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Legally protected cultural goods and bankruptcy proceedings

Prawnie chronione dobra kultury a postępowanie upadłościowe

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Abstrakt: Artykuł dotyczy ogólnych problemów prawnych związanych z celami prawnymi postępowania upadłościowego w związku z celami ochrony dziedzictwa kulturowego. Obydwa zagadnieniami zbudowane są przez zupełnie inne systemy wartości. Postępowanie upadłościowe ma na celu ochronę interesów majątkowych ograniczonej grupy ludzi, podczas gdy dziedzictwo kulturowe jest chronione dla obecnych i przyszłych pokoleń, bez względu na jego znaczenie handlowe. Niewypłacalność właściciela dóbr kultury jest problemem globalnym, ale krajowe przepisy dotyczące upadłości i przepisy dotyczące ochrony dziedzictwa kulturowego różnią się bardzo poważnie. Z tego powodu artykuł nie ogranicza się do żadnego konkretnego porządku prawnego. Omówiono kilka ważnych uniwersalnych kwestii: ograniczenia syndyka/zarządcy w zarządzaniu dobrami kultury będącymi częścią masy upadłości, status prawny dóbr kultury wyłączonych z masy upadłości, konsekwencje sprzedaży masy upadłości w przypadku braku tytułu własności masy upadłości.

Słowa kluczowe: bankructwo, niewypłacalność, syndyk/zarządca, dobra kultury, ochrona dziedzictwa kulturowego

Abstract: This paper deals with general problems of legal aims of bankruptcy proceedings in connection with the aims of heritage protection – issues built by completely different systems of values. Bankruptcy is designed for protecting pecuniary interest of a limited group of people, while cultural heritage is protected for present and future generations, despite its current commercial significance. In the global environment, bankruptcy of a cultural goods owner usually has a cross-border range but national bankruptcy legislations and laws devoted to heritage protection differ in very serious aspects. For this reason the paper is not

limited to any concrete legal order. There are discussed some important universal issues: limits for a trustee in managing cultural goods which are a part of bankruptcy estate, legal status of cultural goods excluded from bankruptcy estate, consequences of bankruptcy sale in the case of lack of bankrupt's ownership title.

Keywords: bankruptcy, insolvency, trustee, cultural goods, heritage protection

1. Introduction

Bankruptcy proceedings, involving liquidation of the bankrupt's assets, are aimed at maximizing satisfaction of the creditors.[1] In the bankruptcy proceedings, expenditure on maintaining assets should be limited and the obvious priority is to sell the bankrupt's estate quickly and profitably. Insolvency regulation on liquidation is dedicated to typical, common goods in commercial relations. However, the bankruptcy estate in some cases may include cultural objects which are subject to a special legal protection regime. This could be a matter of national and international law. *Prima facie* general purposes of liquidation of assets in the course of bankruptcy proceedings and general purposes of cultural objects protection may potentially remain on a collision course.

In the event of bankruptcy of a cultural institution or an owner of cultural goods there are to be distinguished two levels of legal problems. First, a platform for dealing with cultural goods. Secondly, a platform for dealing with other common property components, e.g. a museum building, which is not a protected monument, intellectual property rights, funds from donations, public subsidies, and ticket sales. In the latter case, standard bankruptcy rules apply.

It should be stressed that in internal law orders the bankruptcy ability[2] is – as a rule – not given to the State Treasury[3] or to certain public law institutions, such as museums, galleries, etc., while a significant part of the cultural heritage is state property and public entities property, which are not in position to become a bankrupt.[4] As a rule, museums[5] with the most valuable collections

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[1] R. Adamus, *Bankruptcy and Restructuring Law in Poland*, Societas et Iurisprudentia 2019, Vol. VII, issue 2, Trnava, Slovakia, p. 19, R. Adamus, *Likwidacja masy upadłości zagadnienia praktyczne*, Warszawa 2016, p. 17.

[2] The possibility of being subject to insolvency proceedings.

[3] W. Klyta, *„Upadłość" państwa*, in: Proces cywilny: nauka – kodyfikacja – praktyka: księga jubileuszowa dedykowana Profesorowi Feliksowi Zedlerowi, Warszawa 2012, p. 753-766.

[4] It is a general opinion. In some legal orders institutions of culture such as museums, art galleries, etc. are entitled to use some kinds of insolvency proceedings. As Philadelphia Inquirer announced on 5 March 2020 The National Museum of American Jewish History in Philadaelphia had filed for bankruptcy protection under Chapter 9 of the U.S. Bankruptcy Code https://www.inquirer.com/opinion/editorials/jewish-museum-philadelphia-bankruptcy-cultural-organizations-money-challenges-20200305.html

[5] W. Kowalski, *Pojęcie i zakres własności intelektualnej muzeów*, in: Kolekcje i zbiory muzealne: problematyka prawna, Opole 2015, p. 165-185.

are created as public law bodies and they receive public financial support. National goods of culture of great historical value are excluded from the trade (*res extra commercio*). However, museums can be erected and maintained by private associations[6] and persons. Important collections of cultural goods are very often inherited by persons with potential bankruptcy ability and they hold a private-owned status. Single items and whole collections of cultural goods are traded.[7] Currently, the trend of investing in works of art by entrepreneurs is more and more noticeable.[8] Investment in works of art is a way of money thesaurization. This paper will apply to some crucial aspects of bankruptcy proceedings of persons and entities who have bankruptcy ability and at the same time who are the private owners[9] or holders of legally protected cultural property. The discussed problem is connected with corporate bankruptcy and with consumer bankruptcy[10] of natural persons as well.

National legal orders regarding the protection of cultural property and bankruptcy regulations differ in many aspects. Thus the purpose of this study is not conducting a closer analysis of a specific legal order, but rather a general presentation of issues at the interface between the protection of cultural goods and bankruptcy proceedings.

2. Primacy of protection of cultural goods over protection of the creditors' interests

What should be the main and directional principle for resolving any possible collisions in the above-mentioned matter? It should be appropriate to start by presenting the social functions of bankruptcy law and cultural heritage protection law.

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[6] P. Stec, K. Dziewulska, *Status prawny muzeów kościelnych*, in: M. Jankowska, P. Gwoździewicz- -Matan, P. Stec (editors), Własność intelektualna a dobra kultury, Warszawa 2020, p. 633-646.

[7] P. Stec., *Kolekcja jako przedmiot obrotu cywilnoprawnego*, in: P. Stec, P. Maniurka (editors), Kolekcje i zbiory muzealne. Problematyka prawna, Opole 2015, p. 79-95; P. Stec, *Odpowiedzialność domu aukcyjnego za wady fizyczne dzieła sztuki*, Przegląd Prawa Handlowego 11/1997, p. 9-15; P. Stec, *Ochrona prawna nabywcy na licytacji*, Art&Business 12/1999; P. Stec, *25 lat rynku sztuki w Polsce z perspektywy prawnika*, Santander Art and Culture Law Review 1/2016 (2), p. 135-142.

[8] R. Benedikter, *Privatisation of Italian Cultural Heritage*, International Journal of Heritage Studies Vol. 10, No. 4, September 2004, p. 369–389; R. Mamarbachi, M. Day, G. Favato, *Art as an alternative investment asse*t, SSRN Electronic Journal, March 2008, p. 2; P. Stec, *Komercjalizacja muzealiów*, Muzealnictwo, Vol. 47, 2006, p. 214-223.

[9] E. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, Chicago Journal of International Law 213 (2007), p. 213; R. O'Keefe, E. Peron, T. Musayew, G. Ferrari, *Protection of Cultural Property*, Military Manual, Italy San Remo 2016, p. 4.

[10] R. Adamus *Consumer arrangement under Bankruptcy Law Act in Poland*, Sociopolitical Sciences, Moscow No. 6/2019, p. 76-81; R. Adamus, *Importance of payment morality in the Polish bankruptcy law*, Journal of Business Law and Ethics, New York, December 2019, Vol. 7, No. 1&2, p. 9-15.

Bankruptcy law is intended mainly to protect the economic (pecuniary) interests of only a limited group of people – countable creditors of the bankrupt. It should be stressed that insolvency law is about protecting particular financial interests. Creditors participating in commercial games bear a typical ordinary risk of economic loss. Financial interests are not eternal. On the contrary, pecuniary claims in the course of time could be terminated (expired). In some circumstances pecuniary claims could be cancelled by a relevant ruling of the court.[11] In reorganization proceedings, the majority of creditors may decide about reduction of their claims. One of the UNCITRAL's documents stipulates that "participants in insolvency proceedings should have strong incentives to achieve the maximum value for assets, as this will facilitate higher distributions to creditors as a whole and reduce the burden of insolvency. The achievement of this goal is often furthered by achieving a balance of the risks allocated between the parties involved in insolvency proceedings."[12]

When it comes to *ratio legis* of protection of cultural objects, it is about protecting the lasting interests of entire present communities and even future generations (an uncountable number of people).[13] Moreover, protection of non-pecuniary interests is at stake: protection is of a universal cultural value.[14]

The legal protection of cultural goods has its source in national legislation (administrative law, civil law, criminal law) and international agreements and conventions. It is a legal duty of states, public bodies and individuals as well. This protection has different intensities, in particular depending on the type of cultural asset and its uncontested artistic or historic value (it is important *praetium commune* not individual *praetium singularis*).[15] Historical background is very important for the shape of national legislation (plunder of national cultural goods as a result of wars, nationalization of cultural goods, etc.). Many kinds of common cultural goods are unprotected at all. Not every country fife or clay ocarina deserves a special legal treatment. As mentioned above the legal protection of cultural goods is provided on different levels: international and national (internal).[16] Here, the following documents should be listed: UNIDROIT

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[11] R. Adamus, *Debt relief thorough creditors' repayment plan in Poland*, Economic problems and legal practice, Moscow no. 6/2019, p. 130-136; R. Adamus, *Modes of debt relief for consumers in Poland*, Economic problems and legal practice, Moscow No. 6/2019, p. 137-142.

[12] *UNCITRAL Legislative Guide on Insolvency Law*, New York 2015, p. 10.

[13] K. Papaioannou, *The International Law on the Protection of Cultural Heritage*, International E-Journal of Advances in Social Sciences, Vol. III, Issue 7, April 2017, p. 258.

[14] D. Fincham, *Blood Antiquities Convention as a Paradigm for Cultural Property Crime Reduction*, Cardozo Arts & Entertainment, Vol. 37: 2, p. 300.

[15] W. Kowalski, *Monuments value as a criterion under national and international laws*, in: Heritage value assessment systems – the problems and the current state of research, Lublin 2015, p. 109-132.

[16] F. Franconi, *Public and Private in the International Protection of Global Cultural Goods*, The European Journal of International Law Vol. 23 No. 3 (2012), p. 720; J.H. Merryman, *Two Ways of*

Convention on Stolen or Illegally Exported Cultural Objects, adopted on 24 June 1995, UNESCO Convention on illicit traffic of cultural property adopted in 1970, UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage adopted 16 November 1972.

Cultural goods subject to legal protection are identified in different ways. This purpose can serve the general definition (general clause) of cultural goods. This can be done through an entry in the appropriate register, including the register kept for lost cultural goods.

In addition it should be reminded that, in some cases, the provisions of the insolvency law allow special treatment for certain components of the bankrupt's estate, e.g. when the estate includes assets that are significant from the point of view of state defense.[17] In other words, the special status of some assets of the bankruptcy estate forces their special treatment in the case of insolvency.

Considering the problem (1) of the subjective scope of beneficiaries of cultural property protection and beneficiaries of bankruptcy proceedings, (2) the type of interest being protected, (3) social significance, (4) the rank of the legal act introducing protection, the following conclusions can be made: bankruptcy authorities (including a trustee, a judge – commissioner and bankruptcy court) should generally respect all the restrictions arising from applicable provisions relating to cultural objects; in a situation where there are legally protected cultural goods in the bankruptcy estate, it should be recognized that the bankruptcy authorities should, on their own initiative, take all the necessary steps to treat these goods properly, in accordance with authoritative provisions of public and civil law. Legal regulations often introduce certain provisions limiting the ownership right of cultural goods. Limits may concern all attributes of the ownership right.

The discussed problem could be illustrated with the case of the Detroit Institute of Arts.[18] The City of Detroit, as the owner of one of the largest municipally-owned museums in the United States (the Detroit Institute of Arts), with an art collection valued at more than one billion dollars, filed for bankruptcy protection proceedings with an estimated 18 billion dollars debt. The procedure of bankruptcy protection involves demonstrating insolvency and a desire to

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Thinking About Cultural Property, The American Journal of International Law, Vol. 80, No. 4 (Oct., 1986), p. 831-853; L. Casini, "*Italian Hours*": *The globalization of cultural property law*, International Journal of Constitutional Law, Volume 9, Issue 2, April 2011, p. 369.

[17] R. Adamus, *Zagadnienie praw własności intelektualnej przedsiębiorców przemysłu zbrojeniowego w postępowaniu upadłościowym*, in: Własność intelektualna w prawie upadłościowym i naprawczym, M. Załucki (editor), Warszawa 2012, p. 13-27.

[18] L. Stolongo, *Muses in Bankruptcy Court: a look at US arts and cultural institutions finding themselves in bankruptcy and out.* https://itsartlaw.org/2014/03/28/muses-in-bankruptcy-court-a-look-at-us-arts-and-cultural-institutions-finding-themselves-in-bankruptcy-and-out/ accessed: 10.03.2020.

effect a plan of debt adjustment, and negotiating, attempting to negotiate, or establishing the impracticality of negotiating, in good faith with creditors holding the majority of interest in claims. The City of Detroit considered a concept of selling out the collection of the Detroit Institute of Arts. All pieces of art were acquired with funds provided by Detroit. Creditors generally opted for selling the collection. The Detroit Institute of Arts immediately started public fundraising in order do avoid selling out the collection. It was made an agreement to transfer the ownership of the museum to a nonprofit organization to avoid the threat of selling out goods of culture to cover municipal debts.

In the case of insolvency there arise questions of how to protect cultural goods of a responsible owner, how to maintain unharmed cultural goods during bankruptcy proceedings and how to ensure purchasing cultural goods from the bankruptcy estate by a responsible institution.

3. Cultural objects and the applicable law

As a rule ownership and other rights *in rem* are under the law of the country in which their subject is located (*lex rei sitae*).[19] Thus, the location of the subject of property and other rights *in rem* is the criterion by which the proper legal order is determined. Adopting, as a link, the location of the subject of rights (*situs rei*) for the general norm indicating the material statute is a solution widely accepted in many legal orders.[20] *Situs rei* may determine a concrete national law order or international law if the state where cultural goods are located is a party to international convention protecting heritage. At the same time – as a rule – the law of the country of the opening of insolvency proceedings shall determine in particular the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings (Article 7 sec. 2b Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings).[21] *Lex concursus* therefore determines

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[19] B. Akermans, E. Ramaekers, *Lex Rei Sitae in Perspective: National Developments of a Common Rule?,* Maastricht European Private Law Institute Working Paper No. 2012/14; B. Laukemann, '*Die lex rei sitae in der Europäischen Erbrechtsverordnung – Inhalt, Schranken und Funktion*', Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law Working Paper Series MPILux Working Paper 2 (2014), available at: www.mpi.lu, accessed: 10.03.2020.

[20] J. Kosik, *Zagadnienia prawa rzeczowego w prawie prywatnym międzynarodowym z 1965r.,* Acta Universitatis Wratislavientis No 332, Prawo LVII, Warszawa–Wrocław 1976, p. 30; J. Gołaczyński, *Jurysdykcja w sprawach dotyczących praw rzeczowych oraz statut rzeczowy w prawie wspólnotowym na przykładzie prawa upadłościowego*, Prawo 308, 2009, p. 162.

[21] B. Wessels, *The Changing Landscape of Cross-border Insolvency Law in Europe*, Juridica International XII/2007 p. 117; E. Oprea, *The Law Applicable to Transaction Avoidance in Cross-Border*

which assets are included in the bankruptcy estate, however, as a rule, the legal status of the item as cultural goods is determined by the law of the place where the item is located (generally ***lex concursus*** determines all the effects of the **insolvency** proceedings, both procedural and substantive, on the persons and legal relations).

The legal regulations introducing the principles of protection of cultural goods and the sanctions applied usually define the subject of protection. Thus, there are many legal definitions of cultural objects[22] on the international and national level. Each of them is important because they determine the concrete scope of legal protection. "Cultural goods" in Point 3 of the preambule of Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods[23] are understood as "a part of cultural heritage and are often of major cultural, artistic, historical and scientific importance. Cultural heritage constitutes one of the basic elements of civilisation having, inter alia, a symbolic value, and forming part of the cultural memory of humankind. It enriches the cultural life of all peoples and unites people through shared memory, knowledge and development of civilization." Under Article 2 of the UNIDROIT Convention on stolen or illegally exported cultural objects (Rome, 24 June 1995) "cultural objects are those which, on religious or secular grounds, are of importance to archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention". Some most valuable cultural goods are put in special registers on the international and local level.[24]

Non-physical or intangible goods of cultural property[25] as a rule cannot be a part of bankruptcy estate (unless they can be subject to rights, including property rights, and have property value).

The components of the bankruptcy estate may be cultural goods that are both movable[26] and immovable (real estate). Movable cultural objects may include in

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Insolvency Proceedings, in: V. Lazic, S. Stuij (editors) Recasting the Insolvency Regulation. Short Studies in Private International Law. T.M.C. Asser Press, The Hague 2020.

[22] K. Papaioannou, *The international*…., p. 258; R. McCain, *Defining Cultural and Artistic Goods*, in: V.A. Ginsburgh, D. Throsby, (editors), Handbook of the Economics of Art and Culture, 2006, p. 147-167.

[23] Official Journal of the European Union dated on 7.6.2019 L 151/6.

[24] The National Heritage List for England (NHLE) is the official register of all nationally protected historic buildings and sites in England – listed buildings, scheduled monuments, protected wrecks, registered parks and gardens, and battlefields.

[25] C.A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, Journal of Intellectual Property Law, March 1994, p. 298.

[26] A. Jagielska-Burduk, *Zabytek ruchomy*, Warszawa 2011, p. 9.

particular: works of fine arts, artistic crafts and applied arts, numismatic items, historical souvenirs (especially military items, banners, seals, badges, medals), technical devices (in particular, means of transport and machines and tools providing material culture, characteristic of old and new forms of economy, documenting the level of science and civilization development), library materials, incunabula, manuscripts, maps, music scores, musical instruments, folk art and handicraft products and other ethnographic objects, etc. Cultural goods which are legally protected can be linked in with religion.[27]

A special kind of cultural objects are exhibits. Exhibits are usually defined as movable and immovable property of a museum which are entered in the inventory of museum exhibits. In principle, exhibits are a national heritage and usually have the legal status *res extra commercio*. However, under certain conditions exhibits can sometimes be traded. State and local government museums can make exchanges, sale or donation of museum exhibits, after obtaining the relevant permission of the competent authority.

4. Limits for the owner of legally protected cultural goods

Ownership (*dominium*, *prioprietas*)[28] is the widest, basic right in property, allowing the owner to use and dispose of the property with the exclusion of other persons (*ius disponendi*), under which the owner enjoys maximum rights over the property. A sign of using property is the right to hold property (*ius possidendi*), use (*ius utendi*), receive benefits and other income from things (*ius fruendi*) and the factual disposal of property (*ius abutendi*) including processing, changing and even destruction. In turn, the regulation means the right to dispose of property (e.g. transfer, waiver or disposition in the event of death) and to encumber property by establishing, e.g. a pledge, mortgage or by carrying out actions – obligations regarding property with obligatory effects, i.e., lease, rental, loan. These rights do not constitute the limits of the right to property, which is defined by the applicable legislation. As a rule, owner's right does not expire over time. The property right of legally protected cultural goods is subject to some restrictions in the public interest.[29]

Ownership (*dominium, prioprietas*) must be distinguished from possession (*possesio*). Ownership therefore determines the legal status. Possession is only

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[27] P. Stec *Prawo kościelnych dóbr kultury – niedocenione pole badawcze*, in: K. Dola, E. Mateja (editors.), Imago – vox demonstrans, Opole 2018, p. 437-448.

[28] Roman law influenced both common law and continental law: P. Stein, *The influence of Roman Law on the common law*, https://openaccess.leidenuniv.nl/bitstream/handle/1887/36630/240.pdf?sequence=1, accessed: 10.03.2020; H. Hausmaniger, R. Gamauf, *Casebook zum römischen Sachenrecht*, Wien 2003. Thus, the essence of the ownership could be desribed using development of Roman law.

[29] K. Zeidler, *Prawo ochrony dziedzictwa kultury* Warszawa 2007, p. 231.

a factual state, so the possessor has physical power over property, but that power does not mean that he has the legal title to property.

In the case of bankruptcy – as a general rule – the bankrupt (the owner) is limited in exercising their owner's rights. Management over bankrupt's assets is the exclusive duty of the trustee. The Regulation of 20 May 2015 on insolvency proceedings applies to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed.

Cultural goods could be a part of bankrupt's estate. In such a case an appointed trustee should take a proper care of them and respect limits established by the law. A trustee should insure cultural goods against possible risks. A quite seroius problem in practice is a proper valuation of a "priceless" item for insurance purposes.

4.1. Limits concerning *ius possidendi*

Ownership gives the right to hold property (*ius possidendi*). However, the owner of cultural goods can be limited in exercising this competence. Cultural goods – on the basis of law or on that of a private agreement – could be exhibited for public viewing in the museum. The trustee appointed by the bankruptcy court could be deprived of holding assets belonging to the bankrupt as well.

Cultural goods belonging to private individuals who have the owner's title to them may be kept in the museum's deposit. Thus, the owner of a cultural object (bankrupt) may not be its actual holder on the day when bankruptcy was opened. Two questions arise in these circumstances. First, what is the impact of the owner's bankruptcy on the deposit agreement and the deposit based on the provisions of the law? It seems that a deposit agreement with a museum, the subject of which are cultural goods, cannot be treated as a typical lend term-agreement (*commodatum*). However, the solution to this dilemma depends on the concrete shape of the proper law and the content of the agreement. Nevertheless, the special subject of the agreement should always be taken into consideration. It seems that a deposit based on provisions of law is binding for the trustee and the other bankruptcy authorities. Secondly, there is the following question: can a trustee sell to a third party a piece of cultural goods which is held by a museum? The answer to this question should be in the affirmative. It is possible to transfer the owner's rights for the buyer of a thing which is held by the third person. *Traditio corporalis* – which is about giving a thing away from hand to hand – is only one of the forms of transfer of possession.

4.2. Limits concerning *ius abutendi*

The right to factual disposal of property is the next attribute of the owner. The owner of a legally protected cultural object cannot destroy it, damage or make changes to it. On the contrary, the owner is usually obliged to secure in a special manner a legally protected cultural object against damage, destruction, loss or theft. This means an obligation to bear the costs of maintaining the assets, including specialist maintenance, protection, etc. Cultural goods should be subject to proper care and protection.[30] Possession of cultural objects usually involves their conservation, restoration and conducting construction works if necessary. Persons with legal title to the monument, resulting from ownership, are particularly obliged to finance conservation, restoration and construction works at the monument.

A trustee should keep cultural goods in proper conditions against any kind of destruction: because of humidity, dryness, fire. etc. Anti-theft protection is essential as well. In the case of expiry of necessary contracts because of bankruptcy a trustee should immediately renew them. Preserving legally protected cultural goods is a public duty. If it is necessary, a trustee should cover all necessary costs from bankruptcy estate even with harm to the creditors' interests. However, in such a case a trustee probably could demand a repayment from public funds.

It is possible to perform – by competent authorities – inspections of some cultural objects. Proper authorities are usually entitled to access the property if there is reasonable suspicion of destruction or damage to the cultural objects on the premises. Their duty could be assessment of the condition, preservation and protection of the cultural objects or checking compliance of all actions taken at monuments with the scope or the conditions set out in the issued decisions or other authority rulings and approved documentation.

Bankruptcy has a cross-border dimension. The effects of bankruptcy may conflict with the institution of legal protection of movable property of historical, artistic or scientific loans borrowed from abroad for a temporary exhibition organized on territory of the country granting legal protection. In some cases the owner of cultural goods could not be allowed to change the place of keeping of cultural goods of previous consent of special authority.

The national legislator may provide that one may apply for a targeted subsidy from the state or local government budget for co-financing conservation, restoration or construction works at some cultural goods. Grants for co-financing conservation, restoration or other works on cultural goods could be granted to the bankruptcy authority. A trustee should take advantage of all such possibilities in order to reduce the costs of keeping cultural goods from bankruptcy estate.

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[30] J. Brudnicki, *Prawna opieka nad zabytkami – wybrane aspekty*, http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-e69a5f03-5faa-4122-8ccf-8ff101ec8f96/c/Ochrona_Zabytkow_2014_n2_s049-072.pdf, p. 49, accessed: 10.03.2020.

4.3. Limits concerning *ius utendi*

Depending on the kind of cultural goods, it is possible to use them but under certain conditions. In some cases cultural goods are not intended for common use. They can only be exhibited.

It is very often forbidden to carry out conservation works, restoration, construction and other activities that could lead to violation of the substance or a change in the appearance of the given monument.[31]

Owners of cultural objects are usually obliged by law to provide conditions for scientific research and documentation of the cultural object. It limits the possible use of the owner.

Utility of the immovable monument may involve creation of documentation specifying the condition of the immovable monument and the possibilities of its adaptation, including historical functions and values of this monument.[32] There are frequently established bans and restrictions regarding carrying industrial, agricultural or commercial activities.

4.4. Limits concerning *ius fruendi*

The entity running a museum may charge fees for admission to it. However, individual regulations may introduce some restrictions or exemptions, e.g. that on one day of the week admission to permanent museum exhibitions is free. Sometimes the legislator imposes the obligation to apply certain concessions to particular categories of people. Similarly, the entity running the museum may charge fees for sharing museum images with the use of IT data carriers. Legal regulations may introduce a solution according to which direct access to images of museum exhibits by electronic means is free.

4.5. Limits concerning *ius disponendi*

National legislation grants museum operators priority of buying cultural goods.[33] Some museums may have pre-emptive rights to purchase from entities conducting activity consisting in offering cultural goods for sale within a specified period from the date of notification by the museum of the intention of purchase.[34]

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[31] M. Sabaciński, *Kilka uwag o realizacji przepisów ochrony zabytków. Problemy praktyczne*, Acta Universitatis Wratislavientis No. 3445, Przegląd Prawa i Administracji LXXXIX, Wrocław 2012 p. 39.

[32] K. Zalasińska, *Prawna ochrona zabytków nieruchomych w Polsce*, Warszawa 2016.

[33] A. Jagielska-Burduk, D. Markowski, *Wybrane zagadnienia dotyczące sposobów nabywania własności dzieł sztuki i zabytków przez muzea*, Acta Universitatis Nicolai Copernici, Zabytkoznawstwo i Konserwatorstwo XLIV, Toruń 2013, p. 531.

[34] W. Szafrański, *Regulaminy aukcyjne na polskim rynku sztuki*, in: W. Kowalski, K. Zalasińska (editors), Rynek dzieł sztuki, Warszawa 2011, p. 79; P. Stec, *Szczególne uprawnienia muzeów rejestrowanych w zakresie obrotu dziełami sztuki*, Muzealnictwo 2005, No. 6, p. 182.

Such an entity may go bankrupt. This problem may be regulated differently. The following model can be pointed out: in the case of exercising the right of priority, the acquisition by a museum followed by the price at the time of notification of the intention of purchase. Some museums may have a pre-emption right auctioned off. The declaration regarding exercising the right of pre-emption should be submitted by the museum immediately after the auction, not later, however, than until the end of the entire auction. The law may provide that sales made in breach of the right of priority shall be invalid. Finally, permanent export abroad of some objects of culture requires acceptance on the part of proper authority.[35]

5. The concept of exclusion of some types of cultural goods of bankruptcy estate

In some legal orders there is in force a theory of exclusion of certain cultural goods of crucial value from the bankruptcy estate. A movable property subject to legal protection – pursuant to the relevant legal provisions – may not be subject to attachment for securing in civil and administrative proceedings, enforcement in judicial and administrative enforcement proceedings, attachment in order to secure property penalties, penal measures and claims for damages in criminal proceedings.

Cultural goods excluded from the bankruptcy estate should be kept by the bankrupt himself. In the case of lack of funds the bankrupt should immediately transfer cultural goods to a responsible institution. Besides, at the end of bankruptcy proceedings the insolvent entity is to be dissolved. It seems that national legal orders should provide provisions which allow museums to take over cultural goods excluded from the bankruptcy estate. If there is no such legislation, transfer of cultural goods can be based on a contract.

6. Cultural goods in the factual possession of the bankrupt to which the third party holds the legal title

The bankruptcy trustee takes over all components of the debtor's property, which may include items for which there are *rei vindication* claims of third parties.[36] The bankrupt could be a holder of items with no legal title to them.

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[35] P. Stec, *Kontrola eksportu dóbr kultury w prawie francuskim*, Ochrona Zabytków 2/1997, p. 110-115.

[36] P. Stec, *Odszkodowanie z tytułu zwrotu dobra kultury w konwencji UNESCO z 1970 r., konwencji UNIDROIT z 1995 r. oraz dyrektywie 93/7/EWG*, in: J. Pisuliński, P. Tereszkiewicz, F. Zoll (editors), Rozprawy z prawa cywilnego, własności intelektualnej i prawa prywatnego międzynarodowego. Księga pamiątkowa dedykowana Profesorowi Bogusławowi Gawlikowi, Warszawa 2012, p. 247-268; P. Stec, *Postępowanie w sprawach zwrotu dóbr kultury wywiezionych nielegalnie z terytorium państwa człon-*

Bankruptcy authorities should hand over cultural goods that are subject to release. This applies to, e.g. a treasury when it was found (*inventio thesauri*) by the bankrupt if the applicable law provides that the ownership of such a treasury is acquired by the state.[37] This applies to works of art subject to recovery. Cultural goods could have been subject to war plunder[38] and for those reasons should be returned to the proper owner or his successors. Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012[39] ensures the physical return of the cultural objects to the Member State from whose territory those objects have been unlawfully removed, irrespective of the property rights applying to such objects. Thus, the trustee should return stolen goods.[40]

7. The concept of pre-emption rights in the case of bankruptcy proceedings

The concept of pre-emption rights of most valuable cultural goods in the case of bankruptcy proceedings or similar enforcement proceedings against the owner of cultural goods should be promoted. Pre-emption rights should cover the collection as a whole (primacy of purchasing the whole collection) and every single item of the collection. Pre-emption rights should be given for a national museum or other museums. Pre-emption rights should concern cultural goods located on the territory of the state, where a national museum (or another museum) is seated provided that such a location does not violate any rules (in particular concerning illegal cross-border transfer). In the case of an illegal transfer of cultural goods pre-emption rights should be granted to an institution from the state of origin of the cultural goods. Such pre-emption rights should be introduced on the international law level.

