response to the first legal sources: M. Nagy, *Bírósági mediáció*, Szeged 2011, p. 13; K.M. Rúzs, *Mediáció a munkajogban*, Szeged 2007, p. 131; A. Dósa, *Konfliktusrendezés közvetítői eljárással*, Budapest 2001; and https://birosag.hu/en/court-mediation (accessed on: 12.11.2022).

[4] N. Alexander, *Making mediation law*, Singapore Management University, Singapore 2016, p. 8.

in which the court outsources mediation services. The mediators are typically not employed by the court and are members of a panel of court-approved mediation service providers who set their own fees, which are paid by the disputants.

From both the international and Hungarian perspective, the implementation of the institution of court mediation has been effected by the fast spread of the different methods of alternative dispute resolution outside of traditional forms of court litigation. There was a great need for such form of dispute resolution that exists within the organization of the judiciary but, at the same time, is absolutely separated from the court procedure and is also independent from the judge who decides the case.[5] The goal of court mediation is to offer such a tool for the parties that makes possible for them to reach the best solution after they went to trial.[6] Court mediation allows them to soften their conflict by formulating their feelings and by clarifying those circumstances that resulted in the dispute in question.

But why is it so important to have also a court-related mediation model beyond those institutions that belong to the classic private sector mediation model (also existing in Hungary) or to the community mediation model? The short answer should be that a relatively balanced distribution of mediation services indicates a broad range of access points to mediation and that sustainable diversity is essential for the continued attractiveness of mediation as an adaptable and innovative alternative to traditional court procedures.[7]

Within my previous essay on administrative court mediation,[8] comprising the first part of my research for the scientific cooperation

[5] *A polgári eljárás alternatívája: bírósági közvetítés. A mediáció helye jogrendszerünkben*, p. 3, https://www.mabie.hu/attachments/article/99/A%20polg%C3%A1ri%20elj%C3%A1r%C3%A1s%20alternat%C3%ADv%C3%A1ja%20-%20b%C3%ADr%C3%B3s%C3%A1gi%20k%C3%B6zvet%C3%ADt%C3%A9s%20(1).pdf (accessed on: 1.12.2022).

[6] M. Nagy, *op. cit.*, p. 136.

[7] N. Alexander, *op. cit.*, p. 13.

[8] Á. Rixer, *Court mediation within administrative court proceedings in Hungary*, [in:] *Mediation in judicial proceedings – conceptual and practical approaches in Polish and Hungarian legal framework*, B. Janusz-Pohl (ed.), Instytut Wymiaru Sprawiedliwości, Warszawa 2023 (in the process of being published).

by the name of "Polish – Hungarian Research Platform 2" organised by The Institute of Justice in Warsaw, I tried to review the relevant primary and secondary legal sources (for more detail, see chapter 2), and according to the fact that we have only a very few scientific works dedicated especially to mediation within administrative court procedures in general or to the systematic overview of the practice within that field, the existence of scientific works related to mediation within civil and criminal court proceedings also predisposed me to make a detailed comparison between the three forms of court procedure in Hungary according to their rules related to mediation. I had been looking at similarities and differences, examining such topics as the existence of mandatory mediation within those three fields, the parallel forms of registration of the mediators, also – among others – answering the question "At which stages of the given procedure is mediation allowed?".

That first half of my research also proved that institutions of our modern era, such as mediation (and especially administrative court mediation), perfectly meet the requirements laid down by the scientific literature of good governance and of similar phenomena.

So, what should be the particular direction or task of my current essay? Moreover, what are those aspects of the given issue in which unique results can be shown? There are at least two topics that could be presented by my research (and could fulfil the requirements mentioned): on the one hand I handle mediation as a complex phenomenon of communication by enlisting the needed "tools" of the participants of such a process, and on the other hand, I collected some relevant data on that form of mediation, relying also on the interviews with judges and other participants of administrative court mediation.

Methods used

In accordance with the goals mentioned above, the primary method to approach the topic should be **a review of the relevant primary legal sources**, the actual law in the form of the constitution (Fundamental Law of Hungary), acts, governmental decrees, orders of

the President of the National Office, court cases, etc. and **secondary legal sources** (Hungarian and international scientific literature explaining the primary sources, the legal practice and also the specific circumstances determining the broader social environment) through which we may define relevant scientific problems, create our own definitions and prepare a catalogue of practical problems, specifically for Hungarian issues regarding the topic.[9] Specific webpages run by courts or other authorities have been also used.

As Stokoe states in accordance with the relevant international literature, the methods to examine mediation usually encompass self-reported data, interviews, and survey-responses.[10] This Article will try to build in the results of the interviews with judges, with representatives of different defendants (administrative authorities) and others. Qualitative interviewing, including the interviewing of judges and other participants of such proceedings, is a relatively new method in the field of legal studies, at least in Hungary (raising the questions of its added value and adequate application as well).

Within my research project the interviews with judges and others took the form of in-depth, semi-structured conversations.[11] This technique allows for flexibility and a conversational way of communication. Also, this technique provides the possibility to focus on those matters which were most relevant for the concerned judge.[12] Qualitative, semi-structured interviewing fits particularly well in the interpretivist research approach that aims at understanding

[9] The scientific antecedents of the present work in English are: Á. Rixer, *Features of the Hungarian Legal System after 2010*, Patrocinium, Budapest 2012; Á. Rixer, *Attempts of the Good State in Hungary – New Contents of Norms Created by the State*, "Iustum Aequum Salutare" 2013, 9(2), pp. 129–139.

[10] E. Stokoe, *Overcoming barriers to mediation in intake calls to services: Research based strategies for mediators*, "Negotiation Journal" 2013, 29(3), pp. 289–314.

[11] See in a more detailed way: A. Madill, *Interaction in the Semi-Structured Interview: A Comparative Analysis of the Use of and Response to Indirect Complaints*, "Qualitative Research in Psychology" 2011, 8(4), pp. 333–353. DOI: 10.1080/14780880903521633.

[12] *International Handbook of Survey Methodology*, E.D. de Leeuw, J.J. Hox, D.A. Dillman (eds.), Taylor & Francis, 2008, p. 317.

socially-constructed reality and human action in specific contexts.[13] In a structured interview, the interviewer uses a preestablished schedule of questions, typically referred to as a questionnaire, with a limited set of response categories, and asks each respondent the same set of questions in order to ensure comparability of the data.[14] In contrast to the rigidity of this type of interview, in a semi-structured interview the interviewer relies on an interview guide that includes a consistent set of questions or topics, but the interviewer is allowed more flexibility to digress and to probe based on interactions during the interview.[15] The agenda for a semi-structured interview is never carved in stone.

Semi-structured interviewing is useful in studies where the goals are exploration, discovery, and interpretation of complex phenomena and processes and when combined with documentary methods.[16] Within my current research I did have some preestablished questions, given to all the respondents, but, at the same time, those questions were broad enough, and the interviewees were given the floor to express their further observations as well as what thoughts they might have on the topic.

Those interviews were conducted mainly by telephone. Contemporary scientific literature regards telephone interviews as an option no less viable than other established methods of qualitative data collection: beyond convenience factors, the focus is placed on the methodological strengths of using telephone interviews that have generally been assigned a second, lesser ranking in qualitative research.[17]

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[13] U. Jaremba, E. Mak, *Interviewing judges in the transnational context*, "Law and Method" 2014, 4(2), pp. 35–54.

[14] K.M. Blee, V. Taylor, *Semi-Structured Interviewing in Social Movement Research*, [in:] *Methods of Social Movement Research*, B. Klandermans, S. Staggenborg (eds.), University of Minnesota Press, Minneapolis 2002, p. 92.

[15] *Ibid*.

[16] *Ibid.*, p. 93.

[17] M. Cachia, L. Millward, *The telephone medium and semi-structured interviews: a complementary fit*, "Qualitative Research in Organizations and Management" 2011, 6(3), pp. 265–277.

Forms and content of communication before, during and after the court mediation in administrative court proceedings

Within this chapter I would like to present the most important aspects of communication related to the court mediation in administrative proceedings. In advance, I have to emphasise that court mediation in administrative procedure is a very specific and relatively new institution that requires also examination of the relations between all the participants of such a process beyond the basic legal aspects, i.e., beyond those provisions of Act I of 2017 on the Code of Administrative Court Procedure that provide rules for court mediation in administrative cases. Moreover, as my paper involves the combination of multiple academic disciplines into my research project, the need for interdisciplinarity requires, beyond jurisprudence, the involvement of psychology, media studies and some other fields of science also.

So, what are the most important layers or aspects of communication within that court-centred mediation in administrative cases in Hungary? What are the absolutely indispensable types of communication of such proceedings and who are the participants in those communications?

- The first one is communication between the judiciary and the society on (about) court mediation – in general.
- The second one is communication between the judge of the given case (the proceeding court) and the parties to the case concerning the court mediation.
- The third one is communication between the court performing the tasks of court mediation and the parties to the given case.
- The fourth one is communication between the court mediator(s) and the parties to a certain case.
- The fifth one is communication of the court mediators and the courts involved (the proceeding court and the court performing the tasks of court mediation).
- The sixth one is communication between the courts involved.

I'm going to write in a detailed form only about the first and the fourth type of communication, because all the other aspects are laid down within Hungarian legal sources by clear provisions with good interpretability.[18]

Related to the communication between the judiciary and the society on (about) court mediation in general (point one), my first remark is that the courts' practice of advertising in Hungary is very moderate, very restrained – it doesn't really exist beyond the courts' own webpages. Law is one such profession even globally where lawyers, law firms and state managed legal institutions are not allowed or are only partly allowed to indulge in advertising practices to promote their services. And in spite of the fact that there are some

[18] *Related to point 2*, Section 65 par. (2) subpar. b) of Act I of 2017 on the Code of Administrative Court Procedure states that "In order to facilitate the settlement, the court (…) b) shall inform the parties of the essence of and the possibility and conditions of resorting to a mediation procedure", and under Section 69 par. (1) and (2) "The court shall order mediation if the parties and the interested persons have consented to it. During mediation, the parties and interested persons make an attempt to settle, the legal dispute with the involvement of the court" and "The court shall suspend the procedure until mediation has been completed but for two months at most." The proceeding court shall inform the parties within 8 days about the name of the court mediator, about the date of the first session, as well (Section 38/B par. (4) of Act LV of 2002 on Mediation In addition, "The proceeding court shall examine the settlement and, if it complies with the laws, corporate it into an order with the effect of a judgment". Section 70 par. (3).

Related to point 3, Section 38/B par. (3) of Act LV of 2002 on Mediation states that "(…) The parties of the proceeding shall submit their application for a court mediation process to the court performing the tasks of court mediation".

Related to point 5, Section 70 par. (2) of Act I of 2017 on the Code of Administrative Court Procedure expresses that "Upon completing mediation, the court mediator a) shall put the concluded settlement in writing and send it to the proceeding court, b) shall inform the proceeding court that mediation was inconclusive if no settlement has been concluded or if any of the parties has requested so. Some provisions of Decree of the Minister of Justice no. 14/2002 (VIII. 1) on the rules of court administration are also closely connected with the topic of he given point.

Related to point 6, among others, Section 75 par. (3) of Decree of the Minister of Justice no. 14/2002 (VIII. 1) must be mentioned which is about the selection of the court mediators within a particular case, and Section 38/B par. (3a) of Act LV of 2002, referring to the delivery of the official decisions between the proceeding court and the court performing the tasks of court mediation.

reasonable legal barriers related to advertising practices, we can observe that for example the Hungarian Chamber of Court Enforcement Officers (in Hungarian: *Magyar Bírósági Végrehajtói Kamara*) quite often advertises its own services by television commercials. Thinking about the need for advertising, on the one hand that could be or might be counterproductive by highlighting legal solutions when law must always remain an *ultima ratio*,[19] but on the other hand court mediation – as a form of alternative dispute resolution – is not a mere legal institution, at least not a classical, deeply regulated one within our modern legal system.

Turning to the webpages of the courts, according to the order of the **National Office for the Judiciary, courts are obliged to put a detailed explanation on their webpages explaining to the public what the main rules and advantages are, how to resort to a given certain tool of mediation within administrative and civil court proceedings.**[20]

Even though those webpages[21] do exist, there are several problems related to them:

– firstly, in some cases they introduce the content of the given legal source without substantive explanation, moreover, the logic of the introduction follows the structure of the given act and not the way of thinking of an ordinary man or woman;

[19] In spite of the fact that lawmaking processes and individual decisions became part of the most broadly taken popular culture and media considers them as their own which quite often changes the operation method of law… Á. Rixer, *Features of the Hungarian legal system after 2010*, Patrocinium, Budapest 2012, pp. 28–29. We can also add that according to Turcsánné, the best way to inform the public or even the parties is still direct oral communication by the judge – in most of the cases. K.M. Turcsánné, *Bírósági közvetítés Magyarországon a kezdetektől 2019. Év végéig*, [in:] *Bíró és mediator*, J. Glavanits (ed.), Universitas-Győr, Győr 2020, p. 30.

[20] Section 9 par. (1)–(3) and Section 10 of 11/2014 (VII. 11) Order of the President of the National Office for the Judiciary.

[21] See for example the webpage of the Budapest High Court (Hungarian: *Fővárosi Törvényszék*) with some information about court mediation: https://fovarositorvenyszek.birosag.hu/20210526/1-mi-az-kozvetitoi-mas-neven--mediacios-eljaras (accessed on: 14.12.2022).

- secondly, practical information is quite often hidden in long texts, overwhelming those who are not lawyers. Some of those electronic leaflets are too short, too long, or even too detailed lacking the stable characteristics, stable features of that specific genre that is a 'quick and easy-to-read' type of description of court mediation;
- thirdly, the rules of court mediation within civil cases and administrative cases are introduced together quite regularly, without mentioning the differences or making it clear that they are not absolute equivalents;
- fourthly, at least two webpages do not contain the regulations in force, but offer the content of the previous regulation;
- and lastly, the authority application form used for court mediation in administrative cases, is accessible only in Hungarian, and it is funny, namely, that it is written there (*Ha a közvetítés során idegen nyelvet kíván használni, annak megjelölése*…[22]) that if you would like to use a foreign language during the mediation, please appoint which one is it. If you would like to use Polish, you have to know Hungarian…

We should also take into account that many of the contemporary problems of the Hungarian courts in general are still closely related to the loss or lack of trust towards all the institutional solutions of public administration and towards the courts as well. This scepticism prompts people to rely on informal practices as substitutes for law (and ADR techniques do not belong to that scope of practices). As András Sajó pointed out in his masterpiece, *Illusion and Reality in Law* (1986), the legal culture of the Socialist Hungary was strongly determined by the fact that legal arguments, especially references to rights, played only a limited role in the conflict management strategies of citizens.[23] Sajó named this phenomenon as the lack of rights consciousness. This phenomenon still persists in the post-transitory Hungarian legal culture due to the distortions of the transition to

[22] See e.g.: https://birosag.hu/nyomtatvanyok/birosagi-kozvetites/kozigazgatasi-perhez-kapcsolodo-birosagi-kozvetitoi-eljarast (accessed on: 14.12.2022).

[23] A. Sajó, *Látszat és valóság a jogban* [*Illusion and Reality in Law*], Közgazdasági és Jogi Könyvkiadó, Budapest 1986, p. 11.

a market economy and the general lack of trust,[24] i.e. – among others – the low level of institutional trust, the weakness of channels suitable for lawful lobby activities, and the low level of participation in different decision-making processes.

To sum up, it's clear that communication with respect to court mediation even in administrative cases shouldn't restricted to official webpages or information leaflets… This aspect is also highlighted by the fact that there are not so many departments or at least courses within Hungarian higher education dedicated exclusively to any form of (court) mediation: there are only two postgraduate specialist training courses focusing on the legal aspects of mediation: one in Pécs[25] and another in Győr…[26]

In addition, the communication directed towards the society concerning court mediation, i.e., information for the benefit of the general public, should not appear exclusively in a form of webpages or classic information leaflets put somewhere in the lobby of a given court… As the main difference between the civil law (continental Europe) system and the common law (Anglo-Saxon) system is in the role of court cases setting precedent, the main difference between the law schools that function within countries belonging to one of those systems is how they relate to the importance of practical aspects of the law in general. That's why "law and literature" courses are so popular in common-law states: they also try to reach the meaning of the law and the way of thinking that helps us solving legal problems mainly by using certain cases – even though these cases are not real but fictious ones… Nevertheless, these "law and literature" courses are becoming important elements of institutional efforts to improve the law school curricula in Europe in general and also in Hungary.[27]

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[24] B. Fekete, *Some Specific Central European Experiences May Help to Increase Understanding of the Legal Reality in The Western Countries*, "Droit et société" 2020, 1, p. 150.

[25] https://ajk.pte.hu/hu/szakiranyu-tovabbkepzesek/jelentkezes! (accessed on: 10.12.2022).

[26] https://dfk.sze.hu/szakiranyu-tovabbkepzesek (accessed on: 10.12.2022).

[27] A. Czine, A. Domokos, P. Nagy, A. Prieger, Á. Rixer, J. Zoltán Tóth, *"Jog és irodalom" kurzus a KRE ÁJK-n*, "Ügyészek Lapja" 2019, 26(1), pp. 99–104.

What is this movement about? And why is it important related to communication about court mediation? The answer is that the vast majority of the information about the law comes from different webpages, blogs, from movies and from fine literature, from fiction – at least for ordinary citizens… And if it is so – even in the case of many law students – why shouldn't we introduce legal institutions through fictions, not directly by using legal sources, but through well-known fictious stories – in the case of mediation through stories in which we could find portrayal of mediators or mediation processes. Moreover, it would be – it could be – a good direction also beyond the walls of law schools if someone wants to promote the institution of mediation within the broader society.

My fourth point was about the communication between the mediators and the parties of a certain case. Section 75/A par. (7) of Decree of the Minister of Justice no. 14/2002 (VIII. 1) refers to some important rules of making and maintaining contact between the court mediators and the parties of the certain proceeding. But beyond the legal provisions there are some questions to ask ourselves: what are the essential skills that mediators in general and especially in administrative court cases need? We can agree on the fact that good communication skills are needed in order to speak and behave appropriately with the parties, to maintain good eye contact, listen effectively, present your ideas appropriately, and to write clearly and concisely if an edited document is needed and so on.

The classical functions of communication are to persuade, inform, and motivate, which help parties make better decisions also within court mediation. There are several groupings that try to enumerate the main aspects of communication,[28] and all those functions or aspects of communication are mediator development areas as well. The five most important aspects of effective communication (listen, trust, focus and control, confidence and influence, clarity of the

[28] E.g. in accordance with Aczél and Veszelszki the main functions of communication are leadership, service, cooperation, and knowledge. P. Aczél, A. Veszelszki, *Kommunikáció üzletben és tudományban*, Wolters Kluwer Hungary, Budapest 2021, p. 19.

message[29]) are also well known, and a mediator has to take them into account as well.

One key exercise in dispute mediation is the management of emotions: not only the disputants' emotions but the mediators' own feelings. To achieve that, effective mediators tend to apply interpersonal affect regulation strategies (e.g., paraphrasing, active listening and reflective practices), aimed at emphasising cooperation and mutual understanding.[30] There are several reflective practices that help the parties reflect on their experiences and actions in order to enable recognition of assumptions, frameworks and patterns of thought and behaviour – all of which shape their thinking and action.[31] With these strategies, mediators also promote emphatic communication between the parties in conflict.[32]

But, to be honest, a sophisticated psychological toolbar is not as needed in administrative cases as much as it is in criminal ones: in administrative cases, the need for reconciliation or restoration is almost missing: the parties are using tools of mediation because of the possibility of forthcoming long-term cooperation – that is, the role of emotions and handling of those emotions is less important in administrative cases.

But, the most exciting question we can give ourselves is "Are there any differences between the skills required from a judge acting in his capacity as a judge and a judge who steps in a role of a mediator?" From my perspective, on the one hand, we should not differentiate, a judge should practice civility, by being patient, dignified, respectful, and courteous – whatever his role within a court case or within an ADR process. On the other hand, the only possible difference – when acting as a mediator – is a bigger scope for sociability.

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[29] See more: M. Fielding, *Effective Communication in Organisations*, JUTA Academic, Cape Town 2006.

[30] C.F. Bates, *Empathy and Mediation*, [in:] *Accessing the public sphere through intercultural mediation*, A.M. González, I. Olza (eds.), London 2022, p. 3, https://www.academia.edu/77468462/Empathy_and_Mediation (accessed on: 2.10.2022).

[31] https://www.participatorymethods.org/method/reflective-practice (accessed on: 23.11.2022).

[32] C.F. Bates, *op. cit.*, p. 3.

And beyond the conceptual models used to explain the human communication process, especially the communication between the mediator and the parties, a new field of research has been evolved related to the same topic: the need for holding virtual meetings and to conduct online sessions.[33] Unfortunately, that institution still doesn't exist in Hungary; we are still lacking the legal foundations providing online court mediation proceedings in administrative cases, as well – mainly because of unsolved questions related to data-protection.[34]

After that detailed overview on communication related to court mediation we should go deeper within those aspects by which the whole institution can be analysed. I will therefore introduce hereinafter some facts and data related to court mediation in administrative court proceedings in Hungary. My forthcoming chapter tries to introduce three relevant aspects of court mediation in administrative court proceedings: first, the number of cases settled via mediation, second, the general facts about the former trainings on mediation organised for judges, and, thirdly I will also try to build in the results of some interviews conducted by me with judges, with representatives of different defendants (administrative authorities) and with other professionals involved in the organisation and provision of training for the judges.

Data and interviews on court mediation

So, I have to begin with some data on court mediation in administrative court proceedings, but at this point we face some hardships: we do have the numbers of those cases in which settlements approved by the courts were reached in administrative court proceedings,

[33] The importance of that (research) topic has been constantly growing in Hungary. See e.g.: G. Kurunczi, A. Téglási, *Solutions and Challenges for Online Meetings of Electoral Bodies*, "Krytyka Prawa. Niezależne Studia nad Prawem" 2022, 14(3), pp. 38–49.

[34] J. Glavanits, *Mediáció és pandémia*, [in:] *Bíró és mediátor – Válogatott tanulmányok a közvetítői eljárás elméleti és gyakorlati kérdéseiről*, J. Glavanits (ed.), Universitas-Győr Nonprofit Kft., Győr 2020, p. 359.

but those numbers are aggregated ones acquired by combining data on settlements reached without mediators, and data on those cases in which professional judges were involved as independent mediators (without having any right to make formal legal decisions, without having the right of approval). So I submitted a data subject access request (DSAR) to the President of the National Office for the Judiciary, asking for data on numbers of settlements reached exclusively by court mediation in administrative court proceedings, but unfortunately those data are not available.

So, what was the aggregated number of the settlements in administrative court proceedings in the last five years? It was 6 in 2018, 20 in 2019, 24 in 2020, 20 in 2021 and 16 in the first half of 2022. These numbers are not so high, but we have to take into account that they are slowly increasing and that the total number of administrative court cases declines since 2019 at the same time. So we can say that these are not bad results, or even that they are relatively promising ones.

Table. Aggregated numbers of the settlements in administrative court proceedings in Hungary in the last five years (2018–2022)

Year	Number of settlements
2018	6
2019	20
2020	24
2021	20
2022 (first 6 months)	16

Source: National Office for the Judiciary.

Just to give a detailed picture, there are at about 40 judges and assistant judges in Hungary who are entitled and officially assigned for court mediation in administrative cases.

My second topic within this subchapter is the form and content of the training on court mediation within administrative court proceedings. We have to highlight that between 2018 and 2020 there was training dedicated to that specific field and organised by

the Hungarian Academy of Justice, but there have been no such programmes within the last two years. The reasons for this situation are quite interesting: on the one hand the COVID pandemic can be mentioned,[35] and the fact that for such a sensitive field as mediation, online forms of training are not really suitable, even though an e-learning platform named CooSpace was opened for the users (for judges here in Hungary) on 13 July 2017, including more than 1,800 pages of educational material. But from in my private opinion that was not the main reason; rather, it was the fact **that over the last few years two have seen a competition between two conflicting theoretical approaches concerning the goal of the courts in general**. The first one says that we should put the decisions about their own lives within the hands of the parties, if it's possible, and such a perspective means that we should strengthen all the forms of ADR, but another approach also exists in parallel: a judge is there on the pulpit to make judgments, and whatever happens, it must remain his main role… and some judges think and allege that the second standpoint is the stronger one nowadays in Hungary.

As I have already mentioned, there is a specific institution, the Hungarian Academy of Justice, which operates as one of the departments of the National Office for the Judiciary, aimed to organise and provide trainings for judges and judicial staff. As we all know, the professional judicial activity can only be guaranteed by high-level training for judges, assistant judges, and other judicial employees. The training of 11,000 employees working for the judiciary shall be performed partly centrally and partly on the level of regional courts and regional courts of appeal with the central coordination of training by the Hungarian Academy of Justice.[36] Almost all the

[35] Matteucci Giovanni and his colleagues conducted a questionnaire about the situation in each country with regard to the operation of the Courts, the use of ODR and their opinion about online mediation to find out how mediators and the courts of 30 different countries were coping with the many limitations and government restrictions caused by the virus. *ODR in 30 Countries, 2020 – Mediation in the COVID-19 Era*, G. Matteucci (ed.), https://www.academia.edu/43136391/ODR_in_30_Countries_2020_-_Mediation_in_the_COVID-19_Era) (accessed on: 30.11.2022).

[36] https://birosag.hu/node/30699 (accessed on: 30.11.2022).

training organised by the Hungarian Academy of Justice deals with the requirements of the provisions of the 63/2009 (XII. 17) Decree of the Minister of Justice and law Enforcement on mediation training and further training.

Even though currently there is no training specifically on court mediation, rumour has it that a kind of a further, two-day long training is planned for the next year specifically for appointed court mediators, the aim of which is to provide some further methodological knowledge…

Between 2018 and 2020 – as I have already mentioned above – there was a 60-hour long training for judges and assistant judges dedicated to the specific topic of court mediation.[37]

The training consisted of two parts, one theoretical and one practical, and the Academy had provided written materials also, in particular a textbook on case law. To facilitate an understanding of the case law and also the specific requirements beyond the legal circumstances, simulation exercises were also held in order to encourage the judges to develop their skills through precedents similar to real ones. The simulations were fully interactive exercises that tested the capability of judges to respond to the (simulated) situations even in those cases where specific non-conventional skills were needed.

Practicing court mediators and other experienced judges were also involved as trainers both in the theoretical and the practical part of that training. According to the participants, it was a huge success. The groups were of 15 people maximum and were mixed, consisting both of judges and assistant judges. In some cases, well-known Hungarian actors (!) were also invited to play the roles of the parties.

My third objective for this subchapter is the presentation of the results of those 12 interviews conducted by me with the judges, with representatives of different defendants (administrative authorities) and with other professionals involved in the organisation and

[37] K.M. Turcsánné, *Bírósági közvetítés Magyarországon a kezdetektől 2019. Év végéig*, [in:] *Bíró és mediator*, J. Glavanits (ed.), Universitas-Győr, Győr 2020, p. 19.

provision of trainings for the judges. The interviewees were seven judges, one representative of an administrative authority, one lawyer, one mediator who was not a judge but is a jurist, one organiser of trainings for judges and assistant judges, and lastly, one former provider of such trainings who is not a jurist. So, there were 12 interviewees at all.

It had become obvious for me at the very beginning that I have to make those interviews without questions that refer to certain cases: because of the strict time limits of this research, securing a research permission from the president of the National Office for the Judiciary on time was almost impossible. So, at the very end of that question formulation process only three questions remained:

1) "What are the key skills that are required for a court mediator in administrative cases to succeed?"
2) "What should be the content of the (materials of) training courses dedicated to the court mediators?"
3) "What are the main obstacles that block the growth of the numbers of settlements reached by court mediation within administrative court proceedings?"

Answers given to the first question were very homogeneous: empathy[38] and a willingness to take the initiative are those features that are needed the most if someone serves the public as a court mediator. Some mentioned also that several judges acting as court mediators make the mediation process overly formal because it is hard for them to leave behind those old habits… According to their answers, a huge gap can be detected between the opinions of judges and other interviewees: the vast majority of those judges thinks that judges in general are quite sensitive and empathetic when they act as mediators and the majority of other respondents alleged that undoubtedly it is their capacity for empathy that is in greatest need of improvement.

You can already guess what answers were given to the second question: you are right, the need for courses where judges can improve their capacity for empathy was mentioned by many

[38] See more on emphatic judge in the Hungarian literature: L. Barna, D. Juhász, S. Márok, *Milyen a jó bíró?*, "Miskolci Jogi Szemle" 2018, 1, p. 93.

respondents, and also the need for studying real cases together with colleagues from other courts was quite regularly highlighted. Most judges, who were participants of the former training, were very satisfied with the content of it and with the materials offered.

Nor in the answers to the third question were there any surprises: several answers referred to the mandatory character of administrative law, and also to the fact that in most of the cases the parties' interest in a settlement is by no means equal.

The importance of the mandatory character of administrative law cannot be overestimated: in other words, an administrative authority is strongly bound by the principle of legality: even the possibility of court mediation and the content of any settlement is strongly determined by the extent of the legal discretion provided by the law to the given administrative authority.

Many answers (the vast majority) pointed to the fact that administrative authorities had become interested in settlements only in those cases where that result served as a precedent for a huge number of similar, forthcoming cases, and the authority was able to express its legal standpoint through this specific institution on time or even in advance, thereby avoiding a huge number of further cases. So, the authority in some cases tries to pre-empt the huge number of further legal proceedings by such settlements.

A further reason was also mentioned by one of the respondents: the traditional logic of sound management of public finances is still not compatible with court mediation for many administrative authorities.[39]

Some answers referred to the given topic through the preparedness of the judges, saying that being a mediator is a separate profession and stable, well-established psychological knowledge is more or less a prerequisite for those judges who serve concurrently as court mediators. Moreover, readiness to apply psychological knowledge

[39] See also some similar thoughts: Dr. A. Bokros, *A közvetítés lehetőségei a közigazgatási perrendtartás hatálya alatt*, "Jegyző és Közigazgatás" 2018, 20(1), p. 13.

in practice is not enough: regular (!) professional supervision is also needed.[40]

In accordance with the aforementioned results we should say that it has become obvious that court mediators – at least within our system in which they are all appointed judges at the same time – must have a specific, continual education, specific training that is crucial to their success in the position of a court mediator. Without a kind of a regular training, there's no way for them to qualify for or succeed in such a role that requires not only the classic skills of a legal professional, but confronts them with very sensitive and partly new ethical questions[41] as well. A set of judicial professional ethics guides a judge on the moral obligations arising out of his position as a judge and also informs the public of the standards to which it holds a judge accountable, **but what about a judge performing as a court mediator?**

Closing remarks and further plans

To sum up, the interviews discussed above showed principally, the unmistakable need for continual further training of the judges who take part in court proceedings also as mediators. In addition, not only do traditional skills and knowledge of certain legal institutions need to be developed but also psychological ones, and both require refresher training on a regular basis.

I have to admit that there are some follow-on questions to examine in relation to our topic: the next research should answer, among others, such questions as, "What are the reasons for the use of court mediation by the parties within administrative court proceedings? Why does the defendant (respondent), according to your experience, undertake the participation within that process?" and "What are

[40] See also similar thoughts: M. Munkácsi, *A mediáló és ítélkező bíró kettős szerepe*, [in:] *Bíró és mediator*, J. Glavanits (ed.), Universitas-Győr, Győr 2020, pp. 89–90.

[41] See also: B. Gerencsér, *Ethics in autonomous public service: new trends*, Schenk Verlag, Passau 2012, pp. 22–41.

those case types within administrative court proceedings in which court mediation is most frequently used? Should we broaden the scope of case types?" Such questions can be answered mainly by the judges and by the representatives of administrative authorities, but it would be also interesting to give those questions also to the claimants (plaintiffs).

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Tutela Cautelare in Proceedings before an Administrative Court

The notion and development of the *tutela cautelare*

The term "interim measures" is used to refer to instrumental measures that may be granted by judges during proceedings to protect the goods or interests of parties, and to avoid final decisions being reached too late to fully satisfied the interests of the parties. Such measures are therefore characterised by their instrumental and provisional nature, and in certain cases, their homogeneity with the executory measures determined by a judgment. The different legal mechanisms are available to mitigate the effects of the most serious problem faced by legal systems today – the slowness of justice. They are collectively referred to by the term interim protection ("summary proceedings", "provisional orders", "protective measures", "conservatory measures").[1]

Treccani's "Encyclopaedia Italiana" indicates that the need for preventive protection in administrative proceedings has historically stemmed from a consideration of the gravity of the harm that an administrative act may cause. A judgment upholding an appeal

[1] S. de la Sierra, *Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right to Effective Court Protection*, "European Law Journal" 2004, vol. 10, no. 1, pp. 42–60.

by annulling the contested act may not be adequate to satisfy the citizen's interest: many effects, of a legal or factual nature, may arise before the court's decision and are not always eliminated by the judgment. The separation of the unlawfulness from the ineffectiveness of the act means that the measure has all its effects even if it is unlawful.[2]

The development of social rights, the increasing importance of fundamental rights (particularly in relation to procedural rights), and sociological issues relating to the fast pace of life have influenced the development of such instruments in the majority of national and international legal systems. The perception of interim measures has changed significantly since they were first introduced, partly because they have had to adapt to changes to the administrative law, and more particularly, as a result of the evolution of the concept of the State.

The issue of interim measures is not novel issue as the growth of provisional measures in national and international law has been traced by several academic articles. A vast literature on practical and theoretical aspects of interim measures including their nature, types, requirements, and forum to obtain them, is available. Many scholars have analysed various institutional rules, national laws and supranational law dedicated to interim measures. They highlighted their emergence to look into how such provisions have been received so far and why the enforcement of such measures has proved difficult.

This article is part of the research on national interim protection measures in administrative court proceedings. It focuses primarily on the solutions adopted in Polish law, and comparative threads are treated in a complementary manner. The choice adopted allows for a relatively broad analysis of the topic with the use of the positions represented in the doctrine and case law. It allows the reader to become familiar in detail with the solutions relating to interim protection granted by administrative courts in the Polish legal order. The *de lege ferenda* proposals contained in the final part may serve as a basis for amendments to Polish legislation.

[2] A. Travi, *Tutela cautelare* [dir. amm.], https://www.treccani.it/enciclopedia/tutela-cautelare-dir-amm_(Diritto-on-line)/ (accessed on: 4.12.2022).

Significance of *tutela cautelare*

The interim measures come into play in the conflict arising between the need to guarantee the effectiveness of law and the effectiveness of rights, in other words, the relationship between the power of public authorities and the rights of citizens.[3] The availability of precautionary measures stems from the prevailing solution of non-suspensiveness of the administrative act challenged before the administrative court. Thus, with the exception of situations provided for in separate regulations, final decisions of public administration bodies are enforceable irrespective of a possible complaint to the WSA. This means that the party on whom an obligation has been imposed in the administrative act challenged before the court should perform that obligation.

The question of the presence of interim measures in a European system of justice is of particular relevance to the case law of the Court of Justice of the European Communities, which began with the Factortame[4] case, and was followed by the Zuckerfabrik[5] and Atlanta[6] cases. One may conclude that the Court of Justice attaches great importance to the effectiveness of a judgment on the existence of the rights claimed under EU law. The national court should be able to grant interim relief if this is necessary to ensure this effectiveness, even if the court does not have the power to grant interim relief under national law. When interim relief should be considered necessary depends on the nature of the case lying before the court. Furthermore the Court accepts that under strict conditions the national court may grant an interim measure which involves the (temporary) disapplication of EU legislation. EU legislation may

[3] S. de la Sierra, *Provisional…*, *op. cit.*, p. 43.

[4] Decision of 19 June 1990, The Queen v Secretary of State for Transport, ex parte Factortame Ltd et al., Case 213/89, Rec. 1990, I-02433.

[5] Decision of 21 February 1991, Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest/Hauptzollamt Itzehoe and Hauptzollamt Paderborn, Cases C-143/88 and C-92/89, Rec. 1991, p. I-415.

[6] Decision of 9 November 1995, Atlanta Fruchthandelsgesellschaft mbH et al. (I) v Bundesamt für Ernährung und Forstwirtschaft, Case C-465/93, Rec. 1995, p. I-3761.

further not prevent a national court from granting interim relief, if this is necessary to ensure the effectiveness of its judgment.[7]

The importance that interim protection plays in judicial protection is expressed by the prevalence of its use. It can be applied both to the use of this measure in proceedings before a national court when the dispute is of an internal nature, as well as to international disputes in which States remain litigants.

The different nature of litigation, the interests involved, the mode of handling complaints are only examples of factors that influence the content of the protection afforded. These can be extended to historical experience or even the degree of judicial activism allowed in individual states.

Another dimension of universality is the use of interim protection in cases regardless of the subject matter of the dispute, i.e., whether the dispute relates to private or public law.

The right to effective court protection is a central tenet for the development of interim measures. Thus, the first criterion of effectiveness is that the use of these tools cannot be impossible or excessively difficult for those whose rights are negatively affected by an act of an administrative authority. In other words, legal protection cannot be merely a theoretical possibility for those involved, and they must be able to resort to its institutions and processes.[8]

Provisional measures of protection are becoming a key component of judicial procedures precisely because they are awarded quickly and allow more discretion to be taken by the judges.[9]

The granting of interim protection is fully dependent on the existence of the main proceedings. The inadmissibility of the action will render the application for such protection pointless. The procedure is therefore meant to be incidental.

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[7] M. Reneman, *An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?*, "European Journal of Migration and Law" 2010, 12, p. 420.

[8] Z. Szente, K. Lachmayer, *The Principle of Effective Legal Protection in Administrative Law: A European Perspective*, Taylor & Francis, 2016, p. 9.

[9] J. Bendel, *The Provisional Measures Orders in International Environmental Disputes: A Case for International Courts and Tribunals*, "Nordic Journal of International Law" 2019, 88, p. 491.

Although usually interim protection is primarily associated with national law, space for the application of these measures has also been found in the resolution of international conflicts. According to A. Gandotra, interim or conservatory measures are an essential tool in international arbitration.[10] As far as concerns international environmental disputes, the doctrine proposed to classify provisional measures orders into three main groups: orders that assign unilateral obligations on the defendant; orders that demand collaboration between the parties; and orders that involve a third party in the execution of the order, as a mediator or guarantor of the order.[11]

The specific nature of conflicts settled by administrative courts

The regulation in the form of the non-suspensiveness of a complaint to an administrative court into Italian law was conducted as early as 1889.[12] The doctrine indicates that it did not have an entirely clear basis: on the material level, it seemed to be justified by the conviction that otherwise the public interest, which in turn lies at the origin of the broad conception and historical justification of administrative power, would be recessive, while on the procedural level it was considered as a corollary of the permitted appeal procedure for protection against the effects of an administrative act.[13] Even then, the solution introduced was not absolute, and exceptions were allowed.

Italian doctrine has analysed a shift in the role played by interim protection measures in their national administrative law. Originally the need to restore a balance between the citizen and the administration on a procedural level, which in many cases could

[10] *Judicial intervention in granting interim measures in international arbitration*, "Conflict Resolution Quarterly", 06.2021, p. 350. DOI: 10.1002/crq.21301.

[11] J. Bendel, *The Provisional Measures*…, *op. cit.*, p. 493.

[12] The law establishing the Fourth Section of the Council of State 1889 (l. 31.3.1889, n. 5992).

[13] A. Travi, *Tutela*…, avaliable: www.treccani.it/enciclopedia/tutela-cautelare-dir-amm_(Diritto-on-line)/ (accessed on: 4.12.2022).

be compromised by the production of effects by the administrative acts despite its appeal, was crucial. In the last decades of the twentieth century, another inspiring motive had also emerged, projected more strongly towards a substantial dimension: without prejudice to its interim character, precautionary protection was also aimed at overcoming the obstacles placed in the way of the citizen in the attainment of a benefit that had been unlawfully denied him by the administration. The focus in this way progressively shifted from the protection of so-called oppositional interests to the protection of so-called pretensive interests and concentrated above all on the content of precautionary measures.[14]

Recommendation aimed at Member States, in which it proposes a model for interim protection in administrative disputes, even if "none of the provisions can be interpreted as preventing a State from going beyond the minimum standards, or implying that a limitation to the guarantee has already been recognised by a member State."[15] Even if this recommendation is not binding, the fact that this instrument exists, indicates at any rate that it is accepted that there is common nucleus to the legal mechanism that is the object of our inquiry.[16]

The principle of effective legal protection means procedural fairness requiring the respect of a certain set of procedural rights.[17] The importance of procedural fairness comes from the intrinsic position of the citizens and other private parties facing the administrative body, which acts in the administrative procedures as a representative of the state exercising public power. In administrative cases, the decision maker and the addressees are in a hierarchical relationship, as the former may take actions of its own imposing duties on the latter in a one-sided manner. This asymmetry needs to be counterbalanced in a fair trial, and the procedural rights of the clients are appropriate tools for this purpose. Nevertheless, there

[14] A. Travi, *Tutela*…, avaiable: www.treccani.it/enciclopedia/tutela-cautelare-dir-amm_(Diritto-on-line)/ (accessed on: 4.12.2022).

[15] For more, see point n. 10 of the Preamble.

[16] S. de la Sierra, *Provisional*…, *op. cit.*, p. 48.

[17] Z. Szente, K. Lachmayer, *The Principle of Effective*…, *op. cit.*, p. 12.

must be a delicate balance between the efficient and effective work of administration and the affected basic rights.[18]

The granting of interim relief, which is the suspension of the execution of a contested act or action by an administrative court, must, due to its complainant nature, be regarded as a derogation from the general principle of the lack of suspensive effect of an administrative complaint and must be interpreted by administrative courts in this way.

Council of Europe Recommendation No. R(89)8 on interim protection indicates that every complainant has the right, until a court has ruled on the case, to apply to the court before which the case is pending or to another competent court for a measure granting interim protection against the contested act. At the same time, the right to apply for interim protection should also be granted to the persons concerned before the action is brought before a court, in particular in urgent cases or where the contested act does not suspend its execution.

Polish solutions in relation to *tutela cautelare*

The interim protection established in Polish law should be referred to the model of adjudication by administrative courts. Constitutional regulations require that the exercise of justice by administrative courts constitutes control over the activity of public administration. The criterion for adjudication is the legality of the proceedings of the administration. They thus determine the cassation model of control – as a rule from which few exceptions are allowed.

The administrative courts examine complaints against administrative decisions, other acts (e.g., provisions) that do not end the administrative case, inaction of the administration. The administrative courts have also been appointed to the control of the legality of the supervision exercised by the voivodes over the activity of all

[18] *Ibidem*, p. 13.

units of local self-government (commune, district and voivodeship). These courts also rule on the legality of local law.[19]

Another important element from the perspective of interim protection is that administrative cases have been placed under the jurisdiction of the administrative courts, with some exceptions. These include competition and consumer protection cases, public procurement, election cases, social security regulation, among others. Bringing them under the jurisdiction of the ordinary courts also has the consequence that it allows a judgment to be issued in the case deciding the merits of the case, ending the dispute existing between the parties. With regard to interim protection – it has made it possible to introduce measures other than those available in the administrative court procedure.

The model of adjudication in administrative cases also determines the solutions for the formulation and type of interim protection measures. According to the solution adopted in Polish law, one measure of interim protection is available in cases before an administrative court: suspension of the execution of the challenged administrative act or action.

As a matter of principle, a complaint to an administrative court is not a means of appeal with absolute suspensive effect, as it does not suspend the execution of the act or action by operation of law. The lack of suspensiveness results, inter alia, from the need to ensure the implementation of the decision after the completion of the proceedings before the administrative authorities. Moreover, it ensures that a complaint to an administrative court is not used as a means of postponing the fulfilment of the obligation imposed on a party.

The legislator introduces various modifications to this principle. They consist, inter alia, in excluding by law the possibility of suspending the execution of the administrative act complained of. This deprives the applicant of the possibility to obtain interim protection. The imposition by law of the order of immediate enforceability on a certain type of administrative decision has a similar effect. This is

[19] The Act of 30th August 2002 on the Law on Proceedings before Administrative Courts, Official Journal of Laws RP, 2022, item 329 as amended, hereinafter referred to as: the Law on Proceedings before Administrative Courts.

a solution used by the legislator in specific situations, and the rigour imposed by law is not – as a principle – subject to revocation by a ruling issued by an administrative court.

A complainant undertaking protection by way of administrative court proceedings may file a proposal to suspend the execution of an act or action in whole or in pArt. The issue of suspending the implementation of an act or action challenged before an administrative court is one of the key issues of the efficiency of the administrative court proceedings.[20] Suspending the execution of the challenged act or action is one of the essential conditions for the effectiveness of an individual's legal defence, as the execution of an act or action may lead to irreversible legal effects or effects which are difficult to reverse, whether due to legal (e.g., civil law actions) or factual events. Legislation may introduce special rules concerning the enforceability of a contested act.

Pursuant to the solutions adopted in Polish law, the suspension of the execution of the contested act or action may not take place *ex officio*, but only upon the request for protection put forward by the applicant party. The court, pursuant to Article 6 the Law on Proceedings before Administrative Courts,[21] should instruct the applicant party on the right to obtain interim protection. The court, when considering the application, is obliged to take into account the negative grounds and the positive grounds.

As a complement to the regulations in question, it is worth adding that interim protection may also be granted by an administrative authority. Upon receipt of the complaint and before sending the case to court, it may, *ex officio* or at the request of the applicant, suspend the execution of the contested decision or order. Thus, the authority is entitled to take such a decision on its own initiative or at the request of a party contained in the complaint. The use of the word "may" by the legislator, without specifying additional conditions, makes it possible for the public administration authority, within

[20] P. Daniel, *Wniosek o wstrzymanie wykonania aktu lub czynności przez sąd administracyjny*, "Przegląd Prawa Publicznego" 2011, 2, p. 32.

[21] Assistance should in the first instance be provided to parties who are acting without professional representation (barrister, solicitor).

the limits of its own discretion, to issue a decision on the suspension of the execution of the act.[22] The suspension of enforcement may be in whole or only in pArt. On the other hand, the refusal to suspend the enforcement of an act or action does not deprive the applicant of the right to apply to the administrative court to suspend its enforcement.

The refusal to suspend the enforcement of the act complained of does not mean that the way to obtain such a ruling in the future is closed. If the circumstances change, a renewed application may be submitted. The party seeking amendment or revocation of an earlier ruling refusing to grant interim protection should demonstrate such a change of circumstances that demonstrates the legitimacy of the application.

Once granted, the interim protection may also be amended. The Law on Proceedings before Administrative Courts empowers the court to amend or revoke the protection conferred at any time. The rationale for this is a change in circumstances. According to the legal literature, a party's application is not necessary for the amendment, and the court may act *ex officio*.[23]

In the doctrine, opinions have been raised in favour of granting a power to the administrative court to suspend the suspension of a decision (administrative act) *ex officio*. R. Sawuła argues against such a solution, indicating that the first instance administrative courts' decision to suspend the contested decision ex officio could suggest that the effect of the suspension is an informal, preliminary control of the legality of the object of the appeal.[24] While accepting the view that the granting of interim protection cannot indeed be equated with the institution of pre-judgment, it is necessary to add that the possibility for the court to grant interim protection ex officio would be a better guarantee of a fair trial because of the

[22] R. Sawuła, *Wstrzymanie wykonania rozstrzygnięć wydanych w postępowaniu administracyjnym*, Przemyśl–Rzeszów 2008, pp. 341–442 oraz A. Mudrecki, [in:] *Czynności procesowe zawodowego pełnomocnika w sprawach administracyjnych i sądowoadministracyjnych*, H. Knysiak-Molczyk (ed.), A. Mudrecki, p. 277.

[23] M. Jaśkowska, [in:] *Postępowanie sądowoadministracyjne*, M. Jaśkowska, M. Masternak, E. Ochendowski (eds.), LexisNexis, Warsaw 2010, p. 93.

[24] R. Sawuła, *Wstrzymanie…*, *op. cit.*, p. 361.

assurance of the possibility of full implementation of the court judgment rendered.

Acts under temporary protection

Polish law clearly defines the stage of the procedure in which interim protection may be granted. In the case of complaints, before the complaint is sent to the administrative court, this may be done by the authority that last decided the case.

1) against a decision or a decision – it is the authority that issued the decision or decision that may suspend, *ex officio* or at the request of the complainant, their enforcement in whole or in part, unless there are premises on which, in administrative proceedings, the granting of the order of immediate enforceability is conditional;
2) on other acts or actions in the sphere of public administration concerning powers or obligations arising from the law – the competent authority may, *ex officio* or at the request of the applicant, suspend the execution of the act or action, in whole or in part;
3) on resolutions of bodies of territorial self-government units and their unions and on acts of territorial bodies of governmental administration – the competent authority may, *ex officio* or at the request of the applicant, suspend the execution of the resolution or act in whole or in part, except for the provisions of local law which have entered into force.[25]

The regulations cited above introduce a general legal framework relating to the issue of suspending the execution of an act or action in proceedings before a court. Solutions adopted in substantive and procedural laws may establish different regulations in this respect.

The first direction of change is that there is an exclusion of the admissibility of suspending the execution of the challenged act or action. For example, the Law on Proceedings before Administrative Courts excludes the suspension of enforcement to local laws

[25] More: Art. 61 the Law on Proceedings before Administrative Courts.

that have entered into force. In such a case, regardless of the circumstances of the case, the filing of an application to suspend the enforcement of the act is inadmissible.

Examples of other solutions are those regulations which introduce a suspension of enforcement of the act complained of – *ex lege*. They are special solutions in relation to the basic one – according to which, bringing a complaint to court does not have a suspensive effect. In that case, the filing of a complaint to an administrative court results in the suspension of the execution of the administrative act at the same time.

Also, not all administrative acts and actions listed in Article 61 The Law on Proceedings before Administrative Courts are subject to the possibility of obtaining interim protection. It is argued in the doctrine that the application for suspension may concern only such an act or action which has the feature of "enforceability".[26] Consequently, such a request is deemed to be without subject matter when it concerns decisions of refusal, e.g., decisions refusing remission of tax arrears.

The feature of "enforceability" has received numerous contributions from the doctrine and extensive case law. Both are the sources examined within the framework of this project.

According to the Supreme Administrative Court, the execution of an administrative act should be associated with causing, voluntarily or compulsorily, a state of affairs that is consistent with the decision contained in the act in question.[27]

Enforceability therefore refers to obligatory acts which establish, for their addressees, orders or prohibitions of specific behaviour. It also applies to acts which concurrently confer an entitlement on a particular subject and impose obligations on that subject. The group of enforceable acts includes also those on the basis of which one subject is obliged to do something and the other only entitled

[26] A. Mudrecki, *Rzetelny proces podatkowy*, el/LEX 2015.

[27] For more, see provision Supreme Administrative Court of 19 February 2009, II FZ 48/09, available on: www.orzeczeniansa.gov.pl (accessed on: 10.10.2022); provision WSA w Rzeszowie of 12 January 2022, II SA/Po 956/21, LEX nr 3285590.

to do it. On the other hand, the characteristic of enforceability is not present in the case of negative acts, as well as in the case of constitutive authorising acts, which do not require any action on the part of the entitled parties in order to bring about the factual or legal situation defined in them.[28]

The doctrine also agrees on the basic premise that not every act (action) is enforceable and thus, not every act can be covered by the interim protection granted by the court under Article 61 § 3 The Law on Proceedings before Administrative Courts.

However, the issue appears to be far more complex, as indicated by the degree of detail of the arguments cited in the doctrine. These include the frequent divergence of views, occurring both in the doctrine and in judicial rulings, on the question of the possibility to suspend the execution of acts that do not impose obligations or confer any powers on the subjects of the proceedings.[29]

According to Z. Kmieciak, "enforceable acts" in some legal systems are understood to be legally effective acts that create the legal situation of an individual.[30] K. Defecińska-Tomczak also points out that the notion of enforcement adopted in Article 61 The Law on Proceedings before Administrative Courts. may be referred to all acts and actions subject to administrative court control. In the opinion of this author, the broad understanding of the notion of enforcement in Article 61 The Law on Proceedings before Administrative Courts is supported by the fact that the legislator placed in this provision an explicit ban on suspending the enforcement of the provisions of local law which entered into force.[31] Going into detail, the author observes that this type of construction should be considered as an exception to the possibility of suspension of

[28] A. Mudrecki, *op. cit.*, pp. 280–281.

[29] A.P. Skoczylas, Glosa do postanowienia NSA z dnia 17 lipca 2006 r., I FZ 281/06, OSP 2007, no. 6.

[30] Z. Kmieciak, *Proceduralne problemy wiążących interpretacji prawa podatkowego*, "Państwo i Prawo" 2006, 4, p. 30.

[31] K. Defecińska-Tomczak, [in:] *Polskie sądownictwo administracyjne*, Z. Kmieciak (ed.), Warsaw 2006, p. 108.

enforcement provided for in the law, which cannot be interpreted extensively.[32]

It is argued in the doctrine that the possible suspension of enforcement may concern not only the contested act or action, but extends to all other acts undertaken in proceedings conducted within the limits of the same case. It appears that withholding the enforcement of a specific act by an administrative court may also mean that the act in question temporarily ceases to produce the legal effects that result from the decision contained therein (the action is thus comparable to the effects produced by the suspension of the validity of such an act).[33] On the other hand, suspension of an action undertaken by an authority may consist in suspension of the legal effects produced by this action (thus, *de facto* the action is deemed to be periodically of no effect). Adopting such a concept allows to ensure effective interim protection for the parties in the course of administrative court proceedings. It should be borne in mind, however, that the possibility of suspension of enforcement refers only to acts or actions "which are endowed with the attribute of enforceability in the sense that they require enforcement and are enforceable."[34] However, also with regard to the understanding of the feature of "enforceability", there is no consensus of views in the Polish legal science. According to some authors, the suspension of the execution of administrative acts (in the light of Article 61 The Law on Proceedings before Administrative Courts) may only concern those acts which "qualify for voluntary or compulsory enforcement", with the reservation that "all administrative acts of

[32] J.P. Tarno, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warsaw 2006, p. 186 oraz W. Ryms, *Wstrzymanie wykonania aktu lub czynności*, [in:] *Prawo o postępowaniu przed sądami administracyjnymi (zagadnienia wybrane)*, wydanie uzupełnione po Konferencji sędziów NSA w Popowie, 20–22 października 2003 r., Warszawa, grudzień 2003, p. 55.

[33] For more, see K. Defecińska-Tomczak, [in:] *Polskie*…, Z. Kmieciak (ed.), *op. cit.*, p. 109.

[34] K. Defecińska-Tomczak, M. Długońska, E. Frankiewicz, A. Korzeniowska, J. Wyporska, *Wybrane zagadnienia z zakresu wykonalności decyzji administracyjnej*, [in:] *Procedura administracyjna wobec wyzwań współczesności. Profesorowi zwyczajnemu dr hab. Januszowi Borkowskiemu przyjaciele i uczniowie*, Łódź 2004, p. 81.

refusal do not qualify for enforcement."[35] J. Borkowski points out the errors of such reasoning. As an argument, he points out that it is permissible to suspend the enforcement of a decision refusing to grant a foreigner a residence permit in Poland. Consequently, in the author's opinion, withholding of enforcement may therefore also apply to certain refusals, if they only change the legal or factual situation of the applicant.[36] J. Borkowski also highlights that the suspension of enforcement may also refer to authorising decisions (e.g., a construction permit decision challenged before an administrative court by a third party).[37]

Some of the doubts raised in the doctrine have been resolved by the case law of the administrative courts. Nevertheless, a closer examination of individual cases shows that also in the case law different opinions can be found regarding the admissibility of suspending the enforcement of generically identical decisions. Two examples will be brought up below. The first concerns a divergence as to whether it is permissible to suspend the enforcement of a zoning decision. The second example concerns the determination of a legalisation fee by the construction supervision authority.

The zoning decision, as the first stage of the investment process, gives the investor the right to apply to the architectural-construction authority for a construction permit, but does not itself provide a basis for commencing construction work and implementing the intended investment. Decisions on development conditions are binding on the authority issuing the building permit. The mere fear that administrative acts will be undertaken in the future that will lead to the commencement of the investment process does not

[35] T. Woś, [in:] T. Woś, H. Knysiak-Molczyk, M. Romańska, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warsaw 2005, pp. 295–296.
[36] J. Borkowski, *Wstrzymanie wykonania aktu zaskarżonego do NSA*, [in:] *Instytucje współczesnego prawa administracyjnego. Księga Jubileuszowa Profesora dr hab. Józefa Filipka*, Kraków 2001, p. 75 oraz J. Borkowski, Glosa do postanowienia NSA z 16 października 1996 r. IV SAB 59/96, OSP 1998/1 poz. 22, p. 48.
[37] J. Borkowski, *Wstrzymanie wykonania aktu zaskarżonego do NSA*, *op. cit.*, pp. 76–77.

constitute circumstances justifying the application of the institution of suspension of the execution of the contested decision.[38]

According to one view, the zoning decision does not bind the parties to an obligation to act, omit to act, or to order the behaviour of other entities. Such a decision is only the first stage of the investment process and does not give rise to the commencement of construction works (implementation of the planned investment). This means that the institution of suspension of the execution of the act cannot apply to the indicated decision.

According to the second view, the zoning decision is subject to specific enforcement, as it creates for the investors the right to develop the land in the manner specified therein, while for the other parties the obligation to endure the change permitted by this administrative act may be used to obtain a building permit.

An analysis of the case law of the administrative courts shows that the first of the views presented is definitely dominant. It excludes the possibility to suspend the execution of the zoning decision due to the legal nature of this decision, which is only one of the stages of the broadly understood investment process, not granting the right to carry out construction works.[39]

The Construction Law provides in several cases (e.g., Article 49(1), Article 49b(4)) for the obligation of the construction supervision authority to determine a legalisation fee. The payment of this fee is one of the prerequisites for the sanctioning of a building as an unauthorised act.

In the jurisprudence of the administrative courts, there is no uniformity of views as to whether a decision of the building supervision authority determining the amount of the legalisation fee may be subject to suspension of execution by the court, under the interim protection granted (Article 61(3) The Law on Proceedings before Administrative Courts).

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[38] Provision WSA w Warszawie z dnia 25 stycznia 2016 r. IV SA/Wa 2351/15, LEX nr 2001331.

[39] J. Makuch, *Dopuszczalność wstrzymania wykonania przez sąd administracyjny decyzji o warunkach zabudowy*, el/LEX.

One view assumes that a decision specifying the amount of the legalisation fee is not subject to suspension of enforcement. This is because the order does not impose an obligation to pay the disputed fee, nor does it establish the existence of such an obligation. Moreover, the fee in question is not subject to compulsory collection by way of enforcement. In the event of non-payment, the authority issues a decision on a demolition order and the enforcement of that decision may be suspended.

The second view allows for suspension of enforcement of the decision determining the legalisation fee, assuming that in the situation of determination of the legalisation fee, the enforceability of such a decision consists in the fact that in the event of failure to pay the fee on time and failure to suspend the enforcement of this decision, it is possible to order demolition of the building.

The object of interim protection can only be such acts or actions that are enforceable and require enforcement. The notion of enforcement of an administrative act should be understood as causing, voluntarily or by way of enforcement, a state of affairs that is consistent with the decision contained in the act. The decision on the validation fee does not concern either the imposition of an obligation to pay the fee or the determination of the existence of such an obligation. The fee in question is not subject to compulsory execution, and its non-payment means that the legalisation of the unauthorised construction project is discontinued, which may become the basis for an administrative decision, which is subject to a separate appeal. It follows from the above that a decision on the legalisation fee is not enforceable within the meaning of the aforementioned provision, as it only rules on the amount of the fee and is not the source of an obligation subject to compulsory enforcement. Thus, in the opinion of the Supreme Administrative Court, this decision is not suitable for the application of the institution of suspension of execution, as it does not have direct effects.[40]

In a situation where a legalisation fee has been determined, the enforceability of such an adjudication is based on the fact that if this

[40] Provision Naczelnego Sądu Administracyjnego w Warszawie z dnia 21 lutego 2008 r. II OZ 114/08, LEX nr 1043501.

fee is not paid in time and the enforcement of this adjudication is not suspended, it is permissible to order the demolition of the building.[41]

The first of the presented views prevails in the judicial-administrative case-law. It is based on the assumption that the legal nature of the decision on the determination of the legalisation fee, excludes the possibility of suspending its execution, pursuant to Article 61 para. 3 The Law on Proceedings before Administrative Courts. Within this view, it is pointed out that a decision determining the amount of a legalisation fee does not impose the obligation to pay the fee at all. The consequence is that the said fee is not subject to compulsory execution by way of administrative enforcement. Its payment is a right granted to the investor under the legalisation procedure, which he does not have to exercise.

On the other hand, if the established legalisation fee is not paid, the authority issues a demolition order. Interim protection (Article 61(3) The Law on Proceedings before Administrative Courts) may be sought by the interested party in the proceedings concerning the review of the decision on the order for demolition of the building structure.

The second view takes into account the broader context of the case arising as a result of imposing a legalisation fee on the investor. It sees that in the event that the fee is not paid within the deadline and at the same time there is no suspension of the execution of this decision by the administrative court, it will be permissible to order the demolition of an illegally executed investment, and this in turn may update the prerequisites set out in Article 61 para. 3 The Law on Proceedings before Administrative Courts. It is therefore necessary to extend interim protection to the stage preceding the imposition of the obligation to demolish the object.[42]

The question of the possibility to suspend the enforcement of a decision issued on the basis of Article 329a § 1 of the Act on

[41] Provision Wojewódzkiego Sądu Administracyjnego w Rzeszowie z dnia 18 października 2011 r. II SA/Rz 744/11.

[42] J. Makuch, *Dopuszczalność wstrzymania wykonania przez sąd administracyjny postanowienia ustalającego opłatę legalizacyjną z tytułu popełnienia samowoli budowlanej. Linia orzecznicza*, el/LEX.

Foreigners has also emerged in case law. A decision issued on the basis of Article 329a § 1 of the Act on Foreigners in relation to a foreigner staying in Poland on the basis of a temporary residence permit falls within the scope regulated by Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, with the result that the national provisions relating to it, including those concerning the suspension of its implementation, must be interpreted, inter alia, in the light of Article 13(1) and (2) of that Directive, and thus in such a way as to ensure that an administrative court has the power to suspend its implementation once a complaint has been lodged.[43]

It emerges from these considerations that the doctrine has not developed universal criteria to distinguish which acts have the characteristic of enforceability and which do not. It is therefore necessary to agree with the general solution that in assessing whether an act or action is enforceable, each case must be analysed individually. The circumstances of the particular case and the interests of the parties involved must be taken into account and while avoiding dangerous generalisations.[44]

Prerequisites for granting interim protection

The prerequisites for withholding the execution of an act or an action are listed in Article 61 § 3 The Law on Proceedings before Administrative Courts. An administrative court may decide to withhold the execution of an act or an action if there is

1) a danger of causing significant damage or
2) causing effects difficult to reverse.

The catalogue of grounds for withholding the enforcement of an act or action under the Law on Proceedings before Administrative

[43] Provision Supreme Administrative Court of 19 January 2021, II OZ 1152/20, available on: www.orzeczenianda.gov.pl (accessed on: 10.12.2022).

[44] K. Defecińska-Tomczak, M. Długońska, E. Frankiewicz, A. Korzeniowska, J. Wyporska, *Wybrane…*, *op. cit.*, p. 83.

Courts is closed. At the same time, it should be emphasised that the grounds specified in its content are not of an exclusive nature – specific laws may modify the catalogue of grounds the fulfilment of which makes it possible to obtain the requested measure of protection. Moreover, in the case of a challenge before a national court to an EU act on the basis of which the challenged act or action was issued, the possibility of obtaining interim protection is subject to the conditions set out in the case law of the CJ EU.[45]

The granting of interim protection requires reference to a specific administrative court case involving a particular type of public administration action. In the request, the party should infer the circumstances which, in its opinion, lead to the danger of causing significant damage or causing effects that are difficult to reverse. These may be both factual circumstances and legal events. The cited provision contains the disjunctive alternative "or". Thus, the legislator has made the possibility of suspending an act or action conditional on the occurrence of one of the two premises provided for in Article 61 § 3 The Law on Proceedings before Administrative Courts.

The prerequisite in the form of danger of damage is usually equated with a real threat to the existing current economic (economic) situation of a party to the proceedings. Difficult to reverse effects, on the other hand, usually arise where it is impossible to return to the original state of affairs once the decision has been implemented. The court is obliged to assess their occurrence on a case-by-case basis, with the proviso that this assessment is of a discretionary nature.[46] Both conditions belong to the category of non-explicit notions. Their specification cannot take place in isolation from the possibility of their occurrence in a specific, individual case.

The above premises have the nature of general clauses, which, in addition, do not limit the group of persons in relation to whom the occurrence of the above premises entitles to suspend a decision.[47]

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[45] P. Daniel, *Wstrzymanie wykonania aktu lub czynności w postępowaniu sądowoadministracyjnym*, Warsaw 2013, Legalis/el, C.H. Beck.

[46] Supreme Administrative Court provision of 14.11.2006, II FZ 598/06, Legalis.

[47] For more, see Supreme Administrative Court provision of 20.4.2006, I OZ 407/06, Legalis.

When the Court decides on a request to suspend the enforcement of the contested decision, it must decide whether the risk of substantial damage or effects which are difficult to reverse may also arise for parties to the proceedings other than the applicant and thus other applicants or parties to the proceedings. At the same time, it must be considered ineffective to refer to the possible negative effects of the decision on the administrative authorities deciding the case.[48] It is accepted in the case law that the prerequisites of causing significant damage or causing effects which are difficult to reverse must be linked to the situation which may arise when an administrative act challenged before a court is implemented and subsequently, as a result of the upholding of the action, that act is set aside. Both situations involve an exceptional risk corresponding to a special category of interim protection for a party to proceedings.[49]

The regulations on proceedings before administrative courts do not contain a definition of the term "damage", which is a civilian concept. As stated, in the aforementioned decision, in the absence of a definition of "damage" in the Civil Code, the above concept must be referred to ordinary language, which defines damage as harm to legally protected goods of a pecuniary nature. In the case, it becomes necessary to establish a causal link between the action causing the damage, which must be the performance of the contested act or activity, and its occurrence.

It is not always the case that the execution of a given act or action will result in the occurrence of a significant damage referred to in Article 61(3) The Law on Proceedings before Administrative Courts. The mere fact of the existence of an obligation to execute a decision, e.g., the necessity to pay a specific amount of money, causing a depletion in the taxpayer's assets, constitutes a normal consequence of the existence of a given act in legal circulation. On the other hand, the reimbursement of a possible overpayment of tax, and this with high interest, results in compensation for the applicant. Hence, it is

[48] For more, see WSA in Poznaniu provision of 15.9.2009, III SA/PO 583/09, Legalis.

[49] For more, see provision Supreme Administrative Court of 23 September 2009, I OSK 1232/09, LEX nr 594980.

necessary to establish that the implementation of the act or action in question will result in significant damage, i.e., a significant diminution of the state of the assets of a party to the proceedings. It is precisely the prerequisite of "significant" damage, going beyond the ordinary consequences associated with the implementation of the act or action in question, that makes it possible to grant interim protection.[50] It is argued in the doctrine that the premise in question is a concept that requires assessment in each case with reference to the material status of the party. It cannot be linked to some predetermined value.[51] It is therefore unjustified to take the view that any damage to property constitutes a condition for granting an application to suspend the execution of the contested act or measure.[52]

The jurisprudence points out that the concept of "substantial damage" means damage that will not be compensated for by the subsequent return of the service rendered or its enforcement, nor will it be possible to restore the thing to its original condition.[53] Thus, also in the case of an application to suspend the enforcement of an act or deed, it is necessary to make an overall assessment of the damage, covering not only the direct result of the act or deed in question on the property rights of the parties to the proceedings, but also all the possible potential and adverse consequences that may arise in its property rights as a result of its implementation.[54] The link between the implementation of a given act or action and possible significant damage must be supported by objective criteria, which the administrative court is entitled to assess.

It appears that the intention of the legislator was to include in the premise of difficult to reverse effects, all those categories of administrative decisions which do not directly affect the sphere of

[50] P. Daniel, *Wstrzymanie*…, *op. cit.*

[51] *Ibidem.*

[52] For more, see provision Supreme Administrative Court of 4 November 2008, I OZ 834/08, avaiable on: www.orzeczeniansa.gov.pl, (accessed on: 10.12.2022).

[53] Provision WSA w Białymstoku z 2.6.2010 r., I SA/BK 223/10; provision Supreme Administrative Court of 6 June 2008, II OZ 576/08, Legalis.

[54] P. Daniel, *Wstrzymanie*…, *op. cit.*

property rights of a party to the proceedings, but due to their acute nature may cause adverse consequences for them.[55]

Forced fulfilment of obligations by way of enforcement is by its very nature oppressive and causes a burden in the financial sphere of the obliged party. The financial impact on a party is a normal consequence of administrative enforcement. The institution of suspension of enforcement of the contested decision does not serve to protect a party against any consequences of implementation, but only against such consequences, which a possible victory in court would not remedy.[56]

It is essential that the allegations raised in the application to suspend the execution of the contested decision be supported by source documents. The necessity to send the entire case file to the court in administrative court proceedings does not mean that the court should guess what evidence the applicant would like to present in order to prove that the prerequisites of Article 61 § 3 The Law on Proceedings before Administrative Courts are met.[57] A more moderate position can be found in the decision of the Supreme Administrative Court indicating that the application to suspend the enforcement of the contested act or action is only partly based on the principle of accusatorial procedure. This principle applies only to the initiation of administrative court proceedings to suspend the enforcement of the contested act or action. However, the obligation to be guided by the principle of actionability ends at the stage of the initiation of proceedings to suspend enforcement. Subsequently, the proceedings on the subject are governed by the principle of formality, with which certain obligations of the court are connected. At the stage of examining the application, consideration must also be given to circumstances that have not been pleaded by the applicant.[58]

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[55] *Ibidem*.

[56] Wyrok WSA w Krakowie, I SA/Kr 274/21 z dnia 12 maja 2021 r., LEX nr 3197684.

[57] For more, see provision Supreme Administrative Court of 18 March 2010, II FSK 502/09, LEX nr 740642.

[58] Provision Supreme Administrative Court of 6 March 2014, I OSK 377/14, avaliable on: www.orzeczeniansa.gov.pl (accessed on: 10.12.2022).

These may include facts known to the court of its own motion or contained in the case file.

The court should consider the applicant's request comprehensively, taking into account the factual and legal effects of the contested act or action.

Suspension of the enforcement of a certain act by the administrative court may also mean that a given act temporarily ceases to produce legal effects resulting from the decision contained therein (the force of such act is suspended). Suspension of the enforcement of an act of an administrative body, on the other hand, may consist in suspension of the legal effects produced by the execution of such act by the administrative body (thus, *de facto*, the act is deemed to be temporarily ineffective).[59]

An analysis of the statutory conditions leads to the unequivocal intention of the legislature to separate the procedure for granting interim protection from the substantive procedure in which the legality of the contested measure is reviewed. The merits of the grant of interim protection cannot be demonstrated by the substantive allegations raised in the application against the contested decision. Indeed, the assessment of the existence of grounds for suspending implementation of the contested decision cannot be replaced by a substantive assessment of the contested measure from the point of view of its legality or even by conjecture as to that assessment. In fact, at that stage of the legal proceedings, no assessment is made of the merits of the allegations or of the legality of the measure which is the subject of the action brought.

Exclusion of the grant of interim protection

A circumstance that precludes the granting of interim protection is the fulfilment of the administrative act complained of. Since the decision of the administrative court to suspend enforceability is intended to protect a party from the consequences of the execution

[59] A.P. Skoczylas, Glosa do postanowienia NSA z dnia 17 lipca 2006 r., I FZ 281/06, OSP 2007, no. 6, pp. 462–463.

of the contested act or action, the fact of execution nullifies the purpose of the application of the institution.

One of the cases of modification of the rule allowing the application of interim protection is the order of immediate enforceability granted to a non-final decision. The essence of the immediate enforceability of administrative decisions is that the decision becomes enforceable, irrespective of the remedies (appeal or complaint to the administrative court) filed. The mode in which a decision may be made enforceable is twofold. The first is when the law introduces an enforceability regime for certain decisions. The second is when a public administration body decides on the granting of a decision with rigour, provided that a specific condition is met. The wording of the provision indicates that this is a decision left to the discretion of the public administration authority, but the public administration may not freely expand this catalogue.

The circumstances justifying the granting of rigour are various. They may relate to needs for the protection of human health or life, or for the protection of the national economy against severe losses, or for other social interest or exceptionally important interest of a party. In the latter case, the public administration body may, by way of a decision, require a party to provide appropriate assurance of.[60] The case law indicates that the threat to justify the premise must be real and not merely probable.[61]

The granting of the order of immediate enforceability remains in relationship to the interest of the party. In the case of an order

[60] For more, see Article 108 Act of 14 June 1960 r. the Code of Administrative Procedure (Journal of Laws of 2022, item 2000, as amended; hereinafter referred to as: k.p.a.). Other laws may introduce separate prerequisites for granting decisions issued on their basis the order of immediate enforceability. An example is the act regulating tax proceedings – the Tax Ordinance Act of 29 August 1997 (Journal of Laws of 2021, item 1540). The regulation of Article 239b of the cited Act provides the basis for assigning a rigour to a non-final tax decision if the authority has information indicating that payment of the tax due by the party will be at risk. The granting of the régime will accelerate the commencement of enforcement, and, for example, will prevent the party from carrying out actions involving the disposal of assets of significant value.

[61] WSA in Cracow judgement of 10 March 2021, II SA/Kr 130/21, LEX nr 3164027.

granted by law, the content of this relationship is determined by the need to pursue a specific interest chosen by the legislator. In the case of granting the order of immediate enforceability by the authority issuing the administrative decision, it is the authority that identifies the fulfilment of one of the prerequisites constituting the basis for granting the order.

With the exception of the premise indicating the possibility of assigning a rigour to a decision due to an exceptionally important interest of a party, the others focus on the needs related to the realisation of a public or social interest.

The regulation of Article 61 § 3 The Law on Proceedings before Administrative Courts indicates that the court may suspend the execution of an act or activity, unless a specific act excludes the suspension of its execution. Thus, the possibility of granting interim protection by the administrative court is not absolute – a specific regulation may exclude the application of suspension of an act or activity. A finding by the court that a provision of a law prevents the granting of interim protection must result in a refusal to grant it.

Legal provisions that directly exclude the possibility of interim protection in administrative court proceedings are, for example, the Act on Investment in the Liquefied Natural Gas Regasification Terminal in Świnoujście[62] and the Act on the Principles of Development Policy.[63]

The first Act concerns a one-off investment project of national economic significance for Poland, as it is intended to increase its energy security. The Act introduces a number of distinctions in relation to the investment process. Some of these are aimed at preventing delays in the issuance of individual administrative decisions. One of the peculiarities concerns the admissibility of requesting interim protection after filing a complaint to an administrative court against decisions issued under this Act. The legislator decided to exclude

[62] Act of 24 April 2009 on investments in the liquefied natural gas regasification terminal in Świnoujście (i.e. Journal of Laws of 2021, item 1836; hereinafter referred to as Act on the Świnoujście terminal).

[63] Act of 6 December 2006 on the principles of development policy (i.e. Journal of Laws of 2021, item 1057, as amended, hereinafter referred to as the z.p.p.r. Act).

the granting of such protection. Looking for a justification in the axiological layer, it can be pointed out that the exclusion testifies to giving priority to the public interest expressed in the efficient management of the investment procedure for a particular project. From a praxeological perspective, the exception introduced by the legislator is of minor importance. Among the exceptions introduced by the Act, there are those introducing deadlines for the handling of an administrative case: by the body of first instance, by the body of second instance in the case of an appeal, by the administrative court of first and second instance in the case of appeals. The time limits set by the law for proceedings before the administrative court are respectively: 30 days from the date of receipt of the complaint together with the case file by the first instance court and 2 months for consideration by the court in the second instance.[64] Given the short deadlines imposed by the law for the consideration of the case by the court, the granting of interim protection tied to the effectiveness of judicial protection is of lesser importance. In the present example, the lack of threat to the effectiveness of judicial protection can be attributed to two issues: the strongly limited duration of the court proceedings set by the law and the one-off nature of the investment process itself.

The exclusion of the possibility to obtain interim protection with regard to the regulations of the Act on the Principles of Development Policy concerns the control by the court of the procedure of selection of projects which will receive co-financing from the funds coming from the budget of the European Union. The interest in receiving support for projects from such funds results in the value of projects submitted for co-financing being greater than the value of available financial support. This means that some of the projects, even in the case of a positive assessment, cannot count on receiving support.

The procedure for the selection of projects for co-financing from the European Union budget funds in Polish law has been shaped as an administrative procedure. This means that it is subject to control by administrative courts based on the criterion of compliance with

[64] For more see Art. 35 sec. 1 pt 2 and sec. 2 Act on the Świnoujście terminal.

the law. A complainant may raise allegations indicating a violation of law by an administrative body.

The lodging of a complaint to a court by an applicant does not stop the whole competition. The chosen solution improves the absorption of EU funds, but for the applicant there is a danger that his case will be examined at a time when the entire available allocation has already been consumed.

In this situation, the use of interim protection measures seems particularly relevant. What, then, is the *ratio legis* of excluding their applicability? First of all, the search for an answer must start by going back to the essence of the grant procedure. The role of any legislator is to create such a legal framework that promotes the efficient implementation of EU funds. At the same time, they correctly balance the public interest, which is expressed in economic and social development, and the private interest – in considering its application in accordance with the law.

The solution adopted by the Polish legislator tries to achieve such a balance. Although the possibility of obtaining interim protection has been excluded, the legislator has introduced other statutory solutions aimed at shortening the procedure before the administrative court. The complaint is filed directly to the administrative court and not through the administrative body. This allows the case to be dealt with more quickly by the court. In addition, time limits have been introduced for consideration of the case before the court of first instance (30 days from the date of filing a complete complaint) and the Supreme Administrative Court (in the second instance – also 30 days).[65]

Conclusion and *de lege ferenda* remarks

The shaping of interim protection in administrative matters is the role of the legislator and is one of the circumstances reflecting the relationship between the individual and the public administration of the state. It gives expression to the preferences adopted by the

[65] For more, see Art. 30c and Art. 30d of the z.p.p.r. Act.

legislator with regard to the balance or balancing of the priority in the pursuit of particular interests.

The types of interim protection measures available in administrative court proceedings are determined by the general protection solutions as adopted in a given country in relation to public administration activities. Polish law has a cassation model (with few exceptions) in which administrative courts exercise control over the administration using the criterion of legality. Administrative cases decided on the merits have been submitted to the jurisdiction of the ordinary courts.

The available measure of interim protection in proceedings before administrative courts is the suspension of the implementation of the administrative decision complained of. Consequently, only those administrative acts that can be enforced are covered by interim protection. *De lege lata*, postulating the adoption in case law of the broadest possible understanding of this concept, it is possible to indicate acts which do not have such a feature. If the suspension of enforcement is linked to the feature of enforceability, which is unavoidable in the current legal state, provisional protection will be granted to such enforceable acts.

This is where the first room for change in Polish law arises. It consists in the proposal that, through the intervention of the legislator, interim protection will be guaranteed to those administrative acts whose suspension of enforcement is inadmissible on formal grounds. An example of the creation of a legal basis in a law allowing for the granting of a measure of interim protection is the decision on environmental conditions. In this respect, the courts present a uniform position according to which the suspension of the execution of an environmental decision is not possible. It results from the interpretation of Article 61 § 3 The Law on Proceedings before Administrative Courts, which covers situations where the challenged act produces material legal effects, whereas such effects are generally not produced by the environmental decision, as it is not subject to enforcement proceedings. It was only with the introduction of a provision in the law allowing for the suspension of the enforcement of this decision that the legal situation changed in real terms. Suspension of the execution of the decision is admissible upon

fulfilment of the general premises arising from the Law on Proceedings before Administrative Courts with the addition that, by difficult to reverse effects, it is understood the consequences resulting from the undertaking of a project which may have a significant impact on the environment, for which the contested decision was issued.[66]

An analysis of the various types of derogations allowing the legislator to exclude the application of temporary protection in Polish law leads to the conclusion that statutory exclusions should only be applied as an exceptional solution. Too-frequent application of statutory limitations to the primary mechanism, i.e., the possibility of obtaining temporary protection, has been pointed out by the European Commission.[67] In its opinion, the solutions applied in the Polish legal order, in the laws regulating the issuance of decisions for projects covered by the provisions of the EIA Directive, i.e., projects likely to have a significant impact on the environment, excluded by law in certain cases the possibility of applying to a court for interim measures so that the execution of the project could be suspended and the resulting environmental damage could be prevented until it was resolved whether the decisions had been issued in accordance with the provisions of the EIA Directive.[68]

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[66] For more, see Art. 86e Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessments; Journal of Laws of 2022, item 1029, as amended.

[67] Explanatory Memorandum to the Bill of 30 March 2021 amending the Act on the provision of information on the environment and its protection, public participation in the protection of the environment and environmental impact assessments and certain other acts, draft law notified on 19 February 2021, available at: www.sejm.gov.pl (accessed on: 6.12.2022).

[68] Such decisions included water permits, geological and mining concessions, construction permits and decisions issued on the basis of the so-called specustaw (Act of 24 April 2009 on investments in the liquefied natural gas regasification terminal in Świnoujście, Act of 29 June 2001 on the preparation and implementation of investments in nuclear power facilities and accompanying investments, the Act of 24 July 2015 on the preparation and implementation of strategic investments in transmission networks, the Act of 24 July 2017 on investments in the construction of a waterway connecting the Vistula Lagoon with the Gulf of Gdańsk).

The legislator, responding to the Commission's concerns, reviewed the existing legislation with regard to the limitations on temporary protection. As a result of the work undertaken, amendments were made to extend the application of interim protection measures, among others. The court's power to suspend the execution of an investment permit, within the framework of which fragments of the environmental impact assessment of a project were carried out, was introduced; the court's power to suspend the execution of a decision on environmental conditions was introduced for projects implemented on the basis of specific acts; the power of the authorities examining an appeal against an environmental decision and an investment permit was introduced, giving the possibility to suspend the execution of a decision, also the one which was given the order of immediate enforceability.

The proposal for specific amendments concerns the introduction into Polish law of the possibility to suspend the enforceability of the administrative act complained of *ex officio* by the court. In the current state of the law, the court cannot act *ex officio*; a party's application is required for initiation. Consequently, when the applicant in the application does not invoke arguments to justify the fulfilment of the grounds, the court cannot be expected to seek them on its own. If the application is incomplete, the applicant should be called upon to correct it within a certain period of time.

The lack of possibility for the court to act *ex officio* is a solution that leads to a lack of full protection before the administrative court. It remains an open question to shape the premises that would allow the court to act *ex officio*. In this respect, it is possible to refer to the same premises or modify them. Only a detailed analysis would allow a clear answer as to which of the proposed solutions is optimal.

Allowing the court to grant interim protection *ex officio* cannot be seen as an attempt to somehow mitigate the negative effects of the length of the administrative court proceedings. The duration of the proceedings before the administrative court may influence the extent of the negative effects. The legitimacy of granting interim protection must be linked to the specific administrative case.

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The Impact of AI on Cybercrime. Will It Facilitate the Actions of Perpetrators or Enhance the Effectiveness of Law Enforcement?

Introduction

The development of applications and deployment of artificial intelligence in various fields can cause both benefit and harm. This harm might be both tangible (the safety and health of individuals) and intangible (loss of privacy, restrictions on the right to freedom of expression, human dignity, discrimination) and can relate to a wide range of risks that depend on many factors, including the complexity or use of AI systems. AI systems can be used as stand-alone software system, integrated into a physical product (embedded), used to serve the functionality of a physical product without being integrated therein (non-embedded) or used as an AI component of a larger system. These risks may be present at the time of placing products on the market or arise as a result of software updates or self-learning when the product is being used.

The White Paper on Artificial Intelligence "A European approach to excellence and trust"[1] outlined strategic options for regulatory action to enable the development of AI that can benefit citizens, businesses and society as a whole, provided that AI is human-centred,

[1] White Paper on Artificial Intelligence – A European approach to excellence and trust, COM/2020/65 final.

ethical, sustainable and respects fundamental rights and values. Simultaneously, the White Paper notes that Artificial Intelligence entails a number of potential risks, such as opaque decision-making, gender-based or other kinds of discrimination, intrusion in our private lives or being used for criminal purposes. Furthermore, the White Paper points out the risks associated with cyber security, AI applications in critical infrastructure, or malicious use of AI. The new opportunities and risks associated with the development of AI as well as the other disruptive emerging technologies (including quantum computing, 5G, alternative decentralised networks and cryptocurrencies, 3D printing and biotech) are also indicated by reports released by Europol[2] or other organisations[3] and private companies involved in cyber security.[4] Fundamental to ensuring that AI can be widely used in the European Union are legislative initiatives – including, in particular, the proposed Artificial Intelligence Act,[5] one of the aims of which is to ensure the conditions for safety and confidence in the AI technologies being developed.

[2] *Do Criminals Dream of Electric Sheep?*, Europol, 2019, https://www.europol.europa.eu/sites/default/files/documents/report_do_criminals_dream_of_electric_sheep.pdf (accessed on: 23.11.2023).

[3] *Artificial Intelligence Cybersecurity Challenges*, ENISA, 2020, https://www.enisa.europa.eu/publications/artificial-intelligence-cybersecurity-challenges (accessed on: 23.11.2023); *ENISA. Threat Landscape 2022*, https://www.enisa.europa.eu/publications/enisa-threat-landscape-2022 (accessed on: 13.12.2022); *Cybersecurity Threats Fast-Forward 2030*, ENISA, 2022, https://www.enisa.europa.eu/news/cybersecurity-threats-fast-forward-2030 (accessed on: 23.11.2023).

[4] *Malicious Uses and Abuses of Artificial Intelligence*, Trend Micro Research, United Nations Interregional Crime and Justice Research Institute (UNICRI), Europol's European Cybercrime Centre (EC3), 2021, https://www.europol.europa.eu/publications-events/publications/malicious-uses-and-abuses-of-artificial-intelligence (accessed on: 23.11.2023); *Microsoft Digital Defense Report*, 2021, https://www.microsoft.com/en-us/security/business/microsoft-digital-defense-report-2021 (accessed on: 23.11.2023), *Microsoft Digital Defense Report*, 2023, https://www.microsoft.com/en-us/security/security-insider/microsoft-digital-defense-report-2023 (accessed on: 23.11.2023).

[5] Proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)).

Europe is, as with the issue of personal data protection, likely to become a leader in this field.

Artificial intelligence can benefit cybercriminals by automating their attacks and adapting their scenarios to an established profile of victims, as well as law enforcement agencies using algorithms to analyse large data sets, both in criminal proceedings involving cybercrime as well as other crimes. As technology fundamentally shapes security challenges and responses, the aim of this Article is to analyse the impact of artificial intelligence on cybercrime. The research covers both new threats related to the use of AI by cyber criminals, as well as previously observed cyberattacks in which AI has been used. In addition, selected issues of the use of AI by law enforcement agencies for the detection of cyberattacks, analysis of large sets of personal and non-personal data, profiling or stylometry are included.

Characteristics of the cybercrime phenomenon

The development of modern information and communication technologies, the availability of means of remote communication and the associated development of electronic services have influenced the modus operandi of perpetrators of crimes against various legally protected goods. ICTs are used both by perpetrators who violate goods that have traditionally been under the protection of the criminal law and by those who carry out attacks targeting systems and the data processed and stored in them. The misuse of ICT accompanies its development, and the technological and subcultural roots of hacking are closely linked to the development of early telephones ("phone phreaking"). The rise of cybercrime is inextricably linked to the development of the Internet. Just as the development of the World Wide Web has led to the creation of new types of crime and made it easier to commit crimes that have been known for centuries (such as fraud), AI can contribute to the same.

Although countering cybercrime is the subject of international conventions and the work of international organisations, so far no universally accepted definition of "cybercrime", "computer crime" or

"online crime" has been developed, nor has there been an established, universally accepted catalogue of acts recognised as cybercrimes in Polish domestic or international law. The concept of cybercrime or computer crime in the literature is referred to a wide range of different criminal activities directed against the confidentiality, integrity and availability of computer systems, networks and data, as well as their misuse. **Computer crime is discussed in both substantive and procedural perspectives. Under substantive criminal law, a distinction is made between those in which computer systems and networks are the object or environment of the attack, and those in which the attack is directed at the systems, the data processed and maintained therein and computer programs.**[6] In a broader approach, cybercrime includes those acts in which automatic data processing and networking facilities are not the object but merely the instrument of crime (e.g., fraud, document forgery, impersonation, persistent harassment, making criminal threats). **From a procedural perspective, computer-related offences in the literature include those acts whose prosecution requires law enforcement and judicial authorities to gain access to information processed in computer or ICT systems.**[7] Vertical and horizontal views of cybercrime are proposed. Some studies also distinguish between so-called cyber-dependent crimes (corresponding to a narrow or vertical view of cybercrime), cyber-enabled crimes or cyber-related crimes (corresponding to a broader, horizontal view), and sometimes also as a special category – online child sexual exploitation and abuse.[8]

[6] A. Gryszczyńska, [in:] *Wielka Encyklopedia Prawa. Tom XXII. Prawo informatyczne* [*Great Encyclopedia of Law. Volume XXII. IT Law*], G. Szpor, L. Grochowski (eds.), Warsaw 2021, pp. 106, 122.

[7] A. Adamski, *Prawo karne komputerowe* [*Computer criminal law*], Warsaw 2000, pp. 30 i n.

[8] https://www.unodc.org/unodc/en/cybercrime/global-programme-cybercrime.html (accessed on: 23.11.2023), *INTERPOL National Cybercrime Strategy. Guidebook*, 2021, https://www.interpol.int/content/download/16455/file/National%20Cybercrime%20Strategy%20Guidebook.pdf (accessed on: 23.11.2023), also compare the types of cybercrimes of interest to the EC3 and those discussed in the IOCTA reports, https://www.europol.europa.eu/ (accessed on: 23.11.2023).

The concept of cybercrime can be attempted to be decoded from international conventions. According to the Council of Europe Convention on Cybercrime,[9] criminal offences include: actions against the confidentiality, integrity and availability of data and computer systems, as well as selected computer-facilitated offences: computer forgery (Article 7), computer fraud (Article 8), and some of the information content offences. Currently, a UN Convention is under negotiation in which substantive criminal law provisions are a significant point of dispute. The General Assembly Resolution 74/247 on "Countering the use of information and communications technologies for criminal purposes"[10] launched the process towards a new international convention on the use of ICTs for criminal purposes, and establishing an Ad Hoc Committee to elaborate a "comprehensive international convention". The mandate thus given to continue may indicate a desire to regulate not only narrowly defined cyber-dependent crimes, but also all crimes committed with the use of information and communications technologies. It is undisputed that the convention should cover cyber-dependent crimes, i.e., crimes against the confidentiality, integrity and availability of computer systems, networks and data as well as the misuse of such systems, networks and data. Some states parties indicate that the Convention should also cover narrowly defined cyber-enabled crimes (as defined in the Budapest Convention on Cybercrime). A number of states parties, however, have a much broader approach, seeking to extend the new Convention to cover all crimes committed using information and communications technologies. The narrow approach to the substantive criminal law provisions of the Convention is supported by, among others, the European Union and its Member States, while the broad approach is supported by

[9] The Convention on Cybercrime of the Council of Europe (CETS No. 185), 2001. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185 (accessed on: 23.11.2023).

[10] General Assembly Resolution 74/247 Countering the use of information and communications technologies for criminal purposes, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/440/28/PDF/N1944028.pdf?OpenElement (accessed on: 23.11.2023).

countries such as the Russian Federation[11], Belarus, Nicaragua, China[12], and India.[13]

Regardless of the adopted approach to the substantive defining of cybercrime, attention should be focused on the specific nature of the activity of perpetrators in cyberspace. This is because cyberspace is characterised by its global scope (the activity of perpetrators is not limited to a specific place or geographical area), anonymity (it is difficult to locate the source of the attack, the place where the perpetrator acted, make attribution or establish the identity of the perpetrator) or finally the ease of achieving the asymmetry effect (thanks to easy and cost-effective access to information resources and data processing systems, it is possible to cause considerable damage with relatively small forces and resources).[14]

The perpetrators use modern technological solutions (ICT) that allow for anonymity, efficient communication and transfer of criminal funds. In order to conceal their own identity, they create a new identity or use the data of others – including so-called money mules, use services and technical tools that make it difficult or impossible to analyse network traffic (TOR), determine the IP address assigned to them by the telecommunications network operator (VPN, PROXY),

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[11] For example, the Russian Federation proposes that the Convention also cover acts such as: unauthorized access to personal data, encouragement of or coercion to suicide, creation and use of digital data to mislead the user, Incitement to subversive or armed activities or offences related to the distribution of narcotic drugs and psychotropic substances, more: https://www.unodc.org/documents/Cybercrime/AdHocCommittee/Comments/RF_28_July_2021_-_E.pdf (accessed on: 23.11.2023) and https://www.unodc.org/documents/Cybercrime/AdHocCommittee/Second_session/Russia_Contribution_E.pdf (accessed on: 23.11.2023).

[12] https://www.unodc.org/documents/Cybercrime/AdHocCommittee/First_session/Comments/Chinas_Suggestions_on_the_Scope_Objectives_and_Structure_AHC_ENG.pdf (accessed on: 23.11.2023).

[13] https://www.unodc.org/documents/Cybercrime/AdHocCommittee/Comments/India_-_Views_on_scope_objective_and_structure_7.12.2021_1.pdf (accessed on: 23.11.2023).

[14] K. Molenda, *Rozpoznanie adwersarzy w wojskowych systemach teleinformatycznych* [*Recognition of adversaries in military ICT systems*], [in:] *Internet. Cyberpandemia*, A. Gryszczyńska, G. Szpor (eds.), Warsaw 2020, p. 75.

encrypt data and use anti-forensics methods.[15] The modus operandi of cybercrime perpetrators is also characterised by a high degree of flexibility and adapts well to the current economic, geopolitical or social situation.[16]

Cybercriminals operate both individually and as part of highly specialised and organised criminal groups. With the Cybercrime-as-a-Service[17] model, they do not need to have specialised knowledge or advanced skills. The availability of services that enable or facilitate the commission of crime has significantly lowered the so-called "barrier to entry" for less technically proficient offenders.[18] Cybercrime forums offer Malware-as-a-Service (MaaS) or Ransomware-as-a-Service (RaaS), providing access to malware and 24/7 technical support, enabling more people to get started quickly and cost-effectively. So it is to be expected in the short term that AI-as-a-Service becomes more widespread and will lower the barrier to entry by reducing the skills and technical expertise needed to employ AI.

The attribution of the attack and the identification of the perpetrators is hampered by the cross-border nature of the attack, manifested, inter alia, by the need to gather evidence in different jurisdictions. As the observed attacks are also attributed to so-called State Actors,[19] it is not always possible to obtain the data necessary to identify the perpetrators of the attack or to prosecute them due to the lack of effective mechanisms for international cooperation

[15] More about anti-forensics methods: N. Reddy, *Practical Cyber Forensics: An Incident-Based Approach to Forensic Investigations*, Apress, New York 2019, pp. 133–168.

[16] A. Gryszczyńska, G. Szpor, *Hacking in the (cyber)space,* "GIS Odyssey Journal" 2022, 2(1), pp. 141–152, https://www.gisjournal.us.edu.pl/index.php/gis-odyssey-journal/article/view/64. DOI: 10.57599/gisoj.2022.2.1.141.

[17] K. Huang, M. Siegel, S. Madnick, *Cybercrime-as-a-Service: Identifying Control Points to Disrupt*, "CISL" 2017, vol. 1, no. 1.

[18] *Internet Organised Crime Threat Assessment (IOCTA) 2020*, Europol, https://www.europol.europa.eu/activities-services/main-reports/internet-organised-crime-threat-assessment-iocta-2020, p. 31 (accessed on: 23.11.2023).

[19] P. Roguski, *Przesłanki przypisana cyberoperacji państwu* [*The rationale for attributing cyberoperations to the state*], [in:] *Internet. Cyberpandemia*, A. Gryszczyńska, G. Szpor (eds.), C.H. Beck, Warsaw 2020, pp. 91–99.

or the will of individual States, especially when their officials are suspected of the attack.[20]

A comprehensive analysis of the concept of cybercrime and the methods used by the perpetrators is beyond the scope of this article. However, the characterisation of the phenomenon makes it possible to draw attention to specific features, which will then make it possible to identify the impact of artificial intelligence on cybercrime and the possibilities of using artificial intelligence in criminal proceedings.

The intertwining impact of cybersecurity and artificial intelligence

Among the TOP 10 emerging cybersecurity threats for 2030, ENISA identifies not only artificial intelligence abuse but also threats that may be caused or facilitated by malicious use of AI, such as advanced disinformation campaigns and the rise of digital surveillance authoritarianism, loss of privacy or targeted attacks enhanced by smart device data.[21] The risks associated with the development of artificial intelligence are being pointed out by both

[20] An example is the case involving Korean military hacking units, known by multiple names in the cybersecurity community, including Lazarus Group and Advanced Persistent Threat 38 (APT38). According to the indictment, the perpetrators launched attacks on numerous financial institutions around the world. Around October 2016, the hackers gained unauthorized access to the computer network of the Polish Financial Supervision Authority and made its website into a watering hole (United States District Court for the Central District of California, CR 2:20-cr-00614-DMG 2020, https://www.justice.gov/opa/press-release/file/1367701/download, accessed on: 23.11.2023), The same group is responsible for the WannaCry ransomware attack (Criminal Complaint, Criminal Complaint. 2018. United States District Court for the Central District of California, Case No. MJ 18 – 1479. 2018. https://www.justice.gov/opa/press-release/file/1092091/download, accessed on: 23.11.2023), which was estimated to have affected more than 200,000 computers across 150 countries, with total damages ranging from hundreds of millions to billions of dollars.

[21] *Cybersecurity Threats Fast-Forward 2030*, ENISA, 2022, https://www.enisa.europa.eu/news/cybersecurity-threats-fast-forward-2030 (accessed on: 23.11.2023).

researchers and security and cyber-security organisations. In March 2023, the Future of Life Institute issued an open letter to all laboratories working on artificial intelligence to pause for at least 6 months the training of AI systems more powerful than GPT-4.[22] This model has become synonymous with the powerful capabilities of artificial intelligence now, rather than in the future, on the one hand, and an example of a specific threat on the other. The letter has been signed by more than 33,000 people, including, among others, Elon Musk, who in 2015 invested funds in the creation of the OpenAI lab – a chatbot developer based on the based on the GPT-4 model. According to the open letter AI labs and independent experts should use this pause to jointly develop and implement a set of shared safety protocols for advanced AI design and development that are rigorously audited and overseen by independent outside experts. These protocols should ensure that systems adhering to them are safe beyond a reasonable doubt. **Considering that AI systems with human-competitive intelligence can pose profound risks to society and humanity,**[23] powerful AI systems should be developed only once we are confident that their effects will be positive and their risks will be manageable. Threats associated with the use of AI are already materialising in the form of real incidents. Based on the incident database (AI Incident Database),[24] actually reported incidents of various types, related to the use of AI technology, can be analysed. Examples of incidents involving the use of algorithms range from misidentification in automatic facial recognition, which resulted in wrong decisions by law enforcement agencies, to mistranslations,

[22] *Pause Giant AI Experiments: An Open Letter*, https://futureoflife.org/open-letter/pause-giant-ai-experiments/ (accessed on: 23.11.2023).

[23] B.S. Bucknall, S. Dori-Hacohen, *Current and near-term AI as a potential existential risk factor*, In Proceedings of the 2022 AAAI/ACM Conference on AI, Ethics, and Society, pp. 119–129, https://arxiv.org/abs/2209.10604 (accessed on: 23.11.2023); L. Weidinger et al., *Ethical and social risks of harm from language models*, 2021, https://arxiv.org/pdf/2112.04359.pdf (accessed on: 23.11.2023); J. Carlsmith, *Is Power-Seeking AI an Existential Risk?*, 2022, https://arxiv.org/pdf/2206.13353.pdf (accessed on: 23.11.2023); G. Marcus, *The Next Decade in AI: Four Steps Towards Robust Artificial Intelligence*, https://arxiv.org/abs/2002.06177 (accessed on: 23.11.2023).

[24] https://incidentdatabase.ai/apps/incidents/ (accessed on: 23.11.2023).

artificial intelligence hallucinations and the use of Deepfake to CEO fraud and misinformation.

Considering the differentiated relation between cybersecurity and the development of artificial intelligence, the European Union Agency for Cybersecurity, ENISA, points out that the dimensions that may be identified include the following three:

1) Cybersecurity for AI – because lack of robustness and the vulnerabilities of AI models and algorithms (e.g., manipulation of data used in AI systems, data poisoning);
2) Malicious use of AI – as adversarial use of AI can create more sophisticated types of attacks (deep generative models to create fake data, AI-supported password cracking);
3) AI to support cybersecurity – AI can be used as a tool or means to create advanced cybersecurity (e.g., active firewalls, smart antivirus, automated cyber threat intelligence).

When considering cybercrime in the context of AI, it is important to take into account that artificial intelligence can be used in classic attacks as a means to augment cybercrime and facilitate attacks by malicious adversaries (such as using Deepfake to impersonate another person in a CEO fraud attack) and artificial intelligence itself can be a key target for attacks. Due to its scope, this study will not cover all the risks associated with the development of artificial intelligence.

Attacks on artificial intelligence systems

Artificial intelligence systems and machine learning systems (machine learning systems) in particular are now in wide use. In this context, the danger of deliberate attacks on such systems at any stage of their lifecycle are an increasing challenge to the secure use of the systems.

When analysing the challenges, in providing an adequate level of security for systems using artificial intelligence algorithms, it is important to consider what should be protected and how to prioritise the defences against threats. If we simplify by assuming that "AI is a collection of technologies that combine data, algorithms and

computing power" we understand that the assets that are subject to AI-specific threats and adversary models are: data, algorithms, and products (including supply chain attacks). **In a broader approach that takes into account the AI lifecycle, assets are classified into 6 categories: data, model, actors, processes, environment/tools and artefacts.**

If we agree that a holistic technological approach to security is worthwhile, we can talk about several areas or categories of threats:

- those directed at the algorithms or artificial intelligence models themselves;
- in the process of managing and processing the data handled by the algorithms;
- for the process of training the algorithms with data sets;
- for software implementation of models and artificial intelligence system;
- arising from existing vulnerabilities of the ICT infrastructure (virtualised, cloud or physical) on which the AI systems operate.

