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Schriftleitung (V.i.S.d.P.): Prof. Dr. *Caroline von Gall*, Deutsche Gesellschaft für Osteuropakunde e.V., Schaperstraße 30, 10719 Berlin, Tel.: +49 (0)30/214 784 12, Fax: +49 (0)30/214 784 14, E-Mail: cvgall@uni-koeln.de

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EDITORIAL

Am 28. und 29. November 2024 fand in Wien eine Tagung statt, die dem 25. Jubiläum der Osterweiterung der EU gewidmet war. Diese Veranstaltung wurde durch das Forschungsinstitut für Wirtschaftsrecht in Mittel- und Osteuropa (FOWI) an der WU organisiert. Das FOWI ist eine der wichtigen Stellen der Osteuropaforschung, die für die Einbindung osteuropäischer Forscher in die westliche Wissenschaft eine außerordentliche Rolle gespielt hat. Auch ich persönlich habe sehr davon profitiert – ganz besonders schätze ich die Gespräche mit *Prof. Peter Doralt*, die meine wissenschaftliche Sichtweise bis heute prägen. Das FOWI hat einen großen Beitrag im Prozess der Integration von Osteuropa geleistet und war ein zentraler Knotenpunkt eines wissenschaftlichen Netzwerkes. Die kleine Tagung in diesem Jahr hat dies einmal mehr bestätigt. Trotz seines Erfolgs soll das FOWI bedauerlicherweise geschlossen werden, was ein weiteres Signal der fortschreitenden Abschaffung der Osteuropaforschung im deutschsprachigen Raum darstellt.

Dies ist allerdings eine äußerst bedauerliche Entwicklung: Die politischen Geschehnisse der letzten Jahre – Krieg, die Krise der Demokratie weltweit usw. – sind ein wichtiger Grund, warum solche Institutionen und deren Werte erhaltungswürdig sind. Gerade gegenwärtig ist die Osteuropakompetenz gefragter denn je. Ohne Erfahrung und Kenntnisse lassen sich schwere Krisen kaum bewältigen. Dies betrifft sowohl die Planung des zukünftigen Aufbaus der Ukraine als auch die Entwicklung der östlichen EU-Länder, was ohne notwendige Kompetenz, welche die Osteuropaforschung bietet, unvorstellbar ist. Diese Forschung ist eine unabdingbare Voraussetzung für eine wirksame Politik. Es wird kaum möglich sein, die bestehenden Netzwerke wiederaufzubauen und im vollen Umfang die Forschung führen und fortsetzten.

Die Zeitschrift Osteuropa Recht setzt ihre Arbeit hingegen unermüdlich fort. In diesem Heft findet sich wieder ein Beweis für die Arbeit an der Europäisierung des ukrainischen Rechts. Es werden auch interessante Aspekte, Probleme und Entscheidungen bezüglich der komplizierten Lage der polnischen Justiz besprochen wie beispielsweise eine höchstrichterliche Entscheidung sogenannter „Neurichter", die in einem nach überwiegender Meinung verfassungswidrigen Verfahren ins Amt gekommen sind. Solche Entscheidungen werden durch einen Teil der Justiz und sonstigen Organe des Staates nicht anerkannt oder zumindest wird ihre Geltung in Frage gestellt. Polen befindet sich in einer schwierigen Phase der Wiederherstellung der Rechtsstaatlichkeit, die mitnichten reibungslos verläuft. Das Problem der „Neurichter" gehört zu den schwierigen und anspruchsvollen Herausforderungen für die neue Rechtsstaatlichkeit. Dieser Prozess mit solch wichtigen Auswirkungen, die nicht nur unmittelbar Polen betreffen, sondern auch für die gesamte Europäische Union gelten, muss von der Wissenschaft sorgfältig beobachtet werden.

Fryderyk Zoll, Krakau

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Yevheniia Duliba*

New Law of Ukraine of 10 June 2023 No. 3153-IX "On Consumer Protection": Inadequate Approach to the Implementation of Directive 2019/771

Abstract

This article analyses the implementation of the provisions of Directive 2019/771 to the Law of Ukraine No. 3153-IX dated 10 June 2023 "On Consumer Protection", which shall enter into force on 7 July 2024 or after the end of martial law in Ukraine. The analysis allows for the conclusion that the Ukrainian legislator's approach to the implementation of the provisions of Directive 2019/771 is inadequate and that further improvement of the consumer protection legislation is required.

It is summarised that Ukraine should strive to create a consumer protection system compatible with the principles, approaches and practices of the EU. This requires revision of the current legislation in this area. This article proposes to improve consumer protection legislation by implementing the provisions of Directive 2019/771 and Law 3153-IX into the Civil Code of Ukraine, to ensure consistency and efficiency of legal regulation, and to eliminate duplication of consumer protection provisions in all other legal acts. Such approach will facilitate the harmonisation of Ukrainian legislation with the EU standards.

Keywords: consumer protection, Directive 2019/771, consumer protection system, harmonization of legislation with EU law.

Zusammenfassung

Dieser Artikel analysiert die Umsetzung der Bestimmungen der Richtlinie 2019/771 zum Gesetz der Ukraine Nr. 3153-IX vom 10. Juni 2023, über den Verbraucherschutz, das am 7. Juli 2024 oder nach dem Ende des Kriegsrechts in der Ukraine in Kraft treten soll. Die Analyse lässt den Schluss zu, dass der Ansatz des ukrainischen Gesetzgebers bei der Umsetzung der Bestimmungen der Richtlinie 2019/771 unzureichend ist und eine weitere Verbesserung der Verbraucherschutzvorschriften erforderlich ist.

Zusammenfassend wird festgestellt, dass die Ukraine sich bemühen sollte, ein Verbraucherschutzsystem zu schaffen, das mit den Grundsätzen, Ansätzen und

* D. Sc. (Law), Professor, Research assistant of the Department of Civil Law Faculty of Law and Administration Jagiellonian University (Kraków, Poland); Professor of the Department of Constitutional Law and Field-Related Disciplines, Institute of Law, National University of Water and Environmental Engineering (Rivne, Ukraine). E-mail: dulibayevheniia@gmail.com, ORCID ID: 0000-0003-2651-4977. This article is a part of the research within the project 'Homo consumens, Homo ecologicus – ecological efficiency test of the new directive on certain aspects concerning contracts for the sale of goods' financed by Narodowe Centrum Nauki (NCN, National Science Centre) in Kraków, Poland, 2019/34/A/HS5/00124.

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Praktiken der EU vereinbar ist. Dies erfordert eine Überarbeitung der geltenden Rechtsvorschriften in diesem Bereich. In diesem Artikel wird vorgeschlagen, die Verbraucherschutzvorschriften zu verbessern, indem die Bestimmungen der Richtlinie 2019/771 und des Gesetzes 3153-IX in das Zivilgesetzbuch der Ukraine umgesetzt werden, um die Kohärenz und Effizienz der Rechtsvorschriften zu gewährleisten und die Doppelung von Verbraucherschutzbestimmungen in allen anderen Rechtsakten zu beseitigen. Ein solcher Ansatz wird die Harmonisierung der ukrainischen Gesetzgebung mit den EU-Standards erleichtern.
Schlüsselwörter: Verbraucherschutz, Richtlinie 2019/771, Verbraucherschutzsystem, Harmonisierung der Rechtsvorschriften mit dem EU-Recht.

I. Introduction

The significant growth of e-commerce has shaped the global scenario in recent years and required better regulation of the digital market at the level of the European Union (EU) and increased protection of consumer rights in this area.

With the adoption of Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects relating contracts for the sale of goods (hereinafter Directive 2019/771)[1] EU Member States have been required to take measures to implement Directive 2019/771 into national law to increase consumer protection and improve the functioning of the internal market by enshrining compliance standards and remedies in contracts for the sale of goods (including digital content or digital services which are incorporated in or inter-connected with the good).

At the same time, transposition of EU law into national law is undertaken not only by EU Member States, but also by states that aspire to become fully-fledged members of the European Union. Ukraine, which received EU candidate status in 2022 and has been adapting its legislation to EU law for more than a decade, is no exception to this list.

Ensuring a high level of consumer protection and compatibility of Ukraine's consumer protection system with the EU is not a new problem. Numerous scholars' works have been devoted to this issue, which investigated it from the perspective of studying legislative instruments regulating EU sales contracts,[2] organisation of the EU consumer protection system and using this experience to improve Ukrainian consumer protection legislation and mechanisms for its implementation,[3] consumer protection in Ukraine and in European Union[4] and concluding electronic contracts

1 OJ L 136, 22.5.2019, p. 28.

2 *H. Poperechna/L. Savanets*, Legal regulation for sale of goods and supply digital content in EU – analysis of novelties of new EU directive, Scientific Bulletin of Uzhhorod National University: Series: Law 78|2023, pp. 413-418. DOI: 10.24144/2307-3322.2023.78.2.67.

3 *V.O. Khyzhnyak*, EU standards on consumer protection: lessons for Ukraine. Scientific Bulletin of Kherson State University: series: Economic Sciences 27|2017, Part 1. C. 99-102.

4 *I. Utekhin*, Consumer Protection in Ukraine and the European Union: Current Status and Prospects, Bulletin of E.O. Diodorenko LSUIA 2|2023, C.216-228. DOI: 10.33766/2524-03 23.102.216-228.

within the EU,[5] the necessity of effective state policy implementation in the context of European integration of Ukraine.[6] At the same time, scholars have paid much less attention to analysing the implementation of the Directive 2019/771 into Ukrainian legislation, application of which is extremely relevant in the context of globalisation and development of cross-border e-commerce. The purpose of present article is thus to analyse the provisions of Ukrainian Law dated 10 June 2023, No. 3153-IX "On Consumer Protection" and implementation of the Directive 2019/771 therein. Before elaborating on the topic of this research, it is worthwhile to focus on two important issues: the peculiarities of adaptation of EU legislation to the national law of Ukraine (II.) and the current Ukrainian legislation in the field of consumer protection (III.).

II. Ukraine and adaptation of the EU legislation in national law

As early as 1993, one of the main directions of Ukraine's foreign policy was defined as "expanding participation in European regional cooperation".[7] Subsequently, the state policy of Ukraine on the adaptation of legislation to EU laws was formed as an integral part of Ukrainian legal reform, since the goal was to achieve compliance of Ukrainian legal system with the *acquis communautaire*, taking into account the criteria set by the EU for states that intend to join it.[8]

Already in the Law of Ukraine dated 1 July 2010 No. 2411-VI "On the Principles of Domestic and Foreign Policy", the main principles of foreign policy included "ensuring Ukraine's integration into the European political, economic, and legal area with a view to gaining EU membership" (Article 11).[9]

About the need to improve Ukrainian consumer protection system in accordance with EU standards was also mentioned in the concept of state policy in the field of consumer protection, which aimed to introduce a systematic approach towards solving problems in the area of consumer protection.[10]

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5 *R.A. Prystai/I.M. Yavorska*, Consumer protection in the conclusion of electronic contracts within the European Union. Scientific Bulletin of Uzhhorod National University: Series: Law. B. 74. Part.2. 2022, pp. 255-261. DOI: 10.24144/2307-3322.2022.74.77.

6 *A.I. Lyga*, Legal basis of state policy in the field of consumer protection, Legal scientific electronic journal 8|2023, p. 191-196. DOI: 10.32782/2524-0374/2023-8/44.

7 On the main directions of the Ukrainian foreign policy: Resolution of the Verkhovna Rada of Ukraine as of 2.7.1993, No. 3360-XII. https://zakon.rada.gov.ua/laws/show/3360-12#Text.

8 The Program of Ukraine's integration into the European Union: Presidential Decree of 14.9.2000 No. 1072/2000. https://zakon.rada.gov.ua/laws/show/n0001100-00#Text. On National Program of Adaptation Ukrainian legislation to the legislation of the European Union: Law of Ukraine of 18.3.2004 No.1629-IV. https://zakon.rada.gov.ua/laws/show/1629-15#Text.

9 On the Principles of Domestic and Foreign Policy: Law of Ukraine of 1.7.2010 No. 2411-VI. https://zakon.rada.gov.ua/laws/show/2411-17#Text.

10 Concept of the state policy in the field of consumer rights protection: Order of the Cabinet of Ministers of Ukraine dated 5.6.2003 No. 777-p. https://zakon.rada.gov.ua/laws/show/777-2013-%D1%80#Text.

The ratification by the Verkhovna Rada of Ukraine the Association Agreement between Ukraine, on the one hand, and the EU, the European Atomic Energy Community and their Member States, on the other hand, in September 2014 obliged Ukraine to take measures to align its legislation with EU law.

In the context of our topic, it is precisely in Chapter 20 "Consumer Protection" of Section V "Economic and Sectoral Cooperation" Ukraine has committed itself to ensuring a high level of consumer protection and achieving compatibility between the consumer protection systems of Ukraine and the EU,[11] gradually adjusting its legislation to EU law. Therefore, one of the priority areas identified in the concept of state policy in the field of consumer protection for the period up to 2020 was once again harmonisation of the consumer protection system in Ukraine with EU principles, approaches and practices, as well as full adaptation of national consumer protection laws to EU legislation in accordance with Ukraine's obligations.[12]

At the time of becoming an EU candidate, Ukraine's consumer protection legislation was only partially harmonised with the consumer *acquis*, and therefore further steps and reforms were needed.

Already in the Report concerning the results of initial assessment of the implementation of EU *acquis*, it is noted that a significant part of EU consumer protection legislation has already been fully implemented in Ukrainian legislation.[13]

III. Ukrainian legislation on consumer protection and implementation of Directive 2019/771

Historically, consumer protection in Ukraine has not been based on a comprehensive codification of regulations. The formation of consumer protection legislation in Ukraine began with the adoption of Law No. 1023-XII "On Consumer Protection" (hereinafter Law No. 1023-XII),[14] which was adopted by the Verkhovna Rada of the Ukrainian SSR on 12 May 1991, before Ukraine's independence. In the preamble of Law No. 1023-XII, it was stated that this particular law "regulates relations between consumers of goods, works and services and producers and sellers of goods, contractors and service providers various forms of ownership, as well as establishes consumer rights and defines the mechanism for their protection". Thereafter, consumer protection legislation was formed through the adoption of separate laws and regulations in the areas of trade, works and services.[15] Today, consumer rights are protected

11 The Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, of 27.6.2014. https://zakon.rada.gov.ua/laws/show/984_011#Text.

12 On Approval of the state policy concept in the field of consumer rights protection for the period up to 2020: Order of the Cabinet of Ministers of Ukraine dated 29.3.2017 No. 217-p. https://zakon.rada.gov.ua/laws/show/217-2017-%D1%80#Text.

13 Report on the results of initial implementation assessment of the EU acquis https://eu-ua.kmu.gov.ua/wp-content/uploads/Zvit_UA.pdf.

14 On Consumer Protection: Law of Ukraine of 12.5.1991 No. 1023-XII. https://zakon.rada.gov.ua/laws/show/1023-12#Text.

15 *Utekhin*, fn. 3.

on the basis of Law No. 1023-XII, the Civil Code of Ukraine (hereinafter "Civil Code"), the Commercial Code of Ukraine (hereinafter "Commercial Code"), as well as other laws of Ukraine (for example, Laws of Ukraine No. 1953-IX "On Financial Services and Financial Companies" of 14.12.2021, No. 2633-IV "On Heat Supply" of 2.6.2005, No. 2479-VI of 9.7.2010 No. 2479-VI "On State Regulation of Public Utilities", the Law of Ukraine No. 675-VIII "On E-Commerce" of 3.9.2015, etc.).

The Civil Code, which is the main act of civil legislation in Ukraine, contains provisions that "contracts involving an individual consumer shall take into account the requirements of the legislation on consumer protection" (Article 627(2)), and "the legislation on consumer protection shall be applied to the relations under the retail sale and purchase agreement with the participation of an individual buyer, not regulated by this Code" (Article 698(3)).[16] In this context, it should be assumed that the legislator, when using the term "consumer protection legislation", most likely meant Law No. 1023-XII. After all, the final and transitional provisions of the new Law of Ukraine No. 3153-IX "On Consumer Protection" dated 10 June 2023 (hereinafter "Law No. 3153-IX"), which enters into force on 7 July 2024 or after the end of martial law in Ukraine, whichever is earlier, Part 2 of Article 627 Civil Code is set out in a new version and instead of the concept of "consumer protection legislation" it is indicated "the Law of Ukraine 'On Consumer Protection'", and Part 3 of Article 698 is generally excluded. Therefore, it follows that Law No. 1023-XII only specifies, modifies or stipulates the mandatory position of civil law's general provisions in favour of consumers.

A similar position is contained in a decision of the Cassation Civil Court within the Supreme Court, which states that "[…] the legislator has established the priority of Civil Code of Ukraine in regulating the retail sale and purchase agreement; in absence of regulation at the level of the Civil Code, the legislation on consumer protection applies".[17]

Speaking of Law No. 3153-IX, it is worth noting that this law significantly amended Ukrainian consumer protection legislation, adapted the provisions of various directives, including Directive 2019/771, filling in the existing gaps, and took steps towards convergence with EU consumer protection legislation. Although many amendments have been introduced, Law No. 1023-XII still does not comply with the European consumer protection system, is outdated and contains many gaps, as the rules are not adapted to modern realities or do not work properly, which leads to numerous violations of consumer rights. Thus, to replace Law No. 1023-XII, Ukraine adopted a new Law No. 3153-IX, and the provisions of the Civil Code (Articles 69-709) and the Commercial Code (Articles 20, 39) and other laws continue to apply.

The peculiarity of this arrangement is that the Commercial Code of Ukraine regulates consumer protection issues involving legal entities and individuals who are business entities, while the Civil Code of Ukraine and Law of Ukraine No. 1023-XII (and then, after the entry into force of Law No. 3153-IX) concerns individuals.

16 Civil Code of Ukraine No. 435-IV dated 16.1.2003. No. 435-IV. https://zakon.rada.gov.ua/laws/show/435-15#Text.

17 Resolution of the Cassation Civil Court within the Supreme Court of Ukraine dated 10.10.2018 in case No. 362/2159/15-c. URL: https://reyestr.court.gov.ua/Review/77037278.

Many Ukrainian scholars have welcomed the adoption of the new Law No. 3153-IX, as it is intended to resolve significant gaps in national law. Thus, for example, the legal analysis of consumer protection in the digital sphere of the draft Law No. 3153-IX allowed K. Taldonova to conclude that the adoption of this law will allow achieving compliance between the consumer protection systems of Ukraine and the EU, ensuring a unified interpretation of legal norms; increasing the level of consumer protection by expanding their rights; reducing abuse by establishing a minimum warranty period and clear requirements for the marking of prices for goods; increasing the level of protection in the field of e-commerce and provide a mechanism for pre-trial (alternative) settlement of consumer disputes, etc.[18]

While positively assessing the desire of Ukrainian legislator to implement the provisions of Directive 2019/771 into national law, the inadequate approach to this process must be highlighted, since these amendments were introduced not to the Civil Code of Ukraine, but to Law of Ukraine No. 3153-IX. Such implementation may lead to legal uncertainty and difficulties in applying the new rules in practice, as the Civil Code of Ukraine and Law of Ukraine No. 3153-IX are correlated as general and special laws. As a result, a situation may arise where Law of Ukraine No. 3153-IX does not contain a special provision and it will be necessary to apply the provisions of Civil Code of Ukraine, which may also be absent. In addition, certain provisions on consumer protection are still contained in the Commercial Code. Thus, as a conclusion from the above, when implementing the provisions of Directive 2019/771 into national legislation, the legislator did not comply with the principle that the protection provided to consumers should be broader than the protection provided to consumers in certain legal relations.

Agreeing with the opinion of M. Tomala and F. Zoll, it should be concluded that the Ukrainian legislator, by adopting Law No. 3153-IX, chose a potentially easier way to implement Directive 2019/771, since there is no need to make radical changes to all private law regulations, but only to this legal act.[19]

However, a comparison of the Directive 2019/771 and Law No. 3153-IX made it possible to identify certain problematic aspects of such implementation. It is worth dwelling on them in more detail.

Firstly, Law No. 3153-IX updated the list of terms, which include the concepts used in Directive 2019/771, in particular: “contract”, “distance contract”, “durability of goods”, “commercial guarantee”, “product”, “product functionality”, “seller”, “digital content compatibility”, “digital service”.

Although some of the terminology in Article 1 Law. No. 3153-IX is aligned with the requirements of Directive 2019/771, most of the terms used in the EU are ignored and are not aligned with other Ukrainian laws. For example, the Civil Code continues to use the term “agreement concluded through information and communication systems”, the Law of Ukraine “On Electronic Commerce” uses the terms “electronic

18 *K. Taldonova*, Legal analysis of consumer protection in the digital sphere, Scientific notes. Series: Law 14|2023, pp. 250-255. DOI:10.36550/2522-9230-2023-14-250-255.

19 *M. Tomala/F. Zoll*, The problem of consistency between Ukrainian private law and the provisions of Directive 2019/771 on consumer rights in case of nonconformity of goods transferred under a sale and purchase agreement. Actual problems of jurisprudence 4|2023, pp. 149-57. DOI:10.35774/app2022.04.14.

transaction", "electronic agreement".[20] Taking into account the fact that the Civil Code sets forth general provisions on agreements (Section II "General Provisions on Agreements" Chapter 52 "Concept and Terms of Agreement" (Articles 626-637), Chapter 53 "Conclusion, Amendment and Termination of Agreement" (Articles 638-654)) and general provisions on contractual obligations (Section III "Certain Types of Obligations"), including sale and purchase agreements (Chapter 54) and retail sale and purchase agreements (§ 2 of Chapter 54), it would be more logical to enshrine most of these concepts in the Civil Code.

Secondly, while Directive 2019/771 refers to the conformity of goods (Article 5), subjective and objective conformity requirements (Articles 6 and 7), and incorrect installation of goods (Article 8) when assessing whether the seller fulfils the principal obligation to sell goods to the buyer, Law No. 3153-IX and the Civil Code continue to use the concepts of "defect" "defect of goods", "goods with defect", "goods of proper quality", "goods of inadequate quality" (for example, Article 678 Civil Code refers to goods of inadequate quality, Article 679 Civil Code refers to defects of goods for which the seller is responsible, Article 708 Civil Code refers to goods of inadequate quality).

In addition, the concepts of "conformity of goods" and "non-conformity of goods" are also used in the United Nations Convention on the Contracts for the International Sale of Goods dated 11 April 1980 (Articles 35, 36, 39, 40), which Ukraine joined in 1989 and which entered into force for the Ukraine on 1 February 1991.