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kowskiego Unii Europejskiej – zagadnienia wybrane, in: K. Zeidler (editor), Prawo ochrony zabytków, Warszawa – Gdańsk 2014, p. 395-406.

[37] J.M. Kleeberg, *The Law and Practice Regarding Coin Finds, Treasure Trove Law in the United States*, http://www.muenzgeschichte.ch/downloads/laws-usa.pdf Accessed: 10.03.2020.

[38] W. Kowalski, *Tytuł prawny Polski do zabytków wywiezionych z Wrocławia pod koniec i po zakończeniu II Wojny Światowej,* Acta Universitatis Wratislavientis No. 3440, Przegląd Prawa i Administracji LXXXVIII Wrocław 2012, p. 57; R. Sasin, *Odzyskiwanie dzieł sztuki*, Kontrola Państwowa 2017, No. 6, p. 92; P. Stec, *Problem likwidacji skutków II wojny światowej w zakresie dóbr kultury i archiwaliów w stosunkach polsko-niemieckich w świetle Traktatu o dobrym sąsiedztwie i przyjaznej współpracy*, in: W. Góralski (editor), Przełom i wyzwanie. XX lat polsko-niemieckiego traktatu o dobrym sąsiedztwie i przyjaznej współpracy, 1991-2011, Warszawa 2011, p. 393-417; P. Stec, *Zwrot dóbr kultury wywiezionych bezprawnie z terytorium UE*, Prawo Europejskie w Praktyce 7-8/2010.

[39] Official Journal of the European Union L 159/1.

[40] A. Grajewski, *Odzyskiwanie skradzionych dóbr kultury po latach od ich kradzieży*, Acta Universitatis Lodziensis, Folia Iuridica 8/2018, p. 35.

The next crucial aspect is about the valuation of cultural goods for the purpose of exercising pre-emption rights.

8. *Bona fide* of a purchaser of cultural goods from the bankruptcy estate

A bankruptcy sale is based on the concept of expiration of mortgages, pledges, register pledges and other burdens on the subject of the sale. What are the results of selling by a trustee of cultural goods to which the bankrupt had no legal title? There is a generally accepted rule *nemo in alium plus iuris transfere potest quam ipse habet*. However, the law accepts some exclusions. *Bona fide* of the purchaser was a subject of regulation in Roman law[41] which influenced the *common law* system and continental law system as well. *Common law* generally accepts the rule that an innocent (unconscious) party that purchases property without notice of any other party's claim to the title of that property gains the ownership title upon due inspections which ought reasonably to have been made.[42] Continental law introduces similar solutions.[43]

It should be beyond any doubt that a purchaser of cultural goods is obliged to be diligent and cautious while checking the authenticity of the purchased item and its source, and in particular verifying that the seller has the right to dispose of it.[44]

In this aspect there are crucial legal consequences of creating national and international registers of cultural goods. There are generally two categories of them.[45] Firstly, in many countries there are *sui generis* preventive registers as an important legal form of monuments protection (*ex ante* protection). They are created to prevent an illegal circulation of cultural goods or damage during a war, therefore they play a particularly significant role in countries affected

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[41] M. Chlamtacz, *O nabyciu owoców przez posiadacza w dobrej wierze w klasycznem prawie rzymskim z uwzględnieniem prawa cywilnego austriackiego i niemieckiego*, Lwów 1903, p. 52.

[42] F.A. Whitney, *Value and the Doctrine of Bona Fide Purchase*, St. John's Law Review, Vol. VII, 1933 No. 2, p. 181.

[43] G. Dari-Mattaci, C. Guerriero, *Law and Culture: A Theory of Comparative Variation in Bona Fide Purchase Rules*, Amsterdam Law School Legal Studies Research Paper No. 2014-57, Amsterdam Center for Law & Economics Working Paper, Paper No. 2014-04.

[44] W. Kowalski, *Nabycie własności dzieła sztuki od nieuprawnionego*, Kraków 2004, p. 233-248; K. Zalasińska, *Dobra wiara jako przesłanka ochrony nabywców kradzionych dzieł sztuki*, Palestra 2010, No. 5/6, p. 45-46.

[45] A. Lizak, *Prawne aspekty utworzenia rejestru utraconych dóbr kultury*, Przegląd Prawniczy Uniwersytetu Warszawskiego, Year XVI, No. 1/2017, p. 117; K. Górniak, *Szczególna ochrona własności w ramach Rejestru Utraconych Dóbr Kultury,* Transformacje Prawa Prywatnego No. 2/2018, p. 5; B. Gadecki, *Nowe regulacje dotyczące problematyki zabytków w związku z wejściem w życie ustawy o rzeczach znalezionych*, Ius Novum 2016, No. 4, p. 186.

by armed conflicts. They are not always run by the country authorities themselves, but are often a product of international experts.[46] Secondly, the role of registers in which goods already lost have been entered is different. In such a case protection seems to be a follow-up and the register itself is intended to be a helpful tool in the recovery process of lost heritage (*ex post* protection). Very often, these types of registers (made available to relevant institutions, e.g. museums, auction houses, the police) are mainly informative.[47] The public content of such registers should exclude *bona fide* of the purchaser.

However, some legal orders introduce a solution that no one, even if the conditions of the existence of good faith and prerequisites for the passage of time are met, can purchase cultural property from an unauthorized seller.[48] Another important civil law solution is to exclude the limitation period for recovery claims against cultural goods entered in the register.[49]

Results of a bankruptcy sale are designed by proper *lex concursus*. Nevertheless, it is not possible to omit legal limits of purchasing cultural goods from an untitled person by a sale from the bankruptcy estate.

Conclusions

It should be beyond any doubt that protection of cultural heritage should have primacy over protection of pecuniary interests of creditors. Insolvency of the holder or that of the owner of cultural goods are not daily cases. However, they do happen in practice. Direct bankruptcy legislations evade this matter, although proper interpretation of the existing law allows giving priority to the protection of cultural goods. A trustee (bankruptcy authority) should not be a machine aimed at simple selling out the bankruptcy estate. On the contrary, liquidation of the bankruptcy estate should not infringe on either international or national heritage protection law. From this point of view an academic discussion seems to be necessary. This paper – due to its limited size – can only indicate the most important issues.

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[46] A. Lizak, *Prawne...*, p. 117.

[47] Ibidem.

[48] Ibidem, p. 128-129.

[49] Ibidem, p. 141.

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Legislating in hypertext[1]

Legislacja w hipertekście

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Abstrakt: Współczesne badania w zakresie stanowienia prawa w formie elektronicznej potwierdzają tezę, że teksty prawne udostępniane za pomocą różnego rodzaju systemów informacji prawnej tworzą strukturę hipertekstu. Z kolei badania nad hipertekstami wykazują, że zastosowanie tej technologii podważa strukturalistyczne teorie tekstu, które leżą u podstaw tradycyjnych zasad techniki legislacyjnej oraz dyrektyw wykładni prawa. W związku z tym w artykule omówiono sposób, w jaki hipertekst można wykorzystać do dostarczenia informacji prawnych. W szczególności poniższe rozważania koncentrują się na analizie zastosowania hipertekstu do przetwarzania dokumentów prawnych (w tym cyfrowej reprezentacji tekstów prawnych) oraz możliwościach, które pojawiają się w tym obszarze w związku z opracowaniem tzw. hipertekstów adaptacyjnych. Na tej podstawie podjęta została próba odpowiedzi na pytanie, w jakim zakresie i w jaki sposób można zastosować hipertekst adaptacyjny do prezentacji i analizy tekstów prawnych oraz czy zastosowanie tego rozwiązania może wpłynąć na tradycyjne praktyki prawne związane z opracowywaniem i interpretacją tekstów prawnych.

Słowa kluczowe: hipertekst, hipertekst adaptacyjny, ustawodawstwo, hipermedia, tekst prawny, przetwarzanie i prezentacja informacji

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Abstract: Modern research on lawmaking in electronic format confirms the thesis that legal texts made available by means of various types of legal information systems form a hypertext structure. Furthermore, research on hypertexts confirms that the use of this technology undermines the structuralist theories of text that underlie traditional methods of legislation and interpretation of law. In this article, an attempt is made to show how a hypertext can be used to provide legal information and how it can affect traditional legal practices connected with drafting and interpreting legal texts. In particular, the considerations will focus on the analysis of the use of hypertext for the processing of legal documents (including digital representation of legal texts) and the possibilities that arise in this area in connection with the development of the so-called adaptive hypertexts. On this ground the question is analyzed whether and, if so, to what extent and in what way an adaptive hypertext can be used for the presentation and analysis of legal texts.

Keywords: hypertext, adaptive hypertext, legislation, hypermedia, legal text, information processing and presentation

1. Introduction

Answering the question, to what extent an adaptive hypertext can be used in processing legislation, should take into consideration not only technical aspects of the issue, but also its cultural and, in particular, legal determinants. It is so because processing of legal texts in an electronic system requires both digitalization of legal information and virtualization of legal documents. Legal documents in an electronic format have to meet not only requirements arising from technical standards, developed methods and approaches for legal text processing – thus a possibility of implementation for real use. They have to meet also certain formal requirements, provided for in the law and some general requirements imposed on texts functioning in particular interpretative culture. After all texts are not random sets of linguistic expressions, but rather limited and coherent sequences of linguistic signs which, as a whole, are able to signal a recognizable communicative function.[2] Therefore, legal texts, as all other texts functioning in a particular culture, have to fulfil requirements of textuality. It is one of the reasons why texts visualized on users' screen usually mimic written or printed texts, including international standard paper sizes.[3] One has to be aware, however, that the requirements of textuality can determine both semantics, syntactics and pragmatics of legal texts. Hence, the principles of legal drafting functioning in a legal culture directly or indirectly incorporate these requirements and imply particular forms of their realization. It is so be-

[2] K. Brinker, *Linguistische Textanalyse. Eine Einführung in Grundbegriffe und Methoden*, Erich Schmitt, Berlin 1988, p. 17.

[3] ISO 216:2007, *Writing paper and certain classes of printed matter – Trimmed sizes – A and B series, and indication of machine direction*, International Organization for Standardization, https://www.iso.org/standard/36631.html, accessed: 15.04.2020.

cause compatibility between principles of legal drafting and the requirements of textuality condition to a great extent the effectiveness of communication of legal regulations. The problem is that information and communications technologies (ICT) change mechanisms of drafting and interpreting texts and thus disturb the traditional relationships between them functioning tacitly in the legal culture. It is worth reminding that architectural patterns (widely used in software engineering), which represent in practice high level structures of ICT systems,[4] are based, in particular, on separation from an application the level of information (data) processing and the level of visualization of output information (data). It opens a way to changing only a visualization layer (keeping the database unchanged) in relation to fixed criteria and possible external factors, time, used IT standards/protocols/interfaces, and also application of software used for reading a legal text (i.a. word processors, portable document format viewers, office suites based on cloud storage services) which may not have features to support certain functionalities (for example, footnotes or also text formatting). In addition, legal text presented for a user can be produced by extraction of consistent part, for example a block of text, from various resources (including heterogeneous and distributed ones), thus hyperlinks included may refer to not constant (in time) content and the recommended document structure. Moreover, the content and presented structure of a legal document may differ in relation to a used machine (desktop computer, mobile device, etc.).

All this means that implementation of official adaptive hypertexts into legal practice ultimately will require an alteration of traditional ways of drafting, disclosing and reading legal provisions. Please note that the notion of text in general, and legal text in particular, is commonly associated with the phenomenon of written communication, that is not only with the idea of executed speech, but also recorded and separated speech.[5] From this perspective, a text is a product of communicative action rather than interaction or interpretation.[6] This means, that a text is neither an accidental event taking place here and now nor a result of interpretation. In short, it is not necessarily interaction-oriented. The generally shared belief of lawyers is that text is a self-sufficient, semantically autonomous, continuous, linear and finite entity. Consequently, texts function in the legal culture as a ready-made product. Hypertexts in general and adaptive hypertexts in particular do not fit in this picture. Paradoxically, in many respects, they resemble oral texts a lot more than written or printed

[4] See more: I. Gorton, *Essential Software Architecture*, Springer, Springer, Berlin–Heidelberg 2011.

[5] A. Okopień-Sławińska, *Semantyka wypowiedzi poetyckiej*, Universitas, Kraków 2001, p. 16.

[6] D. Viehweger, *Zur semantischen Struktur der Texts*, in: F. Danes, D. Viehweger (Hrsg.), *Probleme der Textgrammatik II*. Studia grammatica XVIII. Akademieverlag, Berlin 1977, p. 107; S.J. Schmidt, *Texttheorie*, Fink, München 1973, p. 145 ff.

ones. It is so, because they are rather dynamic systems then static structures. Although in hypertexts the final information passed to the user is compatible with input requirements, assumed general scheme of information flow in the system and structure of presentation, such information has also a random component, which is dependent on features of a particular user (a person), hardware and software environment and the time in which the information is retrieved, processed, presented and read by the stakeholder.

Hypertexts are open. It means they do not have a definite beginning or end, they are structurally discontinuous, the information flow is not established, the final information that will reach the stakeholder is unknown. Structural discontinuity is especially visible in the case of adaptive hypertexts which combine the hypertext system with the concept of adaptive systems[7] (complex adaptive systems change their behavior in response to their environment[8]). It needs remembering, though, that while traditional hypertexts were still limited to providing the user with tools allowing free exploration of the information by browsing a complex network of texts nodes, the task of adaptive systems was to adapt the information to the user and provide them with relevant information,[9] dedicated and personalized (in relation to the registered user's experience) and also adapted to current information environment (data stored in databases and related attributes like timeliness, validity, usefulness, consistency and complexity).

2. A legal text in hypertext

Although there is some disagreement in legal theory what can count as the most basic element of a legal text, let us accept for the sake of our analysis that regardless of whether the most basic element of a legal text is a legal provision, or even a phrase not having the form of a legal provision, a legal text, as all other texts, are indeed hyper-sentences constructs.[10] From this perspective, the essence of legal texts is expressed in relations between units more complex than single legal provision. Although such relations may not have a formal character, they still determine interdependencies between practices of writing and reading legal texts. This is the main reason why they should be considered when an adaptive hypertext of legal documents is to be created. It must be noted that

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[7] See more in I. Mareels, J.W. Polderman, *Adaptive Systems. An Introduction*, Birkhäuser, Boston 1996.

[8] Y. Bar-Yam, *Concepts: Adaptive*, The New England Complex Systems Institute (NECSI), Cambridge, MA, http://necsi.edu, accessed: 15.04.2020.

[9] See more in P. Brusilovsky, *Methods and Techniques of Adaptive Hypermedia*, in: P. Brusilovski, A. Kobsa, J. Vassileva (eds) Adaptive Hypertext and Hypermedia, Springer, Dordrecht 1998, p. 1-43.

[10] I. Rosengren, *Texttheorie*, in: P. Althaus, H. Henne, H.-E. Wiegand (Hrsg.), Lexikon der germanistischen Linguistik, Niemeyer, Tübingen 1980, p. 275 ff.

these relations not only define the scope of a particular legal text, but also its composition, and thus help to delineate in it particular microstructures and their mutual interdependencies, which determine its normative meaning.

Even though the question of what constitutes a smallest part of a legal text is relevant for our considerations, one has to bear in mind that both in legal theory and in text linguistics much more attention is paid to the problem of the boundary of text. Without a doubt, any answer in this regard must be of particular importance to any theory of interpretation. After all, it will determine what counts as the object of interpretation, or to put in differently, where a particular text ends and another one begins. Unsurprisingly, answers to the question oscillate between two extremes. On the one side of the scale we have conceptions, influenced by structuralism, which define a text as a closed and finite structure, and on the other one – postmodernist ideas which tend to blur, or even obliterate the boundaries of text.[11] Between these extremes, as usual, there is the whole spectrum of theories attempting to reconcile a text's immanent potential to cross its borders with the postulate of its closed and finite character.[12] From the point of view of our considerations, it is important to see that digitalization and computerization of legal texts results in undermining the role of the text boundary. It is so because from the computer sciences' point of view, a text is nothing more but a string of characters, a string of symbols from an acceptable set of symbols, also called an alphabet, where each character is being written on a specified number of bits. It needs reminding that considering data processing in low-level of raw data processing (with machine code, bytecode, etc.), only a limited set of compact source codes (statements) can be used. Consequently, the legal text considered as an encoded set of characters of a fixed size can be reduced ultimately to strings of zeros and ones stored on a carrier (a digital data storage) in a file format, in a centralized or distributed way,[13] suitable for further data processing (reading, modification), with regard to ensuring its user availability in a real time and consistency. This fact makes us aware that the concept of text in general, and the concept of a legal text in particular are at least to some extent technology dependent, and certain text features are in fact determined by the medium which carries a text. And it is not just about that the medium is the message, as M. McLuhan claims,[14]

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[11] See S. Critchely, *The Ethics of Deconstruction: Derrida and Levinas.* Blackwell, Oxford and Cambridge, MA 1992, p. 38.

[12] W. Kalaga, *Mgławice dyskursu,* Universitas, Kraków 2001, p. 209 ff.

[13] See more A.S. Tanenbaum, M. van Steen, *Distributed Systems: Principles and Paradigms*, Create Space Independent Publishing Platform, 2nd edition, 2016.

[14] M. McLuhan, *The Medium is the Massage: An Inventory of Effects*, Gingko Press, Quentin Fiore 1967.

but that different media imply different ways in which the text is written and interpreted. Furthermore, a traditional text format allows the author to unilaterally organize the text content into specific hierarchic and horizontal structures strengthening its coherence. For example, we could mention text segmentation, elements structurally beginning or closing a text, such as title or conclusion, complex developments or references to preceding or subsequent elements, introductions, tables of content, indexes, division into paragraphs, parts, books, chapters, sections, etc. The same can be said about legal texts. Of course, the sequence or types of certain elements may vary, depending on the requirements of a specific legal system and legal culture in which they are generated. Nonetheless, traditional texts of statutory regulations have a number of significant similarities. Usually, they are divided into a non-articled and articled component. The first usually specifies the type of regulation, title, date of adoption or year, often a preamble and the number of the regulation. Additionally, in many cases we can distinguish a proclamation formula. The articled component is divided into parts, numbered and organized into articles, sections, points or letters. The entire text is usually systematized in a certain manner. Consequently, sets of rules are grouped into books, sections, titles, chapters, etc. In most cases, at the beginning of a regulation, there is a section containing legal definitions, followed by substantial, institutional and procedural provisions.[15] Characteristically, texts of statutory regulations lack metatextual operators, summaries, repetitions or commentaries immanently determining the comprehensibility, clarity or intentionality of typical linear texts. Additionally, legal texts are edited disregarding cause and effect, chronological or result consistency. Nonetheless, they are required to be consistent, materially and formally complete, general in character, and at the same time concise, synthetic, unequivocal and clear.[16]

The possibility to apply the above measures in the process of text production results both from the linear structure and mechanisms of composing written texts. Consequently, a written text is two or, at the most, three-dimensional, which makes it seem a static structure enabling synchronic analyses. It becomes, like it did for Isenberg, a specific, invariable sequence of sentences interlinked by text tools.[17] Furthermore, segmentation features of traditional texts enable to design and develop tools (applications software) with a relatively simple structure

[15] See more in W. Cyrul, Podstawowe zasady legislacyjne tworzenia statutów samorządu terytorialnego, in: W. Kisiel (ed.), Statuty jednostek samorządu terytorialnego. Regulacje europejskie i amerykańskie, Zakamycze, Kraków 2005 and the lit. cited there.

[16] See more in S. Wronkowska S., M. Zieliński, *Problemy i zasady redagowania tekstów prawnych*, URM, Warszawa 1993; P. Noll, *Gesetzgebungslehre*, Rowohlt, Reinbeck bei Hamburg 1973; H. Hill, Einführung in die Gesetzgebungslehre, Müller, Jurist. Verl., Heidelberg 1982.

[17] H. Isenberg, *Überlegungen zur Texttheorie*, ASG-Bericht No. 2, Berlin 1968, p. 4 ff.

(thus interface) for text presentation, finding of words, phrases and specified parts of final documents (sections, cites, equations, etc.). However, contrary to traditional texts, hypertext refers to the non-sequential and dynamic arrangement of text-based information.[18] Simplifying the problem a little, one can say that while the standard text is composed of a set of linearly related sentences, hypertexts assume the occurrence in a real time of many references (links) to various forms and explanatory sources, disturbing the linearity of the text. Moreover, the hypertext enables referencing to subparts (sections, blocks or other parts of documents specified in the legal document structure) of placed above or below an analyzed finite piece of the text.

Although there is a significant difference between the so-called constructive and explorative hypertexts,[19] in general, the hypertext is a system of interlinked nodes, i.e. arranged information appearing on the screen. It is worth noting, however, that an adaptive hypertext is a dynamic system, which at least potentially can support a user in creating, obtaining, applying and managing a set of interconnected information,[20] including also the possibility of changing information in a node. Thus, the specific character of the adaptive hypertext is determined not by the quality or quantity of information, but by the way it is arranged (for example, a number of nodes, references to the same content, a possibility of navigation within the same piece of text, frequency of links inserted). This is due to the fact that text coherence in the hypertext, other than in a linear text, is determined by the goal of the user and his/her choices (it is important to emphasize, that such user's choices may differ in time). A traditional text is consistent, only if its content is free of logical contradictions, and its structure has the right sequence. Contrary to a traditional text, the hypertext can include inconsistent information and still enable consistent ways of its reading. It is so, because in the hypertext, apart from the metalevel of the information management system, there exists *a priori* no necessary order allowing us to speak of its logical or sequential consistency. The hypertext is dynamic and oriented at interaction with recipients (stakeholders). Consequently, it tends to diffuse, fragment and converge with the context in which it is read. Moreover, the hypertext never appears as a whole to a user (by default). As a result, from the reader's perspective, consistency in the hypertext has to be secured on the

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[18] J. Janangelo, *Joseph Cornell and the Artistry of Composing Persuasive Hypertexts*, College Composition and Communication, Vol. 49, No. 1 (Feb 1998) p. 24.

[19] M. Joyce, *Of Two Minds: Hypertext Pedagogy and Poetics,* University of Michigan Press, 1996, p. 39 ff.

[20] We use the notion of information, since a hypertext may include not only texts, but also multimedia elements. See M.P. Bieber, S.O. Kimbrough, *On Generalizing the Concept of Hypertext*, MIS Quarterly Vol. 16, No. 1 (Mar., 1992) p. 77 ff.

level of particular nodes, but not necessarily between them. Thus, one can claim that a consistency level of the hypertext is at least partly affected by a random factor which influences choices of the user at a point in time.

The hypertext imposes also on a text completely different demands as to the requirement of coherence.[21] In the case of a traditional, linear text, coherence depends on the reader having the knowledge and experience assumed by the author and necessary to properly understand the text. If such knowledge is not explicitly expressed in the text itself, the text coherence will depend on the context in which it is read. Thus, traditional text coherence is conditional on the reader's vision assumed by the author (similarly as in the process of retrieving information from data by a person). Nonetheless, this does not contradict an active role the reader has in reconstructing the meaning of a text. In the hypertext, however, the role of the reader and the author undergoes a significant transformation. Basically, we deal here with the possibility of the reader's actual participation in text creation. As a result, whereas the coherence of a structurally written linear text forces the author to verbalize a message as fully as possible and to ensure the highest degree of its semantic self-sufficiency, achieving the same effect in the hypertext would additionally require the author to control the mechanisms of linking information and establishing or changing the rules of information division into coherent information nodes (in this approach, it is important to distinguish between the author of the original text and the author of the hyperlinked texts).

Text coherence, as a function of knowledge assumed by the author and the reader's knowledge, requires a hypertext author to control the links, i.e. to consistently link information on a given topic appearing in various nodes (also availability period and the possibility of creating a link to the same node in different ways). Thus, unless hypertext creators assume that each link constitutes a necessary means to read the text in the hypertext, it will be hard to speak of its coherence in the traditional meaning of the word. Given the lack of the author's control over the ways of interpreting information included in the hypertext, its coherence depends on the actual knowledge of users determining their choice of the way they read and, eventually, persons responsible for publishing texts as hypertexts in an electronic format (for example, on websites HTML documents).

From the point of view of the traditional text coherence theory, the hypertext should be assumed structurally incoherent. Yet, such incoherence of the hypertext does not contradict possible coherence within its respective frag-

[21] W. Cyrul, *Consistency and Coherence in the "Hypertext" of Law: A Textological Approach*, in: M. Araszkiewicz, J. Šavelka (eds), Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence, Springer, Dordrecht 2013, p. 170 ff.

ments (strings of characters) or sets recorded in a linear form in a database. Even though the hypertext as a whole can be a closed system, its structure and functioning substantially prevent the reader from taking all its elements simultaneously into consideration. Consequently, as long as information in the hypertext is not generated and linked by a single entity or according to a certain principle anticipating the reader's choices, it is impossible to ensure coherence of all possible interpretations (thus an intertextuality), including relations and dependencies between information nodes thus mapping the intentionality of a traditional text to a hypertext. On the other hand, if, as it was suggested by Slatin, we take linkage of information for an equivalent of a linear text sequentiality, then a link may simulate a relation between the author's and the reader's mind.[22] Thus, coherent can be both an entire hypertext and each of its nodes. If information is not linked in anticipation of the way it is read, a hypertext, or rather a fragment of hypertext, may only be subject to systematizing and ordering by its users. The products of their operations, however, are not identical with the hypertext. What is more, coherent as they might be on their own, together they will not necessarily create a consistent whole.[23]

The hypertext changes the meaning of intertextuality, that is the relations of a text to other texts.[24] In traditional texts, intertextuality plays a role similar to that of a context, meaning that it determines the relations between a given text and other texts, which gives the text a specific meaning. An intertextual frame in which such a text functions and to which it can refer, reduces the ambiguity which would otherwise be caused by its full self-sufficiency and semantic explicitness. Consequently, a linear text requires of its reader not only knowledge of a language and the rules of its interpretation, but also of other texts to which a given text refers. In effect, it also assumes knowledge of certain generic rules and stylistic and utterance standards underlying specific texts.[25] As a rule, the hypertext does not make such assumptions. Its dynamic character and openness to the reader means that it is the reader who decides in what systems a given piece of information will function. As a result, the hypertext is immanently open, discontinuous and linguistically heterogeneous. The functioning of links, too, confirms the difference between intertextuality

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[22] J.M. Slatin, *Reading Hypertext: Order and Coherence in a New Medium*, College English, Vol 52, (Dec 1990,), p. 877.

[23] W. Cyrul, *Legal Drafting: From Text to Hypertext*, in: M. Pieniążek (ed.), The 23rd IVR Congress of Law and Legal Cultures in the 21st Century: Diversity and Unity, AFM Publishing House, Kraków, 2009, p. 14.

[24] W. Cyrul, *Consistency and Coherence…*, p. 178 ff.

[25] R. Nycz, *Tekstowy świat. Poststrukturalizm a wiedza o literaturze*, wydawnictwo IBL, Warszawa 1995, p. 62;

of a linear text and dynamic reference within a system of existing information nodes in the hypertext. In the case of a traditional text, intertextual relations are usually neither formalized nor obvious or necessary. It is only the hypertext which justifies the claim that a text can become a product enabling a vast number of different, equally proper ways of reading, and validates the statement that a text is created in the course of the reading process. Thus, the intertextual potential of a traditional text is practically represented and realized only via the electronic medium. In the hypertext, the text is no longer only an effect of its writing down, but it *de facto* becomes equally a result of the reading process. Traditional texts as such do not have this dynamic element. Consequently, a traditional text implies a sharp division between the author and the reader. In the hypertext, those roles are not so obvious, considering that the hypertext may in practice be co-created or co-developed by several entities, or even by a system itself.[26] Moreover, the system can automatically link respective hypertext fragments according to a user's requirements.[27] It needs noting that changes of such information can be made independently by different entities (both parallel and in series), linked fragments of a text may contain links to other fragments (multi-level references), and they may also return the reader to parent fragments (repetition of information nodes). On the other hand, algorithms dedicated to automatic linking of fragments of texts can be designed and implemented as deterministic, stochastic and also adaptive ones.

The status of a text depends also on meeting the intentionality requirement. In the case of intentional communication, the author and the reader always take deliberate measures to realize their goals which they want to achieve through communicating or receiving information. As far as a linear text is concerned, its efficiency in mediating the author's intentions depends both on the degree of complying with the textuality category and on the credibility of communication. In written and non-addressed texts, credibility of message is structurally guaranteed on the level of the assumed auditorium model. In written texts addressed to somebody, it depends on the relations between the author/communicator and the receiver.[28] The hypertext does not belong to the category of addressed texts and it is made for somebody rather than addressed to somebody. Nonetheless, as to the hypertext intentionality, it is hard to speak of an assumed model of auditorium or recipients. Moreover, it is hard to measure the

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[26] W. Cyrul, *Legal Drafting…,* p. 15.

[27] M.P. Bieber, S.O. Kimbrough, *On Generalizing...*, p. 82 ff..