The taxonomy presented in the ENISA report,[25] which includes potential impacts and affected assets, describes dozens of types of possible attacks broken down into categories, such as:

- launching attacks that exploit technological immaturity and vulnerabilities;
- unintentionally causing damage or errors;
- violations of laws, contracts, rules and regulations;
- errors or failures of AI systems;
- interception of data, unauthorised disclosure of data or models;
- physical attacks;
- loss of communications;
- disasters or environmental phenomena.

Considering cyber threats in all of the above categories reflects a holistic approach to all ICTs and AI systems are no exception in terms of security principles.

[25] *Artificial Intelligence Cybersecurity Challenges. Threat landscape for Artificial Intelligence*, ENISA, 2020. https://www.enisa.europa.eu/publications/artificial-intelligence-cybersecurity-challenges (accessed on: 23.11.2023).

When discussing attacks on artificial intelligence systems we are dealing with a huge group of existing or anticipated threats, more or less known from the previous practice of those involved in ICT security, and a new area of threats specific to the algorithms, models and data used by AI. It is difficult to list all possible types of threats or attacks, so single examples will be analysed. In the category of attacks that exploit technological immaturity and vulnerabilities, examples are the adversarial examples widely described in the literature. Such attacks are often are presented as the introduction of small perturbations into data (e.g., images), which – invisible to the naked human eye – cause an incorrect (ineffective) performance of AI-based models.[26] Another example in this category could be attacks or weaknesses in the process of labelling of data in supervised learning systems. Manipulation of labels (modifying labels in the learning process, random introduction of perturbations), especially with partial or full knowledge of the target model by the attacker, will result in incorrect algorithm performance. Another risk is unintentionally causing models to malfunction. An example of this can be the so-called bias (i.e., a certain lack of neutrality of the data) on which the model was trained. Often cited case to illustrate this type of danger is, for example, the use of mostly unisex images of human faces for teaching recognition of human faces, of images of people of one sex or one skin colour, or only in a certain age range, which can result in incorrect face recognition across the entire human population. Disruption of data neutrality is a major concern regarding the use of artificial intelligence in the administration of justice. Typically associated with criminal activity will be unauthorised interception of data, unauthorised disclosure of data or models. In addition to the classic threats of unauthorised disclosure of data, this category also refers to the deliberate disclosure or attacking internal model parameters by unauthorised persons.

[26] I. Goodfellow, J. Shlens, C. Szegedy, *Explaining and Harnessing Adversarial Examples*, https://arxiv.org/abs/1412.6572 (accessed on: 23.11.2023); A. Chakraborty, M. Alam, V. Dey, A. Chattopadhyay, D. Mukhopadhyay, *Adversarial Attacks and Defences: A Survey*, https://arxiv.org/abs/1810.00069 (accessed on: 23.11.2023).

Artificial Intelligence is often used as a means to increase the security and safety of IT systems and to automatically configure IT assets. Even when AI is used for cybersecurity, it can become a target for cybercriminals attacking the logic within AI models. A successful attack that reverses the decisions made by the AI model allows cybercriminals to conceal their activities on one hand and cause an attack on the other.

Malicious use of AI

Artificial intelligence, and the uncertainties associated with Large Language Models (LLMs) have received a lot of attention lately. Deepfakes seem like a perfect fit for realistic and targeted social engineering attacks. **Admittedly, there are still many older and simpler techniques that require much less effort and provide good results for crime. That is not to say that threat actors with the resources and determination to make use of the technology will ignore it altogether.** This technology can certainly be used for highly targeted and specialised (but also high-cost) campaigns.

Many reports on cybersecurity highlight the potential for using AI in disinformation campaigns and increasing sophistication and scope of disinformation. Consumer platforms and services, such as social media, creator platforms, search engines, and messaging services, provide state and non-state actors with powerful channels for distributing disinformation. Moreover, these services provide malevolent actors with ready-made tools to experiment, monitor, iterate, and optimise the impact of disinformation campaigns.[27]

Disinformation threats became even more relevant during the war in Ukraine. In its 2022 report, ENISA highlighted the construction by state-backed actors of sophisticated tools for the distribution of fake news. These services provide out-of-the-box tools to test and optimise their content and monitor the outreach and impact of

[27] *Microsoft Digital Defense Report*, 2021, p. 110, https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RWMFIi (accessed on: 13.12.2022).

disinformation campaigns.[28] Moreover, developments in artificial intelligence and deepfakes have provided threat actors with powerful tools to create misleading content. Particularly noteworthy are the observed coordinated information operations related to the Russia-Ukraine crisis, linked to Russian threat actors. Some information operations coincided with disruptive or destructive and other cyber threat activity, while others promoted Russian-favoured narratives and had psychological effects. The risk of cyber operations is heightened during high-profile physical or geopolitical events. As the examples of the 2016[29] and 2020[30] US elections show, skilful control of social media content preceded by the selection of a vulnerable group can significantly disrupt the outcome of an election or lead to riots.

Analyses of the development of disinformation campaigns indicate several important areas of concern. The first is the use of commercial online platforms as an engine of disinformation. The second is advances in machine learning (ML) and graphics, which have led to widely available tools for creating high-fidelity audiovisual content (synthetic media, deepfakes). In a third area of concern AI methods can be used to formulate and drive powerful psychological operations that leverage insights and data about human cognition. The use of algorithms to profile individuals and groups in order to generate personalised disinformation programmes, combined with

[28] More: *ENISA Threat Landscape 2022*, p. 140, https://www.enisa.europa.eu/publications/enisa-threat-landscape-2022 (accessed on: 13.12.2022); *ENISA. Threat Landscape 2023*, https://www.enisa.europa.eu/publications/enisa-threat-landscape-2023 (accessed on: 23.11.2023); *Cybersecurity Threats Fast-Forward 2030*, ENISA, 2022, https://www.enisa.europa.eu/news/cybersecurity-threats-fast-forward-2030 (accessed on: 23.11.2023).

[29] *Grand Jury Indicts 12 Russian Intelligence Officers for Hacking Offenses Related to the 2016 Election*, https://www.justice.gov/opa/pr/grand-jury-indicts-12-russian-intelligence-officers-hacking-offenses-related-2016-election (accessed on: 13.12.2022); https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume4.pdf (accessed on: 13.12.2022); *Indictment. United States District Court for the District of Columbia*, 2018, https://www.justice.gov/opa/press-release/file/1035562/download (accessed on: 13.12.2022).

[30] *Foreign Threats to the 2020 US Federal Elections*, National Intelligence Council, 2021, https://s3.documentcloud.org/documents/20515484/icadeclass16mar21.pdf (accessed on: 13.12.2022).

the use of tools for generating synthetic media, and harnessing AI to guide psychological operations, will lead to increased effectiveness of disinformation campaigns through synergies.

Combating disinformation also involves a multi-level approach. The first and most important level is education and shaping skills to detect disinformation. One of the essential technical approaches for disinformation management is social network detection and mitigation, including: suspension of fake accounts, mechanisms to filter and flag fake news, reductions of automatic activities, artificial intelligence tools and platforms to detect fake news based on online approaches, mobile applications and chatbots powered by factcheckers targeting the general public, web-browser extensions for the general public.[31] Moreover, pattern recognition based on AI can support the detection of manipulated communications and content.[32]

We can also think of the threat posed by disinformation as cognitive hacking – compromising logical, analytical, and critical thinking. This is where the problems of using social engineering for both disinformation campaigns and to commit both cyber-dependent crimes and cyber-enabled crimes intersect. Social engineering has been the subject of sociological research for many years and is defined as the ability to effectively influence others, and as the totality of individual or group methods and actions aimed at obtaining the desired behaviour of individuals or social groups.[33] In computer science, social engineering refers to the art of manipulating people in order to persuade them to take certain actions or reveal confidential information. The effectiveness of a social engineering attack is significantly increased by the use of one of the most visible and discussed malicious uses of AI, namely deepfake. Deepfakes (a portmanteau of "deep learning" and "fake") are hyper-realistic videos digitally manipulated to depict people saying and doing things that never actually happened. Deepfakes rely on neural networks that analyse large sets of data samples to learn to mimic a person' facial

[31] *ENISA Threat Landscape 2022*, p. 140.

[32] *Microsoft FY21 Digital Defense Report*, p. 111.

[33] *Socjotechnika: praktyczne zastosowania socjologii* [*Sociotechnics: practical applications of sociology*], A. Podgórecki (ed.), Warsaw 1968.

expressions, mannerisms, voice, and inflections.[34] The development of deepfake technology is related to easy access to audio-visual content on social media, availability of modern tools, open-source trained models, economical computing infrastructure, and the rapid evolution of deep-learning methods, especially Generative Adversarial Networks (GAN).[35]

The technology has been lauded as a powerful weapon in today's disinformation wars, whereby one can no longer rely on what one sees or hears. The use of deepfake by cybercriminals in CEO fraud attacks has also been confirmed.[36] Moreover, coupled with the reach and speed of the internet, social media, and messaging applications, deepfakes can quickly reach millions of people in an extremely short period. With regard to such a short timeframe, deepfakes present considerable potential for a range of malicious and criminal purposes which includes: destroying the image and credibility of an individual, harassing or humiliating individuals online, perpetrating extortion and fraud, facilitating document fraud, falsifying online identities and fooling KYC mechanisms, falsifying or manipulating electronic evidence for criminal justice investigations, disrupting financial markets, distributing disinformation and manipulating public opinion, inciting acts of violence toward minority groups, supporting the narratives of extremist or even terrorist groups or stoking social unrest and political polarisation.[37]

Fake face generators can be used in many ways. Realistic images of deepfakes can be used for all sorts of scams and frauds, or at best to lend credibility to online accounts aimed at trolling or scamming.

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[34] M. Westerlund, *The Emergence of Deepfake Technology: A Review*, "Technology Innovation Management Review" 2023, 9(11), pp. 39–52. DOI: 10.22215/timreview/1282 (accessed on: 23.11.2023).

[35] M. Masood, M. Nawaz, K.M. Malik et al., *Deepfakes generation and detection: state-of-the-art, open challenges, countermeasures, and way forward*, "Appl Intell" 2022. DOI: 10.1007/s10489-022-03766-z (accessed on: 23.11.2023).

[36] J. Damiani, *A Voice Deepfake Was Used To Scam A CEO Out of $243,000*, 2019, https://www.forbes.com/sites/jessedamiani/2019/09/03/a-voice-deepfake-was-used-to-scam-a-ceo-out-of-243000/ (accessed on: 15.12.2022).

[37] *Malicious Uses and Abuses of Artificial Intelligence*, Europol, 2022, p. 52, https://www.europol.europa.eu/cms/sites/default/files/documents/malicious_uses_and_abuses_of_artificial_intelligence_europol.pdf (accessed on: 23.11.2023).

The literature also points to positive aspects of the use of deepfake technology, e.g., in movies, games and entertainment or various business fields, such as fashion and e-commerce. There are also services available on the internet for creating fake profile pictures to improve one's image for dating apps and social media. The availability of paid generators of fake profile pictures indicates that there is a consumer demand for such services.[38]

As reports on cyber threats indicate, due to inadequate security measures and/or insufficient user knowledge and skills, even poorly prepared attacks based on social engineering end in success for the perpetrators. Therefore, deepfake creation technology is not yet being employed on a large scale by criminals. The main use of deepfakes still predominantly appears to be for non-consensual pornographic purposes.[39] Current criminal tools, technologies, and approaches are likely to be more effective and easier to employ. They would also be less costly and less time-consuming.

At the same time, it should not be forgotten that there is a growing number of well-prepared attacks whose perpetrators employ holistic strategies combining social engineering with the ability to exploit tools, systems and vulnerabilities, use false identities and work in close cooperation with other threat actors. As AI technology develops, so do the different schemes for social engineering that might profit from such technology. It is crucial to note, that social engineering still serves as a top threat that is utilised for facilitating other forms of cybercrime. However, it should be noted that on underground forums cybercriminals are also working on AI-enabled tools to improve social engineering tasks, so social engineering

[38] https://www.vice.com/en/article/5d34yn/ai-can-now-make-fake-selfies-for--your-tinder-profile?mc_cid=c06959ff7f&mc_eid=2bbfc2a60f (accessed on: 23.11.2023).

[39] Note also DeepNude, a desktop application that, using generative adversarial networks (GAN) from a photo of a woman in a swimming suit, was able to generate a version of the photo in which the woman is nude. The use of this application was confirmed in the criminal proceedings of one paedophile, who created false images of naked girls based on photos downloaded from social networks, and then used them to blackmail children in order to obtain further real nude photos.

attacks will evolve towards automatically-generated personalised content. In the first six months of 2022 alone, LinkedIn removed more than 16.4 million fake accounts.[40] Some of the blocked profiles were small AI-generated photos. Most of these accounts were created for marketing and sales purposes.[41] However, there have also been accounts from which fictitious recruitments have been carried out, targeting cyber security professionals and even attacks described as "love scams".

Possible applications of AI in countering cybercrime

In the context of cybersecurity and countering cybercrime, AI may be seen as an emerging approach, and AI techniques have been used accordingly to support and automate relevant operations, e.g., traffic filtering, data correlation, and automated forensic analysis.

As indicated, cybercrime has specific characteristics. One is its trans-border nature, another is the perpetrators' use of anonymisation and anti-forensics methods. This makes it necessary to collect and analyse large sets of structured and unstructured data in order to attribute the attack and identify the perpetrator. The extent of the data to be collected and analysed depends on a number of factors, including, in particular, the type, course and scope of the crime, the services and infrastructure used to commit the crime and, ultimately, the characteristics of the attacked entity and its infrastructure. The providers of data for criminal proceedings are both the parties to the proceedings and the providers of many different products and services. However, it is important to note at this point that data collection does not start when a cybercrime occurs. They are collected by different actors for different purposes; law enforcement agencies rely on data that may have an impact on factual findings, obtained

[40] https://about.linkedin.com/transparency/community-report#fake-accounts-2022-jan-jun (accessed on: 23.11.2023).

[41] S. Bond, *That smiling LinkedIn profile face might be a computer-generated fake*, https://www.npr.org/2022/03/27/1088140809/fake-linkedin-profiles (accessed on: 23.11.2023).

from different actors, and the data is in a different format, making it difficult to analyse with typical analytical software.

An additional complication is the lack of a definition of electronic evidence in Polish law. The concept of electronic evidence is often used by theoreticians and practitioners of forensic science, where it is identified with the term "electronic trace". It is defined as an electronic creation "that shows a link to an established event and can be used to infer its perpetrator". It provides a basis for reasoning, just like any other forensic trace of the perpetrator.[42] In Polish criminal proceedings, there are also no specific provisions relating to the preservation of electronic evidence. The following, in particular, refer to securing data and IT data carriers: Articles 217, 218, 218a, 236a and 241 of the Code of Criminal Procedure.[43]

In most cybercrime cases, the basis for determining the perpetrator and the circumstances of his or her act is telecommunications data, including: subscriber data; date and time of first registration; copy of the contract; means of verifying identity at the time of registration; copies of documents provided by the subscriber; type of service, including the identifier (telephone number, IP address, SIM card number, MAC address); information on related devices; data on confirmation of service use; information on payment methods; and access data, including but not limited to IP connection data, and traffic data. On the basis of the provisions of the Code of Criminal Procedure so-called Internet data are also collected. These do not have a fixed retention period, so they are characterised by transience. The retention period of such data, e.g., logs to e-mail accounts, depends in Poland only on the internal regulations of entities providing electronic services.

In the majority of cybercrime cases, the perpetrators are directed towards financial gain, and therefore the investigation of financial flows is essential. For this purpose, data are obtained from

[42] M. Kulicki, *Kryminalistyka. Wybrane zagadnienia teorii i praktyki śledczo-sądowej* [*Forensic Science. Selected issues of forensic investigation theory and practice*], Toruń 1994, p. 242.

[43] Code of Criminal Procedure of 6 June 1997 (Journal of Laws of 2022, item 1375, as amended), hereinafter referred to as KPK.

banks, financial institutions, clearing agents and/or cryptocurrency exchanges.

Digital evidence and data acquisition is undoubtedly hampered by the cross-border nature, the transient nature of the data, and the technical complexity of the security process as well as the lack of qualified specialists. The variety of equipment to be secured and data to be acquired is increasing. This makes the participation of an IT expert and specialised police officers necessary in a search operation. The volume of data makes triage (selection of data carriers and data to be secured) necessary and live forensics is becoming increasingly important due to the encryption of data by perpetrators.

The increasing volume of data to be secured means that their procedural analysis requires the support of an analyst. In cybercrime cases, comprehensive analyses depicting the entire infrastructure used by the perpetrators, their communications, and their cash flows are particularly useful. Unfortunately, commissioning a comprehensive crime analysis to private parties involves significant costs, while the small number of crime analysts in the police and prosecutor's office makes the waiting time for crime analyses unacceptably long. In view of the problems identified in this way, the use of AI algorithms to analyse secured evidence and to indicate further lines of enquiry or verify investigators' versions could positively influence the detection process and the concentration of evidence. Algorithms could intensify the process of typing bank accounts or cryptocurrency wallets used by the perpetrator, correlating data from ATMs, bit machines, telecommunications data or surveillance footage. Algorithms that analyse recordings to verify biometric pattern matching are already available and in use in some countries. However, it is important to note the ethical concerns and the AI Act proposal regarding unacceptable-risk AI systems and their admissibility for the purpose of law enforcement.[44]

Machine learning techniques can also be used in analyses based on behavioural biometrics: for example, stylometrics (i.e.,

[44] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, 2021/0106(COD).

a method of analysing written text to determine the statistical characteristics of an author's style), Human-Computer-Interaction (HCI), where the use of the keyboard, touchpad or mouse is analysed, or analysis of the user's motor patterns when performing specific tasks. At this point, it is worth noting that stylometrics analytics can be used to both study internet conversations and posts on darkweb forums. It can also be used to determine the author of the malware code.[45]

The basis for learning algorithms is data. In Polish criminal proceedings, in connection with the ongoing process of digitisation of pre-trial files since 2013, the units covered by the project digitised 12,749 volumes of files.[46] The digitisation process has significantly accelerated in 2022 also covering the files of proceedings conducted in the district prosecutor's offices. **Digitisation of files leads to the creation of a database that can be used to teach algorithms that would then support the decision-making process and automatically generate drafts** of selected documents. In criminal proceedings, in connection with the occurrence of a specific state of facts, specific actions are taken, as indicated by generally applicable laws, standard letters are prepared or specific decisions or orders are issued. Some of the actions could be subject to algorithmisation and automation, and a learning algorithm could prepare ready-made draft letters or procedural decisions subject to approval by the prosecutor on the basis of legal regulations.[47]

Given the cross-border nature of cybercrime and the asymmetry of operations in cyberspace, or ultimately the technical complexity of an attack using AI, it is also important to note the importance of joint exercises involving not only cyber security actors, but also in actions

[45] https://whatnext.pl/ten-algorytm-jest-w-stanie-rozpoznac-hakerow-na-podstawie-ich-programow/.

[46] https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/system-dygitalizacji-akt-sda-konferencja-prokuratury-generalnej-podsumowujaca-projekt/ (accessed on: 23.11.2023).

[47] Examples of AI content generators: https://bloggersideas.com/pl/best-ai-content-writing-softwares/.

to combat cybercrime.[48] Through participation in the exercises, participants not only acquire knowledge and skills but also verify the correctness of procedures, communication and coordination processes that are in place at local, sectoral, national, cross-border and EU-wide levels.

Conclusions

Recent developments in AI systems have drawn the world's attention to the most important aspects of cybersecurity associated with them. As ENISA points out, **Artificial Intelligence and cybersecurity have a multi-dimensional relationship and a series of interdependencies – the first dimension is cybersecurity for AI, the second is AI to support cybersecurity, and the third is malicious use of AI.**[49] When considering cybercrime in the context of AI, it is important to bear in mind that: that **artificial intelligence can be used in classic attacks as a means to augment cybercrime and facilitate attacks by malicious adversaries and artificial intelligence can be a key target for attacks.**

AI and its application – for instance automated decision making – especially in safety critical deployments such as in autonomous vehicles, smart manufacturing, eHealth, etc. – may expose individuals and organisations to new and sometimes unpredictable risks, and it may open new paths in attack methods and techniques as well as create new data protection challenges. In this context, the issue is to build learning systems that can withstand attempted attacks (robust machine learning).

There are still very few attacks in which artificial intelligence was the key target for attacks. However, attacks in which AI was used as a means of committing cybercrime are becoming more frequent in Poland and elsewhere.

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[48] For example: Cyber Europe – cyber incident and crisis management exercises organised by ENISA (https://www.enisa.europa.eu/topics/training-and-exercises/cyber-exercises), or the national exercise CyberPOL 2017, in which NASK, the Police and prosecutors took pArt.

[49] *AI Cybersecurity Challenges*, ENISA, 2020, p. 7.

AI offers the potential to change the security landscape by augmenting the skill, speed, and knowledge of defenders. With modern AI advancements analysing trillions of security signals every day, there is potential to build a safer, more resilient online ecosystem. AI can be used to enhance cyber security (traffic filtering), counter cybercrime (automated forensic analysis) or ensure the right to a fair trial (by accelerating the collection of evidence). The use of AI for cyber-attack detection, analysis of large sets of personal and non-personal data, profiling or stylometrics can benefit cyber--security through faster detection of an attack and its attribution, and the collection and analysis of the data necessary to prosecute a specific individual.

The problems identified in Poland are, first, the lack of legal regulations defining the principles and scope of the use of ML algorithms in criminal proceedings. Second, the lack of criminal law regulation for violations related to the use of AI. Third is the lack of training in AI and its applications for both police officers, prosecutors and judges. The generally low digital skills of police officers, prosecutors and judges, combined with the lack of specialisation at the level of the municipal police station and district prosecutor's office, **result in a low level of effectiveness in combating classic cybercrime, even if sophisticated AI-based methods are not used.** If the preparedness of law enforcement agencies for the new challenges posed by the use of AI by cybercriminals is not improved, the primary objective of criminal proceedings, which is to detect and bring to justice the perpetrator, will not be achieved.

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Theoretical Approaches to VOM through the Prism of Polish Regulations

Introduction

This essay will consider selected theoretical aspects of Victim Offender Mediation – (VOM institution) in the frame of regulations of Polish criminal law. Theoretical concepts are divided into three categories: 1) core conception, 2) selected optimisation (optimalisation) formulas, and 3) one legitimisation formula.

The first category, i.e., core conception, refers to Conflict Resolution Theory (CRT).[1] The latter allows the inclusion of different variants of negotiation in criminal proceedings, namely prosecutorial negotiations held between the accused and the public prosecutor (APN) and victim-offender mediation (VOM) against the background of a specific conflict resulting from the violation of sanctioned norms in criminal law. A separate work (the first part of

[1] See J. Burton, *The theory of conflict resolution*, "Current Research on Peace and Violence" 1986, vol. 9, no. 3, pp. 125–130; B. Blackwell, C. Cunningham, *Taking the Punishment Out of the Process: From Substantive Criminal Justice Through Procedural Justice*, "Law & Contemporary Problems" 2004, no. 59, pp. 68–69; O. Batrymenko, V. Andrushko, *The conflictual and consensual natures of power*, 2021. DOI: 10.17721/2415-881x.2021.87.44-54; J. Hagan, J.C. Shedd, *Conflict Theory of Perceptions of Criminal Injustice*, "University of Chicago. Legal Forum" 2005, Issue 1, Art. 8, pp. 269 et seq.

my research) has been devoted to the analysis of the CRT as a basis for VOM.[2] However, it can be briefly pointed out that the CRT enables identifying the interests and objectives of the participants in negotiations (including mediation) and juxtaposing them to the general and specific objectives of the criminal process. It also allows for the determining of the boundary conditions of the so-called entering into negotiations and the boundary conditions for a potential compromise. Previous research also shows a close relationship between CRT's application potential both to adversarial systems of criminal proceedings and, on the other hand, to inquisitorial and mixed systems of criminal prosecution by taking into account their opportunistic or legalistic orientation. Since the Polish criminal process model is based on a mixed model, with the domination of inquisitorial prosecution, and is created based on the legalism principle, VOM's effectiveness in this model presents a challenge.[3]

In this study, the analysis will focus primarily on other theories, which have been indicated at the outset as the optimisation theory and the legitimisation theory. Optimalisation formulas include: the theory of the Communicative Act Approach and the Conventional Act of Communication[4] juxtaposed with the Legal Argumentation Approach.[5] In the frame of legitimisation theory, one theory, namely contrary-to-duty directives, is discussed.[6] Before the essence of

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[2] See B. Janusz-Pohl, *Theoretical and Praxeological Approaches to Mediation – Polish Perspective* (in print).

[3] Compare: A.G. Skrobotowicz, *Mediacja w zmienionym modelu postępowania karnego. Zagadnienia wybrane*, "Annales of Juridical Sciences" 2016, no. 1, pp. 51–70.

[4] See J. Habermas, *The Theory of Communicative Action: The Critique of Functionalist Reason*, Polity Press, Cambridge 2007, *passim*; J. Habermas, *Teoria działania komunikacyjnego,* vol. I, Warsaw 1999, *passim*.

[5] See A. Adamus-Matuszyńska, *Współczesne teorie konfliktu społecznego*, Katowice 1998, *passim*; P.J. Carnevale, D.G. Pruitt, *Negotiation and mediation*, "Annual Review of Psychology" 1992, no. 43, *passim*; R.J. Lewicki, S.E. Weiss, D. Lewin, *Models of conflict, negotiation and third party intervention: A review and synthesis*, "Journal of Organizational Behaviour" 1992, vol. 13, *passim*; J. Mulholan, *The Language of Negotiation: A Handbook of Practical Strategies for Improving Communication*, Routledge, London 1991, *passim.*

[6] See: R.M. Chisholm, *Contrary-to-Duty Imperatives and Deontic Logic*, "Analysis" 1963, no. 24, pp. 33–36. See R. Sarkowicz, *O tzw. normach poprawczych, czyli*

these theories is approached, let us briefly highlight the normative description of mediation in the Polish criminal law system.

Victim-offender mediation in Polish criminal law

Polish criminal law allows us to characterise mediation as a complex institution with the following features: offender-driven rather than victim-driven focus, direct and indirect (in limited frame) model. One could also distinguish full mediation and semi-mediation practice, as well as settlement and non-settlement-driven formulas.[7]

In the given system, mediation is well implemented when it comes to normative aspects, but its functioning in practice is doubtful. One can state that the significance of mediation in Poland is very limited.[8] We could observe a decreasing trend in VOM practices by examining the available statistical data on mediation in criminal cases. Let us indicate that in 2017 there were 4,364 cases of mediation in District Courts[9] registered in the MED system, 3,973 cases in 2018, 4,272 cases in 2019, and 3,443 cases in 2020. Accordingly, in the given period 1,603,877 cases have been adjudicated in the

rozważania na marginesie paradoksu Chisholma, [in:] *Prawo i Polityka. Księga pamiątkowa ku czci Prof. dr. K. Opałka*, A. Bodnar, J.J. Wiatr, J. Wróblewski (eds.), Warszawa 1988, pp. 113 et seq.

[7] On diverse formulas of mediation see: J. Jonas-van Dijk, S. Zebel, J. Claessen, H. Nelen, *Victim–Offender Mediation and Reduced Reoffending: Gauging the Self-Selection Bias*, "Crime & Delinquency" 2020, vol. 66(6–7), pp. 949–972; M.S. Umbreit et al., *Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue*, "International Review of Victimology" 1999, no. 6, p. 321, 323; M. Armour, M.S. Umbreit, *Violence, Restorative Justice and Forgiveness. Dyadic Forgiveness and Energy Shifts in Restorative Justice Dialogue*, London and Philadelphia 2018, pp. 18 ff.; E.L. Worthington, *Forgiving and Reconciling: Bridges to Wholeness and Hope*, Downers Grove 2003, pp. 7–23; J.R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks,* "Western Criminal Review" 1988, no. 1, http://westerncriminology.org/documents/WCR/v01n1/Gehm/gehm.html (accessed on: 19.11.2022).

[8] Data available at: Baza statystyczna, ms.gov.pl (accessed on: 19.11.2022).

[9] As Art. 24 § 1 of the CCP states: A district court shall adjudicate all cases in the first instance except for those referred under the Act to the jurisdiction of another court.

first instance. Consequently, it means that the VOM procedure concerns less than 1% of all cases adjudicated in the first instance.[10]

At the same time, core mediation regulations in Polish criminal law are impressive. Thus, on the one hand, mediation is regulated in detail, and on the other hand, a broad but uniform variant of mediation has been chosen.[11] The mediation procedure is not formally part of the criminal proceedings. It has an optional character, which results from the nature and essence of VOM and the principle of voluntary participation of the perpetrator and the victim. What is more, mediation in the Polish system is not limited to a specific group of cases or stages of the proceedings. According to the Article 23a of the CCP,[12] the court or a court clerk, and in the investigation stage the public prosecutor or another body conducting the investigation may, at the initiative or upon the consent of the accused and of the injured, refer the case to an institution or person authorised thereto in order to conduct mediation proceedings between the victim and the offender, of which they shall be advised, and such advice shall indicate purposes and principles of the mediation proceedings, including the contents of Article 178a.[13] The decision on referring a case to VOM is, therefore, inclusively a matter for the authority, and a decision on refusal is not appealable.[14] If the VOM application is not granted, but, both the offender and the victim have

[10] See also B. Kużelewski, *The Effectiveness of Victim-Offender Mediation in Criminal Proceedings Carried Out in 2011–2014 in the District Court of Białystok in the Light of Files Research*, "Białostockie Studia Prawnicze" 2016, no. 21, pp. 183 et seq.

[11] See B. Kużelewski, *Importance of mediation in criminal cases in Poland (discussion on the background of the fair trial guarantees)*, [in:] *Criminal plea bargains in the English and the Polish administration of justice system in the context of the fair trial guarantees: collective work*, C. Kulesza (ed.), Białytok 2011, pp. 167 et seq. and the Polish literature on mediation referred in this work. Available at: https://www.researchgate.net/publication/313639289_Criminal_plea_bargains_in_the_English_and_the_Polish_administration_of_justice_system_in_the_context_of_the_fair_trial_guarantees_collective_work (accessed on: 19.11.2022).

[12] Polish Code of Criminal Procedure (CCP) – Official Consolidated Version Polish Journal of Laws of 2022, Item 1375.

[13] Art. 178a of the CCP creates a ban on questioning the mediator as a witness.

[14] In accordance with Art. 459 of the CCP, only those decisions which close the way to a judgment or, if the law so provides, are open for being challenged.

agreed to open mediation procedure, they can independently use "private mediation". This may be justified primarily if the decision on refusal has been issued by the public prosecutor. In the situation outlined, the parties may submit an appropriate motion to the court to authorise "private mediation" during the adjudicating process.

The mediation procedure is temporally limited, but the deadline is indicative, and therefore should this term exceed the limit, any detrimental effects on the course of the proceedings are not observed. The mediation proceedings shall last no longer than one month, and their duration shall not be included in the duration of the investigation. The short deadline for mediation is undoubtedly one of the elements that allow characterising mediation in criminal cases on the basis of the Polish system as offender-driven more than victim-driven formula. Temporal limitations for mediation proceedings also correlate with the non-adversarial aspect of the model of proceedings in criminal cases in Poland.

Mediation is formalised, and the dominant formula is direct mediation. The accused and the injured shall participate in the mediation proceedings voluntarily. The consent to participate in the mediation proceedings shall be received by the body referring the case to mediation or the mediator after the said body advises the participants of the purposes and principles of mediation proceedings as well as of the possibility of withdrawing the consent until the mediation is ended.

VOM is confidential and must meet the standard of objectivity expressed in the Act (Article 23a of the CCP): The mediation proceedings shall be conducted impartially and confidentially. This standard is, e.g., ensured by the proper formation of the mediation body – the mediator. Not only can this entity not be an active judge, public prosecutor, junior public prosecutor, nor a trainee in the foregoing professions, a lay judge, court clerk, judge assistant, assistant public prosecutor, or an official of an institution authorised to prosecute crimes, but the entity must meet certain statutory requirements and in a specific proceeding not be exempted as *actore inhabilis* or *actore suspectus* (as an entity related to the case, party to the proceedings). At the same time, however, the mediator shall

have access to the case files to the extent necessary to conduct the mediation proceedings.

The formal aspect of the mediation is enhanced by the fact that the mediator draws up, after conducting the mediation proceedings, a report on its outcomes. The report shall contain the settlement (if concluded), signed by the offender, the victim, and the mediator.

Although VOM can be carried out both in the preparatory and judicial stages – as the system in force in Poland has not introduced temporal exclusion clauses, the observation of the practice opts for the conclusion that most cases are referred to mediation by the court (specifically the president of the court) before the commencement of jurisdictional proceedings. The Code of Criminal Procedure has created the possibility of referring cases to mediation after a preliminary examination of the case brought by the prosecutor or the police, who has filed an indictment or a request for conditional discontinuance of the proceedings. As Article 339 § 4 of the CCP states: the president of the court shall also commit the case to the session when there is a need to consider the possibility of transferring the case to mediation; the provision of Article 23a shall apply accordingly.[15]

Based on Article 23a § 8 of the CCP, The Minister of Justice has been authorised to issue the executive provisions – the regulation(s), the detailed procedure of VOM, the conditions to be met by the institutions and persons authorised to conduct such proceedings, how the foregoing are appointed and dismissed, the scope and conditions of their access to the case files, and the form and scope of the report concerning the outcome of the mediation proceedings, with a view to the efficient conduct of the proceedings. As a consequence, the Ordinance Minister of Justice of 7 May 2015 on mediation proceedings in criminal matters was created.[16] The Regulations specify: 1) the detailed procedure for conducting the mediation; 2) the conditions to be met by the institutions and persons authorised to conduct

[15] See D. Bek, O. Sitarz, *Uwagi do rozporządzenia Ministra Sprawiedliwości z dnia 7 maja 2015 r. w sprawie postępowania mediacyjnego w sprawach karnych*, "Prokuratura i Prawo" 2016, no. 4, pp. 144–158.

[16] Polish Journal of Laws of 2015, item 716.

the mediation; 3) the manner of appointing and dismissing institutions and persons authorised to conduct mediation; 4) the scope and conditions of making the case file available to institutions and persons authorised to conduct mediation; 5) the form and scope of the report on the results of the mediation.

From a typological point of view, it is worth noting that the regulation shapes the formalised mediation procedure, as mentioned above, all in the form of direct mediation. At the same time in § 15 of the Ordinance, grounds for indirect mediation (as a subsidiary formula), have been explicitly established. Let us suppose it is not possible for the accused to meet the victim directly (with the victim referred to in § 14 point 3). In that case, the mediator may conduct the mediation indirectly, providing each of them with information, proposals, and a position regarding the conclusion of the settlement and its content taken by another participant.

In addition, Article 162 of the Polish Criminal Enforcement Code (PCEC) provides an essential basis for mediation at the post--jurisdictional stage. A regulation has been introduced in the context of the rules on an Order on conditional release. Article 162 of the PCEC impacts various interpretations, including those that allow for broad and somewhat autonomous use of mediation in enforcement proceedings (post-adjudicative mediation).

Thus, under Article 162 § 1 of the PCEC: The penitentiary court hears a representative of the prison administration and a probation officer if he has applied for a conditional release, **and takes into account the settlement reached as a result of mediation.** In the case of a person convicted of an offense referred to in Articles 197–203 of the Criminal Code, committed in connection with sexual preference disorders, the conditional release may not be granted without seeking the opinion of experts. § 2: the decision on conditional release may be appealed against. It shall be recognised within 14 days. The provision of Article 154 of the prosecutor's complaint regarding the granting of a break in serving a custodial sentence, § 1 shall apply *mutatis mutandis*, § 3: a decision refusing to grant conditional release may also be appealed against by the director of the prison or the probation officer if they have applied for conditional release.

The key to the aforementioned interpretation is the expression "settlement reached as a result of mediation". Despite an inevitable doctrinal dispute on that point, such an approach makes it possible to infer that the "settlement" may be concluded in the course of the mediation procedure so that it is not only a question of a prior "settlement" preceding the criminal court's ruling on criminal liability and its relevance to the enforcement procedure. However, as indicated, such an interpretation is rejected by some representatives of Polish legal thought, who consider that the enforcement procedure is based on the appropriately applied Article 23a of the CCP.

Indeed, Article 162 of the Criminal Enforcement Code is laconic. In my opinion, the space for the development of mediation and increasing the use of probation institutions in non-adversarial systems is the enforcement procedure. Then, the question of guilt and perpetration is already legally decided in the decision of the criminal court. Mediation, on the other hand, can improve enforcement proceedings and perform a rehabilitation function for both the victim and the offender.

In my previous work, *de lege ferenda*, therefore, has been postulated to establish a clear and consistent normative basis for the use of mediation in enforcement proceedings as an element of probation measures or even to a broader extent. It should be noted that the application VOM procedure in the pre-judicative phase of the criminal trial does not grant concrete and measurable benefits for the accused in case of adjudicating. The application of VOM may be relevant in the case of crimes prosecuted at the request of the victim, a positive result of mediation, especially the settlement-driven formula, can lead to the withdrawal of the request for prosecution by the victim. In principle, the results of the VOM are only one of the circumstances taken into account by the court in the context of the adjudicative process. Under Article 53 § 3 of the Criminal Code, the court shall consider the positive results of mediation when determining the sentence. The wording of Article 60 § 2 of the Criminal Code sounds more optimistic by stating that a positive result of mediation may even affect extraordinary mitigation of the sentence. According to Article 60(2)(1) and (2), extraordinary leniency may be applied when the injured party has reconciled

with the offender, the damage has been repaired or the parties have agreed to compensate for the damage, and when the offender has made efforts to compensate for the damage. Though it should be emphasised, these activities can also be taken outside of the VOM.[17]

In this research, VOM is seen as a formula of interaction between victim and offender and a specific formula of negotiation alongside the consensual proposals. Between the latter and the former, significant dependencies can be observed.[18]

It must be noted that the Polish criminal trial model presupposes the existence of several consensual procedures based on negotiations (e.g., accused-prosecutor negotiations – referred to as APN).[19] Firstly, these types of negotiations are conducted between the accused and the prosecutor (public prosecutor). The aggrieved party (victim) is allowed only to object to the outcome of such negotiations and, accordingly, is not allowed to actively participate (although the condition for reaching an agreement in the frame of consensual procedures [APN]) is to achieve the objectives of the criminal proceedings, among which the directive of including legally protected interests of the victim remains). Secondly, Polish criminal law defines the subject of the negotiations very narrowly. It is restricted to sanctions only – penalties, and other penal measures, as well as the costs of the trial.

Moreover, the legislator does not provide the defendant with a definite possibility of the preferential limitation of statutory sanction, which is supposed to be subject to negotiation. As a consequence, a juxtaposition of the sanction negotiated in comparison with the sanction that could be imposed after a "full trial" is difficult

[17] A different situation arises only in the case of criminal offenses prosecuted in a private complaint procedure, where the principle of legality of prosecution is not applied, and the proceedings are adversarial. Then in the case of settlement-driven VOM, the proceedings are discontinued.

[18] See R. Koper, *Postępowanie mediacyjne a skazanie oskarżonego bez rozprawy*, "Prokuratura i Prawo" 1999, no. 11–12, pp. 68–69; I. Pączek, *Postępowanie mediacyjne jako konsensualne zakończenie postępowania karnego*, "Ius Novum" 2016, no. 10, pp. 102–119.

[19] In fact when it comes to the theoretical approach to negotiations two different concepts must be presented, namely behavioural and based on game theory.

to estimate. It is therefore not clear that conviction without a trial or plea bargaining in Polish criminal law would lead to a conviction with preferential conditions for the accused.[20] Otherwise, as mentioned before, VOM may positively affect the judicial application of the law, as one such feature is the offender's attitude after the crime has been committed and during the course of the proceedings. However, such a kind of "bonus" for the perpetrator is also not easy to estimate, as the Polish system does not provide a specific formula for shaping sanctions, rewarding the restitution attitude presented by the perpetrator.

On the one hand, procedural (ASP) negotiations require that the accused does not question the findings of facts made by the authority, which materialises in the premise of the application of these institutions (the circumstances of the act and the guilt of the perpetrator do not raise doubts). On the other hand, the consequence of the trial negotiations is always conviction. Meanwhile, if a full procedure (non-consensual) is applied due to the distribution of *onus probandi,* the accused may be looking for a benefit as acquittal or discontinuance of the proceedings until the final conviction. Thus, it is clear that in Polish law in case of ASP negotiations (between the accused and the public prosecutor, only with passive participation – namely with the acceptance of the victim who is excluded from the active phase of negotiations) cannot concern the basis of liability, i.e., the charges connected with the act committed by the accused and its legal qualification. In fact, these negotiations (ASP) cover the issue of principal punishment and penal measures (those must be imposed within the scope of the statutory frames provided by the Criminal

[20] C. Kulesza, *Compliance of plea bargaining in the Polish criminal process with fair trial requirements from the point of view of its participants and the court*, [in:] *Criminal plea bargains in the English and the Polish administration of justice system in the context of the fair trial guarantees: collective work*, C. Kulesza (ed.), Białystok 2011, pp. 48 et seq. Available at: https://www.researchgate.net/publication/313639289_Criminal_plea_bargains_in_the_English_and_the_Polish_administration_of_justice_system_in_the_context_of_the_fair_trial_guarantees_collective_work (accessed on: 19.11.2022). Compare with: S. König, S. Harrendorf, *Negotiated Agreements and Open Communication in Criminal Trials: The Viewpoint of the Defense*, "German Law Journal" 2014, no. 1, *passim.*

Code, and the mere fact of negotiations does not authorise specific and preferential conditions for conviction).

Juxtaposing the VOM and the ASP as a conclusion, let us emphasise that the condition of VOM is the acceptance of criminal liability by the accused, recognition of guilt, and the outcome of the negotiations may affect the amount of punishment and other penal measures, especially compensatory measures. It would seem, therefore, that from a described perspective, VOM could strengthen procedural negotiations between the prosecutor and the suspect or accused (APN) in the analysed system. *De lege lata*, however, these institutions are not simultaneously applied. It seems that the reason for this state of affairs is the insufficient involvement of victims in the prosecutorial negotiations (APN). Furthermore, the non-adversarial form of the Polish system could be seen as a reason for the rough cohabitation of VOM and prosecutorial negotiation (APN).[21]

From the perspective of shaping mediation between the accused (offender) and the victim in the Polish criminal procedure, the two-stage procedure seems meaningful. Nevertheless, the pre-trial (preparatory) stage has – one may say – "full procedural value". Its purpose is to collect evidence in a procedural manner and, from the moment when the charges are presented to the suspect, the latter is fully covered by the right to the defense guarantees. The final step of the preparatory proceedings is the preparation of the indictment in a situation where sufficient evidence has been collected. In the preparatory stage the aggrieved is guaranteed *ex lege* status of a party to the trial. It would seem, therefore, that it is the preparatory stage that provides optimal conditions for implementing VOM.

[21] Compare with M.S. Umbreit, R.B. Coates, A.W. Roberts, *The impact of victim--offender mediation: A cross-national perspective*, "Conflict Resolution Quarterly" 2000, no. 17, pp. 215–229; M.S. Umbreit, R.B. Coates, B. Vos, *Victim-offender mediation: Three decades of practice and research*, "Conflict Resolution Quarterly" 2004, no. 22, pp. 279–303; J. Shapland, A. Atkinson, H. Atkinson, J. Dignan, L. Edwards, J. Hibbert, A. Sorsby, *Does restorative justice affect reconviction? The fourth report from the evaluation of three schemes*, "Ministry of Justice Research Series" 2008, no. 10. Available at https://restorativejustice.org.uk/sites/default/files/resources/files/Does%20restorative%20justice%20affect%20reconviction.pdf (accessed on: 19.11.2022).

Meanwhile, statistical data indicated at the outset allows us to draw an opposite conclusion. One could only speculate then, that the accused, in principle (except for the institution of conditional discontinuance of criminal proceedings[22]) may not necessarily be interested in participating in pre-trial VOM. Even because of the fact that the condition for participation in VOM is "culpability admission" by the defendant and since participation in VOM may "prejudge" the conviction (in this sense, it creates the basis for conviction, or eventually the conditional discontinuance of the proceedings).

The elements mentioned above of the Polish system allow the diagnosis that the practical marginalisation of VOM is caused by the so-called "systemic" limitations, mainly: the legalistically- and inquisitorially-oriented criminal prosecution, the lack of clear benefits for perpetrators who have decided to participate in VOM or more generally in procedural negotiations (also prosecutorial negotiation).

It should be stated once again that: The procedural framework for mediation in the pre-adjudicative (pre-trial and trial) stage of the criminal proceedings is satisfactory and allows for broader use. Consequently, the marginal practical significance of mediation is somewhat related to issues of "a systemic nature" connected with the given model of the criminal trial (non-adversarial model). At the same time, development trends for mediation can be referred to as the increasing importance of VOM against the background of probation measures in enforcement proceedings. In this respect, however, some legislative amendments are to be desired. The question remains: why do we need victim-offender mediation in criminal law? Are the arguments for this institution connected with the values (restoration toward victim and community and reintegration of perpetrator) or instead based on instrumental effect linked with the pure benefits for the defendant? It seems that VOM must be observed not only in the frame of legal context but also broader as a social institution.

[22] The institution of conditional discontinuation of criminal proceedings with its probative feature includes a specific ground for VOM – see Art. 341 of the Polish CCP.

This research is based on the distinction of two types of negotiations: prosecutorial negotiation with the defendant and victim-offender negotiation in the frame of VOM. In effect, my previous research[23] has indicated that VOM in penal systems, where the prosecutorial negotiations allow for a profound impact on the dimension of criminal responsibility, has more profound significance for the community and society. Consequently, its impact on VOM is relatively high (because there is an undeniable connection between the two formulas of negation). Unfortunately, the Polish criminal system is on the opposite side. While the benefits for the defendant in case of prosecutorial negotiation are not obvious, the axiological dimension of VOM must be enough, but it might not be enough. Based on my research, it can be stated that: For sure, it might not be enough when it comes to the numbers, but one could believe that when it comes to the quality of VOM performed in Poland, the axiological grounds are substantial. Simultaneously, when "the numbers" have failed regardless of the other aspects, an institution cannot be perceived as entirely effective.

As argued before, in the Polish legal system, the context of values is the most critical feature of VOM. In fact, one can be skeptical about whether such a context is sufficient. Critical reflection is also prompted by the knowledge of the Hungarian mediation model in criminal cases,[24] in which two variants of mediation are distinguished. One type is similar to the Polish model of VOM (although Hungarian researchers have described this model as ineffective). The other is limited to minor crimes, under which the participation of the accused in mediation leads to a specific reduction of the sanctions as one of the outcomes of VOM. The latter is characterised by much higher efficiency.[25] It turns out, therefore, that even in inquisitorial and mixed systems of criminal proceedings,

[23] B. Janusz-Pohl, *Theoretical and Praxeological Approaches to Mediation – Polish Perspective* (in print).

[24] See F. Santha, *Victim-offender mediation as a form of restorative justice in the Hungarian criminal justice system* (in print), and J. Jasco, F. Santha, *New opportunities and challenges of victim-offender mediation and reparation in Hungary – mediation in juvenile delinquency cases and in infraction law* (in print).

[25] *Ibidem*.

opportunistic solutions shall bring certain practical benefits. It is undeniable, therefore, that mediation in criminal cases cannot only be based on values but must award some benefits to its participants, including the accused.

Optimalisation theories

While core theory allows us to determine the institutional shape of VOM and its place in a given model of the criminal process, optimalisation theories can be used to give this institution the desired shape axiologically and praxeologically grounded. Metaphorically, we could say that the core theory sets "the skeleton" for the analysed legal institution, and optimalisation theories allow this "skeleton" to be dressed. However, the latter applies to two areas. The first is closely related to praxeology and could be combined with the research question: how can we make mediation work? Meanwhile, the second area is connected with a strictly axiological issue and indicates the values that are connected with the analysed institution. Accordingly, the second area can be combined with a research question: What are the axiological purposes of mediation, and what attitudes and behaviours of participants to this proceeding are desirable in this respect?

Briefly, The optimalisation theories serve in two dimensions: the axiological and the praxeological layering of the VOM procedure.

In my opinion, the optimisation function implementation is best served by several concepts. All of them assume that the basis for negotiations and mediation are specific communication actions of rational subjects (participants in the communication), also referred to as "speech acts". Depending on the type of concept, initial assumptions are made as to the rationality of the participants and characteristic elements on which the speech acts are based, such as the constitutive rules of speech acts (i.e., rules for recognising the validity of the given act), and rules of desirable patterns of behaviour in the communication process, including argumentation patterns.

One of the most renowned concepts that seem to have interpretative potential for VOM institutions is the communicative act

approach formulated by Jürgen Habermas.[26] According to the communicative act conception, conversation, in conditions of equal opportunities for argumentation, is a model of social interactions. Initially, Habermas distinguishes four types of social activities: teleological action, with strategic action as a subset; normatively regulated action; dramaturgical action,[27] and communicative action. The most vital for the VOM interpretation are rational-purposeful (teleological) and communicative actions (consensus oriented[28]). The first consists of setting the goal of action and selecting appropriate means, and the second focuses on the pure interaction of subjects utilising accepted and understandable signs and symbols. Distinguishing the two given types of social activities allows for the optimisation of the VOM. It seems that the mere awareness of the existence of these types may imply the significance of the teleological and subjective dimensions of the behaviour of the VOM participants. Undoubtedly, the desired interaction pattern within VOM is the communicative (consensual-oriented) type of action. In turn, the strategic model can serve as a negative pattern. Let us bring the essence of the other two variants closer.

In the case of strategic actions, communication is one of the means for achieving an objective that takes precedence over the other elements. It is a type of interaction in which the achievement of goals is based only on supplementing preferences or balancing the interests of both parties. The interlocking of egocentric calculations of benefits results in a "strategy" pattern of this type of

[26] J. Habermas, *The Theory of Communicative Action: The Critique of Functionalist Reason*, Polity Press, Cambridge 2007, *passim*; J. Habermas, *Teoria działania komunikacyjnego*, vol. I, Warsaw 1999, pp. 186–187; J. Habermas, *Pojęcie działania komunikacyjnego*, [in:] "Kultura i Społeczeństwo", vol. XXX, no. 3, 1986, *passim*.

[27] It is worth noting that Habermas also refers to the concept of dramaturgic action. Participants in this type of interaction make a presentation of themselves, while the other participants remain their audience. For the sake of simplicity, we can reject the analysis of the dramaturgical type of action as a non-fully interactive type.

[28] J. Habermas, *Pojęcie działania komunikacyjnego*, [in:] "Kultura i Społeczeństwo", vol. XXX, no. 3, 1986, *passim*.

interaction.[29] The subjects of such interaction are focused only on the results of their actions. The freedom of action of the participants depends only on the calculated success. The usefulness of these activities determines the orientation of the actions of individual participants. These instrumental activities create an anti-pattern of behavior for VOM participants. Awareness of these patterns is crucial to decoding the offender's behaviour. Due to the subject matter of mediation proceedings in criminal cases and the source of conflict related to the violation of the sanctioned norm, and the perpetrator potentially appears to be the entity that can characterise an instrumental attitude towards VOM. As indicated earlier, in Polish law, the benefits for the accused resulting from mediation are not specified in detail. However, there is no doubt that a positive result of mediation proceedings, especially those concluded with a settlement, may be the basis for sentence mitigation. Participation in mediation can be a strategy for the accused. However, then the axiological conditions of VOM are not met, and consequently, the whole idea of restorative justice is distorted.

Meanwhile, against the background of communicative acts (consensual actions), the main goal is to reach an agreement: "In communication activities, the participants of the interaction implement their action plans under the conditions of an agreement reached through communication.[30] The agreement functions as a mechanism for coordinating action in such a way that the participants in the interaction agree on the postulated validity of their statements, that is to say, they intersubjectively acknowledge the claims to validity which they mutually raise".[31]

Due to Habermas' vision, rational discourse is a social action, free from coercion and repression, based on equality and freedom of argumentation. Dialogue, ethics, and the consensus associated with them are intended to be a positive alternative to all kinds of domination. Clear, honest argumentative discourse is also an antidote to the increasingly visible split between theory and practice.

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[29] *Ibidem*, p. 25.
[30] *Ibidem*, p. 42.
[31] *Ibidem*, p. 32.

Habermas draws attention to the need to create an accurate argumentative approach in which the science of effective argumentation will be combined with the principles of equity, rationality, and due competencies.[32]

Under discourse theory, communicative rationality legitimises discourse aimed at reaching a consensus. Rational are all actions conducive to free interaction and open exchange of views. Hence, rational is any discourse that meets all formal requirements. The potential for the rationality of individual judgments stems from the participant's conviction of their truthfulness, rightness, and sincerity of intentions. Communicative acts of at least two participants are criticised, justified, and denied, and the dialogue, conducted without coercion, reveals to the interlocutors the subjectivity of their views. The consensus worked out together ultimately arouses in them the conviction of the existence of a single, common, objective world order. However, accepting an objective world order and setting a common goal in VOM seems challenging. Implementing Habermas' assumptions to the VOM broadens the prism of perception of the participants' actions beyond their legality and includes the axiological dimension of those actions. Sincerity and openness to dialogue as starting conditions are the initial requirements. While from a legal point of view, the condition for starting mediation is an admission of the guilt by the perpetrator, from an axiological point of view, something more is required. Namely, the precondition concerns the perpetrator's truthfulness, remorsefulness, and openness to a sincere dialogue with the victim. Habermas' concept corresponds to the dialogue-driven formulas of mediation, in which the emphasis is placed on the act of communication itself, not only on the result (agreement).

Consequently, the ideal communication situation designed by Habermas allows limiting revictimisation, and moreover it

[32] As Habermas argued a communicatively achieved agreement has a rational basis; it cannot be imposed by either party, whether instrumentally through intervention in the situation directly or strategically through influencing the decisions of opponents. It means that what comes to pass manifestly through outside influence, cannot count subjectively as agreement. *Ibidem*, p. 287.

corresponds with the assumptions of the Victim-Sensitive Mediation Concept with a central focus on the victim's recovery process. In addition, creating an agreement must be accompanied by a principle of sincerity on both sides. In addition, the rules of speech ethics must be observed, and the mediator could be perceived as a guardian of those rules. What is more, communication taking place at the level of discourse is characterised by the suspension of coercion, which aims to eliminate other motives of action, leaving only the desire to communicate.[33]

Considering the communicative act approach as the basis for interpreting the VOM, it should be underlined that the participants' statements in the communication must respect the three claims for validity.

The first concerns the truth of the sentences spoken, and it is a reference to the objective world. One can observe the direct reference to the principle of objective truth. In case of the VOM, the perpetrator's statements, the assumption is based on guilt admission and his/her open attitude for discussing the issues of his/her motives and the entire harm caused to the victim by the crime.

The second claim for validity should consider compliance with the applicable regulatory standards (fairness standard). The third claim for validity concerns the conformity of the intention of the subject of the communicative act (whether what has been spoken is in conformity with its author's intention), and it is to this claim that the category of sincerity refers. Habermas clearly indicates that an author must utter a true sentence (or make accurate assumptions about existence) and provide the listener with a sincere expression of thoughts, intentions, feelings, and wishes.[34] The third condition takes into account a specific axiological context and excludes the instrumental use of mediation to achieve particular goals. As we have indicated, in the context of this assumption, only such a dialogue in which the intention of the perpetrator and the victim is to conduct an honest discussion resulting in reconciliation can be considered as the implementation of the restorative justice postulates.

[33] *Ibidem*, p. 102.
[34] *Ibidem*, pp. 38–39.

As a result of the communicative activity, correct interpersonal relations are to be created, with consistent references to the world and with the genuine involvement of the participants. Undoubtedly, the communicative act's approach is a form of an ideal situation of communication.[35]

One could emphasise that, based on the study of speech acts in dialogue texts, the negotiator, the perpetrator, and the victim can be observed from the point of view of conversational strategy. Conversational strategy is understood as a coherent sequence of speech acts consciously directed by the sender and the recipient, by the employment of which interlocutors strive to achieve an acceptable communication goal. Although we cannot predict verbal behaviour or the actions that entail it, we can develop specific patterns of verbal actions and behaviours and from them predict the use of conversational strategies. The interactive model could be even supplemented by the psychological model of neuro-linguistic programming (NLP) which is applied to interpret communication.[36]

[35] A. Szahaj, *Krytyka, emancypacja, dialog: Jürgen Habermas w poszukiwaniu nowego paradygmatu teorii krytycznej*, Kolegium Otryckie, Poznań 1990, p. 100. Ideal situation of communication must meet the following conditions: „*żadnemu mówiącemu nie wolno stawać w sprzeczności z samym sobą, każdy mówiący, który używa predykatu F do przedmiotu a, musi być gotowy używać F także do każdego innego przedmiotu, który jest we wszystkich istotnych cechach równy a, osobom biorącym udział w argumentacji nie wolno używać tego samego wyrażenia w celu komunikowania różnych znaczeń*" ["any speaker must contradict himself, any speaker who uses the predicate F for object a must use F for any other object that is equal in all essential characteristics to a, and those involved in the argument must not use the same expression to communicate different meanings"] – A. Szahaj, *op. cit.*, p. 129. In Habermas' view, claims to the validity of the speech act mean: „*wiedzieć, że to, co zostało powiedziane, jest prawdziwe w odniesieniu do sytuacji, w której działanie komunikacyjne przebiega; znać normy, do których działanie to się odwołuje, oraz uznać je; mieć pewność, że deklarowane działanie nie jest strategiczne, ufać, że jest ono szczere*" ["know that what has been said regarding the communicative action is true; know the norms to which the action refers and acknowledge them; be sure that the declared action is not strategic, and trust that it is sincere"] – A. Szahaj, *op. cit.*, p. 129. Failure to agree to the above-mentioned assumptions invalidates the action.

[36] R. Bandler, J. Grinder, *The Structure of Magic I. A Book about Language and Therapy*, Palo Alto, Science and Behaviour Books, California 1975, *passim*; R. Dilts, J. DeLozier, *Encyclopaedia of Systemic NLP and NLP New Coding*,

NLP claims that there is a connection between neurological processes (neuro-), language (linguistic), and acquired behavioural patterns (programming), and that these can be changed to achieve specific goals in life, also in the process of communication. The title, coined by Bandler and Grinder, is understood to denote that a person is a whole mind-body system, with systematic, patterned connections between neurological processes ("neuro"), language ("linguistic") and learned behavioural strategies ("programming").[37] A comprehensive approach to this issue includes the relationship between language and thinking, and the psychological aspect of the communication process, the social dimension of interaction, and eliminating communication barriers. Furthermore, the aim of the research should also be to determine the relationship between the personality of the negotiator and other participants in negotiation, i.e., to determine the level of communicative competence. This theory could support the elaboration of the guidelines for mediators and be included as a basis for appropriate training. As practitioners claim, the practical aspects of VOM are in need of constant support.

Regardless of the application of Habermas' concept, John Searle's approach to speech acts – in particular the idea of the constitutive rule highlighted by this author (the rules of validity of a particular conventional act) – could be observed as a clue for the VOM interpretation. Let us put the spotlight on the basic assumptions.[38] Outlining Searle's approach, let us remember that it refers to the conception of performative utterances developed by John Langshaw Austin, specifically to locutionary, illocutionary and perlocutionary acts.[39] An illocutionary act is an intentional act performed by an

Capitola, Meta Publications, California 2000, *passim* – available at http://nlpuniversitypress.com (accessed on: 19.11.2022).

[37] *Ibidem*.

[38] Description based on my previous work: B. Janusz-Pohl, *Definitions and typologies of legal acts: Perspective of Conventionalisation and Formalisation*, Poznan 2017, pp. 23–24 and the literature referred therein.

[39] In Austin's approach, a given sentence is performative when its utterance is performing a specific act the result of which is a new state of affairs that cannot be achieved in any other way than by uttering this sentence. To consider a sentence to be performative, it is not necessary that it have a performative verb, indicating the act being performed by uttering this sentence, while its absence

individual uttering a performative sentence (locutionary act) the purpose of which is to create a new state of affairs, unattainable in any other way.[40] Legal actions are an example of illocutionary acts. In the general theory of law, legal actions are also denominated as formalised conventional acts (actions). It means that one could distinguish the set of specific rules attached to the given types of legal action.[41] These rules are divided by scholars into two groups constitutive rules and regulative rules (i.e., Searle) or rules of conventionalisation and rules of formalisation (i.e., Stanisław Czepita).

Formulating an independent conception of constitutive and regulative rules, Searle relied on performative utterances (i.e., illocutionary acts, distinguished by Austin).[42] Searle's conception provides for distinguishing such speech acts as acts of uttering (muscle movements), propositional acts, and illocutionary acts. Its crux is the distinction of the so-called elementary illocutionary act.[43]

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may be compensated for by unique gestures, intonation, or other circumstances accompanying the utterance of the sentence. Moreover, Let us mention only very briefly here that Austin believed that in ethnic languages there were such sentences the uttering of which served the purpose of performing special acts, while the latter brought about a change in the outside world; the change could not be effected in any other way than by illocutionary acts, which were made of these sentences. A sentence is performative when the speaker performs the act which is spoken about in this sentence or which the sentence indicates; the result of the act is a new state of affairs in the world. Importantly, this state of affairs cannot be achieved in any other way than by uttering this sentence. The fundamental characteristic of performative sentences is the fact that by their utterance, the speaker does not perform the act of describing the very act but performs the act itself. Austin attempted to draw a line between sentences that described or asserted something (hence, they were true or false) and performative sentences. Finally, however, he proved that such a line did not exist – J.L. Austin, *How to Do Things with Words*, Clarendon Press, Oxford 1962, pp. 311 et seq.

[40] See more B. Janusz-Pohl, *Definitions…*, *op. cit.*, p. 25.

[41] Zob. B. Janusz-Pohl, *Definitions…*, *op. cit.*, pp. 26 et seq.; B. Janusz-Pohl, *Formalizacja i konwencjonalizacja jako instrumenty analizy czynności karnoprocesowych w prawie polskim*, Poznań 2017, *passim*.

[42] J.L. Austin, *How to Do Things with Words*, Clarendon Press, Oxford 1962, *passim*; J.L. Austin, *Jak działać słowami*, [in:] J.L. Austin, *Mówienie i poznawanie*, Warsaw 1993, *passim.*

[43] J.R. Searle, *Speech Acts: An Essay in the Philosophy of Language*, London 1967, *passim*; J.R. Searle, *Czynności mowy. Rozważania z filozofii języka*, Warsaw 1987, *passim.*

Searle stressed that: "In our analysis of illocutionary acts, we must capture both the intentional and the conventional aspects, especially the relationship between them. In the performance of an illocutionary act in the literal utterance of a sentence, the speaker intends to produce a certain effect by means of getting the hearer to recognise his intention to produce that effect".[44] Furthermore, in any act, not only an intentional one, component acts can be distinguished. A component act of a given act is held to mean an act the performance of which is a necessary albeit insufficient condition of performing a given act. A component of a given act is renowned based on another theoretical conception as the material substrate of a conventional act. It is crucial to observe that in Searle's conception, illocutionary acts are interpreted by opposing constitutive rules for given speech acts to regulative rules. As the latter, Searle considered such rules regulate antecedently or independently existing forms of behaviour. In turn, constitutive rules not merely regulate but above all create or define new forms of behaviour (we could say conventional forms); they thus create new beings. Searle introduced a pattern of the constitutive rule (making clear that it was not a formal criterion for distinguishing between constitutive and regulative rules). The pattern ran as follows: X counts as Y in context C. He emphasised that constitutive rules were thus rules of conventionalisation. It is worth mentioning that Searle analysed regulative rules on the example of the rules of etiquette, finding that their observation did not undermine the existence of specific acts, but determined their form.[45] Without going into detail about all the

[44] *Ibidem*, p. 45. In Searle's opinion, two goals of an intentional act, as it were, can be distinguished. A direct goal and a final goal. The final goal is the one the person performing an illocutionary act aims at consciously and with intent. The direct goal is the one achieved at the moment of completing the performance of an intentional act appropriate or suitable for achieving the final goal. The achievement of the direct goal is a necessary, but not always sufficient, condition for achieving the final goal. The achievement of the final goal always means the achievement of the direct goal, however, the reverse is not always true. Thus, the direct goal is, as a rule, a means for achieving the final goal, but not guaranteeing its achievement. *Ibidem*, pp. 24 et seq.

[45] *Ibidem*, p. 36. It appears that disavowing the approach to regulative rules as second types of rules helped Searle discern a new approach to illocutionary

complexities of Searle's conception, let us take note, however, that it was drafted in only very general terms. Regardless, the latter has inspired many scholars. One of them was the Polish legal philosopher Stanisław Czepita, who developed the concept of constitutive rules and regulative rules by denominating them as constitutive rules (rules of conventionalisation) and rules of formalisation. Both types have been divided into two other groups: constructive rules and consequential rules. The constructive rules (rules of construction) indicate how to perform a conventional act validly (constitutive rules) and effectively (formalisation rules).[46] To simplify this concept, one shall say that, consequential rules of legal action indicate the legal consequences on the one hand of conventional rules and on the other hand formalisation rules. Through this approach, Czepita analysed the issue of the defectiveness of legal actions: starting with the sanction of "non-existent legal action" and nullity *ex tunc* (in case of breach of constitutive rules) through inadmissibility (in case of breach of some constitutive rules) to nullity *ex nunc* and to non-futility (in case of breach of formalisation rules). Besides, he observed that many formalisation rules remain only the rules of construction and are not linked with consequential rules, the so-called *lex imperfecta*. It means that any legal consequence is not connected with the breach of formalisation rules of this type.

Referring to Czepita's concept in a more detailed manner, it must be emphasised that he elaborated and organised three assumptions to be fulfilled for the constitutive rule. According to the first assumption: for any conventional act of a given individual, a necessary condition for this individual to perform a given conventional act is that a specific person or persons are made to behave in a specific

acts. It inspired scholars to search for such conventional act rules the breaking of which would not undermine the validity (existence) of a given act. In this sense, it appears that regulative rules inspired Czepita to distinguish the rules of formalization of conventional acts and devise a related mechanism of formalization See: B. Janusz-Pohl, *Definitions*…, *op. cit.*, pp. 25 et seq.

[46] Effectiveness has been understood in a specific way and was linked with the typical purpose (result) for the given legal action. So from this perspective effective legal action is valid action performed I accordance with formalization rules for the given type, and its effect is described by law.

way. If the behaviour is always behaviour by a human being, a conventional act may, admittedly, be ascribed to another entity than a human being, but must on each occasion have a material substrate in the form of the behaviour of some human being.[47] In Searle's conception, this element has been denominated as an elementary act. A conventional act, however, may take the form of a collective act. Then, the performance of it may be attributed to more than one person. When applying this approach to the VOM it must be noted that mediation is a sequence of various conventional legal actions of the VOM participants, but the settlement outcome is a collective action. What is more, material substrates of conventional acts may vary (different behaviours, i.e., declaration of will and declaration of knowledge shall be distinguished). Moreover, Czepita's concept is renowned as a connotative concept of constitutive rules, and consequently, Czepita introduced a criterion on the "name" of given action as a criterion referred to as "the constitutive rule."[48]

Additionally, Czepita observed that: "(…) for any conventional act, rules setting the consequences of performing this act may be given on each occasion. This postulate means that an act is conventional when and only when its performance affects the normative situation of the subject of the act or other subjects. In this sense, it actualises or makes concrete duties of one sort or another of one of them."[49] The last-mentioned condition is closely connected to the fact that conventional legal actions are interrelated and create

[47] Cf. S. Czepita, *O koncepcji czynności konwencjonalnych w prawie*, [in:] *Wykładnia konstytucji. Aktualne problemy i tendencje*, M. Smolak (ed.), Warsaw 2016, pp. 138–139; S. Czepita, *Reguły konstytutywne a zagadnienia prawoznawstwa*, "Studia i Rozprawy, Uniwersytet Szczeciński", vol. 223 (CCXCVII), Szczecin 1996, pp. 146 et seq.

[48] Czepita acknowledged that: "(…) for any conventional act, a term may be given in the language in question which is the name of this act and a different one from the name of the behaviour being the material substrate of the act. This observation is the heart of the connotative conception of constitutive rules. In spite of the fact that this work declares its acceptance, it shall not be stringently verified. Since the work is directed at the formal and conventional aspects of acts in proceedings, the focus will be on general questions concerning the definitions and typology of acts in criminal proceedings" – *Ibidem*, p. 146.

[49] *Ibidem*, p. 147.

sequences (temporally ordered linear systems) and aggregates (collective systems, complex in terms of subject matter and individuals involved). At the same time, their connections constitute a conventional situation or a context necessary to perform the following subsequent act.[50]

Applying the concept of conventional actions and the related concept of constitutive rules to the interpretation of VOM might seem that this concept is not of key importance. The latter is necessary for interpreting the legal actions in a criminal trial, creating sequences of actions and the whole process (this concept allows for an insightful description of the defectiveness of such activities). Meanwhile, mediation is not *per se* a part of the criminal process but an autonomous procedure dressed with a more flexible formula. Examining Polish regulations, it shall be highlighted that the constitutive rules for mediation are the rules for starting the mediation procedure, as the latter starts based on the decision of criminal justice bodies. Without such a decision, the defendant and victim are not authorised to perform the VOM procedure described in Article 23 of the CCP. As it was mentioned in such a case, they shall perform private mediation and, during the court proceedings, file the motion to the court for accepting the settlement concluded during private mediation. In this case, the final decision lay with the court. As the VOM procedure is very flexible, by taking the form of direct and indirect mediation, the correct observation is that in this procedure, the formalisation rules prevail, plus those formalisation rules, which are described as rules of construction without legal consequences in the event of their infringements.

An accessory nature of the VOM in juxtaposition with the criminal proceedings suggests that the concept of constitutive rules for its interpretation is not very useful. Despite this observation, one aspect of mediation has solid links with the concept of constitutive rules, i.e., rules of validity for a settlement achieved in VOM. The agreement concluded as a result of mediation is conclusive and could be perceived as the result of unanimous declarations of the will of the participants of VOM concerning the scope and method of

[50] See B. Janusz-Pohl, *Definition*s…, *op. cit.*, p. 27.

compensation applied in a given case. Based on the regulation of the Polish Civil Code on the validity and the effectiveness of civil actions (expressions of intent [will]) it is possible to indicate the constitutive rules for settlement in VOM. There is no doubt that such an agreement must be based on voluntary declarations of intent of the accused and the victim of the crime. Under the Polish Civil Code (CC)[51] Section IV, titled Defects of Declaration of Intent (i.e., will), one could discover the normative sources of constitutive rules. Consequently, Article 82 of the CC states that a declaration of intent (will) shall be invalid if it was made by a person who, for whatever reason, was in a state excluding conscious or free decision-making and expressing his intent. It shall in particular, concern a mental illness, mental retardation or other, even a temporary, mental disorder (Article 82).

In the case of indirect mediation Article 85 of the Civil Code could be invoked. Due to this regulation: A distortion of a declaration of intent by a person used to convey it shall have the same consequences as an error in making the declaration.[52] For the interpretation of an agreement concluded as part of mediation, Article 87 of the Civil Code may also be necessary. Under its provisions, a person who made a declaration of intent under the influence of an illegal threat made by the other party or a third party, may free himself from the legal consequences of his declaration of intent if it results from the circumstances that he might have feared that a serious personal or a property-related peril jeopardised him or another person. The indicated flaws in declarations of will allow the challenging of the agreement concluded as part of mediation;

[51] Official Consolidated Version Polish Journal of Laws of 2022, Item 1360. The Law of 23 April 1964 Civil Code.

[52] In respect to Art. 84 of the CC In the case of an error as to the content of a juridical act, one may free himself from the legal consequences of his declaration of intent. If, however, a declaration of intent was made to another person, freeing oneself from its legal consequences shall only be admissible when an error was provoked by that person, even without that person's fault, or where that person knew of the error or might have noticed the error with ease; the limitation shall not concern a gratuitous juridical act. One may only invoke an error that substantiates a conjecture that had the person making a declaration of intent not acted under the influence of an error and had he judged the matter reasonably, he would not have made the declaration of such a content (essential error).

consequently, they can be discussed as constitutive rules of the mediation agreement. Undoubtedly, the guarantees for the VOM participants of a conscious and free decision-making process and expressing the intent lie with the mediator, who must be qualified and fully aware of those legality features. In the case of VOM, creating conditions of freedom is particularly important since the participants in the VOM are not in an identical position. The victim's motivational situation at the moment of "initiation of mediation" is complex and requires monitoring by a mediator. It is, therefore, necessary to draw up detailed rules for the pre-VOM procedure. These rules should consist of an initial interview with the victim and a preparatory interview with the offender who has previously performed the act of confession. If mediation is initiated by *ex officio*, it is necessary to obtain a preliminary declaration for participation in mediation by the offender, and only then to start an initial interview with the victim of the crime. It is also essential to adequately fulfill the information obligation, both in the pre-VOM phase and in the course of mediation. The participants in the mediation must be aware of their rights and obligation, especially when concluding the settlement. The concept of constitutive rules may help interpret the defectiveness of such an agreement. The role of the mediator should be to create optimal conditions for the participants' freedom of expression and eliminate any coercive behaviour, in relation to both the victim and the offender.

Normative legitimisation theory – contrary-to-duty directives

In my research, the assumption has been adopted that criminal justice must be constructed based on the cohabitation of the retributivism and restorative justice ideas (in effect, a moderate approach has been taken).[53] Looking for an adequate conception for responding to the offence, a formula of cohabitation of restorativism and

[53] D.H.J. Hermann, *Restorative Justice and Retributive Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search*

retributivism is to be taken. Retributive justice and restorative justice are two processes for dealing with crime and each has distinctive features; however, it is argued that there is a firm basis for finding their complementarity since both have the same goal of justice for the offender, victim, and community. Restorative justice operating alone is inadequate because of the lack of participation by the state; nor is there sufficient regard for the harm to the social order caused by crime. The hypothesis in this research is adopted that restorative justice and the accountability required by retributive justice are not mutually exclusive as long as the punishment is humane and rehabilitative. While it may be argued that the punishment should precede the restorative justice process, it seems necessary for the sentencing authority to be able to take account of the results of the restorative justice process when determining culpability and the nature of the censure. The acceptance of responsibility, restitution and reparation, as well as an authentic asking for forgiveness, are relevant to the determination of an appropriate sentence or punishment. The VOM is undoubtedly an instrument closely linked to the idea of restorative justice, but depending on its shape and the variant adopted, it could be a pure manifestation of restorative justice or a compromise solution. In this respect, it is crucial to distinguish between two variants of victim-driven and offender-driven mediation. While the first is the exemplification of restorative justice, the second formula refers to the mixed approach.[54]

The analysis of mediation through the prism of the restorative and the retributive justice models can be combined with the theoretical concept of "contrary to duty". According to the classification of theoretical approaches for mediation proposed in my study, the application of this concept is also known as "the normative legitimisation of restorative justice instruments". Consequently, Chisholm's theory (the so-called "Chisholm's Paradox") opts for a concept of mediation in which the offender receives strictly defined benefits due to a remedial procedure combined with mediation. A contrary-to-duty

for Justice, "Seattle Journal for Social Sciences" 2017, vol. 11, Issue 1, pp. 71 et seq. Available at: https://digitalcommons.law.seattleu.edu/sjsj/vol16/iss1/11.

[54] *Ibidem.*

obligation tells us what ought to be in case something wrong (in the legal sense) has happened. For example: "If you have done something bad, you should make amends". Doing something bad is wrong, but if it is true that you have done something terrible, it ought to be the case that you make amends. Roderick Chisholm was one of the first philosophers to address (the) contrary-to-duty (obligation or imperative). Alternatively, we might say that a contrary-to-duty obligation is a conditional obligation where the condition (in the obligation) is forbidden or is fulfilled only if a primary obligation has been violated. In the first example, he/she should not be guilty; but if he/she is, he/she should confess. This concept has augmented the systemic solution connected with the normative structures. This concept creates the *ratio legis* for the restorative justice approach.[55]

I argue that contrary-to-duty obligations are essential in our moral and legal thinking. They turn up in discussions concerning guilt, blame, confession, redemption, restoration, reparation, repentance, compensation, apologies, damage control, and so forth. In this context, the interpretation of Ryszard Sarkowicz seems innovative. Sarkowicz states: "Why do some systems contain norms that somehow imply a violation of other norms of the given system? It seems that the most important aspect that the legislator has in mind when establishing such a legal norm is that it contributes significantly to the reduction or reparation of damage caused by the previous violation of some other norm of a given system. Such damages can be of various kinds: moral, psychological, and physical – harming the various interests of society or the individuals. (…) A characteristic feature of contrary-to-duty norms is the leniency of sanctions, compared to that which would have applied to the offender. The degree of leniency depends mainly on the seriousness of the basic norm violated and the offender's efforts to avoid or reduce the damage caused."[56]

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[55] See R.M. Chisholm, *Contrary-to-Duty Imperatives and Deontic Logic*, "Analysis" 1963, no. 24, pp. 33–36.

[56] A. Sarkowicz, "O tzw. normach poprawczych czyli rozważania na marginesie paradoksu Chisholma", [in:] *Prawo i Polityka. Księga pamiątkowa ku czci Prof. dr. K. Opałka*, A. Bodnar, J.J. Wiatr, J. Wróblewski (eds.), Warszawa 1988, pp. 113 et seq.

This rather general answer to the purpose for which the legislator introduces contrary-to-duty norms into the system is closely in line with the restorative justice approach in criminal law. When analysing the axiological and praxeological dimensions of mediation, the optimalisation theories concerning the shape of the VOM procedure are appropriate. The theory of normative legitimacy for mediation goes beyond this aspect (the mediation itself) and refers to the impact of mediation on the entire legal situation of the accused (during the criminal process and especially at the moment of adjudicating). Consequently, the contrary to duty concept justifies the existence of modifiers (premises of modification) in the legal system – improving the legal situation of the accused. In this sense, contrary-to-duty directives are essential from the point of view of shaping the sanctioning norm in criminal law. The latter indicates an adequate penal response to the violation of the sanctioning norm in the criminal system.

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Artificial Intelligence Causing Harms: Who Is Responsible?

Introduction: why AI is different when it comes to liability

Artificial intelligence (AI), once confined to the realm of science-fiction, is now steadily progressing towards becoming a reality of economic enterprise and attaining an ever-greater impact on daily activity. There is talk of a fourth industrial revolution,[1] in which AI, in conjunction with other novel or emergent technologies such as 3D printing, virtual reality, blockchain technology, and the Internet of Things (IoT) is likely to define the economic and scientific future of mankind. Whether this future will be utopian, dystopian, or somewhere in between, is likely to be determined by the regulatory context in which these new technologies will be deployed. Regulators around the world are attempting to proactively develop legal norms which will prevent the worst possible outcomes and still leave room for competitive economic development in the field of these new and emerging technologies, which mostly stem from private enterprise, sensitive to over-regulation.

[1] Min Xu, Jeanne M. David, Suk Hi Kim, *The Fourth Industrial Revolution: Opportunities and Challenges*, "International Journal of Financial Research" 2018, 9, no. 2, pp. 90–95.

In our study we will be focusing on the regulatory implications of one of the above-mentioned technologies, with perhaps the most unpredictable and wide-ranging impact: AI. The object of our analysis will be restricted to just a single facet of the regulation[2] of this technology (albeit with much wider implications), comprising the questions of civil liability for damage caused by AI and the mechanisms by which such liability shall operate, and also, quite significantly, the persons who shall be held accountable for damage caused by or at least attributable to AI.

The significance of the topic under examination does not stem solely from the transformative economic nature of AI, but, more importantly from the wide variety of areas in which it is set to be deployed, including medicine, control of industrial equipment and machinery including in potentially hazardous industries, finance, justice, communications and energy grids, the entertainment industry, intellectual property and various law-enforcement and military applications.[3] AI is set to become a ubiquitous, all-encompassing master-technology, which will link together many, if not all other defining technologies of the fourth industrial revolution. As such, AI ultimately carries the inherent risk (perhaps most poignantly explored by Juval Harari[4]) of posing an existential threat to humankind. We need not venture into dystopian speculation to see that even malfunctions of a more limited scope of this technology can lead to serious consequences, on a personal, regional, national, and even international level.

These consequences – the potential damage caused by AI entities – must be dealt with by legal norms, including those of civil law. It is here that the most complicated questions of AI regulation

[2] For a boarder view see Bart Custers, Eduard Fosch-Villaronga, *Humanizing Machines: Introduction and Overview*, [in:] *Law and Artificial Intelligence. Regulating AI and Applying AI in Legal Practice*, Bart Custers, Eduard Fosch-Villaronga (eds.), T.M.C. Asser Press, The Hague 2022, pp. 10–12.

[3] For a comprehensive list, see Emiliano Marchisio, *In Support of 'No-Fault' Civil Liability Rules for Artificial Intelligence*, "SN Social Sciences" 2021, 11 January 1, no. 2, pp. 5–7. DOI:10.1007/s43545-020-00043-z.

[4] See Yuval Noah Harari, *Homo Deus. A Brief History of Tomorrow*, Vintage, London 2017.

arise. However proactive any regulator would be (and some regulators, such as the European Commission seem to excel at proactive concern in this field), all the various ways in which AI may cause damage are as of yet impossible to predict. Therefore, proactive, restrictive regulation on its own is insufficient to compel the various private and state actors involved with AI development to responsible behaviour (some risks will always fall through the cracks in the regulatory edifice). The means of private law, including civil liability, must be utilised to induce voluntary compliance and punish damaging behaviours, even if they are unintentional, perhaps even if they are unpredictable. This is all the more significant, since AI is capable of both complexity and opacity,[5] factors that may foster so-called "black swan events",[6] characterised[7] by rarity, improbability, possibly catastrophic consequences, substantive *ex ante* unpredictability, and *ex post facto* appearance of predictability. All these characteristics (even if we were to exclude the catastrophic consequences) make both finding the party liable for the damage caused and identifying the form of civil liability most suited to redressing the harm done to the injured party especially difficult.

It is precisely these difficulties that will form the basis of our analysis, and *de lege ferenda* proposals for European Union and national regulators in the field of liability for damage caused by AI.

Relevant areas of civil liability for the regulation of AI

The need to award some form of compensation when damage has been caused to another is perhaps as old as humanity itself. Its normative formalisation, as (civil) liability has also been in existence

[5] Jason G. Allen, *Agency and Liability*, [in:] *Artificial Intelligence. Law and Regulation*, Charles Kerrigan (ed.), Edward Elgar Publishing, Cheltenham (UK)–Northampton (USA) 2022, pp. 148–150. DOI: 10.4337/9781800371729.

[6] See for example Andrew Bate, Yuan Luo, *Artificial Intelligence and Machine Learning for Safe Medicines*, "Drug Safety" 2022, 1 May, 45, no. 5, pp. 403–405. DOI: 10.1007/s40264-022-01177-0.

[7] For the notion of a "black swan event" see Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable*, Random House, New York 2017.

since time immemorial. This liability, as we know, may take the form of contractual or tortuous (non-contractual) liability, as the case may be. These forms of liability are distinguished, in both national and international law, by several characteristics. Chief among these is, of course that in the case of contractual liability, the party linked to the other party by a covenant suffers some disadvantage in relation to that covenant, whereas no such prior relationship exists between the parties in cases of tortuous liability.

Tortuous liability itself can be further differentiated, as the continental notion of delict (on which the continental concept of non-contractual liability is also based), as a basis of compensation strictly proportionate to the damage caused, does not fully coincide with that of tort, which carries a more pronounced punitive element, 'inherited' from the Roman legal tradition, whereby such strict proportionality is not always imposed (using liability as also punishment for illicit harm).[8]

Tort or delict as forms of liability are often differentiated from contractual liability also based on the requirement of fault: in the case of torts or delicts the rule is fault-based liability, while in the case of contracts simple non-performance leads to a presumption of fault (which in turn may or may not be rebuttable). This differentiation also has its flaws, as continental legal systems tend to accept the fault principle in some form or another even in the case of contractual liability, where a party may not be held accountable if it proves that the contract was breached with no fault of that party (unless an objective standard of care is introduced).[9]

Recent comparative law literature has identified three fields where liability for tort, or delict (non-contractual liability) and contractual liability may somewhat be differentiated: 1) the possibility to recover pure economic loss, which is most-always present in contractual liability (e.g., delivery of defective goods entitles the

[8] Bernhard Burtscher, Martin Spitzer, *Differences between Contractual and Tortious Liability and Their Reasons*, [in:] *Tortious and Contractual Liability: Chinese and European Perspectives*, Ernst Karner (ed.), Jan Sramek Verlag, Wien 2021, pp. 72–73. DOI: 10.52018/INKB-00275-B004.

[9] *Ibidem*, p. 75.

buyer to compensation) but may be absent in tort or delict-based liability (e.g., the owners of inns near the venue of concert cancelled due to an accident may not recover their lost business), 2) vicarious liability (liability of the master for the servant) is most-always present in contractual settings, while in the case of tortuous liability or liability for delict it may or may not be present, depending on the legal system (some legal systems of course, such as the French model recognises this form of liability), and 3) the burden of proof, which in case of contractual liability is usually shifted to the defendant, while in the case of tortuous liability, or liability for delict, remains with the plaintiff, unless exceptionally otherwise provided for, 4) the prescription periods (statute of limitations) may differ significantly.[10]

Evolution of non-contractual civil liability in the context of social and industrial development. Lessons for the regulation of AI

Liability for delict is of special interest in our perspective, as its evolution has been more spectacular, and carries with it an important analogy for the future regulation of liability for tort (delict) in relation to AI (whereas contractual liability has for a long time retained its strict nature, fault for non-fulfilment of a contract being mostly irrelevant[11] unless situations such as *force majeur* may be invoked for

[10] *Ibidem*, pp. 76–95; Silvia De Conca, *Bridging the Liability Gaps: Why AI Challenges the Existing Rules on Liability and How to Design Human-Empowering Solutions*, [in:] *Law and Artificial Intelligence: Regulating AI and Applying AI in Legal Practice*, Bart Custers, Eduard Fosch-Villaronga (eds.), T.M.C. Asser Press, The Hague 2022, pp. 245–246. DOI: 10.1007/978-94-6265-523-2_13.

[11] The specific problems raised by AI implementations in the contractual field are related to the situations in which non-performance or faulty performance are present, and the defendant aims to demonstrate that these occurred outside its control. See for example Orsolya Júlia Erős, *A Mesterséges Intelligencia (MI) a Kártérítési Felelősségi Rendszerben*, "Magyar Jog" 2022, no. 7–8, pp. 393–399. In such situations it is not the determination of the liable person, or proof of fault which constitute the main problems, but defence against contractual liability. As liability gaps directly affecting the injured party in a contractual setting are relatively rare, in our present study we shall concentrate on liability for delict

justifying it). Insofar as Western legal scholarship is able to reliably trace them, this form of liability has its roots in the Roman legal tradition, where initially the fault of the tortfeasor was irrelevant, so long as causation between its actions and the damage suffered could be demonstrated.[12] This solution is considered to have been adopted initially to grant efficient compensation thereby preventing violent conflict between the families of the victim and the tortfeasor.[13] This situation later changed, progressing beginning in the 14th century towards a model of fault-based liability (specifically in English – but not American – common law), as far as remaining historical sources attest, in which the circumstances of the parties' conduct was taken into consideration.[14] This new approach may be detected in the 17th and 18th centuries in continental European law as well, and later become the general rule of liability during the early 19th century continental codifications of civil law (being present in both the 1804 Napoleonic Code, and the 1811 Austrian Civil Code, the ABGB), and continued to influence the drafters of the German Civil Code (the BGB) which would enter into force in 1900.[15]

Fault-based liability and the principle of fault, while nominally remaining the norm in civil law jurisdictions, did not enjoy a long hegemony, relatively quickly being (re)joined by other models of liability.[16]

(non-contractual liability), especially since major and quite recent progress has been made at the EU level in regulating this domain.

[12] Frank J. Vandall, *A History of Civil Litigation. Political and Economic Perspectives*, Oxford University Press, Oxford 2011, pp. 2–3.

[13] Anthony Gray, *The Historical Development of the Fault Basis of Liability in the Law of Torts*, [in:] *The Impact of Law's History: What's Past Is Prologue*, Sarah McKibbin, Jeremy Patrick, Marcus K. Harmes (eds.), Springer International Publishing, Cham 2022, pp. 105–130. DOI: 10.1007/978-3-030-90068-7_7.

[14] *Ibidem*, pp. 105–130; Morris S. Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth-Century Law of Torts*, "University of Pennsylvania Law Review" 1979, 128, no. 2, pp. 361–362. DOI: 10.2307/3311656; Frank J. Vandall, *A History of Civil Litigation. Political and Economic Perspectives*, *op. cit.*, pp. 2–3.

[15] Janno Lahe, *Forms of Liability in the Law of Delict: Fault-Based Liability and Liability without Fault*, "Juridica International" 2005, no. X, pp. 61–62.

[16] *Ibidem*, pp. 62–63.

The reasons and directions for this development are of interest to our current topic of study, with regard to AI. During the Industrial Revolution of the 18th and 19th centuries (now considered only the first of four similar periods of economic development and upheaval) tort law had to be adapted to new economic and technological realities, which made the previous rules of non-contractual liability untenable. Specifically, a rethinking of liability regimes was prompted, as a recent study conducted regarding American law demonstrated,[17] by several economic and legal phenomena acting in synergy: 1. the increase in horrendous injuries and number of deaths caused by new technologies of the time, such as mechanised factories and even more so, the railroad (technologies that stimulated one another), 2. the emergence of corporations, which owned and operated these technologies, 3. the fact that injuries no longer occurred amongst closely related persons, but among strangers, 4. the (later) advent of insurance schemes, as well as 5. formal prerequisites for claiming damages (such as the development of legal practice in this field).

The liability regime was transformed as an effect of these factors, but the transformations observed in comparative law were not at all identical.

In the United States, case law governing personal injury claims switched from the strict liability model which was retained there until the 1820s to a fault-based model by the 1870s, a model which still influences the judicial practice of that jurisdiction and is more unfavourable to personal injury claims than the strict liability model, a development considered by parts of the literature as implemented in order to benefit the railroads and other industrial interests.[18] Strict liability was however again returned to in the United States, after the solution rendered in the *Escola v. Coca-Cola Bottling Co.* case (regarding an injury incurred by a waitress due to an exploding Coca-Cola bottle) in 1944, when it was established that so long as the

[17] Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, "Journal of Tort Law" 2018, 11, no. 1, pp. 88–93. DOI: 10.1515/jtl-2017-0029.

[18] *Ibidem*, pp. 93–101.

manufacturer is aware that its product will be used without further inspection, and still places an unusually defective (i.e., dangerous) product on the market, it should be held liable; later cases would be decided similarly.[19]

Conversely, in French law, the fault-based model of the Napoleonic Code, as applied up to the 1870s was unfavourable to personal injury claims that arose from industrial activity due to the burden of proof imposed on the plaintiff, who at times was unable to prove the fault of the owner or operator of the object that caused the harm. During the last three decades of the 19th century there began to mount case law that tended to offer redress for personal injury suffered in conditions where no fault could be demonstrated. However this was mostly based on forcing the existing liability regime onto situations it was not designed for.[20] Finally, in 1897, the French Court of Cassation essentially construed Article 1384(1) of the Napoleonic Code (intended as an introductory text mentioning liability for persons, animals, and things under one's control, but previously quasi-unanimously considered to have no normative force of its own) in a way that prohibited any defence against liability by the owner of a thing, on any grounds except for *force majeure* or similar circumstances (*cas fortuit*) which are unpredictable to and irresistible by the person to be held liable; later special legislation was also passed to this effect.[21]

In German (or more precisely Prussian) law, as early as the 1820s strict liability was implemented for damage caused by railroads during transport by train, in order to pressure railroad operators to respect good safety practices, a legislative direction followed by other German states, and finally by the *Reichshaftpflichtgesetz*, the Imperial Law on Liability for Damages (1871) in the case of personal injury (extended in 1943 to damage caused by gas and electricity installations, and to property damage); in the case of

[19] Frank J. Vandall, *A History of Civil Litigation. Political and Economic Perspectives*, *op. cit.*, pp. 27 et seq.

[20] See Bryan M.E. McMahon, *The Reactions of Tortious Liability to the Industrial Revolution: A Comparison I*, "Irish Jurist" 1968, 3, no. 1, pp. 22–23.

[21] *Ibidem*, pp. 23–24.

other dangerous industries, social insurance for work accidents was introduced which permitted indemnification without proof of any fault, while the Civil Code, which entered into force in 1900, still retained the general rule of fault-based liability.[22]

In English common law, apart from a few medieval vestiges of strict liability, fault-based liability remained the norm, including in the case of damage caused by emerging industries right up until 1932 when finally, a constant case law of the courts, by extending[23] the meaning of the "duty of reasonable care" (and of "negligence") started implementing judicial solutions reminiscent of the continental solutions of strict liability.

While major differences between the various regimes of strict liability do persist,[24] and pure strict liability is not universal (being attenuated by some requirement[25] of proven or presumed fault) today this form of liability is generally the preferred regime applied in comparative law to damage caused outside of a contract by hazardous activities, such as various forms of transport including air transport,[26] damage to the environment,[27] nuclear damage[28] and so on.

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[22] This regulatory direction, i.e., strict liability was implemented in the case of automobiles and aircraft as well (in the latter case strict liability was initially limited to only property damage due to airplane crashes, which was later extended to all forms of damage). Bryan M.E. McMahon, *The Reactions of Tortious Liability to the Industrial Revolution: A Comparison I*, *op. cit.*, pp. 27–32.

[23] Bryan M.E. McMahon, *The Reactions of Tortious Liability to the Industrial Revolution: A Comparison II*, "Irish Jurist" 1968, 3, no. 2, pp. 284–285.

[24] See Alexandru Daniel On, *Strict Liability and the Aims of Tort Law: A Doctrinal, Comparative, and Normative Study of Strict Liability Regimes*, Maastricht University, Maastricht 2020, p. 221, DOI: 10.26481/dis.20201201do.

[25] *Ibidem*, p. 161; Cees Van Dam, *297. Strict Liability*, [in:] *European Tort Law*, Cees van Dam (ed.), Oxford University Press, Oxford 2013, pp. 297–306. DOI: 10.1093/acprof:oso/9780199672264.003.0010.

[26] See Lawrence Vold, *Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside of the Established Landing Area*, "Hastings Law Journal" 1953, 5, no. 1, pp. 1–33.

[27] See for example Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, pp. 56–75.

[28] See for example the Vienna Convention on Civil Liability for Nuclear Damage, 21 May 1963, https://www.iaea.org/topics/nuclear-liability-conventions/vienna-convention-on-civil-liability-for-nuclear-damage.

We may consider this evolution to be attributable to several factors: 1) the challenges posed to the fault-based liability model by the complexity of new technologies, as well as the numerous persons and entities involved in their development, operation and marketing, which makes attribution of fault nigh-impossible, 2) the excessive burden of proof imposed on the plaintiff (injured party), in opposition to defendants with vastly superior knowledge of the technology, and resources for alleviating the damage caused, and 3) the social necessity of holding to account those who profit lavishly from new technologies for any damages caused in the course of their deployment (in application of the *ubi emolumentum, ibi et onus esse debet* rule, which requires that those who profit from a risky activity also compensate those who suffered the activity's risks), as a practical way of imposing respect for the precautionary principle, a norm codified – at least in what concerns protection of the environment – in EU primary law[29] since the adoption of the Treaty of Maastricht.

In the above we have shown that most major legal systems, when faced with complex, potentially damaging technologies, and as the case may be, their dangerous products, have quasi-unanimously adopted some form of strict liability, as the basis for reimbursing damage caused by such technologies. We should therefore consider it likely that such a solution should be contemplated when regulation of liability for damage caused by AI is proposed by the legislator. This contemplation must however take into account also other factors that challenge this historic regime of accountability.

The challenge posed by ai to the strict liability regime

AI presents challenges which are on the one hand quite similar to historical precedent (a complex, potentially dangerous technology, developed and deployed by numerous individuals and entities,

[29] See Herman Cousy, *The Precautionary Principle: A Status Questionis*, "The Geneva Papers on Risk and Insurance. Issues and Practice" 1996, 21, no. 79, p. 159.

which makes establishing fault, and the person at fault, quite difficult), while on the other hand fundamentally different (AI may not just pose individual risks, but also collective, even existential risk to mankind itself, and may cause damage even if functioning correctly, according to all parameters which depend on its human "minders," as it quite literally may have a mind of its own, learning and evolving in as yet unpredictable ways[30]). It is precisely these second set of characteristics that must lead us to conclude that perhaps a new regime should be considered for AI liability.

Such fundamental differences justly and immediately raise another set of dilemmas as well. Strict liability, implicitly or explicitly, expresses the legislator's desire to prevent moral hazard by deterring[31] those who profit from complex and unpredictable, possibly dangerous technologies from engaging in risky behaviour and encouraging them to follow the precautionary principle when developing and implementing these technologies. However, excessive imposed caution may wither innovation or may result in avoidance tactics. In the case of liability for damage caused by AI, the future implications of current AI activity are not entirely predictable or specifically well understood, placing any long-term damage that is caused in a category of liability similar to that resulting from the long-term effects of chemicals presently not known to be hazardous, but which turn out to be so in the future. Such situations in other industries have been known to make the proof of causation difficult due to the temporal offset between cause and effect and have also led to corporate optimisation by way of dividing company activity into dispensable subsidiaries (divestiture) which are specifically meant to be unable to pay damages for large-scale damage.[32]

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[30] Silvia De Conca, *Bridging the Liability Gaps: Why AI Challenges the Existing Rules on Liability and How to Design Human-Empowering Solutions*, *op. cit.*, pp. 243–244; Jason G. Allen, *Agency and Liability*, *op. cit.*, pp. 146–147; Emiliano Marchisio, *In Support of "No-Fault" Civil Liability Rules for Artificial Intelligence*, *op. cit.*, pp. 7–10.

[31] Emiliano Marchisio, *In Support of "No-Fault" Civil Liability Rules for Artificial Intelligence*, *op. cit.*, p. 2.

[32] See Al H. Ringleb, Steven N. Wiggins, *Liability and Large-Scale, Long-Term Hazards*, "Journal of Political Economy" 1990, 98, no. 3, pp. 574–595.

Turning to what actually is the current state of regulation for cases of AI damage, as opposed what it ought to be, to we may observe that similar issues as those shown above are already having a major impact. "Liability gaps"[33] are presently occurring and are disrupting (at best may disrupt) the possibility of injured parties in having the damages suffered alleviated.

Some specific scenarios identified by De Conca, as being most prone to result in liability gaps is worth considering here:[34]

1. In cases of discrimination during the establishment for creditworthiness, for example, causality between the AI's discriminatory assessment and the denial of the loan may be weakened by the presence of third-party software developers, which developed, or programmed (taught) the AI on behalf of the bank or provided its training dataset, the root of the discrimination. The nature of liability may also be disputable (e.g., the developer's liability towards the credit applicant would be non-contractual, which is less favourable to the plaintiff due to the excessive burden of proof). The nature of the damage, which in turn again effects proof, may also differ (pure economic loss and moral damage may be present concomitantly).
2. In the case of self-driving cars, the question of the liable party for an accident caused while the vehicle is in self-driving mode arises. In such cases the "driver" is not in control of the vehicle, and therefore the basis of liability must be sought in the *ubi emolumentum, ibi et onus esse debet* principle, and it should be placed on the shoulders of the owner of the car (a solution currently known to some jurisdictions, along with compulsory insurance). Due to the inherent complexity and opacity of AI technologies, it may however be argued that the cause of the accident my derive from the myriad of integrated technologies (both inside the vehicle and constituted

[33] Silvia De Conca, *Bridging the Liability Gaps: Why AI Challenges the Existing Rules on Liability and How to Design Human-Empowering Solutions*, *op. cit.*, p. 240.

[34] *Ibidem*, pp. 245 et seq.

by the – IoT – communications infrastructure) that make the self-driving car possible, opening the proverbial 'can of worms' specific to the field of AI liability, which has already been discussed. Defects and errors may therefore play a role even in case of traditionally strict liability of the owner, deflecting liability towards the manufacturer, or the operator of essential infrastructures.

3. IoT devices integrated into the so-called "smart home" present liability problems of their own, especially when marketed to consumers, as they challenge the standard – product liability based – consumer protection regime which places liability on the shoulders of producers, and marketers (sellers, resellers). Use of AI is problematic to both the notion of product, and that of defect, a problem compounded by the fact that the existence of the defect must be demonstrated by the consumer, along with causality for damage. The opaque workings AI software, and even worse, its ability to learn and adapt may render it incompatible with the traditional notion of product.

In the case of strict liability regimes (either included in general civil law norms, or in special rules governing product liability, or certain inherently dangerous activities) as applied to AI, other specific problems may also emerge. Firstly, these regimes are exceptional, due to the partial reversal of the burden of proof, therefore, only certain AI implementations would be covered (at least as things today stand), such as autonomous vehicles, or AI-derived products; while secondly, the wide range of activities in which AI is deployed would make it apparently less likely that a general strict liability regime for non-contractual damage caused by AI can be implemented.[35] This reasoning led to the risk-based approach according to which certain AI activities would be covered if they present a high degree of risk, the so called *ad hoc* regimes solution proposed by some[36] in the literature. Of course, the inherently unpredictable effects of AI may result in some risky applications falling through the cracks,

[35] *Ibidem*, pp. 248–249.
[36] *Ibidem*, p. 255.

still this approach is the one endorsed by the European Commission at this time (as we shall also discuss below).[37]

Finally, we must also keep in mind, that by applying *ad hoc* solutions for liability, a pronounced risk of fragmentation of the AI liability regime[38] arises, whenever deployment-specific solutions for liability are sought, and different bases or rules for liability are established. While it is also true that general principles may emerge from such disparate regulation,[39] it is also true, that general principles should be kept in view.