Thirdly, the most important changes introduced by Law No. 3153-IX, relate to legal and commercial guarantees in sales contracts with consumers. In particular, the provisions on guarantee obligations have been amended and consumer protection in terms of guarantees and after-sales service has been strengthened compared to the current legislation, along with the seller's liability for any non-conformity existing at the time of delivery of goods and becoming apparent within one year from that moment, as well as liability for any defect in digital content or digital service detected by the consumer within two years from the date of delivery of such goods, if the digital content is to be delivered repeatedly or the digital service is to be provided repeatedly, and if the digital content is to be delivered or the digital service is to be provided for a period exceeding two years.

At the same time, the guarantee has always been regulated by the Civil Code as part of the general laws of obligations, which applies in principle regardless of the contract type. In particular, Articles 675-676e Civil Code regulate the issue of guarantees when entering into a sale and purchase agreement.

Fourthly, Law No. 3153-IX contains a section on unfair business practices, which contains a more general provision on the prohibition of unfair business practices (Articles 24-29). However, again, it is difficult to understand the legislator's logic, since unfair commercial activity is a manifestation of unfair competition carried out by commercial entities and this issue in Ukraine is regulated by the Law of Ukraine "On Unfair Competition", which defines the legal framework for protecting

20 On electronic commerce: Law of Ukraine of 3.9.2015 No. 675-VIII. https://zakon.rada.gov.ua/laws/show/675-19#Text.

business entities and consumers from unfair competition.[21] In addition, certain aspects of restricting monopoly and protecting business entities and consumers from unfair competition are regulated by the Commercial Code.[22]

Fifthly, Law No. 3153-IX updated the provisions on consumer rights in case of purchase of defective goods, enshrining the right to perform one of the following actions: warranty repair of goods and warranty replacement of goods with the same or similar goods. However, there is a double interpretation of this provision: firstly, repair and replacement may be considered as one of the options that a consumer may choose; secondly, replacement may be considered impossible without prior repair.

At the same time, Article 678 Civil Code contains a list of other consumer actions, such as proportionate reduction of the price, free elimination of goods defects within a reasonable time, reimbursement of expenses for elimination of goods defects, as well as withdrawal from the contract with a demand for a refund of the amount paid for the goods, and demand for the goods replacement. And part 2 of the Article 20 Commercial Code defines other ways of protecting their rights and legitimate interests, including those of consumers: recognition the presence or absence of rights; recognition the acts of state authorities and local self-government bodies, acts of other entities that contravene the law, infringe the rights and legitimate interests of a business entity or consumers; invalidation of business transactions on the grounds provided by law; restoration of the situation that existed before violation of the rights and legitimate interests of business entities; cessation of actions that violate the right or create a threat of its violation; award of an obligation in kind; compensation for damages; application of penalties; application of operational and economic sanctions; application of administrative and economic sanctions; establishment, modification and termination of economic relations.

Article 30 of Law No. 3153-IX raises debate, where the subjects of the consumer protection system include the central executive body responsible for formulating state policy in the field of consumer protection, the competent authority and other state bodies that protect consumer rights in the relevant areas.

Analysing the definition of the term "competent authority", it can be concluded that the legislator borrowed this term from private international law, which uses this concept to define the relevant authorities for relations in international agreements (Articles 8, 78, 79 of the Law of Ukraine "On Private International Law").

At the same time, if the central executive body responsible for formulating the state policy in the field of consumer protection is the Ministry of Economy of Ukraine,[23] the question arises as which state authorities are the competent authority and which state authorities are other state authorities that carry out consumer protection in the relevant areas. For example, the Law of Ukraine "On Housing and Municipal Services" states that "the protection of consumer rights in housing and communal services is carried out by the authorised central executive body that implements the

21 On protection against unfair competition: Law of Ukraine of 7.6.1996 No. 236/96-BP. https://zakon.rada.gov.ua/laws/show/236/96-%D0%B2%D1%80#Text.

22 Commercial Code of Ukraine dated 16.1.2003 No. 436-IV. https://zakon.rada.gov.ua/laws/show/436-15#Text.

23 Issues of the Ministry of Economy: Resolution of the Cabinet of Ministers of Ukraine dated 20.8.2014 No. 459. https://zakon.rada.gov.ua/laws/show/459-2014-%D0%BF#Text.

state policy of state supervision (control) over compliance with the legislation on consumer protection" (Article 16),[24] namely the State Service of Ukraine for Food Safety and Consumer Protection, which implements the state policy on state control over compliance with consumer protection legislation and advertising in this area and monitors compliance with consumer protection legislation, advertising compliance in the part of consumer protection.[25] This leads to the question whether the State Service of Ukraine on Food Safety and Consumer Protection is the competent authority or there is another body that protects consumer rights in the relevant areas. A similar situation arises with regard to the classification of other entities, for example, the Antimonopoly Committee of Ukraine (which protects economic competition on the basis of consumer rights priority),[26] the National Commission for State Regulation of Energy and Utilities (protects the rights of consumers of goods (services) in the market that is in a state of natural monopoly and at the related markets in the areas of electricity, heat supply, centralised water supply and sewerage, processing and disposal of household waste, and in the oil and gas sector)[27] or the National Bank of Ukraine (protects the rights of consumers in financial services).[28]

It is worth paying attention to the implementation by Ukrainian legislator of those non-binding provisions of Directive 2019/771 where countries may exercise their discretionary powers, in particular Articles 3 (7), 10(6), 11(2), 12 and 17(4) of the Directive: Unfortunately, Ukraine has not exercised its discretionary powers to the maximum extent.

For example, when choosing the period of recognition of the non-conformity from the moment of delivery of the goods, during which any non-conformity will be presumed to have existed at the moment of delivery of the goods, unless otherwise proven or where this presumption is incompatible with the nature of the goods or the nature of the non-conformity, the Ukrainian legislator, among the options of a one-year or two-year period, chose the shorter period (Article 6), while most EU Member States chose a two-year period.

IV. Improving consumer protection legislation in Ukraine

Although Law No. 3153-IX has not yet entered into force, Ukrainian consumer protection legislation still requires significant improvements.

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24 On housing and communal services: Law of Ukraine of 9.11.2017 No. 2189-VIII. https://zakon.rada.gov.ua/laws/show/2189-19#Text.

25 On Approval of the Regulation on the State Service of Ukraine on Food Safety and Consumer Protection: Resolution of the Cabinet of Ministers of Ukraine dated 2.9.2015 No. 667. https://zakon.rada.gov.ua/laws/show/667-2015-%D0%BF#Text.

26 On the Antimonopoly Committee of Ukraine: Law of Ukraine dated 26.11.1993 No. 3659-XII. https://zakon.rada.gov.ua/laws/show/3659-12#Text.

27 On Approval of the Regulation on the National Commission for State Regulation of Energy and Municipal Services: Decree of the President of Ukraine of 10.9.2014 No. 715/2014. https://zakon.rada.gov.ua/laws/show/715/2014#Text.

28 On the National Bank of Ukraine: Law of Ukraine dated 20.5.1999 No. 679-XIV. https://zakon.rada.gov.ua/laws/show/679-14#Text.

Unfortunately, the fragmentation of Ukrainian legislation complicates not only the process of adaptation, but also the creation of a single, coherent consumer protection system,[29] the more its compatibility with the EU consumer protection system.

Analysing the twenty-year experience of application of the Civil Code of Ukraine and the Commercial Code of Ukraine, O. Kot and A. Hryniak conclude that there exist systemic contradictions and artificially created dualism of private law.[30] Kuznetsova and others, comparing the provisions of the Commercial Code of Ukraine with certain provisions of the Civil Code of Ukraine and other laws and regulations, proved that most of the provisions of the Commercial Code of Ukraine are referential or formulaic, and therefore have minimal regulatory impact and mostly duplicate the provisions enshrined in other legal acts.[31]

Agreeing with the opinion of M. Tomala and F. Zoll that if the provisions of the Commercial Code of Ukraine are excluded from national legislation, Ukraine would have the opportunity to create a holistic consistency of private law provisions, which may result in the unification of Ukrainian civil law,[32] I believe that Ukraine should strive to create a consumer protection system that is compatible with the EU's.

Considering that the rules governing relations involving consumers are not an independent section of private law, but include some exceptions to the general principles of private law, these rules are based on deeply rooted fundamental principles and cannot exist outside of them,[33] I believe that the current consumer protection legislation should be revised by implementing most of the provisions of Directive 2019/771 and Law 3153-IX into the Civil Code of Ukraine to ensure consistency and more effective legal regulation, as well as to eliminate duplication of consumer protection provisions in all other legal acts.

Regarding the Commercial Code of Ukraine, the Verkhovna Rada of Ukraine is currently considering draft law No. 6013 dated 9.9.2021, which provides for the liquidation of the Commercial Code of Ukraine and is being prepared for the second reading,[34] it is necessary to eliminate duplication of provisions on consumer protection in the Commercial Code of Ukraine.

29 *O.B. Moroz*, Problems of Adaptation of Ukrainian Legislation to the Legislation of the European Union, Almanac of International Law. 23|2020, pp. 21-28. DOI: 10.32841/ILA.2020.23.03.

30 *O.O. Kot/A.B. Hryniak*, Commercial Code of Ukraine: to cancel, not to leave, New Ukrainian Law 1|2023, pp. 11-19. DOI: 10.51989/NUL.2023.1.1.

31 *N. Kuznietsova et al.*, Pleniuk Abolition of the Commercial Code of Ukraine: potential consequences and necessary pre-requisites, Journal of the National Academy of Legal Sciences of Ukraine 27|2020, p. 100-131.

32 *Tomala/Zoll*, fn. 19.

33 Principles, Definitions and Model Rules of European Private Law. Available online under https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EN_EPL_20100107_Principles__definitions_and_model_rules_of_European_private_law_-_Draft_Common_Frame_of_Reference__DCFR_.pdf.

34 On Peculiarities of Regulation Business Activities of Certain Types of Legal Entities and Their Associations in the Transition Period: Draft Law of Ukraine dated 9.9.2021 No. 6013. https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72707.

V. Conclusions

The analysis of the implementation of Directive 2019/771 to Law of Ukraine No. 3153-IX shows an inadequate approach of the Ukrainian legislator to this process and indicates the need for further improvement of consumer protection legislation.

Ukraine should strive to create a consumer protection system that is compatible with the EU system, which requires a review of the current legislation in this area.

This can be accomplished by implementing the provisions of Directive 2019/771 and Law 3153-IX into the Civil Code of Ukraine, which will ensure consistency and efficiency of legal regulation, eliminate duplication of consumer protection provisions in all other legal acts, and contribute to the harmonisation of Ukrainian legislation with European standards.

Bartłomiej Dzierwa*

Comments on the judgment of the Polish Supreme Court, II CSKP 765/22

Abstract

The Supreme Court's ruling in case II CSKP 765/22 analyzed contract termination effects under art. 494 of the Civil Code, involving a disagreement between a cardiology health institution and a hospital. The Court found that termination led to contract expiration retroactively, but certain provisions might still apply post-termination. It criticized claims of contract non-existence post-termination and stressed the importance of parties' agreements in determining settlements. Compensation claims were discussed, emphasizing the need for a thorough analysis. Ultimately, the judgment clarified legal consequences of termination and highlighted the importance of parties' agreements in settlements.
Keywords: Effect of termination on the contract, termination, non-existence of the contract after termination, claims for damages in the event of termination, settlement.

Zusammenfassung

Das Urteil des Obersten Gerichtshofs in der Rechtssache II CSKP 765/22 befasst sich mit den Auswirkungen einer Vertragskündigung gemäß Art. 494 des Bürgerlichen Gesetzbuchs, bei dem es um einen Streit zwischen einer kardiologischen Gesundheitseinrichtung und einem Krankenhaus ging. Das Gericht stellte fest, dass die Kündigung rückwirkend zum Erlöschen des Vertrags führt, jedoch bestimmte Bestimmungen auch nach der Kündigung noch gelten können. Das Gericht kritisierte die Behauptung, dass der Vertrag nach der Kündigung nicht mehr bestehe, und betonte die Bedeutung der Vereinbarungen der Parteien bei der Festlegung von Vergleichen. Es wurden Schadensersatzansprüche erörtert, wobei die Notwendigkeit einer gründlichen Analyse betont wurde. Letztlich wurden in dem Urteil die Rechtsfolgen der Kündigung geklärt und die Bedeutung der Vereinbarungen der Parteien bei der Abrechnung hervorgehoben.
Schlüsselwörter: Auswirkung der Kündigung auf den Vertrag, Kündigung, Nichtbestehen des Vertrages nach der Kündigung, Schadensersatzansprüche bei der Kündigung, Abrechnung.

I. Introduction

The judgment of the Polish Supreme Court of 13 December 2022, file reference number II CSKP 765/22, fits into the line of jurisprudence whereby the effects of the with-

* Student at Jagiellonian University in Krakow.

drawal from a contract as regulated in Art. 494 of the Polish Civil Code[1] (hereinafter 'Civil Code') should be applied by analogy to Art. 395 § 2 Civil Code, i.e. in the event of exercising the right to withdraw, the contract should be considered not concluded. This view, although repeatedly presented both in case law[2] and in legal scholarship,[3] is not convincing on the basis of the applicable legal status.

The judgment referred to at the outset was issued as a result of a cassation appeal against the judgment of the Court of Appeal in Poznań (hereinafter also referred to as the 'court of second instance'). The plaintiff alleged infringement of both the substantive rules and the rules of procedure. The Supreme Court partially upheld the allegations, i.e. those concerning the violation of substantive law and referred the case back for reconsideration.

These comments are partial, they refer to the Supreme Court's analysis of the allegations of violation of substantive law regarding the effects of withdrawal from a contract under Art. 494 Civil Code. The comments approve the direction of the decision, while remaining critical to the argumentation used. In particular, its subject is a polemic with the position that, in principle, the contract after withdrawal is considered non-existent (not concluded), due to the analogous application of Art. 395 § 2 sentence 1 Civil Code.

II. Facts

The judgment was issued on the factual background; the dispute was conducted by R.S., running a cardiological non-public health care institution (hereinafter 'plaintiff'), and Szpital w G. (hereinafter referred to as the 'defendant'). On 17 December 2010, they concluded a contract for the provision of medical services. In § 14 sec. 8 of the agreement the parties described the settlement method in the event of its expiry or the withdrawal (i.e. the defendant was obliged to take over the equipment of the cardiology laboratory at fair value). The plaintiff was ready to provide services in May 2011. Nevertheless, the performance had not commenced. In the defendant's view, there were no grounds to proceed with the contract due to its invalidity. The defendant questioned the plaintiff's ability to conclude the contract. On 6 December 2011, the plaintiff called the defendant to perform the contract within three days (pursuant to Art. 491 § 1 Civil Code), and in a letter of 16 December 2011, she withdrew from the contract, unsuccessfully calling the defendant to repair the damage resulting from the

1 The Act of 23 April 1964 – Civil Code of Laws of 2023, item 1610 [Act of 23 April 1964. – Civil Code, OJ 2022, Item 1610].

2 Supreme Court decision of 30 November 1994, III CZP 130/94, LEX No. 4139; Supreme Court decision of 22 January 2002, V CKN 660/00, LEX No. 54084; Supreme Court decision of 18 July 2012, III CZP 39/12, LEX No. 1271627.

3 *J. M. Kondek* in: K. Osajda/W. Borysiak (eds), Kodeks cywilny (Civil Code). Commentary, Warsaw 2024, Article 494, para. 1; *A. Olejniczak* in: A. Kidyba (ed.), Kodeks cywilny (Civil Code). Commentary. Tom III. Zobowiązania – część ogólna (Obligations – general provisions), 2nd edn, Warsaw 2014, Article 494, para. 1; *W. Czachórski*, Zobowiązania (Obligations). Outline of the lecture, Warsaw 2009, p. 347.

failure to perform the obligation. Subsequently, she brought an action before the District Court in Poznań.

III. Course of the proceedings

1. Judgment of the District Court in Poznań of 29 May 2017

The District Court in Poznań found that the contract was valid and effective; the defendant therefore did not fulfill the obligations arising from it. The plaintiff was thus entitled to withdraw from the contract and to receive part of the amount claimed. The awarded sum included compensation for the purchase of medical equipment and laboratory equipment that could not be used as intended (due to the non-performance of the contract by the defendant) or dismantled and installed in other rooms (due to the excessive cost). The plaintiff also received partial compensation for the costs incurred for employees' salaries.

2. Judgment of the Court of Appeal in Poznań of 13 March 2020

The Court of Appeal in Poznań held that the District Court made correct findings. However, it was stated that the plaintiff could not claim compensation for the purchase of medical equipment and laboratory equipment, as the basis for the claim could result from the contract, and the plaintiff withdrawn from the contract. The Court of Appeal emphasised that the standpoint of the plaintiff, who at the same time referred to § 14 sec. 8 of the contract (regarding the takeover of the studio equipment by the defendant in the event of expiry of the contract) and the withdrawal from the contract is inconsistent. In the opinion of the court of second instance, the plaintiff, after withdrawal from the contract, could only take the equipment she owned, in accordance with the standard expressed in Art. 494 Civil Code. The Court of Appeal therefore awarded the plaintiff only the amount related to the costs of inspection and disassembly of one piece of equipment and upheld the judgment of the District Court in the scope of partial compensation for employee remuneration. The plaintiff lodged a cassation appeal against the decision of the Court of Appeal in Poznań.

3. Legal issue

The legal issue at the basis for bringing the cassation appeal and which was noticed by the Supreme Court, comprised two questions: (1) whether withdrawal from a contract, with reference to a breach of obligation, nullifies all its provisions, and (2) whether the defendant should only be ordered to pay the plaintiff the amount necessary to inspect and dismantle one of the devices.

IV. Effects of sanction withdrawal

1. Stance of the Supreme Court

The first of the issues adjudged by the Supreme Court concerned the effects of sanction withdrawal.[4] In particular, it was imperative to clarify whether the contract may shape the mutual rights and obligations of the parties after its withdrawal. The Supreme Court stated that the consequence of the sanction withdrawal is 'the expiration of the contract with *ex tunc* effect'.[5] The literature emphasises the uneven understanding of this concept,[6] which is why it will be useful to present what it meant in the opinion of the adjudicating panel. According to the Supreme Court, the *ex tunc* effect means that 'a new legal relationship is created between the parties, [...] Art. 494 Civil Code is the basis for the settlements of the parties after the withdrawal from a contract [...] only an effective withdrawal from a reciprocal contract is relevant, not the legal nature and provisions of the contract […]'.[7] In addition to the expiry of the rights and obligations under the contract, 'it is assumed that the contract was not concluded, the legal basis for the claims provided for in Art. 494 of the Civil Code in the provisions of an agreement that no longer exists in the legal sense'.[8]

If we were to stop only at the above passage of the judgment, it should be stated that as a rule, the Supreme Court assumed that due to the analogous application of Art. 395 § 2 Civil Code, the contractual provisions would not affect the content of the mutual rights and obligations of the parties after a withdrawal. Thus, the position would be consistent with the ruling of the Court of Appeal. Nevertheless, in the further part of the judgment voted, it was stated that according to the dominant trend in the case law, despite the withdrawal, part of the contractual provisions remains in force. As an example, those related to the right to withdraw modified by Art. 492 sentence 1 Civil Code and regarding a contractual penalty. Ultimately, the Supreme Court stated that the parties provided in § 14 sec. 8 of the decision in the event of expiry, and thus also withdrawal from the contract. It was considered that art. 494 § 1 Civil Code by analogy to Art. 395 § 2 sentence 2 Civil Code is dispositive. Therefore, based on the above statement, it was noted that 'the parties may regulate the settlement

4 Here the term 'sanction withdrawal' proposed in the literature is used instead of 'statutory right of withdrawal.' This removes the ambiguous distinction based on the source of the right to withdraw (as exemplified by the doubts arising from contractual clauses reserved in the event of a breach of obligation). See *K. Panfil*, Odstąpienie od umowy jako sankcja naruszenia zobowiązania (Withdrawal as a sanction for breach of an obligation), Warsaw 2018, p. 138.

5 Supreme Court decision of 13 December 2022, II CSKP 765/22, LEX No. 3456215.

6 *G. Tracz*, Sposoby jednostronnej rezygnacji z zobowiązań umownych (Methods of unilateral rescission from contractual obligations), Warsaw 2008; *M. Warciński*, Cywilne prawo – zobowiązania – odstąpienie od umowy wzajemnej – skutek ex nunc (Civil law – obligations – withdrawal from a reciprocal contract – effect ex nunc). Gloss to the judgment of the Supreme Court of 15 May 2007., V CSK 30/07, Orzecznictwo Sądów Polskich (Jurisprudence of the Polish Courts) 12|2008.

7 Supreme Court decision of 13 December 2022, II CSKP 765/22, LEX No. 3456215.

8 Ibid.

rules differently in the agreement than it results from Art. 494 § 1 of the Civil Code'.[9] The Supreme Court referred the case to the Court of Appeal in Poznań for reconsideration, noting that the court of second instance should consider the impact of § 14 sec. 8 of the agreement for mutual settlements of the parties, as well as the legitimacy of the compensation claim.

2. Argumentation of the Supreme Court

In the judgment of the Supreme Court, it was finally correctly stated that contractual provisions may co-shape the parties' settlements after withdrawal from the contract. The justification, however, unjustifiably refers to the view regarding the analogous application of Art. 395 § 2 sentence 1 Civil Code. In this respect, the judgment does not contain arguments that would explain the adopted thesis. Only two other judgments of the Supreme Court were cited,[10] which are worth quoting. In the first, i.e. the judgment of the Supreme Court of 8 December 2004, I CK 191/04, the view was expressed that 'The withdrawal from its essence has retroactive effect (*ex tunc*), which puts the parties in a situation prior to the conclusion of the contract.' However, it cannot be overlooked that the adjudicating panel formulated this statement in relation to Art. 395 Civil Code, and not Art. 494 Civil Code. Therefore, referring to the judgment of ref. no. I CK 191/04 is not a convincing argument justifying the use of the fiction of non-conclusion of the contract in Art. 494 Civil Code, this could only be the case if the withdrawal referred to in Art. 395 and Art. 494 Civil Code concerned the same legal institution. However, that is not the case.[11]

The second reference decision, i.e. decision of the Supreme Court of 10 August 2018, III CZP 17/18 referred directly to the effects of withdrawal and the application of Art. 494 Civil Code. It contained several statements, which were then reproduced in the judgment being the subject of these comments. At the same time, however, similarly, no arguments were invoked that would justify the use of the fiction of not concluding a contract. Again, several subsequent decisions of the Supreme Court were invoked (to which, moreover, the adjudicating panel referred in the voted judgment).[12] Those judgments also did not contain any deeper arguments, but only referred to other court decisions. This shows the existence of a permanent line of jurisprudence, and at the same time hinders polemics with the adopted view. In the cited judgments, there is no one that would contain extensive argumentation behind the entire line. In a significant part of the cases, the adjudicating panels only repeated the thesis

9 Ibid.

10 Supreme Court decision of 8 December 2004, I CK 191/04, LEX No. 194121; Supreme Court decision of 10 August 2018, III CZP 17/18, LEX No. 2604061, together with the cited case law.