[28] See more in E. Aronson, B.W. Golden, *The Effects of Relevant and Irrelevant Aspects of Communicator Credibility on Opinion Change*, Journal of Personality, 30/1962, p. 135-46; J.S. Kerrick, *The Effect of Relevant and Non-Relevant Sources on Attitude Change*, Journal of Social Psychology, 48/1958, p. 15-20; J.C. McCroskey, *A Summary of Experimental Research on the Effects of Evidence in Persuasive Communication*, Quarterly Journal of Speech, 55/1969, p. 169-176.

efficiency and justifiability of the performed division of text into information nodes and hard to determine, enforce and control a reading path associated with information flow. As it has already been mentioned, the hypertext disrupts the division into the author and the reader. Contrary to a written text, it usually allows the reader to actively participate in the process of generating text and enables the text to be read in a way not anticipated by the author.[29] Insofar as printed texts prevent interaction with readers, electronic texts give readers control and choice. Thus, as long as links and nodes creation in the hypertext is not supervised or planned by the author, it is hard to speak of the hypertext intentionality otherwise than as of an ability to effectively provide information required by the reader, with some additional facilities (for example, reducing time for information finding, avoiding reading uninteresting/undesirable fragments of text, choosing the order of reading, etc.).

Text intentionality as a condition of communicative character is closely related to the problem of text informativeness.[30] After all, traditional text effectiveness depends not only on whether it contains information necessary for proper understanding of a message, but also on whether it includes information which is new to the reader. A lack of new information, previously unknown to the reader can be discouraging, and thus often causes interruption of the reading process or omitting large parts of the available content. On the other hand, excess (redundancy) of information also reduces text readability, making it impossible for the recipient to comply with its original complexity. At this level there emerges a vast advantage the electronic medium holds over printed text: it provides tools to analyze long texts, allowing for their full complexity.[31] Indeed, the hypertext enables link management in a way that eliminates nodes irrelevant from the point of view of user-determined criteria and application of text retrieval engines or intelligent agents technologies.[32] Such tools, algorithms and applied computational paradigms can also duplicate nodes in order to predefine criteria or to modify the content (thus information) in relation to the profile of the user (classified features, system permissions, etc.), time, importance of information (a fragment of text) in relation to changes made by the author, considering user experience (UX[33]).

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[29] N.G. Patterson, *Hypertext and the Changing Role of Readers*, The English Journal, Vol. 90, No. 2, Technology and the English Class (Nov., 2000), p. 76.

[30] W. Cyrul, *Legal Drafting…*, p. 15.

[31] R. Susskind, *The Future of Law. Facing the Challenges of Information Technology*, Clarendon Press, Oxford 1996, p. 107 ff.

[32] W. Cyrul, *Legal Drafting…*, p. 16.

[33] M. Hassenzahl, *User Experience and Experience Design*, in: The Encyclopedia of Human-Computer Interaction, 2nd ed. The Interaction Design Foundation, www.interaction-design.org, accessed: 15.04.2020.

Hypertexts are, by definition, designed and used as a set of distributed nodes, with a referencing schema describing relations between fragments of texts. By default, they are presented digitally. But one should consider that in many situations users (readers) have a need to print a particular text or they want to use consistent fragments of the text (a set of nodes) for further purposes. Thus, in such cases the goal is to split input text into fragments in a way as to ensure the possibility of generating consistent documents (for example pdfs) from distributed fragments, properly formatted for obtaining output text (well-formatted, readable and understood by the user after printing). Thus, it indicates that dividing an original (input) text into a set of information nodes is not a trivial task. It should include also the requirements for merging selected parts of fragments of texts chosen (manually marked) by the user and specific rules of presentation (visualization) to meet the criteria of the text intentionality and contained information intended to be obtained.

3. Remarks on adaptive legal texts

The concept of adaptive hypertexts is related to an idea of adaptive systems and adaptive algorithms which relies on the assumption that such systems/algorithms adapt to the environment. Their parameters, structure, processing conditions and – finally – behavior can change in time. In particular, results presented (available) to the user can differ in relation to properties of input data (for example, a legal text, changes made, a number of references), external conditions (change of overriding provisions of law) and a user profile, related to his/her professional experience, the role, assigned tasks, permissions, etc.

The adaptive hypertext can play an important role in a legal text reading, understanding and drafting. The use of adaptive linking for law can result in supporting the process of ensuring the consistency of text and decreasing the level of its linguistic ambiguity. The adaptive hypertext for law would also ensure a feature enabling adaptation of a text to the user experience (UX, his/her behavior) which can be analyzed in a real time during the user's access to the document (the adaptive system can change behavior in relation to results of such analyses) and also, perhaps, other (related) documents or even other resources (for example, a simultaneous activity on team-management software, legal information system, data repositories, issue tracking systems, etc.). Moreover, it is possible to develop and use tools (application software, programming libraries, etc.) for monitoring efficiency of users' cognition (acquiring knowledge and understanding the available text) and the way they use the available hyperlinks, which can indicate important (crucial) links and inessential ones. Furthermore, adaptive hyperlinks can also be valuable for legislators, because they can encourage (motivate) users not to finish the reading before the final

important information node is reached. Such a requirement can be met by an on-line analysis of the number/frequency of activated links by the reader, time spent reading/analyzing a node, the difference between a typical user behavior during reading a text and the behavior registered for the text, and many other possible factors used as benchmarks for analyzing efficiency of the user cognition.

The idea of adaptive hyperlinks for legislation needs to establish formal rules for dividing a text into consistent parts (denoted as information nodes) and rules for generating hyperlinks. Such a process can be realized and controlled by the superuser (i.e. the author, expert) or, alternatively, by a machine in the case where all principles (rules) can be unambiguously determined or as an effect of applying self-learned software solutions. There are also possible mixed approaches/solutions, especially based on multi-level processes, where on the first level information nodes and/or hyperlinks are initially adapted, and on the second level, changes to be revealed to a user need to be accepted by an authorized agent. Formal rules should cover also validity (availability to the user) of links in text including dedicated areas in documents, where such links can be visible and output text formatting (visualization) in relation to the importance of information and the scope. Moreover, it is important to consider various forms of links descriptions which are presented to the user (for example, full description of the linked information node, short description, acronym, a message combining the analyzed and target text, short fragment of text presenting keywords, a level in the legal document structure, etc.).

Adaptive hyperlinks in a legal document being drafted may refer to one object (an information node), for example a paragraph, chapter or chunk of text, or a set of objects. In the second case, an object (information node) can be viewed as a text (content) generated dynamically during a linking process (e.g. a finite set of related/significant commentaries or provisions). In addition, adaptive hyperlinks can support legal drafting by indicating (referring) related nodes (to the processed text) requiring changes or consideration.

Dynamic links can be activated (visible) and deactivated, depending on environmental factors, especially in the case where a set of normative acts in force changes. This functionality may be usable for legislators to facilitate a legislative process. Further, adaptive links can be static (available in a specific part of the document, with constant features like referred text, font size, etc.) or dynamic (their properties can change in time). Changes of such hyperlinks can be viewed also as changes of the font size, color, family, case of letters and text (a message) describing a particular hyperlink. To generate such a description of a hyperlink one may consider the use of natural language generation techniques.[34]

[34] See more in Robert Dale, Ehud Reiter, *Building Natural Language Generation Systems*. Cambridge University Press, 2000.

Adaptive linking (referencing in the hypertext) concerns inserting hyperlinks in a document (with splitting into consistent parts) in a dynamic way. It means that such links (availability, position, features, status, etc.) can change in time to present up-to-date, relevant information in relation to, among others, the user's profile (to make available personalized information for a profiled person by features like: age, gender, education, profession, experience, etc.), external references structure (an ability to change based on interdependencies and entailment between documents contained in a dataset, including coreference resolution),[35] lifecycle phase of a document and referenced texts (consideration of temporality), physical, syntactic and semantic features of linked information nodes (size of documents, syntactic features, semantic intents, context, word sense disambiguation, etc.), text importance/weight (considering relevance of the document).

To understand and control the relation between information nodes (thus the legislation process) one may recommend the use of visualization techniques to generate hierarchical maps of hyperlinks able to visualize organized information, by analogy with other fields where relations between objects is relevant (i.e. database diagrams,[36] mind mapping,[37] tag/word clouds[38]). Such maps, by definition, may vary in time. They can adapt to changes of hyperlinks, information (content) and the user. In practice, generating of such adaptive maps can be supported, i.e. by the use of relationship extraction[39] and lexical semantics[40] methods.

4. Conclusion

The concept of use of hypertexts for legislation purposes is strongly connected with the need of changing the paradigm of legal text presentation and legal drafting. By mapping legal texts into electronic format suitable for adaptive

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[35] See more in David Crystal, *A Dictionary of Linguistics and Phonetics*, 6th Edition, Wiley-Blackwell, 2018.

[36] B. Thalheim, *Entity-Relationship Modeling*, Foundations of Database Technology, Springer, Berlin Heidelberg 2000.

[37] Who invented mind mapping? https://www.mind-mapping.org, accessed: 15.04.2020.

[38] See more in B. Lee, N. Riche, A.K. Karlson, S. Carpendale, *SparkClouds: Visualizing Trends in Tag Clouds*, IEEE Transactions on Visualization and Computer Graphics, Vol. 16, Issue 6, 2016, p. 1182-1189.

[39] See more in C. Sammut, G.I. Webb, *Encyclopedia of Machine Learning and Data Mining*, Springer US, New York 2017.

[40] See more in Y. Wilks, M. Stevenson, *Sense Tagging: Semantic Tagging with a Lexicon*, Fifth Conference on Applied Natural Language Processing (ANLP-1997), Proc. of the Workshop "Tagging Text with Lexical Semantics: Why, What and How?", Washington, D.C, ACL, 1997.

linking, it is possible to develop tools which will be able to significantly support a legislative process and also further availability and readability of the text to users. To this aim, an approach based on division input text into consistent information nodes with placing adaptive hyperlinks, seems to be valuable and it is suitable for further automatization. In order to visualize the connection between information nodes and control the process of adaption dedicated maps can be used.

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"It was an awful mistake with that girl. Advise me what to do." On Jaroslav Hašek's bigamy

„Z tą dziewczyną to okropne nieporozumienie. Poradź mi, co robić". O bigamii Jaroslava Haška

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Abstrakt: W artykule zostanie rozpatrzona kwestia bigamii Jaroslava Haška z dwóch perspektyw – biograficznej i prawnej. W niemal każdej biografii pisarza pojawiają się wzmianki o podwójnym ożenku pisarza, jednak często są zbywane tylko kilkoma słowami wyjaśnienia. W opinii autorki po niemal stuleciu od śmierci Haška przypadek jego bigamii wymaga dokładniejszej interpretacji.

Słowa kluczowe: Jaroslav Hašek, bigamia, prawne postrzeganie bigamii

Abstract: In this article, Jaroslav Hašek's bigamy will be discussed from two points of view – the biographical and legal ones. In almost every writer's biography, the fact of his marrying two women is mentioned, but it is also quickly dismissed with only a few words of explanation. In the author's opinion, after almost a hundred years following Hašek's death, the case of his bigamy deserves proper interpretation.

Keywords: Jaroslav Hašek, bigamy, legal perception of bigamy

Introduction

Jaroslav Hašek is undoubtedly a writer associated with the Czech literature as one of the most famous ones. The character created by him, a good soldier

Josef Švejk, is very often identified with the author because of similarities in Hašek's and Švejk's peripeteia – Hašek was a soldier in the Austro-Hungarian Army during the First World War, deserted it and joined the Czechoslovak Legion in Russia, in the same way as his fictional character did. Hašek also was a deputy military commander in the district of Bugulma and made his literary character, Švejk, take the same path. There are many other similarities between them both – real and fictional – persons but it is marriage that makes the difference between the two: Josef Švejk was single and he did not fail to take advantage of that fact, although Norbet Holub noticed women's secondary or even marginal roles they played in Hašek's texts.[1] When it comes to the writer, he was married and, actually, had two wives at the same time.

In this article, I would like to discuss the question of Jaroslav Hašek's bigamy from two points of view – the biographical and legal ones. In almost every writer's biography, the fact of marrying two women is mentioned, but it is also dismissed merely with a few words of explanation. In my opinion, almost a hundred years after Hašek's death, the case of his bigamy deserves proper interpretation.

A story of two ladies

Jaroslav Hašek was the kind of person who could be called a restless soul. According to his most scrupulous biographer, Radko Pytlík, his whole life was marked out by moving, wanderings and peregrination. He definitely did not suit the bourgeois model of society characteristic of the late 19th century. Encountering problems at schools, preferring losing a stable job in a bank to wandering somewhere in Hungary made him a member of artistic bohemia before he himself realized he was a part of it. No wonder Hašek at early age became a follower and supporter of Czech anarchistic movements.

Falling in love with Jarmila Mayerová, who he met in 1907, meant a significant change in his life. Jarmila's parents objected to that relationship. They instinctively knew their daughter's sweetheart was likely to bring more problems than happiness. The the writer tried to respond to the most important Mayers family's objection – unemployment – by finding a job as a journalist. He succeeded in the magazines "České slovo" and "Svět zvířat". The second one is worth mentioning for the various hoaxes Hašek invented by creating non existing animal species but his pseudo-scientific jokes soon attracted attention of real scientific societies which criticized these "discoveries" and the career of a young journalist at "Svět zvířat" came to an end. Nevertheless, a low but

[1] N. Holub, *Hašvejk a ženy*, "Tvar" 2003 No. 8, p. 5. (All the translations in the article by the author.)

stable salary Hašek was collecting during the employment was a proof for Jarmila's parents that her lover could become a groom. The wedding ceremony was held on 15 May 1910.

Despite Hašek's long efforts to get the Mayers' permission to marry Jarmila, the marriage was not an idyll. According to Radko Pytlík, the young couple moved to a house that had been a wedding present from the Mayers and at the beginning, Hašek tried to lead a quiet life, but soon "with the new power he started playing the role of a bohemian king"[2] as he tended to spend more time in taverns than at home. He definitely was a spiritus movens of numerous happenings and crazy ideas like the Party of Mild Progress within the Limits of the Law that was created as a parody of a real political party movement due to by-election to the Austro-Hungarian Parliament. Hašek's occupation with various projects and performances was so absorbing that there is no surprise why the couple split.

We have to take into account the fact that the amplest Hašek biographies were written during the communist period of Czechoslovakia and some details of the writer's life as a follower of left-wing ideas and a member of the Soviet Communist Party were not undesirable from the point of view of the then propaganda. That is why reasons for the couple breaking off is a matter of conjecture. The first possible reason is the writer's sexual orientation. According to Czech literary historian Jindřich Chalupecký, Hašek was a homosexual[3] who maybe did not realize this fact and that is why he never made a coming out. Even though another literary historian, Petr Kovařík, challenges this argument,[4] Hašek's attitude towards women was far from the so-called "normal". His marriage could have been a result of a deep intellectual relationship between him and his wife and, on the other hand, a gesture towards society's conventions, perhaps enforced by Jarmila herself. The writer, focused on his addiction to writing and to alcohol, did not really understand what the essence of "marriage" was, since he lost his father when he was a child. The second reason of the separation could have been a venereal disease that Hašek unknowingly infected his wife with. Such cases were rather common in the 19th and the early 20th century bourgeois society in which the awareness of sexually transmitted diseases was in its infancy and a lot of wives' health was put to risk because of their husbands' ignorance.[5] After the separation Jarmila Hašek spent some

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[2] R. Pytlík, *Włóczęga Jarosław Haszek*, tr. M. Ekhardtowa, Warszawa 1974, p. 168.

[3] J. Chalupecký, *Expresionisté*, Praha 1992, p. 175-191.

[4] P. Kovařík, *Literární mýty, záhady a aféry. Otazníky nad životy a díly českých spisovatelů*, Praha 2003, p. 150-153.

[5] See G. Gańczarczyk, *"Ludzkość z ciała się składa!", czyli polskie i czeskie obrazy przygotowania dziewcząt do życia w rodzinie na przełomie XIX/XX* w., in: A. Szlagowska (ed.), *Problemy zdrowia reprodukcyjnego kobiet. Wstęp do badań,* Wrocław 2016, p. 269-291.

time in a hospital and Radko Pytlík presumes that the feeling of guilt was an element which pushed him towards his real or only assumed suicidal attempt. Nevertheless, he was the father of his son Richard, born in 1912. As Jarmila moved out to her parents' and sealed the separation, Hašek met his son only several times.

The history of his second marriage is more mysterious. Hašek's biographers are not sure about the circumstances behind the meeting of Jaroslav Hašek and Alexandra Grigorievna Lvovna. Sources about the writer's military service in the Austrian Army and his being captured by the Russians contain many more details. When the Czechoslovak legions in Russia joined the Western Front in Vladivostok, Hašek went to Moscow and started cooperating with the Bolsheviks. As a soldier of the Red Army he was sent to Samara and in 1918 he was appointed the head of the army printer in Ufa. Pytlík notices that the writer met his future second wife in this city but why did the lady attract his attention? Some sources claim that Alexandra took care of Hašek during his struggle with typhus, some other stress that the marriage was a sealing of his willing to stay in Russia for the rest of his life. Nevertheless, Pytlík writes that "on the 15th May 1920 in the presence of a witness, a German communist Braum, he signed the marriage contract. He claimed that he was a single and that he had no obligation or children."[6] The biographer continues that this fact was a definite negation of Hašek's past and the beginning of his new life in Russia at the same time. However, his attempt to hide himself away in distant Siberia failed. Hašek was sent back to Czechoslovakia in 1920 by the Communist Party to organize a communist movement in the new state. He returned to Prague with his second wife.

Bigamy or ignorance?

Even in ancient times bigamy was illegal. As a reminder we can quote Marci A. Hamilton's statement: "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offense against society."[7] Katarzyna Banasik clarifies that in the 19th-century penal codes bigamy was treated in the same way as adultery. In the primeval version of

[6] R. Pytlík, op. cit., p. 283.

[7] M.A. Hamilton, *Sister Wives: An Illustration of Why Polygamy Is, and Should Be, Illegal,* "Verdict. Legal Analysis and Commentary from Justia", 20.7.2011, [on-line] https://verdict.justia.com/2011/07/20/sister-wives-an-illustration-of-why-polygamy-is-and-should-be-illegal, accessed: 12.02.2020.

German penal code from 1871, it was punishable with prison sentence up to 5 years (§171). The French penal code of 1810, in Paragraph 340, also stipulated a penalty of between 5 and 10 years of hard labour.[8] A similar situation was in Austro-Hungary before 1914 and Czechoslovakia after 1918.

Despite Jaroslav Hašek's understanding of the sense of matrimony, he said his marriage vow twice and the second one was with contradiction to facts. After his return to homeland he even tried to restore contacts with his first wife and wrote a poignant letter with significant words: "Jarmila, do not think I do not love you. I have always loved you. [...] It was an awful mistake with that girl. Advise me what to do."[9] His personal feelings had little to do with the legal status, though.

Biographical sources contain many legends and unproven statements and some of them are worth mentioning from the legal point of view. For example, the Russian version of Wikipedia did not mention Hašek's double marriage at all. The two wives, Jarmila and Alexandra, appear as his "wife" with no explanation of the legal status of these marriages.[10]

Another source claims that the case of bigamy was redeemed for the lack of the Russian certificate of marriage to Alexandra Lvovna.[11] This explanation of extinction of bigamy requires some clarification. If a marriage contract between Jaroslav Hašek and Alexandra Lvovna was signed, the lack of a document carried by one of the spouses would not be a proof of no contract. The evidence is valid, even if it is hidden in a distant country, and the presence of a witness is an insurance that the contract was signed and approved by both sides. This argument can be rejected as an unjustifiable and stretching the rules at the same time.

Another defense line in bigamy accusation was Hašek's proclamation that, according to Pytlík's reckoning, the writer refused to recognize two legal rules at the same time. That means if the first marriage was legal in the light of the Austro-Hungarian regulation, it should be invalid after the fall of the Austro-Hungarian monarchy. Both from the point of view of logic and law, Hašek's opinion was not correct. The contract signed under one legal order is valid according to principles of continuity of legal rules. We can quote "The Yale Law Journal" here: "The international law does not not generally count revolutions among those events that justify termination of existing treaty rights

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[8] K. Banasik, *Bigamia w polskim prawie karnym*, "Prokuratura i Prawo" 2010 No. 9, p. 59.

[9] R. Pytlík, op. cit., p. 308.

[10] https://ru.wikipedia.org/wiki/%D0%93%D0%B0%D1%88%D0%B5%D0%BA,_%D0%AF%D1%80%D0%BE%D1%81%D0%BB%D0%B0%D0%B2, accessed: 13.02.2020.

[11] P. Bożejewicz, *Ponure oblicze wesołego pisarza*, "Rzeczpospolita" 17.6.2018, [on-line https://www.rp.pl/Literatura/306149940-Ponure-oblicze-wesolego-pisarza.html, accessed: 12.2.2020].

and obligations. This view is said – in the few instances when the question is squarely faced – to derive from the need for continuity of the state [...]."[12] Otherwise, following every political change or a new state arising, a great chaos would occur with no valid rules or regulations. Hašek's double marriage is an explicit illustration of such a situation. Moreover, the Reception Act of the new Czechoslovak state declared in 1918 proclaims in Article 2 that all the current regional and imperial laws and regulations shall remain valid.[13] This means that, according to the Austrian penal code of 1892 and, with references to §206,[14] bigamy is a crime. Moreover, in §208 we can read that if a criminal concealed his or her marital status, the inflicted sentence should be hard prison, and that is exactly Hašek's case, because in the marriage procedure with Alexandra Lvovna he did not mention that he was already married. On the other hand, his plans of staying safe in the Soviet Russia with his second wife could also have been damaged due to the Russian law regulations. According to the so-called Tagancev code, i.e. Russian penal code of 1903 in the 19th part, devoted to family laws, we can find a record (418)[15] specifying that bigamy is an act of adultery and should be punished with an arrest penalty. No matter which country Hašek was staying in, his decisions and actions concerning his second marriage were felonies.

Hašek's words mentioned above could be only one of the numerous legends on him, as Pytlík contended that the writer was aware of the crime he had committed and he expected subpoena. And so it happened. Four months after Hašek's homecoming he was served with a summons to appear before the Regional Criminal Court on the charge of Article 206 of the criminal code, that is bigamy.[16] Suprisingly enough, he was not sentenced. The reason was quite paradoxical and even absurd for such a zealous communist as Hašek became in the Soviet Union. The relationships between Czechoslovakia and the new communist state were cold, even hostile. Although the two states signed a trade agreement in 1922, Czechoslovak foreign ministry refused to go further and

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[12] Revolutions, Treaties, and State Succession, "The Yale Law Journal", Vol. 76, No. 8, 1967, p. 1669. *JSTOR*, www.jstor.org/stable/795056, accessed: 14.02.2020.

[13] *16. Pokusy o unifikaci a kodifikaci práva za první ČSR,* [on-line] http://www.ius-wiki.eu/historie/pfuk/cech/zkouska/skupina-b/otazka-16?fbclid=IwAR3VycYp_Z_pJ5G1WpqSzEr31DnpqnsM-ZuhKmq6Hu2Sr8g5UBg9OUpx0yMU, accessed: 15.2.2020.

[14] *Ustawa karna z dnia 27 maja 1852 z uwzględnieniem wszelkich zmieniających ją ustaw austrjackich i polskich*, Lwów 1929, [on-line] https://www.bibliotekacyfrowa.pl/dlibra/publication/50500/edition/51372/content, accessed: 17.02.2020.

[15] *Kodeks karny z r. 1903: (przekład z rosyjskiego z uwzględnieniem zmian i uzupełnień obowiązujących w Rzyczypospolitej Polskiej w dniu 1 maja 1921*, Warszawa 1922 [on-line] https://historia.org.pl/2011/12/27/kodeks-karny-z-r-1903-tagancewa-1903-r/, accessed: 1.03.2020.

[16] See P. Kovařík, op. cit., p. 152.

rejected recognition of the USSR de iure.[17] That means the Soviet law was not recognized and, from the Czechoslovak legal perspective, Alexandra Lvovna was not Hašek's legitimate wife. That situation had disagreeable consequences for both women as after the writer's death his copyrights were the subject of litigation and numerous trials between the two ex-wives.

Conclusion

Jaroslav Hašek's attempt to lead an ordinary, restless life was never fulfilled. He died young, at the age of forty years, very ill, and as an offender. Although he was not sentenced, he had committed a crime as he had married two women within valid legal rules in two different countries and, according to the regulations of the day, should have been sentenced. Even though his life was one offering a rather cruel history to him as a man, in the case of his bigamy paradoxically made him a gift.

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Structural and functional differences between state-owned and private banks in Iran

Różnice strukturalne i funkcjonalne między państwowymi i prywatnymi bankami w Iranie

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Abstrakt: Banki jako instytucje finansowe pełnią rolę pośredników finansowych. Banki wpływają na oszczędności, inwestycje, produkcję, zatrudnienie i wzrost w gospodarce narodowej. Banki państwowe i prywatne pełnią podobną rolę i funkcję, a rządzące nimi zasady i przepisy nie różnią się bardzo. Irańska ustawa o bankowości bez lichwy została przyjęta w czasie, gdy w systemie bankowym kraju nie było prywatnego banku, a wszystkie ustawy i regulacje dotyczące operacji bankowych zostały podporządkowane państwowej wizji działalności bankowej. Stąd pytanie brzmi, czy banki prywatne podążają drogą rządowego systemu bankowego. Pomimo podobieństw banki te podlegają czasem różnym zasadom i regulacjom dotyczącym zakładania, prowadzenia i rozwiązywania. Ta różnica strukturalna doprowadziła do różnicy funkcjonalnej i często różnicowała sposób przyciągania i alokacji zasobów a także sprawiała, że system bankowości prywatnej nieco zrównoważył niedociągnięcia rządowego systemu bankowego.

Słowa kluczowe: rozwiązanie banku, banki prywatne i publiczne, utworzenie banku, wyposażenie i alokacja zasobów, wydajność

Abstract: Banks, as financial institutions, play the role of financial intermediaries: savings, investments, production, employment and growth in the national economy are affected by operations of banks. State-owned and private banks have a relatively similar role and function and the rules and regulations governing them are not very different, because the non-usury banking act was adopted at a time when there was no private bank in the banking system of the country and all acts and regulations governing banking operations were approved by the government's banking vision. At the moment, banks are moving within the same legal atmosphere. Hence, the question is whether private banks are taking the path that the government banking system has taken. Despite the similarities, these banks are sometimes subject to different rules and regulations in terms of how to establish, operate and dissolve. This structural difference has led to a functional difference and has often differentiated the ways in which resources are attracted and allocated and made the private banking system somewhat offset the deficiencies of the government banking system.

Keywords: bank dissolution, private and public banks, establishment of a bank, equipping and allocating resources, efficiency

Introduction

In recent years, Iranian banking system has undergone major changes, the most important of which is the acceptance and establishment of private banks alongside state-owned ones in the banking industry of the country. The banking industry is considered to be the most important economic sector in any country (Issa Zadeh & Shaeri, 1391). Banks are the most important instruments for policy making and financial control of each government, since they are considered to be the main pillars of financial markets as an intermediary of monetary resources alongside stock exchange and insurance. The role of banks in Iran due to the existing economic problems, the lack of proper growth of capital markets, the fragility of Iran's industries and trade in the global market is much more significant.

Banks can help maintain economic balance and stability by providing timely allocation of resources and facilities. Banks, both state-owned and private, have the same function (banking operations) and are set up in the form of a public joint-stock company with their registered shares and are regarded as business enterprises. Banks seem to be subject to Commercial Code from the time they are established to their dissolution, like other joint-stock companies, but because of the importance of banks and the nature of their operations, they are quite distinct from other business enterprises. Therefore, Commercial Code only comes into play in the silence of a set of banking acts, regulations, and banking directives.

A general overview shows that the legal and regulatory resources applying to state-owned and private banks, include the Monetary and Banking Act, the Act on Non-usury Banking Operation (Interest), the Bill on Managing Bank Affairs, the Act on the Establishment of Non-state-owned Banks, the Act on

Regulating Non-aligned Monetary Market, Approvals and Circulars of Money and Credit Council. These banks are often subject to the same rules and regulations. In fact, private banks are not literally private at the moment because they are bound to comply with government decisions and do not have the right to violate the rules that are regulated for state-owned banks, for example, their rate of interest is determined by the central bank, and despite the mandatory rules, structural and functional differences of these banks have been considered less obvious. As the bank's interest rate is profitable, in the private banking system, the mandatory rate of interest also leads to fewer resources coming to private banks. As a result, the non-official market will be more active.

In the discussion of the differences between state-owned and private banks, the state-owned and private banking systems are considered more in terms of efficiency and with a managerial and economic perspective. With the approval and establishment of private banks in the country in 1379 (2000), it was expected that the economic trend of the country would improve. Therefore, considering whether the enactment of the non-usury banking act at the time when the private bank did not exist in the banking system has led private banks to operate in a non-governmental manner, but in accordance with the government banking system or not, is very important. These banks appear to be distinct in some cases, such as formation, activity and dissolution, which results in structural and functional differences in the performance of both state-owned and private banks. Therefore, the question posed by the authors is whether newly-established private banks alongside experienced state-owned banks have the same positions at all stages of their establishment, operation, dissolution and bankruptcy or not, or whether there are differences at the stage of establishment, such as the supply of equity and capital, as well as in terms of workforce, and these comparisons can be made at the stage of activity as well as at the dissolution stage of the banks. In fact, looking at whether there is fundamentally a structural difference between the banks in question or not and whether it can lead to a functional difference, if any, is an issue that we have embarked on answering in this article.

We are also going to give an answer to the aforementioned questions by comparing the necessary conditions and regulations at the stage of establishment, operation and dissolution of newly-established private banks and state-owned banks, which for many years now have monopolized the banking industry.

I. The establishment and formation of Iranian banks

From the economic point of view, from the perspective of microeconomic discussions, a bank is merely an economic actor involved in monetary-financial activities. From the legal point of view, one can also discuss banking law in

two broad categories: one branch is the banking system structure that examines the structure and organization of the bank as a public joint stock corporation, including the selection of the CEO and the board of directors, and it deals with relevant issues. Another field is the functioning of the banking system, which the bank, both state-owned and private, acts as a large machine with various inputs for equipping resources and outputs, which means resource allocation (Jafari, 1396).