A possible list of principles for AI liability

When the future regulation of AI liability is contemplated, historical precedent, as we have seen above, would point to the imposition some form of strict liability. As we have seen, strict liability was historically reinvigorated during the 19th and early 20th century to answer problems quite similar to those posed by AI implementations: the difficulty of establishing the particular person, design, or device at fault for the prejudicious result. Thus, the historical precedent goes to the heart of the main issue in the field of liability for damage caused by AI, which is the opacity of its operation, also called the "black box problem."[40]

However strict liability regimes themselves are quite varied, including forms of pure no-fault liability (usually based on the *ubi emolumentum, ibi et onus esse debet* principle), forms of presumed fault liability with various degrees of refutability regarding the presumption, liability rules combined with compulsory insurance regimes, where usually presumed fault leads to damages paid by a third party,[41] and going as far as proposing that AI be considered a legal person in its own right, apt of being liable for its own

[37] *Ibidem*, p. 249.
[38] Jason G. Allen, *Agency and Liability*, *op. cit.*, p. 147.
[39] *Ibidem*, p. 147. The author cites Lawrence Lessig for this reasoning.
[40] See e.g., Jason G. Allen, *Agency and Liability*, *op. cit.*, pp. 148–151.
[41] Jason G. Allen, *Agency and Liability*, *op. cit.*, p. 255.

actions with its own assets (if any). All these regimes are in one way or another able to treat the various liability scenarios outlined in the previous subchapter, however they do not treat these issues equally well.

Some authors propose as the basic principle of liability for damage caused by AI considering AI itself as an "artefact", i.e., nothing but a glorified machine, an object, resulting from an essentially human intention towards attaining a given purpose; this results in a renewed focus on the human factor as the driving force behind AI development and deployment, and helps combat any tendencies towards endowing AI with legal personality, with the – perhaps unintended – effect of shifting liability away from human actors.[42]

The notion of the artefact nature of AI implementations, in this optic, is complemented by its 'agentivity', i.e., the appearance of autonomous action by the AI entity, when it performs actions which may result in potentially damaging factual results (a situation easily assimilated to damage caused by animals) or in the conclusions of juridical acts (such as autonomous contracting) which carries with it approximating AI liability to that of human agents.[43]

These notions in turn must be complemented by that of "attribution", which refers to the mechanism used to determine the entity liable for the agentive actions of an AI artefact; it is this third notion which is key, and its content lies squarely with the legislator, as it presupposes legislative choices on treating causation (and its proof), and opting between relief for the victim, and punishment, or deterrence of the person held liable as the cardinal points of the liability regime.[44]

It is clear, that when analysing the attribution of liability, in light of agentivity of AI systems as they stand, and especially in the light of the analysis conducted by the European Expert Group when preparing the directive concerning AI liability (which focuses on presumed-fault liability), that AI should not be considered as acting for a human principal, thereby vicarious liability should be excluded,

[42] *Ibidem*, pp. 151–152.
[43] *Ibidem*, pp. 152–155.
[44] *Ibidem*, p. 155.

if for no other reason, then for the very fact that AI systems are not considered as persons acting on behalf of another, but machines employed by a human.[45]

In the literature, a particular set of principles for the regulation of AI liability was formulated, based on the one hand on the more or less opaque way in which AI operates, and on the other on the degree of necessary supervision (autonomy), with one author proposing: 1. standard fault-based liability regimes for AI that is less autonomous and less opaque, 2. fault-based liability with a more attenuated test (i.e., use of presumptions) for intent and causation for AI systems that are more autonomous and less opaque, 3. fault-based liability, under which intent and causation are established according to the use of the AI entity when that system is less autonomous, but more opaque, and 4. strict liability (as the case may be accompanied by mandatory insurance, or a compulsory compensation fund) for more autonomous and more opaque systems.[46] The European Commission seems to have followed a somewhat similar framework when proposing the non-contractual liability regime for AI implementations with, however, a distinction based on the high and low perceived risk of the AI involved, to comply with the system in the proposal for an Artificial Intelligence Act, as we shall show below, with the relevant critique of that system.

A similar, albeit quite clearly strictly risk-based system of classifying AI technologies from a liability regime standpoint was proposed, considering the inherent characteristics of such AI implementations, beyond their opacity and autonomy.[47] Under this approach, three degrees of liability should be considered: fault-based liability, strict liability and liability based on operational risk (applicable to the person, with a duty of care in the meaning of minimising risk to avoid prejudicious outcomes).[48] For determining which form of liability should be applied, the authors considered several AI capabilities:

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[45] *Ibidem*, p. 156.

[46] *Ibidem*, p. 157.

[47] See A. Alekseev, O. Erakhtina, K. Kondratyeva, T. Nikitin, *Classification of Artificial Intelligence Technologies to Determine the Civil Liability*, "Journal of Physics: Conference Series" 2021, 1794, pp. 1–4. DOI: 10.1088/1742-6596/1794/1/012001.

[48] *Ibidem*, p. 3.

the AI's degree of autonomy (unsupervised operation), the AI's ability to self-learn (unsupervised machine learning), the general or task-specific character of AI and the possibility for logging data generated during AI operation.[49]

It was proposed, that: 1. highly autonomous AI implementations and AI capable of unsupervised machine learning should be subjected to a strict liability regime regardless, whether the AI implementation is for a general or a specific application, and all AI implementations without operational data logging should be subjected to the strict liability regime as well; 2. less autonomous AI applications, AI applications that are unable to self-learn (i.e., learn without human intervention or supervision) and AI applied to very specific fields as well as AI able to record operational data should be subjected to a fault-based liability regime, whereas 3. general AI, regardless of its degree of autonomy, ability to self-learn (which in this case is absolutely implied) and regardless of the availability of operational data recording (which may actually be impossible) should be subjected to risk-based liability regulation.[50]

As we have seen, strict and fault-based liability (made more efficient, as the case may be, by presumptions favourable to the injured party) may result in the manufacturer or operator of AI systems being held financially accountable for the damage caused. Some authors, seeing this as an impediment to the development of AI technology, have for this reason proposed doing away with any forms of liability that may affect producers and programmers of AI, so as not to stifle innovation in the field, for example by creating a legal personhood for AI entities (to which the literature is mostly unfavourable).[51] The very proposal shows the economic (as opposed to legal) tension at the heart of regulating AI liability, namely striking a balance between avoiding overly strict regulations while at the same time offering redress to injured parties.

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[49] *Ibidem*, p. 2.

[50] *Ibidem*, p. 3.

[51] For an analysis of this debate see Emiliano Marchisio, *In Support of 'No-Fault' Civil Liability Rules for Artificial Intelligence*, pp. 10–12.

Further attenuating the liability of AI developers and operators, even in cases when deterrence would be the stated aim of the regulation, it has been proposed that any strict liability should only operate when a duty of care has been neglected, therefore when lack of conformity to some pre-determined standard may be ascertained (a solution which partly percolated into EU norms), excluding implicitly situations of damaging actions by the AI due to occasional and unpredictable errors not due to design flaws.[52] Finally, again with the goal of avoiding the stifling of innovation, non-liability solutions have also been proposed for the management of potential damaging effects by AI, which would step away from the "blame culture"[53] inherent to civil liability and instead perform a shift towards "no-fault" compensation schemes, such as in the case of medical products and vaccines, whereby the state or society as a whole assumes the risk of deploying cutting-edge technologies.[54]

Contemplation of the above-outlined possibilities for solving AI liability, taking into account also the historic precedent for the organic evolution of liability rules applicable to new and potentially dangerous technologies, we may state that there are two sets of legislative choices to be made when liability for damage caused by AI is concerned. The first such choice is whether to maintain the current paradigm of civil liability which, partly in order to deter illegal or reckless behaviour imposes either fault-based or strict liability for damage caused, or to transition to a new model for compensating the victims of AI technologies, either based on some form of insurance or a state or industry-run compensation scheme. Opting for civil liability (even fault-based liability) would have the advantage of placing the onus of any risks inherent to deploying AI technology on the industries and individuals who stand to profit most from it. The risk is that this may restrict the appetite for innovation, an argument which large industrialists have been making whenever liability regulation was concerned. Opting for some scheme other than liability, such as compulsory insurance or a compensation fund,

[52] *Ibidem*, pp. 11–12.
[53] *Ibidem*, p. 13.
[54] *Ibidem*, pp. 13–15.

carries the advantage that it actively encourages experimentation with novel AI solutions. The disadvantage here is the moral hazard[55] posed by socialising the risks of AI while privatising the rewards, a solution obviously preferred by industry, but which may prove unpopular; the pharmaceutical industry, to which compensation schemes have historically been applied, provided empirical proof[56] of the inefficiency of such systems which seem to encourage misconduct. Of course, hybrid liability systems may also be conceived, as some of the proposals shown above have stated, but these offer the added disadvantage of requiring the legislator to determine *ad hoc* liability regimes, which in practice may sow confusion or encourage mistrust of liability by individuals. We should also not lose sight of the fact that AI differs fundamentally from other technologies, so that historical precedent for the development of liability regimes may not prove as good a predictor as one would think. After all, along with AI's great promise, no technology deployed for profit ever posed as great a risk to mankind as AI does.

It is in this context that regulators must develop norms for the liability regime applicable to AI, sailing between the Scylla of deterrence and the avoidance of moral hazards, and the Charybdis of the stifling of innovation, unwittingly preventing entrepreneurs from harvesting the productivity gains AI stands to offer. This attempt at reconciling seemingly incompatible goals made its mark on legislative proposals in the AI field. Of these proposals we shall analyse those of the European Commission in some detail, in the following.

The proposed european union AI liability regime

The European Commission, recognising the increasing significance of AI regulation has since 2018,[57] been actively involved in the development of AI legislation. These efforts were manifested, in

[55] *Ibidem*, p. 17.

[56] Marc A. Rodwin, *Compensating Pharmaceutical Injuries in the Absence of Fault*, "Food and Drug Law Journal" 2014, 69, no. 3, pp. 447–472.

[57] Andrea Bertolini, Francesca Episcopo, *The Expert Group's Report on Liability for Artificial Intelligence and Other Emerging Digital Technologies: A Critical*

part in the establishment of a panel of experts (the so-called "Expert Group" – abbreviated as EG) to review the potential modifications of EU law necessary in order to adapt to the future development of AI. The EG delivered its report in 2019.[58] This was accompanied by a comparative law study[59] regarding civil liability for AI implementations.

In its report the EG concluded, that as concerns AI liability, and without any prejudice to the regime set forth for product liability, a two-pronged approach should be employed by: 1) maintaining currently extant liability rules for AI systems that do not pose a particularly high risk of harm (a fault-based regime, where liability can be invoked in case of a breach of the duty of care), without liability for autonomous systems being more lenient than that for humans; 2) introducing the strict liability of the person operating the AI entity (this liability would rest with the person who had the greatest control over the AI's actions, such as the driver of the automated vehicle), and potentially even creating a compulsory insurance regime (or a compensation fund) when AI technology poses an increased risk of harm.[60] These approaches should, according to the EG be complemented by possibly attenuating the evidentiary duties of the victim of harm done by AI, especially in cases where the AI entity is evaluated to pose a high degree of risk, and (or) is particularly opaque in its operation.[61]

Assessment, "European Journal of Risk Regulation" 2021, 12, no. 3, p. 644. DOI: 10.1017/err.2021.30.

[58] European Commission and Directorate-General for Justice and Consumers, *Liability for Artificial Intelligence and Other Emerging Digital Technologies*, Publications Office, 2019. DOI: 10.2838/573689.

[59] European Commission et al., *Comparative Law Study on Civil Liability for Artificial Intelligence*, Publications Office of the European Union, 2021. DOI: 10.2838/77360.

[60] Andrea Bertolini, Francesca Episcopo, *The Expert Group's Report on Liability for Artificial Intelligence and Other Emerging Digital Technologies: A Critical Assessment*, *op. cit.*, p. 645; Horst Eidenüller, Gerhard Wagner, *Liability for Artificial Intelligence: A Proposal of the European Parliament*, [in:] *Law by Algorithm*, Mohr Siebeck, Tübingen 2021, pp. 139–142. DOI: 10.1628/978-3-16-157509-9.

[61] European Commission and Directorate-General for Justice and Consumers, *Liability for Artificial Intelligence and Other Emerging Digital Technologies*, pp. 28 et seq. Andrea Bertolini, Francesca Episcopo, *The Expert Group's Report*

The proposed differentiation between high and low-risk AI applications has come under fire in the literature because on the one hand the severity of the harm needed to qualify AI implementations as high-risk as opposed to low-risk is not sufficiently clear in order to determine which fields of AI use should be included in these categories, and on the other because it alludes to the pecuniary gravity of the harm caused, potentially rendering technologies which initially cause just a relatively small amount of damage being considered low--risk, thereby jeopardising the predictability of the liability regime applied to a certain damaging event, which would vary according to the damage incurred.[62] Moreover, determining the risk posed by any given AI technology is difficult due to the novelty of the technology itself, which may turn out to have unknown but severe risks, even if the factors for determining the risks (exemplified by the EG according to whether the technology is deployed in public spaces, can move autonomously, and conditioned to the availability of other compensations regimes) would indicate otherwise.[63]

The EG report and proposals were also criticised for attempting to attenuate the difficulties in holding the producers, designers and operators of the AI entities by simply relying on evidentiary rules, and logging of activities of the AI to relieve any difficulty in proving causation and fault by the victim of AI-caused damage.[64]

The contents of the EG report came to be included in the Report on The Safety and Liability Implications of Artificial Intelligence, the Internet of Things and Robotics[65] communicated by the European Commission to the European Parliament and other EU institutions relevant in the preparation of legislation. The proposals by the EG

on Liability for Artificial Intelligence and Other Emerging Digital Technologies: A Critical Assessment, *op. cit.*, pp. 645, 652.

[62] Andrea Bertolini, Francesca Episcopo, *The Expert Group's Report on Liability for Artificial Intelligence and Other Emerging Digital Technologies: A Critical Assessment*, *op. cit.*, p. 649.

[63] *Ibidem*, pp. 650–651.

[64] *Ibidem*, pp. 652–654.

[65] European Commission, "Report on The Safety and Liability Implications of Artificial Intelligence, the Internet of Things and Robotics", 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0064.

later came to be embodied in the proposed AI Liability Directive.[66] Considering the magnitude of the legislative effort which resulted in the proposed AI Liability Directive, and its sister instrument, the proposed Artificial Intelligence Act,[67] one can state that, at least as far as liability is concerned, the Latin proverb *arturient montes, nascetur ridiculus mus*[68] comes to mind.

The liability model in the proposed AI liability directive

the problem of AI liability was explored from a legislative standpoint during the development of the proposed Artificial Intelligence Act (AIA) with the interactions between AI liability and product liability being specifically considered; it has been found that EU product liability rules as they stand are unable to fully ensure that all damage caused by AI is properly treated, especially since AI may not be considered a product due to its eminently incorporeal nature, thus the modification of product liability rules, and rules regarding operation of machinery being necessary.[69] The development of an AI Liability Directive is in part meant to alleviate this problem, until

[66] European Commission, "Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive) COM(2022) 496 Final" (2022), https://ec.europa.eu/info/sites/default/files/1_1_197605_prop_dir_ai_en.pdf.

[67] European Commission, Directorate-General for Communications Networks, Content and Technology, "Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (COM/2021/206 Final)" (2021), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52021PC0206.

[68] "Mountains will be in labour, they will give birth to a ridiculous mouse".

[69] See Gabriele Mazzini, Scalzo Salvatore, *The Proposal for the Artificial Intelligence Act: Considerations around Some Key Concepts*, Università Ca' Foscari Di Venezia – Dipartimento Di Economia – Collana Centro Studi Giuridici – Wolters Kluwer – CEDAM (forthcoming) (2022), pp. 27–28. DOI: 10.2139/ssrn.4098809; Laura Delponte, *European Artificial Intelligence (AI) Leadership, the Path for an Integrated Vision* (European Parliament – Policy Department for Economic, Scientific and Quality of Life Policies – Directorate-General for

the product liability regime is updated, under a "holistic" legislative approach (as stated in the Explanatory Memorandum of the proposed AI Liability Directive).

The proposed AI Liability Directive (see Article 2) is strongly linked to the proposed AIA, as it borrows several of the most significant definitions from that other norm, such as those for "AI system"[70] by reference to Article 3(1) of the AIA, "high-risk AI system",[71] by referring to Article 6 of the AIA, "provider"[72] as defined in Article 3(2) of the AIA and "user"[73] according to Article 3(4) of the AIA. In order to avoid any risk of redundancy, we shall not analyse these definitions in detail here, however we will endeavour to state that some of the critiques levelled against the AI Liability Directive (as shown below) implicitly effect the contents of such definitions.

The need for a proposed AI Liability Directive is founded on the reasoning (also as expressed in its Explanatory Memorandum),

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Internal Policies, 2018), 20, https://ec.europa.eu/jrc/communities/sites/default/files/ipol_stu2018626074_en.pdf.

[70] "'artificial intelligence system' (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with".

[71] "1. Irrespective of whether an AI system is placed on the market or put into service independently from the products referred to in points (a) and (b), that AI system shall be considered high-risk where both of the following conditions are fulfilled: (a) the AI system is intended to be used as a safety component of a product, or is itself a product, covered by the Union harmonisation legislation listed in Annex II; (b) the product whose safety component is the AI system, or the AI system itself as a product, is required to undergo a third-party conformity assessment with a view to the placing on the market or putting into service of that product pursuant to the Union harmonisation legislation listed in Annex II. 2. In addition to the high-risk AI systems referred to in paragraph 1, AI systems referred to in Annex III shall also be considered high-risk."

[72] "'provider" means a natural or legal person, public authority, agency or other body that develops an AI system or that has an AI system developed with a view to placing it on the market or putting it into service under its own name or trademark, whether for payment or free of charge".

[73] "'user' means any natural or legal person, public authority, agency or other body using an AI system under its authority, except where the AI system is used in the course of a personal non-professional activity".

according to which the domestic legislations of EU Member States offer divergent solutions, when liability for damage caused by AI is concerned, and therefore there is a need for harmonising national rules in this field. In fact, the proposed AI Liability Directive does much more than simply create minimum rules, instead interfering with national substantive and procedural regimes when it comes to liability and the burden of proof.

Moreover, as stated in the Explanatory Memorandum (based on the EG report), the European legislator faced the choice between several options for the liability model to be implemented: 1. maintaining the fault-based liability model (the general rule of civil liability) and attenuating it, with presumptions to ease the burden of proof imposed on the injured party (a burden made all the heavier due to the information asymmetry between the manufacturer or operator of an AI entity and the injured party), 2. maintaining the fault-based model, implementing attenuated evidentiary requirements but also introducing a strict liability model on an *ad hoc* basis for especially dangerous AI applications, which would be complemented by mandatory insurance, or 3. separating the implementation of the fault-based model with attenuated evidentiary rules and that of the strict liability and compulsory insurance model, reserving the second set of measures as a type of back-up, should the fault-based liability model not live up to expectations.

The third option was preferred after an impact assessment of the various models was conducted. The core of the reasoning for this policy choice was encouraging AI development by implementing a single model for liability, which also permits insurers to more easily offer coverage. While the purely economic basis for this policy choice may have some merit, the explanatory note seems to be fixated on the opportunities of AI while apparently ignoring its major risks. In light of historic precedent, which after a period of maintaining the *status quo* (constituted by fault-based liability) favours strict liability models whenever attribution of fault is made difficult by emerging technologies, we shall endeavour to assume that during the future evaluation of the first choice of the European legislator, strict liability will be implemented (a predictable U-turn which would have been obviated by a correct first choice).

The main, operative parts of the AI Liability Directive are found in Articles 3 (Disclosure of evidence and rebuttable presumption of non-compliance) and 4 (Rebuttable presumption of a causal link in the case of fault). It is these components of the proposed directive which we shall analyse in the following.

DISCLOSURE OF EVIDENCE AND PRESUMPTION OF NON-COMPLIANCE

The evidence disclosure rule in Article 3 of the AI Liability Directive implements a legislative solution by which the information asymmetry between the plaintiff (claimant) and the defendant – a "provider" or persons assimilated to it by Articles 24 or 28(1) of the AIA – or between the possible claimant and possible defendant regarding the potentially damaging workings of an AI system can be overcome.

According to the proposed rule national courts must be permitted specifically to order a "provider" (or persons assimilated to it by the AIA) or a "user" to disclose relevant evidence found at its disposal regarding a given high-risk AI system which can be suspected to have caused damage. According to the provisions of Article 3(1) of the proposed AI Liability Directive, it seems that such disclosure may be ordered only in situations when the "claimant" or a "potential claimant"[74] had previously requested the information directly from the provider or entity assimilated with it and was denied an answer. The language[75] of Article 3(1) of the proposed

[74] According to Article 2(6) of the AI Liability Directive "'claimant' means a person bringing a claim for damages that: (a) has been injured by an output of an AI system or by the failure of such a system to produce an output where such an output should have been produced; (b) has succeeded to or has been subrogated to the right of an injured person by virtue of law or contract; or (c) is acting on behalf of one or more injured persons, in accordance with Union or national law" while according to Article 2(7) a "'potential claimant' means a natural or legal person who is considering but has not yet brought a claim for damages".

[75] "Member States shall ensure that national courts are empowered, either upon the request of *a potential claimant who has previously asked a provider, a person* subject to the obligations of a provider pursuant to [Article 24 or Article 28(1)

AI Liability Directive is unclear as to whether the previous request for information is incumbent upon only potential claimants, or any claimant (the two situations being treated separately) and Recital (17) does little to alleviate this lack of clarity as it only seems to refer to potential claimants. In a possible alternative reading, Article 3(1) of the proposed AI Liability Directive could be understood as referring only to potential claimants, claimants (in the proper sense) being entitled to request a court order for disclosure directly in the litigious procedure (hence without the prior attempt at voluntary disclosure) according to Article 3(2) after undertaking other, non-specified proportionate attempts at obtaining the evidence otherwise. This alternative reading seems to be supported by the second phrase of Article 3(1) which only imposes the obligation of providing sufficient factual grounds and evidence for the plausibility of the claim on the "potential claimant". At the same time, it seems to be opposed by the plural in the Article 3(2) "one of the persons" clause. We clearly do not consider this alternative reading as being the intention of the EU legislator, however the text requires clarification.

We also observe here that "forced" disclosure may be ordered by the court only following a previous request for voluntary disclosure which had been "denied". The notion of denial would merit closer attention, as it implies explicit refusal, whereas the addressee of the disclosure request may simply choose to ignore it.

Furthermore, and more importantly, the proposed rule negatively effects those national procedural regimes, where courts are permitted to order administration of evidence, hence also disclosure of evidence *ex officio*, as it requires an explicit request for a court order towards disclosure by the claimant during the trial (any talk of "potential claimant" in this phase is erroneous). This solution degrades such national procedural regimes, by imposing a requirement for administering evidence that exceptionally also restricts

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of the AI Act] *or a user to disclose relevant evidence* at its disposal about a specific high-risk AI system that is suspected of having caused damage, but was refused, *or a claimant*, to order the disclosure of such evidence from those persons." Emphasis added by the author.

the courts' freedom in finding the facts of the case, thereby creating a form of evidentiary transplant clearly inspired from civil procedure under common law,[76] and which is incompatible with some continental systems as they stand.[77] The same conclusion stands regarding the rule in Article 3(2) which imposes that prior to seeking disclosure, the plaintiff should make reasonable and proportionate attempts at collecting relevant evidence from the defendant. It is also valid for Article 3(3) which regulates requests for the preservation of evidence in the same manner.

The language of Article 3 of the proposed directive seems to endorse two different procedures for disclosure: "pre-trial" disclosure (hence the "potential claimant" clauses) and "in-trial" disclosure. This intention of the EU legislator is insufficiently clear and should also be clarified.

Here we must also mention that the procedure imposing a prior request of evidence by the (potential) claimant fails to address the issue of such requests constituting advance warnings to the potential defendants, who may opt to hinder the gathering of evidence, by hiding, otherwise obfuscating, or even destroying evidence. While ordering the preservation of evidence without notice would be a solution, Article 3(3) of the AI Liability Directive clearly excludes this possibility by referencing paragraph (1). Also, the proposed directive is somewhat lacking in attributing any legal consequences

[76] See Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, "The American Journal of Comparative Law" 1997, Symposium: Civil Procedure Reform in Comparative Context, 45, no. 4, pp. 841–844, https://doi.org/10.2307/841021. The author identifies the different approaches to fact finding in the case in continental and common law, and differentiates them according to the degree of control over evidence exercised by the court of its own motion. In light of this analysis the common law inspiration for the AI Liability Directive's rules on evidence gathering could not be clearer.

[77] For the Romanian solution which combines the obligation of the parties to adduce evidence with the absolute freedom of the court to order administration of evidence at any moment of its own motion during the judicial elucidation phase of the trial, see Ioan Leș, *Reglementarea Probelor În Noul Cod de Procedură Civilă*, "Revista Română de Drept Privat" 2011, no. 1, pp. 82–111; Claudia Roșu, Adrian Fanu-Moca, *Administrarea Probelor În Noul Cod de Procedură Civilă*, "Dreptul" 2012, no. 11, pp. 77–87.

to the infringement of the obligation extant under Article 12 of the AIA to design AI systems which are able to document their activities.

According to Article 3(4) of the proposed AI Liability Directive national courts when ordering disclosure of evidence must limit this action based on proportionality with the claim (a requirement imposed for preservation of evidence as well). In fact, potential trade secrets may be protected during the disclosure procedure even *ex officio*, i.e., by the court's own motion. Procedural remedies against an order for disclosure must also be provided for in favour of defendants.

According to Article 3(5) of the proposed AI Liability Directive, should a defendant fail to comply with the order of the court for the preservation or disclosure of evidence at its disposal, such defendant shall be presumed not to have complied with the relevant duty of care regarding its main obligations[78] set forth by the proposed AIA pursuant to Article 4(2) and (3) of the proposed AI Liability Directive, and concerning liability for delict (non-contractual liability) or its circumstances being claimed as based on such evidence. This presumption is however rebuttable.

A REBUTTABLE PRESUMPTION OF CAUSALITY

Article 4(1) of the proposed AI Liability Directive imposes three concomitant conditions for the application of a presumption of causality between the fault of the defendant (which must separately be demonstrated or presumed) and the damage produced by an AI implementation. Firstly, the defendant, or any person for the behaviour of which it must be liable as it would be for itself, has to be demonstrated or successfully presumed as not having complied with a duty of care laid down by EU or national legislation to protect against the damage that has occurred. Secondly, that the non-compliance can be considered as the reasonable cause, taking into

[78] These obligations are the ones set forth in the AIA at Article 10(2) to (4), Article 13, Article 14, Article 15, Article 16 point (a) or (g), Article 21, Article 29 or in Title III Chapter 2.

account the circumstances of the case, for the damaging action or inaction the AI entity undertook. Thirdly, the claimant must prove that the action or inaction of the AI entity was the direct cause of the damage.

This already complex system for presuming causality is made even more complicated by the subsequent paragraphs, which differentiate between high-risk and non-high-risk AI implementations, according to the dichotomy set forth in the AIA as well as between providers and users, and users of AI for personal (non-professional), and professional purposes, resulting in a veritable Rube Goldberg machine of a regulation, which is at first (and even at second) glance nigh-unintelligible.

In the following we shall analyse the workings of this excessively complex system of presumptions and requirements of proof, while already formulating two specific criticisms. First, the EU legislator failed to achieve a practicable system of liability for damage caused by AI. Secondly, the provisions of Article 4(2) et seq. of the AI Liability directive seem to follow an inverted logic, by which high-risk AI implementations seem exempted from some rigours of the general rule.

Before we proceed any further, we should observe that there are in effect several situations that must be either demonstrated or presumed pursuant to Article 4(1) of the proposed AI Liability Regulation, as summarised in the table below.

Table. Situations that must be either demonstrated or presumed pursuant to Article 4(1) of the proposed AI Liability Regulation

No.	Circumstance which must be demonstrated for the presumption of causality to operate	May the circumstance also be presumed?	Comments and references
1	Damage occurred to the claimant	No	Article 1(2)
2	The damage took place in a non-contractual setting	No	Article 1(2)
3	A duty of care is explicitly provided for in a national or an eu instrument (such as the aia)	No	Article 4(1) (a)

4	This duty of care is explicitly ("directly") provided for preventing the damage alleged to have occurred in the case	No	Article 4(1) (a)
5.1	This duty of care is incumbent on the defendant	No	Article 3(5)
	or		
5.2	This duty of care is incumbent on another person, for the behaviour of which the defendant is responsible	No	Article 3(5)
6	Non-compliance with this duty of care is present (or presumed)	Yes	Article 3(5), Article 4(1) (a)
7.1	The non-compliant party was the defendant (or can be presumed to be the defendant)	Yes	Article 3(5), Article 4(1) (a)
	or		
7.2	The non-compliant party was a person for whose behaviour the defendant is responsible	No	Article 3(5) only refers to the "defendant"
8.1	An erroneous output by an ai entity occurred	No	Article 4(1) (b) and (c)
	or		
8.2	The ai did not provide an output at all	No	Article 4(1) (b) and (c)
9	A reasonable likelihood exists, based on the circumstances of the case, that the non-compliance influenced (i.E., not necessarily directly and/or solely caused) the damaging output or lack of output as the case may be	No (?)[79]	Article 4(1) (b)
10	The erroneous output or lack of output resulted in the damage occurring	No	Article 4(1) (c) – the text excludes applying a presumption here

Source: own development.

As we may note, only two aspects of the evidentiary chain leading to liability may be certainly presumed: non-compliance with the

[79] In such cases, the court may apply a presumption of likelihood based on a logical operation using evidence already administered, with no other evidence by the claimant expressly required.

duty of care, and that the non-compliant party was the defendant, as the text of Article 4(1) must be read in conjunction with Article 3(5) which only refers to the defendant. The court may possibly, based on other evidence adduced also presume the "reasonable likelihood" that the non-compliance led to the erroneous output, or lack of output by the AI implementation. It also must be noted that the causality between the erroneous lack of output and the prejudicious result must, under provisions of Article 4(1) (c), be demonstrated by the claimant. The language of the norm laid down in this manner seems to exclude use of presumptions in this case, further limiting the court under any national procedural regimes which would otherwise allow presumption for proving causation between the erroneous output (lack of output) and the damage which occurred.

We should also note that the presumption of causality under Article 4(1) of the proposed AI Liability Directive is watered down by Article 4(2) et seq. which further differentiate between providers of high-risk AI implementations, and persons assimilated with them, and others. Also, the presumption is at all times rebuttable according to Article 4(7).

HIGH-RISK AI EMPLOYED FOR PROFESSIONAL PURPOSES

The proposed AI Liability Directive differentiates the regime for presumptions applied to producers (persons assimilated to producers) and users of high-risk AI from that applicable to users of non-high-risk AI systems, and those employing such systems for non-professional use.

The presumption of causality in case of high-risk AI systems cannot be held by the court, "where the defendant demonstrates that sufficient evidence and expertise is reasonably accessible for the claimant to prove the causal link" (as stated in Article 4(4) of the proposed AI Liability Directive). Therefore, the rule seems geared eminently towards consumer-to-professional type actions.

Providers of high-risk AI and persons assimilated with them

Should damages be claimed against a provider of high-risk AI or a person assimilated to such a provider which is subject to the rules of chapters 2 and 3 in Title III of the AIA, in order for the presumption of causality to operate, Article 4(2) imposes that the "complainant" (an objectionable notion, as it is not defined by the AI Liability Act but is used alternatively with "claimant" in Recital (27)) demonstrate that the defendant did not comply with certain provision of the AIA, while also considering the steps taken to manage the risks of the AI implementation, and the result of this risk management. Non-compliance with the duty of care must according to Article 4(2) therefore be demonstrated, or presumed under Article 3(5), when the provider, or an entity assimilated with such provider finds itself in one of the following situations:

1) the AI system's models were trained and validated with datasets which did not meet the quality criteria contained in Article 10(2) to (4) of the AIA;
2) the AI system was not designed and developed while observing the operational transparency criteria (i.e., non-opacity) laid down in Article 13 of the AIA;
3) the oversight of the AI system's operation by natural persons is hindered by its design in breach of Article 14 of the AIA;
4) the AI system's design did not achieve a sufficient level of accuracy, robustness, and cybersecurity when considering its purpose, in breach of Articles 15 and 16 (a) of the AIA;
5) the defendant did not take immediate corrective action to restore conformity of the AI system's operation with provisions of chapter 2 Title III of the AIA, or to withdraw or recall the system pursuant to Article 16 (g) or Article 21 of the AIA.

Users of high-risk AI

Users of high-risk AI systems are subject to a different regime when it comes to the presumption of causality implemented in Article 4(1) of the AI Liability Directive, when compared to providers and entities associated with them.

A user may only be subjected to the presumption of causality when the claimant proves that:

1) the user did not employ or monitor the AI system according to its instructions of use, or failed to suspend or to halt its use, in breach of Article 29 of the AIA;
2) an input of data not relevant to the intended purpose of the AI was undertaken by the user, using data that the user controls in breach of Article 29(3) of the AIA.

NON-HIGH-RISK AI EMPLOYED FOR PROFESSIONAL PURPOSES

In case of non-high-risk AI systems, the presumption of causation is limited by Article 4(5) of the proposed AI Liability Directive to situations when "the national court considers it excessively difficult for the claimant to prove the causal link". This rule seems consistent with the consumer-to-professional concept utilised by the proposed AI Liability Directive

AI OF ANY RISK CLASS EMPLOYED FOR NON-PROFESSIONAL PURPOSES

Should AI of any risk class be employed by the defendant in a non-professional manner ("in the course of a personal, non-professional activity"), the presumption of causality may only be used "where the defendant materially interfered with the conditions of the operation of the AI system or if the defendant was required and able to determine the conditions of operation of the AI system and failed to do so" pursuant to Article 4(6) of the proposed AI Liability Directive. This solution by the EU legislator seems to ignore

the major – and potentially unknown – risks of AI systems, which even when used without seeking profit may cause disproportionate amounts of damage.

THE CONSUMER-ORIENTED PRESUMPTION OF CAUSALITY IN THE AI LIABILITY DIRECTIVE

As we have seen, the proposed AI Liability Directive applies a differentiated and rather complex solution for operating the presumption of causality between the fault of the defendant and the erroneous output of the AI system. The proposal concentrates on situations when a producer (or an entity assimilated with it), or the user of a high-risk AI system disregards the precautions imposed by the AIA, whereas it makes the presumption more lenient for defendants employing non-high-risk AI, or for persons using AI systems for non-professional purposes.

Regulatory proposals

Firstly, as a general impression of the proposed AI Liability Directive, one can state, that it seems to be "behind the curve". Historical precedent for the regulation of complex systems, where attribution of fault for harm may be difficult or impossible would point to a strict liability regime, as we have shown above. The framers of the proposed directive instead opted to conserve the fault-based liability baseline, even knowing that employment of AI tools may not only result in damage impossible to attribute to fault, but also in existential risks, both these factors warranting a shift towards strict liability.

Regarding the dichotomy of low-risk and high-risk AI liability regimes we believe that the solution adopted by the EG which made its way into the proposed directive should be amended and other criteria for the selection of the appropriate liability scheme should be considered, along with (or alternatively to) the presupposed level

of risk posed by the AI entity, as proposed in the literature such as:[80] 1) the avoidance of possible overlaps between the various liability regimes, 2) easing access to redress for injured parties which are disincentivised from seeking redress, 3) discouraging the manufacturers, designers and operators of AI entities from evading the pecuniary consequences of damaging outcomes, and externalising them, 4) the "social desirability" of the AI implementation, its "characteristics", and results of its wide-scale deployment, 5) the desiderate of offering the right kind of incentives to all parties involved.[81] In effect, we consider the critique levelled against the conclusions of the EG report and the AIA by Bertolini and Episcopo, some elements of which we have already cited above, to be relevant also to the proposed AI Liability Directive (with the notable exception of granting legal personality to AI entities, which, in line with the proposed AIA text, we deem as futile).

The risk-based model also shows another form of inefficiency in the fact that currently, the proposed AI Liability Directive's language, in accordance with the proposed AIA fails to differentiate between the liability regimes applicable to general AI as opposed to narrower applications, a problem the literature has already recognised as we have shown above, but which was also raised by the United States as it aims to pressure the European Union legislator to adapt AI liability rules according to its economic interests.[82] The proposed solution for this problem, of adopting an implementing regulation that would differentiate according to general purpose and non-general-purpose AI, also seems inefficient. AI poses unknown dangers, regardless of its scope.

We also consider that the proposed text of the directive, just as with the EG report, is overly reliant on evidentiary rules and the recording (logging) of AI's activity for alleviating the difficulties in

[80] Andrea Bertolini, Francesca Episcopo, *The Expert Group's Report on Liability for Artificial Intelligence and Other Emerging Digital Technologies: A Critical Assessment*, *op. cit.*, p. 651.

[81] *Ibidem*.

[82] Luca Bertuzzi, *The US Unofficial Position on Upcoming EU Artificial Intelligence Rules*, "Euractiv", 24 October 2022, https://www.euractiv.com/section/digital/news/the-us-unofficial-position-on-upcoming-eu-artificial-intelligence-rules/.

proving causation and fault, and employs vague language referencing "reasonable" expectations, and "disproportionate" difficulties or costs for recording AI activities, both of which may compromise the efficiency of the proposed liability regime, even in the context in which other factors for reversing the burden proof are present.[83]

Another critique[84] we consider relevant to the proposed AI Liability Directive is that there is some friction between it and the Product Liability Directive as it stands, as product liability is optimised to hold the manufacturer liable, while the AI Liability Directive, if adopted, would leave the door open to placing the onus of liability on other subjects as well (providers, operators and users according to the Explanatory Memorandum). This problem needs to be addressed to avoid the moral hazard posed by uncertainties as to whether the manufacturer can be held liable for processes it is best placed to control.

Furthermore, as we have found above, the language of Article 3(1) to (3) of the AI Liability Directive is unclear, therefore, some clarifications should be included. In fact, we would find it appropriate that national courts be permitted to order disclosure of evidence by the defendant *ex officio*, and without any prior requests which would give the defendant advance warning of an impending claim and extra time to cover its tracks by obfuscating, removing or destroying data and other evidence.

We consider that the rebuttable presumption of non-compliance with a duty of care, which flows from the non-compliance with a court order to preserve or disclose evidence according to Article 3(5) of the proposed AI Liability Act is inefficient, as it allows the defendant to cherry-pick evidence favourable to it, first refusing to comply with the court order (perhaps even hiding, or otherwise illegally disposing of some evidence) then presenting only evidence favourable to it when seeking to overturn the presumption levied

[83] Andrea Bertolini, Francesca Episcopo, *The Expert Group's Report on Liability for Artificial Intelligence and Other Emerging Digital Technologies: A Critical Assessment*, *op. cit.*, p. 653.

[84] Horst Eidenüller, Gerhard Wagner, *Liability for Artificial Intelligence: A Proposal of the European Parliament*, *op. cit.*, p. 138.

against it. Therefore, we propose amending the text by the possibility to render the presumption of non-compliance with a relevant duty of care non-rebuttable should it emerge that the defendant hid, otherwise obfuscated, or destroyed relevant evidence, regardless whether such actions were the result of demonstrable intent or of any degree of negligence.

The coherency of the language of the proposed AI Liability Directive should also be improved, by supressing the single instance of the notion "complainant" and clarifying the situations in which a rule refers to a "claimant" or a "potential claimant". Both these problems have been addressed above.

This modus of regulation in the proposed AI Liability Directive seems out of line both with the unpredictable risk levels of some AI systems, as referred to in the literature we have cited above, and also with the precautionary principle. As with the liability regime itself, any presumption which nudges liability from the fault-based model towards the strict liability model should follow the principle of avoiding moral hazards based on the risks to be avoided. The proposed AIA and AI Liability Directive combination instead seems to create moral hazards by allowing more lenient regimes not just based on the inherently unpredictable risk level of the AI, but also based on the position of the defendant. The basic purpose of facilitating consumer-to-professional actions is laudable, however it in our view results in an overly complicated set of solutions, out of line with the risks that must be addressed.

Conclusions

In the above, we have attempted to analyse the possible regime for liability in case of damage caused by AI, and specifically the proposed regime for liability in cases of AI damage in the European Union. We must conclude that AI poses many of the same dilemmas that liability regimes had to face before, and which they had successfully faced after the advent of the "original" Industrial Revolution. Still, AI poses challenges that are fundamentally different, and orders of magnitude greater than those of the past, partly

because of the novel nature of the technology, its unpredictability, and its opacity, and partly because of the ubiquity of implementations in which it may be deployed, which may lead to it posing not just individual but also worldwide, as of yet unpredictable, possibly existential risks.

We have shown that after some initial uncertainty, the default legislative choice for dealing with the risks posed by new technologies that challenge fault-based liability in civil law is usually a form of strict liability, combined as the case may be, with compulsory insurance. As we have also seen, the European Commission, primarily due to economic concerns opted not to follow this direction in the proposed AI Liability Directive, instead choosing a fault-based liability regime, attenuated by some presumptions that lighten the burden of proof on the plaintiff (claimant), especially if the AI technology is considered to be high-risk.

By this option the European Commission consciously chooses to ignore the precautionary principle, and also to degrade those national rules which would otherwise have provided for strict liability in cases of AI-caused damage. The solution also forces lower standards on national procedural regimes which allow ordering the administration of evidence on the court's own motion. In its proposal the European Commission also ignored other factors, aside from the *ex ante* evaluation of risk, which would have influenced the liability regime applicable, and opted to deviate from the Product Liability Directive when not focusing mainly on manufacturers of AI technology as the main subjects of liability, even though these have the greatest control over possibly risky AI implementations.

We have outlined some possible modifications to the AI Liability Directive that is still in the proposal stage, which we consider could help improve the norm. Still, we consider that further research into the effects of liability regimes on compliance with safety requirements and rules imposing a degree of precaution and diligence should be conducted during the proximal review of the AI Liability Directive, especially to establish whether such positive behaviours could be encouraged by the implementation of a strict liability regime after it had been implemented.

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New Opportunities and Challenges of Victim-Offender Mediation and Reparation in Hungary – Mediation in Juvenile Delinquency Cases and in Infraction Law

Introduction

This paper is a continuation of the future book chapter resulting from the research project Polish-Hungarian Research Platform 2022 (research group Mediation in Court Proceedings), titled "Victim-Offender Mediation as a Form of Restorative Justice in the Hungarian Criminal Justice System". In the second phase of the research, the following hypothesis was formulated: The restorative approach is fully consistent with the principles of child-friendly justice. The conflict resolution methods used as part of diversion are of particular importance in juvenile criminal cases. Victim-offender mediation and other forms of restorative justice can be an effective tools to treat child and juvenile delinquency and also in the field of infraction law. There is a place for the restorative approach to certain sanctions imposed by the criminal court and to certain measures applied by the prosecutor in a criminal case.

To prove this hypothesis, the first part of the paper is devoted to introducing the special provisions for juveniles in the Hungarian Criminal Code (HCC) and characteristics of mediation and other forms of restorative justice for children and young offenders. In the second, we outline the role of victim-offender mediation in the field of infraction law, analysing, among other things, the

way that mediation is implemented, the categories of infractions for which mediation may be applied and the legal consequences of successful mediation. The final part of the paper, aims to give an overview of the legal regulation of other legal consequences that contain restorative elements (community service, restitutional work).

Victim-offender mediation in juvenile delinquency cases

Child rescue movements based on the doctrine of *parens patriae* played a prominent role in the USA in laying the foundation for the development of juvenile criminal justice. On the other hand, in Europe, the acceptance of the tenets of the "mediation school" – particularly associated with the name of Franz von Liszt – creates the principle basis for special criminal law reactions against to youth offenders.[1] The **principle of special treatment of juveniles** defined by Miklós Lévay is as follows: "juvenile criminal justice must be in the interest of the perpetrator and this requirement is satisfied when the reaction of the criminal law is compatible with the personal circumstances of the child and serves to rehabilitate and educate the offender."[2]

Hungarian juvenile criminal law and criminal policy are significantly influenced by instruments adopted in the framework of various international organisations (the UN, the European Union and the Council of Europe). The UN instruments give priority to diversion, alternative sanctions and community punishment and refer to custodial sanctions and other forms of deprivation of liberty only exceptionally, in specific cases and under strict conditions. For our topic, we focus only on the following:

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[1] Váradi-Csema Erika, *Children's rights and the criminal protection of minors*, [in:] *Criminal Legal Studies. European Challenges and Central-and East-Central European Responses in the Criminal Science of the 21st Century*, E. Váradi-Csema (ed.), Central European Academic Publishing, Miskolc–Budapest 2022, p. 452.

[2] Lévay Miklós, *A gyermek érdekétől a megérdemelt büntetésig: a fiatalkorúakra vonatkozó büntető igazságszolgáltatás alakulása az Egyesült Államokban*, [in:] *OKRI Szemle*, Virág György (ed.), OKRI, Budapest 2009, p. 149.

- The General Comment 10 of the Committee on the Rights of the Child, which interprets the Convention of the Rights of the Child as regards children's rights in juvenile justice, places particular emphasis on the importance of diversion. According to Point 3, juvenile justice should promote, *inter alia*, **the use of alternative measures such as diversion and restorative justice**. Point 27 emphasises that the child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities.[3]
- Rule 11.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules") emphasises the importance of diversion: "consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority (…)".[4]
- The United Nations Standard Minimum Rules for Non-custodial Measures[5] (the "Tokyo Rules") was a step forward in defining the purpose of mediation. The Tokyo Rules are based on the premise that communities need to become more involved in the criminal justice system, most importantly in the rehabilitation of the offender, promoting among offenders a sense of responsibility towards society.[6]

[3] It is also an important provision that 'the child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure.' See General Comment No. 10(2007) on Children's rights in juvenile justice.

[4] Adopted by General Assembly resolution 40/33 of 29 November 1985. See also the Rule 11.4: 'In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, *restitution, and compensation of victims*.'

[5] Adopted by General Assembly resolution 45/110 of 14 December 1990.

[6] Raduly Zsuzsa, *A fiatalkorúak büntető igazságszolgáltatása és a resztoratív igazságszolgáltatás*, "Jogi tanulmányok" 2016, 1, pp. 390–391. See also the Rule 2.5. 'Consideration shall be given to *dealing with offenders in the community* avoiding as far as possible resort to formal proceedings or trial by a court (…)'.

– Based on the United Nations Guidelines for the Prevention of Juvenile Delinquency[7] (The "Riyadh Guidelines"), to stigmatise a juvenile with the sanctions imposed in criminal proceedings would be counterproductive and particularly harmful. Stigmatising a juvenile can be a direct way to the juvenile's re-offending and the development of a criminal career.[8]

The documents of the Council of Europe reflect a similar spirit when, for example, regarding the definition of a comprehensive social response to juvenile crime, they note that the juvenile criminal justice system is only part of the fight against youth crime. Accordingly, when criminal justice is used as a tool, the goal is reintegration, the method of which is education.[9] One example is the Council of Europe Recommendation Rec(2003)20 which states that "member states should develop a broader spectrum of innovative and more effective (but still proportional) community sanctions and measures. (…). They should also involve the offender's parents (…) and, where possible and appropriate, deliver **mediation, restoration and reparation to the victim**."[10] Finally, we also mention the Council of Europe Guidelines on child-friendly justice[11] which states that "alternatives to judicial proceedings such as mediation, diversion (of judicial mechanism) and alternative dispute resolution should be encouraged whenever these may best serve the child's best interest".

[7] Adopted by General Assembly resolution 45/112 of 14 December 1990.

[8] Faix Nikoletta, *A gyermekbarát igazságszolgáltatás kialakulása és fejlődése a nemzetközi jogalkotásban*, "Jogászvilág" 2016, július 5, https://jogaszvilag.hu/szakma/a-gyermekbarat-igazsagszolgaltatas-kialakulasa-es-fejlodese-a-nemzetkozi-jogalkotasban/ (accessed on: 25.11.2022).

[9] Váradi-Csema Erika, *Children's rights and the criminal protection of minors*, *op. cit.*, pp. 457–458.

[10] Council of Europe, Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Adopted by the Committee of Ministers on 24 September 2003).

[11] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, 25.

Moreover, the Guidelines recommends the introduction of a kind of mandatory mediation.[12]

HUNGARIAN CRIMINAL LAW ON JUVENILES

Hungarian criminal legislation on juveniles has been designed to harmonise as fully as possible with these international obligations and expectations. The criminal provisions concerning juveniles are not in a separate act, but in the HCC. The provisions of the Code shall apply to juveniles with the exceptions set out in the Chapter IX ("Provisions relating to juvenile offenders"). It means that the special provisions of HCC concerning juvenile offenders do not establish special rules for their criminal liability, there are only different provisions for the applicable penalties and measures.[13]

According to Article 105(1), a juvenile offender "shall mean any person between the age of twelve and eighteen years at the time of committing a criminal offense". At the same time, the HCC determines the minimal age of responsibility in 14 years as a main rule; no child under the age of 14 can be made responsible by criminal law. However, in case of nine serious criminal offences, if he/she was over the age of 12 years at the time the commission of the crime, and he/she has possessed the capacity to understand the nature and consequences of his/her acts, he/or she may be criminally liable.[14]

[12] "Mandatory referral to mediation services, prior to court procedures, could also be considered: this is not to force people to mediate (which would be contradictory to the whole idea of mediation), but to give everyone the opportunity to be aware of such possibility." *Ibid.,* 70.

[13] Karsai Krisztina, *Juvenile Justice in Hungary*, Report for the academic programme of the Third International Crime and Punishment Film Festival on Juvenile Justice, 9. See in https://www.academia.edu (accessed on: 18.11.2022).

[14] Article 16 HCC: "persons under the age of fourteen years at the time the criminal offense was committed shall be exempt from criminal responsibility, except in case of homicide, homicide committed under the influence of a strong passion, battery causing life endangerment or death, assault on a public official, assault on a person entrusted with public functions, assault on a person aiding a public official or a person entrusted with public functions, crime of terrorism, robbery or plundering, if the perpetrator was over the age of twelve years at the

A very important provision stipulates that only criminal measures as criminal sanctions can be applied to a perpetrator between the age of 12 and 14 – in the most severe cases, placement in a reformatory institution, the duration of which may be between one year to four years.

As regards the principles and aims of juvenile justice, the primary aim of the criminal punishment or measure imposed on a juvenile is to enable them to develop in the right direction and become useful member of society. In this respect, the choice of measure or punishment should be made with a focus on the education and protection of the juvenile. The primary sanction is the criminal measure: a punishment should only be imposed on a juvenile when the use of a measure is inappropriate. Custodial sentences should be used as *ultima ratio*. It means that a measure or punishment involving the deprivation of liberty may be imposed against a juvenile offender only if the aim of the measure or penalty cannot otherwise be achieved. Victim-offender mediation and other forms of restorative justice can be an alternative measure to prison.

Among juveniles, and in particular first offenders, diversion and conflict resolution methods are of particular importance and victim-offender mediation seems to be ideal in juvenile criminal cases. The reasons for this finding are as follows:

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time the commission of the crime, and he/she has possessed the capacity to understand the nature and consequences of his/her acts."

As a general rule, the HCC establishes a rebuttable presumption, that those who are under 14 years at the time of committing a criminal offense, cannot be held responsible by criminal law. This presumption may be rebutted in case of the nine crimes listed by the HCC, if the child over 12 years already has the capacity of discernment. See Santha Ferenc, *The new legislation on the age of responsibility in Hungarian criminal law*, [in:] *Current questions and European answers on the field of law and justice in Romania and Hungary*, Erika Váradi-Csema (ed.), Miskolc 2015, p. 225. The legislation, for example, in Poland is different: as a general rule the minimum age is 17, but the Criminal Code provides for an exceptional responsibility of persons who have reached the age of 15 years at the time of the commission of the crimes specifically listed in the Code (e.g., homicide, deliberately caused a grave detriment to health, participated in a group rape or robbery). Katarzyna Laskowska, *The subject of crime in the context of criminal responsibility (on the basis of penal codes of Poland and Russia)*, "Studies in Logic, Grammar and Rhetoric" 2007, 12(25), p. 90.

1) The first reason arises from youth as a specific stage of life. In the case of youth, personality development is not yet complete and the process of socialisation is still ongoing.
2) The time-lapse that often occurs in traditional criminal proceedings reduces or eliminates the educational effect. The time lapse may be linked to the breakdown of the relationship between the offender and the victim.
3) During mediation, the victim is transformed from an "impersonal concept" into a living person, a person with feelings. The possibility of mediation allows the young person to gain the trust of the community and the victim himself.
4) Mediation can also be used to mobilise the micro-environment of the young person (family and community members).[15]

CHARACTERISTICS OF VICTIM-OFFENDER MEDIATION IN CASES OF YOUNG OFFENDERS

The legal background

Victim-offender mediation was introduced into Hungarian criminal law on 1 January 2007 and can be applied in a procedure against juvenile delinquents as well. The legal background of mediation for juveniles is almost identical to the legislation for adult offenders. According to the Hungarian Criminal Procedure Code (HCPC), the objectives of the mediation process are to reach a written agreement between the victim and the offender in order to:

- give compensation for the consequences of the criminal offence;
- encourage the future law-abiding conduct of the offender;
- settle the conflict between the victim and the offender with the involvement of a person independent from the authority (the mediator).

[15] Csemáné Váradi Erika, *A gyermek- és fiatalkori bűnözés alapkérdései, különös tekintettel a serdülőkor pszichés sajátosságaira*, Prof. Dr. Farkas Á. (ed.), *Tanulmányok a bűnügyi tudományok köréből*, Doktori tanulmányok 3, Miskolc 2013, pp. 30–32.

There are three pillars of the relevant regulations which can partly be found in the HCC and the HCPC, further detailed rules are set in a separate Act:

1) Article 29 of the Hungarian Criminal Code (Act C of 2012) regulates Active Repentance as a ground for exemption from criminal responsibility (substantial criminal law rules);
2) Articles 412–415 of the Code of Criminal Procedure (Act XC of 2017) contain the relevant criminal procedure rules;
3) Act CXXIII of 2006 on Mediation in Criminal Cases regulates in detail the mediation procedure to be followed.

Currently, two types of mediation can be distinguished: 1) a mediation process in order to apply active repentance as a ground for exemption from criminal responsibility ("traditional mediation": the scope of relevant crimes is limited); 2) a mediation process in order to make reparation for the consequences of the offence and to obtain a lighter sentence ("new form of mediation": applicable to any crime – in principle).

1. **Traditional mediation** is applicable in criminal cases if the criminal offence is a misdemeanour or a felony punishable with a maximum imprisonment of five years and the offence is a traffic offence or an offence against:
   - life, physical integrity or health,
   - personal freedom,
   - human dignity and fundamental rights,
   - property or intellectual property rights.

   In case of a successful mediation, the criminal procedure is to be terminated (Article 29(1) of the CC).

   One of the main differences between adult and juvenile legislation is that in case of adults, if the abovementioned felony is punishable with a maximum five years imprisonment, the successful mediation will not eliminate the punishability (the case goes to trial), but the penalty may be mitigated by the court without limits (Article 29(2)).

   There are grounds for refusing mediation,[16] namely circumstances that exclude the "traditional mediation process".

[16] See Art. 29(2) of the HCC.

Reiteration alone does not exclude mediation but it shall not applied if a (new) intentional crime is committed during the probation period as a result of suspension of a prison sentence or after being sentenced to prison and before s/he has finished serving the sentence or while released on probation or during the period of conditional suspension of the procedure. Mediation is also excluded if a (new) intentional crime is committed within two years after a successful mediation process or the offender is qualified as a special or multiple recidivist. Finally, mediation is also not possible, if the crime was committed in a criminal organisation or the crime caused death.

2. **New form of mediation** (which can be applied from 1 July 2018) is not linked to active repentance and can be used in criminal proceedings for any offence in which the objectives of mediation can be achieved. Its purpose is to make reparation for the consequences of the offence and to obtain a lighter sentence. Since the scope of relevant crimes is not limited, this type of mediation applies to any criminal offences and consequently to more serious criminal cases. Note, that grounds for refusing mediation do not apply, in principle, to the "new form of mediation".

CONDITIONS OF VICTIM-OFFENDER MEDIATION

The CPC and the related special Act define the following conditions for both types of mediation:

1. Crimes relevant to mediation: two basic methods have been developed to define the scope of offences covered by the mediation process. While a common precondition is the existence of a specific identifiable victim[17], the first approach does

[17] Furthermore, a general perception is that mediation simply does not work for very serious crimes (crimes against the state, crimes committed within the framework of organised crime, homicides, etc.). Most white–collar crimes fall into this category, either because there is no specific victim or because the

not limit the scope of the relevant offences and mediation can be applied in principle for any offence. In the second, the legislator narrows the range of applicable offences, mainly on the basis of their seriousness. As has been shown, in Hungary, in the case of "traditional mediation", the limitation is based on the type and substantive gravity of the crime on the one hand, and the circumstances that exclude the process on the other. The majority of cases referred to mediation in Hungary are offences against property and traffic offences. As mentioned above, the limitation of offences relevant to mediation and grounds for refusing mediation does not apply to the "new form of mediation". In theory, this solution is welcome because it could significantly increase the number of mediation process. Unfortunately, the statistics do not show this. Since 2018, when the new form was introduced, the number of mediation procedures has slightly decreased.[18] There can be two reasons for this development. First, from 2018, the prosecutor has several other forms of diversion at his/her disposal. Second, the perpetrators are not sufficiently motivated to participate in the mediation process,[19] because successful mediation is only a mitigating circumstance to be taken into account in court proceedings and it does not encourage the offenders to participate in the mediation process.

2. Initiation of the mediation process: the suspect, his/her defence counsel and the victim has a right to file a motion in order to start the mediation process. Based on these motions or *ex officio*,[20] the prosecutor has a (discretional)

number of victims is so large that the use of restorative techniques seems physically impossible. See Szabó András, *A resztoratív igazságszolgáltatás elterjedése Kelet–Európában*, Doktori értkezés, Pécs 2022, p. 251.

[18] The number of mediation process (adult and juvenile offenders): 2018: 6.184; 2019: 5.698; 2020: 5.378; 2021: 5.729.

[19] Szabó András, *A resztoratív igazságszolgáltatás elterjedése Kelet–Európában*, *op. cit.*, p. 166.

[20] Mediation is not excluded if neither party has requested it. This can be explained by the fact that the mediation process may also be initiated *ex officio* by the prosecutor without a specific request from the parties.

right to transfer the case to mediation process and suspend the criminal proceedings for a period of six months. It can be seen that both the victim and the suspect (and their legal representatives) are entitled to request the mediation process, but if one of the parties has not requested mediation, his/her consent must be obtained.

3. Confessional statement by the suspect: the necessary prerequisite for mediation is that the suspect has made a confessional statement/has pleaded guilty during the investigation no later than filing the indictment. The confessional statement by the suspect must cover both the fact (circumstances) of the case and his/her guilt. This requirement is closely linked to the main objective of mediation, which is the establishment of a mutually acceptable agreement between the victim and the offender.[21]
4. The discretionary and subjective condition of the process*:* the prosecutor suspends the procedure for the purpose of mediation if reparations for the consequences of the crime are expected and criminal proceedings may be omitted or the mediation process is not be contrary to the principles of the imposition of a penalty on the basis of the nature of the crime, the method of the perpetration, and/or the personal circumstances of the suspect. This latter condition is entirely at the discretion of the prosecutor, consequently he or she has a decisive role in transferring a criminal case to mediation. The question must also be asked why the prosecutor may refuse to refer the case to mediation if the statutory conditions are met, there are no grounds for exclusion and both the victim and the offender request it. The solution to this problem could be to introduce a kind of "mandatory mediation" or "mandatory diversion", as in the abovementioned

[21] Schmidt Szilárd, *A közvetítői eljárás lefolytatását megelőző új büntetőeljárási szabályok*, [in:] *Bíró és mediátor: Válogatott tanulmányok a közvetítői eljárás elméleti és gyakorlati kérdéseiről*, Glavanits Judit (ed.), Universitas–Győr, 2020, p. 321.

Council of Europe Guidelines (2010), if the parties request it and the objective statutory conditions are met.

5. The reparation: successful mediation requires reparation, namely the suspect shall provide reparation by way of the means and to extent accepted by the victim within the framework of a meditation process, or previously if approved in the mediation process. Reparation can be defined as the compensation or reduction of the consequences of a crime by means of voluntary performance by the offender.[22] The form of reparation is determined by the needs of the victim and the possibilities of the offender, and may include material (financial) compensation, reparation in kind or reparation activities by the offender. Reparation can be the physical repair of the damage caused, an activity needed by the victim, or symbolic reparation which can be achieved even with an apology.[23]

MEDIATION OF JUVENILES BASED ON THE STATISTICS AND PRACTICE

From the introduction of mediation, the statistics show that mediation is not used more frequently in juvenile cases than in adult cases. Moreover, for example, the data for 2012 show that mediation in juvenile cases has been very marginal, with only 337 cases out of 9,793 cases that resulted in a finding of responsibility being

[22] Based on Nagy Ferenc, *A jóvátétel, mint a konfliktusfeloldó büntető igazságszolgáltatás egyik formája*, "Jogtudományi Közlöny" 1993, 3, p. 90 and Szabó András, *A resztoratív igazságszolgáltatás elterjedése Kelet–Európában*, *op. cit.*, pp. 54–55.

[23] A study in Hungary (2007) found that in 179 out of 300 mediation cases selected on the basis that the offender did not provide financial compensation, the victim was satisfied even with an apology from the offender. See Iványi Klára, *A büntetőügyekben alkalmazható közvetítői tevékenység bevezetésének tapasztalatai Magyarországon*, IM – Országos Bűnmegelőzési Bizottság, Budapest 2008, p. 87.

successfully mediated.[24] To confirm this statement, it would be useful to examine the relevant statistical data:

The number of mediation process (juvenile offenders):[25]

2012 – 617
2013 – 629
2014 – **633** → the highest number
2015 – 624
2016 – 552
2017 – 485
2018 – 454
2019 – 396
2020 – 406
2021 – **352** → the numbers are constantly decreasing.

The question is, what are the reasons for this negative trend? First of all, the prosecutor has several other forms of diversion at his/her disposal which, to a greater or lesser extent, contain a restorative element. Now we only mention:

1) **admonition** (reprimand): the mildest criminal measure which may also be applied by the prosecutor, if the perpetrator's conduct no presents a danger to society or the danger is negligible; in assessing this condition, in addition to the lack of criminal record and the minor gravity of the offence, it is of great importance whether the offender has compensated the victim or otherwise made reparation;
2) **conditional prosecutorial suspension of the procedure:** the prosecutor may suspend the investigation for a specified time period if law-abiding behavior can be reasonably expected from the suspect, which could lead to termination of the case;

[24] Raduly Zsuzsa, *A fiatalkorúak büntető igazságszolgáltatása és a resztoratív igazságszolgáltatás*, *op. cit.*, p. 393.

[25] Source: https://igazsagugyistatisztika.kormany.hu/partfogo-felugyeloi--tevekenyseg (accessed on: 11.11.2022). The figures represent the number of mediation cases *pending* in a given year (cases ongoing from the previous year + received in the given year).

in case of juveniles, this form of diversion can also be applied in more serious cases, namely if the perpetrator committed a crime punishable by a maximum of 8 years imprisonment; the prosecutor may demand that the perpetrator, among others:

- compensate the victim for the damage, loss of property, or loss of tax revenue caused by the crime,
- ensure the compensation of the victim in another way, or
- make a financial contribution to a specific purpose or perform community service.

Another important rule is that the prosecutor may order the juvenile perpetrator to be placed under probation with supervision for the duration of the conditional suspension. Within the framework of probation with supervision, the prosecutor may prescribe mandatory standards of behaviour for the juvenile to follow, which the probation service is responsible for monitoring, and thus they can keep their eye on the juvenile offender in the longer term. This form of diversion may seem more effective to the prosecutor[26] than mediation: if the mediation process is successful, no criminal penalties or measures can be applied against the juvenile perpetrator. During the prosecutors' discussions, the prosecutors stated that they would make their decision firstly on the basis of the legal conditions and then on the basis of the parties' consent. Admonition is used more in cases where there is no harm or where reparation has been made, and conditional prosecutorial suspension is applied when it is found that the offender needs ongoing supervision or specific rules of conduct to prevent re-offending.[27]

[26] According to a prosecutor's position in the legal literature, for juveniles, it may be appropriate to monitor their behaviour over a longer period of time, for which is the conditional suspension of the procedure combined with rules of behaviour is the perfect solution. In other cases, it may be necessary for the juvenile to "feel the atmosphere of the court" and this could be ensured by bringing the case to court by proposing an expedited procedure. See Bernáth Norbert, *A közvetítői eljárás gyakorlata és kritikája*, "Ügyészek Lapja" 2009, Különszám, pp. 11–12.

[27] This finding is based on an interview with a former mediator with a great deal of experience.

The other reason for the mentioned negative trend is the prosecution service's general opinion/attitude about mediation in juvenile cases. According to this,

1) the majority of juveniles are not able to express regret for their offences during the mediation process,
2) mediation process rarely works from a preventive point of view,
3) the juvenile is usually unable to pay reparation and it ultimately becomes the responsibility of the parents, if they are able to do so; this is problematic, since the real purpose of mediation is less likely to be realised, as reparation is made not by the juvenile, but by his parents.[28]

Mediation in infraction law

In Hungary, criminal law, infraction law and administrative criminal law are used to deal with behaviour that violates or endangers the rules of social coexistence. Sanctioning of an illegal act depends on the subject matter of the offence and the extent to which it infringes or endangers (differentiated regulation). Protection against acts that are less dangerous to society is provided in the Hungarian legal system by the infraction law.[29]

In 2012, the reform of the law on infractions took place in parallel with the criminal law with the adoption of Act II of 2012 on Infractions, Infraction Proceedings and the Infraction Registration System. The legislator's intention in establishing the new Act was to create a new system of infraction proceedings that would provide efficient and rapid means for the state to respond to the less dangerous illegal acts. The Act also aims to introduce a cost-effective procedure in which the offender no longer has an interest in unduly

[28] Barabás A. Tünde, *Áldozatok és igazságszolgáltatás*, P-T Műhely Kft., Budapest 2014, p. 113.
[29] See the General Explanation of the Act II of 2012.

prolonging the proceedings.[30] Law of infractions is based on the theory of criminal liability.[31] It reacts to an illegal act committed in the past by a natural person and imposes a repressive legal sanction based on culpability.[32]

BASIC CONCEPTS

Legal definition of the infraction and conditions of liability

The definition of infraction is provided the Article 1 of the Act.[33] Following the traditional principle of criminal law, an act or omission committed by a natural person can only be punished as an infraction by an Act (*nullum criminen sine lege*), not by a lower source of law.[34] A further conceptual element – similar to the definition of crime in the Criminal Code – is the danger of the act to society. Based on the above, on the one hand, it can be said that the legal definition of infraction and crime are very similar, the conceptual elements are basically the same, and the only difference is that to what extent the two acts pose a threat to society. The preamble of the Act and the legal definition of infraction reflect the so called quantitative

[30] Szeiberling Tamás, *A büntető és szabálysértési közvetítői eljárás jelene és jövője*, "AKV Európai Szemle" 2017, 1, pp. 49–57, https://adreurope.uni-miskolc.hu/files/59/ADR-Europe-2017-1jav.pdf (accessed on: 11.11.2022).

[31] Nagy Mariann, *A közigazgatás szankciórendszere*, [in:] *Internetes Jogtudományi Enciklopédia* (Közigazgatási jog rovat, rovatszerkesztő: Balázs István) Jakab András, Könczöl Miklós, Menyhárd Attila, Sulyok Gábor (eds.), http://ijoten.hu/szocikk/a-kozigazgatas-szankciorendszere (2019). 40. pont.

[32] 63/1997 (XII. 12) Constitutional Court Decision.

[33] "An infraction is an act or omission, ordered punishable by the law, which is dangerous for society."

[34] The Act of 2012 abolished the previously prevalent legislative powers of the government and the local municipalities concerning infractions. See more on the definition of infraction: Hollán Miklós, *A szabálysértési felelősség*, [in:] *A szabálysértési jog tankönyve*, Hollán Miklós, Nagy Judit (eds.), Dialóg Campus, Wolters Kluwer, Budapest 2019, pp. 57–60; Jacsó Judit, Sántha Ferenc, *Közigazgatási büntetőjog*, Miskolci Egyetemi Kiadó, Miskolc 2012, pp. 15–16.

standpoint, as infraction is a criminal act as well, which differs only from a crime in that it poses a smaller threat to society.[35]

The definition of infraction provided by the Act must be completed with the provision of the Act regarding the principle of guilt,[36] and thus, the elements of the legal definition of infraction are: 1) human behavior; 2) a danger to society, although to a smaller extent than a crime; 3) guilt (intent or negligence); 4) an act ordered punishable by the law.

Classification of infractions

Infractions can be categorised on the basis of several criteria. In Hungary, the law of infractions distinguishes between two main groups of offences: infractions punishable with custodial arrest (which are the most serious illegal acts) and infractions punishable with fines (and other sanctions).

In a separate chapter, the Act lists a total of 20 infractions in the former group, including infractions against property of particular importance for mediation (e.g., theft, fraud), but also includes illegal entry into private property and illegal prostitution. Infractions that are not punishable by custodial arrest are regulated by the special part of the Act within nine chapters, based on the protected value or fundamental right. These includes traffic infractions (e.g., driving while intoxicated). The close link between law of infractions and criminal law is illustrated by the fact that many infractions have a criminal form (e.g., offences against property or illegal entry into private property).[37]

Originally, mediation was only available for infractions punishable by custodial arrest, the number of which was low, and therefore

[35] Foundation of criminal law.

[36] See Article 2(1) of the Act: "An infraction punishable if committed intentionally or negligently, except where the law provides for punishment only if committed intentionally."

[37] Erdődy Gyula, *A magyar szabálysértési jog alakulása és fejlődési lehetőségei jogállami környezetben*, PhD értekezés, Pécsi Tudományegyetem, Állam – és Jogtudományi Kar, Pécs 2017, pp. 189–201.

the number of mediation procedures was also low. From 2017, the scope was extended to traffic infractions and, in case of juvenile perpetrators, to any infraction.[38]

General characteristics and types of infraction proceedings

The aim of the infraction procedure is to detect and prove the illegal act, to bring the perpetrator to justice without delay and thus to achieve specific and general prevention. On the one hand, the infraction procedure has the characteristics of criminal proceedings, since it aims to determine the question of liability based on guilt, and coercive measures may be applied, but on the other hand it also has elements of administration law, particularly in view of the characteristics of the infraction authorities dealing with the case in the first instance.[39]

Three types of basic proceedings can be initiated when an infraction is committed: 1) on-the-spot proceedings; 2) proceedings by the infraction authority; and 3) proceedings by the court in case of infractions punishable with custodial arrest.

The on-the-spot proceedings may include the use of a verbal warning and the imposition of an on-the-spot fine, if the perpetrator admits to having committed the infraction. On-the-spot procedures are the best way to achieve the legislative intention of speeding up the procedure, as the commission of the infraction is immediately followed by sanctions. Two million cases are dealt with each year within the framework of on-the-spot procedures, but only a third of the number of other procedures. This is why it is considered one of the "success stories" of the 2012 reform.[40]

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[38] Szabó András, *A resztoratív igazságszolgáltatás elterjedése Kelet–Európában*, *op. cit.*, p. 164.

[39] Bisztricki László, Kántás Péter, *A szabálysértési törvény magyarázata*, HVG–ORAC Lap– és Könyvkiadó Kft., Budapest 2014, pp. 113–224; Jacsó Judit, Sántha Ferenc, *Közigazgatási büntetőjog*, Miskolci Egyetemi Kiadó, Miskolc 2012, pp. 17, 61–62.

[40] Bisztricki László, Kántás Péter, *A szabálysértési törvény magyarázata*, *op. cit.*, p. 317.

Proceedings by the infraction authority can take two forms. If the facts of the case are clear and it is not necessary to hear the perpetrator or to obtain other evidence, the infraction authority will take a decision on the merits (impose a penalty or apply a measure). This is called a procedure without a hearing. In this case, the administrative deadline is 15 days and the decision is subject to appeal (request for a hearing). If there is no room for a procedure without a hearing, the infraction authority will conduct an investigation to clarify the facts. This is called a hearing procedure, where the administrative deadline is 30 days. The hearing procedure is relevant for mediation, because if, in the course of the hearing, the infraction authority (or in case of infractions punishable with custodial arrest, the court) finds that the conditions for referral to mediation are met, it will refer the case to mediation.[41] From a procedural point of view, the infraction procedure is then suspended.

LEGAL REGULATION OF VICTIM-OFFENDER MEDIATION IN INFRACTION LAW CASES

General characteristics

As we mentioned earlier, mediation in criminal cases has been available in Hungary since 2007. The positive practical experiences inspired the Hungarian legislator to introduce mediation into the law of infractions in 2014. Mediation in infraction law cases follows very similar procedural rules and substantial conditions as victim-offender mediation in criminal law but with less complicated procedural rules and shorter deadlines.[42] The objectives of the mediation process are to reach a written agreement between the victim and the perpetrator, to give reparation for the consequences of the infraction, and encourage the future law-abiding conduct of the perpetrator. The fulfilment of the obligation to make reparation

[41] See Article 104(4) of the Act.

[42] Bisztricki László, Kántás Péter, *A szabálysértési törvény magyarázata*, *op. cit.*, p. 256.

under the agreement exempts the perpetrator from liability for the infraction. Prior to the introduction of mediation, reparation was only taken into account as a mitigating circumstance.

The legislation is based on two pillars:

1) Article 82/A–82/K of the Act II of 2012 on Infractions, Infraction Proceedings and the Infraction Registration System (The Act) regulates the main substantial and procedural rules;
2) 73/2013 (XII 18) Minister of Interior Decree on Mediation in Infraction Law Cases regulates the mediation process in detail.

The procedure is of a mixed nature since the infraction authority (which in almost all cases is the police) or the court has a right to suspend the infraction procedure and transfer the case to mediation if the statutory conditions are fulfilled. The court's or the police's decision is followed by the mediation process, which is a non-infraction procedure between the victim and the perpetrator carried out by an independent person – a probation officer – as a mediator. The case may be referred to mediation once during the administrative criminal procedure. Referral to mediation is not excluded if the perpetrator has already voluntarily compensated all or part of the damage caused by the administrative offence.

Conditions of victim-offender mediation

The Act defines several conditions for referring to mediation, which make its scope narrower than in the cases of mediation in criminal law. Under the current legislation, not all infraction can be referred to mediation.

1. Mediation is applicable if the infraction is punishable with a custodial arrest and in cases of traffic infractions. It is important to emphasise that this restriction does not apply to juvenile perpetrators: mediation can be used in all infraction law cases. Practical experience shows that if the illegal act has a victim, the majority of cases are infractions against property and traffic infractions.

2. The second condition is the confessional statement by the perpetrator: it must cover both the fact of the case and his/her guilt. This is one of the conditions which limits the scope of application of the mediation.
3. Successful mediation requires reparation, the perpetrator shall provide reparation by way of the means and to the extent accepted by the victim within the framework of a meditation process, or previously if approved in the mediation process.
4. The next condition is the consensus: both the perpetrator and the victim shall consent to the mediation.
5. Similar to mediation in criminal cases, there is a discretionary and subjective condition of the process. The court or the police suspend the procedure for the purpose of mediation if the infraction procedure may be omitted, based on the nature of the illegal act, the method of the perpetration, and the personal circumstances of the suspect. This condition, which is at the discretion of the court or the police, is also responsible for the limitation of the scope of mediation and the same criticisms can be expressed that we have made in relation to mediation in criminal cases.
6. There is only one ground for refusing mediation: mediation is excluded if the (new) infraction is committed within one year after a successful mediation process.
7. The legal consequences of the successful mediation: the infraction procedure is to be terminated.[43]

CONDUCT OF THE MEDIATION PROCESS

Provided the conditions for mediation are met, the court or the police must inform the perpetrator and the victim about the possibility of the process. The perpetrator and the victim have 8 days to file a motion to start the mediation process. Based on the decision of the competent police/court, the case is suspended for 30 days.

[43] Jacsó Judit, Bak Zoltánné, *A büntetőügyi és szabálysértési mediáció elméleti és gyakorlati kérdései*, "Miskolci Jogi Szemle" 2018, 1, Különszám, pp. 24–36.

The mediator sets a date for the mediation meeting and informs the parties. The next step is the mediation meeting and, following the agreement, the perpetrator has 30 days to make reparation.

Criticism in the legal literature and in practice has mainly focused on the short procedural deadline, as it is challenging to organise mediation within 30 days, which can also have a negative impact on the success of the process.[44] Exceptionally, however, it may be possible for the perpetrator to make the reparation by extending the deadline by 30 days. In this case, the police or the court will extend the period of suspension for a maximum of 30 days, so in this case the maximum deadline is 60 days. However, this does not change the fact that the mediation meeting must be held within the 30-day deadline, which in practice is a huge challenge.

Informing the competent authority of the success of the mediation by the mediator is the final step. If the mediation was successful, the infraction procedure is terminated, but in case of an unsuccessful mediation the case will continue according to the rules of the ordinary procedure.

Practical experience has shown that, among the infractions punishable with custodial arrest, infractions against property (theft, fraud and intentional damage to property) represent the vast majority of cases. Problematic, however, in practice that large companies (e.g., shopping centers) do not give their consent to mediation in cases of minor property infractions.[45] Furthermore, compared to mediation in criminal cases, the willingness of the parties to participate in the mediation process is extremely low. This could be several reasons for this. For example, it is costlier for the parties to appear in the mediation proceedings (primarily because of travel costs) than the outcome they would expect from the proceedings in their own assessment, but in many cases the old age, the remote working or the already compensated damages also play a role. However, if

[44] Szeiberling Tamás, *A büntető és szabálysértési közvetítői eljárás jelene és jövője*, "AKV Európai Szemle" 2017, 1, p. 49, https://adreurope.uni-miskolc.hu/files/59/ADR-Europe-2017-1jav.pdf (accessed on: 11.11.2022).

[45] Schweighart Zsanett, *A szabálysértési ügyekben alkalmazott közvetítői eljárás első öt hónapjának tapasztalatai*, "Jogi tanulmányok" 2014, pp. 405–406.

the parties appear at the mediation meeting, they usually reach an agreement, and these agreements are fulfilled.[46]

THE NUMBERS

The number of mediation process in infraction law cases (adult perpetrators):[47]

2015 – 2,174
2016 – 2,374
2017 – 2,182
2018 – 2,066
2019 – 1,843
2020 – **1,200**
2021 – **1,260.**

It can be seen that the number of mediation cases significantly decreased from 2020. One of the reasons for this decrease may be the pandemic situation caused by COVID-19.[48] The Act provides for mandatory personal presence in the mediation procedure, and online mediation is not available for infraction cases.

De lege ferenda proposals

Consideration should be given to **extend the scope of the infractions** that can be referred to mediation (or even to remove the restriction completely) and to **extend the above-mentioned 30 days**

[46] Jacsó Judit, Bak Zoltánné, *A büntetőügyi és szabálysértési mediáció elméleti és gyakorlati kérdései*, "Miskolci Jogi Szemle" 2018, 1, Különszám, p. 33.

[47] Source: https://igazsagugyistatisztika.kormany.hu/partfogo-felugyeloi-tevekenyseg (accessed on: 11.11.2022). The figures represent the number of mediation cases *pending* in a given year (cases ongoing from the previous year + received in the given year).

[48] Glavanits Judit, *Mediáció és pandemia*, http://real.mtak.hu/112458/1/Glavanits_Mediacioespandemia_2020.pdf (accessed on: 11.11.2022).

period, especially in cases where the situation is not straightforward and requires more time to reach an agreement between the victim and the perpetrator.

We also consider the creation of a legal possibility for online mediation, on an exceptional basis, in cases of minor gravity and in exceptional cases.[49] In many cases, the failure to comply with the terms of the agreement is not the reason why the mediation fails, but the absence of the victim. This is a much more common problem in infraction mediation proceedings, which also has an impact on the success rate: the parties have concluded the agreement in only 60% of the mediation cases.[50] Online mediation could also be a solution to this problem.

The effectiveness of the mediation process could be increased if its benefits were promoted and made known to citizens and legal persons. As we have already mentioned, there is a general "rejection" of mediation among large companies. It would be useful to increase dialogue between practitioners and organise professional forums, as well as to promote restorative mediation and make it known to citizens. The mediation procedure not only serves the interests of the victim effectively but also relieves the burden on the judicial system and benefits society by offering a cheaper, faster procedure that takes into account the interests of the parties and influences the behaviour of the offender in the long term. Similar benefits could be achieved through a more effective use of mediation in infraction law cases.

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[50] Szabó András, *A resztoratív igazságszolgáltatás elterjedése Kelet–Európában*, *op. cit.*, p. 177.

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Efficiency Issues in Administrative Justice Based on the Operational Experience of the Slovak Supreme Administrative Court

The legal basis of the creation of the Supreme Administrative Court of the Slovak Republic

The Supreme Administrative Court of the Slovak Republic is the highest judicial body in matters of administrative justice, which ensures the unity and legality of decision-making. It was established with effect from 1 January 2021 by Constitutional Act No. 422/2020 Coll. amending the Constitution of the Slovak Republic,[1] with the commencement of its activities on 1 August 2021.

The establishment of the Slovak Supreme Administrative Court was part of a comprehensive reform of the judiciary,[2] which involved several interventions in the judiciary as a whole. In this form, this

[1] Ústavný zákon č. 422/2020 Z. z. ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb., https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/422/ (accessed on: 15.12.2022).

[2] Even though the Slovak justice system has been trying to introduce new regulatory solutions for a longer period. For more detail see: Jokel Patrik, *Nové právne inštitúty v správnom súdnom poriadku* [*New legal institutions in the code on judicial proceedings in administrative cases*], "Studia Iuridica Cassoviensia" 2016, 2, pp. 67–81, http://sic.pravo.upjs.sk/files/6_jokel_-_nove_pravne_instituty_v_novom_ssp.pdf (accessed on: 15.12.2022) or Tomáš Lukáš, *Vývojové tendencie slovenského správneho súdnictva v rokoch 1992–2022* [*Development Tendencies of the Slovak Administrative Judiciary in 1992–2022*], "Štát a právo" 2022, 2–3,

intervention went beyond creating an apex body of administrative adjudication – which, however, was perhaps the most significant element of this reform. The public debate on this reform package started in the spring of 2020, preceded by a discussion with the professional organisations concerned (mainly the judiciary). The regulatory package was based first and foremost on a constitutional amendment. In terms of the definition of the content of the draft constitutional law, the legislation focuses on the following:

1) reform of the composition and scope of the Judicial Council (*Súdna Rada SR*), including the professionalisation of the office of the Deputy President of the Judicial Council;
2) the verification of judges' assets and judicial competence;
3) reform of the creation of the Constitutional Court of the Slovak Republic (hereinafter referred to as the "Constitutional Court");
4) the modification of certain rules of procedure before the Constitutional Court, in particular, the introduction of a possible link between the proceedings on complaints by natural and legal persons and the proceedings on the conformity of legislation, including the avoidance of ruling on the conformity of constitutional laws with the Constitution of the Slovak Republic[3] (hereinafter referred to as "the Constitution");
5) the introduction of an age limit for the termination of the office of a judge of a general court and judges of the Constitutional Court and the regulation of the status of judges of general courts in the form of new regulation of the so-called judicial immunity of judges, the abolition of the consent to the prosecution of a judge of general courts and the Attorney General of the Slovak Republic (*generálny prokurátor SR*), as well as the regulation of the reassignment of judges in case of changes in the system of the general courts;

pp. 175–207, https://www.prf.umb.sk/app/cmsSiteAttachment.php?ID=7496 (accessed on: 15.12.2022).

[3] *Ústava Slovenskej republiky, č. 460/1992 Zb.*, https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20210101.html (accessed on: 15.12.2022).

6) the establishment of the Supreme Administrative Court of the Slovak Republic (hereinafter referred to as the "Supreme Administrative Court") and the related new settings of the competence and jurisdiction of the Supreme Administrative Court and the Constitutional Court.[4]

Concerning creating a supreme administrative court, the explanatory memorandum states that it is proposed to include the Supreme Administrative Court in the court system, which will have equal status with the Supreme Court in the hierarchy of general courts. Therefore, all the Constitution's provisions relating to the Supreme Court were amended. In this way, there are currently two supreme courts in the Slovak Republic. The Supreme Administrative Court is the highest in administrative justice, and the Supreme Court is the highest in civil, commercial, and criminal law. In addition to the general jurisdiction of the Supreme Administrative Court in the field of administrative justice, it is laid down that the constitutional jurisdiction of the Supreme Administrative Court should also include disciplinary jurisdiction over judges of the general courts and, to the extent provided for by law, over other professions. Following the establishment of the Supreme Administrative Court and its status as a disciplinary court for judges of general courts, the constitutional competence of the Judicial Council to create disciplinary chambers was deleted, as this provision became obsolete.[5]

In terms of the procedure for the establishment of the Supreme Administrative Court, it was proposed that the establishment of the Supreme Administrative Court should take place on the date of the entry into force of the law (1 January 2021), while it will not start operating until 1 August 2021. This transitory period aimed to create the space for all the actions necessary to ensure the proper functioning of this court, first and foremost, the staffing of the Supreme Administrative Court with judges and the establishment of its management. This outlined process was followed in practice

[4] *Explanatory report* (*Dôvodová správa*), p. 1, https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=484567 (accessed on: 15.12.2022).

[5] *Explanatory report* (*Dôvodová správa*), pp. 2–3, https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=484567 (accessed on: 15.12.2022).

in the year 2021. In this way, the legislation provided that the staffing of the Supreme Administrative Court was carried out first, and only after closing this process did the Supreme Administrative Court begin to carry out its work. This meant that the Supreme Administrative Court was not created by the automatic separation of the Administrative College of the Supreme Court but that the selection of the judges of the Supreme Administrative Court, including the vetting of its judges, took place at a later date. During the transitory period (1 January–1 August 2021), the powers of the Supreme Administrative Court were exercised by the bodies established by the existing rules, i.e., the Supreme Court, the Constitutional Court, and the disciplinary chambers.

To sum it up, the establishment of the Supreme Administrative Court took place in two stages. The first was its establishment as a separate entity. The second phase was the commencement of its activities. The two phases, through the related transitional provisions and the effectiveness clause, allowed for the election of the first President of the Supreme Administrative Court and the selection of the judges (or most of the judges) of the Court. This period also served to build up the Supreme Administrative Court in terms of its additional staffing (administration), organisational provision (e.g., preparation of the work schedule), as well as material and technical provision (court premises, equipment, etc.).

Based on the considerations above, the basis of the Slovakian judicial system is laid down in Article 143 section (1) of the Constitution, by stating that the judicial system shall consist of the Supreme Court of the Slovak Republic, the Supreme Administrative Court of the Slovak Republic and other courts. This provision is definitive in terms of the system of courts in the Slovak Republic. According to the applicable wording, the court system consists of the Supreme Court and other courts. Furthermore, under Article 143 section (2) of the Constitution, a more complex system of courts is to be laid down by law. This law is Act No. 757/2004 Coll. on Courts,[6] according to which district courts, regional courts, and the Specialised

[6] Zákon č. 757/2004 Z. z. o súdoch, https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/757/20230601.html (accessed on: 15.12.2022).

Criminal Court complete the court system. It is clear from the above that courts in the Slovak Republic are created either directly by the Constitution or by legislative act. The establishment of the Supreme Administrative Court as an institution that is to have equal status with the Supreme Court in terms of the hierarchy of the judicial system requires that it be established directly by the Constitution. In terms of the legal provisions issued based on Article 143 section (2) of the Constitution, the establishment of the Supreme Administrative Court needed to be addressed in a relatively large number of laws, including in particular laws regulating the organisation management and administration of the courts, the status of judges, court officials and court employees, including their rights and obligations, as well as laws regulating the procedure before the courts.

As the Supreme Administrative Court was established with equal status with the Supreme Court, this fact should be taken into account in all constitutional aspects of the functioning of the Supreme Administrative Court, including the appointment of its officials. The President and Vice-President of the Supreme Court are appointed and dismissed by the President of the Slovak Republic; the same method was implemented in the case of the President and Vice-President of the Supreme Administrative Court. To this end, Article 102 section (1) Letter (t) of the Constitution was amended, where the new competence of the President of the Slovak Republic concerning the functionaries of the Supreme Administrative Court is explicitly regulated. Furthermore, the constitutional amendment founding the creation of the Supreme Administrative Court aimed to establish a mechanism for resolving any potential jurisdictional disputes between the Supreme Court and the Supreme Administrative Court. Given the existence of two supreme courts within the administrative justice system, the power to resolve jurisdictional disputes between them needed to be given to a body that stands above these institutions. Therefore, the Constitutional Court should resolve disputes between the Supreme Court and the Supreme Administrative Court.[7]

[7] *Explanatory report* (*Dôvodová správa*), pp. 4–5, https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=484567 (accessed on: 15.12.2022).

The Supreme Administrative Court of the Slovak Republic is headed by a President, whom a Vice-President represents. Both the President and the Vice-President of the Supreme Administrative Court of the Slovak Republic are appointed and dismissed by the President of the Slovak Republic on the proposal of the Judicial Council of the Slovak Republic. The seat of the Supreme Administrative Court of the Slovak Republic is in Bratislava.[8]

Reforms of court systems are complex issues,[9] especially when a completely new judiciary is introduced and institutionalised in a system. On the one hand, it is necessary to establish the coordination of the competencies of the new court with those of other existing courts – e.g., the Constitutional Court, the Supreme Court – which is not necessarily without problems. As shown above, in addition to the legal framework and changes on the constitutional, as well as on the ordinary statute level, it is necessary to establish the required financial, material – but most importantly – the human resources for this new institution to carry out its function most efficiently and properly. To these matters we now turn.

Commencement requisites of the Supreme Administrative Courts activities

As is already apparent, the establishment of the Supreme Administrative Court took place in two steps. The first step was the adoption of the legislation establishing the Court. The second step is the

[8] Official web of the Supreme Administrative Court of the Slovak republic, https://www.nssud.sk/sk/sud/o-sude/ (accessed on: 15.12.2022).

[9] See more on this: Chmielewski Grzegorz, *Reforma súdnictva – niekoľko slov k problematike z pohľadu zmien v poľskom a slovenskom práve* [*Judicial reform – a few words on the issue from the perspective of changes in Polish and Slovak law*], [in:] *Úvahy o zmenách v ústavnej úprave súdnej moci a ich dopady na rozhodovaciu činnosť Ústavného súdu Slovenskej republiky – IX. ústavné dni* [*Reflections on Changes in the Constitutional Regulation of the Judicial Power and Their Impact on the Decision-Making Activity of the Constitutional Court of the Slovak Republic – IX. constitutional days*], Orosz Ladislav, Grabowska Sabina, Majerčák Tomáš (eds.), Univerzita Pavla Jozefa Šafárika v Košiciach Právnická fakulta, Košice 2021, pp. 192–224.

commencement of its activities. It is in line with this concept that the transitional provision laid down the rule when the Supreme Administrative Court started its work, which was not identical to the date on which the Court was established. This approach to the commencement of the activities of the Supreme Administrative Court appeared, and appears to be, the most appropriate. The law which determined the moment the Supreme Administrative Court became operational is Act No. 151/2022 Coll. on the Establishment of Administrative Courts.[10] About the establishment of the Supreme Administrative Court, it should be noted that the transitional provisions in the constitutional amendment were limited to those issues which, by their nature, fall within the constitutional text. This means that the implementing legislation contains transitional provisions on those issues which did not need to be dealt with in constitutional terms.

The implementing law laid down the rule upon which, between the establishment of the Supreme Administrative Court (i.e., from 1 January 2021) and the moment of the commencement of its activities, its competencies and jurisdiction were exercised by those judicial bodies (like the Supreme Court) which exercised them before. There was another way to ensure this competence exercise in the interim period. The Court was not created simultaneously as other apex courts but was integrated into an existing system. Accordingly, the regulations introduced a rule whereby the sectorial regulation may provide that proceedings "in progress" shall be completed by the Supreme Administrative Court from the time of commencement of its activities (i.e., from 1 August 2021). If the sectorial regulation had no provisions on this issue, the ongoing cases were to be completed by the competent authorities until then.

The regulatory reform package[11] lays down the rule for creating the office of the first President of the Supreme Administrative

[10] Zákon č. 151/2022 o zriadení správnych súdov, https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2022/151/20230601.html (accessed on: 15.12.2022).

[11] *Explanatory report* (*Dôvodová správa*), p. 36, https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=484567 (15.12.2022) and Article 154g of the Constitution of the Slovak Republic: The first President of the Supreme Administrative Court of the Slovak Republic shall be nominated to the President

Court. Given that, on the effective date of the establishment of the Supreme Administrative Court, that Court did not have any judges at its disposal, since the vacancies in that Court were filled successively after the establishment of the Court, it was stated that the first President of the Supreme Administrative Court was not selected from the judges of the Court, but from all the judges of the ordinary courts. This was a different arrangement and was valid only for the first President of the Court. Later, the President of the Court will be chosen from among the judges of the Supreme Administrative Court.

Therefore, the question of the appointment of judges was a crucial element in the court's creation. This aroused great interest among the professional and the lay public (especially journalists). According to the draft of the judicial reform submitted by the Minister of Justice of the Slovak Republic, the Supreme Administrative Court should not be created by the automatic separation of the Administrative Collegium of the Supreme Court. Still, a new selection of judges of the Supreme Administrative Court should be made through a selection procedure, which candidates will have to pass, including a screening before the Judicial Council. At the time, there was also an opposing opinion to this – supported among others also by the Judicial Council and by the judges of the Administrative Collegium of the Supreme Court – that the basis for the creation of the Supreme Administrative Court should be the automatic transfer of the entire Administrative Collegium of the Supreme Court *ex lege* and the agenda as the whole to the Supreme Administrative Court. The court should then be supplemented with quality people from

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of the Slovak Republic by the Judicial Council of the Slovak Republic from among the judges of the courts referred to in Article 143(1) as in force until 31 December 2020 or persons who are not judges and who meet the conditions referred to in Article 134(4) as in force from 1 January 2021. If a judge who is not a judge of the Supreme Administrative Court of the Slovak Republic or a person who is not a judge is appointed to the office of the first President of the Supreme Administrative Court of the Slovak Republic, he/she shall become a judge of the Supreme Administrative Court of the Slovak Republic on the date of his/her appointment to the office of the President of the Supreme Administrative Court of the Slovak Republic.

the external environment.[12] Also, in the inter-ministerial comments, the Supreme Court requested to establish the transfer of the Administrative Collegium judges and the internal staff of this Collegium to the Supreme Administrative Court of the SR without a special selection procedure.[13] In the end, these proposals were not implemented, i.e., **all the judges of the Supreme Administrative Court were appointed through a public competition**. The basic philosophy of judicial reform in the matter was thus to start from scratch. Nevertheless, the arguments in favour of taking over the judges cannot be ignored. In particular, the position of the supreme judiciary and certain opinions in the literature[14] have pointed in this direction, namely that such a transfer of staff could facilitate the setting up of the new court, the transfer of pending cases, and the preservation of the uniformity of the application of the law.

Concerning the latter opinions, several aspects should be considered during such transformation. One aspect is to select the best judges, with the question: Who can be regarded as such? Linked to this, of course, is the question of who decides. For instance, in the Czech Republic, the Supreme Administrative Court started with only thirteen judges who had transferred from other high courts. The rest were supplemented by judges working in lower courts and people outside the judicial practice – such people were selected for their professional qualities in the first phase and later demonstrated

[12] See for instance: *Diskusia o Najvyššom správnom súde: Bez skúseností správneho kolégia NS je to neuskutočniteľná idea* [*Discussion about the Supreme Administrative Court: without the experience of the Administrative Collegium of the Supreme Administrative Court it is an unfeasible idea*], https://www.nsud.sk/diskusia-o-najvyssom-spravnom-sude-bez-skusenosti-spravneho-kolegia-ns-je-to-neuskutocnitelna-idea/ (accessed on: 15.12.2022).

[13] See: *Vznesené pripomienky v rámci medzirezortného pripomienkového konania* [*Comments made during the inter-ministerial comment procedure*], https://bit.ly/3PqUR2d (accessed on: 15.12.2022).

[14] See for instance: Matejová Jana, *(Ne)Správni ľudia na Najvyššom správnom súde SR?* [*The (Not)Right People at the Supreme Administrative Court of the Slovak Republic?*], "Justičná revue" 2020, 11, 72, pp. 1351–1357, https://www.aspi.sk/products/lawText/7/285823/1/2 (accessed on: 15.12.2022).

their professional skills in a series of interviews.[15] Secondly, the fairness of judicial appointments has to be considered, namely if it is right or fair to require judges (and other staff) of the Administrative College of the Supreme Court to participate in a new selection procedure when they have already gone through one in the past. At the same time, the other judges serving on the remaining Supreme Court will remain in their positions unchanged and do not have to "prove" anything. Connected to this, there is also the issue that the judicial reform did not address the preservation of the position of the president of a senate, which the judges of the Administrative Collegium of the Supreme Court have achieved after several years of experience and after passing the selection procedure for the position of the president of a senate. The third aspect of being considered for the bench emphasises the judicial experience of the selected judges. Usually, all candidates for the position of a judge must demonstrate legal experience, which is naturally given by the judges of the Administrative Collegium of the Supreme Court, an experience that, in fact, only a few have. According to this opinion, it would undoubtedly help, at least in the early stages of the functioning of the Supreme Administrative Court, if the pool of the people who will form it already have experience in working at such a level of administrative justice. The next important factor is the continuity in decision-making, which should be observed during the establishment of the Court, namely the preservation of consistency in decision-making. There is an argument that when the "old"

[15] *Ibid*. It has to be added thou, that the selection of new judges of the Supreme Administrative Court of the Czech Republic takes place in a very complex manner: the suitability of the candidate is first assessed by the President of the Court, then the candidate is given the opportunity to introduce himself and present his views at a session of the Court's plenary session, after which the Judicial Council makes its recommendation to the President of the Court and the latter takes formal steps either to propose the candidate for appointment to the post of judge or to notify the candidate that there are insufficient grounds for doing so. For more detail, see: *Memorandum o výběru kandidátů na soudce pro Nejvyšší správní soud – zveřejnění pravidel* [*Memorandum on the selection of judicial candidates for the Supreme Administrative Court – publication of rules*], https://www.nssoud.cz/o-soudu/soudci/memorandum-o-vyberu-kandidatu-na-soudce (accessed on: 15.12.2022).

judges are transferred to the new court, maintaining continuity in decision-making is virtually inevitable. On the other hand, it should be noted that people outside this judicial practice are also often very familiar with the current case law. Their significant contribution could be new ideas and legal views into lines of thought that have perhaps already been "entrenched" over the years. As pointed out, the fifth – and last aspect – is the public's trust in the judiciary.[16] If everyone (judges and staff) had to go through a new selection procedure, it could potentially strengthen confidence in the new institution thus established, especially if the selection procedures were made as open and accessible to the public as possible.[17]

In starting the actual activity of the Supreme Administrative Court, the transfer of cases was instead an important organisational issue. During June and July 2021, roughly 2,000 files – pending cases from the Supreme Court in the administrative docket – were taken over. This was the most considerable start-up burden, which was expected to take at least two years to settle. In addition, the Supreme Administrative Court started accepting new cases beginning as early as 1 August 2021. According to the President of the Supreme Administrative Court,[18] the most significant burden for the Court will be these 2,000 inherited files in the cassation docket, i.e., in the cassation appeals against decisions of the county courts. It was stressed that the oldest pending cases from the Supreme

[16] The judiciary in Slovakia is currently experiencing a crisis of public confidence in its function and decision-making. In the latest Eurobarometer poll showed dismal numbers (46% fairly bad; 22% very bad) in assessing the independence of judges based on public opinion. See: Perceived independence of the national justice systems in the EU among general public, https://europa.eu/eurobarometer/surveys/detail/2752 (accessed on: 15.12.2022).

[17] For more detailed explanation on this opinion see: Matejová Jana, *(Ne) Správni ľudia na Najvyššom správnom súde SR?* [*The (Not)Right People at the Supreme Administrative Court of the Slovak Republic?*], "Justičná revue" 2020, 11, 72, pp. 1351–1357, https://www.aspi.sk/products/lawText/7/285823/1/2 (accessed on: 15.12.2022).

[18] *Naď: Najvyšší správny súd bude domom ochrany našich práv* [*Naď: The Supreme Administrative Court will be the house of protection of our rights*], "Pravda", 31.07.2021, https://spravy.pravda.sk/domace/clanok/595810-nad--najvyssi-spravny-sud-bude-domom-ochrany-nasich-prav/ (accessed on: 15.12.2022).

Court's cassation docket from 2018 to 2019 will be a priority in the decision-making. Financial, social, and administrative penalty cases dominate these.[19] Alongside this bundle of files, a new agenda was set up also, where the Court had to (and have to) comply with very short procedural deadlines.[20] The proper exercise of the court's jurisdiction and the delivery of individual judgments in a reasonable time will remain a central challenge for the Court in the future. For this reason, these issues will be examined.

Jurisdiction of the Supreme Administrative Court of the Slovak Republic

In matters of administrative justice, the Supreme Administrative shall ensure the uniform interpretation and application of laws and other generally binding legal regulations by its adjudicatory activity and by adopting opinions on the unification of the interpretation of laws and other generally binding legal regulations and by publishing

[19] Especially interesting are the issues of administrative punishment. See: Seman Tibor, *Vplyv ustanovení o správnej žalobe vo veciach správneho trestania (§ 194–§ 198 zákona č 162/2015 Z. z. Správny súdny poriadok v znení neskorších predpisov) na administratívne konanie vo veciach správneho trestania* [*Impact of the provisions on administrative action in administrative punishment (§ 194–§ 198 of Act No. 162/2015 Coll., the Administrative Procedure Code, as amended by as amended) on administrative proceedings in matters of administrative punishment*], [in:] *Správní soudnictví – 15 let existence Soudního řádu správního vs. prvotní zkušenosti s aplikací nového Správneho súdneho poriadku. Sborník z konference a společného zasedání kateder správního práva ČR a SR konaného ve dnech 22. až 23. března 2018 na Právnické fakulte UP v Olomouci* [*Administrative justice – 15 years of the Administrative Procedure Code vs. initial experience with the application of the new Administrative Court Rules. Proceedings of the Conference and Joint Meeting of the Departments of Administrative Law of the Czech Republic and Slovakia held on 22–23 March 2018 at the Faculty of Law of the University of Olomouc*], Frumarová Kateřina (ed.), Iuridicum Olomoucense, Olomouc 2018, pp. 273–295.