11 Several differences are listed in: *Tracz*, fn. 6, pp. 34-40.

12 Supreme Court decision of 28 May 2014, I CSK 345/13, LEX No. Supreme Court decision of 21 October 2010, IV CSK 112/10, LEX No. 688488; Supreme Court decision of 13 June 2008, I CSK 13/08, LEX No. 637699; Supreme Court decision of 13 May 1987, III CZP 82/86, LEX No. 3305.

about the analogous application of Art. 395 § 2 Civil Code.[13] Nevertheless, the following argument appeared in some judgments. It was stated that 'The effects of the exercise of the contractual right of withdrawal are governed by Art. 395 § 2 of the Civil Code [...] and not regulated by Art. 494 of the Civil Code'.[14] Adopting the fiction of not concluding a contract would therefore result from the existence of a gap. This statement was supplemented by the statement that 'an element of fiction [is] necessary when the contract was concluded and to a large extent already performed.'[15]

3. Evaluation of argumentation

The problem that the Supreme Court had to resolve in the first place resulted from the Court of Appeal's literal acceptance of the conclusion that the contract, after the sanction withdrawal, should be considered non-existent, in the literal sense of the word. Such a thesis is not justified in the wording of Art. 494 Civil Code, the only indication for this is the use of the same term 'withdrawal' both in the case of Art. 395, as well as Art. 494 Civil Code. Assuming the rationality of the legislator, it could be argued that its purpose was to regulate the same institution, and therefore the applicable legal regime should be similar. In fact, it is argued that Art. 395 § 2 Civil Code applies to the sanction withdrawal precisely because of its similarity to the contractually agreed right to withdraw.[16] It is even claimed that it is one institution, but with different sources and functions.[17] Even if there were justification for the above argument, which in view of the significant differences between the contractual and sanction withdrawal there is not,[18] it does not prejudge the fact that Art. 395 § 2 Civil Code concerns the fiction of non-conclusion of a contract. In the literature, it is argued that the phrase 'the contract is considered not concluded' should not be read as a phrase that annihilates the contract, but as a technical phrase expressing the moment that serves as the reference point for making settlements.[19] It is also important that, unlike Art. 395 § 2 Civil Code or Art. 31 sec. 1 Consumer Rights Act,[20] Art. 494 Civil Code does not use the the aforementioned wording. Once again, assuming the rationality of the legisla-

13 Supreme Court decision of 24 May 2012, V CSK 260/11, LEX No. 1162612; Supreme Court decision of 27 March 2008, II CSK 477/07, LEX No. 385595; Supreme Court decision of 12 February 2002, I CKN 486/00, LEX No. 54355.

14 Supreme Court decision of 18 July 2012, III CZP 39/12, LEX No. 1271627.

15 Supreme Court decision of 5 October 2006, IV CSK 157/06, LEX No. 224585.

16 Supreme Court decision of 30 November 1994, III CZP 130/94, LEX No. 4139; Supreme Court decision of 22 January 2002, V CKN 660/00, LEX No. 54084.

17 *J. M. Kondek*, fn. 3, para. 2.

18 See fn. 11.

19 *D. Mróz-Krysta, Obligacyjne* skutki ustawowego prawa odstąpienia od umowy, (Obligational effects of the statutory right to rescind a contract), Warsaw 2014, pp. 169-172.

20 Act of 30 May 2014 on consumer rights of Laws of 2023, item 2759 [Act of 30 May 2014 on Consumer Rights, OJ 2023, Item 2759].

tor, it should be considered that the regime of sanction withdrawal was regulated differently from the contractual or consumer regime.[21]

Accepting the retroactive legal non-existence of the contract, which excludes the possibility of modifying the effects of withdrawal, is contrary to Art. 353[1] Civil Code. The parties, within the limits of the law, are free to shape contractual relations between each other, and therefore, after withdrawing from the contract, they could conclude another contract, the essence of which would be to modify the withdrawal's effects. It follows that the parties should already be able to determine the effects of the contract's expiry in the same contract. The fiction of not concluding the contract is also contrary to the regulation of sanction withdrawal. Nevertheless, it is argued that adopting the view of the prospect of withdrawal would result in the provision referring to contractual liability under Art. 494 Civil Code would constitute a *superfluum* as Art. 471 Civil Code would regulate situations covered by the hypothesis of the first provision.[22] However, as is rightly claimed, if it is assumed that the obligation did not exist, then it is not possible to claim compensation for its breach.[23] Even if it were assumed that within the meaning of Art. 494 § 1 Civil Code is to extend the liability for damages to situations where there was no contract in legal terms, it would still be necessary to refer to the obligation that was to be violated. Ultimately, therefore, fiction would be broken by examining the contract anyway, and its non-existence would remain in the sphere of declarations.

The main argument, which is to prove the need to apply Art. 395 § 2 Civil Code to Art. 494 Civil Code, concerns the existence of a gap in the latter provision.[24] It ensues from the case law of the Supreme Court that the gap is to concern material consequences.[25] This statement is doubtful, especially since the literature explains the regulation of Art. 494 § 1 Civil Code without reference to the regime of contractual withdrawal.[26] It has been repeatedly stated that there is no gap in Art. 494 Civil Code.[27] The argument resulting from the comparison of Art. 590 § 1 and Art. 494 Civil Code whereby if the latter provision were to give rise to the fiction of absence of an ownership transfer, the statutory regulation on title retention would, in conclusion, be superfluous.[28]

The Supreme Court did not consider the material consequences of the agreement between the plaintiff and the defendant (and such an issue could arise when trying to

21 As to the validity of the phrase 'the contract is considered not concluded' used in Art. 31 sec. 1 of the Consumer Protection Act, see: *M. Brożyna*, Konsumenckie prawo do odwołania umowy (Consumer's right to rescind a contract), Warsaw 2021, pp. 504-507.

22 *J. M. Kondek*, fn. 3, para. 3.

23 *M. Bujalski/F. Zoll*, Performance and non-performance or improper performance of obligations, in: A. Olejniczak (ed.), Private law system, Vol. 6, Law of obligations — general part. Warsaw 2023, p. 1343.

24 Supreme Court decision of 18 July 2012, III CZP 39/12, LEX No. 1271627.

25 Supreme Court decision of 26 November 1997, II CKN 458/97, LEX No. Supreme Court decision of 27 February 2003, III CZP 80/02, LEX No. 74794.

26 *A. Klein,* Ustawowe prawo odstąpienia od umowy wzajemnej (Statutory right to withdraw from a reciprocal contract), Wrocław 1964, pp.163-167; *Bujalski/Zoll*, fn. 23, p. 1341; *Panfil*, fn. 4, pp. 295-298.

27 *Warciński*, fn 6, p. 127; *Bujalski/Zoll*, fn. 23, p. 1341.

28 *Bujalski/Zoll*, fn. 23, pp. 1343-1344.

interpret § 14 sec. 8 of the agreement between the plaintiff and the defendant). As a rule, the fiction of not concluding the contract was adopted, thereby recognising that it did not include selected provisions of the contract. Finally, it was found that the parties may regulate settlements differently than results from Art. 494 § 1 Civil Code. The question thus arises as to what the fiction of not concluding a contract means in this situation. If the parties can, within the limits of the law, modify Art. 494 Civil Code, then the contract, in the scope of these changes, cannot be considered as not concluded. Otherwise, it could not modify the relation after withdrawal from a contract, as it could not be taken into account in determining the parties' relationship. On the other hand, the non-conclusion of a contract is not necessary to explain the obligation to reimburse the benefits. With the declaration of withdraw, the rights and obligations that were intended to satisfy the creditor's interest are terminated. In their place, in the absence of contractual modifications, obligations to provide services of return arise on the basis of the act. The purpose of the withdrawal is to bring about the legal and factual situation in which the parties were before the conclusion of the contract, taking into account the limitations resulting from the passage of time.[29] Achieving this by compensating the situation resulting from the breach of obligation is also served by a compensation claim. Assuming that the contract was not concluded is not necessary here. The above corresponds to the theory of transformation, according to which withdrawal turns the primary obligation into an obligation to return the benefits received.[30]

On the basis of the voted judgment, the Supreme Court considered only the obligational effects of the withdrawal. If it is consistently argued that there is no gap in Art. 494 Civil Code, and it concerns the material effect, it is not clear why the use of fiction should be extended to the entire contract. It would suffice to state that the non-conclusion of the contract concerns only the transfer of absolute rights. It follows that the principle adopted by the Supreme Court could be read in the context of the dispute over the legal consequences of withdrawal. Owing to the facts, the reliance on the *ex tunc* effect of the withdrawal for cause was therefore not justified. Ultimately, the conclusion that would result from the lack of analogous application of Art. 395 § 2 Civil Code. Therefore, it is argued in the literature that talking about the effect of *ex tunc* (but also *ex nunc*) withdrawal should be read as a conventional concept that may have a different meaning, depending on the context in which it was used.[31]

V. Scope of compensation

The plaintiff originally filed an action for payment of compensation for costs incurred in the purchase of medical equipment and laboratory equipment, costs incurred for employees' salaries, expenditures made for the renovation of the laboratory and lost profits. The District Court found only the first position and partially the second one to be justified. The Court of Appeal upheld the ruling on part of the employees' remune-

29 *Tracz*, fn. 6, pp. 85-86.
30 *Bujalski/Zoll*, fn. 23, p. 1341.
31 *Tracz*, fn. 6, p. 82.

ration, while instead of reimbursing the costs of equipment and remuneration, it awarded the amount necessary to service and disassemble one of the equipment in the studio. When considering the issue of compensation, the Supreme Court noted that Art. 494 Civil Code 'allows the applicant to claim compensation from the defendant in connection with withdrawal from a contract due to the defendant's failure to perform.'[32] It was then found that the court of second instance did not consider the issue of qualifying the plaintiff's claims regarding the costs of medical equipment as a compensation claim and meeting the conditions of Art. 471 Civil Code in conjunction with Art. 361 Civil Code.

The Supreme Court correctly perceived the failure of the Court of Appeal to analyse the premises of Art. 471 Civil Code in the context of the plaintiff's requests regarding the costs of medical equipment. Nevertheless, it should be noted that the court of second instance ordered the defendant to pay a certain amount resulting from the applicant's need to remove the equipment. The literature claims that in the scope of compensation referred to in Art. 494 Civil Code includes the costs related to withdrawal from the contract, including the costs of reimbursement of benefits.[33] The Supreme Court's observation is therefore pertinent insofar as the Court of Appeal did not consider the entire scope of the compensation. However, in the context of compensation, the Supreme Court stated that Art. 494 of the Civil Code constitutes an independent basis for compensation, while in this case Art. 471 of the Civil Code should be applied 'as well'. *Prima facie*, it might seem that it was assumed that Art. 494 Civil Code and Art. 471 Civil Code constitute two different grounds for compensation. However, it should be recognised that, in essence, the Supreme Court noted that Art. 494 Civil Code is self-existent, i.e. independent of the contractual provisions regarding compensation, the basis for claiming compensation for damage. In turn, by referring to Art. 494 Civil Code, Art. 471 Civil Code.

VI. Nature of the contractual provision

Both the Court of Appeal and the Supreme Court did not fully consider the significance of the decision under § 14 sec. 8 of the agreement between the plaintiff and the defendant. The Supreme Court merely stated that it referred to recission from the contract. In addition, the courts of all instances focused on compensation. Meanwhile, the aforementioned decision provided that in the event of withdrawal from the contract, the defendant was obliged to take over the equipment of the cardiology laboratory at fair value. The Supreme Court should consider what the content of § 14 sec. 8 of the Agreement, taking into account the reference to this provision in the cassation appeal. From the wording of this arrangement, the obligation to take possession for monetary compensation was implied. However, it is not known whether this was a provision immediately providing for a material effect, or perhaps another type of obligation, as

32 Supreme Court decision of 13 December 2022, II CSKP 765/22, LEX No. 3456215.

33 *P. Machnikowski* in: P. Machnikowski (ed.), Obligations. General part Commentary, vol. II., Warsaw 2024 Article, 494, para. 43; *A. Lutkiewicz-Rucińska* in: M. Balwicka-Szczyrba/A. Sylwestrzak (eds.), Civil Code. Updated commentary, LEX/el. 2024, Article 494, para. 3.

a result of which the parties were just about to transfer ownership of the equipment. It could have been a conditional sales contract, a preliminary contract to the sales contract (in the case of these two possibilities, there is a problem with determining the price or at least the basis for its calculation) or another type of compensatory provision. In circumstances where the Supreme Court accepted the possibility for the parties to co-determine the manner of mutual settlement after contract rescission, it should consider what type of provision the parties envisaged. But that did not happen.

VII. Conclusions

In the voted judgment, the Supreme Court unnecessarily invoked the fiction of non-conclusion of the contract, thus complicating the legal situation. Initially, a rule with a wide range of impact was formulated, and then came a conclusion that significantly narrowed the original rule, in fact turning it into an exception. Thereby, despite the ultimately correct result, the field for further misinterpretations and legal uncertainty was created. The issue of the admissibility of the plaintiff's invocation of § 14 sec. 8 of the contract could have been resolved by invoking the theory of transformation, which clearly allows for the shaping of the parties' relationship in the event of withdrawal. Subsequently, the Supreme Court validly noticed that the Court of Appeal partially omitted the topic of compensation in the judgment, but at the same time did not notice that it was partially adjudicated, but without referring to the basis under Art. 494 § 1 in conjunction with Art. 471 Civil Code. The Supreme Court did not consider what kind of decision the parties stipulated, what should have been done. The judgment in the case II CSKP 765/22, although it is correct in terms of the ruling, contains shortcomings in the justification.

Jakub Gąsiorek*

Comments on the Polish Supreme Court's resolution III CZP 24/20

Abstract

This commentary provides an analysis of the Polish Supreme Court's resolution from February 26, 2021 (ref. III CZP 24/20), which addresses the complexities surrounding holographic wills, particularly regarding the designation of beneficiaries. The case involves the will of Paweł M., which upon examination was deemed valid in form but ineffective due to its unclear language. The will stated that his property should be divided among friends referred to only as "the men from my photo", without actually attaching any accompanying photograph. This lack of specificity led to significant interpretational challenges, as the courts struggled to identify the intended heirs. The Supreme Court acknowledged the importance of context when interpreting a will, affirming that all available evidence should be considered. However, the author critiques the Court's conclusion as being overly general and lacking in practical application to specific factual circumstances. The commentary underscores the need for a more thorough examination of the will's effectiveness, emphasizing that ambiguities in the language risk undermining the document's intended protective functions against potential misinterpretation or fraudulent claims. Furthermore, the author highlights the necessity for clearer legal standards when dealing with ambiguous testamentary expressions, advocating for guidelines that would ensure the true intentions of testators are honored while preventing disputes. While the Supreme Court's ruling contains valuable insights, it ultimately requires a more comprehensive framework to adequately address the issues posed by holographic wills and their interpretation.

Keywords: Polish Supreme Court, Resolution, Beneficiary Designation, Testament, Interpretation, Legal Standards, Effective Disposition, Ambiguity, Property Distribution, Testator's Intent, Judicial Challenges, Evidence, Legal Framework, Will Validity, Succession Law, Testamentary Dispositions, Court Ruling, Factual Circumstances

Zusammenfassung

Dieser Kommentar stellt eine Analyse des Beschlusses des polnischen Obersten Gerichts vom 26. Februar 2021 (Az. III CZP 24/20) dar, die sich mit den Herausforderungen rund um holografische Testamente befasst, insbesondere in Bezug auf die Benennung von Begünstigten. Im Fall von Paweł M. wurde das Testament formal als gültig, jedoch aufgrund unklarer Formulierungen als ineffektiv eingestuft. Der Testamentstext vermerkt, dass sein Vermögen unter Freunden aufgeteilt werden solle, die lediglich als „die Männer von meinem Foto" bezeichnet wurden, ohne ein entsprechendes Foto beizufügen. Diese Unklarheit führte zu wesentlichen Ausle-

* Student at Jagiellonian University in Krakow.

gungsproblemen, da die Gerichte Schwierigkeiten hatten, die beabsichtigten Erben zu identifizieren. Das Oberste Gericht erkannte die Bedeutung des Kontextes bei der Auslegung eines Testaments an und entschied, dass alle verfügbaren Beweise berücksichtigt werden sollten. Der Autor kritisiert jedoch die Entscheidung des Gerichts als zu allgemein und ohne praktische Anwendbarkeit auf die spezifischen Umstände des Falls. Der Kommentar legt dar, dass eine eingehendere Prüfung der Wirksamkeit des Testaments erforderlich ist, da mehrdeutige Formulierungen die schützenden Funktionen des Dokuments gefährden können und Missverständnisse oder betrügerische Ansprüche fördern. Zudem betont der Autor die Notwendigkeit klarerer rechtlicher Standards im Umgang mit unklaren testamentarischen Äußerungen und fordert Richtlinien, die sicherstellen, dass die wahren Absichten der Testierenden respektiert werden, während gleichzeitig Streitigkeiten vermieden werden. Obwohl das Urteil des Obersten Gerichts wertvolle Einsichten enthält, benötigt es einen umfassenderen Rahmen, um die Herausforderungen, die mit holografischen Testamenten und ihrer Auslegung verbunden sind, angemessen anzugehen.
Schlüsselwörter: Holografisches Testament, Polnischer Oberster Gerichtshof, Resolution, Begünstigte, Testament, Auslegung, wirksame Verfügung, Mehrdeutigkeit, Vermögensverteilung, judikative Herausforderungen, Beweise, Rechtsrahmen, Gültigkeit des Testaments, Erbrecht, testamentarische Verfügungen, Gerichtsurteil, tatsächliche Umstände.

I. Introduction

Polish society is reluctant to draw up wills. This may be caused by, inter alia, a low awareness of one's mortality and an attempt to supersede this fact. Above all, also it is also likely due to the fact that many testators are content with the circle of inheritors designated by statutory inheritance provisions. According to the statistics, only about 8% of people over 45 years have made a will. Out of this group, the notarial will was the most popular (61% of respondents chose this option), while the holographic will came second (30%).[1] The holographic will regulated in Art. 949 of the Polish Civil Code[2] poses huge problems to both legal doctrine and the judiciary. This type of will was intended to allow almost any citizen with full legal capacity to make a disposition of their property in the event of death, regardless of education, social standing or life experience. Unfortunately, giving such a possibility to citizens (usually unaware that the language they use is not always understandable to the general public) means that often the burden of determining the testator's will and making the non-obvious expressions to be logical and lawful rests with the interpreter – the court or notary preparing the succession certificate.

Another problem regarding the matter of interpretation of holographic wills was dealt with by the Supreme Court in the Resolution of 26 February 2021, III CZP

1 Kantar study, carried out on behalf of the GWW law and tax office in the period January-February 2021.

2 The Act of 23 April 1964 – Civil Code (Journal of Laws of 2023, item 1610, as amended, hereinafter referred to as 'Civil Code').

24/20. This problem mainly concerns the interpretation of the imprecise beneficiary's designation in a testamentary disposition, particularly when the clarification of that content requires reference to extra-testamentary sources often indicated by the testators themselves.

The aim of this case comment is to criticise the too general wording of the resolution's thesis, to reflect more deeply on the validity of the discussed will and to polemise with the justification part regarding the effectiveness of the problematic disposition.

II. Facts and decisions of the courts of first and second instance

Paweł M. died leaving a will. The will met all the requirements provided for in Art. 949 § 1 Civil Code – was drawn up in full handwriting, contained the testator's signature and was dated.

The doubts of the District Court in Rybnik conducting the inheritance case were raised by the disposition constituting the appointment of the heirs with the following content: "My property after settling my possible obligations should be divided equally between my friends (the men from my photo)." The testator did not attach any photograph to the will, nor did he indicate any characteristic elements that could be helpful in identifying the photograph in questions. During the procedure, a photocopy of a collage of 9 photos was found, which depicted 11 men. It should be emphasised that these were not the only photos of friends belonging to Paweł M. The District Court considered this decision to be valid, but ineffective, because from their perspective it was impossible to determine the group of heirs based on the testimony of the applicant and participants. In the court's opinion this would be a supplement to the will. In this case, the inheritance took place on the basis of the statutory provisions, and the deceased's brothers were appointed to the inheritance.

An appeal was lodged against the decision issued at first instance, heard by the Regional Court in Gliwice. The Regional Court shared the opinion expressed in the District Court, however, having doubts, it presented the legal issue to the Supreme Court pursuant to Art. 390 § 1 of the Polish Code of Civil Procedure.[3] Presenting the legal issue, the appeal court drew attention to the presumed will to exclude the deceased's statutory heirs from inheritance and the real possibility of determining the persons close to him.

III. Assessment of the decision and justification of the Supreme Court

1. Thesis

Undoubtedly, the Supreme Court's statement that the interpretation of the will should take into account the circumstances of its preparation and using all means of evidence is correct. After all, it is a continuation of the established jurisprudence supported

3 The Act of 17 November 1964 — Code of Civil Procedure.

by a significant part of the doctrine.[4] However, the disadvantage of the thesis is its generality and unsatisfactory reference to the factual problems. It should be noted that the previous judgments of the Supreme Court on the same theses rather concerned a situation in which the testator, when writing the will, used a language specific to himself, and which deviated from that used by the majority of society or marked the beneficiaries in an incomprehensible way or simply made a mistake.[5]

Here, the problem is slightly different – the challenge for the interpreter of the will is not to decide what meaning to give to the words used by the testator, but to decide whether it is acceptable and important to establish heirs by almost direct reference to a non-testament source and, in the case of a declaration of validity, whether it is effective to take into account the circumstances that make it much more difficult to find the right photograph.