All banks in the country work under supervision and with central bank's license after their establishment. State-owned banks are established according to acts, such as the act on the Establishment of a National Bank, and their articles of association are approved by the Islamic Consultative Assembly. The formation of these banks, their goals, the scope of their powers and duties are determined by the act and the articles of association; however, the establishment of a private bank starts with the initial authorization of the Central Bank.[1] The initial approval of the central bank with the establishment of the bank is issued solely for the purpose of filing a record file and the acceptance of shares by the Central Bank, which does not mean the establishment of a bank. In fact, the main registration license is the final agreement with the establishment of the bank, which the central bank issues to register the bank at the corporate registration authority, and the receipt of it means the establishment of the bank. However, this does not end with the registration license because the registration license cannot be used to establish a branch, and for the establishment of the branches, it is necessary to obtain an activity license, which is the authorization to start activities and is issued by the central bank.

The central bank will issue a license for the establishment of banks in accordance with the terms and conditions.[2] Also, the license to establish a bank in Iran will only be possible as a public joint-stock corporation with registered

[1] Article 1 of the Articles of Association on the establishment of the Private Bank – Definitions of the terms and phrases are as follows:

One – Non-state-owned Bank: A bank authorized by the Act to establish non-state-owned banks approved in 1379 and Article 98 of the Act of the Third Economic, Social and Cultural Program of the Islamic Republic of Iran, with the ownership and management of domestic non-state actors, with the permission of the Central Bank of the Islamic Republic of Iran is established and can run all authorized banking operations in accordance with the monetary and banking act of 1351, the non-usury banking operations act and its articles of association.

[2] Article 1 of the Articles of Association on the Establishment of the Private Bank – Definitions of the terms and phrases mentioned are as follows:

Six – Primary License: The initial approval of the central bank to establish the Bank, which is issued solely for the purpose of filing a record file and subscription by the Central Bank. Seven – Registration License: The final agreement with the establishment of a bank that the central bank issues for registration of the bank in the corporate registration authority. Eight – Activity license: A license to start a bank activity that is issued by the central bank.

stock.[3] All natural and legal persons who have all the conditions declared by the Central Bank can submit their application to the Central Bank in addition to the draft article of association and other necessary documents in order to obtain the permission to establish a private bank.[4] Since the bank's articles of association require approval of the central bank, any changes to it must be notified to the central bank.

Legal entities that have effective shares and participation in the state-owned bank will not be allowed to participate in the establishment of non-state-owned banks.[5] The establishment applicants and private bank shareholders must also be responsible for providing and completing the bank's capital in case of inadequate capital or potential losses.[6] Board members also should have banking skills and expertise. In addition, none of the board members of a private bank is allowed to join another bank unless the central bank issues the permission.[7]

Legal members asking for membership of private banks should submit their balance sheets and all documents for their last three years to the central bank. Each private bank should provide the minimum capital determined by the central bank. Moreover, any banking activities such as foreign exchange activities is subject to central bank's authorization. It should be noted that no state-owned institution has the right to own more than one percent of the shares of a private bank unless authorized by the central bank. The point is that the bank's shares are available on the stock exchange. The purpose of a bank should not be merely to fund its shareholders or individuals and groups. The bank's capital should not be provided from the facilities received from banks

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[3] Article 2 of the Articles of Association on the Astablishment of the Private Bank – Formation of the Bank is possible only as a public joint-stock corporation and with registered stocks.

[4] Article 3 of the Articles of Association on the Establishment of the Private Bank – the internal natural and legal persons who have the terms and conditions stipulated in this declaration may submit their application, together with the draft of the articles of association and other documents specified in the relevant instructions, to the central bank for obtaining permission to establish a non-state-owned bank.

Note – The central bank will decide, depending on the needs of the country and taking into account the conditions of the applicants to accept the application or issue a permit.

[5] Article 5 of the articles of Association on the Establishment of a Private Bank: Legal entities in which part of their capital belongs to the State and state-owned companies or public institutions or are directly or indirectly under the management of a public sector or public institutions, shall not be shareholders in non-state banks.

[6] Article of the Articles of Association on the Establishment of the Private Bank: The applicants for establishment and the shareholders of the bank shall have the ability to provide and complete the capital in case the capital was insufficient or there were potential losses.

[7] Article of the articles of Association on the Establishment of the Private Bank: Members of the board of directors, the managing director and his deputy, as well as the members of the bank's managing personnel, cannot participate in any other bank or credit institution except with the permission of the central bank.

and credit institutions, in addition, if the central bank determines that the documents provided by the applicants are false or that they do not meet the bank's establishment requirements, it can withdraw the license. The Central Bank will comply the previous resolutions of the Monetary and Credit Council on monetary and credit policies and other regulations approved for state-owned banks and non-bank credit institutions with the status of non-state-owned banks and will communicate this to them if required. Private banks of Iran currently include Eghtesad Novin Bank, Parsian Bank, Karafarin Bank, Saman Bank, Pasargad Bank, Sarmayeh Bank, Sina Bank, TAT Bank, Shahr Bank, Bank Day, Ansar Bank, Tejarat Bank, Refah Bank, Bank Saderat Iran, Mellat Bank, Hekmat Iranian Bank and Tourism Bank.

Since the article of association of each company represents its legal personality, the subject of its activities, its scope and authority from the beginning, therefore, we will further examine the legal nature and differences existing in the articles of association of the state-owned and private banks in terms of the rules of establishment and human structure.

1- Establishment regulations

State-owned and private banks are subject to different rules of establishment, which are essential to consider for establishment in terms of legal personality of these two banks and in the sphere of initial capital.

1-1- Legal Personality

Under Article 4 of the Public Audit Code,[8] a state-owned corporation is a corporation which is established with the permission of the law and more than 50% of its capital belongs to the state.

In accordance with Article 4 of the Civil Services Management Act and note 1[9] and 2[10] of this Article, a state-owned company is a company governed by law for the purpose of performing part of the state's activities under the general policies of the forty-fourth (44) principle of the Constitution, declared

[8] Article 4 of the Public Audit Code of the State – A state-owned corporation is a definite organizational unit which is established by law as a company or established either by law or by the competent national court or confiscated and recognized as a state-owned corporation, and more than 50% of its assets are owned by the government. Any commercial enterprise that is created by state-owned companies' investment is considered a state-owned enterprise, as long as 50% of its shares are owned by state-owned companies.

[9] Note 1 of Article 4, of the Civil Service Management Act – The formation of state-owned companies under each of the above mentioned categories is permissible only with the approval of the Islamic Consultative Assembly, and the conversion of companies (whose shares of state-owned companies are less than fifty percent) to state-owned companies is prohibited by increasing the capital.

[10] Note 2, Article 4 of the Civil Services Management Act – Companies that are nationalized or confiscated by law or a competent court, and are recognized as state corporations, are considered as state enterprises.

by Supreme leader as one of the duties of the government, and more than 50% of its capital and shares belong to the government. Any business enterprise that is individually or jointly created through the investment of ministries, state institutions and state-owned companies, as more than 50% of their shares are owned by the above-mentioned organizational entities, is a state-owned enterprise.

Therefore, any business enterprise created with the capital of a state-owned corporation is considered to be a state-owned company if more than 50% of its shares belong to a state-owned corporation, so banks whose 50% shares belong to the State are considered state-owned corporation, and the investment of these banks and their participation in other institutions or projects and units such as housing investment projects and the like does not exclude them from being state-owned.

Given the above conditions, banks that are established according to the Act on Establishment of non-state-owned banks and with a central bank license, as well as banks with more than 50% of their shares belonging to public and non-state-owned institutions, are private banks. For example, Sina Bank, the former financial and credit institute of Bonyad and its affiliated corporation, the Ansar Bank, which was formerly Ansarol Mojahedin Interest-free Fund, formerly affiliated to the Islamic Revolutionary Guard Corps cooperative foundation, and Hekmat Iraninan Bank affiliated to the Islamic Republic of Iran Army Cooperative foundation, the Bank of Ghavamin, which is affiliated with Law Enforcement Force of the Islamic Republic of Iran, and the Shahr bank belonging to the municipality, are all private banks.

1-2- Initial capital

To establish any private bank, the minimum capital required by the central bank must be provided. With reference to clause d of Article 32 of the monetary and banking act of the country,[11] the Central Bank may, with the approval of the Councils of Ministers, increase the minimum capital referred to in paragraph B of this Article, which is 20 million Tomans.[12] It seems that the minimum capital of state-owned banks considering the purpose of establishment of a state-owned bank and according to the articles for association of a state-owned banks are different. In the case of private banks, there is a fixed benchmark, meaning that the minimum of the capital has been considered, but no such minimum has been predicted in the case of state-owned banks.

[11] Article 32 of the Monetary and Banking Act of the Country – The Central Bank of Iran, may, with the approval of the ministry, increase the minimum capital referred to in paragraph (B) in respect of all banks or banks whose activities are in special fields.

[12] Article 32 of the Monetary and Banking Act – The minimum capital of Iranian banks, is two hundred million Rials, which must be fully committed and at least fifty percent of it have to be paid, and be deposited into the Central Bank of Iran before submission of the establishment application.

Of course, it should be added that each year capital increase of a state-owned bank is expected in the budget bill.

1-3- Public Offering

In accordance with the articles of association of private banks, their shares may be transferred to others through the stock exchange, but may not be purchased by non-bank legal entities, that are partially owned by the State or by state-owned companies or managed by the public sector.[13] However, there is only one shareholder in the state-owned bank, which is usually the State and state-owned banks' shares are not offered in stock market except in the privatization process.

Therefore, it can be argued that the state bank has no stock certificate (Piroozfar, 1379) because, as a result of non-subscription, we will not need to have a stock certificate. However, the private bank has the stock certificate and in fact the commitment to subscribe takes place only if the written document is signed which is considered to be a stock certificate commitment note in the Commercial Code of Iran. A stock certificate commitment note is prepared by the founders and provided to the bank and the items specified by the code must be written in it. Although both types of banks are public joint-stock corporations and according to the commercial code of Iran, it is possible for a joint stock company to subscribe, but the state-owned banks, the founder of which is only the State, do not need subscription.

As noted above, the stock certificate commitment note is provided by the founders and is made available to the bank, and certain items must be written on it, this sheet of paper is signed by the subscriber or his deputy, thus if there is no subscription in the state-owned bank, thereafter there will be no stock certificate, but in the private bank as there is subscription, so a stock certificate is also available. The reason why the state-owned bank has no stock certificate is that the reason for having stock certificate is the shareholder's confidence in his shareholding and if the only shareholder of the state-owned bank is the State, then there is no need for the State to be confident and the other reason is the transfer of shares, which is also ruled out in the state-owned bank.

1-4- Articles of association of the Bank Melli Iran

One of the other differences between the state-owned and non-state-owned banks can be seen in the articles of association of Bank Melli Iran as a state-owned bank that can act in accordance with Article 23[14] of the said law in

[13] Article 14 of the Articles of Association on the Establishment of the Private Bank – The capital of the non-state-owned bank shall not be provided from the facilities of any bank, whether state-owned or non-state-owned, or credit institutions.

[14] Article 23 of the articles of association of the Bank Melli Iran: The Supreme Council is entitled to request information from the Director General on the matters of the Bank which it considers

order to collect its debts; in fact, if customers do not pay their debts to the bank on time or do not arrange to settle their debts, the bank can collect all its debts through their bank account. In this regard, it should be noted that two different views can be envisioned: a group can hold the view that this special feature of collecting debts is specific to the Bank Melli Iran, which is not extended to other state-owned banks. But another group believe that this particular feature relates to state-owned banks because the Bank Melli Iran does not have a specific feature that we can only differentiate about this bank. If we support the second opinion, then we will see another difference between state-owned and private banks: in fact, if private banks cannot collect their debts through customers' accounts, it is possible for state-owned banks.

2- Human structure

To enter into the discussion on banks' work force or the human structure of banks, and the difference in this structure in private and state-owned banks, we should refer to the Commercial Code of Iran as well as the employment regulations of the banks, which will be discussed further.

2-1- Board of Directors

In private banks, in accordance with Article 107 of the Commercial Code,[15] the Board of Directors, is elected by the General Assembly of shareholders and from among themselves. Shareholders of private banks should be made up of natural individuals with Iranian citizenship or legal entities with 75% ownership of their assets to Iranian natural individuals.

In state-owned banks, the bank's total capital belongs to the State, so there are not many shareholders to be elected from among the board members, but its general assembly is composed of several ministers, whose respective ministries are, in principle, considered to be representing the government's shareholder (Piroozfar, 1385).

Article 57 of Directive No. 92/117708 dated 1392/04/24 (Sample articles of association of commercial non-state-owned Banks) states that "most of the members of the board of directors lack executive positions in the bank and cannot have any management, expert, consultancy, etc., position except for membership in committees mentioned in Article 80" and Note 1 of Article 81 of the same directive states that "the chairman of the board of directors cannot be elected from among the executive members of the board of directors and have the executive responsibility in the bank."

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necessary for the performance of its duties, in addition, it may, at any time, arrange advisory boards from persons whom it chooses and ask for their comments.

[15] Article 107 of the Commercial Code – A company shall be governed by a board of directors elected by the shareholders of the company, and partially or generally disposed by them. The number of members of the board of directors in public joint stock corporations should not be less than five.

Therefore, the CEO cannot be the chairman of the board in private banks at the same time. However, state-owned banks do not stipulate such a ban in their articles of association, so the CEO could be the chairman of the board. State-owned and non-state-owned banks have similar decision-making and implementing bodies. Both have general assemblies, councils, board of directors and the managing board. What looks different in private banks seems to be the greater independence of the board of directors and the managing board. As stated above, there is no legal prohibition for the state-owned banks preventing the CEO from being simultaneously the chairman of the board, which is contrary to international banking standards (Jafari, 1396), when a person is appointed the CEO and chairman of the board of directors, he has the right to make decisions and implement them and he can be influential in the decision-making of the board of directors. In private banks, the articles of association do not allow the CEO to be the chair of the board of directors at the same time, since he can only hold one position. This separation guarantees the control of any type of activity that merely benefits the CEO (Jafari, 1396).

2-2- Employment regulations

Another difference is about the employment regulations in banks. The recruitment process in the state-owned bank is based on the "Employment bylaw of the State-owned Banking System", enacted in 1379 (2000), which is drafted in 50 articles, but non-state-owned banks operate on the basis of their domestic laws, which are usually approved by the General Assembly. Employees of state-owned banks are subject to the Civil Services Management Act, but private banks' employees are subject to the Labor Code (Piroozfar, 1380).

In addition, it appears that state-owned banks can determine certain conditions, in accordance with their internal regulations and resolutions of the General Assembly. Also, in the employment bylaw of the state-owned banking system, with regard to items such as Articles 11-15-21-26-27-29 of the bylaw, some responsibilities have been assigned to the board of directors of state-owned banks, for example, in accordance with Article 29 of this bylaw,[16] the state-owned bank may, in appropriate cases, grant its permanent staff facilities to satisfy essential needs and housing, the payment method for which shall be approved by the Board of Directors, or – in accordance with Article 27[17] –

[16] Article 29 of the Employment Bylaw of the State-owned Banking System may, as far as possible, grant its permanent staff interest-free (Qarzolhasane) facilities to satisfy the necessary needs and housing. The method of payment for the facility shall be approved by the Board of Directors of the Bank.

[17] Article 27 of the Employment Bylaw of the State-owned Banking System - the Bank is obliged to insure all its employees in respect of death for any cause and maim or permanent disability (partial or complete).

Note – The rules concerning the manner and scope of insurance of the above Article are approved by the Board of Directors of the bank.

the Board of Directors is responsible for approving the rules and procedures for insuring state-owned bank employees. Considering the above, which is the responsibility of the board of directors of each bank to formulate and approve a set of rules and regulations, it is possible that the resolutions of the members of the board of directors of the banks are different, that is, on the same issue each state-owned bank will act in its own way.

State-owned banks, the shareholder of which is the state, are controlled by the government with the mechanisms of the state system, such as the salaries and benefits of a coordinated government system, the recruitment and management of human resources in the form of governmental acts, the creation of various types of commissions in the bank like the transactions commission, the commission on purchases and fixed assets in a state-owned manner and in accordance with the codified laws of the state system and the smallest work must be done by bureaucratic procedure. While in private banks, whose board of directors is elected by the Assembly and is itself a shareholder, and the CEO, elected by the shareholders, makes the selection more effective and achievable.

II. The performance and the way in which the banks operate

In the non-usury banking system (the banking system of Iran), the distribution of resources of banks, both state-owned and non-state-owned, is carried out through Islamic contracts. These agreements provide the procedures by which banks can set up and provide the necessary facilities for the customers in the framework of contracts and transactions. In order to distribute this facility, banks must provide the necessary financial resources in the first place.

In fact, the banking system, like the human heart, has inputs and outputs, and the capital must also be circulated in the same way as blood in that organ, which may disrupt the functioning of the banks if it stops. The input of this system is the monetary or capital resources provided by depositors. These resources should not enter more than the standard amount at the heart of a bank, but should always be in flow and go outside the bank through the allocation of resources. Therefore, banks are continuously equipping and allocating their resources.

The allocation of one bank to another can vary depending on the policy-making of the managers and their goals, so the three main components of banks are the equipping, allocation and management of banks (Jafari, 1396).

The action of banks in collecting deposits and using them in economic activities leads to transfer of the capital from a non-active group (depositors) to another group operating in employment; this activity of banks, referred to as equipping resources, is among the banking activities which are of high importance (Vatanpour, 1387).

1- Equipping resources;

Banks may, in accordance with Article 3 of the second chapter of the non-usury banking operations act,[18] carry out operations for the purpose of equipping monetary resources under any of the categories of interest-free deposits (current and savings) and investment deposits (short-term and long-term). Accounts which are opened under the aforementioned titles, the repayment of initial amount is also guaranteed by the banks, and the same amount will be returned to the depositor upon request.

In order to attract these resources and to better operate in the area of equipping resources, banks can apply discounts or exemptions in some cases, such as discounts or exemption from fees, facilities or other banking services (Mirbahari, 1381). In this regard, the creativity of private banks in the sphere of banking services and attracting customers is richer than that of state-owned banks. Moreover, they are less likely to face barriers such as bureaucratic conflicts and regulatory rules in comparison with state-owned banks and have more freedom to equip their resources. On the other hand, state-owned banks do not feel the need to conduct advertising and provide new banking services to attract more customers due to public confidence (Gholizadeh & Kakdori, 1387).

It should be noted that the belief that the act on non-usury banking operations, which states how to arrange resources equipment and allocation, has provided the same methods for equipping banks' resources that it can be concluded that there should be no difference in the methods to equip resources between the two types of banks. Yet, it should be said that in practice this is not the case, because state-owned and private banks have access to inputs which, although they are not described in separation, such as an interest-free deposit and capital deposit, in practice cause entry of resources to the bank. For example, in accordance with Article 76 of the Public Audit Act,[19] all executive agencies and state-owned companies must open all their bank accounts with the permission

[18] Article 3 of the Non-usury Banking Operations Act – Banks may, under any of the following titles, accept a deposit:

A. Interest-free (Qarzolhasaneh) deposits: 1 – Current. 2 – Savings.

B. Long-term investment deposits.

[19] Article 76 of the Public Audit Act - The Department of the treasury or its representative in the cities at the Central Bank of Islamic Republic of Iran and other state-owned banks that have the Central Bank representative will open bank accounts up to the required number for related payments for ministries and governmental institutions and state owned companies (with the exception of banks and insurance companies and credit institutions) and their subsidiaries in the capital and the counties, as the case may be. The use of such accounts in the case of ministries and governmental institutions will be done by the joint signature of the comptroller or authorized official on its behalf and at least one of the other authorized officials introduced to the treasury department or treasury representative in the province, and all payments will be made exclusively through authorized accounts. The use of bank accounts of state-owned enterprises will be possible with the joint signature of the authorities mentioned in their articles of association and comptroller of the company or authorized official on its behalf.

of the department of treasury of the province and in state-owned banks. One of those examples is the ministry of justice fund that a state-owned bank should be in the account of the Melli Bank Iran, in addition to the facilities and aids granted by the central bank to banks that such facilities and aids are granted to state-owned banks more than the amount paid to private banks.

Another influential factor that plays an effective role in equipping banks' resources is the deposit interest rate. In order to attract depositors, there is a higher rate of interest in private banks than state-owned banks. After a mandatory reduction in interest rates for depositors, private banks turned into preferential rates more than state-owned banks. Preferential profit is a surplus on the declared amount of the central bank's profit and the bank's original contract with the depositor. In fact, the bank, in a private agreement with its depositor, pledges to pay, in addition to the legal profit, a surplus amount. The preferential profit rate in private banks has grown by 5%. However, the central bank has so far not officially recognized this type of profit by banks.

In order to provide resources, banks are looking to find the most appropriate way to get more resources into the bank, and banks must take strategies to attract customers and their loyalty and understand customers' needs and what the customer wants so that the bank can attract more resources. Although the services offered by banks are relatively uniform, bank managers have to find a way to achieve this. Relation-oriented marketing is one of these strategies, which means that the customer's strategy is attracting, maintaining and improving relationships with customers. One of the differences that can be said about a private and state-owned bank is extracted from research conducted in Isfahan in the year 87 (Gholizadeh & Kakduri, 2008), the results of this study indicate that trust is the most important factor in attracting customers to a state-owned bank, and the best performance of a state-owned bank has been building trust.

In the private bank, the most influential factor in attracting customers and, consequently, better equipping resources, is conflict management in this type of bank. In addition, the performance of the private bank in this regard should not be overlooked. In explaining the conflict management criterion, we can say that the surface conflict is described as a disagreement between the parties that can be perceived or apparent. When conflict increases in a relationship, the mutual trust and the tendency to create and maintain a long-term relationship is reduced, but conflict management itself is defined as a surface control over the disagreement in working relationships. The bank's ability to manage conflicts is critical to maintaining buyers. In examining this difference, it can be said that the customer's attraction and deposit receiving of state-owned and private banks are not consistent with the generalization of this issue, since the demands and expectations of customers of each of these banks vary somewhat. Finally, it should be pointed out that although these results are only for typical

banks and cannot be generalized to all state-owned and private banks in Iran, it seems that it cannot be denied that the method that private and state-owned banks use for customer attraction is different (Jafari & Bababeik, 1389).

2- Budget

The budget of state-owned banks is approved by the Islamic Consultative Assembly, but such a budget does not exist for private bank. The budget can put the state-owned bank in a safe zone because private banks have nothing but their initial capital and the deposits that customers place in the bank are in debt and must be returned and as a result, the private bank is always struggling to balance its inputs and outputs, but in the state-owned bank, even if this equilibrium is eliminated, it can use its budget, which puts the state-owned bank in a more secure position considering the existence of the budget (Hashmati Molai, 1385).

In addition, according to the monetary and banking institute, the total income of the eight state-owned banks along with the central bank in the budget year of 1397 (2018) is 845 200 billion Rials, which according to these statistics and the comparison of the budget of the year 1396 (2017) shows a more than 9.5% growth of the state-owned banks' revenue through the budget, which means that the security margin mentioned will also be increased more than before and will strengthen the gap between the two types of private and state-owned banks (Tabnak, 1396).

3- Allocation of resources

In the third chapter of the non-usury Banking Act, the allocation of resources to state-owned and private banks is generally divided into four groups, namely, interest-free (Qarzul Hassaneh), a partnership that is governed by an agreement such as Mudaraba, civil partnership, legal partnership, direct investment, farmletting, exchanges, such as installment sales, hire-purchase, forward purchase or short sale, purchase of debt; in the end, such obligations as Julaah, issued warranties, and issuing a credit.

The first motive behind the establishment of a private bank is often to make profit, because private individuals who always seek to make profit conduct business. This motive creates a different approach to allocation of resources. For these banks, the first category (Qarzolhassaneh) in the way of allocation, such as a marriage loan is not that attractive. In fact, if they are not obliged, they will give their facilities in more interest-bearing forms, such as partnerships and exchanges for those applying for the facility. In contrast, this trend exists in allocating resources to state-owned banks because state-owned banks are one of the tools to implement government policies and are usually formed for the purpose of developing and co-operating in a particular sector and industry,

such as the industry, agriculture and housing bank. The facilities in these banks are more likely to be allocated to their goals, and profit is not considered as it is in a private bank.

One of the government's policies to help vulnerable people is to grant bank facilities which is assigned to the state-owned banks more than private banks (the same). Each year, these banks are required to allocate part of their facilities to mandatory facilities, which is a banking source. Another kind of mandatory facilities is a facility that is provided by the government to the banks for a specified purpose. Such as lending to the Imam Khomeini Relief Committee, education, etc. Where the facilities should be paid from bank resources, it is a form of imposed allocation which reduces the liquidity of state-owned banks. (Mirbahari, 1390)

Private banks are more likely to use a trading contract with a predetermined interest rate and partnership agreements with floating interest rates. The basis of Islamic banking is based on partnership agreements, but private banks have surpassed the use of trading contracts in comparison with state-owned banks; that private banks are more in favor of trading contracts and less willing to use partnership contracts results from the purpose of their foundation, contrary to the specific purpose of establishing a state-owned bank, for example agricultural or housing, and the allocation of their resources as a tool for the implementation of government policies (Akbarzadeh, 1394).

Another difference in the field of allocation is the different application of the interest rate. Considering that the risk level varies between state-owned and private banks and depositors also take into account the issue of risk and take lower risk at the cost of excluding part of the return, but if the interest between the private bank and the state-owned bank is to be unified, the issue of competition between state-owned and private banks will be somewhat diminished. In 1397 (2018), the interest rate on the short-term deposits of most active banks in the country was 7% and the Saman Bank with a profit rate of 10%, the Middle East Bank with a 15% interest rate, and Iran Zamin Bank with a profit rate of 20.7% pay the most interest on short-term deposits. Also, in one-year deposits, the major interest rates of banks are 17%, and Mehr Eqtesad Bank, with a 23.3% interest, pays the most. At 3-year deposits, the major interest rate of banks is 19% and Mehr Eqtesad Bank, with payment of 22.1%, pays the most profits to its customers. In the case of five-year deposits, the major interest rates of banks are 20% and the Mehr Eqtesad Bank, paying 23.3%, pays more interests. With the mandatory uniformization and reduction of the rate of interest by the central bank, private banks have turned to preferential profits to equip more resources (Nematzadeh & Seyed Al-Mosavi, 1388).

4- The Association of non-state-owned banks and non-bank credit institutions

The Iranian association of non-state-owned banks and non-banking credit institutions "is a nonprofit institution consisting of banks and non-state-owned credit institutions authorized by the central bank to operate, which are admitted as a member into association and have independent legal personality" (articles of association of Iranian association of non-state-owned banks and non-banking credit institutions).

Obviously, the stronger this association as a self-organized institution gets, the more restricted the central bank becomes in its supervisory areas. The decisions and suggestions of this union have a guiding role regarding the actions and policies of the central bank and do not give rise to any obligation for the central bank. However, due to the increase in the number of members of the association, which includes about 19 banks and private financial and credit institutions, this association, on behalf of its members, can be used as a tool for advising and affecting the central bank's procedures and instructions. But the existence of this association among private banks and credit institutions has contributed to better coordination, uniformity in banking operations, cooperation between members of the association, making efforts to improve the quality of service and attracting customers, establishment of new banking methods and the possibility of expressing opinions and requests of the members through a specific channel.

5- Efficiency

Among the other differences between the private and state-owned banks that distinguish them, is the efficiency of these two types of banks (Soleimani Amiri, Abbaszadeh & Ahadi doulatsara, 1389). The results of the research that evaluates the efficiency of state-owned and non-state-owned banks and compares them show that the efficiency indicators of state-owned banks are far lower than those of private banks. One of the reasons for this is the governmental nature of the state-owned bank, and the conditions which govern the bank make the bank face the phenomenon of organizational irregularity. This organizational irregularity will make the state-owned resource consumer become the waster of those resources. Also, the transparency level in these banks is lower than in the private bank, because the State and the Finance Ministry are shareholders of the Audit Institute of the country. The "organizational irregularity" is the lack of clarity and ambiguity in the client and the target market of the state-owned bank and ambiguity in the goals and mission of the bank and the involvement of these banks in non-specialized matters, such as building and the presence of unnecessary people and many branches that closing them is difficult, the monetary and financial instability of the government, and the subsequent change of the top executives of the bank and compliance with the government's imposed

policies, one example of which is to allocate part of its resources to the Relief Committee and the like.

The presence of unnecessary people also means the individualistic approach. When they do not want to make a person leave the bank, they define a new organizational position while there is no need at all. With these explanations, we realize that because of the lack of these reasons in the private bank and the lack of or less existence of institutional irregularity, we can see better performance (Delkhah, Moshabaki, Danayifar & Khodad Hosseini, 1390).

In discussing economic efficiency, we can use the result of another economic survey, which reviews the efficiency of the state-owned and private banks over the past four consecutive years between 4 private banks and 10 state-owned banks; the result of this research first shows us what the concept of economic efficiency is. In fact, efficiency in the general sense is defined in this research. Also, in this general sense, the degree and quality of reaching a set of goals is desirable. In this research, by using the data and surveys carried out, the economic efficiency of private banks against the state-owned banks is confirmed.

III. Dissolution of banks

Banks, like any other legal personality, can be dissolved one day. Article 39 of the Monetary and Banking Act[20] stipulates the cases in which the Bank withdraws the authorization to establish a bank or transfer it to the central bank upon request by the competent authorities of the bank or if the bank has not started its operation within one year from the date when the authorization to establish the operation is notified, or if the bank stops its activity for more than a week without a reasonable excuse, or if the power of payment is endangered or denied. For example, one of the shareholders of Saderat Bank claimed the dissolution of a large stock exchange bank from the head of the Shahid Beheshti Judiciary Complex due to the disappearance of at least half of the capital, inclusive of legal damages, under Article 141 of the Commercial Code, which follows the organization of two assemblies with the agenda of increasing the capital.