[20] *Najvyšší správny súd má doriešiť dvetisíc konaní presunutých z Najvyššieho súdu The Supreme* [*Administrative Court is to handle two thousand cases transferred from the Supreme Court*], "TREND", 28.8.2021, https://www.trend.sk/spravy/najvyssi-spravny-sud-prevzal-priblizne-2-tisic-nerozhodnutych-spisov-najvyssieho-sudu (accessed on: 15.12.2022).

its final judicial decisions of fundamental importance. Thus, in addition to exercising jurisdiction and simply making decisions, **the court is also responsible for the uniform interpretation and application of the law**. In the exercise of its powers, the Supreme Administrative Court acts and decides in particular on the following main issues, as defined in the Code of Administrative Judicial Procedure:[21]

1) on cassation complaint of the parties to proceedings against final decisions of regional courts in matters of administrative justice;
2) administrative actions against the decisions of a committee of the National Council of the Slovak Republic (*výbor Národnej rady Slovenskej republiky*) to review the decisions of the National Security Office (*Národný bezpečnostný úrad*), in proceedings;
3) in matters of the constitutionality and legality of elections to local self-government bodies;
4) in proceedings for the registration of candidate lists for elections to the National Council of the Slovak Republic (*Národná rada Slovenskej republiky*) and elections to the European Parliament;
5) in proceedings concerning the acceptance of a nomination as a candidate for the office of the President of the Slovak Republic;
6) in proceedings concerning actions for refusal of registration of a political party or political movement;
7) in proceedings concerning actions brought by the Attorney General of the Slovak Republic (*generálny prokurátor Slovenskej republiky*) for the dissolution of a political party;
8) in proceedings concerning competence actions between public administration bodies or between public administration bodies and other entities distinct from the courts;
9) concerning the disciplinary liability of judges, prosecutors, and other persons.

[21] Zákon č. 162/2015 Z. z. Správny súdny poriadok, https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/162/ (accessed on: 15.12.2022).

The **cassation complaints**[22] can be characterised as the primary type of procedure of the Supreme Administrative Court. A cassation complaint is an extraordinary remedy in the administrative justice system.[23] It may challenge a final decision of a regional court rendered in the administrative justice system. As the main rule, cassation complaints shall be decided by a chamber of three Supreme Administrative Court judges.[24]

A cassation complaint is admissible against any final decision of the administrative court of a lower instance. A cassation appeal is not admissible if 1) it is based on legal grounds other than those set out by the Code of Administrative Judicial Procedure; 2) it is based on grounds or evidence that the complainant did not raise in the proceedings before the administrative court in which the contested decision was given, although they could have done so; 3) is directed

[22] Each remedy system (appeal, cassation and review) has its advantages and disadvantages. In the Slovak administrative justice system, the cassation principle has been retained even after adopting the Administrative Procedure Code. In more detail see: Matejová Jana, *Kasačný princíp v správnom súdnictve* [*The Cassation Principle in Administrative Justice*], "Justičná revue" 2018, 6–7, https://www.epi.sk/odborny-clanok/Kasacny-princip-v-spravnom-sudnictve.htm (accessed on: 15.12.2022).

[23] § 438–471, Code of Administrative Judicial Procedure.

[24] In certain cases, the Grand Chamber of the Supreme Administrative Court decides. The Supreme Administrative Court shall hear and determine appeals in cassation before a Grand Chamber composed of the President of the Chamber and six judges if: a) a Chamber of the Supreme Administrative Court has reached a legal opinion in its decision which differs from a legal opinion already expressed in a decision of the Supreme Administrative Court and has referred the case by order to the Grand Chamber for a decision; b) a Chamber of the Supreme Administrative Court, in its decision, has again reached a legal opinion which differs from the legal opinion of the public authority on the same legal question and has referred the case by order to the Grand Chamber for a decision; c) the Prosecutor General has so requested pursuant to Article 47(3) on the grounds of divergent decision-making by the administrative courts or persistent divergence in the decision-making of the administrative courts and the public authorities. The President of the Grand Chamber of the Supreme Administrative Court shall be the President of the Chamber designated by the work schedule. The members of the Grand Chamber shall be the judges of the Chamber of the Supreme Administrative Court which referred the case to the Grand Chamber pursuant to paragraph 1 and three judges designated by the work schedule of the Supreme Administrative Court.

solely against the reasoning of the decision of the administrative court. An attorney in the proceedings on a cassation complaint shall represent the complainant or an omitted complainant obligatory. The cassation complaint and other submissions of the complainant or omitted complainant must also be drawn up by an attorney.

The Code of Administrative Judicial Procedure sets the grounds for proceedings to be brought before the court. According to this, the only basis for a complaint is that the administrative court infringed the law in the proceedings or in its decision based on the following: 1) the administrative court did not have jurisdiction to decide the case; 2) whoever acted as a party to the proceedings did not have procedural capacity; 3) the party to the proceedings did not have total capacity to act independently before the administrative court and was not represented by a legal representative or a procedural guardian; 4) the same case has already been the subject of a previous final decision or proceedings have already been initiated in the same case; 5) the case has been decided by a disqualified judge or an incorrectly constituted administrative court; 6) by an irregular procedure, a party was prevented from exercising his procedural rights to such an extent that the right to a fair trial has been infringed; 7) made a decision based on an error of law; 8) departed from the settled case-law of the cassation court; 9) failed to have regard to a binding legal opinion expressed in the judgment annulling the appeal in cassation or 10) the application was unlawfully rejected. No new facts or evidence may be adduced in a cassation complaint.

A cassation complaint must be lodged within one month of the delivery of the decision of the administrative court to the entitled entity. Where a rectification order has been made to the original decision, the time limit shall run again from the date of service of the rectification order only to the extent of the rectification made. The deadline for applying is statute-barred, i.e., the delay cannot be excused. The complaint has no suspensive effect unless 1) it is brought against a decision of an administrative court on the merits of a case made in proceedings on an administrative action or an action against another intervention, if the defendant public authority is the tax administrator or a public authority which has decided on a proper remedy brought against a decision or measure of the tax

administrator; 2) is brought against a decision of an administrative court on the merits of a case made in proceedings on an administrative action, where the defendant public authority is the Public Procurement Authority (Úrad pre verejné obstarávanie) which has ruled on matters relating to the exercise of supervision over public procurement; 3) it is brought against a decision of the administrative court on the merits of the case rendered in proceedings on an administrative action in matters of administrative punishment, or 4) brought against a decision of an administrative court on the merits of a case brought in proceedings concerning an administrative action on matters of detention and administrative expulsion. Furthermore, the cassation court may, on the application of the complainant or an omitted complainant, grant suspensive effect to a cassation complaint if the legal consequences of the contested decision of the administrative court would threaten serious harm and the granting of suspensive effect is not contrary to the public interest.

Suppose the cassation court, after examination, finds that the cassation complaint is well-founded. In that case, it decides to annul the contested decision and return the case to the administrative court for further proceedings or discontinue the proceedings, referring the case to the authority within its jurisdiction. If the cassation court finds that the contested decision of the public authority is not following the law, the lower instance administrative court has to dismiss the action. In that case, it may reverse the lower administrative court's decision by annulling the public authority's decision and returning the case to it for further proceedings. If the contested decision is annulled and the case is referred back for further proceedings, and the legal opinion of the cassation court arrives at a new decision, both the administrative court and the public authority are bound by it.

Administrative actions against the decisions of a committee of the National Council of the Slovak Republic to review the decisions of the National Security Office are particular types of procedures that concern matters of national security. By their nature, they are rather special administrative and judicial procedures.

Cases in the constitutionality and legality[25] of elections to local self-government bodies are procedures for supervising the legality and constitutionality of local elections in these cases. These cases have special subjects. The active legitimacy in such proceedings is bound by the right to bring an action to a plaintiff, that is: 1) a candidate for a local government office who was not elected if they received at least 10 % of the valid votes cast – that plaintiff may contest the election only in the constituency in which they stood; 2) a political party or political movement or coalition thereof which has filed a valid list of candidates or 3) 10 % of the eligible voters of the constituency concerned. Accordingly, the defendant shall be: 1) any political party, any political movement, or any coalition thereof which was represented in the contested election in a municipal council, local council, city council or local government council, or any elected independent candidate, if the proceedings concern an election to a municipal council, local council, city council or local government council or 2) the mayor of a municipality, the mayor of a municipal district, the mayor of a city or the president of a municipal district elected at a contested election if the proceedings concern the election of the mayor of a municipality, the mayor of a city, the mayor of a municipal district or the president of a municipal district. In these cases, speed is of the essence, so the time frame for bringing a case is rather strict: the action must be brought within ten days from the date of publication of the overall results of the election, and the duration of the case at the court is 90 days.

As a rule, the Supreme Administrative Court shall decide on the action without a hearing; however, it may order a hearing if it deems it necessary. Due to the unique nature of electoral adjudication, inspecting the electoral documents and hearing witnesses is also possible. It may be opened and checked for accuracy if required to review the election documentation. In this case, the parties to the proceedings shall be allowed to be present when it is opened. A record shall be made of the opening of the sealed electoral documentation, which shall be signed by the authorised member of the court's senate and by the other persons present. After the necessary

[25] §§ 312a–312k, Code of Administrative Judicial Procedure.

acts have been carried out, the administrative court shall seal the election documentation again. Furthermore, the ruling senate may authorise a member to question witnesses, particularly the chairperson or other members of the relevant electoral commission. If this is necessary for better clarification, the witnesses may be present when the election documentation is opened and checked for accuracy.

If the administrative court, after examination, finds that the action is not well founded, it shall dismiss it. Otherwise, if after examination it is stated that the action is well established, the court shall, by judgment: 1) declare the election null and void (in this case, the whole election procedure of a given municipality is annulled); 2) annul the contested result of the election (this means partial nullification of some election results) or 3) annul the decision of the electoral commission and declare the person duly elected (meaning, the Supreme Administrative Court changes the decision of the electoral commission and by itself declares the new results).

The judgment of the court is final. The procedure before the Supreme Administrative Court is a one-stage procedure without the possibility of ordinary or extraordinary remedies, which does not preclude lodging a constitutional complaint[26] if the constitutional prerequisites for this are fulfilled. Thus, under the terms of the constitutional order, the entire process of elections to local government bodies, from the pre-election relations to the review of the constitutionality and legality of the elections themselves and their results, will be covered by the administrative justice system. This creates the space for developing comprehensive and uncontroversial case law in the field of electoral justice for local self-government bodies at the administrative judge level.

The decision in these cases is to be served to the parties to the proceedings within three days of its pronouncement, as well as to the National Council, the Ministry of the Interior of the Slovak Republic, and the concerned local self-government.

In the **cases of proceedings in the matters of registration of candidate lists for elections** to the National Council of the Slovak

[26] Under Article 127 of the Constitution.

Republic and elections to the European Parliament,[27] the claimant may bring an action for the retention of a candidate on the list of candidates if the State Commission for Elections and Control of Political Party Financing (Štátna komisia pre voľby a kontrolu financovania politických strán) has decided on the registration of the list of candidates with modifications or seeking a decision on the registration of a candidate list if the State Commission has decided to refuse the registration of a candidate list as a whole. In these cases, the applicant is the political party or coalition of political parties concerned, and the defendant the State Commission.

The Supreme Administrative Court shall decide on the application within five days of receipt of the application. If, after examination, the court finds that the action is well founded, it shall, by order, decide that the candidate shall be retained on the list of candidates or choose to register the list of candidates. It shall indicate in its ruling the political party or coalition of political parties and its registered list of candidates.

In **proceedings concerning the acceptance of a nomination as a candidate for the office of President** of the Slovak Republic,[28] the plaintiff may seek a decision on the approval of their nomination as a candidate for President of the Slovak Republic if the President of the National Council of the Slovak Republic has rejected their nomination. A plaintiff is a natural person whose nomination as a candidate has been denied, and the defendant shall be the President of the National Council of the Slovak Republic. The action must be brought within three days of receiving the defendant's notification of the rejection. The administrative court decides on the action within five days of its receipt. Suppose the administrative court finds that the action is well-founded. In that case, it shall decide on the admission of the plaintiff's petition for a candidate for the office of President of the Slovak Republic.

In **proceedings relating to the registration of political parties**[29] the applicant may seek: 1) a declaration that the application for

[27] §§ 273–282, Code of Administrative Judicial Procedure.
[28] §§ 283–292, Code of Administrative Judicial Procedure.
[29] §§ 375–383, Code of Administrative Judicial Procedure.

registration of a political party is not defective (in these cases, the applicant is the preparatory committee of a political party and the defendant the Ministry of the Interior); 2) a review of the defendant's decision to refuse registration of a political party (in these cases the applicant is the preparatory committee of a political party and the defendant the Ministry of the Interior); 3) review of the defendant's decision to refuse to register a change in the particulars entered in the register of political parties or of the defendant's decision to refuse to register a new constitution in the register of political parties (in these cases the applicant is the political party and the defendant the Ministry of the Interior) or 4) seek a declaration that a decision of a body of a political party is unlawful or contrary to the statutes (in these cases the plaintiff a member of a political party and the defendant the concerned political party). In these cases, too, the cassation principle applies. In some cases, the court either declares the decision invalid or sends the case back for a new procedure, with the decision being annulled. However, it does not have the right to reverse the contested decision.

Proceedings concerning actions brought by the Attorney General of the Slovak Republic for the dissolution of a political party[30] are rather extraordinary cases in which the Attorney General may seek the dissolution of a political party, which is in the role of the defendant. The Supreme Administrative Court shall decide on the action at a hearing by judgment within six months from the date on which the action was brought. If the administrative court finds that the action is well-founded, it shall, by rule by judgment, decide on the political party's dissolution. If the political party has no assets, the administrative court shall decide to dissolve it without liquidation. If the political party has assets, the administrative court shall order the liquidation and appoint a liquidator from among the persons in the list of administrators maintained by the Ministry of Justice. The liquidator may not be a member of the dissolved political party. Furthermore, the court shall also pronounce in its judgment that for a period of five years from the date of the decision final, a person who, during the preparation of the statutes or program of

[30] §§ 384–390, Code of Administrative Judicial Procedure.

the political party, if the content of any of these documents was the reason for the dissolution of the political party, or who, during the period when the activity which was the reason for the dissolution of the political party was taking place, was 1) a statutory body or a member of a statutory body of such a political party; 2) a member of the supreme, executive, arbitration or review body of such party; 3) included on the list of candidates of a such political party, may not be a member of the preparatory committee of any political party, a statutory body or a member of a statutory body, a member of the supreme, executive, or of an arbitration and review body of any political party.

Competence cases deal with competence actions between public administration bodies (including central government authorities) and other entities distinct from the courts.[31] The regulation defines the positive and negative conflict of competence. A positive conflict of competence is a dispute in which several public authorities simultaneously claim that they have the competence to carry out an administrative procedure in the same matter or a dispute between a public authority that wishes to carry out an administrative procedure in a case and another entity that wishes to regulate the same issue by its procedure. A negative conflict of competence is a dispute in which several public authorities simultaneously deny their competence in such a way that none of them wants to carry out an administrative procedure in the same matter, or a dispute between a public authority that does not want to carry out an administrative procedure in a case and another entity which denies its competence to regulate the same matter by its procedure. Proceedings may be brought either by the authorities concerned or by the party in whose case the authorities have jointly established or declared that they lack competence.

The Supreme Administrative Court examines the application without a strict procedural form and shall not be bound by its pleas in law in reaching its decision. Unless the administrative court decides otherwise on the action, it shall determine by judgment, without ordering a hearing, which of the public administration bodies has the competence to carry out the administrative procedure

[31] §§ 412–419, Code of Administrative Judicial Procedure.

in the matter or the competence to regulate the matter by its own procedure belongs to another body. The public authority acting contrary to the determination of competence by an administrative tribunal shall immediately terminate the administrative procedure in the manner appropriate under the special regulation governing that procedure. This shall also apply *mutatis mutandis* to any other entity.

Disciplinary proceedings[32] before the Supreme Administrative Court are an exceptional power exercised by the court under the Act on the Disciplinary Rules of the Supreme Administrative Court.[33] Disciplinary liability of judges, prosecutors, bailiffs, and notaries is decided, and corrective measures are imposed by the Supreme Administrative Court of the Slovak Republic in five-member disciplinary chambers. Since these are sanctioning procedures, the provisions of the Code of Criminal Procedure[34] on the basic principles of criminal proceedings, on joint proceedings, on the exclusion of the court and other persons, on the defense counsel, on the acts of criminal proceedings, on evidence, on the decisions of the court, on the main hearing, on the appeal, on the plea bargain and the sentence, on the retrial and the costs of the criminal proceedings shall apply *mutatis mutandis* to the disciplinary proceedings.

The jurisdiction over disciplinary cases is a newly conceived competence of the Supreme Administrative Court, which the

[32] More on this matter: Gajdošová Martina, *Disciplinárna zodpovednosť sudcov a súdna moc – úvahy o disciplinárnom orgáne pre sudcov* [*Disciplinary responsibility of judges and the judiciary – reflections on a disciplinary body for judges*], [in:] *Úvahy o zmenách v ústavnej úprave súdnej moci a ich dopady na rozhodovaciu činnosť Ústavného súdu Slovenskej republiky – IX. ústavné dni* [*Reflections on Changes in the Constitutional Regulation of the Judicial Power and Their Impact on the Decision-Making Activity of the Constitutional Court of the Slovak Republic – IX. constitutional days*], Orosz Ladislav, Grabowska Sabina, Majerčák Tomáš (eds.), Univerzita Pavla Jozefa Šafárika v Košiciach Právnická fakulta, Košice 2021, pp. 98–121.

[33] Zákon č. 432/2021 Z. z. o disciplinárnom poriadku Najvyššieho správneho súdu Slovenskej republiky, https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2021/432/20211201.html (accessed on: 15.12.2022).

[34] Zákon č. 301/2005 Z. z. Trestný poriadok, https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/301/20221201.html (accessed on: 15.12.2022).

Disciplinary Boards have hitherto exercised. To remove any possible future doubts as to whether or not the statutory anchoring of the disciplinary tribunal is sufficient in the case of judges and prosecutors (including the Attorney-General), the disciplinary jurisdiction of the Supreme Administrative Court over judges is established directly in the text of the Constitution.[35] While the exercise of disciplinary authority over other persons (e.g., notaries, bailiffs, lawyers) is anchored constitutionally,[36] it still requires a special regulation by statute.

Conclusions

Regarding the future trends of administrative adjudication in Slovakia, it is also essential to highlight the novelisations of Act No. 757/2004 Coll. on Courts[37] and Act No. 151/2022 Coll. on the Establishment of Administrative Courts,[38] which introducing several relevant provisions of entering into force on 1 June 2023, namely, that territorial-regional courts will supplement administrative adjudication. This will be a fundamental change in the Slovak court system, as it will create a complex administrative court system with regional courts and a supreme court in a relatively short period of time. According to the regulation of the Act on the Establishment

[35] Article 142 section (2) letter c), Constitution.

[36] The disciplinary jurisdiction has some interesting implication towards attorneys. See in detail: Lešková Katarína, *Najvyšší správny súd Slovenskej republiky a jeho disciplinárna právomoc vo vzťahu k advokátom* [*Supreme Administrative Court of the Slovak Republic and its disciplinary jurisdiction in relation to advocates*], [in:] *Úvahy o zmenách v ústavnej úprave súdnej moci a ich dopady na rozhodovaciu činnosť Ústavného súdu Slovenskej republiky – IX. ústavné dni* [*Reflections on Changes in the Constitutional Regulation of the Judicial Power and Their Impact on the Decision-Making Activity of the Constitutional Court of the Slovak Republic – IX. constitutional days*], Orosz Ladislav, Grabowska Sabina, Majerčák Tomáš (eds.), Univerzita Pavla Jozefa Šafárika v Košiciach Právnická fakulta, Košice 2021, pp. 265–276.

[37] Zákon č. 757/2004 o súdoch, https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/757/20230601.html (accessed on: 15.12.2022).

[38] Zákon č. 151/2022 o zriadení správnych súdov, https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2022/151/20230601.html (accessed on: 15.12.2022).

of Administrative Courts, three regional administrative courts shall be established: the Administrative Court in Banská Bystrica, the Administrative Court in Bratislava, and the Administrative Court in Košice. The administrative courts shall commence their activities on 1 June 2023. Until the administrative courts become operational, their jurisdiction shall be exercised by the county courts (*krajské súdy*), which exercised it according to the regulations in force before. The transformation procedure is handled somewhat in a different way as in the case of the Supreme Court and Supreme Administrative Court. In the case of the regional administrative courts, the transfer of jurisdiction, property, and personnel from the county courts is allowed. The details of this transfer of rights and obligations and the transfer of the administration of state property shall be regulated by an agreement between the county court and the administrative court, which shall define in particular the type and extent of the property, rights, and obligations to be taken over.

The regulation also sets up rules for the transfer of judges from the county courts to the administrative courts. According to this, a judge of a county court, the predominant content of whose decision-making activity consists of the agenda of the administrative justice system and who applies for transfer to an administrative court by 28 February 2023, may be transferred to an administrative court without a selection procedure and supervision of the fulfillment of the prerequisites of judicial competence prior to his transfer to an administrative court. Another judge who applies for transfer to the Administrative Court before 28 February 2023 may be transferred without a selection procedure and without the expiry of the prescribed period of time from the date of appointment to the office of the judge.

In this way, the system of courts from 1 June 2023 shall consist of courts of general jurisdiction and courts of administrative jurisdiction. The courts of general jurisdiction shall be 1) district courts, 2) county courts, 3) the Specialised Criminal Court, and 4) the Supreme Court of the Slovak Republic. Furthermore, the courts of administrative justice are administrative courts and 5) the Supreme Administrative Court of the Slovak Republic. In this system, as a general rule, the administrative courts shall hear and

decide administrative cases in the first instance. At the same time, the Supreme Administrative Court will exercise jurisdiction by deciding on cassation appeals against decisions of administrative courts. Still, there will also be a plethora of cases that will be decided in the first instance (the system of jurisdiction explained above will stay intact). This way, the administrative court system will become more permanent, which is expected to lead to more efficient decision-making and more efficient work.[39]

The judiciary is a crucial component of any modern society. It is the branch responsible for interpreting and enforcing the law and ensuring that individuals and organisations are held accountable for their actions. The judiciary's effectiveness is, therefore, essential for maintaining the rule of law, protecting the rights and liberties of citizens, and promoting justice and fairness in society. Given the importance and specificity of administrative adjudication, this is doubly true in its case. Several key factors contribute to the judiciary's effectiveness, which also applies to administrative adjudication.

One of the most important is the independence of the judiciary. For the judiciary to be effective, it must be able to make decisions based on the law and the evidence before it. This means that judges must be able to act independently of political pressure or influence and not be subject to interference from other branches of government or outside sources. In general terms, a way to increase

[39] Of course, the history of administrative adjudication has a longer tradition, but such a high degree of institutionalization has not been the case until now. More on this see: Hanzelová Ida, *Aktuálne o správnom súdnictve v Slovenskej republike* [*Update on administrative judiciary in the Slovak Republic*], [in:] *Správne súdnictvo a jeho rozvojové aspekty. Zborník príspevkov vedeckej konferencie s medzinárodnou účasťou konanej 7.–8. marca 2011 v Trnave* [*Administrative justice and its developmental aspects. Proceedings of the scientific conference with international participation held on 7–8 March 2011 in Trnava*], Michal Maslen (ed.), Eurounion, Bratislava 2011, pp. 23–26. Trellová Lívia (ed.), *Nový Správny súdny poriadok: návrh: zborník z medzinárodnej konferencie konanej v dňoch 25. až 27. septembra 2014 v Dunajskej Strede* [*New Administrative Procedure Code: draft: proceedings of the international conference held from 25 to 27 September 2014 in Dunajská Streda*], Univerzita Komenského v Bratislave, Bratislava 2014, p. 348. Seman Tibor, *Verejná správa v správnom súdnictve* [*Public administration in administrative justice*], Univerzita Pavla Jozefa Šafárika v Košiciach Právnická fakulta, Košice 2016, p. 180.

the independence of the judiciary is to establish and protect the principle of judicial review. This means that courts have the authority to interpret the law and declare laws or government actions unconstitutional if they violate the principles of the constitution. This ensures that the judiciary can serve as a check on the other branches of government and protect individual rights. Judicial independence is also positively influenced by providing adequate funding and resources for the courts. This can include funding for court operations, personnel, technology, and resources for continuing education and professional development for judges and court staff. Adequate financing can help ensure that the courts can function effectively and independently without interference or influence from other branches of government. Additionally, implementing fair and transparent processes for selecting, appointing, and retaining judges can also help to increase judicial independence. This can include establishing independent commissions or committees to evaluate judicial candidates and make recommendations for appointments, as well as implementing processes for evaluating the performance of judges and removing them from office for misconduct or incompetence. Finally, protecting the independence of the judiciary also requires ensuring the safety and security of judges, court personnel, and the general public. This can include providing security measures for courthouses and other court facilities and supporting initiatives to address threats or violence against judges and court staff.[40]

Another critical factor is the quality of judges. The judiciary's effectiveness depends heavily on its judges' knowledge, skill, and integrity. Judges must be well-trained and knowledgeable about the law and must be able to apply it fairly and consistently. They must

[40] The independence of the judiciary is rather an important issue. More on this: Šikuta Ján, *Materiálna indemnita a procesnoprávna imunita sudcov* [*Material indemnity and procedural immunity of judges*], [in:] *Úvahy o zmenách v ústavnej úprave súdnej moci a ich dopady na rozhodovaciu činnosť Ústavného súdu Slovenskej republiky – IX. ústavné dni* [*Reflections on Changes in the Constitutional Regulation of the Judicial Power and Their Impact on the Decision-Making Activity of the Constitutional Court of the Slovak Republic – IX. constitutional days*], Orosz Ladislav, Grabowska Sabina, Majerčák Tomáš (eds.), Univerzita Pavla Jozefa Šafárika v Košiciach Právnická fakulta, Košice 2021, pp. 26–44.

also be able to make difficult and sometimes unpopular decisions and must be able to withstand the pressures that come with serving on the bench.

The following key factor is the availability of adequate resources. For the judiciary to be effective, it must have access to the resources required to carry out its functions. This includes adequate funding, staffing, facilities, and access to technology and other tools to help judges and court staff do their jobs more efficiently and effectively.

The public's confidence also influences the judiciary's effectiveness in the judicial system. When the public has confidence in the judiciary, they are more likely to respect its decisions and cooperate with the legal system. This can help to promote compliance with the law and to support the rule of law. On a side note, the public's confidence in the judicial system is a relevant question for all ex-socialist states. One way to raise the public's confidence in the judicial system is to improve transparency and accountability. This can be done by making court proceedings more open to the public, providing clear explanations of judicial decisions, and ensuring that judges and other court officials are held to high ethical standards. Another way to increase confidence in the judicial system is to address issues of bias and discrimination. This can be done by implementing fair and unbiased hiring and promotion practices, providing diversity and inclusion training for judges and court staff and instituting systems to identify and address unconscious bias in the courtroom. Additionally, investing in education and outreach programs can help the public better understand the role and function of the judicial system. This can include providing resources and information on the court system and the legal process and offer opportunities for the public to engage with the courts and judicial officials. Finally, ensuring that the judicial system has the resources, it needs to function effectively can also help to boost public confidence. This can include providing adequate funding for court operations and personnel, as well as investing in technology and other tools to improve the efficiency and effectiveness of the courts. Overall, raising the public's confidence in the judicial system will require a combination of efforts to increase transparency and accountability, address issues of bias and discrimination, educate

the public, and provide the courts with the resources they need to function effectively.

In the context of the judiciary's efficiency in administrative justice, it is also essential to mention the duration of court proceedings. The speed with which decisions are made in the judiciary is not necessarily an indicator of effectiveness. Still, in the framework of the administrative judiciary, it gains in its importance. It has to be acknowledged that while the court needs to make timely decisions, particularly in cases where urgent matters are at stake, the primary goal of the judicial system should be to ensure that decisions are made correctly and justly rather than being made quickly. In some cases, taking the time to consider the evidence and arguments presented thoroughly may be necessary to make a fair and accurate decision. This may require additional time and resources, but ultimately it is crucial to ensure that the judicial system can reach the correct decision, even if that takes longer than might be desirable. Furthermore, the speed with which decisions are made can sometimes hinder the judiciary's effectiveness. Decisions made too quickly, without sufficient consideration of the evidence and arguments, can lead to errors and injustices. This can undermine the public's confidence in the judicial system and make it more difficult for the judiciary to promote justice and fairness in society. In administrative adjudication, several regulatory models have been observed to maximise the time of some court proceedings (it is usual in electoral cases). This is not a general phenomenon for all types of proceedings. Still, there are circumstances in the administrative judiciary system where the speed of judicial decisions is paramount compared to other requirements.

In light of the above, it is hoped that the administrative judiciary in Slovakia will develop into a high-quality, transparent, citizen-friendly, and citizen-confident institution, thus promoting the values of the rule of law and social justice in society.[41]

[41] Of course, the development of the system must be kept under constant scrutiny, with a view to its improvement, and attention must be paid to the soundness of each reform process, to the critical points and directions for development that have been identified. More on this matter: Orosz Ladislav, *Justičná*

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Artificial Intelligence and Criminal Law – Risks and Challenges in Different Fields of the Use of AI (Self-Driving Vehicles & New Sexual Offences in the Light of AI)

Self-driving vehicles

The most important feature of self-driving (or autonomous) vehicles, is that they participate in transportation in an AI-assisted way. With this in mind, we have of course, as we have seen, modelled the general characteristics of AI in a number of cases with examples from the field of self-driving vehicles (e.g., the issue of end-use). The issues already covered will not be revisited in this section, but instead I will limit myself to those issues that have not been raised in the previous section in relation to autonomous means of transportation.

It should be noted at the outset that there are a number of fundamental criminal law problems that may arise in relation to self-driving vehicles, the resolution of which may pose particular difficulties for criminal law practitioners and legal scholars analysing the issue. The view, expressed by a private law author, that "criminal law issues are of relatively little importance in the context of self-driving cars, at least in the sense that they do not pose new challenges to the science of criminal law", is therefore to be considered as highly misplaced. The work cited does not cite any criminal law works in support of its position in this context, although it is true that if it had consulted the relevant literature it would have found only positions contrary to the one cited. Thus, it is clear that

Gurney or Westbrook in the US, Weigend in Germany, Prakken in the Netherlands and, among Polish authors, for example, the duo of Brozek-Jakubiec, see a significant criminal law challenge to self-driving vehicles.

Legal history

In order to explore the legal history of the issue of self-driving vehicles, it seems essential to examine which devices and technical achievements can be considered as precursors of self-driving vehicles and, in this light, could have been the subject of criminal law investigations in earlier times. In this area, the relevant reference points are basically industry and, of course, transportation.

The industrial revolution of the mid-19th century brought with it the beginning of the automation of work processes that had hitherto required a high degree of autonomous human activity, which in many respects created a new situation. On the one hand, activities involving considerably greater risks (e.g., rail traffic, factory production) and, on the other, the foundations of legal liability based on human action, which had hitherto been taken for granted, became open to discussion (i.e., whether we can speak of human action in relation to, for example, a rail accident or injury caused by objects falling from an automated production line). The first relevant legislation was the 1874 Act XVIII on liability for death or personal injury caused by iron tracks. 1. § 1: "[i]f, in the course of the operation of an iron railway, although not yet handed over to public use, any person is killed or bodily injured, the iron railway company concerned shall be liable for the damage thereby caused, unless the company proves, that the death or personal injury was caused by an event beyond the control of the company (force majeure), or by the negligence of a third party which the company was unable to prevent, or by the fault of the person killed or injured".

As regards the concept of "industrial culpa", reference should be made to Article XXVIII of 1893 on the protection of industrial and factory workers against accidents and on industrial inspectors. This Article contained no rules on penalties, only provisions to prevent

industrial accidents. In the field of criminal law, if the breach of the obligations laid down in the above-mentioned background legislation led to one of the results described in the Chemistry Code, it was generally possible to establish manslaughter (Article 290) or assault (Article 310).

A radical change in the criminal legislation of both industry and transport was brought about by the Third Amendment to the Csemegi Code (Act XLVIII of 1948 on the elimination and replacement of certain defects in criminal law; hereinafter referred to as the Third Amendment). Bn. III. Chapter VI introduced for the first time in our domestic criminal law a constellation of offences of material offence instead of "endangering life or bodily integrity. Violation of the rules of occupation" under the following heading: "Article 20(1) Whoever, by knowingly violating the rules of his profession or occupation or by knowingly neglecting the duties pertaining thereto, puts the life or physical integrity of others in imminent danger, commits an offence and shall be punished with imprisonment for a term of one to five years. (2) The perpetrator of an act specified in paragraph (1) shall be punished by imprisonment for a term of one to five years if the act resulted in serious bodily injury or was committed for pecuniary gain or repeatedly or continuously, and if the act caused the death of the victim, the punishment shall be imprisonment for a term of up to ten years. Section 21: Whoever commits the act specified in Section 20(1) negligently shall be punished for a misdemeanour by imprisonment for a term of up to one year, and whoever commits the act specified in Section 20(2) negligently shall be punished for an offence by imprisonment for a term of up to three years."

The legislator has thus supplemented the previous criminal law, which was based solely on the degree of harm caused by the offender, by criminalising real danger in the form of a completed offence. In situations of increased danger, such as factory production or road traffic, this solution represented a significant improvement. It is also a not insignificant development that Article 24 of Book III of the Criminal Code increased the penalties for manslaughter and assault.

Subsequently, the development has been towards an increasingly autonomous regulation of traffic criminal law in the area of high-risk activities. Section 258 of the 1961 Criminal Code already

provided for the punishment of the offence of endangering the safety of persons in the course of an occupation in a form similar to that of today, with the essential difference that, under paragraph 4 of the same provision, the traffic rules relating to the driving of vehicles were also to be considered as occupational rules. The corollary of this statutory construction was that those who caused danger or injury while driving a vehicle were essentially punished by the courts of the time on the basis of the facts. Subsequently, Decree-Law No. 28 of 1971 amending and supplementing the Penal Code made disqualification from driving a vehicle (Article 11) a separate sanction and established the facts of a number of traffic offences still known today (e.g., offences against road safety, road endangerment: Article 43). In Chapter XIII of the 1978 Criminal Code, traffic offences were given a separate chapter, and these were – with minor amendments – incorporated into the current Criminal Code.

Overall, it can be concluded that in the industrial and transport context, which can be regarded as the forerunners of self-driving vehicles, there was a gradual autonomisation and differentiation of criminal law, as well as a progressive advance and tightening of liability. Increasingly automated production processes and the proliferation of motor vehicles may explain the development described here.

General prerequisites for self-driving vehicles

Before examining the liability issues that arise, it is necessary to briefly frame our inquiry. Perhaps the most interesting in this context would be to explore the historical and philosophical background of the subject. In the former context, it should be pointed out that the invention of artificial intelligence, intelligent robots and thus driverless vehicles, has long seemed impossible and has been a subject in fantasy and science fiction literature, which has given rise to countless works, from Asimov's "I, the Robot" to Clarke's "Space Seiya".

As for the first philosophical approaches, it is interesting to note that the 17th century classical philosopher René Descartes argued that "if there were machines that resembled our bodies and imitated our actions as far as morally possible, we would still have two sure

means of establishing that they were not really human. The first is that machines could never use words or other signs as we do, i.e., to communicate our thoughts to others. (…) The second is that, although they would do some things as well or better than any of us, they would inevitably fail in others; and from this we might learn that they do not act consciously, but only by the arrangement of their organs." Interestingly, this essentially coincided with the views of Hubert Dreyfus, the famous philosopher from the University of California, who died in 2017, who at the time said that "it has become clear to everyone that this method of creating general intelligence has failed", and that ultimately artificial intelligence can never reach the level of human thinking. However, a quarter of a century later, it now seems that artificial intelligence, precisely because of its capacity for self-improvement, can develop self-driving vehicles to previously unforeseen levels, which may in turn call into question the validity of earlier statements.

In the early days of the automobile industry, literature mentions the name of Bertha Benz, who made her first long journey in August 1888 in an automobile developed by her husband Karl Benz. However, as far as our narrower subject of self-driving vehicles is concerned, the first appearance of these vehicles dates back to 1939, the year of the New York World's Fair, which at the time was, of course, very much in the science fiction category. At the General Motors stand, in a mock-up of the imaginary city of Futurama, the first self-driving cars would communicate by radio signals and, a few decades later, would spare the ordinary driver the burden of driving. Although the technology (and with it the vision) did not work, today's technology has reached a level where it can help the driver, and even replace him. Where this technology can take us is illustrated by the recent legislation in the US state of California, which starting in 2019 will allow fully driverless vehicles to enter the road.

Unfortunately, such devices have also caused fatal traffic accidents. On 18 March 2018, an Uber self-driving car killed a pedestrian in Arizona. In another case in late 2017, a self-driving motorbike caused an accident during an unfortunate left turn.

As a brief overview, it is also necessary to refer to the technical/information technology background of self-driving vehicles. This

is based on the so-called SLAM technology (simultaneous localisation and mapping), which essentially creates and updates a map of the vehicle on which it positions itself. However, this does not yet allow full automation, so a specific grouping of the different levels of sophistication is needed, which according to SAE is as follows:

The human driver performs all operations.

1. An automated system assists the driver in some way, e.g., in steering or accelerating or decelerating. This is the case, for example, with self-parking vehicles, which are already in operation today, where the driver only has to apply the brakes.
2. The automated system performs some of the driving operations itself, which the driver only supervises, while the rest is done by itself. An example of a difference is that a car that accelerates and steers at the same time belongs here, while a car that only automates speed belongs in group 1). This includes, for example, ACC (adaptive cruise control) technology.
3. The most important boundary is between 2) and 3); at this level the car not only performs the task but also exercises control, while the human driver must be ready to take control when the system requires it. Currently, this includes Tesla's software update 8.1, which allows some models to use the so-called "Autosteer" feature, which – up to 80 mph – automatically monitors for lane changes, checks for blind spots and then changes lanes when the turn signal lever is pressed; however, the driver must hold the steering wheel throughout the process.
4. The automated system both performs and supervises the driving tasks, it can control itself without the intervention of a human driver, but only in specific situations.
5. The driving ability of an automated vehicle is the same as that of an average human who has learned to drive a car.

Among the introductory thoughts, it is also necessary to highlight the economic and sociological aspects that can be expected with the spread of self-driving vehicles. The most noteworthy data in this context is that which suggests a drastic reduction in the number of accidents involving physical injury or death in the transport sector. For example, a recently published study suggests that the average

of 41,000 traffic fatalities per year in the USA could be reduced to around 200 per year if self-driving vehicles (including cars and even trucks) were to be introduced. In addition, self-driving vehicles could be used by people who would otherwise be unable to do so because of old age or a disability. A particularly interesting question from the point of view of criminal law will be whether driving under the influence of alcohol (Article 236 of the Criminal Code) can be established if the "offender" gets behind the wheel of a self-driving car after having consumed alcohol. Employers are likely to take the benefits into account when ordering self-driving technology, which implies that, for example, self-driving trucks will be able to drive 24 hours a day, and will therefore not need the rest periods, paid holidays, etc., that truck drivers require and are guaranteed by law. If the explosion in the use of self-driving vehicles is to bring such benefits, it cannot be ruled out that there will be massive job losses, for example among bus and lorry drivers and taxi drivers, which will obviously have to be addressed in some way by decision-makers.

Self-driving vehicles and general issues of legal liability

Vehicle traffic covers virtually every aspect of modern human life, and it is therefore quite obvious that there is probably no area of law that is not related in one way or another to the problem of self-driving vehicles. However, for the sake of space and simplification, we can refer in this section only to the three areas of law that are considered most relevant alongside criminal law, namely civil law, labour law and, finally, perhaps the most important area, transportation law.

In civil law (private law), there are basically three forms of liability that can be applied in the event of damage caused by the operation of a self-driving vehicle. In addition to the general principles of accessory liability and product liability (Civil Code, §§ 6:159–170), the strict rules of liability for dangerous goods (Civil Code, § 6:535), which virtually exclude the possibility of rescue, cannot be ignored. Finally, the provisions on product liability under civil law (Civil

Code, § 6:550–559) also allow the manufacturer of a self-driving vehicle to be held liable on an objective basis.

The solutions in labour law only partly differ from the civil liability constellations. In this context, the employer's liability for damages (Article 166 of Act I of 2012 of the Labour Code) may arise, as may the sectoral regulations on accidents at work (Article 52(1) of Act LXIII of 1997 on compulsory health insurance benefits) or accidents at work (Article 87(3) of Act XCIII of 1993 on occupational safety and health).

It may be pointed out here that, as far as the assessment of possible accidents involving self-driving vehicles is concerned, the application of civil and labour law is considerably easier than the application of criminal law. In the case of the former, the principle of *neminem laedere* means that liability is essentially based on objective grounds, from which exemption is possible only if there are specifically defined grounds for exclusion, which can and must be clearly based on the solutions found in previous and current case-law. The assessment of criminal liability, on the other hand, may be much more problematic: there is no presumption of illegality, and in addition to the reverse burden of proof, it is also necessary to prove the danger to society and personal guilt or culpability in criminal proceedings in order to hold the specific defendant liable.

As a special field of administrative law, transportation law is itself a complex system of rules. It includes, first and foremost, the Highway Code, Decree-Law No. 3 of 1980 on the proclamation of the Convention on Road Traffic, opened for signature in Vienna on 8 November 1968, and Act I of 1988 on road transportation. Essential relevant rules are contained in the Government Decree 410/2007 (XII. 29) on the scope of traffic offences subject to administrative fines, the amount of fines for infringements of the provisions on these activities, the procedure for their use and the conditions for cooperation in control, and in the Government Decree 326/2011 (XII. 28) on road traffic administrative tasks, the issuance and revocation of road traffic documents. The latter includes Chapter XXVII, which deals with priority traffic offences (e.g., drunk driving, disturbing the flow of traffic), and Chapter XXVIII, which deals with other traffic-related offences (e.g., minor traffic offences, railway

offences). At the same time, it is necessary to refer to the subsidiarity of traffic offences under Article 2(4) of the Act, since no offence can be established if the act or omission constitutes a criminal offence, nor if the act or omission is subject to a penalty under an administrative procedure by law or government decree, with the exception of a procedural penalty. Finally, the most recent development relevant to our topic is Article 2(4)(k) of Decree No. 5/1990 (IV. 12) of the Ministry of Transport, Building and Urban Development (hereinafter referred to as the Ministry of Transport, Building and Urban Development) on the technical inspection of road vehicles (hereinafter referred to as the Ministry of Transport, Building and Urban Development), which entered into force on 27 April 2017. According to this, a test driver is a driver who supervises the testing of a self-driving vehicle for development purposes by being present in the self-driving vehicle under test and is able to take control of the self-driving vehicle for development purposes without delay at any time. This definition can also be used to define "drivers" of self-driving vehicles.

Self-driving vehicles and criminal liability for traffic offences

Criminal law assessment, unlike private law, for example, does not make use of the presumption of illegality, which in all individual cases places the onus of proving guilt on the authorities involved. In this context, it is therefore first and foremost a question of whether the offence is punishable under the Criminal Code. The activity (or omission) of the self-driving vehicle is likely to be dealt with in a different way from the previous approach to the concept of an offence in the criminal law. New solutions may also be needed to review the obstacles to criminalisation and to establish the scope of possible underlying criminal liability. The problems of the qualification of the offender cannot be ignored, nor can the question of the criminal law application of other legal norms that fill the framework. Traditional concepts of intentionality and negligence may also need to be rethought.

Traditional criminal liability has long been described in terms of the fact that, in the case of an act committed by a natural person (a human being) and declared a criminal offence (ideally by law), the court (exceptionally, in the case of certain criminal law measures, the public prosecutor's office) has established the person's criminal liability and imposed a sanction (penalty or measure). If this well-established construction is projected back onto the SLAM technology's named cases, it can be concluded that this classical criminal law solution can only be maintained up to the third level. From the fourth level onwards, there is either no natural person "driver" of the vehicle or only a possible one, so that one of the most cardinal questions is who should or can be held criminally liable in such cases.

For our continental legal thinking, as I alluded to in the chapter on AI, it is fundamentally alien that the robot should be the subject (perpetrator) of criminal liability.

In our circumstances, the vehicle cannot therefore be liable on its own, so the question arises as to who should be held criminally liable in the event of damage. In the case of traffic offences (e.g., causing a road accident, driving under the influence of alcohol), traditional criminal liability lasts as long as the offender is engaged in the conduct, typically while driving. An obvious solution would be to add to the Highway Code the definition of "driver" as "the person who puts the vehicle into self-driving mode" or "man behind the machine". It would also be possible to extend the concept of driver to include passengers and to transpose the definition of the above-mentioned Regulation on the enforcement of the law on driving offences into the Highway Code. As we have seen in the case of MI, the construction of *actio libera in causa* could also be considered.

The liability that could be assumed in connection with self-driving vehicles, in addition to the liability of legal persons, also suggests the possibility of criminal liability that could be objectified (if you like, taking on a private law dimension), whereby, were it to materialise, the guilt (intentional or negligent) of a specific person would not have to be proven in criminal proceedings, but only the operator/owner of the vehicle that caused the accident.

There is also the possibility of so-called "underlying" criminal liability, which, as has already been mentioned, is not unprecedented in our existing criminal law.

Although a number of road traffic offences could be investigated in the context of an accident involving a self-driving vehicle, it is conceivable that the most appropriate solution in the latter context would be to establish a *sui generis* road traffic offence.

In our current circumstances, there is no doubt that we can expect an explosion of self-driving vehicles in the very near future. This situation is certainly to be welcomed, as safe transport is in the public interest. As it does with all social changes, the law must follow suit, for example by modernising the Highway Code and traffic offences. However, it should be stressed that the solution to any social problems that may arise should not be sought primarily through the law (and especially not through criminal law).

The process of convergence between the different areas of law may continue in the future, as is also illustrated by the phenomenon of the objectification of criminal liability. However, the purpose and meaning of the regulation of each area should not be lost sight of. It is foreseeable that it will be difficult or impossible to place future socially dangerous acts within the coordinates of traditional criminal law. This forecast may inevitably require new paths to be paved. Lastly, it may be argued that the *ultima ratio* nature of criminal law may be in favour of reducing the penalties for certain traffic offences and even considering their decriminalisation at a later stage, since the social benefits to be expected from the reduction in the number of accidents resulting from the spread of self-driving vehicles are greater than the prospect of necessarily prosecuting the expected ever smaller number of offenders under the current rules and penalties.

The new sexual offences in the light of digitalisation

In this paper, I will present some of the new behaviours with a sexual dimension (also) brought to life by the opportunities offered by digitalisation, which are considered dangerous to society and

which are expected to appear soon (or have already appeared), thus posing a challenge from the point of view of law enforcement and legislation.

Deepfake

The category is difficult to translate into English. The term "deepfake" is a portmanteau. The first part of which – "deep"– refers to the deep learning, AI-based technology already discussed; the second term – "fake" means not real. In a nutshell, "deefake" refers to an image or video footage manipulated by algorithms to make a life-like montage of someone's face on a shot – typically a pornographic shot – that does not originally have it.[1] It is, in essence, a hyperrealistic superimposition, a digital version photographic retouching. In practice, however, deepfakes are not only used in connection with pornographic content: they are also often used, for example, to discredit political or business opponents. In the USA, Article 18 of the Code of Virginia has since 2019 made it a crime under the so-called revenge pornography offence to make a person appear to be a person in pornographic material for sexual purposes (deepfake pornography, see also the next point). The first state to make deepfake a crime for political manipulation was Texas. The Texas Senate Bill 751, as of 1 September 2019, punishes with imprisonment for up to one year or a fine of up to $4,000 anyone who makes a deceptive video with the intent or result of influencing the outcome of an election. Finally, California's comprehensive legislation of 11 October 2019, which includes both deepfake manipulation of political campaigns (Assembly Bill No. 730) and pornographic manipulation of recordings (Assembly Bill No. 602), is worthy of note.

In Hungarian criminal law, deepfake may constitute, fundamentally, the crime of the misuse of personal data that lawmakers had already taken under consideration, in light of Article 3(3b) of the Info Act, which considers biometric data to be special personal data,

[1] R.A. Delfino, *Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn's Next Tragic Act*, "Fordham Law Review" 2019, no. 3, pp. 892–893.

for example, personal data concerning the physical characteristics of a natural person that allows or confirms the unique identification of the natural person, such as a facial image, so that if someone's facial image is added to the body of a person in a pornographic film, this act can be considered as unauthorised personal data processing (of course) without his or her consent. And if it is done for profit or to cause substantial damage to interests, the abuse of personal data under Article 219(1) a) of the Criminal Code may be deemed to have been committed. In a relationship context, the result of substantial damage to interests may of course be of more practical significance. This could be the case if someone suffers a disadvantage in his/her workplace or private life due to the publication of a fake photo (e.g., dismissal from employment, interruption of a new relationship). Kinga Sorbán also raises the possibility of harassment in the context of deepfake, but this could only be the case if the perpetrator regularly sends the manipulated image to the victim him- or herself.[2] If, on the other hand, the transmission is to another person, harassment can be excluded. However, the offences of blackmail or making a false image or sound recording capable of defamation (Article 226/A of the Criminal Code) and publication (Article 226/B of the Criminal Code) may arise.

The category of deepfake does not, in my opinion, carry an additional danger to society that would require the creation of a separate factual situation, because if significant harm to the interests can be established, the act, as we have seen, can be classified as misuse of personal data without consent. If such a result cannot be established, then, pursuant to Section 2:43(g) of the Civil Code, the infringement of the right to the likeness may still be subject to the so-called likeness suit pursuant to Section 502(1) of the Civil Procedure Act of 2016, CXXX of 2016 (hereinafter: the Civil Procedure Act). In view of these circumstances, a further expansion of the criminal threat in this area is not recommended.

[2] K. Sorbán, *A bosszúpornó és deepfake pornográfia büntetőjogi fenyegetettségének szükségességéről*, "Belügyi Szemle" 2020, no. 10, pp. 99–100.

Revenge porn

Revenge pornography usually involves the publication of pornographic images of the victim by the ex-partner out of jealousy, in revenge for the break-up of a relationship.[3] Such images or videos may be of the (typically nude) victim alone, of a sexual act between the perpetrator and the victim, or may be manipulated rather than real, where revenge pornography can be combined with deepfakes. In the US literature, revenge pornography is understood as a subset of a broader concept, nonconsensual pornography (NCP). This category covers the distribution of private, explicit images of the victim without the consent of the victim.[4]

Revenge pornography has been criminalised in some US states since 2000 (first in West Virginia and then in New Jersey), and by 2019, it had been criminalised in 41 states.[5] In addition, as early as 2014, there was already a call for federal legislation.[6] In 2012, there was a notorious case of a victim who committed suicide because of pornographic images of her that had been made public.[7] As an example of a national provision, Section 245 of the New York State Penal Law (N.Y. Penal Law), which as of 2019 makes it a criminal offence to publish a still or video image of a person who is without clothing or if the image is an explicit depiction of a sexual act or shows the the victim performing a sex act. To establish the elements of the offence, the it must be established that the offender intended to cause emotional, material or physical harm to the victim. In Ohio,

[3] J.S. Sales, J.A. Magaldi, *Deconstructing the Statutory Landscape of 'Revenge Porn': An Evaluation of the Elements That Make an Effective Nonconsensual Pornography Statute*, "American Criminal Law Review" 2020, no. 4, p. 1501.

[4] B. Armesto-Larson, *Nonconsensual Pornography: Criminal Law Solutions to a Worldwide Problem*, "Oregon Review of International Law" 2020, no. 1, p. 181.

[5] https://www.nbcnews.com/news/us-news/new-york-poised-join-41-other--states-criminalizing-revenge-porn-n977871 (accessed on: 29.03.2021).

[6] See T. Linkous, *It's Time For Revenge Porn to Get a Taste of Its Own Medicine: An Argument For the Federal Criminalization of Revenge Porn*, "Richmond Journal of Law & Technology" 2014, no. 4, pp. 1–39.

[7] J.S. Sales, J.A. Magaldi, *Deconstructing the Statutory Landscape of 'Revenge Porn': An Evaluation of the Elements That Make an Effective Nonconsensual Pornography Statute*, "American Criminal Law Review" 2020, no. 4, p. 1508.

the knowing disclosure of a nude or an explicit image of a person performing a sexual act is sufficient to constitute the offence.[8]

In 2018, revenge pornography was addressed by federal law in Australia. The Enhancing Online Safety Act added the offence of non-consensual sharing of intimate images to the 1995 Criminal Code Act, with a maximum penalty of 7 years imprisonment.

The non-consensual sharing of intimate images was criminalised in England and Wales in April 2015 in England and Wales, posting images and videos with explicitly sexual content on the internet is a criminal offence (Criminal Justice and Courts Bill), punishable by up to 2 years imprisonment.[9]

Revenge pornography, like deepfake, may primarily constitute a misuse of personal data, and if the perpetrator threatens the victim, for example, to make their joint photos public if he or she does not have sexual relations with him or her again, sexual coercion (Section 195 of the Penal Code) may be established. Unjustified claims to property may also involve the offence of extortion. The requirement of regularity means that harassment may also be established, albeit with less practical relevance.

In connection with this act, *de lege ferenda,* I consider it more conceivable to regulate it as a *sui generis* criminal offence. The reason for this is that revenge porn also infringes an additional legal subject matter against which neither the laws against the misuse of personal data nor any other of the aforementioned offences can fully protect. This legal object is a sub-aspect of the right to sexual self-determination, namely the right to decide for oneself, in relation to pornographic recordings made with the consent of the victim, whether and to what extent to make such recordings public. Thus, in the area of offences against sexual freedom and sexual morality, for example, the offence of unauthorised disclosure of pornographic material could be addressed in Article 205/A of the Criminal Code, which would be committed by anyone who makes available or

[8] Ohio Revised Code Annual § 2917.211.

[9] M. Yar, J. Drew, *Image-Based Abuse, Non-Consensual Pornography, Revenge Porn: A Study of Criminalization and Crime Prevention in Australia and England & Wales*, "International Journal of Cyber Criminology" 2019, no. 2, pp. 578–594.

discloses pornographic material of another person to a third party without the consent of that person, unless a more serious offence is committed. These offences could be regulated as misdemeanours punishable by up to two years' imprisonment, and the perpetrator may be subject to civil as well as criminal prosecution.

Upskirting

Upskirting literally means "up the skirt", which typically involves taking unauthorised pictures or videos of female victims' crotches from below.[10] Of course, cameras existed before the advent of digitalisation, but it is only in the last decade or so that large numbers of people have a smartphone with the ability to take high-quality pictures. Unfortunately, technological progress in this area has had a criminogenic effect, as it is easy to take such pictures or videos of an unsuspecting victim quickly and often unnoticed.

As regards the historical aspects, it is worth mentioning that this act has a very long history, so that even in Roman law there was already a case of *adtemptata pudicitia*, the seduction of unmarried girls or married women in public places.

Scotland was the first country in the UK to make upskirting an offence. Section 9 of the Sexual Offences (Scotland) Act, which came into force in 2010, penalises so-called voyeurism, which is essentially the covert observation of the sexual activity of another person. However, subsection 4B of that Act makes it a separate offence to take a photograph of a victim's genitals or buttocks while the victim is clothed, without the consent of the victim (or a reasonable presumption of consent), regardless of whether the victim is wearing underwear.[11]

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[10] See J.T. Marvin, *Without a Bright-Line on the Green Line: How Commonwealth v. Robertson Failed to Criminalize Upskirt Photography*, "New England Law Review" 2015, no. 1, p. 124.

[11] To the Scottish regulation see G. Lipschitz, *Can the Issues of Cyberbullying and Sexting Be Addressed by Legislation Alone? A Critical Analysis of the Current Legislative Measures and Societal Measures Needed to Protect Our Youth in the Digital Realm*, "Edinburgh Student Law Review" 2020, no. 1, p. 71.

Subsequently, following an incident involving one Gina Martin in Hyde Park, London, in July 2017,[12] the legislature of England and Wales had to take action, which finally took place in April 2019, and upskirting was added to the Sexual Offences Act 2003, through the Voyeurism (Offences) Act 2019. Thus, section 67A(2) of this Act, like the Scottish legislation, makes it an offence to take a photograph of the groin, under clothing, without permission. The penalty is imprisonment for up to two years.

The legislation in the US was triggered by an incident on 11 August 2010 when one Michael Robertson, travelling on a train in Boston, used his mobile phone to take a photo of a woman's skirt. In *Commonwealth v. Robertson*,[13] the Massachusetts Supreme Judicial Court ruled that upskirting was not punishable under Massachusetts General Law 272, Chapter 105(b), after that statute criminalised, at the time of the offense, anyone who videotaped or observed, through a digital device, a person who was partially or fully nude. However, in the case at hand, the victim was wearing underwear, and the court did not find that she was partially naked.[14] In a typical development, the ruling caused such a public outcry that the Massachusetts State Legislature amended the relevant legislation 2 days after the judgment was delivered to make upskirting punishable also in relation to a victim wearing underwear.[15]

In the German legal literature, Gloria Berghäuser has examined whether upskirting can be covered by a provision of the German Criminal Code. She sees this area as unregulated, but draws attention to the fact that in the event of criminalisation, it is essential to consider what interests the legislator would like to protect with the new offence, what conduct should be punished and whether it

[12] See https://www.dailymail.co.uk/news/article-6602107/Upskirting-victim--tells-horrifying-moment-realised-man-took-picture-skirt.html (accessed on: 15.05.2021).

[13] N.E.3d 522 (Mass. 2014).

[14] See J.L. Stathi, *Criminal Law – When Upskirting Was Not Illegal: a Court Ordered Legislative Fix – Commonwealth v. Robertson*, 5 N.E.3D 522 (Mass. 2014), "Suffolk Journal of Trial & Appellate Advocacy" 2015, no. 1, pp. 333–343.

[15] K. Kong, *A New Mens Rea for Rape: More Convictions and less Punishment*, "American Criminal Law Review" 2018, no. 2, p. 273.

would not be sufficient to create a liability for the offence.[16] Recently, however, the German legislator finally made this conduct a punishable offence (StGB § 184k).

Finally, to return to a US source for a moment, Michael Whiteman analyses the impact of technological developments on law. He cites the examples of upskirting and bitcoin, and uses these two typical developments in digitalisation to show that the rule of law doctrine does not allow courts to expand the interpretation of old criminal law, but instead requires the legislature to act where digital changes create loopholes that cannot be penalized.[17]

With this in mind, I would emphasise that the criminalisation of upskirting should also be considered by future domestic legislation. It cannot be regarded as a sexual act [Section 459(1) (27) of the Criminal Code], because it necessarily requires physical contact between the perpetrator and the victim, so that the establishment of more serious sexual offences (such as sexual violence or sexual coercion) is certainly out of the question. A form of indecent assault (Article 205 of the Penal Code) may be theorised. However, in order for Article 205(1) of the Penal Code to be applicable, it is necessary that the perpetrator, motivated by sexual desire, exhibits himself in a lewd manner to others. Paragraph 205(2) of the Penal Code, as a subsidiary offence, may only be committed by a person over the age of 18 against a victim under the age of 14, also motivated by sexual desire, by engaging in indecent conduct. However, the taking of photographs is not considered to be indecent assault. Thus, the finding of these turns of events can in principle be excluded in the context of upskirting. In the context of indecent assault under Section 205(3) of the Criminal Code, the law punishes, according to the relevant ministerial reasoning, conduct which is not seriously indecent and which therefore cannot amount to sexual violence or sexual coercion. The commentary literature, which refers to

[16] G. Berghäuser, *Upskirting und ähnliche Verhaltensweisen Unbefugte fotografische oder filmische Aufnahmen unter der Oberbekleidung*, "Zeitschrift für Internationale Strafrechtsdogmatik" 2019, no. 10, p. 475.

[17] M. Whiteman, *Upskirting, BitCoin, and Crime, Oh My: Judicial Resistance to Apply Old Laws to New Crimes – What Is a Legislature to Do?*, "Indiana Law Journal Supplement" 2020, no. 5, pp. 72–78.

this type of offence as objective indecency, includes minor indecent conduct requiring physical interaction (for example, holding the victim's breasts or buttocks against his or her will, kissing the victim),[18] in other words, those which could have been considered as defamatory acts under the 1978 Criminal Code [Section 180(2) of the 1978 Criminal Code, Section 227(2) of the 1978 Criminal Code]. This view must be clearly agreed with, and the interpretation of the law cannot be extended in the direction of upskirting, if only because § 205(3) of the Criminal Code also requires the commission of indecent behaviour (which violates the human dignity of the victim). This form of indecency can be established without any concerns, as in the case of the 2017 case where minors aged between 14 and 16 years old behaved indecently towards 9 women in the vicinity of the parliament building, which they recorded with their mobile phones.[19]

As mentioned above, harassment under Section 222(1) of the Criminal Code would only be established in the case of regular (or persistent) harassment, and upskirting is therefore not typically punishable under this provision. However, it could be argued that defamation could be considered to fall under the category of "other such acts" capable of damaging honour. However, due to the presumable absence of the situational elements described in Section 227(1) a) or b) of the Criminal Code, in practice only the offence of defamation under Section 180(1) II of the Szabs.

In view of the above, and also in the light of the considerations cited, it must first of all be clarified whether there is a legal subject matter which is attacked by upskirting. In my view, such a right is the aspect of the right of sexual self-determination that no recordings of the victim's intimate parts of his body may be made or disclosed against his will. The higher degree of danger to society and general

[18] Zs. Szomora, *A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények*, [in:] *Nagykommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez* [online], K. Karsai (ed.), Wolters Kluwer, Budapest.

[19] https://index.hu/belfold/2019/04/10/csoportosan_szemeremserto_fiatalok/ (accessed on: 15.05.2021).

prevention may also require prosecution as a criminal offence instead of liability for offences. Hence my *de lege ferenda* proposal:

- would constitute a misdemeanour of making an unauthorised intimate recording, and a person who makes an indecent recording of another person without his or her consent would be punishable by up to 1 year's imprisonment (future Section 205/B of the Criminal Code),
- would constitute a misdemeanour of disclosure of an unauthorised intimate recording, and a person who makes available a lewd recording of another person without his or her consent would be punishable with up to 2 years' imprisonment (future Section 205/C of the Criminal Code).

Finally, in order to avoid legal uncertainty, it would be useful to define the concept of intimate recording at the end of the paragraph in an interpretative provision. This should include video, film and photographic recordings in which the perpetrator depicts or attempts to depict sexuality with indecent frankness. The latter, as an auxiliary measure, would also make it possible to make it a crime to include a recording of the victim wearing underwear.

I should note here that in April 2019, an amendment to the law was also submitted in Hungary, which would have criminalised certain cases of upskirting under the headings of "making a picture with sexual content or other degrading content suitable for defamation" or "publishing a picture with sexual content or other degrading content suitable for defamation."[20] The call for criminalisation may be the right direction, but in my opinion, these facts should be explicitly regulated in the gender chapter of the Criminal Code, given that their primary legal object is sexual self-determination, not human dignity.

Cyberflashing

Cyberflashing is the sending of a picture or video of the genitalia of the perpetrator, typically male, to the victim via a digital device

[20] T/5869. Parlex azonosító: 1NSIHI1O0001.

without prior consent or agreement.[21] The transmission of unsolicited sexual content in this form can therefore be considered the inverse of upskirting.

According to empirical research by a law student at ELTE-AJK, 2/3rds of more than 200 respondents have received unsolicited sexual messages, usually through Messenger, Instagram and Tinder (the latter being a dating app). The reaction of the respondents was mostly negative, many blocked the sender and the majority were disturbed by the viewing of such a message. According to the relevant questionnaire, almost 80% of respondents would like to see cyberflashing made a criminal offence.[22]

McGylnn–Johnson, who have examined the issue in detail in the recent Anglo-Saxon literature, point out that the spread of cyberflashing was largely catalysed by the COVID-19 pandemic, which is discussed in detail in the next chapter of this book. The authors focus on the criminal law aspects of cyberflashing in the context of harassment, concluding that such acts do not generally fall within the Anglo-Saxon definition of harassment without concern. They then go on to examine in detail three related regimes, namely that of Singapore, the US State of Texas and Scotland.

Since January 2020, cyberflashing is a *sui generis* offence in Singapore, committed by anyone who intentionally sends images of his or her own or another person's genitals to another person for the purpose of the victim seeing the images, whereby the offender seeks to gratify his or her sexual desire or to humiliate the victim. This offence is punishable by up to one year's imprisonment.

As of September 2019, Texas will also define this offence as a separate offence of unlawful electronic transmission of sexually explicit visual material. The regulation is also quite broad, although, interestingly, it can only be committed by a man. The penalty is a fine of up to USD 500.[23] Here the authors refer to the legislation

[21] C. McGlynn, K. Johnson, *Criminalising Cyberflashing: Options for Law Reform*, "The Journal of Criminal Law" 2020, no. 3, p. 172.

[22] K. Bodori, *Criminal Law related issues to cyberflashing*, Report, Budapest 2021.

[23] See B.C. Miller, *Fact or Phallus? Considering the Consitutionality of Texas's Cyber-flashing Law Under the True Threat Doctrine*, "Texas A & M Law Review" 2021, no. 2, pp. 423–449.

in California, where the FLASH Act (Forbid Lewd Activity and Sexual Harassment, 2020), which will come into force in February 2020, also imposes a fine of up to USD 500 (or USD 1,000 for repeat offences) on anyone who knowingly transmits indecent or explicit sexual content to another person via electronic means.

Scotland's criminal law – which, as we have seen, also pioneered the criminalisation of upskirting – as early as 2009 criminalised the act of forcing someone to view a sexual image. The cited authors point out that, although this legislation was not introduced at the time to combat cyberflashing, case law has extended its application to the new phenomenon. Very severe prison sentences of up to 10 years are possible for these offences.[24]

Cyberflashing, as the authors cited above suggest, could also give rise to a finding of harassment in our country. However, as we have seen, the existence of regularity (or permanence) as a mode of commission is elementary for the establishment of this offence under Article 222(1) of the Criminal Code, so that a single sending of an image cannot become a factual element. Harassment under Article 222(2)(b) of the Criminal Code, which may be committed by making a false pretense of an event directly endangering the life or physical integrity of another, although not requiring regularity, would only be established in very extreme cases of cyberflashing, for example, if the background of the image of a genital organ indicates a threat of a sexual act of a sadomasochistic nature.

Child pornography can be charged if the person in the picture is under 18. It should be stressed here that a minor who transmits an image of himself or herself to another person may also be a perpetrator. In addition, however, a person who receives a photograph which he does not want to receive does not commit the offence of obtaining within the meaning of Article 204(1)(a)(I) of the Criminal Code. Later, however, if he does not delete the recording because of his indifference, the tort turn may become a factual element, except of course if the offender regards the recording solely as evidence to be used in criminal proceedings and for that reason does not delete it.

[24] C. McGlynn, K. Johnson, *Criminalising Cyberflashing: Options for Law Reform*, "The Journal of Criminal Law" 2020, no. 3, pp. 181–184.

All the problems that have been raised in relation to the ascertainability of sexual offences in the context of upskirting also arise as a dilemma in cyberflashing. The phrase "displaying oneself (…) before another (…)" (Article 205(1) of the Criminal Code) can be applied to offline offences. In my view, the offender online can only be considered to have committed the offence if he does not simply send the victim an unsolicited, previously taken picture of his genitals (since he is then not actually "showing himself" but only the picture), but if, for example, he initiates a "live" broadcast on Facebook and then, when the unsuspecting victim answers the call, he immediately shows his genitals to the victim with the help of the camera. As we have seen, the prevailing interpretation of the phrase "engages in indecent behaviour towards another person which offends the human dignity of the victim" is that it presupposes physical contact. An interpretation could of course be envisaged which would include the sending of a picture of the genital organ to another person in the scope of the "indecent conduct" described in the offence of indecent assault under Article 205(3) of the Criminal Code. However, Article 28(2) of the Fundamental Law provides that "[i]n determining the purpose of legislation, the preamble to the legislation or the grounds for the proposal to enact or amend the legislation shall be taken into account in the first instance". The Ministerial Explanatory Memorandum to the Criminal Code expressly requires physical contact between the perpetrator and the victim in relation to Article 205(3) of the Criminal Code, and a solution which extends the scope of criminal liability to cover indecent acts without physical contact would therefore be contrary to the principle of legality.

As with upskirting, a finding of ancillary defamation may be raised, but, in the absence of a situational element, in practice at most in the form of liability for a misdemeanour.

What may also arise from the "Szabs. tv." is the violation of public morals (Szabs. tv. § 192), which is committed by anyone who in a public place, public place or public transport means engages in conduct contrary to public morals. Implementation in the digital space could be included in the concept of an offence against public morals committed in a public place, provided that the offence

committed by means of an information system can be interpreted as having been committed in a public place without any consents According to Section 29(2)(b) of the Szabs. tv, a public place is a place open to the public and not considered to be a private place. A picture sent in a private messenger message cannot therefore be considered to have been transmitted in a public place. However, posting in a meeting that is open to everyone – for example, accessible with a link provided in advance and not closed – Zoom, MS Teams, etc. – may already give rise to this infringement. However, this also presupposes that the term "place" is not only understood in its conventional sense, but also includes virtual space, which, in the absence of an explicit legislative intention to this effect, could again raise problems of legality.

On this basis, cyberflashing would require *de lege ferenda* regulation. This could be done, on the one hand, by creating an interpretative provision to the offence of indecent exposure that would allow the offence to be established between absent parties, i.e., when the offender sends an indecent video to the victim via a digital device. On the other hand, it would of course be possible to envisage a *sui generis* definition of the offence, for example by drawing on the Singapore or Texas rules. In the latter case, it would make sense to regulate this offence as a crime against sexual freedom and sexual morality, given the sexual nature of its primary legal object.

In drafting the new legislation, care should be taken to ensure that the scope of criminal liability does not become indiscriminate and does not risk gender discrimination, so that it could be stipulated that only the transmission of a picture of the offender's own body could qualify as a punishable offence. Otherwise, the transmission to another person of any pornographic image downloaded from the Internet would constitute a criminal offence, which would still only be punishable by the offence of harassment if it is committed on a regular basis. It may be a question of whether the offence should be established only in the case of an image or video of a genital area or whether it should also be established by means of other images of sensitive parts of the body. Almost all the regulations referred to have emphasised the requirement of intent, which I believe should be adopted, so that if a person carelessly positions himself in front

of the camera in such a way that his uncovered genitals – which the perpetrator is not aware of because of the angle of the camera – are in fact visible to the other party, this act, due to the inadvertent nature of the recording and transmission, would not constitute an offence.

The scope of criminal liability cannot be limited to male perpetrators, as under gender equality, an unsolicited pornographic recording can violate anyone's right to unhindered exercise of sexual self-determination, regardless of gender.

Another important issue to be examined is the problem of consent, which can not only be given expressly and in advance, but can also be implied or even be given subsequent consent, depending on the circumstances. In the case of a long-standing relationship, implied consent may also be recognised on the basis of established practice. It would be worthwhile to regulate the offence as a misdemeanour to be prosecuted on private initiative.

Conclusions

At the end of my study, I emphasise that digitalisation also poses new dangers for sexual self-determination that we have not encountered before. Thus, taking or sending unsolicited pictures and falsifying them are now an everyday problem. With this in mind, it is worthwhile for legislators to give quick and appropriate answers to the problems arising in this area.

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Shall it Be Suspended, or Not? That is the Question

The Dilemma Related to the Judicial Review Procedures in Hungarian Electoral Cases

Introduction

The objective of this paper is to present the current dilemma whether judicial review procedures of electoral decisions can be suspended, and if so, in which cases and by which rules. Before examining the question, the paper presents a comparative analysis of the Hungarian legal remedy system of electoral procedures, analysing the legal remedy tool of objection and appeal. Subsequently, the paper explains the complex regulation regarding procedural rules for judicial review, and also draws attention to the special rules governing the electoral procedures, such as that which requires that decisions made during the election process must be made public, and thus anyone can take legal action against them. The different levels of electoral remedy procedures are actually separate procedures, often with different participants at each stage of the procedure. Moreover, one of the most crucial features of the electoral procedure is that it is a summary procedure, therefore specific rules are determined to expedite the receiving of the final decision, such as the short time limits of decision-making specified in the Act No. XXXVI of 2013 on Election Procedure (hereinafter referred to as Act on Election Procedure), rules regarding presenting proof, etc. After the description of the structure of judicial review procedure, considering also the

summary nature of election procedures, the possibility to suspend the judicial review procedure in electoral cases is analysed through real and hypothetical cases.

Legal remedy system in electoral cases

First, it shall be noted that the legal remedy system in electoral cases is very strictly regulated in the Act on Election Procedure.[1] Three different possibilities for remedy exist in electoral cases in Hungary: the objection, the appeal, and the judicial review procedure.

An objection[2] may be submitted by voters recorded in the central electoral register, candidates, nominating organisations and natural and legal persons and organisations without legal personality affected by the case, referencing a breach of the laws on the election or the fundamental principles of election and election procedure. Thus, if a natural person without voting rights or a legal person or an organisation without legal personality submits an objection in an election procedure, these persons must prove their involvement, i.e., that the case affects them. According to the jurisprudence of the Curia, this affection can be established if the applicant's rights and obligations are directly affected by the quoted infringement in which the objection is based. During the examination of affection, the proof of the affection should be provided by the person

[1] The English version of the Act No. XXXVI of 2013 on Election Procedure is reacheable: https://njt.hu/jogszabaly/en/2013-36-00-00 (accessed on: 15.12.2022). Regarding election procedure see: Csörgits Lajos, *A választási eljárás*, [in:] *Alkotmányjog I.: Alkotmányos fogalmak és eljárások*, Smuk Péter (ed.), Universitas-Győr Kht., Győr 2014, pp. 236–273; Horváth Attila, *Választójog*, [in:] *Alapjogok: az emberi jogok alkotmányos védelme Magyarországon*, Bódi Stefánia, Schweitzer Gábor (eds.), Ludovika Egyetemi Kiadó, Budapest 2021, pp. 221–242; Kurunczi Gábor, Szabó István, *A választási rendszer*, [in:] *A magyar közjog alapintézményei*, Csink Lóránt, Schanda Balázs, Varga Zs. András (eds.), Pázmány Press, Budapest 2020, pp. 769–798; Téglási András (ed.), T*anulmányok a választójog, a választási rendszerek és a népszava-zás aktuális kérdéseiről*, Dialóg Campus, Budapest 2019; Cserny Ákos, Péteri Attila, *Választójogi és népszavazási nagykommentárok*, Wolters Kluwer Hungary, Budapest 2022.

[2] See in detail: Articles 208–220 of the Act on Election Procedure.

submitting the objection.[3] Objections shall be submitted so that they are received by the election commission competent to assess the objections not later than on the third day after the committing of the objected violation. It is possible to submit this legal remedy tool only once, after which time it cannot be amended or supplemented.[4]

One of the basic rules of the election procedure is that the time limits specified in the Act on Election Procedure shall be terms of preclusion. This means that in the event of their failure, there is no possibility for excuses. Regarding time limits the paper would also like to point out that it shall be calculated in calendar days, not in working days and the election procedures time limits expires on the last day at 4 p.m. Meanwhile the time limit for the decision-making procedure of the election commission expires at midnight.[5] From the above-mentioned rules of the Act on Election Procedure it can be deduced that the objections shall be submitted so that they are received by the election commission competent to decide on the objections not later than 4 p.m. on the third day after the committing of the objected violation.

It should be also highlighted that the Act on Election Procedure specifies extremely short deadlines – typically three calendar days – in the legal remedies. The reason for this was determined by the Constitutional Court as follows: "The function of the electoral procedures in ensuring democratic legitimacy, as well as the specificities of the procedural order, including especially the situation of the persons affected by the legal remedies (…) justify the short deadlines for legal remedies and the description of stricter conditions."[6]

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[3] Decisions of the Curia of Hungary Kvk.V.37.507/2018/2, Kvk.VI.38.006/2019/2, Kvk.II.38.216/2019/2, Kvk.VI.37.639/2019/3, Kvk.I.38.318/2019/2.

[4] Decision of the Curia of Hungary Kvk.IV.37.531/2018/2.

[5] See: Article 10 of the Act on Election Procedure.

[6] See: the Decision of 59/2003 (XI. 26) of the Constitutional Court of Hungary. Meanwhile the Fundamental Law of Hungary states that "[t]he decisions of the Constitutional Court made prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions" (Final and miscellaneous provisions 5 of the Fundamental Law). The Fundamental Law of Hungary entered into force on January 1, 2012. The above-mentioned Decision was referred after it too, lately in the Decision of 3053/2015 (III. 13) of the Constitutional Court of Hungary.

The mandatory content elements of the objection are the exact indication of the violation of the law, the proof of violation of law and the details of the person submitting the objection. The election commission decides on submitted objections not later than on the third day of receipt or, for transferred objections, of receipt by the election commission competent to assess the objection.[7] First, the election commission formally examines the objection, which is rejected without examination on merits if for example it was submitted by a person other than a person entitled to do so, or if it is submitted late, or a mandatory element of the objection is missing or if no election commission has the power to assess it. After the formal examination the election commission examines the objection on its merit and decides on objections on the basis of available information given by the person who presented the objection. In the cases when the election commission does not grant an objection, it dismisses it. Meanwhile if the election commission grants the objection, it establishes the violation, it orders the violator to cease the violation, it annuls and orders to repeats the election process or the part of it affected by the legal remedy; it may also impose a fine, for example in case of the violation of the rules of the election campaign.

The other remedy possibility, which can be used against electoral decisions is the appeal.[8] Natural and legal persons and organisations without a legal personality affected by the case may submit an appeal challenging a first-instance decision of the election commission. Meanwhile decisions adopted by the election commission of second instance, and decisions adopted by the National Election

[7] See also Article 214 paragraphs (2)–(3) of the Act on Election Procedure, which describe other time limits in specific cases as follows: "(2) The National Election Commission shall decide on an objection regarding the violation of election campaign rules on general election day not later than on the fifth day after it receives it. (3) The election commission shall make a decision within fifteen days after the submission of an objection if the application does not relate to an election the date for which has already been set, but the result of which has not yet become final and binding."

[8] See Article 221 of the Act on Electoral Procedure and the common rules on the appeal and judicial review procedure: Articles 223–233 of the Act on Electoral Procedure.

Commission shall not be subject to appeal. However, in these cases judicial review is a possible tool for legal remedy. Appeals – as with judicial review applications – can be submitted with reference to a violation of law or against a decision adopted by the election commission within its discretionary power. The appeal can only refer to a violation of the law that was mentioned in the objection too, thus the appeal cannot be extended to a violation of law which was not included in the objection.[9] Appeals should be submitted and received by the election commission – which adopted the challenged decision – not later than 4 p.m. on the third day after the adoption of the challenged decision. The appeal, as with the objection, has a mandatory element, such as its legal basis, and specified data regarding the appellant specified in the Act on Election Procedure shall be indicated.

The election commission in the appeal procedure examine the decision and the underlying proceeding. Therefore, a rejection decision made without an examination on merit of the objection due to the lack of mandatory elements cannot become illegal by the fact that in appeal, the applicant recognises the deficiency of his/her objection and completes it in its application.[10]

Moreover it shall be stated that in an appeal procedure – as well as in the judicial review – new facts and evidence may be also presented. Meanwhile, on the one hand, these new facts and evidence must have a logical relationship with the object of the objection, with the disputed activity, and with the law which was cited in the case. On the other hand, "new evidence" also assumes that evidence has already been attached to the objection and this "new evidence" is intended to confirm this earlier evidence.[11]

On the appeal, the election commission decides not later than on the third day following receipt.

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[9] Decisions of the Curia of Hungary: Kvk.I.37.394/2014/2, Kvk.I.37.494/2014/2, Kvk.II.37.606/2019/4, Kvk.III.39.265/2022/2.

[10] See in detail: Kúria: *A választási és népszavazási eljárásokkal kapcsolatos jogorvoslat tárgyában létrejött joggyakorlat-elemző csoport Összefoglaló vélemény*, Budapest 2018, https://kuria-birosag.hu/sites/default/files/joggyak/valasztasi_nepszavazasi_joggyak.pdf.

[11] Decisions of the Curia of Hungary: Kvk.IV.39.365/2022/5.

An appeal is rejected without examination on its merits if it was submitted by a person other than a person entitled to do, or if it is submitted late, or if it was submitted to an election commission other than which is entitled to decide on the appeal, or if it does not contain the mandatory elements of the appeal. The election commission, if it is deciding on merit of the appeal, shall either uphold or amend the challenged decision. The election commission does not have the possibility to order a new procedure, even if there was a serious violation of the procedural law.[12]

The third legal remedy tool in election procedures is the judicial review procedure. In the Hungarian National Assembly's elections in 2022, there where around a hundred cases before the Curia of Hungary, which is the highest judicial forum and is the court deciding in most of the judicial review cases regarding electoral decisions. The regulation regarding this legal remedy procedure is quite complex and is explained in the next part of the paper.

The complexity of the regulation regarding the judicial review of election decisions

The paper first underlines that all the different elections (national, local, European Union) have their special rules codified in different acts in Hungary,[13] meanwhile the general procedural rules on the elections can be found in the Act on Election Procedure. An interesting fact is that Act No. CL. of 2016 on the Code of General Administrative Procedure cannot be used in election proceedings,[14]

[12] Kúria: *A választási és népszavazási eljárásokkal kapcsolatos jogorvoslat tárgyában létrejött joggyakorlat-elemző csoport Összefoglaló vélemény,* Budapest 2018, p. 208.

[13] See: Act No. CCIII of 2011 on the election of the Members of the National Assembly, Act No. L of 2010 on the election of local government representatives and mayors, Act No. CXIII of 2003 on the election of the Members of the European Parliament.

[14] Article 8 paragraph (1) point b) of the Act No. CL of 2016 on the Code of General Administrative Procedures, which states that "[t]he following shall be not covered by this Act: "(…) b) election procedures, initiation of referendums and referendum procedures […]".

therefore the complete process is described in the Act on Election Procedure.

Regarding the regulation on judicial review procedure of electoral decision, the general rules are described in Article 222–233 of the Act on Election Procedure. These general rules regarding the judicial review procedures shall be used in the special legal remedy procedures as well, for example in the legal remedy procedure regarding the electoral register.[15] The Act on Election Procedure states that the provisions on administrative court actions of the Act on the Code of Civil Procedure shall apply accordingly to the proceedings of the court, with the derogations specified in the Act on Election Procedure.[16] Until the entering into force of Act No. I. of 2017 on Code of Administrative Court Procedure,[17] on 1 January 2018, procedures for the judicial review s of administrative decisions was mostly regulated in the Code of Civil Procedure – which is why the Act on Election Procedure refers to the Code of Civil Procedure. Nevertheless, currently the rules of the Code of Administrative Court Procedure shall be applied. Meanwhile Article 6 of this Code states that the provisions of Act No. CXXX. of 2016 on Code of Civil Procedure are applied to an administrative court action if it is expressly referred to it in the Code of Administrative Court Procedure, which mentions the Code of Civil Procedure in several cases such as regarding language use, the service of documents, time

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See: M. Balázs Ágnes, *A választási eljárás, a népszavazás-kezdeményezési és a népszavazási eljárás mint sajátos közigazgatási eljárás*, [in:] *A hazai közigazgatási (nem hatósági) eljárások alapvető jellemzői a hatékonyság tükrében*, Boros Anita, Patyi András (eds.), Ludovika Egyetemi Kiadó, Budapest 2020, pp. 20–28.

[15] Regarding this procedure special rules are defined in Articles 235–238 of the Act on Election Procedure.

See also Opinion 2/2022 (X. 11) of the Administrative Department of the Curia of Hungary on the procedural rules of the legal remedy procedure regarding the electoral register.

[16] Article 226 paragraph (2) of the Act on Election Procedure.

[17] See: Petrik Ferenc (ed.), *A közigazgatási eljárás szabályai – Kommentár a gyakorlat számára*, 4. kiadás HVG-ORAC, Budapest 2021; Barabás Gergely, F. Rozsnyai Krisztina, Kovács András György (eds.), *Kommentár a közigazgatási perrendtartáshoz: Kommentár a közigazgatási perrendtartásról szóló 2017. évi I. törvényhez,* Wolters Kluwer Kft., Budapest 2018.

limits, court vacation, failures and the excusing of them, the access to documents, making copies and data processing, etc.[18] As it can be deduced from the above-mentioned, the regulation is complex regarding the judicial review procedure of electoral decisions.

From the most important rules of the judicial review procedure of electoral decisions,[19] we would like to highlight the following provisions before examining the question given in the title of the paper. Judicial review application may be submitted by a natural person, a legal person or an organisation without a legal personality affected by the case against a second-instance decision by the election commission as well as a decision adopted by the National Election Commission. The Constitutional Court of Hungary has confirmed in several decisions that the Act on Election Procedure does not define what this affection means, therefore it shall be analysed case-by-case and decided by the body that adjudicates the legal remedy.[20] As with the appeal procedures, in the judicial review procedure the applicant must prove that he/she is affected by the case; it must be proven that the election case obviously influences his/her own legal situation, and that it has a direct effect on his/her rights and obligations. Reference to general reasons such as to the protection of the public interest or to the right to a legal remedy does not establish this affection.[21]

Another important condition is that the judicial review procedure is only possible if in the case there was already an appeal procedure or in the case that appeals cannot be used, thus this legal remedy tool is excluded by the provisions of the Act on Election Procedure.

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[18] Article 36 of the Act No. I of 2017 on Code of Administrative Court Procedure.

[19] See also: Fábián Adrián, *Szabályozási hiányosságok a választási eljárás gyakorlatában a Nemzeti Választási Bizottság és a Kúria joggyakorlata alapján*, [in:] *Választások Magyarországon*, Csefkó Ferenc, Horváth Csaba (eds.), PTE ÁJK, Pécs 2015, pp. 251–259.

[20] Decision of 3081/2014 (IV. 1) of the Constitutional Court of Hungary, Decision of 3097/2014 (IV. 11) of the Constitutional Court of Hungary.

[21] Decision of the Curia of Hungary of Hungary: Kvk.VI.39.407/2022/4.

Several rules of the judicial review are very similar to the appeal procedure, such as the bases on which a judicial remedy procedure can be launched (thus with reference to a violation of law or against a decision adopted by the election commission within its discretionary power), the mandatory elements of the application, the presentation of new proof, submission rules (generally in three days), and the time limit for the making of decisions in general in court procedures is also three days from receipt of the judicial review application by the court.

However, in a judicial review proceeding, representation by an attorney is mandatory. The lack of legal representation, or its insufficient certification of it also results in the rejection of the application without examination on the merit of the case. Based on current judicial practice, it is possible neither to issue a call to remedy this deficiency nor to appoint a lawyer, thus the election procedures are summary procedures.[22]

The court formally examines the judicial review application first: if the conditions are not met, the application is rejected by the court without examination on its merits, otherwise the court decides on the merits of the case if the formal conditions are fulfilled, and either uphold or amend the challenged decision.

The court not only communicates its decision adopted in the judicial review proceeding with the applicant and with those on whom the decision confers rights or imposes obligations and those to whom the second-instance decision was communicated, but also – with the exception of personal data – the decision is available to the public.[23] Against decisions of the court there is no further legal remedy.

Finally it should be kept in mind, as was already mentioned above, that in most cases the Curia of Hungary decides on the judicial review application in electoral cases.[24] One exception to this rule is the legal remedy regarding the electoral register decided by

[22] Decision of the Curia of Hungary of Hungary: Kvk.V.39.307/2022/2.

[23] See also online in the Curia's home page: https://kuria-birosag.hu/hu/valasztasi-ugyek.

[24] Article 229 paragraph (1) of the Act on Election Procedure.

one of the eight regional court which has administrative chambers.[25] In the Curia, the distribution of election cases is automatic: case

[25] The current Hungarian judicial system is formed as follows from March 1st 2022:

There are 113 District Courts located in major cities of Hungary and proceed in most of the civil and criminal cases in first instance, but administrative cases cannot be found in these courts.

The next level is the Regional Courts (19 in the seat of the counties and 1 in Budapest) decide in first instance in several cases specified in acts and in second instance as reviewing appeals against the decisions of the District Courts. Meanwhile only eight Regional Courts have an administrative department and decide on most of the administrative cases in first instance.

The following level is the Regional Courts of Appeal. There are only 5 in Hungary: in Budapest, in Debrecen, in Győr, in Pécs and in Szeged. In regard of administrative cases appeals against the decisions of the eight Regional Court, which have an administrative department are determined by the Budapest Regional Court of Appeal.

In the last instance, we can find the Curia of Hungary – highest general ordinary court – which may review the final court's decisions – as well as in civil, penal and in administrative cases – if these are challenged through an extraordinary remedy. The Curia has also material (first instance) jurisdiction regarding several administrative cases like as in procedures for reviewing the conflict of a local government decree with other laws, procedures due to the failure of a local government to fulfil its obligation to legislate, etc. The Curia guarantees the uniform application of law too.

Consequently, from the above-mentioned explanation we can deduce that in Hungary ordinary courts decide on administrative cases: in first instance mostly the eight regional courts having an administrative chamber, at second instance cases are determined by the Budapest Regional Court of Appeal, and review procedures are decided by the Curia of Hungary (which also acts as a first instance forum in a limited scope of cases).

See: Opinion 1/2021 (IX. 27) of the Administrative Department of the Curia of Hungary on the legal remedy procedure regarding the electoral register.

See also: Patyi András, *Rifts and deficits – lessons of the historical model of Hungary's administrative justice*, "Institutiones Administrationis – Journal of Administrative Sciences" 2021, 1, pp. 60–72; Varga Zs. András, *Administrative Procedure and Judicial Review in Hungary*, [in:] *Judicial Review of Administration in Europe: Procedural Fairness and Propriety*, Giacinto della Cananea, Mads Andenas (eds.), Oxford University Press, Oxford 2021; Darák Péter, *Administrative justice in Hungary*, [in:] *Hungarian public administration and administrative law*, Patyi András, Rixer Ádám, Koi Gyula (eds.), Schenk Verlag, Passau 2014, pp. 219–229; Patyi András, *Administrative justice in Hungary*, [in:] *The Transformation of the Hungarian Legal System 2010–2013,* Smuk Péter (ed.), CompLex Wolters Kluwer, Budapest 2013, pp. 145–154.

allocation is determined by the order of arrival of the cases; taking this into account, two cases will be assigned to a judicial council, than the next two cases will be assigned, in order, to the next judicial council and so on.[26]

As was discussed, the regulation regarding the legal remedy system is quite complex in electoral cases, thus it raised several procedural questions. Therefore, the next part of the paper examines one procedural dilemma, the suspension of the court procedure in electoral cases.

Case studies related to the dilemma of suspension

Regarding the suspension of the court procedure, the Act on Election procedure does not identify any specific rules, therefore the Code on Administrative Court Procedure shall be analysed, which in Article 32 states that: "[t]he rules of the Code of Civil Procedure shall apply to interruption and suspension, subject to the derogation that a) in the event of legal succession in the position of the defendant under law, the procedure shall not be interrupted, b) the court may take measures to separate the claim that is unaffected by the interruption or suspension, even during the term of interruption and suspension, c) the court may initiate proceedings at the Court of Justice of the European Union or the Constitutional Court, and may move for the Curia to review the conflict of a local government decree with other laws, even during the term of interruption and suspension, d) the suspension order may be appealed within eight days following its communication." In most cases the reason for the suspension of the procedure is that the decision of the lawsuit depends on the preliminary question in which a decision is needed, but the court cannot decide on that question.[27]

[26] See the Rules on procedures of the Curia: https://kuria-birosag.hu/hu/szabalyzat (accessed on: 15.12.2022).

[27] The suspension of the proceedings has mandatory and facultative cases described in the Code of Civil Procedure.

We shall also emphasise that the suspension of court procedure is not used in the judicial review procedures in electoral cases, as the court always respects that the decision shall be given on the judicial review application not later than on the third day from receipt. However, the possibility or the prohibition of the possibility to suspend the court procedure is regulated neither in the Act on Electoral Procedure nor in the Code of Administrative Court Procedure. Meanwhile the author of this paper deeply believes that a strict regulation of the possibility of suspension of court proceedings in electoral court cases could be useful. To justify the before-mentioned opinion, the paper would like to present the following real and hypothetical cases.

A SUSPENSION FOR THE REASON OF A CONSTITUTIONAL COMPLAINT PROCEDURE

The fact of the case is the following: on 22 March 2022, a natural person submitted an objection citing that the registered candidate of District 11 of Budapest in the National Parliaments' election of 2022 continuously promoted the contents of his public Facebook page with paid advertisements during the campaign period. As evidence for the objection, he attached screenshots showing that since 17 February 2022, the advertisement worth more than HUF 156,000 (around EUR 390), which according to the data in the social media's ad library was financed by the website kormanyvaltas2022.eu. According to the point of view of the person who presented the objection, this activity is aiming to not respect the provisions of law on limiting campaign expenses. Therefore, it violates Article 7 paragraph (1) point b) of Act No. LXXXVII of 2013 on the transparency of campaign expenses for the election of members of the National Assembly (hereinafter referred to as Kftv.), which establishes a limit of five million forints (around EUR 12,500) for the financing expenses related to election campaign activities. In this way the general principles of the Act on Election Procedure are also

infringed, as is the principle of protection of the fairness of election,[28] equal opportunities for candidates and nominating organisations[29] and the exercising of rights in good faith and in accordance with their purpose.[30] Consequently the person who presented the objection requested the statement of the violation of the above-mentioned provisions of the law by the candidate and by the external financier and to prohibit them from further infringement.

The National Election Commission examined this case[31] and first analysed whether it has the power to decide on the objection. It stated that the Kftv. in the parliamentary election procedure designates rights and obligations mainly for the candidates and the nominating organisations and in addition it establishes a number of tasks and powers for the State Audit Office and the Treasury, which are not considered as electoral bodies. Regarding electoral bodies the National Elections Office has the obligation to provide data and for the National Election Commission establishes tasks in connection with the budget support of national election of the self-governments of minorities. In the light of the aforementioned, the National Election Commission rejected the objection without examination on its merits, since it stated that deciding in this case does not fall within the competence of any election commission.

The political party Fidesz in its judicial review application demanded the amendment of the decision of the National Election Commission and granting the objection. In its point of view, the National Election Commission has the competence to decide in the case, as in the objection the infringement of general principles of the election procedures were stated, thus the National Election Commission failed to investigate the facts.

The Curia of Hungary upheld the Decision of the National Election Commission[32] and accepted the justification regarded the political party's affection related to the case and highlighted that it

[28] Article 2 paragraph (1) point a) of the Act on Election Procedure.
[29] Article 2 paragraph (1) point c) of the Act on Election Procedure.
[30] Article 2 paragraph (1) point e) of the Act on Election Procedure.
[31] Decision No. 204/2022 of the National Election Commission.
[32] Decision of the Curia of Hungary: Kvk.III.39.363/2022/3.

is not possible to take a position on the infringement of the general principles of the Act on Election Procedure stated in the objection without judging the violation of the Kftv., which does not fall under the competence of any election commission. This decision of the Curia was given on 31 March 2022.

According to the Act on Electoral Procedure, there is a possibility to submit a constitutional complaint[33] against the decision of the court in three days from the communication court decision.[34]

In this case the constitutional complaint was presented on 3 April 2022, within the time limit defined by law. In the constitutional complaint, it was referred to the fact that the electoral campaign financing rules are to be examined retrospectively and not by the electoral bodies (…) which does not mean that the violation of this rule could not have a direct impact on the election procedure. The non-examination of the violations of law cited in the objection is unconstitutional; it is against the fundamental right to legal remedy [Article XXVIII paragraph (7) of the Fundamental Law of Hungary][35] and the right to a fair trial [Article XXVIII Paragraph (1) of the Fundamental Law of Hungary].[36]

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[33] See: Gárdos-Orosz Fruzsina, *The Hungarian constitutional court in transition: from actio popularis to constitutional complaint*, "Acta Juridica" 2012, 53, 4, pp. 302–315; Gárdos-Orosz Fruzsina, *The constitutional environment of the introduction of the constitutional complaint to the Hungarian constitutional system*, "Diritto pubblico comparato ed europeo" 2019, 39, 2, pp. 1525–1539; Paczolay Péter, *The constitutional complaint in Hungary and the exhaustion of domestic remedies*, [in:] *Intersecting Views on National and International Human Rights Protection: Liber Amicorum Guido Raimondi*, Chenal Roberto, Motoc Iulia Antoanella, Sicilianos Linos-Alexandre, Spano Robert (eds.), Wolf Legal Publishers, Tilburg 2019, pp. 687–694.

[34] Article 233 of the Act on Election Procedure.

[35] See: Balogh-Békesi Nóra, Pollák Kitti, *The realization of constitutional principles – the right to good administration and the right to legal remedy – in Hungary*, "Bratislava Law Review" 2018, 1, pp. 46–56; Balogh-Békesi Nóra, *Jogorvoslathoz való jog és tisztességesség az esetjog tükrében*, [in:] *Ünnepi tanulmányok a 80 éves Máthé Gábor tiszteletére: Labor est etiam ipse voluptas*, Peres Zsuzsanna, Bathó Gábor (eds.), Ludovika Egyetemi Kiadó, Budapest 2021, pp. 59–70.

[36] See: Patyi András, *A tisztességes eljáráshoz és ügyintézéshez való jog. Az eljárási alapjogok és az eljárási alkotmányosság főbb kérdései*, [in:] *Alapjogok: Az emberi jogok alkotmányos védelme Magyarországon*, Bódi Stefánia, Schweitzer Gábor (eds.), Ludovika Egyetemi Kiadó, Budapest 2021, pp. 155–170; Balogh-Békesi

In the same time frame,, twenty cases arrived at the Curia with similar legal and factual background,[37] few of which had been decided by 5 April 2022, and deviation from the previous case is not possible without presenting the motion for preliminary ruling submitted for the purpose of uniformity of law due to the limited precedent system in Hungary.

Meanwhile the Constitutional Court – according to Article 233 paragraph 2 of the Act on Election Procedure – decides on the constitutional complaint against a court decision within three working days of receipt, while on an admitted constitutional complaint, the Constitutional Court decides within three further working days. It shall be emphasised that while the Curia of Hungary has generally three calendar days – regardless whether it is Easter, on the weekend, etc. – to decide on electoral cases, the Constitutional Court has three working days to decide on the admission of the case + three more working days to decide on the merits of the cases. This could already be more than a week's period of time – and in the meantime, as it happened in the case explained above – the Curia of Hungary should have to issue decisions on numerous similar cases.

Fortunately, the case described above was decided by the Constitutional Court of Hungary on 5 April 2022.[38] The Constitutional Court of Hungary did not admit the case, and declared that the Curia examined all relevant questions regarding the situation, and justified by reasons his decision. The right to seek legal remedy in the case was not violated as the legal question was examined by two different forums (the National Election Commission and the Curia of Hungary) and the fundamental right for legal remedy cannot provide a basis for objecting the decision because of its content, its validity. The Constitutional Court concluded that in the constitutional complaint there were no real references to fundamental rights

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Nóra, *A tisztességes ügyintézéshez és a tisztességes tárgyaláshoz való jog*, [in:] Balogh Éva, *Az Alaptörvény érvényesülése a bírói gyakorlatban 3.: Alkotmányjogi panasz: az alapjog-érvényesítés gyakorlata: tanulmánykötet*, HVG-ORAC, Budapest 2019, pp. 468–503.

[37] See online in the Curia' home page directly: https://kuria-birosag.hu/hu/valasztasi-ugyek.

[38] See Decision of 3209/2022 (IV. 29) of the Constitutional Court of Hungary.

affected in the case; it was explained that the electoral decision is being disadvantageous for the affected person, but this may not justify asserting that the court decision is unconstitutional.

In summarising the above-mentioned case, two facts shall be pointed out, as follows 1. There is a possibility – as it already happened in the presented case – that at the same time a constitutional complaint procedure is submitted against an electoral decision of the Curia and new judicial review procedures are launched in front of the Curia, which are similar in facts and in legal bases to the case, which is before the Constitutional Court. The Constitutional Court may announce that the court decision is unconstitutional and order a new judicial review procedure in the electoral case. However, regarding the fact that the constitutional complaint procedure might be longer (3 working days +3 working days) than the time-limit of the judicial review procedure (3 calendar days), cases similar to it must be decided in the same way – due to the limited precedent system in Hungary – as the decision examined by the Constitutional Court and abolished by it. Logically, the decision(s) of the Curia given in these similar cases are likely to be attacked before the Constitutional Court and new procedures might be launched before the Curia in these cases. Hence, there is a multitude of procedures. However, the solution for this situation might be the suspension of the similar cases before the Curia until the Constitutional Court decides in the first case 2. The author of this paper deeply believes in the positive effects of this regulation might bring, in the meantime she is completely convinced that these provisions shall be as regulated in detail in the Act on Election Procedure as the constitutional complaint procedural rules are in this Act (stating the specific time limits, etc.).

SUSPENSION FOR THE REASON TO PROVIDE THE UNIFORMITY OF LAW

The Curia of Hungary has the fundamental obligation to ensure the uniformity of the application of law by courts.[39] For realising the

[39] Article 25 paragraph (3) of the Fundamental Law of Hungary.

uniformity of law the Curia has several tools[40] such as the review procedures against court decision,[41] which cannot be launched against a court decision in electoral cases. Another new element from 2020 to ensure the uniformity of law is the so-called uniformity complaint procedure.[42] A uniformity complaint can be launched by the parties against a decision of the Curia, if in the request for review a legal deviation from the published decision of the Court made after 1 January 2012 has already been referred to, and the Curia did not remedy the violation caused by the deviation in its decision. In this case if the uniformity complaint council establishes a deviation from the published decision of the Court in a legal matter, it decides on an interpretation binding on the courts and in its decision, meanwhile the uniformity complaint council establishes the violation of law caused by the deviation, but maintains the validity of the decision contested by the complaint, if the complaint was submitted in a case in which the law establishes a maximum five-day deadline for court proceedings and this is the case of the electoral procedure. We shall also state that a uniformity complaint procedure has not yet been started in electoral cases.

The other tool is for ensuring the uniformity of law is the motion for preliminary ruling.[43] The uniformity procedure shall be started a) in order to ensure uniform jurisprudence, or b) if a judicial council of the Curia wishes to deviate from the decision published in the Collection of Court Decisions of the Curia. The uniformity

[40] See: Varga Zs. András, *Tíz gondolat a jogegységről és a precedenshatásról*, "Magyar Jog" 2020, 2, pp. 81–87.

[41] Pollák Kitti, *Perorvoslatok és az alkotmányjogi panasz esetén követendő eljárás*, [in:] *A közigazgatási jogvédelem és jogérvényesítés alapintézményei*, Boros Anita (ed.), Nemzeti Közszolgálati Egyetem, Budapest 2019, pp. 100–110.

[42] Patyi András, *A jogegységipanasz-eljárások gyakorlatának néhány alapkérdése*, [in:] *Jó kormányzás és büntetőjog: Ünnepi tanulmányok Kis Norbert egyetemi tanár 50. születésnapjára*, Koltay András, Gellér Balázs (eds.), Ludovika Egyetemi Kiadó, Budapest 2022, pp. 511–525. Also analyzed by the Venice Commission: Opinion 1050/2021. See: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)036-e (accessed on: 15.12.2022).