2. Validity of the disposition.

In the author's opinion, the Supreme Court moved too quickly to analyse the efficacy of such formulated regulation. Beforehand, the arguments for considering it important should be indicated and analysed. Indeed, there is no shortage of voices in the doctrine (albeit a minority) that attach great importance to the form of the will and depart entirely from the demand for a liberalised approach to the analysis of whether the will has been drawn up in the correct form.[6] With as a rigorous approach, it would be possible to interpret the provision used by Paweł M. as a kind of inclusion of a photo in the will's content and thus a violation of the handwriting requirement for a holographic will. As a result, it would be invalid due to a violation of the form provisions pursuant to Art. 958 Civil Code. There is a comment in the doctrine regarding this ruling that this disposition should be treated as the transfer of the essential content of the will to an external carrier, while the Supreme Court, accepting this state of affairs, goes to lawmaking and the inclusion of the form of the photo-will in the legal system (which may constitute an incentive to draw up video-will).[7] These concerns should be taken into account and attempted to engage in a discussion.

4 See: *M. Rzewuski*, Wykładnia testamentu, a okoliczności zewnętrzne towarzyszące testowaniu (Interpretation of the will and external circumstance), Przegląd Sądowy 1|2015, p. 107; *J. Wierciński*, Commentary to the decision of the Supreme Court of 29.4.2010. IV CSK 524/09, TSO 3|2012, item 29 p. 189; *S. Wójcik/F. Zoll*, System Prawa Prywatnego (Private Law System) Vol. 10 Inheritance Law, 3rd edn, Warszawa 2015, Chapter IV § 23 and court decisions with reference number II CKN 378/00, II CKN 543/00, III CR 131/62.

5 Cf. Ruling of the Supreme Court of 13 February 2001, II CKN 378/00; Judgment of the Supreme Court of 6 October 2016. IV CSK 825/15 point 2 of the thesis.

6 An example may be the views of Jan Gwiazdomorski, who, despite noticing the problem posed by the revocation of the will (failure to implement the testator's expressed will), believes that it is the provisions on form that guarantee the implementation of only the testator's true intentions ('the will dressed in bad clothes does not matter'). See *J. Gwiazdomorski* in: Prawo spadkowe w zarysie (Inheritance law in outline), Warszawa 1990, p. 102-103.

7 *T. Justyński*, Wykładnia testamentu ze zdjęcieciem (Interpreting a will with a photograph). Commentary to the resolution of the Supreme Court – Civil Chamber of 26 February 2021., III CZP 24/20, TSO 1|2023, p. 3, LEX No. 386306667.

In order to examine the validity of the disputed resolution, at the very beginning, it is essential to look at it through the prism of the purposes of the will's form. In the literature, the following functions are distinguished in particular:

a) prompting the testator to make a "serious" declaration of will and thoroughly rethinking its content;
b) determining whether the testator actually had an *animus testandi,* determining whether the document is indeed a will;
c) preventing the falsification of testaments.[8]

The disputed appointment of the heirs certainly does not raise doubts, taking into account the objectives of the form indicated under a) and b), the content of the analysed document shows the testator's clear intentions as to what the document is. It would also be unreasonable to assume that it was drawn up hastily or for a joke. The last of the indicated functions is problematic in this context. It is not difficult to imagine a situation where someone dissatisfied with the content of the will replaces the said photo. Such a situation is unacceptable from the point of view of the protective function and if it is considered that the disposition is based only on a photograph — it should be considered invalid.

Here, an attempt must be made to interpret the wording that causes the problem in this factual situation to decide whether we are indeed dealing with the accident mentioned in the previous sentence. It should be agreed that to analyse the validity of a will, its interpretation must first be made, otherwise its content cannot be fully understood.[9] When interpreting the will, Art. 948 Civil Code, which imposes on the interpreter the obligation to try to maintain the testator's dispositions and give them meaningful content. Consequently, the legislator expresses the superiority of respecting the testator's will over a certain fetishisation of the provisions on form. The form requirements act as a security measures for the testator's declaration of will and not to lead to a situation where their mechanical application will nullify it. The paroemia *Summum ius summa iniura* should always be taken into consideration – despite the nature of *ius cogens*, the provisions on form should not lead to extreme cases as a result of their application.[10] Thus, bearing in mind the postulate of *beningna interpretatio* resulting from Art. 948 Civil Code, the expressions used by the testator should be interpreted in a way allowing to maintain the dispositions in force, as well as the *favor testamenti* principle, i.e. the obligation to choose the interpretation that most fully meets the purpose of the testator, if the result of the interpretation vary. In this case, the interpretation of the expression "[...] should be divided equally between my friends (the men in my photo)", which achieves the testator's goal to the greatest extent and will not invalidate the disposition, at the same time not treating the provisions on

8 Such functions are indicated, for example, in: *Gwiazdomorski*, fn. 6, p. 190; *K. Osajda*, Kodeks Cywilny. Komentarz (*The Civil Code. Commentary), 12th edn*, Warszawa 2024, commentary on Art. 949 point A.I.

9 Alternative approaches are the interpretation of the will only after its validity has been established or the interpretation in favor of the provisions of the inheritance law, *Osajda*, ibid. commentary on art. 948 However, such interpretations should be considered too narrow or too broad, respectively.

10 *Wójcik/Zoll*, fn. 4, Chapter IV § 22.

form too liberally, will be the recognition that Paweł M. has appointed his friends to inherit in equal parts, while the photograph is indicated only as a carrier of information to facilitate the identification of these friends. In this case, testator's entire declaration of will is included and written in person, the photo is not treated as part of the will. So, the testament is valid. Otherwise, if the testator used, for example, the words "how to distribute my property is in the photo", then he would transfer the content of the will to an external source, which would grossly violate the provisions on form.

3. Efficiency of the resolution.

Since the issue of validity has already been clarified, it is necessary to move on to the problem of its effectiveness, which was primarily addressed by the Supreme Court.

It should be noted that the Supreme Court correctly duplicated the opinion that Art. 247 of the Code of Civil Procedure should be applied much more carefully to the will, because the requirement of subjective – individual interpretation makes it sometimes necessary to explain even the obvious and the *clara non sunt interpretanda*[11] principle does not apply. Also to be praised is the District Court's view that the mere appointment of heirs outside those named by statute should, in the event of its ineffectiveness, be interpreted as excluding from the inheritance the very statutory heirs. Accepting the Regional Court's position should undoubtedly be considered as a supplement to the will and a search for a certain testator's implicit will, and not as an examination only of what the will contained in the testament means. In addition, such an interpretation of this ineffective disposition would have to lead to an absurd situation – exclusion from inheritance of all those who were to inherit by virtue of the act, except for the commune of the last residence of the testator or the State Treasury, because the latter two entities, in accordance with the principle of the non-existence of heirless inheritances, cannot be excluded from inheritance, nor can they reject the inheritance if they are appointed by law.[12]

However, one cannot agree with the Supreme Court's view that the imprecise wording used by the testator does not exclude the possibility of reproducing its content through evidence proceedings. The lack of a photo attached to the will, the fact that the deceased had many photos that could have been a designation of the wording "my photo", as well as the failure to provide any characteristic of this photo, excludes the possibility of determining the circle of heirs, so that this disposition should be considered ineffective. This situation can be compared to determining the group of heirs using a cipher to which the testator has not clearly indicated the code allowing to read it.[13] The interpretation should always concern only what is contained in the will and lead to the clarification of inaccuracies. Whereas the search for the

11 *Z. Radwański*, Wykładnia testamentów (Interpreting the testaments), Kwartalnik Prawa Prywatnego 1|1993, p. 8-9.

12 *H. Czerwińska,* Gmina jako spadkobierca ustawowy (Commune as a statutory heir), Gdańskie Studia Prawnicze, Volume XXXIV, 2015, p. 399-400.

13 *M. Mądel*, Szyfrowanie treści testamentu holograficznego (Encrypting the content of the holographic testament), Rejent 8|2016, p. 88.

photograph meant by the testator, with so residual amount of information enabling its identification, may result in forbidden modification of the will's content and achieving a result inconsistent with the testator's intention. As well, the study of the relationship between Paweł M. and his relatives seems unjustified in this case. It would lead to the determination of the testator's circle of friends; however, it will not help in determining who he had in mind when drawing up the last will. The interpreter's task is not to reveal to whom the deceased would really like to leave his property, but only to read the meaning of his words – as the *armchair* rule known from the common law systems says – the court is to try to impersonate the person who wrote the will at the time of its writing.[14] The use of witnesses who are testator's friends should also be questioned. Admittedly, the Supreme Court rightly points out that both in the Polish Civil Code and the Code of Civil Procedure there are no grounds for interpreting such a prohibition on evidence. However, it is difficult not to notice that the *ratio legis* of Art. 957 Civil Code, which is to protect any wills requiring the presence of witnesses against distortion in order to be valid, will not be reflected here either. Indeed, with such a generality of the phrase "friends", as well as a wide group of men close to Paweł M., it is very likely that each of them could become the heir as a result of his testimony, which makes the value of such evidence negligible. The court should take this into account and not consider such evidence to be reliable. There is a view in the doctrine that the endeavour to establish the true meaning of the testator's statement of will should have regard to equity in the context of the facts in question.[15] Taking into account all the aforementioned circumstances, it does not seem justified to inquire what the testator's true will was, because he did not leave enough information that would allow to implement his testament. In such a situation, the decision of the district court was correct – the recognition of the testamentary disposition as ineffective and, as a result, the inheritance of the deceased's brothers under the act.

IV. Summary

The Supreme Court did not explain the problems arising in this and the identical facts, i.e. in a situation where the will directly refers to external sources. Using such a general thesis, although correct, does not help in solving the ensuing problem. Furthermore, the lack of analysis of the disposition in terms of its validity gives rise to doubts in the doctrine, which shows that this issue should not be overlooked. It is also impossible to agree with the recognition of the appointment of heirs' efficacy, as in this state of facts it may even constitute a supplement to the will. Although the Supreme Court's resolution is fragmentarily correct and, in many places, confirms the achievements of judicature and doctrine in the matter of interpretation of the will, it does not synthesise these theories within the existing state of affairs.

14 *P. Księż*ak, Prawo spadkowe (Succession law), Warsaw 2017, p. 186.
15 *Osajda*, fn. 8 commentary on art. 948, point C.17.

Marcin Gryc*

Comments on the Judgment of the Polish Supreme Court of 31 March 2020, Case Ref. no. II CSK 124/19

Abstract

This commentary provides a comprehensive analysis of the judgment issued by the Polish Supreme Court on 31 March 2020 (ref. II CSK 124/19), which centers on the liability of ecclesiastical legal persons for damages attributed to the pedophile actions perpetrated by clergyman Father R. The author rigorously critiques the Court's application of Article 430 of the Civil Code, contending that the ruling improperly interpreted the law by asserting that the relationship of authority between the perpetrator and the ecclesiastical institutions was rooted in canon law, which lacks recognition in the Polish legal order. The author argues that such authority must be derived from factual dependence rather than theoretical legal constructs. The commentary delves into the specific details surrounding the case, detailing how the Claimant, who was a minor at the time, was subjected to repeated sexual abuse by Father R. under the guise of providing religious education. The text emphasizes the emotional and psychological trauma experienced by the Claimant and questions the adequacy of the ecclesiastical institutions' oversight in preventing such abuses. Furthermore, it scrutinizes the implications of the court's ruling on the accountability of religious entities and the precedent it sets for similar cases in the future. In addition, the author assesses the broader context of the Supreme Court's decision, considering how it relates to issues of power dynamics within religious organizations and their impact on victims seeking justice. Key legal principles are highlighted, including the nature of liability, the role of canon law, and the expectations placed on religious institutions regarding the conduct of their representatives. The commentary also explores alternative legal grounds for holding other ecclesiastical entities liable for the actions of clergy, suggesting that a failure to implement proper vetting and monitoring processes for individuals in positions of religious authority may contribute to liability. In conclusion, the author asserts that the judgment of the Supreme Court is fundamentally flawed due to its mischaracterization of the nature of the authority relationship and its overreliance on unrecognized legal principles, advocating for a thorough reexamination of liability standards in cases involving ecclesiastical organizations. This analysis calls for reforms that ensure greater accountability for religious institutions and better protection for victims, promoting a legal framework that acknowledges and addresses the unique dynamics at play in cases of abuse within ecclesiastical contexts. The author emphasizes that such reforms are crucial not only for the protection of vulnerable individuals but also for restoring public trust in religious institutions.

Keywords: Mediation, Polish legal system, civil code, liability, damages, compensation, ecclesiastical legal entities, sexual abuse, religious societies, authority relation-

* Student at Jagiellonian University in Krakow.

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ship, actual dependence, canon law, documentation, legal norms, claim for damages, court judgement, Supreme Court.

Zusammenfassung

Dieser Kommentar beschäftigt sich mit dem Urteil des polnischen Obersten Gerichts vom 31. März 2020 (Ref. II CSK 124/19), das die Haftung kirchlicher juristischer Personen für Schäden behandelt, die durch die pädophilen Handlungen eines Geistlichen, Vater R., verursacht wurden. Der Kläger hatte Schadensersatz und Entschädigung von zwei religiösen Gesellschaften gefordert, die als kirchliche juristische Personen fungieren.

Im Mittelpunkt der Kritik des Autors steht die Anwendung von Artikel 430 des Zivilgesetzbuchs, der die Bedingungen für die Haftung von Vorgesetzten für die Handlungen von Untergebenen regelt. Der Autor argumentiert, dass das Gericht diesen Artikel fehlerhaft angewendet hat, indem es annahm, dass die Autoritätsbeziehung zwischen dem Täter und den kirchlichen juristischen Personen aus dem Kirchenrecht abgeleitet wurde. Dies stelle einen grundlegenden Mangel dar, da das Kirchenrecht im polnischen Rechtsraum nicht anerkannt sei und daher nicht als Quelle für die Autorität betrachtet werden könne.

Der Autor erläutert, dass das Gericht die Handlungen des Täters fälschlicherweise als in der Ausübung einer ihm anvertrauten Tätigkeit interpretiert habe, obwohl Father R. nur für den Religionsunterricht des Klägers zuständig war. Zudem wird in dem Kommentar die Notwendigkeit erörtert, die Kriterien für die Anwendung von Artikel 430 des Zivilgesetzbuchs klarzustellen und festzustellen, dass die Haftung auf Grundlage von tatsächlichen, nicht rechtlichen Beziehungen beruhen sollte.

Darüber hinaus werden die tatsächlichen Umstände des Falles beschrieben, in dem die Klägerin als Schülerin bei Vater R. Unterricht erhielt und über einen langen Zeitraum hinweg sexuell missbraucht wurde. Der Kommentar thematisiert auch die möglichen alternativen Haftungsgründe für andere kirchliche juristische Personen, die möglicherweise ebenfalls in die Verantwortung gezogen werden könnten.

Insgesamt kommt der Autor zu dem Schluss, dass die Entscheidung des Obersten Gerichts aus verschiedenen Gründen fehlerhaft ist, und fordert eine Überprüfung des Falls sowie eine differenzierte Betrachtung der haftungsrechtlichen Grundsätze in Bezug auf kirchliche Institutionen und deren Mitarbeiter. Der Kommentar argumentiert, dass die Klägerin möglicherweise besser bei der Diözese um Entschädigung hätte anfragen sollen, die Vater R. die kanonische Mission erteilt hat.

Diese umfassende Analyse zielt darauf ab, nicht nur die rechtlichen Mängel des besprochenen Urteils aufzuzeigen, sondern auch die gesamtgesellschaftlichen und rechtlichen Implikationen, die sich aus der Anwendung von Normen auf kirchliche Institutionen ergeben, zu beleuchten.

Schlüsselwörter: Mediation, polnisches Rechtssystem, Zivilgesetzbuch, Haftung, Schadensersatz, Entschädigung, kirchliche juristische Personen, sexueller Missbrauch, religiöse Gesellschaften, Autoritätsbeziehung, tatsächliche Abhängigkeit, Kanonisches Recht, Dokumentation, Rechtsnormen, Schadensersatzforderung, Gerichtsurteil, Oberster Gerichtshof

I. Introduction

The commentary aims at a polemic with a part of the justification of the judgment of the Polish Supreme Court ref. no. II CSK 124/19.[1] The Supreme Court upheld the judgment of the Court of Appeal in Poznań, ordering two religious societies (hereinafter referred to as Society I and Society II) to pay compensation in the form of a pension in the amount of PLN 800 (costs of psychiatric treatment) and PLN 1,000,000 as compensation for mental suffering, respectively pursuant to Art. 430 Civil Code[2] in conjunction with Art. 444 § 2 Civil Code and Art. 430 Civil Code in conjunction with Art. 445 § 2 Civil Code. The author critically assesses the part of the justification regarding the interpretation of the prerequisites for the application of Art. 430 Civil Code and the possibility of requesting compensation for damage and harm from other ecclesiastical legal persons.

First, the author will present the prerequisites for the application of Art. 430 Civil Code. He will then assess the Supreme Court's argumentation regarding the source of the supervisory relationship on the basis of which the defendant societies entrusted the activities to the perpetrator of the damage, i.e. Father R.[3] Subsequently, allegations will be presented regarding the Court's recognition of the damage caused as a result of the Claimant's sexual abuse by Father R. as being caused while performing the entrusted activity within the meaning of Art. 430 Civil Code. According to the author, the wrong entities were sued using the wrong legal basis.

Due to the fact that the adoption of the theses presented in this commentary could deprive entities in a similar situation to the Claimant of the possibility of obtaining compensation and redress, it will be necessary to devote a fragment of the comments to considering alternative grounds of liability of other ecclesiastical legal persons for sexual abuse committed by clergy.

II. Factual Circumstances[4]

The claimant met Father. R. in the school year 2005/2006 as her teacher of religion. Father R., under the pretext of helping a person from a family affected by alcohol problems to learn, made attempts to approach the Claimant. In June 2006, he invited the Claimant to the rectory at the parish church to help her learn mathematics. Then, for the first time, there was sexual abuse, which then repeated many times. Importantly, the parish priest knew about the Claimant's stays in the parish to get help

1 Judgment of the Supreme Court of 31 March 2020, II CSK 124/19, OSNC 2021.

2 Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (t.j. Dz. U. z 2023 r. poz. 1610 z późn. zm., dalej jako k.c.) [The Act of April 23, 1964 – Civil Code i.e. Journal of Laws of 2023, item 1610, as amended, hereinafter referred to as the Civil Code].

3 This is how the perpetrator of the damage was called in the justification of the judgment.

4 Selection of press articles regarding this judgment see in: *P. Borecki*, Odpowiedzialność kościelnych osób prawnych za czyny pedofilskie duchownego. Uwagi do wyroku Sądu Najwyższego z dnia 31 marca 2020 r. [Responsibility of ecclesiastical legal persons for paedophilic acts of the clergyman. Comments on the judgment of the Supreme Court of 31 March 2020], II CSK 124/19, Przegląd Sądowy, 11-12|2020 pp. 7-8.

in learning and accepted them, although this was the first such situation in his parish. In 2006, Father R. was transferred to another parish, but he managed to convince the Claimant's parents to send their daughter to a junior high school nearby. Sexual abuse continued until the Claimant confided in one of the teachers.

Father R. was prosecuted and sentenced. A few years later, an action was filed with the District Court in Poznań, in which the Claimant demanded compensation for mental suffering in the amount of PLN 3,000,000 and a monthly pension in the amount of PLN 800 (costs of psychiatric treatment). The District Court ordered the Defendants (Society I and Society II) to pay compensation in the form of a monthly pension of PLN 800 and PLN 1,000,000 as compensation, dismissing the action in the remaining scope.[5] The Court of Appeal[6] upheld the decision of the District Court. The defendants appealed in cassation to the Polish Supreme Court against the judgment of the Court of Appeal in its entirety. To the extent that the Claimant's appeal was dismissed, the cassation appeal was rejected pursuant to art. 398^6 § 3 of the Code of Civil Procedure[7] due to the lack of legal interest, and in the remaining scope it was dismissed.

III. Prerequisites for the Application of Art. 430 Civil Code

Pursuant to Art. 430 Civil Code: Whoever, on his own account, entrusts the performance of an act to a person who, in the performance of that act, is subject to his supervisory and is obliged to comply with his instructions, shall be liable for damage caused by the fault of that person while performing the entrusted activity. Liability on the basis of Art. 430 Civil Code is a liability on a risk basis in the sense that it is detached from the fault, and the responsible can only be released from it by demonstrating that one of the listed conditions of liability is not met.[8] The prerequisites for liability for the foundation of Art. 430 Civil Code are divided into two groups. The first is used to assess the subordinate's act in terms of culpability, and the second one is aimed at assigning responsibility for the subordinate's act to the supervisor. The premises of the first group are basically identical to the premises of liability under the general tort clause (Art. 415 Civil Code). These are therefore: the subordinate's act, the subordinate's fault, an adequate causal link (Art. 361 § 1 Civil Code),[9] damage (loss in assets). The act is human controllable behaviour. Blame of a subordinate unders-

5 Judgment of the District Court in Poznań of 22 January 2018, ref. no. XII C 875/16, unpublished.

6 Judgment of the Court of Appeal in Poznań of October 2, 2018, I ACa 539/18, LEX no. 2593664.

7 Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (t.j. Dz. U. z 2023 r. poz. 1550 z późn. zm.). [The Act of 17 November 1964 Code of Civil Procedure, Journal of Laws of 2023, item 1550, as amended].

8 In the Polish legal doctrine, there is a dispute as to whether liability under Art. 430 Civil Code has the nature of liability on a risk basis, whether it is absolute liability, a special form of liability on a guilty basis, or liability on an illegitimate basis. On this subject, see *M. Wilejczyk*, Teorie prawa deliktów [Theories of Tort Law], Warsaw 2021, pp. 61-64.

9 The method of examining this premise is described in more detail in the part of the article on alternative grounds of liability of other ecclesiastical legal persons.

tood as the contradiction of his behaviour with the legal order, by breaking the norm resulting from the principles of generally applicable law or the principles of social coexistence (illegality or objective guilt),[10] and reprehensibly assessed attitude of the perpetrator to the act (subjective guilt or guilt *sensu stricto*).[11] Damage is understood as material damage to the property of the injured party, with Art. 430 Civil Code in conjunction with Art. 445 § 1 or 2 Civil Code, Art. 446 § 4 Civil Code, or Art. 448 Civil Code may constitute the basis for compensation for harm as mental suffering through the payment of compensation. Adequate causation is investigated by performing a necessary condition test and a consequence normality test.[12] The second group of premises is aimed at assigning responsibility for the subordinate to a third party, i.e. the supervisor. These are the conditions for: entrusting the subordinate with activities on the account of the supervisor, the existence between the subordinate and the supervisor of the supervisory relationship (dependency) within the meaning of Art. 430 Civil Code and causing damage by an act falling within the scope of entrusted activities. The premises of this group will be described in detail and analysed in the context of the above-described factual circumstances later in the article.