[20] Article 39 of the Monetary and Banking Act of the Country: In the following cases, with the initiative of the Central Bank of Iran Governor and confirmation of the Council of Money and Credit Council, and the approval of a committee composed of the Prime Minister and Minister of Finance and the Minister of Economy and the Minister of Justice, managing bank affairs will be assigned to the Central Bank of Iran or the establishment license of the bank will be withdrawn: A. If the competent authorities of the bank ask for it; B. If the bank does not start the operation within one year from the date of notification of the establishment license; C. If the bank, without reasonable excuse, discontinues its activity for a period of more than one week; D. If the bank acts in violation of this act and regulations based on it and the articles of association of the Central Bank of Iran; E) if the banking payment power is endangered or denied.

1- Bankruptcy

According to Article 412 of the Commercial Code,[21] the bankruptcy of a businessman or a trading company is "being unable to pay the debts he is liable to." The bankruptcy declaration authority is the trading company, the owner of the debts, or the competent judicial authority. Although according to the Commercial Code, all credit institutions as well as trading companies are subject to this code, some laws and regulations, in particular, address the issue of bankruptcy of banks and credit institutions. All banks, both state-owned and private, are subject to the monetary and banking act, and the bankruptcy acts are the same for private and state-owned institutions. In the monetary and banking act of the country, approved on 1351/04/18, there is a specific chapter on the bankruptcy of banks, which in Article 41 refers to the Central Bank's comment upon the court's request.[22] However, there is no specific definition of bankruptcy in the act, and therefore it can be deduced that the rules contained in the Commercial Code also cover bankruptcy detection authority. This is set forth in Article 103 of the Bylaw on the Establishment and Management of Non-Governmental Monetary and Credit Institutions.[23]

One of the other key rules of bankruptcy in the banking system of the country is the double urgency interpretive plan on Article 39 of the monetary and banking law of the country, which was approved by the Islamic Consultative Assembly in 1394 under the title "The act on the addendum of a note to Article 41 of the monetary and banking act of the country." This act was passed through the Islamic Consultative Assembly in the light of failure to extend some provisions of the monetary and banking act of the country, including Articles 39, 40 and 41, to non-bank credit institutions in the chapter on procedures for dissolution and bankruptcy of banks chapter. By virtue of this act, the aforesaid articles, with the exception of paragraph D of Article 41, include all non-bank credit institutions which, with the Bank's discretion, engage in banking operations, with the exception of state and non-state-owned development and support funds such as the Agricultural Production Support Fund, within the scope of

[21] The bankruptcy of a businessman or a trading company is being unable to pay the debts he is liable to. The order of bankruptcy of a businessman who is unable to pay his debts while dying, can be issued one year after his death.

[22] Article 41 of the Monetary and Banking Act of the Country – If bankruptcy of a bank is announced, the court will consider the opinion of the Central Bank of Iran before making any decision. The Central Bank of Iran must notify the court in writing within a month of the date of receipt of the court's request.

[23] Article 103 of the Bylaw on the Establishment and Management of Non-Governmental Financial and Credit Institutions – In the event of a bankruptcy of the credit institution, its liquidation is carried out under the supervision of the Central Bank and in accordance with the monetary and banking act of the country, the rules for bankruptcy in the Commercial Code and the rules of the Deposit Guarantee Fund.

the present articles of association. With regard to the above, it can be said that the acts of the country with the referral of bankruptcy of financial institutions to the law of commerce, did not actually distinguish between the definition of bankruptcy in financial institutions and other enterprises. The only key point in this regard is the legislator's special attention to the status of the central bank as the regulator of the banking sector, in a way that requires the court to consider the central bank's comment before issuing an award. Also, according to various articles of the monetary and banking act, the Central Bank plays the key role in the process of dissolution and bankruptcy of financial institutions. This does not automatically reflect the attention of the legislator to the different considerations of bankruptcy of banks and other commercial companies, because in the case of other enterprises, the court will be the only reference involved in the issuance process. In addition to the aforementioned, in the bill on amendments to the monetary and banking act that was submitted to the Islamic Consultative Assembly, Articles 91 to 112 and those in Chapter 6 deal with bankruptcy of banks and non-bank financial institutions (Aziziyan Gilan, 1392).

As stated, from the theoretical point of view, there is a probability of bankruptcy of banks. However, the issue of bankruptcy in banks differs from other enterprises and is a negative phenomenon with many effects and economic consequences. Practically there is a tendency for the government and the central bank to support banks which are unable to pay their debts before their bankruptcy. Nevertheless, unplanned profits that are paid, claims that are not collected, surplus properties that are not sold, paper assets, resources that do not meet the demands and standards that are not met are all serious challenges that the Iranian banking system, including private banks and the state-owned ones, is struggling with and which increase the probability of bankruptcy of banks, especially private banks, due to paying high rates of interest to attract resources and gain a larger market share. This is because the most serious challenge for banks is a devastating competition over paying interest of deposits to their customers that has made the price of money more expensive in the official market and increased interest rates of banking facilities. The competition has posed a big problem to the Central Bank and individual banks which inevitably pay more interest in order to get rid of debts and losses. This tendency to pay more interest is lower in state-owned banks, though. On the other hand, each year in the annual budget of the country, huge sums of money in the current budget of the country are considered for the current operating costs of state-owned enterprises; in fact, the bankruptcy of state-owned companies, including state-owned banks, especially with regard to the reliance on oil revenues is less probable. (National Conference on Modern Research in Management, Economics and Humanities, 1396)

2- Merger

In completing the dissolution issue, it should also refer to the category of bank mergers; since one of the means of distinguishing between the state-owned and private banks is the ability to merge. Merger is an accepted matter in the banking system of the country, although it seems impossible in practice. The Bill on Managing Bank Affairs stipulates that the General Assembly of the bank may proceed with the merger of banks, and the aggregate amount of the merged banks will constitute the capital of the new bank and all the assets and liabilities will be transferred to the new bank. But the problem with merging state-owned banks is that they do not have the same mechanism, especially in developing banks such as Housing, Industry and Agriculture. To merge, the receiving bank must have the capacity and potential of the merged bank's obligations. But it is very difficult or impossible to merge banks such as agriculture and housing that do not have the same mechanism. Concerning the merger of private banks, they seem to be capable of accepting and uniting with each other due to the fact that these banks operate in similar ways in practice (Tabatabaeenjad, 1349).

Conclusion

In recent years, the banking system of Iran has undergone major changes, the most important of which is the establishment and creation of private banks alongside state-owned banks in the banking industry of the country. This study aims to compare the necessary conditions and regulations at the start-up stage of new private banks and experienced state-owned banks that have monopolized the banking industry in the past few years. In addition, it evaluates the performance and dissolution and bankruptcy of private and state-owned banks. In the formation and establishment of banks in terms of the supply of equity and initial capital, and on the terms of the board of directors and CEO, we saw differences between these two types of banks. Also, the two types of bank operate differently regarding their activities. In addition, based on the findings, the performance of these two banks in the dissolution phase, which includes dissolution, bankruptcy and merger, differs only in the merger phase and is similar in two parts.

As stated, the existing structural differences result in a functional difference, and make a change in how the resources of these banks are equipped and allocated. Each private and state-owned banking system has strengths and weaknesses, while complementing one another. In the current economic status, private and state-owned banks sometimes play a different role, making it difficult to eliminate one of the two banking systems. The state-owned bank is one of the most important tools of the government to implement its financial policies in the capital market, and it is not possible to remove this tool. On the

other hand, these banks are more popular with people due to the support of the Central Bank and its governmental nature, and so far private banks have not been able to compete with the state-owned counterparts. But the lack of solutions for intra-organizational problems, management structures, borrowing from the Central Bank and the lack of diversification in the provided services have led to the excellence of private banks and the success of these banks in attracting domestic and foreign capital. Also, private banks respond more quickly to new needs of domestic and international markets due to differences in the management and training structure, as well as diversity in services provided.

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The GeoData Intellectual Property Rights Policy

Polityka praw własności intelektualnej na geodanych

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Abstrakt: W niniejszym artykule autorka przedstawia zasady prawa własności intelektualnej rządzące geodanymi. Głównym celem tego artykułu jest otwarcie tego problemu na dalsze badania i dyskusje. Koncepcje geodanych i ich prawnej interoperacyjności nie spotkały się dotychczas z tak dużym zainteresowaniem naukowym, jak powinny. Opracowanie jednego modelu dostępu do geodanych jest szczególnie trudne, biorąc pod uwagę, że geodane są wytwarzane i przechowywane w różnych środowiskach przy całej ich złożoności. Dlatego ważne jest, aby skonfrontować i omówić czynniki wpływające na licencjonowanie geodanych. Na tej podstawie autorka proponuje taksonomię niezwykle różnorodnych licencji na geodane.

Słowa kluczowe: geodane, licencje, geoinformacja, prawo własności intelektualnej, prawo kosmiczne

Abstract: In this paper, the author presents intellectual property law policies related to geodata. The sole purpose of this paper is to open up this problem for further investigation and discussion. The concepts of geodata and legal interoperability have not received as much scholarly attention as they merit. Drafting one single model for geodata access is especially hard, given that geodata is produced and maintained in multifold environments. This makes it important to confront and discuss the factors influencing the licensing of geodata. On this basis the author proposes a taxonomy of the extremely diverse licenses for geodata.

Keywords: geodata, licences, geoinformation, intellectual property law, space law

1. Introduction – how an invention escapes its underlying goal

The development of civilization is immutably connected with inventiveness, which – on the one hand – allows humankind to subjugate its surroundings, but – on the other one – brings about unexpected changes requiring complete re-evaluation of the world as it is already known. At the turn of the twelfth and the thirteenth centuries, Benedictine monks constructed a prototype clock to ensure regularity in their daily routine, seven hours of which were devoted to prayer.[1] When the invention of the clock escaped the walls of the monastery, it gradually emerged as the "cornerstone of capitalism", contributing to the creation of a regulated day's work. Another breakthrough came in the fifteenth century, when Johannes Gutenberg introduced the movable type, enabling mass exploitation of the printing press. His invention contributed to the development of typographic art and literacy among the common people, feeding their hunger for ever more accessible sources of learning.[2] The change in mindset triggered in large part by Gutenberg's printing revolution resulted in the 18th and the 19th century in the establishment of the framework of an intellectual property rights regime. In this way, human inventiveness shaped this understanding of industrial property rights.

It should be noted that, even though Industry 4.0 is very much a contemporary concept, its roots go back to 1784, a turning point at the beginning of Industry 1.0. That concept was based on the invention of mechanization, steam power and the weaving loom. Industry 2.0 began in 1870, the term referring to mass production, the assembly line and the introduction of electrical energy. Then, in 1969, came the dawning of the era of Industry 3.0, dominated by electronics, computers and automation.[3] It was not until the invention of super-fast (and equally small) computers and the Internet that the world was revolutionized anew. It is a well known fact that the foundations of the modern Internet were laid by the USA's Department of Defense in the 1960s, when it decided to establish a resilient computer network to decentralize the management system providing protection against potential nuclear war with the Soviet

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[1] M. Glenhaber, *The Invention of the Mechanical Clock and Perceptions of Time in the 13th-15th Centuries,* "The Concord Review", 2013, p. 159 and ff., available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjv2eGfmfnnAhVro4sKHVYND2IQFjABegQIBRAB&url=https%3A%2F%2Fmodelsofexcellence.eleducation.org%2Ffile%2F3970%2Fdownload%3Ftoken%3D3xnY9JBB&usg=AOvVaw0sNQXOwUDDro84IoeUjC0- (accessed: 10.02.2020).

[2] M. Jankowska, M. Pawełczyk (eds.), *Prawo informatyczne,* Warszawa 2020, in progress.

[3] P.K.D. Pramanik, B. Mukherjee, S. Pal, B.K. Upadhyaya, S. Dutta, *Ubiquitous Manufacturing in the Age of Industry 4.0: A State-of-the-Art Primer*, in: A. Nayyar, A. Kumar (eds.), *A Roadmap to Industry 4.0: Smart Production, Sharp Business and Sustainable Development*, Springer 2020, p. 75-77.

Union. It turned aut, however, that this robust approach to computer networking became an efficient tool in the hands of American and European universities, enabling communication. In the 1980s, there was another breakthrough with the emergence of personal computers and telecommunication modems.[4] The epochs of evolution can therefore be differentiated based on one denomination: Before Google and After Google.

In this way, computer technology broke out of military and research confines and allowed the public to build on increasingly rich deposits of information available more and more digitally. The resulting new era of innovation was named Industry 4.0 because of the harnessing of the power of the Internet, cyber technology and data gathered through new tools and devices. As noted by André "the industrial revolution is not just about computer programs. It implies a flexible adaptation of the company's structure."[5] Given that a dynamically developing enterprise consists mostly of intangible goods (such as works of authorship, inventions and utility models, etc., but also including know-how regarding making, marketing and targeting of a product),[6] more attention should be paid to licensing schemes and intellectual property rights (IPR) policy within an enterprise and beyond (commercial and non-commercial relations). Serge Catherineau, Directeur Marketing Marché Automobile Aéronautique et Système-intégrateurs at Schneider Electric, rightly pointed out, "in the industry, we don't do Big Data, we do Smart Data. 'Smart Data' means capturing the right data, transforming it (or contextualizing it) and using it to optimize the manufacturing process".[7] New technology broke out of the intellectual property law paradigms as we knew them, casting doubt on the established frames of protection of data, including geodata and indeed any other kind of non-personal data.[8]

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[4] M. Jankowska, M. Pawełczyk (eds), *Prawo…*

[5] J.-C. André, *Industry 4.0: Paradoxes and Conflicts*, London-Hoboken 2019, p. xxxvii.

[6] It should be admitted that "The software of product planning is part of the main software system that looks after the entire product development process. Software is directly linked to the other parts of the manufacturing unit through cloud computing and this allows for data manipulation in real time. There is direct communication with the different machines involved in the manufacturing process. The technical implementation of the software is easy as the software needs to collect the data from the databases and then make a proper analysis and therefore making the necessary decisions. The major problem is the database on which the software relies. Therefore, it is the development phase of the software that can take more time in comparison to the implementation phase. Developed software should form an integral part of the company's intellectual property." See K. Kumar, D. Zindani, J.P. Davim, *Industry 4.0. Developments towards the Fourth Industrial Revolution*, Singapore 2019, p. 25.

[7] J.-C. André, *Industry 4.0…*, p. xxxvii.

[8] I. Stepanov, *Introducing a property right over data in the EU: the data producer's right – an evaluation*, "International Review of Law, Computers & Technology", 2020, Vol. 34, issue 1, text available at: https://www.tandfonline.com/doi/full/10.1080/13600869.2019.1631621, accessed: 12.02.2020.

2. Data revolution

The emerging deluge of software and devices based on new technology is a phenomenon referred to as the "data revolution", triggered by a few artful leaders, remastered by early adopters and implemented by smaller players. The Big Data landscape, providing for a large volume of data that can be accessed and rendered with relatively low levels of computing skills and low software expenditures, gives rise to an array of new, data-driven business models.[9] The last 30 years have witnessed an exponential growth in computing power, Information and Communications Technology infrastructure and domestic devices. The great promise of today's burgeoning volume of data portends a new approach to IPR among entrepreneurs and public authorities. Therefore, there is an inescapable question about the shape of contemporary realities of gathering and disseminating data from the perspective of IPR, which in fact constitute the joint capital of both entrepreneur and public authority. And because the catalog of intangible goods recognised for IPR protection is fixed, when new technologies arise, they may find themselves unprotected or face uncertainty related to their protection. In order to ascertain the legal protection available for data and data sets these have to be gauged from the copyright and database law perspective. An insightful analysis shows that as copyright and database law have not been designed to protect data itself, it is not of much use here.[10]

3. Data- and innovation-driven economy

3.1. Innovative drive

The iterative digital transformation of the economy was made possible due to the availability of efficient IT infrastructure (cloud processing), the capacity to acquire and use increasing volumes of data (Internet of Things, Internet of Humans), and the development of analysis techniques (artificial intelligence). Our prior perception of data and innovation and the related process for making and implementing technical developments has undergone a far-reaching change. The 21st century was hailed as the "age of innovation", in which everybody indifferent to the creativity and the new technology race would end up in the so-called "evolutionary dead end" of the global economy,[11] with all its consequences, scaring them in particular with the prospect of economic and financial

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[9] G. Koloch, K. Grobelna, K. Zakrzewska-Szlichtyng, B. Kamiński, D. Kaszyński, *Data utilization intensity and economic performance – a diagnostic analysis*, 2017, available at https://mc.bip.gov.pl/rok-2017/analiza-diagnostyczna-intesywnosc-wykorzystania-danych-w-gospodarce-a-jej-rozwoj.html, accessed: 10.02.2020.

[10] M. Jankowska, *Digital Maps. IP Paradigms and New Technology,* Warsaw 2017.

[11] M. Jankowska, M. Pawełczyk, *Czarna dziura technologii w innowacyjnej gospodarce a dobra własności intelektualnej.* [The Black Hole of Technology in the Innovative Economy and Intellectual

banishment. In Europe, there is currently a debate at both national and international level as to how to use the data to make the potential of its owner grow.

3.2. What is data? Where does it belong in the IPR schema?

To establish our terminology, we must, as always, begin with an analysis of the basic concepts of the topic, such as, in this instance, data and information. In the literature, some attempts have been made to define and categorize these terms.[12] Considerations of this kind centre around a few basic terms that can be hierarchically summarized in the following order: data – information – knowledge – wisdom. In spite of the diverse set of definitions of "data", it is safe to say that data is the oil of today's economy. Polish language dictionaries define 'data' as 'things, facts on which you can rely in making claims; information, news'[13] or 'basic, unchangeable facts, information, news.'[14] As the terms 'data' and 'information' are incorrectly used interchangeably, mostly due to the lack of words suited to describe the phenomena in sufficient detail, 'information' rather means 'a notice about something, communicating something; news, tips, instructions'.[15] This perplexing hotchpotch is a result of the lack of uniform terminology, as well as the lack of explanation of the meanings of the terms outlined, a fact which can be observed when consulting legal dictionaries. Just as this arises for such terms as 'data'[16] and 'information,'[17] similarly we see the same blurring between 'knowledge' and 'wisdom'.[18]

Property Assets], in: *Znaczenie wyceny własności intelektualnej.* [Proving the Worth – Putting a Value on Intellectual Property], Warszawa-Dąbrowa Górnicza 2019, p. 113-114.

[12] More cf. M. Jankowska, M. Pawełczyk, *The notion of geospatial information – several preliminary remarks, spatial information and public information* [in:] M. Jankowska, M. Pawełczyk (eds), *Geoinformation. Law and practice*, Warsaw 2014, p. 1-18, open access at: iip.edu.pl/en.

[13] M. Szymczak (ed.), *Słownik Języka Polskiego*, Warsaw 1978, p. 360; W. Cienkowski, *Praktyczny słownik wyrazów bliskoznacznych*, Warsaw 1993, p. 27.

[14] E. Wierzbicka (ed.), *Słownik Współczesnego Języka Polskiego*, Vol. I, Warsaw 1998, p. 155.

[15] M. Szymczak (ed.), *Słownik…*, p. 788.

[16] M Jankowska, *Digital Maps…*, Warsaw 2017, p. 56; G. Cornu (ed.), *Vocabulaire juridique*, Paris 2011, p. 367; R. Cabrillac (ed.), *Dictionnaire du vocabulaire juridique*, Paris 2008, p. 154; S. Bissardon, *Guide du langage juridique. Les pièges à éviter*, (in cooperation with R. Burel), Paris 2002, p. 155; N. Delecourt, *Le dictionnaire du droit*, Hericy 2000, p. 118; S. Guinchard, T. Debard, *Lexique des termes juridiques*, Paris 2012, p. 324; J. Law, E.A. Martin, *Oxford Dictionary of Law*, Oxford 2009, p. 152; K. Weber (ed.), *Rechtswörterbuch*, München 2007, p. 255.

[17] R. Cabrillac (ed.), *Dictionnaire…*, p. 228.

[18] So noted by R. Cabrillac (ed.), *Dictionnaire...*, p. 365; S. Bissardon, *Guide…*, p. 267 and 264; N. Delecourt, *Le dictionnaire…*, p. 228 and 226, S. Guinchard, T. Debard, *Lexique…*, p. 777; P.H. Collin, *Dictionary of Law*, Teddington Middlesex, p. 256, cf. L.B. Curzon, *Dictionary of Law*, Essex 2002, p. 452; K. Weber (ed.), *Rechtswörterbuch…*, p. 671, 1385.

We will now turn to an attempt to settle some key concepts within the structural framework, put them in some order, and assign them to well-known legal categories. The motivation to do so becomes even greater given that the axiological pyramid (data-information-knowledge-wisdom) has been applied in the teaching of cartography for a very long time, but has not been translated into theories and structures familiar in legal sciences.

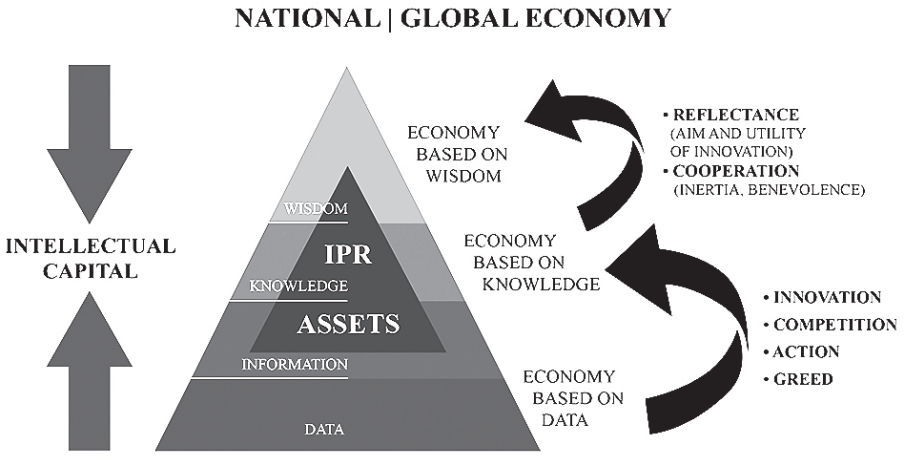

Figure 1. Cognitive pyramid and IPR assets
Source: own work based on available resources, cf. M. Jankowska, M. Pawełczyk, *Czarna dziura…/The Black Hole*…, pp. 143–144.

Figure 1 seeks to depict the relationship between the two sets: the cognitive pyramid and IPR assets and to show that they overlap to an extent, but are not identical. In the theory of private law, the concept of an "enterprise" has received a lot of attention and many have attempted to define it. It can be defined as an organized set of tangible and intangible elements intended for conducting business activity, as it includes in particular: a/ a designation distinguishing the enterprise or its separated parts (the name of the enterprise), b/ patents and other industrial property rights, c/ copyrights and neighboring rights, d/ trade secrets.

In practice, these elements can be broadly understood as data, information and knowledge, which can be created in many ways, ultimately adopting the form of normatively recognized IPR goods: work of authorship, inventions, utility models, industrial designs, trademarks, integrated circuit topography, geographical indications, know-how, breeders' rights and databases (though not data itself).

If data were to be acknowledged somewhere within the realm of IPR goods, one could refer to the IPR schema:

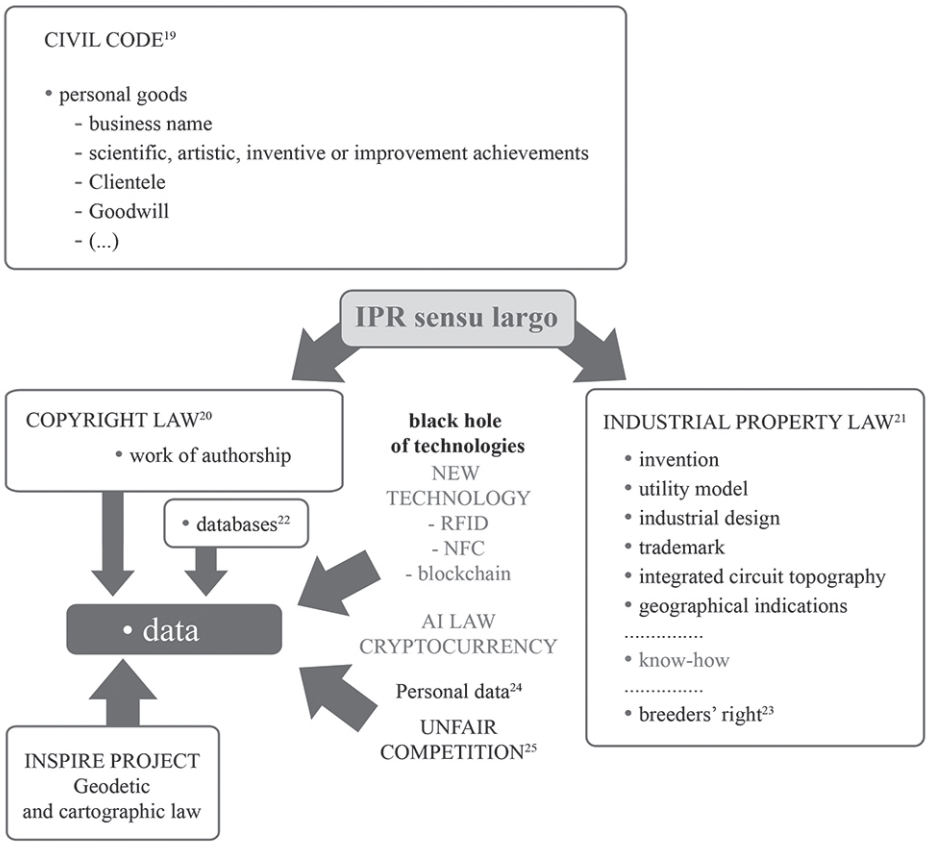

Figure 2. Scope of intellectual property law (marked in grey are the areas which are unregulated, developing, or which have new/fragmentary regulations)
Source: cf. M. Jankowska, M. Pawełczyk, *Czarna dziura…/The Black Hole…*, p. 145.

When looking at the grey areas, it should be noted that the technological progress entwined with the multiplicity of concepts and their lack of systematization preceded by appropriately broad interdisciplinary research means that not only the theory and practice of applying the law find it increasingly

[19] Legal act as of 23.04.1964, Civil Code, JoL as of 2018 pos. 1025.

[20] Legal act as of 4.02.1994, Copyright Law and Neighbouring Rights, JoL as of 2018 pos. 119.

[21] Legal act as of 30.06.2000, Industrial Property Law, JoL as of 2017 pos. 776.

[22] Legal act as of 27.07.2001 on Protection of Databases, JoL as of 2001 r., No. 128 pos. 1402.

[23] Legal act as of 26.06.2003 r. on Protection of Breeders' Rights, JoL as of 2020 pos. 288.

[24] Legal act as of 10.05.2018 on Protection of Personal Data, JoL as of 2019 pos. 1781.

[25] Legal act as of 16.04.1993 on Unfair Competition Suppression Act, JoL as of 2019 pos. 1010.

difficult to order goods and name them.[26] It is, however, important to realise that not everything an enterprise has to offer in an intangible form will fall under copyright protection or will be capable of protection granted by industrial property. From the entrepreneur's perspective, however, it is important to have knowledge in the field of IPR as to what is potentially suitable for protection and of the criteria for obtaining it.

3.3. Origins of data

In 2013, UNECE's Big Data Task Team created a typology of data and grouped it into three categories according to their sources:

1. Social networks – human-sourced information, loosely structured and often ungoverned; available via: social networks, e.g. Facebook, Twitter; blogs and comments; personal documents; pictures, e.g. Instagram, Flickr, Picasa; videos, e.g. YouTube; Internet searches; mobile data content, e.g. text messages; user-generated maps; e-mail.

2. Traditional business systems – process-mediated and thus usually highly structured; often stored in relational database systems; produced by both public agencies (e.g. medical records) and businesses (e.g. commercial transactions, banking/stock records, e-commerce, credit cards, mapping and satellite activities).

3. Internet of Things – machine-generated and well structured; data from sensors: a/ fixed sensors (home automation, weather/pollution sensors, traffic sensors/webcams, scientific sensors, security/surveillance videos/images); b/ mobile sensors/tracking (mobile phone location, cars, satellite images); c/ data from computer systems (logs, web logs).[27]

4. Innovation: a non-legal perspective

In order to make the best use of IPR knowledge and to profit from it – an entrepreneur also has to be innovative, in a sense that he has to be prescient and act protectively. Many attempts to define innovation have been encapsulated into one globally approved definition provided by the OECD Oslo Manual for measuring innovation.[28] The Oslo Manual defines four types of innovation: product innovation, process innovation, marketing innovation and organizational innovation.

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[26] Cf. M. Jankowska, M. Pawełczyk, *Czarna dziura technologii…*, p. 141.

[27] P. Struijs, *BIG data for official statistics*, Eustat, 2016; available at: http://www.eustat.eus/productosServicios/datos/58_Big_Data_for_Official_Statistics_Peter_Struijs.pdf, pp 5-6; https://statswiki.unece.org/display/bigdata/Classification+of+Types+of+Big+Data, accessed: 06.02.2020.

[28] OECD (2005), Oslo Manual, Guidelines for Collecting and Interpreting Technological Innovation Data, OECD/Eurostat Paris; definition available at: https://www.oecd.org/site/innovationstrategy/defininginnovation.htm, accessed: 06.02.2020.

(a) Product innovation: a good or service that is new or significantly improved. This includes relevant improvements in technical specifications, components and materials, software in the product, user friendliness or other functional characteristics.

(b) Process innovation: a new or significantly improved production or delivery method. This includes vital changes in techniques, equipment and/or software.

(c) Marketing innovation: a new marketing method involving significant changes in product design or packaging, product placement, product promotion or pricing.

(d) Organisational innovation: a new organisational method in business practices, workplace organisation or external relations.

However, regardless of the definition of innovation, IPR does not acknowledge such a conceptual category, although it will actually provide legal protection to entrepreneurs' intangible assets. From the practical point of view, the conceptual relationship between innovation intellectual capital and IPR (including intangible goods) becomes important.