[43] The motion for preliminary ruling and uniformity complaints and unification procedures are regulated in the Articles 32–44 of the Act No. CLXI of 2011 on the organisation and administration of courts.

procedure can be proposed by the President of the Curia, the Vice-President of the Curia or by the Head of the Department, and in the second case by the judicial council. If the judicial council submit a motion for preliminary ruling, it shall suspend the proceeding affected until the uniformity decision is adopted. In the motion for preliminary ruling the issues and the reasons for requesting the uniformity decision in the unification procedure shall be presented and if it is submitted by a judicial council, this council shall make a recommendation regarding the decision.

The uniformity complaints chamber decides on the motion for preliminary ruling which may agree to hear the case with involvement of the judge members of the relevant Department of the Curia or to plenary meeting of the Curia. Rules defined regarding the uniformity complaint procedure may be applied in the unification procedure.

The president of the uniformity complaint chamber shall send the motion – if it was not submitted by the Prosecutor General – to the Prosecutor General if it was not denied by the uniformity complaints chamber or the presiding judge. The Prosecutor General shall send to the Curia his assessment within fifteen days of receipt of the motion. If the unification procedure is opened because of the motion for preliminary ruling presented by a judicial council, the president of the uniformity complaints chamber send the motion to the parties to the underlying proceedings, and/or to the defendants and defense counsels, and they shall be able to respond within fifteen days of receipt of the motion. Afterwards, the president of the uniformity complaints chamber set the date of the meeting of the uniformity chamber and shall notify the members of the chamber and the persons who are entitled to attend (such as the Prosecutor General) by law. The Prosecutor General, the initiator of the proceeding and the invited parties, if any, shall be heard at a meeting of the chamber. After the speeches the president of the uniformity complaints chamber shall declare the meeting adjourned for deciding on the merits. However, there is a possibility to reject the motion by means of a ruling without any examination on merits if it is presented by a person without proper entitlement or the general formal conditions are not met. With the exception to these above-mentioned cases, the uniformity complaint

chamber shall conclude the procedure by means of a uniformity decision or a ruling of non-decision.

In electoral cases too, it can easily imaginable that a judicial council wishes to deviate from a previous decision of the Curia. However, due to the limited-precedents system introduced in Hungary in 2020, it is only possible if the judicial council present a motion for preliminary ruling. A motion for preliminary ruling was not used during the electoral cases in 2022, but the author of this paper is of the conviction that it can be used. However it shall be noted that uniformity procedures can be very long – sometimes even several months long – as there is no direct regulation on the duration of these proceedings, therefore, in this regard the author of the paper suggests as *de lege ferenda* to create a more specified regulation for which the basis of the constitutional complaint procedural rules in electoral cases could be used.

A SUSPENSION REGARDING THE ACTS OF FOREIGN ADMINISTRATIVE AUTHORITIES: SHALL IT BE OR SHALL IT NOT BE?

During the parliamentary elections of 2022 an interesting dilemma occurred in the Curia's Decision Kvk.VII.39.408/2022/2. The background of the case is that in Romania papers were found in the garbage that might be related to the Hungarian national elections. The papers had the appearance of – but were not proved to be – postal votes.[44] This situation was brought before the National

[44] See: Kucsera Bettina, *Kitekintés a külképviseleti választások problémakörére*, "Jogelméleti Szemle" 2019, 3, pp. 156–165; Bodnár Eszter, *3086/2016 (IV. 26) AB határozat – levélben szavazás*, [in:] *Az Alkotmánybírósági gyakorlat. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990–2020. Elvi tételek*, Gárdos-Orosz Fruzsina, Zakariás Kinga (eds.), HVG-ORAC, Magyar Tudományos Akadémia TK JTI, Budapest 2022, pp. 671–684; Hallók Tamás, *A levélben szavazás az új szabályok tükrében*, Miskolci Jogi Szemle: A Miskolci Egyetem Állam- és Jogtudományi Karának Folyóirata, 2014, pp. 109–133; Tordai Csaba, *A Kúria határozata a levélszavazás szavazási iratainak érvényességéről: az érvényesség követelményeinek értelmezése a választási alapelvek tükrében*, "Jogesetek Magyarázata" 2018, 9. évf. 3–4, pp. 59–65.

Election Commission,[45] which stated that the territorial scope of the Act on Election Procedure is in regards to Hungary, therefore the National Election Commission has not got the power to decide in the case of an act that was committed in the territory of Romania. The National Election Commission's decision was challenged in front of the Curia, which upheld the decision of the National Election Commission and emphasised that the Act on Election Procedure regulates the material scope of the law and does not contain provisions regarding its territorial scope and the personal scope of it, therefore Article 6 paragraphs (1)–(3) of Act No. CXXX of 2010 on law-making[46] shall be considered, thus the territorial scope of the Act on Election Procedure is the territory of Hungary and its personal scope covers natural persons, legal persons and organisations without legal personality in the territory of Hungary, as well as Hungarian citizens outside the territory of Hungary. The National Election Commission does not have the authority to decide in a case if, based on the available evidence, it cannot be established

[45] Decision No. 287/2022 of the National Election Commission.

[46] Article 6 paragraphs (1)–(6) of the Act No. CXXX of 2010 on law-making states that:

„(1) The territorial scope of laws shall cover the territory of Hungary, while the territorial scope of local government decrees shall cover the administrative area of local governments. The territorial scope of local government decrees shall cover the administrative area of local governments participating in an association in the case specified in section 5(5), and the administrative area of the local governments of settlements participating in the associated representative body in the case specified in section 5(6).

(2) The personal scope of laws shall cover a) natural persons, legal persons and organisations without legal personality in the territory of Hungary, and Hungarian citizens outside the territory of Hungary.

(3) natural persons, legal persons and organisations without legal personality in the administrative area of the local government with regard to local government decrees; natural persons, legal persons and organisations without legal personality in the administrative area of local governments participating in the association in the case specified in section 5(5), and local governments of settlements participating in the associated representative body in the case specified in section 5(6).

(4) The territorial and personal scope of laws shall be defined explicitly in the law in the cases set out in sections 5(5) and (6), and if it covers a territory or a group of persons other than those specified in paragraphs (1) and (2)."

that the facts of the case are under the scope of the Act on Election Procedure. The Curia clearly expressed that the jurisdiction of the Hungarian electoral bodies does not extend to the adjudication of legal violations which might be affecting the elections in Hungary, but the infringements were committed abroad of Hungary.

We shall also note that there are several guaranties in the Act on Election Procedure regarding the voting system by post which aims to eliminate abuses and possible violation of law.[47] However, in summer 2022, after the elections, the Act on Election Procedure was modified as follows, that the Act must be applied in Hungary and outside the territory of Hungary a) in the election of members of Parliament. This modification of the law made abundantly clear that Hungarian election commissions have power to decide in cases not only committed in the territory of Hungary but also to investigate and decide on legal violations related to elections committed outside of Hungary.

In the point of view of the author of this paper, this could and will raise several questions as for example in most of the electoral cases the decisions shall be taken in three days, other countries' procedures could be longer than this three days, if for example information is needed from them. The author of the paper does not find justified in these cases that the court procedure shall be suspended due to the summary nature of the election procedure. The time limit of the legal remedies in electoral cases exclude the conduct of the evidentiary procedure. As a result, the Curia makes its decision based on the proof presented by the person submitted the judicial review application.[48] This may solve the problem presented above, but the author of the paper finds it more convincing that, for example, the voting system by post could be regulated more in detail, and more guaranties could be specified in the Act on Electoral Procedure, such as describing in more detail the returning of postal voting documents to the election office, etc.[49]

[47] Articles 278–291 of the Act on Election Procedure.

[48] Decision of the Curia of Hungary: Kvk.IV.37.316/2014, Kvk.IV.37.657/2019/3, Kvk.IV.39.300/2022/5.

[49] Article 279 of the Act on Election Procedure.

Conclusions

The paper analysed with complex regard a dilemma – the suspension possibility – regarding the judicial review procedure of electoral decisions. After the presentation of the complete legal remedy system of electoral cases, the paper focused on the explanation of the applicable provisions governing the judicial review procedures. The possibility (or the prohibition of the possibility) to suspend the court procedure in electoral cases is not regulated in detail, neither with specific rules in the Act on Electoral Procedure nor in the Code of Administrative Court Procedure. Through the real and hypothetical cases, the paper mentioned three scenarios when the idea of the suspension could be considered. As the first *de lege ferenda* suggestion regarding the suspension, because of an ongoing constitutional court procedure the decision on which may affect similar cases in front of the Curia, the author of this paper is of the profound conviction with respect to the favorable result of the further detailed regulation of this suspension case in the Act on Election Procedure. Secondly, the case of the uniformity procedure was examined as a case for suspension, in which we honestly believe that a precis regulation is needed, as well, in the Act on Electoral Procedure. For these rules, the provisions of the constitutional court procedure in electoral cases (with special time limits, etc.) can serve as an example. However, after the latest amendment regarding the territorial scope of the Act on Electoral Procedure, as the Act must be applied in Hungary and outside the territory of Hungary, the author of this paper supposes that this provision will raise further dilemmas, meanwhile this new regulation does not seem to bring a justified case in which the court procedure shall be suspended, keeping in mind the summary nature of the election procedure. The author of the paper proposes that there could be more detailed rules r even further ensuring the legality of the voting system by post, and that more guarantees (for example, with regard to the returning of postal voting documents to the election office) could be specified in the Act on Electoral Procedure.

The aim of the paper was to give a comprehensive analysis of the suspension possibilities of the court procedure in electoral cases.

The question was: is the suspension needed, and if yes, how is the regulation of it to be made possible. The answer from the author of the paper is "yes", but not in all cases. A detailed regulation is needed, for which this paper intended to give few *de lege ferenda* suggestions.

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Freedoms, Rights and Obligations of the Elderly in Extraordinary Circumstances and Crisis Situations

Introduction

The purpose of the Article is to present the titular issues in the perspective of theoretical formal considerations, which may constitute a point of reference for some practical solutions to each of the listed circumstances and situations, based mainly on the thesis that the elderly are a group which, by its nature, has special rights and freedoms and is subject to certain duties.

The items under assessment will be, above all, constitutional regulations, and the regulations included in special acts and executive acts about extraordinary circumstances (martial law, state of emergency, state of natural disaster), epidemics and crisis situations (emergency management).

The interest in the titular issue originated during classes offered at the War Studies University in Warsaw[1] to Polish Armed Forces officers, when students signalled practical difficulties relating to the provision of security to the elderly, amongst other things, during extraordinary circumstances and crisis situations on the one hand,

[1] https://www.wojsko-polskie.pl/aszwoj/en/ (accessed on: 28.10.2022). Notably, as part of the research-didactic activity conducted at the Faculty of Law and Administration.

and the need for the forces responsible for maintaining state security (safety and public order)[2] within the framework set forth by formal regulations, on the other hand. Based on the current, general provisions,[3] the study may resolve at least some of the theoretical doubts, and then have an impact on effective practical application of legal regulations, by both the uniformed services and (other) representatives of (state and self-government) public administration.

We must emphasise from the start that it should raise no doubt that the elderly have all the subjective qualities that allow them to enjoy general constitutional rights and freedoms. Furthermore, they have specific rights vested in them exclusively and especially. It is to be determined, though, to what extent do extraordinary circumstances and crisis situations, and related emergency management, have an impact on the rights and freedoms and the duties of the elderly. One should also take into account the right thesis of the Polish Constitutional Tribunal (PCT) expressed in the judgment of 3 July 2001, in which it "considers it to be an undoubted fact that the first reason why the rights of an individual may be limited is the protection of the common good, and in particular for the sake of national security and defence needs."[4]

[2] K. Walczuk, *Bezpieczeństwo publiczne, próba definicji*, [in:] *Prawo bezpieczeństwa publicznego*, M. Karpiuk, K. Walczuk (eds.), Warszawa 2013, pp. 11–22. Cf. M.A. Kamiński, *Defense Law as the Foundation of the State Defense System in the Republic of Poland*, "Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza" 2020, vol. 11, pp. 237, 246–247.

[3] Included, mostly, in the analysis prepared as part of the Polish-Hungarian Research Platform 2022, currently under publication: K. Walczuk, *An elderly person (older people) as a group subject to special protection in the perspective of Art. 31 sec. 3 of the Polish Constitution*. The study is a clear point of reference *passim*.

[4] Judgment by the Polish Constitutional Tribunal dated 3 July 2001, case file no. K. 3/01.

The elderly as subject to constitutional rights, freedoms and duties

Human rights, under the Polish (national) conditions, determined above all by the constitutional rights and freedoms, are characterised by certain attributes that can also be applied to the elderly and their rights and freedoms, both commonly held and typical of the group. The attributes that are directly derived from the recognition of the norms of natural law by the Polish lawmaker: inherent nature, dignity and equality.[5]

Inherent nature means that every human being possesses special rights and freedoms (is subject to them) due to the fact of being human. These are prerogative from conception[6] to death.[7] The claim that "the concept of a human being is undetermined to some extent" is unacceptable. Generally speaking, it suggests a certain stage of biological and psychological development. It is hard to associate it with the early stage following birth or with the final stage of their life. The initial level of development is usually described using the expressions such as an infant (a suckling), a baby or even "a little man". When speaking about the elderly, the following phrases are

[5] See M. Piechowiak, *Filozofia praw człowieka*, Lublin 1999, p. 115. Cf., M. Piechowiak, *Godność i równość jako podstawy sprawiedliwości. Z perspektywy międzynarodowej ochrony praw człowieka*, "Toruński Rocznik Praw Człowieka i Pokoju" 1993, vol. 1, pp. 37–48. See also T. Majerčák, *Ústavná koncepcia osobnýchh práv a slobôd*, "Prány obzor" 2008, 1(91), p. 16.

[6] See D. Dudek, *Konstytucja i prawo konstytucyjne*, Lublin 2010, p. 27; K. Walczuk, *Przyrodzony charakter…*, *op. cit.*, p. 115. Some consider one's birth as the moment when rights and freedoms are granted. For reflections on this topic in the context of international regulations – see T. Jasudowicz, *Prawo do życia*, [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, *Prawa człowieka i ich ochrona. Podręcznik dla studentów prawa i administracji*, Toruń 2005, pp. 241–244. See also J. Filip, *Vybrané kapitoly ke studiu ústavního práva*, Brno 2001, p. 66. V. Zoubek, *Svoboda, rovnost v důstojnosti a rovnost v právech (rovnoprávnost)*, [in:] A. Gerloch, J. Hřebejk, V. Zoubek, *Ústavní systém České Republiky. Základy českého ústavního práva*, Praha 1999, p. 307. Here, it is worth noticing that M. Freeman denies the inherent nature of human rights. See: *Prawa człowieka*, Warsaw 2007, pp. 76–77.

[7] It would be arguable here to consider inherent the human right to respect human corpse.

used: an aged man, an old man, even "it used to be a man."[8] Given the inherent nature of human rights, they are vested in everyone irrespective of their age or physical or mental health condition.[9]

Relatively frequently inherent nature is assigned to freedoms, but denied to rights, for the rights are conferred by the positive lawmaker (mainly the legislator) on its own volition. At times, some legal scholars and academics consider the fundamental freedoms to be "cultural achievement and accomplishment"[10] or the conclusion of a social contract is considered a condition for their recognition; alternatively, it is left to the discretion of the sovereign, which is actually equivalent to denying their inherent nature. Nonetheless, considering that, in principle, the rights are granted based on freedoms which, in my opinion, and, so it seems, according to the view of most legal scholars, are of inherent nature, it should be assumed that in the case of some rights, it is appropriate to grant some of them a possibility to affirm their inherent nature. Even more so, theoretical division into rights and freedoms is not clear, and thus it may be debatable.

The rights and freedoms vested in the elderly due to their inherent nature may not be treated only as positive rights, whether they are granted (confirmed/affirmed) by the state, international or community legislator. However, without a doubt, their positivisation facilitates their implementation and protection, also due to the real opportunity for imposing sanctions, should the provisions in question not be observed. Furthermore, it generates fewer practical doubts, which is of particular importance in the event of actions which require fast and clear decision-making, also by those who

[8] K. Complak, *O prawidłowe pojmowanie godności osoby ludzkiej w porządku RP*, [in:] *Prawa i wolności obywatelskie w Konstytucji RP*, B. Banaszak, A. Preisner (eds.), Warsaw 2002, p. 64.

[9] E.g. The preamble to the Universal Declaration of Human Rights of 1948 directly refers to "the inherent dignity and the equal and inalienable rights of all members of the human family", http://libr.sejm.gov.pl/tek01/txt/onz/1948.html (accessed on: 28.10.2022).

[10] See A. Łopatka, *Międzynarodowe prawo praw człowieka. Zarys*, Warsaw 1998, p. 10. Interestingly, when expressing the cited view, A. Łopatka states at the same time that the source of human rights is "the inherent dignity of a human being". *Ibid.*, p. 9.

not necessarily possess the relevant education. These remarks are crucial in case of emergency management.

The other element – **dignity** (of a human being) – is of fundamental importance for the understanding of the essence of a human being and their place in reality, and in the social and legal one, as well. This value is the starting point for the recognition of the constitutional rights and freedoms of an individual. As such, it is also one of the foundations of a democratic state of law[11] and "provides every human being with protection from being objectified, constitutes a premise for the comprehensive development of personality"[12] and equally affecting every human being – from conception until death, including old age, with all of its consequences. However, despite the fact that the concept of "human dignity" is already an integral part of European democratic constitutions and goes hand in hand with the embedding of this concept in the basic universal conventions on the protection of human rights adopted after the Second World War,[13] Polish and international employers, in principle, do

[11] In accordance with Article 2 of the Constitution of the Republic of Poland of 2nd April 1997 (Journal of Laws of 1997 No. 78, Item 483, as amended) the Republic of Poland shall be a democratic state ruled by law.

[12] M. Chmaj, *Godność człowieka jako źródło jego wolności i praw*, [in:] M. Chmaj, L. Leszczyński, W. Skrzydło, J.Z. Sobczak, A. Wróbel, *Konstytucyjne wolności i prawa w Polsce*, vol. I, *Zasady ogólne*, Kraków 2002, p. 73. D. Dudek, *Konstytucja i prawo konstytucyjne…*, *op. cit.*, p. 26.

[13] As noted by J. Svák in: *Premietne sa akceptácia medzinárodných dohovorov Európskym súdom pre ľudské práva do rozhodnutí Ústavného súdu SR?*, [in:] *Ústava Slovenskej republiky ako normatívny základ demokratického a právneho štátu (30. rokov Ústavy Slovenskej republiky) XI. ústavné dni Košice 28. a 29. september 2022*, L. Orosz, S. Grabowska, T. Majerčák (eds.), Košice 2022 (typescript in the process of publishing) an unexpected exception in this regard is the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2, Journal of Laws of 1993, No. 61, item 284, as amended), which does not contain the term "human dignity" in its text. However, this does not mean that dignity is excluded from the protection of the Convention. On the contrary, it appears one or more times (depending on the need to emphasize the importance of alerting the state to human rights violations in a particular case) in more than 2,100 judgments of the European Court of Human Rights, with a marked increase in judgments relating to "human

not define the term of human dignity, for they must assume that it is expressly derived from the totality of European culture[14] and the culture of every individual state. Another issue is that the disputes over "European values" have proven significant discrepancies in the understanding of European culture and its foundations[15], and also in the perspective of the elderly.

Given the concept of human dignity: person-oriented, personalised and personal,[16] the point of reference for our debate is the person-oriented (axiological-ontic) dignity, which every human being is entitled to from the very beginning (inherent nature), and thus characterised primarily by inviolability – regardless of the

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dignity" after 2000 (96%), culminating in 2012 when the term appeared in more than 200 cases. See V. Fikfak, L. Izvorova, *Language and Persuasion Human Dignity at the European Court of Human Right*, "Human Rights Law Review" 2022, vol. 22, Issue 3, September, pp. 1–24.

[14] Thus, also philosophy and religion. Such references are reflected by some legal scholars and academics and in the national and international judicature.

[15] See e.g. K. Walczuk, *Filozoficzne i prawne zagadnienia dotyczące preambuły Konstytucji Unii Europejskiej*, [in:] *Fundamenty nowego porządku konstytucyjnego UE. Aspekty prawne, polityczne i ekonomiczne*, A. Wentkowska (ed.), Sosnowiec 2005, pp. 43–49, with footnotes.

[16] More on these concepts: see K. Walczuk, *Przyrodzony charakter…*, *op. cit.*, pp. 120–122. See also J. Krukowski, *Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki*, [in:] *Podstawowe prawa jednostki i ich sądowa ochrona*, L. Wiśniewski (ed.), Warsaw 1997, pp. 39–42; S. Zieliński, *Rozumienie godności człowieka i jej znaczenie w procesie stanowienia i stosowania prawa. Propozycja testu zgodności regulacji prawnych z zasadą godności człowieka*, "Przegląd Sejmowy" 2019, no. 4(153), pp. 108–125; T. Jasudowicz, *Konstrukcja normatywna międzynarodowo chronionych praw człowieka*, [in:] Gronowska B., Jasudowicz T., Balcerzak M., Lubiszewski M., Mizerski R., *Prawa człowieka i ich ochrona. Podręcznik dla studentów prawa i administracji*, Toruń 2005, p. 92; M. Piechowiak, *Klasyczna koncepcja osoby jako podstawa pojmowania praw człowieka. Wokół Tomasza z Akwinu i Immanuela Kanta propozycji ugruntowania godności człowieka*, [in:] *Prawo naturalne – natura prawa*, Warszawa 2011, pp. 3–20; M. Piechowiak, *Godność jako fundament powinności prawa wobec godności człowieka*, P. Dardziński, F. Longchamps de Bérier, K. Szczucki (eds.), [in:] *Urzeczywistnianie praw człowieka w XXI wieku*, P. Morciniec, S.L. Stadniczeńko (eds.), Opole 2004, pp. 33–54; E. Podrez, *Godność. Z historii teorii godności*, [in:] *Powszechna Encyklopedia Filozofii*, A. Maryniarczyk (ed.), t. 4, Lublin 2003, pp. 17–22; ruling by the Polish Supreme Court dated 27 June 2012 (case file no. IV CSK 389/11).

actions of the person or the acts of others; it is also non-transferable, inalienable and non-degradable.

Consequently, it is reasonable to identify dignity with humanity and assume that due to the inherent dignity of a human, it should be considered a goal in itself,[17] a primary objective, which may not be reduced to a means to achieve goals that are detrimental to the essence of the concept of dignity, e.g., reducing a person to a means to satisfy the need for utility in any form.[18] The last stipulation seems to be of particular significance with reference to the elderly, who, inherently, as the years go by, usually need more attention and assistance from other people and organisations (including the state) than they are able to return, thus they are less useful from the utilitarian point of view, above all, in crisis situations and other situations which require swift and sometimes radical action. Defining a human being as a goal in itself is especially important from a practical point of view (decision-making), that the content of each law and freedom contains a certain content root which may not violated, as it constitutes *conditio sine qua non* of the rule of dignity."[19]

While referring to the Polish constitutional regulations, one may state that the constitutional rights and freedoms are manifestations of a single – grounded in natural law[20] – freedom stemming from

[17] See also I. Kant, *Uzasadnienie metafizyki moralności*, Warsaw 1972, p. 58. See also M. Piechowiak, *Pojęcie praw człowieka*, [in:] *Podstawowe prawa jednostki i ich sądowa ochrona*, L. Wiśniewski (ed.), Warsaw 1997, p. 18.

[18] See K. Walczuk, *Przyrodzony charakter*…, *op. cit.*, p. 121.

[19] Judgment by the Polish Constitutional Tribunal dated 30 October 2006, case file no. P 10/06. See also L. Garlicki, *Comment to Article 30*, [in:] *The Constitution of the Republic of Poland; Komentarz*, vol. I, Warsaw 1999, note 2.

[20] See e.g. D. Dudek, *Konstytucja*…, *op. cit.*, p. 21; K. Walczuk, *Prawa człowieka a prawo naturalne*, [in:] *Kultura bezpieczeństwa. Potrzeby i uwarunkowania*, M. Fałdowska, A.W. Świderski, G. Wierzbicki (eds.), t. III, Siedlce 2016, pp. 99–119; L. Wiśniewski, *Prawo a wolność człowieka. Pojęcie i konstrukcja prawna*, [in:] *Podstawowe prawa jednostki i ich sądowa ochrona*, L. Wiśniewski (ed.), Warszawa 1997, p. 58; J. Kalinowski, *Zagadnienia aksjomatyzacji nauk prawa*, "Roczniki Nauk Społecznych" 1958, nr 1, p. 39. See also Judgment by the Polish Constitutional Tribunal dated 2 March 1994, case file no. W 3/93.

"the inherent and inalienable dignity of the person" (Article 30 of the Constitution of the Republic of Poland).[21]

Another principal element of human rights, particularly important for the elderly, is **equality.** In many respects, it is parallel to prohibition of discrimination, although a part of legal scholars distinguishes between the two concepts.[22] Equality means that identical (i.e., equal) rights have been granted to all people to the same extent, especially that they have originated from the same source, namely human dignity. However, an important reservation should not be overlooked – the principle of equality does not mean everyone is to be treated in the same way and equality before the law should be understood as treating all entities characterised by the same quality to an equal degree using an equal measure. However, sometimes the so-called positive discrimination, consisting in actively preferring certain groups, is allowed when necessary, in order to bring about actual equality.[23] Moreover, on numerous occasions, introducing such distinction has actually been the essence of particular law. For example, this is the case of the women's rights related to childbirth – also stemming from the inherent and inalienable human dignity,

[21] See K. Walczuk, *Comment to Article 31…*, *op. cit.*, pp. 82, 87. Whereby legal scholars claim that the definition of freedom in the Constitution of the Republic of Poland covers three different, though somewhat overlapping, scopes, at times treated as three various ideas of freedom. See remarks *Ibid.*, p. 84. In the broadest understanding, "freedom" is a general liberty to decide about oneself. In a narrower sense, "freedom" seems to denote certain group of rights of an individual (cf. D. Dudek, *Konstytucyjna wolność człowieka a tymczasowe aresztowanie*, Lublin 2000, p. 81) and it should be assumed that this is the meaning in which the term was used in Article 31 section 3 of the Constitution and in other relevant regulations. On the other hand, "freedom" in its most narrow meaning denotes solely personal inviolability, as specified in Article 41 of the Constitution. This interpretation is complemented by the following previous assumption: if a constitutional norm generally authorizes the legislator to limit particular freedom or particular right without indicating the prerequisites for such limitation, the prerequisites contained in Article 31 section 3 of the Polish Constitution shall apply.

[22] For more see K. Walczuk, *Przyrodzony charakter…*, *op. cit.*, pp. 125–126.

[23] Until the Constitution of the Republic of Poland of 1997, a natural disaster was only a reason to introduce a state of emergency. See Article 1(1) of the Act of 5 December 1983 on the state of emergency (Journal of Laws of 1983 No. 66, Item 297, as amended).

specific rights of the children themselves or of the parents towards (in relation to) their own children[24] or the rights related to age and access to specific health or social benefits, etc.

We may distinguish between **equal rights and equality before the law**, whereas **equality before the law is**, in a way, derived from **equal rights**. Equal rights derived from inherent human dignity, thus having its source in natural law, obliges or mandates the application of equality before positive law.[25] Equality before the law may be understood as application of a given legal norm in all cases in which positive law provides for its application.[26]

The elderly, as the subjects of rights and freedoms of a human being and a citizen, fully enjoy the indicated attributes which characterise those rights and freedoms. At the same time, it is important to remember that the elderly have certain age-related qualities resulting in – despite the general equality – special treatment, especially in terms of extended guarantees of rights and freedoms, and an award of special rights of medical and social nature, but also – as presented in more detail in the further, concluding argument – in terms of limitations.

The concept and admissibility of introduction of the "extraordinary state" and the idea of "crisis situation" in the Polish law from the perspective of the elderly

The Polish constitution allows an introduction of 3 extraordinary circumsatnces only: 1) martial law, 2) a state of emergency, and 3) a state of natural disaster (Article 228(1) *in fine* of the Constitution). Therefore, by law, no other type of a "special state", including the state of epidemics,[27] is an extraordinary state.

[24] See K. Walczuk, *Przyrodzony charakter*…, *op. cit.*, p. 127.

[25] *Ibid*., p. 128.

[26] M. Piechowiak, *Pojęcie praw człowieka*…, *op. cit.*, p. 23.

[27] See the Regulation of the Minister of Health of 20 March 2020 on the declaration of a state of epidemics within the territory of the Republic of Poland (Journal of Laws of 2020, Item 491) repealed on 16 May 2022.

In addition, the admissibility of implementation of one of the extraordinary circumstances is regulated constitutionally, which leaves no room for manoeuvre even to statutory provisions – a statute (law) may not introduce or ordain an extraordinary state other than that specified in the Constitution of the Republic of Poland. A condition for an extraordinary state to be implemented is the co-existence of the following circumstances/events: 1) a situation of particular danger of either internal or external nature; 2) insufficiency of ordinary constitutional measures; 3) introduction on the basis of statute, by regulation, which shall be publicised (Article 288(1) and (2) of the Constitution).

Article 228(1) of the Constitution introduced the principle of subsidiarity, i.e., uniqueness, of the implementation of an extraordinary state. In addition, the optionality of its introduction is emphasised with the use of the phrasing that it "may" be introduced. To determine whether an extraordinary state is to be introduced and in what form is to be assessed by a relevant authority.

The insufficiency of ordinary constitutional measures may result in the need to apply special measures, taking the form of: 1) concentration of power among the executive authority and, therefore, actual limitation of the statutory authority; 2) revision in the system of law-making; 3) highly important from our point view, limitation of citizen rights and freedoms, and sometimes the rights and freedoms of a human being (every citizen is a man, but not every man is a citizen); 4) changes in the structure of rules of operation of state authorities.

Under the current state of Polish law, an extraordinary state may be introduced only based on the following Acts: 1) of 29 August 2002 on the martial law and competencies of the Commander-in--Chief and the rules of his subjectivity to the constitution bodies[28]; 2) of 21 June 2002 on the state of emergency[29]; 3) of 18 April 2002 in the state of natural disasters.[30] The Acts constitute, amongst other things, the foundation for the implementation of relevant

[28] Journal of Laws of 2017, Item 1932, as amended.
[29] Journal of Laws of 2017, Item 1928.
[30] Journal of Laws of 2017, Item 1897.

regulations.[31] Given that the limitations of constitutional rights and freedoms of the elderly may be introduced only by statutes (not by regulations etc.), the interest of the elderly here seems to be secured (in two steps).

All activities undertaken as a result of an introduction of an extraordinary state must correspond to the level of threat – they must be proportional – and they should aim at the fastest possible restoration of regular operations of the state (Article 288(5) of the Constitution), and also against a backdrop of performance of state's tasks concerning its citizens in advanced age as well.

It is worth bearing in mind, not all human rights may be limited to the same extent and not in every case of an extraordinary state – e.g., the right to information may be limited during a state of martial law or in the state of emergency (interpretation *a contrario* – no indication in Article 233(1) of the Constitution), but not in the case of the natural disaster state.

Under Article 229 of the Constitution, the **state of martial law** my only be declared in the case of: external threats to the State, acts of armed aggression against the territory of the Republic of Poland; when an obligation of common defence against aggression arises by virtue of international agreement, notwithstanding some forms of terrorism, which may be the condition to declare the state of martial law.[32] It is of particular importance in view of the fact that some forms or concrete examples of terrorism (terrorist activities or terrorist acts) are of an internal nature and origin (domestic). On the other hand, in the Constitution from the year 1997, the approach followed in the 1952 communist-based Constitution,[33] when the declaration of the state of martial law could be justified by the need to guarantee "state security", also in the domestic context, i.e., it could be justified by internal conditions, was abandoned.

[31] The regulations, i.e. the executive acts to the Acts, which are issued only in the event of a clear reference in the Act that: they are to be issued, by whom and for what scope of their regulation.

[32] See the Constitutional Tribunal judgment of 30 September 2008 (case ref. K 44/07).

[33] The Constitution of the Polish People's Republic adopted by the Lower House of Parliament on 22 July 1952 (Journal of Laws of 1952 No. 33, Item 232).

To declare the state of martial law, it suffices to demonstrate one of the conditions listed hereinabove. Without a doubt, the conditions may occur jointly. Martial law is declared by regulation, which – what seems particularly crucial from the point of view of the elderly – just as all regulations related to the declaration of all extraordinary circumstances, is subject to additional public disclosure[34] by the President of the Republic of Poland only upon an application[35] (in the form of an Act) of the Council of Ministers[36] and upon an *a posteriori* consent (confirmation) of the Lower House of Parliament.[37] It has to be clearly seen that martial law is not tantamount to "the state of war" and "the time of war".

Whereas, the state of emergency may be declared if the following are threatened: the constitutional system of the state; safety of the citizens, public order[38] (Article 230 of the Constitution). To declare the state of emergency, it suffices to demonstrate one of the listed conditions, or all of the conditions jointly. In addition, the state of emergency is declared by the President of the Republic of Poland (optionally, it may be declared, but it does not have to), upon an application (obligatory – the President of the Republic of Poland may not on his/her own take the formal initiative) of the Council of Ministers.[39] It is vital to note that the state of emergency may be declared only for a determined period of time, no longer than 90 days, and potentially extended over additional 60 days – its prolongation may occur only once, upon the consent of the Lower House of Parliament.[40]

[34] Pursuant to Article 228(1) of the Constitution.

[35] The President of the Republic of Poland may, but does not have to, allow the application.

[36] It means a collegial body with original competencies, see Article 146 of the Constitution.

[37] See Articles 229 and 231 of the Constitution.

[38] Zob. K. Walczuk, *Bezpieczeństwo publiczne…*, *op. cit.*, pp. 11–22.

[39] Pursuant to Article 230(1) of the Constitution.

[40] Article 230(1) and (2) of the Constitution.

The lowest level of the extraordinary state,[41] **the state of natural disaster**, by principle may be declared most frequently and, therefore, affect the elderly with its restrictions. It may declared to: prevent the consequences of a natural catastrophe exhibiting characteristics of a natural disaster; prevent the consequences of a technological accident exhibiting characteristics of a natural disaster; remove the consequences of a natural catastrophe exhibiting characteristics of a natural disaster; remove the consequences of a technological accident exhibiting characteristics of a natural disaster.[42] The reasons may appear individually or jointly.

A natural disaster is a natural catastrophe or a technological accident, the consequences of which threaten the lives or health of large numbers of people, assets of substantial value or the environment in large areas, and where help and protection may be effective only when extraordinary measures are applied, with cooperation of various bodies and institutions, and specialist services and formations operating under uniform management.[43] A natural catastrophe will be an event relating to the power of the forces of nature, above all, atmospheric discharges, seismic activity, strong winds, intense precipitation, long-term extreme temperatures, landslides, fires, droughts, floods, ice phenomena on rivers, sea, lakes and water reservoirs, massive occurrence of pests, plant diseases, animal diseases or human infectious diseases or an activity of another element.[44] As a technological accident, one means a rapid, unforeseen damage of or destruction of a civil structure, technical device or a system of technical devices causing a break in their use or loss of their characteristics.[45] Both

[41] Until the introduction of the Constitution of the Republic of Poland of 1997, a natural disaster was only a premise for the introduction of a state of emergency. See Article 1(1) of the Act of 5 December 1983 on the state of emergency.

[42] See Article 232 of the Constitution.

[43] Article 3(1)(1) of the Act on natural disasters.

[44] Article 3(1)(2) of the Act on natural disasters.

[45] Article 3(1)(3) of the Act on natural disasters.

natural disasters and technical accidents may also result from cyberspace events[46] and actions of terrorist nature.[47]

The state of natural disaster may be declared by a Regulation[48] issued by the Council of Ministers on a discretionary basis (the Council of Ministers may, but does not have to, introduce it independently, without participation of the President of the Republic of Poland), for a limited period, in principle not exceeding 30 days, subject to its extension only upon the consent of the Lower House of Parliament.[49]

Martial law, state of emergency and state of natural disaster may be declared within the territory of the entire country or its part, for instance, only in the border units of the state administrative division or where specific events or circumstances occurred. This is important from the practical point of view of the elderly for a declaration of martial law on some part of the territory allows their preferential relocation to the area unaffected by the extraordinary state.

Extraordinary circumstances differ from **crisis (emergency) situations.** The notion of a crisis situation was defined in Article 3(1) of

[46] A cyberspace is a space where information created by ICT systems is exchanged and processed, where the ICT system is a set of cooperating IT devices and software, ensuring the processing and storage as well as sending and receiving of data via telecommunication networks by means of telecommunication terminal equipment appropriate for a given type of network, within the meaning of the provisions of the Telecommunication Act of 16 July 2004 (Journal of Laws of 2022, Item 1648 as amended), along their interrelations and the relations with users. See Article 3(1)(4) of the Act on the state of natural disasters read in conjunction with Article 3(3) of the Act of 17 February 2005 on computerisation of the activity of entities performing public tasks (Journal of Laws of 2021, Item 2070, as amended). See also F. Radoniewicz, *Komentarz do Art. 2*, [in:] *Ustawa o krajowym systemie cyberbezpieczeństwa. Komentarz*, W. Kitler, J. Taczkowska-Olszewska, F. Radoniewicz (eds.), Warszawa 2019, p. 33.

[47] Article 3(2) of the Act on natural disasters.

[48] The statutory authorisation to adopt such regulation may be formulated more generally than in the case of authorisation under Article 92(1) of the Constitution. The key issues are reserved for the Act, but it is permissible that more cases be regulated by regulation (see the judgement of the Constitutional Tribunal of 17.05.2012, case ref. K 10/11).

[49] Article 232 of the Constitution. Even though in any such case the time must also be determined, the Constitution does not limit the ability to extend the state of natural disaster, insofar as the circumstances which justify it continue.

the Act on emergency management of 26 April 2007.[50] According to the definition, a crisis (or emergency) situation is a situation which has a negative impact on the level of security of the people, assets of large value or the environment, causing significant limitations in the operation of relevant public authorities due to the inadequacy of possessed forces and measures. Crisis situations involve the state of epidemiological threat or the state of epidemics.[51]

Crisis situations relate to emergency management,[52] viewed as an activity of public authorities which is an element of national security management, which involves emergency situation prevention, readiness to take control over them by pre-planned activities, respond in the event of an emergency situation, deal with its consequences, and recover the resources and critical infrastructure.[53]

The elderly may be expected to be treated in a special manner both in the real world and in the cyberspace. The last example pertains mainly to the sanctions levied on offenders aiming at elderly people (in a situation when particular incapability of an elderly person can be demonstrated).

[50] Journal of Laws of 2022, Item 261, as amended.

[51] See Article 9(5a) of the Act on commune patrols of 29 August 1997 (Journal of Laws of 2021, Item 1763). See also the Act of 2 March 2020 on special solutions related to the prevention, counteracting and combating COVID-19, other communicable diseases and resultant crisis situations (Journal of Laws of 2021, Item 2095, as amended).

[52] The literature notes that there is legislative chaos in the field of crisis management. See M. Karpiuk, *Wygaśnięcie mandatu wójta na skutek skazania na karę grzywny za niedopełnienie obowiązków z zakresu zarządzania kryzysowego. Glosa do wyroku Sądu Rejonowego w P. z dnia 18 kwietnia 2019 r. (II K 1164/14)*, "Studia Iuridica Lublinensia" 2020, vol. XXIX, 1, p. 274.

[53] Article 2 of Act on emergency management.

Permissibility of intervention in the legal rights of the elderly

The Polish constitutional regulations show, above all, vertical (on the state/public administration[54]/human being/citizen/individual plane) but also horizontal (on the inter-human plane and, more broadly speaking, between the individuals not equipped with an empire/state power)[55] operation of human laws and freedoms. It seems particularly important with reference to the elderly, for they often need inherently resulting special treatment.

The Constitution defines the general principles of admissibility of limitations regarding constitutional human rights, which is not without significance for the issue of granting (or not) the specific guarantees for protecting the rights and freedoms of the elderly. As the general principles of admissibility of limitations has been determined in general terms, the natural consequence is admissibility, and – in some cases – even necessity to implement or interpret admissibility with reference to individual social groups or individuals, especially since the regulations contained in Article 31 section 3 of the Constitution of the Republic of Poland[56] determining the

[54] Including government administration (involving also the uniformed services, particularly active during the extraordinary circumstances and crisis situations and whose activity may have a strong impact on the situation of the elderly), self-government administration and the administration of justice.

[55] See, in particular, Article 31 section 2 sentence 1 of the Constitution of the Republic of Poland "Everyone shall respect the rights and freedoms of others." See also Article 31 section 2 sentence 2 of the Constitution of the Republic of Poland "No one shall be compelled to do that which is not required by law", which is actually a reversal of the regulation of Article 7 of the Constitution (specifying the principle of legalism), where the legislator stated that "The organs of public authority shall function on the basis of, and within the limits of, the law". Essentially, this signifies that all widely-understood public authorities may only act as it is explicitly permitted or ordered by the law (thus expressed, not implied), whereas the citizens and – to a wider extent – people (i.e. everyone, including the elderly) may, in general, do anything what the law does not explicitly forbid or order them to do.

[56] "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment,

admissibility of limitations do not actually provide a sufficiently clear answer to whether they constitute an independent authorisation to limit the constitutional rights and freedoms.[57] By way of

health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

[57] See K. Walczuk, *Dopuszczalność ograniczeń konstytucyjnych praw człowieka ze względu na bezpieczeństwo ekologiczne państwa*, [in:] *Stan prawny, zakres przedmiotowy, podmiotowy oraz funkcjonalny prawa bezpieczeństwa narodowego RP*, M. Karpiuk (ed.), Warsaw 2013, p. 210. Whereby some legal scholars held the opinion that the provisions of Article 31 section 3 of the Polish Constitution, allowing for the general and broad limitations, are non-compliant with international and European regulations, and thus subject to depreciation. According to T. Jasudowicz, *Rozważania ogólne*, [in:] *Polska wobec europejskich standardów praw człowieka. Materials from the scientific conference of doctoral and undergraduate students of the Nicolaus Copernicus University in Toruń (NCU) "W 50-lecie Europejskiej Konwencji Praw Człowieka i 10-lecie Katedry Praw Człowieka i Prawa Europejskiego UMK"*, T. Jasudowicz (ed.), Toruń 2001, pp. 16–17. However, bearing in mind the hierarchy of the sources of law, in which the constitutional regulations take precedence over international and community (EU) law, it is difficult to agree with such an approach. See K. Walczuk, *The hierarchy of Polish state security laws from the perspective of European integration*, [in:] *Security and Globalization in the Context of European Integration. Legal Aspects*, P. Sobczyk (ed.), Hamburg 2017, pp. 53–66; K. Walczuk, *Umowy międzynarodowe i prawo europejskie w konstytucyjnej hierarchii źródeł prawa*, [in:] *Pacta sunt servanda – nierealny projekt czy gwarancja ładu społecznego i prawnego*, E. Kozerska, P. Sadowski, A. Szymański (eds.), Kraków 2015, pp. 247–255; K. Klíma, *Suverenita – ústavní význam*, [in:] *Encyklopedie ústavního práva*, K. Klíma at al., Praha 2007, p. 628; W.J. Wołpiuk, *Niepodległość i suwerenność. Dystynkcje pojęciowe*, [in:] *Spór o suwerenność*, W.J. Wołpiuk (ed.),Warszawa 2001, p. 95; M. Granat, *Prawo konstytucyjne. Pytania i odpowiedzi*, Warszawa 2019, p. 94; L. Antonowicz, *Podręcznik prawa międzynarodowego*, Warszawa 1998, p. 39; L. Garlicki, *Konstytucyjne źródła prawa administracyjnego*, [in:] *System Prawa Administracyjnego Vol. 2. Konstytucyjne podstawy funkcjonowania administracji publicznej*, R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), Warsaw 2012. See also Judgment by the Polish Constitutional Tribunal: dated 27 October 2005 (case reference P 1/05); dated 11 May 2005 (case file no. K 18/04); dated 24 November 2010 (case reference K 32/09). Judgments by the Polish Constitutional Tribunal are available under the following address: https://trybunal.gov.pl/orzeczenia/ (accessed on: 8.11.2022). Compare K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, pp. 81–83, with the comment in K. Walczuk, *Comment to Article 31…*, *op. cit.*, pp. 89–92. On the subject of constitutional works to the discussed extent see *Ibid*., pp. 83–84 and references made therein. See also R. Chruściak, *Projekty konstytucji 1993–1997*, Warszawa

interpretation, one should opt for the claim that the essential Article 3 section 3 of the Constitution of the Republic of Poland does not essentially constitute an independent basis for limiting the constitutional rights and freedoms,[58] and only specifies the impassable limits of interference which may be specified "only statutorily" and extended exclusively in regulations of constitutional importance.[59] Whereby it may be – in a way conditionally – applicable directly, provided that it is compliant with formal requirements[60] in the cases where there are no individual, i.e., referring to the particular freedom

1997; J. Zaleśny, *Tworzenie Konstytucji z 1997 roku. Przejaw kooperacji czy rywalizacji elit politycznych?*, "Przegląd Sejmowy" 2017, no. 6, pp. 193–202.

[58] As, however less strict: K. Wojtyczek, *Granice…*, *op. cit.*, p. 82. Cf. K. Walczuk, *Komentarz do Art. 31…*, *op. cit.*, p. 91.

[59] K. Walczuk, *Dopuszczalność…*, *op. cit.*, p. 393; M. Wyrzykowski, *Granice praw i wolności – granice władzy,* [in:] *Obywatel – jego wolności i prawa. Zbiór studiów przygotowanych z okazji 10-lecia urzędu Rzecznika Praw Obywatelskich*, Warsaw 1998, p. 57. K. Walczuk, *Dopuszczalność…*, *op. cit.*, p. 393. The Constitution may also limit the permissibility of intervention in the rights and freedoms to a greater textent than it does in Article 31(3) of the Constitution.

[60] The Polish Constitution distinguishes one formal requirement – the necessity to introduce limitations upon constitutional rights and freedoms in the provisions of statutory importance. This entails the necessary participation of the directly elected representatives of the sovereign (in Poland, the sovereign is the Nation, pursuant to Article 4 section 1 of the Constitution of the Republic of Poland), i.e. deputies (sitting in the Lower House of Parliament – Sejm) and senators (sitting in the Higher House of Parliament – Senat), constituting the legislative authority. However, it would be far-fetched to conclude that non-legislators have been completely excluded from the process of limiting rights and freedoms. It is especially significant from the perspective of regulating the legal standing of the elderly, as it is admissible for the parliament to statutorily determine the scope of limitations and to impose on the executive authority (in Poland it is the Council of Ministers, i.e. the government and the President of the Republic of Poland) the duty to issue executive acts, or the duty to issue local law acts (which also constitute the generally applicable legislation, although only in the territory of the issuing bodies – see Article 87 section 2 of the Constitution of the Republic of Poland) on local government bodies, in order to carry out statutory provisions. Another approach to the formal aspect of limiting constitutional rights and freedoms of human and citizen – see: M. Ławrynowicz-Mikłaszewicz, *Koncepcja istoty wolności i praw jednostki oraz aspekt formalny ich ograniczenia*, "Przegląd Prawa Konstytucyjnego" 2014, no. 4(20), pp. 73–91.

or right, constitutional regulations specifying the individual conditions of the substantial admissibility of the limitations.[61]

Taking into account the above insights and the nature of the legal regulations concerning the elderly, it should be assumed that when certain circumstances, or even the whole area of social and political life, have not been regulated in the provisions concerning particular constitutional rights and freedoms of an individual, the guarantee of individual freedom of action[62] can be derived directly from Article 31 section 1 and 2 of the Constitution of the Republic of Poland. Such reasoning is confirmed by judicial decisions of the Polish Constitutional Tribunal, pursuant to which Article 31 section 1 "complements the provisions defining individual constitutional freedoms"[63] and constitutes *lex generalis* in relation to the provisions governing constitutional rights and freedoms.[64]

In any case, we must not forget that neither the states operating in the international public sphere (contracting primarily in the form of international agreements and by adopting EU law), nor the drafters of national constitutions, nor ordinary legislators can limit the fundamental rights and freedoms at their own discretion. As the nature of fundamental rights and freedoms has been assigned to natural law, the role of the legislator – a positive legislator – is primarily only to "affirm the existence of this freedom, define its fundamental aspects and establish the indispensable guarantees and necessary limitations."[65]

The above is reflected in the constitutional requirement for an introduction of certain limitation of a particular freedom or right, with the application of the proportionality principle. Its essence lies in prohibiting excessive intervention (first and foremost, of the

[61] See and cf. K. Walczuk, *Comment to Art. 31…*, *op. cit.*, p. 93.

[62] Unlike the possibility to impose limitations on constitutional rights and freedoms.

[63] Judgment by the Polish Constitutional Tribunal of: 20 December, case reference K 4/99 and 4 November 2015, case reference K 1/14.

[64] Judgment by the Polish Constitutional Tribunal dated 07 May 2002, case file no. SK 20/00.

[65] Resolution by the Polish Constitutional Tribunal dated 02 March 1994, case file no. W 3/93.

broadly defined state, above all, its bodies equipped with physical power, which is particularly important in the situations where they gain special formal powers, just as in the case of extraordinary circumstances and crisis situations), i.e., acknowledging that if it is truly necessary to impose limitation upon rights and freedoms of an individual, this can only be done to the minimum extent truly necessary and the primary measure for determining such necessity is comparing the significance of the public interest that such limitation is intended to serve and the right or freedom such limitation is to affect.[66] The constitutional imperative to respect the essence of individual rights and freedoms is also not without significance here (Article 31 section 3 *in fine* of the Constitution). It is of major importance in relation to the elderly, who – by virtue of their age – naturally need to be paid more attention to, both when determining the relationship between their individual and public interests, and when indicating an untouchable core of a given right or freedom.

Conclusion

Although in many respects based on concrete regulations, mostly of a constitutional nature, the presented considerations are largely theoretical. This is due to the fact that they refer to fundamental questions which, as such, present a point of reference and the foundation of executive regulations. Therefore, they carry significant practical potential, consisting in the provision of argumentation to the entities protecting the rights and freedoms of the elderly on the one hand and, on the other hand, e.g., to the representatives of public authorities (both on the state/domestic and international/community level),[67] guarding public order and security.

The comments made mostly in the first part of the article, referring to the attributes of human rights vested in the elderly, as for *de lege ferenda* conclusions, demonstrate quite an explicit need to

[66] See K. Walczuk, *Komentarz do Art. 31…*, *op. cit.*, p. 99.

[67] Broadly speaking. See and cf. K. Walczuk, *Bezpieczeństwo publiczne…*, *op. cit.*, pp. 11–22.

determine, as precisely as possible, the powers and obligations, also of the elderly, which will result in the ability to take (or omit to take) action by law enforcement entities and armed forces. Notably where the application of the principle according to which a citizen (a man) may do everything that is not forbidden or required, and the state (its bodies, officers, soldiers) may only do what is allowed or prescribed (action on the basis and within the law), may not be clear whatsoever in extraordinary circumstances and crisis situations. Furthermore, it has been justified that preparing brief papers (*quasi* manuals) for officers and soldiers, which would facilitate the taking of the right decisions in accordance with the formal basis within the scope shown in the title. Here, it should be emphasised that both the decisions and the circumstances which give rise to them are necessarily of casuist nature.

Taking into consideration the current political and legal circumstances, especially in the context of continuous threat from aggressive states such as Russia (above all, the full-scale war with Ukraine that started in 2022) and continuous aggressive activity in the cyberspace, as well as preparations to hybrid operations conducted from the Kaliningrad Oblast[68]) and Belarus (mostly hybrid operations resulting in the migration crisis on the borders with Poland and Lithuania, initiated in 2021) and epidemiological situation (above all the worldwide situation related to the COVID-19 coronavirus), it seems appropriate, on the one hand, to leave considerable freedom in shaping the understanding of particular rights and freedoms to the entities applying certain legal provisions; however, on the other hand – as learned, for example, from experience in Poland and other UE states with distorting the meaning (understanding) and even the content of constitutional regulations,[69] which did not raise any doubts for years and only recently, as a result of subversive movements, have had radically different meaning assigned to them – the immutability (permanence) of the meanings attributed to fundamental rights and freedoms, also those of the elderly, could be considered a value subject to special protection.

[68] Started in the autumn of 2022.

[69] At least those related to marriage.

Without a doubt, the elderly enjoy inherent and inalienable dignity, constituting the source of all fundamental rights and freedoms. They also enjoy the attributes of equality: equal rights and equality before the law. Nonetheless, by virtue of their special position due to age, the scope of those freedoms, the rights above all, must be appropriately modified with a view to attaining equality in practice. It happens that the use of the so-called positive discrimination, for instance in the area of health or social protection, is inevitable. What is more, there are situations which affect the duties of the elderly, where, due to age, a person is not able to undertake certain actions (and thus have full control of their legal and factual situation) – e.g., service in the military[70] or in other (especially armed) formations or actively participate in actions related to crisis situations. It should be explicitly stated that such affirmative treatment and special limitations with respect to the elderly, also during extraordinary circumstances and crisis situations, appear permissible by principle

As a result, the attributes defining the position of the elderly in terms of rights and freedoms affect the implementation of the regulation contained in Article 31 section 3 of the Constitution of the Republic of Poland, whereas, special protection of the elderly based on the said provision will be limited to certain issues only. Being especially sensitive entities, the elderly may encounter statutorily sanctioned limitations, arising, for example, from the necessity to care for public health – which was seen in practice in many countries of the world (including Poland) during the fight against the COVID-19 pandemics – and may occur, in particular, during extraordinary circumstances and crisis situations.

It ought to be emphasised that both *de lega lata* and *de lege ferenda,* any limitation upon the constitutional rights and freedoms requires individual assessment and, especially in the case of the elderly, it may not be assumed that – by definition – it violates the essence of the freedom or right in question, or violates (is against) the attributes defining subjectivity in the sphere of human rights.

[70] See and cf. Judgment by the Polish Constitutional Tribunal dated 16 February 1999, case file no. SK 11/98.

As for future law, on the grounds of Polish law and the appropriate scope of European law, there are no general contraindications to the introduction of limitations upon the exercise of constitutional freedoms and human and civil rights appurtenant to older persons, as long as the said limitations are compliant with disposition indicated in Article 31 section 3 of the Constitution of the Republic of Poland or do not result from *lex specialis* of constitutional nature, and respect the inherent dignity of human beings in line with the principles of equal rights and equality before the law, also during the martial law, the state of emergency, or the state of natural disaster.

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Mediation in Polish Criminal Proceedings – Perspective and Possible Revision (Postulates *De Lege Ferenda*)

Introduction

The institution of mediation has been present in Polish criminal proceedings for 25 years. Since the beginning of the Criminal Procedure Code of 1997,[1] throughout this period, it has been amended twice. Currently, in force is the second ordinance of the Minister of Justice concerning mediation proceedings in criminal cases.[2] It seems that perhaps this is a good time to review the current shape of mediation in the Polish criminal process. The argument in favour of such a revision is not, of course, the duration of the mediation regulations themselves, but the practice of their application, or rather the insignificance of this practice.

[1] Act of 6 June 1997 Code of Criminal Procedure, consolidated text, Journal of Laws of 2022, Item 1375.

[2] Ordinance of the Minister of Justice of 7 May 2015 on mediation proceedings in criminal cases, Journal of Laws of 2015, Item 716.

Mediation *de lege lata*

The regulation of mediation itself in the Polish Code of Criminal Procedure and the 2015 ordinance of the Minister of Justice is quite general. The current regulation of Article 23a of the Code of Criminal Procedure defines the authorities that can refer a case to mediation, the grounds that allow it, the maximum period of mediation, and the entities that cannot act as a mediator. The aforementioned ordinance of the Minister of Justice specifies the stages of mediation proceedings; the conditions to be met by institutions and persons authorised to conduct mediation; the manner of appointing and dismissing mediators; the scope and conditions for making case files available to the mediator; and the form and scope of the report on the results of mediation proceedings. Without recalling here in detail the content of Article 23a of the Code of Criminal Procedure and the provisions of the 2015 ordinance of the Minister of Justice, it can be concluded that their mentioned generality is not necessarily a drawback. On the contrary, these provisions, after a preliminary analysis of them, without looking at the practice of the use of mediation in Polish criminal proceedings, seem to be well thought out and would seem to allow for the effective use of the mediation procedure in practice, as an effective tool of restorative justice.

The practice of mediation in Polish criminal proceedings

Meanwhile, statistics show that only a small number of criminal cases go to mediation. Specifically, it is less than 1%. However, the statistics show a rather high efficiency of the mediation proceedings already initiated – about 60–70% of them end in a settlement. The statistics therefore show that mediation in criminal cases occurs very rarely. On the other hand, when it is initiated, it has a fairly high success rate. Therefore, it is possible to form a hypothesis that mediation can be a very valuable tool of restorative justice; however, there are some serious problems or limitations in its application in the Polish criminal procedure.

The limitations seem to be related to the lack of interest in mediation on the part of the organs conducting criminal proceedings (prosecutors and courts), and of suspects and defendants as well as victims. Such a supposition is confirmed in a report prepared in 2015, at the request of the Minister of Justice, containing a diagnosis of the state of the use of mediation in Poland and the reasons for its low popularity.[3] The results of research conducted by the authors of the report indicate that neither judges nor prosecutors are interested in referring cases to mediation. The reason for this may be the schematic, routine way of conducting proceedings, which does not provide for the possibility of mediation, as well as a lack of trust in the quality of mediation proceedings[4] and of the qualifications of mediators as well as the value of a mediated settlement agreement. The problem of mediators' qualifications was also pointed out by the mediators themselves who took part in the research, indicating a lack of financial resources and motivation to improve their qualifications.[5]

The above-mentioned research carried out for the purposes of the report also indicates a lack of interest in mediation on the part of suspects and defendants as well as victims of crime. The authors of the report recommend in this respect undertaking appropriate

[3] A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza stanu stosowania mediacji oraz przyczyn zbyt niskiej w stosunku do oczekiwanej popularności mediacji – Raport końcowy*.

[4] Compare: M. Hacia-Groticka, P. Czarnecki, *Opinie ekspertów na temat barier instytucjonalnych oraz promocji mediacji w środowiskach prawniczych*, [in:] *Mediacja. Teoria, normy, praktyka*, M. Araszkiewicz, J. Czapska, M. Pękala, K. Płeszka (eds.), Warszawa 2017, p. 449–453. As a passing remark, it should be added that the research cited by M. Hacia-Groticka and P. Czarnecki also shows that according to judges and prosecutors, such prosaic circumstances as the rules of reporting required of them and the rules of evaluating the work of judges are also a limitation in referring cases to mediation. At the same time, prosecutors explicitly indicated in this research that although, according to the law, the duration of mediation is not included in the duration of criminal proceedings, it is nevertheless recorded and analysed in the reporting system of the prosecutor's office, which generates for them concerns about the length of the conducted proceedings – see *Ibidem*, p. 455.

[5] See A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza…*, *op. cit.*, pp. 6–7, 20–31.

promotional, information and communication activities.[6] Such measures are certainly needed. Also worthy of attention is the proposal that at the earliest possible stage of criminal proceedings, e.g., at the first contact between the suspect and the victim with the police or other services, they should be given obligatory information about the possibility of mediation.[7] At the same time, it seems desirable for this information to be as accessible as possible, i.e., in the form of, for example, a informational leaflet rather than a formal instruction. The training measures proposed in the report for courts, prosecutors and mediators themselves should also be looked upon favourably.[8]

However, going beyond the framework of the above-mentioned report and searching for further answers to the question of the reasons for the insignificant use of mediation in Polish criminal proceedings and possible remedies, attention should be drawn to other consensual institutions functioning in Polish criminal proceedings. This is because it seems that it is on them, rather than on mediation, that the interest of the organs of criminal proceedings and, above all, of the defendants themselves is focused. We are referring above all to the institution of sentencing without trial and voluntary submission to punishment as consensual options for ending criminal proceedings. This hypothesis is supported by statistical data. While, as already mentioned above, less than 1% of criminal cases go to mediation, the greater part of criminal cases coming before the court end up in one of the consensual forms, mainly by way of sentencing without trial or voluntary submission to penalty.[9] Without going into the details of the regulation of both these constructions and the advantages and disadvantages of their use here, it must be said that they are simply immeasurably more popular than mediation. They seem to win out primarily on the basis of pragmatism. One of the most frequently indicated advantages of consensual modes of ending criminal proceedings is significantly accelerating criminal

[6] *Ibidem*, pp. 7–8, 41–46.
[7] See *Ibidem*, p. 39.
[8] *Ibidem*.
[9] See i.a. W. Jasiński, *Porozumienia procesowe w znowelizowanym kodeksie postępowania karnego*, "Prokuratura i Prawo" 2014, no. 10, pp. 5 et seq.

proceedings and limiting their costs. Time and financial rationalisation is very important here. Statistical data show that in the case of applying the institution of sentencing without trial, the majority of cases end at the first session.[10] Another advantage is the convicted person's acceptance of the verdict and the punishment imposed on him or her. This aspects seems to be very important for individual-preventive goals of penalty. It seems, however, that in this economy and in view of the pragmatism of applying consensual modes, we somewhat lose sight of the person of the victim and his or her interests. Meanwhile, it can be found in a well conducted mediation procedure, which will be discussed later in this article.

A remedy for the signalled problems, i.e., the lack of interest in mediation among suspects or defendants and the organs conducting criminal proceedings and the "displacement" of mediation by conviction without trial and voluntary submission to punishment, could be the reorientation of the whole system of consensualism in Polish criminal proceedings. This is of course a topic for separate research. However, it seems that a means to increase the role of mediation in criminal proceedings and to make it more attractive from the perspective of suspects or defendants could be a stronger link between some reduction of the criminal law response to the offender and a positive mediation. For example, until 2016 we had in Poland the possibility of discontinuing proceedings at the request of the victim, where the prerequisites were precisely the reconciliation of the perpetrator with the victim and reparation of the damage – mainly through mediation. Maybe it is worth trying to return to this?[11]

[10] See *Ibidem*.

[11] It may be added that the removal of this provision has been met with rather fair criticism from the doctrine – see P. Kardas, *Zarządzanie konfliktem. Dlaczego w prawie karnym potrzebne jest umorzenie kompensacyjne*, Kraków 2019, p. 163.

Mediation from the perspective of the victim

Apart from the lack of interest in mediation in criminal cases on the part of the prosecuting authorities and the defendants, a second, no less important problem is the lack of interest in mediation on the part of the victims themselves. One could risk a hypothesis that apart from the lack of adequate promotional, informational and communication activities, which were mentioned above and which are certainly needed, the reason for this state of affairs is simply the fact that from the perspective of the victim little can be gained from mediation. The automatic counter-argument that comes to mind here is that, after all, the purpose of mediation between the accused and the victim is to conclude a settlement and, as part of this, an obligation on the part of the accused to make reparation for the damage caused to the victim by the offence and to compensate for the damage inflicted. It should be noted, however, that the victim can also obtain this without mediation. It is sufficient that he or she submit an appropriate request, although not necessarily even that. Indeed, pursuant to Article 46 § 1 of the Polish Criminal Code, in the case of a conviction, the court may order, and at the request of the wronged party or other entitled person shall order, applying the provisions of civil law, an obligatory reparation, in whole or in part, of the damage caused by the offence or compensation for the harm suffered. It appears, however, that the benefits that a victim may obtain through mediation are not only material, or legal in general, but also of a psychological and victimological nature.

The results of research on the effects of mediation on victims of crime indicate that the victims who undergo restorative processes in the form of mediation, when they are compared with victims that go through conventional legal processes and that suffered the same type of crime, show consistent and significant decrease in post--traumatic stress symptoms. They have lower scores on the scales of distress and fear. Many of the results also point out considerable reductions in negative emotions expressed by victims (fear, anger, guilt, anxiety, distress) after their participation in mediation. The results consistently showed that the negative emotion of anger felt by victims toward those who have offended them is lower after

mediation, compared to the levels of anger felt by victims who were subjected to conventional justice interventions.[12] Furthermore, mediation promotes a reduction in feelings of helplessness about of what has happened, along with an increased perception of security and self-esteem. What is also very important is that the surveyed victims indicate that mediation gave them a sense of emotional catharsis (closure), based on relief and emotional conditions sufficient to continue their lives.

To somehow summarise and simplify these benefits of mediation for victims, it can be said that mediation helps them to deal with victimisation, the stigma of being a victim. Three main effects of mediation can be identified: obtaining a better understanding of what happened, the opportunity to express emotions and thoughts regarding the crime suffered and feeling that they are heard and that their suffering is validated, contributing to a greater, clearer perception that justice has been done.

Analysing victimisation, it is worth to mention that it is not only primary victimisation – resulting from the crime itself – but also secondary victimisation and so called tertiary victimisation which takes place primarily in the victim's mind, when he or she internalises an image of him or herself as a victim and his or her psychological functioning changes in accordance with this image.[13] However, it is very important to point out that dealing with victimisation and gaining benefit of all these psychological benefits does not happen automatically.

It is not, of course, that whenever a criminal case goes to mediation, the victim's sense of anxiety and fear will decrease of its own accord, closure will with certainty eventuate, the person will not hold a grudge against the perpetrator and that victimisation of every kind will be dealt with decisively. The psychological and victimological effects of mediation differ primarily according to individual

[12] A. Nascimento, J. Andrade, A. de Castro Rodrigues, *The Psychological Impact of Restorative Justice Practices on Victims of Crimes – a Systematic Review*, "Trauma, Violence & Abuse" 2022, vol. 24(3), 1–19, pp. 2, 12.

[13] See G. Bindel-Kögel, K. Karliczek, W. Stangl, S. Behn, W. Hammerschick, A. Hirseland, *Practice guide for mediators in victim-offender mediation. How can victims be supported during the mediation process?*, Berlin 2013, p. 7.

differences concerning the victims themselves, over which, of course, we have no influence in the mediation process. What we do have influence on, however, and which also has a very strong impact on the psychological effects of mediation on the victim, is how and by whom this mediation is conducted.[14]

Victim-sensitive mediation

It seems that the so-called victim-sensitive mediation formula, i.e., victim-sensitive mediation, may be an answer here. This is a variation of VOM (Victim-Offender Mediation), i.e., mediation between offender and victim. Victim-offender mediation is a process through which victims of crimes meet the offender in a structured and safe environment. The goal of VOM is to create the opportunity for the victim and the offender to engage in a dialogue addressing their informational and emotional needs. During the actual VOM meeting, the victim and the offender talk to each other about the crime, discuss the effects of the crime on their lives, and describe their feelings about it.[15] Moreover, it is indicated that victim-offender mediation is one of the clearest expressions of restorative justice. It differs from other types of mediation primarily in that the involved parties are not disputants. Generally, one party has clearly committed a criminal offense and has admitted doing so, whereas the other party has clearly been victimised. It is particularly important to point out that victim-offender mediation is not primarily oriented towards achieving a settlement as a formal document, but precisely towards the dialogue itself, which is intended to help the victim and allow the offender to accept responsibility for his or her act, and only secondarily to lead to reparation of the damage.[16]

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[14] Compare A. Nascimento, J. Andrade, A. de Castro Rodrigues, *The Psychological…*, *op. cit.*, p. 15.

[15] See M. Umbreit, R. Coates, B. Vos, *Victim-offender mediation: Three decades of practice and research*, "Conflict Resolution Quarterly" 2004, no. 22, p. 279.

[16] See *Guidelines for Victim-Sensitive Victim-Offender Mediation: Restorative Justice Through Dialogue*, https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html (accessed on: 16.11.2022).

Among the most commonly formulated basic principles of VOM, in the formula of victim-sensitive mediation, two of them seems to be crucial – victim safety and careful screening of cases. According to victim safety, the mediator simply must do everything possible to ensure that the victim will not be harmed. It is pointed out that to ensure the safety of the victim, the mediation should be conducted in a location that the victim considers safe, and the victim should be encouraged to bring along a support person. Within the framework of careful screening of cases it is important to select the cases that can and should go to mediation, taking into account the perspective and welfare of the victim at all times. The first element here is the type of crime. It is well known that mediation is quite promising in cases without serious repercussions or that result in moderate bodily harm – for example, property crimes and traffic accidents. Much more analysis and caution is required when referring a case to mediation for an act that has caused or eventuated in serious damage to health, or in cases of sexual offences or offences against the family and guardianship. The second important element here is that the offender admits guilt and is able to express remorse. According to the formula of victim-sensitive mediation, a case in which the offender denies responsibility or guilt should not go to VOM.

It is also worth noting that works on victim-sensitive mediation, or VOM in general, draw attention to the possibility of adopting certain assumptions or techniques from particular psychological theories or psychotherapy in mediation meetings. Mentioned in this respect are, for example, object relations theory and so-called self psychology.[17] Perhaps, as a subsidiary model, this could be beneficial for the victim. However, we must remember that mediation is not and cannot be psychotherapy, nor the mediator a psychotherapist. What we probably need to focus on is the development of some *aurea mediocrtias*, a golden mean between VOM as a formal optional element of the criminal procedure, possibly "settlement-driven", and

[17] See i.a. A. Ransijn, *Exploring the experience of victim-offender mediation through Winnicottian object relations theory and self psychology*, Masters Thesis, Smith College, Northampton, MA 2014, https://scholarworks.smith.edu/theses/738 (accessed on: 16.11.2022).

VOM in the extreme form of the victim-sensitive formula, with so strong a focus on dealing with victimisation that it more looks like psychotherapy than a legal procedure.

Amendments to the VOM in the Polish Code of Criminal Procedure

The crucial question that still remains is about the possibility of adapting victim-sensitive mediation in Polish criminal proceedings. Since the victim-senstive mediation formula can bring real benefits to the victim, not only material ones, it seems reasonable to consider the possibility of including it somehow in the Polish regulation of mediation.

The appropriate place for a possible legislative reflection of the victim-sensitive mediation formula would be the provisions of the already mentioned 2015 ordinance of the Minister of Justice on mediation proceedings in criminal cases. About the course and organisation of the mediation proceedings, the aforementioned ordinance of the Minister of Justice currently says, in total, that once a case has been referred to mediation, the mediator immediately establishes contact with the accused and the victim to set a date and place for a meeting with each of the parties. He or she then conducts individual or joint preliminary meetings with the accused and the victim, at a time and place convenient to them, during which he or she explains to the accused and the victim the objectives and rules of the mediation procedure. Finally, the mediator conducts a mediation meeting with the accused and the victim at a place and time convenient for the participants and helps to formulate a settlement agreement (§ 14 of the Ordinance).

This outline of the mediation procedure is rather enigmatic. However, in the formula of victim-sensitive mediation, the course of mediation and the importance of its individual elements are covered in detail. First and foremost, the guiding principle of victim-sensitive mediation is to ensure the victim's sense of security. It is even pointed out that the mediator must do everything to avoid exposing the victim to secondary victimisation. The safety of the

victim is to be ensured, for example, by an appropriate meeting place for the mediation. In addition, the victim may be accompanied by another person of his or her choice. Attention is even drawn to the arrangement of chairs in the room where the mediation takes place, to the places where the participants sit. It seems that these guidelines could be implemented in the mediation regulation of the Minister of Justice functioning in Poland by introducing a provision allowing for the participation in the mediation proceedings of a person accompanying the victim, indicated by him or her. In addition, consideration could be given to liberalising the rule that mediation proceedings should not take place in premises occupied by the participants or their families. If allowing mediation to take place on the premises indicated by the victim, e.g., at their home, would increase their comfort and sense of security, then perhaps a legal guarantee of this possibility should be considered.

Furthermore, the guidance on victim-sensitive mediation draws attention to the relevance of the subsequent stages of mediation. For example, it is emphasised that the first meeting should be held between the mediator and the accused. This is mainly so that if the defendant decides against mediation, the victim will not be disappointed. It seems that such systematisation of mediation proceedings should follow directly from the ordinance of the Minister of Justice. Currently, it only indicates that the mediator should conduct preliminary meetings with the parties to the mediation – joint or individual – and then conduct the actual mediation meeting. This is therefore an area for change.

An amendment to § 15 of the Regulation of the Minister of Justice would also be worth considering. According to this provision, if it is not possible to have a direct mediation meeting between the accused and the victim, the mediator may conduct the mediation proceedings in an indirect manner, providing each of them with information, proposals and positions on the conclusion of the settlement agreement and its content occupied by another participant. Such indirect mediation admittedly does not quite fit into the victim-sensitive mediation formula. However, one must agree that in some cases "indirect mediation" may be an acceptable option. However, it should probably also be allowed that such indirect mediation

is also possible at the request of the victim. For it seems quite likely that should the victim be inclined towards mediation, so shall the accused, but that the victim, for various reasons, will not be ready or willing to meet the offender in person.

The possible changes indicated above, which could adapt the current form of the regulation of the Minister of Justice to the victim-sensitive mediation formula, are certainly not revolutionary and may even be perceived as a manner of nuisance. However, they represent a certain shift of emphasis in the current mediation formula, which lacks sufficient focus on the victim.

Another area of legal regulation of mediation in Polish criminal proceedings that no longer requires not only a shift of emphasis, but revolutionary changes, is the issue of the requirements for mediators. Currently, in accordance with § 4 of the ordinance of the Minister of Justice, a mediator can be a person who is at least 26 years old, enjoys full public rights and has full capacity to perform legal acts, speaks and writes the Polish language, has not been validly convicted of a criminal offence, has skills and knowledge in conducting mediation proceedings, resolving conflicts and establishing interpersonal contacts, and canguarantee due performance of duties. The penultimate of these conditions, i.e., that the candidate mediator has the skills and knowledge to conduct mediation proceedings, resolve conflicts and establish interpersonal contacts, seems to be crucial. The future mediator's fulfilment of this condition is unfortunately not adequately verified under the current legislation.

Meanwhile, victim-sensitive mediation draws attention to the fact that the mediator's competence and role are crucial to the success of the entire mediation process, from the outset – the initial meetings with the accused and the victim – through to the final settlement. It is the mediator's role, in the first initial meetings, to listen patiently and carefully to each party, in particularto the expectations and concerns they have about the mediation. Verify the reasonableness of these expectations and concerns, and then accompany the parties to the actual mediation meeting, so that all those positive effects of mediation that I have mentioned can be achieved.

If such objectives and the role attributed to the mediator are to be achievable at all, those who act as mediators should be adequately

prepared for it. In this regard, it must be stated that it is crucial that the mediator has an adequate level of experience and knowledge in the fields of victimology, psychology and the law, so that he or she is able to carry out the mediation procedure and guide the participants through it. This experience and knowledge should be verified before a person is added to the list of mediators. The most sensible- and straightforward-seeming form of this verification is an exam. A requirement for mediators to improve their qualifications, e.g., by taking part in training courses, in order to keep their knowledge up to date and improve their competences, would also seem to be fairly obvious.[18] In short, if mediation in Polish criminal proceedings is to be a useful tool of restorative justice, bringing real benefits to the victim, not only economic ones, it must be conducted by a person adequately prepared for it. Currently, on the basis of the existing 2015 ordinance of the Minister of Justice, this preparation remains but a proposal and is not adequately verified. It is therefore difficult to see it as a condition for inclusion in the list of mediators. Increasing the requirements for future mediators would obviously entail further legislative changes. For example, the examination procedure or the examining body would have to be defined in detail. It is also clear that increasing the requirements for mediators would also have to entail a different way of remunerating them. However, these issues are secondary to the need to reformulate the current form of mediation towards a victim-sensitive mediation formula, and this undoubtedly requires a slightly different role and attitude of the mediator and different competences. A different one, i.e., one that is more oriented towards accompanying the parties to the mediation in the process of change that is taking place in each of them, and not just towards signing a settlement agreement. The need for changes in this area has also been signalled by the mediators' community in Poland itself, pointing out that "the criteria are too liberal, the verification rules are too vague, it is not possible to verify persons entered on mediators' lists and it is not possible to strike

[18] Compare M. Pękala, *Dobry mediator – czyli kto? Kwalifikacje zawodowe mediatorów w świetle opinii ekspertów*, [in:] *Mediacja…*, pp. 497–500.

out a mediator who has already been entered but is not providing mediation services at an appropriate level."[19]

It should be noted that the reality of mediation in Poland today is such that a very large number of mediators are simply lawyers. Without undermining here the knowledge, experience or even the sensitivity and social competence of lawyers, it seems that this is probably not the most predisposed professional group to be a mediator. It is simply that legal knowledge alone, or the fact of practising some legal profession, is not necessarily sufficient to be a good mediator.[20]

Conclusion

The *de lege ferenda* postulates outlined above, related to the victim-sensitive mediation formula, seem achievable in a relatively short period of time. They seem to be worth considering, which does not mean that they do not perhaps require further research and reformulation. However, they may be the first step towards bringing the number of criminal cases referred to mediation in Poland above the current figure of 1%. This will not happen immediately, of course. In the aforementioned report commissioned by the Ministry of Justice in 2015, it was assumed that, as a result of the measures recommended in the report, it would be possible to increase the number of court cases referred to mediation (in general, not only criminal cases) to the level of 3%, but only in 2030, i.e., after almost 15 years from the implementation of the measures in question.[21] However, it seems that without appropriate legislative changes, this may not happen at all.

[19] *Ibidem*, p. 488.

[20] See *Ibidem*, p. 489.

[21] A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza…*, *op. cit.*, p. 62.

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The Rights of Elderly Persons. Protection and Gaps in Hungarian Law in Light of the Provisions of the Convention on the Rights of Persons with Disabilities

Introduction

My first article, which summarised the research conducted on the protection of older people under public international law concluded that the only human rights instrument offering useful protection to older people is the Convention on the Rights of Persons with Disability (hereinafter referred to as CRPD). It concluded also that the CRPD nevertheless offers some protection to those elderly, who have – as a result of ageing – some kind of disability, it does not concentrate on the problems stemming from ageing, and therefore does not address the problem of ageism and does not give an adequate reply to the needs of older people, the consequence of which is a tangible gap in human rights protection.

The second part of my research concentrates on this narrow but indeed existing protection and looks at the implementation of CRPD into national law, focusing on examination and assessment of the currently existing provisions on legal capacity and its constraints from a human rights perspective.

Rights of older people in Hungarian law

AN AGEING HUNGARIAN SOCIETY

Hungary's society – just as all societies in the developing world – is ageing. It is underscored by the data of the Hungarian Statistical Office,[1] according to which the proportion of the elderly in the population has risen continuously since 1990, from 13.2 to 20.3%. The ageing of the population is shown by the fact that since 2006 there have been more elderly people than children. Meanwhile, the proportion of the active-age population rose from 66.2 to 68.9% between1990 and 2007 thereafter continuously decreased: on January 1, 2021, it was only 65.1% of the population. Thus the burden of supporting older people has correspondingly increased. The indicator that best expresses long-term demographic prospects is the ageing index, which measures the ratio of elderly people to children. Its value has been increasing continuously and dynamically since 1990: on January 1, 1990, for every 100 children there were 64 elderly residents, and on January 1, 2021, the number had increased to 139. The value of the indicator has been steadily increasing in recent decades, and considering the current age composition, the direction will not change in the near future. The ageing index will continue to rise rapidly after reaching briefly levelling-off in the next period and is expected to reach 150 by 2035 and could exceed 250 by 2070. The latter means that the group of elderly people will be almost two and a half times bigger than that of children. There are significant differences in the ageing index between men and women. On January 1, 2021, there were 177 elderly women for every hundred female children. Boys are no longer in the majority compared to elderly men, but the ratio is still lower: there were 104 elderly men for every hundred boys. The reason for this is the less favourable mortality of men and their lower life expectancy compared to women.

[1] https://www.ksh.hu/sdg/4-19-sdg-1.html (accessed on: 20.12.2023).

There are more than 1.8 million[2] people over 65 from which 1.3 million live with some kind of impairment. Currently, the Hungarian state spends 0.4% of its GDP[3] on the protection and provision of older persons, which amount is showing a minimally growing tendency. With ageing there is a growing financial need as well as a growing need for professional caregivers which results in educational needs and in a pressing need to mobilise human resources.

CONSTITUTIONAL FRAMEWORK

According to the Fundamental Law of Hungary, human dignity is the basis of human existence[4]; it is inviolable.[5] Every person has the right to life and human dignity, and the life of the foetus is entitled to protection from the moment of conception.[6]

The Constitutional Court recognises the right to human dignity as to be one of the formulations of "general personal rights". The general personal right is a "mother right", i.e., a subsidiary fundamental right that both the Constitutional Court and the courts can invoke in any case to protect the autonomy of the individual, if none of the specific named fundamental rights can be applied to the given facts.[7]

The Fundamental law states[8] that everyone is equal before the law, and every human being shall have full legal capacity. Interestingly, under the provisions regulating discrimination, there is not any explicit ban on the discrimination on the basis of age. Similarly to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as ICESCR) discrimination on the basis of age would be accorded another status. Nevertheless there is a positive, supporting

[2] Data from 2019, Gyarmati, p. 2.
[3] Gyarmati, p. 2.
[4] Preamble of Fundamantal Law of Hungary.
[5] Article II of the Fundamental Law of Hungary.
[6] Article II of the Fundamental Law of Hungary.
[7] 8/1990 (IV. 23) decision of the Constitutional Court.
[8] Article XV para. 2 of the Fundamental Law of Hungary.

obligation of the state that appears in the text.[9] The Fundamental Law requires the legislator to take various measures to eliminate the inequality of opportunities for people who are unfairly disadvantaged in society. Pursuant to this provision, positive discrimination for the substantive realisation of equality is the responsibility of the state and thus – apart from children – the Fundamental Law highlights women, the elderly and the disabled as a group in need of special care and special protection.[10] Thus, it can be concluded that the Fundamental Law of Hungary guarantees every person's inviolable human dignity and identifies old age as a class of vulnerability that requires special attention to be given to the regulation of their rights.[11]

On 1 October 2021 – on the 30th anniversary when the UN General Assembly declared 1 October the "world day of the elderly", the Commissioner for Fundamental Rights of Hungary issued a statement in which he drew attention to the fact that the lives of elderly people are simultaneously affected by the protracted crisis situation, the reorganisation of the structure of communities, and comprehensive technological development. There is still no balance between the rights and autonomy of the elderly and the burdens and obligations imposed on them, and the vulnerability of the elderly in social, health and public life dimensions is becoming more and more apparent worldwide. Meanwhile, it should become more and more evident that society is not capable of healthy development without the older generation.

[9] Article XV para. 5 of the Fundamental Law of Hungary.

[10] Gáva, Smuk, Téglási, pp. 12–13.

[11] Moreover it is worth highlighting that according to Article 8 of Act CXXV of 2003 on equal treatment and promotion on equal opportunities discrimination on the basis of age qualifies as a direct discrimination in Hungary. Article 31 of the same Act requires municipalities to draw every 5 year an equality plan which assesses the situation of older people.

IMPACT OF HUMAN RIGHTS LAW AND THE IMPLEMENTATION OF THE CRPD

The universal human rights framework analysed briefly in my previous Article is incorporated into Hungarian law, thus apart from an existing obligation in the Constitution and other legislative acts, there is a general obligation under international law for respecting the human dignity of older persons, and to fight discrimination on the basis of age.

However, as mentioned already in the introduction, public international law does not give a sufficient answer to the protection of older persons, and it would be necessary to continue the work that has been already started under the umbrella of the UN Open-Ended Working Group on Ageing and eventuate in the adoption of a Convention on the Rights of Older Persons. Even though the drafting of a new convention is not yet on the table, more and more scholars argue that is necessary to commence work and generate a legislative document similar to the Convention on the Rights of the Child (hereinafter referred to as CRPD) which addresses the issue of children and which addresses the issue of women as does the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as CEDAW).

As also mentioned in the introduction, the most useful protection offered by the human rights law is the one initially designated to protect the disabled i.e., the CRPD. The CRPD brought a change and shifted the approach of the caring model to a rights based model at least to those elderly who would fall into the disabled category. But is there a good understanding of this shift in Hungarian legal system? The current study attempts to look into it by using Article 12 of the CRPD, as the Article is an especially good mirror in this regard.

The CRPD together with its Optional Protocol on the communication procedures[12] was ratified by Hungary on 20 July 2007[13] and incorporated into national law by Act XCII of 2007.[14] The Fundamental Law of Hungary defines the relationship between international law and domestic law, as follows. It says in its Article Q paras. 2 and 3 that "in order to fulfil Hungary's international legal obligations, it ensures the consistency of international law and Hungarian law" and that "Hungary accepts the generally recognised rules of international law. Other sources of international law become part of the Hungarian legal system when they are promulgated in legislation. In accordance with traditions, the Fundamental Law accepts the dualistic approach: international agreements must be transformed in the form of a law or regulation in order for them to become part of the legal system and at the same time to be directly enforceable. Since fundamental rights and obligations can only be regulated through the law adopted by the Parliament, international human rights treaties must also be promulgated by law.

The CRDP was undersigned and ratified by Hungary without making any kind of declaration or reservation to the agreement, meaning that Hungary – in theory during the *travaux préparatoire* – agreed with the interpretation of Article 12 as well.

The situation is different regarding Poland, as Poland signed and ratified the CRPD with several reservations and declarations among which there is an express interpretation of Article 12 of CRDP. The reservation declares that "the Republic of Poland (…) will interpret Article 12 of the Convention in a way allowing the application of the incapacitation, in the circumstances and in the manner set forth in the domestic law, as a measure indicated in Article 12.4, when

[12] *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-persons-disabilities (accessed on: 13.12.2022).

[13] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed on: 13.12.2022).

[14] https://net.jogtar.hu/jogszabaly?docid=a0700092.tv (accessed on: 13.12.2022).

a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct."[15]

Article 12 of the CRPD

The international body responsible for monitoring of the implementation of the CRPD is the Committee on the Rights of Persons with Disabilities[16] (hereinafter referred to as the CRPD Committee). The CRPD Committee issued General Comment No. 1 on Article 12 (hereinafter referred to as General Comment),[17] as well as issues concluding observations on country reports where parties submit comments on the implementation of Article. These documents provide a relatively clear picture of the interpretative approach of the CRPD Committee is as well as present an analysis the normative content or Article 12.

Whenever analysing these documents, it is worth bearing in mind that while Article 12 incorporates a binding obligation under international law, the instruments coming from the Committee such as the General Comments or Concluding Observations are the result of a discourse in between the Committee and the states and have no binding legal effect. However, they provide a space for a deeper understanding of the interpretation and for further discussion, thus pushing international and national legislators into reviewing existing laws and practices. Therefore, while trying to catch the real content and aim of Article 12, the present Article relies on these documents and agrees with scholars that argue the Article 12 consists of the changing of a paradigm from a caring model to a rights based approach, therefore the starting point for drafting any legislation on older persons living with impairment should

[15] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec (accessed on: 13.12.2022).

[16] https://www.ohchr.org/en/treaty-bodies/crpd (accessed on: 13.12.2022).

[17] CRPD/C/GC/1 Plain General Comment No. 1 – Article 12: Equal recognition before the law (accessed on: 11.04.2014).

focus in particular on their needs and rights and not on the needs of their caregivers.

NORMATIVE CONTENT

Article 12 of the CRPD declares that "persons with disabilities have the right to recognition everywhere as persons before the law"[18] and that "persons with disabilities"[19] enjoy legal capacity on an equal basis with others in all aspects of life. Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognises that person as an agent with the power to engage in transactions and create, modify or end legal relationships.[20]

Article 12 obliges States to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity (…) and to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, enter into force as quickly as possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests." Article 12 also requires States to "take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and

[18] This guarantees that every human being is respected as a person possessing legal personality, which is a prerequisite for the recognition of a person's legal capacity.

[19] Including persons that become disabled as a result of natural ageing.

[20] General Comment point 12.

to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property."

Article 12 is strengthened by Article 13 on access to justice by declaring that "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and **age-appropriate accommodations**, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. Moreover, in order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

Besides Article 13, Article 12 touches upon many other articles in the CRPD, such as the one concerning detention (Article 14), forced treatment (Articles 15, 17 and 25), relationships and reproductive rights (Article 23), protection against violence, exploitation and abuse (Article 16), the right to life (Article 10), access to justice (Article 13), living independently (Article 19), and participation in political and public life (Article 29).[21] It is because the full implementation of Article 12 allows older people (those which fall under the scope of the CRPD) to be visible before the law to such an extent that also other aspects of their protection can be simultaneously enhanced, i.e., protection against abuse, strengthening political rights.

INTERPRETATION FRAMEWORK OF ARTICLE 12

The General Comment starts with the sentence, "equality before the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights". Equal recognition before the law is a key concept in international human rights law.[22]

[21] Series, Nilsson.
[22] Bhailís, Flynn, p. 1.

Under Article 12, legal capacity means two things, as already noted regarding normative content. On the one hand there is the **full legal personality**, i.e., to be recognised before the law as a person, to bear rights and duties equal with others regardless of age, or any kind of disability, including disability as a result of ageing. On the other hand legal capacity means also the legal capacity to act, i.e., to exercise those rights and duties. Whenever analysing whether Article 12 has a normative response in national law, it is indispensable to look at regulation of both aspects.

The other **important distinction to be made is between mental capacity and legal capacity.** There cannot be a direct connection between the restriction of legal capacity to act and once diminishing mental capacity.

Article 12 of the CRPD aimed to introduce an absolutely new approach. It aimed to break up with the "old paradigm" which allowed the restriction of legal capacity in an extensive manner. The right to equal recognition was first codified in UDHR, nevertheless it did not have a legally binding effect.[23] The language of Article 12 echoes on, indeed legally binding, Article 16 of the ICCPR, when saying, "Everyone shall have the right to recognition everywhere as a person before the law". The legal literature commenting on this provision assumed for a long time that legal capacity to act can be restricted, therefore national laws allowing limitations to legal capacity to act do not represent a violation of Article 16.[24] If we accept that such limitations does not constitute the breach of equality before the law it would attract the full acceptance of substitute decision making processes, whereas in actuality Article 12 of the CRPD[25] aimed to

[23] *Id*. at 19, p. 7

[24] Bach, p. 2

[25] The right to equality before the law is also reflected in other core international and regional human rights treaties. Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women guarantees women's equality before the law and requires the recognition of women's legal capacity on an equal basis with men, including with regard to concluding contracts, administering property and exercising their rights in the justice system. Article 3 of the African Charter on Human and Peoples' Rights provides for the right of every person to be equal before the law and to enjoy equal protection of the law. Article 3 of the American Convention on Human Rights enshrines the right to

end such laws and promote other types of decision-making methods which actually support and not restrict the decision-making ability of a disabled (in this context older) person. It is mainly because guardianship, as substitute decision-making, is an act of the state which deprives a person of the power to act on some or all decisions, and grants that power to another individual or entity upon the finding that a person lacks capacity.[26] Guardianship is a really old paradigm that originally derives from Roman law[27] and always relies on the hierarchy between the guardian and the person placed under guardianship. And even though the legal institution itself went through several changes and the implementation into national laws may differ based on national legislative traditions, it cannot deny its roots and will never become an equality-based relationship between the older person and its guardian that would be able to reflect on the needs of the one lacking the full mental capacity to make his or her own decisions. And therefore it cannot be ever an adequate answer to the implementation of Article 12.

Regulation of legal capacity and legal capacity to act (or legal competency) under the Civil Code and Code of Civil Procedure in the light of Article 12 of the CRPD and its impact on older people

The core point of this research is to reflect on how successful was the implementation of the CRPD from the point of view of older persons. And, in this frame, to see whether the normative changes deriving from the CRPD are sufficient to offer that specific niche human rights protection to older people obtaining disabilities as a result of ageing on the level of national law as it is offered on the level of human rights law. The simplified but not less important question, therefore, is whether older people have the chance to

juridical personality and the right of every person to recognition as a person before the law.

[26] Booth Glen, p. 93.

[27] Booth Glen, p. 102.

preserve human dignity until the very end within the currently existing legal framework of legal capacity. The current Article does not aim to analyse in depth the restriction of legal capacity to act of adults under Hungarian law, but rather to list those rules that effect the decision making capacity of older persons. It attempts to answer the question whether – from a human rights perspective – would it be justifiable to make a screening of the existing laws and adopt a more chiseled legal framework that would actually be able to answer the needs of older persons and not limit their rights.

In line with the constitutional framework summarised in Point 2, every human being under the Hungarian legal system bears unquestionably a full legal capacity to which one is entitled due to his or her human nature. It commences from the moment of birth and ends with one's death.[28] Legal capacity cannot be restricted, and any declaration or legal notice that restricts it shall be considered null and void. Therefore from the first aspect of Article 12 of the CRPD is met by Hungarian law.

The situation is different when one looks at the provisions of legal capacity to act. Legal capacity to act, or in other words legal competency, means that one can be part of civil law relationships and thus it requires some kind of maturity, decision-making capacity.[29] The legal capacity to act comprises biological and legal elements.[30] The biological element – which can be age and mental capacity – needs to be clearly distinguished from legal capacity, while the legal element is the fact that, one is able to acquire rights and bare duties as a result of his or her own personal process of making decisions.

According to the Act V of 2013 (hereinafter referred to as the Civil Code) Hungarian law legal capacity to is fully acquired when someone reaches adulthood, which as a main rule happens when someone turns 18, or in exceptional cases when someone weds at 16[31], with an express consent of the guardianship authority. Legal

[28] Civil Code 2:1§, 2:4§.
[29] Sándor, p. 95.
[30] Sándor, p. 96.
[31] In these cases, even if one's marriage is ended by divorce or nullity, the maturity obtained by the marriage is not withdrawn.

capacity can be restricted both fully and partially by the guardianship authority based on several grounds. Those persons, who whose necessary discretionary ability for conducting their affairs is – owing to their mental disorder – permanently or persistently diminished – shall be placed by court order under guardianship, which partially limits their legal capacity to act in respect of certain specific matters, where this is deemed justified due to his individual circumstances and family and social ties.[32] It means that the main rule is to place mentally disabled older people under substitute decision-making regimes. If we just look at the situation of older people with mental disability, we do not see a legal regime considering the situation of an older person slowly losing "soundness" of mind as a result of ageing. It is rather to serve or to reflect on the needs of those who are under the burden of taking care of these people. This is also underlined by the last Concluding Observations[33] issued by the CRPD Committee on Hungary on 20 May 2022. In its comments on Article 12, the Committee expresses its concern on the discriminatory nature of restriction on the legal capacity of persons with disabilities on the basis of impairment (also those who are in this situation as a result of ageing), the absence of measures to abolish the discriminatory provisions of the Civil Code and the persistence of the substitute decision-making regime depriving persons with disabilities of their rights. The risk of the breach of human rights when ordering the restriction of legal capacity to act or the placement under guardianship is reflected by the Curia of Hungary as well.

The Concluding Observations in 2012[34] already dealt with this question. As it was just before the adoption of the new Civil Code, the CRPD Committee recommended to use the review process and take steps to derogate guardianship in order to move from substitute decision-making to supported decision-making, which respects the person's autonomy, will and preferences and is in full conformity with Article 12 of the CRPD, meaning that it respects the individual's right, in his/her own capacity, to give and withdraw

[32] Civil Code.
[33] https://digitallibrary.un.org/record/3974105 (accessed on: 13.12.2022).
[34] https://digitallibrary.un.org/record/736932 (accessed on: 13.12.2022).

informed consent for medical treatment, to access justice, to vote, to marry, to work, and to choose a place of residence. The CRPD Committee recommended as well that the State party provide training, in consultation and cooperation with persons with disabilities and their representative organisations, at the national, regional and local levels for all actors, including civil servants, judges, and social workers, on the recognition of the legal capacity of persons with disabilities and on mechanisms of supported decision-making. The new Civil Code brought some changes but it is rather formal than substantive with respect to legal capacity. As highlighted above it still provides for a full limitation of legal capacity, and the guardianship is still persistent. The slight change that may be assessed as a step forward is the fact that when the court analyses whether there is a need to order the placement under guardianship it must assess – beside of the diminishing mental capacity – the social and family environment of the person in question, to see whether there is adequate support for retaining legal capacity.

In line with the recommendation of the CRPD Committee the Hungarian law recognises the supported decision-making by the Act CLV of 2013.[35] It distinguishes between four types of decision making: 1) personal, every day decisions, 2) financial decisions, 3) decisions regarding personal health, and 4) decisions requiring the exercise of civil and political rights. Nevertheless, regarding the currently existing supported decision-making regime, it is essential to underline that on the one hand it is not frequently invoked and on the other hand the legislator did not attempt to create a genuine supported decision-making flow. This is also underlined by the last Concluding Observations issued by the CRPD Committee. The CRPD Committee concludes that the attributes of a substituted decision-making regime have been retained in the supported decision-making mechanism established in Act CLV of 2013, which resulted in a measure that is ineffective and discriminatory.

[35] https://net.jogtar.hu/jogszabaly?docid=a1300155.tv (accessed on: 13.12.2022).

According to the data of the Hungarian Statistical Office[36] currently there are 57,486 persons under guardianship and exhibits a growing tendency. The cases concerning the enactment or supervision of guardianship accounts for approximately 10.5% of cases before the courts.[37] With respect to the legal provisions and the numbers in light of Article 12, it is indeed a pressing need also from the perspective of those elderly who have some impairment and from those who are simply aged and have a special need in this particular time of life to rethink the regulation of legal capacity to act and the institution of guardianship and its alternatives.

Finding and conclusions

FINDINGS OF THE RESEARCH

When analysing the existing legal framework attempting to safeguard the human dignity of older persons from a human rights perspective, both on the international and on the national level, the following questions naturally arise: 1) do we have the adequate legal answer to protect older generations, and if not, 2) are we on the right path to find it?

It is worth collecting the main findings of the research in order to conclude in a necessity of conducting a review of Hungarian legal system from the perspective of the human rights of older people.

The first main finding is that at this point there is no international law instrument that would focus solely on the rights of the elderly. It means that national law that has an even bigger responsibility to reflect on the special necessities of older persons. The CRPD offers the most useful protection to older persons. However, it still leaves a significant group of the elderly unprotected. The elderly rights would require targeted human rights protection, i.e., adoption of a separate human which would understand and address their needs,

[36] https://www.ksh.hu/stadat_files/szo/hu/szo0013.html (accessed on: 13.12.2022).

[37] Kiss, Maléth, Tőkey, Hoffman, Zsille, Dombrovszky.

moreover involving older people in the process which would be an effective way to start fighting ageism.

As a next finding, for the time being we have the CRPD which brought a change and shifted the approach of the caring model to a rights based model at least to those elderly who would fall into the category of disabled persons. But is there a good understanding of this shift in the Hungarian legal system? And is there a possibility to have a good understanding which could be widened to include those groups of older persons who would not necessarily fall under Article 1[38] of the CRPD.

The next finding at this point would be the normative content of Article 12 of the CRPD. It says that "persons with disabilities have the right to recognition everywhere as persons before the law" and have the right to enjoy legal capacity on equal terms with others. The Committee on the Rights of Persons with Disabilities in its General Comments on Article 12 highlights a general misunderstanding of Article 12, which is the possibility of restricting the legal capacity to act and which actually calls for tangible end of substitute decision-making such as guardianship or custody and the adoption of real supported decision-making processes. From the general misunderstanding a holistic examination of all areas of law would arise, as it actually requires a thorough investigation and overview of existing legal instruments. This examination should particularly concern those who suffer from poor mental health and thus have either cognitive or psychological disabilities, as a result of ageing. In the view of the Committee on CRPD it can never serve as a legitimate ground for denying legal capacity.

The second finding is that in Hungary – as in Poland – legal capacity to act can be partially or fully limited on several grounds, from which a legitimate ground can be a mental disorder resulting from ageing. These persons are put under guardianship, while in actuality Article 12 calls for an end of such laws.

[38] Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The Committee on CRPD at this point in its General Comments would say that a clear distinction shall be made between one's legal capacity and one's mental capacity. Legal capacity is to hold rights and duties, in other words to stand legally and to exercise those rights and duties. While mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. Article 12 makes it clear that "unsoundness of mind" and other discriminatory labels are not legitimate reasons for the denial of legal capacity, meaning that perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.

NEED FOR A LAW REFORM FROM A RIGHTS-BASED APPROACH FOR PURPOSES OF ENSURING A BETTER IMPLEMENTATION OF ARTICLE 12

The General Comments on Article 12 of CRPD requires States to holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others. This is also the conclusion to be drawn from the main findings identified during the research.

In the last Concluding Observations of the CRPD on Hungary, the Committee recommends that in line with Article 12 of the CRPD, general comment No. 1(2014), Hungary:

> "(a) Recognise the discriminatory nature of the substitute decision-making regime and abolish all provisions allowing restrictions on the legal capacity of persons with disabilities on the basis of impairment;

> (b) Adopt a mechanism to restore full legal capacity of all persons with disabilities, regardless of their impairment; (c) Revise all provisions as regards the supported decision-making mechanism with the aim of ensuring that supported decision-making mechanisms respect the dignity, autonomy, will and preferences of persons with disabilities in the exercise of legal capacity by all persons with disabilities."

If we look at the recommendations made on Poland[39], we find a very similar attitude from the CRPD Committee, stating that "the Committee is concerned about the State party's interpretative declaration on Article 12 and the provisions of the Civil Code allowing for the deprivation of legal capacity of a person with psychosocial and/or intellectual disability and the assignment of a guardian or 'curator' to make decisions on the said person's behalf, and also about the large and growing number of persons with disabilities deprived of their legal capacity. The Committee calls upon the State party to withdraw its interpretative declaration on Article 12 of the CRPD and, recalling its general comment No. 1(2014) on equal recognition before the law, to repeal all discriminatory provisions under the Civil Code and other legal acts allowing for the deprivation of legal capacity of persons with disabilities, including ones being disabled as a result of ageing, given that legal capacity includes the capacity to be both a holder of rights and having the capacity to perform legal acts, as it is defined in legislation. It also recommends that the State party establish a procedure aimed at restoring the full legal capacity of all persons with disabilities, and develop supported decision-making mechanisms that respect their autonomy, will and preferences."

But what should this review look like and what are the essentials in order to achieve a good understanding which offers a solution under Article 12 of the CRPD, especially to those older persons

[39] https://www.ohchr.org/en/documents/concluding-observations/crpdcpolco1-concluding-observations-initial-report-poland (accessed on: 13.12.2022).

who would fall under the disabled category but would have also an effect on those who have no targeted human rights protection?

First, it is important to accept as a law-maker the more inclusive understanding of legal capacity which must be accompanies by a change of attitude.

Following, it is inevitable to invest resources in research in order to better understand the special and real needs of the target group.