IV. Sources of the supervisory relationship

With regard to the source of the supervisory relationship, the Court stated that: "the subordinate is a person acting on behalf of the supervisor and remaining in a supervisory relationship. The source of subordination may be a law, a contract (e.g. employment), election, appointment, designation, but also a factual, informal relationship".[13] According to the author, such determination of the sources of the relationship of supervisory should be considered correct, provided that the act means all generally applicable legal acts of a general and abstract nature. However, the further part of the justification is not consistent with the above statement.

The Court assumed that the activities of helping the Claimant in learning were part of the clergyman's broadly understood evangelical mission, during which he is subject to the supervisory of the defendant societies within the meaning of Art. 430 Civil Code. The Court considered as their source the Gospel and a number of provisions of the Code of Canon Law[14] (can. 654 in conjunction with can. 601[15] and can.

10 *P. Machnikowski*, Compensation for Accidents in Poland, Otago Law Review 1|2019, pp. 162-163.

11 *A. Szpunar*, The Law of Tort in the Polish Civil Code, International and Comparative Law Quarterly, 16|1 1967, p. 89. *Machnikowski*, fn. 10, p. 163.

12 Ibid., p. 171.

13 Judgment of the Supreme Court of 31 March 2020, II CSK 124/19, OSNC 2021.

14 Codex Iuris Canonici. Auctoritate Joannis Pauli pp. II promulgatus. Code of Canon Law Polish translation approved by the Episcopal Conference, Pallottinum 1984. Hereinafter referred to as can.

15 According to H. Pietrzak, instead of canons 654 in conjunction with can. 601 the court should have invoked can. 273. See *H. Pietrzak*, Odpowiedzialność odszkodowawcza kościelnych osób prawnych za czyny przestępne popełnione przez ich członków [Responsibility of ecclesiastical legal persons for criminal acts committed by their members] in: P. Sobczyk (ed.), (Nie)odpowiedzialność cywilnoprawna kościelnych osób prawnych za czyny

678 § 2). The consequence of the Court's conclusion is the assumption that the internal law of the Catholic Church may constitute the source of the supervisory relationship within the meaning of Art. 430 Civil Code, i.e. it is a binding law in the field of civil law relations. Such statements raise even greater doubts due to the fact that in another element of the justification the Court explicitly stated that canon law may have effects in the Polish legal system only indirectly, i.e. in the case of its reception into the order of generally applicable law.[16]

The above-described procedure met with polemics of some representatives of the doctrine, which mainly concerned the assessment of canon law as an element of the phatic state or *sui generis* of foreign law.[17] According to the author, however, this discussion does not touch on the essence of the defect of justification in terms of the source of the supervisory relationship. The direct objection in relation to the justification in this respect should refer to the Court's failure to state explicitly that the source of the relationship of supervisory that Father R. had with the defendant societies was the supervisory relationship based on factual, not legal relations.

Since canon law is not a generally applicable law in the territory of the Republic of Poland, it cannot be considered a legal source of the supervisory relationship with Art. 430 Civil Code. An exception is the situation in which individual norms of canon law were recast into the Polish legal order, which, however, did not take place in the context of intra-church supervisory relations.[18] In the civil law organisational structure of the defendant societies, Father R. cannot be placed as a subordinate of Society

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niedozwolone popełnione przez osoby duchowne [(Non)civil liability of ecclesiastical legal persons for unlawful acts committed by clergymen], Warsaw 2022, p. 55.

16 Against the adoption of the principle that unrecognized provisions of religious law apply in legal relations: A. Mezglewski, O nieistnieniu zasady odpowiedzialności zwierzchników kościelnych za szkody deliktowe wyrządzone przez zakonnego nauczyciela religii w oparciu o zobowiązania wynikające ze ślubów posłuszeństwa. Rozważania na tle wyroku z 31 marca 2020 r. (II CSK 124/19) [On the non-existence of the principle of liability of church leaders for tort damages caused by a religious teacher based on obligations arising from vows of obedience. Considerations against the background of the judgment of 31 March 2020 (II CSK 124/19)], (in:) (Nie)odpowiedzialność cywilnoprawna kościelnych osób prawnych za czyny niedozwolone popełnione przez osoby duchowne [(Non)civil liability of church legal persons for torts committed by clergymen], P. Sobczyk (eds.), Warsaw 2022, p. 72.

17 The polemic also concerned the existence of an obligation/possibility for the Court to use the opinion of an expert in the field of canon law. A. Mezglewski advocates the need to use the expert opinion. See Ibid., p. 70. Polemic positions, granting the court only an optional opportunity to use the expert opinion: *J. Zieliński*, O potrzebie nowego spojrzenia na relację pomiędzy prawem wewnętrznym związków wyznaniowych a prawem świeckim [On the need for a new perspective on the relation between the internal law of religious associations and secular law], Przegląd Sądowy 4|2023, pp. 46-48 and *A. Wilk,* Stosunek zwierzchnictwa w świetle art. 430 KC w kontekście regulacji wewnątrzkościelnych [The relation of supervisory in the light of art. 430 of the Civil Code in the context of intra-church regulations], Studia Prawa Prywatnego, 2|2023, pp. 59-60. There was also a view excluding the liability of ecclesiastical legal persons for a subordinate, which, according to the author of the commentary, is incompatible with the thesis that the relationship of authority may be based not only on law, but also on the factual relationship. The latter view is set out in: *Pietrzak*, fn. 15, pp. 62-63.

18 Ibid., p. 55.

I or Society II.[19] He is not an officeholder of any body of societies, nor is he bound by any civil law agreement that would result in a supervisory relationship within the meaning of art. 430 of the Civil Code.

The supervisory relationship between the Defendants and Father R. should therefore be sought in relations other than those based on law. In Polish legal doctrine, Z. K. Nowakowski formulated the view that the supervisory relationship between a subordinate and a supervisor may have its source not only in the legal but also in the factual relationship.[20] According to this author, the factual relations giving rise to the relationship of supervisory may have a basis in social or economic ties, as they may also result in obedience to the orders/instructions issued by the supervisor.[21] Liability under the principles of Art. 430 Civil Code (formerly Art. 145 of the Code of Obligations),[22] is a liability motivated by the risk of the existence of a supervisory relationship.[23] The essence of the relationship of supervisory, according to K. Nowakowski, is such a relationship in which the subordinate must follow the commands of the supervisor as to the activity performed, under pain of incurring unfavourable consequences for him.[24] Such consequences may be of a legal nature, in which case the relationship of supervisory will be based on the legal relationship. If there are possible social or economic consequences, the relationship of supervisory will be based on the factual basis. An example of a legal consequence may be exposure to liability for improper performance of an obligation or termination of an employment relationship. A typical economic consequence may be the loss of a source of income, and the social consequence may be the lowering of the position of a subordinate in the social hierarchy of a given group, or the occurrence of another event commonly accepted by a given group as shameful.

The justification for the claim that the relationship of supervisory may result not only from legal but also from factual relationships is the argument that from the point of view of tort liability, the existence of a risk arising in connection with the use of subordinates is relevant, i.e. the existence of a bond that allows for issuing orders, and not basing this bond on the law. It should also be stated that persons who have based the functioning of relations with their subordinates on the basis of binding law cannot be put at a disadvantage (exposed to liability under Art. 430 Civil Code) in comparison with those who did not.[25]

In view of the above relationship of supervisory between Father R. and the defendant societies, it should be sought in terms of economic or social dependence, deter-

19 Another interpretation would be contrary to the principle of autonomy of the state and religious associations. On the autonomy of the state and religious associations, see *J.Krukowski*, Polskie prawo wyznaniowe [Polish secular law], Warsaw 2006, p. 21.

20 *Z. K. Nowakowski*, Odpowiedzialność za cudze czyny według kodeksu zobowiązań [Responsibility for foreign acts according to the codex of obligations], Poznań 1948, pp. 181-183.

21 Ibid., p. 181.

22 Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks zobowiązań, Dz.U. 1933 nr 82 poz. 598 [Ordinance of the President of the Republic of 27 October 1933. – Code of Obligations, Journal of Laws 1933, No. 82, item 598].

23 *Nowakowski*, fn. 20, pp. 164-165.

24 Ibid., p. 180.

25 Ibid., pp. 180-181.

mining whether in the event of non-compliance with the supervisor's instructions, when performing the entrusted activities, he would be at risk of certain consequences. Assuming that, on the instructions of the Societies, even in an implied form,[26] Father R. was obliged to teach religion at the Claimant's school. In the event of non-compliance with the obligations arising from this order, he may have been expelled from the priesthood. Such behaviour would be associated with disgrace (social consequences) and loss of livelihood (economic consequences). This means that Father R. remained in a factual relationship of dependence with Societies I and II. In addition, the liability of not only Society 1, in whose property Father R. lived directly, but also Society II is justified. This is due to the fact that in the field of teaching religion, Father R. also had to comply with the orders of the organs of Society II, and if he did not do so, he would be threatened with consequences in the form of loss of livelihood and expulsion from the priesthood. Therefore, in terms of establishing the existence of the relationship of supervisory between the defendants and Father R., the judgment corresponded to the law, although the Court incorrectly determined the source of this relationship.

V. Interpretation of the phrase "while performing the entrusted activity" in relation to the present case.

1. Arguments of the Court.

In the commented judgment, the Supreme Court departed from the existing jurisprudence, approved by most of the doctrine. The method of separating harmful events for which the supervisor is responsible has been modified on the basis of Art. 430 Civil Code.

Previously prohibited acts performed "while performing the entrusted activity" were contrasted with acts performed "on the occasion of the entrusted activity".[27] The criterion of the perpetrator's (subordinate's) purpose was a factor allowing to separate the two categories.[28] As a consequence of its application, the supervisor

26 *P. Machnikowski/A. Śmieja* in: A. Olejniczak (ed.), System prawa prywatnego[Private Law System], vol. 6, Prawo zobowiązań – część ogólna [Law of Obligations – General Part], Warsaw 2023, p. 496; *J. Kosik*, Powierzona czynność, czy powierzony zakres działania [Entrusted Task or Entrusted Scope of Action], Nowe Prawo 1|1961, p. 42; Judgment of the Supreme Court of 22 April 1977, IV CR 46/77, LEX no. 7932.

27 Such an interpretation was initiated by the creators of the Code of Obligations, see *R. Longchamps de Bérier,* Justification of the draft Code of Obligations, vol. 1, Warsaw 1936, p. 210.

28 Ibid. p. 210; *A. Rembieliński*, Odpowiedzialność cywilna za szkodę wyrządzoną przez podwładnego [Civil liability for damage caused by a subordinate], Warsaw 1971, pp. 138–141; *Nowakowski*, fn. 20*,* p. 169, *Kosik*, fn. 26*,* p. 40, 46; *J. Kuźmicka-Sulikowska*, Zasady odpowiedzialności deliktowej w świetle nowych tendencji w ustawodawstwie polskim [Principles of Tort Liability in Light of New Trends in Polish Legislation], Warsaw 2011, p. 162; *A. Szpunar*, Czyny niedozwolone w Kodeksie cywilnym [Torts in the Civil Code], Studia cywilistyczne, vol. 15, Kraków 1970, p. 66; Although the latter author expresses the view that one should not think with schemes, see *A. Szpunar*, Odpowiedzialność za

is only responsible for the activities performed by the subordinate in his interest – regardless of whether they have been directly entrusted to him.[29]

However, the Court considered the sexual abuse of Father R. as activities carried out "while performing the entrusted activity", even though they were not carried out in the interest of the superiors. The Supreme Court argued that the departure from the criterion of the purpose of the subordinate's action was due to the fact that it lacked precision, as well as *a priori* it excluded the superiors' liability for acts committed intentionally. Subsequently, the Court considered that the phrase "while" is ambiguous and it cannot be inferred from its occurrence that its use by the legislator should result in limiting the activities for which the supervisor is responsible to the activities performed in his interest by the subordinate. Consequently, an act committed "while performing the entrusted activity" should, according to the Supreme Court, be regarded as having a normal causal link with the entrusted activity.

The justification also considered that the activities of assistance to the Claimant should be considered as entrusted activities (can. 756 et seq.), and the damage caused in connection with the sexual abuse of Father R. should be considered to have been made while performing the entrusted activity. The Court supported its argumentation by stating that the activities of Father R. for outsiders (including his superiors) created the appearance of activities in order to implement the evangelical mission.[30]

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szkodę wyrządzoną przez podwładnego[Liability for damage caused by a subordinate] in: A. Mączyński/M. Pazdan/A. Szpunar (eds), Rozprawy z polskiego i europejskiego prawa prywatnego. Księga pamiątkowa ofiarowana Profesorowi Józefowi Skąpskiemu [Studies in Polish and European Private Law. A Commemorative Book Dedicated to Professor Józef Skąpski], Kraków 1994, p. 476. Supreme Court decision of 15 February 1971 r., III CZP 33/70, OSNC 1971. See the full review of case law in the cited publications and the commented judgement.

29 It should be stated that for strictly entrusted activities (other than those constituting an excess over entrusted activities) the supervisor is responsible regardless of the purpose of the subordinate's activity. See Judgment of the Supreme Court 25 November 2005, V CK 396/05, Pr. Bankowe 11|2006; *J.M. Kondek*, W sprawie wykładni pojęcia „przy wykonywaniu czynności" na gruncie art. 430 k.c. [On the interpretation of the concept of "when performing activities" under art. 430 of the Civil Code], Forum Prawnicze 1|2019.

30 So in the grounds of the commented judgment. The District Court and the Court of Appeal directly referred to the articles of E. Łętowska and A. Sieczych. See *E. Łętowska*, Odpowiedzialność Kościoła za szkody wyrządzone przez księży [Responsibility of the Church for damage caused by priests], Państwo i Prawo 3|2015, p. 19; *A. Sieczych*, Odpowiedzialność odszkodowawcza związków wyznaniowych za przestępstwa seksualne popełnione przez duchownych w USA i w Polsce (casus Kościoła katolickiego) [Responsibility for compensation of religious associations for sexual crimes committed by clergy in the USA and in Poland (case of the Catholic Church)], State and Law 1|2017, p. 76. Similarly: *A. Wilk*, Odpowiedzialność kościelnych osób prawnych za szkody wyrządzone wskutek przestępstw seksualnych popełnionych przez duchownych. Glosa do wyroku SN z dnia 31 marca 2020 r., II CSK 124/19 [The liability of ecclesiastical legal persons for damage caused as a result of sexual crimes committed by clergy. Commentary to the judgment of the Supreme Court of 31 March 2020, II CSK 124/19], Orzecznictwo Sądów Polskich 10|2020, p. 59, *A. Wilk*, Is the Catholic Church Liable for Damage Caused by Pedophile Priests?, Scientific Journals of the University of Finance and Law in Bielsko-Biała 2|2019 pp. 66-67; and 2|2019; *A. Wilk*, The 'Scope of entrusted duties' as a problem of the church's vicarious

2. Criticism of the recognition of assistance to the claimant as entrusted activities.

The Court's reasoning is fraught with several flaws. First of all, the entrusted activities should be distinguished by answering the question whether if the subordinate ceased to perform them, whether he would be threatened by any legal, social or economic consequences (depending on the nature of the relationship that connects him/her with the supervisor). In the case of Father R., it cannot be argued that if he ceased to provide assistance to the claimant, he would suffer some negative consequences from his superiors. Therefore, the assistance to the claimant cannot be considered entrusted within the meaning of Art. 430 Civil Code.

3. In Defence of the Current Interpretation of the Phrase "while performing the entrusted activity"

Turning to the interpretation of the phrase "while performing the entrusted activity", the use of the phrase "while" should be interpreted as narrowing the supervisor's responsibility to strictly entrusted activities or excesses made for the purpose related to the implementation of the activities entrusted by the supervisor.[31] Only such an interpretation can be reconciled with the purpose of the standard under Art. 430 Civil Code.

The supervisor's liability under Art. 430 Civil Code is of a guarantee nature[32] and is a liability based on the risk principle. By risk, the author understands in this case the motive of justifying responsibility for individual events that benefit the respondent, and at the same time are above average dangerous to the environment.[33] A model case of liability for such understanding of risk is Art. 435 Civil Code, establishing liability for damage caused in connection with the movement of an enterprise driven by the forces of nature. The consequence of introducing risk-based liability as an exception to the principle of guilt-based liability[34] is to limit cases of liability under the

liability for damages done by sexual crimes of the priests: comparative study, European Journal of Law Reform, 3|2021, pp. 297-298.

31 The use of the phrase 'while as extending the supervisor's responsibility is understood in that way only by L. Bełza. See *L. Bełza*, Odpowiedzialność za szkody wyrządzone w ramach czynów niedozwolonych przy wykonywaniu powierzonej czynności w świetle teorii związku przyczynowego [Tort liability in the performance of an entrusted act in the light of the theory of causation], Przegląd Sądowy 7-8|1996, pp. 85-88. Even if, at the linguistic level, the phrase 'while would be understood as an extension of the supervisor's responsibility, the author erroneously assumes that a clear provision at the linguistic level should not be interpreted by means of a teleological interpretation (*clara non sunt interpretanda*). Such an assumption is contrary to the assumptions of commonly accepted Polish concepts of legal interpretation: See *M. Zieliński et al.*, Zintegrowanie polskich koncepcji wykładni prawa [Integrating Polish concepts of legal interpretation], Ruch Prawniczy Ekonomiczny i Socjologiczny 4|2009, p. 26.

32 *Machnikowski*, fn. 26, p. 494.

33 *Rembieliński*, fn. 28, p. 41 and the article cited there: *J. Łopuski*, Charakter odpowiedzialności z tytułu szkód atomowych [Nature of liability for atomic damage], Państwo i Prawo 4-5|1967, pp. 578-579; *Szpunar*, fn. 11, p. 92.

34 Supreme Court decision (7) of 19 February 2013., III CZP 63/12, OSNC 2013.

first principle only to events that are related to the risk to which the responsible person exposes the society. Determining the risks to which the supervisor exposes the society will therefore be crucial in determining what events we can classify as being performed "while performing the entrusted activity".

The first risk that the supervisor exposes the society to is the difficult pursuit of claims for damage in full. If the supervisor performed the activities entrusted to him personally, then he would be the responsible person. As a rule, the supervisor is a wealthier person and gives greater guarantees of repairing damage from own property.[35] The second risk to which the supervisor exposes the society is the "risk of superiority", related to the possibility of issuing subordinate orders under pain of legal or social consequences.[36] There may be a situation in which a subordinate is more afraid of consequences on the part of his supervisor than, for example, tort liability for acts carried out in the interest of the supervisor.[37]

Therefore, the supervisor's liability for strictly entrusted activities is justified, because if the supervisor did not entrust the performance of activities to a subordinate, he would have to perform them personally and he would be the person responsible for the damage. The liability for excess over strictly entrusted activities is also justified, due to the risk of superiority, i.e. the possibility of the subordinate's belief that if he does not act for the purpose appropriate to the implementation of entrusted activities, he will face negative consequences from the supervisor.

The above limitation of the supervisor's liability may also be supported by the argument that the subordinate should be treated as a "representative" of the supervisor. One of the theories constructed in the doctrine justifying the supervisor's responsibility for the actions of others and in a way detached from guilt[38] is the theory of the representation.[39]

This theory assumes that the subordinate is the "representative" of the supervisor and according to the principle – *qui facit per alium facit per se* – the supervisor is responsible for the culpable acts of the subordinate. This theoretical structure allows to justify both the supervisor's liability for the act of another (subordinate), because if there was no entrustment of activities, the supervisor would have to perform activities independently (also by his authorities) and liability detached from guilt of the supervisor, due to the fact that the premise of liability under Art. 430 Civil Code is the fault of a subordinate as a "substitute" of the supervisor. However, a subordinate may be considered a supervisor representative only to a limited extent. When entrusting the activity, the supervisor agreed only that the subordinate would perform the entrusted activities – he "granted authorisation to act" only in the scope of entrusted activities.

35 *Rembieliński*, fn. 28, p. 46. *W. Czachórski*, in:, W. Czachórski/Z. Radwański (eds), System Prawa Cywilnego[Civil Law System], vol. 3, part 1, Prawo zobowiązań – część ogólna [Law of obligations – general part], Ossolineum 1981, p. 570; Machnikowski, fn. 26, p. 494; *Longchamps de Bérier*, fn. 26, p. 219.

36 See at footnote 24.

37 See at footnote at 24.

38 On the need to justify both thesupervisor's liability for the act of others and its detachment from guilt: see *Rembieliński*, fn. 28, p. 47.

39 On the theory of representation: *Rembieliński*, fn. 28 pp. 59-61 and the literature cited there; *Wilejczyk*, fn. 8, Warsaw 2021, pp. 61/64.

Such an interpretation is consistent with the wording of Art. 430 Civil Code, which makes the assignment of liability under Art. 430 Civil Code from entrusting the performance to a subordinate on the account of the supervisor, i.e. at his expense and in his interest.[40]

Critics of the theory of representation argue that representation is a structure occurring only in relation to legal activities, and it cannot apply to entrusting the performance of factual activities that take place under Art. 430[41] Civil Code. This is not an accurate argument, because it is obvious that using subordinates as a substitute under Art. 430 Civil Code is an event different from the use of a representative within the meaning of Art. 95 Civil Code. In the first case, the structure of the representation was only borrowed as useful to justify liability for someone else's actions, on the basis of detachment from the fault of the responsible person.[42]

Therefore, only liability for entrusted activities is justified, both strictly (the theory of representation and the risk of ineffective pursuit of claims against subordinates) and excesses over strictly entrusted activities performed in the interest of the supervisor (the risk of superiority). Other activities are performed outside the scope of the authorisation and outside the scope of the risks to which the supervisor exposes the society. If the supervisor acted alone, he would not perform activities detrimental to the excess incompatible with the purpose of entrusting activities – classified as performed on the occasion of performing the entrusted activities.