Nowadays, not only technology is defined as innovative, but also social phenomena and the economy. Innovativeness in the economy means "continuous striving to successfully introduce new products, processes and forms of functioning of entities" which is "a means of building significant competitive positions and achieving economic benefits".[29] Social innovations can be understood in a narrow way as non-technological innovations, including improved organizational and management methods, but also as part of technological innovations, being, for example, organizational and marketing tools for their implementation, e.g. zero-stock management strategies, just-in-time (delivery on time) and others, like customer care.

5. The data policy in Poland

Somewhat less attention is drawn to the intricate legal sphere of IPR protection and licensing. To some extent, however, every potential player – be it a public authority or a private entity – may apply some degree of latitude, not to mention outright creativity in using legal tools, inventiveness in applying business models and creating their own IPR strategy. The temptation to exploit the discretion given to each player can be observed in recent years by the example

[29] K. Prucia, *Efektywność finansowania innowacji za pośrednictwem Narodowego Centrum Badań i Rozwoju* [Effectiveness of financing innovations by menas of the National Centre for Research and Development], in: A.A. Janowska, R. Malik, R. Wosiek, A. Domańska (eds), *Innowacyjność i konkurencyjność międzynarodowa. Nowe wyzwania dla przedsiębiorstw i państwa*, Warsaw 2017, p. 55.

of US cities' municipal IPR policies and the litigation triggered by them due to breaches in the municipalities' licensing terms. The question arises as to what model of data policy should be followed and as to the assumed objectives. At the national level, in Poland, for example, it has been *explicite* articulated that, taking into account the specificity of Poland's economy (a large share of foreign investments, large public sector, a significant number of small and medium-sized companies), it is necessary to develop an independent concept for the digital transformation of one's economy. The basis of this model is openness and interoperability. In practice, to allow Polish companies to participate in European and global value chains the following should be ensured:

I. The use of the potential of the state treasury companies through application of digitization to strengthen key infrastructure networks (transport and energy) through intelligent network technologies and implementation of horizontal solutions and platform,

II. Building of cooperation and communication platforms for small and medium-sized enterprises, enabling virtualization of production processes, their combining into complex economic organisms in order to make production more flexible and the building of new business models. Platforms of this kind should ensure access to open machine data (before algorithmization) to provide an environment for further innovation,

III. Transformation of industry towards solutions of fourth generation, which will generate huge data volumes and will open new possibilities to create value,

IV. Building of trust in the digital world through creation of appropriate safety standards and value protection as well as a system of incentives and support for benefits for participants in digital platform teamwork.[30]

6. Geodata-driven decision making, geodata representations and legal interoperability

6.1. Technical interoperability

Recently, more and more attention has been accorded to geoinformation (GI) as today's progress depends on at least two factors, such as space and time. A set of urban data or any Geographical Information System (GIS), is a hybrid, especially when we realise how it is created, at how many different stages the creative process takes place, of how many components it consists and what legal effects it has as a whole.

[30] M. Borowik, R. Kroplewski, L. Maśniak, H. Romaniec, *Przemysł+. Gospodarka oparta o dane* [Industry+. The economy based on data], Warszawa 2018.

Currently, the environment in which decisions are made is rich in information. This is especially so when the decision relates to the spatial aspect in such a way that the data necessary for its adoption are included in maps, aerial and satellite photographs, tables. Not to mention when a number of technological solutions are necessary to acquire them, such as remote sensing, digitization or photogrammetry. It turns out, however, that information obtained from data is not always sufficiently full or precise. As Y. Leung[31] also points out, information becomes dynamic with constant changes in space and time. Furthermore, to gain weight and usefulness it should be supplemented or organized by the human factor in the form of knowledge and expertise. Research into geospatial information used to be limited to working towards a common conceptual, technical, and interoperational framework in which data were created and combined into collections. Legal aspects were mainly limited to working out the principles of data platform functionality, for which open licenses were recommended that allowed the use of data both commercially and non-commercially. The Open GIS Consortium and the International Organization for Standardization contributed heavily to creating the standards of technical interoperability.[32] A Decision Support System (DSS) is an interactive, computer-based system that aids users in judgment and decision-making activities. They provide data storage and retrieval but enhance the traditional information access and retrieval functions with support for model building and model-based reasoning. They support framing, modeling, and problem solving.[33] With the development of GIS, DSS has evolved into Spatial Decision Support Systems (SDSS). This is characterized by the fact that spatial data properties are analyzed and play the major role in the decision-making process. This results from the assumption that the GIS includes the set and structure of data used by the person making the decision. The first and most basic function of GI systems was to create visualization of spatial data, so it resembled a map much more than an application to predict business needs and to model appropriate solutions.[34] In the literature, it is pointed out that the system in most cases works on standard computers and

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[31] Y. Leung, *Intelligent Spatial Decision Support Systems*, Belin Heidelberg 1997, p. 1-2.

[32] C. Reed, *OGC standards: Enabling the geospatial web*, in: Li S, Dragićević S., Veenendaal B. (eds), *Advances in Web-based GIS, Mapping Services and Applications*, London 2011, p. 327.

[33] M.J. Druzdzel, R.R. Flynn, *Decision support systems: Encyclopedia of library and information science*, New York 2000, p. 794; L. Yu, X. Tan, J. Huang, *Distributed decision-support GIS application based on web-service*, Proc. SPIE 6754, Geoinformatics 2007: Geospatial Information Technology and Applications, 675436 (6 August 2007); doi:10.1117/12.765255; http://dx.doi.org.wwwproxy1.library.unsw.edu.au/10.1117/12.765255, accessed: 06.02.2020.

[34] P.J. Densham, *Spatial decision support systems*, "Geographical Information Systems: Principles and applications" 1/1991, p. 403-412.

open licenses.[35] The GI system provides the so-called value-added information and is designed to allow the analysis of spatial information. In literature, this phenomenon is also referred to as geographical information analysis (GIA), spatial multiple criteria decision making (SMCDM) or spatial multi-criteria evaluation (SMCE).[36]

6.2. Usability

Although there is no need to prove that spatial data is widely used, this description of technological development would not be complete without a more precise indication of the main areas of real GIS application. A synthetic description in this respect is made by S. Faiz and S. Krichen.[37] Firstly, state administration collects information about land, owner identification, cadastral maps, spatial development plans, sun exposure studies, plans and models of land relief, planning and management of land development, area calculation and land management, e.g. green areas and parks. Secondly, it is applied in statistical mapping, e.g. statistical, demographic, socio-economic, epidemiological, tourist maps, maps and management tools, city asset management, natural hazards maps and crime risk, simulation of fire propagation mapping, landslides, floods, mapping of rational use of natural resources, forest management, agriculture, air and water quality; including geomarketing, that is, the study of the implementation of a new facility or agency, a network of advertisements for a project, information in the pages of newspapers and regional dailies. Thirdly, the network management provides for maps of roads, bus routes, trains, river networks, water intakes, gas, electricity and telephone infrastructure. A spatio-temporal connected database generates plans and allows control of a network situation and reflects the size of existing phenomena. Also, it provides support in everyday life and in gathering and displaying information about significant events. Finally, remote sensing benefits from surveying, environmental, mineral range, natural phenomena, pollution and excavation data.

What should be borne in mind here is that GIS allows for: 1) storage of a large amount of geographic data at low cost, 2) lower cost production of maps and plans, 3) fast mapping with interactive data selection, 4) creating maps and plans impossible to be produced by hand, 5) improving product presentation.[38]

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[35] J. Delaney, *Geographical Information Systems. An introduction*, Melbourne 2001, p. 10-12.

[36] G. de Tré, J. Dujmović, N. van de Weghe, *Supporting Spatial Decision Making by Means of Suitability Maps*, in: J. Kacprzyk, F.E. Petry, A. Yazici (eds), *Uncertainty Approaches for Spatial Data Modeling and Processing. A Decision Support Perspective*, Berlin Heidelberg 2010, p. 10.

[37] S. Faiz, S. Krichen, *Geographical Information Systems and Spatial Optimization*, Boca Raton, London–New York 2012, p. 9-10.

[38] S. Faiz, S. Krichen, *Geographical Information…*, p. 16 ff.

At the same time, GIS entrepreneurs suffer from: 1) high cost and technical problems of data acquisition, 2) high cost of maintaining and administering updated data, 3) the cost of maintaining software and products, and finally, 4) lack of legal certainty as to product copyright protection, or compatibility of licenses within product components, 5) lack of transparent IPR business strategies.

Many GIS software packages also provide tools for displaying data as histograms, bar charts, point charts, and box plots. Some GIS software packages provide more advanced statistical tools, enabling factor analysis, cluster analysis, regression analysis and correlation. In other words, there is a variety of possible external forms of data presentation and multiple rendering options. SDSS is characterized by such features as: 1) allowing the ingestion of spatial data, 2) enabling the presentation of complex spatial relations as well as structures typical of spatial data, 3) providing analytical techniques that are unique and characteristic of spatial and geographic analysis (including statistics), 4) providing results in a variety of spatial forms, including maps and other, more specialized, characters.[39] Knowledge, in turn, implies reasoning and analysis based on organized information and principles of inference gained through experience and learning. Knowledge in this approach is a factor allowing for the conversion of information into a form that is organized and readable.

6.3. Legal interoperability

Legal interoperability is aimed at establishing a transparent legal framework of norms regulating the use of copyrighted material. It covers the sharing and reuse of works of authorship (e.g. maps) and their components (other materials and data) based on uniform or at least non-contradictory licences, applied for the various components, respectively. It must be kept in mind that constituent components of a map come from many sources and are covered by different licenses. This sort of interoperability is known as legal or licensing interoperability.

7. Intellectual property rights business strategies

7.1. Appropriability mechanisms and strategy

In economic terms, there are appropriability mechanisms (mechanisms of protection against the loss of knowledge) and appropriability strategy (strategy of knowledge protection). In the legal sense these are simply referred to as IPR policy.

[39] P.J. Densham, *Spatial decision…*, p. 405.

Among the available protection mechanisms, legal, technical and factual ones can be distinguished.[40]

1. Legal

A. Copyright protection for works of authorship and unregistered trademarks;

B. Database protection for databases meeting the legal premises of protection;

C. Registration: a) invention – patent, b) utility model – right of protection, c) industrial design – registration right, d) trademark – right of protection, e) topography of integrated circuit – registration right, f) geographical indication – registration right, g) exclusive right to plant varieties;

D. Contracts: a) NDA (non-disclosure agreement), b) confidentiality clauses; c) non-competition clauses, d) licences;

E. Company secrets (know-how);

F. Measures resulting from the act on combating unfair competition;

G. Other: sending correspondence by regular mail, where the postmark will serve as an authenticated date (evidence purposes); security of proof at a notary (for example, a certificate of conformity with the original, a printout with a website, etc.).

2. Technical

A. Technical security (including DRM);

B. Product designation (visible, e.g. logo, or invisible),

C. Steganography (e.g. intentional errors in the product, e.g. copyright traps);

D. Blockchain (used for authorization purposes).

3. Factual

A. Secrets;

B. Priority of placing on the market;

C. Complexity of a product/service.

7.2. Closed vs. open strategies

For many years there was only one, traditional (stereotypical) approach, also described as a closed strategy. It relied heavily on having and developing an entrepreneur's own R&D department responsible for conducting long-lasting and costly research or looking for legal mechanisms protecting the intellectual capital of the entrepreneur. The paradigm of "open innovation" was introduced by H.W. Chesbrough,[41] who in 2003 noticed that a company in the innovation process should use internal (own) and external (third parties') ideas and external and internal paths of introducing innovations into the market. It

[40] M. Jankowska, M. Pawełczyk, *Czarna dziura…*[*The Black Hole…*], p. 146-147.

[41] H.W. Chesbrough, *Open Innovation: The New Imperative for Creating and Profiting from Technology*, Boston 2003.

entwines "processes of creating economic value: external acquisition (external exploration of knowledge) and external use of knowledge (external exploitation of knowledge). External acquisition (intended inflow) of knowledge determines to what extent enterprises gain access to external knowledge resources – ideas or intellectual property – to complement their knowledge and create a unique value for recipients. On the other hand, external utilization (intended outflow) of knowledge means commercialization of the possessed internal knowledge by its flow from the enterprise to the environment, which is accompanied by a contractual obligation of monetary or non-monetary kind."[42] Depending on which direction of flow dominates, centripetal, centrifugal or mixed patterns (strategy) are distinguished.

A number of features differentiate a closed innovation from the open one. The closed strategy is more centralized, meaning that the entrepreneur hires specialists, creates an in-house R&D department and introduces the work or invention to the market on a priority basis. It also has a strong IPR policy that keeps competitors at bay. The open strategy, on the contrary, relies on the exchange of ideas, information and innovation. The entrepreneur benefits from the knowledge of specialists who do not work exclusively on the initiative, the research is often conducted outside, whereas inside of the entity it is decided what data and knowledge are used. In the open strategy, the entity often benefits from opening the intellectual goods to others in many ways, financial or social.

7.3. GeoData license policy

Since geodata has become a kind of "currency", it is important to establish the correct data policy, which differs from agency to agency and from enterprise to enterprise. Among the issues requiring a closer look are those whether the commercial use will ensure payback of the infrastructure investment costs, or whether data should be made accessible without too many restrictions to make it possible for private entities active in the geoinformation and space sectors to grow. The cost of producing geodata is so high that the purpose of collecting them has become more a matter of cognition, science and politics than a matter of profit. The other issue is whether data are a public good, and, if so, to what end?

Drafting one single model for geodata access is especially hard, given that geodata are produced and maintained in multifold environments, such as:

1) public (as part of the public service),
2) private (strictly commercial purpose),

[42] A. Sopińska, P. Dziurski, *Otwarte innowacje. Perspektywa współpracy i zarządzania wiedzą* [Open innovations. The perspective of cooperation and knowledge management], Warszawa 2018, p. 12.

3) internauts, in a fashion that is private *and* open (utilitarian purpose of gathering data).

Already one can see a variety of interests and possible schemes for making data available. This has given rise to a deluge of different licensing models, whose licences are not necessarily compatible, as legal interoperability is typically not considered.

In the literature, R. Harris pointed out seven different licensing types that serve as a starting point for establishing general frames of licensing:[43]

1. Free data for all users (e.g. EUMETSAT, OpenStreetMap),
2. Marginal cost price for all users (e.g. Landsat 7, ERS, Envisat),
3. Market driven, affordable prices for all users (e.g. SPOT),
4. Full cost pricing (e.g. Earthwatch, GMES),
5. Two tier pricing (a symbiosis of market driven policy and marginal cost price for selected users, e.g. ESA, SPOT);
6. Information content pricing (e.g. Landsat, SPOT, ERS, IKONOS; this varies depending on the kind of information and its value, or the quality of data);
7. Access key pricing (data is free, the key to decode data is payable).

The analysis of licensing policies shows that there are three main licensing models: 1) open model, 2) cost recovery model, 3) business model. The factors influencing the selection of model are: 1) public (exchange of data among public agencies at national and international level), 2) private but non-commercial, 3) commercial, 4) scholarly, 5) NGO, 6) emergency. The multitude of licenses for geodata can be grouped as: 1) private, 2) open-typical, 3) half-open (mixed), 4) open-atypical (similar to open-typical but with some dissimilarities), 5) open with extra elements.[44]

Summary

Emerging technologies have enabled the creation of all kinds of data. Data itself has become a kind of currency in Industry 4.0 merely because most contemporary business models, productions and sales are based on data and information. The research undertaken already in the last few years has proved that the cognitive pyramid: data-information-wisdom-knowledge, a concept generally known in technology and economics, maps quite poorly to the scheme of IPR goods. Moreover, the IPR scheme, created in the 19th and the 20th centuries, proves to be of hardly any use for protection of non-personal data,

[43] R. Harris, *Earth observation data pricing policies*, in: *Earth Observation Data Policy and Europe*, eds. R. Harris, Lisse–Abingdon–Exton–Tokyo 2002, p. 116-125.

[44] M. Jankowska, *Charakter prawny mapy cyfrowej* [The legal character of a digital map], Warszawa 2017, p. 599-600.

as data themselves have never been labeled as an independent good worthy of protection. As copyright and database law are not suited for protecting data, it is worth examining which tools can help protect data in their own right. The study shows that the most convenient means of protecting data is through licenses, which come in a variety of forms. A degree of protection can be obtained by introducing distinctive indicators, possibly including tiny unimportant errors, that could readily be identified as the data to be misappropriated. The available technical protection mechanisms are: 1) technical security (including DRM), 2) product designation (visible, e.g. logo, or invisible), 3) steganography (e.g. intentional errors in the product, such as copyright traps), 4) blockchain (used for authorization purposes).

In conclusion, if we accept that our long-established models of IPR protection arose because of the recognized need to protect an originator's creation against exploitation by others, we must recognize the case for proportionate protection for the new kinds of asset which originators create today.

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The legal aspects of compulsory vaccinations

Prawne aspekty obowiązkowych szczepień ochronnych

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Abstrakt: Aspekty prawne szczepień ochronnych są jednym z elementów zarówno szeroko pojętego prawa sanitarnego, jak i prawa medycznego. Z kolei same szczepienia ochronne jako jedno z podstawowych narzędzi w ochronie zdrowia publicznego są bezspornie niezwykle efektywną metodą walki z wieloma chorobami zakaźnymi. Skuteczne realizowanie nałożonego przez ustawodawcę powszechnego obowiązku szczepień ochronnych zapewnia wysoki stopień uodpornienia populacji i zapobiega epidemicznemu rozprzestrzenianiu się chorób zakaźnych.

Słowa kluczowe: obowiązek szczepień, zdrowie publiczne, uchylanie się od szczepień, prawa pacjenta, egzekucja administracyjna, niepożądane odczyny poszczepienne (nop)

Abstract: The legal aspects of preventive vaccinations are one of the elements of broadly understood sanitary law and medical law. Protective vaccinations, as one of the fundamental measures in the protection of public health, are undoubtedly an extremely efficient method for battling numerous infectious diseases. The effective implementation of the universal vaccination obligation, imposed by the legislator, ensures a high level of the population immunization and prevents the epidemic spread of infectious diseases.

Keywords: vaccination obligation, public health, avoiding obligation, patients' rights, administrative enforcement, adverse event following immunization (aefi)

1. Introduction

Prophylaxis of epidemic diseases is, in compliance with Art. 68 para. 4 of the Polish Constitution,[1] the basic obligation of public authorities. Compulsory vaccination, being one of the greatest achievements of contemporary medicine, is a method of prophylaxis of fundamental significance for public health. Legal aspects of preventive vaccinations are one of the elements of broadly understood sanitary law[2] and medical law.[3] At present, the most significant is the matter of distinguishing between the public and individual nature of health, since only treating health as a public good enables the introduction of restrictions on constitutionally guaranteed rights, including restrictions on the patient's right to consent to a medical service of protective vaccination.[4] Effective implementation of a universal vaccination policy imposed by the legislator ensures a high degree of herd immunity and prevents an epidemic spread of infectious diseases.[5]

The aim of this paper is to assess whether the current vaccination system permits the maintenance of the population's vaccination coverage at a safe level through effective implementation of compulsory preventive vaccinations. As a rule, this analysis fits within the system of administration law, although some issues go beyond this system and fall under other areas of legal practice (e.g. civil law).

2. Obligatory protective vaccinations

In Art. 5 para. 1 item 1 b) in connection with Art. 17 para. 1,[6] the Act on prevention and combating infections and infectious diseases among humans imposes on people residing on the territory of the Republic of Poland the obligation to undergo specific vaccinations. The list of mandatory protective vaccinations as well as the group of people obliged to undergo them has been set forth in Art. 17 of the above act and in the Regulation of the Minister of

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[1] The Constitution of the Republic of Poland of 2 April 1997, (OJ of 1997 No. 78, item 483) hereinafter referred to as the Constitution

[2] T. Bojar-Fijałkowski, *Prawo sanitarne w systemie ochrony prawnej środowiska w Polsce,* Bydgoszcz 2019, p. 35-39.

[3] R. Tymiński, *Prawo medyczne dla lekarzy i studentów wydziałów lekarskich*, Warszawa 2014.

[4] A. Augustynowicz, I. Wrześniewska-Wal, *Aspekty prawne obowiązkowych szczepień ochronnych u dzieci,* Pediatria Polska 2013, p. 120-126.

[5] *Kontrowersje wokół szczepień ochronnych,* Kancelaria Senatu, Biuro Analiz, Dokumentacji i Korespondencji, Marzec 2018, p. 7-8.

[6] Act on preventing and combating infections and infectious diseases in humans (OJ of 2019, item 1239 as amended), hereinafter: APCIID.

Health of 18 August 2011 on mandatory vaccination,[7] issued on the basis of the authorization contained in Art. 17 para. 10 of the Act. The universal obligation of preventive vaccination applies to such infectious diseases as tuberculosis, hepatitis B, poliomyelitis, invasive infection with *Haemophilus influenzae* type B, invasive infection with *Streptococcus pneumoniae*, diphtheria, tetanus, pertussis, measles, rubella, epidemic parotitis (mumps) and rabies.

The supplement of the above-mentioned legal regulations is constituted by the Preventive Vaccination Plan (hereinafter: PVP) announced annually by the Chief Sanitary Inspector, pursuant to Art. 17 clause 11 of the Act, through a Communication. PVP is a technical document intended for implementers of mandatory vaccinations and contains information as well as guidelines in accordance with current medical knowledge as to the manner of implementing the obligation of preventive vaccination, including the age, premises resulting from the health status and epidemiological premises, according to which individual vaccinations should be carried out.

A valid concern, which raises legal doubts, is that although the Communication of the Chief Sanitary Inspector has its statutory legitimacy as well as the character of a legal regulation, it does not fit into the catalog of constitutional sources of law and may constitute the basis for raising accusation as to the obligation to vaccinate children, which is specified in a document that does not fall under the catalog of sources of law.[8] Consequently, the issue of whether detailed due dates of vaccinations defined in the PVP are binding for the persons liable has already been the subject of the judiciary's considerations in administrative jurisprudence, an example of which is constituted by the judgment of the Voivodeship Administrative Court in Gorzów Wielkopolski of 9 September 2015, in which the Court stated that "In accordance with Art. 87 para 1 of the Constitution, the act and regulation are the source of universally binding law." In considering the above, the Court concluded that: "Indeed, as such cannot be named the terms in the communication of the so-called immunization schedule, i.e. resulting from medical reasons – the time of administering subsequent doses of vaccines in relation to the age of children during the period (up to 19 years of age) of the statutory obligation to undergo these vaccinations, which undoubtedly serves only the effectiveness of the protective measures applied."[9]

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[7] Regulation of the Minister of Health of 18 August 2011 on compulsory vaccinations (OJ of 2018, item 753 as amended).

[8] N. Szczęch, *Problematyka przymusowych szczepień ochronnych u dzieci na tle orzecznictwa sądów administracyjnych,* Roczniki Administracji i Prawa, 2016, 16/1, p. 187-211.

[9] Judgment of the Voivodeship Administrative Court in Gorzów Wielkopolski of 9 September 2015, file No. II Sa/Go 331/15.

Various legal solutions are used by other countries to increase the level of vaccination; and so, in addition to financial penalties, in 2017 Italy introduced changes that allow the admission to kindergarten institutions (including nurseries, kindergartens, pre-school institutions) of exclusively children who have undergone a complete compulsory vaccination plan, and the possession of certificates confirming having undergone the required vaccinations is verified in schools.[10] In turn, Australia has introduced a tax benefit program for families, which significantly increased the vaccinations of children aged 1 and 5.[11]

3. Patients' rights

Protective vaccination is a medical service within the meaning of the Act on healthcare services financed from public funds.[12] Article 15 of the Act on Patients' Rights and Patients' Rights Ombudsman[13] obliges the healthcare provider to obtain the consent of the patient or his statutory representative to provide certain medical services. In accordance with Art. 17 clause 2 of the APRPRO, in the case of a minor patient, consent is given by the legal representative, and in the absence of such a consent, it may be expressed by the actual guardian. However, as indicated by the Voivodeship Administrative Court in Białystok in the judgment of 16 April 2013, the responsibility of parents to subject children to compulsory vaccinations is a legal obligation in Poland,[14] and in accordance with the ruling of the Supreme Administrative Court:

> […] calling on the constitutional guarantee of human rights and freedoms, including Art. 31 section 1 and 2 of the Polish Constitution has no justification. Contrary to the applicant's arguments, the obligation to undergo protective vaccination is strongly based on the provisions of the Constitution of the Republic of Poland, and above all of Art. 31 section 3 which states that restrictions on the exercise of constitutional freedoms and rights may be established only by statute and only when necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morality, or the freedom and rights of other people. The relationship between preventive vaccinations and the protection of public health is obvious, primarily

[10] F. D'Ancona, C. D'Amario, F. Maraglino, G. Rezza, W. Ricciardi, S. Iannazzo, *Introduction of new and reinforcement of existing compulsory vaccinations in Italy: first evaluation of the impact on vaccination coverage in 2017,* European Communicable Disease Bulletin, May 2018.

[11] J. Leask, M. Danchin, *Imposing penalties for vaccine rejection requires strong scrutiny,* Journal of Paediatrics and Child Health, Feb 2017; https://doi.org/10.1111/jpc.13472 (25.03.2020).

[12] A. Agustynowicz, *op. cit.*

[13] Act of November 6, 2008 on Patients' Rights and Patients' Rights Ombudsman (OJ of 2019, item 1127 as amended), hereinafter: APRPRA.

[14] Judgment of the Voivodeship Administrative Court in Białystok of 16 April 2013, file No. II SA/Bk 18/13.

other people who are exposed in this way to the spread of infectious diseases should be protected (cf. the Supreme Administrative Court judgments cited above on April 17, 2014 and February 4, 2015, as well as judgments of the Supreme Administrative Court of June 12, 2012, II OSK 1312/13 and II OSK 97/13, orzeczenia.nsa.gov.pl).[15]

Only specific medical contraindications for vaccinating a child may constitute exemption from this obligation. At the same time, the Voivodeship Administrative Court in Białystok stated that in the case of compulsory preventive vaccinations, the patient's right to consent to the provision of services is excluded.[16] The Court stressed that "failure to undergo compulsory vaccination, despite the use of administrative enforcement measures, gives rise to criminal and administrative liability as provided for in Art. 115 § 1 of the Petty Offences Code."[17] However, in the case of a lack of consent to perform vaccination, a doctor cannot perform vaccination since the performance of a medical procedure without the consent of a patient, i.e. with the use of force is, according to Art. 36 of the APCIID, admissible only for a person suffering from a particularly dangerous and highly contagious disease that poses a direct threat to the health or life of others.

4. Qualification for vaccination

Pursuant to the APCIID, performing a protective vaccination must be preceded by a medical qualification test aimed at excluding the existence of possible contraindications. This examination must be carried out no earlier than 24 hours before the planned vaccination by a properly qualified doctor. In the case of discovering a long-term contraindication, the doctor refers the child to a specialist vaccination clinic for detailed diagnostics and establishing an individual immunization schedule. Only the acknowledgement of a permanent contraindication to one or several types of vaccination can be the basis for exemption from the statutory obligation.

Pursuant to the APRPRA, the patient has the right to: information on the type and scope of services provided to a given healthcare provider and persons providing these services, information about their health condition, diagnosis, diagnostic and therapeutic methods, foreseeable consequences of their use or omission, results of treatment and prognosis. This information should be conveyed in the most comprehensible and accessible way possible. It may

[15] Judgment of the Supreme Administrative Court of 15 January 2019, file No. II OSK 370/17.

[16] Judgment of the Voivodeship Administrative Court in Białystok of 16 April 2013, file No. II SA/Bk 18/13.

[17] Act of 20 May 1971, Petty Offences Code (OJ of 2019, item 821 as later amended), hereinafter: POC.

be noted that the right to information is a constitutional right contained in Art. 61 of the Constitution. Therefore, it is the physician's duty to inform those obliged to vaccinate about disease hazards and on liability for any evasion of the obligation. The information should also include: type of vaccination, available preparations, number of vaccinations in a given cycle, time intervals at which subsequent vaccinations must be carried out, the most common consequences and complications after vaccination.

5. Adverse event following immunization (AEFI)

Like all medicinal products, vaccine preparations undergo detailed quality control. However, it is not possible to guarantee 100% efficacy either in terms of immunization effects or in predicting possible adverse vaccination reactions.[18]

The issue of side effects of vaccination is regulated by the Regulation of the Minister of Health of 21 December 2010 about adverse post-vaccination reactions and criteria for their recognition.[19] The doctor or surgeon who recognizes an undesirable vaccination reaction is obliged to report it to the sanitary inspector appropriate for the reaction recognition site.

Moreover, as part of the AEFI voluntary supervision system, any person interested, including, e.g. a child's parent/guardian, may report a suspected AEFI directly to the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products, where they are collected and analyzed in the Department for Monitoring Adverse Reactions of this Office, and then transferred to the European database, the so-called Eudra Vigilance (European Union Drug Regulating Authorities Pharmacovigilance) regulated by the European Medicines Agency, or EMA. This method of reporting AEFI does not require confirmation by a healthcare professional.[20]

The AEFI registration and assessment system is the second, apart from clinical trials, way for monitoring the quality of vaccine preparations. It permits elimination of faulty vaccines or some of their series from the market. Furthermore, the supervision of undesirable vaccination reactions allows competent state authorities to take immediate action upon the identification of a potentially dangerous situation.[21]

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[18] K.M. Malone, A.R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights,*https://www.cdc.gov/vaccines/imz-managers/guidespubs/downloads/vacc_mandates _chptr13.pdf (24.03.2020).

[19] Regulation of the Minister of Health of 21 December 2010 about adverse post-vaccination reactions and criteria for their recognition (OJ of 2010, No. 254, item 1711 as amended).

[20] https://szczepienia.pzh.gov.pl/faq/jak-w-polsce-mozna-zglaszac-nop/ (22.03.2020).

[21] S. Dziwisz, *Prawne aspekty przeprowadzania i egzekwowania szczepień Obowiązek szczepień ochronnych,* Państwo i Społeczeństwo, 2015, No. 2.