If accepting the broader scope of legal capacity – which is required from a human rights perspective – it comes with accepting the decision making ability of those who live with some impairment. This requires a new understanding of decision-making methods and the assistance to be given for people in need. It means as well that there cannot be very general solutions, but rather individualised, and the legislators should focus on the details, for instance down to loss of mental capacity and introduce not only genuine supported decision--making mechanisms but also autonomous decision-making to those who would be able to benefit from such types of decision making. Under a real autonomous decision-making status a person is recognised as one who can make communicate his or her decisions in a way that other parties are able to understand. This is very much so regarding older generations. Maybe there is a need for some individualised assistance, but under this autonoumous status, the person would not require others to represent him or her in entering contracts, giving informed consent, or instructing a counsel.[40] The real need here would be the assistance in the decision making flow. Under genuine supported decision-making status the person's right to exercise full legal capacity is respected and protected. Nevertheless, the individual will select others to represent him or her in making decisions.[41] It also requires development of supported decision-making networks which are based on trust with an individual. These are networks that engage in long-term relationships with these individuals and thus are able to reflect their special needs.

My first Article in this research project started with the quote from Michele Bachalet as of 12 May 2021, at that time the United

[40] Bach, p. 17.
[41] Bach, p. 18.

Nations High Commissioner for Human Rights, in a frame of a virtual debate concerning human rights of older person. She emphasised that "Every life has equal value. Our rights do not diminish with age." After conducting my research I shall finish with the same quote and conclude that unfortunately the reality is that our rights do diminish with age, and from a Hungarian perspective – which would also be my *de lege ferenda* proposals – there is a need to:

- contribute to the adoption of an international agreement that would reflect the special needs of older persons;
- acquire a better understanding of Article 12 of the CRPD and consider abolishing the full and partial restriction of legal capacity to act;
- reconsider whether the better understanding of Article 12 could actually have a positive impact on those elderly who do not fall under the scope of the CRPD;
- replace the substitute decision-making mechanism (guardianship) with genuine supported decision-making;
- revise the currently effective supported decision-making regime in order to abolish those elements which still renders it rather substitute decision-making in nature;
- introduce the autonomous decision-making with formal and supervised informal support;
- invest in campaigns that reflect the problem of ageism;
- invest in campaigns that provide information and raise awareness on the broader understanding of legal capacity and the types of decision-making and on the human rights justification behind it;
- regulate and develop decision making networks, in order to be able to reflect the needs of older persons.

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Seniors in the Labour Market. Opportunities for Additional Work in Retirement

Introduction

Most Poles do not want to work, although longer professional activity brings many advantages, not only financial ones. Currently, the statutory retirement age in Poland is the lowest in Europe. Outside Poland, it applies to this extent only in Austria. The most common retirement age in the European Union is 67. European countries also resign from differentiated retirement age due to gender. The retirement age for both sexes has been equalised in almost all EU countries.

The statutory retirement age is the result of a political decision that is sanctioned as binding law. When you reach the statutory retirement age, you can acquire the right to receive an old-age pension. Although the decision whether we actually retire or want to continue working is up to us.

According to research conducted by the Central Statistical Office (GUS), the pandemic had a positive impact on the professional activity of seniors. Among 60-year-olds, 8.2% more men are professionally active as well as 3.3% more women. Among the elderly who took up work, there were also people who had not been professionally

active before for various reasons, but the negative effects of the pandemic made them return to the labour market.[1]

Increasing the retirement age is always associated with protests and a decline in support for the currently ruling party. Therefore, it is a step that no one wants to take, because its political price is too high.[2] We live longer and longer in good health, which should make us happy. However, fewer and fewer children are born every year, and fewer and fewer people work for an increasing number of seniors. As a result, pension contributions are not sufficient to cover pensions. The Polish pension system is inefficient, and the payment of pensions requires subsidies from the state budget.[3] It is worth noting, however, that a possible increase in the retirement age does not apply to seniors who have reached the current statutory retirement age and thus acquired the right to a pension.[4]

Seniors abroad

Most people would probably prefer to retire early at 60, but laws have been passed in recent years in many European countries and around the world to raise the retirement age. In Poland, there have been trends to lower the retirement age quite recently.[5]

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[1] https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5821/19/4/1/osoby_powyzej_50._roku_zycia_na_rynku_pracy_w_2019.pdf (accessed on: 20.10.2022).

[2] https://www.cbos.pl/SPISKOM.POL/2016/K_140_16.PDF (accessed on: 20.10.2022).

[3] J. Sawulski, I. Magda, P. Lewandowski, *Czy polski system emerytalny zbankrutuje?*, https://ibs.org.pl/app/uploads/2019/05/IBS_Policy_Paper_02_2019.pdf (accessed on: 28.10.2022).

[4] J. Babiak, *Polski system emerytalny w świetle rozwiązań europejskich*, Poznań 2002.

[5] B. Bobrowicz, *Analiza regulacji prawnych dotyczących wieku emerytalnego w krajach UE i wieku faktycznej dezaktywizacji emerytalnej*, *Wstępne studium determinant dezaktywizacji zawodowej kobiet i mężczyzn*, cz. III, Załącznik 5d do raportu z badań: "Dezaktywizacja osób w wieku okołoemerytalnym", https://psz.praca.gov.pl/documents/10828/182465/Opracowanie%20cz%C4%85stkowe%20-%20Za%C5%82%C4%85cznik%205d.pdf/bae17ba0-9f65-4664-8604-433aea9d5092?t=1403859802000 (accessed on: 29.10.2022).

Based on data from 2008, employment among the 50+ group is constantly growing. For example, in the case of women in the European Union, the employment rate is 60%, while in Poland it is 50%. It looks more favourable in the case of men – 73% in the European Union to 67% in Poland. Even more pronounced differences are visible in the case of people with lower education.[6]

It is worth mentioning here that around 2050, people older than 55 will probably constitute as much as half of the population. Therefore, the conclusion is obvious – seniors will take up work more and more often, and employers must prepare for it in the near future. However, older people in the workplace are a positive phenomenon. They have above-average professional and life experience, are characterised by responsibility, efficiency, and – the quality most lacking among young people– work discipline.[7]

Countries with a high level of economic development are characterised by a desire to introduce an increasingly later retirement age for their citizens. This is due not only to the economic situation, but also to the fact that the average life expectancy of the society is increasing. Poland, on the other hand, is the only country in Europe that has lowered the retirement age in recent years. What is more, civic projects concerning another amendment to the law on pensions and disability pensions are regularly submitted. According to one of them, submitted in 2021 by NSZZ "Solidarność", the right to a pension would be granted regardless of age after reaching the appropriate length of service. It would be 35 years for women and 40 years for men. If approved, the new idea would mean that a woman who starts working at 20 could retire at 55. This would be the lowest age at which you can acquire pension rights in the European Union.

In recent decades, the most common measure to address the sustainability of pensions in the EU has been to raise the retirement

[6] *Równowaga ekonomiczna systemów emerytalnych. Współpraca w ramach Unii Europejskiej w zakresie zabezpieczenia społecznego*, Zakład Ubezpieczeń Społecznych, Warszawa 2013.

[7] M. Tkaczuk, *Podnoszenie wieku emerytalnego a problemy polskiej polityki społecznej*, "Studia Ekonomiczne. Polityka społeczna wobec problemu Bezpieczeństwa Socjalnego w Dobie Przeobrażeń Społeczno-Gospodarczych" 2014, no. 179, pp. 196–205.

age. In fact, almost all European countries have raised their early and statutory retirement ages (Luxembourg being the only exception). Countries such as Greece, Sweden, France and Finland introduced an increase in the retirement age between 2008 and 2013. Austria and Slovenia also plan to increase the retirement age in order to equalise it for both genders.[8] According to the 2015 Ageing Report, only Luxembourg and Sweden have not introduced any changes in increasing the retirement age.[9]

The largest increases in the statutory retirement age in the years 2008–2060 are expected in Denmark, the Czech Republic, Greece, Italy and Slovakia. The standard retirement age in the European Union is currently 67 (65 for men and 63 for women). In 2060, the highest statutory retirement age is projected to be 72.5 in Denmark (for both men and women) and the lowest, 63, for women in Bulgaria.[10]

In many countries of the European Union, the effective exit age from the labour market is usually lower than the statutory retirement age. In Norway, Sweden and Finland, the retirement age is flexible. This means that a person can collect a pension within a certain age range. On the other hand, many Member States have also introduced various measures to encourage early retirement. They were originally implemented in the 1970s as a response to rising unemployment at the time. Special early retirement schemes, the use of insurance systems for the unemployed or older workers with health problems gave workers more options than before. Increasing the number of years of contributions required for a full pension was also a common feature of pension reform packages.[11]

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[8] https://www.pwc.pl/en/publikacje/raport_pwc_porownanie_systemow_dodatkowego_zabezpieczenia_emerytalnego.pdf (accessed on: 28.10.2022).

[9] *The 2021 Ageing Report: Economic and Budgetary Projections for the EU Member States (2019–2070)*, https://economy-finance.ec.europa.eu/publications/2021-ageing-report-economic-and-budgetary-projections-eu-member-states-2019-2070_en (accessed on: 8.11.2022).

[10] J. Petelczyc, *Podwyższanie wieku emerytalnego w krajach europejskich*, "Zabezpieczenie Społeczne. Teoria, Prawo, Praktyka. Zeszyty Naukowe Zakładu Zabezpieczenia Społecznego IPS UW" 2012, no. 1, pp. 76–82.

[11] J. Niżnik, *Pracownicze programy emerytalne wybranych państw europejskich – analiza porównawcza*, "Annales Universitatis Mariae Curie-Skłodowska" 2017, vol. 6, pp. 243–251.

According to the 2015 Ageing Report, the estimated average contribution period in the EU was 34 years in 2014 and is expected to increase by 4 years to around 38 years in 2060.[12]

We have an ageing population around the world, which is another reason to encourage people to work longer, as well as to extend the statutory retirement benefits for many. But while many governments want their citizens to work until the age of 68, the average age at which people actually retire often differs from what has been established. According to the OECD from 2013–2018, South Korea has the longest period of professional activity – 72.3 years. Both men and women work there on average more than 12 years beyond the official retirement age. The country has the highest poverty rate among the OECD countries, which means that older people, like in Turkey, may be forced to work all their lives.[13]

On the other hand, Japan as a rich country also has the longest--working citizens who usually work until the age of 70. Their average life expectancy is one of the highest in the world, but the desire for such a long professional activity results in this society from the cult of work. In Japan, you work as long as possible, and overtime is considered normal.

In the USA, anyone born between 1943 and 1954 can retire at the age of 66. Anyone born later must work until the age of 67. However, as statistics show, many Americans, after reaching retirement age, instead of giving up work completely, move to part-time work. In Canada, you can retire from the age of 65, as long as you have lived in this country for at least 40 years. In turn, in Australia, those born before 1952 can retire at 65.5, while those born after that face a gradual increase until they reach 67 in 2023. The Australian government has also tried to raise the retirement age to 70, but most parties did not agree to such a project.[14]

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[12] R. Murkowski, *Wiek emerytalny ludności w państwach Unii Europejskiej w kontekście obciążenia ekonomicznego i przeciętnego trwania życia*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2012, no. 3, pp. 267–283.

[13] *Systemy emerytalne na świecie. Rekomendacje dla pracowniczych planów kapitałowych w Polsce,* https://www.politykainsight.pl/_resource/multimedium/20147445 (accessed on: 8.11.2022).

[14] A. Rzońca, W. Wojciechowski, *Ile kosztują nas wcześniejsze emerytury?*, Raporty FOR, Warszawa 2008, https://for.org.pl/upload/File/raport%200%20

An interesting example is South Africa, where the government does not impose an official age as such, so it is up to workers to consult with employers to agree on a retirement age. Usually, however, the average is 60 years.

Eligibility and pension rules are complex and often take into account different needs. The average statutory retirement age in 2018 across OECD countries for a person with a full career who entered the labour marked at the age of 22 was 63.5 years for women and 64.2 years for men. Iceland, Norway, and Israel and Italy had the highest normal age of 67. Interestingly, the largest difference in retirement age between the sexes was 5 years in Austria and Israel and 4.2 years in Poland. In non-OECD G20 countries, the statutory retirement age is lower, with the exception of 65 for men in Argentina. Gender differences exist in half of these countries, but not in India, Indonesia, Saudi Arabia and South Africa.[15]

Pensioner and retirement age

From October 1, 2017, the retirement age in Poland is 60 for women and 65 for men. Reaching the retirement age alone, however, is not a sufficient condition for receiving a retirement benefit. Payment of social security or pension and disability insurance contributions for at least one day should also be documented, e.g. as an employee or a person conducting non-agricultural activity.[16]

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tym%20ile%20kosztuja%20nas%20wczesniejsze%20emerytury.pdf (accessed on: 8.11.2022).

[15] https://poradnikprzedsiebiorcy.pl/-powszechny-wiek-emerytalny-w-europie (accessed on: 13.11.2022).

[16] On 11 May 2012, the Pensions Act was voted through, which provided for a gradual increase in the retirement age to 67 for both men and women. At the time, the introduction of the increased retirement age applied to women born after 31 December 1952 and men born after 31 December 1947. The 2012 law on increasing the retirement age and gender equality did enter into force on 1 January 2013, but met with little approval and only lasted five years. From 1 October 2017, the age was lowered again and differentiated by gender. It is now 60 for women and 65 for men and is within the European average of 60 to 67.

The pension is granted from the month in which the application is submitted, but not earlier than from the date on which the normal retirement age is reached. Choosing the right time to apply for a pension is important, not only for future life plans, but also for financial reasons. The amount of the future benefit depends not only on the length of the working period, but also on when the person decides to retire.

It should be emphasised that the pension is granted on application and it is possible to withdraw it before the decision becomes final and to submit the application again at a more convenient time.[17]

In the context of demographic changes and the increasing number of seniors, who in the vast majority are beneficiaries of the Social Insurance Institution, the problem of increasing the retirement age has been raised in the public space for a long time. This topic is also often raised by politicians, becoming one of the most important issues in pre-election debates.[18] From January 2013, the retirement age in Poland has been gradually extended. The goal was to equalise and raise it to 67 for both women and men. As a result of these changes, men were to reach the new threshold in 2020, and women in 2040. The reform was withdrawn in 2015. The assessment of the introduced changes was assessed extremely, depending on the political position.[19]

In connection with the milestone of the National Recovery and Resilience Plan (Krajowego Planu Odbudowy i Zwiększania Odporności, KPO) No. 68, the problem of the retirement age is

[17] https://www.zus.pl/swiadczenia/emerytury/emerytura-dla-osob-urodzonych-po-31-grudnia-1948/emerytura-w-wieku-powszechnym (accessed on: 13.11.2022).

[18] A. Bera, D. Walczak, *Problematyka wieku emerytalnego w modernizacji polskiego systemu emerytalnego. Głos w dyskusji*, "Wiadomości Ubezpieczeniowe" 2012, no. 1, pp. 111–119; T. Szumlicz, *O (nie)podwyższaniu wieku emerytalnego w systemie zabezpieczenia emerytalnego. Polemika i głos w dyskusji*, 2012, no. 2, pp. 3–7.

[19] https://rynekpracy.pl/monitory/cofniecie-reformy-emerytalnej-spowoduje-niekorzystne-zmiany-na-rynku-pracy (accessed on: 13.11.2022); https://praca.gazetaprawna.pl/artykuly/910426,cofniecie-reformy-emerytalnej-pozytywne-skutki.html (accessed on: 13.11.2022).

again raised.[20] This point assumes actions aimed at "increasing the effective retirement age", i.e., encouraging seniors to work longer and postponing the collection of pensions from the SII (Social Insurance Institution).[21] The statutory retirement age is a political decision, while the effective retirement age is the age at which you actually start collecting your pension from the SII. Raising the effective retirement age is intended to encourage seniors to work longer and to postpone retirement. To achieve this, the government introduces solutions to encourage pensioners not to retire just after exceeding the statutory retirement age and obtaining pension rights, which is quite a common phenomenon in Poland.

The KPO assumptions show that the statutory retirement age of Poles is too low. Raising it, however, would cause a decline in political support, as most Poles still retire soon after reaching it. Hence the concept of the effective retirement age, as well as reliefs and facilities that are intended to influence Poles' decisions regarding the retirement age. On 1 June 2022, the KPO was approved by the European Commission, and on June 17 by the EU Council. Therefore, already in the fourth quarter of 2024, Poland undertook to submit a report to the European Commission on actions aimed at raising the effective retirement age.[22] According to the actions proposed in the KPO, the government should encourage seniors to stay on the labour market by introducing tax reliefs – PIT-0 relief for working seniors; through vocational training for people aged

[20] https://www.gov.pl/web/planodbudowy/0-kpo (accessed on: 13.11.2022).

[21] The KPO is part of the EU Council Recommendations for Poland (CSR) and the National Reform Programme. It covers reforms and investments that started after 1 February 2020 and will be completed by 31 August 2026. KPO money comes from the European Recovery and Resilience Facility (RRF). To receive it, Poland has to sign an agreement with the EC for the grant part and an agreement for the loan pArt. Repayment of the loan will end no later than after 30 years, i.e., by 2058.

[22] Challenge 2. Unfavourable demographic trends and labour supply. Pillar IV of the RRF – Social and territorial cohesion. Pillar VI of the RRF – Policies for the next generation, children and young people, such as education and skills.

60+ and improving health care, i.e., faster diagnosis and treatment, so that seniors are able to work longer.[23]

Suspension and reduction of pension

In a situation where a senior earns extra money to supplement his retirement or disability pension, the additional earnings may cause these benefits to be suspended or reduced. This applies only to earnings from activities covered by compulsory social insurance, e.g., from an employment contract. The difference in the suspension or reduction of the benefit, in turn, depends on the income from the activity for which social insurance contributions are obligatory.[24]

In addition, it is necessary to take into account the situation of generating income from additional work in a situation of exclusions from the social insurance obligation, due to the receipt of an old-age or disability pension, as well as performing additional work for which social insurance contributions do not have to be paid, as they are already paid elsewhere.

The income on which the reduction or suspension of the benefit depends is the amount on which contributions for retirement and disability insurance are calculated, i.e., the so-called contribution base.[25] In the case of conducting non-agricultural activity,

[23] https://www.funduszeeuropejskie.gov.pl/media/109762/KPO.pdf (accessed on: 13.11.2022).

[24] The following may be reduced or suspended: pension; bridging pension; teacher's compensation benefit; disability pension; disability pension due to an accident at work, accident on the way to or from work before 1 January 2003, occupational disease; military invalid's pension if your inability to work is not related to military service; survivor's pension of a military invalid if the death of the invalid was not related to military service; survivor's pension.

[25] The income in question here is income from: work pursuant to an employment relationship; work pursuant to a contract of mandate or cooperation under that contract; work pursuant to an agency contract or cooperation under that contract; work pursuant to a contract for the provision of services (other than a contract of mandate or agency) to which, in accordance with the Civil Code, the provisions on commission apply, or cooperation under that contract; work performed pursuant to a contract of mandate, an agency contract, another contract for the provision of services to which, in accordance with the provisions

this is the income that is the basis for calculating social security contributions.[26]

Regardless of the amount of income earned, the benefit will not be suspended or reduced if the senior is entitled to an old-age pension and has reached the general retirement age. In such a situation, if the senior is also entitled to another benefit, e.g., to a survivor's pension, which he receives as a more favourable benefit, the pension is also payable in full, regardless of how high the earnings are. The partial old-age pension or the war invalid's pension for staying in a camp and places of detention or for a survivor's pension after such an invalid, as well as military invalid's pension in connection with military service or the survivor's pension after a soldier whose death is related to military service, shall not be suspended or reduced.

If a senior intends to work in retirement and is already at the statutory retirement age, taking up employment does not affect the suspension or reduction of the old-age pension. The situation is different when a senior continues to work without termination of employment in the same place as before retirement. Then the

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of the Civil Code, the provisions on commission apply, a contract for specific work. All civil law contracts in a situation where work will be performed on the basis of a contract concluded with an employer with whom the person has an employment relationship or if under such a contract work is performed for the employer with whom the person has an employment relationship; from non-agricultural activity and cooperation in its performance; from work in an agricultural production cooperative and in a cooperative of agricultural circles; from paid work on the basis of referral to work during imprisonment or temporary detention; from a sports stipend; from exercising the mandate of a deputy and a member of the European Parliament and a senator. The same is true of remuneration for serving as a member of a supervisory board; from service in the so-called uniformed services (police, fire brigade, etc.); from activities carried out abroad; from sickness, maternity and care allowances; from remuneration for incapacity for work; from rehabilitation and compensatory benefit; from compensatory allowance and compensatory supplement.

[26] The basis for the assessment of social insurance contributions of an employee is income from the employment relationship and related relationships, i.e. all kinds of cash payments and the monetary value of benefits in kind or their equivalents (regardless of the source of their financing), and in particular basic remuneration, remuneration for overtime hours, allowances of various kinds, prizes, equivalents for unused leave, as well as cash benefits incurred for the employee, as well as the value of other unpaid benefits or partly paid benefits.

pension will be suspended regardless of the amount of earnings and until the employment relationship is terminated and the application for its payment is submitted to the SII.[27]

The pensioner is obliged to inform SII about taking up gainful employment and about the amount of income, and if this is already known when submitting the application for an old-age or disability pension, it should be additionally indicated.

In addition, every year by the end of February, the senior must provide SII with a certificate of income for the previous year. On its basis, the correct amount of the benefit paid is determined. In a situation where the senior earned income and did not inform about it, SII has the right to demand reimbursement of benefits that were not due for 3 years back. However, if he provided information, this time is shortened only to the last year. In a situation where the notification of the amount of income that the senior intends to achieve shows that it will not exceed 70% of the average monthly salary, the benefit will be paid in full. It will be reduced only when it amounts to more than 70% of the average monthly remuneration, but not more than 130% of this amount. On the other hand, if it exceeds 130% of the average monthly remuneration, the retirement benefit will be suspended.[28]

The decision to reduce the benefit contains information from when the event will occur. It can be the month in which the decision was issued or the next month. The amount by which the old--age or disability pension will be reduced will also be indicated. The same will be true if the benefit should be reduced for a certain period back. Ultimately, the benefit will be settled after the end of the calendar year.[29]

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[27] https://www.zus.pl/swiadczenia/emerytury/zmniejszenie-lub-zawieszenie--swiadczen-pracujacych-emerytow-i-rencistow (accessed on: 16.11.2022).

[28] The amount of the average monthly salary is announced quarterly by the President of the Central Statistical Office.

[29] First, the so-called lower income limit amount, which is 70% of the average monthly salary, is deducted from the income. The difference is the amount by which the pension is reduced. However, if the calculated amount is higher than the maximum reduction amount, the benefit will be reduced by the corresponding maximum reduction amount. Where persons entitled to a survivor's pension

Opportunities to raise additional funds

Seniors decide to work for a variety of reasons. In the vast majority of cases, the regularly paid pension is too low. For some people, work is almost an unpleasant necessity. Sometimes the pension is so low that it barely suffices for basic needs. When we add the costs of possible medications to this, it turns out that the monthly budget is not enough. Working for a senior is not only a matter of additional funds. Regularly leaving the house is a positive aspect due to its health benefits. Being part of a team, communicating with other colleagues is, contrary to appearances, an important stimulation for mental health, which delays the diseases of senior age. Interestingly, this is a good way to stimulate memory. Performing certain activities forces you to be mentally and physically active. Regardless of the reasons for remaining in the labour market, professional activity of seniors is growing. In the period from 2018 to 2020, the number of working pensioners increased by about 30%, mostly women.

Reaching retirement age by an employee does not automatically mean that he has to stop working and cannot undertake any additional activity in this respect. At the same time, the willingness to continue working after turning 60 by women and 65 by men can lead to two different situations. Firstly, the retiree may continue to work, but at the same time suspend his or her retirement pension. Thanks to this, his or her retirement benefit increases. She or he may also retire, i.e., receive a benefit and continue employment at the same time. Retirement earnings are not limited in any way.

Men's pensions in Poland are 50% higher than women's.[30] Therefore, equalising the retirement age of women and men would prevent this discrepancy in the current system. The main reason for this

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have income in an amount that results in a reduction of the benefit, only that part of the pension to which they are entitled will be reduced. The amount of this reduction is the difference between the amount of earned income and the permissible amount of income, i.e. 70% of the average monthly remuneration. However, the amount of the reduction cannot be higher than the amount of the maximum reduction, determined in proportion to the number of eligible persons.

[30] According to SII data, in March 2022 the average pension for men was PLN 3,184 and for women PLN 2,128.

discrepancy is the time of women's activity in the labour market. They work shorter hours than men, and often earn less, which means they pay fewer contributions for their future retirement. It is women who most often go on maternity leave and take care of children, as well as their ageing parents. In addition, it should be noted that they live longer than men and therefore take longer to retire. As a result, women are much more likely to receive a micro-pension, i.e., benefits below the minimum pension, sometimes less than a few dozen zlotys.[31]

Seniors can take on various positions, because they are experienced enough in life to cope with many conditions. Most often, however, it is an additional, part-time job. For the elderly, therefore, it is something casual, seasonal. A retiree can do many things. Examples of positions that are most common include childcare and elderly care, security guard, salesman, tutor, caretaker, service and customer service work. In the case of performing duties in the field of these activities, age is not of the slightest importance; what counts is rather patience and openness to the needs of another person. These types of positions can be taken up by seniors who are fully independent. Not all people want or are able to leave the house every day. However, this does not mean that such retirees have to give up their jobs. Nowadays, remote work, e.g., via the Internet, is becoming more and more popular. Seniors, for example, can give private lessons, write content for websites, translate, and deal with telesales. If modern technologies are something incomprehensible, then, alternatively, the aforementioned activities can be performed in a stationary manner, at home.[32]

Seniors may decide to open their own business. It is quite common to join popular franchise networks. These are companies that have already achieved financial success and share their strategies with others. Noteworthy are hair salons, cafes, real estate agencies, toll agencies, newsagents. An interesting initiative on one of the

[31] Almost 82 per cent of micro pension recipients are women; https://innpoland.pl/179764,biedaemerytury-ke-ostrzega (accessed on: 13.11.2022).

[32] https://edziadkowie.pl/18-pomyslow-na-dorabianie-na-emeryturze/ (accessed on: 15.11.2022).

social networking sites is called "Business Grandparents". Thanks to it, seniors can promote their business. However, economic activity is associated with the need to complete many formalities and you need to have a lot of patience to be able to legally operate on the market.

With the entry into force of the Entrepreneurs' Act, it became possible to run your own business without the obligation to register it in the relevant registers of entrepreneurs and to the Social Insurance Institution, i.e., the so-called unregistered activity. Retirees and pensioners can also take advantage of this opportunity. A person who has not conducted business activity for the last 60 months may conduct additional gainful activity without the obligation to register the company. This type of activity is subject to an income limit; it cannot exceed 50% of the minimum remuneration for work in a given month. If within a month the entrepreneur exceeds the statutory income threshold, he is obliged to register with CEIDG (Central Registration and Information on Economic Activity, *Centralna Ewidencja i Informacja o Działalności Gospodarczej*), within 7 days from the date of exceeding the income limit. It is a good solution for people dealing with handicrafts, confectionary, selling fruit and vegetables or preserves from their own garden.

One of the factors that causes problems with finding employment by seniors is the early retirement age. It turns out that in Europe it is rarely differentiated according to gender. Supporting families in caring for disabled or dependent members is also a problem. When a loved one requires long-term care, in the vast majority of cases it is women who decide to retire early. This is done at the cost of giving up one's own job. In addition, grandparents are often burdened with the responsibility of taking care of their grandchildren. In practice, the possibilities to work regular hours are significantly reduced, especially if the parents of grandchildren work three shifts.

Another serious barrier is the lack of continuing education. The modern labour market requires updating your knowledge. Often, after completing the stage of formal education, employees do not continue their education. Such practices are particularly important in the case of modern and fast-growing technological industries, but not only. New, automated systems and legal regulations are implemented on a regular basis. The health of retirees is also a problem

in some cases. Contrary to appearances, preventive health care is an important element that directly affects the retention of employees on the market.

State aid

Pension experts suggest that in the current system it is more profitable to combine retirement with work. There are no income limits for people who have reached the statutory retirement age. The limits of making extra money for a pension or disability pension, which may reduce the benefit, apply not only to persons who have not reached this statutory age. In addition, the working pensioner continues to pay contributions, so he additionally increases his current pension and can apply for a recalculation of the pension. According to the current regulations, such a right is granted to him once a year.

Due to the life expectancy tables of the Central Statistical Office, which are taken into account when recalculating the benefit, the current situation is very favourable, as life expectancy has significantly decreased during the pandemic. For this reason, the capital is divided over a small number of months and thanks to this, the pension grows faster. The 13th and 14th pensions also encourage to collect a pension after exceeding the statutory retirement age.

The only real incentive for working longer and postponing retirement is the PIT-0 tax relief for working seniors, which came into force with the Polish Deal. PIT-0, i.e. a relief for seniors who have reached the statutory retirement age but did not retire because they decided to remain on the labour market, is zero income tax for working seniors for incomes up to PLN 85,528. If they settle according to the tax scale, this amount is higher, because it includes 30,000 of the tax-free amount, which gives a total tax threshold of PLN 115,528. This relief may also be used by seniors who were collecting a pension and suspended the collection of the benefit due to their return to the labour market.[33] The condition for granting it is only reaching the

[33] SII demanded in the first half of 2022 that the PIT-0 relief should not apply to those pensioners who have suspended their pension. Initially, the government

statutory retirement age. This relief is available to persons who do not have an established right to an old-age pension and a decision on granting the benefit is not required. Income obtained under an employment contract, mandate contract, service relationship and business activity is exempt from the tax. The relief does not apply to income from contracts for a specific task or copyright, the senior must pay tax on such contract.

This relief can be used by women over 60 and men over 65 if they do not receive the benefit despite being entitled to: pension or family pension from KRUS; pension or family pension from uniformed insurance systems; pension or family pension from the SII; cash benefits in connection with the dismissal of a uniformed service officer from permanent service; emolument due to a retired judge or family emolument.[34]

Benefits for the employer

It is not without reason that employers are increasingly employing senior workers. Most of them have a stable life situation. Their children are now adults, so older people can work flexible hours. In addition, seniors are almost a guarantee of loyalty and commitment, which is a natural result of psychology. They want to earn extra money, they do not want to lose their job, because finding a new position is associated with problems. It is natural that elderly people do not have such high professional aspirations, which is why changing jobs is a rarer phenomenon. Seniors do everything in their power to prove to others, and above all to themselves, that despite their advanced age, they can still do some things better than most young people. Pensioners already have a lot of experience, as a rule,

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acceded to the change suggested by the Social Insurance Institution and it was to take effect from January 2023, on the grounds that provisions unfavourable to taxpayers cannot be introduced during the tax year. However, in the end, under the influence of public consultation, the government decided not to introduce this unfavourable change.

[34] https://www.gov.pl/web/premier/polski-lad-da-korzysci-dla-ponad-90-proc-emerytow-i-rencistow (accessed on: 13.11.2022).

the issue of climbing the career ladder is no longer interesting for them. They definitely prefer stability, working in one organisation, performing the same function.

Pensioners and retirees are always welcome by potential employers. This is due to a number of reliefs that an entrepreneur can count on when employing seniors. There are many companies, such as security agencies, which are characterised by the fact that almost exclusively employees with the right to a pension or a disability certificate are on board. Working on a retirement or pension is also profitable for seniors themselves, because in many cases such an employee, in addition to remuneration for work, also receives a pension in its full amount. Therefore, it is worth considering the issue of what reliefs an employer can count on when deciding to employ a pensioner. Seniors should, however, be aware of how they can combine their retirement benefit with further professional activity.[35]

Depending on the type of contract concluded, the employer may, to a greater or lesser extent, take advantage of the reliefs provided by the employment of a pensioner. Working under an employment contract is the most suitable and protective of the interests of the senior worker. However, for financial reasons, employers rarely decide to enter into such an employment relationship. In practice, civil law contracts prevail, such as a contract of mandate or a contract for specific work. Employing a pensioner under an employment contract does not provide any additional benefits. An entrepreneur who employs a person receiving retirement benefits is not released from the obligation to pay SII contributions. The full--time job of a senior generates the same costs related to social and health insurance as the full-time job of a person before retirement age. In addition, the employer is obliged to pay sickness and accident contributions. Only in the case of female employees over 55 and male employees over 60, the employer is released from the obligation to pay contributions to the Labour Fund and the Guaranteed Social Benefits Fund. The compulsory nature of the SII contributions is independent of the working time and the amount of remuneration

[35] *Zatrudnianie niepełnosprawnych, młodocianych i emerytów – korzyści dla pracodawcy*, Infor, Warszawa 2020.

earned by the pensioner. The employer is obliged to report such an employee to SII within 7 days from the date of signing the contract with him. As can be seen from the above, in the case of employment under an employment contract, the right to a pension or retirement does not give seniors an advantage over other employees due to legal privileges.

The changes introduced in recent years as part of civil law contracts were aimed at the best possible protection of persons performing work on their basis. Currently, an employer employing on the basis of a contract of mandate is also obliged to pay social security contributions; however, there are a few exceptions. In a situation where the contract of mandate is the only form of employment for a pensioner, the employer is obliged to pay pension and disability pension insurance, accident insurance and health insurance. However, there is no obligation to pay voluntary sickness insurance. Similarly to the employment contract, the employer has 7 days from the day of signing the contract to report the employee to SII. If the amount of pension and disability insurance contributions exceeds the amount of insurance required for the minimum wage, the employer is released from the obligation to pay further sums. This situation concerns another contract concluded between the parties or a contract concluded with another entity. Another exception that distinguishes a mandate contract from an employment contract is the possibility of exempting the employer from the obligation to pay SII contributions, in a situation where the pensioner is employed under another contract under which social insurance contributions are paid on at least the minimum wage, then the employer only has to pay health insurance contributions for the employee. If the mandate contract was concluded by the entrepreneur with his employee already employed under the employment contract (so-called double employment), then the income from this contract is the basis for calculating social security and health insurance contributions.[36]

The contract for specific work that is least favourable for the employee is the most favourable for the employer. Therefore, it is

[36] https://www.pip.gov.pl/pl/f/v/180082/ul%20UmowaPra-UmowCywilno-Internet.indd.pdf (accessed on: 13.11.2022).

the most frequently chosen type of "employee contract", also for the performance of work characterised by elements of the employment relationship under the Labour Code. Employing a pensioner under a contract for specific work does not give rise to the obligation to pay social, health, accident or sickness insurance contributions. Thus, the employer is exempt from SII contributions paid to the employee's account. The ordering party only has to pay income tax on the amount of remuneration of the pensioner and remember to provide the employee with PIT-11. It should be emphasised, however, that the income from the contract for specific work concluded by the entrepreneur with his employee already employed under the contract of employment is the basis for calculating social security and health insurance contributions.

Conclusions

With the current level of retirement benefits, working on a pension or retirement pays off for a senior. In many cases, supplementing the pension is the only way to live a dignified life. Those seniors who, however, have not yet reached the retirement age, e.g., have retired on a bridging basis, should be careful about the generated income from work, as excessive remuneration may even lead to the suspension of their right to a pension. When it comes to employers, concluding employment or commission contracts does not bring too many profits. Therefore, it is not surprising that most of the entrepreneurs decide to sign a contract for specific work with seniors. With this type of contract, there is no obligation to pay social and health insurance contributions for the employee. The only cost is the income tax on the amount of the agreed remuneration. In turn, in the case of seniors who would like to earn a little extra while remaining independent of employers, unregistered activity may be a good solution.

Retirement is a right, not an obligation. It is worth analysing and making this decision consciously. Retirement does not have to mean the end of your professional career. Many seniors, despite

reaching the retirement age, take up work.[37] Over the past few years, the number of working retirees has increased by about 30%. The largest number of working retirees live in the Mazovia (16.1%) and Silesia (15.2%), while the fewest – 2.15%. – are in Podlasie. Working pensioners are dominated by women, whose pensions are sometimes significantly lower than those of men. Working pensioners account for approx. 56% of seniors earning extra money. Almost 90% of working retirees are aged 60–65 and above.

Continuing to work is a good way not only to earn more, but also to increase the amount of your pension. The regulations state that a pensioner who works and social security contributions are paid from his contract has the right to recalculate his benefit taking into account additional contributions.

In economically developed countries, only a small percentage of seniors make extra money for benefits paid from social security. In Poland, it is rather commonplace. The economic situation of pensioners and retirees in Poland is not the best. Low retirement benefits are not surprising. Many people who have crossed the retirement age are still in full vitality, which is why they decide to remain professionally active.[38]

Based on the analysis conducted, the following *de lege ferenda* postulates should be put forward:

1. The legal solutions provided for seniors with regard to their ability to work should also take into account the needs of seniors. Representative groups of senior citizens should be consulted in this regard.

[37] J. Czapiński, M. Góra, *Świadomość "emerytalna" Polaków. Raport z badania ilościowego*, Warszawa 2016, https://www.efcongress.com/wp-content/uploads/2020/02/analizy2016__swiadomosc-emerytalna.pdf (accessed on: 19.11.2022).

[38] *Przed obniżeniem wieku emerytalnego: jak zatrzymać Polaków na rynku pracy?*, Komunikat z badań nr 67/2017, CBOS, Warszawa 2017, https://www.cbos.pl/SPISKOM.POL/2017/K_067_17.PDF (accessed on: 22.08.2022); E. Bonk, S. Retowski, *Emerytura – ulga czy udręka? Postrzeganie emerytury na przykładzie słuchaczy Uniwersytetów Trzeciego Wieku*, "Gerontologia Polska" 2013, t. 21, no. 1, pp. 25–31.

2. In practice, work opportunities in retirement should take into account the needs of seniors and their possible difficulties, e.g., with mobility, frequent visits to doctors, illness.
3. Public entities, especially local authorities, should provide advice on work opportunities for seniors.
4. Consideration should be given to creating a unit separate from the State Labour Inspectorate, possibly within that structure, to deal with the needs of seniors, including advice on labour law.

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The Electronic Administrative Court as a Component in the System of Justice

Introduction

The electronisation of administrative court proceedings is progressing rapidly.[1] While existing procedures have been adapted to technological changes, many procedural elements raise concerns and doubts. The aim of this Article is to determine whether we are dealing with an electronic court in the Polish justice system. Moreover, it is a crucial question whether the construction of the electronic system should start with the courts or with the public administration over which the administrative court has control. Another important issue is also the readiness of professional attorneys, the parties to the proceedings with regard to the electronic administrative court and the judges themselves. The results of the study will identify elements that are working well and those that need to be improved or changed.

[1] Paper prepared within the framework of the scientific project The Reform of the Administrative Judiciary as part of the implementation of the scientific research project Polish-Hungarian Research Platform 2022 under the auspices of the Institute of Justice.

Administrative courts

The current model of the Polish administrative court was shaped on the basis of the experience gained in the functioning of administrative courts in the interwar period and the operation of the Polish Supreme Administrative Court on the basis of the assumptions set out in 1980. Of course, the change of the political system enforced the adaptation of the administrative judiciary to the requirements of a democratic state of law. The following changes are consequences derived from the adoption of the 1997 Constitution of the Republic of Poland and the resulting systemic and legal assumptions. The current system of administrative judiciary, separate from the general judiciary and with a two-tier structure, was adopted in 2002[2] in accordance with these principles. The system of two-instance administrative judiciary system established in this way is part of the Polish justice system and plays an important role in the state.

The administrative courts, pursuant to Article 1 § 1 the Law on the system of common courts are established to control public administration and settle disputes. The only criterion of the administrative court's assessment is legality. This criterion encompasses not only the wording of the law, but the axiology which is the fundamental basis for its creation and interpretation. By the same measure, the administrative court, and at the same time the public administration body, is required to have a proper reading of the legal norm, together with the accepted set of values, marking its reflection in the legal text of universally applicable law, taking into account the specific nature of the administrative law sources in the *sensu largo*, and therefore also of company law. A significant feature of Polish public administration control exercised by an administrative court is its cassation nature of adjudication. It is worth to emphasize that despite the dominant model of cassation adjudication in administrative cases at the European courts, the model of substantive jurisdiction of administrative courts is increasing finding approval

[2] Ustawa z dnia 25 lipca 2002 r. – Prawo o ustroju sądów administracyjnych (t.j. Dz. U. z 2021 r. poz. 137, z późn. zm.), hereinafter p.u.s.a.p – Act of Law on the System of Administrative Courts.

in both the doctrine[3] and the legislation.[4] Apart from the discussions related to the cassation or substantive way of adjudication by the court, new solutions, which do not require a change in the model and structure of the courts, but which are related to new information technologies, are widely introduced.

Administrative court proceedings

Administrative courts have jurisdiction to control the activities of public administration. The predominant manifestations of the public administration activity are the administrative acts issued in the course of administrative proceedings. They shall include administrative decisions, decisions given in administrative proceedings which are subject to a complaint or which terminate the proceedings, as well as decisions which adjudicate on the merits and decisions given in enforcement and precautionary proceedings that are subject to a complaint – Article 3 § 2 of the Act Law on Proceedings before Administrative Courts.[5] In addition, other acts or actions of the public administration taken outside the administrative proceedings may be the subject of a complaint. Proceedings before the administrative courts also include individual written interpretations of tax legislation, precautionary opinions and refusals to issue precautionary opinions.

In addition to the acts that can be complained about and which are addressed to an individual, there is a number of acts that have a general nature. These include those not classified as local law, but

[3] For example: M. Bogusz, *Charakter kompetencji sądu administracyjnego a zasada podziału władzy*, "Gdańskie Studia Prawnicze" 2014, XXXI, pp. 27–33, https://www.ceeol.com/search/article-detail?id=548733; D. Gut, *Merytoryczne orzekanie polskich sądów administracyjnych – tendencje rozwojowe*, Lublin 2018.

[4] K.F. Rozsnyai, *Current Tendencies of Judicial Review as Reflected in the New Hungarian Code of Administrative Court Procedure*, "Central European Public Administration Review" 2019, 17(1), pp. 7–24. DOI: 10.17573/cepar.2019.1.01.

[5] Ustawa z dnia 30 sierpnia 2002 r. – Prawo o postępowaniu przed sądami administracyjnymi [Act of Law on Proceedings before Administrative Courts of 30 August 2002 (i.e., Journal of Laws of 2002, Item 329, as amended)], p.p.s.a.

taken in matters of public administration acts of local law of local government bodies and local government administration bodies; acts of local government bodies and their associations not classified as local law, but taken in matters of public administration. Complaints against of supervision over the activities of local self-government bodies will also be a considered in the proceedings before the administrative courts. In such a case, the complainant will be a public entity, that is to say, local government units. In addition to acts of administration, complaints may also be raised against inaction or lengthy proceedings of public administration bodies.

Administrative courts also resolve disputes over jurisdiction between local government bodies and between local government appellate colleges, as well as disputes over competence between local government bodies and government administration bodies – Article 4 p.p.s.a.

From such a broad scope of administrative court proceedings, based on the Article 5 p.p.s.a., a number of actions concerning internal matters within public administration, such as issues of official relations or hierarchical superiority and inferiority in public administration, have been excluded.

The subject-matter scope is determined by the catalog of entities participating in the proceedings before administrative courts. A party, in accordance with Article 32 p.p.s.a., are two equal entities – the complainant of a public administration body's action and the body whose action is being prosecuted. The entity entitled to lodge a complaint, on the other hand, is everyone whose legal interest has been infringed by an action or omission of a public administration body. The subject may act individually as well as jointly with other entitled parties. The subjects entitled to lodge a complaint are also the public prosecutor, the Ombudsman, the Children's Ombudsman, a social organization and other subjects, whose right derives from the law. These entities, due to Article 8 p.p.s.a., have the right to lodge a complaint, however, as a rule, they act in the public interest and not in the individual interest.

Looking at the statistics of cases handled by the provincial administrative courts, it is strikingly evident that there is a predominance of cases concerning complaints against administrative acts and

actions – 68,837 for 2021, compared to 17,427 complaints against the inaction of authorities and the protracted conduct of proceedings.[6] In the same year, 21,314 cassation appeals were submitted to the Supreme Administrative Court. The volume of cases adjudicated before the administrative courts is steadily increasing year to year by about 2%. Thus there arises the important question of how to increase the efficiency of the courts. One direction of change is to use the potential behind digitalisation. However, a concern arises as to whether simple digitalisation is enough. After all, a certain correlation between the activities of the public administration and the administrative courts is crucial. A higher number of cases heard before public administration bodies will be followed by a higher number of complaints against these actions. Thus, efficient and full computerisation of judicial-administrative proceedings may not be a sufficient remedy for the problems of the Polish judiciary in the public area. Indeed, it is much easier to computerise and automate, at least to some extent, the 16 provincial courts and the Supreme Administrative Court, than it is to computerise and automate several thousand bodies with the entire court proceedings.

Taking into consideration the scale of administrative cases in the Self-Government Boards of Appeal alone, we can see that between 2,218 and 30,071[7] cases are dealt with,[8] per board per year. With 49 boards of appeal in Poland, there are more than 200000 cases per year. In addition to this, there are a number of cases considered by government administration bodies. The scale of the phenomenon studied shows the large volume of administrative acts, that could be potentially brought before the administrative courts, even if only one in 10 or one in 20 decisions would be appealed.

The last 7 years clearly show that the substantive and procedural quality of public administration decisions has been steadily

[6] *Informacja o działalności sądów administracyjnych w 2021 roku*, Naczelny Sąd Administracyjny [*Information on the Activities of the Administrative Courts in 2021*, Supreme Administrative Court], Warsaw, March 2022, p. 13.

[7] Annual report on the activities of the Self-Government Appeal Board in Legnica for the year 2021.

[8] Annual report on the activities of the Self-Government Appeal Board in Warsaw for the year 2021.

declining, increasing by about 2–2.5 percentage points every year. This has been reflected in the efficiency of administrative courts. In 2015, 22.03% of decisions were revoked by the administrative courts, while at the end of the seven-year period, in 2021, 31.07% of the decisions were subject to cassation.

Table. Elimination rate of administrative court decisions from the legal system

Years	2015	2016	2017	2018	2019	2020	2021
Percentage of revoked decisions	22.03	19.78	22.00	25.08	27.32	28.10	31.07

Source: *Information about the administrative court work in year 2021*, Supreme Administrative Court, Warsaw 2022, p. 13.

The number of decisions, even if underestimated, and the scale of the elimination of second-instance decisions from the legal market by administrative courts, clearly shows the complexity and mutual dependence of administrative and judicial and administrative proceedings. All procedural and technical changes at the level of public administration bodies have an impact on administrative courts, statistically as well as in terms of their substance. Therefore, solutions for this connected system of justice and public administration must be implemented jointly, be complementary and have a high degree of correlation. A certain solution is the introduction of electronic solutions, both to the administrative process and to the judicial and administrative process. It is not possible to treat the two systems separately and separately introduce procedural changes and new technologies into proceedings before a court and a public administration body.

Electronisation of administrative court proceedings

The current IT solutions that are in place were preceded by a number of stages of the digitisation of public authority.

The crucial moment was the resolution of the Act on Informatisation of the Activity of Entities Relegating Public Tasks. It sets out key principles for public entities, *sensu largo,* in all spheres of the use of IT systems to communicate with individuals.

It corresponds to the Amendment Act, which amended a number of normative acts, including the Administrative Court Procedure Act and the Code of Administrative Procedure.

There was a legal framework introduced for electronic communication with the administrative court in proceedings before it. These provisions came into force on 31 May 2019, significantly computerising proceedings before administrative courts. To generalise, it can be said that a two-track scheme has been adopted, setting out the conditions for conducting actions electronically alongside or instead of the traditional, paper-based form.

ELECTRONIC CASE FILES

According to Article 12a § 1 p.p.s.a., case files shall be created in electronic or paper form. In the case of electronic files, they are processed in this form. On the other hand, paper form files are processed in both paper and electronic form. Case files are made available to the parties at the courthouse or, in the case of electronic files, via an ICT system. The prerequisite for access to the file is the provision of a PESEL number (PESEL identification number), if the subject requesting access to the file has one. At this point, it should be noted that the PESEL system is of a records-only nature, in accordance with Article 3 of the Population Register Act.

However, practice has moved in a different direction and requiring the production of a PESEL number in court proceedings is a regulated obligation. At the same time, the court requires electronic identification in accordance with the provisions on trust and

electronic identification services or any other statutorily permitted manner.

Thus, the person who wants to access the electronic case file must identify himself/herself, and the key element is not the PESEL number. It seems therefore that this obligation from the point of view of the judicial-administrative procedure is unnecessary. The court obtains confirmation of identity in a way not directly linked to the number. With electronic communication, every additional element of identification, every additional step actually delays access to the case file or other element of the electronic system. Therefore, it is important to consider streamlining and simplifying verification as much as possible, while maintaining data security and confidentiality. Moreover, personal data must be processed in accordance with the principle of *data minimization*.

In this case, requiring the attorney's PESEL number goes beyond the purpose of identifying the participant in the proceedings.

In the course of the proceedings, documents are filed electronically or in paper form, as is indicated by Article 12b p.p.s.a., when they have been sent to the court by means of electronic communication. The delivery may be carried out directly, via the electronic mailbox of the court, or by an authority providing an indirect delivery of the letter. If documents are filed in paper form, the court shall make a certified electronic copy and send it to the participants in the proceedings. If a party does not use electronic communication, the court shall prepare a certified printout and deliver it to the interested party.

The conversion into an electronic version shall not apply to the files of proceedings produced before the body of first and second instance, which are subject to assessment before the court. Thus, we are only dealing with electronisation at the level of court proceedings – of the letters produced and of the procedural actions within these proceedings. At this point it should be considered whether, due to the intensification of the electronisation of administrative court proceedings, public administration bodies should not be obliged to contact the administrative court only in electronic form. Without any doubt, this would simplify administrative court proceedings. It could be introduced gradually, starting with central and supreme

governmental administrative bodies, which conclude administrative proceedings as bodies of second instance. The next step would be to extend this obligation to other bodies of second instance. When combined with the electronisation of administrative proceedings, especially at the stage of second instance, this would improve the efficiency not only of administrative courts but of public administration as a whole.

ELECTRONIC POWER OF ATTORNEY

A party may be represented by an attorney during the proceedings before the court, The Power of Attorney itself or a copy thereof may be drawn up in the form of an electronic document in accordance with Article 37a in conjunction with Article 37 p.p.s.a. These documents must be signed with a qualified electronic signature, a trusted signature or a personal signature.

It should be noted that the legislator basically treats **the electronic form of a document** and **the electronic version of a document**, including a power of attorney, as synonymous. As a general rule, the term form is reserved for the form of legal acts – oral and written. The introduction of the term "version" in Article 12a p.p.s.a. to denote its electronic or traditional form of writing the legally and procedurally relevant text should result in such inclusion in further procedural rules. According to the principle of written form, in connection with the electronicisation of court proceedings, the written form is important, and the electronic or paper form is of secondary importance, as these forms are identical and equivalent in form. The approach applied in Articles 12a, 37a and other p.p.s.a. treating electronic form as another procedural form is highly questionable and should be corrected, as clearly indicated by the doctrine.[9, 10, 11]

[9] P. Pietrasz, *Commentary to Art. 12(2) p.p.s.a.* [*Act of Law on Proceedings before Administrative Courts*], [in:] *Law on Proceedings before Administrative Courts Commentary*, R. Hauser, M Wierzbowski (eds.), Warsaw 2021, pp. 201–202.

[10] https://portal.nsa.gov.pl/sessions/signin (accessed on: 4.11.2022).

[11] https://orzeczenia.nsa.gov.pl/cbo/query (accessed on: 4.11.2022).

ELECTRONIC LETTERS IN PROCEEDINGS

The electronisation of court-administrative proceedings has also covered the issues of pleadings. As a rule, pursuant to Article 46 § 2a–d p.p.s.a., a letter filed in electronic form should contain the information specified in Article 46 § 1–2 and an electronic address. The petitioner is obliged to sign it with a qualified electronic signature, a trusted signature or a personal signature. In addition, attachments taking the form of an electronic document must be signed electronically as well.

At this point, attention should be drawn to the controversial NSA (Polish Supreme Court for administrative matters) resolution of 6 December 2021,[12] in which the court assumed that electronic signing in the ePUAP system) Electronic Platform of Public Administration Services) of a cover letter (i.e., a form) automatically generated by the system, together with attachments (a complaint and a power of attorney) attached to it, does not include these attachments. Thus, the complaint brought in such a way does not allow to consider that the formal requirement of signing the complaint has been fulfilled. The court therefore separated the mere act of electronic signing within the ePUAP system, which satisfies the requirements of an electronic signature, from the formal signing of the complaint. This interpretation of the procedural rules results in passing on the negative consequences of an illogical and inconsistent electronic and legal system, which requires one letter to be signed twice. The resolution was adopted with a dissenting opinion by Piotr Pietrasz and Arkadiusz Despot-Mładanowicz.

The ruling was also voted critically. It is pointed out, *inter alia*, "(…) that since this platform contains functions related to the electronic signature of an electronic document, the use of these functions should be accepted and effective before an administrative court (…)."[13] A contrary interpretation, adopted by the NSA, undermines

[12] Uchwała NSA z 6 grudnia 2021 r., I FPS 2/21 [The resolution of the Supreme Administrative Court of 6 December 2021 (case I FPS 2/21)].

[13] A. Kalicińska, A. Stępień, *Zasady podpisywania pism elektronicznych wnoszonych do sądu administracyjnego* [*Principles of Signing Electronic Documents Sent to Administrative Courts*], Glosa do uchwały NSA z dnia 6 grudnia 2021 r.,

the trust of citizens in the state authorities, as the procedural rules are drawn up in isolation from the technical rules governing the electronic tools used in the process. Of course, it is possible to recommend a change in the technical regulations, but it is important to remember that in the digital world the most important thing is the comfort and intuitive ability of taking action. For the a member of the general public in digital banking, logging directly into the portal already constitutes verification of his or her identity. Specific orders or letters are additionally verified, e.g., by a text message or a token, unless certain operating rules are set that do not require double verification. But as a general rule, if I have filed a letter, ordered some action of the bank, the mere completion of the form, with any attachments attached, and the signing of that form, makes the order – the signing a single action. Any attachments or additional letters are an integral part of the letter/action and verified by it. As argued by Magda Oleś-Leśniewska, signing an electronic letter "(…) with just one signature ensures the integrity of all documents and data containers inside that master file (…)."[14] The aim of the electronification of social and economic systems, including court systems, is to make certain actions convenient, easier and faster. Perhaps the remedy would be to sign the entire letter – i.e., the general letter, from the form, the letter containing the content of the complaint and the attachments, e.g., power of attorney, evidence, in a Blockchain system. In this way, all electronic letters submitted to the court at a given time would be signed with "a single click".

Moreover, there would be no fear of deleting a signature, disconnecting a general letter from a proper letter or failing to sign an attachment. Each document attached to a single set of documents

I FPS 2/21, PP 2022, no. 6, pp. 44–49 [Commentary on Judgment of the Supreme Administrative Court of 6 December 2021 (case I FPS 2/21)].

[14] M. Oleś-Leśniewska, *Podpisywanie załączników pism wnoszonych za pośrednictwem platformy ePUAP w postępowaniu administracyjnym i sądowoadministracyjnym* [*Signing Attachments to Documents Submitted Through the Electronic Platform of Public Administration Services in Administrative Proceedings and Administrative Court Proceedings*], Glosa do wyroku WSA z dnia 7 października 2020 r., II SAB/Gd 40/20, Glosa 2021, no. 3, pp. 112–129 [Commentary on Judgment of the Provincial Administrative Court in Gdansk of 7 October 2020, II SAB/Gd 40/20].

would be permanently described and signed by a specific user, and thus the identity would be clear. And the distributed data used in Blockchain technology, and used for verification, would make it impossible to forge the signature and its associated content. **The Blockchain's popularity is primarily seen in its stability, transparency and potentially the least threat of third-party interference.**[15] Adopting this solution would provide the security and certainty so desirable in legal relationships.

ELECTRONIC DELIVERY

In the light of the *ex officio p*rinciple expressed in Article 65 p.p.s.a., the court shall perform the service of letters by the postal operator indicated in the postal law, by its employees or other persons or body, as well as by means of electronic communication. The principle of electronic service is the acceptance of the use of such a means to the entity wishing to use such a form of communication, for in accordance with Article 74a (1) of p.p.s.a., electronic service takes place if the party:

- has submitted the document in the form of an electronic document via the electronic mailbox of the court or authority through which the document is submitted;
- requested the court for such service and indicated to the court his or her electronic address;
- has consented to service of the writings by such means and has indicated an electronic address to the court.

Accordingly, it requires proactivity on the part of the party, which also demonstrates the ability to use this type of IT, from the operation within the portal to the authentication of letters and the identification of the recipient of the letter. At the same time, at every

[15] K. Stępniak, *Zasada tajności głosowania w Konstytucji Rzeczypospolitej Polskiej a możliwość implementacji głosowania powszechnego z wykorzystaniem e-votingu opartego na technologii blockchain* [*The Principle of Secret Voting in the Constitution of the Republic of Poland and the Possibility of Implementing Popular Voting with the Use of E-voting Based on Blockchain Technology*], "Przegląd Prawa Konstytucyjnego" 2022, 1(65), pp. 97–111. DOI: 10.15804/ppk.2022.01.07.

stage of the judicial and administrative proceedings, it is possible to opt out of receiving court letters in such a form. However, the submission of a declaration to receive letters electronically can be made on paper or electronically, while the resignation as such must be submitted to the court electronically. Again, it is possible to return from paper to electronic form at any time.[16]

REMOTE HEARING

The very essence of the administrative courts' computerisation is the possibility of holding a remote hearing by means of Internet communication. According to Article 94(2) p.p.s.a., the presiding judge may order that a public hearing must be held by means of technical devices enabling it to be held remotely. However, this distance in the light of this provision is merely illusory, as the participants may attend the court session when they are in the building of another court and perform procedural acts there, and the course of procedural acts is transmitted from the courtroom of the court conducting the proceedings to the place of residence of the participants in the proceedings and from the place of residence of the participants in the proceedings to the courtroom of the court conducting the proceedings. Thus, the panel will be in the courtroom of its court, while the parties are obliged to be in another courtroom of the same court, or a courtroom of another court, e.g., a common court.

Such a solution raises a certain amount of surprise and concern that the idea of a remote hearing has been misunderstood. Moreover, in the light of Article 15zzs[4] (2) of the uCov,[17] the provincial administrative courts and the Supreme Administrative Court shall conduct the hearing by means of technical devices enabling the hearing to be conducted remotely with simultaneous direct transmission of

[16] H. Knysiak-Sudyka, [in:] *Prawo o postępowaniu przed sądami administracyjnymi* [*Proceedings before administrative courts*], ed. VI, Commentary, Warsaw 2016, Art. 74(a).

[17] The Act of 2 March 2020 on special arrangements related to the protection, prevention and control of COVID-19, other infectious diseases and emergencies caused by them (i.e., Journal of Laws of 2021, Item 2095, as amended).

images and sound, but the participants need not be present in the court building. This regulation is both *lex specialis* and *lex temporalis,* as it applies during the period of either an epidemic emergency or an epidemic state declared due to COVID-19 and within one year of the last one being revoked. The very idea of a remote hearing, writes Piątek, "(…) provides a higher level of access to the court than holding – as if out of compulsion caused by fear for the health and lives of court participants – a closed session (…)."[18] To some extent, this solution has proved to work and continues to do so, so why can it not be maintained in the post-pandemic period? It is, after all, possible to specify the location of the parties, e.g., in a room provided by the body which is a party, in the office of a professional representative. The conditions for participating in the remote hearing can also be specified in another way, so that the solemnity of the court is preserved.

There are several arguments in favour of the remote hearing. First, there is an unquestionable saving in time, perhaps not on the part of the court, but on the part of the participants in the proceedings, who would not have to travel many kilometres to court. Moreover, this also means financial savings, as the travel costs are reduced and, by the way, the time spent on participating in the hearing is shorter. Another argument for the remote hearings is the issue of wide access to the court, both for the parties as well as the public. This issue is of particular relevance when the subjects of the cases are socially controversial or when there is a large number of parties with a legal interest in attending the hearing. The court would not be limited by the size of the courtroom, but would instead merely provide a link to access the remote hearing via electronic communication. Equally important is the access to a document, an object that is valuable for, e.g., historical reasons, and which if delivered to court could jeopardise the substance of the evidence.[19]

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[18] W. Piątek, *Remote hearing before an administrative court – inevitable future or a temporary solution in the times of a pandemic?*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2022, no. 2, pp. 17–33.

[19] H. Knysiak-Sudyka, [in:] *Prawo o postępowaniu przed sądami administracyjnymi* [*Proceedings before administrative courts*], Commentary, ed. VI, T. Woś (ed.), Warsaw 2016, Art. 94.

The existing regulation setting out the rules for a remote hearing is an exception to the rule of holding it at the seat of the court, and can be ordered at the discretion of the presiding judge. The failure to indicate the statutory criteria that would justify holding a hearing/session on-line should be regarded as a legislative oversight. Interpreting Article 94 § 2 p.p.s.a., it can be assumed that it contains a competence provision of the entity authorised to issue an order to hold an on-line hearing. A remote hearing should implement the constitutional principle of fairness and efficiency of public institutions.[20] In the light of the temporal provisions – Article 15zzs[4] – the requirement for a remote hearing is the epidemic or epidemic emergency state *per se*.[21] In a non-emergency situation, the chairman, acting within his administrative discretion, should have the competence to hold a remote hearing. The boundaries of the discretion should be the complexity and the significance of the case for the public interest, the importance for public opinion, and the number of participants. Also the size of the courtrooms, combined with the high public interest, would support such an order.

The authority of a party to request a remote hearing, whether this request would bind the court, or whether it would be subject to review, remains a separate issue. If such a solution would be adopted, it would be necessary to identify such prerequisites in which a party's request for a remote hearing would oblige the court to hold such a form of hearing. At the same time, it is important to define a different catalogue of premises for a remote hearing, which would allow the court to exercise discretion.

The form of contact and organisation of the on-line hearing raises some technical and organisational questions. Participants interested in such court proceedings are required to submit a declaration seven days before the planned meeting that they have the necessary equipment enabling them to participate in the on-line hearing. He or she

[20] B. Dauter, [in:] A. Kabat, M. Niezgódka-Medek, B. Dauter, *Law on Proceedings before Administrative Courts Commentary*, ed. II, LEX/el. 2021, Art. 94.

[21] P. Pietrasz, *Commentary to Art. 94(2) p.p.s.a. (the Act – Law on Proceedings before Administrative Courts)*, [in:] *Law on Proceedings before Administrative Courts,* Commentary, R. Hauser, M. Wierzbowski (eds.), Warsaw 2021, pp. 620–623.

then receives a link to the meeting. The statement and link is sent via ePUAP (Electronic Platform of Public Administration Services). This is a rather simple solution, created *ad hoc* during a pandemic. The adoption of such a solution in subsequent years is questionable and should be changed to a more comprehensive IT service.

In the situation of reading the obligatory on-line form of the hearing as the basic one in emergency situations, it seems that the electronic system should be designed in a different way. It is up to the court to automatically schedule an on-line public hearing on the relevant digital platform when issuing an order to refer a case to an on-line public hearing. The combination of the issuance of the order should be combined with the automatic booking of the room and the e-mailing the order to the participants in the proceedings. In addition, the parties and other individuals authorised to take part in the hearing should, after logging on to the platform, see the hearing scheduled together with the necessary formal and technical information. Admission to the case should take place at an appropriate time, either through a waiting room where the participants of the hearing should be identified or through an automatic identification system. Furthermore, the identification must take place electronically or there must be a presumption that the person logging in from a given account is the identified legitimate subject of that action, with all the consequences thereof, both in law and in fact. Indeed, it is not possible to rely on the identification of a party or participant in the proceedings by merely presenting an identity card to the camera, a practice which sometimes does happen at present. Also the issue of legal representation, especially in the case of a change of attorney or substitution at a particular hearing, should be resolved automatically or quasi-automatically. In the currently binding regulations, there are claims that attorneys acting as a substitute for an attorney who has already been filed with the court or appeared at other stages of the case are not allowed to participate in the hearings. Certainly, the idea of an on-line hearing needs to be analysed and the whole IT system that is available to the court, the participants in the proceedings, and the public needs to be redesigned. A good idea for developing such an on-line court system might be following the idea of design thinking. The introduction

of on-line courts will result that non-lawyers will be the users in greater numbers, and therefore their perception of the system is ultimately the most important. Even if, in the initial period, on-line court will be the domain of lawyers, in the long term thinking about the functioning of the administrative court will change. Thus, the idea of design thinking in developing, for instance, on-line access to a hearing should be based on identifying and meeting the specific needs of both the courts and professional attorneys, but above all, the parties to proceedings before an administrative court. It is not enough to create an IT system, but it is necessary to implement it and make it adopt a new system with an associated new philosophy of on-line court.

DIGITAL ACCESSIBILITY FOR PEOPLE WITH SPECIAL NEEDS

Another challenge facing administrative justice is its full accessibility for people with special needs. Such an obligation arises from the Digital Accessibility Act 2019 and is imposed on entities carrying out public tasks. It should be acknowledged that the NSA website has the facilities provided by the Act and holds an accessibility declaration.[22] However, the websites used by the administrative courts – eWokanda[23] and PASSA[24] do not have such a declaration and are not supplemented with tools to facilitate the de-reading or listening to the information contained therein. Similarly, the Central Judgment Search Database page does not have these facilities, although there is a link to the accessibility declaration at the bottom of the page, referring to the NSA homepage.[25] The ruling search engine as such and the ruling to be found there are not complemented by accessibility tools.

[22] B. Dauter, [in:] A. Kabat, M. Niezgódka-Medek, B. Dauter, *Law on Proceedings before Administrative Courts,* Commentary, ed. II, LEX/el. 2021, Art. 94.
[23] R. Susskind, *Online Courts and the Future of Justice*, Warsaw 2021, pp. 99–100.
[24] https://www.nsa.gov.pl/deklaracja-dostepnosci.php (accessed on: 4.11.2022).
[25] https://www.nsa.gov.pl/ewokanda/ (accessed on: 4.11.2022).

The situation urgently needs to be improved and IT solutions should be extended with the necessary facilities. It should also be reviewed about the accessibility of the case files themselves, which were originally in paper form. While the preparation of an electronic version and its authentication fulfills the formal requirements, the question arises in this case whether text-reading or contrast--enhancing tools can be used. Thus, the facilitation in the form of digitisation of the judicial-administrative process, in the situation of people who require adaptation of websites, will not occur. Thus, further work in this direction is necessary.

Electronic administrative court: an attempt of summarising

The electronisation of administrative court proceedings and the automation of subsequent areas of action before the administrative court are part of a continuous improvement in the way it operates, particularly in terms of court proceedings' efficiency. After all, as Załucki writes, one of the main problems of the Polish justice system is precisely the lengthiness of proceedings before the courts.[26] However, the issue of the efficiency of the administrative judiciary cannot be viewed only in the context of resolving cases more quickly. This issue must be examined in the context of the subjective right to a court, which is the point of reference for any assessment of the judicial action. Thus, the right to a court, as stated in Article 45(1) of the Constitution of the Republic of Poland, but also implied, e.g., in Article 6 of the ECHR, is the fundamental principle defining the functioning of the justice system. As Pogonowski submits, the essence of effective justice is the right to fair and just proceedings before a court and the possibility to enforce the outcome of the court's action.[27]

[26] M. Załucki, *New technologies, efficiency and the future of the judiciary in Poland*, "Przegląd Sądowy" 2021, no. 11–12, pp. 7–20.

[27] P. Pogonowski, *Efficiency as a pillar of fair civil proceedings*, "Polish Civil Procedure" 2021, no. 3, pp. 355–383.

In the case of administrative courts, there is also another element of the principle related to the right to courts that should be noted, namely the control function it exercises over public administration. This function, which is an element of the right to courts, is also an important element in terms of protection of the rule of law and implementation of the principle of legalism addressed to the subjects of public authority. It is important that an administrative act or inaction of a public authority is reviewed by an independent, impartial administrative court within a reasonable period of time. The time and efficiency of a judicial decision plays an important role in the assessment made by society. It also plays an important role in the assessment made by a party in a dispute with public administration. Indeed, it seems that this efficiency is more likely to be noticed and criticised than the judgment itself stating that the public administration's actions were in compliance with the letter of the law or not.

The efficiency of the judiciary is not only determined by elements related to the judiciary and its organisation, both in its structural and procedural aspects. The quality and stability of the law, the effectiveness of its enforcement, the fulfillment of the objectives and functions of the judiciary, and the above mentioned perception of the action of the courts by the parties to the proceedings and the public at large are also important factors.[28] An extensive understanding of the efficiency of the judiciary clearly indicates the multi-dimensional and multi-entity nature of this principle. The entities responsible for the implementation of the legal obligation are both the judiciary itself, which includes, *inter alia*, the administrative judiciary, as well as, for example, the entities responsible for the law-making process and its stabilisation. The executive administration responsible for supporting the administration of justice must also contribute – through, for example, the proper allocation of funds or the introduction of solutions of a technical and IT nature into the courts – to improve the efficiency of administrative courts. Furthermore, the electronification of proceedings and the extensive

[28] A. Orfin, *Relations between the efficiency of criminal proceedings and its costs*, Warszawa 2020, p. 50.

computerisation of procedural activities is only one element of improving the efficiency of administrative courts. This statement is important as administrative courts, which exercise control over public administration, operate in a certain organisational and legal system. They are not able to easily improve their efficiency, in the sense of speed of proceedings, in a situation of, for example, common functioning of a paper system of administrative files created in the course of administrative proceedings before bodies of first and second instance, which are subject, both in the material and procedural aspect to verification by the administrative court. In other words, the electronisation of court-administrative files does not make sense, or will be significantly complicated, in a situation where public administration continues to function in the age of paper.

On the other hand, it should be borne in mind that the top-down introduction of a compulsory system of electronic proceedings, including digital administrative files, in a given situation where 30% of users to date are still filling in applications and other letters by hand, will not speed up proceedings and will even prolong them. In addition, it should be kept in mind that there is still a high percentage of citizens who do not use IT systems that enable them to use these technologies efficiently and effectively. With the introduction of IT solutions allowing for remote conduct of actions, including participation in a hearing at a distance, the issue of digital exclusion becomes even more significant.

Therefore, when assessing the effectiveness of administrative courts in the context of the realisation of the right to a court against the background of the electronicisation of the judicial-administrative process, it is necessary to take into account all the elements that make up the right to a court in its constitutional aspect. At the same time, the digitisation of individual elements of administrative court proceedings must be coherent with the electronisation of administrative proceedings. Furthermore, the digitisation of public authority alone, in a situation of high instability of public law, will not fully exploit the potential behind the automation of courts and administration or the use of algorithms in the process of law application.

The current, short experience of the functioning of administrative courts with the use of elements of the electronic process, allows a preliminary statement that we in Poland are only at the beginning of the construction of an electronic administrative court. In principle, the adopted solutions should be seen as positive, however, they also require some revision, especially in the aspect of securing the rights of the digitally excluded individual. There is a great deal of concern about the reluctance of the judicial community to use remote hearings, as clearly demonstrated by the results of research from the period of administrative and general courts in the era of the SARS-CoV-2 pandemic. The incomprehensible predominance of *in camera* hearings over remote hearings calls for reflection on the direction of legislative and organisational changes in order to fully exploit the potential behind new remote communication technologies and significantly improve the efficiency of the judiciary.

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Implementing Mediation and Other Forms of Restorative Justice. Advice for the Legislator

Conceptual introduction and preliminary notes

The aim of the paper is to analyse the mediation institution as one of the forms of restorative justice, from the point of view of objectives and measures of legal policy. The general objective of this paper is to present an objective view of mediation and of the benefits it offers to individuals and the society as a whole. A specific objective is to formulate normative foundations (as directives), which should be used by the legislators aiming at mediation standardisation as the basis for their actions. One of the tasks of the publication is thus to present a set of framework postulates related to the restorative justice institution and its implementation. Three types of directives will be formulated within the framework postulates related to the restorative justice institution, namely legislative directives *sensu stricto*, socio-technical directives and directives related to the use of public rights and services.[1] These are directives addressed mainly towards the legislator at the stage of political and legal planning, while detailed shaping of legal regulations depends on the model

[1] See: Z. Ziembiński, *Rola badań socjologiczno-prawnych dla teorii prawa i szczegółowych nauk prawnych*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1970, no. 4, pp. 121–136.

of mediation and of other forms of restorative justice, accepted at a later stage.

It is worth emphasising that, to date, no set of legal policy directives on restorative justice and mediation has been systematically presented, at least not in relation to the types of directives discussed in this article. In this sense, the presented article, which can be seen also as a research report, is completely unique and original.

The execution of the general objective and of the detailed objectives requires answers to a set of fundamental questions. What is the justification behind the introduction of institutions such as restorative justice? Is the restorative justice institution an objective and a value itself because of one or another set of values? Or maybe is it a means intended to achieve different circumstances desired by the legislator? What circumstances would it be? While answering such presented questions, a hypothesis may be stated that the institution of restorative justice reflects the values promoted by the legislator and is used to achieve specific circumstances – a specific, ideal social life. This ideal life is related to values related, in turn, to the institution of restorative justice, and its achievement requires following the directives indicated in the last part of this paper.

It should be noted here that this paper is not related to the field of sociology (law), but rather to legislation theory (or the theory of legal policy).[2] It is thus intended to indicate problems and outline postulates addressed to the decision-makers – entities, authorities and institutions responsible for shaping the legal policy and its efficiency. These postulates are rooted in research work dedicated to restorative justice and take into account the main concepts of restorative justice. On the other hand, axiological thought related to restorative justice is the basis for formulating directives related to legal policy.

[2] It is said that the theory of legislation, in its pragmatic aspects (as a set of activities), formulates directives, suggestions, and proposals based on the characteristics of social phenomena (descriptive aspect) that concern the shape and contents of legal institutions. It can be perceived as a legal policy. This serves the purpose of drafting legal acts, on a final stage of planning.

This paper is related mainly to penal cases, as restorative justice has been conceptualised as an at least partial alternative to the classical – judicial – aspect of justice, a holistic and complementary reaction to the phenomenon of crime.

It seems that there is not a single model for the restorative justice process, because it is strongly dependent on the social, cultural, and moral context of a given society or community. The idea of restorative justice includes introduction of extremely wide changes, not only related to justice (especially in penal cases), but also to education, and the activation of individuals and communitie, as well as related to redefining some liberal, modern life standards. This means that execution of objectives and aspirations of restorative justice supporters requires the use of various measures – neighbourhood advice and mediation centres, school and education curricula and workshops, reinforcement of local community competences being only some of the examples.[3]

In the Polish legal system,[4] only mediation generally meets some requirements raised by the supporters of restorative justice, before the widely understood repair process and the victim-perpetrator relationship.[5] This is also how it is seen by the legislator. However,

[3] L.L. Miller, *The Policitics of Community Crime Prevention*, Burlington 2001, pp. 1–20.

[4] In the concept by W. Lang, for example, the legal system is identified with a set of standards. Legal order is understood in a wider sense as an element of a wider order – social order. There are important legal relationships with other value systems: morality, customs, religion. It is indicated that good legal order should be based on an order of values. See W. Lang, *System prawa i porządek prawny*, [in:] *System prawny a porządek prawny*, O. Bogucki, S. Czepita (eds.), Szczecin 2008, pp. 9–16. T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warsaw 1999, p. 84. Restorative justice obviously extends beyond the legal system, as it requires very strong roots in various social norms, or even adapting such norms to its own requirements.

[5] It is worth explaining the relationship between the restorative justice – restorative or remedial process and mediation. Mediation is a voluntary agreement between the victim and the perpetrator aimed at remedying the material and moral harm done with the help of a mediator, who is an impartial and neutral person supporting the parties to the mediation. However, it should be emphasised that in many restorative justice concepts mediation is not always understood in exactly the same way: sometimes it can take the form of a quasi-mediation

mediation is only a form, or a technique of a wider restorative justice institution and thus is not – nor does it exhaust – the ideal of restorative justice. Restorative justice may be understood in several ways. Each concept of restorative justice: 1) treats crime as an act resulting in evil towards a specific person, a violation of interpersonal relationships, 2) assumes that a crime forms a specific obligation, 3) the main duty is to restore the damage. It is assumed that meeting this obligation, the ultimate objective of which is to restore the status from before the crime (restoring the results of wrongdoing; repairing broken relationships), requires the involvement of: the victim (who should be open to the restoration process), the perpetrator (who should be open not only to the restoration process, but should also be ready to accept responsibility and repair the evil done) and the community.[6] *Restoration processes, regardless of their type (penal, administrative, etc.) must generally take place outside the usual mechanisms of justice. They supplement justice instruments and the legislation decides which types of cases may be included in the scope of the restorative justice institution.*

In the literature on this subject, the term "restorative justice" usually refers to a unique process that is aimed at remedying a wrongdoing caused by the perpetrator with the participation of the community, including the victim and the stakeholders – families, friends, neighbours, etc. This understanding of restorative justice is due to some propositions, as well as moral, functional, and social assumptions. The restorative process is focused on solving a problem, most often a conflict and a violation of personal bonds and relationships (loss of trust, emotional injury, causing distress, indignation, fear, etc.).[7] The

(with partial compulsoriness, an active role of the mediator - or rather a facilitator, imbalance between the standing of the parties, etc.). See: D.J. Della Noce, R.A. Baruch Bush, J.P. Folger, *Clarifying the theoretical underpinnings of mediation: Implications for practice and policy*, "Pepperdine Dispute Resolution Law Journal" 2002, no. 1, pp. 39–65.

[6] H. Zehr, *The little book of restorative justice*, New York 2014, ch. 2; H. Zehr, H. Mika, *Fundamental concepts of Restora tive Justice*, "Contemporary Justice Review" 1998, no. 1, pp. 47–55.

[7] M. Zernova, *Restorative Justice. Ideals and Realities*, London 2008, p. 37ff.; W. Zalewski, *Sprawiedliwość naprawcza. Początek ewolucji polskiego prawa*

wrongdoing caused by the perpetrator is a problem that is faced by the perpetrator himself, the victim, and the community alike, and all of them are responsible for resolving it, eliminating the causes, and ensuring a stable harmony of common life within the community in the future. This restorative process is partly characterised differently in various concepts of restorative justice, although – as was mentioned – the aforementioned components, such as remedying a wrongdoing, involvement of the victim, and responsibility of the community, are usually shared by various concepts. The procedures of restorative justice that are deliberately community-based depend on the "really existing, strong, and integrated community."[8]

Legal policy and legislation theory

Legal norms are treated as an indispensable instrument of rational social engineering as a determinant of the legal policy.[9] Rational social policy implemented with the help of law – legal policy – can constitute an effective tool for behaviour control. As indicated by Andrzej Kojder, regulating specific behaviour can serve the following purposes: "1) stimulating and complementing changes in behaviour, 2) creating general social conditions for the desired changes to take place, 3) legalising the changes in behaviour that take place, 4) gradually stopping changes that are not taking place; 5) maintaining the status quo in terms of some behaviour, 6) eliminating behaviour considered to be undesirable."[10] Obviously, the postulates addressed to the legislator wishing to regulate a given issue cannot be limited to the shape of legal provisions and their content. They

karnego?, Gdańsk 2006, p. 164–203; H. Zehr, *The Little Book of Restorative Justice*, New York 2015, pp. 8–12.

[8] A. Stypuła, *Kręgi rekoncyliacyjne. Sprawiedliwość naprawcza w służbie wspólnoty*, "Studia Socjologiczne" 2010, no. 4, p. 184ff.

[9] A. Kojder, *Prawo jako instrument kontroli zachowań społecznych*, [in:] *Prawo w społeczeństwie*, J. Kurczewski (ed.), Warsaw 1975, p. 303.

[10] Supra note, p. 327.

must include a set of pragmatic operating principles.[11] In addition, they must contain a set of assessments and ethical standards substantiated by these assessments. In other words, they must include the rules of effective operation and ethical directives that will protect the legislator from formalism and the instrumentalisation of the law.

Law is the product of political decisions. As the product of political decisions, law should be of particular interest for those planning reforms not only of law itself, but also partly social reforms, which indispensably involve the implementation of some concept of restorative justice and the legal institution that is linked to it (or a set of legal institutions). This can be considered a preliminary proposition of this article: to carefully consider all social and moral aspects of the political decision to reform law in the spirit of restorative justice, which promotes mediation, etc. This is because adopting some legal norms, as an implementation of a decision with a specific content, will not cause, for example, mediation to become an important element complementary to the adjudicative justice system.

Legal policy is usually viewed as a systematic set of social interactions, aimed at achieving a specific objective within the scope of the specific social system. The thus understood legal policy also assumes consideration of fields, which should be transformed. The policy is based on a certain level of knowledge, including analysis of the current state of affairs and the rules of social life. Such knowledge enables the selection of measures intended to achieve

[11] Identification of the means needed to achieve a set objective requires an understanding of the reality and the links between different states of affairs. The links may be statistical, causal, or functional – but they have to be known to the legislator. Therefore, it is necessary to clearly identify the phenomena that will lead to the state of affairs to be achieved. Such knowledge makes it possible to formulate targeted directives (to achieve state S, means A, B, and C should be used). The selection of the legal means is the result of a calculation (i.e., the balance of the costs of the means and the value of the objective) – of the utility of the legal means in comparison with another type of means of influence (instead of putting up a no stop sign or a no parking sign, sometimes it is easier to install bollards). It is worth mentioning that what matters is not only effectiveness and cost (*praxeological* criteria), but also the validity of the legal means in view of the specific legal culture, the broad social context, morality, and political order. See: J. Wróblewski, *Zasady tworzenia prawa*, Łódź 1979, p. 71ff.

the chosen objective. As it is known, legal policy applies to the creation and application of law, namely how to use the law in order to achieve the assumed situation. Additionally, following the thought of Z. Ziembiński, a policy of making use of their rights by entities other than public authorities may be separated.[12]

The objectives of legal policies are determined by the ideal of social live selected by the legislator, which should be implemented by the law.[13] Which values/objectives could be dictated by such an ideal? This catalogue usually includes social justice, equality, individual freedom, protection of the weakest, etc. A question arises about the vision of social life, a part of which is the restorative justice institution and values implemented by it. Another arising question is related to legislative directives applicable to the implementation methods of the accepted objectives, related to the implementation of the institution of restorative justice. It should be added that such directives may be socio-technical in nature, but also be related to how the specific issue should be regulated technically (flexibly, leaving the authorities freedom to decide or strictly subject such authorities to clear standards of an act, etc.), may also apply to a wide array of issues related to the implementation of legal and social solutions.[14]

Upon returning to the ideal of social life and values, it is worth to summarise the values assumed by the main concepts of restorative justice. They refer mainly to inter-personal relationships (such as care, kindness, forgiveness), shared responsibility, trust. The basis

[12] Legal terminological convention assumes that law is generally applied only by state authorities (or other, competent authorities). However, restorative justice institutions are rather based on the acceptance of general social rules – the course of the restorative process itself includes standards being agreed by mediation participants, which means that law is not applied here, and autonomous standards are created instead (with the creator and the recipient are the same entities). Only such agreements (agreement) may be accepted by the court applying the law. See: Z. Ziembiński, *Teoria prawa a polityka i zasady legislacji*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1994, Issue 4, pp. 5–12; M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warsaw 2012, p. 16.

[13] Z. Ziembiński, *Teoria prawa a polityka i zasady legislacji*…, *op. cit.*, pp. 5–12.

[14] *Ibidem*, pp. 7–9.

for implementation of these values is the obligation awareness and the involvement of the victim, the perpetrator and the community.[15]

It can thus be stated that the legislator, who wants to introduce the institution of restorative justice, wants to implement and promote an ideal of social life referring to such values. From the intellectual point of view, the legislator thus has to assume that restorative justice (as a legal institution) is a mean intended to achieve the resulting state corresponding to such an ideal. The introduction of mediation (as a set of legal regulations regulating the restorative process – mediation and other forms of restorative justice) is obviously not a condition adequate to implement such an ideal.

The selection of measures is based mainly on the wider social, cultural, ethical context, traditions and customs.

Formation of a collectivist (community) culture as a condition for introduction of restorative justice and its forms

The fact that the process of restorative justice is treated as a process implemented generally within the community, moreover, intended to improve the quality of life of said community, is a shared element of restorative justice concepts.[16] It is also postulated to involve community members in community processes, and not only the victims and the perpetrators, but generally all members of the community (although to a different degree).[17] According to the view presented by the main concepts of restorative justice, after D.E. Procter, the

[15] See: M. Armour, M.S. Umbreit, *Violence, Restorative Justice and Forgiveness. Dyadic Forgiveness and Energy Shifts in Restorative Justice Dialogue*, London and Philadelphia 2018, pp. 18ff.; A. Etzioni, *The „Community" in Community in Justice. Issues, Themes and Questions Perspective*, [in:] *Community Justice. An Emerging Field*, D.R. Karp (ed.), Lanham 1998, pp. 373–378. Cf. D. Engster, *The Heart of Justice: Care Ethics and Political Theory*, Oxford 2009, pp. 74ff.

[16] See G.D. Paul, I.M. Borton, *Creating Restorative Justice: A Communication Perspective of Justice, Restoration, and Community*, London 2021, p. 5ff.

[17] C.S. Ward, *Community Education and Crime Prevention: Confronting Foreground and Background Causes of Criminal Behavior*, London 1998, p. 21.

community is conceptualised as a territorial community, as a set of relationships and as a symbol.[18] These are, however, rather aspects of a community than its separate definitions. Restorative justice institutions may operate at specific locations (e.g., at a prison facility – as a territory), within a group of people bound together by strong social bonds (e.g., a family), a community may also be a product of language, interactions and meanings.

It is worth, however, to consider the Polish sociological tradition.[19] In the synthetic approach by A. Szachaj, a community is created by people who are "loyal towards one another and connected by brotherhood resulting from conscious acceptance of certain unifying values, mutual responsibility for their fate and the feeling of certain kinship in the view of the world."[20] A community, as one of the society types, has its "psycho-social aspect (i.e., collective identity), sociological (standards, social interests, institutions and collective behaviour) and often also ecological (space) aspects."[21] From the point of view of most or almost all main concepts of restorative justice, a community settling evil should be the reference group for the perpetrator and for the victim.[22] Such a group plays a normative,

[18] D.E. Procter, *Civic communion: The rhetoric of community building*, Lanham 2006.

[19] There are many important concepts, theoretical and methodological orientations based on sociology, which differ in their approach to the community, its understanding and roles assigned to it. Taking community in the most general meaning, it can be said that it is a type of social group with strong internal bonds, based on emotional, personal, informal factors (e.g. close neighbourhood, family). See i.e. N. Gooodman, *Wstęp do socjologii*, Poznań 2009, p. 375; E. Wnuk-Lipiński, *Świat międzyepoki. Globalizacja, demokracja, państwo narodowe*, Kraków 2005, p. 318; P. Sztompka, O *pojęciu kultury raz jeszcze*, "Studia Socjologiczne" 2019, no. 1, pp. 7–23; Z. Ziembiński, *Czesława Znamierowskiego koncepcje grupy społecznej i społeczności*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1987, vol. 3, pp. 1–11.

[20] A. Szachaj, *Jednostka czy wspólnota? Spór liberałów z komunitarystami a „sprawa polska"*, Warsaw 2000, p. 131.

[21] P. Starosta, *Wspólnota a proces globalizacji*, [in:] *Socjologia jako służba społeczna*, K. Gorlach, M. Niezgoda, Z. Seręga (eds.), Kraków 2007, p. 115.

[22] See A. Etzioni, *The „Community" in Community in Justice. Issues, Themes and Questions Perspective*, [in:] *Community Justice. An Emerging Field*, D.R. Karp (ed.), Lanham 1998, pp. 373–378.

comparative and auditorial roles, which means firstly that it defines the appropriate behaviour, secondly, provides standards to follow and thirdly, it evaluates the behaviour of its members.[23]

Community procedures of restorative justice depend on the "actually existing, strong and integrated community."[24] As is said by commentators of various restorative justice concepts and researchers of programmes, institutions and solutions in the field of restorative justice, this relationship may be reversed and restorative justice may be treated as a "tool used to restore and activate a community (…) and to support self-government and autonomy of the community."[25] "In the restorative justice system, victims and criminals play the main roles, and the state remains in the background (…) Crime is not understood as an attack on the state, but as an action of one person against another person (…). The objective of the restorative process involves healing the wounds of each target of the crime, together with the victim and the perpetrator. Solutions focused on damage reparation are sought."[26] Nevertheless, the state must create the institutional framework for restorative justice, and thus stimulate pro-community activities as a result.

If the legislator assumes that restorative justice concepts propose, in general, good and desired solutions, the role of the existing communities, or rather of the state stimulating creation and strengthening of communities and social ties (as there is no other way in modern societies) should be shaping of members of social groups, from the beginning of their socialisation process (i.e., education), such that they are ready to take the responsibility for the community and other members and to get involved in matters

[23] See T. Parsons, *Societas. Evolutionary and Comparative Perspectives*, Englewood Cliffs 1966, pp. 16–25.

[24] A. Stypuła, *Kręgi rekoncyliacyjne…*, *op. cit.*, p. 184.

[25] Therein, p. 184; A. Sanders, *Creating Justice Through Restoring Tribal Nations*, "The International Journal of Diversity in Organisations, Communities and Nations" 2008, no. 8, pp. 205–213; C.S. Ward, *Community Education and Crime Prevention: Confronting Foreground and Background Causes of Criminal Behavior*, London 1998, p. 21.

[26] J. Consedine, *Sprawiedliwość naprawcza. Przywrócenie ładu społecznego*, Warszawa 2004, pp. 206–207.

of this community, including restorative justice processes. This also applies to issues related to fighting crime. The best idea is to have such actions undertaken on a larger scale by non-government organisations (NGO), as they are more effective in the community learning process than state institutions (thus, crime fighting should be taught by volunteers instead of police officers – as indicated by results of studies conducted in the USA). But it is the state which must fund and stimulate such activities.

It is worth adding that from the philosophical point of view, community plays a central role in the communitarianistic vision of the society and of the individual.[27] Contrary to the above, liberal philosophy assigns the key role to an individual – with the community limiting and weakening autonomy, and most importantly, the obligation to act towards the common good, which needs not to be considered as one's own (as proven, e.g., by R. Nozick).[28] Continuous social and political tensions between these approaches are visible in Poland, as well as in many countries of the former Eastern Bloc.

In Polish legal culture (but not only – also in the economy, etc.), the apparent rule of preference dominant since 1990s claims that *in dubio pro libertate*,[29] due to the formation of Polish economic liberalism and liberalism on an ethical level (with the recognition of the special value of personal liberty).[30] Thus, the legislator should justify, at least on the axiology level, the reasons why it prefers common good rather than personal liberty in the area covered by restoration justice. This remark may seem paradoxical, as *prima facie* mediation and other institutions of restoration justice are

[27] See: A. Buchanan, *Community and communitarianism*, [in:] *Routledge Encyclopedia of Philosophy*, https://www.rep.routledge.com/articles/thematic/community-and-communitarianism/v-1 (accessed on: 12.10. 2022).

[28] See R. Nozick, *Anarchia, państwo i utopia*, Warszawa 2019; R. Dworkin, *Liberal Community*, "California Law Review" 1989, no. 77, pp. 479–504; N. Bobbio, *Liberalizm i demokracja*, Kraków 1998, p. 59.

[29] See: O. Bogucki, *In dubio pro libertate jako dyrektywa wykładni celowościowej*, [in:] *Wymiary prawa. Teoria. Filozofia. Aksjologia*, M. Hermann, M. Krotoszyński, P.F. Zwierzykowski (eds.), Warsaw 2019, pp. 227–237.

[30] At least during the first period of the III Republic of Poland. See: J. Bartyzel, *W gąszczu liberalizmów. Próba periodyzacji i klasyfikacji*, Lublin 2012, pp. 189–190; J. Szacki, *Liberalizm po komunizmie*, Kraków 1994, pp. 15, 23–30.

voluntary and respect the free will of participants by default. This assumption is wrong, however. It should be noted, in particular, that 1) mediation is not restoration justice, but its technique; 2) mediation is a general idea referring to various procedures, more or less similar to the model mediation (thus, rather a specific technique type). In the case of restoration justice, mediation does not have to meet all the classical definition requirements related to the term of mediation – it does not have to be voluntary, for example. Let us assume that obtaining consent and conflict de-escalation on an interpersonal level and without the participation of a court is a value. If this is a value because of that fact that, according to the legislator, societies dealing with conflict (including crime) in such a way fare better than those which prefer the classic adversarial form of adjudication; the common good is implemented by promoting the first ideal. In the name of the common good, parties to a dispute may be obliged to participate in quasi-mediation or such choices may be promoted (which is *de facto* equivalent to pressure). Thus, people intending to divorce may be obliged to participate in quasi--mediation in the name of marriage permanency.

The thesis of this paper, addressed to the legislator, is that each and every society must work out its own approach to conflict solution, including conflicts within legal relationships, including restorative justice. Specific solutions have to take into account circumstances: 1) moral (a system of values, being rooted in a specific moral doctrine, e.g., Catholic), 2) cultural (e.g., customs), 3) legal (especially legal traditions and culture), (d) economic (wealth level impacting the access to legal services, etc.). First and foremost, it has to create and internalise specific values of a collectivist nature (community, communitarian).[31] This is a matter of culture and social order. Restorative justice is a good institution under collectivist culture conditions, not under individualist culture. Collectivist culture is a sociological idea, but it also appears in comparative inter-cultural studies, as well as in law philosophy.

[31] S. Caney, *Liberalism and Communitarianism: A Misconceived Debate*, "Political Studies" 1992, no. 40, pp. 273–290.

Collectivist societies place the collective good above the individual good, however, this is not their exclusive characteristic. Obviously, this includes not only limitations and the scope of individual freedom, but also axiology preferring the common good, altruism and shared responsibility before the utility of individual freedom. Normative aspects of each of the main concepts of restorative justice may be implemented in particular in a collectivist culture. This is the conclusion towards which leans the analysis of a summary prepared by A. Cudowska, quoted below. Collectivist cultures are characterised by 1) avoidance of direct confrontation and clashes with others; 2) loyalty of members towards the group and obligations towards the family; 3) shared presence does not exclude the need to talk, the conversation emerges from the need to transfer information; 4) the feeling of shame is a social phenomenon and depends on whether others know about the deed, violation of the norm itself is not the source of shame, but the disclosure of such a violation ("shame culture"); 5) personal relationships are more important than reaching goals.[32]

Table 1. Basic differences between collectivist and individualist culture

Collectivist Cultures	**Individualistic cultures**
1. Avoiding direct confrontation and clashes with others	1. The unhampered expression of individual opinions in confrontation with the opinions and arguments of others
2. The loyalty of members to the group and commitment to the family, local community etc.	2. Self-interest, desires and life plans take precedence
3. Being present does not require a conversation, the conversation arises from the need to provide information	3. Meetings create the need for verbal communication, the imperative of filling the silence with even banal conversation

[32] A. Cudowska, *Wspólnota w kulturze indywidualizmu*, [in:] *Wspólnoty z perspektywy edukacji międzykulturowej*, J. Nikitorowicz, J. Muszyńska, M. Sobecki (eds.), Białystok 2009, p. 203. See also: G. Hofstede, *Kultury i organizacje*, Warszawa 2000, *passim*.

4. The feeling of shame is a social phenomenon which depends on whether others know about the offense; its source is not just breaking the norm, but its disclosure ("culture of shame")	4. Breaking social norms creates a feeling of guilt in an individual, due to intensely experienced self-awareness ("guilt culture")
5. Personal relationships are more important than achieving the goal	5. Personal relationships serve the purpose

Source: prepared and modified on the basis of A. Cudowska, *Wspólnota w kulturze indywidualizmu*, [in:] *Wspólnoty z perspektywy edukacji międzykulturowej*, J. Nikitorowicz, J. Muszyńska, M. Sobecki (eds.), Białystok 2009, p. 203.

It is now worth comparing the collectivist culture with the social ideal defined by the main concepts of restorative justice and with the social conditions (cultural, moral, moral etc.) in which restorative processes can take place.

Table 2. Basic similarities between collectivist culture and restorative justice ideals

Collectivist Cultures	**Restorative Justice values and ideals**
1. Avoiding direct confrontation and clashes with others	1. Eliminating the causes and effects of confrontations and clashes with others
2. The loyalty of members to the group and commitment to the family, local community, etc.	2. Responsibility for other members of the group, loyalty to the group and commitment to common affairs
3. Being present does not require a conversation, the conversation arises from the need to provide information	3. The conversation results from the need to provide information, to react to an event that has arisen, and is a way of rebuilding the relationship
4. The feeling of shame is a social phenomenon which depends on whether others know about the offense; its source is not just breaking the norm, but its disclosure ("culture of shame")	4. The feeling of shame serves reintegration, has a community dimension, its source is not only breaking the norm, but its disclosure to others
5. Personal relationships are more important than achieving the goal	5. Personal relationships are more important than achieving the goal, adherence to (formal) norms, and even the administration of justice (special role of forgiveness)

Source: prepared and modified on the basis of A. Cudowska, *Wspólnota w kulturze indywidualizmu*, [in:] *Wspólnoty z perspektywy edukacji międzykulturowej*, J. Nikitorowicz, J. Muszyńska, M. Sobecki (eds.), Białystok 2009, p. 203 and M. Zernowa, *Restorative Justice. Ideals and Realities*, London 2008, pp. 35–37.

It seems that the similarities are perfectly visible (that should affect the policy of law of the restorative justice). But it is worth citing a more concrete example to justify that analogy. The scope of this paper does not allow a deeper analysis, however, it is worth providing at least one example related to restorative justice. Making the perpetrator reflect on the harm they caused, the need to repair the damage done and to atone, but also to reflect on the shame he has brought on himself, is one of the instruments used in the process applying the restorative justice institution. This is the so-called *reintegrative shaming* concept, developed on the basis of results of studies by J. Braithwaite.[33] The aim of shaming is not to induce long-term stigmatisation or exclusion, but rather to express the disapproval for the deed (not for the perpetrator) combined with placing the perpetrator in an uncomfortable position – which is exactly what shame is. It is easy to notice that the mechanism of shame is an element of the collectivist culture. And there still remains the element of community involvement and the entire set of communitarian values already mentioned in the paper. Thus, attention should be paid to the objective – obtaining a specific status of social relationships – when outlining the overall objective of the implemented legal changes.

Socio-technical and legislative directives for the legislator. *De lege ferenda* postulates

In view of the considerations presented above, general but fundamental political and legal directives appear here, in the field of law creation, but also of the application of the law – authorities applying the law should operate in the spirit of these directives. These directives are largely related to law effectiveness. The first of these

[33] Described in detail in: J. Braithwaite, *Crime, Shame and Reintegration*, New York 1989; J. Braithwaite, *The fundamentals of restorative justice the fundamentals of restorative justice*, [in:] *A kind of mending Restorative Justice in the Pacific Islands*, S. Dinnen, A. Jowitt, T. Newton (eds.), Canberra 2010, pp. 35–44; J. Braithwaite. *Narrative and Compulsory Compassion*, "Law & Social Inquiry" 2006, no. 2, pp. 425–446.

directives, containing several implicit *de lege ferenda* postulates, preaches the need to create a new legal act related to restorative justice – mediation. The other directives are related to the selection of measures in the field of legal policy aimed at mediation and restorative justice.

Directive D1: The first directive is related to the objective of introducing the restoration justice institution, which should be social change (implementation of a specific ideal of social life). This results in the order to standardise the value system of the entire legal system. One of the key roads leading to this goal includes introduction of coherent legal regulations in particular those relating to penal matters.

D2: The second directive is related to the acknowledgement stating that community is a value and it is worth promoting it and to create, maintain and reinforce bonds (which facilitates talk about the community).

D3: The third directive is related to involvement in the community and to solving the problems of the community.

We will discuss here the three general directives specified above.

Implementation of D1 directives could include development of the legal institution of restorative justice and of a normative act specifying a detailed, uniform model of restorative justice, including mediation. This task would refer, in particular, to penal cases. Of course, because of the nature of restorative justice, its consensual, community, anti-stigmatising nature, such a regulation would have to be provided as a solution complementary to the standard penal proceeding.

(Postulate 1) Despite the fact that certain legal solutions in the field of restorative justice and programmes related to it exist in Polish (Hungarian, etc.)[34] legal system, they lack general normative frameworks (national or regional) that would regulate these programmes in a comprehensive manner. Thus, it is necessary to aim at creation of a general legal act related to restorative justice, harmonised with other legal standards. The key point should include

[34] References to the Hungarian legal order result from the nature of the research project.

standardisation of actual state of affairs resulting in breaking of natural social relationships, good and kind inter-personal relations. This does not have to be a limitation to the violations of the law. We should rather talk about a comprehensive regulation related to conflict solving and management, whether in civil, economic, labour or administrative cases, but also in cases between neighbours, in schools, etc. Co-existence of such solutions, e.g., with courts of peace designed in Poland would be then possible. One can also imagine the appropriate application of such regulations in cases of the violation of general social norms, e.g., for the needs of schools (especially that even the new Polish Act on re-socialisation of minors assigns some upbringing obligations to the education system).[35]

This publication postulates the creation of a legal act, which would contain a comprehensive, general and flexible regulation enabling application of restorative justice, taking into account the specific nature of individual case types and effective *de lege lata* procedures. This would be a regulation creating a general framework for widely understood mediation procedures. Such a regulation would include, in particular: definitions of restorative justice as well as its techniques (mediation, restorative circles, peace conferences, etc.), definition of the professional role of a mediator (i.e., requirements, rights) and ethical standards, define an application procedure for restorative justice, and perhaps introduce certain national regulations (e.g., creation of a national council of restorative justice or other authorities – institutions responsible for coordination and evaluation of the action of law related to restorative justice, perhaps also for mediator training).

How to shape such a law – legal regulations – in Poland? There is no universal or global formula for restorative justice. No patterns (Hungarian, USA, Germany, etc.) can be transposed one to one. It is necessary to carry out specific analyses. Detailed arrangements and solutions clearly depend on the decisions of the lawmaker, or rather, legislators, who prepare the draft of a given normative act and on the possibilities afforded by the legal system (and the need to

[35] Act of 9 July 2022 on supporting and re-socialisation of minors, Journal of Law of 2022, Item 1700.

maintain its consistency – legal regulations should be harmonised, and with the Constitution, as well).