With the purposeful interpretation carried out in this way, the concept of assigning responsibility to ecclesiastical legal persons on the basis of Art. 430 Civil Code due to the mere fact of accepting the presumption that they granted their authority to subordinates.[43]

4. Conclusion of the fifth part.

The reference of the above-described structure of the supervisor's scope of responsibility to the factual circumstances does not allow for the attribution of liability to Society I and Society II for damage arising in connection with sexual abuse on the part of Father R. The actions of helping the Claimant were not entrusted activities within the meaning of Art. 430 Civil Code, because if Father R. did not perform them, there would be no consequences for him. At the same time, even if they were considered to be entrusted activities, an excess over formally entrusted activities may be covered by the scope of liability under Art. 430 Civil Code, only if it was made in connection with the purpose for which the entrusted activities were carried out. For example, superiors would be liable for damage and harm in connection with the use of physical or psychological violence against students, provided that it would serve, even indirectly, to motivate students to learn religion.[44] They would not respond if the violence ap-

40 *Rembieliński*, fn. 28, Warsaw 1971, pp. 138–141.
41 *Rembieliński*, fn. 28, p. 59.
42 *Wilejczyk*, fn. 8, pp. 61-64.
43 This concept is represented by the authors listed in fn. 30.
44 According to such reasoning, the decision contained in the Judgment of the Court of Appeal in Bialystok of 4 December 2008 r., I ACa 388/08, LEX nr. 1488573 shall be questioned.

plied to students was not in any way related to the entrusted activity, i.e. teaching religion. As a consequence, Father R's sexual abuse cannot be considered as related to entrusted activities, as these were neither formally entrusted activities, nor did they constitute an excess over the formally entrusted activities performed in the interest of the supervisor. Thus, it was incorrect to award liability from Society I and Society II on the basis of Art. 430 Civil Code by the District Court and the Court of Appeal, and the Supreme Court should have taken into account the cassation appeal of the Defendants, to the extent that it was not rejected, and referred the case for reconsideration.

VI. Alternative grounds for liability

A Commentary is also required on fragments of the judgement regarding the potential liability of ecclesiastical legal persons other than the defendant societies. The Supreme Court stated that it would be possible to assign, on the basis of Art. 416 Civil Code (liability for the fault of the body of the legal person), the responsibility of the seminary that prepared one for priestly ministry. Responsibility from the seminary could be awarded if its authorities did not exercise due diligence during the preparation of seminarians, e.g. did not conduct tests of paedophilic tendencies. However, such a construction raises doubts due to the inability to attribute illegality (objective guilt) to the act. In the Polish legal system, there is no legal norm binding the seminary, which it could break by the mere improper preparation of seminarians.

However, the assignment of illegality would be possible in the case of fault liability of the diocesan authority, i.e. the bishop who granted the canonical mission to Father R. Pursuant to § 5 sec. 1 of the Regulation of the Minister of National Education on the conditions and method of organising religious education in public kindergartens and schools,[45] a kindergarten or school employs a religion teacher only after issuing a written referral by the diocesan bishop, and in accordance with § 5 sec. 2 of this regulation, the diocesan bishop may withdraw such a referral, as a result of which the clergyman loses the right to teach. At the same time, the text of the regulation does not specify in what form this written referral is granted and on what grounds it can be revoked. Therefore, there is a case where the full standard of conduct cannot be reconstructed on the basis of the content of generally applicable provisions, which gives rise to the claim that the legislator used the technique of implicit reception of religious law.[46] The further part of the generally applicable norm should therefore be reconstructed with the help of the provisions of religious law, which the legislator has

The ruling was issued on the basis of the factual circumstances, in which the caretaker cleaning the parish beat a child who disturbed him while cleaning.

45 Rozporządzenie Ministra Edukacji Narodowej z dnia 14 kwietnia 1992 r. w sprawie warunków i sposobu organizowania nauki religii w publicznych przedszkolach i szkołach (t.j. Dz. U. z 2020 r. poz. 983) [Regulation of the Minister of National Education of 14 April 1992 on the conditions and manner of organizing religious education in public kindergartens and schools (i.e. Journal of Laws of 2020, item 983)].

46 *A. Tunia*, Recepcja prawa wewnętrznego związków wyznaniowych w prawie polskim [Reception of the internal law of religious associations in Polish law], Lublin 2015, pp. 152-154.

given universally binding force, i.e. in this case can. 805. According to this provision, in relation to his own diocese, the local ordinary (bishop) has the right to appoint or approve teachers of religion (issue the so-called canonical mission)[47] and to remove or demand removal whenever the good of religion or morals so requires. Only the interpretation of Article 5 sec. 1 of the Regulation in connection with can. 805 allows to reconstruct the norm that the bishop has a legal obligation to check the substantive and moral qualifications of candidates for teaching religion, while failure to comply with this obligation in a culpable manner may be considered an act unlawful due to the fault of the authority (Art. 416 Civil Code).[48] In the case of people working with children, due diligence would require psychological tests, in particular to detect potential paedophilic tendencies. In the case of Father R., such tests were carried out only at the stage of criminal proceedings and clearly showed that he showed paedophilic tendencies. Due to the failure to comply with the obligation under Art. 5 sec. 1 of the Regulation in connection with can. 805 of the diocese, responsibility for the culpable act (*sensu stricto*) of the authority can be attributed (Art. 416 Civil Code), insofar as the damage suffered by the Claimant remains in an adequate causal link with the failure of the bishop to comply with the above-described obligation. Therefore, tests of the necessary condition and the normality of the consequences should be carried out. Due to the fact that without the referral of Father R. to teach religion, the damage and harm to the Claimant would not have occurred (a necessary condition test).[49] Also, each referral of a person with paedophilic tendencies increases the chance of sexual exploitation of the Claimant, and thus the occurrence of damage and harm to the Claimant (consequence normality test).[50] This means that the damage and harm arose in an adequate causal link with the subjectively and objectively culpable act of the diocesan authority.

In the present case, the Claimant should therefore have demanded compensation for damage and redress for mental suffering from the diocese whose ordinary (bishop) issued a referral to teach religion (canonical mission) to Father R.

47 *J. Grygutis*, Missio canonica jako podstawa trwania stosunku pracy katechety [Missio canonica as a basis for the catechist's employment relationship], Roczniki Administracji i Prawa 1|2019, pp. 329–330.

48 An act contrary to the norms resulting from the provisions of the Regulation may be unlawful. See *J. Gudowski/G. Bieniek* in: J. Gudowski (ed.), Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna [Civil Code. Commentary. Tom III. Liabilities General part], Warsaw 2018, Art. 415, para. 2.

49 *G. Karaszewski* in: J. Ciszewski/P. Nazaruk (eds), :) Kodeks cywilny. Komentarz aktualizowany [Civil Code. Updated commentary], LEX/el. 2023, art. 361, para. 11). Example of failure to meet the test: judgment of the Supreme Court of 26 January 2006, II CK 372/05, LEX No. 172186.

50 *M. Kaliński*, Szkoda na mieniu i jej naprawienie [Damage to property and its restoration], Warsaw 2021, p. 387; *Z. Radwański/A. Olejniczak*, Zobowiązania część ogólna [Obligations, general part], Warsaw 2015, p. 90. Example of failure to meet the test: Judgment of the Supreme Court of 21 May 1991, I ACr 102/91, OSP 1991.

VII. Summary

The commented judgment is fraught with several flaws. The first is to determine that the relationship of supervisory between Father R. and Society I and Society II results from norms of canon law unrecognised by the Polish legal order, where it should result from factual dependence. It was also a mistake to consider assistance to the Claimant as an activity entrusted to Father R., where he was actually entrusted only with teaching the Claimant religion. The Court also adopted Art. 430 Civil Code, the concept of interpretation of the phrase "while performing the entrusted activity". Such an extension of the supervisor's liability for the actions of subordinates was not justified, all the more so that the Claimant could effectively claim compensation from the diocese whose authority granted the canonical mission to Father R.

Unfortunately, the form of the commentary did not allow for a thorough examination of the legitimacy of individual theories justifying the supervisor's liability for the acts of others, as well as the principles of reception of norms of canon law and their impact on civil law relations between the parties.

Adrain Szpunar*

Admissibility of a Sanction Rescission of a Distribution Relationship as a Continuous Obligation — Commentary to the Judgment of the Court of Appeal in Rzeszów of 10 June 2021, I AGa 43/20

Abstract

The Court of Appeal recently decided that the termination of a continuing distribution relationship between two companies is permissible, emphasizing the continuous nature of obligations. The difference between termination and rescission was emphasized, with rescission terminating the contract retroactively. In Polish jurisprudence, there is a debate as to whether the rescission of continuing obligations is permissible before or independently of the performance phase, reflecting the legal development in the Polish Civil Code.
Keywords: Cancellation of continuing obligations, prerequisites for the cancellation of continuing obligations, rescission in the event of non-performance, distinction between termination and rescission, rescission of continuing obligations, party protection in the event of rescission and termination.

Zusammenfassung

Das Berufungsgericht hat kürzlich entschieden, dass die Auflösung einer Dauervertriebsbeziehung zwischen zwei Unternehmen zulässig ist, und hat dabei den kontinuierlichen Charakter von Verpflichtungen betont. Der Unterschied zwischen Kündigung und Rücktritt wurde hervorgehoben, wobei der Rücktritt den Vertrag rückwirkend aufhebt. In der polnischen Rechtswissenschaft wird diskutiert, ob der Rücktritt von Dauerschuldverhältnissen vor oder unabhängig von der Erfüllungsphase zulässig ist, was die Rechtsentwicklung im polnischen Zivilgesetzbuch widerspiegelt.
Keywords: Aufhebung von Dauerschuldverhältnissen, Voraussetzungen für die Aufhebung der Dauerschuldverhältnissen, Rücktritt bei Nichterfüllung, Unterscheidung von Kündigung und Rücktritt, Rücktritt von Dauerschuldverhältnissen, Parteienschutz bei Rücktritt und Kündigung.

* Student at Jagiellonian University in Krakow.

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I. Overview

Doctrine[1] and jurisprudence[2] express heterogeneous views on rescinding[3] a continuous obligation under the general provisions on obligations. The discrepancy concerns the issue of whether such rescission is admissible, and if so, whether as an exception or in principle. Even those authors who generally permit the rescission of continuous obligations disagree on its legal effects.[4] In this case the heterogeneity of views was apparent. The defendant argued in the appeal that the appropriate action to unilaterally end the continuous relationship is to terminate it. The claim was supported by the Court of Appeal. Consequently, the ruling was correct, but the argumentation leading to it requires critical commentary.

II. Facts

The parties (two limited liability companies — A and B) concluded a contract under which B was to produce streetlights according to its innovative design, and then sell them to A in accordance with the orders placed. A would then distribute the streetlights, put them into the market by selling to its own customers. The contract was referred to as a contract of sale. A contributed a total of EUR 2.7 million to B. The contract stipulated exclusivity (Art. 550 Civil Code).[5] The parties agreed on twenty years of collaboration after the signing of the contract. Afterwards, B claimed that the production of streetlights was delayed and avoided passing along the technical documents. More than a year after the signing of the contract, A placed an order for one hundred streetlights, which B accepted. B failed to meet the assurances to manufacture and deliver the lights. A, after numerous subpoenas, sent a final call for B to explain, submit the documents, fulfil the performance and other obligations, under pain of the contract rescission. Due to the expiry of the additional deadline, A issued a

1 Cf. *W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian*, Zobowiązania (Obligations). Outline of the lecture, Warsaw 2009, pp. 347–348; cf. J. *M. Kondek* (in:) Kodeks cywilny (the Civil Code). Commentary, K. Osajda, W. Borysiak (eds.), SIP Legalis 2023, Article 491, para. 24; cf. *J. Górecki, P. Nazaruk* (in:) Kodeks cywilny (the Civil Code). Updated commentary, J. Ciszewski, Piotr Nazaruk (eds.), LEX/el. 2023, Article 664, para. 3.

2 Cf. Judgment of the Court of Appeals in Gdańsk of 20 September 2017, I ACa 1174/16, LEX no. 2441527; cf. Judgment of the Supreme Court of 15 May 2007, V CSK 30/07, OSNC 2008, no. 6, item 66.

3 Terminological doubts about the terms "contract rescission" and "obligation rescission" have been resolved in: *Tracz G.*, Sposoby jednostronnej rezygnacji z zobowiązań umownych (Methods of unilaterally terminating contractual obligations), Warsaw 2008, pp. 76-77 In this paper, I use these terms interchangeably, as their interchangeable use is widespread in practice. I use the term "rescinding a relation" as an abbreviated form of "rescinding an obligational legal relation". Analogous remarks apply to the terms "contract termination", "obligation termination", "rescission of a relationship".

4 A wider reference to the views cited is contained in section 5.4, where I have compared them.

5 The Act of 23 April 1964 – Civil Code, unified text Journal Of Laws 2023, item 1610.

statement of a contract rescission and called for payment of EUR 2.7 million, and then filed a lawsuit for payment of said amount.

The District Court found that A effectively rescinded the contract and awarded the company the full amount. B filed an appeal in which one of the allegations was a breach of the provisions on termination, since continuous obligations can be terminated, but not rescinded. The Court of Appeal dismissed the appeal, citing the arguments set out below.

III. Legal description of the contract

The Court of Appeal tried to avoid an unambiguous qualification of the contract. They reiterated the District Court's position that the parties had entered into a mixed sales and distribution agreement. Furthermore, the court partially agreed with the plaintiff that the case concerned a Supplik contract. It was strongly objected to the recognition of the framework and continuous nature of the concluded contract as a distribution contract, as proposed by the defendant.

A mixed contract is a subclass of unnamed contracts in which the content elements of (two or more) types of named or unnamed contracts are equally combined.[6] The Court of Appeal argued that the concluded contract combines an element of the sales contract (within the meaning of Art. 535 Civil Code) and the distribution contract. The Court of Appeal argued that the concluded contract combines an element of the sales contract (within the meaning of Art. 535 Civil Code) and the distribution agreement. This contract is an unnamed contract (empirical type) usually occurring in professional trade.[7] It is qualified as a type of contract for the provision of services (within the meaning of Art. 750 Civil Code) in the field of commercial intermediation.[8] The distributor and the manufacturer conclude it. Its purpose is to expand the sale of the manufacturer's goods or services. The Distributor, acting on its own account and own risk, builds a sales market and a circle of customers for another entity.[9] As part of its own business, it sells previously delivered products. Typical and practically developed provisions of this agreement include clauses providing for the continuity of cooperation between the distributor and the manufacturer. This is accompanied by the manufacturer's obligation to deliver the goods to the distributor, who should accept them and pay the previously agreed price.[10] Therefore, distribution agreements are not sales agreements, but have the character of framework agreements, which impose on the parties the obligation of loyal contracting and provide for

6 *B. Gawlik*, Umowy mieszane: konstrukcja i ocena prawna (Mixed contracts: construction and legal assessment), Palestra 1974, no. 18/5(197), p. 27.

7 *M. Krajewski et al.*(in:) System prawa handlowego (Commercial law system), vol. 5, Prawo umów handlowych (Law of commercial contracts), M. Stec (ed.), SIP Legalis 2017, p. 667, mn. 290.

8 *E. Wójtowicz,* Ustawowe prawo odstąpienia od umowy dystrybucji — przesłanki i skutki jego realizacji (Statutory right of terminating a distribution agreement — prerequisites and effects of its implementation), Warsaw 2022, pp. 17/65.

9 *M. Krajewskiet al.*, fn. 7, p. 668, mn. 292.

10 ibid., p. 670, mn. 298.

certain provisions as to future agreements.[11] Only implementation agreements concluded in their performance resemble sales agreements.

One of the subtypes of distribution is exclusive distribution, in which the distributor is granted exclusivity for the sale of a certain category of goods, thus the supplier undertakes not to sell the goods to entities other than the distributor.[12] It is assumed that within the scope of the stipulation of exclusivity (Art. 550 Civil Code).

The delivery contract is defined in Art. 605 Civil Code: 'By a supply contract, the supplier commits to manufacture fungibles and to deliver them in parts or periodically, and the recipient commits to collect those things and to pay the price.' The case-law emphasises that, as part of the delivery, the supplier undertakes to produce the goods himself,[13] as, which was also the case in the present case. The parties also specified the product manufactured — electric lamps, which B was to provide to company A. The stipulation of exclusiveness was also permissible due to the reference from Art. 612 Civil Code.[14]

The distribution agreement and the delivery agreement are so similar that it is difficult to distinguish them. In the jurisprudence, it is assumed that the difference between them results from the purpose of the dealer agreement – the sale of goods by the recipient in a certain way, promoting them in a designated area or at designated buyers. It is not only the periodic delivery of certain goods by the manufacturer to the recipient at the agreed price, as in the case of a delivery contract. In addition, in the case of a delivery contract, the recipient has the right to control and supervise the production of goods (Art. 608 Civil Code), while with a dealer contract, it is usually the manufacturer who controls the way the dealer sells the goods and determines its rules.[15]

As a matter of fact, the Court of Appeal found that the contract did not provide for any obligations of the dealer towards the manufacturer. Whereas the characteristic feature of distribution contracts is the influence of the supplier on the organisation of distribution, the choice of distributors, the definition of sales rules and marketing policy and the impact on sales prices[16] of distribution, the choice of distributors, the definition of sales rules and marketing policy and the impact on sales prices.

By contrast, it is apparent from the cited characteristics of the two contracts that this contract resembles more an exclusive distribution than a mixed or supply contract. Even if the parties had not specified the scope of the distributor's responsibilities, in accordance with Art. 65 § 2 Civil Code, it is first necessary to examine what was the consistent intention of the parties and the purpose of the contract, rather than to rely on its literal wording. The preamble of the contract states that its purpose is to regulate the rules of mutual cooperation, including the sale of streetlights by the manufacturer to the dealer and stipulating the exclusivity for the sale and distribution of

11 *E. Wójtowicz*, fn. 8, pp. 22, 40.
12 ibid., pp. 2 – 3.
13 Judgment of the Court of Appeals of 19 March 2015, I ACa 920/14, LEX no. 1665030.
14 *P. Sobolewski* (in:) Kodeks cywilny (the Civil Code). Commentary, K. Osajda/W. Borysiak (eds.), SIP Legalis 2023, Article 612, para. I.
15 Judgment of the Supreme Court of 6 July 2005, III CK 3/05, LEX no. 180925.
16 Judgment of the Court of Appeals of 10 June 2021, I AGa 43/20, LEX no. 3411349.

the above-mentioned products.[17] Thus, A did not definitively purchase products, but for the purpose of offering them to buyers on the market, which both parties were aware of. Consequently, it seems that, due to the economic purpose of the contract, it should have been classified as an exclusive distribution agreement.

IV. Definition of 'Continuous Obligation'

The Court correctly defined continuous obligations. It was recognised that the time factor determines their content and scope of provision. The passage of time also distinguishes them from one-off liabilities. The Court of Appeal took the view that, as part of the continuous obligation, at least one of the parties should meet the continuous performance. It was later aptly added that they sometimes give origin to periodic performances, since the passage of time is also crucial for their extent. The prevailing view in science is that the obligation is continuous if the performance of at least one of the parties is periodic or continuous.[18]

As accepted in the literature, the Court of Appeal argued that the continuous performance consists in the marked, unchanging behaviour of the debtor throughout the duration of the relationship. As an example, rental and lending relationships were cited. Sometimes continuous performance can take the form of a continuous sequence of certain repetitive activities, from which it is difficult to distinguish individual behaviours. The Court of Appeal, on the other hand, failed to determine what a periodic benefit is. It is considered to consist of a series of one-off benefits that recur at noticeable intervals.[19] The payment of the price in pre-defined instalments does not constitute periodic performance because the individual instalments (parts) make up the previously designated whole.

V. Distribution Relations as a Continuous Obligation

The distributor's service consists in purchasing and successively selling the product. They should resell the goods under the conditions specified in the contract, constantly representing the interest of the manufacturer while performing a number of additional services.[20] Some of their duties can be reduced to periodic behaviours. Nevertheless, uninterrupted cooperation between the parties as part of an established economic strategy has the character of a specific, permanent behaviour or a series of repetitive activities, from which it is difficult to distinguish individual behaviours. It consists not only in selling the product in the distributor's stores, but also, for example, in marketing activities and other constant efforts to improve the consumer's perception

17 ibid.

18 *W. Borysiak* (in:) Kodeks cywilny (the Civil Code). Commentary, K. Osajda/W. Borysiak (eds.), SIP Legalis 2023, Article 365[1], para. 6.

19 Ibid.

20 *W.J. Kocot* (in:) System prawa prywatnego (Private law system), Vol. 9, Prawo zobowiązań — umowy nienazwane (Law of obligations — unnamed contracts), W.J. Katner (ed.), SIP Legalis 2023, p. 241, mn. 141.

of the quality of the goods. It is argued that, from the nature of the distributor's obligation and the purpose of the agreement these could not be fulfilled using a one-off intermediary. The purpose of the distribution contract requires the distributor to take permanent actions as well as repetitive actions over an extended period of time.[21] So, the distributor's provision is continuous, and the distribution relation is continuous.

VI. The Impact of the Exclusivity Clause on the Continuity of the Obligation

Pursuant to Art. 550 Civil Code: 'If the sale contract stipulates exclusivity for the buyer either in such a way that the seller will not supply things of a given type to other persons [...], the seller cannot, to the extent the exclusivity was stipulated, either directly or indirectly execute sale contracts which could violate the buyer's exclusivity'. The continuous nature of the relationship is determined according to the adopted definition due to the performance of the parties. Hence, it should first be examined whether the exclusivity of the streetlights' sale to A falls within the scope of B's performance.

The provisions of the Civil Code do not explicitly define what a performance is. According to Art. 353 § 1 Civil Code: 'An obligation exists where a creditor may demand performance from a debtor and the debtor should make the performance.' Paragraph 2 of this article specifies that the performance may consist in acting or refraining from acting. It is assumed that the performance is the behaviour of the debtor consistent with the content of the obligation and satisfying the creditor's interest in the performance of the obligation.[22] The parameter distinguishing what falls within the scope of the performance from other obligations is the creditor's interest in performing the obligation. The parties made the stipulation of exclusivity the subject of performance, because it satisfies their interests. The interest of B as a creditor results from the remuneration for the establishment of the clause. The interest of A as a creditor results from the market effects of the exclusivity stipulation. Without it, A's profits from the sale of streetlights would be much lower. After all, it would make limited economic sense to conclude an agreement providing for 20 years' cooperation without stipulating exclusivity. Hence, B's obligation to refrain from selling lamps to other entities falls within the scope of the performance. It consists of refraining from specific activities for a period of 20 years, and thus unchanging behaviour for an appropriate period of time. The stipulation of exclusivity thus strengthens the thesis of the continuity of the concluded relationship.

21 *E. Wójtowicz*, fn. 8, p. 56.

22 *A. Brzozowski et al.*, Zobowiązania (Obligations). 20, p. 50; more on the element of the benefit: *A. Klein*, Elementy zobowiązaniowego stosunku prawnego (Elements of an obligational legal relationship), Kracow 2021, pp. 62–77.