The costs of health services provided in connection with AEFI treatment for insured persons are financed on the principles set out in the provisions on health care benefits financed from public funds, while in the case of persons without health insurance entitlements, they are financed from the state budget, that is from the part at the disposal of the Minister of Health.

Seeking compensation for damage caused by AEFI may take place on general principles before a common court in civil procedure as a claim against entities responsible for such damage. The only way to seek compensation and satisfaction in the event of complications related to the administration of the vaccine, which is the result of either a medical error or adverse effects caused by the vaccine, remains in civil court proceedings.

In the case of vaccine producers, the provisions of the Act of 23 April 1964 of the Civil Code will apply regarding the so-called liability for a dangerous product based on strict liability (Article 449 of the Civil Code).[22] This also applies if the adverse event is not related to the fault of the vaccine manufacturer, but only because of an unpredictable individual patient's response to the vaccine.

The doctor shall be held responsible on general principles of non-contractual liability. Liability arises upon the occurrence of an event with which the Act combines the sanction of indemnity (i.e. committing a tort); the tort causes harm to another entity, there is an adequate causal relationship between the tort and damage and the offense was committed through the fault of the wrongdoer.[23]

It is also worth noting in this regard the judgment of the Court of Justice of the European Union of 21 June 2017 in the case C-627/15, which interprets the provision of Art. 4 of Directive 85/374/EEC1 imposing on the injured person the burden of proof before the court, regarding the conditions for the producer's liability for damage caused by a defect in their product, i.e. proof of damage, defect and causal link between the defect and damage. The CJEU issued this ruling in response to the questions of the French Court of Cassation before the substantive settlement of the case to hold the producer of the hepatitis B vaccine responsible for the death of a patient who received 3 doses of this vaccine (26 December 1998,[24] 29 January 1999 and 8 July 1999), and who within two years of receiving the first dose contracted multiple sclerosis (November 2000) and died less than a year later (30 October 2011).[25] In the Court's view, requiring patients to provide scientific evidence in any case may in practice prevent them from enforcing their rights. In the case described above,

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[22] Act of 23 April 1964 Civil Code (OJ of 2019, item 1145 as amended) hereinafter: CC

[23] R. Tymiński, *op. cit.*, p. 74.

[24] https://www.mp.pl/szczepienia/prawo/zapytajprawnika/176018,wplyw-orzecznictwa-trybunalu-sprawiedliwosci-ue-na-roszczenia-pacjentow-zwiazane-z-nop.

[25] Ibidem.

it was crucial that scientific studies did not confirm and also did not exclude a link between hepatitis B vaccination and multiple sclerosis. The directive was reflected in the provisions of the Polish Civil Code. The judgment of the CJEU, issued on the basis of reference to the preliminary ruling (i.e. the question of the national court to the CJEU in connection with doubts regarding EU law), is binding on all courts of the Member States, including Poland – they are therefore obliged to take into account such rulings, interpreting the provisions of the CC in analogous matters. However, it should be noted that the judgment is of a general nature and does not determine the substance of the dispute itself. In the justification of the CJEU ruling, it stated that in case C-627/15 such elements as the coincidence of time between vaccine administration and the occurrence of the disease, the lack of personal and family history of the occurrence of this disease and the recording of many cases of this condition after taking such vaccines seem to constitute grounds that may lead the national court to consider that the injured party has met the burden of proof under Art. 4 of Directive 85/374/EEC. The general rule of evidence under Art. 6 of the CC stipulates that "the burden of proving a fact lies with the person who draws legal effects from that fact" and complies with the provision of the directive. In practice, this implies that in the course of submission and evaluation of the evidence, the party convinces the court of the truthfulness of facts. However, the role of the court is to assess their reliability and strength according to their own beliefs based on the collected material.

6. Administrative enforcement

The service provider with whom the child's immunization card is stored is, in accordance with the provisions of the Regulation of the Minister of Health of 18 August 2011 on mandatory preventive vaccinations,[26] obliged to notify the competent State Poviat Sanitary Inspector (SPSI) about the fact of evading the obligation to vaccinate, by placing information in the quarterly report on the implementation of preventive vaccinations, the specimen of which is set out in Annex 3 to the Regulation.

As ruled by the Supreme Administrative Court in the judgment of 1 August 2013, the obligation to undergo protective vaccinations results from statutory provisions and its non-performance results in the initiation of enforcement proceedings, which will result in the child being given mandatory protective vaccinations.[27]

[26] Regulation of the Minister of Health of 18 August 2011 on compulsory vaccinations (OJ of 2018, item 753 as amended).

[27] Judgment of the Supreme Administrative Court of 1 August 2013, file No. II OSK 745/12.

Measures of administrative enforcement in proceedings regarding non-pecuniary obligations are specified in the Act on the enforcement proceedings in administration[28] and include, inter alia a fine for enforcement that may be imposed on the child's legal guardians. The creditor of the obligation to undergo vaccination is the territorially competent State Poviat Sanitary Inspectorate. In accordance with Art. 1a point 13 of the Act on the enforcement proceedings in administration, a creditor is an entity entitled to demand that the obligation be fulfilled or secured in administrative enforcement or security proceedings.

In accordance with Art. 5 point 1 of the Act of 14 March 1985 on State Sanitary Inspection,[29] the scope of activity of the State Sanitary Inspection (SSI) in the field of prevention and combating, among others, infectious diseases, includes setting the scope and dates of preventive vaccinations and exercising supervision in this respect. The act on the SSI, in Art. 12 para 1 is a presumption of competence of poviat sanitary inspectors in matters falling within the tasks and competences of the SSI.

In turn, the enforcement body by law is the territorially competent voivode (which results directly from Art. 20 § 1 point 1 of the Act on the enforcement proceedings in administration), who initiates administrative enforcement upon a request, based on an executive title issued by the SPSI. Administrative execution is initiated upon delivery of a copy of the enforceable title to the obligated party. The voivode may impose a fine on an obligated person in order to force them to comply with the statutory obligation to vaccinate. A fine in order to force the entity may be imposed several times at the same or a higher amount. Each fine imposed may not exceed PLN 10,000. Fines imposed repeatedly may not jointly exceed the amount of PLN 50,000. Persons who refrain from vaccination are entitled, in accordance with Art. 122 § 3. EPA, the right to lodge an objection to the voivode, regarding an administrative execution and the right to appeal against the decision imposing a fine to the Minister of Health. Reported allegations are considered by the voivode after obtaining the final stance of the SPSI regarding the accusations made. The SPSI takes the stand in the form of a resolution to which the obligated persons may appeal to the State Voivodeship Sanitary Inspector (SVSI). In response to the complaint, the SVSI also takes a position in the form of a resolution. After obtaining the above position of creditor, the voivode issues a decision on the allegations. The governor's decision may be appealed by the Minister of Health through the voivode.

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[28] Act of 14 March 1985 on State Sanitary Inspection (OJ of 2019, item 1239 as amended), hereinafter: ASSI.

[29] Act of 17 June 1966 on the enforcement proceedings in administration (OJ of 2019, item 1438 as amended), hereinafter: EPA.

7. Conclusions

Protective vaccinations, as one of the fundamental measures in the protection of public health, undoubtedly offer an extremely efficient method of eradicating numerous infectious diseases. Vaccinations have allowed humans to significantly decrease the number of cases of infectious diseases and deaths caused by these conditions. The percentage of deaths caused by infectious diseases, which in Poland was above 20% in the interwar period, currently remains below 1%.[30] States where all citizens without medical contraindications are subject to compulsory vaccinations record by an 86% lower incidence of infectious diseases than countries where vaccinations are not compulsory.[31]

Despite these successes, infectious diseases that seemed to no longer pose a major problem are once more becoming a threat. At this point it is worth recalling the concept of herd (population) immunity, i.e. the protection of nonimmunized people as a result of vaccinating a high percentage of a given population. Herd immunity provides protection for people who, due to their medical contraindications, cannot be vaccinated.[32] The basic condition guaranteeing the maintenance of herd (population) immunity is to vaccinate a minimum of 95% of the country's population.

In recent years, we have been observing a systematic increase in the number of refusals to vaccinate in Poland; and so in 2010 there were 3,437 people evading vaccination, in 2014 – 12,681 people, and in the period from 1 January to 31 October 2019 – as many as 44,475 people.[33] Furthermore, the large number of foreign citizens from countries with unstable epidemiological situation, who have recently arrived in Poland, remaining completely beyond the control of the SSI authorities, pose an additional threat to the public health in our country.

The growing number of refusals to vaccinate in Poland necessitates the creation of effective enforcement of this obligation. The existing enforcement proceedings, despite the long and time-consuming administrative procedure, do not lead to vaccination of children, and the fines imposed on legal guardians do not have the expected effect. In view of the above, it seems reasonable to consider introducing legal solutions enabling the possible minimization of the

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[30] J. Bzdęga, A. Gębska-Kuczerowska, *Epidemiologia w zdrowiu publicznym,* PZWL, Warszawa 2010, p. 302-303.

[31] O.M. Vaz, K.M. Ellingson, P. Weiss, S.M. Jenness, A. Bardají, R.A. Bednarczyk, S.B. Omer, *Mandatory Vaccination in Europe,* PEDIATRICS Vol. 145, No. 2, February 2020; downloaded from www.aappublications.org/news by guest on 25 March 2020.

[32] W. Magdzik, D. Naruszewicz-Lesiuk, A. Zieliński, *Wakcynologia,* α-medica press, Bielsko-Biała 2007, p. 19-58.

[33] https://szczepienia.pzh.gov.pl/faq/jaka-jest-liczba-uchylen-szczepien-obowiazkowych/ (26. 03. 2020).

number of refusals to vaccinate, such as giving a preventive vaccination plan the form of a regulation or introducing a legal obligation to present a document confirming submission to compulsory vaccinations when admitting children to care or educational facilities. It can therefore be concluded that the existing system of legal measures occurring in the field of preventive vaccinations ensures an optimal level of protection of public health, and a correction is necessary at the level of implementing and enforcement provisions.

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Glosses

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COMMENTARY
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A gloss to the Supreme Administrative Court judgement of 17 July 2018 (II GSK 844/18) – approving

Glosa do wyroku Naczelnego Sądu Administracyjnego z 17 lipca 2018 r., II GSK 844/18 – aprobująca

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Abstrakt: Wyrok, którego dotyczy glosa, prezentuje przełomowe stanowisko Naczelnego Sądu Administracyjnego, w którym sąd uznał, że decyzja Ministra Zdrowia w przedmiocie odmowy udzielenia zgody na refundację leku zawierającego medyczną marihuanę narusza prawa pacjenta w zakresie wyboru skutecznej metody leczenia, podczas gdy inne konwencjonalne metody okazały się nieskuteczne. W ocenie sądu ewentualne wątpliwości – zarówno co do wykładni przepisów dotyczących ochrony zdrowia, jak i oceny stanu faktycznego konkretnej sprawy – rozstrzygać należy na rzecz ochrony życia i zdrowia ludzkiego. Leczenie preparatami zawierającymi medyczną marihuanę wpisuje się w nurt *in dubio pro vita humana*.

Słowa kluczowe: medyczna marihuana, Naczelny Sąd Administracyjny, refundacja leków

Abstract: The sentence which the gloss refers to presents the breakthrough stance of the Supreme Administrative Court, where it is acknowledged that the decision issued by the Minister of Health, concerning the refusal to refund a medicament containing medical marijuana, infringes on the patient's rights in the sphere of selection of an effective method of treatment in the situation where conventional methods have proved inefficient. In the opinion of the Court, eventual doubts – with reference to both the interpretation of the regulations dealing with healthcare and evaluation of the factual state of the case in question – should be settled in favor of protection of life and human health. Treatment with preparations including medical marijuana writes into the current of *in dubio pro vita humana*.

Keywords: medical marijuana, Supreme Administrative Court, refunding medications

Introduction

Treatment with preparations containing medical marijuana is one of the most debatable and controversial issues which write into the broadly conceived healthcare. The right to protection of health which is proclaimed in Art. 68 of the Constitution of the Polish Republic of 2 April 1997[1] implies not only the existence of public authority commitments, but also taking a new approach towards patient's rights. One of them is the right to take advantage of treatment methods, whose effectiveness has no full justification in the paradigm of modern medical science. It is underlined in the literature on the subject that preferences of the suffering as regards the choice of treatment are not without significance in the situation where traditional methods fail.[2] The obligation of the public authority is not only to create a guarantee of health protection on the basis of the highest medical standards, but to supervise the recreational application of cannabis as well and to prevent drug addiction in relation to its use for medical purposes. Here, it is worth stressing that in other states, medical use of marijuana stands in an improper proportion to negative phenomena such as addictions among youth or an increased number of road accidents.[3] On the other hand, in many states, medical marijuana is legal, treatment with the use of this means is refunded from the state budget, and the patient does not have to obtain any special permission (e.g. Germany). In the majority of European states, such as France, Greece, Finland, and since 2018 – Portugal, legalization of medical marijuana has resulted in the possibility of purchasing the medicament on the prescription. In turn, in Croatia, doctors can prescribe medicaments, teas and ointments which contain THC – the active component of cannabis.

One of the most liberal countries is the Czech Republic which has one of the oldest medical cannabis programs in Europe and was the second country (after the Netherlands) on the continent to authorize a domestic grow. However, till now, there has been no regulation to control the price of medical cannabis and make it more affordable for patients. Medical cannabis is not currently covered by health insurance. Study says that in the Czech Republic medical cannabis is prescribed by doctors, obtained at the regular pharmacy and not promoted.[4]

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[1] Dz.U. Nr 78, poz. 483, z późn. zm. [*Journal of Laws* No. 78, item 483, as amended].

[2] K. Jahnz-Różyk, *Medycyna oparta na dowodach*, in: E. Nowakowska (ed.), *Farmakoekonomika*, Poznań 2010, p. 205.

[3] M. Leyton, *Cannabis legalization: Did we make a mistake?*, "Journal of Psychiatry & Neuroscience" 2019, Vol. 44, Issue 5, p. 291-293.

[4] B. Kilmer, *New developments in cannabis regulation*, October 2017, http://www.emcdda.europa.eu/system/files/attachments/6232/EuropeanResponsesGuide2017_BackgroundPaper-Cannabis-policy_0.pdf, accessed: 22.05.2020.

The issue of treatment with preparations containing medical marijuana writes into the current of relevant considerations run in the court-administrative jurisdiction already in an earlier period. The Supreme Administrative Court ruled that all possible doubts relating to the protection of human life and health should be settled for the benefit of the protection (*in dubio pro vita humana*). It justified the use of the principle in the scope of refunding medications in situations, among others, of a threat posed to people's life or health, yet initially this did not remain in a close relation with application of medical marijuana.[5]

In this place it is necessary to remind that in the light of the Polish law the term 'medical marijuana' denotes: "Cannabis plant matter other than fibrous and extracts, pharmaceutical tinctures, and also all other extracts from cannabis other than fibrous and resin of cannabis other than fibrous […]," which are mentioned in Art. 33a of the Act on prevention of drug addiction of 29 July 2005.[6] The regulations stipulate the possibility of medical use of marijuana, yet not without obtaining the permission for admission of pharmaceutical materials on the basis of cannabis to trading. Such a document, in the form of a relevant administrative decision, is issued by the President of the Office for Registering Medicinal Products, Medical Devices and Biocidal Products for the period of five years.

The key elements of the actual situation

An application was submitted with the Minister of Health by a woman-patient, requesting to have a medicament refunded upon the indication: *algodystrophy* of the lower limbs, under Art. 39 para 1 of 12 May 2011 on refunding medicaments, food products of special nutritional purposes and medical products.[7] A demand was attached for a medical product to be purchased abroad, as it was indispensable to save the admitted woman-patient's life or health.

The Minister of Health turned to experts with the request to evaluate the justifiability of the application and the possibility of refunding the product. At the same time he requested to be informed about other methods of treatment that would be possible to apply in this case.

The experts' opinions varied, ranging from expressing the standpoint that "if according to the practice to date, the treatment with cannabinoids brings relief to the patient and the other ways do not yield expected results, then it

[5] Sentence of the Supreme Administrative Court in Warsaw of 27 October 2017.

[6] Dz.U. z 2019 r., poz. 852, z późn. zm. [*Journal of Laws* of 2019, item 852, as amended], (hereafter: APDA).

[7] Dz.U. z 2020 r., poz. 357, z późn. zm. [*Journal of Laws* of 2020, item 357, as amended] (hereafter: AR).

seems purposeful to grant the request" to that "application of cannabinoids in chronic pains is not advisable due to the risk of developing an addiction, which in turn can lead to death […]."

Eventually, the Minister of Health, upon considering the patient's application, refused to grant his permission for refunding the medicament. In the justification of the decision, the organ pointed to the lack of meeting the criteria which are included in Art. 12, points 4-6 and 8-10 of the AR, which relate to the clinical and practical effectiveness of safety of application, ratio of health benefits to application risk. The state organ underlined – being directed by experts' opinions – that there was no evidence which would point to the effectiveness of the product and that such a therapy should be treated as a medical experiment. Moreover, they argued that medically-acknowledged alternative methods of curing aches had not been used.

The Complainant lodged an appeal against the decision of the Minister. Relying on the medical knowledge, she pointed to the lack of effectiveness of morphine-related painkillers applied in her ailment, which she had been taking for four years until then.

The Minister of Health, upon reconsidering the matter, upheld the decision refusing to refund the medicament. In the justification, he explained that the individual woman-patient's case had been consulted with specialists (national and provincial consultants). In the assessment of the organ, the experts' opinions and analyses which were gathered in the case did not prove the premise of clinical effectiveness. Again, the fact was repeated that regarding the patient's treatment, alternative methods which are accessible in Poland and considered to be basic with reference to this disease had not been made use of.

In response the Complainant filed a complaint in connection with the above-mentioned decision with the Provincial Administrative Court in Warsaw (hereafter: PAC) which – in the sentence passed on 20 December 2017[8] – dismissed the complaint, simultaneously rejecting to grant the permission to refund the medicament containing medicinal marijuana. The PAC drew attention to the fact that the currently available publications did not point to cannabinoids as a therapeutic option in treating the patient's ailment. The Court supported the stance of the organ that specialists' opinions and analyses collected with reference to that case did not indicate fulfilment of the premise of clinical effectiveness. Apart from this, the Court shared the Minister's of Health standpoint that health benefits did not outweigh the risk of application of the medicament.

Accepting the cost data and the lack of proven high effectiveness of the medicament in the patient's medical case, as well as possible side effects, and also taking account of the fact that the financial means in the budget at the

[8] VI SA/Wa 2114/17.

disposal of the payer did not concern financing a therapy applying only one controversial medicament, the PAC acknowledged the criterion of price competitiveness to be unfulfilled, either.

The Complainant filed a cessation appeal with the Supreme Administrative Court, requesting to have the challenged judgement annulled and the complaint recognized, or eventually to have the challenged judgement annulled in its entirety and the case transferred to the PAC in Warsaw to be recognized again.

The Ombudsman notified the Court of his participation in the proceedings and requested acceptance of the cessation appeal. He observed that the provisions binding in this respect can exclude the possibility for patients to access the therapy with medical marijuana, which can result in restricting the right of health protection guaranteed in Art. 68, para 1 of the Constitution of the Polish Republic. The Supreme Administrative Court, upon recognizing the cessation appeal on 17 July 2018, annulled the challenged judgement and annulled the challenged decision, as well as the decision of the Minister of Health, which the latter upheld and which refused the Claimant to have the medicament refunded. In this way the Supreme Administrative Court decided that the Minister's of Health decision in the said refusal to refund the drug ought not to be retained in the legal circulation and that the Complainant had the right to be treated with preparations containing medical marijuana.

Comments approving of the judgement of the Supreme Administrative Court

According to the assessment made by the adjudicating panel of the Supreme Administrative Court (hereafter: SAC), the content of the regulations in question does not allow arriving at the conclusion that the necessary condition to approve of the application for refunding and to be granted a positive decision in this respect is joint fulfilment of all the criteria mentioned in the Act (Art. 12, points 3-6, 8-11 of the AR). One needs sharing the stance of the SAC that the need for cumulative meeting the premises included in the Act does not follow from its content. They are of the equivocal character and it is for the organ to assess them and apply in the given state of things. The AR does not contain legal definitions of the notions included in it, which means that it is the relevant organ that is in position to define what the individual premises mean.

It unambiguously follows from the literal recording of the provisions that the legislator directly ordered to take them into consideration.[9] At the same

[9] This standpoint is presented also in the literature. Compare: J. Adamski, K. Urban, E. Warmińska, *Refundacja leków, środków spożywczych specjalnego przeznaczenia żywieniowego oraz wyrobów medycznych. Komentarz*; Lex 2014; Commentary to Art. 12, thesis 3.4.

time, a decision issued in an individual case regarding refund is aptly attributed to the nature of a discretionary one. Thus, one should agree with the SAC's judgement that in view of the discretionary character of such a decision the thesis is justified that not meeting any one of the defined criteria cannot exclude the settlement of the case that is in favor to the appealing party, since discretionary decisions are connected with the obligation to settle the case in the way that takes into consideration "social interest and righteous interest of citizens". On the other hand, all doubts with reference to the content of a legal norm ought to be settled – in compliance with Art. 7a of the Act on the Code of Administrative Proceedings of 14 June 1960[10] – in favor of the party unless there are objections to doing so, resulting from opposing interests of the parties or interests of third parties, which the result of the proceedings can affect in a direct way.

The essence of the administrative approval is not application of the existing margin while interpreting notions, but the question of selecting the content of settlement. An organ of public administration by formulating the settlement should consider all legal and factual conditions and also examine all the circumstances of the given case in order to find the most appropriate settlement that reflects the objective truth and its goal.[11] Administrative approval consists thus in assigning to the organ the possibility of choosing an optimal solution following the juxtaposition of the factual state against the legal one.[12]

The SAC thus observed rightly that the regulation, in accordance with which the organ considering an application of refund is obliged to "take into account" relevant circumstances, means leaving to the organ a margin of decision and entitles it to issue an administrative approval.

Undoubtedly, settlements linked to an analysis of the premises contained in Art. 12 of the AR require conducting evidence proceedings.[13] The SAC decided – sharing the Complainant's point of view – that the evidence in the case had been assessed selectively and accentuated chiefly the circumstances which justified the refusal to grant refund and omitting these fragments of experts' opinions that could speak in favor of accepting the request. The SAC agreed that in that particular case there had not been done a comprehensive assessment of the body of evidence, the reasons had not been explained for the omission when the actual state of the evidence relating to the case was established within the scope pointing to the justifiability of the refund application. Therefore, at

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[10] Dz.U. z 2020 r., poz. 256, z późn. zm. [*Journal of Laws* of 2020, item 256, as amended].

[11] Cf. The judgement of the Constitution Tribunal of 29 September 1993, file No. K 17/92.

[12] For a broader treatment of the theme see J. Zimmermann, *Aksjomaty prawa administracyjnego* Warszawa 2013, p. 203 ff.; idem, *Prawo administracyjne*, Warszawa 2018; p. 408 ff.

[13] The importance of the evidence proceedings in this case was drawn attention to by the Supreme Administrative Court in its judgement of 10 November 2016: II GSK 972/15, LEX nr 2170654.

the same time, the principle of citizens' placing trust in state organs, which results from Art. 8 of the CAP, was undermined. This imposes on organs of public administration the obligation to conduct proceedings in a law-observing and just manner, which becomes expressed in a thorough examination of the circumstances of the case, responding to the demands of the party, as well as taking into account – in the final decision – both social interest and justifiable citizens' interest.[14] Moreover, since traditional methods of treatment do not guarantee full clinical effectiveness, then satisfying this premise (100% of clinical effectiveness) is not sufficient to refuse to refund the medicament.

As far as the existence of alternative therapies is concerned, the organ should exhaustively consider whether and to what extent alternative treatment was applied in the Complainant's case and to what effect. Still, the experts' opinions were based on certain suppositions and this – in the opinion of the SAC – did not suffice to categorically acknowledge the existence of an effective method of alternative treatment. They added, and one should fully agree with the opinion, that a positive settlement of the application does not require exhausting all pharmacological possibilities. There are no premises, indeed, to unambiguously state that the patient's interest obliges to exploit pharmacological methods of treatment. This conclusion corresponds to the Constitutional Court's view which was formulated in the resolution of 17 March 2015, saying that: "In the light of valid scientific research, marijuana can be used for medical purposes […] from the point of view of a given group of citizens taking advantage of services of the healthcare system, approval of medical use of marijuana needs considering because of its therapeutic use in certain medical conditions […]." This thesis impacted further judicial decisions of administrative courts.

Summing-up

In the present case there occurred the necessity to weigh interests: social and a righteous one of the party. Restricting individual rights of the party must be justified by a social interest. In the said scope there were no sufficient premises to refuse to refund the medicament prepared on the basis of medical marijuana as: firstly – it was admitted for use in the light of Polish law and the patient met all the conditions to obtain the drug, and secondly – the traditional methods of treatment had proved ineffective.

The organ issuing the decision should weigh public interest and private ones, and refusing to grant a permission to refund a medication, it must prove that the public interest is so important and relevant that it requires restricting individual citizens' rights, including that to obtain treatment.

[14] Cf. the judgement by SAC of 13 December 2017, file No. II GSK 917/16.

Lastly, one should approve of the SAC's conclusion that likely doubts – as regards both the interpretation of regulations dealing with healthcare and evaluation of the actual state of a concrete case – ought to be settled in favor of protection of human life and health. The fear of application of marijuana for recreational purposes was reduced on the level of legal regulations that established criteria of procuring the medicament on the basis of medical marijuana. In these circumstances depriving the patient of the possibility of being treated with preparations containing cannabis, with the simultaneous admission of this type of treatment undermines the citizens' trust in organs of public authority.

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The 110th birth anniversary of Professor Leszek Winowski (1910-1979), expert in Canon Law, historian of state and law

110. rocznica urodzin profesora Leszka Winowskiego (1910–1979), znawcy prawa kanonicznego, historyka państwa i prawa

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Abstrakt: Prof. Leszek Józef Egidiusz Winowski urodził się 23 stycznia 1910 r. na kresach wschodnich II Rzeczypospolitej w Skałacie, woj. tarnopolskie. Studiował na Wydziale Prawa Uniwersytetu Jana Kazimierza we Lwowie, gdzie uzyskał magisterium (1932), doktorat (1935), a w 1936 r. podjął pracę naukową w Katedrze Prawa Kościelnego; od 1942 r. prowadził działalność konspiracyjną we Lwowie, współpracował z Instytutem Bałtyckim w Sopocie; w Olsztynie zorganizował Ekspozyturę Instytutu Bałtyckiego na Okręg Mazurski. W 1945 r. Leszek Winowski podjął pracę na Wydziale Prawno-Administracyjnym Uniwersytetu Wrocławskiego, a w 1974 r. uzyskał tytuł profesora zwyczajnego. Jednocześnie pracował na Katolickim Uniwersytecie Lubelskim, gdzie w latach 1945–1946 pełnił funkcję dziekana Wydziału Prawa i Nauk Społecznych – po jego likwidacji pracował na Wydziale Prawa Kanonicznego, gdzie wykładał prawo rzymskie i prawo wyznaniowe. W 1957 r. Winowski zrezygnował z pracy na Katolickim Uniwersytecie Lubelskim. W latach 1957–1968 Leszek Winowski pracował w Wyższej Szkole Pedagogicznej w Opolu, będąc równocześnie zatrudnionym w Uniwersytecie Wrocławskim.
W dziedzinie badań naukowych prowadzonych przez prof. Leszka Winowskiego można wyodrębnić trzy główne kierunki. Były to badania na położeniem prawnym innowierców od najdawniejszego średniowiecza; nad państwem i prawem islamu, wreszcie nad dziejami Kościoła na Śląsku.

Prof. Leszek Winowski został odznaczony Krzyżem Kawalerskim Orderu Odrodzenia Polski, był członkiem wielu towarzystw naukowych. Zmarł 16 listopada 1979 r. we Wrocławiu.

Słowa kluczowe: uniwersytet, prawo kanoniczne, historia państwa i prawa

Abstract: Prof. Leszek Józef Egidiusz Winowski was born on 23 January 1910 in Skałat, Tarnopol Voivodeship, in the Eastern Lands of the Second Polish Republic. He studied in the Faculty of Law of Jan Kazimierz University in Lvov, where he earned the Master's degree (1932), Doctor's degree (1935), and in 1936 began his scientific work in the Chair of Church Law; from 1942 he was working in conspiracy in Lvov and cooperated with the Baltic Institute in Sopot; in Olsztyn he organized a branch of the Baltic Institute, which was operating in the Masurian District. In 1945, Leszek Winowski was employed in the Department of Law and Administration of Wrocław University and in 1974 he was granted the title of Full Professor. At the same time he worked in the Catholic University of Lublin, where he held the post of Dean of the Faculty of Law and Social Sciences in the years 1945-1946 and – following its liquidation – he worked in the Faculty of the Canon Law where he lectured in Roman law and ecclesiastical law. In 1957, L. Winowski resigned from his work in the Catholic University of Lublin. Between 1957 and 1968, he was employed in the Teacher's Training College in Opole, still working for Wrocław University.

As regards the fields of scientific studies developed by Prof. Leszek Winowski, one can distinguish three main directions dealing with the legal situation of dissenters from the earliest Middle Ages, the state and law of Islam, and lastly – history of the Church in Silesia. Prof. Leszek Winowski was awarded the Knight's Cross of the Order of *Polonia Restituta*. He was a member of many scientific societies. He died in Wrocław on 16 November 1979.