(Postulate 2) In the case of penal cases it seems that consensual mediation should be allowed, before the judiciary proceeding itself begins. The agreement would be approved by the court. In the case of mediation, no penal proceeding would begin and/or an already started proceeding would be discontinued. The scope of the rule of legalism, one of the key rules of Polish penal proceedings, should be considered here.[36] A regulation related to restorative justice should introduce, and promote in some cases, the rule of proceeding opportunism, together with changes to penal proceeding. Such a solution could be tied to the restorative justice institution, including mediation, and make the use of the opportunism rule conditional on taking actions intended to aim at an agreement. In penal cases, mediation would be intended to repair material and moral damages caused by the crime, enabling the victim to express their feelings, expectations and needs.[37] The perpetrator would have the opportunity to accept the responsibility for the consequences of the crime and undertake related actions. Reaching this objective would be equivalent to achieving the objectives of a penal proceeding and execution of the penalty. It would not have to be mediation, in any case. These could include various forms and techniques of restorative justice, e.g., conciliatory circles or peace conferences.

(Postulate 3) An idea would be to exceed the narrow framework of *minima non curat praetor*. In the literature of the subject, it is indicated that perpetrators of more serious offences or crime are the most susceptible to the mechanisms of restorative justice, with mediation between the victims and ETA terrorists (Basque Country) as an example.[38] Thus, the restorative justice institution should not

[36] According to the rule of legalism, proceeding authorities have a strict obligation to being and continue penal prosecution, if statutory prosecution is permitted by law and actually justified.

[37] See: E. Silecka-Marek, *Instytucja mediacji w polskim prawie karnym*, "Resocjalizacja Polska" 2020, no. 19, pp. 127–144.

[38] J.L. de la Cuesta, *Victimological Challenges and Restorative Justice in Present Basque Country*, https://www.nomos-elibrary.de/10.5771/0934-9200-2015-2-148.pdf?download_full_pdf=1 (accessed on: 12.10.2022); M. Zernova, *Restorative*

be limited to less serious crime, small offences with a low level of social danger.

If a crime (or, in the spirit of restorative justice – social conflict violating personal relationships) involves the perpetrator, the victims and their family, as well as the interested members of the community (stakeholders)[39], public authorities must have at least the competence to respect it and remain only an observer in some cases, approving the agreement and enforcing its execution, if necessary.

In its summary, the D1 directive instructs creation of general mediation law. It is worth to briefly outline the benefits of such a solution. It shall allow the efficiency evaluation of restorative justice and mediation programmes (in reference to standardised institutions, definitions, objectives), make access to such information easier for citizens (they would be included in a single normative act), outline the ethical framework and standards of mediator work, likely influencing their authority, and in addition, the creation of an act of particular importance of law shall increase the importance of mediation in the legal system. It shall also be a clear signal related to the legal policy of the state and its objective, axiology, rules, and so forth.

The D2 and D3 directives should be briefly characterised here. The task of legal policy is indeed to create conditions ensuring that the objective of community members is to ensure success not only for themselves, but also for the community as a whole. Community members should become active participants of the process of reacting to law violations and violations of social order, while at the same time they have the obligation (certainly a moral one) to show care for the perpetrators.[40] This objective requires placement of the

justice in the Basque peace process: some experiments and their lessons, "Contemporary Justice Review" 2017, no. 3, pp. 363–391.

[39] The community, as a stakeholder, may play the role of a victim affected by the crime, a neutral third party, helping the perpetrators to take the responsibility for their actions, or members who can be involved in restorative processes.

[40] D.R. Karp, *Community Justice. An Emerging Field*, [in:] *The Community Justice Movement*, T.R. Clear, D.R. Karp (eds.), Oxford 1998, pp. 22–28.

developed normative act – act on mediation[41] – within a specific axiology, in rules and values of collectivist culture, which values the good of the community and the involvement of its members in their shared matters.

Restorative justice institutions, including mediation, need to be based on values of the collectivist culture. This requires re-formulation or supplementation of the set of values realised by the legislator. Social internalisation of the utility and efficiency of mediation and of other, alternative forms of conflict solving is required. Restorative justice is intended, first and foremost, to repair and reinforce social ties. As a result, the implementation of D2 and D3 could take place by implementation of detailed activities listed below. It is worth noting here, that each of these points is also related to the policy of use of the law by the citizens and other entities of the law, as it is related to the shaping of legal awareness and hierarchy of values supported by the state. Five detailed directives can be formulated (in the sense of an order to conduct a specific activity), and activities proposed (A1–A5). These are, of course, legal policy directives.

A1) In the field of education (i.e., primary, secondary schools), the creation of a culture of dialogue, care for common good and shared responsibility should be treated as a priority.[42] There should be training and education programmes in place, which would present in a general manner and as a thorough overview the topics of conflict management and topics related to conflict solving. Thus, it is necessary to promote knowledge on mediation and other, alternative forms of conflict solving, already at the stage of school education.[43]

[41] Or only a set of legal institutions operating in the field of restorative justice, spread across various legal acts – if the will to create a single act is absent.

[42] Cf. L. Lochner, *Non-Production Benefits of Education: Crime, Health, and Good Citizenship*, [in:] *Handbook of the Economics of Education, Elsevier Science*, E. Hanushek, S. Machin, L. Woessmann (eds.), Amsterdam 2011, pp. 183–282.

[43] See: *Restorative Justice in Education: Transforming Teaching and Learning through the Disciplines. Race and Education Series*, M.T. Winn, L.T. Winn (eds.), Cambridge 2021.

A2) It is necessary to undertake systematic activities (social actions, state programmes, support for NGOs, etc.) supporting the creation of various communities, personal relationships based on dialogue, empathy and respect for diversity. It is important to offer the space for mediation practice. It is thus necessary to raise legal awareness related to mediation and restorative justice, promoting peaceful conflict resolution, and all of this through standardised and permanent information and awareness campaign. These activities should be combined with trainings of civil servants, including judges, etc.

A3) When it comes to the promotion of the culture of dialogue, mediation or restorative justice, specific legislative solutions should not be based on utilitarian aspects, such as financial savings, shorter proceeding times or supporting the justice system and public administration. These are certainly important issues, but they are not only and not the key ones. Within the discussed scope, the objective of the law should be to implement an ideal of social life, in which people freely and willingly take responsibility for conflicts, for violations of the law, are responsible for their own lives and are ready to take care about the quality of social co-existence. Thus, we should not follow utilitarian and instrumental aspects, which happened in the case of the Polish (but also the Hungarian) legislator, but values rooted in the idea of restorative justice.

A4) Restorative justice, including mediation, implements the value of social life based on a summary and responsible, non-egoistic citizenship, relating to values such as common good, involvement and participation in decision making. Legal changes conforming to the ideal of restorative justice must lead to a change to the social paradigm and the perception of justice. Building a collectivist peace culture, based on a set of values, traditions, and lifestyles facilitating such an ideal, is of key importance. Axiology should be supplemented by knowledge related to the management of

relationships and conflicts, and the dialogue-based forms of solving such conflicts.[44]

A5) An institution, a body or a public authority responsible for coordination of mediation and restorative justice should be created, with its tasks being to coordinate, evaluate and apply for changes to legal regulations, as well as to trainings and social campaigns related to mediation and restorative justice. Thus, it would be an authority responsible for legal policy related to mediation and restorative justice. It could be an advisory and evaluation body, but also a research and a training entity. The legal policy directives can be presented in the form of a table.

Table 3. Legal policy directives

<table>
<tr><td colspan="2">Directives
D1:
• Defining the purpose of introducing the institution of restorative justice (social ideal aspect)
• An order to bring the system of values to the entire legal system coherent (in terms of Restorative Justice values)
• Introducing a coherent legal regulation (e.g., the mediation law)</td></tr>
<tr><td>D2:
Community is a value and should be promoted (aspect of the organisation)</td><td rowspan="2">Activities (A1–A5):
A1) education
A2) public space for mediation, NGO support
A3) resignation from utilitarian and instrumental reasons
A4) building a collectivist culture of peace, based on a set of values, traditions and lifestyles favoring such ideals
A5) an institution or body responsible for coordinating mediation and restorative justice – an advisory, evaluation, as well as research and training institution</td></tr>
<tr><td>D3:
Involvement in the life of the community and solving its problems (membership aspect)</td></tr>
</table>

Source: study based on own research.

[44] See: T. Hope, *Community Crime Prevention. Building a Safer Society: Strategic Approaches to Crime Prevention*, "Crime and Justice" 1995, vol. 19, pp. 21–89; P. McCold, *Restorative Justice and the Role of Community*, [in:] *Restorative Justice: International Perspectives*, B. Galaway, J. Hudson (eds.), New York 1996, pp. 85–101.

When implementing the above-mentioned directives, attention should be paid to the potential risks arising from the operation of restorative justice institutions, especially in criminal cases. There are specific risks, that should be minimised). First of all, for the victims, there is a risk of re-victimisation (for instance, a mediation assumes conversations – talks about the crime, meetings with the perpetrator or perpetrators, etc. – this causes the return of traumatic experiences, sociologically the victim remains a victim as long as is called "a victim" and fulfills such a social role).[45] But there are also risks for the perpetrators. In the first place, it is worth pointing to the risk of increasing the affliction of the sentence and demand of moral repentance (even if there is not acceptable for the perpetrator). Moreover, an access to the open prison and probation or a lighter form of sanctions may be difficult for those who do not participate in restorative processes or who do not complete them satisfactorily. Last but not least, there are specific risks for society: a retributive feeling can be established, which legitimises the hardening of sentences for those offenders who do not show repentance. On the other hand, the courts, prison institutions, police and the public's trust in authority, etc., can suffer a loss of legitimacy due to a weakened capacity to deter or punitive strength of measures and sanctions. The golden mean is the balance between a response that is truly just, and forgiveness and a clean slate for the perpetrator.

Final remarks

Restorative justice is used to implement a specific ideal of social life. This ideal is dictated by the values and attitudes that have been characterised in this paper, and it is certainly close to what has been named here as collectivist culture and the ethics of care, kindness and shared responsibility – the *shalom* ethics. From the point of view of law policy, it is important which measures will lead to the implementation of this objective. They have been presented in the form of a variety of directives, of which are a range of detailed

[45] M. Kilching, *Opferinteressen und Strafverfolgung*, Freiburg 1995, p. 155ff.

legislative socio-technical directives and three general directives, and *de lege ferenda* postulates (very general, but fundamental).[46]

The community aspect should be emphasized by way of an example. The community and the institutions functioning within it (neighbourhood mediation centres, associations, and leaders that advocate conflict resolution, but also prisons and rehabilitation centres, etc.) are established to apply restorative justice; therefore, such communities are needed before the institution of restorative justice is implemented.[47] The engagement of a community also means a certain level of trust in those people, entities, and institutions that are involved in the conciliation between the perpetrator and the victim, but that are not directly associated with the bureaucratic justice system. Of course, one can imagine mediation, e.g., in criminal cases, without the community aspect associated with the involvement of the local community, but it is impossible to imagine the operation of the institution of mediation on a broader scale without the trust of the community.

Reinforcement of mediation and restorative justice in the education, family environment, etc., and in the common understanding and awareness generally, should be the key twin measures of law policy in the field of restorative justice. A good practice should be to promote the use of these forms of conflict solving in possibly many areas of social life. Initiatives promoting dialogue, empathy, respect for oneself and others, communication, avoidance of violence, etc., should be supported. All of this also requires the creation of a public space, such as meeting places of neighbours, etc., where specialists may help solve problems and conflicts. It is necessary to support and create the legal framework for social changes towards the ideal of social life determined by values, on which the institution of restorative justice is built. This also applies to changes to the perception of citizenship, of the tasks of the state and of the communities, and to building the feeling of mutual, shared responsibility. Creation

[46] They should be fleshed out once the model of restorative justice and mediation is selected.

[47] J. Goodey, *Victims and Victimology. Research, Policy and Practice*, Harlow 2005, p. 210.

of a standardised mediation law, so-called, would also be a good measure. It is needed to create a uniform model of restorative justice and mediation, matching the requirements and capacity of the given (Polish, Hungarian, etc.) society.

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Judicial Review in Competition Law Cases in the European Union and the United States

Introductory remarks

Due to the foundational meaning of the common market from the very beginning of the European Community,[1] competition law has been constituted the object of the European Commission and the Court of Justice of the European Union. The same should be said of the antitrust laws of the United States, which from antitrust law's very inception in the second half of the nineteenth century, attached particular importance to free interstate commerce based on equal, antitrust principles.

The experience of first the U.S. and then European countries, played an important role in the formation of the European model: first, of competition law, and second, of judicial review of decisions issued by the European Commission in these matters. In this first respect, it should be emphasised that a properly functioning common market has been the foundation of European integration since the beginning of the Communities. As in the United States of America, so also in the European Union, the experience of the

[1] Based on the Treaty Establishing the European Economic Community (Rome Treaty from 1957).

economic community is the strongest bond of the federation of member states.

As for the judicial review of the Commission's decisions, on the other hand, the model that exists today has been shaped, on the one hand, by the fairly solid legal basis now included in Article 263 of the Treaty on the Functioning of the European Union (TFEU), and on the other hand, by the case law of the Court of Justice of the EU. The same is true of the judicial review of the Federal Trade Commission's decisions in antitrust cases, which is exercised by the federal courts, with the Supreme Court at the forefront. The framework for this review is contained in the provisions of § 701–706 of the Administrative Procedural Act (APA).[2] At the same time, the Supreme Court has made a binding interpretation of these provisions of the APA, which to some extent even deviates from their wording.

A comparison of the orders of judicial review of antitrust decisions in the European Union and the United States is hindered by different legal traditions nor by jurisprudential doctrines (principles). In particular, the "rule of reason" requires a court to balance an agreement's pro-and anti-competitive effects under section 1 of the Sherman Act 1890 in the United States; where the latter outweigh the former, the agreement will be regarded as an unlawful restraint of trade. The European Union competition law does not recognise a rule of reason under Article 101(1) TFEU. That is because the structure of Article 101 is different from that of section 1 of the Sherman Act; the pro-and anti-competitive effects of an agreement are weighed under Article 101(3) TFEU.

Common law tradition dictates in the US that agencies – including the FTC – use civil actions in antitrust cases first. Less frequently, the FTC chooses to use an administrative mode, resulting in a decision by the agency either ordering or prohibiting an entrepreneur to take certain actions toward the elimination of certain restrictive practices. The European tradition, in turn, has resulted in the choice of the administrative route as the only one possible for the Commission to protect competition in the common market. Both FTC and European Commission decisions are subject to judicial

[2] 5 USC Ch. 7.

review, as will be discussed further – separately for each of the legal systems in question.

Standards for judicial review of EC decisions

ON THE MERITS REVIEW

The Treaty on the Functioning of the European Union indicates the general criterion for judicial review, which is the legality of acts of institutions, bodies, organisational units and agencies, at the same time defines the grounds for their annulment. According to Article 263 indents 2 and 4 of the TFEU, the Court has jurisdiction over complaints alleging lack of competence, violation of essential procedural requirements, violation of the Treaties or any legal rule related to its application, or abuse of power. Undoubtedly, these grounds – as well as the whole mechanism of **action for annulment** at the dawn of its existence – were modeled on French solutions.[3] These grounds can be classified in various ways. It is possible to divide them into those that relate to external illegality (*illégalité externe*) and those that relate to so-called internal illegality (*illégalité interne*). The former refers to an action "without competence" (*incompetence*) by a person or body that was not authorised to do so, and a violation of procedural or formal rules (*vice de forme ou de procédure*). The second group of unlawful actions refers to violation of the law (*violation de la loi*), which can take various forms, and abuse of power (*détournement de pouvoir*).[4] Another division assumes that the first of the three grounds is in connection with a violation of EU law higher up in the hierarchy of its sources. The appearance of the latter grounds for annulment of acts should be taken into account by European courts *ex officio*. According to

[3] For more on the grounds for declaring an act invalid under French law: H. Pünder, A. Klafki, *Grounds of Review …*, *op. cit.*, pp. 443–445 and the literature and case law of the Council of State cited therein.

[4] More widely: J.B. Auby, L. Cluzel-Métayer, L. Xenou, *Administrative Law in France*, [in:] *Administrative Law of the European Union, its Member States and the United States*, R. Seerden (ed.), Antwerp-Intersentia 2018, pp. 38 and n.

well-established case law, the absence or inadequate justification of an act constitutes a violation of essential procedural requirements within the meaning of Article 263 TFEU (formerly: Article 230 EC) and is a plea on a question of public policy that can and even must be taken into account by the CJEU on its own initiative.[5] This was also the position taken by the Court in its judgment of 2 December 2009 in Case C-89/08 P, *European Commission v. Ireland and Others*, in which it concluded that by taking into account of its own motion the issue of the lack of reasons for the decision at issue, a plea that was not raised by the parties in principle, the EU General Court did not go beyond the framework of the dispute before it and did not exceed its powers.[6]

The above considerations of the Court also allow us to propose a third division of the grounds for annulment of an act, contained in Article 263 TFEU into: substantive grounds (which also take into account substantive competence), procedural fairness grounds, and abuse of right. The latter refers to a situation in which, although an institution, body, organisational unit or agency has a legal title to act, it uses it for a purpose other than that which is implied by that legal basis (*détournement de pouvoir*).[7]

Rights immanent to procedural **fairness rights** – which have their traditions not only in continental European law, but also in the so-called **common law world**[8] – are expressed in the collective concept of (the right to) **good administration** contained in Article 41 of

[5] See the judgment of the Court of Justice: of February 20, 1997 in Case C-166/95 P *Commission v. Daffix*, Rec., p. I-983, para. 24; of April 2, 1998 in Case C-367/95 P *Commission v. Sytraval and Brink's France*, Rec., p. I-1719, para. 67; of March 30, 2000 in Case C-265/97 P, *VBA v. Florimex et al.*, Rec., p. I-2061, para. 114; and of July 10, 2008 in Case C-413/06 P, *Bertelsmann and Sony Corporation of America v. Impala*, Rec., p. I-4951, para. 174.

[6] ECLI:EU:C:2009:742.

[7] See cases: 92/78, *SpA Simmenthal v. Commission of the European Communities*, ECLI:EU:C:1979:53; C-400/99, *Italian Republic v. Commission of the European Communities*, ECLI:EU:C:2005:275; T-387/08, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v. European Commission*, ECLI:EU:T:2010:377.

[8] See P. Daly, *Understanding Administrative Law in the Common Law World*, Oxford–New York 2021, pp. 108 and n.

the EU Charter of Fundamental Rights. This concept is seen in the literature as a set of principles specific to administrative proceedings[9] – it includes principles such as the right to fair proceedings, the principle of participation (the right to be heard),[10] the right of access to information about the proceedings and access to the case file,[11] the principle of transparency (transparency),[12] freedom from self-incrimination[13] and the obligation to justify the decision.[14] Moreover, according to Article 41(1) of the EU Charter of Fundamental Rights, everyone has the right to have his or her case heard within a reasonable time and without delay. On the other hand, in the jurisprudence of the Court of Justice of the EU, the principle of the obligation of the authorities to properly and completely investigate the facts relevant to the resolution of the case[15] has been formed and established.

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[9] See: *ibidem*. For German-language literature, see H.P. Nehl, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung "mehrstufiger" Verwaltungsverfahren*, Berlin 2002, pp. 178 et seq.; K. Pfeffer, *Das Recht auf eine gute Verwaltung*, Baden-Baden 2006, pp. 113 et seq., 138 and n.; O. Mader, *Verteidigungsrechte im Europäischen Gemeinschaftsverwaltungsverfahren*, Baden-Baden 2006, pp. 134 and n., 264.

[10] P. Korzeniowski, *Legal Aspects of Environmental Protection*, [in:] *Substantive Administrative Law*, Z. Duniewska, B. Jaworska-Dębska, M. Stahl (eds.), Warsaw 2014, p. 587.

[11] See R. Geiger, [in:] *European Union Treaties*, R. Geiger, D.E. Khan, M. Kotzur (eds.), Munich 2015, pp. 43 and n.

[12] M. Kotzur, [in:] *European Union Treaties*, *op. cit.*, p. 1091; H.P. Folz, [in:] *Europäisches Unionsrecht*, Ch. Vedder, W.H. von Heinegg (eds.), Baden-Baden 2012, pp. 1158 et seq.

[13] A. von Arnauld, [in:] *Verwaltungsrecht der Europäischen Union*, J.P. Terhecht (ed.), Baden-Baden 2011, p. 116. In addition, see R. Bieber, A. Epiney, M. Haag, *Die Europäische Union. Europarecht und Politik,* Baden-Baden 2013, pp. 239–240 – and the literature cited therein; P. Craig, *UK, EU and Global Administrative Law. Foundations and Challenges*, Oxford 2016, pp. 156 et seq.

[14] See C. Franchini, *European Principles Governing National Administrative Proceedings*, "Law and Contemporary Problems" 2004, no. 68, p. 183–196; M. Ruffert, *Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund*, "Die Öffentliche Verwaltung" 2007, pp. 761 et seq.; M. Klatt, *Europäisches Unionsrecht. Band 1*, H. von Groeben, J. Schwarze, A. Hatje (eds.), Baden-Baden 2015, p. 788–789.

[15] See P. Ostojski, *Justice procedural…*, *op. cit.*, p. 133–144.

It is accepted in the case law of the Court of Justice that judicial review under Article 263 TFEU must be limited to the legality of the challenged act, and both the EU General Court and the Court do not subject its expediency to examination.[16] Moreover, these courts may under no circumstances substitute their own reasoning for that of the author of the challenged act.[17]

The CJEU's approach to the issue of the intensity of control in the interpretation of the law by the public administration of the Union should be described as "restrained" (deferential[18]). This issue is related to the question of judicial review of administrative discretion (review of discretion). The EU legal system does not distinguish between the concepts of administrative "discretion" and "margin of discretion". At the same time, the doctrine points out that in the absence of a definition of the concept of "recognition", EU jurisprudence has developed an autonomous understanding of it, not following in this regard either the French model or the German model.[19] The literature emphasises that at the EU level, EU institutions have a wide margin of discretion, among other things, when establishing acts of general application.[20] It is clear from the landmark *Fedesa*

[16] See Judgment in Case C-84/94, *United Kingdom v. Council*, ECLI:EU:C:1996:431.

[17] Judgment of the CJ in Case C-164/98, *DIR International Film Srl and Others v. Commission*, ECLI:EU:C:2000:48: "The Court of Justice and the Court of First Instance cannot under any circumstances substitute their own reasoning for that of the author of the contested act." In addition, see the judgment of the CJ in Case C-246/11, *Portugal v. Commission*, ECLI:EU:C:2013:118.

[18] Literally, "respectful" or "submissive". See M. Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, "Columbia Journal of European Law" 2016, vol. 22.2, p. 275 and n. The term "deference" also functions in the European literature to describe the relationship of the CJEU to the courts of member states – see, for example: S.K. Schmidt, *Just Hitting the Nail or Also the Thumb? The Court's Deference to Member States*, "European Constitutional Law Review" 2021, vol. 17, no. 2, pp. 353–367; G.A. Moens, J. Trone, *The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo*, "Journal Of Legislation" 2015, vol. 41, no. 1, pp. 65–201.

[19] H. Pünder, A. Klafki, *Grounds of Review …*, *op. cit.*, pp. 461–463.

[20] See R. Widdershoven, *The European Court of Justice and the Standard of Judicial Review*, *op. cit.*, pp. 53–54.

case[21] and numerous subsequent rulings that the Court of Justice exercises clear restraint when reviewing the substance of such acts. Obviously, the Court cannot substitute its own assessment – an assessment made by another EU institution. On the contrary, it must confine itself to examining whether the assessment made by the administration contains a manifest error (manifest error) or constitutes an abuse of power (misuse of power), or whether the authority manifestly exceeded the limits of its discretion.[22] In substantive terms, this standard therefore requires judicial restraint (judicial deference).[23]

It should be mentioned that the above style of examining cases is common among *common law* systems, although to varying degrees. On the grounds of these systems, it is pointed out that, although the task of the courts is to limit the power given to the administration by the legislature, they should do so with a view to respecting the autonomy of the decision makers.[24] At the same time, it is emphasised that: "(…) reticence toward administrative decision-makers [is the same] as reticence toward expert bodies that can efficiently deal with complex issues, sometimes relying on input from interested parties. Such bodies can perform their functions with "cheapness, accessibility, freedom from technical issues, speed and expertise on the subject."[25]

The rationality of the above arguments seems to have underpinned the standard of review adopted by the Court of Justice of the European Union in cases of actions for annulment of administrative acts, especially in the field of competition protection. In the doctrine,

[21] Judgment in Case C-331/88, *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*, ECLI:EU:C:1990:391.

[22] *Ibid*. In addition, see J. Van den Brink, W. Den Ouden, S. Prechal, R. Widdershoven, J. Jans, *General Principles of Law*, [in:] *Europeanisation of Public Law*, Groningen 2015, p. 182.

[23] See R. Widdershoven, *The European Court of Justice…*, *op. cit.*, p. 54.

[24] P. Daly, *Understanding Administrative Law in the Common Law World*, Oxford–New York 2021, pp. 161–162.

[25] *Ibid*. Also see: M. Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, "Columbia Journal of European Law" 2016, vol. 22.2, pp. 275 and n.

it has been pointed out that it is advisable for the courts, in their review of the decisions of the competition authorities, to respect the policy of punishing these authorities as institutions established to carry out competition policy.[26] The Court made this point in its judgment of 17 November 1987 in Joined Cases 142/84 and 156/84, *British-American Tobacco Company Ltd. and R.J. Reynolds Industries Inc. v. Commission of the European Communities*[27], in which it is stated that: "[t]hough, as a general rule, it is the Court that exercises, in a general manner, full control over the question of whether the conditions for the application of Article 85(1) of the Treaty [after the entry into force of the Lisbon Treaty – on Article 101(1) 1 TFEU], its review of the Commission's assessments of complex economic conditions is necessarily limited to verifying that the relevant procedural rules and principles relating to the duty to state reasons have been complied with, in addition – to examining the veracity of the findings of fact and determining whether there has been a manifest error of assessment (manifest error of assessment) or an abuse of power."

In cases where it is necessary to make a decision requiring economic or scientific expertise, CJEU judges are reluctant to engage in comprehensive evaluations.[28] In Case C-331/88, *R v. Ministry of Agriculture, Fisheries and Food, ex parte: Fedesa and others*,[29] the CJEU limited itself to stating that: "[by virtue of the principle of proportionality] the lawfulness of the prohibition of economic activity is subject to the condition that the measures of prohibition are appropriate and necessary to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, the least onerous must be

[26] M. Bernatt, *Between Full Judicial Review and Respect for the Administration's Punishment Policy – On Judicial* Review of *Penalties Imposed in Competition Cases*, "European Judicial Review" 2016, no. 9, pp. 18 et seq.; *idem*, *Transatlantic Perspective on Judicial Deference in Administrative* Law, "Columbia Journal of European Law" 2016, vol. 22, no. 2, pp. 275 et seq.

[27] ECLI:EU:C:1987:490.

[28] H. Pünder, A. Klafki, *Grounds of Review…*, *op. cit.*, p. 463.

[29] ECLI:EU:C:1990:391.

used, and the inconvenience caused must not be disproportionate to the objectives pursued."

The "manifest error of judgment" test was criticised in 2002, when the EU General Court issued three judgments in the cases: *Airtours*,[30] *Schneider*[31] *and Tetra Laval*,[32] annulling Commission decisions banning three different operations. Some observers wondered whether the General Court had reserved the right to consider *de novo* the substantive compatibility analysis, thus setting a stricter standard of review than previously.[33] In a judgment issued on 15 February 2005, dismissing the Commission's appeal against the judgment of the EU General Court in the latter case, the Court of Justice concluded that the EU General Court had not erred in law with regard to the criteria to be applied in the exercise of judicial review, explaining and setting forth the reasons why the Commission's conclusions seemed inaccurate in this regard. Well, they were based on insufficient, incomplete, irrelevant and inconsistent evidence.[34] In doing so, the Court of Justice formulated the following standard of judicial review: "[j]ust if even [one] accepts that the Commission is entitled to certain limits of discretion in the economic field, this does not mean that the Community judge should refrain from reviewing the Commission's interpretation of economic data. Indeed, in particular, the Community judge should review not only the substantive accuracy of the evidence cited, its accuracy and consistency, but also whether this material constitutes a set of relevant data that must be taken into account in order to assess a complex situation, and whether it can support the conclusions drawn from it."[35] Over the past decade, the test, as reformulated in *Tetra Laval*, has been mentioned and applied in several

[30] T-342/99, *Airtours v. Commission*, ECLI:EU:T:2002:146.

[31] T-310/01, *Schneider Electric v. Commission*, ECLI:EU:T:2002:254.

[32] T-5/02, *Tetra Laval v. Commission*, ECLI:EU:T:2002:264.

[33] D. Bailey, *Standard of Proof in EC Merger Proceedings: A Common Law Perspective*, "Common Market Law Review" 2003, no. 40, pp. 845–861.

[34] C-12/03 P, *Commission v. Tetra Laval BV*, ECLI:EU:C:2005:87, para. 37 and n.

[35] *Ibid*., para. 39. Also see: R. Widdershoven, *The European Court of Justice*..., *op. cit.*, pp. 55–56.

cases, but, as indicated in the literature, its relevance in each case appears to vary.[36]

In 2011, the Court of Justice again confronted the above issues and clarified the standard of judicial review formulated in 2002. Well, in its rulings of 8 December 2011 in the *KME Germany*[37] *and Khalkor*[38] cases, the Court of Justice discussed this standard in detail. These rulings have become the leading ones in this field.[39] The Court of Justice specifically addressed the problem of "complex economic assessments", stating that: "(…) although in the areas that lead to [these] assessments (…) the Commission has a certain margin of discretion in economic matters, this does not mean that the courts of the European Union must refrain from reviewing the Commission's interpretations of information of an economic nature. These courts must not only determine, among other things, whether the evidence relied upon is factually correct, reliable and consistent, but also whether that evidence contains all the information that must be taken into account to assess a complex situation and whether it is sufficient to justify the conclusions drawn from it."[40]

Presented, the granting of extensive powers to the EU General Court in the above-mentioned rulings to examine factual findings made by the Commission in the course of administrative proceedings – and the reasons for the decision subject to judicial review – does not mean, however, that there are no limits to these powers. In its judgment of 10 July 2008 in Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala)*,[41] the Court of Justice

[36] F.C. de la Torre, E.G. Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, Cheltenham-Northampton, MA 2017, p. 282 and case law cited therein.

[37] C-272/09 P, *KME Germany AG, KME France SAS and KME Italy SpA v. European Commission*, ECLI:EU:C:2011:810.

[38] C-386/10 P, *Chalkor AE Epexergasias Metallon v. European Commission*, ECLI:EU:C:2011:815.

[39] F.C. de la Torre, E.G. Fournier, *op. cit.*, p. 284.

[40] C-272/09 P, *KME Germany et al. v. Commission*, *ibid.*, para. 94.

[41] ECLI:EU:C:2008:392.

overturned the EU General Court's judgment of 13 July 2006[42] and referred the case back to the first instance. In particular, the Court stated that: "(…) the General Court erred in law, first, in requiring the Commission to be particularly exacting as to the strength of the evidence and arguments submitted by the parties notifying the concentration (…) and, second, in concluding on that basis that the lack of additional market research (…) and the Commission's consideration of the arguments submitted as part of the appellants' defense amounted to an impermissible referral of the investigation to the parties involved in the concentration."[43] The literature indicates that the above judgment: "(…) is a useful reminder that it is not only the formula used at the beginning of the judgment that counts, but the actual exercise of the power of [judicial] review".

In the above context, attention should also be drawn to the judgment of the Court of Justice of 29 June 2010 in Case C-441/07 P, *Commission v. Alrosa Company Ltd.*,[44] which reiterated that the standard of judicial review established in the *Tetra Laval* judgment does not justify interference by the EU courts with certain assessments by the Commission. The Court ruled that the EU General Court had gone beyond the scope of the examination required to review complex economic issues by annulling the Commission's decision under Article 9 of Regulation 1/2003 accepting commitments made by DeBeers to address the abuse of dominance in connection with the purchase of rough diamonds from the Russian state-owned company Alrosa.[45] Well, the first-instance judgment found that the Commission violated the principle of proportionality by accepting a second set of unilateral commitments, while the joint commitments were sufficient to address anti-competitive concerns.[46] According to the Court, the EU General Court presented its own different assessment of the suitability of the joint commitments to

[42] T-464/04, *Independant Music Publishers and Labels Association (Impala, association internationale) v. Commission of the European Communities*, ECLI:EU:T:2006:216.

[43] C-413/06 P, *Bertelsmann AG and Sony*, *ibid*., para. 95.

[44] ECLI:EU:C:2010:377.

[45] *Ibid*.

[46] T-170/06, *Alrosa v. Commission*, ECLI:EU:T:2007:220.

eliminate the competition concerns identified by the Commission, after which it concluded that in the case under review there were alternatives that were less restrictive for companies than a total ban on transactions. On this occasion, the EU General Court provided its own assessment of the complex economic circumstances, and thus substituted its own assessment for that of the Commission – thus violating its discretion, instead of reviewing the legality of the Commission's assessment.[47]

Of significance is the fact that Union law is among those regimes in which in the course of judicial review evidence is allowed – both in the written and oral parts of the proceedings before the CJEU (**regime open to evidence**). In this regard, Union law is similar to French, Dutch and German law.[48] European courts can play an active role in fact-finding, as long as the parties have been able to define their position in this regard. At the same time, the parties must present evidence supporting their claims, that is, *prima facie*, relating to their allegations and information demonstrating even minimally the need for the evidence in question.[49] Only then will the court examine the allegations by means of so-called "organisational measures"[50] or "means of [fact] investigation."[51] The former are intended to provide courts with the ability to smoothly ask questions in writing or at trial and to set time limits for the parties to present their arguments in the case. Evidentiary measures, on the other hand, include: the personal appearance of the parties, requests for the production of information or documents, oral testimony, the commissioning of expert reports, and the inspection of a place or thing. The parties may be present during the taking of evidence.

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[47] C-441/07 P, *Commission v. Alrosa Company Ltd*, *ibid*., para. 66–67.

[48] M. Varney, *Conduct of Court Proceedings*, *op. cit.*, pp. 365 and n.

[49] *Ibid*., p. 372 and the judgment of the CJ in Case C-185/95 P, *Gaustahlgewebe v. Commission*, cited therein, ECLI:EU:1998:608.

[50] Literally: "measures of organization of procedure" (*measures of organization of procedure*).

[51] Literally: "measures of inquiry" (*measures of inquiry*). See judgments: General Court in Case T-53/96, *Syndicat des producteurs de viande bovine v*. Commission, ECLI:EU:T:1996:170 and CJ in Case C-185/95 P, *Gaustahlgewebe v. Commission*, ECLI:EU:1998:608.

COURT DECISIONS

The legal and European literature indicates that if an administrative act has been appealed to an administrative court, in a typical case the complainant seeks the annulment of an administrative decision.[52] In addition, the legal solutions in force in various European countries, as well as in the Union itself, may provide that complainants are entitled to demand the following: an order that an institution or other body, entity or agency refrain from unlawful actions; an order that a public entity perform its legal duties; a declaration of the rights or obligations of the parties; an order that a public authority pay compensation to the complainant for the damage suffered by the applicant.[53] Some of the above-mentioned types of rulings are familiar to various legal traditions of continental Europe. At the same time, however, one should note the similarity of various types of orders (orders) and declaratory judgments (declaratory judgments) to the above-mentioned: **prerogative writs, injunctive remedies and declaratory remedies**, characteristic of the states of the common law tradition derived from English law.[54] However, there is no doubt that a common feature of European legal systems, which the EU legislature has implemented, is the empowerment of administrative courts to declare an administrative act invalid.

The jurisprudential powers of the CJEU are modeled on French legislation – with the proviso that disputes generally concern the annulment of an administrative act (*contentieux de l'annulation pour excès de pouvoir*), while full litigation under full jurisdiction (*contentieux de pleine juridiction*)[55] – are an exception to the rule and take place only in situations defined by law. In European Union law, a variety of administrative acts (Article 263(1) TFEU), both in terms of subject and object – including refusals – may be the subject of an action for annulment. The consequence of the aforementioned

[52] E. Chevalier, *Remedies and Consequences of Court Decisions*, *op. cit.*, p. 555.
[53] *Ibid*.
[54] P. Daly, *Understanding Administrative Law in the Common Law World*, Oxford–New York 2021, pp. 188 et seq.
[55] See J.B. Auby, L. Cluzel-Métayer, L. Xenou, *op. cit.*, pp. 38 et seq.

complaint may be the annulment of the act in whole or in part.[56] It has been noted in the literature that, although in the case of the validity of the complaint, the CJEU "declares" the act under examination void (**declares the act void**, Article 264(1) TFEU) – which would suggest the declaratory nature of this ruling – the effect it has indicates its constitutive nature.[57] This manifests itself in restoring the legal situation of the parties to the moment before the challenged act took effect. In other words, the effect of the judgment of the union court goes back to the date on which the covered act entered into force.[58]

However, an exception to the above rule, which is provided for by the standard of Article 264(2) TFEU, must be emphasised. According to this provision, if the Court deems it necessary, it shall determine which effects of the act it has ruled invalid should be considered final. This means that an EU court may decide that certain effects of an administrative act will remain in force.[59] A far-reaching position in this regard was taken by the Court in its judgment in Case C-211/01, *Commission v. Council*[60], adopting that: "(…) in order to avoid legal uncertainty regarding the application of international obligations entered into by the Community in the Community legal order, the effects of the contested decisions must be maintained pending the adoption of the measures necessary to implement this judgment". However, such cases are rare, and the use of this mechanism can be justified in light of the general principles of Union law, including in particular the aforementioned principle of legal certainty.[61]

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[56] The conditions for partial annulment of an act were defined by the CoJ in its judgment in spr ava 17/74, *Transocean Marine Paint v. Commission*, ECLI:EU:C:1974:106.

[57] E. Chevalier, *Remedies and Consequences of Court Decisions*, *op. cit.*, p. 563.

[58] *Ibid.* – and the rulings in cases cited there: 22/70, *Commission v. Council*, ECLI:EU:C:1971:32; joined 97/86, 99/86, 193/86 and 215/86, *Asteris and others v. Commission*, ECLI:EU:C:1988:199.

[59] E. Chevalier, *Remedies and Consequences of Court Decisions*, *op. cit.*, p. 563.

[60] ECLI:EU:C:2003:452.

[61] See the judgment of the CJ in Case C-402/05, *Kadi and others v. Commission*, ECLI:EU:C:2008:461.

The consequence of the annulment of the act should be the obligation of the EU institution to take the necessary measures to implement the CJEU judgment (Article 266 TFEU). This means that the EU courts are empowered to give directions to the European institutions on how to implement the rulings. In its judgment of 26 April 1988 in Joined Cases 97/86, 99/86, 193/86 and 215/86, *Asteris AE and Others and Hellenic Republic v. Commission*[62], the Court explained that: "[in] order to implement a judgment and to execute it in full, the institution is obliged to take into account not only the operative part of the judgment, but also the explanatory memorandum, which (…) constitutes its essential basis, in so far as this is necessary to determine the precise meaning of what is stated in the operative pArt. It is the statement of reasons, on the one hand, that identifies (…) the reasons behind the finding of illegality and which the institution concerned must take into account when [it comes to] replacing an invalid [legal] measure." At the same time, the Court is of the opinion that it has no legal basis for indicating the specific measures or course of action that an institution should take to implement the decision of the court.[63] At the same time, in the specific circumstances of the case, it is possible for the court to give guidance on the implementation of the case. By way of example, in the judgment in Joined Cases T-94/01 and T-286/01, *Hirsch and Others v. European Central Bank*[64], the EU General Court, in annulling the contested decisions, indicated that: "(…) it is up to the European Central Bank to properly implement (…) the judgment by amending the system of educational allowances under Article 19 conditions of employment, in the light of the grounds of this judgment, so that they comply with the principle of equal treatment, and by considering, within the framework of the amended system, the applicants' applications for educational allowances for their children."

The CJEU has no instruments with which it can compel an institution to comply with a judgment. Only the entity affected by the

[62] ECLI:EU:C:1988:199.

[63] See judgment in Case 53/85, *AKZO Chemie v. Commission*, ECLI:EU:C:1986:256.

[64] ECLI:EU:T:2003:3.

institution's failure to act may file a complaint in order for the court to declare an infringement in this regard (Article 265 TFEU).[65] At the same time, the EU courts emphasise the need to give the Union's institutions a reasonable time to implement the judgment. The delay in implementing the judgment cannot in itself affect the validity of the contested act. The annulment of an act solely due to the alleged tardiness of the institution in implementing the court's directions would, in effect, prevent the adoption of a new act in due time.[66]

In addition, it should be pointed out that the case law of the General Court of the EU has stated that an action for annulment of an administrative act can be combined with a claim for recognition of the institution's liability for an unlawful act. In the judgment of December 13, 2016 in Case T-713/14, *Organisation of staff of European and international institutions in the Federal Republic of Germany (IPSO) v. European Central Bank*[67], it was emphasised that, in light of Article 340 TFEU, the harm alleged by the applicant to arise from the illegality of the administrative act is, in principle, sufficiently remedied by the court's finding of such illegality. In fact, the annulment of the contested act makes it necessary for the institution to take the measures required under Article 266 TFEU to implement this judgment – which should lead to full redress of the harm alleged by the applicant.[68] The exception to this rule is if the applicant demonstrates that it has suffered a harm separable from the illegality forming the basis for the annulment and impossible to be fully remedied by the annulment itself. In turn, in its judgment of 25 October 2018 in Case T-334/16, *FN and Others v. European Union Agency for Law Enforcement Training*,[69] the EU General Court ruled

[65] See the judgment of the EU General Court in Case T-521.14, *Kingdom of Sweden v. Commission*, ECLI:EU:T:2015:976.

[66] See the judgment of the EU Court in Case T-73/95, *Estabelecimentos Isidoro M. Oliveira SA v. Commission*, ECLI:EU:T:1997:39.

[67] *Organization of Employees at European and International Institutions in the Federal Republic of Germany (IPSO) v. European Central Bank*, ECLI:EU:T:2016:727.

[68] See, in addition, the judgments of the EU General Court in the cases: *Abdulrahim v. Council and Commission*, C-239/12 P, ECLI:EU:C:2013:331 and case law cited therein; *Girardot v. Commission*, T-10/02, EU:T:2006:148 and case law cited therein.

[69] ECLI:EU:T:2018:723.

that in the case under review, claims for compensation for material damage were subject to dismissal in connection with the dismissal of the action for annulment of the administrative act. Regardless, the inadmissibility of the claim for compensation was due to the failure to comply with the requirements for the pre-complaint procedure. The applicants filed a claim in this regard only at the appeal stage. The claim for damages, on the other hand, should have been filed at the same time as the action for annulment of the act.

In light of the above, it should also be added that where an institution has a wide margin of discretion under EU law, it is only possible to successfully bring a claim for damages before the EU General Court if there has been a "manifest and serious" overstepping of the bounds of discretion.[70]

The general power of the courts of the Union to declare an act invalid if any of the conditions laid down in Article 263(2) TFEU exist, results in a general lack of legal grounds for replacing an unlawful administrative decision[71] with a judgment of the court. This solution coincides with the aforementioned inadmissibility of the Court to replace with its own reasoning the grounds of the institution's decision in a given case.[72]

In contrast, Article 261 TFEU states that: "[r]egulations adopted jointly by the European Parliament and the Council, and by the Council, in accordance with the provisions of the Treaties, may confer on the Court of Justice of the European Union unlimited jurisdiction to rule on the sanctions provided for in those provisions." Exercising the power granted by this provision, the Union legislature stated in Article 31 of Regulation 1/2003[73], that: "The Court of Justice shall have unlimited jurisdiction to review decisions in which the Commission has fixed a fine or periodic penalty [and

[70] H. Pünder, A. Klafki, *Liability of administration*, *op. cit.*, pp. 893 and n.

[71] See E. Chevalier, *Remedies and Consequences of Court Decisions*, *op. cit.*, p. 572.

[72] See the judgment in Case C-73/11 P, *Frucona Košice v. Commission*, EU:C:2013:32 and the case law cited therein.

[73] Council Regulation (EC) No. 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal of the EU L 2003 No. 1, item 1.

that] it may cancel, reduce or increase the fine or periodic penalty imposed." In exercising this power under Article 31 of Regulation No. 1/2003, the Union's courts are empowered, in addition to the mere review of the legality of the fine or pecuniary penalty, to substitute their own judgment for the sanction imposed by the Commission.[74] The Court of Justice has repeatedly emphasised in its case law that, unlike the review of legality provided for in Article 263 TFEU, the scope of the unlimited jurisdiction of the EU courts under Article 261 TFEU is strictly limited to the determination of the amount of a fine or periodic penalty,[75] excluding any change in the constitutive elements (*ad meritum*) of the Commission's decision under review by the court.[76] Only in order to determine the amount of the fine imposed does the court independently assess the circumstances of the case and the nature of the violation under consideration.[77] This issue will be considered in greater detail in the next chapter of this work.

The EU legal system provides for the admissibility of a declaratory judgment by the CJEU only if the meaning or scope of the judgment *ad merit* of the case is in doubt. In such a case, the court issues a so-called "interpretative judgment" clarifying the doubts presented in a party's or EU institution's request, provided that they demonstrate a legal interest in issuing such a judgment (Article 43 of the CJEU Statute[78]). An interpretative judgment does not change

[74] See the judgment of the CJ in Case C-3/06 P, *Groupe Danone v. Commission*, ECLIEU:C:2007:88.

[75] See, among others, the judgments in the cases: *Groupe Danone v. Commission*, C-3/06 P, EU:C:2007:88; *Alliance One International v. Commission*, C-679/11 P, EU:C:2013:606; *Commission and others v. Siemens Österreich and others*, C-231/11 P to C-233/11 P, EU:C:2014:256; *Telefónica and Telefónica de España v. Commission*, C-295/12 P, EU:C:2014:2062; *Galp Energía España SA and others v. Commission*, C-603/13 P, ECLI:EU:C:2016:38.

[76] See judgment of the CJ in *Knauf Gips v. Commission*, C-407/08 P, EU:C:2010:389.

[77] See judgment of the CJ in *Nederlandsche Banden-Industrie-Michelin v. Commission*, 322/81, EU:C:1983:313.

[78] Protocol on the Statute of the Court of Justice of the European Union – added to the TEU by Article 7 of the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related

an existing judgment on the merits, so it does not constitute a *sui generis* remedy for the parties. It serves only to "explain" the meaning of the judgment by declaring to the CJEU what the scope of the judgment is or what rights or obligations flow from its contents. Of particular importance is the clarification by the court of doubts regarding the obligations of the parties, as this enables effective enforcement.[79]

Standards for judicial review of FTC decisions

ON THE MERITS REVIEW

Despite the fact that judicial review is a cornerstone of modern law – both constitutional and administrative – of the United States,[80] the constitution of that country does not expressly state in *expressis verbis* that courts are granted the authority to exercise judicial review of agency activities. However, the existence of a constitutional mandate for the courts to perform this role is supported in particular by an evolutionary interpretation of US law. The origins of the "American style" of exercising judicial control over the activities of the executive branch (agencies) are immanently connected with the formation of the appellate model of this control.

This model is borrowed from the understanding of the relationship between appellate courts and courts of first instance in civil cases, which in turn are based on the relationship between judges and juries.[81] This author points out that the appellate model of

acts (OJ 04.90.864/32) in connection with Poland's accession to the European Union.

[79] E. Chevalier, *Remedies and Consequences of Court Decisions*, *op. cit.*, pp. 609–610.

[80] This is already evidenced by the fact that within the framework of comprehensive studies of U.S. constitutional law the issue of *judicial review* is analyzed as the first element of the constitutional system of this country; see: E. Chemerinksy, *Constitutional law: principles and policies*, New York 2019, pp. 1 and n.; D.A. Farber, N.S. Siegel, *op. cit.*, pp. 17 and n.

[81] T.W. Merrill, *The Origins of American-style Judicial Review*, [in:] *Comparative Administrative Law*, *op. cit.*, p. 367.

review has three important features: 1) the evidence on which the reviewing institution makes its decision is solely a record generated by the initiating institution. If the reviewing institution determines that additional evidence is critical to making the right decision, it calls on the initiating institution to develop new material, and does not conduct the evidence itself; 2) the standard of scrutiny varies depending on whether the problem falls within the area of overriding competence of the initiating institution or the reviewing institution; 3) the division of competence is based on the distinction between law and fact.[82] "(…) In matters of fact, it is understood that the initiating institution has superior competence, and the reviewing institution takes into account its findings. On questions of law, it is understood that the opinion institution has overriding competence, and it decides the case on its own."[83] Briefly stated, agencies specialise in the minutiae of their specific regulatory programs: developing documentation, making findings of fact, issuing dispositive orders, initiating enforcement actions. The courts, in turn, review the agencies' acts to make sure they are operating in a reasonable manner, and focus on legal conclusions to harmonise the agencies' regulatory programs with broader principles of law, including constitutional freedoms such as protection against confiscation.[84]

The provisions of Section 706 of the APA set forth general standards governing judicial review of agency action. These standards are expressed using a different phraseology than the traditional standards of review governing the civil process.[85] Nevertheless, the said provision also includes: "(…) indications of the level of

[82] *Ibid*. and M.B. Louis, *Allocating Adjudicative Decision Making Authority between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, "North Carolina Law Review" 1986, no. 64, pp. 1002–1007.

[83] T.W. Merrill, *The Origins…*, *op. cit.*, p. 367. In addition, see R.M. Levin, *Identifying Questions of Law in Administrative* Law, "Georgetown Law Journal" 1985, no. 74, pp. 1–64.

[84] T.W. Merrill, *Article III …*, *op. cit.*, p. 1000. Also see J.L. Mashaw, R.A. Merrill, P.M. Shane, M.E. Magill, M.F. Cuellar, M.R. Parrillo, *Administrative Law. The American Public Law System. Cases and Materials*, St. Paul, MN 2014, pp. 3 and n.

[85] K.E. Hickman, R.J. Pierce Jr., *Federal…*, *op. cit.*, p. 385; K.E. Hickman, R.J. Pierce Jr., *Administrative Law Treatise II*, *op. cit.*, pp. 1081 and n.

skepticism that the court should apply in examining the results of agency action."[86] Most of the standards in § 706 of the APA do not differentiate between rulemaking (rulemaking) and adjudication (adjudication) by the agency, hence, in *essence,* the rationale for the court's *ad merit* review of both forms of legal agency action is the same.[87]

Analysing the standards used in judicial review in administrative cases, the doctrine distinguishes three separate but interdependent elements of the agencies' taking of the aforementioned actions: findings of facts (findings of facts), conclusions of law (conclusions of law), and the reasoning process (reasoning process).[88] In examining these issues, the courts apply the same criteria to both agency rulemaking and decision-making in individual cases. By having the courts perform the task of examining the legality of administrative acts, agencies can align their actions with (federal) law as a whole.[89] As I mentioned above, in fulfilling their fundamental role of "ensuring that government officials comply with laws when the rights of individuals are at stake",[90] courts can perform three types of review: constitutional, procedural and substantive.

The legal doctrine points out that the structure of adversarial review is shaped by a number of important principles of US administrative law. The first, and most basic, is that Congress has entrusted the agencies, not the reviewing courts, with the primary role in deciding how best to implement the standards flowing from the authorising (regulatory) law.[91] In contrast, the court's position in guaranteeing the rule of law, as mentioned, is crucial but secondary; judges decide (only) whether administrative acts comply with the law.[92]

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[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid*.
[89] L.L. Jaffe, *Judicial Control of Administrative Action,* Little, Brown & Co., Boston 1965, p. 590.
[90] See *Marbury v. Madison*, 5 U.S. 137(1803).
[91] K. Werhan, *Principles…*, *op. cit.*, p. 351.
[92] *Ibid.* and E. Gellhorn, G.O. Robinson, *Perspectives on Administrative* Law, "Columbia Law Review" 1975, no. 75, pp. 771–781; Supreme Court decision in *Michigan v. Environmental Protection Agency*, 576 U.S., 135 S.Ct. 2699–2710(2015).

The role of the courts in the review of administrative acts, so conceived, was expressed in the content of the principle formed in the Supreme Court decisions in *Securities and Exchange Commission v. Chenery Corporation of* 1943 (*Chenery I*) and 1947 (*Chenery II*)[93]. According to this principle, courts decide the validity of an agency's actions solely by examining: "(…) the justification on which [the agency] based its action."[94] If the court finds it "inadequate or inappropriate", it cannot uphold the agency's action, while replacing the agency's reasoning for its decision with its own considerations that it deems more adequate or appropriate. "(…) In doing so, the court would be stepping into a domain that Congress has exclusively delegated to an administrative agency."[95] In the opinion of Justice Frankfurter, who drafted the opinion for the judgment in the first case indicated: "(…) it would be inappropriate to allow that it is the business of judicial judgment, not "administrative judgment" (administrative judgment) to decide how best to apply the law."[96] Subsequently, the Supreme Court has limited the above principle to discretionary agency action. In view of this, it does not apply to cases where an agency issues an act whose content is conditioned by law[97]. In such situations, the court should apply the "harmless error" rule (harmless error) and uphold the agency's decision if it is possible for the court to justify its correctness (correct rationale), while the motives presented by the agency are flawed (flawed reasoning).[98] In addition, the Supreme Court has held that in exceptional cases, remanding a case to the agency for reconsideration due to manifest error could be an expression of unnecessary formalism.[99]

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[93] See K.M. Stack, *The Constitutional Foundations of Chenery*, "The Yale Law Journal" 2007, vol. 116, p. 952.

[94] *SEC Ruling v. Chenery Corp.*, 318 U.S. 80, 88(1943).

[95] *SEC Ruling v. Chenery Corp.*, 332 U.S. 194, 196(1947).

[96] 318 U.S. at p. 88(1943).

[97] Ruling in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527(2008).

[98] See K. Werhan, *Principles…*, *op. cit.*, p. 182 and the Supreme Court decision cited by him in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659–660(2007).

[99] See *NLRB v. Food Store Employees Union*, Local 347, 417 U.S. 1, 8(1974).

In its 2 March 1971 ruling in *Citizens to Preserve Overton Park v. Volpe*[100], the Supreme Court reasoned that: "(…) the focal point of judicial review should be the evidence already in existence, not new material gathered from the outset by the court conducting the review."[101] Of significance was the fact that in the case: "(…) the lower courts based their assessment on affidavits."[102] According to the Supreme Court, these affidavits only served to attempt to rationalise *post hoc* certain circumstances: "(…) which have traditionally been considered an insufficient basis for [conducting] an audit."[103] The court emphasised that the statements did not constitute "all of the evidence" produced by the agency that is required as a basis for inspection under Section 706 of the APA.[104] In *Overton Park*, it made clear that the only remedy the appellate court could apply was to return the case to the agency for a fuller explanation of the agency's reasoning at the time of the challenged action.[105] Subsequent cases have made it clear that in the absence of an opportunity to base judicial review on the evidence, *remanding to the agency* is in fact the preferred course of action.[106] If "(…) the reviewing court simply cannot assess the challenged agency action on the basis of the records [compiled by the agency and submitted to the court], the proper course, except in rare circumstances, is to return the case to the agency for further study or clarification."[107] In view of this, it is reasonable for the court to require the agency to present the full evidence that underpinned its decision.[108]

The reasoning set forth by the Supreme Court in the *Overton Park* case is not absolute in nature. The court may allow the introduction of supplementary information into evidence to help "complete the

[100] 401 U.S. 402(1971). In addition, see *Camp v. Pitts*, 411 U.S. 138, 142(1973).
[101] 401 U.S. 402(1971).
[102] *Ibid*., p. 419.
[103] *Ibid.* and the ruling cited therein in *SEC v. Chenery Corp.*, 318 U.S. 80, 318 U.S. 87(1943).
[104] 401 U.S. 419(1971).
[105] *Ibid*., pp. 420–421.
[106] *Florida Power* & *Light Co. v. Lorion*, 470 US 729, 470 US 744(1985).
[107] *Ibid.* and *Pension Benefit Guaranty Corporation v. LTV Corporation*, 496 U.S. 633(1990).
[108] See *Pension Benefit Guaranty Corp. v. LTV Corp*., 496 U.S. 654–655.

picture" of the agency's action.[109] However, this information must not constitute an attempt to "new rationalization" (new rationalisation) of the agency's decision.[110] In addition, the court may admit evidence "outside" the evidence gathered by the agency to determine whether: "(…) the agency has recognised all relevant circumstances or fully explained the proceedings or reasons for the decision."[111] However, it is widely accepted in both case law and doctrine that the "task" of the courts in the United States is not to review administrative cases, but simply to ensure that the agency is properly performing its role in the fact-finding process.[112]

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* cited in the introduction, the Supreme Court ruled on 3 April 1978[113] that the lower court had improperly interfered with the agency's decision-making process. This involved the court's questioning of the agency's authority to exercise discretion in deciding when the agency could best proceed to develop the needed evidence and how, in light of such evidence, it could change an earlier decision.[114]

According to the Supreme Court, it is a matter for the agency, not the court, to examine the relevant circumstances of the case. In the majority opinion to the cited *Michigan v. Environmental Protection Agency*[115], Justice Antonin Scalia indicated that administrative agencies have the burden of "reasonable decision-making" which

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[109] *Camp v. Pitts*, 411 U.S. 138, 143(1973).

[110] See *Environmental Defense Fund, Inc. plaintiff-appellant, v. Douglas M. Costle, As Administrator, U.S. Environmental Protection Agency*, et al., 657 F.2d 275 (D.C. Cir. 1981).

[111] *Asarco, Inc. v. U.S. Environmental Protection Agency et al.*, 616 F.2d p. 1160 (9th Cir. 1980). Regarding concerns about the admission of supplemental evidence before the court: S. Stark, S. Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, "Administrative Law Review" 1984, no. 36, p. 333.

[112] See *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 411, 416(1971); K. Werhan, *Principles…*, *op. cit.*, p. 358.

[113] 435 U.S. 519, 98 S. Ct. 1197(1978).

[114] *Ibid.*

[115] 576 U.S., 135 S.Ct. 2699–2710(2015).

requires them to consider all "relevant factors."[116] Under the circumstances of the aforementioned case, the cost of power plants was that relevant factor in deciding whether to regulate electric steam generating units (EGUs). Thus, the Environmental Protection Agency (EPA) should have considered the cost of the power plants. According to the court, the agency's interpretation of the phrase "appropriate and necessary" from the Clean Air Act was unreasonable, as it assumed that the EPA was not required to consider all relevant factors, including the cost of power plants.[117]

Part of the intensity of judicial scrutiny of agency actions is the concept of "substantial evidence". In this regard, a landmark Supreme Court decision was the ruling of 25 February 1951 in *Universal Camera Corp. v. National Labor Relations Board*[118]. According to the court, in stating "evidence" in both the APA and special laws, Congress meant "substantial evidence."[119] The court defined it as: "(…) something more than a mere scintilla. It means such relevant evidence as a reasonable mind might consider sufficient to support a conclusion."[120] Accordingly, the agency: "(…) must do more than raise [mere] suspicion of the existence of the fact to be established."[121] Making an analogy to a jury trial – the evidence must be sufficient to justify the need to deny a verdict."[122]

Determining whether there is substantial evidence in the record as a whole to support the agency's findings is a task that Congress has imposed on courts performing judicial review. Courts intervene only in cases where they find that the agency has misconstrued the wording of a legal standard or grossly misapplied it. An agency's determination of facts based on accumulated evidence is subject

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[116] *Ibid*.
[117] *Ibid*.
[118] 340 U.S. 474(1951).
[119] *Ibid.* and *Washington, Virginia* & *Maryland Coach Co. v. National Labor Relations Board,* 301 U.S. 142, cited therein.
[120] 340 U.S. 474(1951) and *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 305 U.S. 229, cited therein.
[121] 340 U.S. 474(1951).
[122] *Ibid.* and the *Labor Board* ruling cited therein, *v. Columbian Enameling* & *Stamping Co.*, 306 U.S. 292, 306 U.S. 300.

to the requirement that the agency's action be set aside if it is "not supported by substantial evidence", according to Section 706(2)(E) of the Administrative Procedure Act. The "substantial evidence" test exists precisely to ensure that the agency minimally meets this obligation, which is the basis of all fair and lawful adjudication.[123] By way of example, in its ruling of 3 May1971, the Supreme Court stated that a written report prepared by a licensed physician who examined the applicant and set forth in the report his medical findings in his area of expertise may be admitted as evidence of disability and, despite the presence of contrary medical testimony and the testimony of the applicant himself, may constitute substantial evidence in support of a factual finding adverse to the applicant.[124]

Section 706(2)(A) of the law under review directs the court to set aside an agency act if it is found to be **arbitrary and capricious.** Currently, the courts interpret this criterion as conditioning the substantive review of the agency's actions, setting a higher standard of protection than in the historical period before the APA.[125] At the same time, the courts apply the indicated criterion not only to individual decisions, but also to regulations issued by agencies. The elimination of agency action in this case occurs when the court finds that the statement or intention included in the rule does not allow the assessment that the agency has taken a "hard look" at the issue, and therefore has not satisfied the court in its explanation of how to resolve each of the contested issues.[126] Courts in their jurisprudence have not limited the scope of review according to the "hard look at the issue" to purely procedural problems, but have implemented the concept by reaching much deeper into the quality and accuracy of the agency's reasoning. To illustrate this doctrine, the literature cites

[123] See *Allentown Mack Sales* & *Service, Inc. v. NLRB,* 522 U.S. 378–379(1998); F.E. Cooper, *Administrative Law: The Substantial Evidence Rule*, "ABA Journal" 1958, no. 44, pp. 1002 et seq.

[124] 401 U.S. 402(1971).

[125] The original version of this approach to the issue at hand was presented by the Supreme Court in *Pacific States Box* & *Basket Co. v. White*, 296 U.S. 176, 186(1935).

[126] K.E. Hickman, R.J. Pierce Jr., *Federal…*, *op. cit.*, p. 560; K.E. Hickman, R.J. Pierce Jr., *Administrative Law Treatise II*, *op. cit.*, pp. 1136 and n.

a "trilogy" of court justifications issued in proceedings involving review of regulations issued by the National Highway Traffic Safety Administration (NHTSA[127]). In the first of the cases, *Automotive Parts & Accessories Association v. Boyd*, the court, hearing an action for pre-enforcement review of a rule, stated that: "[t]he overriding purpose [of the court] is to ascertain whether the agency, having an essentially legislative task to perform, has performed it in a manner calculated to negate the dangers of arbitrariness and irrationality in formulating rules for general application in the future."[128] In the second of the cases, *National Tire Dealers and Retreaders Association, Inc. v. Claude S. Brinegar, Secretary of Department of Transportation*, the District Court of Appeals of the District of Columbia explained, referring to the rule formulated above, that: "(…) while it is true that an agency may act in accordance with informal rulemaking procedures 'on the basis of information available in its own files and the agency's knowledge and experience', [in the case under review] the Secretary's allusions to information and knowledge outside the evidence are not persuasive in light of the serious doubts raised by the applicant's and others' existing comments in the record regarding the enforceability of the permanent labeling requirements. The Secretary's statement regarding the validity of his claim regarding this enforceability is not credible enough for the court to accept on the basis of the agency's *ipse dixit* alone."[129] In view of this, the court stated that: "(…) the Secretary's determination of enforceability [of permanent labeling requirements] was arbitrary, and therefore required (…) the overruling of Standard No. 117 [issued] under § 10(e) of the APA."[130] In contrast, in the third of the mentioned cases, *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co*., the Supreme Court recognised the existence of a principle of law (**the legal doctrine**), according to which: "(…) although the scope of control under the standard: 'arbitrary and arbitrary' is narrow, and the

[127] National Highway Traffic Safety Administration.
[128] 407 F.2d 330 (D.C. Cir. 1968).
[129] 491 F.2d 31 (D.C. Cir. 1974).
[130] *Ibid*.

court cannot, by its judgment, substitute for the act issued by the agency, the agency must nevertheless examine the relevant data and formulate satisfactory explanations for its action. In examining these explanations, the court must consider whether the decision was based on a recognition of the relevant factors and whether there was a clear error of judgment."[131]

In view of the above, it has been pointed out in the literature that only "well-documented and well-founded" decisions will survive the scrutiny of "hard judgment."[132] On the other hand, the above principle is evaluated in the perspective of, among other things, judicial activism and separation of powers.[133] In addition, *Federal Communications Commission [FCC] v. Fox Television Stations, Inc.* raised the question of whether the FCC must prove that a change in its policy is "better" than its previous position. In giving a negative answer to such a question, the Supreme Court indicated that the FCC must rather prove that its new policy is "permissible" and that there are good reasons for it.[134]

Notwithstanding the above, the provision of Section 706 in paragraph 2(A) *in fine* of the Administrative Procedure Law states that the court shall resolve all relevant legal issues by interpreting constitutional and statutory provisions. If it determines that an act issued by an agency "for other reasons does not comply with the

[131] 463 U.S. 29(1983).

[132] W.F. Pederson Jr., *Formal Records and Informal Rulemaking*, "The Yale Law Journal" 1975, no. 85, pp. 38 and 60.

[133] See: C.R. Sustein, *In Defense of the Hard Look: Judicial Activism and Administrative Law,* "Harvard Journal of Law and Public Policy" 1984, no. 51, pp. 51–53; S.A. Shapiro, R.E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, "Duke Law Journal" 1987, no. 387, pp. 412–413; M. Seidenfeld, *Demystification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, "Texas Law Review" 1997, no. 75, pp. 483–502; K.A. Watts, *Proposing a Place for Politics in Arbitrary and Capriciouse Review*, "Yale Law Journal" 2009, no. 119, p. 2. Also see: J.L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, "Duke Law Journal" 2012, no. 61, p. 1811; M. Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, "Washington University Law Review" 2012, no. 90, p. 141.

[134] 129 S. Ct. 1800(2009).

law", it declares it unlawful and repeals it.[135] In some cases, agencies have the opportunity to interpret regulations of a general nature – for example, the APA or the National Environmental Policy Act (NEPA[136]) – which they are not obliged to implement. In addition, agencies can resolve a dispute based on the identification and application of a kind of "common law" representing *sui generis* administrative rules of law or policy developed by the agency.[137] In cases of this type, the court "shows no deference" (accords no deference) to the agency's method of resolving the case and, in making its own independent interpretation of the law or explication of the common law principle, conducts a *de novo* review.[138] The legal doctrine emphasises that such an approach by the court is justified in the cases indicated, since courts have greater expertise than agencies with regard to the interpretation of general laws, as well as in the determination and application of common law principles.[139]

Notwithstanding the above, at this point it should be added that in the aforementioned *Vermont Yankee* ruling, the Supreme Court formulated an exception to the rule of not substituting the agency's findings for that of the court's – if the party challenging the agency's action "clearly demonstrates bad faith or misconduct" underlying the agency's decision.[140] This exception gives courts the freedom to go beyond the existing evidence. In the practice of the Supreme Court, such a case occurred (for the first time) in the judgment of 27 June 2019 in *Department of Commerce et al. v. New York et al.*[141] The case involved the taking of evidence to conclude that the agency had "clearly demonstrated bad faith". Writing on behalf of the majority of the panel, Supreme Court Chief Justice John Roberts

[135] In the original, this provision reads as follows: "The reviewing court shall (…) hold unlawful and set aside agency action (…) found to be (…) otherwise not in accordance with law".

[136] National Environmental Policy Act, 42 U.S.C. § 4321 and n. (1969).

[137] R.J. Pierce Jr., *Administrative Law*, *op. cit.*, pp. 49–50.

[138] *Ibid.*

[139] *Ibid.*

[140] In English: "if the party challenging the agency action makes a strong showing of bad faith or improper behavior underlying the agency decision" – *Overton Park Inc. v. Volpe*, 401 U.S. 402(1971) nb. 402.

[141] 588 U.S. (2019).

pointed out that: "(…) it is not improper for a chief executive taking office with [certain] policy preferences and ideas (…) to work with a staff of lawyers to justify the legal basis for the preferred policy". The court "(…) cannot ignore the discrepancy between the decision made and the explanation given."[142]

Most of the legal issues recognised by the agencies are related to the interpretation of the provisions of the (special) laws under which they carry out their tasks. The modern legal principle governing judicial review of agencies' interpretation of laws can be summed up most broadly in one word: "Chevron."[143] Indeed, it seemed that the courts had made a dramatic shift in the judicial review of agency interpretation of laws – after the Supreme Court's justices appeared in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[144] As Kristin E. Hickman and Richard J. Pierce Jr. pointed out many years later, *Chevron* continues to "dominate the playing field" as evidenced by the fact that other court rulings in key cases are notable mainly for how they clarify or change the understanding or scope of *Chevron,* or how they describe exceptions to the rule.[145] Nevertheless, assessing the nature and significance of the change "forged" by *Chevron* is impossible without understanding the approach taken by the courts prior to its emergence.[146]

The way the Supreme Court decided cases before 1984 was criticised by lower court judges, as well as by experts in administrative law.[147] In addition, in the last decade, there have been views suggest-

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[142] *Ibid*., nb. 2574–2575.

[143] K.E. Hickman, R.J. Pierce Jr., *Federal…*, *op. cit.*, p. 597.

[144] 467 U.S. 837(1984). See K.E. Hickman, R.J. Pierce Jr., *Federal…*, *op. cit.*, p. 597.

[145] *Ibid*.

[146] *Ibid*., p. 598.

[147] R.J. Pierce Jr., *Administrative Law*, *op. cit.*, p. 94. On the Chevron theory debate, see, among others: R.J. Pierce Jr., *Chevron and Its Aftermath*, "Vanderbilt Law Review" 1988, no. 41, pp. 301–308; A. Scalia, *Judicial Deference to Administrative Interpretations of Law*, "Duke Law Journal" 1989, pp. 511–521; L. Schultz Bressman, *Chevron's Mistake*, "Duke Law Journal" 2009, no. 58, pp. 549–566. For case law, see especially the Supreme Court decisions in: *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36(2002), *Departing of Housing* & *Urban Development v. Rucker*, 535 U.S. 125(2002); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581(2004); the ruling of the District Court of Appeals Columbia in

ing that the courts could return – to a certain extent – to the state of affairs prior to the creation of the aforementioned doctrine. As Richard J. Pierce Jr. points out: "(…) For decades, the [Supreme] Court has flip-flopped between (…) diametrically opposed approaches to interpreting agency-administered statutes, without explaining why it took one approach in some cases and the opposite approach in others."[148] In some judgments the court rejected the agency's reconstructed understanding of the law and instead applied its own interpretation of the provisions of the act in question, even if it concluded that their content was ambiguous and the agency's interpretation was perfectly acceptable.[149] In other rulings, the Supreme Court has shown a high degree of restraint (deference[150]) with regard to regulations promulgated within the scope of narrow and specific authority.[151] In the majority opinion of the panel in *NLRG v. Hearst Publications*,[152] Judge Wiley Rutledge explained why judicial restraint is more appropriate when reviewing an agency's interpretation of a law in this case. In the court's assessment: "(…) day-to-day experience in implementing the Act allows [the agency] to become familiar with the circumstances and origins of labor relations in various industries, with the possibilities and needs of workers for self-organization and collective action, and with the possibilities of adapting collective bargaining to the peaceful resolution

American Bar Association v. Federal Trade Commission, 430 F.3d 457 (D.C. Cir. 2005).

[148] R.J. Pierce Jr., *Administrative Law*, *op. cit.*, p. 94: "(…) For decades the Court flip-flopped between (…) diametrically opposed approaches to interpretation of agency administered statutes, with no explanation of why it used one approach in some cases and the opposite approach in other cases."

[149] *Ibid*., pp. 93–94 and *Davies Warehouse Co. v. Bowles*, 321 U.S. 144(1944), cited therein.

[150] The word "deference" can also be translated as "respect" – in this case relative to the agency's interpretation of the law.

[151] See K.E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, "Minnesota Law Review" 2006, no. 90, pp. 1537–1571 and sample justices in: *Atchison, Topeka & Santa Fe Railway v. Scarlett,* 300 U.S. 471(1937); *AT&T v. United States*, 299 U.S. 232–237(1936); *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496(1948).

[152] 322 U.S. 111(1944).

of their disputes with their employers."[153] And, in *Skidmore v. Swift & Co.*,[154] the Supreme Court developed a third concept of judicial review of agency interpretation of statutes, defining the criteria that a reviewing court should demonstrate against agency-issued regulations: accuracy of agency findings, soundness of reasoning, consistency of interpretation over time, and other agency enforcement powers.[155] And while the doctrine flowing from the *Skidmore* ruling has been revived in the early 21st century, it remains unclear to this day what legal consequences flow from it.[156]

In the cited *Chevron* decision, the Supreme Court, in finding permissible the Environmental Protection Agency's (EPA[157]) interpretation of the statutory term: "stationary source", indicated that if Congress did not directly address the specific issue at issue in the case, it was a matter for the court to determine whether the agency's resolution of that issue was based on a permissible interpretation.[158] According to the Supreme Court, an examination of the evolution of the Clean Air Act, as well as its content, supported the court's appellate court's conclusion that Congress had no specific intent regarding the application of the "bubble concept"[159] to these cases.[160] According to the court, the fact that the EPA changed its interpretation of the term "source" from time to time could not lead to the conclusion that the EPA's interpretation of the Act[161] should

[153] *Ibid*., p. 130.
[154] 323 U.S. 134(1944).
[155] *Ibid*., p. 140.
[156] K.E. Hickman, R.J. Pierce Jr., *Federal…*, *op. cit*., pp. 711–737 and the case law and literature cited therein.
[157] Environmental Protection Agency.
[158] 467 U.S. 842–845.
[159] "*The bubble concept*" originated under the Clean Air Act as worded after the 1970 and 1977 amendments: treated a polluting facility as if it were surrounded by a plastic bubble with only one outlet for total emissions, rather than limiting emissions from individual outlets; see.: L.H. Rhinelander, *Bubble concept: a pragmatic approach to regulation under the Clean Air Act*, "Virginia Journal of Natural Resources Law" 1981, no. 1, pp. 177 –228.
[160] 467 U.S. 845–851.
[161] "The fact that the EPA has from time to time changed its interpretation of the term 'source' does not lead to the conclusion that no deference should be accorded the EPA's interpretation of the statute"; 467 U.S. 859–866.

not be treated with respect. "(…) The agency, in order to engage in informed rulemaking, must constantly take into account different interpretations, as well as questions of the wisdom of its policies. Policy arguments regarding the 'bubble concept' should be directed to legislators or [administrations], not to judges. The EPA's interpretation of the law in this case represents a reasonable accommodation of clearly conflicting interests and requires respect."[162]

The proclaimed doctrine of "restraint" (deference) in the *Chevron* case was based on "… the assumption that Congress, by leaving ambiguity in a statute intended for implementation by the agency, recognised that the ambiguity would be resolved primarily by the agency, and intended that the agency (and not the courts) would have as much discretionary authority as the ambiguity allowed."[163] In view of this, it is most often indicated in judicial decisions that Congress has handed the agency "interpretative authority" (the interpretative authority).[164] In footnote nine to the[165] opinion in the above case, the Supreme Court stated that: "(…) the judiciary is the ultimate authority on questions of statutory interpretation and must reject such interpretation that is contrary to the clear intent of Congress. (…) If the court, using the traditional tools of statutory construction, finds that there was [clear] Congressional intent in the case with respect to the particular issue at issue, that intent is law and must be given effect."[166] The literature has noted that the

[162] "An agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Policy arguments concerning the "bubble concept" should be addressed to legislators or administrators, not to judges. The EPA's interpretation of the statute here represents a reasonable accommodation of manifestly competing interests, and is entitled to deference"; 467 U.S. 859–866.

[163] See *Smiley v. Citibank* (South Dakota), N.A., 517 U.S. 735, 740–741(1996).

[164] See, e.g., *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 983(2005), regarding the agency as an "authoritative interpreter of [ambiguous] statutes."

[165] That is: to justify the judgment.

[166] "The judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect."

above content of the ninth footnote has raised the question of what "tools" the courts should use to establish Congressional intent, for purposes of applying the "first step" (step one) of the *Chevron* doctrine.[167] In answering this question, it is pointed out that there are five traditional tools for determining the proper meaning of laws subjected to judicial interpretation[168]: the plain meaning rule; the evolution of a statute (**legislative history***);* the purpose of a statute (**legislative purpose**); formulas of interpretation (**canons of construction**), and *stary decisis.*[169] The plain meaning rule refers to the use of dictionary definitions to determine the meaning of certain words in a law.[170] If the language of the law is ambiguous, and the evolution of the law indicates a different understanding of the law than through the interpretation applied by the agency, the question arises whether, under the "first step" of the analysed doctrine, the court should refuse to recognise its validity. According to the said doctrine, the courts should further examine the purpose of the law. At the same time, however, this legislative tool also has serious limits, caused mainly by the fact that most laws were passed for different, often conflicting purposes.[171] In addition, the legislator may not be silent on purposes or values.[172] Regarding interpretive formulas, it should be pointed out that: "(…) they constitute a system of basic principles and maxims that are considered to govern the construction or interpretation of written instruments."[173] In the

[167] K.E. Hickman, R.J. Pierce Jr., *Federal…*, *op. cit.*, p. 644.

[168] *Ibid*.

[169] In full: *stare decisis et non quieta movere*, meaning "stay with the decision made"; see H.C. Black, *Black's Law Dictionary. Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 4th edition, revised, St. Paul, MN 1964, pp. 1577–1578.

[170] The limited usefulness of this rule, due to the divergence in dictionary definitions of the same words, was pointed out by R.J. Pierce Jr., [in:] *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, "Columbia Law Review" 1995, no. 95, p. 749.

[171] K.E. Hickman, R.J. Pierce Jr., *Federal…*, *op. cit.*, p. 645. Also see: R.J. Pierce Jr., *What Factors Can an Agency Consider in Making a Decision*, "Michigan State Law Review" 2009, p. 67.

[172] See R.J. Pierce Jr., *What Factors…*, *op. cit.,* p. 67.

[173] "The system of fundamental rules and maxims which are recognized as governing the construction or interpretation of written instruments"; H.C. Black,

already "classic" judicial jurisprudence of the early 20th century, it was pointed out figuratively that these formulas: "(…) are principles that have evolved through centuries of experience, but are like trees burning in the forest; they lead the traveler in a general direction without establishing a well-defined and certain path."[174] Among the substantive formulas, those that ensure the conformity of laws with the Constitution are fundamental.

Chevron's step two means, in turn, that the agency's interpretation is a "reasonable policy choice for the agency."[175] In *National Cable & Telecommunications Assn. v. Brand X Internet Services.*[176] the court found that the agency had provided a correct rationale for its decision. According to the agency: "(…) there are now alternate forms of Internet transmission, including wireline, cable, terrestrial wireless and satellite. (…) Broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market." In view of this situation, the court assumed that there was nothing "arbitrary or capricious" about the agency's application of the new analysis to the cable industry.[177] In other words, the second step of the "*Chevron* test" directs the court to uphold the agency's interpretation of an ambiguous provision of law – only if that interpretation is permissible or reasonable.[178]

The experience of the first decades of application of the above doctrine by the federal courts in administrative cases has prompted not only academics but judges, too, to reflect on the indicated approach of the courts in controlling the interpretation of laws. An important voice in the debate over a possible change in this approach was expressed by Justice Clarence Thomas in his concurring opinion

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op. cit., p. 260.

[174] "Canons of construction are rules which have been evolved by centuries of experience, but they are like trees blazed in the forest; they guide the traveler in a general direction without fixing a well-defined and certain path"; Judgment of the Appellate Division of the Supreme Court of New York of November 15, 1916 in *Frederick J.R. Clarke v. Paul Linson*, 174 App. Div. 736 (N.Y. App. Div. 1916).

[175] 467 U.S. 845.

[176] 545 U.S. 967(2005).

[177] *Ibid.*

[178] K.E. Hickman, R.J. Pierce Jr., *Federal…*, *op. cit.*, p. 684.

(concurring opinion) with the Supreme Court's decision in *Michigan v. Environmental Protection Agency [EPA]*.[179] In his opinion, there are serious doubts about the constitutionality of the courts' practice of reticence with regard to the agencies' interpretation of Congressional laws.[180] Many times judges treat the agencies' "interpretive power" as if they possessed legislative power.[181] In view of this, the *Chevron* doctrine raises serious questions about the separation of powers.[182] "(…) Judicial power, as originally understood, requires the court to exercise independent judgment in interpreting and clarifying regulations. (…) Interpretation of federal laws – including ambiguous ones executed by agencies – requires independent judgment."[183] *Chevron* deference prevents judges from exercising this judgment, forcing them to abandon what they consider "the best reading of an ambiguous statute" in favor of "agency construction of standards."[184] In this way, the indicated doctrine takes away from the courts the supreme interpretive authority to "say what the law is"[185], and hands it over to the executive. According to Justice Thomas, "(…) such a transfer contradicts the *Vesting* Clause of Article III [Constitution of the United States], which grants judicial authority only to Article III courts and not to administrative agencies. In fact, agencies 'interpreting' ambiguous laws usually do not engage in interpretive activities at all. (…) Instead, as acknowledged in the [opinion in the] *Chevron* case itself, they are engaged in 'policy formulation.'"[186] In the aforementioned opinion, Justice Thomas also pointed out that the said doctrine violates Article I of

[179] 576 U.S. (2015); concurring opinion pp. 1–2.
[180] *Ibid*.
[181] See *United States v. Mead Corp.*, 533 U.S. 218, 229(2001), in which the court noted that an agency "speaks with the force of law when it addresses an ambiguity in a statute or fills a space in an enacted law," even when "Congress did not really intend a particular result."
[182] 576 U.S. (2015); concurring opinion p. 2.
[183] "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws"; *Perez v. Mortgage Bankers Assn.*, 575 U.S. (2015) (concurring opinion, pp. 8, 12).
[184] 576 U.S. (2015); concurring opinion p. 2.
[185] *Marbury v. Madison*, 1 Cranch 137, 177(1803).
[186] 576 U.S. (2015); concurring opinion p. 3.

the Constitution, which grants Congress all the legislative powers indicated therein.[187] Thus, the agency has the power to decide – without any particular allegiance to the text of the law – what policy goals it wishes to pursue.[188] In the case under review, the Supreme Court reasonably inferred that that the EPA had exceeded even the extremely permissive limits on the agency's authority established in the text of judicial precedents, then, in the opinion of Justice Clarence Thomas, "(…) we should be concerned that [the agency] felt sufficiently emboldened by those precedents to petition for [judicial] restraint."[189]

An alternative to the *Chevron* deference doctrine also appears to be the use of the court's formula for avoiding interpretations that would raise substantial constitutional questions (constitutional avoidance doctrine). In the rationale of *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers et al.*, the then Chief Justice of the Supreme Court, William H. Rehnquist, deduced that: "(…) where an agency's interpretation of a statute would raise serious constitutional problems, the court will give the statute an interpretation that avoids such problems unless the construction in question is clearly contrary to the intent of Congress."[190] Recognising that in the case under review, the Army Corps of Engineers statutory provision was issued as a consequence of exceeding the authority granted to the agency in the Clean Water Act,[191] the court assumed that allowing that entity to claim federal jurisdiction over the ponds and mud flats covered by the Migratory Bird Rule would constitute a significant interference with the traditional and fundamental authority of the states over the use of land and water. The court

[187] See *concurring opinion of Justice Thomas to the judgment in Department of Transportation v. Association of American Railroads*, 575 U.S. (2015).

[188] 576 U.S. (2015); concurring opinion p. 3.

[189] *Ibid*. See also Justice Thomas' dissenting opinion in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc*.

[190] 531 U.S. 159(2001): "Where an administrative interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to Congress' intent." In addition, see *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575(1988).

[191] The Clean Water Act, 86 Stat. 884, as amended, 33 U.S.C. § 1344(a).

therefore read the law "as written" to avoid significant constitutional and federalism-related problems. As a result, it refused to apply deference.[192]

According to some academics and judges, the directive flowing from the court's formula for avoiding interpretations that would raise significant constitutional questions is a tool by which courts can recognise the supremacy of laws and maintain the proper shape of the separation of powers between Congress and the judiciary. According to others, on the contrary, the "constitutional avoidance doctrine" is an expression of "supplanting legislative supremacy" by giving courts permission to substitute their own interpretation for that which is more in line with Congress' intentions, and by limiting Congress' power to legislate on the verge of constitutionality.[193]

COURT DECISIONS

In the context of a proper reading of the content of § 706 of the APA Ronald M. Levin and Mila Sohoni – polemicising with an Article by John C. Harrison published in 2020 in the "Yale Journal on Regulation Bulletin"[194] – stressed that in answering the question of whether § 706 refers to remedies (rulings) in the judicial review procedure, it is necessary to refer to the text of this provision[195], which states in paragraph 1 that the reviewing court: "(…) shall oblige the agency to act unlawfully withheld or unreasonably delayed."[196] According to the aforementioned authors, the second part of this phrase specifies the criteria for control, and the first specifies the measure that the

[192] 531 U.S. 159(2001).

[193] K.E. Hickman, R.J. Pierce Jr., *Federal…*, *op. cit.*, pp. 666–667.

[194] J.C. Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, "Yale Journal on Regulation Bulletin" 2020, no. 1, https://www.yalereg.com/nc (accessed on: 16.08.2021).

[195] R.M. Levin, M. Sohoni, *Universal Remedies, Section 706, and the APA*, "Yale Journal on Regulation", https://www.yalereg.com/nc (accessed on: 16.08.2021).

[196] Literally, "compel agency action…" ("compel agency action unlawfully withheld or unreasonably delayed").

court must grant if these criteria are met.[197] The power to "declare unlawful and set aside" (hold unlawful and set aside) the agency's decision, is specified in paragraph 2 of the aforementioned provision. For example, if a reviewing court were to find that an order issued by an agency is "arbitrary or capricious" or "unsupported by substantial evidence," or was taken "without observance of procedure required by law," then: "(…) few lawyers – administrativists would doubt that § 706 directs the court to make a ruling {granting a remedy – P.O.} consisting of "declaring [the order] unlawful and setting it aside."[198]

The practice of U.S. federal courts justifies the conclusion that the proper way for a court to proceed when it finds an agency action illegal is obvious: the court declares the action invalid and sends it back to the agency for further consideration. In the U.S. Supreme Court's opinion in *Federal Energy Regulatory Commission v. Electric Power Supply Association*,[199] Justice Kagan emphasised (as did previous courts) that: "(…) in reviewing this decision, we cannot substitute our own judgment for that of the Commission. The scope of review under the standard: 'arbitrary and capricious' is narrow. The court must uphold the rule {issued by the agency – P.O.}, if the authority has considered the matter adequately and explained its actions adequately, including the rational connection between the facts found and the choice made. (…) And nowhere is this more true than in a technical area such as electricity tariff design. We are very reticent about the Commission's rate decisions."[200]

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[197] R.M. Levin, M. Sohoni, *op. cit.*

[198] *Ibid.*: "(…) Few if any administrative lawyers would doubt that Section 706 directs the court to remedy that agency action by " hold[ing] it unlawful and set[ting it] aside"."

[199] 136 S.Ct. 760 88 870 2016.

[200] "In the opinion of the Supreme Court of the United States, Justice Kagan emphasized that (also like earlier courts): "(…) in reviewing that decision, we may not substitute our own judgment for that of the Commission. The scope of review under the 'arbitrary and capricious' standard is narrow (…) The court must uphold a rule if the agency has examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. (…) And nowhere is that more true than in a technical area like electricity rate design. We afford great deference to the Commission in its rate decisions." See also: *Judulang v. Holder*,

In the above perspective, the literature has pointed out that in typical cases where the reviewing court overturns the agency's file, the only protective measure it can take is to refer the agency's case for further consideration.[201] The court cannot resolve the administrative matter itself.[202] In other words, as mentioned, the court cannot substitute its own judgment for that of the agency's.[203]

Notwithstanding the above, the science of administrative law has attempted to explain the jurisprudential phenomenon resulting from the application of **equitable power.**[204] In its decision in *Idaho Farm Bureau Federation v. Babbitt*,[205] the Court of Appeals for the Ninth Circuit agreed with the claims of the complaining livestock groups and ruled to remand the case to the Fish and Wildlife Service agency for it to follow due process. The court added, however, that the plaintiffs' challenged regulations issued by the agency could (temporarily) remain in force – until the agency completes its investigation. A ruling by the court declaring the agency's regulations unlawful but allowing them to continue to remain in force is referred to as: "transfer without repeal" (remand without *vacatur*).[206] According to the court's findings, the agency's errors were "minor", therefore rescinding the administrative order would cause undue disruption to the regulatory program. Despite the practical value of

565 U.S. 42, 52–53(2011); *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527(2008); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43(1983); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416(1971).

[201] K. Werhan, *Principles…*, *op. cit.*, p. 353.

[202] *Ibid.*

[203] *Overton Park Inc. v. Volpe*, 401 U.S. 401(1971) nb. 401.

[204] See R.M. Levin, '*Vacation' at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, "Duke Law Journal" 2003, vol. 53, no. 2, pp. 293 and n.

[205] 58 F.3d 1392 (9th Cir. 1995).

[206] Also known in a more figurative form: "remand without vacation". See also: *NLRB v. Food Store Employees Union*, Local 347, 417 U.S. 1, 8(1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766–67(1969).

such a judicial determination, there are doubts in the literature as to whether § 706(2) of the APA permits such "remand-only" rulings.[207]

It is also necessary to refer to the content of § 703 of the APA, which, according to the suggestion expressed by some authors,[208] would provide for "form" rather than adjudicative consequences, stating that "the form of judicial review proceedings" is the appropriate "review proceedings under a specific statute" or "in the absence or inadequacy, any applicable form of legal action (including an action for declaratory judgment or writ of injunction or prohibition or **habeas corpus**)."[209] In a landmark unanimous opinion to the *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*[210] cited above, the Supreme Court ruled that a (federal) court cannot require an agency to follow a procedure that is not required by the constitution, statute, or regulations issued by the agency. The Supreme Court explained that an authority is free to choose the procedures it wishes to use for various purposes, as long as it remains within the – sometimes broad – range of procedural options permitted by the constitution and applicable laws.[211] According to the prevailing position presented in science and jurisprudence, courts should apply only such adjudicatory powers as are handed to them by the constitution and the law. This position does not allow the application of measures flowing either from principles of equity or from common law on the grounds of administrative law, unless the grounds for doing so arise from an express provision of the law. This conclusion also calls into question the aforementioned construction of "remand without *vacatur*".

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[207] "Remand-only orders"; see: K. Werhan, *Principles…*, *op. cit.*, pp. 353–354 and literature cited therein.

[208] J.C. Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, "Yale Journal on Regulation Bulletin" 2020, no. 1, https://www.yalereg.com/nc (accessed on: 16.08.2021).

[209] *Ibid*.

[210] 435 U.S. 519(1978).

[211] R.J. Pierce Jr., *Administrative Law*, *op. cit.*, p. 6.

Conclusion

The evolution of the two legal systems under study, that of the US and that of the EU, has led to the formation of the same general standards for judicial review of public administration activities. The difference between the two legal systems is that in the US there is a standard of essentially "closed" evidence (closed record), while in proceedings before the CJEU there is an "open" evidence standard (open record). However, this difference does not have a decisive impact on the judicial review standard for determining the facts of a case. It should be noted that the jurisprudence of the Supreme Court and the CJEU requires a "hard" or "restrictive view of the case", which makes it possible to determine not only the legality, but also the rationality of the actions taken by the public administration.

Judicial review in terms of the agencies' interpretation of the law in the US is described as "restrained" or "full respect" (deferential). In the European Union, in cases where a decision requiring economic or scientific expertise is necessary, the CJEU applies the "manifest error of judgment" test. In both legal orders, too, the test of whether a public administration has clearly exceeded the limits of its discretionary powers is well expressed by an American statutory term: "the arbitrary-and-capricious test" – aimed at a court's assessment of whether a public administration has clearly exceeded the limits of its discretionary powers.

The CJEU, as a rule, does not have jurisdiction to replace with its rulings unlawful acts of the institutions or organisational units of the Union, but declares an administrative decision invalid (annul) if the grounds for doing so indicated in Article 263 TFEU exist. Also, the U.S. Supreme Court does not have the power to change agency rulings; the U.S. federal courts are only empowered to set aside (set aside) a challenged agency act and remand the case for reconsideration. Exceptions to this rule may arise from special provisions.

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Combating Disinformation and Deepfake Used by Criminals: Ideas for Law Reform

Introduction

Disinformation issues have become a social problem, as it is a tool in the struggle for political influence and, as actrual events show, an element of warfare in the case of armed conflicts between states. A particular form of misleading can be deepfake, an extremely credible content produced by artificial intelligence. However, less often mentioned are issues related to crime, which is not idle and also uses the mentioned means to achieve its own benefits from criminal activities.

The aim of this Article is to introduce the reader to the basic concepts related to the dangers of disinformation and deepfake used by criminals, as well as to identify potential threat areas. In addition, the Article presents fundamental tools that support the detection work of law enforcement agencies, using forensic as well as tactical operations as examples. The presented considerations provide a foundation for a discussion of the shape of legal regulations related to disinformation and deepfake, where an attempt is made to identify priorities for legislators.

Due to the broader legal norms at both international and national levels, the Article uses methods of analysis, logic, as well as hermeneutic methods in place of the classic dogmatic-legal approach. In this way, it is hoped that the problems presented will be brought to

the reader's attention, a preliminary framework of considerations will be defined, which will inspire further discussion among legal and security specialists on the shape of solutions for combating disinformation activity of criminals.

Threats of criminal disinformation and deepfake activity

tools such as the use of various forms of disinformation and the generation and reproduction of fake news are becoming an everyday part of criminal life, significantly hindering the work of law enforcement agencies. Disinformation activities are particularly noticeable in the case of the desire to achieve goals of a political nature, but are slowly becoming an everyday part of organised crime, especially in the area of economic turnover.[1]

In the preliminary considerations of the article, it is necessary to clarify how to understand disinformation. This is a problem that concerns philosophy rather than law due to the lack of legal definitions, hence it misses the point to make a complete definitional review. For this reason and for practical reasons, let us consider it sufficient and justified to operate with the simplest and most universal understanding possible. In view of the above, disinformation is a type of information that is intentionally misleading. It is information that – just as the source of the information intended – is likely to cause people to hold false beliefs. However, it is worth noting that some researchers believe that misinformation can be misleading, but it is not always an intentional act of the subject expressing some information, it can be a side effect of other information.[2]

[1] R. Wielki, *Nowe technologie w procederach kontrwykrywczych – działania dezinformacyjne grup przestępczych w sieci* [*New technologies in counterintelligence procedures – disinformation activities of criminal groups in the network*], [in]: P. Chlebowicz, P. Łabuz, T. Safjański, *Antykryminalistyka. Taktyka i technika działań kontrwykrywczych* [*Anti-forensics. Tactics and technique of counterintelligence operations*], Difin, Warsaw 2022, p. 79.

[2] D. Fallis, *The Varieties of Disinformation*, [in]: *The Philosophy of Information Quality*, L. Floridi, P. Illari (eds.), Cham, Springer 2014, pp. 137–138.

In common understanding, disinformation is sometimes equated with fake news. It can be assumed that fake news is news that lacks truth and truthfulness. It lacks truth in the sense that it is either literally false or communicates something false. It lacks truthfulness in the sense that it is propagated with the intention to deceive or without concern for the truth. At the same time, it is pointed out that news today is distributed through a much greater number of channels and sources than in the past, thanks in particular to social media.[3] In this sense, disinformation and fake news can be treated synonymously, although it is not excluded that in the course of future rule-making, these concepts will be separated.

In turn, we can consider disinformation activities as a way of transmitting true or false information, the purpose of which is to mislead the victim and make him behave in accordance with the expectations of the disinformer. At the same time, it should be noted that disinformation activities often do not hide the truth, but consist in creating a sufficiently wide field of intellectual possibilities so that in the mind of the addressee his own preferences come to the fore and he believes what he wants to believe.[4] In addition, in order to increase the effectiveness of disinformation, the creation of multiple false, seemingly independent sources of information is used to lead to the belief that the information under consideration is multi-source, which increases the likelihood of estimating it as reliable in the mind of the recipient.[5]

Misinformation activities can be put in the form of a cycle, consisting of eight elements, which are often part of a very well--organised and logical scenario of criminal activities:

– The first is **reconnaissance**, which involves gathering information and analysing the target group and taking into account

[3] R. Jaster, D. Lanius, *Speaking of Fake News. Definitions and Dimensions*, [in:] *The Epistemology of Fake News*, S. Bernecker, A.K. Flowerree, T. Grundmann (eds.), Oxford University Press, Oxford 2021, p. 20.

[4] A. Codevilla, *Informing Statecraft. Intelligence for the New Century*, The Free Press, New York 1992, p. 431.

[5] J. Konieczny, *Kryminalistyczny leksykon śledztwa* [*Forensic Lexicon of Investigation*], Wydawnictwo Uniwersytetu Opolskiego, Opole 2020, pp. 69–70.

its level of loyalty, acceptance and maturity of knowledge on the subject.

- The second stage is **weaponisation**, related to the preparation of a false narrative, taking into account all the elements of "facts" as well as side stories to anchor the narrative in case some of the audience is not willing to consider some of the information given as credible. Then, a false narrative, so to speak, is prepared via a side path to deceive inquisitive minds, such as law enforcement agencies.
- The third stage is **delivery**, the aim of which is to reach a group of potential recipients through online services.
- Next, activities are directed to **exploitation**, which is the controlled distribution of information supported by small but active groups of supporters or the use of digital communication tools or artificial intelligence for this purpose.
- This allows the transition to **persistence**, which aims to increase the popularity of the false narrative to achieve a snowball effect. In other words, false information begins to live its life. This effect can be reinforced by generating an artificial – either positive or negative – response.
- This allows the transition to the **sustainment** stage by reinforcing the narrative with additional stories and misinformation campaigns to prepare the audience for the change. It can also be said to be an evaluation stage, as it provides an opportunity to assess the effects to date and learn lessons for the future.
- The penultimate stage of the cycle is **actions on object**, which are already possible due to the change in the attitude of the information recipients brought about by the previous steps.
- The last phase of the cycle is **removing trace(s)**. Most often, it takes the form of diverting the attention of information recipients toward other topics, deprecating the previous narrative, so to speak. This helps to reduce interest, reasserting the belief that the entire misinformation campaign has

remained under control until the end, and a base is prepared for starting the cycle anew on another topic.[6]

Criminal activity related to the use of disinformation activities can be particularly dangerous when perpetrators use artificial intelligence tools. Here we will focus primarily on the dangers associated with the use of deepfake technology. The word is a combination of two terms: "deep learning" and "fake". Deepfake uses neural networks that analyse large data sets to learn how to mimic someone's facial expressions, voice or inflections.[7] Very often deepfake can be used to manipulate a photograph, audio recording or video. This is dangerous because deepfake can easily lead to mass belief in some false picture of reality. In addition to changing beliefs, it is possible to prevent people from gaining knowledge, the process of forming an individual's beliefs is altered, and as deepfake becomes more widespread, it may become more difficult to believe what is actually true.[8]

In general, deepfake images and videos can be categorised as follows:

- **face replacement**: swapping the face of one person by stitching it onto that of another person,
- **face reenactment**: manipulating the features of a target's face to make it look like they are saying something that they are not,
- **face generation**: creating convincing, yet entirely fictional synthetic images of individuals,
- **speech synthesis**: generating audio content by using and training algorithms to create a deepfake voice or a synthetic audio file,

[6] See: L. Gu, V. Kropotov, F. Yarochkin, *The Fake News Machine. How Propagandists Abuse the Internet and Manipulate the Public. A TrendLabs Research Paper*, "Trend Micro" 2017, pp. 62–64.

[7] A. Chadha, V. Kumar, S. Kashyap, M. Gupta, *Deepfake: An Overview*, [in:] *Proceedings of Second International Conference on Computing, Communications, and Cyber-Security*, P.K. Singh, S. Wierzchoń, S. Tanwar, M. Ganzha, J.P.C. Rodrigues (eds.), Springer, Singapore 2021, p. 558.

[8] D. Fallis, *The Epistemic Threat of Deepfakes*, "Philosophy & Technology" 2020, Springer Nature B.V, p. 3.

– **shallowfakes**: creating audio-visual forgeries of a less sophisticated nature using rudimentary editing techniques.[9]

The threats of criminals using artificial intelligence to generate deepfakes are many. Deepfakes, with the reach and speed of the internet, social media, and messaging applications, can quickly reach millions of people in an extremely short period. With regard to such a short timeframe, deepfakes present considerable potential for a range of malicious and criminal purposes which includes:

1) destroying the image and credibility of an individual,
2) harassing or humiliating individuals online,
3) perpetrating extortion and fraud,
4) facilitating document fraud,
5) falsifying online identities and fooling KYC (Know Your Customer) mechanisms,
6) falsifying or manipulating electronic evidence for criminal justice investigations,
7) disrupting financial markets,
8) distributing disinformation and manipulating public opinion,
9) inciting acts of violence toward minority groups,
10) supporting the narratives of extremist or even terrorist groups,
11) stoking social unrest and political polarisation.[10]

The presented potential criminal activities associated with the use of deepfake lead to the conclusion that deepfake can be a form of disinformation, but at the same time it can also be used to spread it. However, it is worth considering how the forms of deepfake use may overlap with the goals of criminal activity.

Although disinformation activities mainly serve to achieve political goals, it is increasingly common to encounter its use for criminal purposes. Note that AI-powered social media is the base for spreading disinformation, causing social chaos. In this context, deepfake technology is rapidly developing, becoming more readily available, and disinformation campaigns are becoming increasingly credible.[11]

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[9] *Ibidem*, p. 54.

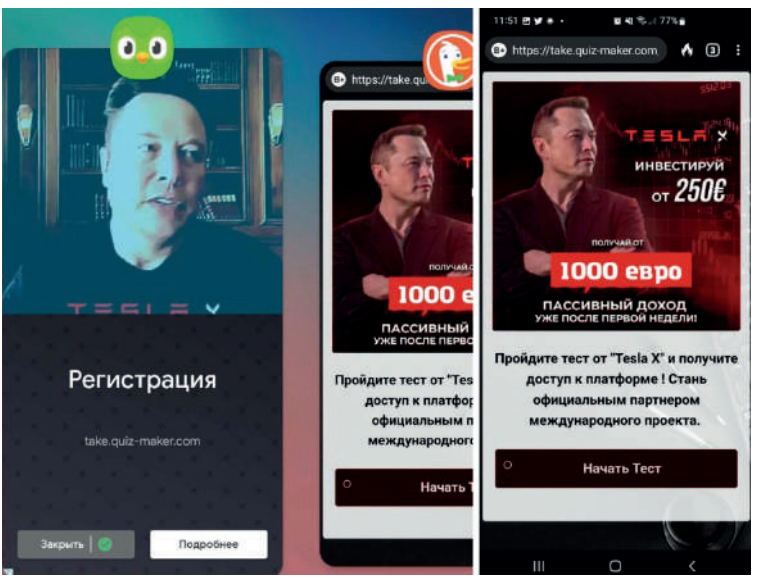
[10] Trend Micro Research, United Nations Interregional Crime and Justice Research Institute (UNICRI), Europol's European Cybercrime Centre (EC3), *Malicious Uses and Abuses of Artificial Intelligence*, "Trend Micro Research" 2020, p. 52.