VII. Comparison of the Institution of Termination and Sanction Withdrawal

The Court of Appeal made a brief comparison of termination and rescission of the contract. They considered termination to be a means of traditionally terminating a continuous obligation. In the case of obligations concluded for an indefinite period, it serves, in the General Court's view, to determine the moment of expiry of the obligation. The Court pointed out that it could be a manner to early terminate a continuous relationship concluded for a fixed period. The obligation ends upon the expiry of the period generally set out in Art. 365^1 Civil Code[23] or, if there is an effective termination without notice, immediate or when there has been an effective termination without observing the notice periods — immediately.[24] It should also be added that termination is commonly considered to be a unilateral creating legal rights act having an *ex nunc* effect.[25] As a rule, this means that there is no need to settle for the services provided by both parties so far. On this account, it is adapted to the properties of a continuous obligation. Reimbursement of a certain amount of the already fulfilled continuous performance seems almost impossible, which creates an obstacle to settlements for a partially fulfilled continuous performance.

1. Termination

The legislator omitted the general regulation of termination.[26] Instead, it appears repeatedly in the provisions of the detailed part of the third book of the Civil Code. The variously regulated notice period usually helps the addressee of the notice to prepare for the end of a permanent relationship.[27] When a party had obtained basic goods as part of the relationship, this period was to serve to find another source to satisfy existential needs. It is only after the end of the period that the relation is transformed. Sometimes the relation may only be terminated at a certain point in time.[28] The notice period is most generally defined in Art. 365^1 Civil Code,[29] particular deadlines are also provided for appropriate named contracts[30] or even for specific institutions regulated in individual regulations.[31]

23 *G. Tracz*, fn. 3, p. 45.
24 ibid., pp. 123, 144.
25 ibid., pp. 72-73.
26 With the exception of Art. 365^1 and 384^1 Civil Code.
27 *W. Borysiak*, fn. 18, Article^{3651}, para. 32.
28 As, for example, in Art. 673 § 2 of the Civil Code — at the end of the quarter, at the end of the calendar month, etc.
29 This provision is reflected in Art. 272 Labour Code.
30 For example, Art. 673 § 2 Civil Code.
31 This is the case, for example, with the special institution of termination by a creditor of a partner's share in a civil partnership — Art. 870 Civil Code.

2. Rescission

The Court of Appeal determined the rescission (regulated in Art. 491–496 Civil Code) as a unilateral declaration of will directed to the addressee. It was stated that, as a result of its filing, the legal relationship between the parties expires with *ex tunc* effect.[32] Additionally, the rescission updates the obligation to settle under Art. 494 § 1 sentence 1 Civil Code: 'The party rescinding a reciprocal contract is obliged to return to the other party all that it received from the latter under the contract and the other party is obliged to accept it.'

The issue of rescission's effects has not been clearly resolved in the literature. Some authors (as well as the Court of Appeal) support the thesis that after the rescission the contract is considered not concluded,[33] others — that the relation expires for the future, others — that the relationship expires for the future.[34] Some consider that as a result. Others consider that as a result of the rescission, the liability is transformed.[35] The outlined difference of views is irrelevant to the discussed problem because Art. 494 § 1 sentence 1 Civil Code clearly determines that the rescission results in updating the obligation to return reciprocal performances.

Both institutions — rescission and termination — create legal rights powers aimed at ending the contractual relationship. The rescission, in principle, updates the obligation of retrospective settlements between the parties under Art. 494 § 1 sentence 1 Civil Code.[36] Termination usually does not have a similar effect. Article 491 § 1 sentence 1 Civil Code provides for the protection of the debtor in the form of setting an additional deadline under pain of rescission. This mechanism may sometimes be omitted.[37] On the other hand, the rescinding party is sometimes protected by a period of notice or in a different manner. Both of the differences may create difficulties in rescinding the continuous relation.

VIII. Admissibility of a Continuous Obligation Rescission

The Court of Appeal agreed with the defendant's view of the inadmissibility of rescission with an ex tunc effect. It was also suggested that continuous liabilities expire only as a result of termination. Then again, it was referred to the view that it is permissible to rescind a continuous obligation if the contract has not been performed. The wording of the Court of Appeal 'if the contract has not been performed' is

32 Judgment of the Supreme Court of 9 September 2011, I CSK 696/10, LEX no. 989123.
33 *J.M. Kondek*, fn. 1, Article 491, para. 27.
34 *M. Gutowski* (in:) Kodeks cywilny (the Civil Code). Vol. 2, Commentary. Art. 353–626, M. Gutowski (ed.), SIP Legalis 2022, Article 491, mn. 16.
35 *A. Lutkiewicz-Rucińska (*in:) Kodeks cywilny (the Civil Code). Commentary, M. Balwicka-Szczyrba, A. Sylwestrzak (eds.), Warsaw 2022, Article 491, para. 5, p. 905.
36 In certain situations, we may consider applying the Art. 494 § 1 of the Civil Code after termination *per analogiam*. Some provisions, on the other hand, regulate separately the rules of settlements after termination — e.g. Art. 746 § 1 sentence 2 Civil Code.
37 e.g. inability to provide, reservation *of lex commisoria*.

extremely unfortunate. It is difficult to determine what form of breach of obligation[38] is referred to – non-performance of the obligation, improper performance of the obligation or another. It is only by referring to the aforementioned judgment that it is[39] assumed that the Court of Appeal refers to rescission of a continuous obligation that has not yet entered the implementation phase.[40] Such a thesis is supported in the literature.[41]

IX. Exclusion of the Right to Rescind by the Provisions on Termination

The Polish Civil Code does not exclude the rescission of continuous obligations.[42] The thesis on the inadmissibility of rescission results from the assumption that there is a *lex generalis – lex specialis* relationship between the general provisions on rescission and individual articles allowing termination. The general provisions on rescission are thus excluded.

In order for a special provision to exclude a general provision, there must be a relationship of conclusion between them. More recent literature emphasises the role of rescission as a functional sanction for breach of obligation.[43] Termination, on the contrary, does not always serve as a sanction for a breach of an obligation. Multiple functions of termination are distinguished[44] — such as termination for an important reason, termination in order to end a continuous indefinite commitment. The role of sanctions seems to be such as termination for an important reason, termination in order to end a continuous indefinite commitment. The role of sanctions seems to be fulfilled by relationship termination without notice[45] when the other party's behaviour is incompatible with the obligation's content.[46] The hypothesis of individual provisions on sanction termination usually includes forms of breach of an obligation with a fairly

38 More on the distinction between a contract and a contractual relationship: *A. Klein*, fn. 24, pp. 17-18.

39 Judgment of the Court of Appeals in Katowice of 12 August 2004, I ACa 299/04, LEX, no. 193658.

40 e.g. lease relationship, the subject of which has not yet been delivered.

41 *K. Pietrzykowski* (in:) Kodeks cywilny (the Civil Code). Vol. 2, Commentary. Art. 450–1088, SIP Legalis 2021, K. Pietrzykowski (ed.), Article 664, recital no. 10.

42 See *K. Pasko*, Odstąpienie od umowy z powodu naruszenia zobowiązania w wypadku umów o charakterze ciągłym (Contract termination due to breach of obligation in the case of continuous contracts), Przegląd Sądowy 5|2016, p. 74.

43 *M. Bujalski/F. Zoll* (in:) System prawa prywatnego (Private law system), Vol. 6, Prawo zobowiązań — część ogólna (Law of obligations — general provisions), A. Olejniczak (ed.), SIP Legalis 2023, pp. 1321–1322, mno. 283; *K. Panfil*, Odstąpienie od umowy jako sankcja naruszenia zobowiązania (Contract termination as a sanction of breach of obligation), Warsaw 2018, p. 52; *G. Tracz*, fn. 3, pp. 33–34.

44 *G. Tracz*, fn. 3, p. 117.

45 ibid., pp. 144–145.

46 *K. Pasko*, fn. 44, p. 77.

narrow scope.[47] Rescission is sometimes excluded[48] only in the situations provided in provisions allowing termination. Partial rescission is not allowed pursuant to Art. 491 § 2 sentence 1 Civil Code in the event of the lessee's delay in paying the rent for one payment period. Simultaneously, it is recognised that the provisions on the warranty regarding the lease agreement (Art. 664 Civil Code) allow for termination without notice coinciding with a sanction rescission.[49] Accordingly, it seems that the relationship between the general regime of sanction rescission and individual provisions allowing for sanction termination should be examined separately. The function to be performed by a given provision should be taken into account. However, a broader argument on this subject would go beyond the scope of the comments.

In contrast, a contractual relationship does not exist between a sanction rescission and the provisions on termination at any time, termination for important reasons and termination for reasons other than the debtor's conduct inconsistent with the content of the obligation. The important reasons clause may also cover breach of an obligation, but the function of the provisions allowing termination for important reasons is not to sanction breaches.

X. Advantages and Constraints of Allowing Rescission from Continuous Obligations

The permissibility of rescinding a continuous obligation is supported by the sparse manner in which termination is regulated. The special part of the law of obligations provides for the right to terminate the relationship in a fragmentary, inconsistent and selective manner. That being so, adopting the view that it excludes the rescission of continuous obligations would lead to leaving the creditor in a situation where the provisions on termination protect his interest only against certain selected forms of violations on the part of the debtor. In the remaining scope, the failure of the debtor to comply with its obligations would not allow the creditor to terminate the obligation by means of a unilateral legal act.

While the creditor's protection in the context of liabilities under named contracts is to some extent regulated, in the case of liabilities under unnamed contracts the creditor's position is completely uncertain.[50] The creditor must rely on the application of the provisions on contracts called *per analogiam*.[51] This reasoning always leaves

47 E.g. Art. 672 Civil Code allows the landlord to terminate without notice if the tenant is in default of rent for two payment periods. The scope of the hypothesis does not include cases where the parties have agreed that the rent will be paid in advance for the entire lease period.

48 The issue was also considered in the literature on the basis of the code of obligations — see *A. Klein*, Ustawowe prawo odstąpienia (Statutory right to terminate), Kracow 2021, pp. 55-57.

49 *S. Strzelecka* (in:) Umowa o roboty budowlane (Construction works contract). Komentarz do przepisów KC (Commentary on the provisions of the Civil Code), D. Okolski (ed.), SIP Legalis 2024, Article 664, para. 10, recital no. 10.

50 *K. Pasko*, fn. 44, p. 83.

51 *B. Gawlik*, Pojęcie umowy nienazwanej (The concept of an unnamed contract), Studia cywilistyczne, 1971, Vol. 18, pp. 25-26.

a certain amount of uncertainty and valuation.[52] The analogous application of the provisions ultimately depends on the discretion of the court, which does not ensure adequate safety of trade. Applying the general provisions on rescission to unnamed continuous obligations seems to eliminate the need to refer to the provisions on sanction termination by analogy in the event of a breach of the obligation.

Withal, some provisions of the special part allowing for termination without notice strengthen the creditor's protection. This applies, for example, to the warranty for defects in the leased item (Art. 664 Civil Code). If it were to be considered that the general regime of rescission is entirely excluded, the function of those provisions could not be achieved. Hence, the authors assume that in these cases there is a coincidence of sanction rescission and termination. The obligation of retroactive settlements after rescission pursuant to Art. 494 § 1 sentence 1 Civil Code for a partial continuous benefit. Moreover, allowing the rescission of a continuous obligation may lead to the abuse of power to avoid mechanisms to safeguard the other party's interest. The creditor may use the rescission to omit a long notice period.

1. Rescission from the Periodic Performance Obligation

'Periodic performance obligation' for the purposes of this argument means a reciprocal relationship, where one of the parties is obliged to periodic performance, the other – to periodic or one-off performance. Similarly, a 'continuous performance obligation' is a reciprocal relationship in which one party is obliged to perform a continuous performance, the other – a one-off, periodic or continuous performance.

The periodic performance consists in fact of a series of periodically recurring one-off benefits. Unless the reciprocal performance is a continuous benefit, the problem of settlements under Art. 494 § 1 sentence 1 Civil Code does not arise. Furthermore, periodic performance obligations show the feature of divisibility.[53] As a result, it is easy to apply the disposition of Art. 491 § 2 sentence 1 Civil Code: 'If the performances of the two parties are divisible, and one of the parties defaults only in part of the performance, the right to rescind the contract vested in the other party is limited, at its discretion, either to that part, or to the whole remaining part of the performance not made.' An additional argument for the presented thesis is the regulation directly in Art. 611 Civil Code, to rescind the supply relationship, which belongs to continuous obligations. However, periodic performance obligations, which are not equivalent to a continuous performance, are rare. Thus, the further argument will only concern the rescission of obligations for continuous performances.

2. Rescission of Continuous Performance Obligation

In the literature, some authors discussing the problem of settlements under Art. 494 § 1 sentence 1 Civil Code and consider that the provisions on termination exclude the

52 See ibid., p. 26.

53 *A. Pyrzyńska, Zobowiązanie* ciągłe jako konstrukcja prawna (Continuous obligation as a legal construction), Poznań 2017, p. 165.

general rescission regime.[54] Others argue that a rescission is only permissible if the continuous obligation has not entered the performance phase.[55] If execution of the continuous performance did not commence at that time, there is no obligation to return the benefits. Others assume that a rescission from continuous obligations is allowed regardless of the stage of performance. Albeit,[56] as an exception, it has *ex nunc* effect.[57] *Ergo,* the obligation to reimburse does not apply to the performance of both parties to the extent that it has already been fulfilled.

Grzegorz Tracz, on the other hand, assumes that there are no constraints to the application of the statutory right of rescission to continuous obligations. The return of a partially fulfilled continuous performance after rescission should be carried out in accordance with Art. 395 § 2 sentence 3 Civil Code applied *per analogiam*. This provision stipulates that appropriate remuneration is due to the other party for the services provided and for the use of the goods. If, on the other hand, the benefits of both parties are divisible and the debtor is in default with the fulfilment of part of the benefit, the creditor may rescind on the basis of Art. 491 § 2 Polish Civil Code.[58]

The above-mentioned arguments about the need to provide the creditor with more reliable and full protection against breach of obligation lead to the adoption of the thesis on the admissibility of rescission regardless of the stage of performance of the obligation. The continuous performance shows, similarly to the periodic one, the attribute of divisibility.[59] The time factor is one of the elements influencing its size.[60] As a consequence, it can be easily divided by separating the entire time period. Hence, some authors find the normative basis for rescinding continuous obligations for the future in Art. 491 § 2 sentence 1 Civil Code.[61] This applies in particular to continuous performance obligations that have already been fulfilled in a certain part.

This direction is consistent with the historical development of rescission and termination. The Code of obligations[62] — the Civil Code's predecessor — did not distinguish both institutions as clearly as the Civil Code. Sanction rescission was also regulated in the provisions of the special part regarding named contracts being a source of continuous liabilities. Some authors shared the view that the general provisions on waiver also apply to continuous obligations and rescission has an ex nunc effect in this respect.[63] It was only in the Polish Civil Code that the wording on rescission from the special part was replaced by termination without notice. In the literature under the Code of Obligations, 'immediate termination' (or 'instant termination', 'prompt termination', 'premature termination') with *ex nunc* effect appeared. It can properly be

54 *W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian*, Zobowiązania (Obligations). 1, pp. 347–348.
55 *K. Pietrzykowski*, fn. 53, Article 664, recital no. 10.
56 As an exception, the authors consider this thesis to be favourable to the position that the termination in principle causes a fiction of non-conclusion of the contract.
57 *J.M. Kondek,* fn. 1, Article 491, para. 24.
58 *G. Tracz*, fn. 3, pp. 89 – 90.
59 *A. Pyrzyńska*, fn. 57, pp. 165–166; *M. Bujalski, F. Zoll*, fn. 45, p. 1323, mn. 285.
60 *E. Wójtowicz*, fn. 8, p. 56.
61 *A. Pyrzyńska*, fn. 57, pp. 519–520; *K. Pasko*, fn. 44, p. 75.
62 Regulation of the President of the Republic of Poland of 27 October 1933 — Code of Obligations (Journal of Laws 1933, no. 82, item 598).
63 *R. Longchamps de Berier*, Obligations, Lviv 1938, p. 373.

considered as the prototype of the current termination without notice. The authors who proposed using it noticed the terminological confusion. Consequently, they postulated that instead of certain regulations on rescission they should see the right to terminate immediately.[64] One of these provisions was the then Art. 250 § 2 sentence 1 of the Polish Code of Civil Procedure *in fine*: 'If the benefits of both parties are divisible, then in the event of a delay of one of the parties in fulfilling the obligation as to the part of the benefit, the right of rescission, serving the other party, is limited, at its choice, to that part or to the entire rest of the unfulfilled benefit'. To the Polish Civil Code (Art. 491 § 2 sentence 1) only certain stylistic changes were introduced, and the content of the provision remains the same – a especially the phrase 'to all the rest of the unfulfilled benefit', in which the basis for immediate termination was considered. These considerations of the doctrine do not seem to lose their validity.

The indivisibility of the one-off benefit of the other party may prevent rescission (pursuant to Art. 491 § 2 sentence 1 Civil Code). However, the authors note that failure to perform part of the obligation on time is *de facto* non-performance of the obligation, as the party undertook to perform the obligation in full. Thus, since one of the parties must provide an indivisible benefit, and even after the additional deadline has been set, the other party has not received the full equivalent, its interest is in allowing the possibility of full rescission. It may also be the case that non-performance of the obligation, as the party undertook to perform the obligation in full. Thus, since one of the parties must provide an indivisible benefit, and even after the additional deadline has been set, it has not received the full equivalent, its interest is in allowing the possibility of rescission in its entirety[65] in the event of partial delay, when the performances of both parties are divisible and if partial performance would not be relevant to it due to the properties of the obligation or due to the intended purpose of the contract, known to the party in delay (Art. 491 § 2 sentence 2 Civil Code). In this case, the obligation to reimburse the partially fulfilled continuous performance may arise. It seems that it should be implemented in accordance with Art. 395 § 2 sentence 3 Civil Code.[66]

The risk of avoiding the notice period by the rescinding creditor remains to be considered. It is of little importance because termination often performs functions other than sanctioning a breach of obligation.[67] The sanction rescission may only coincide with the termination due to a breach of the obligation by the debtor — usually a termination without notice. In many cases of this type, the provisions on termination exclude to some extent the general regime of rescission.

The provisions on sanction termination due to the function stipulate that it ensues without the notice. Consequently, the notice period cannot usually be circumvented. As an exception, the legislator decided to protect the interest of the other party also in the event of a sanction termination — e.g. Art. 11 section 2 of the Act on the protection of tenants' rights, municipal housing resources[68] specifies the obligation to com-

64 See ibid., p. 56.
65 *J.M. Kondek*, fn. 1, Article 491, para. 26.
66 *G. Tracz*, fn. 3, pp. 89–90; otherwise: *K. Panfil*, fn. 45, p. 323.
67 *G. Tracz*, fn. 3, pp. 33–34.
68 Act of June 21, 2001 on the protection of tenants' rights, municipal housing resources and amending the Civil Code, unified text Journal Of Laws 2023, item 725.

ply with an additional deadline, and according to Art. 703 sentence 2 Civil Code, the lessor may terminate the lease after notifying the lessee and granting them an additional three-month period to pay the outstanding rent.

In addition, it is rarely possible to claim that it is easier to rescind an obligation than to terminate it in a sanctioned manner. One of the conditions of a rescission is to first set an appropriate, additional deadline for the debtor under pain of rescission. It often protects the interests of the parties better than rigid notice periods. The phrase 'appropriate' is so vague that it allows the degree of protection of the debtor to be adapted to the circumstances that occur *ad casum*. Finally, the last safety valve is the allegation of abuse of subjective right under Art. 5 Civil Code, when exercising the right of rescission is contrary to its socio-economic purpose or the principles of social coexistence.

XI. Summary

Taking the views presented above, the contract concluded between the parties was continuous. A was entitled to rescind in full pursuant to Art. 491 § 1 sentence 1 Civil Code in relation to B's delay in fulfilling the obligation. A has effectively rescinded its obligation; thus, B is obliged to return EUR 2.7 million pursuant to Art. 494 § 1 sentence 1 Civil Code. The problem of reimbursement of fulfilled benefits does not arise. Nor can there be any abuse of the right of rescission to omit statutory protection.

AUS DEM SCHRIFTTUM

***Thomas M. Buchsbaum/Katharina Pabel (eds.)*: Democratizing the Constitution of Belarus. Towards a Constitution for a New Belarus in a European Context – *Томас М. Бухсбаум/Катарина Пабель (ред.)*: Демократизация Конституции Беларуси. На пути к Конституции для новой Беларуси в европейском контексте, Verlag Österreich, Wien 2024, 355 S. bzw. 393 S.**

Die östliche, einst kommunistische Hemisphäre Europas ist in den ca. 35 Jahren seit dem Zusammenbruch des sowjetischen Hegemonialsystems und der Sowjetunion selbst in der weltgeschichtlichen Epochenwende von 1989/1991 nicht zur Ruhe gekommen. Unruhe und Instabilität in Gestalt innerer Spannungen und Krisen bis hin zu revolutionären Umbrüchen und – seit 2014 – zu Russlands Krieg gegen die Ukraine, einer neuen historischen Zäsur mit globalen Wirkungen, haben mehr oder weniger tiefe Spuren in manchen Verfassungen der postkommunistischen Staaten hinterlassen. Das betrifft besonders das Profil der Regierungssysteme. Vereinfacht gesagt, haben sich die Verfassungsentwicklungen, Verfassungsänderungen und Verfassungsrevisionen in dieser Hinsicht in zwei Richtungen bewegt: Favorisierung eines parlamentarischen Regierungssystems oder eines Präsidialsystems. Die postkommunistischen Staaten Ostmittel-, Nordost- und Südosteuropas haben sich für parlamentarische Regierungssysteme in verschiedenen Spielarten entschieden, während die Russländische Föderation und weitere Republiken der ehemaligen Sowjetunion präsidiale Herrschaftsordnungen errichtet haben. Zwar sind alle postkommunistischen Staaten Mitglieder der KSZE bzw. OSZE geworden und, sofern geographisch zu Europa gehörig, (mit Ausnahme von Belarus`) auch Mitglieder des Europarats, aber nur die postkommunistischen Staaten mit stabilen parlamentarischen Regierungssystemen sind in die Europäische Union aufgenommen worden. Ihre Rückkehr zu einem präsidentiellen Regierungssystem ist nicht erkennbar. Die Stabilität dieser verfassungspolitischen Grundentscheidung hat zwar das Aufkommen autoritärer Tendenzen innerhalb der parlamentarischen Regierungssysteme nicht ausgeschlossen, wie Polen, Ungarn und neuerdings auch die Slowakei und Albanien zeigen, aber kraft freier und fairer Parlamentswahlen sowie politischer und institutioneller Einwirkungen von Seiten der EU sind solche Tendenzen nicht unbedingt von Dauer. Sie können, wie sich in Polen zeigt, Korrekturen unterliegen.