Keywords: university, canon law, history of state and law

Introduction

The Teacher's Training College, established in Wrocław in 1950 and subsequently transferred to Opole (the ceremonial inauguration of the first academic year in Opole took place on 22 October 1954), was the first college of higher education in Opole region, reaching with its roots the academic centres based in Lvov and Wrocław. For many years graduates and research workers of Jan Kazimierz University in Lvov and Wrocław University formed the academic personnel of the Teacher's College in Opole. The year 1957 saw the beginnings of historical studies run in that college, with the first two chairs: the Chair of History of Poland and the Chair of General History, being founded then. Prof. Stanisław Kolbuszewski (1901-1965), Polish philologist, and Dr. Alojzy Gembala (1904-1963), historian, the organizers of the historical study courses, succeeded in winning over Prof. Leszek Winowski – the then renown historian of state and law, who in the Interwar period had been a research worker in Jan Kazimierz University in Lvov (1933-1939) and after the War worked for the Catholic University of Lublin (1945-1957) and Wrocław University (1945-1979), to come to

Opole. Prof. Leszek Winowski worked in the Teacher's Training College between 1957 and 1968, at the same time being employed in Wrocław University.[1]

The year 2020 celebrates the 110th anniversary of the birth and the preceding year (2019) saw the occasion of 40 years after the death of Professor Leszek Winowski. This creates a special opportunity to remember the Professor and to bring closer his scholarly achievements and his contribution to the scientific development of three Polish universities and the Teacher's Training College in Opole. It seems that Prof. Winowski – in a similar way as many other academics who used to be affiliated with Jan Kazimierz University in Lvov – is a rather forgotten scholar. Yet, without any doubt, he does deserve being remembered.

Professor Leszek Winowski.
From the collection of the Institute of History of State and Law, Faculty of Law, Administration and Economy, Wrocław University

[1] See for a broader treatment: A. Maziarz, *Zarys dziejów katedr i zakładów* [An outline of the history of university chairs and sections], in: J. Dorobisz (ed.), *Półwiecze. Katedry i zakłady Instytutu Historii w latach 1957–2007*, Opole 2007, p. 11-16.

Family home, siblings, youth and education

Leszek Józef Egidiusz (Idzi) Winowski was born on 23 January 1910 in Skałat on the Zbrucz River, lying in Tarnopol Voivodeship[2] in the Eastern Lands of the Second Polish Republic. His parents were Karol and Helena, née Wernberger. The mother's family had come to live in the vicinity of Zbaraż from the Kingdom of Poland in the mid-19th century. Leszek Winowski's grandfather, Egidiusz Wernberger (1825–1911), graduate of Monachium studies, doctor of philosophy, had come from the environs of Augsburg. He took on lease Łubianki, the estate belonging to the Stadnicki Family, comprising three granges: Łubianki Wyżne and Niżne as well as Łysy Okop. Then he purchased the nearby Sieniawa with its mansion. Egidiusz Wernberger married a Belgian, Leona Vincart de la Gardie (1838–1888), the teacher employed by the Stadnickis. Helena, née Wernberger, married widowed Karol Winowski in 1902. Following the loss of their property, the married couple moved from Sieniawa and Łubianki to Skałat, where Karol Winowski held the post of the County Judge. He died rather early, leaving three children orphaned: two daughters – Maria (1904–1993) and Janina (1906–2007) – and his son Leszek.[3] Helena, the mother, stayed widowed till the end of her life (she died in Krakow in 1949). After her husband's death, she moved together with her children from Skałat to Lvov, where she lived at 16 Dąbrowskiego Street.[4]

At first, the Winowskis' children learned at home under their mother's supervision. Maria and Janina sat their examinations in the range of subjects of elementary school in Trembowla and Tarnopol. Leszek Winowski's elder sister, Maria, graduated in Roman languages and Latin from Jan Kazimierz University in Lvov, where – in 1927 – she also defended her doctorate in Philosophy and worked as an assistant to Prof. Edward Porębowicz (1862–1937), romanist, translator and poet. In France, she earned her Doctor's degree in Theology. She won recognition as a publicist and writer (she had 38 books published, which were translated into many languages). Maria Winowska cooperated with, among others, Primate August Hlond and Cardinal Stefan

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[2] Archives of the University of Opole (hereafter: Arch. OU), Personal files of Leszek Winowski, file number 100/25/70; E. Wilemska, *Winowski Leszek*, in: E. Gigilewicz (ed.), *Encyklopedia katolicka*, Vol. 20, Lublin 2014, p. 678–679.

[3] In his biography drawn up in 1957, L. Winowski declared that his father died one year following his birth. See Arch. UO, Personal files of Leszek Winowski.

[4] M. Walczewska, *Pani dr Janina Winowska obchodzi stulecie* [Dr. Janina Winowka celebrates her centenary], „Cracovia Leopolis" 2006, No. 4, p. 23–26; K. Bukowski, *Zwykli czy niezwykli. Sylwetki osób współczesnych* [The ordinary or the extraordinary. Profiles of contemporary persons], Kraków 1998, p. 115–120; J. Wojtycza, *Winowska Janina*, in: *Małopolski słownik biograficzny uczestników działań niepodległościowych 1939–1956*, Kraków 2007, p. 179–180.

Wyszyński.[5] In turn, Janina completed Queen Jadwiga Grammar Comprehensive School in Lvov and in 1925 began studies majoring in Polish philology in the Department of the Humanities of Jan Kazimierz University in Lvov. Additionally, she studied French philology and Latin. In 1932, she defended her doctoral dissertation entitled *Tragizm w twórczości Krasińskiego* [The tragic nature in Krasiński's literary output]. She worked as a teacher of Polish in different schools, among others, in the years 1938–1939 she taught in Pedagogical Grammar Comprehensive School in Stanisławów. In 1945, she left for Krakow with her mother. She took employment in the education system, working, among others, in Myślenice and Tuchów. At the same time she was engaged in scouting activity.[6]

Leszek Winowski completed his primary education in a private school and in the years 1920-1928 attended the VIIth Tadeusz Kościuszko State Grammar Comprehensive School in Lvov, where he passed his final secondary school leaving exam.[7]

Studies and scholarly work in Jan Kazimierz University in Lvov

On finishing the Grammar Comprehensive School, Leszek Winowski pursued his education at the Faculty of Law of Jan Kazimierz in Lvov, completing the studies in 1932 and earning the title of Master of Law. Afterwards he did military service, attending a division course for officers-cadets of infantry reserve of the 19th Infantry Regiment in Lvov, as well as completed his training in the 40th Infantry Regiment.[8]

Already during his studies, his exceptional abilities and diligence attracted attention of the University authorities who distinguished L. Winowski with a special scholarship. The period of studies and then working in the Faculty

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[5] E.K. Czaczkowska, *Kłopoty z kultem Bożego miłosierdzia w korespondencji Marii Winowskiej w latach 1958–1975* [Trouble with the cult of divine mercy in the correspondence of Maria Winowska in the years 1958-1975], „Polonia Sacra" 2018, Vol. 22, No. 3, p. 7–8; *eadem*, *Maria Winowska – szara eminencja Kościoła* [Maria Winowksa – a grey eminence of the Church], „Gość Niedzielny" 2016, No. 13, p. 24–25.

[6] M. Walczewska, *op. cit.*, p. 23–26; J. Wojtycza, *op. cit.*, p. 179–180; K. Szymurowa, *Nabytki rękopiśmienne w zbiorach specjalnych Biblioteki Naukowej PAU i PAN w Krakowie za lata 2000–2002* [Manuscripts acquired in the special collections of the Scientific Library of PAU and PAN in Krakow], „Roczniki Biblioteki Naukowej w Krakowie" 2003, Vol. 48, p. 560.

[7] S. Jóźwiak, *Leszek Winowski (1910–1979)*, in: A. Dębiński, W.S. Staszewski, M. Wójcik (eds), *Profesorowie prawa Katolickiego Uniwersytetu Lubelskiego*, Lublin 2008, p. 449.

[8] M. Pyter, *Działalność uniwersytecka prof. Leszka Winowskiego (lata lwowskie i lubelskie)* [Prof. Leszek Winowski's university activity (years of stay in Lvov and Lublin], „Śląski Kwartalnik Historyczny Sobótka" 2008, Vol. 3, p. 397.

of Law of Jan Kazimierz University in Lvov enabled Leszek Winowski to get acquainted with and make use of the achievements of the widely-known Lvov school of history and law, the founder of which was Władysław Abraham (1860–1941) who, in 1888, was awarded the title of full professor of ecclesiastic law. Prof. W. Abraham was a close friend of Oswald Balzer (1858–1933), an outstanding Lvov historian of law. The circle of prominent academics, whom Leszek Winowski made contacts with, included also Leon Halban (1893–1960), historian of church law, and Karol Koranyi (1897–1964), historian of criminal law. As a student, he attended seminars run by Prof. W. Abraham and Prof. L. Halban.[9] On 28 September 1933, the head of the Chair of Ecclesiastic Law, Prof. W. Abraham, submitted a request to the Board of the Faculty to consider appointing L. Winowski for the post of voluntary assistant in his Chair. Consequently, L. Winowski held the position from 1 November 1933 and on 1 October 1934 he was appointed for the post of senior assistant. In the years 1933–1934, he wrote the work entitled *Przywileje kleru w konkordatach XIX i XX wieku* [Privileges of clergy in concordates of the 19th and the 20th centuries] presented before the Board of the Faculty of Law of Jan Kazimierz University in Lvov with a view to being admitted for examinations in Church law and the history of Polish law. L. Winowski's work was thoroughly reviewed by two referees – Prof. W. Abraham and Prof. Ludwik Ehrlich (1889–1960), a specialist in the field of public international law, history of international law in Poland, as well as history of political and legal doctrines. Upon the referees' presentation of two positive evaluations, the work was acknowledged to be fully satisfying. On this basis, on 17 June 1935, L. Winowski was granted permission to take his examination in ecclesiastical law and history of Polish law, which he passed successfully. The decision supporting the Dean's request to grant L. Winowski the title of Doctor and admitting him for doctoral promotion was taken unanimously. As a result, on 6 July 1935 L. Winowski obtained the degree of Doctor of Law and then was employed in the Chair of Ecclesiastic Law, holding the regular full-time post of a senior assistant. Following his earning the doctor's degree, L. Winowski began writing a dissertation dealing with the attitude of early Christianity towards war. He succeeded in presenting the results of his studies already in the spring of 1939 in the session of Section of Law and History of the Lvov Scientific Society. The dissertation was admitted for publication; however, the outbreak of the War interfered with the publishing process.[10] It did not appear in print until 1947 through the efforts of the

[9] *Eadem*, *Oswald Balzer i lwowska szkoła historyczno prawna* [Oswald Balzer and the Lvov School of History and Law], Lublin 2010, p. 11, 27, 179, 182, 183.

[10] *Eadem*, *Działalność uniwersytecka…*, p. 396–398.

Scientific Society of the Catholic University of Lublin and then presented as a dissertation in fulfilment of the requirements to earn the degree of Doctor with habilitation from that university.[11]

The war years, conspiracy and paid employment

The outbreak of the Second World War ruined Leszek Winowski's further scholarly plans. Until the invasion of Lvov by Germans in 1941, he had still maintained his academic contacts with the University. Prior to that, i.e. during the Soviet occupation of Lvov in the years 1939-1941, he worked as a night watchman, carter and an assistant to a bookkeeper. After the Germans' entering Lvov, he was employed as an auxiliary accountant in the board of property management office. In October 1941, he married his younger fellow student, Janina, née Tinz (born in Bregens, Austria, on 8 February 1915).[12]

L. Winowski's sister, Janina, who got involved in conspiratorial activity, ran classes organized within the underground education system in Poland. She spent six weeks in prison (located in Łąckiego Street in Lvov) between 3 July and 15 August 1941. That year also saw L. Winowski's arrest by the Gestapo and detaining him in the same prison. He was sentenced to death. Eventually, he was released from prison after three months. Meanwhile, his flat was searched and he had the materials he had prepared for his monographs confiscated: *Rozwój historyczny pojęcia tolerancji ze szczególnym uwzględnieniem Polski* [The historical development of the notion of tolerance, specifically in Poland] and *Historia kościelna Ormian w Polsce* [The ecclesiastic history of the Armenians in Poland]. Works on the above research topics were never resumed by L. Winowski. Fortunately, a copy of his future habilitation work entitled *Stosunek chrześcijaństwa pierwszych wieków do wojny* [The attitude of Christianity of the first centuries towards war] was preserved as it was stored outside the place that was searched.[13] The elder sister, Maria, was also wanted by the Gestapo, yet she had managed to flee to the south of France, where she was active in the local resistance movement.[14]

In 1942, Leszek Winowski started his cooperation with the Baltic Institute then functioning in the underground. He studied and collected materials related

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[11] L. Winowski, *Stosunek chrześcijaństwa pierwszych wieków do wojny* [The attitude of Christianity of the first centuries towards war], Towarzystwo Naukowe KUL, Lublin 1947, p. 171.

[12] K. Bukowski, *op. cit.*, p. 115.

[13] S. Jóźwiak, *op. cit.*, p. 500.

[14] K. Szymurowa, *op. cit.*, p. 560.

to the history of Warmia and Masuria. This, as Prof. Kazimierz Orzechowski (1923-2009), historian of state and law concluded – testified to the "genuine and relatively early interest in the areas which – after 1945 – were called the Regained Lands, then the Western Lands and the Northern Lands. One could see in this the beginnings of the motivation which in subsequent years led the Professor [Leszek Winowski] to come to Wrocław and tied him to the city till the end."[15] From July 1943 L. Winowski worked as a warehouseman for a private cosmetics company based in Lvov. He was employed under a false name, since he was wanted by the Gestapo in connection with his conspiratorial activity, in particular secret teaching. In 1944, in the situation of a continuing threat, as soon as it was only possible, he left Lvov and moved to Krosno, where his wife and their daughter, Ewa, had gone earlier.[16] Until June 1945 he worked as a photographer there.[17] At the same time he lectured in church law in the College of Administration in Rzeszów, organized by Dr. Lesław Adam (1908-1979), a colleague of his while working for Jan Kazimierz University in Lvov and the Lvov Tax Chamber, later a professor of Wrocław University. In July 1945, determined to continue his scholarly-research activity commenced in the period of conspiracy and in connection with the mission to organize the Baltic Institute, he moved to Sopot together with his family. There he took part in the organization of the Marine Library and the Marine Archives. In the same year in October, as a scientific worker of the Baltic Institute, he was transferred to Olsztyn, where he established a branch of the Institute in the Masurian District. He performed his duties with utmost dedication and success, managing the Olsztyn-based Department of the Baltic Institute which he had organized.[18] In January 1946, L. Winowski accepted the invitation to be employed in the Faculty of Law and Administration in Wrocław and to hold the post of Deputy Professor in the Chair of Ecclesiastic Law (at that time, officially, there functioned one joint college of higher education in Wrocław: Wrocław University and Politechnics). Intending, initially, to be employed on the temporary basis only, he remained attached to Wroclaw University until the end of his life.[19]

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[15] K. Orzechowski, *Ze Lwowa – przez Olsztyn – do Wrocławia. Prof. Leszek Winowski* [From Lvov – via Olsztyn – to Wrocław. Prof. Leszek Winowski], „Śląski Kwartalnik Historyczny Sobótka" 1997, Vol. 3–4, p. 332–333.

[16] *Ibidem*, p. 332.

[17] M. Pyter, *Działalność uniwersytecka…*, p. 399.

[18] K. Orzechowski, *op. cit.*, p. 333.

[19] T. Janasz, *Leszek Winowski – historyk ustroju i idei politycznych* [Leszek Winowski – a historian of the polity and political ideas], „Czasopismo Prawno-Historyczne" 1998, Vol. 50, No. 1, p. 172.

The scholarly and didactic activity in Wrocław University and the Catholic University of Lublin

As it has been mentioned above, Leszek Winowski was to be employed as a Deputy Professor in the Chair of Ecclesiastic Law of the Faculty of Law and Administration in Wrocław University. However, for political reasons this chair was not called to life. In consequence, on 1 August 1946, he was offered the post of a senior lecturer in the Chair of Law of Nations. When, two years later, he was refused to be employed further in that chair, he was admitted by Prof. Iwon Jaworski (1898–1959) to the Chair of Law in Western Europe, where he began work on 1 October 1948.[20]

In this place, it is needs underlining that the academic year 1945/1946 was a period of organizing of the academic staff at the Catholic University of Lublin. The Dean of the Faculty of Law and Social Studies, Prof. Zdzisław Papierkowski (1903-1980), offered L. Winowski a post in that university. At the beginning of his didactic activity there, L. Winowski lectured in Roman law and state denominational law. He obtained his *habilitation* in canon law from the Catholic University of Lublin, on the basis of his dissertation under the title *Stosunek chrześcijaństwa pierwszych wieków do wojny* [The attitude of Christianity of the first centuries towards war]. On 2 August 1946, the Faculty Board conferred *veniam legendi* (the right to lecture in the field of church law) on Leszek Winowski. On 10 August 1946, the Senate of the Catholic University of Lublin in an unanimous vote approved of the decision of the Faculty Board. In October 1946, L. Winowski was promoted the Deputy Professor in the Chair of Roman Law of the Faculty of Canon Law. In the years 1952–1957, he held the function of Vice-Dean of the Faculty. Prof. L. Winowski worked for the Catholic University of Lublin until 1957, yet he maintained his scholarly ties with the University until the end of his life.[21] In that University, he successfully conducted 16 procedures in requirement of obtaining Doctor's degree.[22] According to Teresa Janasz (1921–2001), historian of state and law, Leszek Winowski promoted altogether 22 doctors.[23] From among those promoted at the Faculty of Canon Law of the Catholic University of Lublin a few stayed bishops in the future, some were Rectors of catholic colleges of higher education, among others: the Rev. Bogdan Sikorski, Bishop of Płock; the Rev. Paweł Latusek, Rector of the Higher Theological Seminary in Wrocław, Auxiliary Bishop of Wrocław; the

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[20] S. Jóźwiak, *op. cit.*, p. 500–501.

[21] M. Pyter, *Działalność uniwersytecka…*, 399–401; T. Janasz, *Leszek Winowski 1910–1979*, „Czasopismo Prawno-Historyczne" 1980, Vol. 32, No. 2, p. 240.

[22] S. Jóźwiak, *op. cit.*, p. 503.

[23] T. Janasz, *Leszek Winowski 1910–1979…*, p. 240.

Rev. Edmund Ilcewicz, Bishop of Lublin; the Rev. Tadeusz Pieronek, Auxiliary Bishop of Sosnowiec, Rector of the Papal Theological Academy in Krakow; the Rev. Piotr Hemperek, Auxiliary Bishop of Lublin, Rector of the Catholic University of Lublin.[24] Two of the doctoral students, who were preparing their dissertations under Prof. L. Winowski's supervision – T. Janasz and Edmund Klein (1929–2011), historian of state and law (prospective professors) – earned their doctor's degrees in 1964 – from the Professor's home Chair in Wrocław University.[25]

Being employed at Wrocław University, L. Winowski could not count on an easy life, since his person provoked a sense of anxiety and raised different objections on the part of the communist party unit based in the university due to his parallel being employed at the Catholic University of Lublin. For example, at the Ist All-Poland Conference of Historians of Law, which was held in Toruń 1950, his lectures in denominational law were personally criticized by the then Minister of Justice Henryk Świątkowski.[26] Living in that peculiar "bed of thorns" came to an end after the October of 1956, when the university authorities' attitude towards L. Winowski changed. In 1957, on the power of the decision of the Central Qualifications Commission he was nominated Full Professor in the Chair of General History of State and Law, which – following the death of Prof. Iwon Jaworski – he managed in the years 1959–1969.[27] Prof. L. Winowski performed also the function of Vice-Dean of the Faculty of Law (the name of the Faculty was officially accepted in 1950) of Wrocław University, starting the first term of office in the academic year 1956/1957 (from 17 February 1957), and the second term in that of 1957/1958.[28] In 1969, when the University chairs were liquidated and replaced by sections being constituent parts of individual Institutes, Prof. L. Winowski was appointed the head of the Section of General History of State and Law, performing the function until 1979.

It needs explaining that the procedure of conferring the title of Full Professor on L. Winowski, which was commenced in 1966, took eight years for a variety of reasons of non-scholarly nature. It was not until November 1974

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[24] J. Koredczuk, *Leszek Winowski – „Poszukujący"* [Leszek Winowski – 'Seeker'], in: J. Koredczuk, *Wspomnienia i plotki, czyli o tych, co odeszli, lecz w pamięci pozostali*, „Prawo" CCCIII, „Studia Historyczno-Prawne", red. A. Konieczny, „Acta Universitatis Wratislaviensis" No. 3015, Wrocław 2007, p. 93.

[25] J. Koredczuk, *op. cit.*, p. 93; E. Klein, J. Koredczuk, *Leszek Winowski (1910–1979)*, in: L. Lehmann, M. Maciejewski (eds), *Pamięci zmarłych profesorów i docentów Wydziału Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego 1945–2010*, Wrocław 2010, p. 320–321.

[26] J. Koredczuk, *Dzieje Zakładu Powszechnej Historii Państwa i Prawa Uniwersytetu Wrocławskiego* [The history of the Section of General History of State and Law of Wrocław University], „Przegląd Prawa i Administracji" C/1, „Acta Universitatis Wratislaviensis" No. 3661, Wrocław 2015, p. 54.

[27] K. Orzechowski, *op. cit.*, p. 334.

[28] J. Koredczuk, *Dzieje Zakładu Powszechnej Historii…*, p. 54.

that on the power of the resolution of the Council of State, Leszek Winowski received the title of Full Professor of Legal Studies.[29]

For a short period of time Prof. L. Winowski lectured in canon and denominational law at the Faculty of Law and Administration of Wrocław University. Beginning with 1959 he conducted lectures and classes in universal history of state and law, as well as interesting and erudite monographic lectures in the field of history of law of Islam and the polity of Muslim states, as well as the polity of England in the 17th and the 18th centuries. He was able to skilfully combine his interest in the subject matter of relations between the state and the Church with the problem area of history and law.[30]

Cooperation with the Teacher's Training College in Opole

In 1957, following the formal termination of his employment in the Catholic University of Lublin, Prof. Leszek Winowski received an offer of academic work in the Teacher's Training College in Opole. His employment here (similarly as in the case of K. Orzechowski's) was closely connected with the initiative of students of Russian Philology of the College, who in January 1957 applied to the authorities of the Philological Department to be given the opportunity of studying history apart from the subjects included in the curriculum of their major. As part of the realization of that request, beginning with October 1957, the program of studies included the so-called side subjects like History of Poland and History of the Middle Ages. Lecturing in the first of them was entrusted to Prof. K. Orzechowski, while in the other – to Prof. L. Winowski (at that time both were research workers of the Complex of Chairs of History and Law of Wrocław University).[31]

In order to launch study courses in History, on 28 January 1957, the Senate of the Teacher's Training College in Opole established the Chair of History of Poland and the Chair of General History. On 1 February 1957, K. Orzechowski was appointed head of the former and A. Gembala – of the latter, in which Prof. L. Winowski was employed. In the academic year 1962/1963, he transferred to the Section of History of Poland of the Feudal Epoch established within that Chair. It should be mentioned that Prof. L. Winowski's employment in the Opole-based college met with objections on the part of the then state authorities who argued that he was "a historian of law, not a historian". Still, thanks to

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[29] T. Janasz, *Leszek Winowski – historyk ustroju…*, p. 173.

[30] K. Orzechowski, *op. cit.*, p. 334.

[31] J. Koredczuk, *Opolszczyzna w badaniach Profesora Kazimierza Orzechowskiego oraz jego wkład w rozwój opolskiego ośrodka historycznego* [Opole region in the studies of Prof. K. Orzechowski and his contribution to the development of Opole centre of historical studies], „Opolskie Studia Administracyjno-Prawne" 2011, Vol. 9, p. 215–216.

the intervention of Prof. Maurycy Horn (1917-2000), historian and subsequent Rector of the Teacher's Training College in Opole, that absurd reservation was withdrawn and Prof. L. Winowski started lecturing in general history of the feudal epoch (476–1648).[32] Apart from lectures, Prof. L. Winowski supervised master's seminars which enjoyed popularity with his students. According to K. Orzechowski, Prof. Leszek Winowski transferred into Wrocław and Opole academic environments "rich and unique traditions and customs of Jan Kazimierz University and generally speaking those of Lvov itself: profound and versatile knowledge coupled with incredible modesty; gentleness and understanding combined with always high scholarly standards; reliable substantive criticism with great kindness for every person."[33]

Prof. Winowski was the author or a co-author of textbooks and academic books in the field of history of the Middle Ages, Polish denominational law, general history of state and law. With the support of the authorities of the Teacher's Training College in Opole, he had volumes of lectures dealing with the medieval history published for students majoring in History (*Historia średniowiecza* [History of the Middle Ages], part 1, Opole 1961, 318 pages; part 2, Opole 1966, 350 pages). In a separate volume, he presented history of the Islamic state in the times of Mahomet and 'the Rashidun Caliphs' (*Państwo islamu w czasach Mahometa i „kalifów prawowiernych" (632–661)* [The state of Islam in the times of Muhammad and "The Rightly Guided Caliphs" (632-661)], „Zeszyty Naukowe Wyższej Szkoły Pedagogicznej", monographic series, Opole 1966, 100 pages). Because of the severe shortage of academic handbooks in history in the 1960s, the volumes enjoyed great popularity with history students, as they contained an impressive amount of relevant material.

Prof. L. Winowski worked for the Teacher's Training College in Opole until the end of the academic year 1967/1968. It should be noted that following the March events (the Polish 1968 political crisis begun with a series of students' protests), he resigned from the work in the Senate Commission for Discipline of Students and then from his employment in the College as such.[34] On 1 July 1968 he suffered a serious heart attack which had grave consequences for his health condition in the subsequent years of his life.[35] Despite the termination of his employment in the Teacher's Training College in Opole, Prof. L. Winowski continued running Master's seminars with intramural students and those attending extramural courses (designed for students in employment

[32] Arch. UO, Akta osobowe Leszka Winowskiego [Personal file of Leszek Winowski]. See: A. Maziarz, *op. cit.*, p. 40.

[33] K. Orzechowski, *op. cit.*, p. 337.

[34] J. Koredczuk, *Opolszczyzna w badaniach Profesora Kazimierza Orzechowskiego…*, p. 219.

[35] E. Klein, J. Koredczuk, *op. cit.*, p. 321.

on weekdays). In 1970, he promoted 20 Master's course undergraduates, in 1971 – 4, in 1972 – 3. Among the graduates whose MA theses were supervised by Prof. L. Winowski were prospective research workers of the Teacher's Training College in Opole, later transformed into Opole University, as well as of the State Silesian Institute in Opole, Prof. dr hab. Elżbieta Trela-Mazur, Dr. Marta Hatalska, Prof. dr hab. Stanisław Senft, to mention but a few.

Scholarly interests

As far as the field of studies which were carried out by Prof. L. Winowski is concerned, it is possible to distinguish three major research areas. The first comprised studies on the legal position of dissenters, beginning with the earliest Middle Ages; the second dealt with the state and law of Islam; the third – with history of the Church in Silesia.[36] Prof. L. Winowski was the author of 34 publications, including 5 books.[37] The last of his published monographs under the title *Innowiercy w poglądach uczonych zachodniego chrześcijaństwa XIII i XIV wieku* [Dissenters in the views of scholars of Western Christianity in the 13th and the 14th centuries] (he died while working on it, leaving the manuscript) came out in 1985 in Wrocław,[38] having been prepared for publication by Prof. K. Orzechowski.[39] The scholarly output of Prof. L. Winowski – as the Rev. Dr. Stanisław Jóźwiak emphasized – "entitles him to be recognized as an outstanding lawyer and significant representative of Polish canon law studies. As the last of the circle of Władysław Abraham's disciples, he passed the best traditions of the reputed School of Lvov on to a numerous circle of his own disciples."[40]

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Prof. Leszek Winowski was awarded the Knight's Cross of the Order of *Polonia Restituta*. He was a member-correspondent of the Scientific Association

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[36] See for a broader treatment: T. Janasz, *Leszek Winowski – historyk ustroju…*, 174; S. Jóźwiak, *op. cit.*, p. 504–506.

[37] Cf. T. Janasz, *Bibliografia prac profesora dra Leszka Winowskiego* [Bibliography of works of Dr. Leszek Winowski], „Czasopismo Prawno-Historyczne" 1980, Vol. 33, No. 2, p. 241–243; *eadem*, *Wykaz prac naukowych prof. Leszka Winowskiego* [List of research works by Prof. L. Winowski], „Roczniki Teologiczno-Kanoniczne" 1981, Vol. 28, No. 5, p. 23–25.

[38] L. Winowski, *Innowiercy w poglądach uczonych zachodniego chrześcijaństwa XIII i XIV wieku* [Dissenters in the views of scholars of Western Christianity in the 13th and the 14th centuries] Zakład Narodowy im Ossolińskich, Wrocław 1985, 183 pages.

[39] J. Koredczuk, *Dzieje Zakładu Powszechnej Historii…*, p. 61.

[40] S. Jóźwiak, *op. cit.*, p. 506.

of the Catholic University of Lublin from the year 1948 (next an active member of this Association at the Faculty of Social Studies), a member of Wrocław Scientific Society (since 1957) and Opole Scientific Society. He was also a member of the editorial committee of *Czasopismo Prawno-Ekonomiczne* [The Law and Economics Journal].[41] It is worth adding that a part of the extensive scholarly output of Prof. L. Winowski was given over by his sisters to the special collections of the Scientific Library of the Polish Academy of Learning and the Polish Academy of Sciences in Krakow.[42]

L. Winowski died in Wrocław on 16 November 1979 after a long illness (he suffered a few infarcts), bereaving his wife, Janina – a teacher of biology, and two children: the daughter – by education a biochemist and the son – a medical doctor.[43] He was buried in the cemetery at The Holy Family Church in Sępolno in Wrocław.[44] During the funeral ceremony, while accentuating L. Winowski's firm attachment to faith, Bishop Wincenty Urban recollected that "the late Professor Winowski was a man of prayer. It was indeed a beautiful picture to see him drop in the Wrocław Cathedral on his way back home from the University."[45]

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[41] E. Klein, J. Koredczuk, *op. cit.*, p. 321.

[42] K. Szymurowa, *op. cit.*, p. 560.

[43] K. Bukowski, *op. cit*., p. 118.

[44] E. Klein, J. Koredczuk, *op. cit.*, p. 322.

[45] Quotation from: K. Bukowski, *op. cit*., p. 118.

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