[11] European Union Agency for Cybersecurity, *ENISA Threat Landscape 2022*, ENISA, Athens 2022, p. 84.

Face replacement can be used for both photographic and video footage. Most often, it is used to perpetrate advanced fraud, as we can see from an official Federal Bureau of Investigation alert. Criminals are using stolen personal information and deepfake technology to apply for remote jobs. Deepfakes include a video, an image, or recording convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said.[12] Criminals use such procedures to get jobs at HighTech companies in customer service, finance departments to gain access to databases.

There are also known cases of using celebrity images, as evidenced by the case of ads in legitimate and popular mobile apps that used not only static images, but also deepfake videos of Elon Musk to advertise "financial investment opportunities" (Figure 1).

Figure 1. A deepfake scam of Elon Musk in a Duolingo ad



Source: https://www.trendmicro.com/en_us/research/22/i/how-underground--groups-use-stolen-identities-and-deepfakes.html (accessed on: 30.11.2022).

[12] FBI, Public Service Announcement, *Deepfakes and Stolen PII Utilized to Apply for Remote Work Positions,* https://www.ic3.gov/Media/Y2022/PSA220628 (accessed on: 30.11.2022).

As Europol points out, the phenomenon of non-consensual pornography is also a problem, with the victim's face appearing in place of that of pornographic film actors in scenes of sexual acts.[13] The motivations for creating this type of fictional content can be many. Some perpetrators in this way try to satisfy their erotic fantasies or are characterised by sexual preference disorders. It also happens that such actions are used to discredit a person, as well as to extort ransom or as an act of revenge against a person.

This phenomenon particularly exposes women, who are more likely to become victims of this type of criminal activity. The literature points out that deepfake pornography destroys the sexual privacy of victims and inherently strips women of their humanity, creating a "sexual identity" that they had no part in creating. There are claims among victims that appearing in manipulated pornographic material can be compared to digital rape. The intensely personal nature of deepfake pornography is used to deliberately attack women. Deepfake pornography videos also pose a substantial threat to a victim's job prospects if the videos remain on the internet, tied to her name.[14]

A significant modern threat is the use of face generation by criminals. It is already possible to create a high-quality image of a non-existent person (Figure 2), which criminals are eager to use to create fictitious online identities used, for example, as Internet troll profiles on social media.

[13] Europol, *Facing Reality? Law Enforcement and the Challenge of Deepfakes*, An Observatory Report form the Europol Innovation Lab, Publications Office of the European Union, Luxembourg 2022, p. 11.

[14] A.P. Gieseke, *The New Weapon of Choice: Law's Current Inability to Properly Address Deepfake Pornography*, "Vanderbilt Law Review" 2020, vol. 73, no. 3, p. 1484.

Figure 2. Artificial intelligence generated facial images

Source: www.thispersondoesnotexist.com (accessed on: 30.11.2022).

Note that all the faces shown in the figure are generated by artificial intelligence[15] using a free online tool,[16] are very realistic, but they do not depict a human being existing in reality.

The deepfake issue is also worth leaning into in the form of speech synthesis (audio deepfake), because voice spoofing techniques, have become an increased threat on voice interfaces due to the recent breakthroughs in speech synthesis and voice conversion technologies.[17] Imitating the sound of someone's voice can cause many risks, as can imitating an image. Both image and sound are sometimes used in biometric security, making the risk of attacks by criminals especially high. It is also not difficult to imagine a situation in which a voice recording manipulated with artificial intelligence could serve as false evidence in criminal cases.

The dangers of criminals using artificial intelligence to distribute disinformation content are many, and the problems presented are more of a heuristic to draw the reader's attention to the potential

[15] See: T. Karras, S. Laine, T. Aila, *A Style-Based Generator Architecture for Generative Adversarial Networks,* "IEEE Transactions on Pattern Analysis and Machine Intelligence" 2021, vol. 43, no. 12, pp. 4217–4228.

[16] www.thispersondoesnotexist.com (accessed on: 28.11.2022).

[17] T. Chen, A. Kumar, P. Nagarsheth, G. Sivaraman, E. Khoury, *Generalization of Audio Deepfake Detection,* Odyssey 2020: The Speaker and Language Recognition Workshop, p. 132.

for the development of cybercrime. Cybercriminals are eager to use artificial intelligence algorithms that allow them to deceive victims by generating false images or audio. Deep fake technology allows anyone to create a recording or image that may suggest that a person – such as a politician – said words that were not actually said.

Increasingly, we are hearing about deepfake disinformation, creating media hype, causing political and social unrest or working against businesses. The deepfakes themselves are also sometimes referred to as 21st century photomontage. It is important, however, that in the face of the growing risks associated with the use of modern technology by criminals, the methods of law enforcement agencies should be appropriately selected, as well as the creation of effective laws that are in line with modern times, which will be the subject of further discussion.

Tools in the hands of law enforcement

The examples presented of the risks associated with the use of disinformation activities and artificial intelligence force us to reflect on the possibilities for law enforcement agencies to act. It seems that it will be crucial to focus on two important areas:

1) the possibilities of combating disinformation and deepfake using forensic methods,
2) the selection of tactics for action.

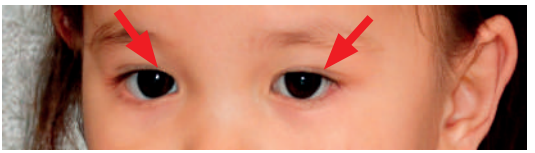
We will first discuss tools for detecting false content generated by criminals, since in this field forensic science is very efficient in implementing new solutions. Detection of deepfake anomalies is possible through manual detection. This is a labor-intensive task that can be performed only for a very limited number of files and requires adequate training to know all the signs of falsity. Moreover, the process is further complicated by the human predisposition to believe in audiovisual content and work. Deepfake generating systems can produce believable graphic content, but may contain imperfections such as: blurring around the edges of faces (Figure 3), no blinking, angle of light reflection in eyes (Figure 4) inconsistencies in the

reproduction of hair, veins, scars, as well as inconsistencies in the background or depth of field of the image.[18]

Figure 3. Blurring around the edges of the mouth and teeth

Source: own work.

Figure 4. Different angles of light reflection in the eyes



Source: own work.

One of the more useful methods is also to analyse the angles of incidence and lengths of shadows in images, as content generated by artificial intelligence is sometimes inaccurate in this area. The problem unfortunately becomes human perception, which is limited. Studies show that people have trouble recognising inconsistencies in shadows and reflections, which is worrisome, as this is one of the primary tools for detecting visual misinformation. However, this has the other side of the coin, as criminals can also make mistakes and inaccurately prepare manipulated material.[19]

It is worth mentioning the interesting studies that have been conducted to determine the degree of effectiveness of deepfake recognition by humans and by algorithms. They show that if current

[18] A.E. Venema, Z.J. Geradts, *Digital Forensics Deepfakes and the Legal Process*, "The SciTech Lawyer" 2020, vol. 16, no. 4, p. 15.

[19] S. Nightingale, K.A. Wade, H. Farid, D.G. Watson, *Can People Detect Errors in Shadows and Reflections?*, "Attention, Perception & Psychophysics" 2019, vol. 81, p. 2936.

trends continue, automated detection techniques will improve and it will be possible to detect deepfake anomalies more effectively. On the other hand, human perception, although limited, also has the ability to surprise, as people participating in experiments achieved satisfactory results in detecting false content.[20]

Detecting deepfake is also possible through image noise analysis. In a manipulated image, changes in pixel density are created. With digital image processing, it is almost impossible to achieve the same pixel density as in the original photo. The more a given image is altered, the higher the noise level. Visualisation of noise traces can show a clear distinction between an artificially modified area of an image and another unmodified part of it. This uses automated tools based on machine learning, which are getting better at detecting.[21]

The problem with manipulated images is that they can appear in official news reports, in intelligence data or as forensic evidence. Let's look at material published by Sepah News, the media arm of Iran's Revolutionary Guard, on 9 July 2008 (Figure 5 – left side). The image first appeared on the front pages of The Los Angeles Times, The Financial Times, The Chicago Tribune and several other newspapers, as well as on BBC News, MSNBC and many other major websites. However, The Associated Press received a different image a day later from the same source (Figure 5 – right side). This image appeared to have been taken from the same vantage point at almost the same time. It was eventually proven that the image on the left was manipulated by duplicating elements in the image. Digital images are becoming less and less reliable as a definitive record of an event, so automated systems are being developed to authenticate digital images.[22]

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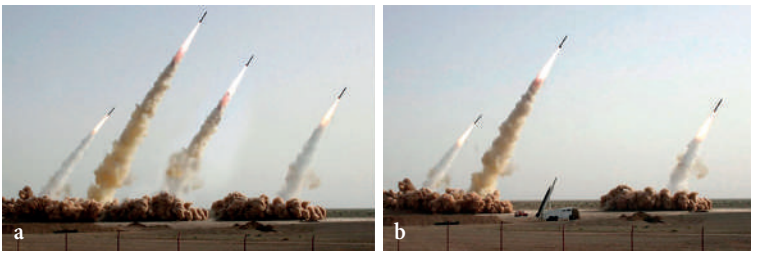
[20] M. Groh, Z. Epstein, C. Firestone, R. Picard, *Deepfake Detection by Human Crowds, Machines, and Machine-Informed Crowds*, "Proceedings of the National Academy of Sciences" 2021, vol. 119, no 1, pp. 1–11.

[21] T. Wang, M. Liu, W. Cao, K.P. Chow, *Deepfake Noise Investigation and Detection*, "Forensic Science International: Digital Investigation" 2002, vol. 42, pp. 1–9.

[22] Z. Liu, H. Suo, B. Yang, *A Novel Clone Detection Scheme Based on Generative Adversarial Networks*, [in:] *Artificial Intelligence and Security. 6th International Conference, ICAIS 2020 Hohhot, China, July 17–20, 2020*, X. Sun, J. Wang, E. Bertino (eds.), Springer, Singapore 2020, pp. 439–440.

Figure 5. Left side – image manipulated by adding elements, right side – original image



Source: https://www.npr.org/2008/07/11/92442928/photo-of-irans-missile-launch-was-manipulated (acccessed on: 30.11.2022).

While the technical capabilities for detecting deepfake are increasing as technology advances and forensics develops, it is worth remembering that law enforcement agencies must also take care of the issue of skillfully selecting tactics to combat contemporary and future disinformation efforts.

Disinformation campaigns and the use of deepfake are linked to the involvement of many tools and actors, both individuals and businesses. This, in turn, means that effective law enforcement operations require the use of investigative tools and tactics that take into account this array of actors. One can see a certain analogy here with multi-faceted criminal cases such as cybercrime, economic cases, and corruption cases, in which it is very difficult to obtain physical evidence, while at the same time there is a need to establish the facts in a thicket of a lot of information. For this reason, it seems reasonable to call for law enforcement agencies to make greater use of crime analysis.

According to one view, crime analysis is the collection and processing of crime-related information and data and the discovery of existing patterns in order to predict, understand and empirically explain crime and criminality, as well as to carry out evaluations of the administration of justice or to create tactics and strategies for managing human resources in the broader criminal law. Although crime analysis is used by police services, continued development shows that its potential can have broader application on the ground

of problems of a social nature. The four main goals of crime analysis include:

1) understanding and predicting crime,
2) making strategic assumptions and rationalising police resources,
3) conducting evaluations of the efficiency of police resource allocation,
4) conducting evaluations of the performance of police personnel.[23]

Taking a slightly different view, there are four forms of crime analysis. The first is tactical crime analysis, which the authors frame as the day-to-day identification and analysis of emerging or existing patterns of criminal behaviour. In addition, it is an in-depth study of recent incidents and criminal activity by examining how, when and where crime occurs, as well as how patterns, trends and potential perpetrators develop. Strategic crime analysis is treated as a study of data processing to better understand long-term crime trends. The authors also distinguish between administrative crime analysis and police operations analysis. They consider the one listed in the first as making public the results of studies related to crime research and analysis of legal, political and practical concerns, in order to inform government agencies and citizens. The latter, on the other hand, is the study of police policies and practices, in order to effectively dispose of personnel assignments, funds, equipment and other resources.[24]

Criminal analysis can include a number of specific activities such as:

– link structure analysis,
– analysis of connections and financial transfers,
– finding relationships linking various sources of evidence,
– reconstructing commodity and financial flow paths,
– reconstructing the chronology of events,
– analysis of extensive databases,

[23] C.M. Lum, *Crime Analysis*, [in:] *The Encyclopedia of Police Science*, J.R. Greene (ed.), Routledge, New York 2007, p. 283.

[24] G. Grana, J. Windell, *Crime and Intelligence Analysis: An Integrated Real-Time Approach*, CRC Press, Boca Raton 2017, pp. 219–220.

- analysis of telephone billing records,
- revealing personal connections (social networks),
- capital ties,
- determining mechanisms of criminal activity (modus operandi).

It seems that the application of criminal analysis should also include the skillful use of social media as a source of information. The development of the Internet has caused a revolutionary change in social behavior, which is best illustrated by the following example. The study of causes and dependencies occurring in social behaviour online is one of the more interesting challenges of criminology today, especially in the sociological stream. From the point of view of criminology, it may be most relevant to determine the relevancy of information posted by users of social networks. In doing so, let us note the potential databases that can serve as sources of information, and all activities on social media leave digital traces, becoming the largest collections of information about people and communities to date. There is a reason why the category of social media intelligence (SOCMINT) has been distinguished in science.[25]

Social media performs a number of broader functions relevant to law enforcement, for example:

1) discovering criminal activity and obtaining probable cause for criminal phenomena,
2) collecting evidence,
3) identifying the whereabouts of criminals,
4) identification of persons involved in criminal acts,
5) identification of relationships between persons involved in criminal acts,
6) managing volatile situations,
7) seeking information on persons wanted in other countries,
8) obtaining witnesses based on information posted by users.[26]

[25] D. Omand, C. Miller, J. Bartlett, *Towards the Discipline of Social Media Intelligence*, [in:] *Open Source Intelligence in the Twenty-First Century. New Approaches and Opportunities*, C. Hobbs, M. Moran, D. Salisbury (eds.), Palgrave Macmillan, London 2014, p. 24.

[26] *Social Media Use in Law Enforcement: Crime Prevention and Investigative Activities Continue to Drive Usage*, LexisNexis 2014, pp. 8–9.

The potential of social media as a source of unclassified information was first recognised by the New York Police Department, which prepared a strategic document.[27] The included procedures for dealing with the criminal intelligence system address publicly available social media data that can assist law enforcement agencies in information gathering, law enforcement, and investigations related to criminal activity, including that related to terrorist activity.

The combination of these advanced forensic tools related to the detection of false information and the selection of appropriate investigative methods that take into account the use of multi-faceted crime analysis and social media intelligence can help effectively combat disinformation. Also, that disinformation that uses content generated by artificial intelligence. Certainly, these methodological issues seem crucial to addressing disinformation and deepfake, while it is also reasonable to think about defining a legal framework in the face of new challenges posed by the criminal world.

Reflections on the shape of the new legislation

Consideration of the shape of the law on disinformation, fake news or deepfake is somewhat abstract. This is related to the fact that the law, and criminal law in particular, has not kept pace with technological, social, or economic changes. The nucleus of legal change is the draft regulation published on 1 April 2021 by the European Commission establishing harmonised rules on artificial intelligence, called the Artificial Intelligence Act.[28] The Commission is proposing new rules to make sure that AI systems used in the EU are safe, transparent, ethical, unbiased and under human control. The

[27] NYPD, Use of Social Networks for Investigative Purposes – General Procedure 2012, https://info.publicintelligence.net/NYPD-SocialNetworkInvestigations.pdf (accessed on: 18.11.2022).

[28] Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, {SEC(2021) 167 final} – {SWD(2021) 84 final} – {SWD(2021) 85 final}.

proposed new law will cover issues related to the use of artificial intelligence by police forces and the judiciary.

We, on the other hand, have to look at the problem of regulation from a completely different angle. The aforementioned Europol report points out that disinformation and deepfake will have an impact on the criminal process. This is related to the trust of criminal trial actors in audiovisual evidence and the widespread assumption that it is authentic. Whether the file was downloaded from a suspect's phone, downloaded from social media or obtained from the CCTV system of a store near the crime scene, the authenticity of the situation presented is usually not questioned. As deepfake grows in popularity, it will become increasingly important to analyse such content and verify whether it is real or somehow artificially manipulated or generated. It will become even more important to verify footage. This requires careful verification of digital evidence with a particular focus on demonstrating that it can be trusted as authentic. A consistent and transparent chain of custody for digital evidence is needed to prove that no one could have falsified it in the course of an investigation.[29]

Certainly, one must agree with Europol's prediction that the issue of evidence verification will be central to criminal proceedings. This, in turn, requires the development of a common methodology for analysing digital evidence, primarily digital photos, videos and voice records. On European soil, it is noticeable that this trend is being pursued through the activities of the European Network of Forensic Science Institutes (ENFSI).

Best practice manuals are currently being developed for:

- facial recognition,[30]
- forensic image and video enhacement,[31]
- digital image authentication,[32]

[29] Europol, *Facing Reality?…*, *op. cit.*, pp. 14–15.

[30] ENFSI, *Best Practice Manual for Facial Image Comparison, ENFSI-BPM--DI-01*, ENFSI, Wiesbaden 2018.

[31] ENFSI, *Best Practice Manual for Forensic Image and Video Enhancement, ENFSI-BPM-DI-02*, ENFSI, Wiesbaden 2021.

[32] ENFSI, *Best Practice Manual for Digital Image Authentication, ENFSI-BPM--DI-03*, ENFSI, Wiesbaden 2018.

and guidelines for:

– analysis in forensic authentication of digital evidence,[33]
– forensic semiautomatic and automatic speaker recognition.[34]

Since the methods of the various agencies dealing with the disclosure and interpretation of evidence on the technical side are rather universal and require international cooperation between organisations, we should not see the need to implement regulations in this regard.

One has to wonder whether it is necessary to create regulations on the basis of criminal law that would deal with the dissemination of false information, the creation of deepfakes, etc. For several reasons, which I further substantiate, I encourage you to consider the following thoughts.

The current situation is that certain forms of disinformation activities are born, as technology develops. They may use deepfake, we see the dangers inherent in the use of artificial intelligence by criminals. However, it is worth noting that the technology is not perfect today, both in terms of carrying out crimes and in terms of fighting them. It's a situation where the bad guys and the good guys are fighting something like a digital trench warfare, in which each side knows what it wants to achieve, but has limited options for action. Yet these will change in the near future, as technological advances are highly dynamic, and this is worth bearing in mind.

Introducing more criminal laws may not be warranted, because forms of cybercrime are changing rapidly. Creating new laws that are too detailed will result in the legislature not keeping up with the changes. As K. Mamak notes, in Poland, substantive criminal law generally has enough universal provisions that it is possible to

[33] ENFSI, *Forensic Speech and Audio Analysis Working Group Best Practice Guidelines for ENF Analysis in Forensic Authentication of Digital Evidence, FSAAWG-BPM-ENF-001*, ENFSI, Wiesbaden 2009.

[34] A. Drygajlo, M. Jessen, S. Gfroerer, I. Wagner, J. Vermuelen, T. Niemi, *Methodological Guidelines for Best Practice in Forensic Semiautomatic and Automatic Speaker Recognition including Guidance on the Conduct of Proficiency Testing and Collaborative Exercises*, ENFSI, Wiesbaden 2015.

hold individuals criminally liable on the basis of existing law.[35] It is not excluded that this phenomenon will be present in the criminal laws of other European Union countries.

However, the author believes that a change in the law cannot be based on criminalising all fake news, as such a solution would encroach on constitutionally protected freedom of expression. A blanket ban would introduce de facto censorship, as well as the risk of a chilling effect: people would refrain from contributing online for fear of potential criminal liability. A blanket ban is also a risk of such laws being used to fight political opposition. This doesn't mean, however, that one can't consider criminalising certain types of fake news.[36]

Certainly, the problem in punishing the creation of disinformation or even deepfake content is determining who should be held responsible. It is difficult to imagine that in the age of the Internet and widespread sharing and reproduction of content, any individual doing so could face criminal liability. Recall that disinformation activities are captured in the form of an eight-element cycle. In essence, the actual perpetrator of the crime operates in the stages of reconnaissance, weaponisation, delivery, actions on object and removing traces.

The entire disinformation process, in turn, grows the most in the exploitation, persistence and sustainment stages and takes on a snowball effect. Disinformation begins to take on a life of its own is duplicated by many entities. It could be that an individual spreads disinformation, but while he is theoretically a perpetrator, at the same time he could be considered a victim, as he often spreads disinformation unconsciously, as he is subjected to manipulation. In view of this, it would be difficult to find responsibility for such a person. It seems that possible criminal liability related to the creation and spread of disinformation or deepfake should be linked to the achievement of benefits by such an individual. Then we would

[35] K. Mamak, *Prawnokarne sposoby walki z fake newsami* [*Criminal law ways to fight fake news*], Fundacja Centrum Cyfrowe, Warsaw 2020, pp. 17–32.
[36] *Ibidem*, p. 34.

have more confidence that we are dealing with someone who acted deliberately and with intent.

It seems that regulation should not only go in the direction of creating new criminal laws, and perhaps we should focus more on issues of administrative regulation of social media. In essence, social media today provides the tools to spread disinformation, and often provides the opportunity to create content that can be considered fake news or perhaps even deepfake. Moreover, it is social media administrators who have knowledge of users, who have the tools to filter content and search for fake profiles. Law enforcement agencies can identify such problems themselves, but they will not be able to do so as effectively, and bureaucracy limits the ability to obtain data from administrators. Often these administrators cite that they are not subject to European law due to a different place of registered office, so cooperation with law enforcement is far from satisfactory.

On 10 February 2021, MEPs debated the issue of social media regulation. The EU is currently working on the Digital Services Act (DSA) and the Digital Markets Act (DMA), which are expected to include regulations for platforms and ways to combat harmful or illegal content online, such as disinformation. The EU's efforts are moving toward regulating the Internet through regulations, rather than rules and regulations set by platforms, but it will emphasise that these rules must protect freedom of expression and fundamental rights, avoiding censorship. It noted, among other things, that there is a need to establish clear rules for Internet giants whose regulations affect the real world and who seem to be the ones who decide the acceptability of a given message. Decisions about what will be published in the digital sphere should not be made on the basis of guidelines created by platforms, but on the basis of regulations that set clear procedures and rules. Current measures against disinformation and hate speech are insufficient to counter a possible attack on democracy.[37]

[37] https://www.europarl.europa.eu/news/pl/headlines/society/20210204STO97129/media-spolecznosciowe-a-demokracja-potrzeba-praw-nie-wytycznych (accessed on: 28.11.2022).

It seems that effectively combating disinformation and the most advanced attacks using artificial intelligence and deepfake technology does not necessarily involve a revolutionary approach to criminal law. Public awareness, knowledge of the threats play a key role, but there is an emerging need to consider regulating certain areas of the Internet while maintaining standards specific to democratic countries.

Conclusions

The considerations made, due to the lack of current legal regulations on the activity of criminals in the field of the use of disinformation and deepfake, can serve to further explore future criminal law problems. As one will see from the reflections undertaken, disinformation activities have many stages, involve many actors, and it is very difficult to discover relationships and dependencies. However, it may be crucial to identify those who do not so much duplicate the creation and reproduction of false content, but, first and foremost, achieve benefits from introducing them into the public space. The problem of disinformation activities and the use of deepfake is certainly not just a matter of fighting for political influence, but a concrete tool already used by criminals, where the scale of the phenomenon is likely to grow in the future.

Law enforcement agencies have to face the challenges posed by the criminal world, but it is necessary to develop forensic techniques that will use artificial intelligence tools and support manual recognition of fake content, the consequences of their use can be very harmful to society and legal systems. In addition to supporting the technological evolution related to the recognition of fake content, it is necessary to support the use of a proactive approach and involve forensic analysis and social media intelligence. This allows law enforcement to build the knowledge and skills that will be necessary to effectively combat disinformation and deepfake.

It is difficult to talk about specific visions related to lawmaking today, as we are in the early stages of both the development of artificial intelligence used by criminals and the change in the

mentality of lawyers, who must adapt to the new realities of social life. It seems that instead of introducing specific criminal law regulations and defining sanctions for acts related to disinformation and deepfake, it is necessary to first regulate the issue of social media, which is a platform for the spread of false content. These changes at the level of international law and the achievement of a cross-border compromise will make it possible to create regulations in national law in the future.

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The Maintenance and Non-Maintenance Obligation of Family Members Towards the Elderly Relative

Introduction

Parents and children should help and support each other materially and spiritually. The help and support given to each other should be completely selfless. These obligations derive primarily from family ties, the emotional relations existing between family members and the rules of social coexistence. It is natural that a person in a difficult life and material situation will first turn to the members of his or her immediate family for help. However, if this assistance is not provided, although it could and should be provided in the circumstances of the case, it may be enforced before a court on the basis of the rules on maintenance obligations. However, while the enforcement of material support is not in doubt, the question arises whether the fulfilment of the maintenance obligation can be enforced in the sphere of spiritual support (emotional assistance)? How can and should children support elderly parents in need of assistance? Does their maintenance obligation towards elderly parents always come into play? Are the children of institutionally assisted parents obliged to contribute towards the costs of institutional care?

The care of the elderly by the family is the result of ethical, social, cultural and legal conditions that oblige parents and children to help and support each other. Parents and children should help and

support each other at all times and in all places, which is primarily due to biological ties, forming a particularly close relationship, and for moral reasons. However, norms of morality are not sufficient motivation for everyone. For this reason, the legislator has introduced a maintenance obligation whereby both children and parents can expect support from each other at different stages of their lives. According to the natural order of things, during childhood these obligations fall on the parents. As the child becomes independent, these responsibilities are gradually reduced and, in principle, cease when the child is able to support himself or herself. However, as time passes, the child's parents grow older, which means that they themselves may require help and support from their children due to a progressive loss of strength, earning capacity and, above all, health. Ageing and the accompanying changes, both in the human body and in interpersonal relationships (family, social, professional), result in the need for assistance from others, which *de facto* means a restriction of the elderly person's freedom and leads to their dependence on others. The duty of the family to fulfil its caring function for members in need of help and support seems self-evident.

This raises a number of additional questions, namely, is there a legal basis for obliging the mother or father to care for them when they reach old age? Can a child caring for his or her parents rely on state support? Is a child entitled to a care leave from work and an attendance allowance for elderly parents? Does the law provide for the possibility of enforcing the obligation to support elderly parents? Is the family, as the basic element of assistance and support for the elderly, prepared and capable of doing so? How are carers to be supported?

Duty of mutual respect and support

On normative grounds, the answer should be sought in the Act of 25 February 1964, the Family and Guardianship Code,[1] which, in

[1] Act of 25 February 1964 Family and Guardianship Code, consolidated text Journal of Laws of 2020, item 1359, as amended, hereinafter: FGC.

Article 87, determined that "Parents and children are obliged to respect and support each other." The duty of mutual respect and support is the foundation on which further, more detailed rules defining family relationships are built. It is dependent neither on the parents being married on whether the child is a minor or an adult, nor on the child's financial situation. Mutual respect and support for each other should be inherent in the attitudes of parents and children, continuing regardless of the stage of life. The obligation of mutual respect and support between parents and children is a lifelong one, meaning that it lasts until the death of one or the other. Respect means an attitude of appreciation towards someone or something because of the value it represents. It is emphasised that it is an attitude towards people considered valuable and worthy of recognition. It should characterise all interactions between parents and a child. A visible sign of respect is not only the way in which they relate to each other, but also the willingness to support each other, which often requires sacrificing one's own comfort for the benefit of the person requiring help, which always involves making some effort. Mutual support means providing assistance to each other, which can be of both a material and immaterial nature, since only their combined satisfaction ensures a decent existence. In a normally functioning family, the obligation to support each other is carried out voluntarily, on an ongoing basis, as and when the needs arise and can be met. The material support of the parents by the children mainly comes down to the provision of financial assistance. Non-material support, on the other hand, comes down to visits to the parents, accompanying presence and psychological support in cases of illness, suffering, disability, special care in the event of setbacks in life or any kind of mental crises, intellectual assistance in making important decisions or dealing with life matters, and physical assistance in carrying out various daily activities. In addition, the content of this duty can also include behaviour that cannot be qualified as assistance in the strict sense in a specific situation, because it is an expression of positive emotions, remembrance or, for example, consists in maintaining family contacts, preventing loneliness.[2]

[2] H. Dolecki, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warsaw 2013, p. 336.

Respect and support are mutually conditional – without respect it is difficult to be supportive, while support is conditioned by the way one approaches the other. In this context, the duty to raise the child as the child's well-being and the interests of society require is realised. In the context of parent-child relationships, the duty of mutual respect and support has a much broader meaning – it is part of the child's upbringing process, teaching the child's attitude towards older people. The upbringing process forms the basis for shaping the child's personality and attitudes that he or she will later exhibit in adult life. How a child will function in a social group and how he or she relates to his or her environment depends on the underlying system of values and the way in which he or she is brought up, supported by the personal example of the parents.

The relational nature of care is therefore rightly emphasised, for it is a situation where someone cares for someone else, which implies an asymmetrical relationship between two people, a specific relationship in which one cares for the other, who is weaker in the relationship. Care is reduced to the personal endeavours of the person caring towards the person being cared for. In view of this, even the institutional nature of care does not change the fact that it ultimately takes place in a relationship. Any relationship, to be good, should be based on exchange, both parties should give as well as take. This allows the relationship to be in a sense symmetrical, to be in relative balance. Only in a situation of exchange and balance does this relationship have the chance to be satisfying for both parties.[3] The relational nature of care is a consequence of living in a community whose members show interest and care for each other, particularly evident in the family community, which is the basis for the formation of larger and more complex communities.

[3] M. Pabiś, D. Kuncewicz, *Poza standardami opieki zdrowotnej nad osobami starszymi*, "Pielęgniarstwo XXI wieku" 2016, vol. 15, no. 4, p. 65.

Legal nature of the maintenance obligation

Assistance and support towards the parents is a fundamental obligation incumbent on the child, which can be fulfilled in a number of ways depending on the age of both parties, the health, family and work situation in which they find themselves and the needs that exist. The primary form is material support, which takes the form of a maintenance obligation as a consequence of the existence of family-law ties. The maintenance obligation is part of the family's caring function towards its members. The content of the maintenance obligation is set out in Article 128 of the FGC, according to which it is an obligation to provide means of subsistence and, where necessary, means of upbringing, which is imposed on relatives in the direct line and on siblings. Relatives in the direct line are persons where one is descended from the other. Other relatives who may be subject to the maintenance obligation include persons related by adoption or by affinity (stepchildren and step-grandchildren). Siblings, on the other hand, are persons who have at least one parent in common, and it is irrelevant whether or not these persons come from married parents. It should be emphasised that the maintenance obligation, apart from siblings, including step-siblings, does not apply to other relatives in the collateral line. Thus, the maintenance obligation fulfils a momentous social function, as it strengthens family ties and mutual responsibility for family members. This requires, however, that the family bond which becomes more valuable precisely in old age be developed and nurtured in all previous periods of life.

The maintenance obligation is reciprocal in nature, which means that persons bound by the underlying family-law relationship may be both entitled and obliged to provide maintenance to each other when the statutory requirements for the obligation to provide maintenance arise. Consequently, the right to maintenance belongs both to the child, who can claim it from the parents, and to the parents, who can equally claim it from their child. Fulfilment of the maintenance obligation may be voluntary, or it may be the result of an order by the family court. However, a court decision imposing a maintenance obligation does not create that obligation, but only makes it more specific with regard to certain persons. That is to say,

it indicates an already existing obligation, specifying the extent of the service and the manner in which it is to be provided.

The obligation to provide maintenance is to be understood as covering normal day-to-day consumption needs, either in cash or in kind. The purpose of maintenance is to provide for the maintenance of the recipient. A child's maintenance obligation towards his or her parents exists regardless of whether the children live with their parents or separately and whether they have started their own families or not. The fulfilment of the maintenance obligation is an expression of mutual responsibility and solidarity among family members manifested in taking an interest in the fate of the weaker ones and providing them with the necessary assistance.[4] Obviously, this is limited to what is necessary for normal functioning. However, one must not lose sight also of the fact that the maintenance obligation, in addition to its financial purposes, also has an ethical significance. "Along with the economic purpose of providing the beneficiary with the necessary material means to satisfy his or her needs, the maintenance obligation also serves to shape appropriate, from the point of view of generally accepted social patterns, rules of conduct in the family, influences the strengthening of bonds between the family and shapes the mutual relations between its members."[5]

There is no doubt that this is a material and personal obligation linking the maintenance creditor to his debtor. The existence and scope of the maintenance obligation is regulated in a mandatory manner, with the result that it arises by operation of law (provided that certain conditions are met) and is thus independent of the will of the parties. The basic prerequisite for the creation of a maintenance obligation is the existence of a normatively defined, but natural law-based, family-law relationship between the beneficiary and the obligor. The other prerequisites are the inability of the person entitled to maintenance to satisfy his or her justified needs on his or her own, as well as the financial or earning capacity of the obliged person to pay maintenance.[6]

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[4] M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warsaw 2006, p. 197.

[5] Resolution of the Supreme Court of 24 February 2011, III CZP 134/10, LEX no. 707477.

[6] M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warsaw 2006, p. 199.

Conditions under which the maintenance obligation arises

A child's maintenance obligation arises only in the case of privation on the part of his or her parents. Deprivation does not only occur when the person entitled to maintenance does not have any means of subsistence, but also defines the material situation of the entitled person when he or she cannot fully satisfy his or her justified needs.[7] "The concept of justified needs cannot be clearly defined, as there is no single fixed criterion of reference. The nature and extent of these needs depends on the characteristics of the entitled person and on the mix of social and economic circumstances in which the entitled person finds himself. It is not possible to establish a catalogue of justified needs to be met under the maintenance obligation and to distinguish them from those which, as a manifestation of superfluity or for other reasons, should not be taken into account. In any event, the scope of the maintenance obligation will be determined by the particular circumstances of the beneficiary and the obligor, by specific socio-economic conditions and by the objectives and functions of the maintenance obligation. Only against this background will it be possible to determine the needs of life – material and intellectual – of the beneficiary."[8] Such needs are commonly considered to be food, the costs of maintaining a dwelling, medical treatment and medication, the purchase of clothing and personal hygiene products. This is most often the case when the parents are seriously ill, preventing them from working, or when they are elderly. This means that only if the parents are unable to meet their justified needs on their own can they claim maintenance from their child. *A contrario*, the scope of the maintenance obligation does not include needs which are not justified and which are related to the creation or enhancement of an inheritance.[9] Thus, if the parents are able to satisfy their justified

[7] Judgment of the Supreme Court of 20 January 2000, I CKN 1187/99, LEX no. 51632.

[8] Resolution of the Supreme Court of 16 December 1987, III CZP 91/86, LEX no. 3342.

[9] Judgment of the Supreme Court of 24 August 1990, I CR 422/90, LEX no. 3665; judgement of the Court of Appeal in Poznań of 22 October 2013, I ACz 1805/13, LEX no. 1388909.

needs by their own efforts even only in part, the maintenance obligation of their child is then limited only to the remaining unsatisfied part of the parents' justified needs. In this sense, child maintenance is subsidiary in nature. Indeed, if the parents are able to meet their justified needs in part because they receive a salary, pension or an annuity, they can only claim maintenance from the child for the remaining pArt. Importantly, the inability to meet the justified needs must not be the fault of the parent. If a parent could work, even if only part-time, or otherwise earn a livelihood, but does not do so, then he or she is not entitled to claim maintenance from the child. The court examines the living, health and work situation of the parent in a state of deprivation. Thus, it assesses whether, due to their age, state of health and ability, they are able to undertake gainful employment that would allow them to earn enough money to meet their justified needs. Equally important is the parents' education and the real opportunities on the labour market. In addition, the court also takes into account their assets, assessing whether they have assets that could generate some income.

However, in order for a child to be compelled to fulfil his or her obligation to provide for his or her parents, the child must have the earning capacity to fulfil this obligation. In other words, an adult child, who is financially independent, must have an income at such a level that will allow him/her to support himself/herself and the family he/she has created and to support his or her parents financially. When awarding maintenance, the court must take into account both the justified needs of the person entitled to maintenance and the earning and asset capacity of the obliged person.

When assessing the extent of a child's maintenance obligation towards his or her parents, the court also examines the child's earning capacity and assets (Article 135 § 1 FGC). Since the legislator points to the capacity to earn and not to the amount of earnings or assets, what is important for the legislator is not how much the child actually earns or has, but how much the child could earn or have if only he or she made full use of his or her possibilities, education, qualifications, state of health, family status, and situation on the labour market. In other words, the earnings and property possibilities of the obligor should not therefore be associated with the

amount of earnings or pure income from property. The assessment of the debtor's earning capacity and assets therefore also includes the unused capacity if it is only realisable and the debtor is not able to meet the justified needs of the entitled persons with his or her resources. The wage-earning capacity of the obligor may also be demonstrated by the expenses he incurs. In addition, the extent of the obligor's own justified needs shall also be taken into account when assessing his earning capacity and assets, as the effect of a maintenance award may not be to place him in a state of privation.

Unworthiness of maintenance

The possibility for parents to claim maintenance for their child also depends on their past behaviour, as the onus is on them to prove that they have properly discharged their responsibilities towards their child under parental authority. The maintenance obligation is therefore conditional on a prior contribution to the maintenance and upbringing of the child, before the child became independent, and on the condition that the maintenance claim is compatible with the principles of social conscience, i.e., that it corresponds to the social sense of justice. Incidentally, it should be added that rules of social coexistence are extra-legal norms with axiological justification, referring to universally recognised values rooted in natural law and reflected in the form of moral and customary norms. In the context of a child's maintenance obligation towards its parents, the rules of social intercourse indicate that the latter are or are not worthy of maintenance, i.e., that maintenance is or is not due from the child. Unfortunately, in practice, maintenance is often sought by parents who have neglected their child for life, who have not actively participated in the child's life, who have not cared for the child, who have not contributed to the child's upbringing, who have not paid for the child's maintenance, who have not been interested in the child's fate and who have not even had any contact with the child.

Circumstances justifying unworthiness of maintenance also include violent behaviour towards the child, alcohol abuse, as well as abandonment of the child and lack of any interest in his or her

fate.[10] Such parents should not expect the child to feel an obligation towards them in the future when they find themselves in poverty. In the meantime, it is quite common for elderly or sick parents to reside in social welfare homes and either have no means of their own to cover the costs of their stay in such homes, or the means at their disposal are insufficient, so that the directors of the social welfare homes make demands for the child to pay the fees associated with their stay. In such a situation, the child may invoke the provisions on infringement of subjective rights, namely he or she may raise the allegation that the parents' maintenance claim constitutes an abuse of their right. Pursuant to Article 5 of the Act of 23 April 1964 – Civil Code[11] – "One cannot exercise one's right in a manner contradictory to its social and economic purpose or the principles of community life. Acting or refraining from acting by an entitled person is not deemed an exercise of that right and is not protected." In view of this, the realisation of the child's maintenance obligation towards the old parents is a consequence of the quality of the family relationship and the bonds between the relatives developed and consolidated in previous periods of family life. It is clear that the absence of these ties or positive relations will result in the child seeking to alienate himself from his parents and to become independent as soon as possible, and sometimes even to break off all contact. The effect of bringing an action assessed as an abuse of subjective rights is to dismiss the action. This provides protection for the obliged party against a claim that does not deserve protection.

The Supreme Court confirmed that it is permissible to dismiss an action for maintenance in whole or in part in the event that the conduct of the person entitled to maintenance is grossly inappropriate and arouses widespread disapproval. Grossly improper conduct which could constitute grounds for dismissal of an action for maintenance includes conduct which is detrimental to the life and health of a family member, which violates the dignity, good

[10] Judgment of the Regional Court in Olsztyn of 17 September 2014, VI RCa 147/14, LEX no. 1621650.

[11] Act of 23 April 1964 Civil Code, consolidated text Journal of Laws of 2022, item 1360.

name and other personal rights of a person, which consists of culpably falling into want or intentionally creating a situation leading to a demand for maintenance.[12] Another form of being considered unworthy of maintenance is when a parent who has lost assets through his or her own fault, when he or she squanders the money on alcohol or illicit drugs or gambling, instead of using it to meet his or her needs or putting it aside, to use as sustenance during his or her own old age. The issue of the admissibility of the demand for maintenance from the point of view of the principles of social co-existence was definitively settled by Article 144^1 FGC, according to which the obligor may evade the execution of the maintenance obligation towards the entitled person if the demand for maintenance – in the circumstances of a particular case – is contrary to the principles of social co-existence. This provision constitutes an independent premise for the evasion of maintenance claims in any case, with the exception of maintenance claims of minor children against their parents. A child's claim does not depend on whether he or she is in want. Parents are obliged to provide for the child's maintenance and upbringing, as this is inherent – the child is incapable of supporting himself or herself until the age of majority. In view of this, parents cannot evade their maintenance obligation towards a minor child even despite the child's reprehensible behaviour and hostile attitude towards them. The provision of Article 144^1 of the FGC may constitute an independent basis for a demand to revoke the maintenance obligation or at least to limit its scope. The contradiction of the demand for maintenance with the principles of social co-existence may be raised as a plea of the defendant in the maintenance trial, the acceptance of which may lead to the dismissal of the action or at least affect the scope of the maintenance payments ordered from the defendant.[13]

[12] Resolution of the Supreme Court of 16 December 1987, III CZP 91/86, LEX no. 3342.

[13] Judgment of the Regional Court in Olsztyn of 26 November 2014, VI RCa 250/14, LEX no. 1621657.

Persons obliged to provide maintenance

The maintenance obligation is imposed on the descendants before the ascendants, and on the ascendants before the siblings. If there are several descendants or ascendants, it is to be borne by the descending relatives before the ascending relatives. Relatives in the same degree are subject to the maintenance obligation in the proportions corresponding to their earning capacity and assets (Article 129 § 1 FGC). It follows that maintenance can be demanded first from the closer relatives and only when support cannot be obtained from them can such demand be made against the further relatives. On the other hand, relatives to the same degree of kinship are under a maintenance obligation that corresponds to their earning capacity and assets. The solution adopted broadens the circle of persons obliged to pay maintenance to old parents, as it means that not only their child, but also their grandchild may be obliged to pay maintenance. If it is not possible to obtain maintenance from the child, maintenance can be claimed from the adult grandchildren. However, the obligation of a more distant obligor (distant relative) only comes into effect if there is no closer obligor (closer relative) or if the closer relative is unable to fulfil his or her obligation or if it is impossible or excessively difficult to obtain the necessary maintenance from the closer relative in time (Article 132 FGC). A person without an earning or material capacity is not subject to a maintenance obligation at all.

If there are several persons obliged to pay maintenance to the same degree, they do not pay in equal shares, but each according to his or her earning capacity and assets. This is because the ability of the persons obliged to pay maintenance is determined individually with respect to each of them. The principle that "everyone pays equally" does not apply. As a rule, the earnings and assets of the maintenance obligations vary, with the result that each of them pays different amounts of maintenance. Moreover, since the maintenance obligation may be discharged in whole or in part not only in the form of material support (financial support), but also through personal efforts and actual care for the old parents. This often involves taking the old parents into one's own home, taking care of them, or

providing assistance in the form of doing the shopping, cleaning, laundry, housekeeping, support in daily care. Consequently, one of the children may be obliged to pay maintenance in the material form and the others, due to their difficult financial situation, to provide assistance to the parents in the non-material form. This leads to a situation in which one child's maintenance obligation will weigh more heavily on the others. This issue should be clarified between the obliged parties themselves and, in the event of a dispute, by the court, which will determine the extent of the maintenance obligation in respect of each obliged party, taking into account the earning capacity and assets of each of them.

Offence of non-maintenance

In the case of evasion of the maintenance obligation by the obligor, the entitled person, in addition to the possibility to demand its implementation through civil proceedings, may also report this fact to the law enforcement authorities. This is because according to Article 209 of the Act of 6 June 1997 Criminal Code,[14] evading the maintenance obligation is a criminal offence. Pursuant to Article 209 § 1 of the Criminal Code, "Whoever evades the maintenance obligation defined in terms of amount by a court decision, a settlement concluded before a court or other authority or another agreement, if the total amount of arrears resulting therefrom is the equivalent of at least 3 periodic payments or if the delay in payment of an overdue payment other than periodic payments is at least 3 months, shall be subject to a fine, the penalty of restriction of liberty or imprisonment for up to one year." If the perpetrator of this act exposes the entitled person to the impossibility of satisfying the basic needs of life, he or she is subject to a fine, the penalty of restriction of liberty or deprivation of liberty for up to 2 years (Article 209 § 1a CC). At the same time, these basic needs of life, like the justified needs of life, are difficult to define and depend on many

[14] Act of 6 June 1997 Criminal Code, unified text Journal of Laws of 2022, item 1138 as amended, hereinafter: CC.

different circumstances, above all the socio-economic conditions and the state of social consciousness at a given stage of development of society. The higher the stage of this development and the higher the average standard of living, the greater and more varied are the needs in life that are generally regarded as basic. This means that they cannot be limited solely to securing a minimum existence in the form of the provision of food or clothing or housing, but also include – depending on age – the provision of adequate education and vocational training, opportunities for cultural enjoyment and even leisure activities. The perpetrator of these offences is prosecuted at the request of the victim, the social welfare authority or the authority taking action against the maintenance debtor. If the victim has been granted appropriate family benefits or cash benefits paid in the event of ineffective enforcement of maintenance, the prosecution of these offences takes place *ex officio*.

Legal solutions to support the implementation of care for the elderly

The main burden of caring for the elderly in our culture lies with their relatives, mainly children, who try to combine caring for their elderly parents with their own family and working lives. If the parents are still physically and mentally fit enough, they manage to fit this care into their daily routine. The situation becomes much more complicated when the parents require permanent care. In this case, the caring children can either take advantage of care leave and special attendance allowance or arrange informal care for the parents, the costs of which they must in principle cover themselves.

Care leave is granted for caring for a sick family member. Every employee is entitled to care leave regardless of the duration of employment and the type of employment relationship. The length of care leave is a maximum of 14 days per year. The employer may not refuse to grant the leave provided that the employee requesting it remains in a joint household with the sick family member and is the only person who can provide the necessary support in case of

illness.[15] Employees subject to sickness insurance are additionally entitled to attendance allowance. The condition for obtaining the leave and the allowance is a medical certificate of temporary inability to work due to the need to personally care for a sick relative. In order to obtain the attendance allowance, it is also necessary to fill in an appropriate application, which is submitted to the competent branch of the Social Insurance Institution.

However, it is not uncommon, in cases of serious illness or disability of a parent, for the provision of round-the-clock care to result in the necessity to give up work. Caring for sick or disabled people requires a great deal of commitment and financial resources on the part of the carer. In order to at least partially compensate for the abandonment of work and loss of income, the legislator has introduced a special attendance allowance. It can only be used by those who actually fulfil their maintenance obligation, i.e., those who care for a relative in a direct line. The special attendance allowance derives from the provisions of the Act of 28 November 2003 on family benefits.[16] Pursuant to Article 16a(1) of the same Act, a special attendance allowance is granted to a spouse or persons with a maintenance obligation. The special attendance allowance may be granted to persons who do not take up employment or other gainful employment or who give up employment or other gainful employment in order to take up permanent care of their spouse or another person with whom they have a maintenance obligation. The carer may also not receive other benefits from the social security system at the same time. The granting of this allowance depends on the amount of monthly income per family member received by both the family of the carer and the family of the person in need of care.

[15] Pursuant to Article 34 of the Act of 25 June 1999 on monetary benefits from social insurance in the event of sickness and maternity (consolidated text Journal of Laws of 2022, item 1732, as amended), "Attendance allowance is not due if, apart from the insured person, there are other family members remaining in the common household who can provide care for the child or sick family member. However, this does not apply to care provided for a sick child up to the age of two."

[16] Act of 28 November 2003 on family benefits, unified text Journal of Laws of 2022, item 615 as amended.

The procedure for determining this income derives from Article 19 of the Family Benefits Act and currently amounts to PLN 764 net per month per person. All these criteria must be met together. It follows that the basis for granting the special attendance allowance is the existence of a link between the maintenance obligation and the need to fulfil it, in terms of providing care for the person requiring it, by giving up professional activity. Hence, the allowance is granted primarily when the person in question requires constant care that cannot be reconciled with work.

Pursuant to Article 162 FGC, the court shall award the guardian an appropriate periodic remuneration or a one-off remuneration on the day the guardian ceases to provide care or is released from care, upon the guardian's request. Remuneration will not be awarded if the guardian's workload is insignificant or if the provision of guardianship meets the principles of social conscience. This means categorising carers and, even worse, placing *de facto* carers, often the closest family members, in a worse position than legal carers, who are not connected to the ward by a bond of kinship or a particularly close emotional relationship. This application of this provision is unfair to *de facto* carers who are the closest persons to the elderly. On the other hand, however, this distinction is a consequence of maintenance obligations and the traditionally ingrained duty of care by members of the immediate and extended family to look after each other. In other words, the provision of care by children to their elderly parents is considered to be a matter of social propriety and therefore not deserving of remuneration. In such a situation, the principle of remuneration for the provision of care, as derived from Article 162 of the FGC, does not apply here.

As a side note, it should be added that the care of sick or disabled parents should be carried out by all children. Thus, if the parents were only cared for by one child who had to give up his or her career, the child can pursue his or her claims against the siblings in court. The reimbursement of the costs for the care of the old parents is the subject of a separate court action initiated by an action for payment.

Reinforcing the child's maintenance obligation towards the old parents is Article 210 § 1 of the CC, according to which whoever abandons a person who is incapable due to his or her mental or

physical condition, contrary to his or her duty of care, shall be punished by imprisonment for a term of 3 months to 5 years. A person who is vulnerable is a person who, due to his or her physical (e.g., old age, bedridden by/with illness or disability) or mental (e.g., mental disability) characteristics, does not have the possibility to decide independently about his or her fate or to change his or her position.[17] Abandonment here means the action of abandoning an incapacitated person, combined with the cessation of caring for him or her, without ensuring that he or she is cared for by others. The essence of abandonment is therefore to leave the person to be cared for to his or her own fate, whereby it is not only a matter of failing to care for the person who is not well, but also of preventing such a person from providing immediate support.[18]

Risks associated with the implementation of care for the elderly

A key role in providing care to an older person is provided by family or other close relatives (mostly middle-aged women[19]), who provide this care unpaid. The care they provide is informal. The reason for the high level of involvement of informal care towards the elderly is mainly due to traditional family relationships, stemming from a sense of duty to provide care to those family members who provided upbringing and sustenance to the next generation, allowing

[17] Resolution of the Supreme Court of 9 June 1976, VI KZP 13/75, LEX no. 19141.

[18] Judgment of the Supreme Court of 4 June 2001, V KKN 94/99, LEX no. 49445.

[19] Women are statistically more likely to decide to downsize or give up work altogether in the event of care needs of relatives. Economically inactive women aged 25–54 more often than men indicate as a reason for professional deactivation the provision of care for minors (children, grandchildren) and the elderly, *Kobiety i mężczyźni na rynku pracy*, Główny Urząd Statystyczny, Warsaw 2016, pp. 3, 14. This results in their inability to cope with other responsibilities and, consequently, in an earlier exit from the labour market or, in the case of young women, postponing motherhood or having fewer children, M. Racław, *Informal caregivers. The short-term functionality of unpaid work*, [in:] *O sytuacji ludzi starszych*, vol. 2, J. Hrynkiewicz (ed.), Warsaw 2012, pp. 71 et seq.

them to grow up in an atmosphere of love and security. It is worth stressing that care provided by relatives has positive social and health effects for an elderly person in need of support in his or her daily life, as the presence of relatives and a positive relationship with the family are particularly important for a sense of security and well-being. As a side note, the decision to care for an older person in need of support in daily life is often dictated by the limited availability of health and social care services and the inadequacy of public support dedicated to this particular group of people.

However, the need to provide care for an elderly person in their daily life leads to unfavourable physical and psychological burdens on carers as a consequence of the length and intensity of the care provided, due to psycho-physical exhaustion, lack of competence,[20] awareness of the need to provide adequate financial resources, concern for their own family's livelihood, the need for self-fulfilment and the constraints of being permanently present with an elderly person in need of care. Indeed, care is equated not only with physical work, but also with emotional involvement. Among the factors that reduce a carer's quality of life are most often changes in the quality of the relationship between the carer and the older person, a sense of lack of control over the situation, family conflicts, relationship problems, lack of acceptance of help from the family, changes in leisure activities, and lack of experience and skills in dealing with the older person.[21] Therefore, the somatic state of carers deteriorates with the length of caregiving, making them more susceptible to the negative effects of stress. Longer caregiving duration is necessarily associated with increased psychological strain, the occurrence of depressive and anxiety symptoms, and thus with a deterioration of the carer's self-assessment of his or her health and reduced quality of life. The strain of caring tasks, combined with the feeling of

[20] Effective care requires a great deal of competence and dedication on the part of informal carers, but in many cases these carers do not have sufficient knowledge, skills and support to enable them to adequately provide day-to-day care.

[21] H. Kachaniuk, A. Bartoszek, B. Ślusarska, G. Nowicki, K. Kocka, A. Deluga, K. Piasecka, *Jakość życia starszych opiekunów nieformalnych osób przewlekle chorych w opiece domowej*, "Geriatria" 2018, no. 12, p. 75.

being trapped in the caring role, are among the main reasons why carers choose to institutionalise care for their loved ones.[22] With the above in mind, it is not surprising that caregivers need support both in terms of meeting the care, social, therapeutic or rehabilitation needs of the older person, as well as health and other needs related to their own quality of life. Unfortunately, however, in Poland there is no system regulating the principles of support for family carers.

Institutional care for the elderly

Having the elderly cared for by the family is ideal, as they remain in a familiar safe environment among loved ones. The family is seen as a fundamental part of the elderly care system. Institutional care is seen as a last resort when the family itself cannot provide care for an older person. However, when an elderly person in need of care cannot be provided for by the family, then this function is taken over by care institutions – involving assistance in the form of care services or specialised care services. Pursuant to Article 50 of the Act of 12 March 2004 on Social Assistance,[23] these services are available to a single person who due to age, illness or other reasons requires long-term temporary or permanent assistance of other persons. The type of these services therefore depends on the health condition and degree of independence of the elderly person. Care services include assistance with daily living needs, hygienic care, care prescribed by a doctor and, as far as possible, providing contact with the environment. Specialised care services, on the other hand, are services adapted to the special needs resulting from the nature of the illness or disability and provided by persons with specialist professional training. Assistance in the form of care services and specialised care services is provided by the township/municipal social assistance centre with jurisdiction over the place of residence of the person in need of assistance. Once such a need is reported, within 14 working

[22] *Ibidem*, p. 81.

[23] Act of 12 March 2004 on social assistance, unified text Journal of Laws of 2021, item 2268 as amended, hereinafter: ASA.

days, a social worker visits a person in need of assistance in his or her flat and conducts a so-called family environmental interview with the purpose of assessing the life situation of such a person. Within 30 days from receiving such a request, a social welfare centre issues an administrative decision on granting or refusing to grant assistance in the form of care services and specialist care services. When granting care services and specialist care services, the scope, duration, place of provision and detailed conditions for partial or complete exemption from payment are determined.

A person requiring round-the-clock care due to age, illness or disability, unable to function independently in daily life, who cannot be provided with the necessary assistance in the form of care services at the place of residence by the family and the municipality, is entitled to be placed in a social welfare home (Article 54 ASA). Such a person – with his or her prior consent – shall be directed to a social welfare home of the appropriate type located as close as possible to his or her place of residence. On the other hand, a person requiring intensive medical care is referred to a nursing or care facility.[24]

Institutional support in the form of placement in a social welfare home is provided to an elderly person when the community care provided does not ensure a decent existence in their own living environment. Referral to social welfare home is made on the basis of documents prepared by a social worker. One of these is a community interview to diagnose the elderly person's situation with regard to the possibility of family, friends, neighbours and the granting of community-based services. If neither informal support nor community services meet the elderly person's needs in terms of daily functioning, they are then referred to a nursing home. At the same time, a referral to a social care home is not the same as an admission, for which one usually has to wait.

The emphasis, however, is on seniors remaining in their homes, not only because the elderly person does not like to move and home-based care is preferable, but also because it provides them with

[24] See Article 33a of the Act of 27 August 2004 on health care services financed from public funds, unified text Journal of Laws of 2021, item 1285 as amended.

peace of mind, stability and, despite everything, some independence. Placement in a nursing home is a last resort. A decision on referral to a social welfare home and a decision on payment for the stay is issued by the municipal authority competent for the place of residence of the elderly person on the date of referral to a social welfare home, while a decision on placement in a social welfare home is issued by the municipal authority or the head of the district authority which runs the social welfare home. A stay in a social welfare home is paid for, such payment being borne by each resident of the home. If the person cannot afford to pay the fee, the obligation is transferred successively to the spouse, children and grandchildren, or to the municipality which has sent the elderly person to the social welfare home (Article 61 paragraph 1 ASA). The relatives of a person placed in a social welfare home and the municipality pay the fee only when the resident of such a home is unable to cover it from his or her own resources. At the same time, the obligation to pay the fee arises irrespective of the place of residence of the relatives. Indeed, it should be noted that in administrative proceedings concerning the fee for a stay in a social welfare home, the first sentence of Article 144^1 FGC, which allows the obliged person to evade the maintenance obligation towards the entitled person if the demand for maintenance is contrary to the principles of social co-existence, is not applicable. The descendant obligation resulting directly from Article 61(1)(2) of the ASA, although functionally related to the maintenance provisions, is not a maintenance obligation, but a public law burden arising from the admission of a person referred to a social welfare home. Bearing this burden is intended to cover the administratively determined costs of maintaining a resident in a social welfare home. The person obliged to incur the charge may apply for the institution of fee waiver provided for in Articles 64 and 64a of the ASA, as well as for the institution of waiver of reimbursement of fees paid in lieu by the municipality provided for in Article 104(4) of the ASA.[25] In the case where the payment for the stay of an elderly person in a social welfare home is borne by the municipality, the municipality

[25] Judgment of the Provincial Administrative Court in Kielce of 30 January 2020, II SA/Ke 1145/19, LEX no. 2865053.

may then claim reimbursement of the expenses incurred from the resident of the home or his or her relatives.

The long waiting time for placement in a social welfare home and the cost of paying for the stay, often disproportionate to the pension received by the elderly, are serious problems limiting the use of this type of institutional assistance.

Conclusions and recommendations

The maintenance obligation towards elderly parents falls primarily on their children. This is due to the natural law character of family relationships, which are based on the emotions that bind the individual family members together and which constitute an internal determinant obliging them to help and support their needy relatives. Without the emotions that result from these feelings, it is difficult for the family environment to function properly and for the resulting obligations to be properly interpreted. State aid is subsidiary, meaning that the state only supports families in caring for the elderly when they are unable to fulfil this duty towards their relatives. The solution adopted is a consequence of the principle of subsidiarity and respect for family autonomy.

The issue of care for the elderly has a special dimension as it is an expression of intergenerational solidarity, in which the elderly give way to the younger generation, but justifiably expect the latter to provide them with a decent living at the edge of their lives. The provision of appropriate care for the elderly not only affects the quality of life of the elderly, but also determines the quality of life of the younger generations, who, in order to reconcile their own aims and responsibilities towards their established families with their duty of care towards the elderly, must be able to obtain the help of a well-organised, well-functioning and efficient system of social and institutional support. The current model of care for the elderly, based on its provision solely by immediate family members who are not provided with adequate support, only leads to a deterioration in the quality of life of both those who are cared for and those who provide care. This is all the more so because care services are

not only invisible, but are also undervalued, especially with regard to elderly care.

There is an urgent need to develop a new model to support informal carers in order to ensure quality care services. Above all, it is necessary to provide informal carers with psychological support that offers an opportunity to prevent and treat disorders that may arise in the context of long-term care tasks for older people. To this should be added educational activities to raise awareness of the risks involved in caring for older people and how to avoid or overcome them, i.e., ensuring adequate preparation for the role of informal carers. However, it is also important to provide material support adequate to the scope of care, compensating for the carer's resignation from professional work, ensuring a decent livelihood and at the same time valuing this type of work. There is a lack of appropriate systemic solutions for reconciling paid work with caring for the elderly. This obviously requires a reform of the welfare system and the recognition of informal carers caring for older people as an integral part of it.

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Topical Issues of Legal Protection of the Elderly in Hungarian Private Law

Introduction

According to Article XV of Fundamental Law of Hungary, "Everyone shall be equal before the law. Every human being shall have legal capacity. By means of separate measures, Hungary shall protect families, children, women, the elderly and those living with disabilities." The Fundamental Law of Hungary also highlights certain groups to be protected. This includes families, which are the smallest basic units of society, children, women, the elderly and the disabled. The implementation of the rules contained in this paragraph is also supported by the rules contained in other articles of the Fundamental Law.

Even though the Fundamental Law specifically names the elderly as a group to be protected, **Hungarian civil law typically does not have a specifically named rule for the elderly.** In the Hungarian civil law and civil procedure law, as in international and European legislation, vulnerable or disabled persons or persons in need of support are designated as a target group, which represents a much

wider class than the elderly.[1] However, there are private law regulation that define specific groups of the elderly.

The legal situation of the elderly in private law can be examined from many aspects. In this study, we will examine two aspects of private law's protection for the elderly. On the one hand, we will analyse the current form of procedural protection of the elderly; what kind of procedural support the elderly person can receive during a civil procedure. On the other hand, we will analyse the very topical issue of the civil law's rights of the elderly: the right of contact of elder relatives.

The substitute decision-making model in Hungarian civil law

Various regulatory models related to the rights of persons with disabilities are known. The **medical model** focuses on the person with a disability, treating their condition as an illness, making them the object of treatment. The regulation is therefore exclusively related to the data subject; it completely ignores its social environment and social functioning. The so-called **welfare model** has a similar approach to the medical model, which sees the affected persons as a disadvantaged group in society. These classes are "groups in need of help, in need of financial and moral support, and accordingly, various support and rehabilitation systems are established for them".

[1] Of course, in Hungary was also carried out in-depth research to analyze and improve the situation of the elderly, but these brought relatively few visible results at the level of legal regulation. Such a project was e.g., research coordinated by the Office of Commissioner for Fundamental Rights of Hungary. These were the "Projects on the Rights of the Most Vulnerable Groups: Homeless, Disabled and Elderly People of the Parliamentary Commissioner for Civil Rights in Hungary 2008–2010" and the "Dignified Old Age" project in 2011–2012, https://www.ajbh.hu/documents/14315/131278/Projects+on+the+Rights++of+the+Most+Vulnerable+Groups+-++Homeless%2C+Disabled+and+Elderly +People+of+the+Parliamentary+Commissioner++for+Civil+Rights+in+Hungary+2008-2010.pdf/b6b307ae-5c0b-4a99-83a8-91535e68b973?version=1.0&t= 1370507112954& and https://www.ajbh.hu/documents/10180/124838/idoskorban.pdf/cddcd096-66ce-42d8-9c40-b37e543e8d1c?version=1.0&t=1362946 100833.

Against these stands the human rights or social model, which instead of persons with disabilities puts the other members of society at the center of regulation, highlighting that it is not necessary to "cure" the person concerned, but to make society suitable for everyone to be able to participate equally in social processes.[2]

Hungarian civil law recognises several procedural options for the protection of the rights of persons whose capacity for conducting their affairs has decreased, including the elderly. One of these options is the placement under guardianship, two forms of which are regulated by the Hungarian Civil Code: **guardianship partially limiting the capacity to act (partial guardianship), and guardianship fully limiting the capacity to act (plenary guardianship)**. In the judgment on partial limitation of the capacity to act, the court shall specify those categories of affairs of a personal or property nature in which the capacity to act is to be limited.

An adult shall have no capacity to act if placed by the court under custodianship fully limiting his capacity to act.

The court shall place an adult under guardianship fully limiting his capacity to act if, due to his mental disorder, he permanently and completely lacks the ability required to take care of his own affairs, and consequently, having regard to his personal circumstances, family ties and social relations, his placement under custodianship is justified. The court shall be allowed to limit the capacity to act in full if the protection of the rights of the person concerned cannot be ensured by means that do not affect his capacity to act or by partial limitation of his capacity to act.

Placement under guardianship entails the consequence that the legal declarations of the person placed under guardianship require the consent of the guardian, who is appointed by the guardianship authority for the person placed under guardianship. The substantive legal rules of guardianship are contained in Act V of 2013 on Civil Code (hereinafter: Civil Code), while the procedural rules are

[2] Fruzsina Gulya, István Hoffman, *A támogatott döntéshozatal sorsa Magyarországon* [*The chance of supported decision-making in Hungary*], Fogyaték osságtudomány.elte.hu 2019, http://fogyatekossagtudomany.elte.hu/wp-content/uploads/2019/12/2019_2_NT_v-02.pdf.

contained in Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: Civil Procedure Code). This study does not analyse the rules of guardianship; the analysis is a part of another paper.

The placement under guardianship decision relates to the personal status, which often means an irreversible status change. In Hungarian civil law, there are only a few legal institutions for the support of vulnerable persons that do not entail such serious legal consequences as placing them under guardianship. One of these is the supported decision-making.

Supported decision-making as an alternative to guardianship

THE BACKGROUND OF LEGAL INSTITUTION OF SUPPORTED DECISION-MAKING

In accordance with the UN Convention on the Rights of Persons with Disabilities (hereinafter: CRPD), when the Civil Code entered into force, the aim was to introduce a procedure to help a person in need of support that does not affect the person's capacity to act.

Supported decision-making is a world-wide alternative to guardianship. Instead of having a guardian make a decision for the person with the disability, supported decision-making allows the person with the disability to make his or her own decisions.[3]

Supported decision-making came into the forefront of attention with the adoption of CRPD. According to Article 12(2) of the CRPD, "States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others." According to its advocates, supported decision-making represents a paradigm shift in mental capacity legislation. Contrary to substitute decision-making, it does not involve the substitution of someone's judgment for the judgment of the person with impaired decision-making

[3] Cf: Rosie Harding, Ezgi Tascioglu, *Supported Decision-Making from Theory to Practice: Implementing the Right to Enjoy Legal Capacity*, 2018, https://www.mdpi.com/2075-4698/8/2/25 (accessed on: 20.12.2023).

ability; rather, it means that the person is enabled to make his or her own decisions through adequate support. Support can come in many different forms.[4]

Supported decision-making allows individuals with disabilities to make choices about their own lives with support from a team of people chosen by them. Individuals with disabilities choose people they know and trust to be part of a support network to help with decision-making.[5]

In the year 2021, 57,489 adults were under guardianship[6] in Hungary, but their number is expected to increase significantly in the future due to the ageing of the population. The number of individuals with intellectual or developmental disabilities under guardianship is expected to increase over the next few decades. Due to enhanced medical care, many people with intellectual or developmental disabilities will outlive their parents and family caregivers. The data suggest that by 2030 there will be more than 100,000 people with intellectual disabilities in Hungary who could conceivably need to be placed under guardianship.

THE REGULATION OF SUPPORTED DECISION-MAKING IN THE CIVIL CODE

According to Section 2:38 § of the Civil Code, the guardianship authority shall, at the adult's request and in order to avoid limiting his capacity to act, appoint a supporter for the adult who, due to not being entirely of sound mind, needs help in administering some of

[4] Antal Szerletics, *Paternalism vs. autonomy? Substitute and supported decision-making in England and Hungary*, "Hungarian Journal of Legal Studies" 2021, vol. 62, issue 1, pp. 75–95, https://akjournals.com/view/journals/2052/62/1/article-p75.xml (accessed on: 20.12.2023).

[5] Cf: Jillian Craigie, Michael Bach, Sándor Gurbai, Arlene Kanter, Scott Y.H. Kim, Oliver Lewis, Graham Morgan, *Legal capacity, mental capacity and supported decision-making: Report from a panel event*, "International Journal of Law and Psychiatry" 2019, vol. 62, pp. 160–168.

[6] https://www.ksh.hu/stadat_files/szo/hu/szo0013.html (accessed on: 20.12.2023).

his affairs or in making his decisions. If, during the procedure for placement under custodianship affecting the capacity to act, the court considers that not even the partial limitation of the capacity to act is justified, but the person concerned needs help in administering some of his affairs due to not being entirely of sound mind, it shall reject the request for placement under custodianship, and shall notify the guardianship authority of its decision. The supporter shall be appointed by the guardianship authority, based on the court decision, in agreement with the person concerned. The appointment of a supporter shall be without prejudice to the adult's capacity to act.

Supported decision-making means help adapted to individual circumstances if the person's capacity to take care of his own affairs is reduced, but the limitation of the capacity to act is not justified in his case.

The supporter provides assistance in making the legal declaration and can therefore also be present in official proceedings involving the supporter. At the same time, supported decision-making is not fundamentally a civil law institution, because the capacity of an adult to make a legal declaration is not affected by the appointment of a supporter. Thus, it is not the court that decides on its ordering, but the guardianship authority based on the request of the person concerned. The fundamental difference between supported decision-making and guardianship is that the **consent of the person concerned is not required for the person to be placed under guardianship**, and a supporter can only be appointed at the request or with the consent of the person concerned.

The Civil Code Section 2:19(4) and Section 2:21(3) also confirm the principle of proportionality to be taken into account when limiting the capacity to act, based on which a person's capacity to act cannot be restricted if there is an alternative that can provide assistance, for example, supported decision-making. Consequently, during the guardianship procedure, the court must examine whether it is sufficient to initiate the appointment of a supporter in the case of the person to be placed under guardianship.

SEPARATE ACT ON SUPPORTED DECISION-MAKING IN BRIEF

At the same time as the Civil Code entered into force, a separate act, Act CLV of 2013, introduced the legal institution of supported decision-making in Hungarian Law.

The guardianship authority appointed a supporter for an indefinite period of time at the request of the supported person or based on the request of the court, on a general basis or for categories of affairs, in agreement with the supported person. It is not possible to appoint a supporter to the categories of affairs of a personal or property nature, in respect of which the person concerned is under guardianship affecting the capacity to act.

THE SUPPORTER

As below, the supporter:

- may be present along with the supported person at all procedural acts during the procedure (in civil, administrative, or criminal matters), including hearings held with the exclusion of the public,
- may consult the party without disturbing the order of the hearing with a view to facilitating a juridical act being made,
- may be present when the supported person makes the declaration of rights,
- may facilitate the making of the legal declaration of the supported person with his advice and by providing the information necessary for the supported person,
- may assist the supported person in making a decision, as well as contributes with his personal presence in the making of the decision.

The guardianship authority may appoint a maximum of two persons to the role of supporter for the supported person. The guardianship authority decides on the appointment of the supporter after a personal hearing of the supporter and the supported person. The guardianship authority appoints the supporter for an indefinite period but reviews the appointment every five years.

The guardianship authority appoints a professional supporter if
1) there is no person designated by the supported person who could be appointed as a supporter, and
2) the supported person agrees with the appointment of a professional supporter.

A professional supporter can be a person employed by the body appointed by the Government (the social welfare and guardianship authority) in a government service relationship or other legal relationship aimed at working, or a professional guardian to perform the professional support tasks.

THE ROLE OF THE SUPPORTER IN CIVIL ACTIONS

The Civil Procedure Code defines the procedural role and participation of the supporter in civil actions.

If a supporter or a professional supporter is appointed for a party by the guardianship authority, the supporter:
1) may be present along with the party at all procedural acts during the action, including hearings held with the exclusion of the public, but his absence shall not be an obstacle to the carrying out of a procedural act or the continuation of the act,
2) may consult the party without disturbing the order of the hearing with a view to facilitating a juridical act being made.

The supporter may not make a juridical act in place of the party supported by him. The supported party shall arrange for the presence of the supporter at a procedural act, and the court shall not take any measure in this respect.[7]

Several questions arise in connection with this procedural regulation. The regulations make it clear that the supporter is not the party's representative, does not act on behalf of the party, and cannot make a statement on behalf of the party. However, what is the supporter's responsibility if the party makes a statement in an action that leads to its loss precisely because of its legal assistance and bad advice? The supporter does not have the same liability insurance

[7] Section 57 of Civil Procedure Code.

as a lawyer. Can the supported party assert a claim for compensation against the supporter in case of loss? Can the supporter save himself by referring to the rules of procedure? How different is the situation if a professional supporter acts, whose job is to provide support and who performs his work in an employment relationship? Jurisprudence did not answer these questions, because proceedings with a supporter hardly ever occur. In my opinion, if a professional supporter performs the support tasks, then the insurance company is obliged to bear the damage caused to the supporter either because of the body that employs him or on the basis of liability insurance. For this, of course, the supported person must initiate another legal proceeding, in which he may need support again.

GUARDIANSHIP AUTHORITY'S PROCEDURE FOR APPOINTING A SUPPORTER

The guardianship authority decides on the appointment of the supporter within the framework of a public administrative procedure. The guardianship authority initiates the procedure for the appointment of a supporter at the request of the person in need of support or based on the request of the court. It should be emphasised that the guardianship authority will only conduct the procedure initiated for the appointment of a supporter if the person in need of support agrees.

During its proceedings, the guardianship authority will hear the person in need of support and the person seeking to be appointed supporter, in person and preferably together.

The guardianship authority can also obtain an expert opinion to establish the justification for appointing a supporter. The expert can examine the ability of the person in need of support to manage their own affairs.

The guardianship authority, in its decision on the appointment of a supporter, may specify categories of affairs in which supported decision-making exists.

The supported person and the supporter can at any time request the modification of the case groups in which the supported person needs help.

The professional supporter performs his duties within the framework of an employment relationship and prepares an annual report on his work.

If, during the procedure, the guardianship authority determines that the activities of the professional supporter harm the interests of the supported person, it removes the professional supporter and simultaneously appoints a new supporter with the consent of the supported person.[8]

EVALUATION OF THE HUNGARIAN SUPPORTED DECISION-MAKING SYSTEM

Although the new Civil Code, adopted in 2013, contains a partial reform of Hungary's mental capacity legislation, the new regulation fails to meet the requirements of Article 12 of the CRPD. At least five general problems can be identified. The Civil Code introduces the possibility of supported decision-making, but it does not abolish substitute decision-making. The Act preserves the models of plenary and partial guardianship as instruments of substitute decision-making. A further point of concern is that the regulation of the Civil Code does not sufficiently recognise the situation-specific character of mental capacity. The regulation of supported decision-making in section 2:38 of the Civil Code is very rudimentary compared to the detailed regulation of guardianship. Although there is a separate Act on supported decision-making, the regulation remains quite superficial, perhaps because supported decision-making was always intended to be merely "secondary" or "supplementary" to guardianship. One problematic issue is that the regulation does not require a relationship of trust between the supported person and the person providing support. Although the Act on supported decision-making

[8] Sections 126/A–126/D. of 49/1997 (IX. 10) Government decree on guardianship authorities and the child protection and guardianship procedure.

prohibits the appointment of a support person against the will of the supported person, this does not necessarily ensure a relationship of trust between the two individuals, which seems essential to the functioning of supported decision-making regimes. Article 12(2) of the CRPD requires that "measures relating to the exercise of legal capacity respect the rights, will and preferences of the person."[9] The Civil Code contains no provision with respect to the standard of supported decision-making.[10]

As we can see, the domestic regulations still – contrary to the provisions of the CRPD – rigidly adhere to the institution of guardianship limiting the capacity to act. It is difficult for the Hungarian legal regulations to be bound by the so-called social and fundamental rights model. Although the introduction of supported decision-making is a departure from the basic structure of the previous regulation, the minimal use[11] of the institution does not give cause for optimism.[12]

[9] Cf: Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, "Human Rights Brief" 2012, no. 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2040938 (accessed on: 20.12.2023).

[10] Antal Szerletics, *Paternalism vs. autonomy? Substitute and supported decision-making in England and Hungary*, "Hungarian Journal of Legal Studies" 2021, vol. 62, issue 1, pp. 75–95, https://akjournals.com/view/journals/2052/62/1/article-p75.xml (accessed on: 20.12.2023).

[11] In 2016, 149 persons and in 2017, 167 persons participated in supported decision-making. Fruzsina Gulya, István Hoffman, *A támogatott döntéshozatal sorsa Magyarországon* [*The chance of supported decision-making in Hungary*], Fogyatékosságtudomány.elte.hu 2019, http://fogyatekossagtudomany.elte.hu/wp-content/uploads/2019/12/2019_2_NT_v-02.pdf (accessed on: 20.12.2023). Since then, the data on supported decision-making has not been available on the website of the Hungarian Central Statistical Office.

[12] Fruzsina Gulya, István Hoffman, *A támogatott döntéshozatal sorsa Magyarországon*, [*The chance of supported decision-making in Hungary*], Fogyatékosságtudomány.elte.hu 2019, http://fogyatekossagtudomany.elte.hu/wp-content/uploads/2019/12/2019_2_NT_v-02.pdf (accessed on: 20.12.2023).

De lege ferenda proposal for a more effective procedural protection for elderly: Elder Law Lawyer

As a *de lege ferenda* proposal, it could be considered to introduce a new regulatory model instead of supported decision-making, where a lawyer with special qualifications as an Elder Law Lawyer would represent an elderly person who is not placed under guardianship but needs support in his or her decisions. As I mentioned earlier, the current rules do not regulate the responsibility of the person acting as a supporter. If the supporter is a professional supporter, then the issue of financial damage caused by the supporter can be handled based on the underlying responsibility of the government agency that employs him. But if the supporter is a family member who, even to the best of his knowledge, only gives bad advice, which leads to unsuccessful action, then he does not take responsibility according to the rules of civil law, because according to the rules of liability for damages, his behavior is not unlawful.

In view of all these aspects, it would be better if the elderly person in need of support were represented by a lawyer with special training, because in this case the issues of liability would be clearly settled.

The Elder Law Lawyer could be assigned from among those lawyers who would be registered in a separate register by the Bar Association and who, in addition to their legal qualifications, have special education and training (e.g., family law specialist lawyer, social worker, mediator, psychologist) that makes them well-suited for the role of supporting and informing the elderly.

The court with the assistance of the Legal Aid Service would appoint an Elder Law Lawyer for the elderly person in need of support if it detects a circumstance that makes it necessary to protect the interests of the elderly person in the proceedings, or if the person in need of support requests it.

For example, the duties of an Elder Law Lawyer would include:

- informing the elderly person about the procedure, his procedural rights, the procedural acts affecting him, as well as the content and legal effects of court decisions affecting the elderly person;

- being required to inform the court of all circumstances that are of importance when deciding matters regarding the elderly person;
- making suggestions to the court on the content of the measure or judicial order serving the interests of the elderly person (e.g., provisional measures);
- representing the opinion of the elderly person in need of support during the procedure and can comment on the procedural actions affecting the elderly person.

The fees and costs of the Elder Law Lawyer would be advanced and reimbursed by the state, so the appointment of the Elder Law Lawyer would be a special legal aid service. In addition to civil proceedings, the Elder Law Lawyer could also act in proceedings before the guardianship authority, but only on the basis of the assignment of the authority or the court.[13]

The right of contact of the elderly relatives

PERSONS ENTITLED TO HAVE CONTACT WITH THE CHILD

The UN Convention on Rights of the Child 20 November 1989 (hereinafter: Child Convention) to which all EU member states are parties, clearly establishes the child's right to contact. According to para. (2) of Article 9 of the Child Convention, "The States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

[13] The Elder Law Attorney is known in the United States, and he aids in many areas of life (e.g., estate planning, social security, employment discrimination, medical care, grandparents contact rights), not only in procedures, to persons in need of support. They also have their own association, the National Academy of Elder Law Attorneys. It was found in 1987 as a professional association of attorneys who are dedicated to improving the quality of legal services provided to people as they age and people with special needs, https://www.naela.org/Web/ImportTemp/About_NAELA_New.aspx?hkey=feboefd3-bd62-4508-9ca4-20de373d4784.

In accordance with the Child Convention, Hungarian civil law ensures the child's right to contact. The basic rules of contact are in the Hungarian Civil Code. The Civil Code basically regulates the **right of contact between the parent who is living separately and the child**. According to Section 4:178 § (1)–(2) of the Civil Code, "The child shall have the right to maintain a personal and direct contact with the parent living separately. The parent or other person bringing up the child shall be required to ensure unimpeded contact. Unless otherwise provided by the court or the guardianship authority, the parent living separately from the child shall be entitled and obliged to maintain contact with the child."

THE INTERNATIONAL CONTEXT OF QUESTIONS OF CONTACT BETWEEN A CHILD AND PERSONS OTHER THAN HIS OR HER PARENTS

Since the right of contact can also be interpreted between parent and child based on, e.g., the Child Convention, the right of contact of relatives other than parents is not obvious in the absence of concrete legal regulations.[14]

In view of the current nature of this subject, the Council of Europe adopted the Convention on Contact[15] concerning Children in 2003 (hereinafter: Contact Convention), which entered into force in 2005.[16] This convention authorises the member states to define the circle of persons based on close family ties who can have contact with the child.

According to Article 2(d) of the Contact Convention, **"family ties" means a close relationship such as between a child and his**

[14] Cf: Felicity Kaganas, *Grandparent contact: another presumption?*, "Journal Social Welfare and Family Law" 2020, vol. 42, pp. 176–203.

[15] https://rm.coe.int/convention-on-contact-concerning-children/1680a40f71.

[16] According to the Status table of signed and ratification of the Convention only 19 Members of Council of Europe signed the Convention, and only 9 Members of Council of Europe ratified the Convention. Poland signed the Convention in 2003, but did not ratify it, while Hungary neither signed nor ratified it, https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=192.

or her grandparents or siblings, based on law or on a *de facto* family relationship.

According to Article 5 of the Contact Convention, "Subject to his or her best interests, contact may be established between the child and persons other than his or her parents having family ties with the child." The Explanatory Report of the Contact Convention pointed out that the determination of the persons, in addition to parents, with whom a child may have contact, subject to the best interests of the child, is of crucial importance. The most recent legislation relating to this matter has tended to broaden the circle of persons who are given or who may apply for contact.[17] The case law relating to the ECHR has recognised the possibility to apply to maintain contact between a grandmother and her grandchildren, and the European Court of Human Rights states as follows: "The Court noted, firstly, that it was common ground that issues relating to the relations between the second applicant and her grandchildren were covered by Article 8 of the ECHR. It also pointed out in that connection that 'family life', within the meaning of Article 8 includes **at least the ties between near relatives, for instance those between grandparents and grandchildren**, since such relatives may play a considerable part in family life."[18]

In EU law, the grandparents' right to contact also involved uncertainty. Advocate General Szpunar, in Case C-335/17, *Neli Valcheva v Georgios Babanarakis,* pointed out, that despite the efforts of the EU legislature to adapt the legislation in matters of parental responsibility to developments in society, those developments are proceeding at a much faster pace than the process of legislative adaptation and it is clear that there remain some "grey areas" for which the legislation does not provide an explicit response. The case in the main proceedings is an illustration of those "grey areas" created by developments in society, in particular with regard to a child's contact with other

[17] Cf: Ann Buchanan, Anna Rotkirch, *Twenty-first century grandparents: global perspectives on changing roles and consequences*, "Contemporary Social Science, Journal of Academy of Social Sciences" 2018, vol. 13, pp. 131–144.

[18] Explanatory Report to the Convention on Contact concerning Children, https://rm.coe.int/16800d380d.

persons to whom the child has "family" ties based on law or on fact, such as grandparents. Those "grey areas" may give rise to uncertainties, sometimes paradoxical, concerning the existence of rights of access by persons other than the parents, in this case grandparents. With regard to grandparents specifically, is not that uncertainty is disconcerting, considering that, in principle and subject to the best interests of the child, **contact between grandparents and their grandchildren, in particular in an ever-changing society, remains an essential source of stability for children and an important factor in the intergenerational bond which undoubtedly contributes to building their personal identity**.[19]

In this particular Case, the European Court of Justice made it clear that "the concept of 'rights of access' referred to in Article 1(2)(a) and in Article 2.7 and 2.10 of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, must be interpreted as including rights of access of grandparents to their grandchildren."[20]

CONTACT RIGHTS OF ELDERLY RELATIVES IN HUNGARIAN CIVIL LAW

The Civil Code – in accordance with above-mentioned applicable international legal conventions and EU law – entitle other relatives to permit contact with the child to persons other than the parents, including the grandparents. According to section 4:179 § (1), "The grandparents, sibling and, if the parent and the grandparent are not alive or are permanently prevented from having contact with the child or do not exercise the right of contact on their own fault,

[19] Opinion of Advocate General Szpunar Delivered on 12 April 2018 in Case C335/17 Neli Valcheva v Georgios Babanarakis, paras. 31–32, https://curia.europa.eu/juris/liste.jsf?language=en&num=C-335/17.

[20] Judgment of the Court 2 April 2018 in Case C335/17 Neli Valcheva v Georgios Babanarakis, https://curia.europa.eu/juris/liste.jsf?language=en&num=C-335/17.

the sibling or parent of the child's parent shall also be entitled to have contact with the child. Upon their request, if the child was raised for an extended period of time in their household, the former step-parent, foster parent, guardian and also the person whose presumption of paternity regarding the child was rebutted by the court, may be granted the right of contact."

The Civil Code therefore precisely defines those relatives to whom it grants the right of contact with the child. Among elderly relatives, the Civil Code designates the grandparent's right of contact with the child (grandchild). This means that, for example, such a right of the great-grandparent cannot be enforced based on the Civil Code.[21]

We must note that before the entry into force of the Civil Code in 2014, the previous Act IV of 1952 on Family Law **did not name the grandparent as a family member entitled to have contact with the child**. We must immediately add to this, that section 28 of 49/1997 (IX. 10) Government decree[22] named the grandparent as the person entitled to have contact with the child even before the entry into force of the Civil Code in 2014.

Nevertheless, the need to regulate contact between grandparent and grandchild also arises when there is no agreement between parents and grandparents. Based on judicial practice the question of contact with the grandparent arises most often and most acutely when one parent dies and the other parent does not allow contact with the deceased parent's relatives. This typically arises when the parents have already divorced and their relationship is full of conflicts. It makes the situation even more difficult if the surviving

[21] The Capital Court ruled that when considering the requests of relatives who are dissatisfied with contact, it is not the responsibility of the parents or other relatives entitled to contact, but the resolution of an existing situation that harms the child's interests and is burdened with tensions.

[22] Section 28 of 49/1997 (IX. 10) Government Decree: "The parent, grandparent, and sibling have the right to have contact with the child, and – if the parent and grandparent are not alive, or are permanently prevented from maintaining contact, or do not exercise their right to contact through no fault of their own – the sibling or parent of the child's parent shall also be entitled to have contact with the child."

parent finds a new partner or gets married, because in this case the contact with the deceased parent's relative is even more in the background, since the child has a "new family".

Based on judicial practice, it is a special question of grandparent contact whether this right of the grandparent can be considered part of his or her personality rights. It is common for grandparents to request contact with their grandchild on the basis that it is part of their personality rights to privacy and to a "full" family life as defined in the Civil Code. Judicial practice is also divided on this issue, but the typical interpretation is that the right to contact between a child and a grandparent is a constitutional fundamental right, a child's right, or a fundamental human right, but not an independent personality right.[23]

Based on the analysed jurisprudence, the question arises as to whether the purpose of contact is to maintain the family relationship between the child and the person entitled to contact, or whether its purpose may be to create a grandparent-grandchild family relationship that did not exist before. The jurisprudence is not uniform on this issue. There is a court decision which according to the legislation does not provide for the initiation of contact. Likewise, there is a court decision according to which, in a situation where the relationship between a grandparent and her daughter (parent) ended fifteen years prior and the grandparent has never met her grandchildren, so no relationship or emotional bond has developed between them, so the grandparent cannot claim contact.

According to another part of judicial understanding, the fact that the grandparents did not have a close relationship with the children due to a family conflict is no reason not to continue to have the relationship; children not only have an interest but have a right to know and nurture their family relationships and it is essential for their own personality development to know their forebears, thereby strengthening their sense of identity and their roots. It did not arise during the procedure that the grandparents had ever exposed their grandchildren to any danger. In this context, the responsibility of the

[23] The most recent judicial practice also confirmed this in the Debrecen Court of Appeals Case Decision No. Pf.I.20.321/2019/8. See later in detail.

parents arises because in the previous 10 years their family conflicts escalated to the point where their children were deprived of the love and care of their grandparents. (County Court of Veszprém Case Decision No. K. 701.016/2021/9).

THE CONTENT OF THE RIGHT OF CONTACT

The purpose of contact is to maintain the family relationship between the child and the persons entitled to contact and the parent or other relative entitled to contact, e.g., the grandparent should constantly monitor the child's upbringing and development and help as much as possible.

Contact rights shall include the right to meet the child in person, to take the child regularly for a specified period of time from his place of domicile or residence, to spend a longer time with the child periodically, mainly during school holidays and multi-day public holidays, and it shall include the right to maintain contact with the child without meeting in person. Unless otherwise provided by the court or the guardianship authority in the interest of the child, the right of contact shall include taking the child abroad for a definite period of time.[24]

The Curia (Supreme Court of Hungary) confirmed in one case that the grandparents' contact right is an independent right, so by definition it should not be enforced at the expense of the separated parent's contact. Therefore, the argument that the child can see his grandparents when he meets his father living separately is not an acceptable argument.[25]

[24] Section 4:180 of Civil Code.

[25] Supreme Court of Hungary Case Decision No. Kfv.II.37.709/2017/10.

RESOLVING DISPUTES CONCERNING CONTACT

According to Hungarian procedure law if there is a dispute between the parties regarding contact with the child or the grandchild, the court or the guardianship authority has the power to resolve the dispute.

It must be emphasised that the court or guardianship settlement will only take place if there is no agreement between the parties on the exercise of contact.

In the absence of agreement, the court shall decide, upon request or in the interest of the child *ex officio*, on the contact with the child if matrimonial (divorce) action or action for settling parental custody is pending. If no matrimonial action or action for settling parental custody is pending, in the absence of the parents' agreement the guardianship authority shall decide on the contact with the child. Before adopting the decision, any interested party and the child who is of sound mind shall be heard. The court or the guardianship authority shall decide on the contact with the child taking the age, health and living conditions of the child, the parents' personal conditions and the opinion of the child who is of sound mind into account. The decision on contact shall provide the frequency and duration of contact, whether the contact is regular or periodical, whether the contact is to be supervised, furthermore where, when and how the child is to be received and returned by the parent, the obligation to notify the other parent of contacts to be missed and substitution of missed contact. If the contact with the child was regulated by the court, modification of the contact with the child may be requested from the court.[26] The enforcement of the decision on the right of contact is ordered by the court in non-litigation civil court proceedings,[27] so the enforcement of the decision does not fall under the competence of the guardianship authority.

[26] Section 4:181(1)–(4) of Civil Code.

[27] The enforcement of the decision regulating contact is a separate Act, the Act CXVIII of 2017 regulates.

SETTLING THE CONTACT OF GRANDPARENT AND THE GRANDCHILD

As can be seen above, both the court and the guardianship authority have jurisdiction over the issue of contact with the child.

The court has jurisdiction over the settlement of contact if there is a divorce case or parental custody case pending. Given that such an action cannot take place between the grandparent and the parents, always the guardianship authority decides on the issue of grandparental contact with the grandchild.[28]

In the case of a dispute, the guardianship authority is either party, such as, e.g., at the request of the grandparent, decides on maintaining contact or changing it at their request. The guardianship authority primarily tries to settle the relationship by agreement during the holding of the hearing. The guardianship authority may oblige the parties to participate in a mediation process in order to reach an agreement. In the mediation process, the mediator facilitates the creation of an agreement ending the dispute between the parties in accordance with the best interests of the child. The guardianship authority can only oblige the parents to use the mediation procedure; if the grandparent initiates the procedure, he cannot be obliged to participate in the mediation procedure.[29]

If the guardianship authority dismisses the request for contact, it can be challenged in court in administrative court action,[30] so ultimately the court makes the final decision in the case as well, but in administrative court action and not in civil court action. **This is remarkable, because the substantive legal rules of contact are clearly private law rules and not public law rules**.[31]

[28] Sections 28–29 of 49/1997 (IX. 10) Government decree on guardianship authorities and the child protection and guardianship procedure.

[29] Sections 49/1997 (IX. 10) Government decree on guardianship authorities and the child protection and guardianship procedure.

[30] The rules of this procedure regulated by the Act I of 2017 on Administrative Court Procedure.

[31] This legal regulatory solution is clearly in the best interest of the child, because if the court were to decide on all contact issues, a decision would probably be made much slower than in the case of a guardianship authority's decision.

It should be emphasised that in the administrative court action the issue of contact can even go as far as the Curia in a review procedure, so the supreme court can even adopt a decision in the matter of contact between grandparent and grandchild. But according to the Code of Administrative Court Procedure,[32] the party cannot automatically bring its case before the Curia; the Curia decides on the admissibility of the review application in each case. It should be noted that the Curia recently accepted many cases, so the highest judicial forum can have the final word on legal issues of grandparental contact.

The judicial practice has developed the following aspects in contact cases between grandparents and grandchildren:

1. The Supreme Court found that the grandparents' right to contact is a right, but it does not necessarily guarantee the right to contact their grandchild regardless of the circumstances. Contact must be regulated in all cases – and primarily – regarding the best interests of the child. Persons concerned must do everything in order to ensure that the child can be a part of the grandparents' love and care. (Supreme Court Case Decision No. Kfv. II.39.089/2007).
2. Grandparent contact can be decided at the guardianship authority's discretion. The guardianship authority shall provide the reasoning in its discretionary decision[33]. The

[32] According to Section 118 of Act on Administrative Court Procedure, the Curia shall find the review application admissible if reviewing the violation of the law that affects the merits of the case is justified a) by the need to ensure the uniformity of jurisprudence or its further development, b) due to the specific gravity or social relevance of the legal issue raised, c) due to the need for the preliminary ruling procedure at the Court of Justice of the European Union, or d) because the decision contains a provision that deviates from the published case law of the Curia.

[33] According to Section 85(5) of Act I of 2017 on the Code of Administrative Court Procedure: "concerning the lawfulness of an administrative act carried out within the administrative organ's discretionary power, the court shall also review whether the administrative organ exercised its power within the limits of its authorisation to proceed under its discretionary power and whether the aspects and the causality of the assessment may be established from the document containing the administrative act."

guardianship authority, when making its decision, takes into account the fair interests of the person obliged to maintain contact and the person entitled to maintain contact, keeping in mind the best interests of child. In the procedure the guardianship authority is not bound to the submitted application, so it can decide on its frequency and duration differently from the application. (Curia Case Decision No. Kfv. II.37.709/2017/10 and Curia Kfv. 37.279/2020/13).

3. When deciding on the issue of contact, the child's best interest must be taken into account, which may conflict with the right of contact of the grandparent. It is not the best interest of the child to have contact that causes shock and significant harm to the child. The grandparent must create an emotional attachment in the child so that the child also feels and becomes aware that the lack of grandparental relationship means an irreplaceable loss not only for the grandparent, but also for the grandchild. (Supreme Court Case Decision No. Kfv. 40.141/2001).
4. In the grandparent's contact procedure, the facts need to be clarified carefully and in detail to ensure that a well-founded decision is made. Attention must be paid to parental contact, or the lack thereof, and to the grandparents' circumstances and relationship with the parents. Above all, however, it must be taken as a basis that the contact must serve the best interests of the child, and everything must be considered in this light. (Curia Case Decision No. Kfv. 37.249/2012/5).
5. The contact rights of the two sets of grandparents are independent of each other. (Curia Case Decision No. Kfv. III.37 333/2013/7).
6. In terms of the prohibition of discrimination and the requirement to apply equal treatment, grandparent status cannot be considered as a protected characteristic. In Hungarian society, grandparents cannot be considered a vulnerable, excluded group that suffers continuous and unjustified disadvantages; therefore, they cannot claim a violation of equal treatment if contact with the grandparent is regulated by the guardianship authority as supervised contact. The right to

contact between a child and a grandparent is a fundamental constitutional right, a child's right, and a basic human right, but – in the absence of additional facts – not an independent personality right. (Debrecen Court of Appeals Case Decision No. Pf.I.20.321/2019/8).

7. When considering the requests of relatives who are dissatisfied with contact, it is not the responsibility of the parents or other relatives entitled to contact that must be decided, but the resolution of an existing situation that harms the child's best interests. (Budapest Court of Appeals Case Decision No. Pf.9.20.366/2016/6).
8. The grandparent has the right to maintain contact independently and not jointly with the parent living separately, within the period of his/her contact. (Curia Case Decision No. Kfv. III.37.285/2013/7).
9. The Curia court states that none of the relevant legislation contains a provision regarding the relationship between parents and grandparents, nor does it indicate a sequence. The approach according to which the grandparent's contact rights can only be regulated if the parent's contact rights have already been settled, is wrong. It follows from the legal provisions that the parent living separately and the grandparent also have the right to contact, which in the case of the parent is settled by the court while the action for settlement of marital or parental custody is pending, and in the case of a grandparent's application by the guardianship authority, in the absence of an agreement. The dismissal of the request for parental contact or the withdrawal of the right to contact of the parent cannot provide a basis, for example, for the withdrawal of contact with the grandparents, or for taking measures of similar content. The Curia emphasises that **parental and grandparental contact are two separate and independent rights in themselves**, they are not dependent on each other, and there is no order in their regulation whether it is done by the court or the guardianship authority. The guardianship authority must decide on the application for grandparental contact, even if the court has not yet

decided on parental contact, or perhaps it will not. However, knowing the court's decision, the grandparent contact can be re-regulated and adjusted accordingly. The cohesion of parental and grandparental contact can be shaped and coordinated with knowledge of the parental contact order that will be settled later, so this reason does not create the need to wait for the judge's decision either. (Curia Case Decision No. 37.363/2018/8).

10. Conflicts between the child's parent(s) and the grandparent(s) cannot lead to the withdrawal of the right to contact with the grandparent. It is obvious that adults must settle their problems and disputes with each other – for the sake of the child, but regardless of the relationship. With this reasoning, the grandparent's right to contact cannot be denied. (Curia Case Decision No. Kfv. III.37.285/2013/7).
11. The grandparental contact rights cannot be derived from parental rights. It is the wrong point of view that contact with the grandparent can only be ensured if the parents' right to contact is not violated. With such an interpretation, the legal provisions ensuring the grandparent's contact would become empty, and in the absence of an agreement between the parties, the enforcement of the grandparent's rights would be impossible. The purpose of the contact is to maintain and further deepen the relationship with the grandparent, even if the parents do not want this due to the sour relationship. The child cannot be a tool on the side of the opposing parties in the existing conflict. (Debrecen Court of Appeals Case Decision No. Kfv. 702.222/2021/14).
12. Supervised contact is the appropriate form of contact between a grandparent and grandchild who did not know each other before. An hour of supervised contact per month is in the interest of the child and provides a suitable basis for the development of the relationship between the grandparent and the grandchild. According to this decision of the Curia, it is in the interest of the child to know the concerned grandparent and maintain a proper family relationship with him/her. (Curia Case Decision No. Kfv. 37.438/2020/7).

EVALUATION OF CONTACT RIGHTS OF GRANDPARENTS AND *DE LEGE FERENDA* PROPOSALS

Hungarian civil law guarantees the right of contact of grandparents among elder relatives in established law, according to the provisions of international legal conventions in force and the provisions of EU law.

The Hungarian jurisprudence consistently applies that the grandparent's right to contact is independent of the parent's contact rights and the grandparent's right to contact cannot be restricted because of the bad relationship of the parent and the grandparent. In Hungarian jurisprudence, the principle according to which the child's best interest is ahead of the grandparent's right to contact is consistently applied, so if contact with the grandparent is not in the child's best interest, the guardianship authority can reject the grandparent's request to have contact. To judge this question, the guardianship authority often employs an expert, who interviews witnesses, and the opinion of the child who is of sound mind must also be taken into account.

With regard to the right of contact of elder ascendants, the question arises as to whether the line can be drawn as to who can have contact with the child. The Civil Code ensures the right of contact for the grandparent. But can the great-grandparent's contact rights be limited on constitutional grounds?

It should be noted that the Fundamental Law of Hungary specifically provides, in several places, for the protection of families and relationships within the family. According to the fundamental rights catalog of the Fundamental Law of Hungary, "Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected." (Fundamental Law VI. Article (1)). The general conclusion regarding the protection of the family can be drawn from this, that the state must guarantee contact within the family, especially between those relatives who are in direct kin relationship, including the exercise of the great--grandparent's right to contact.

From which the general conclusion regarding the protection of the family can be drawn, that the state needs to guarantee contact

within the family, especially between those relatives who are in direct kin relationship, including the exercise of the great-grandparent's right to contact.

If due to the conflict between them the family members do not allow the elder family member to maintain contact with his grandchild or great-grandchild, then the possibility of the appropriate legal remedy mechanism must be ensured in the case of the family member who has suffered a violation of his or her rights. This means that in the absence of an agreement between the parents and the elder relative, the elder relative must be provided of initiating an administrative or civil proceedings settling contact.

On the one hand it would be well-founded to extend the range of persons entitled to contact to all elderly relatives who are in direct kin relationship,[34] because there is no constitutional basis for the law to withdraw the range of persons entitled to contact at the grandparent level. This proposal is harmonised with the provisions of the previously cited international legal conventions, in particular the Council of Europe's Convention on Contact concerning Children and with the European trend that has tended to widen the circle of persons who has right of contact.

On the other hand, the child's private life must also be taken into account when enlarging the circle of persons entitled to contact. If we imagine, if the child has to maintain contact with his separated parent, with his four grandparents and with his eights great--grandparents, then his life will be of a "series of contacts" and he will not have time for activities chosen by him, which is contrary to the child's rights. In view of all these points of view, this issue must be handled within reasonable limits, by coordinating the interests of all persons interested in this legal relationship.

In the area of contact rights, the range of elderly relatives entitled to contact must be clarified, but the interests of the child must be taken into account when extending the range of those entitled to contact. According to the UN Convention on the Rights of the Child, the child has a right, not an obligation, to maintain contact.

[34] According to Section 4:96(1) of Civil Code "Lineal kin relationship exists between those of whom one originates from the other."

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