Völlig anders ist die Lage im postsowjetischen Raum der GUS-Staaten. Dort ringen seit den 2000er Jahren zwei verfassungspolitische Haupttendenzen um den Vorrang und die Macht: Zu konstatieren ist einerseits ein weiterer Ausbau des präsidentiellen Regierungssystems bis hin zu einer Präsidialdiktatur mit der Tendenz zu einer Autokratie oder gar Despotie des Staatsoberhaupts – so in einigen zentralasiatischen ehemaligen Unionsrepubliken, in Aserbaidschan, in der Russländischen Föderation und in Belarus`. In die entgegengesetzte Richtung, nämlich hin zu einem semipräsidentiellen und – weiter – zu einem parlamentarischen Regierungssystem, ist die verfassungspolitische Entwicklung seit den 2000er Jahren in der Ukraine, Moldova,

Georgien und Armenien gegangen. Dort sind in schwierigen Anpassungsprozessen und Machtkämpfen parlamentarische Regierungssysteme entstanden. Die zwischen ihnen bestehenden Unterschiede betreffen in erster Linie die Stärke des Präsidenten und Staatsoberhaupts, d.h. die Frage, wie stark die eigenen, selbstständigen Befugnisse des Staatspräsidenten in der Exekutive sind und wie groß sein Einfluss auf die Regierungsbildung, insbesondere die Einsetzung des Regierungschefs ist. Die Bandbreite der Varianten reicht von relativ starken Präsidenten wie in der Ukraine zum Staatspräsidenten Armeniens, dessen Funktionen und Kompetenzen auf Repräsentation und symbolische Integrationsakte beschränkt sind.

Vor diesem Hintergrund ist Weißrussland besonders interessant, denn dort ist in den letzten Jahren die innere Lage durch den Zusammenprall zweier diametral entgegengesetzter politischer Entwicklungen gekennzeichnet: einerseits ein friedlicher Aufstand von Bürgern, die nach den offenen, zynischen Fälschungen der Präsidentenwahlen vom 9. August 2020 in Massendemonstrationen Hunderttausender Demokratie, Menschenrechte und Grundfreiheiten einforderten;[1] andererseits erneut Massenrepressionen auf Anordnung des Präsidenten *Lukaschenka*, der gestützt auf rohe Gewalt der Sicherheitsorgane, Gerichte, Propaganda und den Kreml seine Diktatur immer weiter ausgebaut und 2022 durch eine weitere Verfassungsrevision abgesichert hat.[2]

In diese bizarre politische Lage stieß das Verfassungsprojekt hinein, das Gegenstand des hier zu besprechenden, von *Thomas M. Buchsbaum* und *Katharina Pabel* herausgegebenen und mitverfassten Buches ist. Es ist das Werk einer internationalen Gruppe von Verfassungsrechtlern, dessen Ergebnis der Entwurf einer neuen Verfassung für Weißrussland ist, wie es im Untertitel heißt. Die 20 Autoren stammen aus zehn Ländern des Europarats, ein knappes Drittel, darunter die Herausgeber, aus Österreich (6), ferner aus Litauen (3), der Schweiz (2), je einer aus Italien, Tschechien, Polen, Deutschland und den Niederlanden sowie zwei aus der Ukraine. Acht Autoren waren oder sind eng mit der Kommission „Demokratie durch Recht" des Europarates verbunden („Venedig-Kommission"), darunter ihr langjähriger Generalsekretär *Thomas Markert* aus Deutschland. Nur zwei stammen aus Belarus`, darunter *Aleksandr Vaškevič*, der vom Mai bis Dezember 1996 Richter des Verfassungsgerichts von Belarus` war und heute Professor für Verfassungsrecht und Europarecht an der European Humanities University (EHU), die 2004 aus politischen Gründen von Minsk nach Vilnius „emigrierte" und überwiegend Studenten aus Weißrussland ausbildet. Mit der EHU sind auch die drei Autoren aus Litauen verbunden. Hervorstechend ist die internationale Vernetzung der Autoren, die weit über die „Venedig-Kommission" und die EHU hinausreicht und u.a. auch das „Office for Democratic Institutions and Human Rights

1 *Manfred Sapper/Volker Weichsel* (Hrsg.), Gewalt statt Macht. Belarus: Repression, Schikane, Terror, in: Osteuropa 2020, Hefte 10/11; *Astrid Sahm*, Politisches Patt in Belarus. Etappen einer Systemkrise, in: Osteuropa, a. a. O. S. 17-33.

2 *Hans Janus*, Eine neue Verfassung für Belarus: Russlands Verfassungsreform als Vorbild, in: Deutsch-Russische Rechtszeitschrift Bd. 7 (2022), Heft 1, S. 21-33.

(ODIHR)“ der OSZE in Warschau einbezieht.

Das Werk „Democratizing the Constitution of Belarus” ist Frucht des mehrmonatigen “International Seminar on Belarus Constitutional Reform“ (Feb.-Dez. 2021). Es war eingefügt in das Wirken der oppositionellen „Öffentlichen, gesellschaftlichen Verfassungskommission“ Weißrusslands. Sie war nach den gefälschten Präsidentschaftswahlen vom August 2020 von *Svetlana Tichanovskaja*, der Gegenkandidatin von Präsident *Lukaschenka*, initiiert worden. Geleitet wurde sie von dem prominenten Politiker *Anatolij Lebed`ko*, der von 1990 bis 1996 Abgeordneter des Obersten Sowjets gewesen war. Die Kommission organisierte mit Hilfe des Internets über Monate innerhalb der Protestbewegung eine intensive Diskussion verschiedener Verfassungsentwürfe, in die sich 2021 die Autoren des „Internationalen Seminars“ einschalteten. Trotz der Behinderung durch das *Lukaschenka*-Regime gelang es den Organisatoren des „Seminars“, mehrere Dutzend belarussische Politiker und Experten in die Arbeit einzubeziehen und im ständigen Dialog mit ihnen die Sachnähe, Stimmigkeit und Vertretbarkeit der Formulierungsvorschläge zu prüfen, zu modifizieren und zu korrigieren (*Buchsbaum*, S. XVII f.). Es wäre deswegen ein Irrtum, aus der Tatsache, dass nur zwei Autoren aus Belarus‘ dem Autorenkollektiv angehörten, zu schließen, das vorliegende Werk sei eine Aktion „verfassungsrechtlicher Entwicklungshilfe“ aus dem Europarat, für die Zeit „nach *Lukaschenka*“. Die Herausgeber waren sich darüber im Klaren und betonen, dass die in dem vorgelegten Verfassungsentwurf schließlich vereinbarten Bestimmungen „nicht in Erz gegossen seien“, sondern dass es durchaus auch Alternativen gebe (*Pabel*, S. XIV).

Von Anfang an war jedoch klar, dass das „Seminar“, ausgehend von dem Statut des Europarates und gleichsam axiomatisch, drei verfassungsrechtliche Grundprinzipien zur Leitschnur machen müsse: Demokratie, Rechtsstaat und Menschenrechte (*Pabel*, a.a.O.). Ebenso klar war, dass es innerhalb dieser „Leitplanken“ verschiedene Möglichkeiten, Varianten und Regelungen gebe, jene Grundprinzipien auf den Fall „Belarus`“ anzuwenden und „zuzuschneiden“.

Zu den schwierigsten Problemen, vor deren Lösung die Teilnehmer des „Seminars“ standen, zählten die Fragen, wie man mit dem „Erbe“ des *Lukaschenka*-Regimes umgehen solle, wie die juristischen Grund- und Leitwerte des Europarats gesichert und wirksam gegen einen Rückfall in Diktatur und Autokratie geschützt werden könnten und wie das in Gesellschaft, Staat und Volk verloren gegangene politische Vertrauen in die zu erneuernden Staatsinstitutionen und in die Rechtsordnung wiedergewonnen werden könne. *Erin C. Houlihan*, Juristin aus Holland und Programmdirektorin am National Democratic Institute (NDI, Washington D.C.), hat sie in zwei Katalogen aufgeschlüsselt. Einige besonders wichtige Fragen seien daraus zitiert (S. 145 f.):

(1) How should the legacy of the past be reflected in the constitution?
(2) How can the constitution contribute to making institutions that have lost all legitimacy become legitimate again?
(3) What should be done about the institutions and individuals that were part of the Lukashenka regime? Should these issues be addressed at the constitutional level?
(4) How should the symbols of the former Lukashenka regime be addressed? Should flags, insignia and/or place names be changed?

(5) How should the constitution strengthen the separation of power, particularly to constrain executive overreach?
(6) How can judicial independence be strengthened?
(7) How can constitution protect itself from manipulation particularly in light of past experience with abusive referendums? Should referendums be maintained?
(8) How will the constitution restructure the security services to ensure that they will not again become a tool of a repressive regime or themselves undermine or overthrow the democratic constitutional order?

Besondere Aufmerksamkeit hat die Autorin dem Problem geschenkt, in welchem Verfahren die Verfassung verabschiedet werden solle:

(1) How can the process of negotiating a new or amended constitutional text serve to (re)build civic trust and foster legitimacy? What about restoring the original 1994 constitution?
(2) What kind of constitution-making body should be used and how should it be convoked?
(3) How should the public be educated and consulted about the constitutional project to realize the right to participation and also foster trust and legitimacy?
(4) How will the draft text be adopted? Given the history of abusive referenda, what should be considered in terms of organization?

Die Autoren des Werks haben mit dem von ihnen schließlich beschlossenen, aus 173 Artikeln und sehr ausführlichen Übergangs- und Schlussbestimmungen auf diese und viele andere Fragen klare Antworten gegeben, aber auch ebenso klar eingeräumt, dass es sich nur um „vorläufige (preliminary)“ Antworten und Vorschläge handeln könne, weil völlig offen sei, wann und wie die Diktatur *Lukaschenkas* zu Ende gehe und in welcher Lage sich Belarus` dann befinden werde. Nicht weniger waren und sind sie aber auch von der Notwendigkeit und Wichtigkeit überzeugt, um der Zukunft des weißrussischen Volkes und des Staates Belarus´ willen den Entwurf einer Verfassung „für den Tag X“ zu besitzen, um für die dann mit Sicherheit „auf die Tagesordnung“ kommende Verfassungsfrage gerüstet, jedenfalls nicht gänzlich unvorbereitet zu sein.

Man kann die von dem Entwurf einer Verfassung „nach *Lukaschenka*“ gegebenen Antworten in dem Satz zusammenfassen: Entscheidung für ein im Ansatz parlamentarisches Regierungssystem mit einer nur dem Parlament verantwortlichen Regierung, einem kompetenziell mittelstarken Staatspräsidenten und einem dominanten Ein-Kammer-Parlament, das zusammen mit einer Reihe starker parlamentsabhängiger Kontrollorgane, flankiert von einer unabhängigen Justiz, die bis dato allmächtige Präsidialexekutive an Verfassung und Recht bindet und wirkungsvoll einhegt. Schon an der redaktionellen Abfolge und dem Inhalt der 19 Kapitel des Entwurfs lässt sich das ablesen. Das Hauptproblem der Verfassungsgebung nach Präsident *Lukaschenka* hat der Entwurf überzeugend gelöst: ein wirksames System der Gewaltenteilung, von checks and balances, welches trotz der Jahrzehnte währenden Despotie und Willkürherrschaft der Präsidialexekutive zu funktionieren verspricht. Die Hoffnung gründet sich nicht zuletzt darauf, dass das Verfassungsprojekt nicht nur in der von *Svetlana Tichanovskaja* angeführten Opposition breit diskutiert worden ist, son-

dern auch, wie das vorliegende Werk bezeugt, Gegenstand intensiver Diskussionen international anerkannter europäischer Verfassungsrechtler war und in einem Prozess über mehrere Stufen bzw. Entwürfe entstanden ist.

Es ist dieser Entstehungsprozess, der das Verfassungsprojekt „nach *Lukaschenka*“ auch über Belarus` hinaus zu einem bedeutenden Ereignis und das Studium lohnenden Beispiel macht. Bei allen Unterschieden dürfte das unbedingt für die Russländische Föderation im Falle eines Sturzes der Autokratie *Vladimir Putins* gelten.

Die in jüngster Zeit von russischen Intellektuellen im westlichen Exil erarbeiteten Verfassungsentwürfe für die Zeit „nach *Putin*“ bewegen sich – grosso modo – in dieselbe Richtung wie das belorussische Projekt, unterscheiden sich von ihm aber signifikant dadurch, dass sie nicht das Ergebnis einer breiten Diskussion in einer repräsentativen nationalen Oppositionsbewegung und darüber hinaus in und mit einem hochkarätig besetzten internationalen Fachseminar sind, sondern von politisch engagierten Geisteswissenschaftlern ohne professionelle Erfahrungen und Kenntnisse auf den Gebieten von Verfassung, Recht und Politik verfasst wurden.[3] Eine kritische Würdigung der in Russland geführten Diskussion de constitutione reformanda kann im vorliegenden Rahmen nicht erfolgen. Sie muss einer späteren Darstellung vorbehalten bleiben.

Otto Luchterhandt, Lüneburg

3 Siehe dazu *Angelika Nußberger*, Eine neue Verfassung für Russland? in: FAZ v. 17.10.2024, S. 7.

AUS DER RECHTSPRECHUNG DES EGMR

UNGARN

Grenzen der Kritik an öffentlichen Behörden

In der Sache Mária Somogyi./. Ungarn[1] hatte sich der EGMR mit den Grenzen öffentlicher Kritik an behördlichen Maßnahmen im Rahmen von Art. 10 EMRK auseinanderzusetzen.

Im Ausgangsfall hatte ein ungarischer Bürger auf seiner Facebook-Seite einen Beitrag gepostet, wonach die Stadtverwaltung seiner Heimatstadt Tata eine denkmalgeschützte Immobilie deutlich unter Wert an einen örtlichen Geschäftsmann veräußert habe und sie nun von ihm zu einem „verrückten Preis" zurückmiete; er forderte eine genaue Untersuchung dieser Vorgänge und bat die Bürgerinnen und Bürger von Tata, seinen Post zu teilen. Das tat die Beschwerdeführerin.

In der Folge stellten die Stadt Tata und die Stadtverwaltung Strafanzeige gegen den Bürger, der den Beitrag ins Netz gestellt hatte, sowie gegen alle, die den Beitrag geteilt hatten. Die Behörden argumentierten, der Post verbreite unwahre Tatsachen, die ihren Ruf schädigten. Gegen die Beschwerdeführerin stellte die Staatsanwaltschaft das Verfahren ein.

Hingegen erhoben Stadt und Stadtverwaltung Zivilklage gegen die Beschwerdeführerin wegen Verletzung ihres guten Rufs. In allen drei Instanzen urteilten die ungarischen Zivilgerichte, dass eine Kritik an behördlichen Handlungen grundsätzlich zulässig sei. Im vorliegenden Fall handele es sich aber nicht um hoheitliches Handeln der Gemeinde, da es sich um den Verkauf und die Anmietung einer Immobilie handle. Es gehe vielmehr um ein zivilrechtliches Geschäft. Im zivilrechtlichen Rechtsverkehr genieße die Stadt und die Stadtverwaltung Persönlichkeitsrechtsschutz wie jede juristische Person. Diesen Persönlichkeitsschutz sahen die Zivilgerichte verletzt und gaben der Klage gegen die Beschwerdeführerin statt. Ihre Verfassungsbeschwerde wurde wegen Unzulässigkeit nicht angenommen, weil sie nicht die Verletzung von Verfassungsrecht, sondern v.a. eine falsche tatgerichtliche Beweiswürdigung rüge, die jedoch nicht verfassungsbeschwerdefähig sei.

Der EGMR ging davon aus, dass das letztinstanzliche ungarische Urteil einen Eingriff in die Konventionsrechte der Beschwerdeführerin aus Art. 10 EMRK darstellt; dies wurde von den Parteien auch nicht bestritten. Der Streit drehte sich darum, ob das Urteil einen legitimen Zweck i.S.d. abschließenden Aufzählung in Art. 10 Abs. 2 EMRK verfolgt. Der hier in Frage kommende „Schutz des guten Rufes … anderer" erstreckt sich Kraft ständiger Rechtsprechung auf private Personen und Personenmehrheiten sowie in einem gewissen Rahmen auch auf staatliche oder kommunale Unternehmen, die am Markt agieren und daher auf ihren Ruf im Kundenstamm ähnlich angewiesen sind wie ein Privatunternehmen. Andererseits ist die ständige Rechtsprechung ebenfalls klar darin, dass eine Kritik an staatlichen und kommunalen Behörden möglich sein muss und dass diese keinen Persönlichkeitsschutz geltend machen können.

Die Besonderheit dieser Entscheidung liegt in der konventionsrechtlichen Einordnung der ungarischen Argumenta-

1 Urteil v. 16.5.2024, AZ.: 15076/17.

OER 4/2024, DOI: 10.5771/0030-6444-2024-4-369

tion, eine Kommune oder Behörde, die ein Gebäude verkaufe und dies dann zurückmiete, agiere zivilrechtlich und könne aufgrund dieser Tatsache zivilrechtliche Persönlichkeitsrechte gegen Kritik an ihrer Geschäftsgebarung in Stellung bringen. Im Ergebnis schloss sich der EGMR dieser Argumentation nicht an. Er stellte auf den politischen Charakter der kommunalen Verkaufs- und Anmietentscheidung ab. Hierbei liege der Ausnahmetatbestand eines kommunalen Unternehmens, das mit seiner Reputation am Markt zu bestehen habe, gerade nicht vor, weshalb der Grundsatz gelte, dass staatliches und kommunales Handeln kritisiert werden dürfe, weil Behörden etc. keinen konventionsrechtlichen Persönlichkeitsschutz genießen, zumal sie sich durch ihre PR-Abteilungen sehr gut gegen falsche Anschuldigungen wehren könnten. Das habe das letztinstanzliche ungarische Urteil nicht hinreichend beachtet.

Im Ergebnis ist die Rechtsprechung des EGMR im Hinblick auf die Zulässigkeit und die Grenzen von Kritik an der öffentlichen Hand im Lichte von Art. 10 EGMR um eine weitere Facette reicher. Die öffentliche Hand kann sich, um in den Genuss von Persönlichkeitsrechten i.S.v. Art. 8 EMRK zu kommen und diese einer Kritik von außen entgegenhalten zu können, nicht „ins Privatrecht flüchten" und auch nicht hinter dem privatrechtlichen Charakter des kritisierten Geschäfts verschanzen. Solange es nicht um ein eigenständiges Unternehmen geht, das sich über den Markt finanziert, liegt konventionsrechtlich die Ausübung staatlicher oder kommunaler Hoheitsgewalt vor, deren Kritik eben nicht durch Art. 8 EMRK beschränkt wird.

Im Übrigen hätten die ungarischen Zivilgerichte bei gehöriger Anwendung des ungarischen Zivil- und Verfassungsrechts zu demselben Ergebnis kommen müssen. Diesen Aspekt der falschen Rechtsauslegung, die die Regierungspartei begünstigt und daher möglicherweise schon in Richtung Rechtsbeugung geht, hat der EGMR allerdings nicht thematisiert.

Kein assistierter Suizid in Ungarn

In der Sache Dániel Karsai./. Ungarn[2] hatte der EGMR sich mit der Frage des selbstbestimmten Sterbens auseinanderzusetzen. Der Antragsteller befindet sich in einem fortgeschrittenen Zustand einer degenerativen Nervenerkrankung, die ihn in absehbarer Zeit völlig bewegungsunfähig machen wird, während sensorische und kognitive Fähigkeiten erhalten bleiben. Um zu verhindern, dass er zu „einem Gefangenen im eigenen Körper" wird, will er einen medizinisch begleiteten Tod, was in Ungarn jedoch auf einfach-gesetzlicher Ebene unzulässig ist, da es keine Art von Euthanasie gibt und zudem die Beteiligung an einem Selbstmord strafbar ist. Der Antragsteller argumentiert, dass diese Lage ihn zu einem Selbstmord zu einem frühen Zeitpunkt, an dem er noch Kontrolle über seine motorischen Fähigkeiten hat, zwingt, während er später, nämlich in dem Moment, wo er seine motorischen Fähigkeiten verloren haben wird, begleitet sterben möchte.

Der EGMR zieht zahlreiche internationalen Dokumente für die Fragen des selbstbestimmten Sterbens heran, u.a. des Menschenrechtsausschusses der Vereinten Nationen, und untersucht die innerstaatliche Rechtslage in England und Wales, Deutschland, Italien und Kanada. Er kommt zu dem Schluss, dass die Ausge-

2 Urteil v. 13.6.2024, AZ.: 32312/23.

staltung des eigenen Lebensendes in den Schutzbereich von Art. 8 EMRK fällt. Allerdings haben die Konventionsstaaten einen sehr weiten Ermessensspielraum bei der Ausgestaltung des ärztlich begleiteten Todes. Die ungarische Kriminalisierung der Hilfestellung zu einem fremden Selbstmord selbst auf Wunsch des Selbstmordkandidaten überschreitet laut EGMR diesen Ermessensspielraum nicht, denn sie dient u.a. dem Schutz vulnerabler Personen ggf. vor sich selbst. Auch im Hinblick auf die bisherige Rechtsprechung des EGMR ist keine Verletzung von Art. 8 EMRK festzustellen. Ebensowenig ist Art. 14 i.V.m. Art. 8 EMRK verletzt, weil die ungarische Regelung differenziert genug ist, um unterschiedlichen Fallgestaltungen, z.B. einerseits dem Wunsch nach einer aktiven Sterbehilfe und andererseits dem Wunsch nach Abbruch einer laufenden Behandlung, gerecht zu werden.

Diese Entscheidung reiht sich in eine Reihe von Urteilen zur Selbstbestimmung am Lebensende ein, so z.B. Koch./. Deutschland.[3] Eine überzeugende Lösung ist dem EGMR auch in diesem Fall nicht gelungen. Sachgerecht ist die Zurückhaltung des EGMR in einer Frage, in der auch die Konventionsstaaten selbst noch keine klaren Maßstäbe entwickelt haben. Sterben in einer alternden Gesellschaft, in der der medizinische Fortschritt Menschen in Situationen zum Leben zwingt, in denen im normalen Verlauf der Dinge der Tod längst eingetreten wäre, ist und bleibt ein Dauerthema für gesellschaftliche Debatten und gesetzgeberische Aktivitäten.

Prof. Dr. Dr. h.c. Herbert Küpper

3 Urteil v. 9.7.2012, AZ.: 497/09.